

## **Alabama Sentencing Commission**

Minutes of Commission Meeting  
August 23, 2002

The Alabama Sentencing Commission met in the Mezzanine Classroom at the Judicial Building in Montgomery on Friday, August 23, 2002. Present at the meeting were:

Honorable Joseph Colquitt, Chairman, Retired Circuit Judge, Professor, University of Alabama School of Law, Tuscaloosa  
Honorable Ellen Brooks, District Attorney, 15<sup>th</sup> Judicial Circuit, Montgomery  
Rosa Davis, Chief Assistant Attorney General, Montgomery  
Stephen Glassroth, Esq., Glassroth & Van Heest, P. C., Montgomery  
Lou Harris, D.P.A., Faulkner University, Montgomery  
Edward "Ted" Hosp, Esquire, Legal Advisor to the Governor, Montgomery  
Honorable O. L. (Pete) Johnson, District Judge, Birmingham  
Honorable P. B. McLaughlin, Presiding Circuit Judge, 33<sup>rd</sup> Judicial Circuit, Ozark  
John Hamm, Department of Corrections, Montgomery  
Bill Segrest, Executive Director, Board of Pardon and Paroles  
Becki Goggins, The Sentencing Institute, Montgomery  
Lynda Flynt, Executive Director, Alabama Sentencing Commission, Montgomery  
Melisa Morrison, Senior Research Analyst, Alabama Sentencing Commission, Montgomery

### **Introductory Remarks**

The meeting convened at approximately 10:00 a.m. Chairman Colquitt called the meeting to order and made introductory remarks.

### **Drafting Committee Report**

Lynda Flynt reported the recommendations made from the Drafting Committee.

1. The Drafting Committee voted to have some type of voluntary sentencing system, which includes dispositional and durational sentencing standards. The voluntary system would be a modified, descriptive sentencing system based on historical sentencing patterns, but with adjustments. The voluntary, modified, descriptive sentencing standards would utilize the offense seriousness ranking, and the suggested sentencing would be expressed in months as opposed to years. The Drafting Committee recommended that the standards include both dispositional (in-out decisions) as well as durational (time served) recommendations. The standards would be multi-dimensional, rather than the simple two-dimensional grid that contained the offense and criminal history in its simplest form. They recommended Alabama adopt multi-dimensional system standards that would include weighted factors, which among other things include the current offense, additional counts, the number and type of prior offenses, offender status, and injury to the victim. At this time, although our statutory mandate does state that we will consider adult and juvenile offenders, the Drafting Committee recommended that the standards

govern only felony offenses. The Drafting Committee recommends the standards operate by adoption by the Alabama Sentencing Commission and presented to the Legislature. There would be a provision stating that the guidelines will become effective unless affirmatively rejected by the Legislature.

2. The Drafting Committee recommended that instead of implementing this statewide, the voluntary sentencing system would initially be implemented only in pilot sites to include courts from both rural and urban circuits.
3. The Drafting Committee recommended not to reclassify the criminal code at the present time. However, the Alabama Sentencing Commission should undertake the reclassification process in the future. Any reclassification of the offenses in the criminal code would only be able to occur after the Alabama Sentencing Commission database is complete. By adopting a voluntary sentencing system at this time, the Commission will also avoid any *Apprendi* problems, which would be inherent in a comprehensive reclassification of felony offenses, providing narrower sentencing ranges. Although the reclassification should not be completed at this time, the Drafting Committee recommended, based upon projected impact, that certain offenses be amended. Specifically, Theft 1<sup>st</sup> and 2<sup>nd</sup>, Receiving Stolen Property 1<sup>st</sup> and 2<sup>nd</sup>, Drug Possession, Drug Trafficking, and Felony DUI. The Drafting Committee recommended that a score sheet be utilized based on the Virginia model. This score sheet would be developed for Alabama to organize and weight sentencing factors ordinarily used in determining sentencing recommendations and make an attempt to simplify the worksheet to make it as user friendly as possible. The Drafting Committee recommends one worksheet that that would cover all offenses. The worksheet would include the type of crime, the number and types of prior convictions, and other major factors that should be considered in determining the sentence.
4. The Drafting Committee recommended although the sentencing standards will be voluntary with no appeal authorized for deviations from the recommended sentence, reasons for departure must be required to be reported to the Alabama Sentencing Commission for data collection and forecasting purposes
5. The Drafting Committee recommended that the Habitual Felony Offender Act be retained, but not necessarily in its present form.
6. The Drafting Committee recommended reviewing the criminal history aspect regarding what factors should be considered. Prior felony convictions would be categorized by the seriousness (how serious was the crime) and arrests will not be considered in the defendant's criminal history analysis for determination of the length of the sentence imposed. The factors considered in weighing priors are: a) type/nature of prior offense, b) relationship to present offense, c) number of offenses, d) when offense occurred, and e) defendant's status at time of offense. The following would be considered primary for dispositional purposes only: a) misdemeanor convictions, b) convictions for violation of municipal ordinances, c) traffic violations, d) juvenile adjudications, e) youthful offender

