

# CRIMINAL JUSTICE REFORM IN ALABAMA

A Report and Analysis of Criminal Justice Issues in Alabama

Part One:

Sentencing, Probation, Prison Conditions and Parole

Prepared By The

EQUAL JUSTICE INITIATIVE OF ALABAMA

122 Commerce Street

Montgomery, Alabama 36104

[www.eji.org](http://www.eji.org)

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## EXECUTIVE SUMMARY

Alabama’s criminal justice system is in crisis. Mass incarceration, severe prison overcrowding, budget-busting costs and unfair sentencing have created conditions and practices that threaten the state’s resources and basic human rights. Alabama’s criminal justice system has marginalized thousands of residents and devastated many poor and minority communities while failing to improve public safety in any appreciable way. Many criminal justice policies have contributed to endemic hopelessness and dysfunctional and criminal behavior and have proven to be very ineffective.

The costs of many criminal justice policies have additionally created a fiscal crisis. Education spending and state planning and development have been undermined by out-of-control prison costs and financial demands generated by sentencing policies and misguided practices.

These problems have been fostered by a lack of information and critical analysis and shielded by a legal and political culture that is fearful of sensible reform unless it appears “tough on crime.” This report provides a critical assessment of many criminal justice issues in the hope that more informed debate, dialogue and decision-making can take place in Alabama.

Part one of this report addresses sentencing, probation, prison conditions and parole in Alabama.<sup>1</sup> Alabama’s sentencing laws, ineffective use of probation, unregulated and politicized parole procedures and an underfunded prison system have conspired to create one of the highest incarceration rates in the world. The consequences are devastating for poor people and people of color as well as Alabama’s economic, social and political health. Alabama’s political and legal culture allows politicians to use prisons and punishment to manage social and health care problems. This ill-advised approach has resulted in record deficits and a fiscal crisis that creates both a serious threat to public welfare and an opportunity for significant reform.

### I. SENTENCING, PROBATION, PRISON CONDITIONS AND PAROLE IN ALABAMA

#### A. Sentencing

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<sup>1</sup>Forthcoming reports will address a range of other criminal justice issues in Alabama including indigent defense, judicial selection, juveniles, the death penalty, law enforcement and the prosecutorial function.

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In the last twenty-five years, Alabama’s prison population has skyrocketed from 6000 prisoners in 1979 to nearly 28,000 prisoners today. The dramatic increase in the number of people sent to prison is primarily the result of changes in Alabama’s sentencing laws. The use of incarceration to punish illegal drug use and the passage of the Habitual Felony Offender Act in 1979 have created a crisis in the administration of criminal justice. Alabama now has one of the highest incarceration rates in the United States, the country with the highest incarceration rate in the world.

Both drug laws and the HFOA have imprisoned thousands of non-violent inmates for extremely lengthy and harsh sentences. Defendants convicted of writing a bad check, simple marijuana possession or a minor property crime have been sentenced to life in prison or life imprisonment without parole. Although the punitive and harsh political climate has made reform difficult, politicians and legislators have come to recognize that these laws are inefficient and too costly.

Drug laws in Alabama are among the most severe in the country. In the last twenty years, the number of drug offenders sent to prison has increased by 478%, as compared to a “mere” 119% increase for other convicts. Simple marijuana possession can be treated as a felony with some offenders receiving lengthy prison sentences for a first offense. Mandatory minimum sentences for repeat offenders and mandatory “add-on” sentences for drug use or trafficking near a school or church can result in fifteen-year sentences or life in prison for first offenses. First-time drug offenders have been sentenced to life in prison without parole.<sup>2</sup> Tremendous disparities exist between the state’s management of alcohol-related offenses – which tend to result in the arrest of white men – and its treatment of simple marijuana possession – which nets disproportionately high numbers of African-American men. The long-term incarceration of drug offenders for simple possession of comparatively small quantities of drugs has contributed greatly to mass incarceration in Alabama.

Other non-violent property crimes also have resulted in extremely severe and harsh prison sentences. Offenders in Alabama have been sentenced to life imprisonment without parole for stealing a bicycle, writing bad checks and other minor property crimes. Some 8000 prisoners in Alabama have been sentenced under the Habitual Felony Offender Act.

Finally, Alabama’s sentencing scheme for violent offenses is also extreme. The state has one of the most expansive death penalty statutes in the country, with the most death row prisoners per capita in the United States. An enormous number of people are serving life

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<sup>2</sup>See *Wilson v. State*, 830 So. 2d 765 (Ala. Crim. App. 2001).

imprisonment without parole as a result of Alabama’s sentencing structure.

B. Probation

The stated purpose of probation in Alabama is “to assist the probationer to become a law-abiding citizen.”<sup>3</sup> Alabama currently does not have enough probation officers to carry out this mission. Probation officers supervise an average of 143 people in Alabama compared to about sixty in Arizona and other comparably-sized states. There are nearly 44,000 people on probation in Alabama; almost 21% of those sent to prison each year come from the ranks of probationers. Better supervision and support of this group may have the single greatest impact on the number of people sent to prison in Alabama each year. Sixty percent of those sent back to prison for probation revocation were readmitted for non-violent behavior, failure to pay fines or technical violations of their probation conditions.

Although the United States Supreme Court and the Alabama Supreme Court have imposed requirements to protect the due process rights of those on probation, the absence of counsel, infrequency of appeals and general lack of review, scrutiny and oversight has resulted in widespread violations of individual rights. Most notable is the persistent practice of incarcerating people who are unable to pay fines and failing to provide counsel to those facing long-term incarceration or confinement.

C. Prison Conditions

The crisis created by the tremendous increase in the number of people sent to prison over the last twenty-five years now has been proclaimed by Governor Riley to be “a time-bomb waiting to explode.” Alabama’s prisons are currently operating at over 200% capacity. Federal courts have found that conditions in some state and local facilities are “barbaric,” “a substantial risk to staff and inmates” and similar to “holding units of slave ships during the Middle Passage.” The costs associated with maintaining Alabama’s disproportionately large prison population seriously threaten the state’s fiscal health. Estimates project that it may cost the state hundreds of millions of dollars over the next ten years to maintain current levels of incarceration. Crowding in state prisons has caused backlogs and crowding in county jails because state prisons have been incapable of receiving new prisoners from county facilities. County jail officials and county governments consequently have been burdened with the costs of managing these prisoners and have successfully sued the state over the ensuing problems. In 2002, the state faced fines of \$1.5 million per month for failing to relieve county jails of state

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<sup>3</sup>*Ex parte J.J.D., Jr.*, 778 So. 2d 240, 243 (Ala. 2000).

prisoners who were sapping local resources.

In response, the state recently sent Alabama prisoners to out-of-state private prisons where suspect practices and conditions threaten the rights and welfare of state prisoners. After several scandals, including the sexual abuse of female prisoners at one private facility in Louisiana, some state prisoners have been returned to Alabama from private prisons.

The strain on Alabama's prisons continues to grow. In December 2004, county jails reported a new backlog of state prisoners held in county facilities.

Most of the problems found in prison conditions are the direct result of Alabama's underfunded system. Alabama spends significantly less than other states to incarcerate prisoners. As a result, fewer programs and services are available, facilities are less secure and less safe, and conditions of confinement are intolerable, unconstitutional and inhumane.

Three particular problems are worth noting. First, Alabama does not provide medical care adequate to protect imprisoned people from disease. This is most obvious among the growing population of elderly prisoners and among prisoners with severe medical problems like HIV infection. The death rate among prisoners with HIV in Alabama is one of the highest in the country. A looming crisis presented by hepatitis C and tuberculosis poses a significant threat to public health. The recent introduction of fees which prisoners must pay to receive basic medical care is certain to exacerbate inmates' medical problems.

Second, Alabama is attempting to finance its underfunded prison system by recovering huge kickbacks from private telephone companies that charge extraordinarily high rates to the family members of prisoners who seek to stay in touch with their loved ones. Private telephone providers in Alabama have engaged in illegal and criminal practices resulting in indictments and scandal. However, reliance on private telephone companies to provide significant funding of corrections in Alabama continues. Alabama uses a bid contract system that forces private telephone companies to pay over 55% of their revenue back to the Department of Corrections. The increased cost of doing business is passed on to the indigent family members who receive calls from state prisoners. The state will rely on private telephone companies to provide close to \$7 million of its anticipated operating costs this year. While many states receive revenue from private telephone companies, there is evidence that Alabama's rates are exceptionally high. Connection fees, surcharges and poor service can create extraordinary costs for family members of prisoners with very little protection against abusive and unfair practices. One Alabama family reports accumulating over \$100 in charges for less than fifteen minutes of telephone use as a result of disconnected calls and charging problems. The Department of Corrections' dependence on private revenue creates an unfair tax on prisoners and their families to subsidize

an underfunded prison system.

Third, the use of private prisons presents very serious problems for prisoners and their families. The poor history of most of these institutions and the conditions that prevail in these facilities has caused most observers to view private prisons as a serious threat to constitutional and fair treatment of the imprisoned. Opposition to private prisons thus has become an increasingly significant part of the challenge to reform prison conditions in Alabama.

#### D. Parole

Parole in Alabama has been strongly influenced by the 1994 Violent Crime Control and Law Enforcement Act and the introduction of Truth-In-Sentencing grants from the federal government. These federal laws have provided millions of dollars to states that incarcerate prisoners for 85% of the sentence imposed. Alabama has adopted provisions aimed at keeping people in prison longer to obtain federal grants, which has undermined legislative initiatives to reduce the number of prisoners through increased parole.

Alabama arguably spends more money to hold inmates in prison longer than it receives from the federal government in exchange for compliance with Truth-In-Sentencing requirements. However, there is very little oversight and no serious assessment of parole to evaluate what the state is doing. Parole in Alabama also has been disrupted by victim notification laws, political attacks from the Governor and the Attorney General and inadequate attention to the due process rights of prisoners in the parole process. The Parole Board rarely provides written explanations for the denial of parole. The Board typically will not review a case for another five years following the denial of parole, which is much longer than in most states.

The absence of offender re-entry programs and support services for parolees also contributes to parole revocation and recidivism. The disfranchisement of ex-offenders has received some attention in Alabama but the recently-enacted statute for restoration of voting rights still imposes significant obstacles for prisoners who would like to regain their right to vote. Despite the fact that two-thirds of Alabama's prisoners are African-American, nearly two-thirds of those whose voting rights have been restored in recent years have been white.

## II. RECOMMENDATIONS

A wide range of activities is needed to confront and reform the problems that plague Alabama's administration of criminal justice. Some immediate reforms, however, could improve many of the problems Alabama faces.

A. Recommendations for Sentencing Reforms in Alabama

Drug Offenses

1. Eliminate all mandatory minimum sentences for drug-related offenses as recommended by the American Bar Association and as required by the costly and inefficient burden these sentences have placed on Alabama’s prisons and taxpayers.
2. Eliminate all mandatory “add-ons” that require mandatory sentence additions based on the proximity of drug offenses to schools or churches. While judges should have the discretion to sentence more harshly those offenders who risk the welfare of school children with drug trafficking, the mandatory “add-ons” have imposed decades of imprisonment even where there is no relationship between the offense and its proximity to a school or church.
3. Alabama requires three convictions before driving under the influence (DUI) can be punished as a serious felony with significant incarceration, but Alabama permits long-term incarceration for simple marijuana possession on a first offense and mandatory incarceration for subsequent convictions. DUI is a much more serious offense that creates enormous costs and numerous deaths each year. Sentences for marijuana possession immediately should be reduced to mirror Alabama’s sentencing scheme for DUI.
4. Alabama is the only state in the country that fails to distinguish between inchoate drug crimes and those that are successfully completed. Lawmakers should reduce the sentencing range for controlled substance offenses that involve inchoate crimes, i.e., solicitation, attempt and conspiracy.
5. The nature of drug addiction is such that mandatory sentences for repeat offenders is ill-advised. All felony drug offenses should be excluded from habitual felony offender consideration except Class A felonies. Drug offense convictions should not be considered in establishing eligibility for habitual felony offender status unless the prior convictions are Class A felonies.
6. Simplify the drug sentencing options for trafficking offenses and permit discretionary sentences within a range of one to ten years for offenders with no extensive history of trafficking and a maximum sentence of twenty-five years for the most serious drug

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trafficking offenders. In all cases, cap the maximum sentence that can be imposed on any drug offense at twenty-five years of imprisonment.

7. Eliminate the restriction on probation for certain drug-related offenses and dramatically increase the use of alternative sentencing, drug courts, community sentencing options for all drug offenders.
8. Create, fund and staff a major five-year health care initiative to provide no-cost or low-cost treatment to people suffering from drug addiction and related problems, including 100- to 200-patient treatment facilities in Huntsville, Birmingham, Montgomery, Mobile, Tuscaloosa, Gadsden, Selma, Auburn and Dothan. A study of the impact of treatment and its impact on public safety must be part of the program.

*Non-Violent and Violent Crimes*

1. Eliminate Class B and Class C felonies from playing any role in the determination of habitual felony offender status thus reserving habitual felony offender status for the most serious repeat offenders.
2. Reduce the monthly incarceration average for non-violent offenders by dramatically increasing the use of alternative sentencing, community sentencing, and restitution programs. The Alabama Sentencing Commission estimates that the state saved \$3 million by assigning 1700 felony offenders to serve their sentences in community corrections programs in 2003 rather than in state prisons.
3. Require fiscal impact statements for all Alabama sentencing laws and mandate review of sentencing laws and their efficacy in controlling crime and improving public safety.
4. In all cases, cap the maximum sentence that can be imposed for a non-violent felony at twenty-five years of imprisonment. This reform should be made retroactive to prisoners currently in custody.

B. Recommendations for Reform of Probation in Alabama

1. Increase the number of probation officers in the state to reduce the ratio of probationers supervised by each probation officer. Improve the diversity, education and training of probation officers to reduce the number of unnecessary and technical revocations.

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2. Drastically reduce the grounds for probation revocation to only those problems which warrant incarceration for probationers. Eliminate revocation for technical violations and use community service and alternatives to incarceration as a tool to reduce the number of prison admissions from probation.
3. Enforce requirements for written justification of any probation revocation and provide counsel to indigent people facing probation revocation that could result in imprisonment. The denial of counsel in these cases must be appealed and challenged in legal actions.
4. Prepare educational materials for people who are sentenced to probation so that they can fully comply with the terms of their probation and obtain critically needed support and assistance if their probation is at risk of revocation.

C. Recommendations for Prison Conditions Reform in Alabama

1. Dramatically reduce Alabama's prison population through sentencing reform, increased use of alternative sentencing, probation and community sentencing and make sentencing reforms retroactive where possible.
2. Oppose the use of private prisons and unregulated incarceration of Alabama prisoners.
3. Increase spending on prison health care to limit the spread of infectious diseases and improve the medical conditions and treatment of prisoners.
4. Improve the prisoner staff to inmate ration, relieve crowding and restore basic services and rehabilitation programs for prisoners which can increase public safety and reduce the incidence of violence within the prison.
5. Limit any program or practice that creates an economic incentive to keep people in prison when public safety does not require incarceration.

D. Recommendations for Reform of Pardons and Parole

1. Require written explanations for every denial of parole. Justification for the denial of parole should be made available to prisoners so that there are clearer guidelines for prisoners and the public as well as an improved understanding of what is expected of incarcerated people.

2. After denial of parole, Alabama prisoners typically must wait five years before they are eligible for parole consideration again. Once eligible for parole, prisoners should be reviewed every year unless the Board expressly delays review for two years. By forcing the Board to either grant parole or require a prisoner to serve an additional five years, the Board cannot make the careful, sensible decisions that are required for an effective parole system.
3. Modify victim notification requirements and require victim notification only for serious, violent Class A felony offenses. Parole hearings are often delayed for months because victim notification cannot be accomplished.
4. Create automatic, full restoration of voting rights to ex-offenders. Automatic restoration will help prisoners successfully re-engage in the state with a commitment to follow the law that will improve the likelihood of successful re-entry. While the 2001 reforms have improved the situation surrounding felon disenfranchisement, the restoration of voting rights is still complex, difficult and intimidating to most ex-offenders.

### III. CONCLUSION

While there are many obstacles to reform of Alabama's criminal justice system, the present financial crisis and increased costs create an opportunity to pursue reform strategies that could improve sentencing, probation, parole and prison conditions.

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## SENTENCING

### Introduction

There is little doubt that there is an incarceration crisis in Alabama, and the numbers reflect this fact in every way. The most obvious index is the swelling number of inmates. Over the last thirty years, Alabama's general population has increased 30%, while its total inmate population has expanded at a staggering 600% rate.<sup>4</sup> In 1979, Alabama incarcerated fewer than six thousand people; today that number has swelled to over twenty-seven thousand.<sup>5</sup> This latter number is particularly disturbing in light of the fact that the current facilities were designed for less than half that number.<sup>6</sup>

At the same time, Alabama finds itself in a fiscal crisis vis-a-vis its correctional facilities, notwithstanding the fact that the state leads the nation in lowest annual cost per inmate at \$9,073 per year,<sup>7</sup> less than one-third the national average of more than \$31,073 per year.<sup>8</sup> Indeed, the Alabama Sentencing Commission has calculated that the cost of merely adding the number of beds necessary to sufficiently house the current number of incarcerated individuals would exceed \$933 million; operating costs will drive that number higher still.<sup>9</sup> In accord with these estimates, Department of Corrections Commissioner Donal Campbell recently requested \$580 million in appropriations from the Legislature—nearly double the previous year's budget—to pay for the growing costs of maintaining such a large incarcerated population,

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<sup>4</sup> LA. SENTENCING COMM'N, 2004 ANNUAL REPORT 15 (2004).

<sup>5</sup> Mike Cason, *Advocates Push Prison Reform*, MONTGOMERY ADVERTISER, Sept. 25, 2003, at 2-A; ALA. DEP'T OF CORR., MONTHLY STATISTICAL REPORT 6 (Dec. 2004).

<sup>6</sup> LA. DEP'T OF CORR., MONTHLY STATISTICAL REPORT 2 (Dec. 2004).

<sup>7</sup> *Id.* at 107.

<sup>8</sup> ALABAMA SENTENCING COMM'N, SENTENCING REFERENCE MANUAL 107 (2003). Even by the more modest regional standards, Alabama is far behind her neighbors in terms of spending on prisoners: Mississippi is the next closest at \$12,576, South Carolina spends \$12,846, Georgia spends \$19,996 per year and Tennessee approaches the national average by expending \$28,609 per inmate. *Id.* at 108.

<sup>9</sup> LA. SENTENCING COMM'N, ANNUAL REPORT 1 (2004).

including the construction of two new 2,000-bed correctional facilities.<sup>10</sup> Meanwhile, the Sentencing Commission estimates that whereas inmates cost the state \$26.07 per day, individuals in community corrections programs require only \$10.33 per day, while those on probation or parole cost only \$2.27 in daily expenditures.<sup>11</sup> Furthermore, in many instances these alternative measures are likewise more effective, insofar as they allow offenders to more readily make good on their obligations to pay restitution, fines and fees.<sup>12</sup>

In addition to the profound economic impact of Alabama’s sentencing regime, the drive towards incarceration has other effects too, which disproportionately affect the poor and people of color. Families and communities are destabilized,<sup>13</sup> individual liberties are compromised,<sup>14</sup> economic opportunities are lost.<sup>15</sup> While Alabama’s current situation is typical in some ways of

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<sup>10</sup> Carla Crowder, *Prison Sentence Reforms Urged; Commissioner Seeks Doubled Budget, Alternative Programs*, BIRMINGHAM NEWS, Jan. 21, 2005, 1C; John Davis, *Corrections Seeks Bigger Budget*, MONTGOMERY ADVERTISER, Jan. 21, 2005, [http://sentencingcommission.alacourt.gov/News/news\\_art\\_montg\\_1.21.05.html](http://sentencingcommission.alacourt.gov/News/news_art_montg_1.21.05.html) (last visited Feb. 16, 2005).

¶ LA. SENTENCING COMM’N, SENTENCING REFERENCE MANUAL 108 (2003).

<sup>12</sup>*Id.*

<sup>13</sup>*See, e.g.*, Donald Braman, *Families and Incarceration*, in INVISIBLE PUNISHMENT 117, 118 (Marc Mauer & Meda Chesney-Lind eds., 2002) (noting that mass incarceration “is producing deep social transformations in the families and communities of prisoners—families and communities, it should be noted, that are disproportionately poor, urban, and African-American.”).

<sup>14</sup>The list of individual restrictions is a long one. In addition to losing liberty of movement and freedom of interaction, the right to vote, the right to run for office, and the right to obtain certain licenses can all be circumscribed to one degree or another following a felony conviction. Anthony Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV 255, 272-73 (2004). Likewise, access to federal housing can become exceedingly difficult. *Id.* at 278.

<sup>15</sup>*See, e.g.*, Bruce Wester, *et al*, *Black Economic Progress*, in INVISIBLE PUNISHMENT 165, 175 (Marc Mauer & Meda Chesney-Lind eds., 2002) (finding that “the penal system itself also increases inequality by reducing the employment and earnings of ex-inmates after release” by attaching stigma, eroding job skills and undermining social connections to good job

endemic criminal justice issues in the country at large—most notably the drive to incarcerate large segments of its population<sup>16</sup>—an analysis of current sentencing policies makes it clear that Alabama is on the bleeding edge when it comes to the severity of its sentencing regime.

As the Alabama Sentencing Commission has noted, criminal laws and sanctions in Alabama historically have been driven more by anecdotal evidence than by careful analysis.<sup>17</sup> High profile cases produce knee-jerk reactions from legislators and those otherwise positioned to influence the state’s sentencing laws.<sup>18</sup> Too often, bad politics makes for bad policies which, rather than ameliorating the perceived problems, in fact “exacerbate Alabama’s troubles and potentially put citizens at greater risk.”<sup>19</sup> These observations dovetail with an abundance of data that call into question the cost effectiveness of severe sentencing regimes and a simple “get

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opportunities).

<sup>16</sup>See, e.g. JAMES AUSTIN, JFA INST., ASSESSMENT OF ALABAMA PRISON SYSTEM 3 (2004) (finding that from 1980 to 2003 there has been a 278% increase in the number of people under some form of correctional supervision nationwide, as compared to a mere 29% increase in the adult population). See also MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION 2-3 (2003) (noting that the national inmate population is now six times what it was in 1972, prior to initiation of “get tough” crime policies and that the United States leads the world in incarceration rates, currently imprisoning individuals at a rate of five to eight times that of other western industrialized nations); William Spelman, *What Recent Studies Do (and Don’t) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 430 (2000) (identifying the nearly universal move by states to jump on the “prison bandwagon,” resulting in a per capita increase in prison populations of over 300% since 1975).

ALABAMA SENTENCING COMM’N, INITIAL REPORT TO THE LEGISLATURE 3 (2002).

<sup>18</sup>See, e.g. Philip Rawls, *Senate Passes Tough Anti-Carjacking Bill*, MOBILE REG., Feb. 26, 1993 (identifying a bill to make carjacking a capital crime as a response to the killing of a federal agent the previous year); Mike Cason, *Bill Would Expand Death Penalty Law*, MONTGOMERY ADVERTISER, Nov. 28, 1996 (noting that a proposed bill to make the death penalty statute more expansive was an effort to remedy a perceived wrong in one man’s capital trial).

ALABAMA SENTENCING COMM’N, INITIAL REPORT TO THE LEGISLATURE 3 (2002). As Representative John Knight recently declared, “It’s easy to get up and demagogue on ‘tough on crime,’ but you’re not tough on crime if you don’t come up with the funding.” Carla Crowder, *Prison Sentence Reforms Urged; Commissioner Seeks Doubled Budget, Alternative Programs*, BIRMINGHAM NEWS, Jan. 21, 2005, at 1C.

tough on crime” philosophy. Study after study suggests that (1) money can be used more effectively in other ways, such as drug treatment centers;<sup>20</sup> (2) there is diminishing marginal value in dollars spent on incarceration;<sup>21</sup> and/or (3) the relationship between higher incarceration rates and crime rates is unclear, at best.<sup>22</sup>

This section will cover each of the three major categories of offense: drug-related crimes; non-violent (non-drug) crimes; and violent crimes. As a preliminary matter it is useful to begin with a brief overview of sentencing history in Alabama. Before moving into the specific offense categories, this report will discuss two relatively recent, but hugely important, developments on Alabama’s sentencing landscape—the Habitual Felony Offender Act and the creation of the Alabama Sentencing Commission. Because these two legislative creations impact sentencing developments, it is important to understand what they are in a general context; because they are relevant to different categories of offenses in different ways, they will also be discussed in each of the major sections that follow.

## I. SENTENCING IN ALABAMA

### A. History of Sentencing

As suggested above, the story of sentencing in Alabama is, to some extent, merely the story of sentencing in the United States writ small. Beginning in the mid-to late 1970s, federal, state and local government responded to growing concerns about crime by enacting policies that

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<sup>20</sup>See, e.g., John Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 ND J. L. ETHICS & PUB POL’Y 311, 312-14 (2004) (citing a study by the Rand Corporation that mandatory minimum sentences were less cost effective than either conventional law enforcement of drug treatment programs. The study suggested that while a million dollar expenditure on incarceration costs would reduce cocaine distribution by 13 kilograms, using the same money on a drug treatment program would reduce distribution by more than 100 kilograms.).

<sup>21</sup>See, e.g., WASH. STATE INST. FOR PUB. POLICY, *THE CRIMINAL JUSTICE SYSTEM IN WASHINGTON STATE: INCARCERATION RATES, TAXPAYER COSTS, CRIME RATES, AND PRISON ECONOMICS* 7, <http://www.wsipp.wa.gov> (2003); JENNI GAINSBOROUGH & MARC MAUER, *THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s* (2000).

<sup>22</sup>See, e.g., JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, *REPORT TO THE ABA HOUSE OF DELEGATES* 21 (2004); JENI GAINSBOROUGH & MARC MAUER, *THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s* 14 (2000).

resulted in an unprecedented increase in the population of the nation’s prisons and jails.<sup>23</sup> In the 1980s, incarceration became the primary tool for responding to the perceived imminent threat of crime, particularly for drug-related crimes. The number of drug offenders who went to prison increased by 478% as compared to a “mere” 119% increase for other convicts.<sup>24</sup> Politicians, regardless of political persuasion, saw a “get tough on crime” message as critical to a successful campaign, while the media tended to fuel the fires through an increasing (and disproportionate) focus on crime in its coverage; one study indicated that there was a 100% increase in news on crime between 1992 and 1993, despite the fact that crime rates remained more or less the same during that period.<sup>25</sup>

For the four decades preceding the 1970s, incarceration rates in the United States held relatively constant at about 110 per 100,000 people.<sup>26</sup> Today, some thirty years after the initiation of “get tough on crime” policies, the incarceration rate nationwide is 702 per 100,000, a number which makes the United States the world leader, ahead of Russia, and which is five to eight times higher than the rates of the countries of Western Europe.<sup>27</sup> In absolute terms, this translates into suitably huge increases as well: between the years 1974 and 2001, the number of prison inmates grew from 216,000 to 1,355,748, while during the period from 1985 to 2002 the number of those held in local jails more than doubled, from 256,615 to 665,475.<sup>28</sup> Nationwide more than two million people are currently incarcerated<sup>29</sup> and close to seven million

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<sup>23</sup> JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORT TO THE ABA HOUSE OF DELEGATES 16 (2004).

<sup>24</sup> Anthony Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV 255, 262-64 (2004).

<sup>25</sup> *Id.*

<sup>26</sup> ARC MAUER, RACE TO INCARCERATE 16 (1999).

<sup>27</sup> ARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION 2-3 (2003).

<sup>28</sup> JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORT TO THE ABA HOUSE OF DELEGATES 16 (2004).

<sup>29</sup> *Id.*

are under some form of correctional supervision.<sup>30</sup> While a variety of factors have contributed to the massive growth of prisoners, probationers and parolees, evidence suggests that sentencing policies have had a far greater impact than crime rates on the dramatic changes that have occurred.<sup>31</sup>

Throughout this period of profound change in America’s penal policies, Alabama’s incarceration rates tracked, and indeed outpaced, those of the rest of the nation. From 1979 to 2001, the incarceration rate in Alabama increased 326%, compared to 234% nationwide.<sup>32</sup> As noted above, the increasing rate of imprisonment has translated into a 600% surge in the size of the incarcerated population in Alabama over the last thirty years.<sup>33</sup>

#### B. The Habitual Felony Offender Act

The stringent nature of Alabama’s drug laws is further amplified by their interaction with the state’s Habitual Felony Offender Act (“HFOA”).<sup>34</sup> Passed in 1979, the HFOA sought to target recidivism by enhancing the sentences of defendants who had previous felony convictions. Most notably, the statute called for the mandatory imposition of a life sentence on anyone who had three prior felony convictions and committed a Class B felony; a person who had committed three felonies and was convicted of a Class A felony could only receive a sentence of life without the possibility of parole.<sup>35</sup> The effects were predictable and extreme: the prison population grew dramatically, as more and more offenders were kept in prison for longer and longer periods of time, for less and less serious offenses. Today, there are nearly eight thousand inmates serving time under the HFOA; nearly 1300 of those inmates have life

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<sup>30</sup>See JAMES AUSTIN, JFA INST., ASSESSMENT OF ALABAMA PRISON SYSTEM 3 (2004).

ARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION 6 (2003).

ERA INST. OF JUSTICE, ALABAMA DATABOOK: A SUMMARY OF CRIMINAL JUSTICE STATISTICS FOR ALABAMA AND THE UNITED STATES 69 (2002).

LA. SENTENCING COMM’N, 2004 ANNUAL REPORT 15 (2004).

LA. CODE § 13A-5-9 (1994).

<sup>35</sup>See 1979 ALA. ACTS 1163.

sentences and an additional 574 are serving life without the possibility of parole.<sup>36</sup>

Recognizing the extreme strain that the HFOA was placing on the Alabama Department of Corrections, as well as the potential to move non-violent offenders out of overcrowded state prisons, the Alabama Legislature amended the HFOA on May 25, 2000.<sup>37</sup> The amendment afforded trial court judges increased discretion in sentencing repeat felony offenders. Prior to the amendment, the HFOA called for a mandatory sentence of life without parole for anyone convicted of a Class A felony who also had three prior felony convictions, regardless of the type or severity of the predicate convictions.<sup>38</sup> Likewise, the original HFOA required judges to impose life sentences on anyone convicted of a Class B felony who had any three prior felony convictions.<sup>39</sup> The amendment allowed judges in the former instance to sentence an offender to either life or life without parole so long as none of the prior felonies were also Class A offenses; offenders whose fourth conviction was a Class B felony could be sentenced anywhere from twenty years to a life sentence.<sup>40</sup> In 2001, recognizing that the backlog of inmates in the prison system would not be readily cleared absent further action, the Legislature enacted Alabama Code section 13A-5-9.1, which made the 2000 HFOA amendment retroactive.

Shortly after section 13A-5-9.1 was signed into law by Governor Siegelman, Junior Mack Kirby, who previously had been sentenced to life without the possibility of parole under the HFOA, filed a motion to be re-sentenced pursuant to the newly enacted legislation.<sup>41</sup> The State opposed the motion, challenging the trial court's jurisdiction to re-sentence Kirby on the grounds that section 13A-5-9.1 was an unconstitutional exercise of the Legislature's authority, and violated established separation of powers doctrine.<sup>42</sup> The trial court issued a ruling finding the 2001 HFOA amendment unconstitutional on those grounds and the Court of Criminal

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<sup>36</sup> LA. DEP'T OF CORR., MONTHLY STATISTICAL REPORT 7 (Dec. 2004).

<sup>37</sup> LA. CODE § 13A-5-9 (amended by 2000 Ala. Acts 759).

<sup>38</sup> LA. CODE § 13A-5-9 (1994).

<sup>39</sup> *Id.*

<sup>40</sup> LA. CODE § 13A-5-9 (amended by 2000 Ala. Acts 759).

<sup>41</sup> *Ex parte State (in re Kirby v. State)*, No. 1030128, 2004 WL 1909345, at \*2 (Ala. Aug. 27, 2004).

<sup>42</sup> *Id.*

Appeals twice dismissed Kirby's appeal, first on the grounds that the trial court's decision was not appealable, and then on the ground that Kirby's motion was not timely and thus that the trial court had no jurisdiction to issue a ruling on it.<sup>43</sup> The Alabama Supreme Court took the case up and decided unanimously that section 13A-5-9.1 was not a violation of the separation of powers and that the trial court indeed had jurisdiction to hear Kirby's motion.<sup>44</sup> The long process of reversing the backlog created by the HFOA now can begin.

Most recently, the Alabama Sentencing Commission has taken note of the peculiarly expansive scope of the HFOA. In particular, the Commission noted that the statute is out of step with those of "the vast majority" of states with similar laws insofar as, when considering prior offenses, it does not make distinctions between prior offenses of varying degree or recency.<sup>45</sup> While the Commission appears to at least be concerned about this aspect of the statute, it apparently was not prepared for immediate action on that front, instead opting for further study of the topic.<sup>46</sup>

### C. The Alabama Sentencing Commission

The Alabama Sentencing Commission grew out of recommendations made by the

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<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 7.

<sup>45</sup> LA. SENTENCING COMM'N, 2004 ANNUAL REPORT 12 (2004). As the Commission notes, there is one distinction made based on the degree of previous felonies: for an individual who has three prior felonies and is convicted of a Class A felony, the appropriate sentence depends on whether that individual has a prior Class A conviction (in which case the statute calls for a mandatory sentence of life without parole) or a no prior Class A conviction (in which case the court has the discretion to sentence to either life *or* life without the possibility of parole). ALA. CODE § 13A-5-9(c)-(d).

In contrast with the Alabama law, the Louisiana habitual offender statute was recently amended to require that in order to trigger the more severe mandatory penalties, all three prior convictions must be for violent crimes, sex offenses, drug crimes punishable by ten or more years or any other offense punishable by twelve or more years. RYAN S. KING & MARC MAUER, STATE SENTENCING IN CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 4 (2002).

<sup>46</sup>*Id.*

Judicial Study Commission in 1998.<sup>47</sup> In 2000, the Legislature enacted Act 2000-596 (codified at ALA. CODE § 12-25-1 to -12) and the Sentencing Commission was born as a permanent agency. The Chief Justice of the Alabama Supreme Court serves as the chair of the Commission, or appoints the chair as his designee.<sup>48</sup> The remaining members of the Commission are likewise provided for by statute, and include various officials or their designees: the Governor; the Attorney General; a district attorney appointed by the President of the Alabama District Attorney’s Association; two circuit judges appointed by the President of the Alabama Association of Circuit Court Judges; a district judge appointed by the President of the Alabama Association of District Court Judges; a victim of a violent felony or a family member of such a victim appointed by the Governor; the Chair of the House Judiciary Committee; the Chair of the Senate Judiciary Committee; a private attorney specializing in criminal defense appointed by the President of the Alabama Criminal Defense Lawyer’s Association; a private attorney specializing in criminal law appointed by the President of the Alabama Lawyer’s Association; a county commissioner appointed by the Governor; the Commissioner of the Department of Corrections; the chair of the Alabama Board of Pardons and Parole; and a member of the academic community with a background in criminal justice.<sup>49</sup> Notably, but not surprisingly, there is only one position reserved for a criminal defense *practitioner*.<sup>50</sup> Even less surprising is the absence of any kind of institutional allowance for input from inmates’ family members.

The Commission has been charged with a number of tasks related to the review of state sentencing policies and procedures. More recently, the Legislature sharpened the focus of the Commission with its passage of the Alabama Sentencing Reform Act of 2003 (“SRA”).<sup>51</sup> In particular, the SRA calls for (1) voluntary sentencing guidelines; (2) the abolition of traditional parole and good time credits for felons; and, (3) the availability of a continuum of punishment

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<sup>47</sup>See ALA. SENTENCING COMM’N, 2004 ANNUAL REPORT 21 (2004).

<sup>48</sup> LA. CODE § 12-25-3 (2004 Supp).

<sup>49</sup> LA. CODE § 12-25-3 (2004 Supp.).

<sup>50</sup>Though the statute calls for a second private attorney who is an expert in criminal law, the language of the statute suggests that, for instance, a professor of criminal law would also satisfy the requirements of the position.

<sup>51</sup>Codified at ALA. CODE § 12-25-30 to -38 (2004 Supp.).

options.<sup>52</sup> To this end, the SRA required the Sentencing Commission to propagate voluntary sentencing standards, and present them to the Legislature by the 2004 Regular Session. Once approved, the standards would become immediately effective in October of 2004.<sup>53</sup> The SRA likewise called for the development of “voluntary truth-in-sentencing standards” before or during the 2006 Regular Session.<sup>54</sup> It is these latter guidelines which judges would ultimately use to sentence those convicted of crimes in Alabama.<sup>55</sup>

While the Sentencing Commission has indeed developed its initial voluntary sentencing guidelines,<sup>56</sup> the Legislature did not adopt them.<sup>57</sup> Nevertheless, the Commission remains “optimistic that these standards will be approved during the next session.”<sup>58</sup>

## II. DRUG OFFENSES

### A. Current State of the Law

#### 1. Range of Sentences

Perhaps in no other area has Alabama’s tendency towards harsh sentencing been more noticeable than with regard to drugs. Keeping pace with the national trend to wage a “war on drugs,” the Alabama sentencing regime for drug-related crimes is extremely expansive in at least three ways: (1) the stringent manner in which inchoate crimes are classified; (2) low thresholds and large sentence ranges for the substantive offenses; and (3) the presence of mandatory minimums and enhancements. Finally, each of these three attributes of the drug sentencing scheme interacts with the Habitual Felony Offender Act to create further burdens on both those convicted of drug crimes and Alabama’s criminal justice and penal systems.

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<sup>52</sup> LA. CODE § 12-25-31(a) (2004 Supp.).

<sup>53</sup> LA. CODE § 12-25-34(a)(3). (2004 Supp.).

<sup>54</sup> LA. CODE § 12-25-34(a)(4) (2004 Supp.).

<sup>55</sup> LA. CODE § 12-25-36 (2004 Supp.).

<sup>56</sup> LA. SENTENCING COMM’N, 2004 ANNUAL REPORT APPENDIX 1-34 (2004).

<sup>57</sup> LA. SENTENCING COMM’N, 2004 ANNUAL REPORT i. (2004).

