

HB

106

STATE OF ALASKA
HOUSE OF REPRESENTATIVES
Box V, Juneau, Alaska 99811
(907) 465-2487 • 465-2498

REPRESENTATIVE CLIFF DAVIDSON

District 27

Box 746, Kodiak, Alaska 99615

SECTIONAL ANALYSIS - HB 106

This legislation accomplishes two purposes. First it authorizes organizations which provide medical or counseling services to collect restitution, and when ordering restitution as a result of a criminal conviction, it creates a presumption in favor of the offender's ability to pay restitution. The second section, in a post conviction proceeding brought to enforce restitution or fines, shifts the burden of proving inability to pay from the state to the offender.

Section 1: This section repeals and reeacts the existing restitution statute, AS 12.55.045(a). It permits the court to order restitution to shelter organizations or other agencies which provide medical or counseling services to a victim. As the law is currently structured an organization such as a shelter who provides services to a victim is probably not an aggrieved party, and thus would not be eligible to receive restitution.

The second change in this section repeals existing statutory language which requires the sentencing court to make affirmative findings before restitution is ordered at sentencing. Existing language requires a predictive judgement by the sentencing court on matters oftentimes particularly within the control of the offender. Absent this affirmative finding, restitution orders are presumptively invalid.

In the practical world of criminal proceedings, most restitution orders occur in misdemeanor cases, a good portion of which are resolved at the initial court appearance with guilty pleas. In this situation, the court does not have the benefit of an extensive presentence investigative report from which to make the predictive judgement, and the affirmative findings required by current statute as a precursor to valid restitution orders only increases the court's workload during criminal proceedings.

By repealing this language, orders of restitution become presumptively payable by offenders. In those situations when the offender is a true indigent, without any prospects or possibilities of paying restitution, the offender can raise the issue and demonstrate this ability to the sentencing court.

Section 2: The amendments to this section address the proceedings which occur when the offender fails to pay restitution or a fine. Under current law, the state has the burden to show first, that the offender didn't pay, and second, that the failure to pay was because of bad faith on the part of the offender. (intentional refusal or failure to pay." As currently structured the state must prove information that is particularly within the control of the criminal, i.e. that the offender did have the ability to pay restitution, but simply refused or failed to do so for no legitimate reason.

Under the changes contained in section 2 the state would still be required to prove the offender didn't pay, but then the burden would shift to the criminal to show that there was a lawful excuse for not paying. With this amendment when restitution is not paid by the defendant, the state does not have to engage in an extensive investigation into the offender's affairs in order to also prove the bad faith failure to pay. Rather, the offender who has a lawful excuse for not paying, needs to merely present evidence of that lawful excuse to the court. Then only those who fail to pay for bad faith reasons are penalized under law; not the victim, nor the state.

As was stated in the U.S. Attorney General's Task Force
on Family Violence in 1984:

The tragedy of family violence goes beyond the pain of any single episode. The research of the last decade has demonstrated the frightening degree to which family violence is cyclical in nature, with violence in one generation begetting violence in the next. Children in violent homes "learn" violence in much the same way they learn any other behavior. They observe that violence is a normal way for people to treat one another and a normal way to solve problems. The family violence that occurs today is a time bomb that will explode years later as abused children become abusers of their own children or other children, and as children who watch one parent hitting the other repeat the example in their own relationships or the community.

The costs of this violence and its transmission through the generations are intolerable, however they may be counted. The human costs in suffering are the most obvious and the most immediately tragic. But there are other incalculable costs as well for society as a whole. The family is the fundamental unit upon which society is built. When families are unable to function as the healthy, protective, nurturing institution that America has always depended upon, it should come as no surprise that community problems -- crime, drug and alcohol abuse, dropouts from education and from the workplace -- have been growing.

The ultimate task is to break the cycle and to prevent family violence from occurring.

STATE OF ALASKA THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.

3-2-87

1:30p.m.

H. JUD.

2-18-87

1:30p.m.

HOUSE COMMITTEE REPORT

74

(7)

Date referred: 2/4/87

FURTHER REFERRALS: Finance

DATE: 3/3/87

The Judiciary Committee has considered HB 106

"An Act relating to the payment of criminal fines and restitution."

RECOMMENDS:

- replace with (S HB 106 (Judiciary)) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact
- 3 ~~zero~~ fiscal notes
- 2 zero with analysis
- same as previous fiscal note published _____
- same as previous zero fiscal note published _____

SIGNING DO PASS:

[Signature]

[Signature]

[Signature]

[Signature]

SIGNING OTHER RECOMMENDATIONS:

[Signature] (No Rec)

[Signature] No Rec

He need proper fiscal notes from correction

[Signature]

Chairman's signature

Original sponsors: Davidson, Brown,
Goll, et al.

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE
2 CS FOR HOUSE BILL NO. 106 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FIFTEENTH LEGISLATURE - FIRST SESSION
5 A BILL

6 For an Act entitled: "An Act relating to the payment of criminal fines and
7 restitution."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 12.55.045(a) is repealed and reenacted to read:

10 (a) The court may order a defendant convicted of an offense to
11 make restitution as provided in this section, including restitution to
12 the victim ~~As a result of services rendered by~~ ^{to} a public or private nonprofit
13 organization that has provided counseling, medical, or shelter ser-
14 vices to the victim, or as otherwise authorized by law. A defendant
15 is presumed to have the ability to pay restitution unless the defen-
16 dant establishes the inability to pay by a preponderance of the evi-
17 dence. In determining the amount and method of payment of restitu-
18 tion, the court shall take into account the

19 (1) public policy that favors requiring criminals to com-
20 pensate their victims;

21 (2) financial burden placed on the victim as a result of
22 the criminal conduct of the defendant; and

23 (3) the financial resources of the defendant and the nature
24 of the burden its payment will impose.

25 * Sec. 2. AS 12.55.045(d) is amended to read:

26 (d) In any case, including a case in which the defendant is
27 convicted of a violation of AS 11.46.120 - 11.46.150 ~~in~~ in which the
28 property is commercial fishing gear as defined in AS 16.43.990, the
29 court ~~shall consider the victim's need for, and~~ may order, restitution;

Original sponsors: Davidson, Brown,
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29 court shall consider the victim's need for, and may order, restitution

1 that may include compensation for loss of income.

2 * Sec. 3. AS 12.55.051(a) is amended to read:

3 (a) If the defendant defaults in the payment of a fine or any
4 installment or of restitution or any installment, the court may order
5 the defendant to show cause why the defendant should not be sentenced
6 to imprisonment for nonpayment. If the defendant fails to establish
7 [COURT FINDS] by a preponderance of the evidence that the defendant
8 did not intentionally refuse or fail [DEFAULT WAS ATTRIBUTABLE TO AN
9 INTENTIONAL REFUSAL OR FAILURE] to make a good faith effort to pay the
10 fine or restitution, the court may order the defendant imprisoned
11 until the order of the court is satisfied. A term of imprisonment
12 imposed under this section may not exceed one day for each \$50 of the
13 unpaid portion of the fine or restitution or one year, whichever is
14 shorter. The state may enforce payment of a fine and the restitution
15 recipient may enforce payment of a restitution order against a defen-
16 dant under AS 09.35 as if the order were a civil judgment enforceable
17 by execution. Credit shall be given toward satisfaction of the order
18 of the court for every day a person is incarcerated for nonpayment of
19 a fine [OR RESTITUTION].

20 12.55.035(a)
21 Fines Enforcement

12.55.025(F)

09.38

24 Overturning
25 Kurr

Original sponsors: Davidson, Brown,
Goll, et al.

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16 dant under AS 09.35 as if the order were a civil judgment enforceable
17 by execution. Credit shall be given toward satisfaction of the order
18 of the court for every day a person is incarcerated for nonpayment of
19 a fine [OR RESTITUTION].

REVISED

Adopted

A M E N D M E N T #1

Offered in the House

By Gruenberg &

To: HB 122

Taylor

Page 1, line 19

Delete "(4) larcenously;" and insert "[(4) LARCENOUSLY]"

Renumber following section accordingly.

Comment: In appropriate cases, the court should have the authority to allow civil compromises of petty larcenies, including, for example, shopliftings. Larcenies under \$500 and theft of credit cards are misdemeanors and could be civilly compromised if the amendment is adopted.

