

**Alabama Sentencing Commission (ASC)
Legislative Committee Meeting**

September 13, 2005

Minutes

Dr. Lou Harris, Chair of the Legislative Committee and Member of the Alabama Sentencing Commission, called the meeting to order. Also present were:

- Vernon Barnett, Alabama Governor's Office;
- Sharon Bivens, Legislative Analyst, Legislative Fiscal Office;
- Honorable John Bush, Circuit Judge, 19th Judicial Circuit;
- Rosa Davis, Alabama Attorney General's Office and Member of the Alabama Sentencing Commission;
- Cynthia Dillard, Assistant Executive Director, Alabama Board of Pardons and Paroles;
- Lynda Flynt, Executive Director, Alabama Sentencing Commission;
- Becki Goggins, UCR Division Manager, Alabama Criminal Justice Information Center;
- Steve Hayes, Assistant to the Commissioner, Department of Corrections
- Bill Segrest, Executive Director, Alabama Board of Pardons and Paroles.

Dr. Harris called the meeting to order and explained that the purpose of the meeting was to consider the package of bills the Alabama Sentencing Commission has requested the Governor to put in the call for the possible upcoming Special Legislative Session on prison overcrowding and reform. While no official date for the session has been determined, if there is a special session, it will likely be held near the end of October 2005. He noted that the Committee would first review the nine bills which have been previously presented to the Alabama Legislature in the order they appear in Judge Colquitt's letter to Governor Bob Riley dated September 8, 2005. Each bill approved by the Committee will be presented to the Alabama Sentencing Commission for its approval. Only bills approved by the full membership will make up the Commission's legislative package. The "short title" of each bill, a synopsis of the bill and a short summary of the Committee's discussion are presented below.

1. **Sentencing Standards Bill – Approved with Amendments.** This bill proposes the adoption of voluntary sentencing standards for 26 felony offenses in compliance with the Sentencing Reform Act of 2003. The draft presented for consideration is the same bill that passed the Alabama House of Representatives during the 2005 Regular Session with the following amendments:

- Page 1, Line 23 – Change 2008 to 2009 in the synopsis, for implementation of the truth-in-sentencing standards;
- Page 4, Lines 21 and 22 – Change the introduction date and effective date of the truth-in-sentencing standards to 2009; and

- Page 1, Line 7 and Page 2, Line 18 – Change the language to state that the standards will cover 26 (not 27) felony offenses. (This change was made because there were insufficient data to estimate the impact the sentencing standards recommendations would have on sentences for Sale of Marijuana to a Minor.)

The committee members present decided to recommend the Sentencing Standards Bill as amended to the Alabama Sentencing Commission for its approval.

2. **Access to Juvenile and YO Records – Approved.** This bill would amend §§ 12-15-100 and 15-19-7 of the *Code of Alabama 1975* to provide statewide access to juvenile and youthful offender records for judges, prosecutors, victim service officers, probation and parole officers, defense attorneys and other appropriate court personnel.

Ms. Flynt noted the court officials listed about currently lack statewide access to these records. The bill as circulated is the same as the one previously approved, with the exception that it specifies access for defense attorneys for both juvenile and YO records. The committee members present decided to recommend the Access to Juvenile and YO Records as amended to the Alabama Sentencing Commission for its approval.

3. **Pardons and Paroles Facility Fees – Approved.** This bill would amend §15-22-30 of the *Code of Alabama 1975* to increase the amount that can be deducted from the wages of individuals housed in residential facilities operated by the Board of Pardons and Paroles from 25 to 45 percent of gross wages. Of the person’s earnings, 25 percent of the wages would be applied to the costs incidental to the person’s supervision and upkeep, 10 percent to court costs, fines, fees and assessments and 10 percent to victim restitution. In the event court costs, fines, fees and assessments are paid in full, then the 10 percent shall continue to be collected and applied to restitution. If the restitution payments are fulfilled first, the 10 percent would continue to be collected and applied to court costs, fines, fees and assessments.

Ms. Davis noted the language on Page 3, Lines 9-12 may need to be improved to clarify how each of the “10 percent increments” described above will be distributed in the event one financial obligation is met before the other. Dr. Harris asked the Committee to approve the bill with the understanding that Ms. Davis may work with the Legislative Reference Service to clarify the technical language. The committee members present decided to recommend the Pardons and Paroles Facility Fees Bill to the Alabama Sentencing Commission for its approval.