<sup>58</sup> *Id.*

Controlled substance offenses are virtually unique in that inchoate crimes (i.e. solicitation, attempt and conspiracy) are punished as though the crime were successfully completed.<sup>59</sup> Only murder receives the same kind of treatment<sup>60</sup> and even then what otherwise would amount to a capital crime can at most be punished as a Class A felony if it remains inchoate.<sup>61</sup> In every other instance, the inchoate offense is punished at one level lower than is the underlying substantive offense.<sup>62</sup> Naturally, by increasing the severity of inchoate offenses, the Alabama drug sentencing regime administers longer punishments than would otherwise be the case.

In addition, Alabama’s drug statutes provide for strict mandatory minimums for a variety of offenses. Most strikingly, trafficking in any controlled substance carries a series of mandatory minimums, ranging from three years for the lowest range up to life without the possibility of parole for the highest tier.<sup>63</sup> A five year mandatory enhancement follows upon a finding that the defendant possessed a firearm during commission of the acts that led to the trafficking conviction.<sup>64</sup> Sentences for trafficking are further lengthened because they are not subject to the general policies of probation, parole or good time reduction; an inmate convicted of drug trafficking must remain in prison for the full duration of the relevant mandatory minimum or fifteen years whichever is shorter.<sup>65</sup>

There are additional mandatory add-ons that can further augment a drug sentence (whether it is trafficking or a mere distribution charge) to extremes: conducting a drug sale within a three-mile radius of either a school or a public housing project triggers a five year mandatory minimum to be tacked on top of the sentence for the underlying offense.<sup>66</sup> These

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<sup>59</sup> LA. CODE §§ 13A-12-202, 203, 204 (1994).

<sup>60</sup> LA. CODE §§ 13A-4-1(f), 2(d), 3(g) (1994).

<sup>61</sup> *See id.*; ALA CODE § 13A-5-40 (1994) (outlining capital offenses); ALA. CODE § 13A-6-2 (1994) (explaining the two possible sentences available for capital crimes).

<sup>62</sup> LA. CODE §§ 13A-4-1, 2, 3 (1994) (defining solicitation, attempt and conspiracy).

<sup>63</sup> *See* Appendix II, Drug Trafficking Sentencing Scheme.

<sup>64</sup> LA. CODE § 13A-12-231(13) (1994).

<sup>65</sup> LA. CODE § 13A-12-232 (1994).

<sup>66</sup> LA. CODE §§ 13A-12-250, 270 (1994).

two mandatory provisions are not mutually exclusive, so that in the event that both are implicated by the circumstances of a sale, the defendant faces a ten year addition to any sentence she would otherwise receive.<sup>67</sup>

Mandatory minimums are in turn impacted by the triggering thresholds that are established by the state. Thus, for instance, because Alabama attaches a mandatory minimum to the crime of drug trafficking (including, in some instances, exposing first-time offenders to mandatory life without the possibility of parole sentences), the fact that Alabama's thresholds for the offense are lower than many nearby states undoubtedly increases the number of people who fall within their scope. This leads to more people serving more time in prison.

Alabama is not alone in its recent trend of imposing mandatory sentences on those convicted of various drug crimes.<sup>68</sup> However, there has been a great deal of scholarly and professional refutation of the effectiveness of mandatory minimums. The American Bar Association recently recommended that all jurisdictions repeal their mandatory minimums, "so that sentencing courts may consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence."<sup>69</sup> Many judges<sup>70</sup> and academics<sup>71</sup> have also questioned the efficacy and fairness of such devices.

## 2. Habitual Felony Offender Act

The HFOA, low quantity thresholds for triggering Alabama's felony drug statutes, and

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<sup>67</sup>See *id.*; *Wilson v. State*, 830 So. 2d 765, 767 (Ala. Crim. App. 2001).

<sup>68</sup>See, e.g., Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 (2001).

<sup>69</sup>JUSTICE KENNEDY COMM'N, AM. BAR ASS'N, REPORT TO THE ABA HOUSE OF DELEGATES 26 (2004).

<sup>70</sup>See, e.g., John Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 ND J. L. ETHICS & PUB POL'Y 311, 312-14 (2004) (explaining that many federal judges dislike the widespread use of mandatory minimums in the Federal Sentencing Guidelines because they serve little deterrent effect and produce unduly harsh sentences); Paul Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

<sup>71</sup>See, e.g., Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

the expansive scope given to inchoate crimes means that those engaged in drug-related activity face particularly severe sentences. The drug trafficking statutes present a particular problem vis-a-vis the HFOA. First of all, trafficking is a Class A felony, so if a person has prior felony convictions and is thereafter found guilty of a trafficking charge, he is immediately subject to a sentence of life or life without parole.<sup>72</sup> As previously mentioned, the threshold for triggering the trafficking statutes are quite low—mere possession of one kilogram of marijuana, twenty-eight grams of cocaine or four grams of morphine is sufficient to be convicted as a trafficker.<sup>73</sup> Finally, because the HFOA counts all prior felonies equally, regardless of the severity or recency of the offense, a defendant’s sentence can be escalated by offenses that have no reasonable

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<sup>72</sup>See, e.g., *Ex parte State (in re Kirby v. State)*, No. 1030128, 2004 WL 1909345, at \*1 (Ala. Aug. 27, 2004).

<sup>73</sup>LA. CODE § 13A-12-231 (1994).

*Case Study: Lydia Diane Jones*

Lydia Diane Jones's story illustrates the excessive sentences that judges are often forced to mete out to undeserving defendants. In November 1997, Ms. Jones moved herself and her children out of her apartment and into her parents' home in order to provide round-the-clock care for her terminally ill father. After the 42-year-old single mother vacated the apartment, Louis "Ronnie" Cook, a former boyfriend of Ms. Jones, began occupying it. Cook was actively involved in a massive state-wide drug operation in which he acquired, distributed and sold marijuana and cocaine in both Northern Alabama and the Montgomery area and he began using the apartment to stash his drugs.

On the morning of December 10, 1997, Ms. Jones returned to her former residence to gather clothing left behind during her move. Officers from a joint federal and state narcotics task force that had been monitoring Cook's activities made an unannounced forced entry into the apartment, pursuant to a warrant authorizing a search for marijuana and other evidence of illegal drug activity. The officers found Ms. Jones inside, and detained her at gunpoint. The officers interrogated Ms. Jones but did not arrest her despite finding marijuana, cocaine and other drug evidence in the apartment. Instead, one of the officers gave Ms. Jones his card and asked her to call him if she could provide any helpful information.

Four months after the raid, Ms. Jones was charged with trafficking in cannabis and possession of cocaine. At trial, Ms. Jones was represented by attorneys who also represented Cook, who had been charged with federal drug offenses. While the defense attorneys initially intended to have Cook admit at Ms. Jones's trial that the drugs found in the apartment were entirely his, they abandoned this strategy when the State made clear it would prosecute Cook if he testified to any wrongdoing. Ms. Jones's trial proceeded, despite the fact that the overwhelming burden of the conflict of interest experienced by her attorneys denied Ms. Jones any chance of mounting an effective defense, and she was convicted on both counts.

For seventeen years prior to her conviction, Ms. Jones had maintained a law-abiding lifestyle, raising her children as a single mother and avoiding any kind of legal trouble. Seventeen years earlier, Ms. Jones had received three felony convictions—one count of robbery and two counts of possession of a forged instrument—all stemming from a single incident in which her ex-husband had stolen a woman's purse and he and Ms. Jones had written forged checks to a grocery store for food. Notwithstanding the fact that Ms. Jones served only a year on all three counts, after her 1998 trial she was nonetheless found to be a fourth-felony offender under the Habitual Felony Offender Act. Because the trafficking charge was a Class A felony, she received the only sentence available under the statute: life in prison without the possibility of parole. Denied relief on direct appeal, Ms. Jones subsequently filed a Rule 32 petition, which was dismissed by the circuit court. Her case is now pending at the Court of Criminal Appeals.

bearing on her danger to society or likelihood of committing future offenses.<sup>74</sup> The trafficking statutes also potentially are implicated in the HFOA scheme by virtue of being "violent" offenses. The language of the 2001 amendment to the HFOA, which calls for the provision of section 13A-5-9 to be applied retroactively, applies only to nonviolent convicted

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<sup>74</sup>See ALA. SENTENCING COMM'N, 2004 ANNUAL REPORT 12 (2004) (noting that "Alabama's repeat offender statute is unlike the vast majority of states inasmuch as there is no limitation according to type or degree of the offense or decaying provision (time limits for consideration of the prior convictions).").

offender[s].”<sup>75</sup> While common sense and practical experience would suggest that a trafficking violation is not necessarily (or even generally) “violent” in any meaningful way,<sup>76</sup> the Legislature has included drug trafficking in a statutory definition of “violent offense.”<sup>77</sup> Though this definition is not found within the section pertaining to the HFOA, and thus does not directly control, there can be little doubt that the State will make an effort to identify individuals with drug trafficking convictions as “violent offenders” and then try to exclude them from the benefits of sections 13A-5-9 and 13A-5-9.1.

### 3. Internal Case Study: DUI v. Marijuana Possession

A look at the way in which Alabama sentences drunk drivers as opposed to those convicted of possession of marijuana is instructive; it provides a glimpse both at how the current sentencing regime is racially discriminatory and how sentences do not currently correspond to any reasonable measure of risk to society.

Felony DUI and felony marijuana possession are class C felonies, carrying with them a sentence of one year and one day to ten years.<sup>78</sup> A closer examination reveals a number of critical distinctions, however. First, driving under the influence only becomes a class C felony on the *fourth* conviction; prior to that, DUI convictions are treated as misdemeanors, exposing the defendant to, at most, a year in the county or municipal jail.<sup>79</sup> Conversely, possession of marijuana becomes a felony when an individual either has a previous misdemeanor conviction of possession or when he possesses an unspecified quantity greater than that deemed to be for personal use only.<sup>80</sup>

The characteristics of those convicted of felony DUI and marijuana possession are also

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<sup>75</sup> LA. CODE § 13A-5-9.1 (2003 Supp.).

<sup>76</sup>The case of Theresa Wilson, a first time offender who received life without parole for selling a vial of morphine, discussed *infra* at Section II.B, is illustrative on this point.

<sup>77</sup> LA. CODE § 12-25-32(13) (2004 Supp.).

<sup>78</sup>See ALA. CODE § 32-5A-191(h) (felony DUI); ALA. CODE § 13A-12-213 (1994) (first degree possession of marijuana); ALA. CODE § 13A-5-6 (sentences for felony convictions).

<sup>79</sup> LA. CODE § 32-5A-191(e)-(g) (1994).

<sup>80</sup> LA. CODE § 13A-12-213 (1994).

striking. Statistics from the Alabama Department of Corrections indicate that in fiscal year 2003, 311 black males were incarcerated for marijuana possession compared to 194 white males. In total black males accounted for 58.5% of the 532 inmates serving time for marijuana possession, while white males accounted for only 36.5% of the same population.<sup>81</sup> As seen in the chart below, the numbers are even more stark with regard to felony possession of a controlled substance—those serving time for these possession charges are overwhelmingly African-American. In contrast, felony DUI is predominately a white crime insofar as the Department of Corrections population is concerned: 507 of the 687 (73.8%) inmates incarcerated for felony DUI in 2003 were white males, as compared to only 153 (22.3%) black males. There is clearly a significant racial attribute, at least as far as sentencing goes, with regard to drug possession as opposed to felony DUI.

As the table below illustrates, the average sentence length for possession crimes differs dramatically from that of felony DUI convictions. While possession of marijuana and possession of controlled substances sentences averaged 101 and 103 months, respectively, average DUI sentences were nearly half that duration. While disaggregated statistics for the sentence length of African-American and white inmates were unavailable for this report, the previously discussed racial characteristics of these crimes is highly suggestive of a strong racially discriminatory impact in the sentencing schemes for these crimes. To wit, the substance-abuse crimes more strongly identified with African Americans are punished more severely than the DUI offenses that are primarily committed by whites. While there could be a racially-neutral explanation for this discrepancy, the most obvious candidate—public welfare and safety—can seemingly be dismissed out of hand. In 2000, there were 399 fatalities in alcohol-related car accidents in Alabama,<sup>82</sup> a number larger than the total number of homicides (314) in the state that same year.<sup>83</sup> While it is harder to measure the total cost of simple drug possession, a recent study estimated that for 2000, nationwide, some 17,000 deaths could be attributed to all direct and indirect results of illicit drug use, as compared to 85,000 for alcohol consumption.<sup>84</sup> Clearly

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<sup>81</sup> ALA. DEP'T OF CORR., ANNUAL REPORT FISCAL YEAR 2003 (2003).

<sup>82</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMINISTRATION, IMPAIRED DRIVING IN THE UNITED STATES: ALA. (2002), <http://www.nhtsa.dot.gov/people/injury/alcohol/impaired-drivingusa/AL.pdf>.

<sup>83</sup> ALA. CRIMINAL JUSTICE INFO. CTR., 2003 CRIME IN ALABAMA 20 (2003), <http://acjic.state.al.us/sac/cia2003.pdf>.

<sup>84</sup> Ali Mokdad et al., *Actual Causes of Death in the United States 2000*, 291 J. OF THE AM. MEDICAL ASS'N 1238, 1240 (2004), <http://www.csdp.org/research/1238.pdf>.

it strains credulity to suggest that the disparity between DUI and drug possession charges can be explained by the greater danger posed by controlled substances as compared to alcohol.

**Comparison: Simple Drug Possession v. Felony DUI**

Crime	Total DOC Population 2003	African American Males		White Males		Avg. Sentence Length (Total DOC Population) (Months)
		#	%	#	%	
Possession of Marijuana, First Degree	532	311	58.5	194	36.5	101
Possession of Controlled Substance	2141	1230	57.4	685	32.0	103
Felony DUI	687	153	22.3	507	73.8	58

The proposed voluntary sentencing guidelines propagated by the Alabama Sentencing Commission make some headway in addressing the disparities that exist under the current sentencing regime. Most notably, on the worksheet designed to determine whether a prison sentence is appropriate or not, simple possession of either marijuana or another controlled substances is worth only one point, while a felony DUI is worth four points; a total of eight or more points indicates that a prison sentence would be warranted.<sup>85</sup> Furthermore, the worksheet to be used for calculating the length of sentence under the voluntary guidelines assigns marijuana possession and felony DUIs the same number of points (42), while possession of a controlled substance receives somewhat more (71). For someone with no prior felonies, the recommended range for a first time felony possession of marijuana, first time possession of a controlled substance and a first time felony DUI would each be 13-32 months under the guidelines.<sup>86</sup>

Of course, reality may well prove that such apparent parity is just an illusion. Most importantly, the guidelines are voluntary, so there is no reason that a judge would feel compelled to sentence in a manner any different than she already practices. And even if a judge did sentence within the guidelines, the disparities between the minimum and maximum sentence available can be substantial. Even at the lowest levels, the difference between a minimum of thirteen months and a maximum of thirty-two months is significant; at higher levels the gap grows larger: 18-97 months for a mid-range offense, 45-130 months at the upper end of the

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<sup>85</sup> See ALA. SENTENCING COMM’N, 2004 ANNUAL REPORT A-29 (2004).

<sup>86</sup> *Id.* at A-31-32.

spectrum.<sup>87</sup> Furthermore, the above-mentioned disparities already exist within a system where there are (broad) guidelines—because both felony marijuana possession and felony DUI are Class C felonies, they both are deemed to warrant a sentence between a year and one day and ten years.<sup>88</sup> Yet, as discussed above, this does not prevent judges from routinely sentencing one class of defendants (possessors of marijuana, who are disproportionately African-American) to more severe sentences than another class of defendants (drunk drivers, who are disproportionately white).

### B. Comparison to Other Jurisdictions

Alabama is among the harshest states with regard to the sentencing of those convicted of drug crimes. As of 1997, the average sentence length for drug offenses was 97.10 months, a 50% increase over 1983. This places Alabama fifth among the thirty-five states for which data are available in terms of the severity of drug sentences, 41.72 months above the national average of 55.38 months.<sup>89</sup>

The features of Alabama’s sentencing scheme discussed above are not unique to that state. It is not uncommon for states to expand the scope of inchoate offenses,<sup>90</sup> make use of mandatory minimums, and impose substantial sentences on offenders. Nevertheless, as suggested by the charts below, Alabama clearly tends towards more severe sentences than its neighbors. The differences are most stark with respect to the trafficking statutes of the various states. In the chart below, which details the sentencing schemes for marijuana trafficking in Alabama and four nearby states, a couple of clear trends emerge. First, it is notable that the threshold in the other states is substantially higher in Alabama. While one kilogram of marijuana is sufficient to be labeled a trafficker in Alabama, Georgia requires ten pounds,

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<sup>87</sup>*Id.* at A-32-33

<sup>88</sup> LA. CODE § 13A-5-6 (1994).

<sup>89</sup> ERA INST. OF JUSTICE, ALABAMA DATABOOK: A SUMMARY OF CRIMINAL JUSTICE STATISTICS FOR ALABAMA AND THE UNITED STATES, 57 (2002).

<sup>90</sup>*See, e.g.*, FL. ST. § 893.135 (extending the same degree of culpability to those who conspire to commit trafficking as to those actually convicted of trafficking); LA. R.S. § 40:979 (attempt and conspiracy in the same manner as the underlying drug offense, with some limitations on the length of actual sentence). During the 1980s and 1990s, forty-nine states instituted some form of mandatory minimums covering drug and violent crimes. *See* Table: Trafficking in Marijuana, *infra*.

Florida twenty-five and Louisiana sixty pounds for the same classification. While Tennessee's threshold is exceptionally low, that state's scheme is still less severe than Alabama's because (a) the mandatory minimum is lower; (b) the maximum sentence is lower; and (c) Tennessee does not follow Alabama in proscribing parole, probation or early release for good time for drug traffickers.

Further study of the trafficking chart shows other ways in which Alabama is clearly more severe in its sentencing policies than the other states. In no other state is a trafficker exposed to a life sentence, nor is life without the possibility of parole an option. Furthermore, with the exception of Tennessee, the quantities needed to trigger each level of the trafficking statute are smaller under Alabama's statute than the other states. As noted above, despite the lower thresholds under Tennessee's statute, the net sentencing effect of Alabama's scheme is more pronounced, since the mandatory minimum required and the maximum allowed is higher at every level. Alabama's sentencing regime with regard to trafficking in marijuana is clearly the most punitive in the region.

Not surprisingly, when compared to other states, Alabama's sentencing policies are severe not only with regards to trafficking in marijuana but for other drugs as well. A case that was instrumental in shining a spotlight, at least for a time, on the iniquities inherent in the current system was that of Theresa Wilson, a first-time offender who was convicted of selling ninety-six grams of liquid morphine mixture to an undercover narcotics officer.<sup>91</sup> Wilson was a thirty-year-old junior high school dropout and mother of two who, when unable to pay a \$95 electricity bill, sold a vial of morphine to an undercover officer for \$150 – far below its \$10,000 street value.<sup>92</sup> Nevertheless, Wilson fell within the ambit of Alabama's "drug baron" statute, which called for a mandatory sentence of life without the possibility of parole.<sup>93</sup> While the sentence was eventually overturned on the grounds that the statute was unconstitutional as *applied to Wilson*, the Court of Criminal Appeals left the sentencing scheme untouched.<sup>94</sup> As part of its analysis, the CCA examined the severity of Alabama's morphine trafficking law as compared to those of other states. The court found that of the states it considered, none attached a sentence of life without the possibility of parole for such an offense. Florida's statute

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<sup>91</sup> *Crime and Punishment: Wilson Case is Symptom of System in Need of Reform*, BIRMINGHAM NEWS, [http://www.ago.state.al.us/issue/sub/sentence\\_10.htm](http://www.ago.state.al.us/issue/sub/sentence_10.htm) (Dec. 2, 1999).

<sup>92</sup> Eric Slater, *The Nation: Theresa Wilson*, L.A. TIMES, May 2, 2002, A14.

<sup>93</sup> See ALA. CODE § 13A-12-231 (1994).

<sup>94</sup> *Wilson v. State*, 830 So. 2d 765, 781 (Ala. Crim. App. 2001).

called for a mandatory minimum of twenty-five years in prison for the sale of more than twenty-eight grams but less than thirty kilograms of morphine. Similarly in Georgia, trafficking in more than twenty-eight grams of morphine carried a twenty-five year minimum sentence. In short, both states would have imposed a harsh sentence on Wilson under the circumstances, but neither they nor any other state would have placed her behind bars for the rest of her life on account of a single transaction. Notably, when given the opportunity to exercise its discretion, the trial court released Wilson after she had served five years of her sentence, giving her three additional years of probation.<sup>95</sup>

### Simple Possession of Marijuana

State	Statute	Quantity	Sentence
Alabama	§ 13A-12-213 (1 <sup>st</sup> Degree)	Any amount <sup>a</sup>	1 year 1 day-10 years
	§ 13A-12-214 (2 <sup>nd</sup> Degree)	Any amount	≤ 1 year
Florida	§ 893.02	< 20 grams	≤ 1 year
		> 20 grams < 25 pounds	≤ 5 years
Georgia	§16-13-31	< 10 pounds	1 year-10 years
Louisiana	§ 40:966	First Offense	≤ 6 months
		Second Offense	≤ 5 years
		Third Offense	≤ 20 years
Tennessee	§ 39-17-418	First/Second Offense	≤ 11 months 29 days
		Third Offense	1-6 years

<sup>a</sup> An individual can be charged with first degree possession in Alabama if he either possesses marijuana other than for personal use or if he has previously been convicted of personal-use possession.

### Trafficking in Marijuana

State	Statute	Quantity	Sentence
Alabama	§ 13A-12-231	> 2.2 pounds < 100 pounds	3 years-life <sup>a</sup>

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<sup>95</sup>Carol Robinson, *Sentenced to Life Without Parole for a First-time Drug Offense, a Mother of Two Makes Plea for - and Is Granted - Mercy*, BIRMINGHAM NEWS, May 2, 2002.

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		≥ 100 pounds < 500 pounds	5 years-life <sup>a</sup>
		≥ 500 pounds < 1000 pounds	15 years-life <sup>a</sup>
		≥ 1,000 pounds	Life without Parole
Florida	§ 893.105	> 25 pounds < 2,000 pounds	3-30 years <sup>a</sup>
		≥ 2,000 pounds < 10,000 pounds	7-30 years <sup>a</sup>
		≥ 10,000 pounds	15-30 years <sup>a</sup>
Georgia	§ 16-13-31	> 10 pounds < 2,000 pounds	5-30 years <sup>a</sup>
		≥ 2,000 pounds < 10,000 pounds	7-30 years <sup>a</sup>
		≥ 10,000 pounds	15-30years <sup>a</sup>
Louisiana	§ 40:966	> 60 pounds < 2,000 pounds	5-30 years <sup>a</sup>
		≥ 2,000 pounds < 10,000 pounds	10-40 years <sup>a</sup>
		≥ 10,000 pounds	25-40 years <sup>a</sup>
Tennessee <sup>b</sup>	§ 39-17-417	≥ .5 ounces ≤ 10 pounds	1-6 years
		> 10 pounds ≤ 70 pounds	2-12 years
		> 70 pounds ≤ 300 pounds	8-30 years
		> 300 pounds	15-60 years

<sup>a</sup> A person convicted under this statute is not eligible for parole until the entire period of the minimum has passed. In Alabama, an inmate becomes eligible for parole after the minimum has run or fifteen years have passed, which ever comes first.

<sup>b</sup> Tennessee’s statute does not expressly address “trafficking;” with the exception of the first level, which has a very low threshold, however, it is similar in kind to the trafficking statutes of the other states examined, and is thus included in this chart.

C. Recent Developments

Even though Alabama’s drug laws are more severe than those of its neighbors, that has not stopped legislators from trying to further strengthen them. Of particular note are bills proposed in 2000 and 2001, decrying the fact that crack and powder cocaine were treated the same. The bills sought to both reduce *and* differentiate the thresholds needed for a person to qualify as a drug trafficker. Where once a person violated the lowest level of the cocaine trafficking statute if he had twenty-eight grams of cocaine in any form, fourteen grams of *powder* cocaine—or a mere 250 milligrams of *crack* cocaine—would have been sufficient for a trafficking conviction under the proposed law.<sup>96</sup> In light of the well-documented racial implications of such a bifurcated cocaine policy,<sup>97</sup> as well as the extremely harsh drug trafficking laws in place in Alabama,<sup>98</sup> it is hard to imagine what legitimate state interest it was furthering. That the proposal did not pass is somewhat reassuring; that it sailed through the House on a vote of 88-0 with one abstention and passed out of Judiciary Committee in the Senate is cause for concern.<sup>99</sup>

### III. NON-VIOLENT CRIMES

#### A. Current State of the Law

The term “non-violent crimes” is itself ambiguous and is perhaps best understood to occupy the space remaining after violent crimes on the one hand and drug-related crimes on the other have been accounted for. Setting aside the way in which non-violent property crimes frequently are closely related to drug use,<sup>100</sup> it turns out that identifying what is a violent crime

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<sup>96</sup>See HB 499, 2000 Reg. Sess. (Ala. 2000); HB 10, 2001 Reg. Sess. (Ala. 2001).

<sup>97</sup>See, e.g., JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORT TO THE ABA HOUSE OF DELEGATES 28, <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> (2004); see generally, Kathleen Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665 (2003).

<sup>98</sup>See Section II.B, *supra*.

<sup>99</sup>See HB 10, 2001 Reg. Sess. (Ala. 2001) (History) <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp?SESSION=1016> (last visited Feb. 16, 2005).

<sup>100</sup>A 1997 study conducted by the Bureau of Justice Statistics (BJS) found that 37% of property offenders reported that they had committed their current offense while they were under the influence of drugs. Likewise, a 1999 BJS found that 24% of drug and property offenders were incarcerated for a crime committed to raise money for a drug habit. BUREAU

and what is a non-violent crime is not as straightforward as it might appear. This ambiguity becomes important because, while each offense has its own statutorily-defined sentencing range, classifications such as “violent” and “non-violent” become relevant in the context of the Habitual Felony Offender Act (“HFOA”)<sup>101</sup> as well as the increasing attention paid toward incapacitating violent offenders.<sup>102</sup>

1. Range of Sentences

As noted above, non-violent, non-drug offenses are almost universally excluded from the Class A felony classification, leaving the remainder of the spectrum of offense classifications, ranging from Class C misdemeanors to Class B felonies.

2. Habitual Felony Offender Act<sup>103</sup>

As with all other sentencing categories, non-violent crimes are impacted by the HFOA. An individual who commits only non-violent and non-drug-related crimes would most likely not be eligible for the most extreme sanctions under the HFOA, though that has very little to do with the manner in which that statute works, and more to do with the general sentencing structure assigned to the various class of felonies. Virtually all Class A felonies, for instance, are either violent crimes (e.g. murder, assault, rape, kidnaping) or drug-related (e.g. drug-trafficking); non-violent crimes that don’t involve drugs are, with one or two possible exceptions, Class B and C felonies or misdemeanors. As noted above, the current version of the HFOA does not distinguish between the type or degree of a predicate offense, so long as it rises to the level of a felony (with the sole exception that those who have a prior Class A felony conviction receive a mandatory sentence of life without the possibility of parole if their fourth conviction is also a Class A felony);<sup>104</sup> therefore, a defendant with three non-violent prior felony convictions (even if they are Class C offenses) still faces the prospect of receiving essentially a life sentence: from

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OF JUSTICE STATISTICS, DRUG USE AND CRIME, <http://www.ojp.usdoj.gov/bjs/dcf/duc.htm> (last revised on Jan. 13 2005).

<sup>101</sup> LA. CODE § 13A-5-9 (2003 Supp.).

<sup>102</sup> See, e.g., ALA. CODE § 12-25-32 (2004 Supp.).

<sup>103</sup> For a discussion of the general history and evolution of the Habitual Felony Offender Act, see section II.A.2, *supra*.

<sup>104</sup> See ALA. CODE § 13A-5-9 (2003 Supp.).

fifteen to ninety-nine years for a Class C felony, twenty years to life for a Class B felony, and life or life without parole for a Class A felony.<sup>105</sup>

B. Comparison to Other Jurisdictions

Alabama is ranked third among all states for which data are available with regards to the severity of its sentences for non-violent property crimes. In 1997, the average length of sentence imposed for such a conviction was 108.52 months, nearly twice the national average of 53.17 months. And while the national average has remained fairly stable from 1988 (around fifty-nine months) to present, Alabama's sentences have increased dramatically from the 1986 level of eighty-one months; current sentence lengths represent a 33% increase from those earlier levels.<sup>106</sup>

C. Recent Developments/Attempts at Reform

In contrast to the realm of drug crimes, the Alabama Legislature has shown some recent willingness to address outdated and exceptionally low thresholds for a whole host of property and other non-violent offenses. In 2003 Representative Marcel Black introduced a bill to amend the minimum thresholds with respect to criminal mischief (first through third degrees), theft of property (first through third degrees), theft of lost property (first through third degrees), theft of services (first through third degrees), receipt of stolen property (first through third degrees), and charitable fraud (first through third degrees) among others.<sup>107</sup> The bill passed overwhelmingly in both houses of the Legislature,<sup>108</sup> with minor amendments,<sup>109</sup> and was

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<sup>105</sup> *Id.*

<sup>106</sup> ERA INST. OF JUSTICE, ALABAMA DATABOOK: A SUMMARY OF CRIMINAL JUSTICE STATISTICS FOR ALABAMA AND THE UNITED STATES, 55 (2002).

<sup>107</sup> HB 491, 2003 Reg. Sess. (Ala. 2003), <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp?SESSION=1026> (last visited on Feb. 16, 2005).

<sup>108</sup> *See id.*

<sup>109</sup> The only changes were the result of a compromise with the Alabama Retail Association, which convinced lawmakers to keep the original thresholds for repeat offenders for theft of property (second degree) and receipt of stolen property (second degree). *See* Mike Cason, *Felony Theft Bill Clears First Hurdle*, MONTGOMERY ADVERTISER, Apr. 24, 2003, [http://sentencingcommission.alacourt.gov/News/news\\_art\\_montg\\_4.24.03.b.html](http://sentencingcommission.alacourt.gov/News/news_art_montg_4.24.03.b.html).

enacted into law that year.<sup>110</sup> The bill can be seen as a substantial improvement; though it did virtually nothing to change the substantive language of the offenses, by increasing the threshold to trigger the various degrees of each crime, presumably significantly fewer people will come within their scope.

#### IV. VIOLENT CRIMES

##### A. Current State of the Law

As noted above, determining which offenses are “violent crimes” is not as straightforward as it might otherwise seem, and yet the distinction is of critical importance in light of provisions of the section 13A-5-9.1, which amends Alabama’s Habitual Felony Offender Act to allow for the re-sentencing of non-violent offenders who previously received mandatory sentences of life without the possibility of parole.<sup>111</sup> The Legislature recently attempted to define violent offenses.<sup>112</sup> While the list of offenses generated by the Legislature pertains only to the Sentencing Reform Act, it would not be surprising to see the State advance an argument that a person convicted of any of the offenses detailed in section 12-25-32(13) should be ineligible for relief under section 13A-5-9.1. Indeed, in at least one case, the State suggested that *any* Class A felony was *ipso facto* a violent offense.<sup>113</sup> This attempt at an expansive definition seems to run contrary both to common sense and the federal government’s own understanding of what constitutes a “violent offense.”<sup>114</sup>

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<sup>110</sup>2003 Ala. Acts 355.

<sup>111</sup> LA. CODE § 13A-9-5.1 (2003 Supp.).

<sup>112</sup>See ALA. CODE § 12-25-32(13) (2004 Supp).

<sup>113</sup>See State’s Motion to Dismiss the Defendant’s Motion for Reconsideration, Reduction and/or Re-Sentencing, *Norris v. Alabama*, CC-93-0786 (Tenth Jud. Cir. filed Nov. 12, 2004) (making the claim that an individual cannot be re-sentenced under section 13A-5-9.1 because his most recent conviction was for drug trafficking, a Class A felony, and that all Class A felonies should be considered “violent offenses.”).

<sup>114</sup>In passing the 1994 Crime Act and the subsequent amendment in 1996, Congress earmarked federal funds for states that were willing to implement some measure of a truth in sentencing regime. The central prerequisite for qualifying for this money was that states commit to imprison their violent offenders for a specified period of time. In defining which offenders fell within the purview of this requirement, the legislation specified that the truth in sentencing

### Range of Sentences

Exactly what constitutes the range of sentences for violent offenses depends on what is classified as “violent.” Determining what is violent is not as transparent as it might at first appear, and there are widely differing opinions on the matter, even within the Legislature.<sup>115</sup> Most of the violent offenses, regardless of definition, are felonies, with sentences ranging from one year and one day to ten years for a Class C felony, to ten years to life or life without parole for Class A felonies. A person convicted of capital murder can be sentenced only to either life in prison without parole or death.<sup>116</sup>

#### B. Comparison to Other Jurisdictions

With respect to the sentences that are available for the most severe violent crimes, there is little variation among states. That does not mean, however, that the statutes are enforced in a similar manner across jurisdictions, and indeed the data suggest quite the contrary. With respect to violent crime, Alabama imposes the harshest sentences of any state for which data are available. In 1997, sentences in Alabama for crimes of violence averaged 231.53 months in length, almost double the national average of 117.72.<sup>117</sup>

#### C. Recent Developments/Attempts at Reform

Perhaps more than the other two categories of offenses, the tendency in dealing with

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scheme should apply to “part 1 violent crimes,” which are defined as murder, non-negligent manslaughter, rape, robbery and aggravated assault. WILLIAM J. SOBOLE ET AL., THE INFLUENCE OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS 4 (2002).

<sup>115</sup> Compare SB 527, 2001 Reg. Sess. (Ala. 2001) (including in its definition of ‘violent’ murder, manslaughter, sodomy, sexual torture, and the first degree forms of: assault, kidnapping, rape, sexual abuse and arson) with ALA. CODE § 12-25-32 (2004 Supp.) (including, *inter alia*, all of the offenses from SB 527 but adding criminally negligent homicide, treason, promoting prostitution I, production of obscene matter involving a minor, drug trafficking, child and elder abuse, and second degree assault, kidnapping, rape, arson and robbery).

<sup>116</sup> See ALA. CODE §§ 13A-5-6, 13A-6-2 (1994).

<sup>117</sup> ERA INST. OF JUSTICE, ALABAMA DATABOOK: A SUMMARY OF CRIMINAL JUSTICE STATISTICS FOR ALABAMA AND THE UNITED STATES 53 (2002).

violent crimes has been for the Legislature to seek to make more offenses eligible for longer sentences. To a degree this makes sense; a legitimate purpose of the criminal justice system is to reduce violent crime, and there appears to be some positive correlation between imprisoning violent offenders and the reduction of violent crime rates.<sup>118</sup> Problems arise, however, when criminal justice policy decisions are based on little more than anecdotal evidence or a high-profile (and therefore almost by definition unusual) case that attracts the attention of the media and politicians alike. Violent crimes in particular are prone to capturing attention due to their often gory or otherwise shocking details. The tendency for legislators and the public to react to high-profile cases in a knee-jerk fashion may be no more clearly illustrated than in the area of capital crimes. A decision to incarcerate those perceived to be violent offenders in order to reduce violent crime at least has an air of plausibility to it.<sup>119</sup> Responding to the outcry over a high-profile case by seeking to expand the scope of a capital punishment statute that has no measurable deterrent value<sup>120</sup> is little more than political grandstanding. And yet that seems to be the dominant trend in dealing with violent offenses (and even some non-violent drug offenses).

### 1. Capital Punishment Legislation

There are numerous examples spanning back over more than a decade of the efforts of law enforcement and some legislators to expand the scope of the capital offenses statute, section 13A-5-40 of the Alabama Code. In 1992, then-Attorney General Jimmy Evans sponsored a package of bills that sought to extend the death penalty to four new offenses: murdering someone under fourteen; shooting and murdering someone inside a dwelling; shooting and murdering someone inside a motor vehicle; and murder during a drive-by shooting.<sup>121</sup> Typical of the kind of publicity-garnering move associated with the announcement of such a bill, Evans

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<sup>118</sup>See, e.g., WASH. STATE INST. FOR PUB. POLICY, *THE CRIMINAL JUSTICE SYSTEM IN WASHINGTON STATE* 7-8 (2003) (explaining that in 2001 in Washington State, the incarceration of one additional violent offender netted a decrease of 2.5 violent crimes).

<sup>119</sup>See *id.*

<sup>120</sup>Ronald Tabak, *How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System: How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1431-32 (1998).

<sup>121</sup>Dana Beyerle, *Anti-Gang Crime Bill Would Expand Offenses That Rate Death Penalty*, TIMES DAILY (Florence, Ala.), Feb. 27, 1992, at 1A.

was joined by the mother of a victim of a drive-by shooting.<sup>122</sup> Rather than making any kind of reference to general trends or any specific explanation of how the bills would make the public safer, Evans relied on the emotional appeal of a single (and understandably grieving) mother, and made the comment that the bill “is aimed at gangs who fire into our streets shooting innocent children and bystanders.”<sup>123</sup> No mention was made of how frequently such events occurred or how likely it was that the perpetrators of such crimes would have been deterred by the bills in question. Ultimately, all of the provisions supported by Evans became law, and they remain a part of the capital statute.<sup>124</sup> That same year, a bill supported by then-Governor Guy Hunt to make a murder committed during a drug deal punishable by death failed to move out of the Senate.<sup>125</sup> Hunt also had shown continued support for a bill that would have removed the Court of Criminal Appeals from the death penalty appellate process, calling for all direct appeals to proceed directly to the Alabama Supreme Court.<sup>126</sup> It was not the first year such a bill was proposed,<sup>127</sup> and it would not be the last—every year up to the present a similar bill has been introduced.<sup>128</sup>

A number of additional efforts that ultimately have failed in adding to the list of capital crimes nevertheless are illustrative of the political process and sentencing. In 1993, a bill was introduced to provide for the death penalty in the event someone was killed during the course of a carjacking.<sup>129</sup> It was widely reported that this was a response to a high-profile murder

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<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>See ALA. CODE §§ 13A-5-40(15)-(18) (1994).

<sup>125</sup>Phillip Rawls, *Most Crime Bills Killed by Senate*, MOBILE PRESS, May 7, 1992.

<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup>See, e.g., Philip Rawls, *Speedier Appeal Bill Heads for Senate*, ASSOCIATED PRESS, June 8, 1995; Phillip Rawls, *Getting Tougher on Crime*, BIRMINGHAM POST-HERALD, Feb. 29, 1996; *Hundreds of Bills to Die in Special Session*, OPELIKA/AUBURN NEWS, Aug. 25, 1997; Phillip Rawls, *Republican Candidate Clash on Death Penalty Appeal Bill*, HUNTSVILLE TIMES, Mar. 5, 1998.