REVISED

A M E N D M E N T #2

Offered in the House

By Gruenberg

TO: HB 122

Page 1, line 20, following "(5)":

Insert "in a case involving a misdemeanor charge
under AS 11.41, criminal trespass (AS 11.46.320 -.330),
harassment (AS 11.61.120), or similar municipal
ordinances which was committed."

REVISED

A M E N D M E N T #3

Offered in the House

By Gruenberg

TO: HB 122

Page 1, line 11, following "Action."

Insert "(a)"

Page 1, after line 28 insert:

"Section 2. AS 12.45.120 is amended by adding a new subsection to read:

(b) Notwithstanding AS 24.45.120(a)(5) the court may accept a civil compromise to a crime otherwise compromisable, if the court makes findings based on clear and convincing evidence that:

- (1) the victim and defendant are engaged in a pre-existing open divorce case in which both are represented by independent counsel, and both counsel have jointly petitioned the court to accept the compromise,
- (2) both parties are aware of the consequences of the prosecution of the criminal charge, and the consequences of a dismissal,
- (3) there is no duress or coercion of the victim, and;
- (4) there is no need to protect the victim or the public by prosecuting the criminal charge."

A M E N D M E N T

Offered in the HOUSE

By Sund

TO: HB 106

Page 2, lines 6 - 8:

Delete "If the defendant was not given a suspended sentence of imprisonment conditioned upon paying a fine or restitution, a [A]"

Insert "A"

Page 2, lines 10 - 14:

Delete "If the defendant was given a suspended sentence of imprisonment conditioned upon paying a fine or restitution, the defendant shall be incarcerated for the duration of the sentence or until the fine or restitution is totally paid, whichever is shorter."

*page 2 line 17-19 - leave as in current statute.
do not delete.*

A M E N D M E N T

#2

Offered in the HOUSE

By Sund

TO: HB 106

#3
Adopted

Page 2, lines 6 - 8:

Delete "If the defendant was not given a suspended sentence of imprisonment conditioned upon paying a fine or restitution, a [A]"

Insert "A"

Page 2, lines 10 - 14:

Delete "If the defendant was given a suspended sentence of imprisonment conditioned upon paying a fine or restitution, the defendant shall be incarcerated for the duration of the sentence or until the fine or restitution is totally paid, whichever is shorter."

Page 2 lines 17-19 - leave as in current statute

do not delete

Adopted
except last 2 words
Am & to Am

A M E N D M E N T

Offered in the HOUSE

By Sund

TO: HB 106

Page 1, line 21, after "judgment;":

Insert "and"

Page 1, line 23:

Delete "; and"

Insert "."

Page 1, lines 24 and 25:

Delete all material.

page 1 line 24 add a new (4)

~~the ability of the defendant~~

*(4) financial resources of the defendant and the
nature of the burden its payment will impose.*

AMENDMENT

Offered in the HOUSE

By Sund

TO: HB 106

Page 1, line 21, after "judgment;":

Insert "and"

Page 1, line 23:

Delete "; and"

Insert "."

#1
Adopted

Page 1, lines 24 and 25:

Delete all material.

~~Page 1 line 24~~ addition new (4)

~~the ability of the defendant~~

#2

Adopted

(4) financial resources of the defendant and the nature of the burden its payment will impose.

~~HB 106~~
#4
Adopted

A M E N D M E N T

Offered in the HOUSE

By Gruenberg

TO: HB 106

Page 1, after line 25:

Insert the following new bill section to read:

"* Sec. 2. AS 12.55.045(d) is amended to read:

(d) In any case, including a case in which the defendant is convicted of a violation of AS 11.46.120 - 11.46.150 and in which the property is commercial fishing gear as defined in AS 16.43.990, the court shall consider the victim's need for, and may order, restitution that may include compensation for loss of income."

Renumber the following bill section accordingly.

(COMMENT BY SPONSOR: by permitting a court to order restitution for compensation for loss of income in any appropriate case, any equal protection problem created by limiting this remedy to cases involving theft of commercial fishing gear is avoided.)

#5 (Taylor)

Pg 1, Line 20-21 Delete (2) Adopted

AMENDMENT

4

Offered in the House
TO: CSHB 106 (Finance)

BY: SUND

Page 1, line 20:
after "compenstate" delete "for"
after "their" delete "actions" replace with "victims"

Page 1, line 21:
after "victim" delete "and others"

Withdrawn
J

see # 5

Introduced: 2/4/87
Referred: Judiciary and
Finance

BY DAVIDSON, BROWN, GOLL,
LARSON, MENARD, TAYLOR,
KOPONEN, GRUENBERG AND
ZAWACKI

1 IN THE HOUSE

2 HOUSE BILL NO. 106

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the payment of criminal fines and
restitution."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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10 (a, The court may order a defendant convicted of an offense to
11 make restitution as provided in this section, including restitution to
12 a public or private nonprofit organization that has provided counsel-
13 ing, medical, or shelter services to the victim, or as otherwise
14 authorized by law. A defendant is presumed to have the ability to pay
15 restitution unless the defendant establishes the inability to pay by a
16 preponderance of the evidence. In determining the amount and method
17 of payment of restitution, the court shall take into account the

18 (1) public policy that favors requiring criminals to com-
19 pensate their victims;

20 (2) fact that a victim may encounter difficulty in obtain-
21 ing an enforceable civil judgment;

22 (3) financial burden placed on the victim as a result of
23 the criminal conduct of the defendant; and

24 ~~(4) need of the victim and society for punitive compen-~~
25 ~~sation to be extracted from the defendant.~~

26 * Sec. 2. AS 12.55.051(a) is amended to read:

27 (a) If the defendant defaults in the payment of a fine or any
28 installment or of restitution or any installment, the court may order
29 the defendant to show cause why the defendant should not be sentenced

① Max's
② Delete (4)
③ Add Ability to pay
④ Delete N.P.Z., L6-8 + L10-14 need
⑤ Reinstated last sentence pg 2

#16
The victim for services rendered
by
A. [unclear]

Amc: Ability of defendant to pay

1 to imprisonment for nonpayment. If the defendant fails to establish
2 [COURT FINDS] by a preponderance of the evidence that the defendant
3 did not intentionally refuse or fail [DEFAULT WAS ATTRIBUTABLE TO AN
4 INTENTIONAL REFUSAL OR FAILURE] to make a good faith effort to pay the
5 fine or restitution, the court may order the defendant imprisoned
6 until the order of the court is satisfied. If the defendant was not
7 given a suspended sentence of imprisonment conditioned upon paying a
8 fine or restitution, a [A] term of imprisonment imposed under this
9 section may not exceed one day for each \$50 of the unpaid portion of
10 the fine or restitution or one year, whichever is shorter. If the
11 defendant was given a suspended sentence of imprisonment conditioned
12 upon paying a fine or restitution, the defendant shall be incarcerated
13 for the duration of the sentence or until the fine or restitution is
14 totally paid, whichever is shorter. The state may enforce payment of
15 a fine and the restitution recipient may enforce payment of a re-
16 stitution order against a defendant under AS 09.35 as if the order
17 were a civil judgment enforceable by execution [CREDIT SHALL BE GIVEN
18 TOWARD SATISFACTION OF THE ORDER OF THE COURT FOR EVERY DAY A PERSON
19 IS INCARCERATED FOR NONPAYMENT OF A FINE OR RESTITUTION].

*lots of violations
worse behavior
define counseling
included live drugs + alcohol*

*Code of Civil
Procedure
Execution of
Judgments*

will fill the jails

*Equal Protection
For Indigent Defendant*

*Takes away
discretion
of Judge*

*Constitutional
Problems*

debtor prison

contempt of court

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 2 [COURT FINDS] by a preponderance of the evidence that the defendant
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rich get out poor stay in jail

discriminates against poor
counseling defunct ??

12.55.045(d) ->

12.55.025(f) see
redundant ->

Lomick v Ave
Ct of Appeals
upheld debtor
prison

Introduced: 2/4/87
Referred: Judiciary and
Finance

BY DAVIDSON, BROWN, GOLL,
LARSON, MENARD, TAYLOR,
KOPONEN, GRUENBERG AND
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*→ the victim for
services rendered by*

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*where does it
say victim*

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???

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19 pensate their victims;

can't afford atty

20 (2) fact that a victim may encounter difficulty in obtain-
21 ing an enforceable civil judgment;

3/2/87 de [unclear]

22 (3) financial burden placed on the victim as a result of
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29 the defendant to show cause why the defendant should not be sentenced

*fine
no restitution*

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version: HB106

Publish Date: _____

Revision Date: _____

Agency Affected: Department of Administration

Title: "An Act relating to the payment of criminal fines and restitution."