adjudications, f) probation/parole revocations, g) failure to appears, h) arrests, i) offenses that have been dismissed or nol prossed, and j) drug court participation.

7. The Drafting Committee recommended presentence investigation reports would not be required by statute or rule for all felony offenders.
8. The Drafting Committee recommended that the present good time system be abandoned and some form of bad time be adopted in conjunction with Judge McLaughlin's committee recommendations of last year. A recommendation for bad time would be a statutorily defined amount or no more than 20% of the maximum sentence. A post-incarceration bad time/good time committee should be formed immediately to work out the mechanics.
9. The Drafting Committee recommended some form of post-incarceration supervision that would be required for all felons committed to the Department of Corrections.
10. The Drafting Committee recommended not to incorporate risk assessments at the present time. Although some states have incorporated risk assessments into their standards, the Drafting Committee recommended that at this time, the Alabama Sentencing Commission would not incorporate it into their standards, but would consider the risk assessment at a later time when more comprehensive research has been completed and the data is available to determine the effectiveness. Risk assessment would be required by statute for parole.
11. The Drafting Committee recommended that the report from the Alabama Sentencing Commission include some revenue raising recommendations, although the discussion at the present time was too premature. Revenue raising recommendations should be reviewed and evaluated for incorporation into the Legislative package.
12. The Drafting Committee recommended that community corrections be one of the focal points addressed in the report to the Legislature. A special committee would be established to make specific recommendations (building on the work of last year's committee) and draft legislation to provide for express sentencing options. Judges would be asked to serve on this committee in conjunction with the Alabama Sentencing Commission members because ultimately the judges will decide which programs they will use. Others recommended to serve on this committee are Judge Pete Johnson, Joe Mahoney, John Hamm, Dr. Lou Harris and representatives for prosecutors and the defense bar. Ongoing would be a continual review of other states' community correction statutes and systems.
13. The Drafting Committee recommended that the District Attorney's office have immediate access to juvenile and youthful offender history. A recommendation was made to review the Department of Corrections and Pardons & Paroles factors that they consider for their classifications. A subcommittee will be appointed to start work at a later date.

### **Time Constraints for Submitting the Report to the Legislature**

Judge Colquitt stated that the Alabama Sentencing Commission has roughly six months to complete the report due in March 2003 for the Legislative session. Judge Colquitt stated that the purpose of today's meeting is to vote on a sentencing scheme that the Commission is willing to accept. He explained that the Commission has expended the available time and manpower discussing different sentencing schemes and that now is the time to vote on a sentencing scheme and begin drafting the report.

### **Recommendation for a Voluntary Experienced Based Sentencing Scheme**

Judge Colquitt recommended that the Commission consider the concept of a voluntary experienced based sentencing scheme, similar to Virginia and Utah's sentencing structure. He suggested creating a small working task force to write a sentencing scheme proposal creating a voluntary experienced based sentencing scheme for Alabama. Then, by October or November, the task force would submit the proposed sentencing scheme for review by each Commission member. He stated that the voluntary experienced based sentencing scheme was the Drafting Committee's central focus, even though there are many details that need to be addressed.

Judge Colquitt stated that the Alabama Law Institute could be of valuable assistance because they were the parent organization that drafted the existing criminal code. Judge Colquitt stated that he would speak with Robert McCurley from the Alabama Law Institute and possibly establishing a sponsorship with them regarding work involving revisiting the reclassification issues. Judge Colquitt's idea is to have the Alabama Law Institute revisit the criminal code, taking the Commission's recommendations and reporting back to the Commission their recommendations of reclassifying criminal offenses. He would like to have the Alabama Law Institute make recommendations to the Commission and possibly create a report based on their research. Judge Colquitt will report on this issue at the next Commission meeting.