<sup>129</sup>Phillip Rawls, *Senate Passes Tough Anti-Carjacking Bill*, MOBILE REG., Feb. 26, 1993.

involving a federal agent.<sup>130</sup> Again, there was no indication that this was a measured response to a well-documented rise in a particular type of crime, nor was there any explanation of how the public would be made more safe than before. The sponsor was quoted as saying merely, “I asked an officer if it’s as bad as it seems, and he said, ‘It’s worse. If you knew how bad it was, you wouldn’t let your wife and daughter go shopping.’”<sup>131</sup> In this age where the media is quick to latch on to crime stories, it seems unlikely that the extent of danger could have reached such proportions without going reported. Either way, instead of a careful study on the matter, Senator Butch Ellis simply noted, “We hope it will be a deterrent.”<sup>132</sup> This un-critical approach to sentencing, particularly in connection with capital punishment, is both deeply troubling and all too common.

The 1996 legislative session saw then-Governor Fob James propose a crime package that included imposing the death penalty on those convicted more than once of being a “drug kingpin.”<sup>133</sup> The proposed package was advertised not only as being “one of the best and toughest in the United States” but also as capable of cutting costs.<sup>134</sup> That same year, a bill was proposed to make the killing of more than one person pursuant to one criminal act a statutory aggravator.<sup>135</sup> Once again, the bill was a response to a particular case, that of Terry Lee Ponder, which had seen the State’s efforts at execution frustrated by the absence of a corresponding statutory aggravator. In order to remedy this perceived gap in the law, the Attorney General who represented the State in Mr. Ponder’s case, Jeff Sessions, urged Representatives Tony Petelos and Neal Morrison to sponsor the bill.<sup>136</sup> Though the bill did not pass that year, it was incorporated into the Alabama Code in 1999.<sup>137</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Phillip Rawls, *Getting Tougher on Crime*, BIRMINGHAM POST-HERALD, Feb. 29, 1996.

<sup>134</sup> *Id.*

<sup>135</sup> Russ Corey, *Death Penalty Bill Viewed Cautiously*, TIMES DAILY, Nov. 30, 1996.

<sup>136</sup> *Id.*

<sup>137</sup> LA. CODE § 13A-5-40(9) (2003 Supp.).

In 1998, then-Governor Don Siegelman introduced legislation calling for the death penalty for those “repeatedly convicted” of sexual crimes against children.<sup>138</sup> Disregarding the vague language of the statute, and while acknowledging the profound public interest in protecting children from being victimized, the willy-nilly approach to crime seems epitomized by the legislation. Governor Siegelman also introduced a bill which would allow for “chemical castration” of repeat sex offenders.<sup>139</sup> The incongruity of two bills—one which apparently views sexual offenders as morally culpable, rational actors capable of being deterred and warranting the moral disapprobation of the public and which would put them to death because of it, the other apparently viewing sexual crimes as a medical problem, one which can only be managed through highly invasive medical procedures—apparently did not occur to the governor.

There has been no slackening of efforts to continue to extend the capital punishment statute. In 2000 an effort was made to create the offenses of “aggravated rape” and “aggravated sodomy,” which involved rape or sodomy in the first degree of a person twelve years or younger by a person twenty-one years or older. Both crimes would have been punishable by death, had they been enacted.<sup>140</sup> A 2003 bill would have made it a capital crime to murder someone in violation of a protection order.<sup>141</sup> As always, the crimes involved are tragic, but it is not clear what additional protections are ensured by either of these proposals.

The trend in capital sentencing legislation has not been entirely one-directional, though the proposed bills are truly nothing more than proposals. For each of the last several years, a small number of legislators has continued to advance bills seeking: a three year moratorium on the death penalty,<sup>142</sup> a prohibition of “judge-override” of a jury’s sentence,<sup>143</sup> a ban on the

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<sup>138</sup> Kendall Clinton, *Siegelman Wants Death Penalty for Child Molesters*, DOTHAN EAGLE, Jan. 27, 1998.

<sup>139</sup> *Id.*

<sup>140</sup> HB 175, 2000 Reg. Sess. (Ala. Feb 1, 2000); SB 180, 2000 Reg. Sess. (Ala. Feb. 1, 2000).

<sup>141</sup> SB 35, 2003 Reg. Sess. (Ala. Mar. 4, 2003).

<sup>142</sup> *See, e.g.*, SB 18, 2004 Reg. Sess. (Ala. Feb 3, 2004); SB 308, 2003 Reg. Sess. (Ala. Mar. 14, 2003); SB 86, 2002 Reg. Sess. (Ala. Jan. 8, 2002).

<sup>143</sup> *See, e.g.*, SB 601, 2001 Reg. Sess. (Ala. May 1, 2001); HB 823, 2000 Reg. Sess. (Ala. Apr. 4, 2000); HB 895, 2000 Reg. Sess. (Ala. Apr. 13, 2000).

imposition of the death penalty on minors,<sup>144</sup> and a ban on the execution of the mentally retarded.<sup>145</sup> None have passed (though the United State Supreme Court has rendered the issue of executing the mentally retarded moot and will soon weigh in on the question of executing minors).<sup>146</sup>

## 2. Non-Capital Legislation

There has been an interesting assortment of non-capital bills pertaining to violent (or allegedly violent) crimes as well. Some have passed into law; many others simply show the way in which at least certain elements in the political process think about sentencing and other criminal justice issues: “lock ‘em up and throw away the key.”

Juveniles, burdened by the perception that they present a mounting threat to the security of the populace, have been a growing target of attempted legislation over the past decade or so. A number of bills have been proposed which would facilitate trying juveniles as adults. These are frequently coupled with public rhetoric by lawmakers that the youth of today are increasingly incorrigible and unresponsive to non-punitive measures. Thus, in the context of sponsoring a bill (titled the “Seven Deadly Sins Act”) that would allow a judge to sentence a child aged thirteen, fourteen, or fifteen to a sentence at a juvenile facility, to be followed by a sentence in an adult prison, Senator Rodger Smitherman noted, “A lot of these kids know how the juvenile system works, and that’s why it’s no deterrent for kids who have a propensity for violence.”<sup>147</sup> Though Smitherman’s bill did not pass into law, its legacy continues: as recently as 2003 the

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<sup>144</sup>See, e.g., SB 92, 2004 Reg. Sess. (Ala. Feb. 3, 2004); SB 325, 2003 Reg. Sess. (Ala. Mar. 18, 2003).

<sup>145</sup>See, e.g., HB 476, 2002 Reg. Sess. (Ala. Feb. 26, 2002).

<sup>146</sup>See *Atkins v. Virginia*, 536 U.S. 304 (2003); *Roper v. Simmons*, No. 03-633 (United States Supreme Court argued Oct. 13, 2004).

<sup>147</sup>Phillip Rawls, *13-year-olds Not Considered Adults in State*, TUSCALOOSA NEWS, Mar. 28, 1998. The theme is an oft-repeated one; see Clay Redden, *Drive-By Bill Would Impose Death Penalty*, DECATUR DAILY, Jan. 27, 1994 (quoting Representative Curtis Smith as saying “We do need to get tough with teen-agers. We need to set an example as a deterrent to people who think along those lines from committing crimes like that.”).

Seven Deadly Sins Act was proposed during the legislative session.<sup>148</sup> Though it never made it out of the Senate Judiciary Committee,<sup>149</sup> the proposal remains a disturbing illustration of how one subsection of legislators thinks regarding juvenile justice issues.

Not to be outdone, then-Attorney General Bill Pryor indicated that he was prepared to reoffer legislation that would allow a judge to sentence a child as young as eight to life incarceration for committing what would have been a capital crime if committed by an adult.<sup>150</sup> All of this was in response to a shooting in Arkansas involving two young boys who killed four students and a teacher.<sup>151</sup> The Jonesboro shooting was a true tragedy, but the instinctive and unthinking reaction of state politicians to increase the severity of juvenile sentences fails to even consider (a) that the frequency of such events is likely much lower than the intensive media scrutiny might otherwise suggest and (b) whether the circumstances that would lead children to act in such a violent manner are best dealt with through incarceration.

### 3. Truth in Sentencing

The truth in sentencing (“TIS”) groundswell in Alabama appears to have begun by 1994 at the latest. It was then that Governor Don Siegelman and Attorney General Jeff Sessions began pushing for a TIS regime, including it as element of their campaigns.<sup>152</sup> Since that time, the governor’s crime package has been calling for some form of TIS virtually every year.<sup>153</sup> It now seems a near certainty that TIS will arrive in earnest, as the Legislature has called upon the recently-formulated Sentencing Commission to develop TIS guidelines to be introduced during

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<sup>148</sup>SB 197, 2003 Reg. Sess. (Mar. 6, 2003), <http://alisd.b.l.gislature.state.al.us/acas/ACASLogin.asp?SESSION=1026> (last visited Feb 16, 2005).

<sup>149</sup>See <http://alisd.b.l.gislature.state.al.us/acas/ACASLogin.asp?SESSION=1026>.

<sup>150</sup>Phillip Rawls, *13-year-olds Not Considered Adults in State*, TUSCALOOSA NEWS, Mar. 28, 1998.

<sup>151</sup>*Id.*

<sup>152</sup>Phillip Rawls, *Getting Tougher on Crime*, BIRMINGHAM POST-HERALD, Feb. 29, 1996.

<sup>153</sup>See, e.g., *id.*; *James Won’t Give up on Legislative Agenda*, OPELIKA-AUBURN NEWS, Jan. 13, 1997; Phillip Rawls, *Crime Bill Stops In Senate*, GADSDEN TIMES, Mar. 8, 2002.

the 2006 Regular Session.<sup>154</sup> In the context of a purported desire to dig its corrections system out of the enormous hole in which it is entrenched,<sup>155</sup> Alabama should nonetheless consider the experiences of other states, where truth in sentencing regimes have tended to *increase* the size of state prison populations as more offenders are incarcerated for longer periods of time.<sup>156</sup>

#### 4. Alternative Sentencing

There has been some movement on the alternative sentencing front, beginning with the Community Punishment and Corrections Act of 1991 (CPCA) and the ensuing amendments to that bill in 2003; the state has acknowledged that incarcerating all offenders is in the interest of no one. Currently, the Community Corrections Division (CCD), which is a part of the Department of Corrections, is responsible for implementing the CPCA, which involves reviewing plans proposed by counties, awarding grants to pay for qualifying plans, providing technical assistance to develop community corrections programs, and auditing the participating counties to ensure compliance.<sup>157</sup> As of now, thirty counties, accounting for approximately 57% of Alabama’s population,<sup>158</sup> have Community Corrections programs.<sup>159</sup> Thirty-five counties have no such programs; twelve more have “expressed an interest” in establishing them, and one county is currently operating a community corrections program without any funding from the Department of Corrections.<sup>160</sup> The Alabama Sentencing Commission estimates that the 1,700 felony offenders currently serving their sentence in community corrections programs in 2003

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<sup>154</sup> LA. CODE § 12-25-34 (2004 Supp.).

<sup>155</sup> See ALA. SENTENCING COMM’N, ANNUAL REPORT 1 (2004).

<sup>156</sup> BUREAU OF JUSTICE, SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 3-4, <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf> (1999).

<sup>157</sup> LA. CODE §§ 15-18-171.1, 174 (2004 Supp.).

<sup>158</sup> See U.S. CENSUS BUREAU, GEOGRAPHIC COMPARISON TABLE-ALABAMA, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=n&\\_lang=en&mt\\_name=DEC\\_2000\\_PL\\_U\\_GCTPL\\_ST2&format=ST-2&\\_box\\_head\\_nbr=GCT-PL&ds\\_name=DEC\\_2000\\_PL\\_U&geo\\_id=04000US01](http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_PL_U_GCTPL_ST2&format=ST-2&_box_head_nbr=GCT-PL&ds_name=DEC_2000_PL_U&geo_id=04000US01) (2000).

<sup>159</sup> LA. SENTENCING COMM’N, 2004 ANNUAL REPORT 18 (2004).

<sup>160</sup> LA. SENTENCING COMM’N, 2004 ANNUAL REPORT 18 (2004).

would have otherwise been sent to state penitentiaries at a cost of \$2,975,000.<sup>161</sup>

These numbers suggest some movement in the right direction. But, even taking into account those offenders who are specifically precluded from participation in community corrections programs by virtue of the nature of their offense,<sup>162</sup> there are thousands of inmates for whom sentencing alternatives may be appropriate. To help increase the flow of offenders to community corrections programs, the Legislature needs to ensure that the CPCA is properly funded.<sup>163</sup> Furthermore, as is often the case, the CPCA specifically excludes anyone who is convicted of any drug sale or trafficking charge from participating in a community corrections program.<sup>164</sup> While the state may have a legitimate penological interest in incarcerating those most responsible for the drug trade, such a categorical elimination of anyone convicted of selling is vastly over-inclusive. Indeed, the high-profile case, discussed above, of Theresa Wilson, a woman who was sentenced to life without parole as a first-time offender for trafficking in morphine when she sold a vial of her neighbor's pain medication, demonstrates the way in which merely being in violation of the state's drug laws does not make a person a hardened or otherwise dangerous individual.<sup>165</sup> As a final note of caution on this front, the CPCA explicitly mirrors the language of the probation laws with regard to how to proceed in the event that an

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<sup>161</sup>*Id.*

<sup>162</sup>The Community Punishment and Corrections Act excludes from consideration those convicted of the following offenses: murder, kidnaping (first degree), rape (first degree), selling or trafficking in controlled substances, robbery (first degree), forcible sex crimes, lewd and lascivious acts upon a child, assault (first degree) if assault leaves the victim permanently disfigured or disable. ALA. CODE § 15-18-171 (2004 Supp.).

<sup>163</sup>In 2004, the Legislature appropriated \$ 2,975,000 for the CPCA. *See* 2004 Ala. Acts 562. That same year, bills in the senate and house calling for additional funds failed to pass. *See* HB 607, 2004 Reg. Sess. (last action taken May 6, 2004), <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp?SESSION=1029> ; SB 338, 2004 Reg. Sess. (last action taken Feb. 17, 2004), <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp?SESSION=1029>.

<sup>164</sup> LA. CODE § 15-18-171(14) (2004 Supp.).

<sup>165</sup>*See Crime and Punishment: Wilson Case is Symptom of System in Need of Reform*, BIRMINGHAM NEWS, December 2, 1999, [http://www.ago.statel.al.us/issue/sub/sentence\\_10.html](http://www.ago.statel.al.us/issue/sub/sentence_10.html) (last visited Feb. 16, 2005); *Wilson v. State*, 830 So. 2d 765, 781 (Ala. Crim. App. 2001).

offender violates the terms of his community corrections sentence.<sup>166</sup> In light of what may be widespread disregard for the statutorily-mandated procedural protections afforded probationers, careful monitoring of the community corrections system should be conducted.

Furthermore, incorporated within the notion of alternative sentences is the idea that real rehabilitation and substantial support be given to ex-offenders as they re-enter the community. It is ineffectual and irresponsible to arrest, prosecute, incarcerate and probate an individual and then expect him to spontaneously emerge as a productive and stable member of society without any form of continued support.<sup>167</sup>

## V. EDUCATION EFFECT

Though it is true that incarceration rates do to some extent correlate negatively with crime rates,<sup>168</sup> it would be economically and morally remiss to ignore the effect that education and the economy have on crime rates as well.<sup>169</sup> Indeed, there is both an intuitive and measurable relation between educational attainment and incarceration. As detailed in the chart below, in 2003 over 60% of the Department of Corrections population was comprised of individuals who had not obtained a high school diploma or its equivalent. This fact becomes all the more striking with even a small bit of analysis. As the table indicates, approximately 1.8% of all of those individuals over twenty-five years of age statewide who did not hold a high school diploma or its equivalent were incarcerated in 2003. In contrast, a mere .24% of those

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<sup>166</sup>See ALA. CODE § 15-18-175 (2004 Supp.);

<sup>167</sup>See the discussion of the impact of mass incarceration on communities and individuals, *supra* at n.7-10. For a detailed discussion about barriers to offender re-entry and possible steps to take in clearing these hurdles, see Anthony Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV 255, 262-64 (2004).

<sup>168</sup>As discussed elsewhere, this correlation is loose, and at time utterly ambiguous. See, e.g., JENI GAINSBOROUGH & MARC MAUER, THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S 14 (2000).

<sup>169</sup>One study estimated that declining unemployment rates could explain approximately 30% of the fall in crime rates from 1992-97. In addition, from 1992 to 1998, unemployment rates for young men with a high school degree generally were closely correlated with the declining crime rate during that period, in all regions of the country. JENNI GAINSBOROUGH & MARC MAUER, THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S 19 (2000).

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individuals who did obtain a high school diploma were incarcerated. The incarceration rate for those with a college degree was almost infinitesimal: .07%. Simply put, individuals without a high school diploma were incarcerated at a rate seven and a half times greater than those who did complete twelfth grade. Clearly there are many variables that contribute to these effects, including socioeconomic status, family stability and geography. Yet it seems clear that studying these effects and focusing resources towards the twenty percent of individuals who will ultimately become sixty percent of the Department of Corrections population would produce significant effects on crime at a much lower human cost.<sup>170</sup>

**Education Effect: Percentage of DOC Population without HS Diploma or Equivalent**

	DOC Population (%)	DOC Population (#)	State Population (%)	State Population (#)	Incarceration Rate (Prison Population/ State Population) (%)
No High School, GED or HED	60.09	16,660	20.1	904,701	1.80
High School Diploma	31.32	8,685	79.9	3,596,299	0.24
College Degree	00.27	74	22.7	1,021,727	0.07

Source: ALABAMA DEP'T OF CORR., ANNUAL REPORT (2003); U.S. CENSUS BUREAU, EDUCATION ATTAINMENT OF THE POPULATION 25 YEARS AND OVER, BY STATE, <http://www.census.gov/population/socdemo/education/cps2003/tab13.pdf> (last visited February 25, 2005).

Unfortunately, things appear to be heading in the other direction. See the chart below:

**Appropriations for Education and Corrections**

Year	Education K-12	% Change	DOC	% Change
2002	\$3,156,520,632,	--	\$256,077,537	--
2003	\$3,238,652,139	2.6	\$292,073,731	14.1

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<sup>170</sup>The utility of focusing on educational reform was thrown into sharper relief upon the recent release of a study detailing Alabama's flagging high school graduation rate, which fell from 69% in 1991 to 58% in 2002, while the national average held roughly steady at 72%. Nationwide, only South Carolina, Georgia and Tennessee performed more poorly than Alabama on this measure. Gigi Doubian, *Alabama's Graduation Rate 47<sup>th</sup> Nationally*, BIRMINGHAM NEWS, Feb. 15, 2005, 1A.

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2004	\$3,270,470,204	.98	\$320,947,592	9.9
Total Change		3.6		25.3

Source: LEGISLATIVE FISCAL OFFICE, BUDGET AND FISCAL INFORMATION, <http://www.lfo.state.al.us/budget-fiscal.html> (last visited Feb. 16, 2005) ; EXECUTIVE BUDGET OFFICE, <http://www.budget.state.al.us/stgovfin.html> (last visited Feb. 16, 2005).

To be sure, the total spending on education still dwarfs that on inmates, in aggregate. But when broken down to per capita the landscape changes: Alabama spends \$9,643 per year per inmate,<sup>171</sup> and only \$6,029 per student.<sup>172</sup> Furthermore, Department of Corrections appropriations increased more than 25% from 2001 to 2003, while educational monies grew at only 3.6% during that same period. It is a worrisome trend, and one that may soon come to a head: Department of Corrections Commissioner Donal Campbell has recently requested from the Legislature appropriations of nearly \$580 million dollars, nearly double the previous year's budget, to pay for the rising costs of the corrections department, including the construction of two new 2,000-bed facilities.<sup>173</sup>

## RECOMMENDATIONS

### Drug Offenses

1. Eliminate all mandatory minimum sentences for drug-related offenses as recommended by the American Bar Association and as required by the costly and inefficient burden these sentences have placed on Alabama's prisons and taxpayers.
2. Eliminate all mandatory "add-ons" that require mandatory sentence additions based on the proximity of drug offenses to schools or churches. While judges should have the discretion to sentence more harshly those offenders who risk the welfare of school

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<sup>171</sup> ALABAMA SENTENCING COMM'N, 2004 ANNUAL REPORT 15 (2004).

<sup>172</sup> Rena Havner, *Alabama is 43<sup>rd</sup> in Per-Pupil Spending*, MOBILE REG., Jan. 6, 2005, <http://www.al.com/news/mobileregister/index.ssf?/base/news/110500651459120.xml> (last visited Feb. 16, 2005).

<sup>173</sup> Carla Crowder, *Prison Sentence Reforms Urged; Commissioner Seeks Doubled Budget, Alternative Programs*, BIRMINGHAM NEWS, Jan. 21, 2005, 1C; John Davis, *Corrections Seeks Bigger Budget*, MONTGOMERY ADVERTISER, Jan. 21, 2005, [http://sentencingcommission.alacourt.gov/News/news\\_art\\_montg\\_1.21.05.html](http://sentencingcommission.alacourt.gov/News/news_art_montg_1.21.05.html) (last visited Feb. 16, 2005).

children with drug trafficking, the mandatory “add-ons” have imposed decades of imprisonment even where there is no relationship between the offense and its proximity to a school or church.

3. Alabama requires three convictions before driving under the influence (DUI) can be punished as a serious felony with significant incarceration, but Alabama permits long-term incarceration for simple marijuana possession on a first offense and mandatory incarceration for subsequent convictions. DUI is a much more serious offense that creates enormous costs and numerous deaths each year. Sentences for marijuana possession immediately should be reduced to mirror Alabama’s sentencing scheme for DUI.
4. Alabama is the only state in the country that fails to distinguish between inchoate drug crimes and those that are successfully completed. Lawmakers should reduce the sentencing range for controlled substance offenses that involve inchoate crimes, i.e, solicitation, attempt and conspiracy.
5. The nature of drug addiction is such that mandatory sentences for repeat offenders is ill-advised. All felony drug offenses should be excluded from habitual felony offender consideration except Class A felonies. Drug offense convictions should not be considered in establishing eligibility for habitual felony offender status unless the prior convictions are Class A felonies.
6. Simplify the drug sentencing options for trafficking offenses and permit discretionary sentences within a range of one to ten years for offenders with no extensive history of trafficking and a maximum sentence of twenty-five years for the most serious drug trafficking offenders. In all cases, cap the maximum sentence that can be imposed on any drug offense at twenty-five years of imprisonment.
7. Eliminate the restriction on probation for certain drug-related offenses and dramatically increase the use of alternative sentencing, drug courts, community sentencing options for all drug offenders.
8. Create, fund and staff a major five-year health care initiative to provide no-cost or low-cost treatment to people suffering from drug addiction and related problems, including 100- to 200-patient treatment facilities in Huntsville, Birmingham, Montgomery, Mobile, Tuscaloosa, Gadsden, Selma, Auburn and Dothan. A study of the impact of treatment and its impact on public safety must be part of the program.

Non-Violent and Violent Crimes

1. Eliminate Class B and Class C felonies from playing any role in the determination of habitual felony offender status thus reserving habitual felony offender status for the most serious repeat offenders.
2. Reduce the monthly incarceration average for non-violent offenders by dramatically increasing the use of alternative sentencing, community sentencing, and restitution programs. The Alabama Sentencing Commission estimates that the state saved \$3 million by assigning 1700 felony offenders to serve their sentences in community corrections programs in 2003 rather than in state prisons.
3. Require fiscal impact statements for all Alabama sentencing laws and mandate review of sentencing laws and their efficacy in controlling crime and improving public safety.
4. In all cases, cap the maximum sentence that can be imposed for a non-violent felony at twenty-five years of imprisonment. This reform should be made retroactive to prisoners currently in custody.

CONCLUSION

As the Sentencing Commission has noted, Alabama's corrections system is in a hole of substantial proportions, in large part because of the prevailing sentencing scheme. The costs to the state of properly housing the current swollen ranks of the incarcerated are more than it can reasonably bear. At the same time, thousands of people are being placed in prisons and jails for periods far in excess of what is necessary from a public safety perspective and appropriate from a reintegration perspective. Implementing reforms and finding alternatives that are cost effective and adequately address the true causes and effects of crime is to the benefit of everyone.

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APPENDIX I

Alabama Sentencing Scheme for Selected Crimes

<u>Crime</u>	<u>Code Section</u>	<u>Imprisonment<sup>a</sup></u>	<u>Fine<sup>b</sup></u>
Capital Murder	13A-5-40	LWOP/Death	≤ \$20,000
Murder	13A-6-2	10 years-life	≤ \$20,000
Manslaughter	13A-6-3	2-20 Years	≤ \$10,000
Criminally Negligent Homicide	13A-6-4	≤ 1 Year	≤ \$2,000 <sup>174</sup>
Assault in the First Degree	13A-6-20	2-20 Years	≤ \$10,000
Assault in the Second Degree	13A-6-21	1 year 1 day-10 years	≤ \$,5000
Assault in the Third Degree	13A-6-22	≤ 1 year	≤ \$2,000
Menacing	13A-6-23	≤ 6 months	≤ \$1,000
Reckless Endangerment	13A-6-24	≤ 1 year	≤ \$2,000
Criminal Coercion	13A-6-25	≤ 1 year	≤ \$2,000
Compelling Streetgang Membership	13A-6-26	1 year 1 day-10 years <sup>175</sup>	
Unlawful Imprisonment, First Degree	13A-6-41	≤ 1 year	≤ \$2,000
Unlawful Imprisonment, Second Degree	13A-6-42	≤ 3 months	≤ \$ 500
Kidnaping, First Degree	13A-6-43	10 years-life	≤ \$ 20,000
Kidnaping, Second Degree	13A-6-44	2-20 years	≤ \$10,000
Interference with Custody	13A-6-45	1 year 1 day - 10 years	≤ \$5,000
Rape, First Degree	13A-6-61	10years-life	≤ \$20,000
Rape, Second Degree	13A-6-62	2 - 20 Years	≤ \$10,000
Sodomy, First Degree	13A-6-63	10 years-life	≤ \$20, 000
Sodomy, Second Degree	13A-6-63	2-20 years	≤ \$10,000
Sexual misconduct	13A-6-65	≤ 1 year	≤ \$2,000
Sexual Torture	13A-6-65.1	10 years-life	≤ \$20,000
Sexual Abuse, First Degree	13A-6-66	1 year 1 day - 10 years	≤ \$5,000
Sexual Abuse, Second Degree	13A-6-67	≤ 1 Year	≤ \$2,000
Indecent Exposure	13A-6-68	≤ 1 Year	≤ \$2,000

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<sup>174</sup>Normally a Class A misdemeanor, but if committed while intoxicated becomes Class C felony.

<sup>175</sup>Normally a Class C felony, but if the defendant is over the age of eighteen and the other person is under the age of eighteen, it become a Class A felony (ten years to life).

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<u>Crime</u>	<u>Code Section</u>	<u>Imprisonment<sup>a</sup></u>	<u>Fine<sup>b</sup></u>
Enticing Child for Immoral Purposes	13A-6-69	≤ 5 years	≤ \$5,000 <sup>176</sup>
Stalking	13A-6-90	1 year 1 day - 10 years	≤ \$5,000
Aggravated Stalking	13A-6-91	2-20 years	≤ \$10,000
Criminal Trespass, First Degree	13A-7-2	≤ 1 year	≤ \$2,000
Criminal Trespass, Second Degree	13A-7-3	≤ 3 months	≤ \$ 500
Burglary, First Degree	13A-7-5	10 years-life	≤ \$20,000
Burglary, Second Degree	13A-7-6	2-20 years	≤ \$10,000
Burglary, Third Degree	13A-7-7	1 year 1 day-10 years	≤ \$5,000
Possession of Burglar's Tools	13A-7-8	1 year 1 day-10 years	≤ \$5,000
Criminal Mischief, First Degree	13A-7-20	1 year 1 day-10 years	≤ \$5,000
Criminal Mischief, Second Degree	13A-7-22	≤ 1 year	≤ \$2,000
Criminal Mischief, Third Degree	13A-7-23	≤ 6 months	≤ \$1,000
Criminal Tampering, First Degree	13A-7-25	1 year 1 day-10 years	≤ \$5,000
Criminal Tampering, Second Degree	13A-7-26	≤ 6 months	≤ \$1,000
Arson, First Degree	13A-7-41	10 years-life	≤ \$20,000
Arson, Second Degree	13A-7-42	2-20 years	≤ \$10,000
Arson, Third Degree	13A-7-43	≤ 1 year	≤ \$2,000
Criminal Possession of Explosives	13A-7-44	1 year 1 day-10 years	≤ \$5,000
Theft of Property, First Degree	13A-8-3	2-20 years	≤ \$10,000
Theft of Property, Second Degree	13A-8-4	1 year 1 day-10 years	≤ \$5,000
Theft of Property, Third Degree	13A-8-5	≤ 1 year	≤ \$2,000
Theft of Lost Property, First Degree	13A-8-7	2-20 years	≤ \$10,000
Theft of Lost Property, Second Degree	13A-8-8	1 year 1 day-10 years	≤ \$5,000
Theft of Lost Property, Third Degree	13A-8-9	≤ 1 year	≤ \$2,000
Theft of Services, First Degree	13A-8-10.1	2-20 years	≤ \$10,000
Theft of Services, Second Degree	13A-8-10.2	1 year 1 day-10 years	≤ \$5,000
Theft of Services, Third Degree	13A-8-10.3	≤ 1 year	≤ \$2,000
Theft of Trademarks or Trade Secrets	13A-8-10.4	1 year 1 day-10 years	≤ \$5,000
Unauthorized Use of Vehicle	13A-8-11	≤ 1 year	≤ \$2,000 <sup>177</sup>
Breaking and Entering Vehicle	13A-8-11	1 year 1 day-10 years	≤ \$5,000

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<sup>176</sup>For a second violation, sentence increases to two to ten years with no possibility for probation.

<sup>177</sup>If force or threat of force is used, becomes a Class B Felony, punishable by two to twenty years and up to \$10,000 in fines.

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<u>Crime</u>	<u>Code Section</u>	<u>Imprisonment<sup>a</sup></u>	<u>Fine<sup>b</sup></u>
Extortion, First Degree	13A-8-14	2-20 years	≤ \$10,000
Extortion, Second Degree	13A-8-15	1 year 1 day-10 years	≤ \$5,000
Receiving Stolen Property, First Degree	13A-8-17	2-20 years	≤ \$10,000
Receiving Stolen Property, Second Degree	13A-8-18	1 year 1 day-10 years	≤ \$5,000
Receiving Stolen Property, Third Degree	13A-8-19	≤ 1 year	≤ \$2,000
Obscuring Identity of Vehicle	13A-8-22	1 year 1 day-10 years	≤ \$5,000
Robbery, First Degree	13A-8-41	10 years-life	≤ \$20,000
Robbery, Second Degree	13A-8-42	2-20 years	≤ \$10,000
Robbery, Third Degree	13A-8-43	1 year 1 day-10 years	≤ \$5,000
Forgery, First Degree	13A-9-2	2-20 years	≤ \$10,000
Forgery, Second Degree	13A-9-3	1 year 1 day-10 years	≤ \$5,000
Forgery, Third Degree	13A-9-4	≤ 1 year	≤ \$2,000
Possession of Forged Instrument, First Degree	13A-9-5	2-20 years	≤ \$10,000
Possession of Forged Instrument, Second Degree	13A-9-6	1 year 1 day-10 years	≤ \$5,000
Possession of Forged Instrument, Third Degree	13A-9-7	≤ 1 year	≤ \$2,000
Possession of Forgery Device	13A-9-9	1 year 1 day-10 years	≤ \$5,000
Criminal simulation	13A-9-10	≤ 1 year	≤ \$2,000
Obtaining Signature by Deception	13A-9-11	≤ 1 year	≤ \$2,000
Illegal Possession/Fraudulent Use of Credit Card or Debit Card	13A-9-14	1 year 1 day-10 years	≤ \$5,000
Giving False Name or Address to Law Enforcement Officer	13A-9-18.1	≤ 1 year	≤ \$2,000
Escape, First Degree	13A-10-31	2-20 years	≤ \$10,000
Escape, Second Degree	13A-10-32	1 year 1 day-10 years	≤ \$5,000
Escape, Third Degree	13A-10-33	≤ 1 year	≤ \$2,000
Permitting/Facilitating Escape, First Degree	13A-10-34	1 year 1 day-10 years	≤ \$5,000
Permitting/Facilitating Escape, Second Degree	13A-10-35	≤ 1 year	≤ \$2,000
Promoting Prison Contraband, First Degree	13A-10-36	1 year 1 day-10 years	≤ \$5,000
Bail Jumping, First Degree	13A-10-39	1 year 1 day-10 years	≤ \$5,000
Hindering Prosecution, First Degree	13A-10-43	1 year 1 day-10 years	≤ \$5,000
Bribery of Public Servants	13A-10-61	1 year 1 day-10 years	≤ \$5,000
Perjury, First Degree	13A-10-101	1 year 1 day-10 years	≤ \$5,000
Perjury, Second Degree	13A-10-102	≤ 1 year	≤ \$2,000
Perjury, Third Degree	13A-10-103	≤ 6 months	≤ \$1,000
Bribing a Witness	13A-10-121	1 year 1 day-10 years	≤ \$5,000
Bribe Receiving by a Witness	13A-10-122	1 year 1 day-10 years	≤ \$5,000
Intimidating a Witness	13A-10-123	1 year 1 day-10 years	≤ \$5,000
Tampering with a Witness	13A-10-124	≤ 6 months	≤ \$1,000

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<u>Crime</u>	<u>Code Section</u>	<u>Imprisonment<sup>a</sup></u>	<u>Fine<sup>b</sup></u>
Bribing a Juror	13A-10-125	1 year 1 day-10 years	≤ \$5,000
Bribe Receiving by a Juror	13A-10-126	1 year 1 day-10 years	≤ \$5,000
Intimidating a Juror	13A-10-127	1 year 1 day-10 years	≤ \$5,000
Jury Tampering	13A-10-128	≤ 6 months	≤ \$1,000
Treason	13A-11-2	10 years-life	≤ \$20,000
Riot	13A-11-3	≤ 1 year	≤ \$2,000
Inciting to Riot	13A-11-4	≤ 1 year	≤ \$2,000
Unlawful Assembly	13A-11-5	≤ 6 months	≤ \$1,000
Failure of Disorderly Persons to Disperse	13A-11-6	≤ 6 months	≤ \$1,000
Riot	13A-11-3	≤ 1 year	≤ \$2,000
Unlawful Distribution of Controlled Substance	13A-12-211	2-20 years	≤ \$10,000
Unlawful Possessions or Receipt of Controlled Substance	13A-12-212	1 year 1 day-10 years	≤ \$5,000
Felony DUI <sup>178</sup>	32-5A-191(h)	1 year 1 day-10 years	≤ \$5,000
Unlawful Possession of Marijuana, First Degree	13A-12-213	1 year 1 day-10 years	≤ \$5,000
Unlawful Possession of Marijuana, Second Degree	13A-12-214	≤ 1 year	≤ \$2,000
Sale of Controlled Substance by Person over 18 to Persons under age 18	13A-12-215	10 years-life <sup>179</sup>	≤ \$20,000
Trafficking in Cannabis, Cocaine, Etc.	13A-12-231	See Appendix II	See Appendix II
Drug Paraphernalia: Use, Possession, Delivery or Sale	13A-12-260	≤ 1 year	≤ \$2,000
Bigamy	13A-12-1	1 year 1 day-10 years	≤ \$5,000
Adultery	13A-13-2	≤ 6 months	≤ \$1,000
Incest	13A-13-3	1 year 1 day-10 years	≤ \$5,000
Carrying Concealed Weapon	13A-11-50	≤ 6 months <sup>180</sup>	\$50-\$500
Brass Knuckles and Slingshots	13A-11-53	≤ 6 months <sup>181</sup>	\$50-\$500
Possession or Sale of Brass/Steel Teflon-Coated Handgun Ammo	13A-11-60	1 year 1 day-10 years	≤ \$5,000
Discharging Firearm into Building–Occupied	13A-11-61	2-20 years	≤ \$10,000
Discharging Firearm into Building–Unoccupied	13A-11-61	1 year 1 day-10 years	≤ \$5,000

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<sup>178</sup>Only becomes a felony on fourth conviction.

<sup>179</sup>The imposition or execution of sentence shall not be suspended and probation shall not be granted.

<sup>180</sup>To be done at county jail or at hard labor for the county.

<sup>181</sup>To be done at county jail or at hard labor for the county.

*Criminal Justice Reform in Alabama – Part One  
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<u>Crime</u>	<u>Code Section</u>	<u>Imprisonment<sup>a</sup></u>	<u>Fine<sup>b</sup></u>
Possession, Sale, Etc. of Short-Barreled Rifle/Shotgun	13A-11-63	1 year 1 day-10 years	≤ \$5,000
Alteration, Etc. of Manufacturer's Number of Firearm	13A-11-64	1 year 1 day-10 years	≤ \$5,000
Promoting Prostitution, First Degree	13A-11-111	2-20 years	≤ \$10,000
Promoting Prostitution, Second Degree	13A-11-112	1 year 1 day-10 years	≤ \$5,000
Promoting Prostitution, Third Degree	13A-11-113	≤ 1 year	≤ \$2,000
Dissemination of Obscene Matter Containing Visual Reproduction of Persons under 17 Years of Age Involved in Obscene Acts	13A-12-191	2-20 years	≤ \$10,000
Possession with Intent to Disseminate Obscene Matter Containing Visual Reproduction of Persons under 17 Years of Age Involved in Obscene Acts	13A-12-192	2-20 years	≤ \$10,000
Possession of Obscene Matter Containing Visual Reproduction of Persons under 17 Years of Age Involved in Obscene Acts	13A-12-192	1 year 1 day-10 years	≤ \$5,000
Parent Permitting Children to Engage in Production of Obscene Matter	13A-12-196	10 years-life	≤ \$20,000
Production of Obscene Matter Containing Visual Reproduction of Person under 17 Years of Age Involved in Obscene Act	13A-12-197	10 years-life	≤ \$20,000

a. For Class A felonies (those which carry a sentence of ten years to life) when a deadly weapon was used to attempted to be used in the commission of the felony, the sentence shall be not less than twenty years. ALA. CODE § 13A-5-6(a)(4) (1994). For class B or C felonies (those which carry sentences of two to twenty years and one year and one day to ten years, respectively) in which a firearm or deadly weapon was used or was attempted to be used in the commission of the felony, the sentence shall not be less than ten years. ALA. CODE § 13A-5-6(a)(5) (1994).

b. Notwithstanding the range of fines listed, a court may fix any fine for a felony or misdemeanor in an amount not to exceed double the pecuniary gain to the defendant or the loss to the victim caused by the commission of the offense. ALA. CODE §§ 13A-5-11(a)(4), 13A-5-12(a)(4) (1994).