4. **Amendment of Burglary 1st and 2nd Degree Statutes to Eliminate the “Loot Rule” for Deadly Weapons – Approved.** In studying sentencing data, the Sentencing Commission determined that an opportunity for disparity in charging a lower or higher degree of burglary exists where the burglary includes the theft of a weapon. Some home burglaries where a weapon is stolen are charged and convicted as Burglary, 1st Degree, while others are charged with Burglary 1st and convicted as Burglary, 2nd Degree. This disparity sometimes depends on whether the weapon was actually used in the commission of the offense or flight from the scene of the crime. This bill recognizes that offenders in the same circumstances should be

treated alike and amends §§ 13-7-5 and 13-7-6 of the *Code of Alabama 1975*, relating to Burglary in the 1st and 2nd degrees to require the offender to either be armed with a deadly weapon upon entry into a dwelling or building or use or threaten the immediate use of a deadly weapon in order to commit these crimes to be convicted of the higher offense. It is specifically provided that the fact that a deadly weapon or dangerous instrument is one of the items stolen in the burglary does *not* constitute “use” or “threaten the use” of the deadly weapon or dangerous instrument.

Ms. Davis also reminded the committee members that these proposed changes would codify the procedures for sentencing burglaries described in the sentencing standards instructions. Following a brief discussion the Committee decided to recommend the changes to Alabama’s burglary statutes to the Alabama Sentencing Commission.

5. **Correction of the Theft of Property 2nd Degree Statute – Approved.** In 2003, based on the recommendation of the Alabama Sentencing Commission, the Legislature changed the felony thresholds for Theft of Property, 1st Degree and Theft of Property, 2nd Degree to adjust for inflation since the original codification of these offenses. In 2004, the threshold for Theft of Property, 2nd Degree was inadvertently changed back to the pre-2003 level in a bill changing the words “horses” and “mules” to “equine” and “equidae” that used the pre-2003 statute language in making the amendment. This change effectively eliminated the crime of Theft of Property, 2nd Degree. Ms. Flynt explained that the amendment to the bill is needed to change the Theft of Property, 2nd Degree statute back to reflect the monetary thresholds established by the Legislature in 2003 and to officially restore this category of offense.

The committee agreed this change was needed and elected to recommend the changes to the Theft of Property, 2nd Degree statute to the Alabama Sentencing Commission.

6. **Driving Under the Influence (DUI) Statute; Out of State Convictions – Approved**
Under current law, prior DUI convictions from out-of-state may not be used for the purpose of enhancing punishment when a person is subsequently convicted for violating Alabama’s DUI statute. This bill would amend Alabama’s DUI statute to specifically authorize the use of out-of-state convictions for enhancements under § 32-5A-191, Alabama’s DUI Law.

The committee members decided to recommend the proposed amendments to the DUI statute to the Alabama Sentencing Commission for its approval.

7. **Authorize (not mandate) Increase of the Maximum Fines for Felony Offenses – Approved**
The fines authorized for criminal offenses have not been adjusted since the Criminal Code was originally codified back in the 1970’s. This bill amends §§13A-5-11 and 13A-5-12 of the *Code of Alabama 1975*, to increase (based on the inflation index), the maximum amount of fines authorized to be assessed upon conviction for a felony, misdemeanor or state violation. If passed, the amendments would allow the judge to retain the discretion to impose any lesser fine amount and would simply authorize a larger fine in appropriate cases.

Following a brief discussion, the Committee decided to recommend the changes to Alabama's fine schedule to the Alabama Sentencing Commission.

8. Amendment to Drug Trafficking Statute – Approved with amendments for adding the drug Ecstasy.

Alabama's current drug trafficking statute fails to provide a fine for the most serious trafficking offenses. This bill amends Alabama's trafficking statute, §13A-12-231, *Code of Alabama 1975* to provide a fine for the most serious trafficking offenses and to correct the fine for trafficking in hydromorphone involving 4,000 - 9,999 pills to impose a graduated increase consistent with the other provisions of the statute. As now written, the fine for this offense is the same as trafficking in hydromorphone involving 1,000-3,000 pills.

Ms. Flynt also noted that Ellen Brooks, District Attorney, 15th Judicial Circuit, had mentioned on several occasions that Alabama's current trafficking statute needed to be carefully reviewed and revised in its entirety. She also mentioned that it had been brought to her attention that the language in the section of the bill related to types of amphetamines need to be amended to include the chemical name for the most common kind of club drug "Ecstasy." Currently, this chemical is not named in the statute. Ms. Goggins stated she would contact the Department of Forensic Sciences to determine the correct chemical nomenclature that needs to be added to the bill.

Following a brief discussion, the Committee decided to recommend the proposed changes to the Alabama Sentencing Commission with the understanding that Ms. Goggins and Ms. Flynt would ensure the additional chemical compound for Ecstasy is included in the final draft of the bill.

