



# Alabama Prison Crisis

*A Justice Strategies Policy Report*

COMMISSIONED BY

**THE DRUG POLICY ALLIANCE**

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# Preface

For over 30 years, the United States has been waging a war on drugs, and in this time the country has come to an almost universal—if often unspoken—conclusion: that this war hasn't worked. Nationwide, hundreds of billions of tax dollars have been spent on this war, yet we are nowhere near winning it. Drug use and abuse continue almost unabated, and heroin, cocaine, methamphetamine and other illicit drugs are cheaper, purer and easier to get than ever before. Nearly half a million people are behind bars on drug charges. To appreciate the gravity of this number, consider this: the number of people behind bars in the US for drug offenses is greater than the number of people who are incarcerated in Western Europe for *all* offenses—and Western Europe has a bigger population. Perhaps most troubling is that our drug law policies, under even the most casual scrutiny, reflect embarrassing racial disparities unfit for any nation, especially a democratic one. In short, the war on drugs, whatever its stated intent, has become a war on families, a war on public health and a war on our constitutional rights. Indeed, there is perhaps no other public policy in the United States which continues to be funded at ever higher levels despite a 35-year track record of failures. But if the drug war has failed, then what is our exit strategy? What is the effective alternative?

As states across the country wrestle with devastating budget shortfalls, policy-makers from every political persuasion are asking these questions with greater urgency. The Drug Policy Alliance has become the nation's leader in answering such calls with sensible policy recommendations that not only address the collateral damages of the failed war on drugs, but also set a new standard for evaluating existing drug policies. Through rigorous research, information sharing, and capacity building, the Alliance is sharply focused on creating a *new bottom line*, whereby drug polices are measured by their ability to promote public safety, reduce substance abuse, and save lives — all while saving limited tax dollars. The Alliance has been at the forefront of some of the most effective drug policy reforms in the country, including but not limited to Proposition 36 in California, Treatment Not Incarceration in Maryland and Wisconsin, Rockefeller Drug Law reform in New York, and this year's ground-breaking equalization of penalties for "crack" and powder forms of cocaine reform in Connecticut.

Here, we turn our attention to Alabama, a state whose over-use of incarceration for African-American, non-violent *and* over-use of incarceration for African-American and non-violent offenders has alarmed advocates has alarmed advocates and policy analysts nation-wide. In an effort to examine why this disturbing trend exists, and what we can do about it, the Drug Policy Alliance has commissioned this important study.

We understand that in order for Alabama to move from an excessive punitive standard of practice to a public health approach in dealing with substance abuse, there must be a foundation of sound, evidence-based research and ideas for realistic alternatives. Toward that end, the Alliance has enlisted the expertise of Justice Strategies to produce this report. The study that follows examines the current sentencing and corrections practices in the state of Alabama, and lays out a comprehensive road map for effective reforms.

With a concrete plan of action, informed by evidence-based research, Alabama can reduce the death, disease, harm and suffering that is inherent in the war on drugs and create effective drug policies based in reason, compassion, and justice. The release of ALABAMA PRISON CRISIS is just one of the constructive contributions the Drug Policy Alliance is making to this effort.

Gabriel O. Sayegh  
Policy Analyst  
Drug Policy Alliance

# Executive Summary

It will come as no surprise to anyone who follows the issue to hear that Alabama's prison system is in profound crisis. A Justice Strategies research team has documented the extraordinary cost — in both human and financial terms — of continuing the policies and practices that have caused the crisis. The good news is that effective, cost-efficient solutions are at hand. The package of sentencing reforms that Alabama's Sentencing Commission has placed before the legislature was crafted after years of painstaking study and analysis of the factors that have boosted the prison population to a level that has swamped the system's capacity. The Commission's voluntary sentencing standards proposal has already gained broad support among criminal justice policymakers and legislators.

Alabama's prisons are dangerously overcrowded and disastrously under-funded. Facilities designed for 13,500 prisoners hold more than 27,000, and Alabama's largest prisons are crammed to three times their design capacity. State corrections officials struggle daily to manage a system characterized by the nation's lowest per-prisoner expenditures and highest ratio of prisoners to guards, along with a death rate that far exceeds the norm.

Alabama's prison crisis is a consequence of explosive prison population growth. While the state's resident population grew by less than 20 percent during the past quarter-century, the prison population more than quadrupled, surpassing 27,000 prisoners in July 2005. Alabama's incarceration rate, which barely exceeded the national average in 1980, now ranks among the top five. African-Americans — who make up just a quarter of Alabama residents but 60 percent of state prisoners — have been hit hard by prison population growth, as have women whose share of the population has increased rapidly.

Alabama's love affair with incarceration has failed from a crime-control perspective. If the purpose of prisons is to combat crime and provide for public safety then Alabama's tendency to "lock them up and let the parole board sort them out" must be viewed as a failure. While the growth in the state's incarceration rate has outpaced the nation as a whole, Alabama lags behind when it comes to reducing index crime rates.

Further, a disproportionate, and growing, share of the state's correctional resources has been devoted to incarcerating people convicted of nonviolent offenses. Person offenses accounted for just a quarter of prison admissions during the last half-decade, and the proportion continues to fall as drug and property commitments grow.

The use of incarceration for offenses that are directly tied to substance abuse contributes significantly to Alabama's overcrowding crisis. Among the ten leading commitment offenses, the *top three* are substance-related. Drug and alcohol offenses account for just 38 percent of *all* prison admissions. In 2004, more people were admitted to prison for possession of marijuana than for first- and second-degree assaults combined.

While many states taken steps to reduce incarceration of substance abusers, Alabama is allowing addiction to drive prison growth. Comparing 1999 and 2004, commitments for drug possession and DUI were up by 28 percent and 17 percent, respectively, while admissions for person offenses were down by 14.

Alabama's overuse of incarceration and attendant prison crisis stem from two flaws in the state's criminal justice system. First, the current sentencing structure exposes defendants charged with

nonviolent and low-level offenses to the same long sentencing ranges as others whose crimes pose a much greater risk to public safety. The problem is compounded by harsh mandatory sentencing laws — including the state’s repeat-offense statute and “drug-free zone” enhancements — that fall hardest on those convicted of nonviolent crimes.

Alabama’s Habitual Felony Offender Act — considered one of the toughest in the nation — exposes defendants to sentences that are up to *ten times* the sentences permitted for first-offenders. Under the law, an individual charged with stealing \$3,000 who has one previous felony conviction faces the same harsh sentencing range, 10 to 99 years, whether the prior conviction was for marijuana possession or murder. In fact, prisoners sentenced as “habitual offenders” were *twice as likely* to be serving time for property offenses as person offenses. Further, wide variation in use of the statute exacerbates sentencing disparity. For example, prisoners committed from Montgomery were two times more likely to be sentenced as “habitual offenders” than those committed from Mobile.

The second cause of Alabama’s prison crisis is historic underinvestment in community corrections, which has left judges with few options apart from the already overburdened prison and probation systems. The state’s community corrections programs have been shown to be a popular and effective way to cut criminal justice costs while improving outcomes. Despite progress made in the last few years, however, half of Alabama counties have no access to community corrections programs. This year’s increase in state funding for the programs will help to fill that gap, and should set the stage for development of a strategic plan to increase funding support to assure that every judge has effective penalty options and sufficient high-quality substance abuse treatment placements at hand when making sentencing decisions.

Led by the Alabama Sentencing Commission, key state policymakers have proposed solutions — including the adoption of voluntary sentencing standards and the expansion of community corrections — that could bring unbridled growth of the prison population under control. Using a simulation model, the commission predicts that, if no steps are taken toward reform, the prison population will grow to nearly 29,000 by 2007. On the other hand, if the proposed sentencing standards are adopted, the commission expects the number of prisoners to stabilize at around 27,000 — creating “breathing room” that corrections officials could use to strengthen community supervision and create a more rational “punishment continuum.”

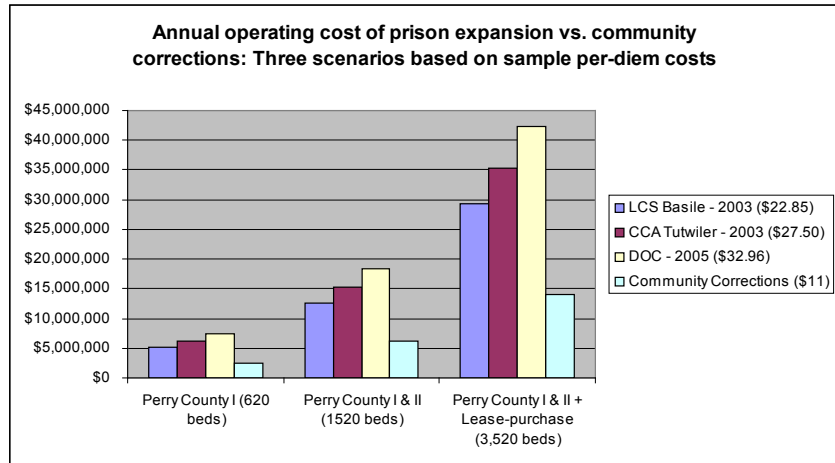
Unfortunately, to date, elected officials have been unable to overcome legislative gridlock and the state is at risk of losing what may be its best opportunity to bring sanity to the sentencing and correctional system. While Governor Bob Riley successfully engineered a one-year turnaround in the growth trend using a special parole docket for prisoners convicted of nonviolent offenses, a rising tide of admissions has lifted the prison population back above 27,000.

While the legislature remains deadlocked, speculators have taken matters into their own hands. Louisiana Correctional Services has begun construction of an 620-bed prison in Perry County, near Uniontown, despite the fact the DOC has declined to participate in the project. The company is gambling that, once the facility is built, population growth and political pressure from the prison’s backers will force the agency’s hand.

Speculative prison expansion threatens take Alabama down a dangerous and costly path. The experience of states that have allowed private and local interests to grow the prison system through the “back-door” is not a happy one. Those who advocate for more prison beds have failed to address the enormous price-tag attached to expansion, regardless of whether the beds in question are public or private. As the chart below makes clear, the annual operating costs of the most ambitious expansion proposals would likely exceed \$30 million and could surpass \$40 million. By contrast, the

same number of cases could be handled by a strengthened community corrections system for less than \$15 million a year.

Alabama is at the crossroads in regard to the choices that face the state's policymakers. The Sentencing Commission's reform package provides a gateway to a more fair and equitable system for sentencing, and a more cost-effective approach to provision of correctional services. This year's increased investment in community corrections will provide judges with a much-needed boost in the resources they need to begin reducing unnecessary prison commitments. It should also set the stage for a strategic planning process designed to guide steadily increasing investments in future years that will build on the state's evidence-based, effective program models.



The choice is clear: a permanent prison crisis that fuels ever-more costly prison expansion; or rational sentencing standards and a comprehensive statewide system of community corrections serving every court jurisdiction and every county.

# Alabama Prison Crisis

## INTRODUCTION

Alabama's correctional system has sustained a severe prison-overcrowding problem, careening from crisis to crisis for many years. Alabama's government is one of the poorest in the nation, ranking 48<sup>th</sup> among all 50 states in per-capita collection of taxes and fees, while ranking 47<sup>th</sup> among the states in its high school graduation rate. Gov. Bob Riley pushed for a more adequate tax structure in 2003, but voters rejected his proposal, leaving state officials to struggle with rising costs for public education, health care for the poor and elderly, and other essential public services. Now the swelling prison population is piling an unmanageable load on the backs of Alabama's taxpayers.

Led by the Alabama Sentencing Commission, key state policymakers have proposed solutions — including the adoption of voluntary sentencing standards and the expansion of community corrections — that could bring unbridled growth of the prison population under control. Unfortunately, to date, elected officials have been unable to overcome legislative gridlock and the state is at risk of losing what may be its best opportunity to bring sanity to the sentencing and correctional system.

## ALABAMA'S PRISON CRISIS

While Alabama's overall population grew by less than 20 percent in the past quarter-century, the state's prison population has more than quadrupled, surpassing 27,000 prisoners in July 2005.<sup>1</sup> According to the most recent Bureau of Justice Statistics annual report on prison populations, Alabama's incarceration rate ranked fifth in the nation.

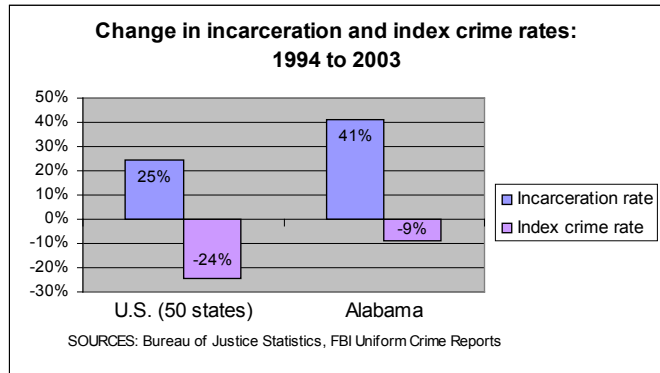
If the purpose of prisons is to combat crime then Alabama's tendency to "lock them up and let the parole board sort them out" must be viewed as a failure. Between 1994 and 2003, Alabama's incarceration rate shot up by 41 percent yet the state's index crime rate fell by a paltry nine percent.<sup>2</sup> During the same period, the nation as a whole experienced slower growth in incarceration rates, which rose by 25 percent, but much greater reductions in the crime rate, which fell by 24 percent.

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1 The state's prison population reached 27,885 in July of 2005 according to the Alabama Department of Corrections July 2005 Monthly Report, available at [www.doc.state.al.us/docs/MonthlyRpts/2005-07.pdf](http://www.doc.state.al.us/docs/MonthlyRpts/2005-07.pdf)

2 According to the Federal Bureau of Investigation's Uniform Crime Reports, between 1994 and 2003, the national index crime rate fell from 5,374 to 4,063 per 100,000 residents — a decline of 24 percent. By contrast, Alabama's crime rate fell by just nine percent, from 4,903 to 4,479.