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APPENDIX II

Drug Trafficking Sentencing Scheme (ALA. CODE §13A-12-231)

Drug	Quantity	Imprisonment <sup>1</sup>	Fine <sup>2</sup>
Cannabis	>2.2. pounds <100 pounds	3 years	\$ 25,000
	≥100 pounds < 500 pounds	5 years	\$ 50,000
	≥ 500 pounds < 1,000 pounds	15 years	\$ 200,000
	≥ 1,000 pounds	Life without Parole	
Cocaine	≥ 28 grams < 500 grams	3 years	\$ 50,000
	≥ 500 grams < 1 kilo	5 years	\$ 100,000
	≥ 1 kilo < 10 kilos	15 years	\$ 250,000
	≥ 10 kilos	Life without Parole	
Morphine, Opium, Heroin	≥ 4 grams < 14 grams	3 years	\$ 50,000
	≥ 14 grams < 28 grams	10 years	\$ 100,000
	≥ 28 grams < 56 grams	25 years	\$ 500,000
	≥ 56 grams	Life without Parole	
Methaqualone	≥ 1,000 pills < 5,000 pills	3 years	\$ 50,000
	≥ 5,000 pills < 25,000 pills	10 years	\$ 100,000
	≥ 25,000 pills < 100,000 pills	25 years	\$ 500,000
	≥ 100,000	Life without Parole	
Hydromorphone	≥ 500 pills < 1,000 pills	3 years	\$ 50,000

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Drug	Quantity	Imprisonment <sup>1</sup>	Fine <sup>2</sup>
	≥ 1,000 pills < 4,000 pills	10 years	\$ 100,000
	≥ 4,000 pills < 10,000 pills	25 years	\$ 100,000
	≥ 10,000 pills	Life without Parole	
3,4-methylenedioxy amphetamine	≥ 28 grams < 500 grams	3 years	\$ 50,000
	≥ 500 grams < 1 kilo	5 years	\$ 100,000
	≥ 1 kilo < 10 kilos	15 years	\$ 250,000
	≥ 10 kilos	Life without Parole	
5-methoxy-3,4- methylenedioxy amphetamine	≥ 28 grams < 500 grams	3 years	\$ 50,000
	≥ 500 grams > 1 kilo	5 years	\$ 100,000
	≥ 1 kilo < 10 kilos	15 years	\$ 250,000
	≥ 10 kilos	Life without Parole	
Phencyclidine	≥ 4 grams < 14 grams	3 years	\$ 50,000
	≥ 14 grams < 28 grams	5 years	\$ 100,000
	≥ 28 grams < 56 grams	15 years	\$ 250,000
	≥ 56 grams	Life without Parole	
Lysergic Acid Diethylamide (LSD)	≥ 4 grams < 14 grams	3 years	\$ 50,000
	≥ 14 grams < 28 grams	10 years	\$ 100,000
	≥ 28 grams < 56 grams	25 years	\$ 500,000
	≥ 56 grams	Life without Parole	

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Drug	Quantity	Imprisonment <sup>1</sup>	Fine <sup>2</sup>
Amphetamine	≥ 28 grams < 500 grams	3 years	\$ 50,000
	≥ 500 grams < 1 kilo	5 years	\$ 100,000
	≥ 1 kilo < 10 kilos	15 years	\$ 250,000
	≥ 10 kilos	Life without Parole	
Methamphetamine	≥ 28 grams < 500 grams	3 years	\$ 50,000
	≥ 500 grams < 1 kilo	5 years	\$ 100,000
	≥ 1 kilo < 10 kilos	15 years	\$ 250,000
	≥ 10 kilos	Life without Parole	

<sup>1</sup>All imprisonment figures for trafficking are mandatory minimums. Since trafficking is a Class A felony, the maximum for any conviction under section 13A-12-231 is life imprisonment. The Alabama Supreme Court has found this scheme does not violate the state constitution. *Ex parte Robinson*, 474 So. 2d 685 (Ala. 1985). A defendant may be sentenced below the mandatory minimum if the prosecuting attorney moves to reduce or suspend the sentence of a person who “provides substantial assistance in the arrest, or in the conviction of any of his accomplices, accessories, coconspirators, or principals.” ALA. CODE § 13A-12-232(b) (1994). Individuals who are sentenced to life without the possibility of parole are not eligible for any reduction in their sentence. *Id.*

The penalty for a trafficking conviction is increased by a five-year mandatory prison sentence and a \$ 25,000 fine for possession of a firearm during commission of the acts that led to the trafficking conviction. ALA. CODE § 13A-12-231(13) (1994). An additional five-year penalty, with no possibility for probation, is added for the sale of drugs if “the situs of such an unlawful sale was . . . on the campus or within a three-mile radius of the campus boundaries of any public or private school, college, university or other educational institution in this state,” ALA. CODE § 13A-12-250 (1994), or “within a three-mile radius of a public housing project owned by a housing authority.” ALA. CODE § 13A-12-270 (1994). In instances where both circumstances apply, the defendant’s sentence shall be enhanced pursuant to both sections 13A-12-250 and 13A-12-270. See ALA. CODE. § 13A-12-250 Commentary.

Finally, any person convicted under section 13A-12-231 is not “eligible for any type of parole, probation, work release, supervised intensive restitution program, release because of deduction from sentence for good behavior under corrections incentive time act or any other program, furlough, pass, leave, or any other type of early, conditional, or temporary release program . . . prior to serving the mandatory minimum term of imprisonment prescribed in this article or 15 years, whichever is less.” ALA. CODE §13A-12-232 (1994).

<sup>2</sup>All fines listed are mandatory. The fine is increased by \$25,000 for “any person who has possession of a firearm during the commission of any act” proscribed by section 13-12-231. ALA. CODE § 12-12-231(13) (1995). Additionally, every person found guilty of a violation of section 13A-12-231 shall be assessed an additional penalty of \$1,000 for first offenders and \$2,000 for second and subsequent offenders. ALA. CODE § 13A-12-281(a) (1994).

## PROBATION

### I. OVERVIEW

According to the United States' first probation officer, in 1841 the object of probation was "to reform criminals, and to prevent crime and not to punish maliciously, or from a spirit of revenge."<sup>182</sup> In 2000, the Alabama Supreme Court described the purpose of probation as, "to assist the probationer[r] to become a law-abiding citizen."<sup>183</sup> Whichever variation one ascribes to, courts throughout the United States use probation extensively to provide community-based sentences as an alternative to incarceration. Probation varies widely from state to state in terms of the structure of state agencies, number of people on probation, types of cases supervised and services provided.<sup>184</sup> In Arizona, for example, probation officers each supervise approximately sixty probationers, contact each one daily and refer them to services ranging from substance abuse treatment to education and job development programs. In Alabama, probation officers supervise an average of 143 people and probation does not go beyond a series of conditions (e.g., reporting to an officer, attending alcohol treatment classes and/or paying fines) and referrals to community-based services.<sup>185</sup>

Courts use probation significantly less in Alabama than do courts in other states despite the fact that Alabama maintains one of the highest rates of incarceration in the country.<sup>186</sup> In 2003, there were 4,073,987 individuals on probation in the United States, and 43,879 on probation in Alabama.<sup>187</sup> While Alabama has 48% more individuals in prison per 100,000

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<sup>182</sup>Symposium, *Model Penal Code: Sentencing: The Importance of Purpose in Probation Decision Making* 7 BUFF. CRIM. L. R. 171, 175 (2003) (citing JOHN AUGUSTUS, FIRST PROBATION OFFICER 23 (1939)).

<sup>183</sup>*Ex parte J.J.D., Jr.*, 778 So. 2d 240, 243 (Ala. 2000).

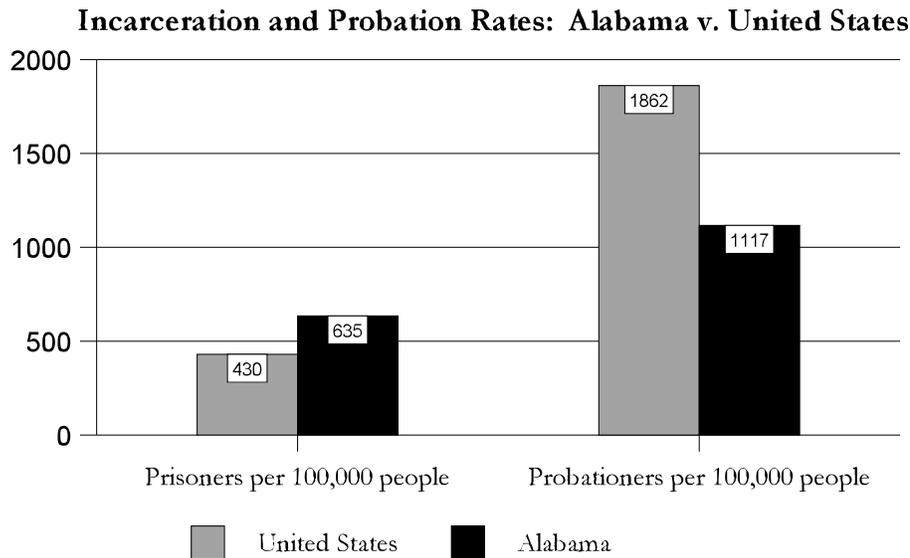
<sup>184</sup>AMERICAN PROBATION AND PAROLE ASSOCIATION, ADULT PROBATION IN THE UNITED STATES: A WHITE PAPER, <http://www2.courtinfo.ca.gov/probation/reference.htm> (Sept. 2000).

<sup>185</sup>*Id.* at Appendix 1, Tables 5, 7, and 11.

<sup>186</sup>AMES AUSTIN, THE JFA INST. (2005), ASSESSMENT OF THE ALABAMA PRISON SYSTEM.

<sup>187</sup>Bd. of Pardons and Parole, ALABAMA BOARD OF PARDONS AND PAROLE STATISTICAL DOCUMENTS, <http://paroles.state.al.us/statsdoc.pdf> (last visited Jan. 28, 2005).

people than the rest of the United States, it has less individuals per capita on probation (see chart below).<sup>188</sup> Not only are fewer individuals granted probation in Alabama, but more probationers have their probation revoked, often for technical violations.<sup>189</sup> Between October 2003 and October 2004, probation revocations accounted for 21% of admissions to the Alabama Department of Corrections. Of those revocations, 39% were for property offenses and 25% were for other non-violent offenses.<sup>190</sup>



There are a number of possible reasons for the low number of people on probation in Alabama. The Alabama Legislature has significantly limited eligibility for probation over the past thirty years and continues to propose additional bars to probation eligibility. Once Alabamians are on probation, the loose due process requirements of revocation procedures make it easier for courts to revoke probation and incarcerate probationers, often for technical violations or an inability to pay fines and restitution. Despite state mandates to the contrary, courts do not always provide written orders justifying revocation decisions and indigent

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<sup>188</sup>There are 1117 people on probation for every 100,000 in Alabama and 1862 out of every 100,000 in the United States. JAMES AUSTIN, THE JFA INST. (2005), ASSESSMENT OF THE ALABAMA PRISON SYSTEM.

<sup>189</sup> AMES AUSTIN, THE JFA INST. (2005), ASSESSMENT OF THE ALABAMA PRISON SYSTEM.

<sup>190</sup> AMES AUSTIN, THE JFA INST. (2005), ASSESSMENT OF THE ALABAMA PRISON SYSTEM.

probationers are not always represented by counsel at revocation hearings. In addition, appeals of probation revocations are exceedingly rare – in 2003, there were only 143 probation revocation appeals filed in Alabama<sup>191</sup>– so that due process violations at revocation hearings are rarely rectified.

## II. HOW PROBATION WORKS<sup>192</sup>

### A. Eligibility for Probation

Generally, courts have the power to suspend an individual’s sentence and place him on probation if the sentence to be suspended is less than fifteen years imprisonment.<sup>193</sup> However, in recent years the Legislature has added a number of offenses for which probation is limited or unavailable. Even if the prison sentence that would be suspended is less than fifteen years, probation is currently unavailable for any of the following convictions<sup>194</sup>:

- Two convictions of enticing a child to enter a car, house or other place for the purpose of assaulting the child;<sup>195</sup>
- A second or third conviction under Alabama’s DUI laws;<sup>196</sup>

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<sup>191</sup> ALABAMA ADMINISTRATIVE OFFICE OF COURTS, THE UNIFIED JUDICIAL SYSTEM OF ALABAMA: 2003 ANNUAL REPORT AND STATISTICS, <http://www.alacourt.gov/Publications/AOCAnnualReport/2003/2003AOCAnnualReport.pdf> (2003). Repeals of probation revocations represented 7.6% of all appeals in 2003. *Id.*

<sup>192</sup> Probation in Alabama is generally governed by Sections 15-22-50 through 15-22-56 of the Code of Alabama for district and circuit courts, and by Section 12-14-13 of the Code of Alabama for municipal courts. The procedures for the granting and revocation of probation are set out in Rule 27 of the Alabama Rules of Criminal Procedure.

<sup>193</sup> LA. CODE § 15-22-50 (2004).

<sup>194</sup> In 1985, the Alabama Legislature increased from ten to fifteen years the length of a jail sentence that could be suspended and replaced with probation.

<sup>195</sup> Added in 1975. ALA. CODE § 13A-6-69 (1994).

<sup>196</sup> Added in 1980. ALA. CODE § 32-5A-191 (2004).

- Robbery of a pharmacy;<sup>197</sup>
- Selling, furnishing or giving controlled substances to a minor;<sup>198</sup>
- Selling drugs on or near a school campus;<sup>199</sup>
- Selling drugs at or near a public housing project;<sup>200</sup> or,
- Domestic violence in the first or second degree.<sup>201</sup>

In addition, under Alabama’s mandatory minimum drug laws, passed in 1980, any person sentenced under the mandatory minimums statute (ALA. CODE § 13A-12-231) is ineligible for probation *unless* that person provides “substantial assistance in the arrest, or in the conviction of any of his accomplices, accessories, coconspirators, or principals.”<sup>202</sup> A reduction or suspension of sentence as a result of such “substantial assistance” is only possible after a motion from the prosecuting attorney.<sup>203</sup>

Since 2000, more than twenty bills have been introduced in the Legislature that create new offenses carrying mandatory terms of imprisonment with no possibility of probation or parole. While only the domestic violence bill listed above has passed, bills that did not pass have excluded from probation individuals convicted of: video voyeurism,<sup>204</sup> unlawful manufacture of a controlled substance in the second degree while in possession of a firearm,<sup>205</sup>

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<sup>197</sup>Added in 1982. ALA. CODE § 13A-8-52 (1994).

<sup>198</sup>Added in 1987. ALA. CODE § 13A-12-215 (1994).

<sup>199</sup>Added in 1987. ALA. CODE § 13A-12-250 (1994).

<sup>200</sup>Added in 1989. ALA. CODE § 13A-12-270 (1994).

<sup>201</sup>Added in 2000. ALA. CODE §§ 13A-6-130, -131 (Supp. 2004).

<sup>202</sup> LA. CODE § 13A-12-232(b) (1994).

<sup>203</sup>Id..

<sup>204</sup>HB 111, 2004 Reg. Sess. (Ala. 2004).

<sup>205</sup>HB 315, 2003 Reg. Sess. (Ala. 2003).

sexual offenses against minors,<sup>206</sup> committing a crime while in office as a public official,<sup>207</sup> and other sex crimes.<sup>208</sup> In addition, a bill that failed in the Alabama Senate in 2001 would have taken away the possibility of probation or parole from any person convicted of more than one violent offense.<sup>209</sup>

## B. Granting Probation

When an individual is eligible for probation, it remains up to the presiding court to decide whether to explore probation as a possible disposition. When a court chooses to consider probation, it refers the cases to a probation officer, who must provide a presentence investigation report before sentencing. In addition to the defendant's criminal record and social history, such a report can include physical and mental examinations of the defendant.<sup>210</sup>

If a court decides to grant probation, it can determine the period of probation within certain limits: the maximum probation time is two years for misdemeanors and five years for felonies.<sup>211</sup> Under Alabama Code section 15-22-52, possible conditions of probation include requirements that the defendant:

- (1) Avoid injurious or vicious habits;
- (2) Avoid persons or places of disreputable or harmful character;
- (3) Report to the probation officer as directed;
- (4) Permit the probation officer to visit him at his home or elsewhere;
- (5) Work faithfully at suitable employments as far as possible;
- (6) Remain within a specified place;
- (7) Pay the fine imposed or costs or such portions thereof as the court may determine and in such installments as the court may direct;
- (8) Make reparation or restitution to the aggrieved party for the damage or loss

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<sup>206</sup>HB 255, 2002 Reg. Sess. (Ala. 2002).

<sup>207</sup>SB 533, 2002 Reg. Sess. (Ala. 2002).

<sup>208</sup>HB 817, 2000 Reg. Sess. (Ala. 2000).

<sup>209</sup>SB 34, 2001 Reg. Sess. (Ala. 2001).

<sup>210</sup>LA. CODE § 15-22-51 (2004).

<sup>211</sup>LA. CODE §§ 15-22-54, 12-14-13 (2004).

- caused by his offense in an amount to be determined by the court; and  
(9) Support his dependents to the best of his ability.<sup>212</sup>

In addition, Alabama Rule of Criminal Procedure 27.1 provides that conditions of probation may include community service and the statute governing municipal courts lists “defensive driving schools, alcohol countermeasure programs or courses where available” as other possible conditions.<sup>213</sup> The Committee Comments to Rule 27.1 provide that, “[c]onditions imposed on the probationer should reflect the correctional as opposed to the punishment goals of probation.”

When an individual is released on probation, the probation officer is required to provide him with written instructions regarding the conditions of probation and to explain the reasons for the conditions and the consequences of violating the conditions.<sup>214</sup> A court cannot later revoke probation if the defendant has not been given a written copy of the conditions.<sup>215</sup>

A probation officer has the authority to “modify or clarify” conditions of probation, and may request a court order changing conditions. If the conditions of probation change, the court is required to notify the probationer, who has ten days to request a hearing to contest the changes.<sup>216</sup>

### C. Completing Probation

Probation automatically terminates on the scheduled date of completion and “upon successful completion of the term of probation set by the court.”<sup>217</sup> When recommended by the probation officer, the court can terminate probation prior to the scheduled date upon a showing of “continued satisfactory compliance with the conditions of probation over a

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<sup>212</sup> LA. CODE § 15-22-52 (2004).

<sup>213</sup> LA. CODE § 12-14-13 (2004).

<sup>214</sup> LA. CODE § 15-22-53 (2004); ALA. R. CRIM. P. 27.1.

<sup>215</sup> LA. R. CRIM. P. 27.6(e).

<sup>216</sup> LA. R. CRIM. P. 27.2.

<sup>217</sup> LA. R. CRIM. P. 37.3(c).

sufficient portion of the period of the probation.”<sup>218</sup> A probationer may request a hearing for early termination of probation under Criminal Procedure Rule 27.3(b).

#### D. Revoking Probation

Probation officers have the power of arrest and do not need an arrest warrant as long as the probation officer furnishes a written statement describing violations sufficient to warrant the detention of the probationer.<sup>219</sup> A probation revocation hearing can occur after the probationer has completed his term of probation as long as the process for revoking probation has begun before the date of completion.<sup>220</sup>

Under Alabama Code section 15-22-54(d)(1), the court must conduct a hearing when a probationer has allegedly violated the conditions of probation. At the probation revocation hearing, the court can either continue the existing probation, issue a warning, or modify or revoke probation. When “no measure short of confinement will adequately protect the community from further criminal activity by the probationer” or “no measure short of confinement will avoid depreciating the seriousness of the violation,” the court must revoke probation.<sup>221</sup> Committee notes to Rule 27.5 further note that alternatives to imprisonment should always be considered before deciding to revoke probation.

Probation revocation hearings carry fewer due process requirements than do criminal trials or sentencing proceedings. At a probation revocation hearing, a probationer has a right to present evidence, cross-examine witnesses and testify.<sup>222</sup> The Fifth Amendment right against self-incrimination applies in probation revocation hearings as well.<sup>223</sup> In *Armstrong v. State*, the Alabama Supreme Court set out minimal due process requirements that must be met before

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<sup>218</sup> LA. CODE § 15-22-54(b) (2004).

<sup>219</sup> LA. CODE §§ 15-22-53(a), 15-22-54(b) (2004). The court may also issue a warrant for the violation of any terms of probation. ALA. CODE § 15-22-54(c) (2004).

<sup>220</sup> *Owens v. State*, 728 So. 2d 673, 675 (Ala. Crim. App. 1998).

<sup>221</sup> LA. CODE § 15-22-54(d)(4) (2004).

<sup>222</sup> LA. R. CRIM. P. 27.6(d)(1).

<sup>223</sup> *McElrath v. State*, 637 So. 2d 908, 909 (Ala. Crim. App. 1994).

probation can be revoked. They are:

1. Written notice to the probationer of the claimed violations of probation.
2. Disclosure to the probationer of evidence against him or her.
3. Opportunity of probationer to be heard in person and to present witnesses and documentary evidence.
4. The right to confront and cross-examine adverse witnesses (unless the judge specifically finds good cause for not allowing confrontation).
5. A written statement by the judge as to the evidence relied on and reasons for revoking probation.<sup>224</sup>

These requirements are mirrored in Criminal Procedure Rules 27.5 and 27.6. They come from the United States Supreme Court’s list of minimal due process requirements for probation revocation<sup>225</sup> and are therefore similar in most states. The Alabama Court of Criminal Appeals has held that each of the requirements of Rules 27.5 and 27.6 can be waived and errors must be raised at trial.<sup>226</sup> In addition, the court is not bound by the strict rules of evidence in a probation revocation hearing and is allowed to take into account any “relevant evidence not legally privileged” (including hearsay).<sup>227</sup> The Alabama Supreme Court has held that the State can use circumstantial evidence to prove its case, but it is required to show that the probationer *knowingly* violated his conditions of probation.<sup>228</sup>

### III. PROBATION REVOCATION

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<sup>224</sup>*Armstrong v. State*, 312 So. 2d 620, 623 (Ala. 1975). The court also noted that: the trial judge who granted probation may also conduct the revocation hearing; two hearings are not necessary if the probationer has been given sufficient notice of the charges and the evidence to be relied on for revocation of probation; the judge conducting the probation hearing should decide on a case-by-case basis whether due process requires that an indigent probationer be represented by counsel; and, the trial judge must only be reasonably satisfied from the evidence that the probationer has violated the conditions of his probation. *Id.* at 623.

<sup>225</sup>*Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

<sup>226</sup>*Taylor v. State*, 600 So. 2d 1080, 1081 (Ala. Crim. App. 1992).

<sup>227</sup> LA. R. CRIM. P. 27.6(d)(1).

<sup>228</sup>*Ex parte J.J.D., Jr.*, 778 So. 2d 240, 243 (Ala. 2000).

A. Due Process

According to the Alabama Court of Criminal Appeals, due process requires that the “written statement by the judge” mandated in *Armstrong* constitute not simply a written reference to an admission by the probationer that he has violated probation, but an order setting forth what term or condition of probation was violated and the reasons for revoking the probation.<sup>229</sup> However, there is some evidence that courts do not always provide such an order. For example, one recent trial docket sheet from a Birmingham Municipal Court proceeding revoking an individual’s probation provides, “Probation revoked owing \$693.50 and 75 days to serve. Credit for 7 days served. Balance of sentence to serve is \$693.50 and 68 days,” without any attached written order or explanation.<sup>230</sup>

In some instances, probationers are not being afforded *any* of the procedural guarantees articulated in *Armstrong*. Candy Moore, a probationer before the Birmingham Municipal Court, recently had her probation revoked without being informed of her right to present evidence or call witnesses on her behalf (indeed, her efforts to speak in the courtroom were rebuffed). A request to speak to an attorney was also ignored and Ms. Moore was confined to the municipal jail for more than 480 days without any written order or finding of fact on the part of the court.<sup>231</sup>

B. Right to Counsel

While federal law and the laws of many states guarantee individuals a right to counsel at probation revocation hearings,<sup>232</sup> the United States Supreme Court has held that indigent prisoners do not have an absolute constitutional right to counsel at probation revocation proceedings, reasoning that the deprivation of liberty occurs at sentencing rather than at

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<sup>229</sup>*Evans v. State*, 794 So. 2d 1234, 1237 (Ala. Crim. App. 2000).

<sup>230</sup>*Edge v. State*, Trial Docket, Municipal Court of the City of Birmingham, Alabama (Nov. 15, 2004) (on file with Equal Justice Initiative).

<sup>231</sup>*Moore v. State*, Trial Docket, Municipal Court of the City of Birmingham, Alabama (Nov. 9, 2004) (on file with Equal Justice Initiative); Interview with Candy Moore, Birmingham, Ala. (Jan. 11, 2005) (on file with Equal Justice Initiative).

<sup>232</sup>For federal statutory right to counsel at probation hearings, see 18 U.S.C.S. 3006A(a)(1)(c); FED. R. CRIM. P. 32.1.

revocation.<sup>233</sup> In Alabama, the rules of criminal procedure provide that a probationer is entitled to bring counsel to a hearing and, if indigent, can be appointed counsel if the probationer has a colorable claim that he has not committed the alleged violation or “if there are substantial reasons that justify or mitigate the violation and that may make revocation inappropriate, and the reasons are complex or otherwise difficult to develop or present.”<sup>234</sup> While courts are thus permitted to determine whether a probationer is entitled to counsel on a case-by-case basis, they must nevertheless make a determination whether an individual has a right to counsel in each case.<sup>235</sup> A failure to inform a probationer of his possible right to counsel only violates due process when the revocation hearing was one in which the defendant “was materially harmed by the absence of counsel.”<sup>236</sup>

Even when a court determines that an indigent probationer is deserving of court-appointed counsel, lawyers are not always readily available. A probationer must therefore choose between waiting in jail for an appointed lawyer, or waiving his right to counsel and choosing self-representation. The latter option can seem more enticing when faced with imminent jail time, resulting in indigent probationers representing themselves even when a judge has found them deserving of appointed counsel.<sup>237</sup>

The lack of a definitive right to counsel is problematic for a number of reasons. Probationers are often unfamiliar with the restrictions on a court’s ability to revoke their probation, and can be imprisoned illegally without a lawyer to prevent the imposition of unwarranted sentences (*see, e.g.*, discussion of imprisonment for failure to pay fines below). The presence of a lawyer can also help to insure that the due process requirements of probation revocation hearings are met and that any issues at a hearing are preserved for appeal. Since legal services organizations do not often take on appeals of probation revocations, it is especially important that individuals be represented at their initial hearings.

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<sup>233</sup>*See Gagnon*, 411 U.S. at 790.

<sup>234</sup> LA. R. CRIM. P. 27.6.

<sup>235</sup>*See Gibbons v. State*, 882 So. 2d 381, 382 (Ala. Crim. App. 2003); *Law v. State*, 778 So. 2d 249, 250 (Ala. Crim. App. 2000).

<sup>236</sup>*Evans v. State*, 794 So. 2d 1234, 1236 (Ala. Crim. App. 2000).

<sup>237</sup>Interview with Isaac Edge, Birmingham, Ala. (Jan. 11, 2005) (on file with Equal Justice Initiative). Mr. Edge chose to waive his right to counsel at his probation revocation hearing because he did not want to wait in jail for a lawyer. *Id.*

C. Imprisonment for Failure to Pay Fines

Constitutional and statutory bars against incarcerating indigent individuals for failure to pay fines are clear. In *Bearden v. Georgia*, the United States Supreme Court held that a court cannot imprison an individual for a failure to pay excessive fines unless that failure to pay is willful or incarceration is the only option.<sup>238</sup> The Eleventh Circuit Court of Appeals has held that *Bearden* applies to restitution payments.<sup>239</sup> In Alabama, Rule 26.11(I)(2) provides that “[i]n no case shall an indigent defendant be incarcerated for inability to pay a fine or court costs or restitution.” In addition, Alabama Code section 15-18-62, as amended in 2002, restricts the amount of time for which individuals can be incarcerated for willfully failing to pay fines. The restrictions range from ten days imprisonment for charges totaling less than \$250 to a maximum of thirty days imprisonment for charges totaling up to \$1000, with four additional days for every \$100 after that.<sup>240</sup>

Despite these restrictions, reports from Alabama judges and inmates indicate that probation is often revoked for failure to pay fines, court fees and/or restitution, and sentences sometimes may exceed statutory limits. One male inmate at the Birmingham Municipal Jail reported that dozens of his fellow inmates have received 700 or 800 days in jail for failing to pay fines, often at probation revocation hearings, and one female inmate estimates that more than half of the women in the Birmingham Municipal Jail have been incarcerated for failing to pay fines.<sup>241</sup> Of further concern are indications that when fines have not been paid, judges are revoking probation for technical violations such as failing to report to a probation officer.<sup>242</sup> While such reports need to be verified, when combined with the extraordinarily high rate of probation revocations for non-violent and property offenses, they point towards a disturbing phenomenon in which Alabama’s jails have come to resemble debtor’s prisons, full of indigent

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<sup>238</sup> *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983).

<sup>239</sup> *United States v. Satterfield*, 743 F. 2d 827, 842 (11th Cir. 1983).

<sup>240</sup> LA. CODE § 15-18-62 (2004).

<sup>241</sup> Interviews with Isaac Edge and Candy Moore, Birmingham, Ala. (Jan. 11, 2005) (on file with Equal Justice Initiative).

<sup>242</sup> *Id.* Mr. Edge’s statements and record indicate that his probation may have been revoked for a combination of failing to pay large restitution charges and not reporting to his probation supervisor. However, this case presents another instance in which no written order of revocation exists.

Alabamians unable to pay the court's fines. Even though the Committee Comments to Rule 27.1 governing conditions of probation in Alabama provide that "[c]onditions requiring payment of fines, restitution, reparation, or family support should not go beyond the probationer's ability to pay," fines and restitution charges can pile up to unmanageable amounts for indigent individuals. To incarcerate probationers for failing to pay such charges in their entirety creates a system that imprisons people based on class and contradicts the underlying principles of *Bearden*.

## RECOMMENDATIONS

1. Increase the number of probation officers in the state to reduce the ratio of probationers supervised by each probation officer. Improve the diversity, education and training of probation officers to reduce the number of unnecessary and technical revocations.
2. Drastically reduce the grounds for probation revocation to only those problems which warrant incarceration for probationers. Eliminate revocation for technical violations and use community service and alternatives to incarceration as a tool to reduce the number of prison admissions from probation.
3. Enforce requirements for written justification of any probation revocation and provide counsel to indigent people facing probation revocation that could result in imprisonment. The denial of counsel in these cases must be appealed and challenged in legal actions.
4. Prepare educational materials for people who are sentenced to probation so that they can fully comply with the terms of their probation and obtain critically needed support and assistance if their probation is at risk of revocation.

## CONCLUSION

Given that 21% of those sent to prison each year come from the ranks of probationers, better supervision and support of this group may have the single greatest impact on the number of people sent to prison in Alabama each year. Finally, ensuring that probationers have access to counsel at revocation hearings and on appeal will help protect against the widespread violations of individual rights that currently characterize probation revocation proceedings in many Alabama courts. Ensuring that these proceedings comport with due process and that individuals have access to adequate resources while on probation will help Alabama to carry out its mission "to assist the probationer to become a law-abiding citizen."

## PRISON CONDITIONS

### I. OVERCROWDING

Following the passage of the Habitual Felony Offender Act in 1979,<sup>243</sup> Alabama's prison population skyrocketed from less than six thousand<sup>244</sup> to more than 17,220 in 1991.<sup>245</sup> In a system designed to hold fourteen thousand prisoners, Alabama currently houses approximately twenty-eight thousand inmates.<sup>246</sup> "Alabama has among the most overcrowded prison systems and the highest ratio of inmates to corrections officers in the country."<sup>247</sup> Alabama's cost per inmate is approximately \$26 per day. The national average daily cost is about \$62 per inmate; in the Southeast, the average daily cost is \$40 per inmate.<sup>248</sup> Alabama's per-inmate spending ranks last among sixteen states in the Southeast.<sup>249</sup>

Lawsuits were filed in response to this crisis, alleging that this rate of overcrowding was unconstitutional.<sup>250</sup> In Morgan County, for example, inmates were forced to sleep on concrete

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<sup>243</sup> LA. CODE § 13A-5-9 (1994).

<sup>244</sup>Mike Cason, *Advocates Push Prison Reforms*, MONTGOMERY ADVERTISER, Sept. 25, 2003, at 2A; CRIMINAL JUSTICE INST., INC., THE CORRECTIONS YEARBOOK 2 (1982).

<sup>245</sup> OSA DAVIS, LYNDA FLYNT, BECKI R. GOGGINS, & ALLEN L. TAPLEY, ALABAMA'S CRIMINAL JUSTICE SYSTEM UPDATE, <http://sentencingcommission.alacourt.gov/Publications/AL%20Criminal%20Justice%20Sys%20Update.pdf> (2003).

<sup>246</sup>*Not Permanent Solution*, MONTGOMERY ADVERTISER, July 17, 2003, at 7A.

<sup>247</sup>Brendan Kirby, *Alabama's Parole Experiment*, MOBILE REG., Feb. 27, 2005.

<sup>248</sup>*Id.*

<sup>249</sup>*Id.*

<sup>250</sup>*See, e.g., Chairs v. Burgess*, 143 F. 3d 1432 (11th Cir. 1998) (vacating district court order finding state in violation of decree ordering Department of Corrections to remove state prisoners from Morgan County Jail; evidence about whether state prison system lacked adequate beds and guards for all prisoners being sentenced in Alabama was material to determining state's ability to comply with decree).

floors because the jail lacked enough beds.<sup>251</sup> The United States District Court Judge wrote, “[t]o say that the Morgan County Jail is overcrowded is an understatement. The sardine-can appearance of its cell units more nearly resemble the holding units of slave ships during the Middle Passage of the eighteenth century than anything in the twenty-first century.”<sup>252</sup>

Tutwiler Prison for Women was another site of overcrowding, with more than one thousand inmates packed in space designed for about 360.<sup>253</sup> A federal judge found that the overcrowded and understaffed dorms created a substantial risk of serious harm to staff and inmates and issued a preliminary injunction requiring the Department of Corrections to reduce the inmate population.<sup>254</sup> The United States District Court concluded that the prison’s overcrowded conditions violated the Eighth Amendment and described the prison as a “time bomb ready to explode facility-wide at any unexpected moment in the near future.”<sup>255</sup> In August 2004, a federal judge approved a settlement in this lawsuit, which calls for improvements in the medical care and living conditions of inmates.<sup>256</sup> The settlement provides for the use of community corrections placements to control the population flow, maintenance of an adequate temperature, outdoor shade, ventilation, drug treatment, recreational opportunities, and additional programming.<sup>257</sup>

Long-term solutions to overcrowding include constructing six new prison facilities to house 10,040 male inmates and 1380 female inmates,<sup>258</sup> and short-term solutions meant the

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<sup>251</sup>*Maynor v. Morgan County*, 147 F. Supp. 2d 1185, 1186 (N.D. Ala. 2001).

<sup>252</sup>*Id.*

<sup>253</sup>Samira Jafari, *Settlement Approved in Lawsuit over Conditions at Tutwiler*, AP NEWS, Aug. 24, 2004.

<sup>254</sup>*Laube v. Haley*, 234 F. Supp. 2d 1227 (M.D. Ala. 2002).

<sup>255</sup>*Id.* at 1252.

<sup>256</sup>Samira Jafari, *Settlement Approved in Lawsuit over Conditions at Tutwiler*, AP NEWS, Aug. 24, 2004.

<sup>257</sup>*Laube v. Campbell*, 333 F. Supp. 2d 1234, 1248-51 (M.D. Ala. 2004).

<sup>258</sup>*Id.*

transfer of hundreds of Alabama prisoners to private prisons in Louisiana and Mississippi.<sup>259</sup>

Prison overcrowding also created a backlog of state prisoners awaiting transfer in county jails due to inadequate space in state prisons.<sup>260</sup> Addressing the problematic nature of leaving inmates in county jails, a Montgomery Circuit Court held former Corrections Commissioner Michael Haley in contempt for leaving state prisoners in county jails.<sup>261</sup> In order to facilitate immediate action, the judge proposed a \$26 per day fine for every prisoner who remained in county jail after thirty days.<sup>262</sup> Because there were over two thousand inmates fitting this classification, the state faced the threat of fines of up to \$52,000 per day and \$1.5 million per month.<sup>263</sup> The state eliminated this backlog through accelerated paroles and temporary transfers to out-of-state private facilities.<sup>264</sup>

Despite litigation and settlements demanding a remedy to overcrowding and efforts to control the situation, the state remains at approximately 190% capacity.<sup>265</sup> Additionally, in December 2004, county jails reported another growing backlog with 192 inmates in county jails who should be transferred to state facilities.<sup>266</sup> Estimates project that it will cost the state at least

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<sup>259</sup>*Id.*

<sup>260</sup>*Barbour County v. Haley*, CV-92-399-SH (Barbour Co. Cir. Ct. May 18, 2001).

<sup>261</sup>*Id.*

<sup>262</sup>*Id.*

<sup>263</sup>John Peck, *County Sheriffs Applaud Judge's Ruling on Inmate Backlog*, THE HUNTSVILLE TIMES, July 21, 2001; *Judge Orders State to Relieve Inmate Crowding in County Jails*, THE GADSDEN TIMES, July 21, 2001; ROSA DAVIS, LYNDA FLYNT, BECKI R. GOGGINS, & ALLEN L. TAPLEY, ALABAMA'S CRIMINAL JUSTICE SYSTEM UPDATE, <http://sentencingcommission.alacourt.gov/Publications/AL%20Criminal%20Justice%20Sys%20Update.pdf> (2003).

<sup>264</sup>*Fiscal System Flawed*, MONTGOMERY ADVERTISER, Jan. 5, 2005, at 7A.

<sup>265</sup>Carla Crowder, *Private prison site work begins in Perry County*, BIRMINGHAM NEWS, Jan. 9, 2005.

<sup>266</sup>*Underscores Need For Reform*, MONTGOMERY ADVERTISER, Dec. 18, 2004, at 9A.

\$750 million over the next ten years to house state prisoners.<sup>267</sup> A lack of funding will continue to plague the overcrowding dilemma.

