

Alabama Sentencing Commission

Minutes of Commission Meeting

September 11, 2009

The Alabama Sentencing Commission met in the Mezzanine Classroom of the Judicial Building in Montgomery on Friday, September 11, 2009. Present at the meeting were:

Hon. Joseph Colquitt, Chairman, Retired Circuit Judge, Professor, University of Alabama School of Law, Tuscaloosa
Commissioner Richard Allen, Alabama Department of Corrections
Vernon Barnett, Deputy Commissioner, Alabama Department of Corrections
Ellen Brooks, District Attorney, 15th Judicial Circuit, Montgomery
Rosa Davis, Chief Assistant Attorney General, Montgomery
Cynthia Dillard, Acting Executive Director, Board of Pardons and Paroles, Montgomery
Ben McLaughlin, Presiding Circuit Judge, 33rd Judicial Circuit, Ozark
Joel Sogol, Esq.

Advisory Council:

Denis Devane, Birmingham
Chaplin Adolph South, Tuscaloosa
Miriam Shehane, VOCAL
Judge Bill Cole, Circuit Judge, 10th Circuit
David Horn, President, Ala. Assoc. of Community Corrections

Staff:

Lynda Flynt, Executive Director
Melisa Morrison, Analyst
Bennet Wright, Statistician

Others Attending:

Chief Justice Sue Bell Cobb
Annette Brown, Birmingham
Becki Goggins, CJIC

Welcome and Introductory Remarks

Chairman Colquitt called the meeting to order at 10:00 am thanking everyone for attending and specifically recognizing and welcoming back Chief Justice Sue Bell Cobb.

Chief Justice Cobb addressed the Commission explaining that while there are those that we all know need to be locked up in prison for a long time; however, we also know that we are continuing to lock up people when we would do better to address the underlying causes of their criminal behavior. She said that she wanted to just listen to today's

discussion on the various issues. She said that Commissioner Allen and Chairman John Knight have met and discuss some of the prison population problems – we have added 1000 people to our prison population a year, even though we have grown drug courts to 51 counties; so we are in a crisis situation. She stated that the Sentencing Commission was the group that has got to help us solve it. That we do not sacrifice public safety, but rather, enhance it by identifying people who need to be treated in a different way. She said that she had talked with Miriam Shehane and that the victim advocates are very supportive of trying to get that nonviolent drug induced offenders and find ways to deal with him to make our community safer.

Report of the Legislative Committee

Lou Harris, Chair

Lynda Flynt was asked to give the Legislative Report for Dr. Harris, who was unable to make it because he was sick. She distributed a copy of the minutes of the Legislative Committee meeting held on August 25, 2009 and a copy of the Commission bills. She started out with the bill modifying the sentencing standards.

Ms. Flynt reminded the Commission members that this bill was the same bill that was introduced last year but failed to pass, not due to opposition, but rather, because other bills received priority and that the only Sentencing Commission bill that did pass during the last Legislative Session was the postponement of truth in sentencing.

Ms. Flynt stated that she had noted in the Legislative Commission meeting that she had been advised by some to have a conservative agenda for the 2010 Legislative package that we should not try to introduce many bills. Since that time she had been told that 2010 was the year to have an aggressive legislative agenda.

Sentencing Modification Bill

Ms. Flynt explained that according to the bill's basic provisions it would add attempts, solicitations and conspiracies to commit murder and certain drug offenses because to the sentencing standards and worksheets because they are punished the same according to our Criminal Code. We wanted to include those to avoid the situation where someone sentenced to an attempt, solicitation, etc., could be given a harsher sentence than a defendant convicted for actual commission of the crime and sentenced under the standards. The Legislative Committee agreed to these recommendations.

Since the modification bill did not originate in the Legislative Committee last year, but was considered by the Sentencing Standards Committee, Ms. Flynt advised that Rosa Davis, chair of that committee would be reviewing the other provisions of the bill.

Judge Rains noted that on page 3 where there is a semicolon it should be a comma. Rosa and Lynda indicated that the bill was not up for a vote today, since it was still to be considered by the Standards Committee on October the 2nd or 9th and if there are changes that need to be noted, she would go over them with the Committee. We wanted to only advise the Commission members that the Legislative Committee had approved of the

concept of including attempts, conspiracies and solicitations for these offenses in the sentencing standards.

