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**THE PENNSYLVANIA COMMISSION ON SENTENCING**

**TESTIMONY BEFORE THE HOUSE PROFESSIONAL LICENSURE COMMITTEE**

**Hearing on Enforcement and Investigation of  
Professional and Occupational Licenses**

**House Bill 2104, PN 3543  
House Bill 2105, PN 3544  
House Bill 2108, PN 3547**

**June 1, 2006**

*(Revised as presented)*

**Mark H. Bergstrom  
Executive Director**

Good morning Representative Dally and members of the Committee on Professional Licensure. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you providing this opportunity to appear before you today to comment on House Bills 2104, 2105 and 2108. The Commission has not taken a formal position on these bills, so I will limit my remark to highlighting aspects of the proposed legislation that may warrant closer examination by the committee.

#### House Bill 2104

House Bill 2104 imposes a duty on investigators with the Department of State's Bureau of Enforcement and Investigation to report facts and circumstances that would constitute a crime to the prosecutor representing the licensing board or commission, and if approved, provide notice of the same to the district attorney of that jurisdiction. The bill appears to limit this duty-to-report to facts and circumstances uncovered in the course of the investigation of a disciplinary matter. Such a limitation is important, since the reporting requirement in the proposed legislation extends to all classes of crimes (i.e., summary, misdemeanor, felony) and includes all Titles (e.g., Crimes Code, Vehicle Code, Controlled Substances Act, etc.). Absent such a limitation, what seems to be a reasonable requirement could begin to impact the ability of investigators to perform their regular duties.

#### House Bill 2105

House Bill 2105 addresses two procedures for holders of professional or occupational licenses: bail and sentencing.

Under the bail proposal, the magisterial district judge or other issuing authority would be required to consider whether a defendant poses a threat to the victim or any other individual by continuing to hold the license or practice the profession or occupation. As with the previous bill, this appears to be a reasonable requirement, but only if the issuing authority has access to the necessary information in a timely manner. Bail and pretrial resources vary tremendously from county to county, with bail decisions made at all hours of the day and night. As a result, the

availability of reliable information, the implementation of appropriate procedures, and the monitoring and enforcement of the conditions imposed may be inconsistent across the Commonwealth.

It should be noted that the Rules of Criminal Procedure provide substantial guidance to issuing authorities regarding bail and pretrial release (see: Pa.R.Crim.P. Chapter 5). While the proposed legislation does not appear to be in conflict with these Rules, it does direct decisions being made by the issuing authorities. In the Sentencing Code, where legislation was enacted relating to the *informational basis of the sentence* and the *imposition of the sentence*, the statutes were suspended by the Pennsylvania Supreme Court as inconsistent with the Rules of Criminal Procedure (see: 42 Pa.C.S. §§9731, 9732, 9733, 9734, 9735, 9736, 9751, and 9752). In effect, a Separation of Powers issue. It is not clear that this is an issue here, but it may warrant further review by the committee.

Turning to the sentencing proposal, I should note that exactly one year ago today, I testified before the House Judiciary Committee's Subcommittee on Courts regarding proposed amendments to the restitution statutes. At that time, I testified in support of efforts to hold offenders accountable to victims and the community through the imposition and collection of a wide range of economic sanctions, including fines, costs, fees and restitution. Ironically, the legislation proposed in this section, at least as presently drafted, may undermine the ability of courts to impose such sanctions, and of offenders to meet these increasing financial obligations.

House Bill 2105 would require the court to order the surrender of a professional or occupational license for any person convicted of an offense graded a third degree misdemeanor or higher. The statutory maximum for a third degree misdemeanor is one year. However, there are also a number of 'ungraded' or 'unclassified' misdemeanors, with a wide range of statutory maxima. As an example, a first DUI conviction within a 10-year look-back period is an ungraded misdemeanor with a statutory maximum of six months; possession of a small amount of marijuana is an ungraded misdemeanor with a statutory maximum of 30 days; Possession with Intent to Deliver (PWID) (Schedule V) is an ungraded misdemeanor with a statutory maximum of one year *if a first-time offender* and a statutory maximum of two years *if a subsequent*

*offender.* If the intent in using a misdemeanor of the third degree is to provide a one-year threshold, it may be helpful to include the statutory maximum in the legislation. If, on the other hand, the intent is to exclude all ungraded or unclassified misdemeanors, it may be helpful to state so in the legislation.

