

**Alabama Sentencing Commission  
Sentencing Standards Committee**

**February 5-6, 2004  
Minutes**

**February 5, 2004**

Chairman Rosa Davis, Chief Assistant Attorney General and Attorney General Bill Pryor's Appointee to the Sentencing Commission, called the meeting to order. Also present were:

- Hon. Ellen Brooks, District Attorney, 15<sup>th</sup> Judicial Circuit (Montgomery County);
- Cynthia Dillard, Assistant Executive Director, Alabama Board of Pardons and Paroles;
- Lynda Flynt, Executive Director, Alabama Sentencing Commission;
- Becki Goggins, Research Specialist, The Sentencing Institute;
- Billy Hill, Attorney at Law;
- Hon. Eugenia Loggins, District Attorney, 22<sup>nd</sup> Judicial Circuit (Covington County);
- Hon. P. B. McLauchlin, Jr., Judge, 33<sup>rd</sup> Judicial Circuit (Dale and Geneva Counties);
- Dr. Tammy Meredith, Consultant, Applied Research Services, Inc;
- Melisa Morrison, Research Analyst, Alabama Sentencing Commission;
- Hon. David Rains, Judge, 9<sup>th</sup> Judicial Circuit (Cherokee and Dekalb Counties);
- Joe M. Reed, Attorney at Law;
- Miriam Shehane, Executive Director, Victims of Crime and Leniency (VOCAL);
- Hon. Tommy Smith, District Attorney, 6<sup>th</sup> Judicial Circuit (Tuscaloosa County);
- Dr. John Speir, Applied Research Service, Inc;
- Hon. Virginia Vinson, Judge, 10<sup>th</sup> Judicial Circuit (Jefferson County); and
- Bob Williams, Shelby County Public Defender's Office.

Ms. Davis asked if there were any changes or corrections that needed to be made to the minutes from the December 11-12 meeting. The minutes were approved as circulated.

Dr. Meredith began discussing what the Applied Research Services, Inc. (ARS) staff had developed for the Alabama Sentencing Commission over the past two months. First, she explained that ARS had analyzed Alabama's prison sentences from the five-year Alabama Department of Corrections (DOC) cohort to develop "sentence ranges" for the crimes to be scored on the Drug and Property Sentence Length Worksheets. The ranges presented reflect the middle 50 percent of all DOC sentences imposed. (The decision to exclude the top 25 and bottom 25 percent of sentences was made early on in the Sentence Commission's deliberations so as to exclude the more "atypical" cases from the analysis. This was because the Sentencing Commission's goal for some time has been to develop standards that work for the majority of cases – and not necessarily for those cases where particularly aggravating or mitigating circumstances would result in an especially harsh or lenient sentence.)

Next, Dr. Meredith called the committee's attention to changes made to the worksheets since the last meeting in December 2003. First, she pointed out that some wording had been changed for clarification purposes and noted that the factor which adds a point for possessing a deadly weapon during the commission of a crime had been added to the "In/Out" worksheets. She reminded the group that all of the original factors scored on the draft In/Out worksheet presented at the last meeting were statistically significant in predicting a dispositional outcome. Because this factor was not predictive in terms of determining the disposition (e.g. probation or prison) imposed by judges in drug offenses, the presence of a weapon was excluded in the first draft. It was added to the sheet, however, because members of the committee decided this is an important factor in sentencing whether or not enough data are available to prove its statistical significance. Ms. Loggins also reminded the group that the Alabama Legislature and the public would be unlikely to support sentencing recommendations that do not take into account the presence of a deadly weapon during the commission of a crime.

Ms. Goggins asked if the instructions should specify that the presence of the weapon had to be related to the crime in order to be counted. Mr. Williams noted that it would be unfair, for instance, to penalize an individual found in possession of marijuana who was arrested after being pulled over in a truck with a gun in its gun rack if the presence of the gun had no relationship to the offense. (i.e. The driver, who lives in a rural area, always keeps his or her gun in the truck that serves as their hunting vehicle.) After some discussion, it was decided that the presence of a weapon had to have a connection with the commission of the offense in order to be counted.