BRU: Public Defender Agency

Sponsor: Davidson, et al.

Components: _____

Requestor: House Finance

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-				

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-				
FEDERAL FUNDS						
OTHER						
TOTAL		-0-				

POSITIONS:

FULL-TIME		-0-				
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Zero fiscal impact.

Prepared by: Dana Fabe, Public Defender
Division: Public Defender Agency

Phone: 279-7541
Date: February 20, 1987

Approved by Commissioner: [Signature]
Agency: Dept. Administration

Date: 2/26/87

Distribution (by preparer):

- Legislative Finance -
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version: HB 106
Publish Date: 02/04/87

Revision Date: _____
Title: "An Act relating to the pay-
ment of criminal fines."
Sponsor: Davidson, Et. Al.
Requestor: House Judiciary

Agency Affected: Administration
BRU; Office of Public Advocacy
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						

REVENUE	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92

FUNDING: (Thousands of Dollars)

FUNDING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

POSITIONS	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy
Approved by Commissioner: Garrey Peska
Agency: Department of Administration

Phone: 274-1684
Date: 2/22/87
Date: 2/26/87

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)
 - Senate Secretary

POSITION PAPER

HB 106

~~This bill does three things:~~

- ~~1. It changes the burden of proof at sentencing to require a defendant to prove that he or she does not have the ability to pay full restitution. Currently the prosecution must prove that the defendant does have the ability to pay.~~
- ~~2. It shifts the burden to the defendant of proving that he or she did not intentionally refuse or fail to pay the fine; and~~
- ~~3. It requires the judge to mandatorily impose an entire suspended jail sentence on the defendant if there is any default in the fine or restitution payment.~~

~~This third provision of the bill is extremely problematical. It mandates that the court incarcerate a defendant who fails to make a single installment of his fine, a result which is contrary to Alaska Supreme Court law which requires the court to find that reincarceration is necessary once a probation violation has been found. A defendant could be incarcerated for years if he were to miss one fine payment unless he had the financial resources to pay the total amount of the fine or restitution.~~

~~This provision violates equal protection standards and penalizes an indigent defendant. Two identically situated defendants would be treated differently under this provision based only on their financial status. Take the following example: Defendant A has \$3,000 of restitution to pay. He has a low-paying job and is thus ordered to pay \$100 a month. He has five years of suspended time hanging over his head. If he misses one of his \$100 installments he would be revoked and would face a mandatory term of five years in jail. The judge could not modify or lessen that term under this bill. Furthermore, he would remain in jail for that five years if he didn't have the funds to pay the \$3,000 total.~~

~~Defendant B, who is wealthy, has also intentionally failed to make his restitution payment. His probation would also be revoked but he would be able to pay the full \$3,000 amount, thus enabling him to buy his way out of jail. This disparate treatment of two persons based on their economic standing violates equal protection standards and comes close to debtor's prison in that a person's incarceration will depend totally on his ability to pay the total fine (not simply the missed installment).~~

~~This provision penalizes those on probation and rewards repeat offenders who are subject to presumptive time. This bill states that a person who does not have probationary time hanging over his head will be required to serve one day of jail for every \$50 of the fine or restitution which has not been paid. On the other hand, a probationer who has three years of suspended time over his head will spend the~~

entire period of suspended time if the total amount of the fine cannot be paid.

Take the following example: Two defendants who have committed identical property offenses and each has a \$1000 restitution requirement for property damage to the home which was burglarized. Offender A is a first offender who has no prior record and the court gives him three years with all three suspended on the condition that he pay restitution. Offender B is a second time offender and is given the four-year presumptive term. He cannot receive any additional suspended probationary time on top of that four-year term under the current presumptive sentencing scheme.

Each of the offenders is found to have intentionally missed a restitution payment. Offender A, the first time offender, will be required to serve three years in jail unless he can come up with the \$1000. Offender B, the repeat burglar, will be able to work off his fine in 20 days ($20 \times \$50 = \1000). This type of anomaly will penalize first offenders who are more likely to receive probation and will reward repeat offenders who receive presumptive time.

This provision removes discretion from the judges. Current Alaska Supreme Court case law requires each judge to go through a two-prong analysis when determining whether to revoke probation. First, the judge must decide whether a condition of probation has been violated. If it has, the judge must then decide whether reincarceration is necessary, for what period of time that reincarceration should extend, and whether further restrictions or modifications of probation might solve the problem which caused the violation.

Thus, if a defendant is found to have been using cocaine, the judge can incarcerate him for a lengthy period of time, incarcerate him for a short period of time and then require drug rehabilitation, or can send him directly into a residential drug rehabilitation program as a new condition of probation. The judge's decision will depend greatly upon the nature of the underlying offense, whether the violation of probation was an isolated incident or a repeated course of conduct, whether the offender's attitude requires jail time to get his attention, and whether the nature of the violation of probation indicates that reincarceration is necessary to protect the public.


Under this law, failure to make one installment of a fine or restitution will often result in a much more severe form of punishment than many other more serious types of probation violations. The trial judge who has heard the facts of the case, has had experience with the offender, and can hear the recommendations of the probation officer is in the best position to determine whether reincarceration is necessary. Often, a defendant will have a good payment record on restitution and an outside pressure or stress will cause one or more missed payments. Bringing that offender back before the judge for a stiff lecture or a small jolt of jail time as a reminder of the alternative may be as effective in motivating full payment of restitution.

In summary, this section of the bill deprives the trial court of discretion, penalizes first offenders and indigent defendants and will result in unnecessary incarceration of defendants who are otherwise on the road to rehabilitation.

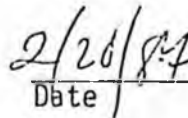
Also problematical is the second section of the bill which shifts the burden of proof of a probation violation from the prosecution, which normally has the burden to prove that a defendant has violated a condition, to the defendant to prove that he did not violate it. This bill requires a defendant to establish by a preponderance of the evidence that he did not intentionally fail to pay his fine or restitution. This reversal of the burden of proof differs from that of all other probation violations where the prosecution is required to prove the defendant's violation.

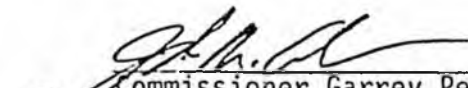
Finally, the Public Defender Agency agrees that requiring a defendant to establish his inability to pay restitution rather than requiring the prosecution to establish his ability to pay, makes good sense. The defendant will usually have better access to the types of records necessary to establish an inability to pay and the prosecution may often be groping in the dark to try to establish an ability to pay.

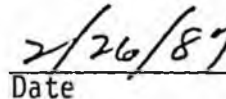
Based on the above reasons, the Alaska Public Defender Agency and the Office of Public Advocacy oppose this bill as drafted.



Dana Fabe, Public Defender


Date


Commissioner Garrey Peska
Department of Administration


Date

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to the payment of criminal fines and restitution."
Sponsor: Rep Davidson, Brown, Goll, et al
Requestor: House Judiciary

Agency Affected: Department of Corrections
BRU: Operations
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Susan E. Knighton, Director
Division: Administrative Services
Approved by Commissioner: Susan Humphrey-Barnett
Agency: Department of Corrections

Phone: 465-3376
Date: 1-15-88
Date: 2-19-88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____

Bill Version: HB 106

Publish Date: _____

Revision Date: _____

Agency Affected: Dept of Corrections

Title: "An Act relating to the payment of criminal fines and restitution."

BRU: Operations

Sponsor: Rep. Davidson, Brown, Goll, et al

Components: _____

Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

It is felt that this bill will have some effect on inmate population though not much. The size of the impact will depend on the courts.