Community Corrections Bill

Ms. Flynt noted that she revised the bill to emphasize the major provisions, which in this bill was to delete the absolute prohibition now in the community corrections statute for people selling drugs to participate in community corrections programs. She emphasized that this does not mean that those people are going to go to a Community Corrections program; the bill would leave the decision up to the sentencing judge. These same provisions were in last year's bill. We also added that community corrections, like probation, had to have a suspended sentence. This change was so the judge would have some prison sentence to revoke an offender to if he or she violated the conditions of community corrections. The other change was grammatical, to change the wording and consistently refer to "offender" rather than "inmate" throughout the bill, as recommended by Judge Rains. There were also amendments to include nonprofit community corrections programs, which was inadvertently left out and a provision to allow county commissions to provide liability insurance to the community correction programs. Judge Bill Cole raised concerns about the change requiring a suspended sentence for community corrections and that this change would affect the "custody" determination and whether the community corrections programs would be able to receive reimbursement from ADOC. Judge Rains noted that he has always been opposed to the fact that a community corrections sentence as a condition of probation is treated differently than a straight community corrections sentence, since the former does not receive good time but the latter, considered as within the custody of ADOC, does receive good time. He asked that the minutes show that he objects to good time being given to anyone who is on community supervision. Judge Colquitt noted that Judge Rain's concerns good time. The issue here is whether a direct sentence to community corrections should have a suspended sentence. Judge Rains stated that he does not sentence offenders to community corrections because they would get good time. Instead, he puts them on probation and requires the same conditions as if otherwise sentenced to community corrections. Judge Cobb asked the feasibility of requiring judges to place offenders on probation and require participation in a community corrections program as a condition of probation. It was noted that this would affect the reimbursements from ADOC and eliminate good time being given to these offenders. Ms. Flynt noted that she thought that most of the sentences to community corrections were being given after imposing a prison sentence and suspending the execution of that sentence. Judge Rains stated that there is something fundamentally wrong with giving good time to an offender sentenced to community corrections one way and getting good time and a like offender sentenced another way. It was stated that ADOC is granting good time credit because they consider that these people, who are not within the prison walls, are within their custody. Judge Joel Sogol moved to delete that change from the proposed bill, and defer that issue to another time. Rosa Davis seconded the motion and it passed unanimously. Ms. Davis then suggested that this issue be referred back to the Legislative Committee for further research. Ellen Brooks stated that she was not comfortable moving forward on the bill until they got more information. Ms. Flynt stated that the Commission just voted to remove the proposed amendment that would require a suspended sentence; remaining is

the bill provisions that would eliminate the absolute bar from community corrections of offenders convicted of selling drugs. Mrs. Davis noted that the provision removing the absolute prohibition would affect over 900 people that might otherwise be sent to community corrections. The Commission members were referred to the impact statement that was given out. Ms. Flynt noted that this problem stemmed from the way the Distribution statute was drafted – it covers several types of distribution - transfers, giving away (which may be sentenced to community corrections) and sells (which may not be sentenced to community corrections). In most instances we only have data that a conviction is based on a violation of this statute, without information about how the distribution occurred.

The discussion centered on reimbursement of community corrections programs for offenders that are true diversions from prison. In response to a question from Chief Justice Cobb, Commissioner Allen explained that it was not a statute that prohibited them from paying for community corrections participation which is a condition of probation, but rather a departmental regulation. Ms. Davis explained that there are rules for when community correction programs will be reimbursed: 1) When they are directly sentenced to community corrections and meet the 10 point scale, 2) the judge states that they would otherwise have sent this offender to prison, and 3) they are recommended for prison under the sentencing standards and the judge sends a letter stating that this is a true diversion or 4) they are revoked. Chief Justice Cobb asked why a letter was required if the sentencing standards recommended prison but he is sentenced to community corrections, she stated that the worksheet should be enough. She asked Commissioner Allen to revisit the requirement of a letter from the sentencing judge sending a letter if the worksheet recommends a prison sentence and asked that it be done before the next meeting of the Commission. Judge Rains noted that, on the 10 point scale, there are probably more offenders eligible than on the worksheets. David Horn, President of the Alabama Association of Community Corrections stated that this was true. What the Chief is asking is whether ADOC would reimburse the community corrections programs if they qualify on either the 10 point scale or on the worksheets. Mr. Wright noted that another reason why it was either/or on that issue was because approximately one out of every 6 people are not worksheet applicable, so the fall back to the worksheet is the ten point scale under ADOC Regulation 490.