9. Medical and Geriatric Release – NOT APPROVED. Legislators and prison officials have expressed concern over the growing cost of keeping certain critically ill and geriatric offenders incarcerated who for reasons associated with advanced age or health problems no longer pose a threat to the public safety. This bill would provide for the discretionary medical and geriatric release by the Board of Pardons and Paroles of "terminally ill," "permanently incapacitated," and "geriatric inmates" who do not constitute a danger to themselves or society, would establish policies and procedures for submitting applications for consideration to the Board of Pardons and Paroles and the Department of Corrections. The authority to grant medical or geriatric release would be within the Board's discretion and not subject to judicial review in either the exercise, authority or the manner in which it is exercised. In determining an inmate's eligibility for release, the Board would be required to consider the inmate's 1) risk for violence; 2) criminal history; 3) institutional behavior; 4) age (both at present and at the time of the offense); 5) the severity of the illness, disease or infirmity; 6) all available medical and mental health records; and 7) release plans which could include alternatives to caring for terminally ill, permanently ill, or geriatric inmates in settings other than prison. Inmates convicted of capital murder and sentenced to life without parole or inmates convicted of a crime involving sexual misconduct with a minor would not be eligible for release under the provisions of this bill.

Several problems with the draft bill were noted by members of the committee. First, there was concern that this bill would place an undue burden on the existing public health and social services systems in terms of providing services to offenders released under the provisions of this bill. It would also slow down the docketing and parole review process at the Board of Pardons and Paroles due the high volume of petitions for relief under this act which would likely be filed upon passage of the bill. Additionally, several sections of the bill are unclear relative to who will be required to pay for examination and/or medical services required by the bill. *See Attachment*

Ms. Davis reminded those present that Senator Smitherman and Representative Coleman have introduced very similar bills in the past, and that this type of legislation may very well be introduced again. Nevertheless, the committee members stated the bill was unworkable as currently drafted and voted *not* to recommend this bill to the Alabama Sentencing Commission for inclusion in its legislative package. Ms. Davis and Ms. Flynt stated that they would speak with Senator Smitherman and Representative Coleman about the problems with the bill in its current form.

New Business

The bills listed above have already been presented in one form or another to both the Alabama Sentencing Commission and the Alabama Legislature. Ms. Flynt mentioned that one bill was omitted from the package presented to the Committee for consideration – the bill amending the split sentencing statute. Previously, the Commission had approved this bill for inclusion in its Legislative package because the Court of Criminal Appeals had issued an opinion, *Hollis v. State*, 845 So.2d 5 (Ala.Crim.App. 2002), holding that under the provisions of Alabama’s split sentence statute, when a defendant had completed his term of incarceration and had begun serving his term of probation, the only possible sentencing option upon revocation of probation was for the court to reinstate the entire sentence that was suspended. The proposed bill would have expressly granted the trial court authority to impose various sanctions upon revocation of probation, including modifying any condition of probation, ordering the offender to participate in a substance abuse or community corrections program, incarcerating the offender for any portion of his or her suspended sentence or for the entire term of the suspended sentence. The *Hollis* case was subsequently overruled by the Court of Criminal Appeals in *Dixon v. State*, ___So.2d___, 2005 WL 182 WL 182827 (Ala.Crim.App. January 28, 2005), thereby eliminating the need for corrective legislation.

1. AG Proposed Bill – Child Pornography; Multiple offenses - No Action

Ms. Flynt distributed a copy of HB643 (2005 Regular Session) relating to the production, dissemination and display of obscene material concerning children. The primary effect of this bill would be to allow for separate charges and convictions for each visual depiction of child pornography. For instance, under existing law a person found in possession of 50 nude photographs of children would be charged with a single count. Under the proposed law, the same crime would allow 50 individual charges to be filed based on “unit of prosecution” as defined in the bill. This bill was distributed to the Committee members for informational purposes only. The members were advised that an empirical analysis of the impact of the bill

would be performed and that Sentencing Commission staff would undertake this analysis and report their findings to the Committee.

2. AG Proposed Bill – Meth Lab Endangering Child – No Action

Ms. Flynt next distributed a copy of SB37 (2005 First Special Session) which would create the crime of “chemical endangerment of exposing a child to a methamphetamine laboratory” and provide penalties. This bill was also presented only for informational purposes. Several committee members asked what impact the passage of this act would have on the state prison population. It was noted that since the death or physical injury of a child as a result of a methamphetamine lab accident may already be charged under the state’s felony reckless murder or assault statutes, the only fiscal impact would likely be associated with those convictions resulting from a situation where a child was exposed to a methamphetamine lab but was uninjured. (Under current law, this would fall under the misdemeanor statute for child endangerment. Under the proposed law, this form of child endangerment would be increased to a felony.) The Committee requested that additional research should be conducted to determine the impact such legislation would have on the state prison population and the bill and analysis should be presented to the Sentencing Commission members at their next meeting.

