Alabama Sentencing Commission

Minutes of Commission Meeting
June 28, 2002

The Alabama Sentencing Commission met in the Mezzanine Classroom of the Judicial Building in Montgomery on Friday, June 28, 2002. Present at the meeting were:

Hon. Joe Colquitt, Chairman, Retired Circuit Judge, Professor, University of Alabama School of Law, Tuscaloosa
Ellen Brooks, District Attorney, 15th Judicial Circuit, Montgomery
Rosa Davis, Chief Assistant Attorney General, Montgomery
Stephen Glassroth, Esquire,The Glassroth Law Firm, P. C., Montgomery
Lou Harris, D. P. A., Faulkner University, Montgomery
Hon. Pete Johnson
Emily Landers
Honorable Ben McLauchlin, Presiding Circuit Judge, 33rd Judicial Circuit, Ozark
Honorable David Rains, Circuit Judge, 9th Judicial Circuit, DeKalb
Bill Segrest
Advisory Council:
Doug Parker, Director, DeKalb County Community Punishment & Corrections Authority, Inc., DeKalb

Speakers:
Dr. Tammy Meredith, Applied Research Services, Atlanta, Georgia
Dr. John Speir, Applied Research Services, Atlanta, Georgia

Others Attending:
Monica Agee
Sharon Bivens
Andrew Dollar
Jimmy Doyle, Deputy Legal Advisor, Governor's Office for Ted Hosp
Becki Goggins
Stacey Neeley
Tom Samford

Staff:
Lynda Flynt, Executive Director, Alabama Sentencing Commission
Gregory Dailey
Melisa Morrison

Welcome and Introductory Remarks

The meeting convened at approximately 10:00 a.m. Chairman Colquitt welcomed the Commission and thanked them for their attendance.

Judge Colquitt – There are a couple of people who came for the purpose of hearing a little bit about Apprendi & ? and so we will probably get those matters out of the way so that those people who care are welcomed to. Let me first introduce Melisa Morrison who is the senior research analyst for the commission. We are please to have on board to work with a lot of this data with ARS & Lynda. We also have a summer intern working with Gregory Dailey. Our session today will cover several things. Dr. Meredith and Dr. Speir are back with us from ARS. They are going to give us an update on the data. They have been meeting with the task forces. Their work product has been involved and they can explain why some changes have been made and some focus has been shifted and some of the things that they have been working in addition to telling us where they are they can give us a lot better idea where they are headed with regard to the development of the data bases and what issues remain as far as having this one consolidated usable data source.

We are also going to talk about other cases of interest. We are also going to talk briefly about the Dept. of Corrections proposed procedure implementation of the legislative act last year. Lynda will report on that and what it entails. We were directed to have input on that and at this time may actually have a proposal and it is in final form before it goes to the Governor and Legislature we will discuss that. We will talk about the Habitual Offender Act statues and procedures for implementing some of the legislation dealing with habitual offenders. We will have reports from our 2 subcommittees. Rosa is chairing one of those committees. We know that she is stuck in New York trying to get a flight out. She is leaving New York this morning coming home but she could not get here yesterday like she thought she would be able to. She will not be with us. That means that we may have to draft somebody to make that report. Judge McLauchlin will report on his subcommittee.

Judge Colquitt – Any other working business today ?

Recent Cases

Impact of Ring v. Arizona, on Alabama's Capital Sentencing Structure

Chairman Colquitt stated that there has been a lot of attention on Ring v Arizona. It's natural because Alabama is a death penalty state and Ring v. Arizona dealt with the Arizona death penalty. That particular case actually rose out of some earlier cases one of which is Apprendi v. New Jersey. Chairman Colquitt gave a thumbnail stretch of this because some of these issues will become very important to the Commission as it moves in certain directions. If we start trying to define crime, deal with elevated sentences with particular type elements within that offense or some of that nature we start having trendy issues confronting us.

The United States Supreme Court has determined based on the right to jury trial that a criminal defendant has a right to have a jury determine the presence or lack of presence of any element or any factor which would increase the maximum range of punishment for an offense or which would place the punishment outside of the normal range of punishment with one exception. Apprendi said that if the issue is prior conviction.

Lets suppose you have two offenders being tried. One is a first offender the other allegedly is a repeat offender. If there is an issue with regard to the use of—lets use Apprendi ?. Apprendi allegedly engaged in a crime. Under New Jersey law there was sealing for the crime—a maximum punishment. If it's shown that the purpose of the offense was a hate crime than the maximum punishment was elevated—it was higher. So, what they did in New Jersey was they gave to the judge the role of deciding the hate crime. In Apprendi the judge sentenced the guy to more than the what the normal statutory maximum would be for that offense. The United States supreme court reversed and said that the jury would have to determine whether or this was a hate crime because it takes the maximum punishment beyond the normal range. It was a factual issue that did and you could that factual issue to a judge it had to go to a jury. Factual issue did not say that the jury must sentence. We have 2 offenders in New Jersey. For Example, One is a first offender and the other is a second offender. We gave two crime committing assaults. Both guys are convicted and they come before the judge for sentencing. They say judge this a hate crime and therefore instead of the maximum 10 years it's now a maximum of 15 years and we want you to sentence to 15. Apprendi would say whether this is a hate crime or not have to be decided by a jury. The jury would have to give some answer yes the reason this crime took place was motivated by hate within the definition of the New Jersey statute. That part of it we have an answer for in Apprendi. Apprendi also answers this other part. New Jersey lets suppose has another law that says anybody who commits and assault and has previously has been convicted of an assault shall be subject to a sentence of up to 20 years. Now the judge wants to sentence the 1 offender to some lesser term but wants to sentence the prior convicted offender to the maximum 20 years. The jury has to decide whether is previously convicted and Apprendi says no that's an exception. If it is an issue of whether not the defendant has been previously convicted of a crime the presence or absence of that conviction even though factual and subject to dispute or some resolution after hearing evidence can be done by the judge.

Somebody out in Arizona was looking at this and said wait a minute what about capital cases. If you have got a capital case in Arizona who decides who lives and who dies—the trial judge. So you have 5 states that say the judge sentences and the question is how do we get from life to death in Arizona. There was case called Walton v. Arizona that actually mentioned in the Apprendi (pro?) (children). The case out of Arizona is actually discussed where they were discussing the fact of aggravating circumstances. Most of us that have been involved with capital punishment realize that it's common to see a state say some people live/some die when the commit a capital offense. The way you decide who lives and who dies basically is the presence or absence of aggravating and mitigating circumstances.

