THE UNIVERSITY of MISSISSIPPI
SCHOOL OF LAW

MEMORANDUM OF LAW

To: The Honorable William L. Waller, Jr., Chief Justice, Mississippi Supreme Court and the Mississippi Sentencing Disparity Task Force

From: Phillip W. Broadhead, Clinical Professor of Law, The University of Mississippi School of Law

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Re: Policy Considerations for the Adoption of State Sentencing Guidelines in Criminal Cases

In 2007 the Conference of Chief Justices positively endorsed the findings of a report from the National Center for State Courts (NCSC) entitled, "Getting Smarter About Sentencing," which made recommendations based in part on (among many other resources) a survey conducted by Princeton University on public attitudes toward the sentencing of defendants in criminal cases. The findings of the survey were summarized in the 2006 NCSC report:

> While people may not agree on all of the details, there is surprising consensus about various aspects of sentencing as it is and how it should be:
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> •Americans consistently favor a much tougher approach in sentencing those convicted of *violent* crimes than they do in sentencing *non-violent* offenders.
>
> •Americans think *rehabilitation* is a more important priority than punishment and overwhelmingly believe that many offenders can, in fact, be successfully rehabilitated. But most see America's prisons as *unsuccessful* at rehabilitation.
>
> •Current sentencing policies and practices are widely viewed as *unfair* to minorities, non-English speakers, and low income offenders, and prone to give higher income offenders preferential treatment.
>
> •High levels of public support are found for *alternatives to prison* like probation, restitution, and mandatory participation in job training, counseling or treatment programs, at least for non-violent offenders. The public is particularly receptive to using such alternatives in sentencing younger offenders and the mentally ill.

The survey also found by an almost 3 to 1 margin the public favoring *prevention and rehabilitation* over *enforcement and punishment* as the best way to deal with non-violent offenders. Rehabilitation was seen as achievable for many offenders – eight in 10 people surveyed (79%) also rejected the idea that little can be done to turn an offender into a productive citizen. But prisons are generally perceived by the public as simply a "warehouse" for people, and a majority (59%) of state correctional facilities are seen by persons surveyed as *not too successful* or *not at*

all successful at rehabilitating inmates. The survey also revealed the public (by 76%) would rather see their tax dollars support programs that try to prevent crime by helping offenders find jobs and get treatment, rather than be used to build more and more prisons.

A. Are There Material Differences in Sentencing in Mississippi Courts?

The first questions to be answered in the process of considering the legislative adoption and appellate court enforcement of sentencing guidelines is relatively simple on the surface: Do material differences exist from trial judge to trial judge in sentencing similarly-situated defendants, and do these material differences affect sentencing in violation of the Due Process and Equal Protection Clauses of the Mississippi and United States Constitutions? Anyone who has spent any time working within the criminal justice system in Mississippi has stories about quantifiable differences in sentencing by a judge for the same conviction in the same or different case before that specific trial court, but this anecdotal evidence *does not* form a practical basis for the adoption of sentencing guidelines, nor does it include hard numbers on sentencing disparities that may exist among the *individual* circuit judges *across* the twenty-two judicial districts in Mississippi. The jump-drive handout for today includes sentencing data generated by the Mississippi Administrative Office of Courts (AOC) to provide the Task Force with records containing statistical information from criminal dispositions to compare and contrast the individual sentences handed down over the past ten years in cases involving ten different crimes (see the "Sentencing Data- AOC Reports" folder included on the jump drive handout):

Miss. Code Ann. § 97-3-7 - Armed robbery
Miss. Code Ann. § 97-3-95 - Sexual battery
Miss. Code Ann. § 97-3-35 - Manslaughter
Miss. Code Ann. § 97-37-5 - Possession of firearm by a convicted felon
Miss. Code Ann. § 97-21-59 - Uttering a forgery
Miss. Code Ann. § 41-29-139(1) - Sale of a controlled substance (other than marijuana)
Miss. Code Ann. § 41-29-139(2) - Sale of marijuana
Miss. Code Ann. § 97-5-39(2)(d) - Felonious child abuse
Miss. Code Ann. § 97-17-70 - Receiving stolen property
Miss. Code Ann. § 97-17-41 - Grand larceny

A detailed analysis of this statistical data from the AOC will reveal any substantial differences in sentencing (including either *pre-trial* in a guilty plea by the defendant or *after* a jury trial) from all circuit court judges among the judicial districts across the state for the Task Force to conclude whether or not material disparities do indeed exist in Mississippi today.