Alabama has not always relied so heavily on prisons. In 1980, state prisons held 149 prisoners for each 100,000 state residents — a rate that was only a bit higher than the average for all 50 states and the District of Columbia (130 per 100,000). However, 1980 marked the beginning of an explosive four-year burst of double-digit annual growth in the state’s prison population.<sup>3</sup> A similar growth spurt took place around 1990, and again between 1998 and 2001 when the number of prisoners in Alabama’s overcrowded system swelled by 4,262.<sup>4</sup>



By the end of 2003 Alabama’s incarceration rate was 48 percent above the national average — 635 per 100,000 and 430 per 100,000, respectively. Alabama’s incarceration rate has ranked among the top five in the nation for four of the last five years.

Alabama’s prison capacity and correctional expenditures have not kept pace with population growth. Facilities designed for 13,500 prisoners now hold more than 27,000, and the state’s largest prisons are crammed to three times their design capacity. The overcrowding has resulted in the “backlogging” of prisoners in local jails — a practice that precipitated a crisis in 2002 when state prisoners comprised a fifth of the jail population.

Alabama prisons are not only dangerously overcrowded but also disastrously under-funded. The most recent available data from the Bureau of Justice Statistics show that the annual per-prisoner expenditure in Alabama was the lowest in the nation and *less than half* of the national average.<sup>5</sup> Perhaps unsurprisingly, a 2002 survey of 45 states by the American Correctional Association found the Alabama’s prison system operates with the highest ratio of prisoners to guards.

The death rate in Alabama prisons also far exceeds the national average. Lawsuits by prisoners have revealed that HIV-positive individuals at the Limestone Correctional Facility who wanted to get their medications were being forced to stand in long lines three times a day or go without; and that elderly prisoners housed at the Hamilton Aged and Infirm Center were being held in unsanitary conditions without adequate access to competent medical care.<sup>6</sup>

Recognizing that fixing the state’s broken sentencing and correctional system would require systemic reforms, Alabama lawmakers moved in 2000 to establish a Sentencing Commission. The legislature charged Sentencing Commission members to collect and disseminate information about sentencing

<sup>3</sup> “Criminal Justice Reform in Alabama: A Report and Analysis of Criminal Justice Issues in Alabama. Part One: Sentencing, Probation, Prison Conditions and Parole.” Montgomery, AL: Equal Justice Initiative of Alabama. March 2005.

<sup>4</sup> Ibid.

<sup>5</sup> In 2001, the most recent date for which comparable data is available, the annual expenditure was \$8,128 per prisoner in Alabama, while the national average was \$22,650. See Stephan, James J. “State Prison Expenditures, 2001.” Washington, DC: Bureau of Justice Statistics. June 2004. During the 2005 legislative session, DOC reported that the agency currently spends \$12,032 per prisoner per year.

<sup>6</sup> “Criminal Justice Reform in Alabama: A Report and Analysis of Criminal Justice Issues in Alabama. Part One: Sentencing, Probation, Prison Conditions and Parole.” Montgomery, AL: Equal Justice Initiative of Alabama. March 2005



practices; to review the problem of overcrowding and removal of state prisoners from local jails; and to make recommendations concerning the enactment of new laws relating to criminal offenses, sentencing, correctional and probation matters.

When it came time to adopt the major recommendations put forth by the Sentencing Commission, however, state lawmakers failed to act. For the second year in a row, the legislature has adjourned without taking up the system of voluntary sentencing standards proposed by the commission. In the meantime, under pressure from both state and federal courts, Alabama's criminal justice policymakers have scrambled frantically to find short-term remedies to cope with the overflow of prisoners.

The most successful of these remedies has been the establishment of a special parole docket that targeted individuals convicted of nonviolent offenses for early release. Governor Riley's parole initiative achieved a remarkable one-year turnaround in the growth trend. Between July 1, 2003 and June 30, 2004, Alabama's prison population fell by 6.7 percent – more than twice the reduction achieved by the second-leading state.<sup>7</sup>

In the past year, however, special parole releases – which have been under sustained attack by reform opponents – have slowed to a mere trickle, while a rising tide of admissions has lifted the prison population back above 27,000. Absent passage of reforms proposed by the state's Sentencing Commission, the prison population is projected to reach nearly 29,000 by 2007.

## History of the Crisis

### **COUNTIES CLOSE THE DOOR**

After years of simmering amid overcrowded conditions, Alabama's prison crisis came to a full boil during the summer of 2001. Under state court pressure to reduce crowding in Alabama's county jails, Governor Don Siegelman threatened to send prisoners to private prisons in Louisiana. Before contracts could be secured, however, the legislature passed a bill that offered hundreds of people convicted of nonviolent repeat offenses who were serving life without parole under the state's habitual offender law the possibility of winning a reduced sentence. Act 2001-977 authorized the establishment of a two-tiered system of review by the parole board and the sentencing court.

In September Gov. Siegelman signed the new legislation and directed DOC managers to establish an evaluation procedure for determining the public safety risk presented by each eligible prisoner. The goal was to develop a process, as provided in the new law, for determining which prisoners should be reviewed by the state parole board for possible referral to a judge for consideration of a sentence reduction. Staff analysts at the Alabama Sentencing Commission estimated that as many as 300 prisoners might be affected by the change, although the real number was likely to be lower.

The DOC engaged the services of James Austin, a national expert on parole issues at the Institute on Crime, Justice, and Corrections at George Washington University. Austin was asked to assist the DOC staff in development of risk assessment criteria. But the state's district attorneys and the attorney general joined to oppose the measure. The attorney general charged that legislators had not adequately defined what they meant by a "nonviolent" offender, and had not set forth an adequate procedure for implementing the sentence reviews. District attorneys complained that they had been excluded from involvement in development of the procedure. They also expressed the belief that inclusion of sentencing judges as decision-makers in a parole process would not pass constitutional muster.

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<sup>7</sup> The only states whose prison populations fell by more than two percent over the period were Connecticut (2.5 percent) and Ohio (2.3 percent).

Gov. Siegelman put implementation of the risk-review system on hold until the Sentencing Commission was able to make its own recommendations about how to proceed. The commissioners recommended, that the matter be submitted for judicial review regarding the role of the trial courts and the parole board. Implementation was halted pending the outcome of several court cases. In March 2003 the circuit court of Jackson County held that Act 2001-977 represented an unconstitutional breach of the doctrine of separation of powers. The circuit court's decision was eventually overturned by the Alabama Supreme Court, which ruled on August 27, 2004 that the act was not unconstitutional

Meanwhile, in the absence of action on release of nonviolent lifers, a speed-up of parole board release approvals served to alleviate prisons population pressures for a time. The administration also had proposed that a network of Supervised Intensive Release (SIR) programs be revived, and that eligible prisoners be diverted to work-release programs. The special parole dockets were not sustained due to personnel shortages, and participation in SIR declined over time.<sup>8</sup> By December 2002 the jails were again clogged with state prisoners.

Jailers complained that foot-dragging by the corrections department was costing them dearly. In Tuscaloosa County jail per diem costs run \$28.50, but the DOC was reimbursing the county at a rate of just \$1.75 per prisoner per day. Alabama Circuit Court Judge William Shashy ordered the DOC to accept an additional 100 prisoners each week in order to reduce a backlog of 1,600 state prisoners held in county jails after finding the agency in contempt of an earlier consent decree. He levied new contempt fines against the state and directed state officials to pay the counties adequately for housing the state's prisoners.

#### **THE TUTWILER "TIME-BOMB"**

As correctional managers staggered under the weight of Judge Shashy's demands, their problems were compounded when, addressing a lawsuit brought on behalf of women prisoners by lawyers at the Southern Center for Human Rights (SCHR), Federal Judge Myron Thompson ruled that the state's prison for women in Tutwiler was "a ticking time bomb." Thompson gave state officials just 30 days to develop a plan to remedy conditions in the prison, where more than 1,000 prisoners were being housed in a decrepit facility built in 1942 to hold 365.

SCHR lawyers demanded that the state immediately decrease the population or hire 58 more guards to staff the prison. Attorneys defending the state asked the judge to order Alabama counties to stop sending women prisoners while state officials sought \$60 million in emergency funds from the legislature to build a new prison. In February 2003 Judge Thompson rejected the state's request to close Tutwiler to new prisoners.

Meanwhile, Judge Shashy ordered state officials to spend a \$2.4 million cash reserve to hire new parole officers and increase the volume of parole hearings, and to expand community work release programs. Newly-elected Gov. Bob Riley pledged that he would reduce the population at Tutwiler to just 750 by speeding up the parole of nonviolent women prisoners, and sending other women to out-of-state private prisons. In addition, he promised to request a budget increase of almost \$4 million to improve conditions for the women who would remain at Tutwiler.

In April 2003, 140 women were sent by Alabama DOC managers from Tutwiler to a Louisiana

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<sup>8</sup> By March 2003 there were 50 percent fewer SIR participants than there had been just one year before, and work release was operating at less than full capacity.

Correctional Services (LCS)-run prison in Basile, Louisiana at a cost of \$22.85 per person per day. LCS runs a small private jail empire that spans the Louisiana/Texas border and has been cited repeatedly with allegations of physical abuse of prisoners and other human rights violations.

After their transfer, the women complained that they had been flung from the frying pan into the fire. While prison services were inadequate to meet their needs at Tutwiler, even less was available by way of education, rehabilitation, or health care at Basile, where just two instructors were provided by the company for 850 prisoners at the facility. Since the company wanted to minimize potential management problems, the DOC had chosen prisoners for transfer on the basis of their good conduct at Tutwiler. Many complained about being pulled out of education and treatment programs where they had been striving to improve the chances of making it once they gain release to their families and home communities.

Despite the complaints, state officials sent another 100 women from Tutwiler to Basile in June 2003 and laid plans to ship 1,400 male prisoners, at a per diem cost of \$27.50 each, to an empty facility run by the Corrections Corporation of America (CCA) in Tutwiler, Mississippi.

In the meantime, lawyers at the Southern Poverty Law Center in Montgomery filed suit in federal court challenging inadequate medical care for diabetics held in Alabama's prisons. The lawyers filed a second lawsuit in mid-May charging that health care at the St. Clair Correctional Facility was inadequate for all seriously-ill prisoners confined there.

Two days after the St. Clair case was filed the lead plaintiff died. Lawyers for the 63-year-old prisoner charged that their client had suffered from severe breathing problems but was denied medication. They said he had also been denied replacement of a broken denture, and had been unable to receive adequate nutrition. The prisoner had lost 40 pounds during the year before his death.

#### **STATE OFFICIALS SEEK SOLUTIONS**

To address the prison crisis, Donal Campbell, Alabama's new corrections chief, pressed the legislature for a \$146 million increase in the state's \$204 million prison budget. Acknowledging that the state couldn't afford to allocate the full amount needed, Campbell suggested inviting private companies to finance and build prisons for the state.

Parole Board director Bill Segrest proposed conversion of five state mental health facilities slated for closure for use as correctional "transition centers." Capacity figures for the facilities ranged from 150 to 600, for a total of 1,700 beds. Segrest said that the facilities could serve as an intermediate sanction alternative to imprisonment, and provide release services for those newly paroled from prison. One parole transition facility, Life Skills Influenced by Freedom and Education (L.I.F.E.) Tech, has been established to serve women being released from prison, but no such facilities exist for men.

According to Lisa Kung, a staff attorney at the Southern Center for Human Rights, use of the L.I.F.E. Tech program as a parole transition facility has been less than successful. She charges that many of the women now being sent to L.I.F.E. Tech would be better served by placement in drug treatment programs in or close to their home communities. Moreover, Kung says L.I.F.E. Tech is underutilized, with 20 percent of its beds going unfilled. Kung pointed out that the women who are now confined in the Louisiana private prison are Alabama's best-behaved prisoners, with the lowest risk of recidivism, and said, "Until they are paroled to L.I.F.E. Tech, Alabama tax-payers are being, in effect, double-billed for their custody."

In March 2003, the Sentencing Commission produced preliminary recommendations for short-term measures to address the crisis and called for an expanded "continuum" of alternative punishment

options. They sought legislative authority for development of voluntary sentencing standards that might be adopted to improve Alabama’s sentencing laws, policies, and practices in the long term.

Lawmakers authorized the Sentencing Commission to continue its work on the sentencing standards and they also took up a recommendation to reform the statutes that govern sentencing in theft cases. Monetary thresholds for crimes involving cash and property with cash value were amended to more closely reflect current economic valuation of property and to bring different theft and property offenses in line with each other. Prior to the changes, Alabama was one of only three states in the nation that had maintained a felony threshold as low as \$250 for theft and related offenses. Further, the monetary thresholds for different felony offenses were inconsistent, and had not been amended to account for inflation since the criminal code was revised more than a decade ago.

Introduced in the 2003 legislative session, HB 491 faced with initial opposition from Alabama merchants and was initially voted down in the House Judiciary Committee. The proposal was passed after an amendment restored the \$250 threshold for *repeat* theft offenses. The Sentencing Commission projected that HB 491 would save more than 3,000 prison beds over the following five years. Women, who are more likely to be incarcerated for property offenses, would be affected most. However in 2004, before the reform had time to take full effect, the statute was inadvertently amended using the old values. A bill to correct this error was part of the Commission’s 2005 legislative package and is included in their legislative package for the 2006 session.

At the Commission’s suggestion, the legislature also amended the Community Punishment and Corrections Act to consolidate community corrections programs and make it easier for counties to develop alternatives to incarceration.<sup>9</sup> However, because legislators failed to fund the initiative, DOC and counties were left to do more with less.

#### **A TEMPORARY SOLUTION**

In the meantime, the state’s fiscal crisis worsened. Facing a looming \$675 million budget shortfall for fiscal year 2004, Gov. Riley postponed development of a new state budget, pending a September vote on a \$1.2 billion “tax and accountability” initiative package. The governor’s tax plan was designed to raise revenues with increases for wealthy individuals and corporations, while lessening the burden on low-income residents. State officials warned that, if the package was rejected, an 18-percent across-the-board budget cut would force release of 5,000 to 7,000 prisoners. The governor himself appealed to voters’ religious values. “According to our Christian ethics, we’re supposed to love God, love each other, and help take care of the poor.”