## II. PRIVATE PRISONS

### A. History

With the growing political rhetoric of waging a war on drugs and getting tough on crime,<sup>268</sup> the 1980s marked the birth of prison privatization, the private development of new prisons and takeover of existing government prisons.<sup>269</sup> Private prisons operate using a per diem or monthly rate per inmate which the state, local, or federal government pays to the private company.<sup>270</sup> Proponents of prison privatization point to cost savings and efficient operation of facilities as support for the trend.<sup>271</sup> First, from a fiscal perspective, private prisons promise a to reduce labor costs through the use of nonunion labor and reductions in wages and benefits.<sup>272</sup> However, research reflects that perceived savings do not exceed one percent of the labor costs of public facilities.<sup>273</sup> Second, privatization proponents' contention that private facilities provide higher-quality correctional services than do public facilities is severely undermined by reports of violence, physical abuse, and escapes from private prisons.<sup>274</sup>

Opponents of prison privatization point to the fact that “private prison companies are

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<sup>267</sup>Mike Cason, *State Faces Prison Dilemma*, MONTGOMERY ADVERTISER, Jan. 18, 2001 at 3B.

<sup>268</sup> CORRECTIONS (Third World Newsreel 2001).

<sup>269</sup>AMY CHEUNG, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 1, <http://www.sentencingproject.org/pdfs/1053.pdf> (Sept. 2004).

<sup>270</sup>*Id.*

<sup>271</sup>*Id.*

<sup>272</sup>*Id.* at 2.

<sup>273</sup>*Id.*

<sup>274</sup>*Id.* at 2-3.

beholden to the bottom line and maximizations of profits.”<sup>275</sup> In this relationship between profit goals and public policy lies the financial incentive for private companies to hinder criminal justice reforms, such as shorter prison terms, alternatives to incarceration, and sentencing reform.<sup>276</sup> Two of the private prison industry’s biggest companies, Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation, make enormous contributions to the American Legislative Exchange Council, a conservative public policy group that successfully has advocated for tough-on-crime policies and habitual offender laws across the country.<sup>277</sup> During the 2000 election cycle, private prison companies reportedly contributed more than \$1,125,598 to 830 candidates in fourteen Southern states.<sup>278</sup> In addition to concerns over private company motivations, opponents are similarly unnerved by the lack of accountability and public oversight in the development and operation of private facilities.<sup>279</sup> Taxpayers are denied the opportunity to approve or disapprove the building of new facilities while remaining liable for the expenses incurred by the state through its contracts with private prison companies.<sup>280</sup>

The Supreme Court has held that “it is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced, or to be transferred to an out-of-state prison after serving a portion of his sentence in his home State.”<sup>281</sup> This ruling is interpreted to apply even in cases of transfer to private prisons.<sup>282</sup> Similarly, difficulties in visitation due to long distances or diminished

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<sup>275</sup>*Id.* at 3.

<sup>276</sup> CORRECTIONS (Third World Newsreel 2001).

<sup>277</sup> MY CHEUNG, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 4-5, <http://www.sentencingproject.org/pdfs/1053.pdf> (Sept. 2004).

<sup>278</sup> DWIN BENDER, A CONTRIBUTING INFLUENCE: THE PRIVATE-PRISON INDUSTRY AND POLITICAL GIVING IN THE SOUTH 4, <http://www.followthemoney.org/press/ZZ/20020430.pdf> (Apr. 28, 2002).

<sup>279</sup>*Id.* at 5.

<sup>280</sup>*Id.*

<sup>281</sup>*Olim v. Wakinekona*, 461 U.S. 238, 247 (1983).

<sup>282</sup>*White v. Lambert*, 370 F.3d 1002, 1013 (9th Cir. 2004) (citing *Olim* and stating, “[i]ncarceration in a private prison does not change this analysis because state prison facilities

programming opportunities available at private facilities do not deem the transfer unconstitutional.<sup>283</sup>

B. Response to Overcrowding Woes

The per-inmate cost in Alabama is the lowest in the nation;<sup>284</sup> however, its facilities are operating at nearly double their designed capacities.<sup>285</sup> There are approximately twenty-eight thousand inmates in prison in Alabama in facilities designed to hold only fourteen thousand.<sup>286</sup> In March 2004, Alabama prisons were still operating at more than 185% of their designed capacity.<sup>287</sup> Despite efforts to remedy the overcrowding dilemma, the state remains at approximately 190% capacity.<sup>288</sup> A consulting firm in Columbia, South Carolina estimated that it would cost Alabama over \$1 billion to fund a ten-year master plan to reduce overcrowding and understaffing in the state's prison system.<sup>289</sup> Long-term plans included constructing six new prison facilities to house 10,040 male inmates and 1380 female inmates.<sup>290</sup> In an effort to

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have never 'been exclusively public.'") (quoting *Richardson v. McKnight*, 521 U.S. 399, 405 (1997) (discussing history of private penal institutions)).

<sup>283</sup>*Overton v. Bazzetta*, 539 U.S. 126 (2003) (visitation hardship); *Fort v. Reed*, 623 F. Supp. 1106, 1108 (E.D. Wash. 1985) (program opportunities).

<sup>284</sup>*Reprieve Well Justified*, MONTGOMERY ADVERTISER, May 24, 2003, at 7A.

<sup>285</sup> LA. DEP'T OF YOUTH SERVICES, ANNUAL REPORT FY 2003, <http://dys.state.al.us/PDFs/AnnualRpt2003.pdf> (Sept. 30, 2003), providing facility information on each of the state's correctional institutions, community based facilities, and work release centers.

<sup>286</sup>*Not Permanent Solution*, MONTGOMERY ADVERTISER, July 17, 2003, at 7A.

<sup>287</sup>*Male Inmates Return to Alabama*, CORRECTIONS NEWS 3, [http://www.doc.state.al.us/monthly\\_rpts.htm](http://www.doc.state.al.us/monthly_rpts.htm) (Mar. 2003).

<sup>288</sup>Carla Crowder, *Private prison site work begins in Perry County*, BIRMINGHAM NEWS, Jan. 9, 2005.

<sup>289</sup>Mike Sherman, *Prison overhaul has big price tag* MONTGOMERY ADVERTISER, Apr. 9, 2003, at 1A.

<sup>290</sup>*Id.*

achieve a short-term solution, the Alabama Legislature approved a \$4.57 million supplemental appropriation to fund the transfer of Alabama prisoners to private prisons in Louisiana and Mississippi.<sup>291</sup> Within this legislation, which passed unanimously in both chambers, \$2.7 million was earmarked to relieve overcrowding at Tutwiler pursuant to a court-ordered injunction, \$975,000 for community corrections programs, and \$900,000 for additional beds.<sup>292</sup> “[O]ur prison system is a ticking time bomb---especially considering that it is operating at more than 200 percent capacity,” said Governor Riley.<sup>293</sup>

Under court order to reduce overcrowding at Tutwiler, Governor Riley signed an emergency contract with LCS Corrections Services to house female inmates in a private Louisiana prison at a daily rate of \$24 per inmate, \$3 cheaper than in-state housing costs, according to corrections officials.<sup>294</sup> In April 2003, the Department of Corrections sent the first seventy women from Tutwiler to Louisiana, eventually sending a total of 309 women.<sup>295</sup> The selection process of transfer inmates favored those who were not suffering from mental or chronic health problems and near the end of their sentences.<sup>296</sup> Alabama transferred 1400 male inmates to Tallahatchie County Correctional Facility in Tutwiler, Mississippi, which is owned by Corrections Corporation of America.<sup>297</sup> Despite these cost-saving intentions, these emergency contracts cost Alabama about \$500,000.<sup>298</sup> In 2004, when Alabama sought to return

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> Mike Sherman, *Riley approves cash for prison bailout*, MONTGOMERY ADVERTISER, Apr. 10, 2003, at 3B.

<sup>294</sup> Mike Cason, *Tutwiler inmates sent to Louisiana*, MONTGOMERY ADVERTISER, Apr. 15, 2003, at 1A.

<sup>295</sup> *Id.*; Mike Cason, *Transferred Convicts Like Tutwiler Best*, MONTGOMERY ADVERTISER, Nov. 9, 2003.

<sup>296</sup> *Id.*

<sup>297</sup> *Corrections Corporations of America: Partners with Alabama to Provide Emergency Housing of State's Inmates*, CORRECTIONS NEWS 2, [http://www.doc.state.al.us/monthly\\_rpts.htm](http://www.doc.state.al.us/monthly_rpts.htm) (Sept. 2003).

<sup>298</sup> *Prisons Pressing Issue*, MONTGOMERY ADVERTISER, Feb. 8, 2004, at 6A.

four hundred male inmates, the terms of the contract mandated that the state continue to pay \$27.50 a day per inmate even after their return home.<sup>299</sup> The contract required the state to give a sixty-day notice before ending the agreement, requiring the state to pay fees through March for inmates who returned home in February.<sup>300</sup>

C. Legislative Action

In June 2003, State Senator French introduced a Senate Joint Resolution urging Commissioner Campbell to return to Alabama inmates transferred to out-of-state prisons and terminate the use of private prisons.<sup>301</sup> The resolution cited several concerns including the “coercive power and authority” of private hands as well as the motivation of private companies to “put profit motives ahead of the public interest, inmate interests.”<sup>302</sup> The resolution also expressed concerns that private transfers would “skim the cream,” removing the “best” prisoners to make the private facilities look better than the government facilities left with the “worst” prisoners.<sup>303</sup> Finally, the resolution cited the diminished chances for rehabilitation in out-of-state prisons and the hardships facing family visitation efforts.<sup>304</sup> The resolution was inactive after its move to the Senate Rules Committee and was not introduced in any subsequent legislative session.

D. Facility Concerns

LCS Corrections Services, Inc. operates six facilities in Louisiana and Texas, one being its South Louisiana Correctional Center in Basile that houses Alabama Tutwiler transfers.<sup>305</sup>

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<sup>299</sup>*Id.*

<sup>300</sup>*Id.*

<sup>301</sup>S.J.R. 108, 2003 Reg. Sess. (Ala. June 9, 2003). Commissioner Campbell is not a strong proponent of privatization, but is willing to use that avenue as long as the lack of space necessitates it.

<sup>302</sup>*Id.*

<sup>303</sup>*Id.*

<sup>304</sup>*Id.*

<sup>305</sup>*Troubling Past*, MONTGOMERY ADVERTISER, Apr. 19, 2003, at 7A.

This company has a history of mismanagement and poor performance. Management concerns surfaced following reports that the warden is present at the facility only two days a week.<sup>306</sup> In 1997 there was a riot and escape and in 1999 a grand jury indicted a high-ranked company executive on charges of violating prisoners' civil rights.<sup>307</sup> Idaho brought their transfers home after becoming aware of problems with the facility.<sup>308</sup> Additionally, one guard is being investigated on charges of sexual abuse of inmates.<sup>309</sup> Over twenty of Alabama's female inmates were called to testify in front of a Louisiana grand jury regarding these allegations.<sup>310</sup> In Louisiana, it is illegal for prison guards to engage in non-consensual or consensual sexual relations with inmates.<sup>311</sup> Before 2004, Alabama lacked such protections for inmates. In February 2004, Rep. Barbara Boyd, D-Anniston, won the passage of HB 4, which established the Class C felony of custodial sexual misconduct by government agency employee deemed with the responsibility of caring for, controlling, or supervising pretrial of sentenced persons in the penal system or detention facility.<sup>312</sup>

Corrections Corporation of America (CCA) is one of the biggest prison operators in the nation, surpassed by only four states and the federal government. CCA is the largest owner and operator of private correctional facilities in the United States.<sup>313</sup> According to the Department of Corrections, CCA offers rehabilitation and educational programs, health care, food service,

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<sup>306</sup>*Id.*

<sup>307</sup>*Id.*

<sup>308</sup>*Id.*

<sup>309</sup>*In Perry County*, MONTGOMERY ADVERTISER, Apr. 24, 2004, at 98A.

<sup>310</sup>*More Than 20 Female Inmates Testify in Louisiana Sex Probe*, BIRMINGHAM NEWS, June 9, 2004.

<sup>311</sup>*Illicit Contact: It's a Crime that Sex With Inmates Isn't a Crime*, TUSCALOOSA NEWS, Apr. 13, 2004.

<sup>312</sup>2004 ALA. ACTS 298.

<sup>313</sup>*Corrections Corporations of America: Partners with Alabama to Provide Emergency Housing of State's Inmates*, CORRECTIONS NEWS 3, [http://www.doc.state.al.us/monthly\\_rpts.htm](http://www.doc.state.al.us/monthly_rpts.htm) (Sept. 2003).

and work and recreational programs.<sup>314</sup> Some inmates have provided rave reviews of the Tallahatchie facility; one inmate stated, “This prison right here, it’s like a dream prison to prisoners. The people treat you better . . . It’s cleaner. It’s not crowded. Everything is up to par.”<sup>315</sup> Others were not so pleased with being isolated from their families in a location where lodging for visitors is not readily available.<sup>316</sup> Although private prisons in some instances serve a cost-saving function, this function itself comes at an additional price. The private facility in Mississippi to which Alabama transferred hundreds of male inmates does not provide any educational or vocational programming for inmates other than exercise and recreation.<sup>317</sup>

E. Family Concerns

The use of out-of-state facilities has a significant impact on the family members of Alabama prisoners. When the first female inmates left Tutwiler for a private facility in Louisiana in the dead of night, their families received notification only after the women arrived in Louisiana.<sup>318</sup> Prior notification, according to Commissioner Campbell, constitutes a security risk.<sup>319</sup> Concerned loved ones base their dissatisfaction with out-of-state transfers on both limitations on familial relationships and increased difficulty in accessing legal counsel.<sup>320</sup>

F. In-State Facilities

In many instances, the development of private facilities is used as the solution to the

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<sup>314</sup>*Id.*

<sup>315</sup>Stan Bailey, *Air Conditioning Food Draw Rave Reviews at Out-of-State Prisons*, BIRMINGHAM NEWS, July 12, 2003.

<sup>316</sup>*Id.*

<sup>317</sup>*Not Permanent Solution*, MONTGOMERY ADVERTISER, July 17, 2003, at 7A.

<sup>318</sup>Mike Cason, *Tutwiler inmates sent to Louisiana*, MONTGOMERY ADVERTISER, Apr. 15, 2003, at 1A.

<sup>319</sup>*Id.*

<sup>320</sup>*Id.*

economic shortfalls of rural, poor counties in America.<sup>321</sup> Perry County is set to be the location of the first in-state private prison facility.<sup>322</sup> For some local officials, the 880-bed facility is a solution to the county's economic deprivation.<sup>323</sup> However, the plan has met opposition from community activist groups.<sup>324</sup> Their hesitation may be in large part due to the questionable past of LCS Corrections Services, the company that owns this facility as well as the prison in Basile, Louisiana, where Tutwiler transfers reside.<sup>325</sup> In addition to drug use, escapes, a riot, and sexual assault allegations, one of LCS's prisons ranked among the worst for its mistreatment of INS detainees in the 1990s.<sup>326</sup> Despite the fact that the Perry County facility will feature lunchroom and laundry facilities that can accommodate between three and four thousand inmates, questions remain as to whether inmates will face a lack of educational programming and treatment, as did inmates in the Basile facility.<sup>327</sup> The Department of Corrections has yet to commit to use the facility; however, it continues to acknowledge that the state is in desperate need of space.<sup>328</sup>

### III. MEDICAL CARE FOR ALABAMA PRISONERS

#### A. Rights of Prisoners

Under the Eighth Amendment, prisons are required to provide inmates with adequate

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<sup>321</sup> CORRECTIONS (Third World Newsreel 2001).

<sup>322</sup>Carla Crowder and Tom Gordon, *Job-Starved Perry County Set to House Private Prison*, BIRMINGHAM NEWS, Apr. 22, 2004.

<sup>323</sup>*Id.*

<sup>324</sup>Carla Crowder, *Private Prison Site Work Begins in Perry County*, BIRMINGHAM NEWS, Jan. 9, 2005.

<sup>325</sup>Carla Crowder and Tom Gordon, *Job-Starved Perry County Set to House Private Prison*, BIRMINGHAM NEWS, Apr. 22, 2004.

<sup>326</sup>*Id.*

<sup>327</sup>*Id.*

<sup>328</sup>Carla Crowder, *Private Prison Site Work Begins in Perry County*, BIRMINGHAM NEWS, Jan. 9, 2005.

medical care.<sup>329</sup> This protection extends to prisoners receiving both public and privately contracted medical care.<sup>330</sup> When prison guards or prison doctors demonstrate “deliberate indifference to serious medical needs of prisoners,” their actions constitute “the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”<sup>331</sup> “Deliberate indifference” can be demonstrated through proof that the prison official (1) “knows of and disregards an excessive risk to inmate health or safety;” (2) is “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists;” (3) and actually draws this inference.<sup>332</sup> This standard applies to the mental health and dental care of prisoners as well.<sup>333</sup> Failures to satisfy this standard cannot be justified by financial limitations.<sup>334</sup>

## B. Disturbances in Alabama

### 1. Injury

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<sup>329</sup>*Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (finding that “[t]hese elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration”). Prison health care standards have been developed by the National Criminal Justice Association, American Correctional Association, National Commission on Correctional Health Care, and the U.S. Department of Corrections National Institute of Corrections. (Only the last two entities make their standards or guidelines available online without a fee or membership.) The Alabama Department of Corrections’ website does not indicate the status of the department’s membership in any of these associations.

<sup>330</sup>*West v. Atkins*, 487 U.S. 42, 56-58 (1988) (holding that “[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State’s prisoners of the means to vindicate their Eighth Amendment rights”); *Richardson v. McKnight*, 521 U.S. 399 (1997).

<sup>331</sup>*Gamble*, 429 U.S. at 104.

<sup>332</sup>*Farmer v. Brennan*, 511 U.S. 825, 838 (1994).

<sup>333</sup>*Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

<sup>334</sup>*Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (noting that “systemic deficiencies in medical care may be related to a lack of funds allocated to prisons by the state legislature. Such a lack, however, will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment”).

Elmore County Correction Facility is one of the Alabama prison facilities attacked legally and in the media for its failures in providing medical care. Elmore serves as the recycling headquarters for the Department of Corrections and composts for other nearby facilities.<sup>335</sup> In November 2001, over two hundred inmates filed a class-action lawsuit alleging that the current conditions of the recycling facility exposed inmates to serious diseases, including AIDS and Hepatitis B, as they were forced to handle medical waste, used hypodermic needles, bloody bandages, and used sanitary napkins with no protective gear.<sup>336</sup> The Department of Corrections and the inmates reached a settlement that requires the facility to provide inmates working the recycling line with protective goggles, work gloves, forearm barriers, aprons, and dust masks.<sup>337</sup> Despite these efforts, inmates were forced to file suit again in September 2002 because the department failed to comply with the agreement, as inmates were continuously being stuck with needles and not given immediate medical treatment.<sup>338</sup>

Elmore County also faced a legal battle with Brian Dodd, an inmate who suffered an eye injury while working the recycling line.<sup>339</sup> Dodd requested and was denied safety goggles, and several days later a piece of glass flew into his eye causing an injury.<sup>340</sup> Dodd contended that the medical treatment he received was inadequate and he continued to suffer from pain, irritation, a blind spot, and blurred vision.<sup>341</sup> The State first contended that Dodd was not injured at the prison, never requested goggles, and that the lack of medical records supported this fact.<sup>342</sup> This

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<sup>335</sup> LA. DEP'T OF YOUTH SERVICES, ANNUAL REPORT FY 2003, <http://dys.state.al.us/PDFs/AnnualRpt2003.pdf> (Sept. 30, 2003).

<sup>336</sup>Nick Lackeos, *Officials Settle in Inmate Case*, MONTGOMERY ADVERTISER, Jan. 9, 2002.

<sup>337</sup>*Id.*

<sup>338</sup>*Judge Rules for State Inmates*, MONTGOMERY ADVERTISER, Jan. 15, 2003, at 2A.

<sup>339</sup>Carla Crowder, *Inmate Gets \$90,000 Settlement for Eye Injury*, BIRMINGHAM NEWS, Feb. 20, 2004.

<sup>340</sup>*Dodd v. Robinson*, CV-03-F-571-N (M.D. Ala. 2003).

<sup>341</sup>*Id.*

<sup>342</sup>*Id.*

allegation was shown to be false when legal interns recovered Dodd's medical records.<sup>343</sup> The Department of Corrections settled the suit for \$90,000 and agreed to provide Dodd with treatment by an ophthalmologist.<sup>344</sup>

## 2. Death

High rates of inmate deaths are also a cause for concern in Alabama.<sup>345</sup> In 2003, the average rate of death of inmates nationwide was twenty-three per ten thousand prisoners, while Alabama's rate was approximately thirty-seven deaths per ten thousand inmates.<sup>346</sup> This rate outpaces most other states, such as North Carolina, which spends more than Alabama on inmate health care.<sup>347</sup> As compared to other states, Alabama ranks last in spending on medical care per inmate.<sup>348</sup> Alabama spends approximately \$5.50 per inmate; the national average is \$7.38 per inmate.<sup>349</sup> Investigating this trend is complicated by Alabama's policy of providing data on causes of inmate death only for HIV-positive inmates.<sup>350</sup> Unfortunately, there are reports that this trend is worse in the context of deaths of HIV-infected inmates.<sup>351</sup> In 2002, twelve out of 248 of Alabama's HIV inmates died while segregated in Limestone Correctional Facility.<sup>352</sup> The neighboring State of Florida, with ten times more HIV-positive inmates,

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<sup>343</sup>*Id.*

<sup>344</sup>Carla Crowder, *Inmate Gets \$90,000 Settlement for Eye Injury*, BIRMINGHAM NEWS, Feb. 20, 2004.

<sup>345</sup>*Is Health Care Adequate?*, MONTGOMERY ADVERTISER, May 15, 2003, at 7A.

<sup>346</sup>Sam Hodges, *Inmate Deaths: a Fact of Life*, MOBILE REG., May 11, 2003.

<sup>347</sup>*Id.*

<sup>348</sup>*Id.*

<sup>349</sup>Carla Crowder, *Prison's Medical Care Blasted Limestone HIV Units Facilities, Delays in Pill Distribution Cited*, BIRMINGHAM NEWS, Mar. 12, 2004.

<sup>350</sup>*Is Health Care Adequate?*, MONTGOMERY ADVERTISER, May 15, 2003, at 7A.

<sup>351</sup>*Id.*

<sup>352</sup>*Id.*

experienced only three and a half times more deaths.<sup>353</sup>

C. Areas of Special Need

1. HIV/AIDS

The accelerated rate of death for HIV-positive inmates is likely attributable to the failures of the Limestone Facility to provide adequate care. In November 2002, HIV-positive prisoners at Limestone filed a class-action lawsuit alleging “an extremely high and constitutionally unacceptable number of AIDS-related inmate deaths,” “extremely slow and completely inadequate” emergency response procedures, and “life threatening lapses in the infection control program.”<sup>354</sup> This litigation followed reports of inmates going seven or eight months without seeing a doctor and inmates being housed in a vermin-infested “old warehouse with leaky ceilings and double bunks so close together that they foster infections.”<sup>355</sup> Inmates could receive medication only by standing in long lines at 3:00 a.m. and two other times a day; those too weak to stand were forced to go without.<sup>356</sup> The settlement, as approved by a United States Magistrate Judge, provides for hiring an HIV coordinator, adequate training for health care staff, periodic evaluations of prisoners, the implementation of an infection control plan, protocols for the administration of medications, medical treatment for HIV inmates with hepatitis A, B, or C and diabetes, the implementation of an effective emergency plan, and food for HIV inmates.<sup>357</sup> Following the filing of the suit, the Department of Corrections moved HIV inmates into two-man cells in modular buildings.<sup>358</sup>

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<sup>353</sup>*Id.*

<sup>354</sup>*Leatherwood v. Campbell*, CV-02-BE-2812-W (N.D. Ala. 2004).

<sup>355</sup>*More Bad News: Another Prison Cited for Dangerous Health Care*, BIRMINGHAM NEWS, Feb. 16, 2003.

<sup>356</sup>Adam Liptak, *Alabama Prison at Center of Suit Over AIDS Policy*, N.Y. TIMES, Oct. 26, 2003.

<sup>357</sup>*Leatherwood v. Campbell*, CV-02-BE-2812-W, at \*15 (N.D. Ala. 2004).

<sup>358</sup>Carla Crowder, *Classes Now Open to HIV Inmates State Policy Ends Form of Segregation*, BIRMINGHAM NEWS, Jan. 20, 2004.

At the time of the lawsuit, Alabama was the only remaining state in the country that segregated its HIV-positive and AIDS inmates from general population programming.<sup>359</sup> In other states, this type of HIV-oriented segregation is used only if the inmate assaults others or develops complications.<sup>360</sup> Critics of HIV segregation point to the dangerousness and inhumanity of isolating infected inmates in an environment in which they are more likely to become more ill.<sup>361</sup> In January 2004, Alabama allowed HIV/AIDS inmates at Limestone to participate in educational and vocational programs with other inmates for the first time.<sup>362</sup> This change in policy did not extend to women suffering from HIV at Tutwiler Prison for Women, who remain segregated from vocational programming and housing available to general population inmates.<sup>363</sup> This makes Tutwiler the last prison in the country to segregate HIV-positive inmates from educational programming.<sup>364</sup> While Commissioner Campbell favors an integration policy, it is not a high priority for the department at this time.<sup>365</sup>

## 2. Hepatitis C

Hepatitis C is a contagious disease which, if ignored, can lead to liver failure.<sup>366</sup> Nationwide, between seventeen and thirty percent of prisoners are infected with this virus.<sup>367</sup>

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<sup>359</sup>Adam Liptak, *Alabama Prison at Center of Suit Over AIDS Policy*, N.Y. TIMES, Oct. 26, 2003.

<sup>360</sup>Carla Crowder, *Classes Now Open to HIV Inmates State Policy Ends Form of Segregation*, BIRMINGHAM NEWS, Jan. 20, 2004.

<sup>361</sup>Adam Liptak, *Alabama Prison at Center of Suit Over AIDS Policy*, N.Y. TIMES, Oct. 26, 2003.

<sup>362</sup>Carla Crowder, *Classes Now Open to HIV Inmates State Policy Ends Form of Segregation*, BIRMINGHAM NEWS, Jan. 20, 2004.

<sup>363</sup>*Id.*

<sup>364</sup>Samira Jafari, *Alabama Prison Last That Still Completely Segregates HIV Inmates*, THE ASSOCIATED PRESS, Mar. 13, 2004.

<sup>365</sup>*Id.*

<sup>366</sup>Carla Crowder, *Jail Contractor To Treat Hepatitis C*, BIRMINGHAM NEWS, Nov. 2, 2003.

<sup>367</sup>*Id.*

There is a substantial risk that prisoners will pass along this disease, which may take up to fifteen years to show symptoms.<sup>368</sup> However, if the virus is treated within a strict window of time, patients can be cured; therefore, the National Commission on Correctional Healthcare considers hepatitis C treatment a necessary standard of care for prison facilities.<sup>369</sup> Hepatitis C treatment and prevention is incorporated in the Department of Corrections' new health care contract for an additional \$3 million to \$8 million a year.<sup>370</sup> This treatment costs \$25,000 per inmate, but it is a worthwhile price to pay to protect inmates and the outside community from this fatal disease.<sup>371</sup>

A prisoner at St. Clair Correctional Facility recently reported that prisoners are not being tested for hepatitis C, newly-diagnosed prisoners are not receiving treatment, and prisoners who have been receiving chronic care treatment for hepatitis C have been told that they will receive only five more weeks of treatment. The failure to prevent and treat hepatitis C in Alabama's prisons presents a serious threat to prisoners' health.

### 3. Mental Health

In 2000, Alabama reported that 2.5% of its inmates received round-the-clock mental health care and 8.4% received therapy or counseling.<sup>372</sup> Thirteen of Alabama's correctional facilities provided twenty-four-hour care and twenty-one offered therapy and counseling.<sup>373</sup> According to a report by Human Rights Watch, Alabama's mental health inmate patients suffered years of neglect, abuse, and improper medication.<sup>374</sup> Reportedly, inmates were left untreated for extended periods of time and forced to mutilate themselves to get staff

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<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000 6, <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf> (July 2001).

<sup>373</sup> *Id.* at 5. These numbers surpassed that of Mississippi, Louisiana, and Kentucky.

<sup>374</sup> *Imprisoned and Ill State's Mentally Ill Inmates Finally Get Better Services*, BIRMINGHAM NEWS, Oct. 27, 2003.

attention.<sup>375</sup> In response to a lawsuit settlement in 2000, Alabama increased its prison mental health staff by 300% and opened two additional mental health units.<sup>376</sup> This situation will require monitoring in years to come.

#### 4. Women

Women prisoners are at an increased risk of contracting sexually transmitted diseases and certain types of cancer.<sup>377</sup> As a result, it is necessary to test and treat female inmates during intake for cervical cancer, sexually transmitted diseases, pregnancy, menstruation, and mental problems.<sup>378</sup> In addition to issues of prison overcrowding, the litigation surrounding Tutwiler Prison for Women calls for improvements in the medical treatment of women.<sup>379</sup> Prisoners stated that the Department of Corrections failed to provide adequate medical and mental health care, increasing the inmate's risk of lingering illness and premature death.<sup>380</sup> Inmates complained of the lack of training of prison nurses, medication delays, sick-call procedures, paying for follow-up care, and the lack of separate housing for women with mental health problems.<sup>381</sup> The settlement reached in 2004 called for medication to be stocked at the prison and made available within twenty-four hours and within forty-eight hours if medication must be obtained from outside the prison.<sup>382</sup> Inmates must be seen by a nurse within twenty-four

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<sup>375</sup>*Id.*

<sup>376</sup>*Id.*

<sup>377</sup> AT'L INST. OF CORR., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF THE ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 24, <http://www.nicic.org/Library/018735> (Feb. 2004).

<sup>378</sup>*Id.*

<sup>379</sup>John Davis, *Tutwiler Inmates Tell Woes*, MONTGOMERY ADVERTISER, July 22, 2004, at 3C.

<sup>380</sup>*Laube v. Campbell*, 333 F. Supp. 2d 1234, 1237 (M.D. Ala. 2004).

<sup>381</sup>*Id.* at 1243-44.

<sup>382</sup>John Davis, *Tutwiler Inmates Tell Woes*, MONTGOMERY ADVERTISER, July 22, 2004, at 3C.

hours of such a request and sick call is available daily.<sup>383</sup> Additionally, the settlement provides for tuberculosis testing, continuity of care, discharge planning for medical care, dental services, emergency medical services, infection control, women’s health care, patient education, and vaccinations for hepatitis.<sup>384</sup>

D. Recent Changes

Following allegations of inadequate treatment of Alabama prison inmates by NaphCare, a private medical care contractor based in Birmingham, the Department of Corrections canceled its contract.<sup>385</sup> As of 2004, the Department of Corrections has a \$143 million contract with Prison Health Services of Brentwood, Texas.<sup>386</sup> Critics expressed reservations about the state choosing this no-bid contract from one of Governor Riley’s campaign contributors, but the state contended that the contract was awarded in a competitive process to the lowest bidder.<sup>387</sup> Additionally, in the fall of 2004, the Department of Corrections hired Ruth Naglich to serve as health care director with the responsibility of overseeing the medical care of Alabama state prisoners.<sup>388</sup>

An oversight committee convenes in the Legislature to examine aspects of the Department of Corrections’ operations. In March 2004, a bill was introduced in the Senate that would require all legislation related to the prison system to be referred to this committee for recommendations and approval.<sup>389</sup> The bill received a favorable report from the Senate Committee on Government Affairs but was indefinitely postponed in May 2004.

IV. THE PLIGHT OF ELDERLY INMATES

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<sup>383</sup>*Laube v. Campbell*, 333 F. Supp. 2d 1234, 1253 (M.D. Ala. 2004).

<sup>384</sup>*Id.* at 1252-65.

<sup>385</sup>Mike Sherman, *State Official Blasts Contract*, MONTGOMERY ADVERTISER, Jan. 15, 2004, at 1C.

<sup>386</sup>*Id.*

<sup>387</sup>*Id.*

<sup>388</sup>*State Has Obligation*, MONTGOMERY ADVERTISER, Nov. 13, 2004, at 5A.

<sup>389</sup>SB 408, 2004 Reg. Sess. (Ala. 2004).

In the wake of the trend toward severe sentencing, particularly life without parole, it is only a matter of time before hundreds of inmates join the more than 1300 Alabama prisoners already serving these sentences.<sup>390</sup> Increased severity in sentencing guidelines translates into a greater number of offenders spending an increased amount of their lives in prison.<sup>391</sup> Moreover, guideline sentencing warrants the incarceration of offenders who otherwise would receive a community-oriented sentencing alternative.<sup>392</sup> As of July 2004, Alabama incarcerated 591 people aged fifty years and older.<sup>393</sup> Nationwide, approximately 39,000 inmates are over the age of fifty-five, according to a 2002 report from the Bureau of Justice Statistics.<sup>394</sup>

A. Health Care Costs

The Supreme Court has interpreted the Eighth Amendment’s prohibition against cruel and unusual punishment to require states to provide medical care for inmates, who otherwise lack the ability to care for themselves.<sup>395</sup> Incarcerating the elderly with longer sentences translates into additional health care costs for this age group.<sup>396</sup> Government expenditures on elderly health care increase with the added transactional costs of providing those health care

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<sup>390</sup>Sarah Abramsky, *Prisoner’s Dilemma: Lifers*, 2004-APR LEGAL AFF.40, 42 (2004).

<sup>391</sup>John Burrow, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 ELDER L.J. 273, 275 (2003).

<sup>392</sup>*Id.*

<sup>393</sup> . LEGISLATIVE CONFERENCE: L.A. LEGISLATIVE FISCAL OFFICE, COMPARATIVE DATA REPORT ON CORRECTIONS: STATE PROFILES 46, [http://www.slcatlanta.org/2004CDRs/2004cdr\\_corrections\\_states.pdf](http://www.slcatlanta.org/2004CDRs/2004cdr_corrections_states.pdf) (2004).

<sup>394</sup>Sarah Abramsky, *Prisoner’s Dilemma: Lifers*, 2004-APR LEGAL AFF.40, 42 (2004).

<sup>395</sup>*Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (permitting Eighth Amendment claims by prisoners if prison officials treated their medical condition with “deliberate indifference”); *see also Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994) (laying out three part test for “deliberate indifference”).

<sup>396</sup>John Burrow, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 ELDER L.J. 273, 276 (2003).

services to incarcerated members of that population.<sup>397</sup> The national average cost of incarcerating a geriatric inmate is approximately \$69,000 a year.<sup>398</sup> This figure is over three times the cost of incarcerating a younger person and over twice the average annual cost of care in a full-service nursing home.<sup>399</sup>

Inmates are said to age ten to twenty years faster than their free peers given their histories of substance abuse, previously harmful lifestyles, and the stress associated with prison life.<sup>400</sup> Inmates over fifty-five are projected to suffer at least three chronic illnesses during their incarceration.<sup>401</sup> States are managing this reality differently. Some states devised managed care systems, by which a statewide HMO is created for inmates, promoting fixed budgets and cost-efficient decision-making.<sup>402</sup> Alabama is among the Southern states that seek to save on health care costs by contracting medical services out to private companies.<sup>403</sup>

## B. Additional Challenges

Several other considerations, in addition to physical condition, account for higher health care costs for the elderly. Elderly inmates are more likely to succumb to depression than their younger counterparts.<sup>404</sup> This depression stems from their declining physical condition, age, and

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<sup>397</sup>Patricia Corwin, *Comment: Senioritis: Why Elderly Federal Inmates are Literally Dying to Get Out of Prison*, 17 J. CONTEMP. HEALTH L. & POL'Y 687 (2001).

<sup>398</sup>Sarah Abramsky, *Prisoner's Dilemma: Lifers*, 2004-APR LEGAL AFF.40, 42 (2004).

<sup>399</sup>Patricia Corwin, *Comment: Senioritis: Why Elderly Federal Inmates are Literally Dying to Get Out of Prison*, 17 J. CONTEMP. HEALTH L. & POL'Y 687 (2001).

<sup>400</sup>*Id.*

<sup>401</sup>Todd Edwards, *The Aging Inmate Population* 15, <http://www.slatlanta.org/AgingInmatePopulation.pdf> (1998).

<sup>402</sup>*Id.* at 8.

<sup>403</sup>*Id.*

<sup>404</sup>Todd Edwards, *The Aging Inmate Population* 9, <http://www.slatlanta.org/AgingInmatePopulation.pdf> (1998).

the loss of relatives and friends.<sup>405</sup> “[T]he physical, intellectual and emotional deterioration brought on by long confinement can create bitterness and resentment among older inmates, and they may become pessimistic about their present and future status as time passes.”<sup>406</sup> Suggested treatments for depression range from drug treatment and peer support to behavior and cognitive therapy.<sup>407</sup>

Elderly inmates also have special dietary needs.<sup>408</sup> Their age and physical condition will likely require more vitamins and minerals and less protein and calories.<sup>409</sup> Elderly diets should correspond with medications and meals, as a result, they may require longer periods of time to intake.<sup>410</sup>

Finally, managing the physical condition, mental health, and dietary needs of elderly inmates requires increased training of correctional officers otherwise lacking this knowledge.<sup>411</sup> This training should include “an increased knowledge of growing old and how this knowledge specifically affects the elderly in a prison environment,” in addition to an understanding of “the social and emotional needs of the elderly, dynamics of death and dying, procedures for identifying depression, and a system of referring older inmates to experts in the community.”<sup>412</sup>

C. Alabama’s Approach to Incarcerating the Elderly

Alabama houses elderly and disabled prisoners at Hamilton Aged and Infirm Center

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<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 11.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 11.

<sup>412</sup> *Id.*

in Hamilton, Alabama, located in the northwestern region of the state.<sup>413</sup> Hamilton serves as the state’s single geriatric facility for elderly and disabled inmates, where minimum and medium custody inmates are housed.<sup>414</sup> A health care contractor evaluates inmates’ medical condition to determine their eligibility for transfer from general population to Hamilton.<sup>415</sup> The facility is meant to serve as a mechanism to service the unique needs of the older prisoner population and to protect older inmates from victimization.<sup>416</sup>

A recently-filed lawsuit charges that the 300 inmates at Hamilton live in an unsanitary facility designed for 67 prisoners and are often denied essential medical treatment, resulting in unnecessary suffering and premature death.<sup>417</sup> Every Hamilton inmate has some major medical condition or impairment, but a doctor visits the facility only once a month and sometimes only once every two months.<sup>418</sup> Health services are run by a nurse practitioner with a staff of three or four nurses.<sup>419</sup> In the infirmary, the stench is unbearable, mold grows on the showers, the toilets often back up and overflow and urine and feces are allowed to stay on the infirmary floor.<sup>420</sup>

“In many instances, geriatric prisoners lie in their own urine and feces for two to three days without receiving assistance,” the suit said.<sup>421</sup> Elderly and disabled prisoners must stand

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<sup>413</sup> LA. DEPT OF YOUTH SERVICES, ANNUAL REPORT FY 2003, <http://dys.state.al.us/PDFs/AnnualRpt2003.pdf> (Sept. 30, 2003).