Judge Colquitt stated that the Habitual Felony Offender statute and the mandatory sentencing provisions (i.e., mandatory minimums, mandatory sentences, habitual offender sentencing, enhancement sentencing) must be addressed. Community-based alternatives, treatment models, and treatment procedures, like drug courts, will also be addressed in the next couple of months.

The models that the Commission was presented for reviewing and voting on are:

- Mission statement
- Voluntary experience-based sentencing standards
- Truth-in-Sentencing module
- Criminal code reclassification
- Habitual Offender Act
- Mandatory minimum sentencing
- Treatment models
- Community based alternatives

Stephen Glassroth expressed his concern over a strictly experience-based sentencing scheme, but in as much as data may prove that sentencing in Alabama is insufficient. He stated it should be

“experienced-based, modified as necessary”, so to avoid duplicating past unwarranted sentencing patterns. Mr. Glassroth stated the Commission needs to focus on implementing the voluntary sentencing system by studying the historical data and determining whether or not the historical data proves to be something that we want to continue or something we need to change.

Judge Johnson expressed his concern that judges will sentence voluntarily within a wide base range. Judge Johnson stated that by choosing a voluntary sentencing system, the Commission has not changed anything from the current sentencing system. He stated that before a voluntary sentencing system is developed, the Commission should address the effects of the Habitual Offender Act on property and drug crimes. First, the Commission should address the great disparities created by the statutes and existing sentencing schemes, and then recommend a voluntary sentencing scheme, dealing with these major issues first. Judge Colquitt stated that by voting to develop a voluntary sentencing scheme does not change the fact that changes need to be made to the other models.

By the Drafting Committee Stephen Glassroth stated that all of the information that was obtained from those states that implemented a voluntary sentencing scheme, the research shows that when states have implemented voluntary standards, they have been used once they were understood by everyone. Mr. Glassroth stated there are ways to encourage the use of voluntary standards by requiring explanations for not following the recommended standards. He noted that the Drafting Committee is recommending that certain pilot sites be used to test it before the Commission suggests that everyone adopt these standards. Commentating on the mandatories and the Habitual Felony Offender Act, Mr. Glassroth state that the Legislature could conceivably pass Legislation granting the courts the power to encourage use of the voluntary sentencing standards notwithstanding any other provisions of law regarding minimum mandatories or implementation of the Habitual Offender Act. By using the voluntary standards, which will consider criminal history, then a court could be empowered not to apply those statutory minimum mandatories or the habitual law. Mr. Glassroth stated that he thinks the Legislature could, as a part of a sentencing package, move to the encouragement of voluntary sentencing standards and authorize the Judiciary to implement these standards notwithstanding any minimum mandatories or habitual felony offender law.

Judge Colquitt stated that from his research of other states, the experience shows that judges will begin to realize that based on the historical data, their sentencing patterns need to be changed, thereby, reducing or eliminating sentencing disparity. Today, one of the shortcomings is the inability to compile historical data and actually rely on the accuracy of the data. The Commission would recommend requiring the reporting of all sentencing data across the state to the Alabama Sentencing Commission for data to be compiled and researched to study the effects of sentencing. A motion was made to accept the Commission’s voluntary sentencing system. The majority of the Commission accepted, one member opposed.

Judge Colquitt stated that drafting of the voluntary experienced-based sentencing scheme would begin immediately. A motion was made for next month’s focus to include community-based alternatives, treatment models, and drug courts. The Commission accepted the motion. None opposed.

## **Funding**

Judge Colquitt expressed that to approach the specific funding issues, the Alabama Sentencing Commission would express in the report to the Legislature 1) what the present system costs, 2) what changes in the present system would either save or require additional costs, and 3) offer specific ideas pertaining to a new proposed sentencing system. It should be the Legislature's decision how to fund the proposal.

Judge Johnson expressed his concern for community corrections programs. He stated that if community corrections were not funded by the Legislature, the responsibility would fall on the community and the counties to provide funding. The Legislature would be giving the county direction to do something without providing them with the funds to properly operate (unfunded mandates). Judge Johnson stated that the report to the Legislature should point out this problem and express that for community corrections to be effective, it must be funded by the Legislature. John Hamm suggested that the Alabama Sentencing Commission should help lobby the Legislature to provide funding for the proposed models and that the Alabama Sentencing Commission should include recommendations in the report regarding ideas on how to fund the proposed models. Judge Colquitt stated that reports from other Sentencing Commission's around the country that have made these types of reports to the Legislature have been very careful to just tell the Legislature the facts. The reason they didn't work is because the Legislature didn't fund them. The Alabama Sentencing Commission must explain why we are recommending a proposal, how much it will cost, how much it will save, and let the Legislature decide whether or not to pass it. Also, if the recommendation is not passed, here is what the present system will cost, and what will be the outcome.