On September 9<sup>th</sup>, voters rejected the tax package by a two-to-one margin. Convening a special session to prepare a new state budget before the 2004 fiscal year began on October 1, Gov. Riley asked legislators to cut funds for most state agencies by 10 to 20 percent, including cuts that would reduce the number of state police, and cause layoffs at the attorney general’s office as well as regional district attorneys’ offices and in the judiciary.

While most state agencies were asked to absorb massive cuts, Gov. Riley asked for a 6.9 percent increase in the prison budget. The \$16 million increase would be devoted to upgrading medical care for prisoners and covering costs for a federal court settlement. The money would also be used to pay fees for housing prisoners add private facilities in Louisiana and Mississippi until the parole board was able to make room for them in Alabama’s prisons through parole releases. The Governor also requested \$10 million to add four parole board members to hear a special docket of candidates for parole, along with funding for 107 additional parole officers and two 150-bed parole transition centers

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<sup>9</sup> The act is explained in greater detail below.

to speed the release of 5,000 to 6,000 nonviolent prisoners.<sup>10</sup>

The establishment of the special parole dockets and the investment in expanded parole supervision capacity paid off. Between April 2003 and March 2004, 7,211 prisoners received hearings as part of the special parole dockets, with close to half (46 percent) of the requests granted.

The acceleration of parole releases had an immediate and positive effect, allowing the DOC to move all of the individuals whose transfer from jail to state prison was overdue and bring back most of the prisoners housed out of state. In December 2003, Alabama's county jails held over 1,500 individuals who had been awaiting transfer to prison for a month or more. By December 2004, that figure had dropped to zero. By March 2004, Alabama was able to bring all of its male prisoners back from Tutwiler, Mississippi, although the contract with the private operator required the DOC to continue paying for beds even after they were emptied.<sup>11</sup>

The work of the second parole board continued, although the pace slowed considerably during the rest of 2004, as did the proportion of parole grants. Between March 2004 and early January 2005, just 28 percent of parole hearings resulted in grants, with a total of 794 prisoners being paroled. By March 2005 parole grants from the special docket had slowed to a trickle. Some argued that all of the suitable candidates had been given hearings. However, Parole Board member Velinda Weatherly told the *Birmingham News* that there were over 2,500 prisoners in the standard parole docket whose parole hearings were overdue.<sup>12</sup>

#### **DEJA VU ALL OVER AGAIN**

It has become clear that the special parole dockets were only a temporary solution. By early 2005, both the prison population and the number of sentenced individuals awaiting transfer from jail to prison were on the rise. Meanwhile, for the second straight legislative session, the legislature failed to enact the Sentencing Commission's proposed voluntary sentencing standards. Although the Commission's package of bills was approved by the House of Representatives, the bills languished in the upper house as senators remained deadlocked through the end of the session over the general fund budget proposal.

While failing to enact much-needed sentencing reforms, the Governor and legislature have shown little inclination to "bite the bullet" and invest hundreds of millions of dollars in expanding the prison system to accommodate the current population. In early 2005, Commissioner Campbell told lawmakers that his department needed an additional \$266 million — nearly double the current budget — to address the overcrowding issue and avoid future lawsuits.<sup>13</sup> But Rep. John Knight (D — Montgomery), who chairs the Government Finance and Appropriations Committee, indicated that the legislature was unlikely to meet Campbell's request, and the budget proposed by Gov. Riley

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10 Participants in the special dockets could not be serving a split sentence; have a conviction for a Class A felony, drug trafficking offense, sexual offense, child abuse or a gun offense; have three or more revocations of supervision in the past three years, have any prior gun convictions, or be serving time for domestic violence." to "Participants in the special dockets could not be 1) serving a split sentence; 2) have a conviction for a Class A felony, drug trafficking offense, sexual offense, child abuse, or a gun offense; 3) have three or more revocations of supervision in the past three years; 4) have any prior gun convictions; or 5) be serving time for domestic violence.

11 "A Rational Sentencing Plan — Ready for Approval: 2005 Annual Report." Alabama Sentencing Commission. February 22, 2005.

12 Crowder, Carla. "Special parole board debated." *Birmingham News*, March 20, 2005.

13 Ellington, M.J. "Corrections commissioner says funding needed to avoid more lawsuits." *Decatur Daily*. January 22, 2005.

included an increase of just \$3.3 million — less than two percent of Campbell’s original request.<sup>14</sup>

While the legislature remains deadlocked, speculators have taken matters into their own hands. Louisiana Correctional Services has begun construction of a 620-bed prison in Perry County, near Uniontown, despite the fact the DOC has declined to participate in the project. The company is gambling that, once the facility is built, population growth and political pressure from the prison’s backers will force the agency’s hand. Local officials in Thomasville have also expressed interest in a new prison and say they are being courted by private prison companies.

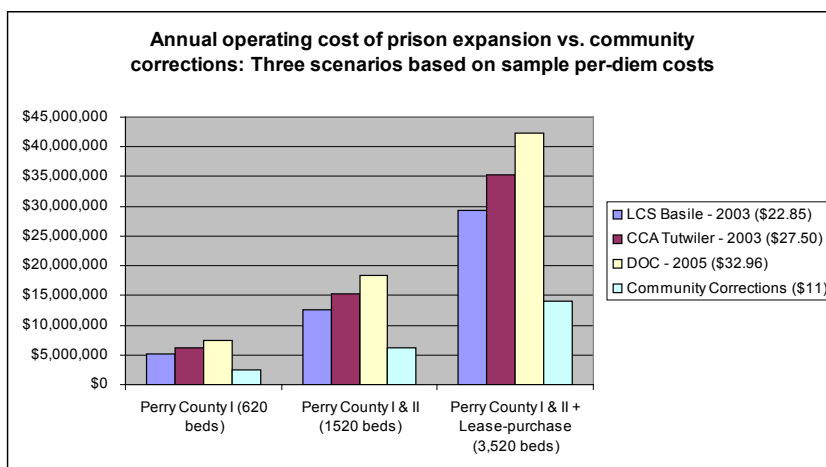
An 11-member Prison Overcrowding Task Force convened by Gov. Riley in the spring has just completed its review of the state’s prison crisis. Headed by Michael Stephens, former CEO of a Birmingham-based rehabilitation hospital, the task force members produced a long list of recommendations and policy options. They called for a special legislative session to deal with the prison crisis and urged enactment of the Sentencing Commission’s legislative package. They also pushed for expansion of community corrections programs:

It is now time to wage an aggressive campaign for the expansion of community corrections programs, with the collaborative involvement of essential service providers, county commissions, judges, prosecutors, private industry, faith-based organizations, and the general citizenry of each community.<sup>15</sup>

The task force report also included policy options for construction of additional prison beds, giving three possible “scenarios” for expansion: 1) continued use of out-of-state private prison beds; 2) utilization of the 620-bed private prison under construction in Perry County, and expansion of this facility with an additional 900 beds; and 3) contracting with a “private entity” to build a privately-financed 2,000-bed prison for operation by the DOC under a lease-purchase agreement.

As described below, prison expansion — whether pursued through privatization or back-door financing of new public prison beds — is very costly in the long run, especially as compared with the benefits of making investments in drug courts and community corrections programs. The chart below presents several scenarios for the annual operating cost of prison expansion proposals that are currently on the table, using the most recent available per-diem cost information. As the chart makes clear, the annual operating costs of the most ambitious expansion proposal would likely exceed \$30 million and could surpass \$40 million. By contrast, the same number of cases could be handled by a strengthened community corrections system for less than \$15 million a year.

In light of findings, detailed immediately below, that Alabama’s criminal justice system makes excessive use of incarceration in nonviolent and low-level cases where defendants are highly likely to be substance abusers, it is hard to justify committing millions of tax dollars to prison expansion. Enactment of new sentencing



14 Davis, John. “Legislators: No dough for DOC.” *Montgomery Advertiser*. February 5, 2005.

15 Task force on prison crowding report, released on October 14, 2005.

## The pitfalls of prison privatization and “back-door” finance

“Back-door” prison expansion can come at a much greater cost to taxpayers than planned expansion. Not only do private concerns that build prisons on speculation pay higher interest rates when they borrow, but they also expect a larger return on their investments. And as advocates at the Equal Justice Initiative point out:

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>1</sup>

The savings promised by proponents of privatization are often elusive. For example, Arizona has often been cited as a prison privatization success story. However, in a recent study, a Justice Strategies analyst found that previous cost analyses neglected to account for significant differences in the populations served by public and private prisons, ranging from the type of offenses committed to the prisoners’ medical and mental health needs and even their gender.<sup>2</sup> A comparison of Arizona’s state-contracted prisons and public low-to-medium-security units found that the private facilities were seven times less likely to house prisoners with violent convictions, three times less likely to house those convicted of serious offenses and half as likely to house prisoners with high medical needs.

Further, the study found that the reported savings had been erased by the 20- to 40-percent increases in per-diem rates that the leading private vendor won in the contract renewal process, which pushed the cost of private operation above projected public costs. The Arizona experience shows that any short-term gains achieved through privatization are likely to evaporate when the contracts come up for renewal (if not earlier, since private operators often “discover” midway through a contract that they cannot afford to maintain adequate staffing and program levels without additional help from the state). States that have relied on private prison companies to finance and build new facilities have very little leverage when renegotiating contracts unless officials are prepared to immediately find new homes for prisoners housed in private facilities.

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1 “Criminal Justice Reform in Alabama: A Report and Analysis of Criminal Justice Issues in Alabama. Part One: Sentencing, Probation, Prison Conditions and Parole.” Montgomery, AL: Equal Justice Initiative of Alabama. March 2005.

2 Pranis, Kevin. “Cost-Saving or Cost-Shifting: The Fiscal Impact of Prison Privatization in Arizona.” Tallahassee, FL: The Private Corrections Institute. February 2005.

standards and broad expansion of Alabama’s community corrections and drug court models are far more sensible and cost-effective solutions to the state’s prison crisis.

## Who goes to prison in Alabama?

### TYPES OF OFFENSES

A handful of high-volume offenses drive prison admissions in Alabama according to Sentencing Commission data.<sup>16</sup> Between 1999 and 2004, 10 offenses accounted for 60 percent of state prison commitments. Of these, four were property crimes, three were drug crimes, two were person crimes, and the final offense was felony Driving Under the Influence (DUI).<sup>17</sup> Six of the top 10 commitment offenses were Class C felonies — the lowest felony level. Overall, just 27 percent of prisoners admitted

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16 “A Rational Sentencing Plan — Ready for Approval: 2005 Annual Report.” Alabama Sentencing Commission. February 22, 2005.

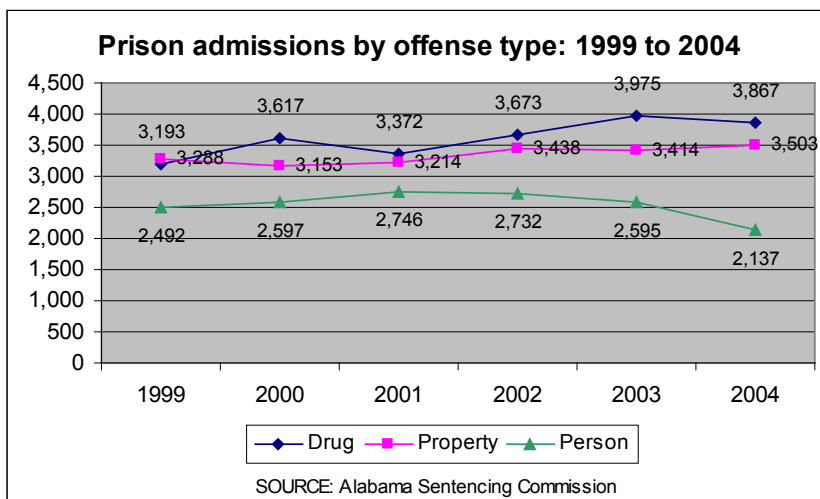
17 Although third-degree burglary is a property crime, it can be considered a “violent offense” under Alabama law if an individual enters or remains in a building unlawfully for the purpose of committing a violent crime.

to prison between 1999 and 2004 were convicted of person offenses.

The use of incarceration for offenses that are directly tied to substance abuse contributes significantly to Alabama’s overcrowding crisis. Among the ten leading commitment offenses from 1999 through 2004, the *top three* were substance-related: possession of a controlled substance, distribution of a controlled substance and felony DUI. First-degree possession of marijuana took seventh place. Drug and alcohol offenses account for just over a third (38 percent) of all prison admissions.

Substance-related offenses are also driving growth in prison admissions. Comparing 1999 and 2004, the number of new commitments for drug distribution, drug possession and felony DUI were up by 15 percent while admissions for the remaining Top 10 offenses (third-degree burglary, first-degree theft, first-degree robbery, second-degree theft, second-degree possession of a forged instrument and second-degree assault) were actually *down* by four percent. Commitments for drug possession led the way, up 28 percent, followed by DUI admissions, which were by 17 percent. Overall, the number of drug and alcohol admissions was 21 percent higher in 2004 than five years earlier, while the number of person admissions was 14 percent lower.

The Sentencing Commission’s research team determined that many prisoners serving time for drug and alcohol offenses have extensive histories of substance abuse, but little experience with substance abuse treatment. They found that among those sent to prison for drug possession, 80 percent were drug abusers yet just 28 percent had any experience with treatment. Virtually *all* of those imprisoned on a felony DUI conviction had a history of alcohol abuse, yet only one-half report ever receiving treatment for their problem.



The most frequent commitment offense during the last six years was possession of drugs. Including first-degree possession of marijuana, drug possession accounted for nearly one in five prison admissions (17 percent). In fiscal year 2004, Alabama judges committed more people to prison for first-degree possession of marijuana (419) than for first- and second-degree assaults combined (356).

