

**Alabama Sentencing Commission (ASC)
Sentencing Standards and Worksheets
Committee Meeting**

November 19, 2004

Proposed Minutes

Rosa Davis, Chief Assistant Attorney General and Chair of the Sentencing Standards and Worksheets Committee, called the meeting to order. Also present were:

- Chris Booth, Attorney, Alabama Sentencing Commission;
- Hon. Ellen Brooks, District Attorney, 15th Judicial Circuit;
- Cynthia Dillard, Assistant Executive Director, Alabama Board of Pardons and Paroles;
- Becki Goggins, UCR Program Manager, Alabama Criminal Justice Information Center;
- Hon. Eugenia Loggins, District Attorney, 22nd Judicial Circuit (Covington County);
- Hon. Ben McLaughlin, Presiding Judge, 33rd Judicial Circuit (Dale and Geneva Counties);
- Hon. David Rains, Presiding Judge, 9th Judicial Circuit (Cherokee and DeKalb Counties)
- Robert Ray, Defense Attorney, Ft. Payne, Alabama;
- Miriam Shehane, Victims of Crime and Leniency (VOCAL);
- Hon. Tommy Smith, District Attorney, 6th Judicial Circuit (Tuscaloosa County); and
- Mitzi Wheat, VOCAL.

Ms. Davis reported that the Alabama Sentencing Commission (ASC) received 162 sets of worksheets from Birmingham that were completed during the one-week pilot program during which they tried out the sentencing worksheets in actual sentence hearings. The purpose of piloting the worksheets and standards was to see how the recommended dispositions and sentence ranges compared to the actual sentences imposed during these proceedings. The results compiled by the ASC revealed that judges complied with the sentence recommendations in 122 of the cases sentenced during the pilot project. In the other 40 cases, the judges sentenced outside of the standards. Overall this project revealed a 75 percent compliance rate and a 25 percent departure rate – exactly the rates predicted during the development of the standards.

Ms. Brooks asked whether or not nolo contendere pleas (nolo pleas) from other states would count the same as convictions for the purposes of scoring the worksheets. Ms. Davis indicated that presently they should not be scored as convictions, because the data analyzed to develop the standards did not take these pleas into consideration. Ms. Loggins noted it is unfair to penalize offenders who receive nolo pleas in other states less severely than offenders whose criminal convictions have all occurred with the state. There was some discussion as to how frequently judges and district attorneys see nolo pleas. Those present agreed that it is somewhat infrequent to encounter them; however, everyone reported running across them occasionally. Ms. Davis asked Ms. Dillard if it would be possible to get an estimate of the number of cases involving nolo pleas from the pre-sentence investigations (PSI's) conducted by probation and parole officers. Ms. Dillard said she would check with Jim Gibbs to see if it would be possible to retrieve this information. Ms. Davis said she would check with Mike Carroll to see if the Administrative Office of Courts (AOC) could provide this information, and Ms. Goggins said

she would check with Mark Hartley to see if this data could be extracted from the computerized criminal history files maintained by the Alabama Criminal Justice Information Center (ACJIC).

After this discussion, Ms. Davis suggested that the committee not make a decision as to whether or not to include nolo pleas until the ASC can be provided with an estimate of how many cases would be impacted. If there are very few nolo pleas, the ASC may elect to vote to instruct worksheet preparers to score these the same as convictions since the resulting impact on the prison population should vary only slightly from the projections produced by the prison population simulation model designed by Applied Research Services, Inc. (ARS). However, if there are a significant number of nolo pleas, it would be unwise to change the scoring instructions until enough statistical data can be gathered to allow the ASC to accurately estimate the effect this change would have on the state prison population. Ms. Davis noted she would advise the committee as to the feasibility of assessing the number of nolo pleas as soon as she had further information. If the data can be collected, then it will be presented to the committee and the ASC as soon as it becomes available.

It was also noted that if the ASC determines that more information on nolo pleas is needed before changes are made to the way prior convictions are counted, then judges still have the option to consider departing from the standards if the number of nolo pleas warrant a harsher sentence. Additionally, a judge could opt to impose a sentence that is from the upper end of the recommended range based on an excessive number of nolo pleas.

Next, Ms. Davis noted that a factor taking into account whether or not a person was under criminal justice supervision (e.g. probation or community corrections) at the time an offense was committed may need to be added to the worksheets. The reason this may need to be added is because this seemed to be a consistent reason for departing from the standards cited by judges participating in the pilot project.