The data compiled by Applied Research Services will be able to forecast the number of people committed to community corrections and the amount of money that will be saved by diverting these people to community corrections. Lynda Flynt reported that the Commission has awarded the Simulation Model contract to Applied Research Services, and work will begin on September 6, 2002. This will enable the Commission to make some projections regarding the number of people that can be diverted from prison. Lou Harris suggested that everyone should read the Three Strikes handout that discusses a simulation policy analysis conducted in California.

## **The Alabama Sentencing Commission Mission Statement**

The members reviewed the mission statement. By unanimous vote of the members present, the following will be the mission statement for the Alabama Sentencing Commission:

The Alabama Sentencing Commission shall work to establish and maintain an effective, fair and efficient sentencing system for Alabama that enhances public safety, provides truth-in-sentencing, avoids unwarranted disparity, retains meaningful judicial discretion, and provides a meaningful array of sentencing options, while recognizing the most efficient and effective use of correctional resources.

## **Report from Department of Corrections**

### **Proposed Procedure for Implementation of Amendment to Habitual Felony Offender Act**

John Hamm, Department of Corrections, reported that their position has not changed with respect to the implementation of the Habitual Offender Act. The Department of Corrections proposes that an inmate will file a motion with the sentencing court, in the jurisdiction where the defendant was last convicted, for a review of sentence. The Department of Corrections standpoint is they do not have the resources to review every offender eligible and fear litigation if they deny an offender their right to have their sentence reviewed.

A proposed definition was provided to the Commission members for the phrase “violent criminal,” for purposes of determining which inmates would be excluded from consideration for “early parole” under the provisions of Act 2001-977. However, because there were still concerns that had not been addressed regarding the proposed evaluation procedure, *no vote was taken on the definition that was submitted by the Department of Corrections*. The primary issues that the members of the Sentencing Commission indicated still need to be addressed in the proposed procedure for evaluation and implementation are: 1) the omission of the Board of Pardons and Paroles from the evaluation process; 2) the authority of the trial courts and the role they are to play in this “early parole” process; 3) the effect of the preclusion grounds, statute of limitations and other provisions governing Rule 32 petitions; and 4) whether adequate input has been obtained from victims, victim advocates and prosecutors in developing the proposed procedure.

After an extended discussion regarding the problems associated with implementing Act 2001-977, by unanimous vote of the members present, the Sentencing Commission recommended that these were questions that should more appropriately be addressed by the courts, perhaps in an action brought by the Attorney General’s Office, Board of Pardon and Paroles, and/or Department of Corrections. In making this suggestion, one of the members noted that a petition for certiorari had been filed in the Supreme Court raising some of the key issues that need to be decided, i.e., the Constitutionality of Act 2001-977 and the jurisdiction of the trial court under the Act’s provisions. Although a preliminary examination regarding the grant or denial of certiorari was held on June 4, 2002, no final determination has been made to date.

The Commission notes that although the Department of Corrections and the Sentencing Commission have attempted to interpret the amendments to the Habitual Felony Offender Act and develop a workable procedure for implementation of Act 2001-977, until there is interpretation of the Act’s provisions by the courts and a definitive determination on the role and authority granted to the trial courts and the Board of Pardons and Paroles, any recommendation would be premature.

### **Status Report – Jail Overcrowding Problem and Governor’s Proposals**

Ted Hosp, Legal Advisor to the Governor, addressed the Commission giving an update on the status of the Governor’s short-term solutions to the prison-overcrowding problem. Mr. Hosp stated the Governor had a meeting on Tuesday, August 20, 2002. The Attorney General, the Lieutenant Governor, Hank Sanders, representatives from the Alabama Sentencing Commission, representatives from the Speaker’s Office, representatives from Pardons & Paroles, and representatives from the Department of Corrections were present at the meeting. This meeting