In Arizona Ring was convicted of what we would call a capital crime. Then it went before the trial judge for the trial judge to decide the sentence. The jury found Ring guilty of was the crime that we call felony murder. Murder during a felon but murder because it was during a felony not because it was intention. The jury did not find that Ring intentional killed the victim. In fact the jury according to the Arizona Supreme Court had no real evidence that Ring killed anybody. He was 1 of 3 people involved in this killing. They did know who the trigger person was. If you know you capital

punishment law you remember Inman v. Florida. Inman v. Florida says that a non-trigger person convicted of felony murder cannot be executed unless and then they had all of things that must be proven. So, what the Arizona judge had to do would have a factual determination by him of the fact that Ring either did intend to kill, was the trigger person or was so involved in it as to be legally culpable in the killing not in the robbery. What they was got a codefendant the state did on a deal if you will testify against the other 2 we will cut you a deal and you get 50 years or 80 years, etc. The guy testified against Ring at the sentence hearing. He came in at the sentence hearing and said Ring was the trigger person. Now we have part of what this judge had to have in order to sentence to death. They have answered the constitutional issue about this is a felony murder conviction but we got the trigger person and so we can give him the death penalty for the constitutional law. Now we have to go to the second part can we do it under state law. They go to the second issue and the trial judge says I have a list of statutory aggravated circumstances. I have to determine whether any of the statutory aggravated circumstances are present. The judge says yes 2—this killing was done for (?) gain and ???? are cruel. Arizona has read Apprendi and said you know we have got a judge hear making sentencing hearing determinations and he is deciding that this guy was actual trigger person—factual issue that gets him eligible for death penalty where otherwise he would not be eligible for the death penalty. He would be eligible for life without parole or whatever their sentence happens to be. This trial judge also made the factual decision that 2 aggravated circumstances were present. One of which has to be there in order for this guy to get death under the state law. So there are 2 decision makings going on in Rings.

On this second one they said that ?? cruel was not an issue under Arizona law. Basically they said that ???cruel didn't apply. All Ring alledgely did was shot the victim there was no torture or anything of that nature. They set that on aside but they this gain (??) thing is present Arizona law, therefore, the trial judge acted pursuant to Arizona law. So now the only question is under Apprendi can he do that or must it go to a jury. So they got to looking at Apprendi and Jones, Harris and they notice that the united states supreme court actually talked about Arizona law and Arizona capital sentencing law. They picked on Walton v. Arizona and they talked about it these cases. They said that in Arizona in their majority opinion the United States Supreme Court said that in Arizona that basically Apprendi says that if you are pushing the case above the maximum punishment you must have a jury determination. If you are staying within a range the judge can decide factual issue. They said (this is Walton) under Arizona law their not pushing it above that the judge has 2 options life or death. The maximum is death and so they are never going above death. Justice O'Conner had to decented in Walton and she said that is not what Arizona provides at all. If there is no aggravated circumstance the maximum under Arizona law is life. In order to get to death you have to find an aggravated circumstance. The judge is finding the aggravated circumstance which raises the punishment beyond life to death. In doing so it violates Apprendi. Judge O'Conner is from Arizona. I think she as a trial judge in Arizona and at one time may have been on the Arizona supreme court so she was probably quite familiar with Arizona law.

In Ring the United States Supreme Court said Arizona we don't know what he guys in Washington are talking about Justice O'Conner is right and the majority opinion in Walton is wrong. In Arizona the maxiumum for capital conviction is life unless there is

an aggravated circumstance and then it is elevated to death. In saying that they automatically doom themselves to the decision in Ring because now the united states supreme court says well Walton and Apprendi in conflict we misconstrued Arizona law. Arizon supreme court has corrected us. We now see that arizon law violates Apprendi and said that a jury had to determine the factual existence of the aggravated circumstance.

Ring basically says what Apprendi says. If there is a factual matter that is required in order to elevate a sentence from what would be the normal maximum to a higher maximum or higher sentence beyond the ordinary maximum a jury must determine that element (they must determine whether it's there or not). The only mention of Alabama in Ring is in a footnote where they set out and said ok here is what we are talking about. We are talking about 9 states and we have got 5 that have clear judge sentencing and they are directly impacted by the Ring decision if the they use aggravating and mitigating circumstances. We have 4 other states—3 of whom Alabama, Florida and Indiana have similar processes and Delaware has something dealing with hybrid judge and jury type sentencing. They don't discuss those they just mention. Justice O'Conner said in her decent that there are X number of people on death row in these 5 states and everyone of them have got to have to new hearings, et. She said that there are X number of people in these other 4 states and they might be impacted.

In Alabama without to far into capital litigation which is not directly affecting us this morning but which does have some impact in understanding the difference. Alabama has a system where we have jury decide guilt or innocence. Even on a plea of guilty a jury has to decide guilt or innocence. We have statutory components. 13A-5-40 has 18 subcategories of capital crime and a jury must determine the presence or absence of that component beyond a reasonable doubt. ?? says in his concurrence you ought get all of this out of the way with the guilty verdict by the jury. If you can do it with the guilty verdict of the jury then you don't have a sentencing issue later. You are sentencing within a range and not elevated. If you combine the 18 components with overlapping circumstances there is a good argument that Ring does not apply to a lot of Alabama cases at all because the jury did determine the element that would make the person eligible.

Our purpose today is to remind you that as we deal with any issues such as revision of the Alabama Criminal Code with regard to definitions of crime and the range of sentencing for each version of that particular crime. If we have robbery and we are talking about use of a weapon verses showing of a weapon verses the use of blu?? oppose to a gun and we have different ranges of punishment. We are getting into some very hairy issues with regards of what is a necessary jury determination verses what can a judge decide. You have 2 cases Jones and Harris. In one of those instances one of them is a carjacking case and the united states supreme court said under that statute you had basically one crime with 3 levels of punishment depending upon the facts. They said in that instance that the prosecutor had to charge which one of those 3 that you were prosecuting so that the jury would make the decision whether or not that is true and then the judge could sentence.

In Harris you had a statute that had a crime and had 1 range punishment if the guy had a gun another range of punishment if he brandished the gun and another range of punishment if he used the gun. The same supreme court says those are sentencing factors

for a judge to decide. Sclea says I am concerned about my brothers and sisters on this court and members of congress who are basically taking away the rights of juries by calling things sentencing factors when in reality they are elements of the crime. What you could have that would really raise Scolea's concern would be to say anyone who commits a homocide in the state of Alabama shall be subject to punishment not less a year and a day no more than life without parole. Then you could say there are certain factors that the judge will look at in deciding whether or not to give one of these punishments. Scolea is saying that if we don't keep a ?? on this we can take anything that's a jury trial issue and make it into a sentencing. If we address that if you talk about guidelines, definition of crime and ranges of punishment into today's law you have to deal with Apprendi and Ring type issues.

We have to ask ourselves are we walking ourselves into an Apprendi problem or have we addressed Apprendi and taken care of it so that we don't have a legal issue in that regard. Whatever we want to do we always have to remember that there is this overriding constitutional concern about what we can and cannot do. Apprendi and Ring don't impact Alabama law as much as some people are saying it does. It also impacted more than some people say it does but the truth is somewhere in the middle. For our purposes we are not dealing with capital punishment. What we are dealing with is sentencing and the bottom line in sentencing is any time you have an element that arguably raises the maximum available punishment beyond what ordinarily would be available in all likelihood you have to start with the presumption that's probably a jury issue. Somehow it has to given to the jury either in the indictment through the development of the crime or in some type of ?cated procedure where the jury is making a factual determination with the existence or nonexistence of an element or an aggravated factor. If you are not going beyond the normal statutory maximum or you are only addressing a prior conviction then Apprendi doesn't apply.