Prepared by: Susie Riley, Program Budget Analyst

Phone: 465-3376

Division: Administrative Services

Date: 2/18/87

Approved by Acting Commissioner: William W. Ladwig

Date: 2/18/87

Agency: Department of Corrections

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: Bill Version: HB 106
Publish Date:

Revision Date: Agency Affected: Alaska Court System
Title: An act relating to the payment of criminal fines and restitution BRU: Trial Courts
Sponsor: Davidson, Brown, Goll, ... Components:
Requestor: House Judiciary Committee

EXPENDITURES/REVENUES:		(Thousands of Dollars)					
OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	
Personal Services	
Travel	
Contractual	
Supplies	
Equipment	
Land & Structures	
Grants & Claims	
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	
CAPITAL	
REVENUE	

FUNDING:		(Thousands of Dollars)					
General Funds	0.0	0.0	0.0	0.0	0.0	0.0	
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	

POSITIONS:		(Thousands of Dollars)					
Full-time	
Part-time	
Temporary	

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Karla Forsythe, General Counsel Phone: 264-8228
Division: Alaska Court System Date: 2-18-87

Approved by: *Stephanie Cole* Stephanie J. Cole, Deputy Director Date: 2-18-87
Agency: Alaska Court System

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management & Budget
 - Impacted Agency(ies)
 - Senate Secretary



STATE OF ALASKA

HOUSE OF REPRESENTATIVES

Box V, Juneau, Alaska 99811

(907) 465-2487 • 465-2498

REPRESENTATIVE CLIFF DAVIDSON

District 27

Box 746, Kodiak, Alaska 99615

February 23, 1987

To: John Sund, Chairman
House Judiciary Committee

From: Cliff Davidson

Re: Re-write of HB 106

Upon reading the enclosed letter from Public Defender Dana Fave, I would like to request that the suggested changes be made. My two main inclusions in the bill were to allow the judge to ask for restitution to care-giving institutions, and that the defendant be required to establish inability to pay restitution rather than requiring the prosecution to establish ability of the defendant to pay.

I appreciate the assistance in the suggested re-write.

Thank you.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

900 W. 5TH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 279-7541

February 19, 1987

John Hartle
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

RE: HOUSE BILL NO. 106

Dear John:

A copy of our position paper on HB 106 is currently being routed through the Commissioner's office. Since you have requested an immediate response to this legislation, this letter contains the concerns I expressed over the phone to you.

HB 106 does three things:

1. It changes the burden of proof at sentencing to require a defendant to prove that he or she does not have the ability to pay full restitution. Currently the prosecution must prove that the defendant does have the ability to pay.
2. It shifts the burden to the defendant of proving that he or she did not intentionally refuse or fail to pay the fine; and
3. It requires the judge to mandatorily impose an entire suspended jail sentence on the defendant if there is any default in the fine or restitution payment.

This third provision of the bill is extremely problematical. It mandates that the court incarcerate a defendant who fails to make a single installment of his fine, a result which is contrary to Alaska Supreme Court law which requires the court to find that reincarceration is necessary once a probation violation has been found. A defendant could be incarcerated for years if he were to miss one fine payment unless he had the financial resources to pay the total amount of the fine or restitution.

This provision violates equal protection standards and penalizes an indigent defendant. Two identically situated defendants would be treated differently under this provision based only on their financial status. Take the following example. Defendant A has \$3,000 of restitution to pay. He has a low-paying job and is thus ordered to pay \$100 a month. He has five years of suspended time hanging over his head. If he misses one of his \$100 installments he would be revoked and would face a mandatory term of five years in jail. The judge could not

modify or lessen that term under this bill. Furthermore, he would remain in jail for that five years if he didn't have the funds to pay the \$3,000 total.

Defendant B, who is wealthy, has also intentionally failed to make his restitution payment. His probation would also be revoked but he would be able to pay the full \$3,000 amount, thus enabling him to buy his way out of jail. This disparate treatment of two persons based on their economic standing violates equal protection standards and comes close to debtor's prison in that a person's incarceration will depend totally on his ability to pay the total fine (not simply the missed installment).

This provision penalizes those on probation and rewards repeat offenders who are subject to presumptive time. This bill states that a person who does not have probationary time hanging over his head will be required to serve one day of jail for every \$50 of the fine or restitution which has not been paid. On the other hand, a probationer who has three years of suspended time over his head will spend the entire period of suspended time if the total amount of the fine cannot be paid.

Take the following example: Two defendants who have committed identical property offenses and each has a \$1000 restitution requirement for property damage to the home which was burglarized. Offender A is a first offender who has no prior record and the court gives him three years with all three suspended on the condition that he pay restitution. Offender B is a second time offender and is given the four-year presumptive term. He cannot receive any additional suspended probationary time on top of that four-year term under the current presumptive sentencing scheme.

Each of the offenders is found to have intentionally missed a restitution payment. Offender A, the first time offender, will be required to serve three years in jail unless he can come up with the \$1000. Offender B, the repeat burglar, will be able to work off his fine in 20 days ($20 \times \$50 = \1000). This type of anomaly will penalize first offenders who are more likely to receive probation and will reward repeat offenders who receive presumptive time.

This provision removes discretion from the judges. Current Alaska Supreme Court case law requires each judge to go through a two-prong analysis when determining whether to revoke probation. First, the judge must decide whether a condition of probation has been violated. If it has, the judge must then decide whether reincarceration is necessary, for what period of time that reincarceration should extend, and whether further restrictions or modifications of probation might solve the problem which caused the violation.

Thus, if a defendant is found to have been using cocaine, the judge can incarcerate him for a lengthy period of time, incarcerate him for a short period of time and then require drug rehabilitation, or can send him directly into a residential drug rehabilitation program as a new condition of probation. The judge's decision will depend greatly upon

the nature of the underlying offense, whether the violation of probation was an isolated incident or a repeated course of conduct, whether the offender's attitude requires jail time to get his attention, and whether the nature of the violation of probation indicates that reincarceration is necessary to protect the public.

Under this law, failure to make one installment of a fine or restitution will often result in a much more severe form of punishment than many other more serious types of probation violations. The trial judge who has heard the facts of the case, has had experience with the offender, and can hear the recommendations of the probation officer is in the best position to determine whether reincarceration is necessary. Often, a defendant will have a good payment record on restitution and an outside pressure or stress will cause one or more missed payments. Bringing that offender back before the judge for a stiff lecture or a small jolt of jail time as a reminder of the alternative may be as effective in motivating full payment of restitution.

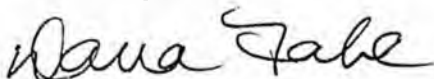
In summary, this section of the bill deprives the trial court of discretion, penalizes first offenders and indigent defendants and will result in unnecessary incarceration of defendants who are otherwise on the road to rehabilitation.

Also problematical is the second section of the bill which shifts the burden of proof of a probation violation from the prosecution, which normally has the burden to prove that a defendant has violated a condition, to the defendant to prove that he did not violate it. This bill requires a defendant to establish by a preponderance of the evidence that he did not intentionally fail to pay his fine or restitution. This reversal of the burden of proof differs from that of all other probation violations where the prosecution is required to prove the defendant's violation.

Finally, the Public Defender Agency agrees that requiring a defendant to establish his inability to pay restitution rather than requiring the prosecution to establish his ability to pay, makes good sense. The defendant will usually have better access to the types of records necessary to establish an inability to pay and the prosecution may often be groping in the dark to try to establish an ability to pay.

The official position paper on this bill will be available to you shortly. I hope this is of some assistance. I will see you on Thursday, February 26th.

Sincerely,



Dana Fabe
Public Defender

DF:sh

MEMORANDUM

3/23/87

TO: Rep. John Sund
FROM: J. Hartle, PA
RE: HB 106

HB 106 (Dav. dson, et al) An Act relating to the payment of criminal fines and restitution.

A. Status: House Floor Monday in Third Reading

B. Judiciary CS reported out do pass:

- 1) Removed "shall be imprisoned for balance of sentence" section i.e. debtors prison
- 2) Added "to the victim" for services by non-profits
- 3) Took out section not allowing prisoners to work off a fine, but left repeal of ability to work off restitution
- 4) Expanded restitution for loss of income to all victims (from only those who suffered loss of fishing gear)

C. Finance CS:

- 1) took out "to the victim" language, based on requests from interest groups.
- 2) Took out "shall consider the victim's need for" (restitution) based on not wanting a rich person to be eligible for more restitution than a poor person (JH: my theory was that "need" in this case means only that some harm was done for which the victim needs to be made whole, not a needy victim versus a rich one)

D. Floor action Friday:

- 1) Taylor moved an amendment which would have reinserted the "for services rendered by" language meaning that restitution could only go to the victim.
 - a) Failed 12Y-19N-5E-4A
- 2) Gruenberg moved an amendment to change shall consider the victim's "need" to the victim's "loss"
 - a) Adopted 19Y-16N-5E
- 3) The motion to move from second to third reading failed, receiving 27 votes

ALASKA NETWORK
ON
DOMESTIC VIOLENCE
AND
SEXUAL ASSAULT

130 Seward, No. 501 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Berling Sea Women's Group (BSWG);
Cordova Women's Resource Center (CWRC); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRCQ); MEN, Inc.;
Men's Support Network (MSN); Safe & Fear-Free Environment (SAFE);
Sitkians Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPCSA);
South Peninsula Women's Services (SWPS);
Tundra Women's Coalition (TWC); Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

February 25, 1987

Re: HB 106

Attached are two items:

1) A copy of AS 12.55.045. It has been suggested that HB 106 be amended to provide for the deletion of language in paragraph (c) of this statute.