<sup>414</sup> *Id.*

<sup>415</sup> Todd Edwards, *The Aging Inmate Population* 15, <http://www.slcatlanta.org/AgingInmatePopulation.pdf> (1998).

<sup>416</sup> *Id.*

<sup>417</sup> Alan Elsner, *Suit Charges Cruelty to Infirm in Alabama Prison*, REUTERS, Feb. 24, 2005.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

in line for up to forty-five minutes to receive medication.<sup>422</sup> Untrained prisoners change colostomy bags, bandages and intravenous drips for fellow inmates.<sup>423</sup> The suit charged that these conditions amount to a violation of the Constitution’s prohibition of cruel and unusual punishment.<sup>424</sup>

Whether elderly and infirm persons should be incarcerated at all is not a settled question. After the opening of a geriatric prison in Chattahoochee, Florida, a newspaper commented:

With ever-tougher mandatory sentencing laws, more and more inmates are going to be growing old and spending their “golden” years behind bars. . . . Conventional wisdom has held that once offenders reached a certain age, they become significantly less likely to commit new crimes or pose a danger to society and, thus, are better candidates for release. But the lock-em-up-and-throw-away-the-key mentality has overtaken that rationale.<sup>425</sup>

In October 2004, a documentary entitled *Prisoners of Age* premiered. The film explores the personal tragedies of geriatric prisons at Hamilton and in Ontario, Canada’s Warkworth Institution,<sup>426</sup> documents the deteriorating mental and medical condition of elderly inmates, and probes the operation and health care costs incurred by these facilities and the function of these facilities within the context of retribution and incarceration principles.<sup>427</sup> Hamilton is one of the few of its kind across the nation.<sup>428</sup> Nevertheless, Alabama continues to spend the least on

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<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> Christopher Mascharka, *Comment: Mandatory Minimums Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U.L. REV. 935, 950 (2001).

<sup>426</sup> *Prisoners of Age*, <http://www.prisonersofage.com/PrisonersOfAge.html>. The extended version of the film will appear on Bravo TV in October 2005.

<sup>427</sup> *Id.*

<sup>428</sup> . LEGISLATIVE CONFERENCE: L.A. LEGISLATIVE FISCAL OFFICE, COMPARATIVE DATA REPORT ON CORRECTIONS: STATE PROFILES 49, [http://www.slcatlanta.org/2004CDRs/2004cdr\\_corrections\\_states.pdf](http://www.slcatlanta.org/2004CDRs/2004cdr_corrections_states.pdf) (2004).

inmate health care, as compared to other states.<sup>429</sup> Alabama spends approximately \$5.50 per inmate; the national average is \$7.38 an inmate.<sup>430</sup>

In March 2004, Representatives L. Coleman, M. Black, Dunn, Jackson, Newton, and Salaam introduced HB 603, the Medical Release Bill.<sup>431</sup> This legislation would establish a procedure by which state inmates convicted of non-capital offenses could be granted discretionary medical or geriatric release by the Board of Pardons and Paroles.<sup>432</sup> Supporters of the legislation point to the purpose Alabama prisons are intended to serve: “To the extent that they become nursing homes or hospitals for aged and seriously ill inmates, their mission as institutions of incarceration is impaired.”<sup>433</sup> Under this legislation “geriatric inmates,” “permanently incapacitated inmates,” and “terminally ill inmates” qualify for release.<sup>434</sup>

A “geriatric inmate” is an inmate seventy years or older, convicted of a non-capital felony offense, suffering from a life-threatening illness or infirmity, who is not a danger to himself or society.<sup>435</sup> A “permanently incapacitated inmate” is an inmate convicted of a non-capital felony offense “who does not constitute a danger to himself or herself or society and who, by reason of an existing medical condition which is not terminal, is permanently and irreversibly incapacitated and as a result of the medical condition requires immediate and long-term residential care.”<sup>436</sup> A “terminally ill inmate” is an inmate convicted of a non-capital felony offense “who has an incurable condition caused by illness or disease which would, within reasonable medical judgment, produce death within 12 months and who does not constitute a

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<sup>429</sup>Sam Hodges, *Inmate Deaths: a Fact of Life*, MOBILE REG., May 11, 2003.

<sup>430</sup>Carla Crowder, *Prison’s Medical Care Blasted Limestone HIV Units Facilities, Delays in Pill Distribution Cited*, BIRMINGHAM NEWS, Mar. 12, 2004.

<sup>431</sup>HB 603, 2004 Reg. Sess. (Ala. 2004).

<sup>432</sup>*Id.*

<sup>433</sup>*Pass Medical Release Bill*, MONTGOMERY ADVERTISER, Apr. 29, 2004, at 5A.

<sup>434</sup>HB 603, 2004 Reg. Sess. (Ala. 2004).

<sup>435</sup>*Id.*

<sup>436</sup>*Id.*

danger to himself or herself or society.”<sup>437</sup>

No qualifying inmate is guaranteed parole, but would at least warrant consideration if he met these definitions. At the close of the 2004 Legislative Session, the bill passed in the House and moved to the Senate where it received a favorable report from the Senate Judiciary Committee. This measure, while seemingly progressive, does not make anyone convicted of capital murder, serving a life without parole sentence, or convicted of sexually assaulting a minor, eligible for this special consideration.<sup>438</sup> Therefore, it will do very little to ease the anticipated boom in the elderly population as a result of sentencing guidelines mandating life imprisonment without parole.

Moreover, some analysts of the aging prison population believe that this type of release program ultimately will be ineffective if elder releasees are not adequately prepared for survival in the outside world.<sup>439</sup> Elder inmates require “release planning,” a program by which inmates receive assistance in locating employment, as well as “referrals to long-term care, assisted-living, and eligibility counseling for Medicaid and Social Security.”<sup>440</sup> Without such programs, elderly inmates likely will be unable to identify and maintain full-time employment in accordance with their parole conditions.<sup>441</sup>

#### D. Techniques in Other Southern States in 2004

Arkansas, with a total inmate population of 424 inmates aged fifty and older, allows for early medical or compassionate release.<sup>442</sup> Additionally, the Arkansas Department of Community Corrections offers a post-release program which begins three months prior to

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<sup>437</sup> *Id.*

<sup>438</sup> HB 603, 2004 Reg. Sess. (Ala. 2004).

<sup>439</sup> Todd Edwards, *The Aging Inmate Population* 9, <http://www.slcatlanta.org/AgingInmatePopulation.pdf> (1998).

<sup>440</sup> *Id.* at 9-10.

<sup>441</sup> *Id.* at 10.

<sup>442</sup> . LEGISLATIVE CONFERENCE: L.A. LEGISLATIVE FISCAL OFFICE, COMPARATIVE DATA REPORT ON CORRECTIONS: STATE PROFILES 51, [http://www.slcatlanta.org/2004CDRs/2004cdr\\_corrections\\_states.pdf](http://www.slcatlanta.org/2004CDRs/2004cdr_corrections_states.pdf) (2004).

release. Inmates receive transitional living, substance abuse, and mental health services tailored to their individual “after-care plan,” as developed by their parole officer, counselor, and Department of Corrections staff.<sup>443</sup>

Florida incarcerates 3545 persons aged fifty and older.<sup>444</sup> Elderly inmates without special needs are assigned to any adult facility.<sup>445</sup> All others are divided between four elderly correctional facilities.<sup>446</sup> In addition to both a pre- and post-release program, the Florida Parole Commission will consider an inmate for conditional medical release if he is permanently ill or incapacitated.<sup>447</sup> In 2004, Florida released one inmate under this program.<sup>448</sup>

Georgia, incarcerating 363 inmates aged fifty and older, also provides a program for medical release under the discretion of the Board of Pardons and Paroles.<sup>449</sup> Elderly inmates are dispersed throughout the Georgia state prison system, with the exception of those suffering from chronic illnesses who are housed in the Men’s State Prison in Central Georgia.<sup>450</sup>

Kentucky incarcerates 381 persons aged fifty and older in its state institutions.<sup>451</sup> A large

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<sup>443</sup>*Id.* at 56.

<sup>444</sup> . LEGISLATIVE CONFERENCE: L.A. LEGISLATIVE FISCAL OFFICE, COMPARATIVE DATA REPORT ON CORRECTIONS: STATE PROFILES 57, [http://www.scatlanta.org/2004CDRs/2004cdr\\_corrections\\_states.pdf](http://www.scatlanta.org/2004CDRs/2004cdr_corrections_states.pdf) (2004).

<sup>445</sup>*Id.* at 61.

<sup>446</sup>*Id.*

<sup>447</sup>*Id.* at 58, 62.

<sup>448</sup>*Id.* at 58.

<sup>449</sup> . LEGISLATIVE CONFERENCE: L.A. LEGISLATIVE FISCAL OFFICE, COMPARATIVE DATA REPORT ON CORRECTIONS: STATE PROFILES 63-64, [http://www.scatlanta.org/2004CDRs/2004cdr\\_corrections\\_states.pdf](http://www.scatlanta.org/2004CDRs/2004cdr_corrections_states.pdf) (2004).

<sup>450</sup>*Id.* at 66.

<sup>451</sup> . LEGISLATIVE CONFERENCE: L.A. LEGISLATIVE FISCAL OFFICE, COMPARATIVE DATA REPORT ON CORRECTIONS: STATE PROFILES 68, 71, [http://www.scatlanta.org/2004CDRs/2004cdr\\_corrections\\_states.pdf](http://www.scatlanta.org/2004CDRs/2004cdr_corrections_states.pdf) (2004).

number of elderly inmates are held at the Kentucky State Reformatory or in a fifty-eight-bed full-service licensed nursing care facility inside one of the state prisons.<sup>452</sup> Additionally, those inmates who have less than one year life expectancy, those who require complete dependant care, or terminally ill inmates can be recommended by their physicians to the parole board for early release.<sup>453</sup> A release planning program is also available.<sup>454</sup>

Louisiana houses its 1411elder inmates (aged fifty years and older) at either a clinical treatment center at David Wade Correctional Facility with a capacity of 592 inmates or at the treatment center at the state penitentiary at Angola.<sup>455</sup> Angola offers a fully staffed medical facility and a leading Prison Hospice Program.<sup>456</sup> Louisiana offers a medical release program as well as a re-entry initiative.<sup>457</sup>

## V. PRISON PHONE PRICE-GOUGING

Studies show that prisoners who stay in touch with their families are much less likely to return to prison once they get out.<sup>458</sup> Nonetheless, the Alabama Department of Corrections

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<sup>452</sup>*Id.* at 71.

<sup>453</sup>*Id.*

<sup>454</sup>*Id.* at 72.

<sup>455</sup> . LEGISLATIVE CONFERENCE: L.A. LEGISLATIVE FISCAL OFFICE, COMPARATIVE DATA REPORT ON CORRECTIONS: STATE PROFILES 73, 76, [http://www.slcatlanta.org/2004CDRs/2004cdr\\_corrections\\_states.pdf](http://www.slcatlanta.org/2004CDRs/2004cdr_corrections_states.pdf) (2004).

<sup>456</sup>*Id.* at 76.

<sup>457</sup>*Id.* at 74, 77.

<sup>458</sup>National Public Radio, *Morning Edition*, Sept. 22, 1999; see THE CAMPAIGN TO PROMOTE EQUITABLE TELEPHONE CHARGES, COMMON MYTHS, [http://www.curenational.org/~etc/common\\_myths.htm](http://www.curenational.org/~etc/common_myths.htm) (citing EMT ASSOCIATES, EVALUATION OF THE —2 SPONSORS PROGRAM: FINAL REPORT (1987) (finding strong relationship between contact visits and success on parole); DOUGLAS LIPTON ET AL, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975) (condition most strongly associated with favorable outcomes following release from prison is social ties); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974) (family ties showed higher association with avoidance of

(“DOC”), by awarding an exclusive contract to a telephone service provider in Alabama’s prisons and jails, has transformed a simple telephone call into a costly luxury that many poor families of inmates in Alabama cannot afford.

A. History of Prison Pay Phone Service in Alabama

In 1989, political consultant Willie F. “Buddy” Hamner, William T. Boyett, former Mobile County Commissioner Dan Wiley, former State Auditor Terry Ellis and Wiley’s partner Donald Bahouth joined together their two prison pay phone companies to obtain contracts with the State of Alabama to install, operate and maintain pay phones in four state prisons.<sup>459</sup> The joint venture was called National Telecoin, Inc.<sup>460</sup>

In 1995, recently-appointed DOC Commissioner Ron Jones included among his new policies the statewide installation of a phone system that limited the numbers prisoners could call and the duration of time for which they could talk.<sup>461</sup> That year, Attorney General Jeff Sessions filed a civil suit against Hamner, Ellis, Boyett, Wiley and National Telecoin in an effort to collect more than \$329,000 the State contended it was shortchanged in prison pay phone

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criminal behavior following release than participation in prison treatment and training programs)); *see also* JUSTICE COUNSEL, COMM. ON CORR., FLA H.R., MAINTAINING FAMILY CONTACT WHEN A FAMILY MEMBER GOES TO PRISON: AN EXAMINATION OF STATE POLICIES ON MAIL, VISITING, AND TELEPHONE ACCESS 28 (1998), <http://www.fcc.state.fl.us/fcc/reports/family.pdf> (last visited Feb. 3, 2005); USE OF PRISON TELEPHONES BY FEDERAL INMATES TO COMMIT CRIMES: HEARING BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT, SENATE JUDICIARY COMMITTEE, 106<sup>th</sup> Cong., 2d Session (Apr. 6, 2000) (statement of Glenn A. Fine, Director, Special Investigations and Review Unit, Office of the Inspector General, U.S. Dep’t of Justice) (stating that the Federal Bureau of Prisons “provides inmate access to telephones on the grounds that it furthers important correctional objectives, such as maintaining inmates’ ties to their families”).

<sup>459</sup>Garry Mitchell, *Final Two Defendants Plead Guilty in Prison Phone Scheme*, NEWSFLASH, July 16, 1999.

<sup>460</sup>*Id.*

<sup>461</sup>Eddie Dominguez, *Jones’ New Rules Cut TV Time, End Grievance System*, MONTGOMERY ADVERTISER, July 1, 1995, at 3F.

commissions.<sup>462</sup>

Meanwhile, Global Tel\*Link Corporation (one of the companies in the National Telecoinc joint venture) faced at least two class-action lawsuits from receivers of collect telephone calls from inmates (hereinafter, “call receivers”). In *Talton Telecom. Corp. v. Coleman*, 665 So. 2d 914 (Ala. 1995), the call receivers alleged that Talton and Global Tel\*Link Corporation’s practice of limiting calls to fifteen minutes, which substantially increased receivers’ telephone bills because a new connection fee was imposed to resume each conversation, was not authorized by tariff or other regulation of the Alabama Public Service Commission (“PSC”). The Alabama Supreme Court found that the PSC has exclusive jurisdiction over rates and services of telephone companies<sup>463</sup> and reversed the Bullock Circuit Court’s denial of the phone service providers’ motion to dismiss for failure to exhaust administrative remedies.

Global Tel\*Link also settled a class-action suit filed in Mobile County Circuit Court that accused the company of overcharging prisoners’ families and friends on collect long-distance calls. Under the 1995 settlement agreement, defrauded customers received \$3.7 million in refunds,<sup>464</sup> while three state agencies – the Attorney General’s Office, DOC and PSC – were to share over \$2 million in unclaimed refunds. While the agencies had pledged to spend the funds on behalf of utility consumers and inmates, instead the monies were used to outfit the attorney general’s office with new computers, to fund a school grant administered by a PSC member, and to augment the DOC’s general account. Attorney General Bill Pryor, who initially promised to spend his office’s settlement share in pursuit of its legal responsibility to represent utility consumers, said in 1999 that a change in the way that telephone companies were regulated meant that rate cases were no longer necessary.<sup>465</sup>

Effective June 20, 1995, the Alabama Code was amended to give the PSC authority to regulate utility rates and services by methods other than a determination of net return on a predetermined rate basis so as to establish rates and regulations for services that are fair, just,

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<sup>462</sup>Malcomb Daniels, *Judge Halts Prison Pay Phone Suit*, MONTGOMERY ADVERTISER, Aug. 27, 1996.

<sup>463</sup>For more on the use of “primary jurisdiction” doctrine in rates cases, see Section IV, *infra*.

<sup>464</sup>AP, *Distribution of Funds*, July 8, 1999.

<sup>465</sup>Sean Reilly, *Prisoners, Consumers Won’t Get Pay-phone Bonanza*, MOBILE REG., July 8, 1999.

and reasonable to the public and to the utility.<sup>466</sup> As detailed *infra*, this change in the regulation scheme has not solved the problem of high rates and poor services for calls from Alabama inmates.

In 1999, Hamner, Boyett, Wiley, Ellis and Bahouth were indicted for tax fraud and for rigging their prison phone company's books in order to pay less in commissions to state and local authorities. They were also accused of secretly padding phone bills when inmates made calls from Alabama prisons. Wiley, Ellis and Bahouth plead guilty to tax evasion; Hamner and Boyett plead guilty to a single tax conspiracy charge.<sup>467</sup>

In 2001, the State of Alabama awarded to T-NETIX, Inc., a three-year contract to provide telephone service to all inmate and public payphones in state locations. The contract, which includes services for 26,500 inmates in thirty-two correctional facilities statewide, also provides for two, one-year renewals at the option of the state. According to a state representative, "the contract was competitively bid in accordance with Alabama state law. 134 vendors were invited to participate and five bids were submitted. T-NETIX was awarded the contract because it satisfied all conditions of the invitation to bid and offered the state the most favorable financial conditions."<sup>468</sup>

T-NETIX estimated that the Alabama contract would yield about \$36 million in gross revenues during the first three-year term, and an additional \$12 million for each one-year renewal.<sup>469</sup>

T-NETIX, Inc., is a Texas-based corporation that casts itself as a "leading provider of specialized telecommunications products and services, including security enhanced call processing, call validation and billing for the corrections communications marketplace."<sup>470</sup> T-NETIX currently provides products and services to more than 1600 private, local, county and

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<sup>466</sup> LA. CODE § 37-1-80 (1975).

<sup>467</sup>Garry Mitchell, *Final two defendants plead guilty in prison phone scheme*, NEWSFLASH, July 16, 1999.

<sup>468</sup>*Alabama Contract Awarded to T-NETIX, Inc.*, <http://www.t-netix.com/news/Default.asp?a=detail&p=4&r=109> (Oct. 24, 2001).

<sup>469</sup>*Id.*

<sup>470</sup>*Id.*

state correctional facilities and justice departments in over forty states and in Canada.<sup>471</sup> T-NETIX has been providing inmate call processing to the corrections industry since 1986.<sup>472</sup> It currently processes over 1.5 million secured inmate call transactions per month across 50,000 lines.<sup>473</sup> Over 400,000 state prisoners in the custody of twenty Departments of Corrections and about 750,000 county, city, military, federal, private prison and community center inmates currently use T-NETIX calling platforms.<sup>474</sup>

In March 2004, the Miami office of White & Case LLP closed a tender offer for TZ Acquisition, Inc, an indirect subsidiary of H.I.G. Capital, LLC, when it acquired T-Netix, Inc.<sup>475</sup> The transaction was valued at \$105 million.<sup>476</sup>

Prior to T-NETIX, the DOC contract was given to Qwest, an international communications company, to provide telephone service to Alabama prisons. The United States Department of Justice indicted Qwest; a company executive plead guilty to fraud in May 2004.<sup>477</sup> The high rates and service problems discussed below characterize not only T-NETIX's current service, but also that of Qwest, National Telecoin, and Global Tel\*Link before it.

#### B. Unfair Rates Fund State Kickbacks

“In a manner . . . reminiscent of convict leasing, other methods sometimes are employed

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<sup>471</sup>T-NETIX, *Corporate Overview*, [http://www.t-netix.com/about\\_us/](http://www.t-netix.com/about_us/) (last visited Jan. 31, 2005).

<sup>472</sup>*Id.*

<sup>473</sup>*Id.*

<sup>474</sup>*Id.*

<sup>475</sup>*White & Case Closes \$105 Million Tender Offer for T-NETIX, Inc.*, [http://www.whitecase.com/new/news\\_detail.aspx?newsid=10594&type=News+Releases](http://www.whitecase.com/new/news_detail.aspx?newsid=10594&type=News+Releases) (Mar. 16, 2004).

<sup>476</sup>*Id.*

<sup>477</sup>*EX-Qwest Exec Pleads Guilty in Fraud Case*, REDNOVA NEWS, <http://www.rednova.com/modules/news/tools.php?tool=print&id=60551> (May 29, 2004).

to make money in private prisons besides simply economizing on services.”<sup>478</sup> The Corrections Corporation of America was sued by an advocacy group claiming that the corporation and its telephone carriers are earning “super-profits” by charging exorbitant rates for inmate phone calls.<sup>479</sup> Charging exorbitant rates for inmate calls is a practice not unique to private prisons. Collect calls made from state-run prisons also are charged at a higher rate than other collect calls, with the telephone company and the government sharing the extra revenue.<sup>480</sup>

The Alabama Department of Corrections relies on inmate phone calls for about \$6.5 million of its \$50 million annual budget for prison costs not included in state funds, according to Department of Corrections spokesman Brian Corbett. The Department earns more than a half million dollars per month from inmate phone calls.<sup>481</sup>

Most state prison systems nationwide rely on inmate phone calls to raise revenue. The states contract with private companies that offer call monitoring and other security features

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<sup>478</sup>Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 144 (2001) (citing Bill Miller, *Prison Firm Sued over Phone Rates: High Costs Deter Contact, Families Say*, WASH. POST, Feb. 17, 2000, at B2).

<sup>479</sup>*Id.*

<sup>480</sup>Jack Beermann, *Privatization and Political Accountability*, 28 FORDHAM URBAN L. J. 1507, 1543 n.108 (2001) (citing Jeremy Kohler, *Boycott Highlights High Fees Paid By Inmates’ Families for Long Distance Calls: Missouri Will End Payments to State in Next Contract*, ST. LOUIS POST DISPATCH, Aug. 11, 2000, at A1; Cathy Woodruff, *Vote Set for Jail Phone Contract*, TIMES UNION (Albany, NY), Sept. 6, 2000, at B1 (describing \$1.30 surcharge on county jail inmates’ collect calls which funds a forty-nine percent commission on calls that goes to county; county claims that the surcharge and commission do not affect the rates charged)).

<sup>481</sup>AP, *Prisoners’ Families Plan Phone Boycott Against DOC’s High Charges*, MONTGOMERY ADVERTISER, Aug. 31, 2004. The Alabama Department of Corrections also makes money by requiring inmates’ families and friends to order Christmas gift packages for inmates from a state vendor, rather than purchasing approved items themselves. For Christmas 2000, the DOC selected a vendor, Swanson Services Corp., that offered to pay the Department a 30% commission on orders for the gift packages. Families complained about the increased prices, such as \$6.98 for a jar of Tang that can be bought at stores for about \$3. Moreover, the packages in 2000 were delayed. The DOC netted approximately \$90,000 from Christmas orders placed in 2000. AP, *Many Alabama inmates still waiting for gift packages*, NEWSFLASH, [http://www.al.com/n.../getstory\\_ssf.cgi?j3335\\_BC\\_AL--PrisonGifts&&news...](http://www.al.com/n.../getstory_ssf.cgi?j3335_BC_AL--PrisonGifts&&news...) (Jan. 3, 2001).

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while billing families for the calls. The service provider sets the cost of the calls and surcharges, while the DOC collects 56% commission on the calls.<sup>482</sup>

The cost of the commissions paid to DOC by T-NETIX are passed on to the friends and families of inmates who pay high rates to receive collect calls from Alabama prisoners. An in-state, 15-minute, long-distance call costs \$5.25 – a \$2.25 surcharge and \$.20 per minute rate. For out-of-state calls, the surcharge is \$2.85 plus \$.69 per minute, or \$13.20 per 15-minute call. Local calls cost \$2.85.<sup>483</sup> All prison calls cut off after fifteen minutes and require another surcharge payment to continue the conversation. Prisoners cannot have phone cards or cell phones.<sup>484</sup>

On August 21, 2004, family members who receive calls from Alabama inmates planned a boycott in hopes of depriving the Department of Corrections of this revenue. Montgomery-based Family Members of Inmates encouraged family members to write instead of accepting inmate phone calls, which cost more than ten times as much as a fifty-cent pay phone call.<sup>485</sup>

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<sup>482</sup>AP, *Prisoners' Families Plan Phone Boycott Against DOC's High Charges*, MONTGOMERY ADVERTISER, Aug. 31, 2004; see also National Public Radio, *Morning Edition*, Sept. 22, 1999.

<sup>483</sup>AP, *Prisoners' Families Plan Phone Boycott Against DOC's High Charges*, MONTGOMERY ADVERTISER, Aug. 31, 2004; see also Editorial, *Prisons slams families with shameful phone bills*, BIRMINGHAM NEWS, Sept. 2, 2004. By comparison, in Kansas, T-NETIX collect local calls cost \$4.35; prepaid local calls cost \$3.65. T-NETIX, *T-NETIX Billing Programs – Kansas DOC*, [http://docnet.dc.state.ks.us/contracts/Consumer\\_Billing\\_Terms\\_Conditions\\_rev4.pdf](http://docnet.dc.state.ks.us/contracts/Consumer_Billing_Terms_Conditions_rev4.pdf) (Sept. 16, 2003). In 1999, families and friends of Virginia inmates paid more than dollar a minute: calls ranged from \$7.84 for eleven minutes to \$4.50 for four minutes. National Public Radio, *Morning Edition*, Sept. 22, 1999. A debit call from FCI Pekin in Illinois costs \$2.70 for fifteen minutes; whereas a collect call costs \$9.70. THE CAMPAIGN TO PROMOTE EQUITABLE TELEPHONE CHARGES, NEW LEGISLATION, [http://www.curenational.org/~etc/new\\_legislation.htm](http://www.curenational.org/~etc/new_legislation.htm) (Mar. 2003). In California, a call from the Twin Towers – Los Angeles County's women's jail – cost \$2.89 for the first minute, compared to \$1.65 from a payphone in downtown Los Angeles. *High call charges 'cut prisoners off'*, BBC NEWS, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/4202885.stm> (Jan. 25, 2005).

<sup>484</sup>AP, *Prisoners' Families Plan Phone Boycott Against DOC's High Charges*, MONTGOMERY ADVERTISER, Aug. 31, 2004.

<sup>485</sup>*Id.*

During the first phone boycott, in August 2003, the DOC collected \$512,003 in phone revenue, down slightly from the 2003 monthly average of \$536,000. Corbett said that it is hard to judge the impact of phone boycotts because phone revenue varies monthly anyway.<sup>486</sup>

T-NETIX offers a prepaid calling program that features reduced rates, but the program currently is not available in Alabama.<sup>487</sup> The prepaid rates can remain quite high relative to free market rates, although they are less expensive than inmate collect calls. For example, in Pennsylvania, prisoners' families report that prepaid rates are \$5.62 per 15-minute call, as opposed to \$.45 for a 15-minute call charged to a consumer calling card.<sup>488</sup>

Moreover, T-NETIX advertises different rates than those actually charged to prisoners and their families.<sup>489</sup> A Pennsylvania prison poster announced that calls cost \$2.25 for the first three minutes and \$.22 for each additional minute, plus 6% sales tax. The recorded phone announcement, in contrast, states that the rate is \$2.47 for the first one minute and \$.22 cents for each additional minute. Recipients of calls are *actually* charged at least \$2.54 for the first minute and the actual amount charged varies between calls for no apparent reason.<sup>490</sup>

### C. Technical Difficulties

T-NETIX boasts “the most experience in the industry” and describes its Inmate Calling

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<sup>486</sup>*Id.*

<sup>487</sup>T-NETIX, *Inmate Friends & Family Prepaid Program*, <https://selfhelp.t-netix.com/secured/nonmember/prepaidAccount.asp> (last visited Jan. 31, 2005).

<sup>488</sup>Sandra Feigley, *The Greedy Duo: Prison and T-Netix*, <http://www.prisoners.com/tnetix2.html> (last visited Jan. 31, 2005).

<sup>489</sup>The company has been accused of other fraudulent practices in Alabama. On June 16, 2004, Birmingham's Fox6 news reported that T-NETIX – or someone claiming to be T-NETIX – sent out bills for hundreds of dollars to people in Alabama who never subscribed to their services. Fox6 On Your Side, *Archived Stories: June 16, 2004 – Telephone Company Scam*, <http://www.wbrc.com/6onyourside/index.shtml> (June 16, 2004).

<sup>490</sup>Sandra Feigley, *The Greedy Duo: Prison and T-Netix*, <http://www.prisoners.com/tnetix2.html> (last visited Jan. 31, 2005).

System as a “highly featured, state-of-the-art system.”<sup>491</sup> The company remotely monitors its equipment twenty-four hours a day and implements other “reliable methods to keep the facility’s service running trouble-free.”<sup>492</sup>

However, prisoners’ families report that T-NETIX’s service is “not only unreasonably overpriced, it’s intermittent, very unreliable and censored.”<sup>493</sup> Recipients of inmate calls are charged for calls that are not connected, for long delays between the time that the call is accepted and the time at which the recipient and inmate can actually talk to each other, and for more time than is actually used on a call.<sup>494</sup>

Recipients of calls find that the calls frequently are cut off, so that another connection fee must be paid to resume the conversation. One Alabama recipient reported that forty-three disconnects occurred on her phone in under seven minutes, which cost her \$102 dollars that T-NETIX refused to remove from her bill.<sup>495</sup>

In addition, friends and family members of inmates often find that calls from inmates are “blocked.” Alabama prisoners’ families report that calls are blocked by T-NETIX:

1. if an inmate makes \$25 worth of calls in a 24-hour period, calls are blocked for 24 hours;
2. if an inmate makes \$50 worth of calls in a week, calls are blocked for a week;
3. if an inmate makes \$150 worth of calls in a month, calls are blocked until month is up.<sup>496</sup>

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<sup>491</sup> T - N E T I X , *I n m a t e C a l l i n g S y s t e m* , <http://www.t-netix.com/products/default.asp?m=callsys> (last visited Feb. 1, 2005).

<sup>492</sup>*Id.*

<sup>493</sup> Sandra Feigley, *The Greedy Duo: Prison and T-Netix*, <http://www.prisoners.com/tnetix2.html> (last visited Jan. 31, 2005).

<sup>494</sup>*Id.*

<sup>495</sup> Prison Talk Online, *vBulletin*, <http://www.prisonertalk.com/forums/printthread.php?threadid=3883> (Aug. 27, 2002).

<sup>496</sup>*Id.*

T-NETIX informs recipients of calls from inmates in Kansas Department of Corrections facilities that some blocks placed on calls from inmates “are within control of the customer or their local phone company; some of them are within the control of T-NETIX. More than one of these blocks can apply to a customer.”<sup>497</sup> Calls may be blocked because the local phone company does not permit collect calls to be placed to a customer’s phone; T-NETIX may block numbers if it does not receive timely payment from the customer’s local phone company; or because a local phone company refuses to bill collect calls on behalf of T-NETIX. Customers and the Department of Corrections may also cause phones to be blocked.<sup>498</sup>

Alabama family members have sent written complaints to the Alabama Public Services Commission and the Attorney General’s Office complaining that T-NETIX refuses to address customers’ billing concerns and about the disconnections and attendant fees.<sup>499</sup>

### Attorney Calls

In 1992, the Southern Center for Human Rights filed a class-action lawsuit on behalf of death row prisoners challenging Donaldson Correctional Facility’s failure to provide access to confidential attorney phone calls. A consent order was entered in 1995 and a new phone system instituted at Donaldson. In 1999, the phone system was replaced by another system, and attorneys representing death row inmates at Donaldson reported a number of problems. Prisoners had their attorneys removed from their phone lists because of the prison’s policy that two prisoners cannot have the same number on their lists. Batteries in the cordless phone provided to prisoners were not sufficiently charged, causing static that made it difficult for the client to hear his attorney. Often the connection became so weak as to cut off altogether and require the prisoner to call again. Phone calls were permitted only after 3:00 p.m. Prisoners also expressed concern that, because the same phone was used for attorney and private calls, the attorney calls may also be recorded and monitored. Indeed, when placing attorney calls, prisoners heard an announcement stating that the call could be recorded.<sup>500</sup>

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<sup>497</sup>T-NETIX, *T-NETIX Billing Programs – Kansas DOC*, [http://docnet.dc.state.ks.us/contracts/Consumer\\_Billing\\_Terms\\_Conditions\\_rev4.pdf](http://docnet.dc.state.ks.us/contracts/Consumer_Billing_Terms_Conditions_rev4.pdf) (Sept. 16, 2003).

<sup>498</sup>*Id.*

<sup>499</sup>Prison Talk Online, *vBulletin*, <http://www.prisontalk.com/forums/printthread.php?threadid=3883> (Aug. 28, 2002).

<sup>500</sup>Letter from Lisa Zahren, Southern Center for Human Rights, Jan. 14, 2000.

T-NETIX imposed very low credit limits on one nonprofit law firm in Alabama – when the credit limit was reached, calls from clients were blocked until the bill was paid. T-NETIX is known for providing poor customer service, including putting customers on hold for extremely long periods of time when calling to resolve service and billing issues, and delayed billing.<sup>501</sup>

D. History of Reform Efforts

1. Litigation

A recent analysis of twenty-two lawsuits challenging prison phone rates in the courts concluded that “[t]o date, litigation has not provided call recipients with any meaningful relief, in part because of the many harsh doctrines barring courts from reaching the merits of their claims, and in part, perhaps, because of willingness to extend a restriction on inmates to the inmates’ family and friends.”<sup>502</sup> T-NETIX and its partner communications companies have been sued in a number of states in which the company contracts with state departments of corrections, with no success.

Regulatory agencies have been more receptive than the courts in addressing complaints brought by inmate call recipients. The FCC is, in its own words, “currently examining long distance telephone service rates imposed on inmates and their families in an ongoing proceeding regarding the provision of inmate payphone service.”<sup>503</sup> In California, the Public Utilities Commission ruled in September 2000 that MCI had not billed its tariffed rates for intrastate MCI Maximum Security Collect Calls. MCI was ordered to pay overcharges to Friends Outside, a California nonprofit organization that assists families, prisoners, and ex-prisoners. The ruling

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<sup>501</sup>Interview with Ronald Berry, Administrative Assistant, Equal Justice Initiative of Alabama, in Montgomery, Ala. (Feb. 4, 2005) (on file at EJI).

<sup>502</sup>Madeleine Severin, Note, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1529-30 (2004) (footnotes omitted).

<sup>503</sup>*Id.* at 1471 n.10 (2004) (citing FCC, PETITION FOR RULEMAKING FILED REGARDING ISSUES RELATED TO INMATE CALLING SERVICES PLEADING CYCLE ESTABLISHED, CC Docket No. 96-128, Public Notice, DA 03-4027 (Dec. 31, 2003) (seeking comment on the *Wright v. Corr. Corp. of Am.* petition) (citing *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 F.C.C.R. 3248 (Feb. 21, 2002))).

came after a complaint was filed by the Utility Consumers' Action Network.<sup>504</sup> The Kentucky Public Service Commission found prison phone rates to be unjust and unreasonable, and after reviewing prison phone rates throughout the state, imposed a cap of \$1.50 surcharge per call.<sup>505</sup>

Following a series of articles and an October 22, 2001, editorial in the *Atlanta Journal*,<sup>506</sup> Georgia's Public Service Commission opened an investigation into numerous complaints that prison phone service provider MCI was charging both a connection charge and a per-minute fee, which is prohibited by Georgia's tariff rules, and that MCI's recorded message provided incorrect rates or no rates at all. In addition, the cost of a ten-minute call increased from \$5 (with vendor Sprint) to \$10 with MCI. Georgia DOC Commissioner asked that DOC's share of the overcharge be refunded. On February 19, 2001, the Georgia Public Service Commission ordered telephone providers to reduce the rates for prisoner calls from \$3.95 (connection fee) and \$.69 per minute to \$2.20 (connection fee) and \$.35 per minute.<sup>507</sup>

## 2. Legislation

Several states have enacted legislation to provide inmate call recipients with relief from excessive rates. New Mexico passed a law providing that prison phone contracts must be awarded to the lowest bidder and forbidding commissions to some extent.<sup>508</sup> Washington, D.C., prohibits prisons from imposing any "surcharge, commission, or other financial imposition"

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<sup>504</sup> THE CAMPAIGN TO PROMOTE EQUITABLE TELEPHONE CHARGES, NEW LEGISLATION, [http://www.curenational.org/~etc/new\\_legislation.htm](http://www.curenational.org/~etc/new_legislation.htm) (Mar. 2003).

<sup>505</sup> *Id.*; but see *Basham v. Mountaineer Power Sys.*, Nos. 92-1026 COCOT-C, 92-1092 COCOT-C, 92-1159 COCOT-C, 1995 WL 447123, at \* 9 (W. Va. Pub. Serv. Comm'n June 15, 1995) (dismissing inmates' rate complaint on ground that "complaints regarding the rates charged at the confinement facilities for telephone service are generally not entertained by the Commission . . . but are instead reviewed in the service provider's next rate proceeding").

<sup>506</sup> THE CAMPAIGN TO PROMOTE EQUITABLE TELEPHONE CHARGES, NEW LEGISLATION, [http://www.curenational.org/~etc/new\\_legislation.htm](http://www.curenational.org/~etc/new_legislation.htm) (Mar. 2003).

<sup>507</sup> *Id.*

<sup>508</sup> Madeleine Severin, Note, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1528 (2004) (citing N.M. STAT. ANN. § 33-14-1 (2003)).

on top of legal long-distance rates.<sup>509</sup> In 2002, Connecticut passed an act requiring its Department of Corrections to establish a pilot program allowing inmates to choose a debit account system in lieu of collect calls.<sup>510</sup> A New Jersey bill would direct the \$5 million per year in commissions into a Crime Victims Compensation account instead of into the State Treasury; a Rhode Island bill would provide that a portion of the phone revenues be used to fund the purchase of phone cards of inmates whose families are indigent.<sup>511</sup>

Vermont's statute does the most to provide substantial relief for inmate call recipients. It is the only law clearly requiring that prison phone service contracts must be awarded to the phone company offering the lowest cost to inmates.<sup>512</sup>

Organizations have launched boycotts to pressure Legislators and prison authorities on this issue, with limited success. Ultimately, the utility of boycotts is limited because "call recipients cannot stop taking the calls without cutting off their incarcerated loved ones from the

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<sup>509</sup>*Id.* at 1528 (citing D.C. CODE ANN. § 24-263.01 (2003)).