In the sentencing proposal, there does not appear to be a requirement for a nexus between the offense and the profession or occupation. If this is correct, then every defendant convicted of a misdemeanor of the third degree or greater, regardless of when or where it occurs or whether it has any bearing on the defendant's profession or occupation, will be required to surrender his or her license, whether an accountant or a barber or a real estate agent or a doctor. And while the proposal mandates the surrender of a license, it does not address the duration of the loss of that license, or under what conditions the license is returned or reinstated.

If there is interest in narrowing this provision, one option is to incorporate language from the bail proposal, requiring the court to determine whether the defendant poses a threat of danger to the victim or any other individual by continuing to hold the license, and if this threat exists, require a surrender of the license. A second option is to provide the courts with this new sentencing alternative, but to remove the mandatory requirement, so that courts have the discretion to decide when and if to order the surrender of a license.

The Commission has found through its own research what national studies often report: consistent employment is one factor that is regularly associated with lower recidivism rates. It is for this reason that teaching inmates marketable skills and providing opportunities for certification and licensing have become key components of offender re-entry efforts. Requiring offenders to surrender professional or occupational licenses as a broad-based policy runs counter to this trend and these ongoing efforts; it reduces the prospect of an offender obtaining or maintaining employment; it decreases the ability of the offender to pay victim restitution, court costs and other economic sanctions; and it increases the likelihood that the offender will re-offend.

## House Bill 2108

House Bill 2108 amends the aggravated assault statute by adding attorneys and those with professional or occupational licenses as the 37<sup>th</sup> and 38<sup>th</sup> classes of individuals specifically protected under the statute. While the designation of certain classes of protected individuals and the associated enhanced penalties for violations initially applied only to teachers, police and firefighters, it has been expanded regularly and now includes other law enforcement officers/agents, other ‘first responders,’ court-related officials, state elected officials, public utility employees, and more. However, the unprecedented expansion recommended in this proposal, with the addition of all licensed attorneys and all those that hold professional or occupational licenses, seems to move the description of the protected classes well beyond its traditional link to government employees working in high risk environments.

So why is being in a protected class such a popular request? At least three reasons have been advanced to explain this development; the first two describe the attraction to being a designated class under the aggravated assault statute, and the third describes the resistance to obtaining a conviction under the simple assault statute.

The first reason for the creation of so many protected classes is the enhanced penalties available for offenses against a member of one of the classes. An assault resulting in bodily injury that would generally constitute simple assault (M2, statutory maximum of two years) is elevated to aggravated assault (F2, statutory maximum of ten years) if the victim is a member of a protected class and the assault occurs ‘while in the performance of duty.’ The increased penalties are intended to provide a greater deterrence so as to reduce the incidence of assault against those performing official duties or services; and to provide greater punishment for those offenders who are not deterred.

The second reason for the growth in these protected classes is the issue of proportionality, or perhaps better described as relativity or equality. Once a class of individuals is identified for special protection under a statute, other similar classes of individuals are going to seek the same recognition and protection. And so, police and firefighters eventually lead to law enforcement

and first responders; probation officers and parole agents lead to judges and prosecutors and public defenders and caseworkers. This proposal to add all attorneys and those with professional or occupational licenses is just the latest example of this.

The third reason for continued requests for new protected classes may be that the penalties associated with simple assault, at least in those cases where the injuries sustained fall just short of 'serious bodily injury,' or which occur 'while in the performance of duty,' do not seem adequate for the harm caused. And the easiest way to increase the penalties in some of these instances is to add another category as a protected class.

Over the years, the Commission has received comments and suggestions from many practitioners regarding a restructuring of the assault statutes. Some have called for the elimination or streamlining of the protected classes in aggravated assault. Others have called for an increase in the grading of simple assault. Perhaps the most common suggestion is the creation of a mid-range assault, between aggravated and simple assault, as part of a broader, comprehensive examination of all offenses and penalties found in Chapter 27 (Assault). Considering the scope of the proposal contained in House Bill 2108, this may be an appropriate time to begin a systematic review of the assault statutes.

### Conclusion

Thank you again for providing this opportunity to testify. The primary purpose of the Commission on Sentencing is to create a consistent and rational statewide sentencing policy that promotes fairer and more uniform sentencing practices in the Commonwealth. As an agency of the General Assembly, the Commission on Sentencing is available to work with the Professional Licensure Committee, its members and its staff as you continue to review these issues.

Thank you.