Unsurprisingly, given the admissions trends, the proportion of prison beds devoted to housing individuals convicted of violent and sex offenses has fallen steadily over the past year. In May 2004, the DOC reported that 54 percent of prisoners were serving time for person crimes but within a year the proportion declined to 51 percent.<sup>18</sup>

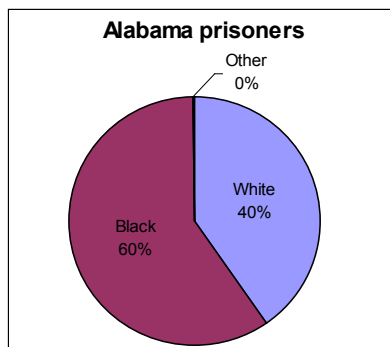
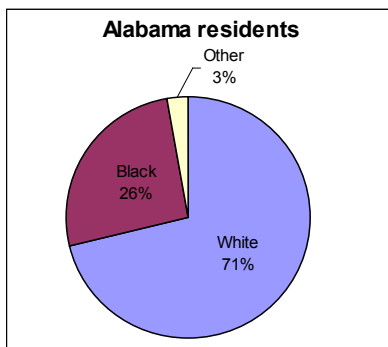
#### DEMOGRAPHIC PROFILE

African Americans are significantly overrepresented among Alabama prisoners. Although they make up just a quarter (26 percent) of Alabama residents, African Americans account for 60 percent of the state’s prison population and 62 percent of those incarcerated under the habitual

<sup>18</sup> “May 2005 Monthly Statistical Report.” Montgomery, AL: Alabama Department of Corrections



offender law. Whites, who comprise 71 percent of state residents, fill just 40 percent of prison beds.



Women make up a small proportion – seven percent – of Alabama prisoners but their number has been rising quickly. Between 1995 and 2003, the population of women prisoners grew by 55 percent (from 1,295 to 2,003) as the overall prison population increased by 41 percent.<sup>19</sup> In May 2005,

Alabama prisons held 1,907 women, down slightly from 2003.

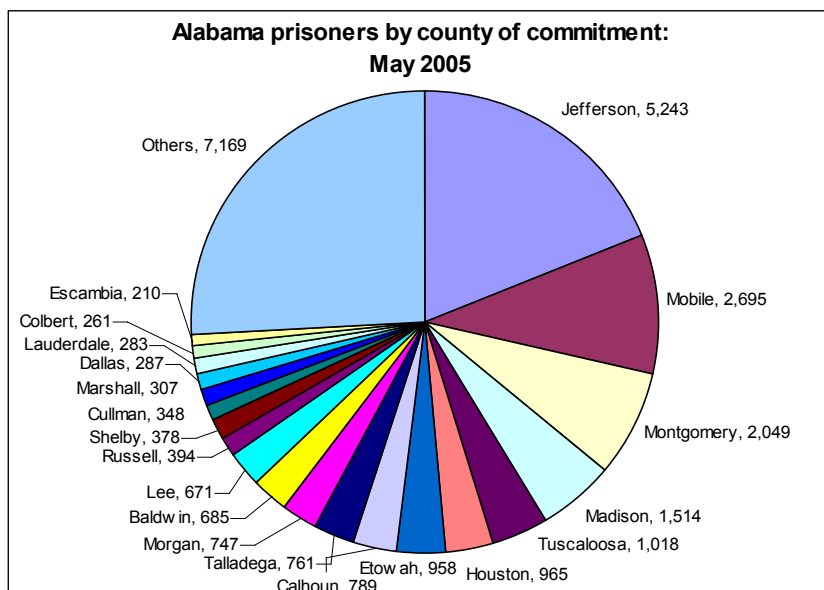
Slightly over half of Alabama’s prisoners are 35 years of age or younger. Young prisoners (25 and under) make up 18 percent of the population. One in 10 prisoners is over the age of 50.

Over a third of the prison population was sentenced in Jefferson (including Birmingham and Bessemer), Mobile or Montgomery Counties. Just under a third comes from Madison, Tuscaloosa, Houston, Etowah, Calhoun, Talladega, Morgan, Baldwin, Lee, and Russell Counties. Alabama’s remaining 54 counties together account for a third of the prison population.

Although Jefferson County accounts for the largest share of the state prison population, it is not the jurisdiction that makes the greatest use of incarceration. In fact, when counties are ranked by their incarceration rates in 2000, Alabama’s largest urban jurisdiction did not even make the top 10.

According to 2000 prison and census data compiled by Zoe Gottlieb, Russell County (pop. 49,756) topped the list with an incarceration rate of 1,200 per 100,000 county residents.<sup>20</sup>

Russell was just one of six counties with populations under 50,000 in the top 10, joined by Coosa, Chambers, Dallas, Bullock and Pike. Just two of the top incarcerators were counties with populations of 100,000 or more: Montgomery (874 prisoners per 100,000 residents) and Etowah (771 per 100,000).



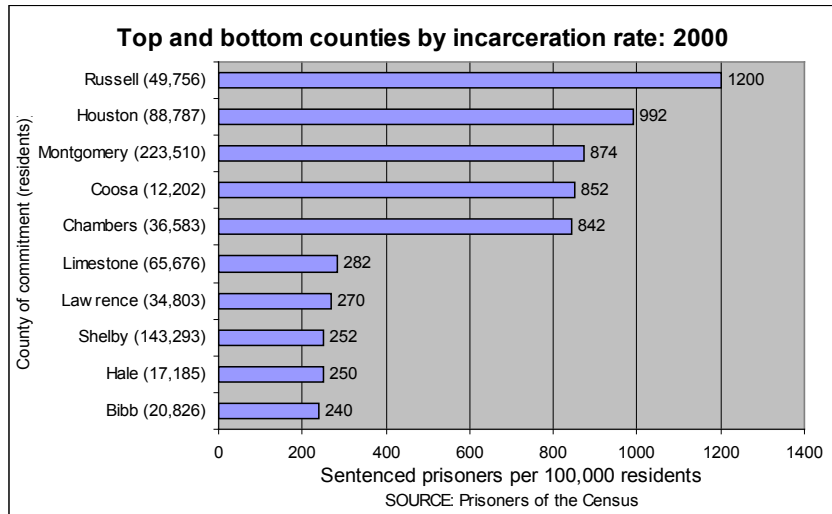
<sup>19</sup> "Prisoners in 2003." Washington D.C.: Bureau of Justice Statistics. 2003.

<sup>20</sup> Gottlieb, Zoe. "Prisoner Enumeration and the "Usual Residence" Rule in Southern States." Unpublished paper submitted to *Contemporary Issues in Law and Politics* in December 2004. [www.prisonersofthecensus.org/news/fact-11-4-2005.shtml](http://www.prisonersofthecensus.org/news/fact-11-4-2005.shtml).

It is not immediately obvious why Russell County’s incarceration rate should have been four times as great as the incarceration rates in Blount or Jackson – counties with similar resident populations. Disparities such as these have given rise to concerns over Alabama’s sentencing structure, which allows judges to impose widely varying sentences on similarly situated defendants, as well as concerns over whether certain jurisdictions are “overusing” a sanction for which state taxpayers must pick up the tab.

The monthly statistics published by DOC include a list of the 20 counties with the greatest number of committed prisoners. Based on these figures and the most recent county population estimates (July 1, 2004), there has been some change in county incarceration rates but little change in the levels of disparity.

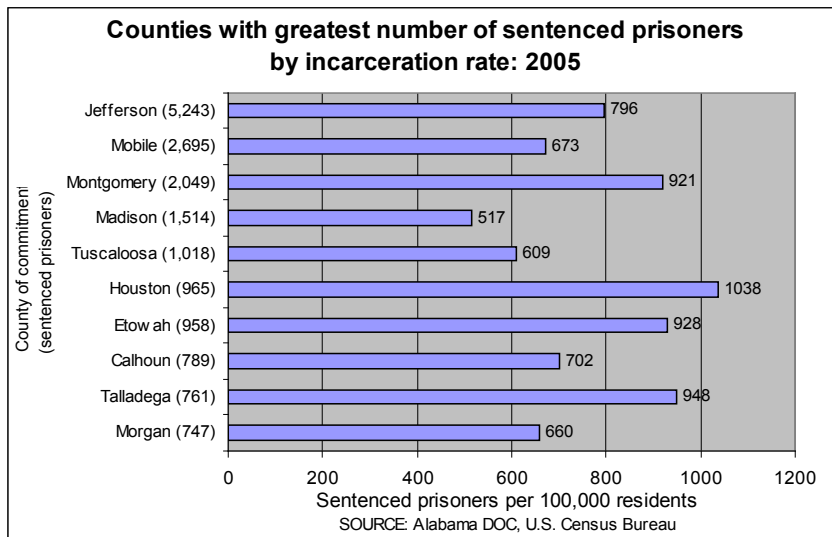
In May of 2005, Houston County led the pack with an incarceration rate of 1,038 prisoners per 100,000 residents. By comparison, Shelby County’s incarceration rate was just 228 per 100,000. Although Houston’s resident population is a little over half the size of Shelby’s, the state houses two-and-a-half times more prisoners sentenced in Houston than in Shelby.



### SENTENCING ISSUES

Like many states, Alabama has experienced a decline in violent crime over the past several years, producing a corresponding reduction in prison admissions for violent offenses. Between 1999 and 2004, annual admissions for robbery and assault fell by 26 percent while commitments for murder fell by an even more impressive 46 percent.

This trend should be providing a measure of relief to Alabama’s overburdened and overcrowded corrections system. Yet thanks to a rising tide of nonviolent commitments, the number of admissions was slightly greater in 2004 than in 1999. In effect, rather than using the drop in crime as an opportunity to get control of overcrowding, Alabama’s criminal justice system has ratcheted up incarceration of people convicted of drug and other nonviolent offenses.



Between 1999 and 2004, the total number of commitments for person offenses fell by 14 percent or 355 prisoners. During the same period, however, admissions for property offenses rose by seven percent (215 prisoners) and admissions for drug and alcohol offenses increased by 21 percent (674 prisoners)

### THE SENTENCING STRUCTURE IN ALABAMA

Alabama's indeterminate sentencing system establishes extremely broad sentencing ranges for most felony offenses and grants judges wide latitude in imposing a prison sentence. Under the Alabama Criminal Code felonies are classified according to the level of seriousness as follows:

FELONY LEVEL	SENTENCING RANGE	DEADLY WEAPON ENHANCEMENT*
Murder	10 years to life; life without parole; death <sup>2</sup>	Not less than 20 years
Class A	10 to 99 years or life	Not less than 20 years
Class B	2 to 20 years	Not less than 10 years
Class C	1 year and 1 day to 10 years	Not less than 10 years

\* The deadly weapon enhancement constitutes a mandatory minimum sentence which normally cannot be suspended or split. Under the *Soles* decision (discussed below) it appears that if a sentence that includes a deadly weapons enhancement is for a term of 20 years or less, the judge could erase the mandatory minimum requirement by imposing a split sentence.

Analysis of the top 25 offenses that drive felony caseloads shows that the most serious offense in two-thirds of the cases is a Class C felony. All of the five highest-volume offenses – possession of a controlled substance, second-degree theft, felony DUI and possession of marijuana in the first degree – are Class C felony offenses.

MOST SERIOUS NON-CAPITAL FELONY OFFENSE AT CONVICTION JUNE 1, 2003 — MAY 31, 2004			
Possession of controlled substance	Class C	3,823	23.3%
Theft of property (second degree)	Class C	1,023	6.2%
Felony DUI	Class C	993	6.0%
Theft of property (first degree)	Class B	963	5.9%
Burglary (third degree)	Class C	934	5.7%
Distribution of controlled substance	Class B	895	5.4%
Possession of marijuana (first degree)	Class C	833	5.1%
Possess forged instrument (second degree)	Class C	782	4.8%
Receiving stolen property (second degree)	Class C	418	2.5%
Robbery (first degree)	Class A	407	2.5%
Assault (second degree)	Class C	397	2.4%
Receiving stolen property (first degree)	Class B	362	2.2%
Breaking/entering a vehicle	Class C	331	2.0%
Trafficking drugs	Class A	284	1.7%
Forgery (second degree)	Class C	273	1.7%

Robbery (third degree)	Class C	240	1.5%
Fraud use of credit/debit card	Class C	228	1.4%
Manufacture of controlled substance (second degree)	Class B	228	1.4%
Manufacture of controlled substance (first degree)	Class A	158	1.0%
Sexual abuse (first degree)	Class C	151	0.9%
Burglary (first degree)	Class A	150	0.9%
Robbery (second degree)	Class B	147	0.9%
Burglary (second degree)	Class B	146	0.9%
Escape (third degree)	Class C	125	0.8%
Assault (first degree)	Class B	124	0.8%
Obstruct justice - false identity	Class C	124	0.8%
Other offenses		1,904	11.6%
<b>TOTAL FELONY CONVICTIONS</b>		<b>16,443</b>	<b>100.0%</b>

SOURCE: ALABAMA SENTENCING COMMISSION

### PROBATION AND SPLIT SENTENCES

Judges are required to impose a prison sentence on every person convicted of a felony, however if the term is not longer than 15 years, they have the option of suspending the prison sentence and placing the defendant on probation.<sup>21</sup> A judge may also choose to “split” a prison sentence of up to 20 years, dividing the term to impose a period of confinement, while suspending the remaining portion of the sentence and placing the offender on probation. If the sentence imposed is not more than 15 years, the confinement part of the split sentence can be from one day up to three years in duration at the discretion of the judge. If the prison term is more than 15 but not more than 20 years, the confinement period must be set between three and five years.

Generally, the prison portion of a split sentence is served first, but judges are also permitted to impose a “reverse split sentence” in which the defendant is placed on probation first in expectation that, if he or she succeeds, the prison term will be suspended altogether.

The split-sentence statute provides that during the confinement portion of the sentence, a person may be placed in a prison, a “jail-type institution” or a “treatment institution.” In consultation with DOC officials, the judge may order that for the incarceration portion of a split sentence, the offender be placed in a “disciplinary, rehabilitation, [or] conservation camp program” operated by the DOC. Prisoners serving split sentences are not eligible to earn “good time” or be paroled while serving the imprisonment portion of the sentence. Once released, they are placed on probation and remain under the jurisdiction of the sentencing judge.