B. Policy Basis for State Sentencing Guideline Systems

There are three basic systems of sentencing guidelines that appear in the fifty states today (this report does not include a study of the Federal sentencing guidelines): (1) voluntary, (2) advisory, and (3) presumptive. (For a compilation of the 19 states who have enacted and

presently have one of these differing systems, see the two NCSC reports included on the jump drive handout, "State Sentencing Guidelines: Profiles and Continuum" and "Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States") In the states that have a *voluntary* system, individual trial judges have the *option* to follow or not follow established guidelines when sentencing a criminal defendant in their courts. The *advisory* system requires trial judges *to consider* an established range of sentencing tailored to classes if offenses and offenders, but does not require the sentencing judge to strictly adhere to the guidelines. A departure from the sentencing range for a particular defendant may be handed down by a trial judge with only a simple written statement of the reasons for the departure. The states that follow the *presumptive* system of guidelines, it is *mandatory* for each trial judge to sentence defendants with different criminal records within the range set forth for particular class of offenses. A departure from the range of sentences is allowed *only* in "particular substantial and compelling circumstances" of the individual case before the court, and an appellate review of all sentences handed down (whether by a guilty plea or a verdict of guilty after trial) is to be made available in order that the state supreme court can enforce the "mandatory" nature of the system. In all three systems, a "worksheet" is created with *a grid chart* that produces a proportional sentencing range by observing three main factors found in each individual case: (1) the seriousness of the offense (violent/nonviolent), (2) the defendant's past criminal record (first or habitual offender), and (3) the degree of culpability of the defendant.

When considering implementation of a sentencing guideline structure for trial judges to follow after the conviction of a citizen of a criminal offense, the importance of judicial discretion must be *weighed against* the possibility of sentencing disparities among offenders who commit similar offenses and who have comparable criminal histories. Preference for probationary, treatment, or other alternatives to incarceration should be presumptive for first-time offenders and for nonviolent crimes. Sentencing guidelines should also be designed to *first* identify the risk created for public safety by disproportionate imprisonment through sentencing policy structures. A policy modification endorsed by the NCSC, The National Judicial College, *and* the Crime & Justice Institute, known as "Evidence-Based Sentencing (EBS),"[1] attempts to modify existing sentencing alternatives using a "Risk and Needs Assessment" instrument to be employed by trial judges when determining sentence. This modification of the policies of imprisonment is designed to begin the process of rehabilitation the moment an offender enters prison, rather than just simply "warehousing" inmates. Under the existing policies of "retribution," the vast majority inmates are released only to re-offend and return to prison within five years. The sentencing judge, probation officers, and corrections officials should identify "high-risk" (to re-offend) defendants and to *immediately* begin to provide the services these inmates require for rehabilitation, with a view toward *the end* of incarceration and release of the inmate back into society. This system of sentencing policy modification comes full-circle in the start of another

[1] https://cdm16501.contentdm.oclc.org/digital/collection/criminal/id/185

initiative presently being pursued by the Department of Corrections, the Inmate Re-Entry Program, which is designed to assist recently released inmates to find housing, jobs, and, most importantly, to reduce their odds of going back to prison through intensive supervision of the highest-risk offenders and cognitive behavior modification in group and individual counselling settings. Sentencing guidelines, coupled with re-entry supervision, promote this "in/out" awareness by judges, corrections officials, and probation officers that prisoners will eventually return to society, and unless they are *required* to participate in programs that increase the likelihood of success of rehabilitation, the endless cycle of recidivism will continue.

C. Sentencing Guideline Systems Employed in Other States

Different states apply sentencing structures in different ways, but in examining the 50 states' systems of imposing sentence after conviction of a criminal offense, three broad categories emerge. In states such as Virginia that follow a *voluntary* system of "recommended" sentences, judicial discretion forms the cornerstone of their criminal sentencing process, leaving judges free to hand down *any* sentence less than the statutory maximum. Virginia and its sister states who do not require adherence to the strict application of sentencing ranges pay a significant price for this "judicial discretion" through the possibility of material sentencing disparities among the trial judges in these states. Judges in these "voluntary" states are given the unfettered freedom to hand down sentences given to offenders guided *generally* by to the criminal histories of the offenders and the background of the offense. The disparities in sentencing among trial judges also permits the *possibility* that still-existing parole boards may keep offenders incarcerated *longer* in reaction to the differences in sentences from judge to judge, which also inevitably leads to inconsistencies in expected release dates among similarly-situated inmates. Interestingly, Missouri had a "voluntary" system of sentencing guidelines, which was controversial in its application and was repealed by the legislature in 2015. Virginia also presently has a "voluntary" guideline structure in place, but has no Sentencing Commission to oversee compliance by trial judges.