Data Update and Simulation Model Presentation

Tammy Meredith – We will be giving you an update on the data. We met with many of you last week at the subcommittee meeting. I am going to give you an update about what is we are working on and how we are going to organize the data. The way that we recommend the data be organized is to go back to your original goals and assess. What is it that this commission is assessing and what is it they are claiming should be the goals in the sentencing system/judicial system here in Alabama. From all of your goals and objectives we came up with 4 areas where data can help you. It can assess whether these 4 things exist and tell you about your current system. Consistency – is there consistency in sentencing. Is there disparity in sentencing? How does this exist? Part of the goal says that the system should not have disparity in sentencing. Do we have truth in sentencing in Alabama and why is that important? Are we using our source prison resources in a way that matches our priorites? In other words are placing the right people in our prison beds? These are the areas in you goals and objectives and in your vision where the data can help you.

Our job is to come up with ways to organize the data around these areas. That was our focus on last Friday. The subcommittee members said yes this is where we want to. Let me give you an idea of how we are going to organize the data. At that subcommittee

meeting we passed out a mock-up 1 page of a book. I will give you a sense of how we are going to answer these questions. On every visit we have given you tables on the top on the 25 crimes. The majority of the offenders are low level property and drug offenders. We have expanded that list to add 5 more. We have got 25 crimes that we are going to organize information on. Those 25 crimes account for 90% of the bodies that come through this system when talking about felons that are convicted.

We are going to create a book and it's going to have a page on each of those offenses and it's going to answer the same question on each offense so that you as a commission can look through this information as you are making decisions about your final recommendations to the legislature. It's going to answer questions on take possession of drugs—Do we have consistency in sentencing? Are we presenting things right? As you look across the circuit what proportion of people go to prison? For disparity, I think, you match up similarly situated offenders, first timers convicted of one count of drug possession that has never been in trouble before are they receiving the same type of sanction from place to place. On that page we are going to answer some questions about truth in sentencing. What kind of sentences you get when you go to prison for drug possession and compare your sentence to what you actually served in prison—people who get out on parole and end their sentence. What's the relationship between your sentence and what you actually serve. Truth in sentencing says in philosophy whatever the judge says that's what you should serve or something close to it.

We are going to address some of these issues: Who is going to prison? For drug possession offenders how much of your prison space and scarce prison resources are devoted to this group. This will sort of a reference book. We made a lot of changes to that book. We will you some updates about what we are doing.

Today I'm bringing you data. I'm going to talk to about what it is that we are working on right now to help create this book and help you organize your information around your key goals and objectives so that you can make decisions.

One of the biggest issues we came out of last week's meeting with is this: in order to do a good job of assessing consistency in sentencing and disparity in sentencing, truth in sentencing we have to be a able to be sure that we identify offenders that are similar situated. We have to come up with some measure of each felon (gotten over 48,000 convicted felons in the 3 years) for each of those 48,000 people we have to have a good measure of their prior criminal history. That is the only way that we can identify whether or you are a first timer. We have to be able to compare similarly situated people. If you have no prior record and you committed one count of drug possession how are you handled from place to place from jurisdiction to juridiction over time. That's the toughest thing that we are dealing with in measuring. We are going to show you how we are going to improve that measure.

I have made a list I have got 2 slides of some of the data concerns and issues that we are working on right now. We have noticed from the commission that we have had a lot of conversation about the fact that we have got annually high percent of incarceration sentence. We are working on that measure. The last time that we were here we had a long discussion about the percentage of people that were ? going to prison. Last week at

the committee meeting there was a decision that we need to shape off those that are only receiving prison incarceration time. From the AOC data we are going to come up with a measure of percent prison. We talked about if we can't percent prison we can call incarceration. I think we can come up with a measure of people who receive a prison sentence. In AOC data we have identified now people that are only sentenced to time served or that receive only a jail sentence. Now we can identify of those 48,000 people how many of them the judge said you are to receive this amount of time to serve in the prison system. We are refining that measure from what we have heard from everybody.

Question: When you say high what are you comparing to? Is it unusually high?

Tammy – The last time we came in here we had a pie chart that said 69% of everybody who received prison time not just that overall. When we are looking at offense by offense some of the tables and charts that we have been presenting to subcommittees. Last week we were looking at the drug offenses for instance. I not setting the bar of what I think is high. I'm not sure if 61% going to prison is high enough. The first test of good data analyst here we have got the data, we are answering your question, here is the answer. If everybody looks at it and says that it doesn't sound right that's a clear message to us that we have got to go back to the data.

Question: So you are not doing any comparing analyst with other states at this point?

Tammy – No, because I don't have this data on other states.

Tammy - I know that in Alabama and this is big in the news now when you are sentenced to prison you receive some time to serve in prison first you go to the local jail and then you have to wait for the Dept. of Corrections to come and get you. I are working on a way that we can measure whether or not he ever made it from the local jail to the prison system.

Comment: Last week at the subcommittee meeting I thought what we decided was a lot ? on that drug on possession of drug where 69% of them were going to prison I think that we said that has got to be revocation of probation.

Tammy – And we also talked about the SAP program and how many of them are getting sent to SAP. We are looking that.

Tammy – That's one of the key issues we are working right now. We have been graveling with this issue of can we identify prison bound offenders? The movement from the jail to prison and think we have the solution for that in the parole data that we are going to show you.

Last week we talked about drug possession folks as well. We got an unusually high percent of first timer for drugs going to prison and that may be reflecting judges that are sentencing you to prison so that you can get into the SAP program. John is pulling those people out separately from corrections so we will know on our drug possession what percentage of the prisoners get into the SAP program so that we can start looking at who can actually receive drug treatment. In other words getting to this notion that Rosa keeps

writing in some of her stuff: Are we using prison beds to do drug treatment and are you receiveing a prison incarceration sentence because that's the only way you can get treatment if so we need to address that.

We have had a lot of discussion about profiling prison admissions.

John – What was best helpful for us last week really to come to these meetings and get the data to you and everybody says that's wrong. What was helpful about last week was you sat down and said for me to believe that table I'm going to have to see it this way. This is the element that I have to see. You told us specifically. Some of you got to see the data. It is literally volumes of data. We could be there splitting numbers up 2500 different ways. We are pulling out new offenses, new court sentences directly from that are not revocation from people going to prison. We are getting the revocation separated out both probation and parole revocation. I will go ahead and cover the SAP ? too.

The only way to determine in the Dept. of Corrections file whether they got sent to SAP ? is in a comment field. We had to print all the files in the possible comment and hand code each one to stop whether they are a SAP program or not. We had thousands going off with SAP. I believe that once we merge it back and get that number in there what you are suspecting to be true is true. They appear to be possession and going off to prison but really they are getting the chain gang with SAP. SAP and return back to court. I think that will help you along with the revocation issue for people going to prison for drugs is just going to flatten out.

Question: Will you have way of tracking them after SAP back to court to see if they then go back to prison?

John – We are going to talk about that and share the data source with you.

Question: What if your data is right?

Tammy – We are clearifying measures and if we come to you and say now we guarntee that we have gone through a, b, c, d every hoop that you put in front of us for each argument that you have about this data is incorrect and when we down to the bottom line and we say X percent of first timers on drug possession are getting sent to prison then you are going to decide we except that or we don't.