(d) In a case in which the defendant is convicted of a violation of AS 11.46.120 - 11.46.150 (and in which the property is commercial fishing gear as defined in AS 16.48.990,) the court shall consider the victim's need for, and may order, restitution that may include compensation for loss of income. (SS 12 ch 166 SLA 1978; am SS 38 ch 102 SLA 1980; am SS ch 73 SLA 1986)

The effect of this amendment would be to allow the court to order restitution for loss of income to be paid to all victims.

2) A copy of HB 106. Objections have been raised to the language highlighted in yellow. It has come to our attention that an amendment may be proposed to delete this wording. The Network has absolutely no objections to this.

Margaret Dick

federal courts have likewise approved the practice of awarding interest under the analogous Federal Longshoremen's and Harbor Workers' Compensation Act.⁷ Today we join those states which recognize the workers' right to interest when compensation payments are not promptly and timely made.⁸

[8] We hold that a workers' compensation award, or any part thereof, shall accrue lawful interest, as allowed under AS 45.15.010, which provides a rate of interest of 10.5 percent a year and no more on money after it is due, from the date it should have been paid.

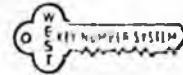
The judgment of the superior court reversing the decision of the Alaska Workers' Compensation Board is AFFIRMED. Such part of the judgment standing in affirmation of the Board's decision is REVERSED and REMANDED with directions

(1951); *Norman v. American Woolen Co.*, 117 Vt. 28, 84 A.2d 125 (1951). *Nevada Industrial Comm'n. v. Strange*, 84 Nev. 153, 437 P.2d 873 (1968), is inapposite. *Strange* permitted interest pursuant to the general interest statute to be added to an award based upon an action filed in the district court. The Nevada Supreme Court treated the action as an original proceeding against the Industrial Commission which earlier had awarded the claimant substantially less than the district court award. The Nevada legislature subsequently enacted Nev.Rev.Stat. § 616.543 (1981) which provides that judicial proceedings for compensation are limited to judicial review of decisions by Industrial Commission appeal officers. Consequently, it is not clear that the Nevada courts would continue to award interest.

Moreover, twenty-seven states have legislation allowing interest. Ark.Stat. Ann. § 81-1319(g) (1976); Cal.Lab.Code § 5800 (West 1971); Colo. Rev.Stat. § 8-52-109 (1973); Conn.Gen.Stat. Ann. § 31-300 (West Supp.1983-84); Del.Rev. Code Ann. tit. 19, § 2350 (1974); Ga.Code Ann. § 114-718 (Supp.1982); Idaho Code § 72-734 (Supp.1983); Iowa Code Ann. § 85.30 (West Supp.1983-84); Kan.Stat. Ann. § 44-512b (1981); Ky.Rev.Stat. § 342.040 (1983); Me.Rev. Stat. Ann. tit. 39, § 72 (Supp.1982-83); Md. Ann. Code art. 101, § 56 (1979); Mass.Gen.Laws Ann. ch. 152, § 50 (West Supp.1983-84); Mich.Comp. Laws Ann. § 418.801 (Supp.1983-84); Minn. Stat. Ann. § 176.221 (West Supp.1983); Mo. Ann. Stat. § 287.160 (Vernon Supp.1982); N.H. Rev. Stat. Ann. § 281:37-a (Supp.1981); N.J. Stat. Ann. § 34:15-28 (West 1959); N.Y. Work. Comp. Law §§ 20, 24 (McKinney 1965), § 221 (McKinney Supp.1982-83); N.C. Gen. Stat. § 97-86.2 (Supp.

to further remand to the Board for proceedings in accordance with this opinion.

MOORE, J., not participating.



Diana L. KARR, Appellant/Petitioner,

v.

STATE of Alaska, Appellee/Respondent.

No. 7011.

Supreme Court of Alaska.

July 13, 1984.

Defendant pled nolo contendere to charges of embezzlement and theft in the

(1981); Okla.Stat. Ann. tit. 85 § 42 (West Supp. 1982-83); Pa.Stat. Ann. tit. § 77, 717.1 (Pardon Supp.1983-84); Tex.Civ.Stat. Ann. art. 8306a (Vernon 1967); Utah Code Ann. § 35-1-78 (Supp.1981); Va.Code § 65.1-98.1 (Supp.1983); W.Va.Code § 23-4-16a (1981); Wis.Stat. Ann. § 102.22 (West Supp.1982-83).

7. See *Newport News Shipbuilding and Dry Dock Co. v. Graham*, 573 F.2d 167, 171 (4th Cir.), cert. denied, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir.1971), cert. denied, 406 U.S. 958, 92 S.Ct. 2060, 32 L.Ed.2d 344 (1972); *Quick v. Martin*, 397 F.2d 644, 648 (D.C.Cir. 1968); *Cunningham v. Donovan*, 304 F.Supp. 612 (E.D.La.1969).

8. Our decision might well be different if the purpose of the penalty provision in AS 23.30.155(f) was in part to provide compensation for lost use of the money due to claimants. In such a situation an award of prejudgment interest coupled with the penalty might constitute an impermissible double recovery. However, we read AS 23.30.155(f) as providing an incentive to employers to make prompt payment of compensation owed to employees, and as a punishment to employers who do not do so, and not as a mechanism to provide compensation for lost use of money owed. This court has elsewhere distinguished between interest and penalty provisions, concluding that interest is "non-punitive" and thus may be awarded where a penalty is unwarranted. See, *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 546 (Alaska 1978).

TERRANCE L. WILSON

first degree and the Superior Court, Fourth Judicial District, James R. Blair, J., sentenced defendant to serve ten years, with five suspended, and to pay \$300,000 in restitution, and defendant appealed. The Court of Appeals, 660 P.2d 450, affirmed, and defendant appealed. The Supreme Court, Moore, J., held that: (1) defendant's sentence of ten years' imprisonment, with five suspended, was not clearly mistaken, and (2) trial court erred in ordering restitution of \$300,000 without serious inquiry into defendant's ability to pay.

Affirmed in part, reversed in part and remanded.

1. Criminal Law \S 1205

Standards under which sentences are to be reviewed require inquiry into following objectives: rehabilitation of the offender; protection of society from future criminal conduct of offender; community condemnation or reaffirmation of societal norms for purposes of maintaining respect for norms; and deterrence of members of society with tendencies toward similar criminal behavior.

2. Criminal Law \S 1208.1(2)

Any portion of sentence that is suspended is to be weighed in determining whether sentence is excessive; however, suspended time is less important consideration than nonsuspended time.

3. Criminal Law \S 1208.1(2)

Criminal sentence is excessive only when it is clearly mistaken in light of sentencing considerations.

4. Embezzlement \S 52

Sentence of ten years, with five suspended, was not excessive for conviction of theft in the first degree in embezzlement of \$365,000 from employer, even though defendant had no prior criminal record, because of harm done to employer, period of time over which thefts took place, and need to deter this type of offense. AS 11.46.120; AS 11.20.280 (Repealed).

5. Criminal Law \S 986.2(1)

Degree of harm inflicted upon victim is a consideration properly included within context of community condemnation factor in sentencing.

6. Criminal Law \S 986.2(1)

Initial sentencing is the appropriate time at which an inquiry into offender's ability to pay restitution must be performed; declining to follow *Brezennoff v. State*, 658 P.2d 1359. AS 12.55.045(a).

7. Criminal Law \S 1208.1(2)

Trial judge erred in sentencing defendant convicted of embezzlement and theft in first degree of \$365,000 from her employer to pay \$300,000 in restitution without inquiry into defendant's ability to pay; inquiry in ability to pay restitution should include analysis of any assets that defendant owned, past earning capacity and potential and future as a wage earner, based on experience, training, and any other relevant factors. AS 11.46.120, 12.55.045(a); AS 11.20.280 (Repealed).