Ms. Loggins asked if this factor should be counted if the possession of a weapon was connected to an offense other than the primary one being scored on the worksheet. For instance, she asked if the weapon enhancement should be applied if a person is being "scored" on the property offense worksheet for Burglary II, but is also being sentenced for Unlawful Distribution of a Controlled Substance – where a weapon was found on the offenders's person – at the same sentencing event. Several of those present felt the weapon enhancement should only apply if the presence of the weapon was associated with the most serious offense. On the other hand, Judge Rains and Judge McLauchlin noted that in practice judges usually consider an offender's tendency to be armed when deciding on a sentence. For instance, if an offender has been caught with a pistol on several occasions – even if it was not used – a judge might be more likely to sentence him or her to prison than someone who is not known to be in the habit of carrying a handgun.

After considerable debate, it was decided that the instructions should require the "weapon" factor to be counted only if "there was a connection between the presence of a deadly weapon and the commission of any of the offense(s) being sentenced at the current sentencing event."

Dr. Meredith next noted that the "cutoffs" – or the scores at which a person is recommended for a prison sentence – had been increased since the original draft worksheets were circulated. This was because the recently completed simulation model revealed the original cutoffs would have resulted in a dramatic increase in the state prison population over the next five years if followed as originally drafted. The change was important because she and Dr. Speir are trying to develop worksheet recommendations that – if followed – will not increase the growth rate within Alabama's prison population.

Ms. Brooks noted that she does not feel that it is the Sentencing Commission's primary responsibility to reduce rates in the prison system. Rather, she views the group's responsibility as developing sound sentencing policy recommendations that are aimed at protecting public safety as opposed to saving state dollars.

Judge Rains noted that the Sentencing Commission needs to encourage the Alabama Legislature to reinsert the language in the Sentence Reform Act of 2003 which would abolish discretionary parole for offenders who commit crimes after the implementation of the Truth in Sentencing guidelines in 2006. Ms. Davis agreed. However, she felt the legislature would be unlikely to consider this change until some sort of "safety valve" for relieving prison overcrowding could be developed, and this is unlikely to occur this year.

Dr. Meredith noted that the simulation projections only take into account changes to sentencing practices that result from following the worksheet recommendations in those specific offenses scored by the worksheets. They are not designed to assess the impact of what would happen if judges started making sentencing decisions for "non-worksheet" offenses which are similar to those contained on the worksheets. Judge Rains noted that when preparing the worksheet instructions, it should be made clear that the worksheets are intended for use only in cases where the actual offense is covered by the sheet.

Judge McLaughlin and Ms. Goggins asked if the factor labeled "Prior Incarceration of One Year or More" was to be counted if an offender had actually *served* one year or more or had been *sentenced* to one year or more. Dr. Meredith and Ms. Davis explained that this factor should be counted whenever a person had been sentenced to an "unsuspended" term of one year or more – it doesn't matter how long the person actually served. Several of those present indicated that this needs to be clarified in the worksheet instructions.

Next the committee began discussing the Drug Prison Sentence Length Worksheet. The question was posed, "Why are Class C felony convictions counted twice – once in the section dealing with total prior adult felony convictions and again in the number of adult felony Class C convictions?" Dr. Meredith explained that her statistical analysis showed that these two factors are independently significant relative to determining sentence length. She said she suspected this was due to the fact that many offenders tend to commit numerous low-level offenses before they ever receive a prison sentence. In other words, judges appear to be weighing the fact that many drug offenders have been convicted for low-level times repeatedly when making their sentence length decisions. Several members of the committee noted that there needs to be an explanation of why Class C felonies are counted more than once in the worksheet instructions.

Ms. Loggins asked what would happen if the recommended sentence range for an offense exceeded the statutory maximum for the crime. Ms. Davis noted that the sentence ranges contained within the standards will not always be consistent with the statutory ranges. When there is a conflict, the standards should be applied notwithstanding any provision of the law to the contrary *unless* the sentence range is *higher* than the statutory maximum. In this case, the statutory maximum should be applied to avoid any conflict with the U.S. Supreme Court's decision in *Apprendi v. New Jersey* [530 US 466 (2000)].