Question – Did you say that thousands are being sent to prison for SAP for drug treatment?

John – Not annually but over a period of years.

Question – We are sending thousands of first offenders to prison for drug treatment because we don't have anything else?

Tammy – We are not saying because. We can only tell you what is happening.

Response – The Judges are doing that.

Tammy – What we see from the data that we are going to have folks that when you look at it it looks like they are just going to prison. We are going to be able to tell you some of those people it looks like they are getting sent to prison for drug treatment. So when you start practicing alternatives are we using our prison beds correctly. This is something for the commission to ponder. If that is not the best use of your prison beds then you are going to have to consider diverting some of these folks. If it is treat that they need then you are talking about diverting them treatment. That's my thought of where you will go with this.

John – The ? tells the commission and the judges statewide ? pretend they are going to prison in reality ? segment that actually went to SAP.

Response – What you said is wrong John because they are going to prison for SAP.

Question – John were you using the same 3 year cohort that we were talking about last week?

Tammy – yes

John – For the SAP program we pull everybody that was sent to prison in the last 5 years.

Question – If the AOC added a field for SAP would your data work better?

Tammy – yes. The Department of Corrections needs a field that tells you clearly. AOC has a flag for drug treatment. I am not sure yet how accurate that field in the AOC data is. We are going to compare that to what the prison record says for people that go to prison so that we can assess that. I think that is going to be critical. If this is a big issue to the commission then some of our recommendations are going to be how important it is to monitor this sort of information over time so that it not so much to answer these what would seem to be simple questions.

Some of the problems that we are working on now on fixing with our database and come with ?. This is back to the issue of why it is so critical to identify your prior record to assess these issues and do we have disparity. The only way that we can tell that you have got similar offenders is we have to pick people that have on the same level of prior records. Our prior record measure is critical. Here are some the problems with the data. These are all about prior record issues. It would be great if the DOC or the AOC data had a clean measure of your prior record that had a count of how many felony convictions you have. Then we would know that we have got a guy with no prior felony convictions. There is no such flag in the court or DOC data. That puts Alabama at a disadvantage because many other state data systems are designed with flags to answer those questions. We have tougher times answer that question with our data her.

With AOC we can search back through prior years on your name and date of birth. One of the things that we are going to do is look at that. There is no flag in AOC so prior convictions is not measured directly. That's why we have gone through of this work of getting the rap sheet data. The CJIS data. That's supposed be for you as an individul for

your entire life. Every time you get arrested and convicted in the state of Alabama here is your criminal history information. What we are determining is that when people are looking at the data and saying this doesn't sound right or look right. This doesn't look like first timers. These people must have prior convictions.

We have been spending a lot time in the past few weeks with Debbie Summerland and CJIS going through cases and records and trying to figure out what we have. Our best hunch so far is that we are missing disposition codes on more arrest records in CJIS than we originally thought. I know that Mike Carroll has talked to this group before and talked about the fact disposition information comes from AOC back to CJIS when there is an arrest. That happens in 95% of the cases. I hunch is that recently since the days of Mike Carroll really working on this connection we do have a lot of dispositions. Our biggest fear is a guy who has a conviction 5 or 6 years or. 6, 7, 8, 9 10 years ago—it looks like in the CJIS data that we a lot more missing disposition information. So I might be calling a person a first timer when really he had a felony conviction 8 years ago. We can't find any convictions in Alabama. Things like that are what we are working on in Alabama. We have solution on how to improve that and it has to do with inconsistent use of identifiers. All of this is difficult for one reason: in the state of Alabama these 3 agencies corrections and the court and CJIS have no method for talking to each other in terms of data. We have no uniform criminal justice system. There is no unique I.D. that marks a person that these agencies are required to use. That's why it is so hard to connect all this stuff. The way that I am connecting now your court data to your rap sheet is with your name, age, race, date of birth and sex which is how the court and CJIS take to each other. They do not have a unique I.D. like your social security number. The fact that we are missing SID which is your prison number. We have AOC numbers on the court data. We have SID or prison number on the prison data. We have FBI numbers on your rap sheets but none of these systems capture all the numbers. My hunch is that if I have a unique I.D. from the court for a person and I go to CJIS with that unique I.D. that number I will probably be able to connect their data better than the way that I am doing it now.

How are we going to prove this? Here is our missing link. As we all know this commission just recently got access to the pardons and paroles data. We have worked for the last week with Mike Carroll with AOC who is informing us about all the data that is captured by pardons and paroles and the format that it is captured in. We have been given permission (Lynda and this agency) from the parole board to access that data. We are now writing a data request for Mike Carroll who will create the data abstracts. Here is what you are going to get: from probation and parole the fill out what they call rap sheets which is information on somebody who is a new probation case. It's called fache (a sheet that's filled out on a new probation case). When a person is in prison before he is up for parole a fache is filled out. If you are on parolee under supervision they capture different information. They have got different data systems capturing information. All of their data contain unique identifiers (they have got FBI numbers on this data). When we get the pardons and paroles data we are going to search for our 48,000 people and we are going to connect them to their parole data and also to corrections data and we are going to pick up all the unique I.D.s (FBI numbers). Then we are going to take the numbers and go back to CJIS and try a new connection to the rap sheet based on their number not just their name.

We are going to merge all of the data bases which will allow us to link by the person identifiers. This is going to hopefully give us a lot more information about your case outcome. We are hoping that we will be able to answer some of the questions about those folks that are incarceration, given some prison time to serve or whether they have moved from the jail to prison. I think we are also going tell from measuring the parole data for the first time. We also going to improve identify prisoners transferred to DOC, improve method for linking the 2 using the FBI number, we want to link the courts and correction's data to see if you showed up in classification and actually went to a prison facility. So far that has been tough because we have no link to cross up with your data file. Once in the parole we pick up your FBI number and your SID then we add that to your court data. The correction's has your SID. I think that we will be able to answer a lot of questions and link these data bases to help clarify where we are going.

Here's what we are recommending: what if we go through all of that stuff and we have got a new link and it based on I.D. s and it's not just people's names and then you still tell me that doesn't sound right. We have developed a multiple measures of prior records and this is going to have to be our strategy. We are going to have to get a little more complicated then we are just going to measure the number of prior felony convictions we have.

Comment: a couple of rules in other states and rules of say 10 years on a prior conviction our habitual offender law has no 10 years. If someone has a prior felony conviction that the habitual offender act applies—10 years doesn't apply.

Tammy – You are looking at my bullet that say 10 years. The reason that's there is because we are going to ask for all of the data since the beginning of the current automation in the AOC system which is only 10 years. We will have to search by name and birth date through the court records to see if the court say you had a prior conviction. That would be one measure. The second is that we will go to the DOC prison data to see if you as a person if you are in our cohort you have a SID (state prison number). We will have to seach through to see if you have been incarcerated before. That' another measure of your prior record. We also have the option of using the CJIS information and measure prior record as arrest and not just as convictions. I'm not ready to say that's what you need to do yet because I don't know once we measure our numbers of names how good our conviction data will be. Once we do that we will know. We may come to the conclusion that we just have too many missing dispositions from old arrest records that we want to broaden our measured prior history to be arrests. I think that between CJIS, the courts and corrections we ought to be able to do a much better job of identying those first timers. What we are looking for is the least serious group of offenders so that we can compare them from place to place under these ? .

