

Prison Reform

Huntsville Bar “Last Chance” CLE

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Overview

In 2015, the Alabama legislature adopted a reform package with the goal of reducing Alabama’s prison overcrowding. The changes made were a good start, particularly with regard to the parole process, but there are additional opportunities the legislature should pursue to reform sentencing practices to reduce the rate, and expense, of incarceration in Alabama.

This document reviews those changes and proposes solutions to address the remaining drivers of Alabama’s incarceration rate to reduce the state’s financial burden, without risking public safety.

2015 Prison Reform Package (SB67)

Class D Felonies:

- Reclassifies several frequently charged low-level drug and property offenses, including simple drug possession and property crimes involving a \$500-\$1500 dollar value.
- Maximum sentence = 5 years
- When they do not result in probation or other alternative sentences, judges are directed to impose a split sentence. Initial incarceration cap of 2 years, and limited to community corrections (not jail or prison)
- Not subject to Habitual Felony Offender Act enhancements
- Provides for indigent defense costs for these new felonies

Class C Felonies:

- When imposing an incarceration sentence for a Class C felony, a court impose a split sentence with a maximum initial period of 2 years’ incarceration

Burglary III:

- Removes burglaries of unoccupied non-dwelling buildings from the list of ‘violent’ offenses

Juvenile Confinement:

- ADOC facility housing a person under 18 must be fully compliant with sight and sound separation requirements, meaning that there cannot be clear visual contact or verbal communication between people under 18 and those over 18 in the facility
- Use of solitary confinement or isolation to meet these requirements is prohibited
- Applies only to ADOC facilities (not local jails)

Parole:

- Mandates creation of evidence-based guidelines for both docketing and release decision by the parole board
- Reduces the maximum set-off period (the period of time between a parole denial and reconsideration) for non-violent offenses from 5 to 2 years

Mandatory Release:

- People not released to probation or parole are required to be released to supervision at 3-24 months (depending on underlying sentence length) before end of sentence

Early Discharge from Supervision:

- Early discharge review required of most parole and probation cases every 2 years when there has not been a revocation and all financial obligations are current

Intermediate Sanctions:

- Creates a range of intermediate sanctions short of revocation that are available for violations of probation and parole conditions, such as: electronic monitoring, ignition interlock device, day reporting, diversion or treatment programs, etc.

Technical Violations:

- Caps incarceration for technical violations of probation and parole to 45 days
- Applies to first three such violations only
- Caps do not apply to people convicted of sex offenses or Class A violent offenses

Evidence-Based Practices, Risk and Needs Assessments:

- Requires the use of EBPs and RNAs at various points throughout the system so treatment, supervision, and release decisions are made in a smart, effective way

Driver's License Suspension:

- Limits offenses that trigger license suspension to possession with intent to distribute and trafficking, both of which require possession over specified quantity thresholds.

TANF/SNAP:

- Removes lifetime ban
- Allows people to be eligible for TANF and/or SNAP benefits upon completion of a sentence for a drug offense (or while on supervision and meeting requirements)

Medical Furlough:

- Expands eligibility for this release mechanism

Ongoing Study – Mental Health:

- Creates a joint legislative prison task force to study mental health issues at reentry, in consultation with system stakeholders, and deliver a report to the legislature in 2016

Driver's Licenses at Reentry:

- Requires the development of a program through which people leaving prison can get DLs

Reentry – Small Business Assistance:

- ADECA directed to establish small business training and assistance program for people exiting the correctional system

Remaining Issues & Proposals

1. Habitual Felony Offender Act (§13A-5-9)

Alabama’s Habitual Felony Offender Act (aka “three strikes and you’re out”) has been one of the leading contributors to Alabama’s overcrowded prisons, with an estimated 30% of the DOC population sentenced under the statute. Although only 28 states have a habitual offender enhancement statute, with a second felony of any classification* triggering a life sentence, Alabama’s HFOA law is easily classifiable as the harshest its kind in the nation. NOTE: Class D felonies, created by the 2015 reforms, are not included in the HFOA.