Ellen moved that the bill, as modified, be referred back to the committee for further research and review. The Committee was asked to consider all the issues just discussed. Cynthia Dillard seconded the motion and it was approved.

Split Sentencing Bill

Ms. Flynt explained that this split sentencing bill is not the same one that was introduced last year. The Legislative Committee omitted some of the language that was causing some problems, and that language is shaded and deleted on the copy of the bill distributed. The major portions on this bill would prohibit the imposition of the consecutive split sentences, i.e. the stacking of splits, and would also limit the probation term of a split sentence to 5 years for a felony or 2 years for a misdemeanor. She stated that ASC staff had also obtained data for Commissioner Allen which was handed out.

Bennet told the Commission members that if anyone had any questions that he or Melisa would be glad to answer them. Mrs. Davis stated that there was one change in the bill that was a housekeeping issue; in section 15-18-8 (a) where it referred to Class A and B child sex offenders. Ms. Flynt stated that this was a recommendation made by Judge Rains and approved by the Commission last year. Referring the members to §15-22-54, line 12, the committee asked why “amended/modified” was included. Since no one could remember why that language was added and it caused confusion, the Legislative Committee voted not to include. The Commission approved the bill as proposed.

Ms. Flynt advised that these were just the bills that the Commission introduced last year but failed to pass and that she encouraged the members to provide recommendations for any other legislation. She stated that there have been recommendations from some of our people that are providing Alabama technical assistance, one of which was to limit the time a technical violator would have to serve, providing earned time for probationers and parolees. There was a suggestion regarding the community corrections bill, to provide that there be included in the bill that no good time will be provided for offenders that are serving time in community corrections.

Ms. Flynt asked the Chief Justice if she wanted to address the Commission about some of the legislative suggestions that have been made. Chief Justice Cobb stated that our Prison System must be adequately funded. As gatekeepers, we are obligated to see that ADOC is adequately funded and that we make sure that the nonviolent offenders are released. Ms. Shehane stated that she wanted to make sure that these nonviolent offenders were held accountable. The Chief said that we have to do a better job fixing people and to do this we have to have sentencing reform. She said that she is here to suggest that the Governor and Commissioner join with her to ask Pew Charitable Trust for a grant to help us have a more serious lobbying effort to correct some perceived sentences and focus on alternatives for the nonviolent offender. She asked the Commission members for their thoughts on looking at the penalties for possession of marijuana. She stated that she is not looking at decriminalizing it. She is looking at a more appropriate classification for possession and perhaps looking at possession of prescription drugs. In most states, the overwhelming number of states, these crimes misdemeanors. She wanted to know the possibility of the Sentencing Commission introducing a bill, supported by them, that would set a certain amount of possession of marijuana (say under 8 oz) would be a Class A misdemeanor and would do away with the statute making it a felony on second conviction. Over 8 oz. would be a felony. She explained that she was just throwing that figure out as an example. Presently there are 700 people under ADOC’s roof for simple possession, 200 were first charged with trafficking. At least 500 were not charged for trafficking. She noted that perhaps we could elevate the penalty for heroine or something else. Secondly, she said that she would like to look at the reclassification of possession of prescription drugs, i.e. 5 pills or more a felony and 4 pills or less could be a misdemeanor. She did state that we do not know how many people these would effect, but these would still be considered a crime and have to go to court. Ellen Brooks stated that one of her concerns is that these offenders would be sentenced to city court now and we would not have them going to the drug courts under the district and circuit courts jurisdiction or getting drug treatment.

Joel Sogol suggested that we consider amending the statute to provide for an affirmative defense.

The Chief Justice reiterated that this change could affect 500 of the prisoners that are now in prison for possession. Judge Rains asked if she had looked at the prior convictions of these people or if they had previously had drug treatment. She indicated that this review had not taken place yet since it is just a concept she wanted to put before the Commission. She said that she wanted Pew to help the Commission with their legislative agenda and then we could do more in-depth research.