John - Mike Carroll from AOC told us that CJIS hired researchers ? off a federal grant. These rulings clear up a whole lot of standing arrests. If they have an outstanding arrest and if it wasn't completed his admission for they traveled the state and went to the individual circuits and tried to find it.

Comment – I have not noticed a big increase in dispositions in the rap sheets that we are getting from CJIS.

Tammy – Here's how it works if there is an arrest record that information goes to CJIS. Then what CJIS does is create and automated file. The take that information and ship it to AOC and then the courts write programs to search through their system to find what was a result of that arrest and then they send the file back saying for this record here is the disposition and the disposition date. The send back to CJIS who then links it together.

Comment – If someone is arrested by the city of Birmingham and are never charged by warrant the clerk's office would never have it. The only way the circuit clerk is going to ever have a file is the district clerk who works for the circuit clerk is if the defendant after the arrest by the municipality is then charged with the offense in some court. There are arrest where they don't ever get a felony warrant. That's a gap in their arrest that you never will have that. If a police officer charges someone with a felony, puts them in the city jail if a warrant is not issued CJIS has got that arrest record that doesn't mean anything.

Tammy – Here is the bottom line of all of this we are not on the hunch for the perfect measure. You don't have enough time and funds to pay us to do it. The goal is this exercise is how do we assist you to answering about these issues. We can only address these issues after comparing first timers.

Comment – You are going to find when you get through all of it you've got judges in this state that are sending folks to prison for first time minor offenses.

Question(Ellen): Could you clarify I hear the term first time offenders and I assumed that it was someone who didn't have a prior felony conviction. I see for the first time the use of prior felony and misdemeanor convictions in the first bullet. We have seen the term prior convictions in other things. Is misdemeanor to be included in all of this?

Tammy – We came up with a definition of first timer would be somebody with no prior felony convictions and said the strategy what we are moving toward here is if we get to all of this going to the parole and merging all of this and we are still not happy with that measure of prior felony convictions our recommendations and our strategy would be to build more measures of prior records.

Ellen – I think what I am trying to ask is why did you insert misdemeanor in the first bullet?

Tammy – Simply because the court system we are going to get that data the court can tell us if they have got a misdemeanor.

Ellen – AOC does not have city convictions in their misdemeanors.

Tammy – they may not have it through the ordinance.

Ellen – In Montgomery we do not have a uniform system.

John – The problem with using CJIS is a lot more reliable then booking a misdemeanor

Tammy – I forgot to mention that your prior history is also captured one other place that I am going to pick up. One of things that we have with the pardons and paroles data is that if you are placed on supervision either probation or parole in this state the officer assigned to supervise you also does their own investigation of your prior record and they actually enter in an automated format what they know about your prior history from their own search. We are going to capture that table as well with our parole data. The point of all of this is that we are going to have lots of agencies telling us something about your prior history. Our job is to go across all of it and come up with the best measure of first timers that we can so that when you are looking at our data you comparing apples to apples you more comfortable with. This is our strategy over the next couple of months.

John – Other states already different data bases ready and this one we are really starting form stretch.

Comment - In support of what you doing I sense that there is a big frustration here that I think that it is ? ? that we are grasping for 100%. You have already told us that you recognize that we will never get 100%. I see you as research partners and your ? is on the line as much as ours is in terms of the decision that we are making. I think that you doing the very best job with the data that you have just got ?? is the best that you can do with limitations that you have got. I feel that we should take that as the best data that we have got and go with that and make decisions.

Judge Colquitt – The other thing about data too is that sometimes you can go searching for that one case that not correctly shown in the data and that's basically irrevelent because you are dealing with search large data and one case wouldn't change the outcome.

Tammy – The bottom line in all of this is that 25 pages that we decided that we want to see the data in this format that just means that I am not going to be able to give you that next week. I could run it with the data that we have but I don't like a measure of first times. That book will be out in about 2 months instead of next week. I feel it will be much better because we will all feel much better about the quality of data ??.

Comment (Bill Segrest?)This goes back to something that you talked about earlier about identifying numbers that would identify a person and not an event. My department is working on that with Mike Carroll in AOC to come up with a number or an identifying number that will identify an offender. We talking about going back as far as arrest but if not arrest at least at indictment to give this person a number that will stay with him for the rest of his life. We are working on that right now. We have had already had several meeting and are making progress toward unifying those 3 fache sheets that you talked about earlier. Right now 2 of them are fine—they talk to each other but the third doesn't so we going to right over. We going to fix so that they will all write over to each other. I don't want to do something that will be changed by something that this commission does.

I asking for advice. Should I put this on hold for a while until we see what this commission does?

Tammy – I don't think so if this commission lends support for anything your agency does this commission confirms for you the critical need to link people by unique I.D. number.

Comment: Can we go back and talk about the use of misdemeanors/misdemeanor as part of the determination when a person is a first offender. There seems to be some concern about that. Misdemeanors convictions are not arrest.

To the extent that we need some definition or disclaimer in the booklet that you are going to put together we should make sure that we don't leave the impression that a first offender has no prior misdemeanor convictions. We need to make sure that we make disclaimer that we haven't looked at that because if we say that these people are first offenders with prior felonies and not prior felony convictions that doesn't mean that they had no misdemeanor convictions.

Tammy – We need to be very clear on that. That was one of the things that I had mentioned last week when I was here at the subcommittee meeting. We stopped using the term first offenders and some of it could be ?. We have to clearly set our tag whatever we call this bunch and clearly define who they are.

John – I thought give you a walk through of what simulation is and how it plays into this type of effort—commission work. How it is going to guide our efforts in the fall—what are going to get out of it? The commission wants to build a projection simulation model. A simulation model in short means: projection means what is going to happen. We want to build a simulation tool. A simulation tool is an automated tool that mimics the correctional system or criminal justice system. How much you mimic or how in detail you get really depends on 2 things. The goal on what you want the model to do and how much data you have.

We talked to in length to Rosa and everyone and we get ideas of what the purpose of what a simulation model is. One of which is everyone wants to know what bed space capcity or bed space is going to be. If we keep going the same 85% just sort of just rolls in what will it look like in 9 years. What happens when new laws come on the plate. Legislative and policy impact analysis.

Most states have some sort of projection capability. I'm not sure about Alabama and whether DOC has an official projection model they use and how they do that. Identifying ?? bottlenecks and constraints that's the impact of resources. Financial impact is the court legislative policy decision. These are sorts of goals people want a model to be able to do. All of these can be done.

Why is simulation technology recommended? An example is looking at a criminal justice system (Georgia model) we have got bodies flying every where. They come, go, move, they come back and they head out again—they roll everywhere. A lot of things can happen. What we want to do is literally build a model that's an imitation of the operation of the real world. We want to take that graph that I showed you and mimic it

on the computer of how people flow through the system. That's simulation. If I can imitate the current system, so it runs and looks like our current system that gives me the ? to make changes to the system on the computer—run it and see what potential impact it would have down the road. It's tough to do but it is doable. The industry and private sector have been doing it for years. Criminal justice has been doing it but they are using some old tools. It could describe and analyze behavior of a system. This the really the only way to do true what if questions or scenerio. Simulation in my view is the closest thing you can do is to do what if analyze.