Split sentences have become very popular with Alabama judges because they give judges greater control over how long an individual spends in prison and what happens when they get out.<sup>22</sup>

<sup>21</sup> The maximum permissible duration of a normal probation term is five years.

<sup>22</sup> While split sentences afford judges greater control over the initial term of confinement, their options are limited when a defendant serving a split sentence is revoked from probation. If the defendant in question was not initially sentenced to the

Prosecutors often favor split sentences because defendants who receive them are not eligible for parole release during the confinement portion of the sentence.

The most recent data available from the Sentencing Commission shows that the use of split sentences rose sharply over the last four and a half years, from 28 percent of prison admissions in 1999 to 39 percent in 2004. Conversely, new commitments that are not split sentences have fallen from 49 percent to 39 percent of admissions.

The use of probation is also on the rise but has not kept pace with the use of incarceration. The probation caseload has grown steadily from 1995, when there were 27,349 probationers under supervision, to 2004 when the caseload hit 33,845.<sup>23</sup> Despite this growth, however, a study by the Equal Justice Initiative found that probation is underutilized in Alabama.<sup>24</sup> According to advocates at the organization, while the state’s incarceration rate is 48 percent higher than the national average, Alabama’s “probation rate” – 1,117 probationers per 100,000 residents – is 40 percent *below* the national rate of 1,862 per 100,000.

### SENTENCING ENHANCEMENTS

On top of the long sentences that judges are free to impose on defendants convicted of virtually any felony offense, those with prior convictions are subject to harsh sentencing enhancements under Alabama’s Habitual Felony Offender Act. Considered one of the nation’s toughest “repeat offender” laws, Alabama’s habitual felony offender statute exposes defendants to sentences that are, in some cases, *ten times* the sentences permitted for first-offenders.

FELONY LEVEL	NORMAL SENTENCING RANGE	ONE PRIOR	TWO PRIORS	THREE PRIORS
Class A	10 to 99 years or life	15 to 99 or life	99 or life	Life or life w/o parole <sup>3</sup>
Class B	2 to 20 years	10 to 99 or life	15 to 99 or life	Not less than 20 or life
Class C	1 year and 1 day to 10 years	2 to 20	10 to 99 or life	15 to 99 or life

Many states that impose enhanced sentences on individuals convicted of repeat offenses have tailored their statutes to focus on those who pose the greatest threat to public safety. For example, Alabama’s Sentencing Commission found that a third of states with repeat offender statutes consider whether the instant offense was violent in determining whether a sentence should be enhanced. More than a quarter consider whether the offense was sexual.

In Alabama, however, individuals convicted of repeat offenses face an enhanced sentence regardless of the danger they pose to the public. Further, with one exception, the law does not consider the

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maximum term of confinement (either three or five years), the judge may split the remaining sentence, provided that the total confinement time does not exceed said maximum. Once the maximum is reached, however, the defendant must be committed to serve the suspended portion of the sentence behind bars. According to staff at the Sentencing Commission, when revoking probation of an individual who has served the maximum term of imprisonment, it is not clear whether the law requires judges to execute the *entire* suspended sentence or allows them to imprison the split-sentence revokee for any period of time *up to* the original suspended sentence. A bill proposed by the Commission in 2005 and described at the end of this report would have expanded the range of options available to judges in handling split-sentence revocations.

23 “A Rational Sentencing Plan — Ready for Approval: 2005 Annual Report.” Alabama Sentencing Commission. February 22, 2005.

24 “Criminal Justice Reform in Alabama: A Report and Analysis of Criminal Justice Issues in Alabama. Part One: Sentencing, Probation, Prison Conditions and Parole.” Montgomery, AL: Equal Justice Initiative of Alabama. March 2005.

seriousness of past offenses.<sup>25</sup> An individual charged with stealing \$3,000 who has one previous felony conviction faces the same harsh sentencing range, 10 to 99 years, whether the prior conviction was for marijuana possession or murder.

If they invoke an enhancement, prosecutors must give notice of intent to proceed under the habitual offender law, and must disclose the specific convictions that will be relied on in seeking an habitual offender sentence.

On its face, the habitual felony offender law seems to leave a judge no discretion to impose a sentence below the minimum term established by the statute. But in actual practice, and under recent appellate court decisions as well, there remains a fair amount of “wobble room” around sentencing enhancements and mandatory minimum sentencing requirements. Further, judges retain discretion to split a sentence that has been enhanced under the habitual offender law, as long as the prison term is no more than 20 years.

In 2000, the habitual offender law was modified to increase judicial discretion in a narrow range of cases where defendants faced mandatory prison terms of life with parole or life without parole. Prior to the change, a person convicted of a Class A felony with three prior felony convictions faced a mandatory term of life without parole, even if all of the past convictions involved lower-level offenses. The reform gave judges the option to impose life with parole as long as the defendant had not previously been convicted of a Class A felony. The legislation also permitted judges to sentence individuals convicted of Class B felonies with three prior felony convictions to a minimum 20-year prison term rather than a life sentence. In 2001, the act was made retroactive as discussed above. An analysis conducted by the Sentencing Commission found that, on May 31, 2004, there were at least 266 prisoners serving life without parole, and 209 prisoners serving life with parole, under the old provisions of the habitual offender act.

#### **DRUG OFFENSE SENTENCING**

Unlawful possession of a controlled substance is a Class C felony unless the amount is large enough to trigger a trafficking conviction (discussed below). Possession of marijuana for personal use is a Class A misdemeanor, unless the defendant has a prior such conviction, in which case the offense becomes a Class C felony.

A review of marijuana statutes conducted by the Sentencing Commission found that the maximum penalty for marijuana possession in Alabama far exceeds penalties permitted in most other states.<sup>26</sup> For example, a person convicted of possessing less than a kilo of marijuana — the threshold for Alabama’s drug trafficking statute — can receive a 10-year prison sentence in Alabama. In contrast, four in five states set the maximum prison term for marijuana possession at or below five years.

Unlawful distribution of a controlled substance is a Class B felony unless the amount exceeds the trafficking threshold or the recipient is under the age of 18 (the latter is a Class A felony). Manufacturing a controlled substance in Alabama is also a class B felony unless certain aggravating circumstances are present (e.g., possession of a firearm; operating a clandestine laboratory; manufacturing in the presence of a juvenile) which make the offense a Class A felony.

Under Alabama’s drug laws, criminal solicitation, criminal attempt, and criminal conspiracy to

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<sup>25</sup> The seriousness of past felony convictions is a factor only in the case of individuals who stand convicted of Class A felonies and have three prior felony convictions.

<sup>26</sup> “A Rational Sentencing Plan — Ready for Approval: 2005 Annual Report.” Alabama Sentencing Commission. February 22, 2005.

commit a drug crime are all punished the same as the drug crime itself. Individuals convicted of drug distribution or trafficking are not eligible to participate in community corrections programs.

### SENTENCES FOR DRUG TRAFFICKING

Above a specified weight threshold, manufacturing, delivering, importing or possessing a controlled substance is construed as drug trafficking. Trafficking carries mandatory minimum sentences that vary according to the type and weight of the drugs involved, as in these examples:

DRUG TRAFFICKING AMOUNT THRESHOLDS AND MANDATORY MINIMUM SENTENCES			
Marijuana	Cocaine	Heroin/Opium/Morphine	Mandatory minimum
Over 2.2 lbs up to 100 lbs	Over 28 g up to 500 g	Over 4 g up to 14 g	3 years
Over 100 lbs up to 500 lbs	Over 500 g up to 1 kg		5 years
		Over 14 g up to 28 g	10 years
Over 500 lb up to 1,000 lbs	Over 1 kg up to 10 kg	Over 28 g up to 56 g	15 years
Over 1,000 lbs	Over 10 kg	Over 56 g	Life w/o parole

If a person possesses a firearm while committing a trafficking offense, he or she is subject to an additional five-year sentencing enhancement imposed on top of the required prison term. This enhancement cannot be suspended, and the defendant cannot be placed on probation, unless the judge decides to impose a split sentence as permitted under the *Soles* decision (discussed below).

Where a defendant is found to have organized, supervised, or managed five or more other persons in a drug trafficking enterprise, and to have drawn substantial income from the enterprise, the mandatory minimum prison term is 25 years. A second conviction under these circumstances mandates a sentence of life without parole.

The Alabama Court of Criminal Appeals recently overturned the sentence of a woman who was given life in prison without parole for selling 97.8 grams of a solution containing morphine. After spending four years in prison, the woman was re-sentenced to probation. A close observer of sentencing practices in Alabama courts says that the ruling in this case turns on very narrow circumstances — the fact that the defendant was a first offender and clearly *not* a typical drug dealer — and will not apply in many other trafficking cases.

The legislature has designated drug trafficking a “violent” offense even in cases where no weapon or violence is involved.<sup>27</sup> As a consequence, individuals convicted of drug trafficking are not eligible to participate in the special parole dockets.

### “DRUG-FREE ZONE” LAWS

As in most states, drug sales within Alabama’s designated “drug-free zones” carry mandatory enhanced punishment. Drug-free or “school-zone” laws commonly apply to an area within 1,000 feet of school grounds but the Alabama’s legislators have cast a much wider *three-mile* zone of prohibition. Further, while many other state’s “zone” laws define “schools” as public or private educational institutions that serve minors, Alabama’s school-zone definition includes colleges and universities. Similar enhanced penalties are attached to drug sales that take place within three miles of a public housing project.

<sup>27</sup> “Criminal Justice Reform in Alabama: A Report and Analysis of Criminal Justice Issues in Alabama. Part One: Sentencing, Probation, Prison Conditions and Parole.” Montgomery, AL: Equal Justice Initiative of Alabama. March 2005.

At the discretion of the sentencing judge, prison terms for separate offenses may be imposed to be served concurrently. But a sentencing *enhancement* must be served consecutively to the sentence for the underlying offense. The drug-free zone enhancement provides an extra five years, which is supposed to be added *on top* of a prison sentence for the base offense. If, for example, a person is convicted of a class B felony distribution offense within three miles of a school, the minimum sentence must be seven years — a minimum of two years for a class B felony plus the five-year enhancement. Where a school zone overlaps a public housing zone (a situation not uncommon in urban areas of the state) a defendant faces *two* five-year enhancements on top of the two-year base, for a total sentence of *twelve* years.

Actual practice is more complex. A 2001 Court of Criminal Appeals decision (*Soles v. State*) lessened the sting of Alabama’s mandatory minimum laws by giving judges the ability to impose a split sentence, thus reducing the portion of the sentence that must be served behind bars. The *Soles* decision upheld the suspension of a prison sentence under Alabama’s split sentencing law for a person convicted in a school-zone drug sale case.

In their initial report on Alabama sentencing practices, members of the Sentencing Commission speculated that the holding in *Soles* may well apply more broadly to other mandatory punishment enhancement provisions. They expressed confidence that Alabama judges will exercise a reasonable degree of discretion as they look at aggravating and mitigating factors on a case-by-case basis. The Sentencing Commission has not yet completed an analysis of the decision’s impact on sentencing patterns, but the staff does not expect to find that significant changes took place. Ralph Hendrix, vice-president of the Alabama Community Corrections Association, says that while the *Soles* decision is important, “it’s really just a patch on a badly worn tire.”

#### **SENTENCING PATTERNS AND LENGTH OF STAY**

Alabama’s high sentence maxima expose Alabama defendants to extremely long prison terms, especially when combined with harsh sentencing enhancements. In fact, according to a comparison of data from 35 states conducted by researchers at the Vera Institute of Justice in 2000, Alabama judges imposed the longest average sentences.<sup>28</sup>

The current system not only encourages the use of long prison terms, but also does a poor job of distinguishing between individuals whose crimes pose a threat to public safety and those whose activities are less serious. Defendants charged with nonviolent drug and property offenses face the same sentencing range as others whose offenses are violent.

For example, the penalty for distribution of a controlled substance — two to 20 years — is the same as the penalty for manslaughter, second-degree rape and first-degree assault (causing serious physical injury through the use of a weapon). Similarly, third degree burglary carries the same maximum sentence — up to 10 years in prison — as third degree robbery, despite the fact that the latter involves the use or threat of force or weapons while third degree burglary applies to nonviolent offenses in which no weapon was involved.<sup>29</sup>

Alabama’s habitual offender law compounds the problem, crowding state prisons with people serving long sentences for low-level, nonviolent crimes. According to DOC statistics, three in ten prisoners

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28 “Alabama Databook: A Summary of Criminal Justice Statistics for Alabama and the United States.” New York, NY: Vera Institute of Justice. October 11, 2002.