Ms. Davis next asked the committee if there were any suggestions for rewording the worksheet instructions. Ms. Loggins indicated that #16 on the General Instructions may create problems since it would allow a defendant to withdraw a guilty plea upon being advised of the recommended sentence range under the standards. Judge Rains noted that advising defendants about both the statutory sentencing range and standards range makes delivering the colloquy somewhat cumbersome. He expressed his belief that a defendant only needs to be advised as to the statutory ranges because the standards recommendation will always fall somewhere within this range. Mr. Smith agreed, and he expressed his concern that Alabama may run afoul of *Blakely v. Washington* if the standards ranges are cited in the colloquy. Mr. Ray indicated he also believed that covering the statutory ranges in the colloquy would be best. Following this discussion, the consensus among the committee members was to revise # 16 in the general instructions to read, "The court's obligation to advise the defendant as to the statutory range of punishment prior to accepting a guilty plea is not affected by the standards."

Ms. Davis asked the group whether it would be okay to cite the statutes which define deadly weapons and dangerous instruments rather than defining them in the instructions. Ms. Brooks noted she favored this approach so that as the Legislature amends the statutory definitions and/or case law affects the definitions the instructions will not have to be changed to

comply with existing law. The committee agreed to amend the worksheet instructions to strike the sections that define a dangerous instrument and deadly weapon and insert language that says, “For the purpose of completing the worksheets, a deadly weapon shall be defined pursuant to Sections 13A-1-2 and 13A-11-72. A dangerous instrument shall be defined pursuant to Section 13A-1-2.” This factor appears in the following worksheets:

- Drug Prison In/Out Worksheet - # 7;
- Property Prison In/Out Worksheet - # 9;
- Property Prison Sentence Length Worksheet - # 7; and
- Personal Prison In/Out Worksheet - # 5.

Ms. Davis and Mr. Booth reported they would make these changes to the worksheets and instructions.

Mr. Smith noted that there was an error on # 15 of the General Worksheets relating to how to count previous convictions for Driving Under the Influence (DUI). This instruction was revised to read as follows: *“All previous convictions of misdemeanor Driving Under the Influence (DUI) should be counted as priors, including when the worksheets are being completed for Felony DUI cases even though the prior DUI convictions are an element of the offense.”*

Ms. Loggins suggested changing the “must” to “shall in # 19 of the General Instructions. The committee agreed, and this section was amended to read as follows: “Pursuant to § 12-25-35, Code of Alabama, 1975, worksheets should be completed and the sentencing standards recommendations shall be considered for all offenders to whom they are applicable.”

Next there was considerable discussion relative to whether or not a community corrections sentence can be counted as a prior incarceration for the purposes of completing the worksheets. The committee concluded that it depends on whether or not the community corrections supervision resulted from a suspended or non-suspended sentence. In short, if a defendant is placed under supervision of a community corrections provider as a part of a suspended sentence, then the punishment should be counted in the same manner as a sentence to state probation. However, if a judge orders a defendant to a period of confinement or supervision under community corrections as a non-suspended sentence, then the punishment should be counted the same as a prior incarceration. (In the latter example, DOC would receive a transcript for the defendant even though the institution code would list the offender in the custody of a local community corrections provider.) As a result of this discussion, the committee suggested rewording the instructions for scoring prior incarcerations as follows:

- ***Drug Prison In/Out Worksheet (#4) –***

Prior Incarceration of One Year or More - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Notes:

This should be counted each time a person enters (or re-enters) the ~~prison~~-system whether or not the person actually *serves* at least a year. As long as the “non-suspended” portion of the sentence was one year or longer at the time of admission, this should be counted.

This factor is not cumulative. For instance, if a defendant was sentenced to serve two separate non-suspended six month sentences, they should not be counted here. Only count those sentences where the non-suspended time imposed was at least one year.

- ***Drug Prison Sentence Length Worksheet (#5) –***

Prior Incarceration of One Year or More - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Notes:

This should be counted each time a person enters (or re-enters) the ~~prison~~-system whether or not the person actually *serves* at least a year. As long as the “non-suspended” portion of the sentence was one year or longer at the time of admission, this should be counted.

This factor is not cumulative. For instance, if a defendant was sentenced to serve two separate non-suspended six month sentences, they should not be counted here. Only count those sentences where the non-suspended time imposed was at least one year.

- ***Property Prison In/Out Worksheet (#5) –***

Prior Incarceration of One Year or More - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Notes:

This should be counted each time a person enters (or re-enters) the ~~prison~~-system whether or not the person actually *serves* at least a year. As long as the “non-suspended” portion of the sentence was one year or longer at the time of admission, this should be counted.