Mary E. Greene, Asst. Public Defender, Fairbanks and Dana Fabe, Public Defender, Anchorage, for appellant/petitioner.

Carol Greenberg, Asst. Dist. Atty. and Harry L. Davis, Dist. Atty., Fairbanks, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee/respondent.

Before BURKE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

Diana Karr was convicted of embezzling over \$256,000 from her employer. She was given a ten year sentence with five years suspended and ordered to pay \$300,000 in restitution. Karr appeals the sentence as excessive. She further appeals the restitution order on the grounds that her ability to pay was not considered.

Diana Karr began working as a receptionist for Meyeres Real Estate, Inc. in

1975 and eventually became the personal secretary of Bud Meyeres, the owner of the business. Between January, 1979 and December, 1981 Karr used her position to embezzle at least \$356,000 from Meyeres Real Estate.¹ Karr perpetrated the thefts by altering checks, issuing unauthorized checks and directly stealing cash.

Most of the embezzled money was used to subsidize Karr's husband's failing construction business. Karr stated that she intended to pay the money back as soon as her husband's business made a profit. The embezzlements from Meyeres Real Estate had a damaging effect on the business and on Mr. Meyeres himself. Meyeres stated that as a result of the financial setback, he will be unable to retire in the near future.

The embezzlements were eventually discovered when the Karrs went on vacation. Mrs. Karr admitted her guilt to the officers investigating the crime. Karr was charged with one count of theft in the first degree² for the money converted after January 1, 1980 and one count of embezzlement by an employee³ for funds misappropriated before January 1, 1980. Two counts were charged because the statute was changed in 1980, but the crime was treated as one continuing offense. Karr pleaded nolo contendere to the charges.

Judge James R. Blair sentenced Karr to serve ten years with five years suspended. Karr was further ordered to pay restitution of \$300,000. Karr appealed the sentence and the restitution order to the Court of

Appeals and that court affirmed both. 660 P.2d 450 (Alaska App.1983). On a petition for hearing to this court, Karr asserts that the sentence imposed was excessive and contends that the restitution was imposed in violation of AS 12.55.015(a) because the judge did not consider her ability to pay restitution.

I.

[1-3] The standards under which sentences are to be reviewed were established in *State v. Chaney*, 477 P.2d 441 (Alaska 1970). Under *Chaney*, inquiries into a sentence should determine the following objectives: (1) rehabilitation of the offender; (2) protection of society from future criminal conduct of the offender; (3) community condemnation⁴ or reaffirmation of societal norms for the purpose of maintaining respect for these norms; and (4) deterrence of members of society with tendencies toward similar criminal behavior. 477 P.2d at 444. Any portion of the sentence that is suspended is to be weighed in determining whether a sentence is excessive; however, suspended time is a less important consideration than non-suspended time. *Leuch v. State*, 633 P.2d 1006, 1010 (Alaska 1981). With these considerations in mind, a sentence is excessive only when it is clearly mistaken. *McClain v. State*, 519 P.2d 811 (Alaska 1974).

[4] Applying the *Chaney* criteria to this case compels a conclusion that the sentence imposed is not excessive. Karr is thirty-

which may be the subject of larceny, and which has come into his possession or is under his care by virtue of his employment is guilty of embezzlement. If the property embezzled exceeds \$100 in value, a person guilty of embezzlement is punishable by imprisonment in the penitentiary for not less than one year nor more than 10 years. If the property embezzled does not exceed the value of \$100, a person guilty of embezzlement is punishable by imprisonment in a jail for not less than one month nor more than one year, or by a fine of not less than \$25 nor more than \$100.

1. In addition to \$356,000 of documented thefts Karr stole an unknown amount of cash.

2. AS 11.46.120 states:

(a) A person commits the crime of theft in the first degree if he commits theft as defined in § 100 of this chapter and the value of the property or service is \$25,000 or more.

(b) theft in the first degree is a class B felony.

3. Former AS 11.20.280 provided:

Embezzlement by employee or servant. An officer, agent, clerk, employee, or servant who embezzles or fraudulently converts to his own use, or takes or secretes with intent to embezzle or fraudulently convert to his own use, money, property, or thing of another

4. This is to be distinguished from retribution which is an impermissible consideration in sentencing. *Leuch v. State*, 633 P.2d 1006, 1012 (Alaska 1981).

four years old, married, and the mother of two. She has no criminal record and the record indicates that, except for the thefts from Meyeres Real Estate, she has led a responsible life. The sentence imposed is not required for furtherance of the first two *Chaney* goals: rehabilitation and protection of the public. Karr's sentence, however, facilitates the last two *Chaney* goals: reaffirmation of societal norms and deterrence.

[5] The superior court judge stated that he did not "see any way that the court system can send a message to the community that you can steal hundreds of thousands of dollars and not get a substantial sentence. If a court does that then the whole criminal justice system ... loses credibility," because societal norms are not maintained. We agree that a substantial sentence is imperative in a case such as this in order to maintain the integrity of the criminal justice system. Additionally, the degree of harm inflicted upon the victim is a consideration properly included within the context of the community condemnation factor. *Leuch v. State*, 633 P.2d at 1013. Bud Meyeres, in his late sixties, has suffered a severe financial setback as a result of the thefts. Although he may be able to salvage his real estate business, his plans for retirement have been severely hampered, if not eliminated, as a result of Karr's embezzlements.

The fourth *Chaney* criterion, deterrence, is furthered by the sentence imposed in this case. We have stated that "'white collar' crimes must be taken seriously and that sophisticated schemes to defraud should be deterred." *Fields v. State*, 629 P.2d 46, 53

5. Karr's ten year sentence with five years suspended violates the court's statement in *Austin* because the presumptive sentence for a Class B felony, which Karr was convicted of, is four years if the offense is a second felony conviction. AS 12.55.125(d)(1).

6. In *Amidon v. State*, 565 P.2d 1248 (Alaska 1977), we held that three year sentences for two first offenders convicted of embezzling \$65,000 from one of the offender's grandmother should be reduced to a sentence not in excess of one year.

(Alaska 1981). The amount of money stolen here was so large that unless a substantial sentence is imposed on Karr, it is likely that others would be tempted to perpetrate a similar crime. We conclude that under the *Chaney* criteria the sentence imposed in this case is not clearly mistaken.

Karr argues that the sentence imposed violates sentencing standards established by this court in *Leuch v. State*, 633 P.2d 1006, 1013-14 (Alaska 1981), and by the Court of Appeals in *Austin v. State*, 627 P.2d 657 (Alaska App.1981). In *Leuch* we stated that probation in combination with restitution is the appropriate sentence when the crime is against property, and there is no indication that such a sentence would not protect the public, deter the offender, and further the offender's rehabilitation. 633 P.2d at 1013. The Court of Appeals in *Austin* stated that "normally a first offender should receive a more favorable sentence than the presumptive sentence for a second offender." 627 P.2d at 657-8. The sentence imposed upon Karr conflicts with both these statements.⁵ We noted in *Leuch* that the *Leuch* rule is not a "hard and fast rule" and should not be applied if other "factors militate against it." 633 P.2d at 1013-14. In *Austin* the court stated that the *Austin* rule should only be violated in "an exceptional case." 627 P.2d at 658.

The magnitude and manner of the theft in this case is so exceptional that the statements in *Leuch* and *Austin* are not applicable here. Karr embezzled over \$356,000. This dwarfs the amounts stolen of \$65,000,⁶ \$25,000⁷ and \$6,500⁸ in similar offenses

7. In *Fields v. State*, 629 P.2d 46 (Alaska 1981), we reversed a nine year sentence with four years suspended and held that a sentence should not exceed six years with three years suspended. Fields, who had no significant criminal record, had received about \$25,500 through fraudulent sales of securities.

8. In *Huff v. State*, 598 P.2d 928 (Alaska 1979), the defendant was a first offender who used his position as a real estate salesman to embezzle \$6,500 from a client. We upheld the three year sentence for embezzlement but reduced a five

where the court has reviewed the sentences imposed. An additional distinction between this case and previous cases reviewed by this court for excessive sentencing is the length of time over which the thefts occurred. Karr perpetrated more than fifty thefts over a two year period.⁹ This makes Karr's crime a more egregious one because over these two years she viewed the devastating effects her thefts were causing Meyeres Real Estate and Bud Meyeres himself, without discontinuing them.¹⁰ All these considerations compel the conclusion that the sentence imposed in this case is not clearly mistaken and should be affirmed.