One thing it does once you build a model everyone buys into that's valid and reliable it illuminates the emotion decision—it will quiet people down. Once you buy into it you can test certain things and see what the outcome is. Companines that are doing simultion—thousands. Every company builds a simulation model of the whole thing before they even break ground. The build the whole physical plan on the computer first.

Simulation can test every aspect of proposed change without committing resources. Its exported policy will operate procedures without expense or disruption. I going to bring up a model we built in Georgia. It's a visual model. Gave commission an overview of how people move around in Georgia. What we do in this model is when we hit the button prison, probation and parole are actually filled up and populated with actual records of offenders in the system in Georgia. They literally load up all 200,000 of them which is probationers , parolees and inmates. They are sitting in the prison. What we say is if we just the way the system is going to operate for 2 years hit the button and see what the outcome would be. It really mimics every decision in here and what you don't see behind the scenes is the tons of data and math behind this figuring out, analyzing your characteristic, sentencing practices so it knows exactly what to do with the right people.

Our analysis and studies have shown us that we can almost off by ½% reproduce people actually like the people who usually go to prison or probation in Georgia down to their race, age, offense, prior history, HIV status, etc. We are actually producing people into the future who actually like the kind of people we have seen in the last couple of years in Georgia. We diversion detention bed—we call it soft bed in Georgia. We have revocations, etc.

The model allows us to manipulate changes in the system. The goal is in a commission like this is to run the model forward to say if you do nothing what would things look like in 8 years in Alabama? If we do something what would it be and how would it change that outcome? That's called simulation. We also have a financial model built into too so it keeps up with dollars and cents of every person in probation and parole or in prison. You can analyze cost as you do too.

Question: Will your model have handle changes in multiple and variables at the same time? For instance, change one variable then all the other variable remain constant?

John – For example, one thing we build when you are a new offender say we are in year 2005 and we are building my model and I have to create this new guy. If I change his race (we have certain demographic profile of people coming into the system) or age that would influence every decision in they system about building him.

Recent Cases/Other Cases of Interest

Lynda – went over some of the cases. The most recent cited on June 27th by the united states supreme court involving an Alabama prison inmate that was handcuff to a hitching post for disruptive conduct. This occurred back in 1995. This case was Holt vs Helser. The federal magistrate that looked at this case determined that the guards that were sued were entitled to qualify immunity. They never got issue or whether punishment violated ? commitment. When the district court got the magisgrate recommendation they entered summary judgment for the defendant and then when it got to the 11th circuit the 11th circuit affirmed. The United States Supreme Court held it. The defense had qualified immunity should have been included at the summary judgment phase. In other words they should not have ruled on the immunity at that phase. The defendant's allegations if they had been established as true did result an eighth amendment violation and of the eighth amendment violation. They said that the ? question that the 11th circuit should have asked whether the state allowed 95 day fair warning that the defendant treatment was unconstitutional. Then they looked and they said that a reasonable officer would have known that this punishment was unlawful and also mentioned that the Justice Department had specifically advised the Alabama Department of Corrections that there was a constitutional unfirmity of punishment prior to this ?.

Harris vs United States I think Judge Colquitt mentioned this one before this was a June 24th of this year case in which the united states supreme court looked at a statute penalizing carrying a firearm in relation to drug trafficking offense. In that case Judge Colquitt mentioned they stated that set forth a single offense for drug trafficking and the part about brandishing and discharging of a file which had the enhancement were mere sentencing factors to be found by the judge rather than elements of defense to be found by the jury. I got an email from Families Against Mandatory Minimals and I thought that it interesting that they sent an article out that says U. S. Supreme Court decision inherits under scores the need to end mandatory minimals.

To give you some facts about the case they started citing from the opinion itself particularly Justice Bryer opinion. The opinion says that mandatory minimal statutes are fundamentally inconsistent with congress's ? efforts ? honest and rational sentencing system through the use of sentencing guidelines. They have been for sentencing trials and prosecutors you can determine sentences through charges they decide to bring and you will thereby reintroduce much of the sentencing disparity that congress created the guidelines to eliminate.

The most recent cases deal with prospective application of the amendment of the habitual felony offender act. The retroactive application the latest case was decided June 14th—it was exparte Zimmerman. In this instance the defendant sort false post conviction release following his conviction after the amendment of the habitual felony offender act saying that since his life without parole sentence was under the act that he was entitled to the same lenient treatment that the new amendment allowed and not give him that which was violation of equal protection. The Supreme Court held the defendants right to equal protection wasn't violated by the (?) application of the act which was Alabama Supreme Court. They said that the Legislature probably can give only the (?) application to statute

that (?) punishment therefore expo facto (?) kicks in and gets more serious. They said that for more lenient punishment it can be prospective application only. They cited a lot of cases mostly from other states but some from Alabama. Justice Patterson's opinion from criminal appeals basically holding that a reduction of sentences only prospectively from the date of new sentences statutes takes place is not a denial of equal protection.

In Alabama v. Shelton case is the case the Attorney General William Pryor went to the United States supreme court on. The Supreme Court held that the 6th amendment didn't convince the accusation that the suspended sentence upon the defense that was violation of (?) (?) with his probation if the state didn't provide him with a counsel during the prosecution of offense of which he was prisoned. This was misdemeanor assault where the defendant was sentenced to 30 days in jail that the trial courts suspended in placing the defendant on 2 years unsupervised probation. They rejected his argument relating to the cost of the case and his argument saying we don't give counsel for misdemeanor offenses unless actual imprisonment will be imposed but if we suspend the sentence at that revocation of probation we would give them an attorney at that time. They rejected that argument noting that Alabama did not provide attorney at the probation revocation stage.

They also said that based on figures suggesting that the conditional sentences were commonly imposed but rarely activated. The appropriate rule would permit any additional suspended sentence on an uncounseled defendant and require appointment of counsel if at all only if probation revocation stage when incarceration is imminent. That regime would unduly reduce the 6th amendment's domain. In Alabama the probation revocation hearing is an informal proceeding in which the defendant has no right to counsel. The court has no obligation to observe customary rules of evidence. More significantly than the (?) validality or reliability of the underlying conditions at the probation revocation stage. The hearing so time structured cannot compensate for the absence of trial counseling. When talking about the cost of the different states they went on to say that even if the attorney general was correct that some states cannot afford the cost of the court (?). Those jurisdiction have recoursed to the option of pretrial probation. Thereby the prosecutor and the defendant agree to the sentence participation in a pretrial rehabilitation program which include conditions typical of post trial probation and the ajudication of (?) sentence in the underlying offense occurr only if the defendant breaks his (?) (?).

Lynda – referred to memo on habitual felony offenders (key issues). We said on the survey to submit recommendations. Received 3 responses from commission members. Every response said that they did not like the proposal. A lot of them mentioned that was a conflict with what the bill actually said. The AOC's memo was included which is behind the key issues which is an actual letter to Attorney General Pryor. If you want to read letter, attachments and AG's opinion and then we will discuss.