29 See footnote 17



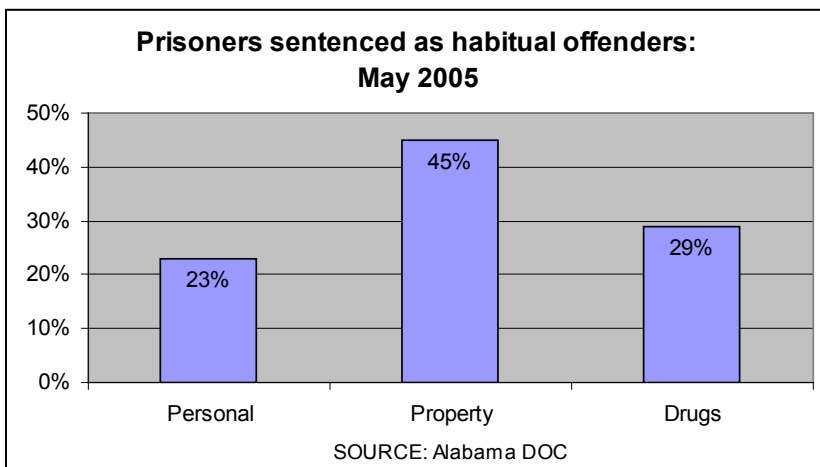
received an enhanced term under the law, with individuals convicted of property offenses *twice as likely* as those convicted of person crimes to have been sentenced as habitual offenders.<sup>30</sup>

**ALABAMA PRISONERS ON MAY 31, 2005 BY OFFENSE TYPE AND HABITUAL OFFENDER ENHANCEMENT**

	PERSON	PROPERTY	DRUGS	OTHER	TOTAL
<b>HABITUAL</b>	3,288	3,477	1,325	169	8,259
	23%	45%	29%	12%	30%
<b>NON HABITUAL</b>	10,810	4,251	3,210	1,202	19,473
	77%	55%	71%	88%	70%
<b>TOTAL</b>	14,098	7,728	4,535	1,371	27,732

SOURCE: ALABAMA DOC MONTHLY STATISTICS – MAY 2005

When habitual offender and “drug-free” zone enhancements are added on top of an already tough schedule of penalties for drug and property offenses, the resulting sentences can be harsher than those imposed on many convicted of serious violent offenses. Data from the Sentencing Commission show that, between 1999 and 2002, the average prison term imposed on all individuals convicted of drug distribution (8.1 years) was longer than the



average sentence for manslaughter (7.4 years) or first-degree assault (6.4 years) and *twice as long* as the typical sentence for first-degree sexual abuse (4.1 years). In the same vein, the data show that individuals incarcerated for third-burglary actually received sentences almost as long as those incarcerated for third-degree robbery (5.7 years vs. 6.6 years).

**UNEVEN APPLICATION OF SENTENCING LAWS**

The Sentencing Commission’s research team found a high degree of sentencing disparity on the basis of geography. This disparity appears to be exacerbated by the fact that Alabama’s statutes, sentencing ranges and enhancements are so broad that they make it possible for similarly situated individuals to get probation in one jurisdiction and a 20-year prison term in another. In the case of drug offenses, sentencing disparity is also fueled by school and public housing drug-free zones, which are less ubiquitous in rural areas, but which help to pack the prisons with drug defendants from urban court districts.

A preliminary review of actual sentencing practices by the Sentencing Commission indicates that mandatory minimum penalties in drug cases are not uniformly applied. Ralph Hendrix points out, for

<sup>30</sup> Sentencing Commission staff believe that proportion of prisoners sentenced as habitual offenders may be significantly higher since habitual offender sentences are not consistently recorded in the DOC information management system.

example, that the prosecutor of Jefferson County – which includes Birmingham – seeks imposition of mandatory prison terms across the board in distribution and trafficking cases. By contrast, Hendrix says prosecutors in many other jurisdictions use mandatory prison provisions as a spur for plea bargaining to lesser charges that provide judges more flexibility at sentencing.

Examining the sentences meted out to individuals with no prior felony conviction record who stood convicted of drug possession, the Commission’s research team found that the chance of getting a prison sentence was highly dependent on the Circuit Court jurisdiction. The percentage of first-time offenders receiving a prison term varied from a low of 11 percent in one jurisdiction to a high of 87 percent in another. And while the statewide average prison term imposed on those that *were* sentenced to prison for drug possession was 33.6 months, when broken down by circuit court jurisdiction average prison terms ranged from just 13 months in one jurisdiction to more than *six years* in another.

Alabama’s habitual offender law appears to be a major driver of sentencing disparity because it is not uniformly applied. For example, the Sentencing Commission research team found that just 28 percent of individuals convicted for theft of property in the first degree who were known to have a prior felony conviction were sentenced as habitual offenders by the courts. Those who *were* sentenced as habitual offenders (i.e., those subject to a sentence of two to 20 years under the habitual offender laws) received widely disparate prison terms:<sup>31</sup>

SENTENCES IMPOSED FOR FIRST-DEGREE THEFT WITH HABITUAL OFFENDER ENHANCEMENT					
Up to 2 years	23%	6-8 years	0%	12-14 years	1%
2-4 years	22%	8-10 years	18%	14-16 years	19%
4-6 years	5%	10-12 years	1%	16-18 years	13%

SOURCE: ALABAMA SENTENCING COMMISSION

An examination of DOC statistics suggest that the use of the habitual offender law varies widely by jurisdiction.<sup>32</sup> Statewide, individuals sentenced under the habitual offender law comprise 30 percent of the prison population. Yet they accounted for between 40 percent and 50 percent of prisoners sentenced in Talladega, Montgomery, Colbert, Calhoun, Tuscaloosa, Etowah and Escambia, and over half of prisoners sentenced in Russell.

Together, these eight counties account for over a third (35 percent) of the habitual offender prison population and just 18 percent of prisoners not sentenced as habitual offenders. The disparity does not appear to be the result of an unusually high concentration of repeat offenders in the counties named. In fact, prisoners sentenced in the counties that make the greatest use of the habitual offender law were just as likely to be experiencing their first episode of incarceration in Alabama as those sentenced elsewhere.

Nor does the disparity appear to be related to the size of the jurisdiction. For example, among prisoners committed from Mobile, 42 percent were serving their first Alabama prison term and just 20 percent were sentenced as habitual offenders. By contrast, while prisoners committed

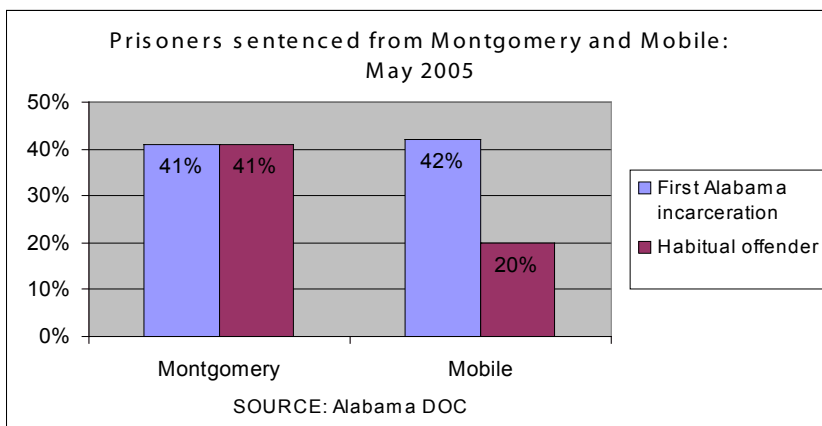
31 Alabama Sentencing Commission. “2003 Report: A Rational Approach to Sentencing Reform.” Online at <http://sentencing-commission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf>

32 As previously indicated, DOC data on habitual offender sentences may be incomplete, while statistics published by the DOC do not indicate what proportion of prisoners were eligible for an enhanced sentence under the HFOA. As a consequence, further research would be required to accurately measure the degree of jurisdictional disparity in the application of the act.

from Montgomery were equally likely to be serving a first Alabama prison term (41 percent), they were *twice as likely* to be sentenced under the habitual offender law (41 percent).

**TIME SERVED IN PRISON**

Because Alabama makes extensive use of both parole release and good-time credits, the relationship between the sentence imposed and the amount of time served is anything but straightforward. The Sentencing Commission found that the majority (57 percent) of prisoners serve less than half of the sentence imposed before their first release, while nearly a third (32 percent) served 90 percent or more of the prison term.<sup>33</sup>



PERCENTAGE OF TIME SERVED BY THOSE RELEASED FROM PRISON • FISCAL YEAR 1999-2002			
0-10%	843	50-60%	1,146
10-20%	1,040	60-70%	297
20-30%	1,958	70-80%	173
30-40%	3,118	80-90%	153
40-50%	2,286	90-100%	5,274

SOURCE: ALABAMA SENTENCING COMMISSION

Among prisoners released after serving time for the top 10 commitment offenses, those convicted of person crimes tended to serve a longer proportion of their sentence than others. The differences were not great, however. The average proportion of time served for person offenses ranged from 34 percent for first-degree robbery to 38 percent for second-degree assault. For property offenses, the proportion of time served ranged from 32 percent for third-degree burglary to 34 percent for second-degree theft. Finally, prisoners released after being incarcerated for drug offenses had served between 34 percent and 27 percent of their sentence for possession and distribution, respectively.

AVERAGE TERMS AND TIME SERVED BY OFFENSE TYPE • FISCAL YEARS 1999-2002			
Conviction Offense	Prison Term Imposed	Actual Time Served	Percent Time Served
Robbery (first degree)	11.2 years	3.8 years	34%
Unlawful distribution of a controlled substance	8.1 years	2.2 years	27%
Manslaughter	7.4 years	3.1 years	42%

<sup>33</sup> Alabama Sentencing Commission. "2003 Report: A Rational Approach to Sentencing Reform." Online at <http://sentencing-commission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf>

Burglary (first degree)	7.3 years	2.2 years	30%
Escape (second degree)	7.2 years	2.0 years	28%
Robbery (second degree)	7.0 years	2.6 years	37%
Robbery (third degree)	6.6 years	2.4 years	36%
Burglary (second degree)	6.5 years	2.0 years	31%
Assault (first degree)	6.4 years	2.4 years	38%
Burglary (third degree)	5.7 years	1.8 years	32%
Theft of Property (first degree)	5.1 years	1.7 years	33%
Theft of Property (second degree)	5.0 years	1.7 years	34%
Assault (second degree)	4.8 years	1.8 years	38%
Receiving stolen property (first degree)	4.5 years	1.6 years	36%
Forgery (second degree)	4.5 years	1.5 years	33%
Receiving stolen property (second degree)	4.3 years	1.5 years	35%
Possession of a forged instrument (second degree)	4.3 years	1.4 years	33%
Breaking and entering a vehicle	4.2 years	1.6 years	36%
Sexual abuse (first degree)	4.1 years	2.0 years	49%
Fraudulent use of a credit card	4.1 years	1.4 years	34%
Possession of a controlled substance	3.8 years	1.3 years	34%
Escape (third degree)	3.7 years	1.3 years	35%
Felony DUI	2.6 years	1.1 years	42%

SOURCE: ALABAMA SENTENCING COMMISSION

The proportion of time served depends on whether a prisoner is eligible for and receives “good-time” credit; and whether a prison is eligible for and is granted parole release.

#### **TIME SERVED IN PRISON IS ON THE INCREASE**

The average time served in prison for common offenses rose rapidly between 1999 and 2002.<sup>34</sup> The Sentencing Commission reports that the average amount of prison time served before release for the 25 most frequent conviction offenses rose by 22 percent. Average time served by Alabama prisoners convicted of common high-volume offenses increased yet more sharply. The time served for simple possession of drugs increased by one third. Moreover, the rate of increase for purely nonviolent offenses of theft and forgery was greater than the rate for robbery and burglary. This trend may be related to increased use of “split” sentences, which prevent those sentenced under them from being awarded good time credits and/or parole release.

34 Alabama Sentencing Commission. “2003 Report: A Rational Approach to Sentencing Reform.” Online at <http://sentencing-commission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf>

CHANGE IN THE AVERAGE LENGTH OF STAY IN PRISON			
Offense	Average length of stay (months)		Change
	1999	2002	
Possession of a forged instrument (2nd degree)	10.6	16.5	55%
Theft of property (2nd degree)	13.3	20.1	51%
Robbery (2nd degree)	14.5	17.0	43%
Burglary (3rd degree)	14.7	19.8	34%
Possession of a controlled substance	11.4	15.2	33%

SOURCE: ALABAMA SENTENCING COMMISSION

### GOOD TIME CREDITS

One important safety valve, without which the prison crisis would probably escalate to disaster proportions, is provided by Alabama’s system of good-time credits. The rate at which good time is granted varies according to a prisoner’s “earning class” as follows:

CLASSIFICATION LEVEL	GOOD TIME ACCRUAL RATE
Class I	75 days earned for each 30 days served
Class II	40 days earned for each 30 days served
Class III	20 days earned for each 30 days served
Class IV	None

Prisoners who are incarcerated for Class A felonies, sentenced to more than 15 years (including life terms), or serving the prison portion of a split sentence, are not eligible to earn good-time credits. Prisoners convicted of drug trafficking are also ineligible for good time until they have served the applicable mandatory minimum prison term or 15 years, whichever is less. Under the good time system the average Prisoner is given 242 days credit for every 365 days served.<sup>35</sup>

### PAROLE RELEASE

When a prisoner can be considered for parole release is a complex matter in Alabama. For those who are parole-eligible, the initial parole hearing is set based on the length of the sentence received. Those serving terms of five years or less are immediately eligible for parole consideration. With a sentence between five and 10 years, prisoners can receive consideration for parole 12 months before their minimum release date (the sentence term minus good time); between 10 and 15 years, 24 months before the minimum; and for those over 15 years, 36 months prior to the minimum.

A prisoner who is not eligible for good time must normally serve one-third of a prison sentence or 10 years — which ever is less — before becoming eligible for release on parole. An eligible parole applicant must receive approval by a majority vote of the Alabama Board of Pardons and Paroles. But a prisoner may be granted parole release *prior* to reaching their eligibility date, if they can garner a *unanimous* vote for release.

35 Alabama Sentencing Commission. “2003 Report: A Rational Approach to Sentencing Reform.” Online at <http://sentencingcommission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf>

The parole board recently adopted a controversial “truth-in-sentencing” rule that is being applied to certain serious offenses. The parole board is requiring that prisoners sentenced for serious violent felonies – murder or attempted murder; first-degree rape, sodomy or sexual torture; and first-degree robbery, burglary or arson involving serious physical injury – serve the lesser of 85 percent of the sentence or 15 years before their initial parole consideration date. Exceptions to this rule may be made for prisoners facing imminent death due to medical problems, or if the parole board receives a petition from the sentencing judge or the district attorney that prosecuted the case.

An individual who stands convicted of a murder, rape, robbery or assault with a deadly weapon – whether completed or attempted – that directly resulted in serious physical injury, and who has also been convicted of a felony resulting in serious injury within the last five years, is never eligible for parole release.