The Chief Justice stated that Mental Health Commissioner Houston advised her and Commissioner this week that \$1.9 million is available statewide for drug treatment, which is not enough for Jefferson County alone. This is only for a 28 day program and we must move to a minimum of 60 days. We must add this in some way and redirect funding into low-cost quality drug treatment. Ms. Davis advised that federal grants are available in the community for drug treatment. The Chief Justice advised that she now has a committee looking at this problem and trying to determine why we do not have low cost quality drug treatment in the community, and they are about to make their report. She said that we are going to get more active on this, but we knew that in order for drug courts to succeed we needed to have more low cost, quality drug treatment programs available in Alabama. The Chief Justice advised the Commission members that in Alabama we have 22 counties in Alabama that do not even have an outpatient drug program. She stated that this was due to lack of funding. While they are looking at faith based programs, these must be certified. Commissioner Allen stated that ADOC spends between \$4-\$5 million dollars a year on drug programs in the prison. These are now threatened due to budget cuts. The Chief stated that this is a critical condition. She emphasized that we are spending \$5 million on drug treatment in the prisons but less than \$1.9 million statewide in the communities, meeting only 10% of the need.

One other idea the Chief Justice mentioned and asked for input from the Commission members was the creation of a Restorative Justice Council. The idea is to get one of the churches, First United Methodist in Montgomery, to fully fund a Restorative Justice Director who would then interface with the adult and juvenile courts in Montgomery and interface with other justices. There are not sufficient public monies available. It will be a faith based effort. There have been faith based initiatives, but we need to get them together in a cohesive fashion. She asked for ideas from the members about going forward with this project.

Report of the Sentencing Standards Committee

Rosa Davis, Chair

Referencing a handout distributed to the Commission members, Mrs. Davis noted pages that needed to be taken out. She also referred to a document entitled, "Alabama Sentencing Standards and Worksheets Committee Report, September 11, 2009. Ms. Davis advised that the Standards Committee met on August 13, 2009 and is trying to set another meeting for October the 2nd or 9th when they hope to finalize the standards and

worksheets changes and the legislation that they will bring to the Commission to approve. She invited any conversation or suggestions about what the Committee has done thus far. The Sentencing Commission has been going through thousands of files to determine what is happening with the use of the sentencing standards and worksheets. They have identified two things to focus on: 1) how are we doing compliance-wise and 2) and how successful is the process we are using? Because there are so many process issues, we do not have enough information coming into the Sentencing Commission to make valid compliance judgments. The Commission was given a preliminary report at its last meeting, a preliminary report at the judge's conference and a preliminary report in the Commission's 2009 Report to the Legislature. Because we only had 49% of cases with worksheets that were valid we could not get a real valid account of compliance. The first issue that the Standards Committee looked at was those involving process issues, i.e. low worksheet submission rates. Reasons may be because the judges are not completing the worksheets, clerks are not sending the final worksheets to the Commission and sometimes the worksheets are not getting from the court to the clerk's office. There is also a problem with obtaining the final court orders. The problem with the paper transfer from the court clerks to the Commission is not just with the worksheets, but with the sentencing orders. Although the Commission staff was trying to rely on SJIS for the final sentencing orders when the electronic worksheets were being used. There are also issues with some District Attorneys not using the sentencing worksheets and defense lawyers not being familiar with the sentencing standards. There is a definite need for more training especially for new defense lawyers.

Mrs. Davis advised that in performing our preliminary compliance analysis, some of the sentencing worksheets had to be thrown out because the final conviction offense did not match the offense for which the worksheet was completed, it was a plea down. Another problem was that some of the worksheets were not completed properly – sometimes instead of putting in a score, the worksheet preparer would write in “unknown”. These are all issues that the committee considered and tried to come up with solutions for. Also, the Commission has no way of knowing that the worksheet that we receive is the final one considered by the judge. We are not receiving complete sentencing information. Ms. Davis stated that we cannot rely on SJIS for sentencing information for compliance. This is due to system errors, sentencing entry errors. These are due in large part to lack of funding for system upgrades, sufficient programmers and adequate training for system users. Possible solutions that the Commission Staff and the Committee came up were referenced.