The current sentencing structure in Alabama, a life sentence is available for all Class A felonies even if the defendant has no prior felony convictions. The HFOA enhancements make a life sentence available for any second felony conviction, regardless of the current or prior felony classification, often resulting in a disproportionate sentence for the crime. As the Alabama Sentencing Commission has noted, the practice of failing to distinguish between the degree(s) or timing of prior offenses is incongruent with the vast majority of other states’ laws. Alabama’s HFOA provides for the following:

<u>Type of Offense</u>	<u>No prior Felonies</u>	<u>1 prior Felony</u>	<u>2 prior felonies</u>	<u>3 prior felonies</u>
Class A (e.g. murder, 1 st degree robbery, drug trafficking)	10 years to life	15 years to life	99 years or life	Life or life without parole
Class B (e.g. 1 st degree manslaughter, robbery, 1 st degree assault, 2 nd degree drug manufacturing)	2-20 years	10 years to life	15 years to life	20 years to life
Class C (e.g. stalking, criminally negligent homicide, possession of a controlled substance, 2 nd possession of marihuana (personal use) charge)	1-10 years	2 years to life	10 years to life	15 years to life

Kirby v. State of Alabama: In 2001, the Alabama legislature amended the HFOA to allow individuals sentenced to serve life for non-violent offences prior to the 2000 changes to apply for early parole. In 2004, the Alabama Supreme Court, in *Kirby*, upheld this amendment and ruled that non-violent offenders could apply to be resentenced under the new sentencing structure. Then, in 2014, the legislature repealed the retroactivity provision, closing the door for future HFOA resentencing opportunities for the remaining non-violent offenders still serving life sentences.

Proposal #1: Amend the Alabama HFOA to mirror Mississippi law by restricting the sentence of life in prison (with or without the possibility of parole) to only the 3rd violent Class A felony convictions

arising out of separate incidents (i.e. make it a true “3 strikes and you’re out” statute and applying the harshest sentences to the most serious, repeat offenders).

**An alternative approach: repeal the mandatory enhancement and allow the jury to consider the option (while considering the severity and timing of priors). GA and MS will be considering this in their respective legislative sessions in 2016.

Proposal #2: Reinstate the 2001 HFOA’s retroactivity provision: “The provisions of Section 13A-5-9 of the Code of Alabama 1975, as amended by Act 2000-759 of the 2000 Regular Session, shall be applied retroactively by the Board of Pardons and Paroles for consideration of early parole of each non-violent convicted offender based on evaluations performed by the Department of Corrections and submitted to the board.”

2. **Drug and Property Sentencing**

Even with shifting of a few low-level drug and property crimes to the newly created Class D felony classification, Alabama’s drug and non-violent property crime laws remain among the most severe in the country. This is in large part to the low relevant thresholds that trigger a felony change, as detailed below. The trend in other states, including our southeastern neighbors, is to increase the relevant levels to restrict the number of non-violent drug and property offenders serving long sentences and reserve long-term, costly incarceration for serious offenders.

Additionally, Alabama law provides extremely punitive “add on” sentences, even for first offenses (i.e. drug use near a school or church, without a prior conviction, carries a minimum sentence of 15 years).

a. **Drugs**

i. **Marijuana possession**

In Alabama, the first conviction of Possession of Marihuana (“for personal use” or any amount less than 2.2 lbs) is a Class A misdemeanor. Ala. Code §13A-12-214. A second “personal use” offense or possession of any amount over 2.2 lbs is a Class C felony. Ala. Code §13A-12-213.

There is tremendous disparity between this and Alabama’s DUI structure, where the felony is not triggered until the 4th offense. Additionally, the average weight requirement for a felony among the southeastern states is 2 ounces (anything less than that amount is a misdemeanor, regardless of the number of offense).

Note: The Habitual Felony Offender Act does not apply to DUI convictions, whereas it does apply to drug convictions.

Proposal: Expand misdemeanor classification of marijuana possession (not just 1st time offenders). Mirror Mississippi and set a limit for personal use (e.g. 1 ounce) but never allow a conviction of that offense to trigger a felony.