<sup>510</sup>*Id.* at 1528 (citing 2002 CONN. ACTS 02-104 (Reg. Sess.) (codifying Sub. HB 5672, 2002 Gen. Assem., Feb. Sess. (Conn. 2002)), available at <http://www.cga.state.ct.us/2002/act/Pa/2002PA-00104-R00HB-05672-PA.htm> (approved June 3, 2002)).

<sup>511</sup>*Id.* at 1528-29 (citing A.B. 168, 2002 Leg., 210th Sess. (N.J. 2002); HB 7784, 2004 Leg., Gen. Assem., Jan. Sess. (R.I. 2004)).

<sup>512</sup>*Id.* (citing 28 VT. STAT. ANN. tit. 28, § 802a (2003)). In relevant part the law provides:

(c) When an inmate requests and receives a list of parties approved to receive telephone calls, the inmate shall be provided the option of using a debit or collect call system to place such calls. Under the debit system, the inmate shall pay for telephone service at the time of use, and the cost of such service will be automatically deducted from an account maintained by the inmate for that purpose.

(d) Any contract to provide telephone services to inmates in state correctional facilities shall be negotiated and awarded in a manner that provides for the lowest reasonable cost to inmates, to their families, and to others communicating with inmates.

*Id.*

important opportunity to communicate with someone on the outside.”<sup>513</sup>

### 3. Changes in DOC Decision-making

In 2002, the Pennsylvania DOC entered into a new contract that lowered the average price of a fifteen-minute call by up to 30%. The following year, the Pennsylvania system introduced debit calling, which reduced the price of local calls to \$2.60.<sup>514</sup> In South Dakota, a new telephone system installed in August 2002 meant a decrease for local calls from \$2.71 to \$1.35 for debit calls.<sup>515</sup> Interstate call rates decreased from \$16.71 to \$3.79 (debit) and \$11.20 (collect).<sup>516</sup>

Grassroots groups such as the Campaign to Promote Equitable Telephone Charges, organized by CURE (Citizens United for the Rehabilitation of Errants) and co-sponsored by the American Friends Service Committee; Correctional Association of New York; Justice Policy Institute; Criminal Justice Ministry, Society of St. Vincent DePaul, St. Louis Council; Women’s Project; Coalition for Prisoners’ Rights; Project Return; National Coalition to Abolish the Death Penalty; Massachusetts Correctional Legal Services; Family Voices of Oklahoma; Families of Incarcerated Individuals; and Dominicans of St. Catharine, Kentucky, strive to gain access for inmates to debit calling using prepaid debit accounts, 1-800 calling and competitive telephone services. The eTc Campaign notes that Colorado, Tennessee and the Federal Bureau of Prisons offer debit calling and that, since the start of the campaign in January 2000: Missouri has announced that its next contract for prison telephone systems will not include a commission or kickback for the state; Summit County, Ohio council members unanimously approved a contract that will reduce the fees for calls originating at the county jail; the Ohio prison system entered into a contract that will reduce the cost of phone calls by 15%; the Michigan prison system is currently reviewing telephone system bids in response to a request for proposals that includes debit calling; the Rhode Island prison system is reportedly investigating cheaper alternative phone systems, including debit calling; and, the Texas Department of Criminal Justice has reportedly agreed to examine the feasibility of implementing an inmate phone system.

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<sup>513</sup>*Id.* at 1523-24.

<sup>514</sup> THE CAMPAIGN TO PROMOTE EQUITABLE TELEPHONE CHARGES, NEW LEGISLATION, [http://www.curenational.org/~etc/new\\_legislation.htm](http://www.curenational.org/~etc/new_legislation.htm) (Mar. 2003).

<sup>515</sup>*Id.*

<sup>516</sup>*Id.*

## RECOMMENDATIONS

1. Dramatically reduce Alabama’s prison population through sentencing reform, increased use of alternative sentencing, probation and community sentencing and make sentencing reforms retroactive where possible.
2. Oppose the use of private prisons and unregulated incarceration of Alabama prisoners.
3. Increase spending on prison health care to limit the spread of infectious diseases and improve the medical conditions and treatment of prisoners.
4. Improve the prisoner staff to inmate ration, relieve crowding and restore basic services and rehabilitation programs for prisoners which can increase public safety and reduce the incidence of violence within the prison.
5. Limit any program or practice that creates an economic incentive to keep people in prison when public safety does not require incarceration.

## CONCLUSION

The predominate feature of Alabama’s prison system today is gross overcrowding; so far, the state’s attempts to deal with overcrowding have introduced additional problems, including the mistreatment of inmates in private prisons. Alabama fails to provide adequate medical treatment for state prisoners and to provide for the special needs of geriatric prisoners, female prisoners and prisoners with HIV/AIDS. Finally, the state renders virtually impossible for poor families and friends of state prisoners the acceptance of collect calls, thereby weakening relationships that are essential to ensuring inmates’ positive behavior in prison and to reducing recidivism.

## PAROLE

### I. HISTORY OF THE ALABAMA BOARD OF PARDONS AND PAROLES

Alabama’s first parole law passed in 1897. The law authorized the Governor to discharge an inmate and suspend a sentence without granting the individual a pardon. Prior to the enactment of this law, prisoners could be released prematurely only if they were granted a pardon by the Governor. Alabama’s 1901 Constitution gave the Governor parole power and created a Parole Board, consisting of the Attorney General, State Auditor, and Secretary of State, whose primary purpose was to play an advisory role to the Governor. In 1935, the Governor created the Alabama Parole Bureau to conduct a study and ultimately produce a list of prisoners worthy of parole.

On July 11, 1939, a constitutional amendment was enacted that shifted the power of pardons and paroles from the Governor to the Legislature. The Legislature then created a three-member State Board of Pardons and Paroles, which had complete authority in matters of pardons, paroles, and restoration of rights.<sup>517</sup> The Legislature also gave the courts the power to issue probation.

The Board of Pardons and Paroles (hereinafter, “Board”) was given authority to establish parole consideration based “on its evaluation of a prisoner’s prior record, nature, and severity of the present offense, potential for future violence, and community attitude toward the offender.”<sup>518</sup> The Board was also given authority to adopt rules and regulations to deal with matters relevant to granting paroles and pardons.<sup>519</sup> Notably, the stated purpose for a parole system is to deal with prison overcrowding.<sup>520</sup> A byproduct of the state’s ability to cope with the overcrowding is the release of inmates from prison.<sup>521</sup> Accordingly, the State of Alabama

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<sup>517</sup> LA. CODE § 15-22-24(a) (1995).

<sup>518</sup> LA. CODE § 15-22-24(e) (1995).

<sup>519</sup> LA. CODE § 15-22-37 (1995).

<sup>520</sup> Interview with Steve Sirmon, Attorney, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Sept. 24, 2004).

<sup>521</sup> *Id.*

does not right recognize any right to parole.<sup>522</sup>

By the 1950s, the Board had become corrupt, selling paroles to those who could afford to make payments.<sup>523</sup> To rectify this problem and restore the credibility of the Board, it is now required that all Board action be taken at open public meetings.<sup>524</sup>

## II. PAROLE STATISTICS IN ALABAMA

Crucial to solving the crisis of Alabama's overcrowded prisons is the use of its only release valves: parole and probation. However, the state's failure to ensure that a steady proportion of prisoners are released each year has resulted in the creation of an entirely unsustainable system. Indeed, while the number of prisoners has increased significantly over the past decade (from 17,222 in 1992 to 27,727 in 2003), the percent of inmates being paroled has been cut nearly in half (from 20.3% in 1992 to 10.2% in 2003).

Though the percent of inmates granted parole as compared with the number considered for parole has increased, these statistics are somewhat skewed by the fact that fewer individuals are now considered eligible for parole as a result of the passage of Alabama's 85% (or fifteen years) rule for violent offenders.

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<sup>522</sup> LA. CODE § 15-22-26 (1995); ALA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES: PREAMBLE, <http://www.paroles.state.al.us/rules.html> (last viewed Jan. 26, 2005).

<sup>523</sup> Interview with Steve Sirmon, Attorney, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Sept. 24, 2004); *Ellard v. State*, 474 So. 2d 743, 751 (Ala. Crim. App. 1984).

<sup>524</sup> LA. CODE § 15-22-23(b)(1) (Supp. 2004).

*Criminal Justice Reform in Alabama – Part One  
Equal Justice Initiative – Parole*

Yearly Incarceration Rates <sup>525</sup>						
Fiscal Year	Number of Inmates Released on Parole or Whose Parole Was Reinstated	Number of Total Inmates in Alabama Penal System	Percent of Inmate Population Released via Parole or Parole Reinstatement	Average Length of Sentence of Inmates Released (in months)	Average Length of Stay of Inmates Released (in months)	Percent of Sentence Served by Inmates Released (in months)
2003	2,834	27,727	10.2%	85.00	32.00	37.6%
2002	2,364	27,656	8.5%	82.00	29.00	35.3%
2001	1,541	26,729	5.7%	Unavailable	Unavailable	Unavailable
2000	1,827	25,873	7.0%	Unavailable	Unavailable	Unavailable
1999	1,796	24,733	7.2%	90.00	33.60	37.3%
1998	2,849	22,670	12.5%	86.89	36.97	42.5%
1997	2,030	22,243	9.1%	80.17	35.24	43.9%
1996	1,977	21,476	9.2%	90.15	42.32	46.9%
1995	1,986	20,248	9.8%	84.20	40.08	47.6%
1994	2,097	19,269	10.8%	84.50	38.59	45.6%
1993	2,317	17,267	13.4%	87.83	38.11	43.3%
1992	3,501	17,222	20.3%	86.62	37.71	43.5%

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<sup>525</sup>Statistics acquired from Alabama Department of Corrections and Alabama Board of Pardons and Paroles' Annual Reports. ALA. DEP'T OF CORR., ANNUAL REPORT: FISCAL YEAR 2003, [http://www.doc.state.al.us/monthly\\_rpts.htm](http://www.doc.state.al.us/monthly_rpts.htm) (last viewed on Jan. 26, 2005); ALA. BD. OF PARDONS AND PAROLES, ANNUAL REPORT: 2002 - 2003, <http://www.paroles.state.al.us/statistics.html> (last viewed on Jan. 26, 2005).

*Criminal Justice Reform in Alabama – Part One  
Equal Justice Initiative – Parole*

Yearly Parole Rates				
Year	Number of Inmates Considered for Parole	Number of Inmates Denied Parole	Number Granted Parole	Percent of Paroles Granted
2002-03	6,936	3,738	3,198	46.1%
2001-02	5,811	3,642	2,169	37.3%
2000-01	5,452	3,680	1,772	32.5%
1999-00	5,406	3,570	1,836	33.9%
1998-99	5,592	3,863	1,729	30.9%
1997-98	7,834	5,073	2,761	35.2%
1996-97	7,822	5,110	2,712	34.6%
1995-96	6,549	4,300	1,644	25.1%
1994-95	6,155	3,868	2,287	37.1%
1993-94	5,633	3,338	1,942	34.4%
1992-93	5,443	2,930	2,093	38.4%
1991-92	5,423	2,750	2,289	42.2%

From October 1, 2002 until September 2003, approximately 7359 individuals were under parole supervision in Alabama. Incredibly, 20,576 parole investigations, or 2.8 investigations per parolee, were conducted during this time. Of this number, 904 parolees were declared delinquent and 796 (or 10.8% of the paroled population) had their parole revoked.

Stringent conditions of parole and lack of support for those who reenter the community result in a high degree of recidivism among parolees. Indeed, an Alabama Department of Corrections study of 1999 parolees concluded that the rate of recidivism (defined as the percentage of parolees that return to the Department’s jurisdiction within three years) was 22%. Applying this percentage to the FY 2004 number of parolees (3791), this would mean that approximately 834 of FY 2004's parolees will be readmitted within three years.<sup>526</sup> Given that Alabama’s prison system is operating at nearly 200% capacity, it will be difficult to sustain these

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<sup>526</sup> LA. DEP’T OF CORR., DECEMBER 2004 MONTHLY STATISTICAL REPORT 1, [http://www.doc.state.al.us/monthly\\_rpts.htm](http://www.doc.state.al.us/monthly_rpts.htm) (2004).

types of incarceration rates.

### III. RECENT LEGISLATION

Because the Legislature has delegated to the Board of Pardons and Paroles the power to create rules and regulations, most changes in parole policy seem to occur with minimal publicity. Unlike legislative proposals, which require movement through both houses and often cause some lobbying or at least discussion, changes to the Board's Rules and Regulations seem to receive little attention.

#### A. Background

Recent changes in parole laws are largely attributable to federal grants made available in the mid-1990s. The federal Violent Crime Control and Law Enforcement Act offers federal grants to states to expand their prison capacity if they increase incarceration of violent offenders.<sup>527</sup> Under the 1994 Act, Truth-in-Sentencing (TIS) grants and Violent Offender Incarceration (VOI) grants were provided separately.<sup>528</sup>

The VOI program had a formula with three tiers of funding. States received some funding if they gave assurances that violent offenders would serve a substantial portion of their sentences, their punishments were sufficiently severe, and time served by violent offenders was sufficient to protect the public.<sup>529</sup> All fifty states received some funding under the VOI grant

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<sup>527</sup>Grants are administered by the Department of Justice's Corrections Program Office. Joanna M. Shepperd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J. OF LAW AND ECON. 509, 511 (Oct. 2002). In FY 1997, approximately \$234.9 million in TIS grants were awarded to qualifying states, ranging from \$100,433 for North Dakota to about \$55.7 million for California. U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES, <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=ns98129t.txt&directory=/diskb/wais/data/gao> (1998).

<sup>528</sup>WILLIAM J. SOBOLE ET AL., URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 1, <http://www.urban.org/Template.cfm?Section=ByAuthor&NavMenuID=63&template=/TaggedContent/ViewPublication.cfm&PublicationID=7810> (Apr. 2002).

<sup>529</sup>*Id.* at 2.

program.<sup>530</sup>

Under the first version of the TIS grant program, states could receive TIS funding if they could show that (1) they had laws in effect requiring violent offenders to serve at least 85% of the sentence imposed or (2) since 1993, they have increased the number of violent offenders sentenced to prison, increased the prison time for such offenders, and required that repeat violent (or serious drug) offenders serve 85% of the sentence imposed.<sup>531</sup>

However, in 1996, the requirements for TIS grant funding changed and created different requirements for determinate sentencing and nondeterminate sentencing states.<sup>532</sup> Determinate sentencing states qualify for TIS grants if either (1) 85% of the sentence imposed by the court will be served by the individual convicted of a violent crime, (2) on average, 85% of the sentence imposed is served by persons convicted of violent crimes, or (3) the state has enacted, but not yet implemented (but will do so within three years) laws that require individuals convicted serve at least 85% of their sentence. Indeterminate sentencing states qualify for TIS grants if either (1) persons convicted of violent crimes serve at least 85% of their prison term under the state's sentencing and release guidelines, or (2) persons convicted of violent crimes serve at least 85% of the maximum prison term allowed under the sentence imposed by the court.<sup>533</sup>

These grant programs provide a huge incentive for states to shift towards a truth-in-sentencing system, which demands that inmates remain incarcerated for an amount of time reflective of the sentence handed down in court.

## B. Recent Legislative Proposals/Trends

### 1. Truth in Sentencing

Though not yet adopted, a push for pure truth-in-sentencing legislation has been

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<sup>530</sup>*Id.*

<sup>531</sup>Violent Crime Control and Law Enforcement Act of 1994, PL 103-322 § 20102 (codified as 42 U.S.C. § 13704).

<sup>532</sup>Department of Justice Appropriations Act, 1996, PL 104-134, § 20101 (codified as 42 U.S.C. § 13701).

<sup>533</sup>*Id.*

discussed since at least the mid-1990s.<sup>534</sup> Indeed, former Attorney General Jeff Sessions and former Governor Fob James began drafting truth-in-sentencing proposals in their 1994 campaigns.<sup>535</sup> The stated purpose of such proposed legislation is to decrease costs by eliminating the parole board and, as Mr. Sessions stated, such legislation also would allow “crime victims [to] know for the first time how long their assailants will serve.”<sup>536</sup> While parole costs might decrease, because truth in sentencing systems result in more prison time for a great number of prisoners, implementation of such a scheme would substantially increase the cost of incarceration.<sup>537</sup> Failing to discuss these unavoidable incarceration costs, proponents have advocated that the Legislature model Alabama’s sentencing system after the federal system where judges use sentencing guidelines and prisoners serve the duration of their sentence in prison.<sup>538</sup> Attorney General Bill Pryor continued the push for truth-in-sentencing laws during the late 1990s until the end of his tenure in 2004.<sup>539</sup> One of his biggest problems with the sentencing system in Alabama is that the use of parole results in great disparities in sentences, making it impossible to determine whether uniformity in sentencing exists.<sup>540</sup>

Prompted at least in part by the Board’s initial refusal to withdraw paroles granted to Kenneth and Michael Thornton in 2000, Governor Don Siegelman continued the push for

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<sup>534</sup>See, e.g., Phillip Rawls, *James, Others Endorse No Parole, Other Crime Bills*, TUSCALOOSA NEWS, Feb. 29, 1996.

<sup>535</sup>*Id.*

<sup>536</sup>*Id.*; Stan Bailey, *Governor, AG: Parole System Broken*, BIRMINGHAM NEWS, Dec. 9, 2000.

<sup>537</sup>UREAU OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 7-8, <http://www.ojp.usdoj.gov/bjs/abstract/tssp.htm> (Jan. 1999)

<sup>538</sup>Because mandatory guidelines are prohibited by the Sixth Amendment, *United States v. Booker*, No. 04-104, 2005 WL 50108 (Jan. 10, 2005), adoption of such advisory guidelines and a truth-in-sentencing system could be harmful to criminal defendants insofar as judges will have great discretion in sentencing and the Board of Pardons and Paroles, which presumably smooths out judge-to-judge disparities, will be eliminated.

<sup>539</sup>Chris Collins, *Officials Push In Sentencing Law*, MONTGOMERY ADVERTISER, Mar. 14, 1998.

<sup>540</sup>Kathy Kemp and Brett J. Blackledge, *Sentences – And the Time Served – Vary Widely*, BIRMINGHAM NEWS, Dec. 19, 2000.

abolition of the Board of Pardons and Paroles.<sup>541</sup> The creation of Alabama's Sentencing Commission in 2000 led to a more concentrated study of the parole system in Alabama.<sup>542</sup> The push for truth-in-sentencing (resulting in the elimination of parole) continues today. As recently as its 2003 Report, the Sentencing Commission has continued to recommend this long-term approach to dealing with sentencing in Alabama.<sup>543</sup> In fact, some have speculated that parole may be abolished<sup>544</sup> in the State of Alabama by 2006.<sup>545</sup>

As part of its push for TIS reform, in 2001, the Board of Pardons and Paroles passed a rule that anyone convicted of a violent offense must serve 85% of their sentence or fifteen years, whichever is less.<sup>546</sup> Violent offenses include murder, attempted murder, sexual torture, first-degree cases of rape, kidnapping and sodomy and first-degree cases of burglary, robbery and arson in which a victim suffered serious physical injury.<sup>547</sup> At the same time this rule passed, the Board also put in place rules that (1) require individuals testifying before the Board to do so under oath, and (2) provide for the announcement of parole grants or denials at the time of

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<sup>541</sup>Stan Bailey, *Siegelman: Abolish State Parole Board*, BIRMINGHAM NEWS, July 27, 2000.

<sup>542</sup>Kathy Kemp and Brett J. Blackledge, *Officials Pushing for Truth in Alabama Sentencing*, BIRMINGHAM NEWS, Dec. 19, 2000; ALA. SENTENCING COMM'N, ABOUT US, <http://sentencingcommission.alacourt.gov/about.html>

<sup>543</sup>LA. SENTENCING COMM'N, RECOMMENDATIONS FOR REFORM OF ALABAMA'S CRIMINAL JUSTICE SYSTEM: 2003 REPORT 53-58, <http://sentencingcommission.alacourt.gov/publications.html> (Mar. 10, 2003); Stan Bailey, *Panel OKs Truth-in-Sentencing Report*, BIRMINGHAM NEWS, Feb. 25, 2003.

<sup>544</sup>It is unclear at this juncture whether the elimination of parole would apply prospectively only. Notably, other states passing TIS legislation have ensured that the TIS system applies prospectively only. See, e.g., *Evans v. State*, 2004 WL 2743546 (Del. Nov. 23, 2004) (citing 11 Del C. § 4381(a)); WISC. STAT. 973.01(1), (4), & (6).

<sup>545</sup>Stan Bailey, *Panel Urges Phasing Out Paroles by 2006*, BIRMINGHAM NEWS, Feb. 28, 2003.

<sup>546</sup>David White, *Stiffer Rules on Paroles Adopted*, BIRMINGHAM NEWS, Mar. 22, 2001; ALA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 1, <http://www.pardons.state.al.us/rules.html> (last viewed January 27, 2005).

<sup>547</sup>*Id.*

the hearing.<sup>548</sup>

On September 28, 2001, Congressman Spencer Bachus reported that Alabama received a \$2.7 million VOI/TIS grant for requiring serious violent criminals to serve at least 85% of the sentence imposed.<sup>549</sup> It is unclear from this press release whether Alabama received a VOI grant, a TIS grant, or both.

## 2. Commutation

In February 2004, the House Judiciary Committee delayed action on a proposal to allow the Board of Pardons and Paroles to commute sentences of life in prison without parole to life with the possibility of parole.<sup>550</sup>

## 3. Appropriation of Funds to Board of Pardons and Paroles

The Alabama Sentencing Commission has recommended that in response to the overcrowding problem in Alabama's prisons more money be appropriated to the Board of Pardons and Paroles.<sup>551</sup> Due to the overwhelming costs of incarcerating criminals in Alabama, the Sentencing Commission has recommended that the Board more expeditiously parole non-violent offenders.<sup>552</sup> Recognizing that with such increased numbers of parolees comes an increased need for parole officers, the Commission has recommended that the state allocate

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<sup>548</sup>David White, *Stiffer Rules on Paroles Adopted*, BIRMINGHAM NEWS, Mar. 22, 2001.

<sup>549</sup>Press Release, Office of Congressman Spencer Bachus, Alabama Receives Federal Grant to Build More Prison Space, <http://bachus.house.gov/HoR/AL06/Press+Room/Press+Releases/2001/09-28-01+Alabama+Receives+Federal+Grant+to+Build+More+Prison+Space.htm> (Sept. 28, 2001).

<sup>550</sup>*Legislature Briefs*, BIRMINGHAM NEWS, Feb. 12, 2004.

<sup>551</sup>LA. SENTENCING COMM'N, RECOMMENDATIONS FOR REFORM OF ALABAMA'S CRIMINAL JUSTICE SYSTEM: 2003 REPORT 48-49, <http://sentencingcommission.alacourt.gov/publications.html> (Mar. 10, 2003); Brett Blackledge, *Low-Level Crooks Top Parole Plan: Nonviolent Thieves, Drug Offenders Focus of Early Release Proposal*, BIRMINGHAM NEWS, Sept. 29, 2003.

<sup>552</sup>*Id.*

more funds to the Board, at least in the short term.<sup>553</sup> Perhaps informed by these recommendations as well as similar recommendations made by Governor Bob Riley, in 2004 the Alabama Legislature appropriated \$7.38 million extra for the Parole Board's budget and additional officers to oversee new releases.<sup>554</sup>

#### IV. RECENT DEVELOPMENTS

##### A. Rescinding Grants of Parole

In the past five years, there have been two high-profile parole cases. In July 2000, the Board granted paroles to two men, Kenneth and Michael Thornton, who were convicted of the kidnapping and rape of Wanda Jones in Birmingham, Alabama.<sup>555</sup> The men had served eighteen years of their forty-year sentences at the time of their parole hearing.<sup>556</sup> Former Governor Don Siegelman asked that the Board reconsider their grant of parole.<sup>557</sup> Mr. Siegelman was outraged, stating that "it is entirely unclear on what basis the board made its decision."<sup>558</sup> The Board, however, stated that it believed the Thorntons were no threat to society.<sup>559</sup>

Less than a week later, the Board unanimously rescinded both grants of parole.<sup>560</sup> There was some discussion that the decision to rescind the parole grants was motivated by a desire to

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<sup>553</sup>*Id.*

<sup>554</sup>Carla Crowder, *Parole Board's Work Slows Inmate Releases, Does Little to Relieve Overcrowding*, BIRMINGHAM NEWS, Aug. 19, 2004; Mike Cason, *Second Parole Board on Way*, MONTGOMERY ADVERTISER, Sept. 16, 2003.

<sup>555</sup>Stan Bailey, *Governor Requests Parole Reversal*, BIRMINGHAM NEWS, July 21, 2000; Kathy Kemp and Stan Bailey, *Board Rescinds Paroles: Hearings Ordered for Two Rapists*, BIRMINGHAM NEWS, Aug. 2, 2000.

<sup>556</sup>Bailey, *Governor Requests Parole Reversal*.

<sup>557</sup>*Id.*

<sup>558</sup>*Id.*

<sup>559</sup>*Id.*

<sup>560</sup>Kemp, *Board Rescinds Paroles: Hearings Ordered for Two Rapists*.

avoid surrendering confidential files.<sup>561</sup> One member of the Board stated that she received confidential information before the parole decision was made.<sup>562</sup> Montgomery County Circuit Court Judge Charles Price ordered that the Board turn over this confidential information to Montgomery County D.A. Ellen Brooks.<sup>563</sup> In the end, the case became moot because the Board rescinded the paroles to “avoid the perception that the board acted inappropriately.”<sup>564</sup> A new hearing was held a few days later.<sup>565</sup>

Similarly, in September 2004, Attorney General Troy King demanded that the Board reconsider its grant of parole to Melanie Lowery.<sup>566</sup> In August 2004, the Board voted to grant Ms. Lowery parole.<sup>567</sup> Ms. Lowery had served fourteen years of her thirty-year sentence for murdering her husband, which she contended was motivated by her husband’s abuse towards her and her children.<sup>568</sup> Ms. Lowery’s second hearing was very confrontational. Despite the fact that her son testified at trial that he was sodomized by the father, Attorney General Troy King spent much of the hearing contending that Ms. Lowery lied about the abuse inflicted upon her and her children by her husband.<sup>569</sup> Despite granting parole a month earlier, the Board unanimously voted against granting her parole, which means she will not be eligible for parole for another five years.<sup>570</sup>

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<sup>561</sup>*Id.*

<sup>562</sup>*Id.*

<sup>563</sup>*Id.*

<sup>564</sup>*Id.*

<sup>565</sup>*Id.*

<sup>566</sup>*Decision Can be Difficult*, MONTGOMERY ADVERTISER, Sept. 25, 2004, at A9; Carla Crowder, *Board Reverses Vote to Parole Lowery: Governor, AG Pressed to Keep Prisoner Behind Bars*, BIRMINGHAM NEWS, Sept. 23, 2004.

<sup>567</sup>Crowder, *Board Reverses Vote to Parole Lowery*.

<sup>568</sup>*Decision Can Be Difficult*.

<sup>569</sup>Crowder, *Board Reverses Vote to Parole Lowery*.

<sup>570</sup>*Id*; *Decision Can Be Difficult*.

B. Victim Notification

Though state law requires that victims be notified at least thirty days before parole hearings, there continually has been some question as to whether victims have been notified by the Parole Board.<sup>571</sup> The Birmingham News took credit for exposing the Board's failure to notify victims back in 2000.<sup>572</sup>

Victim notification laws account for a great deal of the backlog in parole cases.<sup>573</sup> Because Alabama law has often demanded victim notification and victims are difficult to track down, hearings are often pushed back on the calendar as a great deal of time is spent attempting to track down victims.<sup>574</sup> The issue of victim notification continues today as reflected by the Alabama Sentencing Commission's 2004 Legislative Packet.<sup>575</sup> The Commission's bill proposed to amend Alabama Code section 15-22-36 to require that notice of hearings shall (1) be sent to victims named in the indictment (or immediate family when deceased) by certified mail, return receipt requested, at the last address contained in the Board's files; (2) contain the actual time the prisoner has been confined; (3) contain the date of sentence rather than the date of conviction; and (4) be provided to the Chief of Police of the city or town only if the crime was committed in an incorporated area with a police department.<sup>576</sup> In May 2004, Alabama Code section 15-22-36 was amended to relax some of the requirements for victim notification.<sup>577</sup>

Victims of Crime and Leniency ("VOCAL"), an influential organization dedicated to

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<sup>571</sup>Kathy Kemp and Brett Blackledge, *Officials Pushing for Truth in Alabama Sentencing*, BIRMINGHAM NEWS, Dec. 19, 2000.

<sup>572</sup>*Id.*

<sup>573</sup>Indeed, the inevitable delay of notifying victims has resulted in a backlog of over 2500 parole cases. Carla Crowder, *Search for Crime Victims Backlogs Violent Criminals Chances for Parole*, BIRMINGHAM NEWS, May 12, 2004.

<sup>574</sup> *Id.*

<sup>575</sup> LA. SENTENCING COMM'N, 2004 LEGISLATIVE PACKET 3, <http://sentencingcommission.alacourt.gov/publications.html> (last viewed Jan. 26, 2005).

<sup>576</sup> *Id.*

<sup>577</sup> LA. CODE § 15-22-36 (Supp. 2004).

preventing the release of prisoners,<sup>578</sup> has made it difficult for legislators to promote legislation that would decrease incarceration rates. Notably, one of the commissioners on the Alabama Crime Victims Compensation Commission, Miriam Shehane, was a founding member of VOCAL and has sat on the Board of the organization since its inception in 1982. In the area of victim notification, VOCAL lobbied strongly against changes to the Code that would relax notification requirements. In the face of defeat, VOCAL continued to express its disagreement with the amendments.<sup>579</sup>

### C. Special Dockets

To deal with prison overcrowding, Special Dockets were created in April 2003 pursuant to Article 16 of the Board's Rules and Regulations.<sup>580</sup> The intention of these Special Dockets is to help clear Alabama's overcrowded prisons by focusing on non-violent offenders. Accordingly, those eligible for early parole under the Special Dockets must meet the following criteria: (1) not serving a split sentence, (2) no Class A convictions, (3) do not have three parole or probation revocations in the past three years, (4) no violations involving use or threat of a gun, (5) offense did not involve injury to a victim, (6) not serving time for domestic violence, (7) no drug trafficking convictions, (8) no sexual offense convictions, and (9) no child abuse convictions.<sup>581</sup>

Through this effort, approximately 4000 non-violent offenders were paroled over the next sixteen months; however, there seems to be some concern that the Special Dockets have, over the last few months, considerably pulled back on the number of paroles issued.<sup>582</sup> Contending that the deceleration in parole issuances is attributable to a depleted pool of

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<sup>578</sup>Stan Bailey, *Victims Group: Keep Convicted Murderers in Jail*, BIRMINGHAM NEWS, Mar. 6, 2001.

<sup>579</sup>Carla Crowder, *Search for Crime Victims Backlogs Violent Criminals Chances for Parole*, BIRMINGHAM NEWS, May 12, 2004.

<sup>580</sup>Carla Crowder, *Parole Board's Work Slows Inmate Releases, Does Little to Relieve Overcrowding*, BIRMINGHAM NEWS, Aug. 19, 2004; Mike Cason, *Second Parole Board on Way*, MONTGOMERY ADVERTISER, Sept. 16, 2003.

<sup>581</sup>Cason, *Second Parole Board on Way*.

<sup>582</sup>Carla Crowder, *Parole Board's Work Slows Inmate Releases, Does Little to Relieve Overcrowding*, BIRMINGHAM NEWS, Aug. 19, 2004.

nonviolent offenders, the Attorney General recently backed a proposed bill, which would cut short the Special Dockets' term fifteen months earlier than planned.<sup>583</sup> While the Attorney General is correct that the number of offenders currently defined as "nonviolent" has dropped, his faulty conclusion that nothing more can be done to relieve prison overcrowding is based upon an unnecessarily restrictive definition of "nonviolent" offenders.<sup>584</sup> For example, eliminating traffickers from the class of nonviolent offenders would increase considerably the pool of eligible parolees and simultaneously prevent serious public safety threats.

## V. COMPARATIVE ANALYSIS OF ALABAMA PAROLE

### A. State Systems<sup>585</sup>

Since the early 1990s, most state parole systems have been altered in response to the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants.<sup>586</sup> As stated above, to qualify for TIS grants, states must require individuals convicted of violent crimes<sup>587</sup> to serve at least 85% or more of their sentence. Either determinate or indeterminate sentencing states may qualify for the TIS grants.<sup>588</sup>

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<sup>583</sup> Carla Crowder, *Bill Would End Parole Panel for the Nonviolent*, BIRMINGHAM NEWS, Feb. 22, 2005.

<sup>584</sup> See Sentencing II.A.2.

<sup>585</sup> Most information regarding state parole systems was acquired from the following reports, which present accurate information through the year 1999: BUREAU OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS, <http://www.ojp.usdoj.gov/bjs/abstract/tssp.htm> (Jan. 1999); WILLIAM J. SOBOL ET AL, URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS, <http://www.urban.org/Template.cfm?Section=ByAuthor&NavMenuID=63&template=/TaggedContent/ViewPublication.cfm&PublicationID=7810> (Apr. 2002).

<sup>586</sup> See section on Legislative Proposals in Alabama.

<sup>587</sup> Violent crimes include murder, nonnegligent manslaughter, rape, robbery and aggravated assault.

<sup>588</sup> WILLIAM J. SOBOL ET AL, URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 2, <http://www.urban.org/Template.cfm?Section=ByAuthor&NavMenuID=63&template=/Ta>

Determinate sentencing states may qualify for TIS grants if either (1) 85% of the sentence imposed by the court will be served by the individual convicted of a violent crime, (2) on average, 85% of the sentence imposed is served by persons convicted of violent crimes, or (3) the state has enacted, but not yet implemented (but will do so within three years) laws that require individuals convicted serve at least 85% of their sentence. The following determinate sentencing states qualified to receive TIS grants from 1996-99:

QUALIFYING DETERMINATE SENTENCING STATES		
85% of Sentence Imposed	On avg., 85% of sentence imposed	85% law enacted, but not yet implemented
AZ, CT, FL, GA, IA, KS, LA, ME MN, MO, MS, NC, ND, NJ, NY, OH, OR, SC, TN, VA, WA	DE	DC, OK

Indeterminate sentencing states qualify for TIS grants if either (1) persons convicted of violent crimes serve at least 85% of their prison term under the state’s sentencing and release guidelines, or (2) persons convicted of violent crimes serve at least 85% of the maximum prison term allowed under the sentence imposed by the court. The following indeterminate sentencing states qualified for funding under the first criteria from 1996-99<sup>589</sup> (85% of their prison term served according to sentencing and release guidelines): CA, MI, PA, and UT.<sup>590</sup>

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ggedContent/ViewPublication.cfm&PublicationID=7810 (Apr. 2002). An indeterminate sentencing state is a state, like Alabama, in which the court imposes a sentence of a range defined by statute and an administrative agency controls release within the statutory range. Determinate sentencing occurs when the court imposes a sentence that will reflect, at least closely, the amount of time a prisoner will actually serve.

<sup>589</sup>Though not listed in 1999 as a TIS grant state, on September 28, 2001, Congressman Spencer Bachus reported that Alabama received a \$2.7 million VOI/TIS grant for requiring serious violent criminals to serve at least 85% of the sentence imposed. Press Release, Office of Congressman Spencer Bachus, Alabama Receives Federal Grant to Build More Prison Space, <http://bachus.house.gov/HoR/AL06/Press+Room/Press+Releases/2001/09-28-01+Alabama+Receives+Federal+Grant+to+Build+More+Prison+Space.htm> (Sept. 28, 2001). It is unclear from this press release whether Alabama received a VOI grant, a TIS grant, or both.

<sup>590</sup>WILLIAM J. SOBOLE ET AL., URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS 7,

Some states have what they consider TIS laws; however, they did not qualify in 1999 for the federal TIS grants. For instance, Indiana, Maryland, Nebraska, and Texas demand that individuals serve 50% of their sentence.<sup>591</sup> Idaho, Nevada, and New Hampshire demand that 100% of the minimum sentence imposed be served. Alaska requires that two-thirds of the sentence be served in prison (100% of prison term must be served) and one-third be served on parole.<sup>592</sup> Arkansas requires individuals convicted of violent offenses serve 70% of their sentences.<sup>593</sup> In Colorado, violent offenders with two prior violent convictions serve 75% of their sentence and violent offenders with one prior violent conviction serve 56.25% of their sentence.<sup>594</sup> Massachusetts requires that prisoners serve 75% of their minimum prison sentence.<sup>595</sup> The following table reflects which states have satisfied the requirements for TIS grants, which states have other TIS laws, and which states have no TIS laws:

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<http://www.urban.org/Template.cfm?Section=ByAuthor&NavMenuID=63&template=/TaggedContent/ViewPublication.cfm&PublicationID=7810> (Apr. 2002); U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES (1998), <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=ns98129t.txt&directory=/diskb/wais/data/gao> (1998).

<sup>591</sup>*Id.* at 8; BUREAU OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 2, <http://www.ojp.usdoj.gov/bjs/abstract/tssp.htm> (Jan. 1999).

<sup>592</sup> BUREAU OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 2, <http://www.ojp.usdoj.gov/bjs/abstract/tssp.htm> (Jan. 1999).

<sup>593</sup>*Id.*

<sup>594</sup>*Id.*

<sup>595</sup>*Id.*

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STATE TRUTH-IN-SENTENCING LAWS (as of 1999) <sup>596</sup>		
Federally Compliant 85% TIS States (29 states)	Other TIS laws (14 states)	No TIS Laws (8 states)
AZ, CA, CT, DC, DE, FL, GA, IA, IL, KS, LA, ME, MI, MN, MO, MS, NC, ND, NJ, NY, OH, OK, OR, PA, SC, TN, UT, VA, WA	AK, AR, CO, ID, IN, KY, <sup>597</sup> MA, MD, MT, NE, NH, NV, TX, WI <sup>598</sup>	AL, <sup>599</sup> HI, NM, RI, SD, VT, WV, WY

Of the TIS receiving states, the following states have abolished parole for violent offenders (i.e. in those states receiving TIS grants that have not abolished parole for violent offenders, a prisoner may be paroled after serving 85% of his sentence):

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<sup>596</sup> WILLIAM J. SOBOLE ET AL, URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 8, <http://www.urban.org/Template.cfm?Section=ByAuthor&NavMenuID=63&template=/TaggedContent/ViewPublication.cfm&PublicationID=7810> (Apr. 2002); BUREAU OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 2, <http://www.ojp.usdoj.gov/bjs/abstract/tssp.htm> (Jan. 1999).