There was a long discussion concerning whether the sentence ranges expressed in the standards should be based on the “total time imposed” or the “prison time imposed.” (For the purpose of this discussion, [total time imposed] = [prison time imposed]+[time suspended].) The ranges presented by Dr. Meredith earlier at the meeting only reflected the “prison time imposed.” This troubled the district attorneys present, because split sentences and straight sentences were both counted in the same manner in the ARS analysis. Specifically, Ms. Loggins felt strongly that this was an inaccurate way to portray sentences, because the total sentence imposed – not just the split portion of the sentence – is the “real” sentence. She noted that in her circuit, judges will often impose split sentences to ensure that an offender serves a longer period in prison than he or she would under a straight sentence. (The reason a split sentence often causes the offender to serve longer is a result of the state’s current parole and good time policies which allow for early release under a straight sentence.)

Other members of the committee thought the ranges should be based solely on the “prison time imposed.” Their contention was that the judge orders a split sentence because he or she feels this is the most appropriate sentence for the crime at hand. Because the sentencing judge does not really intend for the offender to served the “time suspended,” some committee members said it should not be included in calculating sentence length since it would artificially inflate sentence lengths.

After considerable debate, it was determined that the recommended ranges contained in the sentencing standards would be based on the “total time imposed” for straight sentences with a separate section that will include recommendations for split sentences.

Following this discussion, the committee began discussing the Property Prison In/Out Worksheet. Several people asked Dr. Meredith why the number of prior Class A, B and C felonies were weighted differently on this worksheet and not on the Drug Prison in/Out Worksheet. Dr. Meredith explained the analysis of the property data revealed that the *type* – not just the number – of prior offenses affected dispositional decisions (prison or probation).

Dr. Meredith also noted that the “number or prior adult convictions for the same felony” appears on this worksheet as an additional factor. Once again, in analyzing sentences imposed for property offenses, it was found that judges weigh this factor when making their sentencing decisions. Dr. Meredith explained that this factor should only be counted when the current offense is *exactly* the same offense as the prior(s). For instance, if a person is being sentenced for Burglary I and he or she has a previous conviction for Burglary III, then this factor would not be scored. However, if the same person had one or more prior convictions for Burglary I, then this factor should be scored according to the point system on the worksheet. Ms. Goggins noted that she would make sure this issue is addressed in the Property Prison In/Out Worksheet Instructions.

Judge McLaughlin asked how consecutive and concurrent sentences would work under the new sentencing scheme. Specifically, he wanted to know if a separate worksheet would be completed for each offense being sentenced during a single sentencing event. Ms. Davis explained that under the new system, only one worksheet will be scored (corresponding with the

most serious offense being sentenced) and any other offenses being sentenced at the same time will be factored in on the In/Out and Sentence Length worksheets. This system will result in a single recommended sentence range that reflects all of the offenses being sentenced. *How* the time is imposed will be left up to the sentencing judge. For example, if an offender is being sentenced for three felonies and the time imposed is 30 years, then the judge has several options. He or she could: 1) order the offender to serve a 30 year sentence for each offense to be served concurrently; 2) order the offender to serve three 10 year sentences consecutively; or 3) order the offender to serve one 20 year sentence and two 5 year sentences consecutively, etc.

Ms. Davis asked the committee to think about how the sentencing worksheets and standards should be presented to the legislature. Ms. Davis and Mr. Williams noted that it would be preferable to ask the legislature to adopt the standards during the 2004 Regular Session and allow the Sentencing Commission to make changes as deemed necessary based on data obtained once the standards go into effect. Mr. Flynt noted that the Sentence Reform Act of 2003 would have to be amended to make this possible, since it requires any changes to the standards to be adopted by the legislature before they become effective.

There being no other business to discuss, the meeting was adjourned until the following morning.