Judge Colquitt asked Lynda to give Commission members a brief summary or overview of what they are recommending and why and what the content if the (?).

Lynda - of the proposals that were submitted they are saying that first there over 8,000 offenders that would be applicants. Under this procedure the inmate would file a Rule 32

petition with the court, the sentencing court. If wasn't a sentencing judge then it stated a presiding judge in the rule. In the jurisidiction where he was convicted. Then from that the court would be required to make specific request of DOC for an assessment to see if the defendant qualifies or not. This can be anybody in jail that wants to file Rule 32 petition whether they come under the specific guidelines or not. They would not be screened through DOC first they are going to come into the courts. Then the DOC will look to and see if that offender is barred and the DOC will request a risk assessment instrument and a brief fact sheet on those that are not barred outlining the criminal behavior with a brief synopsis. That will be sent back to the courts.

In this procedure I noted that in no place did Pardons and Paroles come into the framework prior to the. Also it was worded in the memo that we were all waiting for the definition of violent/nonviolent offenders to be included in this procedure that would be given to us. We kind of held off on our own definition to see what they were going to say. When I received I called Commissioner Haley and asked him where it was. He did say that they had a list of the offenses that had been turned in by the Office of Prosecution Services. They had given it to the DOC and asked when would it be made public and wasn't this part of the procedure. He responded no that it would not be made public until the Governor looks at the proposed procedure and finally approves a procedure. One guideline could be what is now being used by the Governor as a nonviolent offender for the Thursday hearings.

Ms. Flynt asked if anyone knew what that criteria was.

Response – We had a sheet that had about 12 criteria on it that we applied to each individual case. If they passed those criteria then we would put them on a docket.

Ms. Flynt asked if the Commission could be provided with a copy of that criteria.

Response - yes

Ms. Flynt as if it would be helpful.

Response – No, because usually these cases were one of the criteria. It would not be helpful for the habitual offender act because one of the criteria that excluded people were prior offenses. We did not have habitual offenders that passed the criteria.

Question (Ellen) – Did you define violent or nonviolent?

Response – We did not define violent/nonviolent. It was subjective determination if it were assault, robbery or murder.

Ms. Flynt – They say that any assessment by the DOC would be considered final.

Judge Rains - What are the policy considerations with respect to having these filed with the court first or with DOC person?

Ms. Flynt responded that they decided that they would put the administrative burden on the DOC for them to screen them first.

Judge Rains responded that I think that would be something they are going to do anyway. It looks like to me they are asking the court to do something that they are going to have to do anyway and they can save the court a lot.

Ms. Flynt stated that one of the judges mentioned that may be we could have clerks when these petitions come in just send them straight to DOC for his education. That would be a lot of unnecessary steps and waste of postage. I'm getting real popular with the inmates before this procedure is finalized. Even what we come up with I'm not sure under the executive order whether what we recommend to DOC is ever going to be submitted to the Governor. It could be that we make a recommendation and the Attorney General makes a recommendation and DOC looks at and decides what it wants and sends to the Governor.

Question – what is anticipated with the respect to counsel and adversarial hearings.

Ms. Flynt responded it is not in the procedure. They are going to do the Rule 32 procedure which several people say is not the avenue to go. One of the things that we need to address is it the avenue to. I tried to list some issues that just came to mind in the front of this. One issue that was even brought up was under some of the procedures it questions whether the last act making it retroactive only required the Class A's with 3 priors or did it also apply to Class B s under that provision that was amended. The synopsis of the bill included in your packets it looked like that only wanted to address the Class A s. In the body of the bill it talks about the amendment to the whole statute so it would have to apply to Class B s with 3 priors.

Tom Parker – addressed Judge Rains' question stating that there are some policy considerations on the other side weighing against the DOC recommendation that it starts with the court system. AOC takes the position that this does not fit into Rule 32. It's not an unconstitutional sentence when it was given. It's not an illegal sentence. It's seems that this creates a whole (?) (?). Something as different as habeas corpus is from Rule 32 as so there is no provision or filing (?) in this statute.

Judge Rains - There a procedure that this can be done. It's not Rule 32 and that is through the Community Corrections Act. The Community Corrections Act has a sentence in it that authorizes cases to be by recommendation of the DOC cases can be brought back for review by the court and placed on community corrections. That sentence in the community corrections act doesn't speak to modifying the sentence but it does provide a vehicle by which someone can be release from prison but it anticipates that it would be on recommendation of the DOC and then review by the court. I know that DOC has done this with some circuits. We have done it a couple of limited cases in out circuit. I think you exactly right about this not being appropriated for Rule 32. I think from policy stand point that DOC ought to be the ones that are screening these people before they ever get to the court system in the first place. They have got to screen them anyway. If they file it with the court we just send it back to them.

Tom Parker – For our clerks and judges it is going to be expense generating. I would like to have it prescreened by DOC and then go through the approval process in Pardon and Paroles. Have all of that attached to the petition. I would like to explore looking at the Community Corrections Act. Our thing was to treat it as a new filing without fill and so we wanted to reduce those by having them precleared before they got to us.

Ms. Flynt stated that there has been talk that somebody might challenge this and saying that it's unconstitutional on grounds of void probabeous. It might never go into effect. There could be legislation that would appeal it.

Ellen – I tend to agree with the comments that were just made. That makes good sense to me. It does occur to me that aren't we dealing with a finite number. It's retroactive and you can identify everybody who has ever gotten life without parole. The big issue is does it apply to anything other than a Class A. I think the statute itself may be subject to challenge. I can foresee some victims of the other—the Class b's that were affected.

Lynda – The problem is that is the synopsis not the title.

Ellen – Isn't there a law that says the synopsis has to match the ?

Lynda – yes.

Ellen – But it doesn't—it's misleading.

Lynda – Talked to Bob McCurdy about and he said that he didn't think that would cause?

Chairman Colquitt – at one point it was said that we were supposed to get this proposal and review (we don't have it in it's entirety—we don't their definitions). They have definitions—they just did not give them to us. The first thing is we don't have the definitions. Secondly, we are suppose to answer this by June 1st.

Lynda – DOC was to get it to us by June 1st. They did give it to us May 30th. There is not deadline.

Chairman Colquitt – There is no deadline when DOC is suppose to submit it to the Governor.

Lynda – No, nor for us to submit to DOC or the AG to submit it to DOC.

Chairman Colquitt – Is DOC taking the position that they can submit this to the Governor whenever they decide to. Do they have a timeframe?

Lynda – I tried to get in touch with Dr. Haley on yesterday but he is out of town. Emailed John Hamm have not heard anything from him. I did want some kind of representative from the DOC here today.

Chairman Colquitt – They are not supposed to submit their proposed process to the Governor until they have the recommendations and comments from the Attorney General's Office and the Sentencing Commission.

Lynda – That doesn't mean that they have to incorporated.

Ellen – It does say that they have to incorporate the recommendations and comments.

Chairman Colquitt – It would seem to me that we need to know what it is they are proposing not just part of what they are proposing. We need to take our position and get it to them so that it gives it an opportunity to go ahead and finalize recommendations. Is that the process? We should request from they a complete proposal.