II.

[6] AS 12.55.045(a) provides:

The court may order a defendant convicted of an offense to make restitution as provided in this section or as otherwise authorized by law. In determining the amount and method of payment of restitution, the court shall take into account the financial resources of the defendant and the nature of the burden its payment will impose.

year perjury sentence to not more than three years.

9. *Huff* and *Amidon* involved one-time offenses and the offense in *Fields* occurred over three months.

10. In Meyeres' letter to the superior court he stated:

Over the period of Diana's stealing and as pressure and desperation increased, she my most trusted employee and friend was the very person I would most turn to for a mutual searching of the problem, for some kind of answer or change of course, even to closing down before it was too late. I would receive her assurance that it would all work out and on the same day she would make another theft.

11. These statements include:

Well, I think it's [restitution] obviously impossible. She's never going to be able to pay it back, Mr. Madson.

Restitution will be ordered in the amount of \$300,000. Another factor that I haven't mentioned and I should have is that it appears to me that restitution in this case is flat out impossible.

The superior court expressly stated three times that it would be impossible for Karr to pay restitution.¹¹ Diana Karr argues that in light of these findings, the superior court incorrectly ordered her to pay \$300,000 in restitution.

The Court of Appeals rejected Karr's argument. The court followed *Brezenoff v. State*, 658 P.2d 1359 (Alaska App.1983), by holding that when lengthy terms of incarceration are imposed restitution can be ordered without an inquiry into the offenders ability to pay. Under this approach, the inquiry into the offender's ability to pay is postponed until after the offender is released. *Brezenoff*, 658 P.2d at 1364. At this point, the inquiry into the offender's ability to pay is performed either when the offender petitions the court to modify the restitution order pursuant to AS 12.55.051(e)¹² or when the offender is ordered to show cause for nonpayment of the restitution order pursuant to AS 12.55.051(a).¹³

We agree with Karr that the initial sentencing is the appropriate time at which an inquiry into the offender's ability to pay

That's the amount I'm ordering and I frankly don't think it makes much difference if I say \$300, 200 or 100. I don't think Mr. Meyeres will ever get (indiscernible).

12. AS 12.55.051 Enforcement of Fines and restitution provides:

(c) Pursuant to a petition filed by a defendant who has been sentenced to pay a fine or restitution or an installment, the court, upon a finding of inability to pay, may order modification of the fine or restitution, subject to conditions the court finds appropriate.

13. AS 12.55.051(a) provides, in pertinent part:

If the defendant defaults in the payment of a fine or any installment or of restitution or any installment, the court may order the defendant to show cause why he should not be sentenced to imprisonment for nonpayment. If the court finds by a preponderance of the evidence that the default was attributable to an intentional refusal or failure to make a good faith effort to pay the fine or restitution, the court may order the defendant imprisoned until the order of the court is satisfied.

must be performed. AS 12.55.045(a) requires sentencing judges to "take into account the financial resources of the defendant and the nature of the burden its payment will impose" in ordering restitution. The opportunity provided by AS 12.55.051 for the court to later modify a restitution order does not replace this legislative mandate. The legislative commentary to AS 12.55.045(a) supports this conclusion by stating that AS 12.55.045(a) "requires the court to consider the defendant's financial resources in *setting* restitution." 2 Senate Journal 151 (1978). (Emphasis added).

There are policy considerations that militate against the approach adopted by the Court of Appeals in *Brezneff*. Restitution should not only compensate the victim for the harm inflicted by the offender, but should further the rehabilitation of the offender. If restitution is ordered in an amount that is clearly impossible for the offender to pay, the offender's rehabilitation will be inhibited and not furthered. If the offender is haled into court for nonpayment of restitution under AS 12.55.051(a), or if the offender petitions the court under AS 12.55.051(c) to avoid this sanction, his reintegration into society will be disrupted. Also, an offender might simply give up and make no payments at all if the restitution ordered is clearly impossible to pay. This could result in the offender's incarceration under AS 12.55.051(a), or in his fleeing the jurisdiction to avoid this sanction, neither of which would further the dual goals behind restitution.¹⁴

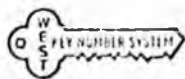
[7] In this case, the sentencing judge found that full restitution would be impossible. Instead of making an inquiry into what amount the defendant reasonably could be expected to pay, the judge stated

14. In *People v. Kay*, 36 Cal.App.3d 759, 763, 111 Cal.Rptr. 894, 896 (1973), the court stated that "to subject a defendant to a judgment which he cannot pay and has no reasonable prospect of paying ... is of little use to the victim of the crime, and is apt to be either frustrating to a repentant probationer or perversely satisfying to a rebellious one." See also Annot., 73 A.L.R.3d 1240 (1976), which notes that in many jurisdictions, courts must consider an offender's ability to pay restitution when ordering restitu-

tion as a condition of probation, regardless of whether a statute compels this or not.

that "all we can do is get as much back as we can" and ordered restitution of \$300,000. This violates AS 12.55.045(a). On remand the superior court should make a serious inquiry into Karr's ability to pay restitution and order restitution accordingly.¹⁵ This inquiry should include an analysis of any assets that Karr presently owns, her past earning capacity and potential in the future as a wage earner, based on her experience, training, and any other relevant factors.

AFFIRMED in part, REVERSED in part, and REMANDED.



Senator Jalmar KERTTULA, Appellant,

v.

Mitchell E. ABOOD, Jr., et
al., Appellees,

and

Norman C. Gorsuch, et al., Appellees.

No. S-257.

Supreme Court of Alaska.

July 27, 1984.

Certain members of the current majority coalition of the state House of Representatives subpoenaed Senate President to appear and give testimony at a deposition in regard to conversations he had with the Governor pertaining to the Governor's convening of a joint session at which appoint-

tion as a condition of probation, regardless of whether a statute compels this or not.

15. The superior court must decide both the total amount of restitution to be paid and the terms of payment. The probation officer may not be assigned this judicial responsibility. *Brezneff v. State*, 658 P.2d 1359, 1363-64 (Alaska App. 1983).

Pearl LOMINAC, Appellant,

v.

MUNICIPALITY OF ANCHORAGE,

Appellee.

No. 5960.

Court of Appeals of Alaska.

Feb. 18, 1983.

Defendant appealed from an order of the District Court, Third Judicial District, Anchorage, John D. Mason, J., revoking her probation. The Court of Appeals, Bryner, C.J., held that the trial court could not properly revoke probation and impose a sentence of imprisonment when defendant, who was given a suspended imposition of sentence on condition that she make restitution payments, violated the restitution requirement because of financial inability to pay.

Reversed and remanded.

1. Criminal Law \S 982.9(7)

Trial court could not properly revoke probation and impose sentence of imprisonment when defendant, who was given suspended imposition of sentence on condition that she make restitution payments, violated restitution requirement because of financial inability to pay. AS 12.55.051(a).

2. Criminal Law \S 982.5(1), 1208(5)

It is permissible for sentencing court to require payment of restitution either directly, as part of sentence imposed, or indirectly, as condition or probation in cases involving suspended execution or suspended imposition of sentence. AS 12.55.045, 12.55.100(a)(2).

Michael L. Wolverton, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

David G. Berry, Asst. Municipal Prosecutor, Allen M. Bailey, Municipal Prosecutor, and Theodore D. Berns, Municipal Atty., Anchorage, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

In this appeal, we are faced with the question whether a court may properly revoke probation and impose a sentence of imprisonment when a defendant who is given a suspended imposition of sentence on condition that she make restitution payments violates the restitution requirement because of financial inability to pay.

Pearl Lominac was convicted of assault and battery on August 14, 1980. District Court Judge John Mason suspended the imposition of Lominac's sentence and placed her on informal probation. As a condition of probation, Judge Mason required Lominac to make ten monthly restitution payments of \$150 each to the victim of her assault. Thereafter, the prosecutor's office of the Municipality of Anchorage filed a petition to revoke Lominac's probation, alleging that she had failed to make any restitution payments. A hearing on the petition was held before Judge Mason on March 31, 1981.