Chief Justice Cobb commented that much of these problems are training issues. She asked if the Sentencing Commission would be willing to join with the Judicial Study Commission and support mandatory judicial education. It was supported unanimously by both circuit and district judges associations. She explained that this covers not just the education of judges, but everyone within the system, e.g., our court specialists, our JPOs, everyone. This rule is going to be considered in September, and the Commission may want to make a formal recommendation. Mrs. Davis stated that she wanted to first go through and tell the Commission what the Standards Committee proposed and then come

back to that recommendation and see how that fits in with what the Committee's proposals.

When the Sentencing Standards Committee met they decided not to revisit what we have done before, i.e. last year's approved changes to the sentencing worksheets, the inclusion of new offenses. and the changes to worksheet instructions. That is the starting point for any works we do this year. Mrs. Davis advised that at our next Commission meeting that these same proposals will be presented to the members for a vote. In looking at the recommendations,

In looking at education and training, it was decided that we need to continue the regional training workshops that we did last year and we are looking at scheduling these now. Ms. Flynt has already started trying to schedule one in Montgomery and we have already talked to Madison and Jefferson Counties and Baldwin County has already asked us to conduct a training session there. We need more local seminars that would be available to all assistant DAs and defense attorneys.

The Standards Committee also discussed a Sentencing Seminar for judges similar to the Capital Sentencing Seminar that was well attended and put on by the National Judicial College, with the curriculum drafted by the Crime and Justice Institute. We thought of recommending that type of seminar just on criminal sentencing. We could spend the whole day instead of just being limited to the hour we now get at the judges conferences. Training should now be more effective since there has been some experience in using the worksheets.

Mrs. Davis also stated that the issue came up on whether to make the failure to consider the sentencing standards appealable and/or whether we should look at judicial ethics when a judge refuses to consider the sentencing standards. The committee felt that this was not the time to pursue those issues, because we think judges are more involved than the data shows. The decision of the committee was to undertake training and see if we could not resolve some of these issues, without resorting to more drastic measures such as allowing appeal ability.

Another issue was to make the worksheets a part of the record in the case, so that it shows what the sentencing recommendations were for that case. This will be a statutory change and a change in the worksheets instructions that the Standards Committee will present for approval at the next Commission meeting. Lynda noted that since YO and Juvenile adjudications were, by statute, confidential, any change would have to be made by statute. Ms. Davis said that there is still discussion to be held on this issue.

One issue Ms. Davis said she wanted the Commission to vote on today, was whether to discontinue use of the e-worksheets as the official worksheet. When the e-worksheet was originally developed, it was thought that the Commission would be able to get the information needed for good sentencing data. Mrs. Davis stated that the reasons that this has not happened are because we never know when the worksheet is the final worksheet considered, the worksheets are not changed after court; SJIS is not giving us complete

information on sentencing orders, there are problems with uniform data entry. Mrs. Davis said that the Sentencing Standards Committee recommended that the court clerks be required to send the Sentencing Commission paper copies of the worksheets and actual Sentencing Order. Ms. Flynt noted that the Commission should expect to receive opposition from the court clerks on this issue because it will cost them time and money in copying and mailing costs. She stated that we knew of no other option. The electronic worksheet will still be available to assist in completing the worksheet, but will not be considered the official worksheet to be submitted to the Sentencing Commission. She stated that under this new procedure the Court Clerk would have to copy and send the actual sentencing order, not a copy of the SJIS sentencing screen. Mrs. Davis said that every other sentencing commission in the country requires this, without relying on electronic data. After calling for the question, the Sentencing Commission voted to make this procedural change, effective April 1, 2010. It was noted that the Commission needed enough time to get notice out to the judges and clerks.

Ms. Davis also stated that there was a change recommended on who the worksheet preparer could be, which would be discussed more by the Sentencing Standards Committee and later presented to the Commission. Another recommendation was the requirement that a judge sign or initial the worksheet. Ms. Davis stated that this would be a change that will be made in the instructions and it will be brought back before the Commission.

Another recommendation was to clarify the subheadings under the IN/OUT captions of the worksheets and what they mean. Ms. Davis stated that she would work on this.