addressed the importance of what the Alabama Sentencing Commission is doing, and made everyone understand that getting a report from the Alabama Sentencing Commission will not get the state anywhere unless the different agencies are committed to putting the recommendations into law. The primary purpose of the meeting was to determine what measures could be taken to provide immediate relief to the counties that are housing state inmates. On Wednesday, August 25, 2002, a contract was entered into with the city of Atmore for the sale of approximately 410 acres of land to use for economic development. 89 acres will be used for an industrial park and 320 acres will be used for attracting a manufacture plant. This contract will provide the state with \$2.4 million dollars that, with the approval from Judge Shashy, immediate relief of the jail overcrowding can be upheld by hiring additional probation/parole officers. The goal is to use \$1 million for hiring 10 new officers and have the Thursday dockets re-instated to their full capacity. Also, community corrections will receive several hundred thousand dollars. There will be some construction completed to the Bullock facility that will open approximately two hundred beds, and a portion of the money will be used to purchase temporary buildings that are fitted as kitchens, bathhouses, and sanitary facilities. This land sale will be a step forward for immediate relief for the counties.

Other ideas discussed were putting fences at the Kilby facility, but this is not a cost-effective solution. General Sommerall from the National Guard stated that there are some buildings in Montgomery that are vacant. The Governor's office is exploring the use of these buildings. At this point, the buildings will require some work and some costs will be associated with the supervision at these facilities. The goal is to use this facility to house lower security inmates.

Mr. Hosp stated the Governor's intent is to have a budget prepared for the September 4, 2002 hearing before Judge Shashy with a proposal as to how to spend the \$2.4 million dollars so the court can approve or disapprove it. Right now, we are under a court order to pay the counties \$2.1 million dollars.

Mr. Hosp reported on several lawsuits received involving death row inmates that included all three women's facilities. The plaintiffs in the Tutwiler facility lawsuit are arguing that there are too many inmates in Tutwiler. The same attorneys are arguing in county lawsuits that the state is required and must immediately bring inmates from the county jails to the state facilities. This is an interesting dynamic where the same attorneys are asking the state to take contradictory actions.

A question was asked about hiring personnel with one-time resources and how to continue paying those people after they have expended those resources. Mr. Hosp responded stating the attention drawn to this issue over the last year is going to have to provide the impetus to the Legislature to properly fund some of these functions. He noted that there was no dispute that the state needs to beef up the number of probation/parole officers. If operated properly, this is an extraordinarily cost effective means of punishment. An example is raising the fees for those on probation or parole to pay a \$5 dollar increase in fees. This raise would generate approximately \$800,000 a year. This is a possible source of funding to hire the probation/parole officers and the tweaking of some of these fees would allow the programs to continue.



Another question was whether there had been any consideration of utilizing the Ireland facility in Jefferson County as a minimum security drug treatment facility? Mr. Hosp responded yes, there are two issues and they both relate to money. First, a fairly significant staff would be needed to supervise the people in the facility. Second, this is an asset to the Department of Mental Health. The Department of Mental Health is working on complying with the Wyatt settlement agreement that was entered into back in January 2000. This option has been discussed and will be continued to be considered.

The question was asked whether the court wanted to know where the status of the prison overcrowding would be in the next six months to a year? Mr. Hosp responded saying no, Judge Shashy is not interested. Mr. Hosp stated that the problem with this lawsuit from the start has always been that measures taken to appease the court have been generally one-time bed space. The state got out from under this court problem under the James administration when they opened up half of the Brent facility and immediately the county jails were empty of state inmates over 30 days. Then the overcrowding problem started creeping its way back in and a year later, the number of state inmates in the county jails has risen. Mr. Hosp stated that with community corrections, drug treatment, probation and parole, circulation of people through these programs could begin.

John Hamm announced that hopefully by the next Legislative session, a bill will be introduced called Prison Industry Enhancement (PIE) where private corporations will actually build a facility within the walls/fence of the prison and will use inmate labor that was otherwise confined to cells. Life-without-Parole inmates could be utilized within the fence, and would be supervised by correctional officers. It would be like a free world industry inside the walls.

The Governor's office has a report due to the court within a week. He stated that the Executive Branch acting alone can only do so much, and most of what needs to be done going forward will come from the Alabama Sentencing Commission and then the Legislature.

Mr. Hosp stated it is imperative that the recommendations made by the Alabama Sentencing Commission include ideas for generating the money needed to fund the proposed ideas in their report to the Legislature. He stated that the Legislature is likely not to pass any proposals without a plan of action addressing funding.

Judge Colquitt stated that he would like to have the Executive Director and other Alabama Sentencing Commission members present at the September 4, 2002 meeting with Judge Shashy.

#### **Announcement of Future Meeting**

The next Commission meeting will be held on Friday, September 27, 2002 at 10:00 a.m. in Montgomery.

There being no further business, the meeting was adjourned.