This factor is not cumulative. For instance, if a defendant was sentenced to serve two separate non-suspended six month sentences, they should not be counted here. Only count those sentences where the non-suspended time imposed was at least one year.

- ***Property Prison In/Out Worksheet (#6) –***

Prior Incarceration with Sentence Imposed of Less Than One Year - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was less than one year. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Note: If a defendant received a non-suspended sentence of less than one year to be served concurrently with a sentence of more than one year, it should not be counted here. This factor should only be scored in cases where the defendant received a non-suspended sentence of less than one year separate and apart from any longer period of incarceration imposed.

- ***Personal Prison Sentence Length Worksheet (#5) –***

Prior Incarceration of One Year or More - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Notes:

This should be counted each time a person enters (or re-enters) the ~~prison~~-system whether or not the person actually *serves* at least a year. As long as the “non-suspended” portion of the sentence was one year or longer at the time of admission, this should be counted.

This factor is not cumulative. For instance, if a defendant was sentenced to serve two separate non-suspended six month sentences, they should not be counted here. Only count those sentences where the non-suspended time imposed was at least one year.

- ***Personal Prison In/Out Worksheet (#3) –***

Prior Incarceration of One Year or More - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Notes:

This should be counted each time a person enters (or re-enters) the ~~prison~~-system whether or not the person actually *serves* at least a year. As long as the “non-suspended” portion of the sentence was one year or longer at the time of admission, this should be counted.

This factor is not cumulative. For instance, if a defendant was sentenced to serve two separate non-suspended six month sentences, they should not be counted here. Only count those sentences where the non-suspended time imposed was at least one year.

- ***Personal Prison Sentence Length Worksheet (#3) –***

Prior Incarceration of One Year or More - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Notes:

This should be counted each time a person enters (or re-enters) the ~~prison~~-system whether or not the person actually *serves* at least a year. As long as the “non-suspended” portion of the sentence was one year or longer at the time of admission, this should be counted.

This factor is not cumulative. For instance, if a defendant was sentenced to serve two separate non-suspended six month sentences, they should not be counted here. Only count those sentences where the non-suspended time imposed was at least one year.

- ***Personal Prison Sentence Length Worksheet (#4) –***

Prior Incarceration with Sentence Imposed of Less Than One Year - Count prior prison, jail or *Department of Corrections/community corrections* sentences where the non-suspended time imposed was less than one year. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

Note: If a defendant received a non-suspended sentence of less than one year to be served concurrently with a sentence of more than one year, it should not be counted here. This factor should only be scored in cases where the defendant received a non-suspended sentence of less than one year separate and apart from any longer period of incarceration imposed.

Mr. Booth indicated that he would redesign the bottom portion of the worksheets to make it easier for users to tell the difference between when a prison, probation or Department of Corrections/community corrections sentence is ordered.

Ms. Brooks suggested changing “Possession of Schedule I-V” on the General Instructions and Drug Worksheets and Instructions to “Unlawful Possession or Receipt of Controlled Substances” to match Section 13A-12-212, Code of Alabama 1975.

Ms. Davis indicated that questions were raised during the sentencing standards training sessions relative to why certain offenses were not included on the worksheets. Specifically, several people wanted to know why Manufacturing Methamphetamine and Possession of Precursor Chemicals (a charge usually associated with methamphetamine production) were not included. The reason is that since these offenses are relatively new, there were too few cases in the cohort of cases used to conduct the initial analysis of crimes being sentenced in Alabama to allow ARS researchers to draw any statistically relevant conclusions concerning how these offenses are being sentenced. It is expected that sufficient data will be available concerning methamphetamine offenses by the 2006 Legislative Session. Ms. Davis asked the committee if there were any offenses that need to be added to worksheets. In addition to the

methamphetamine offenses, other offenses identified were: 1) Sexual Abuse I; 2) Vehicular Homicide; 3) Drug Trafficking; and 4) Arson.

The committee agreed that Ms. Davis should continue to work on a preface for the standards and worksheets report to be submitted to the Alabama Legislature during the 2005 Regular Session. Those present agreed that it would be best to keep this section short. The committee also agreed that Ms. Davis and Mr. Booth should continue to work on a short summary of the steps required to complete the worksheets to be included in the legislative report. Ms. Davis indicated they would do this and send out a draft preface and summary of steps as soon as they are completed. She also asked other members of the group to review the work done to date and let the ASC know if they had any suggestions or revisions for these sections.

There being no other business to discuss the meeting was adjourned.