<sup>597</sup>Effective July 15, 1998, offenders must serve 85% of their sentence.

<sup>598</sup>Effective December 31, 1999, offenders must serve 100% of their sentence and a sentence of extended supervision at 25% of the prison sentence.

<sup>599</sup>See section on legislative proposals, explaining that it is unclear under which program Alabama is receiving federal grants.

TIS STATES THAT ABOLISHED PAROLE FOR VIOLENT OFFENDERS <sup>600</sup>	
Abolished Parole for Violent Offenders <sup>601</sup>	Have Not Abolished Parole for Violent Offenders
AZ, CA, DC, DE, FL, GA, IA, IL, KS, ME, MN, MS, NC, NY, OH, OR, TN, VA, WA	CT, LA, MI, MO, NJ, ND, PA, OK, SC, UT

**B. Statistics**

Under a truth-in-sentencing law requiring 85% of the sentence be served, violent offenders generally are expected to serve an estimated fifteen months longer than the projected average minimum time to be served by offenders prior to the existence of such laws.<sup>602</sup> Indeed, the average time served by violent offenders increased from forty-three months in 1993 to forty-nine months in 1997.<sup>603</sup> Under TIS laws, state prison populations are expected to increase through the incarceration of more offenders for longer periods of time.<sup>604</sup>

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<sup>600</sup> WILLIAM J. SOBOLE ET AL, URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 8, <http://www.urban.org/Template.cfm?Section=ByAuthor&NavMenuID=63&template=/TaggedContent/ViewPublication.cfm&PublicationID=7810> (Apr. 2002); BUREAU OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 3, <http://www.ojp.usdoj.gov/bjs/abstract/tssp.htm> (Jan. 1999).

<sup>601</sup> Arizona, Delaware, Florida, Illinois, Indiana, Kansas, Minnesota, Mississippi, North Carolina, Ohio, Oregon, Washington, and Wisconsin have abolished discretionary parole board release for *all* offenders. Alaska, New York, Tennessee, and Virginia have abolished parole board release for violent offenders and Louisiana has abolished parole for crimes against a person. California allows discretionary release by a parole board only for offenders with indeterminate life sentences.

<sup>602</sup> BUREAU OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 7-8, <http://www.ojp.usdoj.gov/bjs/abstract/tssp.htm> (Jan. 1999).

<sup>603</sup> *Id.* at 9 tbl 8.

<sup>604</sup> *Id.* at 3-4.

## VI. PARDONS

### A. Background

The issue of pardons became a hot topic in 2003. Prior to that year, Alabama had ex-felon disenfranchisement laws that prohibited all ex-felons from voting.<sup>605</sup> In 2003, legislation passed that allowed ex-felons to apply for restoration of their voting rights.<sup>606</sup>

The process for receiving restoration of one's voting rights is an expedited process that requires less time than that required for restoration of full political and civil rights.<sup>607</sup> Accordingly, an ex-felon who receives restoration of his voting rights does not necessarily have full restoration of his political and civil rights.<sup>608</sup> Notably, Alabama remains one of the few states that does not automatically give felons their voting rights back at the end of their sentence.<sup>609</sup>

### B. Pardons (Restoration of Full Political and Civil Rights) Granted in the Last Decade

The following chart indicates the number of pardons granted over the past thirteen years:

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<sup>605</sup>Carla Crowder, *State's Ex-Felons Start to Regain Voting Rights*, BIRMINGHAM NEWS, Apr. 16, 2004.

<sup>606</sup>LA. CODE § 15-22-36.1 (Supp. 2004). The legislation only allows some ex-felons to apply for restoration of their voting rights. ALA. CODE § 15-22-36.1 (Supp. 2004). Ex-felons who have felony charges pending are not eligible nor are ex-felons who were convicted of impeachment, treason, murder, rape, sodomy, sexual abuse, incest, sexual torture, and a number of offenses involving children as victims. *Id.* Moreover, in order to apply, one must have fulfilled the terms of his or her sentence, including completion of his or her sentence, payment of fines, court costs, and restitution. *Id.*

<sup>607</sup>*Id.*

<sup>608</sup>Phone conversation with Board Member, Pardons Department (Jan. 26, 2005).

<sup>609</sup>Crowder, *State's Ex-Felons Start to Regain Voting Rights*.

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Yearly Pardons	
Year	Number of Pardons (with Restoration of Full Political and Civil Rights Granted) <sup>610</sup>
2003-04	158
2002-03	317
2001-02	161
2000-01	41
1999-00	276
1998-99	226
1997-98	242
1996-97	158
1995-96	201
1994-95	63
1993-94	333
1992-93	464
1991-92	576
Total	3216
<i>Average</i>	247 per year

C. Racial Background of Those Pardoned (Full Restoration of Political and Civil Rights) Between Feb. 1, 2000 - Jan. 31, 2003<sup>611</sup>

Between February 1, 2000, and January 31, 2003, a total of 561 individuals were granted pardons. Of these 561 individuals, 221 (39.3%) were African-American and 334 (59.5%) were Caucasian, 423 (75.4%) were male and 138 (24.5%) were female. The race/gender breakdown is as follows:

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<sup>610</sup>Acquired from Alabama Board of Pardons and Paroles' Annual Reports for the years listed in the left side of the table. ALA. BD. OF PARDONS AND PAROLES, ANNUAL REPORT.

<sup>611</sup>Acquired as a print out from Board of Pardons and Paroles. ALA. BD. OF PARDONS AND PAROLES, 2000-03 PARDON STATISTICS (2003) (on file with EJI).

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Sex/ Decision	Black	White	Indian	Asian	Hispanic	Unknown
Female Granted	60 <i>10.87%</i>	76 <i>13.77%</i>	0	1 <i>0.18%</i>	1 <i>0.18%</i>	0
Male Granted	161 <i>29.17%</i>	258 <i>46.74%</i>	1 <i>0.18%</i>	0	3 <i>0.54%</i>	0
Unknown R/S	0	0	0	0	0	0

D. Restoration of Voting Rights

At least one recent study has concluded that 29.85% of the voting-age (eighteen years or older) African-American male population in Alabama is disenfranchised.<sup>612</sup>

Historically, ex-felons could have their voting rights restored only by being granted a full pardon by the Alabama Board of Pardons and Paroles. On average, 247 full pardons are granted annually. In 2003, the Legislature enacted a bill to facilitate the restoration of voting rights (not full pardons) to certain ex-felons by instituting an expedited restoration procedure.<sup>613</sup> In the nearly seventeen months since the bill was enacted on September 25, 2003, 2428 ex-felons (of all racial backgrounds) have had their voting rights restored.<sup>614</sup> An additional 111,755 African Americans living in Alabama currently are eligible to apply for restoration of their voting rights.

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<sup>612</sup>Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777-803 (Dec. 2002). Uggen and Manza’s article contains a detailed methodology which sets out the researcher’s assumptions and evaluates the quality of their source data. They rely primarily on Department of Justice source data in arriving at their conclusion that 111,755 African-Americans are disenfranchised in Alabama.

<sup>613</sup> LA. CODE § 15-22-36.1 (Supp. 2004) (effective Sept. 25, 2003).

<sup>614</sup>Message from Sarah Still, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Feb. 10, 2005).

## VII. THE BOARD

The Board of Pardons and Paroles consists of three members.<sup>615</sup> Members are appointed by the Governor with the advice and consent of the Senate. Nominations are made by a five-person panel consisting of the Chief Justice of the Alabama Supreme Court, the presiding judge of the Court of Criminal Appeals, the Lieutenant Governor, the Speaker of the House, and the President Pro Temp of the Senate. One member of the Board is designated the chairman.<sup>616</sup> All members serve six year terms and may be impeached.<sup>617</sup>

There are also four special members of the Board who are appointed by the Governor.<sup>618</sup> Special members serve the limited purpose of conducting hearings and making parole determinations.<sup>619</sup> The Board (consisting of general and special members) sits in two three-member panels with the chairman serving as an alternate.<sup>620</sup> Three-member panels have the same authority as the full Board.<sup>621</sup>

The three original members of the Board were Alex Smith, Edwina Mitchell, and Robert Hill. Today, the chairman of the Board is Sidney T. Williams (a former police and security officer). The other two members are Nancy McCreary (whose own victimization was dramatized by a made-for-TV movie) and LeLinda Weatherly (former DOC Classification Officer and parole officer).

## VIII. ALABAMA'S PAROLE PROCESS

After the Board was created by the Legislature in 1939, it proceeded to set up a system of review to guide the Board and its staff in assessing each case. The following summarizes

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<sup>615</sup> LA. CODE § 15-22-20(a) (Supp. 2004).

<sup>616</sup> LA. CODE § 15-22-20(c) (Supp. 2004).

<sup>617</sup> LA. CODE § 15-22-20(d), (e) (Supp. 2004).

<sup>618</sup> LA. CODE § 15-22-20(I) (Supp. 2004).

<sup>619</sup> LA. CODE § 15-22-20(I) (Supp. 2004).

<sup>620</sup> LA. CODE § 15-22-20(j) (Supp. 2004).

<sup>621</sup> LA. CODE § 15-22-20(k) (Supp. 2004).

some of the more relevant sections of the Alabama Board of Pardons and Paroles Rules, Regulations, and Procedures:<sup>622</sup>

A. Article 1: Intake<sup>623</sup>

Anyone in prison eligible for parole will have his parole eligibility date assessed immediately after he is sentenced.<sup>624</sup> Shortly after a defendant is sentenced, the Board begins a file on the prisoner.<sup>625</sup> This file includes: (1) a complete statement of the crime, (2) circumstances of the crime, (3) nature of the sentence, (4) the court in which he was sentenced, (5) name of the judge and D.A. and copies of probation reports as well as reports regarding the prisoner's social, physical, mental, and psychiatric condition and history, and (6) a complete criminal record of the prisoner.<sup>626</sup> If any other information is needed to complete the file, an investigation shall be conducted.<sup>627</sup> The Board may not act until a prisoner's social and criminal reports, as created and detailed in writing by a parole officer, are made a part of the prisoner's file.<sup>628</sup>

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<sup>622</sup>Unless followed by a citation, all information contained in Part III is acquired from the Alabama Board of Pardons and Paroles' Rules Regulations, and Procedures. ALA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES, <http://www.pardons.state.al.us/rules.html> (last viewed Jan. 26, 2005).

<sup>623</sup> LA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 1, <http://www.pardons.state.al.us/rules.html> (last viewed Jan. 26, 2005).

<sup>624</sup>This would exclude anyone on death row and individuals sentenced to life imprisonment without the possibility of parole. In addition, when the sentencing court imposes a split sentence (i.e. a sentence of imprisonment combined with a period of probation), the Parole Board will not consider parole; instead, the Board will defer to the sentencing court to determine when the prisoner is ready for release. Those sentenced to death whose sentences were commuted by the Governor also are not eligible for parole unless the Board is satisfied that the individual was innocent. ALA. CODE § 15-22-27 (Supp. 2004).

<sup>625</sup> LA. CODE § 15-22-25(a) (1995).

<sup>626</sup> LA. CODE § 15-22-25(a) (1995).

<sup>627</sup> LA. CODE § 15-22-25(a) (1995).

<sup>628</sup> LA. CODE § 15-22-25(b) (1995).

The date of parole eligibility is determined by considering good time credit first and then the length of the sentence imposed.<sup>629</sup> Good time credit is automatically given to every prisoner in Alabama unless his sentence is greater than fifteen years.<sup>630</sup> It may be lost for various forms of misconduct and/or convictions.<sup>631</sup> Based on the assumption that a prisoner will not lose good time credit, the Board sets a minimum release date – the date the prisoner is eligible for release without being paroled. Factoring in good time credit usually places an inmate's minimum release date at around one third of the sentence.<sup>632</sup> After calculating the minimum

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<sup>629</sup>Interview with Steve Sirmon, Attorney, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Sept. 24, 2004).

<sup>630</sup>*Id.* Good time credit may be given to a prisoner whose sentence is greater than fifteen years if he is serving consecutive sentences that make his combined sentence greater than fifteen years. For example, a prisoner may receive good time credit if he received three ten-year sentences to run consecutively. Interview with Steve Sirmon, Attorney, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Sept. 24, 2004).

<sup>631</sup>Because good time credit may have a substantial impact on the length of a prisoner's sentence, he has a vested interest in having constitutionally permissible procedures employed during his deprivation process. Accordingly, inmates may challenge the constitutionality of the process by which they are denied good time credits. *Wolff v. McConell*, 418 U.S. 539 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). In Alabama, the Department of Corrections must adhere to the state's Administrative Regulations in denying a prisoner good time credits. If prisoners are denied proper credit, an inmate may bring a writ of certiorari in the Montgomery County Circuit Court challenging the constitutionality of the process by which he was stripped of his credits. *McConico v. Alabama Dep't of Corrections*, No. CR-03-0287, 2004 WL 918330 (Ala. Crim. App. Apr. 30, 2004). Moreover, in order for the requirements of due process to be satisfied, the record must also show that there is "some evidence" to support the decision to revoke an individual's good-time credits. *Superintendent v. Hill*, 472 U.S. 445, 454 (1985).

Though an inmate may lose good time credit, there are a number of ways to reinstate good time credit when lost; therefore, the minimum release date usually does not fluctuate much. Only when an inmate continually engages in misconduct is he prevented from reinstating good time credit and forced to serve the actual length of his sentence. Interview with Steve Sirmon, Attorney, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Sept. 24, 2004).

<sup>632</sup>For example, if someone is serving a sentence of nine years, his minimum release date is three years.

release date, the parole eligibility date is determined by taking one-third of that time or ten years,<sup>633</sup> whichever is less.<sup>634</sup>

Once the date is calculated,<sup>635</sup> the prisoner's initial parole consideration is scheduled. Where a prisoner is receiving good time credit and his sentence: (1) is less than five years, he will be considered for parole when the next docket is called; (2) is five to ten years, his initial parole consideration will be scheduled approximately twelve months prior to his minimum release date; (3) is ten to fifteen years, his initial parole consideration will be scheduled twenty-four months prior to his minimum release date; (4) is in excess of fifteen years, his initial parole consideration will be scheduled thirty-six months prior to his minimum release date. If the prisoner is not receiving good time credit, an initial parole consideration is scheduled as soon as practicable after one-third of the prisoner's sentence has been served or ten years, whichever is less. If the Board designee scheduling the initial parole consideration finds mitigating circumstances, he may recommend scheduling an initial parole consideration date earlier than that required. In such an event, the designee must prepare a memorandum for the Board to review.

Certain classes of offenses are not eligible for this parole consideration schedule. Where a prisoner has been convicted of a violent crime (meaning Class A felonies: Rape I, Robbery I, Murder, Burglary I with serious physical injury, Attempted Murder, Sodomy I, Arson I with serious physical injury, or Sexual Torture), parole may not be considered until eighty-five percent

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<sup>633</sup>Alabama law provides that someone may be released on parole earlier than this amount of time upon a unanimous affirmative vote of the Board. ALA. CODE § 15-22-28 (1995).

<sup>634</sup>For instance, a prisoner serving nine years would be parole-eligible after one year (based on one-third of his minimum release date, i.e. three years, being one year). A prisoner serving eighteen years would be parole-eligible after six years because he cannot receive good time credit and one-third of his sentence is six years. A prisoner serving fifty years is eligible for parole after ten years because he cannot receive good time credit and ten years is less than one-third of his sentence.

<sup>635</sup>At the time this calculation occurs, the appropriate field office is asked to forward a copy of any investigations to the central office. If no investigation has been conducted or the investigation is insufficient, the field office is required to conduct an investigation.

(85%) of his total sentence or fifteen years, whichever is less, has been served.<sup>636</sup>

Also, any person convicted of any act of, or attempt of, murder, rape, robbery, or assault with a deadly weapon which resulted in serious physical injury, and who within the past five years was convicted of another felony, or attempt thereof, resulting in serious physical injury to another is not eligible for parole.<sup>637</sup>

B. Article 2: Rescheduling of Consideration<sup>638</sup>

A Review Committee assesses whether early parole should be considered in certain cases. The Committee consists of five members designated by the Board who serve as senior staff at the Parole Board Office. A three-person vote is required to make recommendations.

Only prisoners who have served five years, with the exception of inmates facing imminent death,<sup>639</sup> may initiate contact with the Parole Board's Office and request consideration of earlier parole. Only when good cause is shown and there is a probability that he will succeed on parole will the Review Committee consider early parole. If the Board has denied or revoked parole and scheduled the next consideration for three or more years after the denial or revocation, the Committee may consider an earlier scheduling, but such review may not occur less than eighteen months after the Board has denied or revoked parole.

C. Article 3: Docket<sup>640</sup>

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<sup>636</sup> LA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 7, <http://www.pardons.state.al.us/rules.html> (last viewed Jan. 26, 2005).

<sup>637</sup> LA. CODE § 15-22-27.1 (1995).

<sup>638</sup> LA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 2, <http://www.pardons.state.al.us/rules.html> (last viewed Jan. 26, 2005).

<sup>639</sup> Inmates facing imminent death may apply for early parole review at any time.

<sup>640</sup> LA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 3, <http://www.pardons.state.al.us/rules.html> (last viewed Jan. 26, 2005).

Due to a history of corruption in Alabama’s system of pardons and paroles,<sup>641</sup> the Board now considers and decides whether to order or grant any pardon or parole at a public hearing.<sup>642</sup> Individual board members are expressly prohibited from discussing cases outside of this public hearing.

In terms of placing inmates on the parole hearing docket, the Board does so almost immediately after one is sentenced (having made the calculation as to when an individual is parole-eligible – see above). However, initially, prisoners are only told the month they will be on the docket. Then, within ninety days of the actual hearing, the Board notifies the prisoner of the exact date on which the hearing will be held. Before the exact date is set, a Board designee ensures that the prisoner has been interviewed by a parole officer. At this interview, the officer shall allow the prisoner to make a statement regarding his situation and his proposed plans upon release. The Board is supplied a docket sheet four weeks prior to each hearing, indicating the date, time, and place of the meeting as well as the type of consideration sought. This docket sheet is available to the public.

All action or inaction taken at a hearing is noted on the docket. Minutes are taken at each meeting and the docket is included in the minutes for the meeting. The minutes of each meeting are public records. In the event that the Board denies relief without specifying a future docket date, the case will be rescheduled at the discretion of the Board’s designee.

D. Article 4: Notice of Hearings<sup>643</sup>

Cases are separated into victim and non-victim groups for purposes of parole hearings. In cases involving death, violence, or physical injury, Alabama law requires that notice of the hearing be given to the victim or his or her immediate family at least thirty days prior to the hearing.<sup>644</sup> Until such notification is given, no prisoner may be granted parole if he committed (1) a Class A felony, (2) any felony prior to January 1980 which would today be designated a

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<sup>641</sup>In the 1950s, the Board was selling paroles. Interview with Steve Sirmon, Attorney, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Sept. 24, 2004).

<sup>642</sup>Interview with Steve Sirmon, Attorney, Alabama Board of Pardons and Paroles, in Montgomery, Ala. (Sept. 24, 2004).

<sup>643</sup> LA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 4, <http://www.paroles.state.al.us/rules.html> (last viewed Jan. 26, 2005).

<sup>644</sup> LA. CODE § 15-22-36(e)(1) (Supp. 2004).

Class A felony, (3) any felony involving violence, death, or physical injury, (4) any felony involving sexual assault or conduct, (5) any felony involving lewd or lascivious behavior upon a child under sixteen years of age, (6) any crime committed before January 1980 that would today be defined as sexual abuse, child abuse, or sodomy, or (7) any violation of Alabama Code section 13A-6-69.<sup>645</sup>

Such notification to the victim must include (1) the prisoner's name, (2) the crime, (3) date of sentence, (4) court of conviction, (5) sentence imposed, (6) time prisoner has been held in confinement, (7) action being considered by the Board, (8) date, time, and location of the board meeting, and (8) a statement that all persons requiring notice are entitled to speak at the hearing.<sup>646</sup> If the victim remains a minor, his or her parents shall be notified.<sup>647</sup> If the victim asks not to be notified, the Board shall verify that request and indicate that it will send no notices unless it is contacted by the victim.<sup>648</sup>

Moreover, the Attorney General, District Attorney, Sheriff, and the Judge must be given thirty days notice that the prisoner is being considered for parole.<sup>649</sup> The Board must also give notice to the Attorney General, District Attorney, Sheriff, and Chief of Police at least seven days prior to the hearing.<sup>650</sup> Any individual entitled to notice will be notified as to any Board action taken.<sup>651</sup>

E. Article 5: Preliminary Review of Docketed Cases<sup>652</sup>

Before docketed cases are referred to the Board, a designee must ensure that the casefile

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<sup>645</sup> LA. CODE § 15-22-36(e)(1) (Supp. 2004).

<sup>646</sup> LA. CODE § 15-22-36(e)(2) (Supp. 2004).

<sup>647</sup> LA. CODE § 15-22-36(e)(3) (Supp. 2004).

<sup>648</sup> LA. CODE § 15-22-36(e)(4) (Supp. 2004).

<sup>649</sup> LA. CODE § 15-22-36(d). (Supp. 2004)

<sup>650</sup> LA. CODE § 15-22-23(b)(2) (Supp. 2004).

<sup>651</sup> LA. CODE § 15-22-36(f) (Supp. 2004).

<sup>652</sup> *Id.* at Article 5.

contains (1) a statement of the offender’s personal and social history, (2) his criminal history, (3) the details of the offense for each sentence under consideration, (4) an assessment of his adjustment during the sentence, (5) a proposed home and job program, and (6) evidence that notices have been sent to the appropriate individuals. Board members then consider the matter individually and they may request an investigation of any matter that may bear on the Board’s decision. The designee is also responsible for ensuring that the proposed home and job program has been requested.

F. Article 6: Board Action<sup>653</sup>

All testimony delivered at a hearing is recorded and given under oath. Individuals asking the Board to grant relief are permitted to speak first. All prisoners are permitted to have counsel, but no right to counsel exists.<sup>654</sup> Then, those entitled to notice are allowed to speak, followed by any other person who desires to speak and whom the Board permits. The Board may discuss the case before taking action. If a Board member feels that more information is necessary and it may not be obtained at the hearing, the Board may decide to proceed without that information or to schedule another meeting. Any Board member favoring relief must file a written statement, indicating why he or she believes relief is proper. A quorum of two members of the Board must be present before a vote may be taken.<sup>655</sup> A majority vote is required for a ruling; if a quorum is not present, cases are rescheduled. If parole is denied, a new hearing will be set less than five years from that date. If the prisoner has less than five years to serve on his sentence, he may be required to serve the remainder of the sentence.

The Board shall award parole only when it is of the opinion that “there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society.”<sup>656</sup> In order to make this determination, the Board considers the prisoner’s progress review, which includes a study of the prisoner’s conduct and work record while in prison, his general progress, attitude, and

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<sup>653</sup> *Id.* at Article 6.

<sup>654</sup> LA. CODE § 15-22-37 (1995).

<sup>655</sup> LA. CODE § 15-22-20(f) (Supp. 2004).

<sup>656</sup> LA. CODE § 15-22-26 (1995).

prison official's report and recommendations.<sup>657</sup> Parole will be granted if (1) the inmate's prison adjustment is good, (2) there are no valid protests to parole, (3) the inmate's release appears to be compatible with society's welfare, (4) the Board believes the inmate has served a sufficient portion of his sentence, and (5) a satisfactory parole plan is available.

If parole is granted, the remainder of the individual's sentence will be served under the supervision of a parole officer.<sup>658</sup> However, the Board may relieve a prisoner on parole from making further reports and may permit such prisoner to leave the state or county if satisfied that it is in the best interest of society.<sup>659</sup> Each member of the Board favoring parole shall enter his or her reasons in detail and these reasons are made part of the public file.<sup>660</sup>

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<sup>657</sup> Though prisoners have no right to release prior to the expiration of their sentences, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), they do have the right to be properly considered for parole. *Bostwick v. Alabama Board of Pardons and Paroles*, 865 So. 2d 1245, 1246 (Ala. Crim. App. 2003); *Tedder v. Alabama Board of Pardons and Paroles*, 677 So. 2d 1261, 1263-64 (Ala. Crim. App. 1996). Therefore, a "parole should not be denied for false, insufficient, or capricious reasons." *Bostwick*, 865 So. 2d at 1246. Consequently, despite having discretionary review under Alabama's parole statute, ALA. CODE § 15-22-26 (1995), the Board may not engage in "flagrant or unauthorized action." *Thomas v. Sellers*, 691 F. 2d 487, 489 (11th Cir. 1982).

Though such arbitrary or baseless grounds may not be relied upon by the Board, inquiries into whether any of these grounds account for a prisoner's denial of parole are difficult to make insofar there is no constitutional or statutory requirement that the Board detail its reasons for denying parole. *Graves v. Alabama Board of Pardons and Paroles*, 845 So. 2d 1, 2 (Ala. Crim. App. 2002). However, Alabama courts have considered and suggested, at least implicitly, acquiring affidavits from members of the Board indicating the reasons why they refused to grant parole. *Tedder v. Alabama Board of Pardons and Paroles*, 677 So. 2d 1261, 1264 (Ala. Crim. App. 1996) (using affidavits of Parole Board members to conclude that parole was denied for capricious reasons); *Graves v. Alabama Board of Pardons and Paroles*, 845 So. 2d 1, 2 (Ala. Crim. App. 2002) (remanding to circuit court and suggesting that litigants acquire affidavits of members of Parole Board).

<sup>658</sup> LA. CODE §§ 15-22-26 (1995), 15-22-33 (1995).

<sup>659</sup> LA. CODE § 15-22-33 (1995).

<sup>660</sup> LA. CODE § 15-22-36 (Supp. 2004).

G. Article 7: Certification and Reconsideration<sup>661</sup>

After the Board enters an order granting parole, the Board’s secretary checks to be sure the number of affirmative votes appear on the record. If, prior to the certificate of relief taking effect, good cause is found by the Board staff suggesting that relief could be held null and void, a hearing shall be rescheduled. Prior to the certificate of relief, any member of the Board can void his or her vote. If a member of the Board voids his or her vote, the case shall be docketed for reconsideration as soon as practicable.

Orders of relief are certified by the Executive Director of the Board. If after execution of the certificate, but before it takes effect, the Executive Director receives information that could result in the grant of parole being rescinded, he or she may stay the effect of the certificate pending further review by the Board. If after reviewing the information, the order is still favored, the stay is vacated. If an order to parole is withdrawn, that case shall be rescheduled for consideration in twelve months.

Similarly, Alabama Code section 15-22-40 allows the Board to declare null and void any parole grant made contrary to the provisions set forth in Chapter 15 of the Alabama Code.<sup>662</sup>

H. Article 11: Parole Violations<sup>663</sup>

A prisoner granted parole is provided a copy of the conditions of his parole.<sup>664</sup> Any violation of these conditions may render him liable to arrest and imprisonment.<sup>665</sup> Such conditions, as stated by the Legislature, may include the following requirements: (1) parolee is prohibited from leaving the state without consent, (2) he must contribute to the support of his dependents to the best of his ability, (3) he also shall pay restitution, (4) he shall abandon “evil associates and ways,” and (5) carry out the instructions of his parole officer.<sup>666</sup>

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<sup>661</sup> *Id.* at Article 7.

<sup>662</sup> LA. CODE § 15-22-40 (1995).

<sup>663</sup> *Id.* at Article 11.

<sup>664</sup> LA. CODE § 15-22-29 (1995).

<sup>665</sup> LA. CODE § 15-22-29 (1995).

<sup>666</sup> LA. CODE § 15-22-29 (1995).

Parole officers receiving information that a parolee may have violated the terms of his parole shall conduct a reasonable investigation proportionate to the seriousness of the alleged violation. If no further action is necessary, he may report the investigation in the “Notice of Violation” format. If further investigation is required, he should report the investigation in the “Report of Parole Violation” format. If there is reason to believe the parolee poses a threat to the community or that he would abscond if left at liberty, the officer may issue an “authorization to arrest” writ, causing the parolee to be held in the county jail.<sup>667</sup>

Reviewing officers assessing parole violations must place in the record all information upon which they rely in making their assessment. Parole officers have discretion to decide whether an alleged violation is sufficiently serious to warrant referral to the Board for declaration of delinquency and/or to authorize the Department of Corrections to issue a fugitive warrant.<sup>668</sup>

Charges may be referred to the Parole Court prior to the decision to refer to the Board for declaration of delinquency or DOC to issue a fugitive warrant. The parolee is directed to appear before the Parole Court for an evidentiary hearing. The parolee may be incarcerated during this time and the Board retains jurisdiction to reconsider whether to enter a declaration of delinquency at any point in the process. Once the case is docketed for Parole Court, the case will also be docketed for the Board to decide whether the parolee should be declared delinquent. Such delinquency declarations should be docketed weekly.

I. Article 12: Parole Court Hearings<sup>669</sup>

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<sup>667</sup> LA. CODE § 15-22-31(a) (1995). Any parole officer or other law enforcement officer with power of arrest (upon request of a parole officer) has the power to arrest a parolee without a warrant, but the parole officer must later submit a written statement indicating why he believes the parolee had violated the conditions of parole, in which case such statement will serve as a sufficient basis for a warrant for the individual’s detention; provided, that in no case, the parolee is made to wait more than twenty days for the arrival of the warrant. ALA. CODE § 15-22-31 (1995).

<sup>668</sup>In the event that the parole officer is unaware that the parolee has been arrested and convicted of an offense, the warden of the prison where the inmate is located shall notify the Board and the Board shall hold a parole court hearing at the prison where the prisoner may be heard. ALA. CODE § 15-22-32 (Supp. 2004).

<sup>669</sup> LA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 12, <http://www.pardons.state.al.us/rules.html> (last viewed Jan. 26, 2005).

The Parole Court consists of hearing officers designated to make factfindings regarding alleged parole violations.<sup>670</sup> Usually, a single factfinding hearing takes place and hearing officers are authorized to determine whether a parolee is guilty as well as to determine whether “probable cause” to detain the parolee exists pending resolution of the charges.

The investigating parole officer shall provide the parolee with notice of the charges against him prior to or at the same time as notice of his appearance before the Parole Court. Hearing officers may accept knowing and intelligent guilty pleas to parole violations. However, the parolee must be told the charges and his rights before accepting the plea. The hearing officer must document the facts admitted by the parolee. The parolee is responsible for informing his attorney and any witnesses of the hearing, but parole officers are permitted to contact the parolee’s attorney as a courtesy to the parolee.

A probation and parole officer presents the case of the alleged parole violation and the parolee is generally permitted to cross-examine accusing witnesses (unless the hearing officer determines that a confrontation might ensue).<sup>671</sup> The parolee may present evidence in his own defense, but his witnesses are subject to cross-examination. Hearing officers may also question any witnesses. The parole court has discretion to determine what evidence is relevant and therefore decides whether questions posed to witnesses are relevant. Adverse rulings should be recorded.

The Rules of Evidence do not apply at parole revocation hearings. Hearsay evidence is admissible. Though Treatises on Evidence have persuasive authority, the hearing officer is not bound by them. However, if the hearing officer considers evidence that would not be

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<sup>670</sup>The position of hearing officer was created by Alabama Code section 15-22-32(b). Hearing officers conduct parole hearings and recommend revocation or reinstatement. ALA. CODE § 15-22-32(b) (Supp. 2004).

<sup>671</sup> Though there is no right to parole in Alabama, *Johnston v. Alabama Board of Pardons and Paroles*, 530 F. Supp. 589 (M.D. Ala. 1982), once parole is granted, there is a right to remain on parole and not be denied such status without due process of law. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *Kirk v. State*, 536 So. 2d 118, 119 (Ala. Crim. App. 1987). Indeed, “parole revocation requires ‘an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.’” *Id.* To this end, “a written statement by the factfinders as to the evidence relied on and reasons for revoking parole” is required. *Thomas v. State*, 768 So. 2d 1016, 1019 (Ala. Crim. App. 2000).

admissible by the Rules of Evidence, he or she must explain the reasons such evidence was considered reliable.

The parolee is permitted to present mitigating evidence and, in fact, is afforded great leeway in doing so. The hearing officer *shall* consider any mitigating evidence offered and any objections to the mitigating evidence shall go to its weight, not its admissibility.

Hearing officers may take judicial notice of the terms of the individual's parole; however, the parolee may introduce evidence that he was not aware of a condition. Hearing officers may also presume that municipal codes mirror the Alabama Code and may accept a certified copy of a judgment of conviction as conclusive evidence that parole was violated, provided the parolee's appeal on the conviction had been denied or the time to file passed.

Hearing officers are not bound by the allegations in a delinquency report. Therefore, a parolee may be charged with violating the law in one respect or one condition of his parole and the hearing officer may conclude, after reviewing the evidence, that another, uncharged condition was violated or that another law was violated. However, the delinquency report must provide fair notice to the parolee that the other condition or law was violated.

J. Article 13: Parole Court Reports<sup>672</sup>

After the hearing, the hearing officer must file a detailed written report, laying out the evidence considered and the determination, including which charges were found. If the parolee is found guilty, the officer must include an assessment of the mitigating circumstances. The hearing officer makes a final recommendation as to whether parole should be revoked or reinstated, along with grounds supporting the recommendation, and the parolee is given a copy of the hearing officer's findings. If the officer determines no charges were proven, but probable cause exists to believe a charge may be proven, the case can be continued and the parolee may be detained until that time (requiring a written explanation for the detention by the hearing officer).

If charges are not proven to the reasonable satisfaction of the hearing officer, he shall prepare a draft order for the Board's signature directing withdrawal of any warrant, which is sent to the Board and the Executive Director. If the parolee is found guilty of any charge, the officer's report is filed with the Parole Court clerk. These cases are separated into two groups:

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<sup>672</sup> LA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES ARTICLE 13, <http://www.pardons.state.al.us/rules.html> (last viewed Jan. 26, 2005).

(1) reinstatement of parole is recommended, and (2) revocation of parole is recommended.

In the event that revocation is recommended, the Board must receive the officer's report no less than three weeks after it is prepared so the parolee has an opportunity to submit written comments or objections. If the parolee believes the Parole Court's report misstates facts, he may file written objections with the Board within fourteen days of receiving the report. Failure to file means the parolee has waived his objections. The Board can remand cases for the parole court to address such objections.

If the Parole Court recommends reinstatement, the Board shall receive the written report as soon as practicable. If the Parole Court recommends revocation, the written report should be submitted to the Board within a reasonable time after the time has run for the parolee to file his objections.

K. Article 14: Board Action Subsequent to Parole Court<sup>673</sup>

Having considered the Parole Court's recommendation as well as the parolee's objections, the Parole Board decides whether to revoke parole. If parole is revoked, the Board must state its reasons, citing evidence presented. If the parolee is found guilty of the parole violation, but parole is nonetheless reinstated, the case can be continued to a later meeting, pending verification of the parolee's home and job plan. The Board can also decide that it does not have enough information and remand the case for further hearing. The Board will only consider revocation on charges proven to the reasonable satisfaction of the Parole Court. The Board retains jurisdiction to reconsider any revocation that is later determined to have been improvidently ordered.

L. Article 15: Records<sup>674</sup>

Board records relating to each prisoner are confidential. The Board's minutes are, however, public records. Board orders, the vote, and statements of reasons are public records.

M. Article 16: Flexibility in Responding to Crisis<sup>675</sup>

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<sup>673</sup>*Id.* at Article 14.

<sup>674</sup>*Id.* at Article 15.

<sup>675</sup>*Id.* at Article 16.

In the event of a manifest need for expedited parole consideration, the staff will survey the prison population and the Board will set criteria for Special Dockets as well as (if necessary) for secondary dockets. This criteria will be published on the Board's website. Staff will screen files that appear to meet the criteria and separate them into three categories: (1) those that are clearly excluded, (2) those that should be excluded from Special Docket, but appear to be candidates for Secondary Docket, and (3) those not excluded from the Special Docket. Special Docket cases are those that do not require victim notification.<sup>676</sup>

Special Docket scanning will look to: (1) nature and severity of the offense, (2) seriousness of prior criminal history, (3) length of sentence and time served, and (4) events occurring since incarceration. Secondary Dockets will be screened for those convicted of violent offenses, but who appear less likely to commit violent crimes in the future. The Secondary Docket consideration will also consider all the same factors as Special Dockets with the addition of the community attitude toward the offender. Backlogged victim notification cases may be screened by senior staff who may direct the Victim Service Unit to expedite notice.

## RECOMMENDATIONS

1. Require written explanations for every denial of parole. Justification for the denial of parole should be made available to prisoners so that there are clearer guidelines for prisoners and the public as well as an improved understanding of what is expected of incarcerated people.
2. After denial of parole, Alabama prisoners typically must wait five years before they are eligible for parole consideration again. Once eligible for parole, prisoners should be reviewed every year unless the Board expressly delays review for two years. By forcing the Board to either grant parole or require a prisoner to serve an additional five years, the Board cannot make the careful, sensible decisions that are required for an effective parole system.
3. Modify victim notification requirements and require victim notification only for serious, violent Class A felony offenses. Parole hearings are often delayed for months because victim notification cannot be accomplished.
4. Create automatic, full restoration of voting rights to ex-offenders. Automatic restoration will help prisoners successfully re-engage in the state with a commitment to follow the

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<sup>676</sup>Article 4: Notice of Hearings, *supra*.

law that will improve the likelihood of successful re-entry. While the 2001 reforms have improved the situation surrounding felon disenfranchisement, the restoration of voting rights is still complex, difficult and intimidating to most ex-offenders.

## CONCLUSION

As incarceration rates increase, parole has become a critical mechanism for easing the burden of Alabama's bulging prison population. Despite the increased need, this release valve is being utilized less and less frequently. With each attempt to move toward a truth-in-sentencing system, and the accompanying elimination of parole, the prison housing crisis will continue to escalate. To divert a financial crisis, serious discussion should be had regarding the retention of Alabama's parole system and the tailoring of that system so that it may more effectively and expeditiously release inmates who pose no threat to the community.