Ellen – It's hard to comment on something you don't have.

Lynda – I will draft a letter to Commissioner Haley from Chairman Colquitt.

Chairman Colquitt – The other thing that we could go ahead and just comment that there are members of the Commission who have concerns about the attempt to make proprosal on top of the Rule 32 process a new type of action that simply doesn't fit the Rule 32 process. It would be much better if they are going to make recommendations that one of their recommendations might be a recommendation to the AOC and the Supreme Court that a proposed rule be adopted by the Supreme Court setting out the process by which these cases would be presented to court rather than trying to just stick it in a Rule 32.

Judge Johnson – What the chairman just said I think we need to put in that we need to put in that letter and I would make a motion. Rule 32 if they call this a rule 32 I'm going to deny it because it's not a Rule 32. Then they are going to appeal that and tie up the court of appeal and it doesn't fit in Rule 32 because the correction's commissioner wants it to fit or whoever in his office is designing those plans wants it to fit it's not going to make fit rule 32. There needs to be a request by the DOC to the Supreme Court that they promulgate a rule to fit this procedure.

Ellen – the procedure says that victim's advocates groups should be contacted and consulted with. I am concerned about that. Secondly, it states the DOC should consult with district attorney's association. On Friday before this was developed a phone call went to the executive director and they had a brief meeting but no district attorney has been consulted on this and it was to come up to our July meeting. I have some concern about the thoroughness with which this was thought out and that a draft was circulated among victim advocates and they DA's association. I have a problem with what the law says because I would argue that it should not apply to class b s for several reasons. Secondly, it says early parole of each nonviolent convicted offender. I think that's a very narrow scope. I think that we would all agree that a murder, robber, rapist is a violent offender regardless of their prior Class A' s if they have any or not. Therefore, we are not talking about a thousand. We are talking about I would suggest a very small group of people which I think changes the whole dynamics of what we are about.

Comment: I have serious problem with the Board of Pardons and Paroles approving a process whereby early parole might be granted at some future point. I think that we ought to suggest that this bill be repealed the next session of the legislature.

Chairman Colquitt: At least the purpose of drafting a letter without (?) the position of the sentencing. The purpose of drafting a letter back to a member of this commission is going to the Commissioner that we have several concerns with the regard to DOC actions not the legislature. We have some concerns about using Rule 32 as the process by which these cases or reviewed. We have concerns about taking a position on their report without have a complete copy of the report and knowing what types of definitions they are using, etc. Is there anything else that should be included in the letter to the Commissioner?

Lynda – Include in letter to Commissioner that even though he said in his letter that victim advocates and the DA's Association had been consulted Ellen was not aware of.

Chairman Colquitt – We can include in the letter that in observation it was reported to the Commission that some of the groups that were due to be contacted in the Governor's Executive Order to take positions they haven't.

Lynda – Could we actually have a vote by the Commission today on the Rule 32 issue so I could say we have a majority that says Rule 32 is not the way to go rather than just say have concerns about it.

Comment: I don't think we are at the stage where we need to say that we don't think it's the way to go. DOC is not the one to say use Rule 32 anyway. They have a discrete role to play in making the evaluation. They should not be the one saying how the process should do that would be the Judicial Branch.

Chairman Colquitt: The Governor's Executive Order says that DOC creates the process and then they would circulate this process for input. A their process says is basically we don't want to deal with this until somebody tells us to do it so the courts can do it under Rule 32. That's not the process the Governor was talking about. The Governor started talking about a process for evaluating nonviolent offenders and the process developed shall be subject to administrative procedures act which sounds administrative not court. Rule 32 is not subject to administrative procedure.

Response: What he is talking about the APA there is for adopting any kind of rules or procedures that DOC may have be subject to the notice and comment, etc., under the APA. I that's what that means not that whatever procedure does is administrative

Lynda – Is the letter properly addressed to Dr. Haley or should it be to the Governor since it was the Executive Order that Dr. Haley was trying to comply with?

Chairman Colquitt – We are suppose to comment to the DOC. It says that after receiving and incorporating recommendations and comments from the sentencing commission DOC shall present. At this point we need to make it clear that we don't feel that we are in a position to a final position because we don't even have the full report. We already have concerns about they are attempting to inappropriately use Rule 32 as the process and

that's the wrong process. It would be much better advice to recommend to the Supreme Court that the Supreme Court adopt the a rule setting up a process by which these will be handled. That they provide us the rest of the information with regard to definitions, etc. and that there is one agency that has reported to us that they haven't been consulted yet and that we might want to seek their input before we take a position on the report. We are simply unable to reach a final conclusion on this a this particular time.

Lynda – This is who we will send copies to: Ted Hosp, Randy Hillman, Tom Parker of AOC and Bill.

Report on Offender Seriousness Subcommittee
Lynda reported on the Offender Seriousness Subcommitte for Rosa Davis, Chair – The subcommittee will meet again on July 19th. She's going to propose to Judge McLauchlin today thru Lynda that subcommittees have a joint meeting. Ms. Davis stated that in her opinion one or two more meetings will be needed before the commission will actually be at a place where it can say: Where are we going? Are we going guideline? Are we going to re the criminal code? Where in this whole state are we going to finally have somewhere to start? Judge Colquitt mentioned there are several statutues that we wanted to look at and that we can recommend amending but overall what we are going to do will be determined will be based on what the subcommittees come with when the classified their seriousness ranking of offenses and the seriousness ranking of offenders.

Rosa's seriousness ranking of offenders met twice last week or last two weeks and Tammy and John mentioned that probably the last meeting was more of a data collection of simulation model demonstration than anything else. We will be moving forward. I think that's where Judge McLauchlin is at his point to that his thinks they are about finished according to my phone conversation with him.

Report Offense Seriousness Subcommittee
Judge McLauchlin - stated that the main thing the subcommittee has been doing the last few meeting is mainly weighted the offenses and their seriousness for data purposes. Referred to handout where some of the data is broken down in different ways and that's mainly what the subcommittee has done as far as dealing with offense seriousness. The rest of the time the subcommittee has basically been brainstorming and then figure out exactly what is that they are trying to do. I have got a few random thoughts that have just noted. Basically there are 3 alternatives or approaches to (?) our sentencing structure:

1. We could leave the 3 classes like they are with the same the punishment range/sentence. Classification of offenses and offenders would be the same with the same range of sentences and punishment. We could have different levels within each class with suggested sentences or punishment for each level. Would be similar to the bond schedule or child support guidelines. Under this approach there may be less need to submit amendments to the legislature. Possibly we could recommend suggested sentencing and a punishment schedule or guidelines to the Supreme Court Rules Committee and then they could present this to the Supreme Court and possibly it may be the same way the same structure that you can do this by rule rather then having to go before the legislature. That would be

basically keeping the same crimes, same punishment for those crimes and adjusting the levels as a recommendation of punishment.

Question (Lynda): Would that avoid the Apprendi problem?

Chairman Colquitt: That's Harris v Jones. Harris on one end of the spectrum and Jones on the other. You have got to make sure you stay leaning toward the one that is permissible opposed to the one that is impermissible.

Lynda – But if he has got a suggested range if we still keep the maximum and then you have sub classes with in that that are just suggested.