GENERAL PAROLE ELIGIBILITY				
Length of sentence (years):	Five or less	Five to 10	10 to 15	Over 15
If eligible for good time	Immediate	One yr. before min. rls. date	Two yrs. before min. rls. date	Three years before min. rls. date
If ineligible for good time	After lesser of one-third of sentence or 10 years served			
If convicted murder or attempted murder; first-degree rape, sodomy or sexual torture; or first-degree robbery, burglary or arson involving serious physical injury	After lesser of 85 percent of sentence or 15 years served			
If convicted of murder, rape, robbery or assault with a deadly weapon (including attempts) resulting in serious injury with prior conviction in last five years for felony resulting in serious injury; or sentenced to life for Class A felony with prior Class A felony conviction.	No eligibility			

Those released from prison on *parole* typically serve one-quarter of their sentence. Among those not granted parole, prisoner still serve, on average, less than half of their sentence:

AVERAGE TERMS AND TIME SERVED BY RELEASE TYPE • FISCAL YEARS 1999-2002			
Type of Release	Prison Term Imposed	Actual Time Served	Percent Time Served
Released on parole	10.8 years	2.6 years	24%
Released at the end of the sentence	5.4 years	2.1 years	39%
Released to probation (split sentence)	2.9 years	1.2 years	41%

SOURCE: ALABAMA SENTENCING COMMISSION

## PAROLE SUPERVISION

Alabama's parole population has gone through several expansions and contractions over the past 30 years. The late 1980s saw exponential growth in the parole caseload, with the number of parolees shooting from 2,599 in 1985 to 6,629 in 1990 (an increase of 155 percent). Growth in the parole population slowed considerably in the early 1990s and peaked in 1994 when the number of parolees reached 7,306.

By 1997, the parole population had fallen by more than a third to 4,631. Parole caseloads stayed between 4,500 and 5,500 until the establishment of a special parole docket in 2003. By 2004, the parole population had reached an all-time high with 7,645 parolees under supervision.

Alabama has committed new resources to managing growth in the parole population and improving the quality of community supervision. In 2003 and 2004, the legislature provided funding for the state to hire 65 new parole officers to handle an increased caseload produced by reinstatement of the weekly special dockets. Between fiscal years 2003 and 2004, the average caseloads for probation/parole officers dropped from 183 clients to 167 clients, although it remains well above the board's goal of one officer for every 100 supervisees.

Historical patterns show that Alabama's parole revocation rate has been very high. The U.S. Bureau of Justice statistics reports that 56 percent of those taken off parole in Alabama between 1989 and 1997 were revoked and returned to prison – the third-highest rate in the nation. During that period, the ratio of paroles granted to paroles revoked fell from better than three-to-one in 1989 to just under two-to-one in 1996.

Parole authorities claim that Alabama now enjoys a lower incidence of parole violations than many other states. In fiscal year 2004, nine percent of parolees under supervision were revoked, while the ratio of parole grants to revocations approached six-to-one, driven by an active special parole docket.<sup>36</sup>

The Sentencing Commission has recommended that the Board of Pardons and Paroles begin tracking reasons for revocation in their electronic data systems – a step that could help officials determine whether revocation rates could be reduced through policy changes or provision of substance abuse treatment and other supportive services. The Sentencing Commission also recommended in 2005 that the state's split sentencing statute be amended to allow judges to sanction split-sentenced probationers who are in violation of supervision conditions without revoking their probation.

#### **REHABILITATION AND COMMUNITY CORRECTIONS**

Prison and standard probation are not the only sentencing options available to Alabama judges. With support from the Edna McConnell Clark Foundation's "State-Centered Program", a small network of model alternative sentencing programs were established in a few Alabama court jurisdictions in the late 1980s.

In 1990, Alabama lawmakers expanded upon this network by adopting the "Mandatory Treatment Act," which authorized the Administrative Office of the Courts to appoint a "court referral officer" in every court circuit to identify defendants in need of substance abuse treatment and to make referrals to appropriate treatment programs. With permission from the district attorney, such defendants may be diverted to treatment in lieu of prosecution.

The next year, Alabama legislators took a further step toward institutionalizing community corrections alternatives to incarceration by enacting the Community Punishment and Corrections Act (CPCA). The act authorized the establishment of programs to be run by local community corrections authorities or nonprofit entities under agreements with the DOC and county officials. However the

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<sup>36</sup> Ibid.

legislature failed to provide *funding* to support operation of such programs for the next five years.

Under the CPCA, judges are empowered to sentence eligible defendants directly to a community corrections program as an alternative to prison, as a condition of probation, or in conjunction with a split sentence. In addition, DOC officials may make “institutional diversions,” assigning prisoners to a community corrections program after sentencing, as long as the judge has approved the prisoner for participation.

Defendants who have demonstrated a pattern of violent behavior, or who stand convicted of either a serious violent or sexual offense, drug trafficking, or drug sale are excluded from participation in community corrections programs.<sup>37</sup>

One of the largest community corrections programs operates in Mobile. The Mobile Community Corrections Center offers a wide array of program services including pretrial services and jail diversion, community service sentencing, a drug court, an electronic monitoring program, court referral services, and alternative sentencing programs.

Treatment Alternatives to Street Crimes, which operates through the University of Alabama in Birmingham (UAB TASC), has been able to attract federal funding to develop model substance abuse treatment programs. Established in 1973, UAB TASC operates as the designated community corrections program for Jefferson County. A comprehensive pretrial release component provides screening and release-on-recognizance (ROR) services for felony arrestees in the county jail, assessing and testing releasees for drug dependency. The program provides support services for both Jefferson County’s drug court and its mental health court.

Nonviolent prison-bound defendants are targeted for alternative sentencing options through provision of specific sentencing plans, enhanced supervision options, and placements in residential and half-way house programs. These essential services are provided through partnerships with a wide network of church groups and nonprofit community organizations. In addition, the UAB TASC program provides placement and supervision for more than 2,000 people sentenced to perform community service each year.

Some community corrections programs receive funding from local government, as well as from fees collected from participants. State funding for community corrections programs finally began to flow in 1996. The DOC disburses funds to community corrections programs based on the number of participants who score 10 points or more on a “diversion checklist”. The purpose of the checklist is to ensure that community corrections funds used for front-end diversion are targeted to individuals who would have been incarcerated but for their participation in the program.

DOC pays counties a fee of \$15 per day for each qualifying participant during the first six months of his or her sentence. The per diem falls to \$10 during the seventh, eighth and ninth months; and reaches \$5 for the remainder of the individual’s tenure in the program, up to a maximum of two years.

In fiscal year 2003, the DOC funded 1,745 felony diversions, of which 81 percent were sentenced to the program by judges and 19 percent referred by DOC staff after being sentenced to a period of incarceration.

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<sup>37</sup> Offenses that make an individual ineligible to participate in a community corrections program include murder, kidnapping in the first degree, rape in the first degree, sodomy in the first degree, arson in the first degree, selling or trafficking in controlled substances, robbery in the first degree, sexual abuse in the first degree, forcible sex crimes, lewd and lascivious acts upon a child, or assault in the first degree if the assault leaves the victim permanently disfigured or disabled.



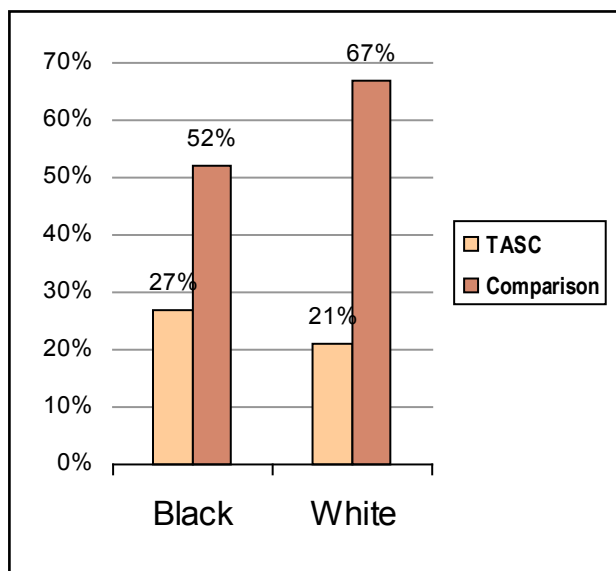
The Sentencing Commission estimates that diversions saved the state \$3 million in 2003.<sup>38</sup>

Drug courts are among the programs that have been established under CPCA. Alabama's first drug court was launched in Mobile in 1992. In 1995, through a grant secured by the University of Alabama's community corrections program, a drug court began operation in Birmingham. An evaluation determined that Birmingham drug court participants (more than 1,000 each year) were much less likely to be rearrested in the year after their court disposition than their non-participant counterparts.<sup>39</sup>

#### ANY OFFICIAL ARREST FOR CRIME

Most of Alabama's drug courts depend on grants and participant fees that can range from \$500 to \$3,000 per person for entry, drug testing and monitoring. Most drug court participants are charged with drug possession, although some counties also accept individuals charged with nonviolent property offenses.

Given the fact that a large proportion of property and drug crime is fueled by substance abuse, Alabama's drug court programs are a promising mechanism for reducing prison population figures while increasing public safety through delivery and monitoring of effective treatment interventions. However, Alabama's 17 drug courts serve just 18 of the state's 67 counties. Although there were nearly 1,000 adult drug-court participants in Jefferson County, the typical drug court accepts just 60 new participants a year and has a caseload of 50.



SOURCE: UAB TREATMENT ALTERNATIVES TO STREET CRIME (TASC)

#### COMMUNITY CORRECTIONS ALTERNATIVES ARE UNDER-FUNDED AND UNDER-UTILIZED

Alabama's criminal justice officials and policymakers have never provided sufficient financial support for development or operation of programs that can serve as effective alternatives to prison. After the Edna McConnell Clark Foundation provided seed grants to support development of model sentencing advocacy and correctional alternative programs, legislators voted to authorize their utilization through the Community Punishment and Corrections Act of 1991. But state *funding* for implementation of the CPCA was not provided until 1996. The \$2.5 million initially provided was not adequate to meet the pool of appropriate defendants that are eligible for diversion to these programs.

At the recommendation of the Sentencing Commission, Alabama lawmakers took an important step toward strengthening the statewide community corrections network by enacting The Community Punishment and Corrections Act of 2003. The legislation modified the 1991 community corrections act by allowing state funds to be used for start-up costs, streamlining the process for launching programs and authorizing the establishment of programs that serve more than one jurisdiction.

Lawmakers also directed DOC to set up a division to coordinate community corrections programs

38 "Criminal Justice Reform in Alabama: A Report and Analysis of Criminal Justice Issues in Alabama. Part One: Sentencing, Probation, Prison Conditions and Parole." Montgomery, AL: Equal Justice Initiative of Alabama. March 2005.

39 Harrell, Adele, et. al. "Evaluation of the Breaking the Cycle Demonstration in Birmingham, Alabama — Final Report." Available at [www.ncjrs.org/pdffiles1/nij/grants/189244.pdf](http://www.ncjrs.org/pdffiles1/nij/grants/189244.pdf)

and establish a special fund earmarked for community corrections. Although the legislature did not immediately appropriate the additional funds that were to accompany the new responsibilities, in 2005 they earmarked \$5.2 million for community corrections during fiscal year 2006, still short of the \$5.5 million originally required by the Community Punishment and Corrections Act.

The statewide “court referral” system might offer another promising avenue for diverting substance abusers to treatment instead of incarceration. But the track record is disappointing. In practice the court referral officers tend to function primarily to divert misdemeanants charged with DUI to fee-based “DUI schools.” Critics of the system charge that the fees paid by participants are used to subsidize the salaries of the referral officers, as well as other court functions, rather than to support effective treatment interventions for substance abuse.

During 2002, \$375,000 was provided to establish residential drug treatment programs for chronically-addicted defendants who would otherwise have been sentenced to prison. The programs, which serve between 50 and 60 clients each year, include Aletheia House and Fellowship House in Birmingham; and RAPHA House in Gadsden. The Sentencing Commission has recommended expanding the program to allow for diversion of 180 defendants per year.

### **PROSPECTS FOR SENTENCING AND CORRECTIONAL REFORMS**

While most state officials agree that Alabama’s sentencing and correctional system is in crisis and needs a major overhaul, there has been little consensus among those officials about what needs to be done. Judged by at least one vital factor, Alabama should provide fertile ground for sentencing reform. A ground-breaking public opinion study was conducted by John Doble for the Public Agenda Foundation during the height of the late-1980s “tough on crime” period in Alabama. Doble found that when Alabamians learned more about non-incarcerative sanctions, they overwhelmingly favored using them with an array of nonviolent offenders and some carefully selected and screened violent offenders.

To a remarkable degree, apparent punitiveness seemed to evaporate when Alabamians were provided with a full array of sentencing options. Given only prison or probation as options and asked to choose the sentence in 23 case scenarios ranging from crimes involving serious violence to petty property and drug offenses, a cross-section of Alabamians from every area of the state sentenced 18 of the hypothetical defendants to prison. After being provided information about a range of specific sentencing options that included intensive probation, restitution, community service, house arrest and boot camp, the respondents were asked to reconsider their sanction choices. In this new context, prison was deemed appropriate in only *four* of the 23 cases.

Alabamians indicated a strong preference for alternatives to prison for a wide range of offense scenarios, including most property crimes, drug possession, drug sales (provided an offender did not have a long prior record) and burglary. Even in the case of knife-point robbery, where the offender was a young first offender, a healthy majority (63 percent) preferred a strictly supervised non-prison, restorative sentence.

The most popular types of alternative sentences were those were perceived as putting the emphasis on restitution and rehabilitation. Most felt it was also important to include education, counseling, and job training as part of the regimen. Given options such as these, most Alabamians were comfortable forgoing a prison sentencing for all but the most violent offenders who they thought presented a clear danger to public safety. Recent results from national public opinion polls show marked increases in public support for community corrections and alternatives to prison, especially for people convicted of nonviolent drug and property offenses. There is no reason to assume that public opinion on these issues is worse today in Alabama.