The second category of sentencing structures, which are *advisory* in nature, are found in Maryland and the other states that attempt to balance judicial discretion *equally against* the possibility of disparity in sentencing, and the struggle between these two competing forces is powerful. Maryland attempts to lessen this tension by a form of limited judicial discretion through the requirement of the production of a written statement by the sentencing judge *explaining* the reasoning for a departure from the sentencing guideline range set down for the particular offender and offense (See the "Maryland Sentencing Guidelines Manual" found in the jump drive handout). However, Maryland's guidelines are *voluntary* among the judicial districts, and discrepancies can easily exist among the judges who follow the recommended guidelines and those who do not. In the districts that follow the guidelines, offenders know precisely how much time of a prison sentence they must serve, and Maryland permits its judges to adjust sentences given to specific offenders for specific offenses through a worksheet that attempts to

balance the mitigating and aggravating factors in the case in order to find a fair sentence. As a matter of stated public policy, judicial discretion is of a low priority in Maryland's sentencing system. Maryland's system also limits the power of sentencing judges (who must stand for election) to impose unreasonably excessive sentences in response to public pressure, and their system is also inadequate to allow judges to facilitate prison population control and the avoidance of overcrowding through sentencing discretion.

In North Carolina, low sentencing disparity appears to exist among offenders with similar offenses and similar prior criminal histories because of the *presumptively mandatory* nature of the sentencing guidelines trial judges *must* follow after conviction. A "presumptive range" in sentencing may be departed upward or downward within specific sentences due to aggravating or mitigating circumstances, if a "compelling" justification is present and documented in writing by the trial judge in the case. Although in states such as Virginia and Maryland a defendant may *not* appeal a sentencing departure, in North Carolina and other states that impose a *mandatory* structured sentencing structure, a convicted person is allowed to appeal a sentence imposed under the "guidelines" and appellate courts are allowed to adjust sentences much like the system employed by the Federal courts. Prison sentences are *required* for violent and repeat offenders, while probation, treatment, or other alternative sentencing outcome is *presumptive* for nonviolent first-offenders.

D. Formal State Sentencing Oversight Commissions

Of the nineteen states that have statutory sentencing guideline systems, only seventeen have a permanent sentencing commission to collect, report, and collate sentencing data for each trial judge in the state. Although Missouri legislature repealed their voluntary sentencing guideline system in 2015, interestingly, it still retains a "bare-bones" Sentencing Commission that collects and reports sentencing data to the state supreme court (Alabama's Sentencing Commission website has also gone dark). A formal sentencing oversight commission (and *how* it should collect, report, and collate sentencing data) should be considered as essential should Mississippi adopt a system of guidelines in order to insure adherence to and compliance with such responsibilities in sentencing from judge to judge in each judicial district in the state. In Mississippi the AOC is presently charged with collecting this data from each of the county clerks in the state in *all dispositions* in circuit court cases, both civil and criminal, and then generates reporting statistics for the cases in a static form that can be produced in a .pdf format (see "Sentencing Data- AOC Reports" included on the jump drive handout). This reporting by the AOC of these court records would be essential to the oversight operation of a sentencing commission to identify which judges are in or out compliance with sentencing guidelines. Should Mississippi adopt a guidelines system the *form and content* of reporting this sentencing data by the AOC would also be required to be "made-to-order" for use by a sentencing commission in their analysis of each judge's compliance with the guidelines in order to make an accurate assessment of whether the sentences actually handed down conform to the range established by the system.

Additionally, another layer of reporting information to the AOC would be required to be created for circuit clerks to gather disposition data in criminal cases in the form of a "sentencing worksheet," which contains a *calculation grid* designed to determine a fair sentence under the terms of a sentencing guideline structure (see "Sentencing Worksheet Forms" included on the jump drive handout). The procedural method of the creation of these worksheets vary somewhat from state to state, but sentencing judges are *ultimately responsible* for the accuracy of the background information collected in each case, the actual calculation of the grid to find the sentencing range, and the disposition in sentencing that complies with the guideline structure. Under NCSC recommendations, three considerations are key for populating a grid worksheet with precise information in compliance with a sentencing guideline system: (1) the seriousness of the offense (violent/nonviolent), (2) the defendant's past criminal record (first or habitual offender), and (3) the degree of culpability of the defendant. Using these three factors to then populate the grid, the worksheet would produce a uniform and consistent range of sentences for all similarly-situated defendants for each of the judges across all of the judicial districts in the state.