## **February 6, 2004**

Chairman Rosa Davis, Chief Assistant Attorney General and Attorney General Bill Pryor's Appointee to the Sentencing Commission, called the meeting to order. Also present were:

- Cynthia Dillard, Assistant Executive Director, Alabama Board of Pardons and Paroles;
- Lynda Flynt, Executive Director, Alabama Sentencing Commission;
- Becki Goggins, Research Specialist, The Sentencing Institute;
- Hon. Eugenia Loggins, District Attorney, 22<sup>nd</sup> Judicial Circuit (Covington County);
- Hon. P. B. McLauchlin, Jr., Judge, 33<sup>rd</sup> Judicial Circuit (Dale and Geneva Counties);
- Dr. Tammy Meredith, Consultant, Applied Research Services, Inc;
- Melisa Morrison, Research Analyst, Alabama Sentencing Commission;
- Hon. Tommy Smith, District Attorney, 6<sup>th</sup> Judicial Circuit (Tuscaloosa County);
- Dr. John Speir, Applied Research Service, Inc;
- Hon. Virginia Vinson, Judge, 10<sup>th</sup> Judicial Circuit (Jefferson County); and
- Bob Williams, Shelby County Public Defender's Office.

Ms. Davis asked Dr. Speir to determine from ARS's DOC cohort how many offenders would qualify for DOC reimbursement if the cut-points for determining which offenders should go to prison was raised to divert more offenders into community based programs. She noted that this would allow the Sentencing Commission to tell the legislature how much money would be needed to expand the number and capacity of community corrections programs in order to reduce or stabilize the growth in the state prison population.

Dr. Speir was also asked to determine how many offenders admitted to DOC over the last five years scored less than 10 points on the DOC Diversion Checklist. (This is important as DOC does not reimburse community corrections providers for up-front diversions for these offenders, since they are not considered to be “prison-bound” based on the offenders’ offense and criminal history.) According to Dr. Speir, 35 percent of all property admissions and 56 percent of all drug admissions scored less than 10 points on this scale. This demonstrates that there is a significant number of inmates admitted to prison each year who – based on DOC’s criteria – are better suited for punishment in the community rather than prison.

Dr. Meredith next reminded the group that the factors and weights included on the sentence length worksheets may change as a result of recalculating sentence ranges based on the total sentence imposed instead of the prison time imposed.

Ms. Loggins asked how to determine which offense will determine which worksheets should be completed prior to sentencing in the event multiple cases are being sentenced at the same time. Ms. Davis said that the preparer should first compare the statutory maximum sentences for the different crimes and select the one that is highest. In the event of a tie, the preparer should next consult the “offense seriousness table” and pick the one with lowest score. (On this table, the lowest score is the most serious and the highest is the least serious.) Ms. Goggins noted that it might be a good idea to provide a short a table that only includes the offenses included on the worksheet to make this task easier. An alternative approach would be to include small text boxes on the worksheets themselves listing the seriousness offense scores from the master table.

Ms. Loggins wanted to know if more than one worksheet could be completed in the event it was unclear which offense would result in the a recommendation of prison (as opposed to probation) and/or the longest sentence. After considerable debate, it was decided that this would be allowed. Ms. Goggins said she would make sure this is included in the general worksheet instructions.

Mr. Williams suggested that the Sentencing Commission ask the legislature to include a provision within the legislation adopting the proposed sentencing standards that allows the Commission to make changes as necessitated by statistical analyses of sentencing data conducted subsequent to the passage of the act approving them.

Ms. Loggins asked if district attorneys would be required to prove prior convictions in the same manner as in the current system. For instance, will prior convictions have to be certified by court clerks in order to be counted as they do now? Would it be permissible to count nolo contendere pleas from other states as prior convictions? Ms. Davis said for the time being the same rules that apply to proving prior convictions for the purposes of enhancing sentences under the existing Habitual Felony Offender Act would apply. However, she noted that this issue needs to be examined further in the future. Ms. Goggins stated she would include an explanation of how priors should be counted on the general worksheet instructions.

Ms. Davis announced that the next committee meeting will be held on Wednesday, February 18, 2004, and the next Sentencing Commission meeting will be on Friday, February 20, 2004. At the February 18 meeting, members should be prepared to discuss the crimes against the

person worksheets and finalize legislative recommendations which will be submitted to the Sentencing Commission for approval. She reported that new draft worksheets, instructions and recommended sentence ranges will be sent to members of the committee as soon as they are completed.

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