## **THE ALABAMA SENTENCING COMMISSION**

The push for sentencing reform in Alabama was initiated in 2000 by Alabama's Attorney General Bill Pryor, who proposed establishment of a Sentencing Commission. Pryor has acknowledged the need for reform in the handling of nonviolent drug offenders, but is no longer in a position to help to bring this about, since he has been appointed to the 11<sup>th</sup> U.S. Circuit Court of Appeals.

The 16-member Sentencing Commission has been at work for five years to examine and address the sentencing laws and correctional policies that are driving the population boom. Much of the data research and analysis has been performed by the experienced staff at Applied Research Services in Atlanta, while the Vera Institute's state sentencing and corrections program is providing additional technical assistance.

In March 2003 the Alabama Sentencing Commission submitted recommendations for reform to the state's top-level policymakers. The Sentencing Commission's report to the legislature described a criminal justice system in crisis. Observing that "no simple 'tweaking' of the existing system" would save it from a complete collapse, the commissioners urged both immediate actions to shore up the system, and long-term solutions for lasting change.

The commissioners recommended a long-term agenda involving creation of a sentencing system that would promote "truth in sentencing" while maintaining judicial sentencing discretion in handling individual cases. They proposed to develop a new system of voluntary sentencing standards designed to avoid unwarranted sentencing disparity, prevent prison overcrowding, and prompt judges to use a wider array of sentencing options.

The Commission's technical consultants have amassed a comprehensive sentencing database over 95,000 felony convictions sentenced over nearly six years. They have managed to integrate data from the courts, the DOC, the parole board, and the state's criminal justice information system. A computerized simulation model has been developed to predict the impact of changes in sentencing laws and practices on both prison and jail population levels. According to Sentencing Commission staff, the simulation model has predicted changes in prison population levels with a high degree of accuracy.

The simulation model has been used to estimate the impact of Alabama's current sentencing and correctional policies if no steps are taken toward reform. Their "status quo" estimate indicates that the prison population will grow to 28,922 by 2007.<sup>40</sup> The Commission anticipates that, if the proposed sentencing standards are adopted and followed in 75 percent of cases, the number of prisoners would stabilize at around 27,000.

The Sentencing Commissioners underscore the fact that the current crisis has arisen during "the best of times." A decade of relatively low unemployment and a decline in the number of youngsters in the "high risk" crime-prone age cohort have produced declining crime rates. The homicide rate is half of what it was in 1975. Arrests for serious "index" crimes have declined by 29 percent over five years and arrests for drug crimes are down by eight percent since 1996. But demographic shifts are expected in the near future and are likely to change this picture for the worse.

With both state and federal judges breathing down their necks, Alabama's criminal justice policymakers stand at a crossroads. If they choose to continue the traditional heavy reliance on incarceration in response to nonviolent property and drug crime, the price tag for out-of-state prison

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<sup>40</sup> If prison admissions had followed the pre-special parole docket trend line, however, the Commission projected that the population would have reached 33,450.

beds and construction of new prisons will be very steep. The Sentencing Commission invites Alabama policymakers to chart a different course.

The Commission has mapped out a blueprint for sentencing policy development. The two major components of the blueprint are a set of voluntary sentencing standards designed to promote both rational use of scarce correctional resources and uniformity in sentencing, while allowing judges to retain discretion to respond to individual circumstances; and the establishment of “a complete coordinated continuum of punishments” that would provide judges with a wider range of sentencing options.

#### **PROMOTING UNIFORM, RATIONAL SENTENCING THROUGH VOLUNTARY SENTENCING STANDARDS**

The Sentencing Commission has developed voluntary sentencing standards for Alabama’s judges that are designed to work within the current criminal codes. The proposed standards would be less rigid than presumptive or mandatory guidelines systems.<sup>41</sup> Though judges would be required to report reasons for any departures from the standards, there would be no mechanism for appellate review of sentences. Sentences that conform to the new standards would be exempted from existing statutory mandatory minimum sentencing requirements with the exception of those that mandate a sentence to life without parole.

Developed with input from judges, prosecutors, defenders and other criminal justice stakeholders, the standards help judges to make more informed sentencing decisions and give them guidance on whether a defendant should receive a prison sentence and provide a recommended range for those who are prison-bound. In devising the standards, the Commission considered both historical patterns of incarceration and the factors that currently trigger sentence enhancements and mandatory minimums. The standards *incorporate* those factors – with adjustments – into the voluntary sentencing standards so as to eliminate the need for *adding* them on top of the standards.

Although the voluntary sentencing standards build on current sentencing patterns, they seek to prioritize the use of incarceration for individuals who pose the greatest danger by reducing the use of long prison terms in nonviolent cases. For example, the new standards would not recommend a prison term for a person convicted of drug possession or theft unless he or she had a significant criminal history (multiple convictions probably resulting in a past prison commitment).

The standards, which cover the 26 offenses that account for 87 percent of the felony cases sentenced in Alabama, were successfully “field-tested” in Jefferson, Montgomery and DeKalb Counties. They have also been reviewed by local stakeholders in a series of 12 regional workshops conducted during the summer of 2004. Based on the experience piloting the standards, which performed as projected, the Sentencing Commission and its researchers believe that the standards can bring Alabama’s prison population growth under control.

Once the voluntary sentencing standards have been adopted and their effectiveness assessed, the Commission has been charged with developing “truth-in-sentencing” standards to be submitted for legislative approval three years after the initial standards take effect. The voluntary “truth-in-sentencing” standards would recommend that every prison sentence contain three elements:

- A minimum term – a “base” sentence to be chosen from the standards recommendation
- A maximum term – an additional term to be set at 20 percent of the minimum term, to be applied

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<sup>41</sup> A presumptive guidelines system (such as Minnesota’s) allows a judge to depart from a guidelines sentence, but such a departure could be challenged in an appeal to a higher court by the prosecutor or the defendant. A mandatory guidelines system (such as North Carolina’s) does not allow departures. The North Carolina guidelines grid gives judges limited leeway to account for aggravating or mitigating circumstances in a particular case, but they cannot depart beyond the set limits.

in response to bad conduct in prison.

- A mandatory one-year term of post-release supervision.

Adoption of the final standards would be yoked to abolition of parole, termination of the good-time release credit system, and institution of post-release supervision for all prisoners re-entering the community. The replacement of the current indeterminate sentencing system with a voluntary system of “truth-in-sentencing” standards would allow for greater uniformity and certainty in sentencing. Judges, prosecutors, victims and defendants would all know the range of recommended punishments and how long an individual sentenced to prison could be expected to spend behind bars. Thus policymakers, including legislators and corrections officials, would be able to better maximize the use of limited resources by projecting the likely impact of policy changes on the state’s prison population.

#### **ADDITIONAL PROPOSED REFORMS**

The Sentencing Commission has identified elderly and infirm prisoners as a group that consumes a disproportionate share of correctional resources, of whom some may be appropriate candidates for compassionate release. In 2005, the Commission recommended that the legislature establish a mechanism for the discretionary release of eligible prisoners who are 70 years of age or older, permanently incapacitated so that they present no danger to the public, or suffering from a terminal illness.

In the Commission’s 2005 annual report, its researchers estimated that there were 378 individuals who could conceivably qualify for release under the narrowly-drawn provisions of the act. Although the number of potential releasees is small, the impact of the proposed legislation could be significant because of the extraordinarily high cost of incarcerating people who are elderly and/or suffer from serious illness. The proposal has not been included in the Commission’s 2006 legislative package because the issue is currently being handled administratively.

Other proposed changes included:

- Opening access to juvenile records to judges, prosecutors, probation and parole officers so they can obtain information necessary to complete sentencing standards worksheets
- Limiting the statutes prohibiting first-and second-degree burglary to cases involving individuals who enter a dwelling armed, or who use or threaten the immediate use of a deadly weapon during commission of the crime — excluding cases where a weapon is among the items stolen but not used in the crime.
- Allowing out-of-state DUI convictions to be used to enhance punishment for repeat DUI offenses.
- Increasing the maximum fines that can be assessed by a judge to levels comparable to those established in Tennessee, Georgia, Virginia and other southern states; and establishing fines for the most serious drug trafficking offenses.

#### **BUILDING “A COMPLETE COORDINATED CONTINUUM OF PUNISHMENTS”**

Increased investment in community corrections and supervision resources would form the basis for creating a more rational “punishment continuum,” available for use as both sentencing options and re-entry programs for those released from prison. If they were provided a robust array of program interventions that incorporate various intensities of supervision or restrictions, the commissioners believe that judges and correctional officials would be amenable to reducing reliance on incarceration.

Although the number of counties served by community corrections programs has doubled in the past three-and-a-half years, from 17 in 2002 to 33 today, half of Alabama’s counties have no program. Further, the capacity of the existing programs limited. As a result, hundreds of people convicted of low-level drug and property offenses are being incarcerated for lack of a community-based alternative.

The additional funds provided for community-based corrections this year provides a good start, but more is needed. A steady increase in the level of investment in community corrections, if targeted to redirecting prison-bound defendants to community-based alternatives, could save millions given that costs for CPCA intermediate punishment programs for prison-bound defendants average \$11 per day, compared with \$33 per day for imprisonment.<sup>42</sup> Further, there is no shortage of enthusiasm on the part of the counties. According to the Sentencing Commission, Barbour, Bullock, Clarke, Choctaw, Butler, Crenshaw and Lowndes counties have all expressed interest in establishing programs.

The Commission has proposed that the Board of Pardon and Paroles be allowed to deduct an additional 20 percent from the wages of individuals housed in its residential facilities, in order to facilitate extension of residential re-entry options — now available only to women — to male parolees. Currently, while defendants assigned to work release or other community corrections residential programs can be required to surrender 45 percent of their gross wages for supervision, upkeep, court-ordered fines and fees, and victim restitution, the board can only deduct 25 percent of gross wages.

## **CONCLUSION**

Over the past few years most states in the U.S. have struggled with a severe fiscal crisis. In the face of declining revenues, policymakers — both Republicans and Democrats — have been re-thinking many of the costly correctional policies they had embraced when revenues were booming.

In 31 states, policymakers have introduced major reforms in their efforts to cut costs while improving the effectiveness of their sentencing and correctional systems. At least 20 states have rolled back mandatory minimum sentences or restructured other harsh penalties enacted in preceding years to “get tough” on low-level drug defendants or nonviolent lawbreakers. Legislators in at least 24 states have eased prison population pressures with mechanisms to shorten time served in prison, speed the release of prisoners who pose little risk to public safety, and penalize those who violate release conditions without returning them to prison.<sup>43</sup>

While state revenue performance improved somewhat in 2004, many state officials are continuing on a trajectory of reform. New initiatives in state after state are expanding and improving correctional supervision of people in the community instead of incarcerating them. These efforts have focused, in particular, on diverting those with substance abuse problems to treatment, and imposing alternative sanctions for those who violate conditions of probation or parole.<sup>44</sup>

In Alabama, the costs of over-reliance on imprisonment have not been borne equally. African Americans comprise 60 percent of prisoners, while they represent just 26 percent of the state’s resident population. The incarceration of individuals convicted of nonviolent offenses is far out of proportion to the damage caused by their behavior. Finally, Alabama’s use of imprisonment is characterized by deep geographic disparities that have no apparent justification.

Alabamians need only look to the experience in neighboring Southern states to understand that they cannot build their way out of the current prison overcrowding crisis. The price of doing so would be

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42 According to Ralph Hendrix, \$11 represents the cost of the intensive treatment and/or supervision and services required by those diverted from a prison sentence. Placements under drug court treatment and supervision, or less intensive types of community corrections programs are even more economical.

43 Greene, Judith A. “Positive Trends in State-Level Sentencing and Corrections Policy.” Washington, D.C.: Families Against Mandatory Minimums. November 2003. Available online at [www.justicestrategies.net/Publications.htm](http://www.justicestrategies.net/Publications.htm)

44 Lyons, Donna. “State Crime Legislation in 2004.” Denver, CO: National Conference of State Legislatures.

steep indeed, and without fundamental sentencing and correctional reforms these costs would spiral to the sky. Fortunately, cost-efficient relief for Alabama’s prison crisis — as well as effective solutions for the glaring inequities associated with over-reliance on imprisonment — is at hand.

The package of reforms that Alabama’s Sentencing Commission has placed before the legislature was crafted after years of painstaking study and analysis of the factors that have boosted the prison population to current levels. The Commission’s voluntary sentencing standards proposal has gained the support of judges, prosecutors, and correctional officials, as well as approval from the House of Representatives and the Senate Judiciary Committee. The reforms appear to have missed enactment earlier this year only due to a legislative stalemate over unrelated budget issues.

The Sentencing Commission’s reform package provides a gateway to a more fair and equitable system for sentencing, and a more cost-effective approach to provision of correctional services. This year’s increased investment in community corrections will provide judges with a much-needed boost in the resources they need to begin reducing unnecessary prison commitments. It should also set the stage for a strategic planning process designed to guide steadily increasing investments in future years that will build on the state’s evidence-based, effective program models.

The crime-control benefits documented in the Urban Institute’s evaluation of the Birmingham drug court mirror solid findings from a growing body of research completed since the start of the “war on drugs” which indicates that a rational cost-benefit calculation favors treatment over prison sentences hands-down. Alabama’s prisons are chock-full of people whose likelihood of continued offending would have been greatly reduced if they had been sentenced to mandatory treatment and other effective community-based options instead of prison.

Alabama legislators can be confident that enacting the Sentencing Commission’s reform package and making further investments in proven program models for a statewide community corrections system would solve the prison crisis, while making communities safer for all Alabamians.

### **(Footnotes)**

1 The deadly weapon enhancement constitutes a mandatory minimum sentence which normally cannot be suspended or split. Under the *Soles* decision (discussed below) it appears that if a sentence that includes a deadly weapons enhancement is for a term of 20 years or less, the judge could erase the mandatory minimum requirement by imposing a split sentence.

2 “Ordinary murder” carries a sentence of not less than ten years to life, while aggravated circumstances can trigger the death penalty or a sentence of life without parole.

3 If the offender has one or more prior Class A felony convictions, the sentence must be life without parole.