An alternative approach: Set a limit for personal use (e.g. 2 ounces) and apply DUI sentencing structure (felony triggered on 4th offense).

ii. Inchoate drug offenses

Alabama is the only state that punishes an uncompleted drug offense at the same level as the underlying substantive offense. For instance, *criminal solicitation to commit* a controlled substance crime and a controlled substance crime receive the same punishment, even though the former never involved a completed act. Only murder receives such treatment. In all other instances, a conviction of solicitation, attempt, or conspiracy of a crime is punished at one level lower than the underlying crime.

Proposal: Reduce the sentencing range for controlled substance offenses that involve inchoate crimes (i.e. solicitation, attempt, and conspiracy) to one step below the underlying offense.

- Ala. Code §13A-12-202, 203, and 204

iii. Enhancements (i.e. “add on” sentences) and mandatory minimums

Alabama law mandates an additional 5 years be added to a sentence if a drug offense was committed within 3-miles of a public or private K-12 school, college/university, or public housing unit. *See* Ala. Code §13A-12-250 and 270. Additionally, possession of a firearm tacks on a mandatory 5-year sentence (and \$25,000 fine) in trafficking convictions. *See* Ala. Code §13A-12-231(13). Judges should have the discretion to sentence more harshly those offenders who risk the welfare of school children, mandatory “add-ons” have imposed decades of imprisonment even where there is no relationship between the offense and its proximity to a school or church.

Proposal: Reduce the sentencing range for controlled substance offenses that involve inchoate crimes (i.e. solicitation, attempt, and conspiracy) to one step below the underlying offense and require that anyone arrested for a drug offense in an enhancement zone must have knowledge that he or she was in a restricted area.

NOTE: Mississippi created a safety valve for drug trafficking that will allow a judge to sentence down to 25% of the applicable mandatory minimum (to 2.5 years for trafficking, 6.25 for aggravated trafficking) with reasons for departure on the record and upon findings that: (1) person was not leader of criminal enterprise, (2) person did not use violence/weapon in commission of crime, (3) offense did not result in death or serious bodily injury to a non-participant, and (4) interests of Justice are not served by imposition of Mandatory Minimum.

b. Property

Alabama is 1 of 16 states where a property offense amounting to \$500 triggers a felony. In 2012, Georgia increased its felony threshold to \$1,500 and, as seen in the chart below, we lag significantly behind Mississippi’s sentencing structure.

MISSISSIPPI		ALABAMA	
Up to \$1,000	Misdemeanor (1 st /2 nd offense)* 0-3 years (3 rd /subsequent)	Up to \$500	Misdemeanor
		\$500-\$1,500	0-5 years** (Class D)
\$1,000-\$5,000	0-5 years	\$1,500-\$2,500	1-10 years** (Class C)
		\$2,500+	2-20 years (Class B)
\$5,000-\$25,000	0-10 years		
\$25,000+	0-20 years		

*Subject to presumptive probation

**Subject to initial sentencing caps discussed

Proposal:

Proposed Reform	Sentence
Up to \$1,500	Misdemeanor
\$1,500 - \$5,000	0-5 years** (Class D)
\$5,000 - \$25,000	1-10 years** (Class C)
\$25,000+	2-20 years (Class B)

3. Burglary III (§13A-7-7)

The 2015 reforms removed burglaries of unoccupied non-dwelling buildings from the list of ‘violent’ offenses. Burglary III (of an unoccupied house) involves no act or threat of violence and should not be listed as a “violent offense” alongside battery, robbery and murder.

4. Technical Violations

The provisions related to technical violations adopted in the 2015 reforms excluded Class A felonies from changes made to technical violations. Mississippi applies caps on incarceration for technical revocations to everyone, regardless of the underlying offense.

5. Retroactivity of 2015 Sentencing Reforms

The 2015 reforms included a few sentencing changes – mostly low-level, non-violent offenses - which, if applied retroactively, would help in the stated goal of reducing prison overcrowding in Alabama.

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