Report of the Cooperative Community Alternative Sentencing Project Rosa Davis, Co-Chair

Reporting on the CCAS Project, Mrs. Davis, advised that this project is our effort in 4 pilot sites to develop a more comprehensive community supervision system under local jurisdictions. Working with the Crime and Justice Institute and the Vera Institute of Justice, they have worked with the local criminal justice officials and programs in Lawrence County and now in Montgomery County. The first few meetings are devoted to educating the counties on what we are trying to do, to coordinate the supervision programs. Ms. Davis explained that Marshall County, one of the pilot sites, has really grasped the concept of how the different community supervision agencies (probation and parole and community corrections) need to work hand-in-hand to resolve issues. They are coming up with written policies. Montgomery County is at its very beginning stages, with reluctance by some.

Ms. Davis explained that another aspect of the CCAS Project was utilization of a risk and needs assessment in Alabama. There has been a committee established to review how to use risk assessment instruments in the pilot sites for convicted offenders. Mrs. Davis advised that we have requested a \$500,000 grant in recovery money and if we are awarded that grant we will be able to pursue the use of these instruments in these pilot sites. These instruments help to redirect our resources for the best outcomes. The data should prove what is effective and what is not effective.

New Business

ASC Funding for FY 2009 and FY 2010

Ms. Flynt reported Funding for the Alabama Sentencing Commission for 2009 and for FY 2010, noting that for FY 2009 we were running short because Mary retired and we had not budgeted for that item. She warned that the budgets for FY 2010 and FY2011 were also going to be tight, since we are expecting a 12% cut in FY 2010 – with the plan to cut 3% each quarter to avoid pro ration.

Reviewing both the Senate and House passed version of the budget, the Commission had been given an appropriation of \$557,903 – \$46,850 less than the amount requested of \$604,753, but \$13,119 more than appropriated in FY 2009. She emphasized that the Commission has lost two staff positions – its secretary and legal research assistant and that these positions will not be filled during FY2010 or FYP 2011 without additional appropriations. Ms. Flynt also mentioned that she had budgeted \$30,000 out of the 2010 budget to host the National Association of Sentencing Commissions, but this amount is gone considering the expected 12% budget cut. Another cut may have to be from travel or professional services. Advising on the budget request for FY 2011, Mrs. Flynt stated that she had asked for an increase of \$128,964 for a total appropriation of \$686,867.

Grant Application

Ms. Flynt thanked Becki Goggins for the tremendous work she did drafting and submitting a grant request to the Department of Justice for CASP and the Sentencing Commission. When asked if she had gotten any feedback from the request, she stated that she had heard that they were now before the peer review committee and we should know something by the first of October.

Top 25 Data Book

Ms. Flynt advised the Commission that Bennet and Melisa were currently working on revising the Top 25 Datebook and asked Melisa to elaborate on their work. Melisa Morrison reminded the members of the Top 25 Datebook that Drs. Meredith and Speir drafted in October 2002. It lists the top 25 offenses and includes basic information, e.g., how many people are being convicted of this offense, how long are they being sentenced, how long they were serving, how many were being sent to prison for the offense. All except the truth in sentencing information is being updated with current data. To further advance this datebook, in the July 2003 Judges Reference Manual there was a section called statewide sentencing practices that took the same top 25 offenses and expanded on the sentencing information – basic information about the offenders, charts for single counts, single conviction – will also be updated and included in the revised report. Ms. Flynt stated that this may be our Report to the Legislature this year, or at least a good portion of the report. Mr. Wright stated that this will give a good idea of the differences in sentencing from when the report was originally composed.

Ms. Flynt stated that there were copies available of a report from the Vera Institute of Justice showing sentencing trends and legislative changes. Ms. Davis advised that this was an updated version of a sentencing trends memo Vera originally did for Alabama.

Mrs. Davis reminded the Commission that the Chief Justice recommended that the Sentencing Commission support the Judicial Study Commission's recommendation for mandatory judicial education. Chairman Colquitt stated that he should not only support the Chief Justice's request and recommend mandatory judicial education but also state that there is a great need for an ongoing communication between the judges and the Sentencing Commission and the judges should be acquainted with all the changes in sentencing laws, encouraging the Supreme Court to ensure that the Sentencing Commission has an opportunity to attend and participate in the judges conferences. Judge Rains stated that he would like to pursue education through a Judges sentencing seminar. Joel Sogol made a motion for a letter to be sent to the Chief Justice from the Sentencing Commission supporting mandatory judicial education. Miriam Shehane seconded the motion and it was unanimously approved.

The next meeting was tentatively scheduled for November 6, 2009.

There being no further business, the meeting was adjourned.