E. Policy Considerations for Mississippi

Each of the three sentencing guideline systems described above have inherent benefits and drawbacks. The best sentencing guideline system will take the advantages of all three systems, while limiting their intrinsic weaknesses. Key advantages to be *considered* in a Mississippi sentencing guideline system include (1) a *presumptive* structure of sentencing guidelines personalized to the status of individual offenders and specific convictions to promote a minimum sentencing disparity among judges; (2) limited judicial discretion supported by a documented aggravating/mitigating factors *worksheet* in the case in order to tailor sentences by judges (who are elected) to prevent the imposition of excessive sentences in response to public pressure and to facilitate the avoidance of prison overcrowding; (3) certainty by offenders about release dates; (4) the ability of defendants to appeal a sentencing departure; and (5) prioritizing prison sentences for violent and repeat offenders, while imposing presumptive probationary sentences for nonviolent and first offenders. The primary sentencing guideline weaknesses to be *avoided* include material sentencing disparities among individual judges for similarly-situated offenders due to (1) a "voluntary" implementation of the adopted guidelines, (2) limiting judicial discretion for a departure from the guideline ranges when the judge inadequately explains the reasoning for a departure in sentencing for a particular offender and offense, (3) an inability for sentencing judges to reward inmates for mitigating and rehabilitative efforts *before* sentencing through a written statement setting out reasoning for the downward departure, and (4) refusing to *require* judges to facilitate prison population control through sentencing, and the avoidance of overcrowding through an alternative sentencing presumption for nonviolent offenders that does not require immediate incarceration.

An effective sentencing guideline system would take a balanced approach between judicial discretion and the risk of sentencing disparity, while adding the positive attributes of alternative sentencing outcomes. For example, sentencing guideline implementation should not be "voluntary" from judge to judge in order to avoid sentencing disparity between judges who implement the guidelines in their sentencing practices and those who do not. In addition, judges should be given the ability through sound judicial discretion supported by written reasoning to reward inmates for their efforts of mitigation in order to promote rehabilitation, which is not found in any system detailed above. In contrast to both Maryland and North Carolina, in a balanced system trial judges must be allowed to use judicial discretion supported by written reasoning to go outside sentencing guidelines in nonviolent offenses to facilitate prison population control. While some measure of judicial discretion should be a matter of stated public policy, there should be a clear inventory of all mitigating and aggravating factors *required* to be taken into consideration by the judge during the sentencing process in order to limit the possibility of disparity among similar offenders.

Offenders should also be able to appeal a departure in sentencing by the trial judge in the *presumptive* sentencing guideline ranges that results in a material disparity compared to other similarly-situated offenders in order to allow the Mississippi Supreme Court to enforce judge adherence to the guidelines. The ability to appeal a sentencing departure from the established guidelines promotes sentencing equality and consciously limits the authority of judges (who must stand for election) to impose excessively severe sentences in response to perceived public pressure.

Perhaps the most important part of the practical application of any sentencing guideline structure is identifying *what person or persons* will investigate the background of the conviction, then complete the pre-sentencing worksheet grid. In most states with a sentencing guideline structure, the probation and parole officer compiles the worksheet information and makes a report to the sentencing judge. In Maryland, depending on the circumstances, either a parole agent or even the judge, through delegation to staff, may complete the sentencing worksheets. In North Carolina, the district attorney completes a "prior record" form for the offender, and the trial judge is responsible for assembling the "sentencing judgment" form. In examining the "worksheet" foundation used in most sentencing guideline processes, it appears the best possible option would be to split the responsibility for creating the sentencing guideline worksheets equally among the prosecutors, defense attorneys, and the court's probation officers to avoid an unfair burden being placed on the trial judge to assemble all of the information necessary to determine a fair sentence under the guidelines. The trial judge's ability to rely on the implementation, correctness, and clarity of the sentencing guideline worksheets by the officers of the court ultimately affects the fairness of the sentence handed down as a result of an examination by the judge of all of the aggravating and mitigating factors compiled in the worksheet forms.

F. Conclusion

Of course all features, practical applications, and consequences of the implementation of any system of sentencing guidelines should be considered thoroughly against the *existing* statutory maximum and minimum sentences *before* drafting any broad scheme for trial judges to employ in criminal cases resulting in a conviction. Sentencing guidelines have implications far beyond the words and numbers in the criminal rules or code, as they will affect offenders and victims, their families, the State of Mississippi (and its budgets for the judicial branch and corrections department), and, most importantly, the overall confidence of the public in the criminal justice system of Mississippi.