3. First Felony Offender - Tabled.

Ms. Flynt next distributed a copy of a proposed First Time Felony Offender Act. Ms. Goggins noted the goal of this bill was to allow offenders of any age with no previous felony conviction to apply for an adjudication status similar to that offered under the provisions of the state’s current Youthful Offender Act. This would mean that offenders granted “First Offender” status would not lose voting rights and other privileges forfeited as a result of a felony conviction. Several committee members noted that if passed, this act should replace the current Youthful Offender Act. After some debate it was decided this bill should be tabled until additional research could be conducted. It was requested that the draft bill be distributed to the Commission members with a copy of the Youthful Offender Act attached, for informational purposes only.

4. Habitual Felony Offender Act – No Action.

Ms. Flynt asked the Committee if there was any interest in modifying Alabama’s Habitual Felony Offender Act (HFOA). Ms. Goggins noted that the recent amendments to the HFOA and the Split Sentence Act gave judges the discretion to handle the vast majority of cases in an appropriate manner. It was noted that the effect of the initial Voluntary Sentencing Standards should be assessed before additional changes in Habitual Felony Offender Act are considered. Existing problems may be resolved with the use of the standards. It was also noted that until the standards are adopted, problems continue to exist. Because the need to amend the HFOA was not viewed as a pressing issue, a majority of the Committee decided no further action need to be taken relative to amending the Habitual Felony Offender Act.

5. Good Time – Tabled

Ms. Flynt noted that several legislators have expressed an interest in amending the state’s “good time” statutes to allow the Department of Corrections to award Correctional Incentive Time (CIT) to inmates serving sentences of up to 20 years. Following a discussion of the

recent amendments to the split sentencing statute for defendants sentenced to 20 years and the to the HFO statute for defendants sentenced to life (minimum of 20 years), the Committee tabled the bill pending further study.

6. Shared Access to Criminal Data Between Criminal Justice Departments and Agencies – To Be Drafted and Distributed for Vote.

Ms. Flynt indicated that an AOC-ACJIC committee had requested Sentencing Commission staff draft an information sharing bill that would require the state’s criminal justice agencies to provide better inter-agency access to criminal information, including information relating to criminal history. Ms. Goggins noted that ACJIC is bound by numerous federal regulations that restrict the dissemination of criminal history information – especially criminal history records originating from other states. However, she stated that Mr. Maury Mitchell, Director, Alabama Criminal Justice Information Center (ACJIC), has expressed his desire to share information to the extent allowable by law. It was noted that the following agencies should be included in the bill: ACJIC, Administrative Office of Courts (AOC), Alabama Sentencing Commission (ASC), Board of Pardons and Paroles (BPP), Department of Corrections (DOC), Department of Forensic Sciences (DFS) and the Department of Public Safety (DPS). It was decided that Becki Goggins and Lynda Flynt would work with Mr. Mitchell and other appropriate agency representatives to prepare draft legislation and that Ms. Flynt would distribute the draft to the Legislative Committee members for a vote prior to the Commission meeting of September 30th.

7. Authority to Commute Life Without Parole Sentence to Life – No Action

For informational purposes only, Ms. Flynt distributed a proposed bill that had been drafted and that could be introduced in conjunction with a Constitutional Amendment, which would empower the Governor to commute a life without parole (LWOP) sentence to life in certain cases where a defendant’s sentence was enhanced pursuant to the Habitual Felony Offender Act. Under the draft provisions, commutation would only be allowed after obtaining the approval of the sentencing judge and prosecutors, or their successors, and after providing prior notice to the victim or victims, if any. No person convicted for a capital offense would be eligible for relief under the proposed act.

Several committee members remarked it would not be wise to place this responsibility in such a heavily politicized office. Additionally, it was pointed out that the parole board has the staff and experience to review these types of cases more thoroughly than the governor or his or her staff. The consensus of the committee was that if commutation of LWOP sentences was going to be authorized, this power should be vested in the parole board rather than with the governor.

8. Victim Notification – Bill to be Drafted and Distributed for Vote

Following a general discussion about the parole hearing backlog caused by Alabama’s current victim notification procedure, the committee requested Lynda Flynt to draft a bill which would alleviate some of the problems associated with finding victims or family members when no address is available in the court records or indictment and with the requirement that businesses (many of which are no longer in operation) and their employees. It was recommended that a meeting be arranged with Miriam Shehane, victim advocates, and

representatives from the Governor's office, Board of Pardons and Paroles, DOC and the Sentencing Commission to obtain their agreement on the bill's provisions. After obtaining a consensus on the provisions, Ms. Flynt will distribute the bill to the Committee members for a vote.

Ms. Flynt announced that she had no other issues to bring before the Committee and asked if anyone else had other issues to discuss. Dr. Harris thanked everyone for their participation and attendance, and he pointed out that even if a Special Session does not occur this year, the work of the Committee can be presented later for inclusion during the next Regular Session of the Alabama Legislature in 2006. There being no other business to discuss the meeting was adjourned.