At the hearing on the motion to revoke probation, Lominac admitted that she had paid no restitution. She explained that she was injured in a car accident in October, 1980, and had been unemployed since the sentence was imposed. She said she left Alaska in November to visit her daughter, who was seriously ill. Lominac had no source of income and had been relying on friends and family to provide her living expenses and the cost of her out-of-state travel. Lominac stated that she planned to take an entrance examination for a job-training program offered by the Cook Inlet Native Association. She was hoping to pass the examination, obtain training and get a part-time job that would enable her to pay restitution. Lominac also testified that she received no social security, had no bank account, car, assets or property which could

be liquidated to meet restitution payments imposed by the court. Lominac's counsel asked the court to leave the suspended imposition of sentence and the restitution order intact, and to evaluate Lominac's compliance with the restitution order at the conclusion of her probationary term.

In the course of the hearing, Judge Mason determined that Lominac's failure to pay restitution was not willful. He stated that the prosecution had failed to show Lominac had the financial ability or the assets to enable her to pay restitution. However, the judge concluded:

My ruling is—is where the initial sentence is suspended imposition I don't think it would cover if she was initially sentenced on like thirty days suspended. But where it's initially—or no sentence is imposed in the beginning and a clear plan of restitution and there's no effort or no success in that regard, no payment at all and the defendant leaves the state in the meantime and, does not contact the court, that's grounds to impose a sentence.

Judge Mason revoked probation and imposed a sentence of thirty days in jail, with twenty-five days suspended.¹ In addition, he imposed a requirement that Lominac pay \$1500 restitution within six months.

[1] Lominac appeals Judge Mason's ruling, contending that revocation of probation and imposition of sentence was unjustified in light of the court's finding that her failure to pay restitution was not willful. Although both Lominac and the municipality have based their arguments on appeal primarily on constitutional grounds, we believe that disposition of the issue presented is controlled by provisions of the Alaska Statutes.

1. The municipality does not contend that Lominac was ever placed under any requirement to remain in the State of Alaska or to report to the court in the event she left the state. To the extent that Judge Mason's remarks indicate that Lominac's probation might have been revoked in whole or in part for leaving the state without contacting the court, the revocation would plainly not be based upon a violation of any specific condition of probation and would therefore be improper. See *Holton v. State*, 602 P.2d 1228, 1238-39 (Alaska 1979). Our disposition of the case makes it unnecessary

Of direct relevance to the present case is AS 12.55.051(a), which states:

Enforcement of Fines and Restitution.

(a) If the defendant defaults in the payment of a fine or any installment or of restitution or any installment, the court may order the defendant to show cause why he should not be sentenced to imprisonment for nonpayment. If the court finds by a preponderance of the evidence that the default was attributable to an intentional refusal or failure to make a good faith effort to pay the fine or restitution, the court may order the defendant imprisoned until the order of the court is satisfied. A term of imprisonment imposed under this section may not exceed one day for each \$50 of the unpaid portion of the fine or restitution or one year, whichever is shorter. Credit shall be given toward satisfaction of the order of the court for every day a person is incarcerated for nonpayment of a fine or restitution.

Prior to making his decision to revoke Lominac's probation, Judge Mason indicated his awareness of AS 12.55.051, and he acknowledged that, because Lominac's failure to pay restitution was unintentional, the statute precluded him from directly ordering her incarceration for failing to make restitution as required.

However, the judge distinguished between directly imposing a sentence of imprisonment for failing to pay restitution and revoking probation and imposing a sentence based upon a finding that failure to pay restitution violated a condition of probation.² Judge Mason found that AS 12-

for us to speculate as to the degree of Judge Mason's reliance on this fact.

2. In this regard, Judge Mason stated:

The other question in my mind is ... can I now terminate this suspended imposition of sentence and impose sentence for not complying with the condition. Is there any difference between that and directly ordering imprisonment on the restitution? The whole purpose of the sentence imposed ... was that she would make restitution.

55.051 was not applicable to those situations where restitution is ordered as a condition of probation. We disagree.

[2] Under Alaska law, it is permissible for a sentencing court to require payment of restitution either directly, as part of the sentence imposed, or indirectly, as a condition of probation in cases involving suspended execution or suspended imposition of a sentence. See AS 12.55.045 and AS 12.55.100(a)(2). Nothing in the language of AS 12.55.051 suggests that its application is restricted to those cases where fines or restitution orders are imposed directly, as part of the sentence, instead of indirectly, as a condition of probation. Nor has the municipality called our attention to any legislative history indicating that this statute was meant to be restricted in the scope of its operation. We believe that AS 12.55.051(a) prescribes a specific method for dealing with enforcement of court orders requiring the payment of fines or restitution, regardless of whether such orders are directly imposed as part of the original sentence, under AS 12.55.045, or indirectly imposed as a condition of probation, under AS 12.55.100.

Since AS 12.55.051 expressly provides that imprisonment for failure to pay court-ordered restitution is permissible only if the failure to pay was intentional or the result of bad faith, and since Judge Mason expressly determined that Lominac's failure to pay was not intentional, we hold that the order revoking probation and imposing sentence must be vacated, and that the order suspending imposition of Lominac's sentence be reinstated.³

REVERSED and REMANDED.



3. In reaching our disposition, we express no view on the difficult question whether, in the absence of a controlling statute, an intentional violation of a condition of probation must be found before an order revoking probation and imposing a jail sentence may properly be entered. Compare *Genet v. United States*, 375

Patricia KWALLEK, Appellant,

v.

STATE of Alaska, Appellee.

No. 7429.

Court of Appeals of Alaska.

Feb. 18, 1983.

Defendant convicted of first-degree murder appealed from the Superior Court, First Judicial District, Ketchikan, Thomas E. Schulz, J., which granted State's motion to remand defendant into custody pursuant to new bail statute. The Court of Appeals, Coats, J., held that statute providing in part that if a person has been convicted of an offense which is an unclassified felony or a class A felony, the person may not be released on bail either before sentencing or pending appeal did not apply to defendant because her conviction arose before the effective date of statute.

Reversed

Bail ⇐43

Statute providing in part that if a person has been convicted of an offense which is unclassified felony or class A felony, the person may not be released on bail either before sentencing or pending appeal did not apply to defendant convicted of murder in the first degree because her conviction occurred before effective date of statute. AS 12.30.040(b).

Daniel Westerborg, Birch, Horton, Bittner, Pestinger & Anderson, Anchorage, for appellant.

F.2d 960 (10th Cir.1967), and *Trumbly v. State*, 515 P.2d 707, 710 (Alaska 1973), with *Wood v. Georgia*, 450 U.S. 261, 284-87, 101 S.Ct. 1097, 1110-11, 67 L.Ed.2d 220, 238-40 (1981) (White, J., dissenting), and *Hood v. Smedley*, 498 P.2d 120 (Alaska 1972).



Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
STAFF COUNSEL

303 K Street
Anchorage, Alaska 99501

(907) 264-8228

February 18, 1987

Representative John Sund
House of Representatives
P. O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

At the request of the House Judiciary Committee, I am writing with regard to House Bill 106, an act relating to the payment of criminal fines and restitution.

The Alaska Court System does not take a position about the substantive merits of this measure. However, several provisions raise interpretation questions which may be of interest to the committee

1. Paragraph (a)(4) provides that the court shall take into account the need of the victim and society for punitive compensation. This provision appears to be inconsistent with AS 12.55.100(a)(2), which provides that while on probation and among the conditions of probation, a defendant may be required to make restitution for actual damages or loss caused by the crime.
2. In Section 2, at lines 6 through 8 and 11 through 14, it is not clear whether the phrase "suspended sentence" refers to a suspended execution of sentence, a suspended imposition of sentence or to both. Also, which procedure will apply if a judge orders a fine and restitution as both a direct court order and a condition of probation?
3. On page 2 at line 14, the measure provides that the state may enforce payment of a fine and the restitution recipient may enforce payment of a restitution order. What procedure will be followed if a fine is owed to a municipality? Additionally, does this sentence mean that only the restitution recipient and not the state, can use the civil execution process to enforce a restitution order? By way of comparison, under 18 USC Section 3579 (copy attached), an order of restitution may be enforced by the federal government or a victim in the same manner as a judgment in a civil action.

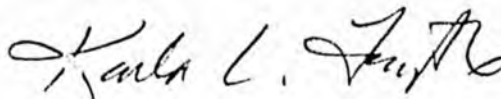
*John
This troubles
me too*

Pete

Representative John Sund
February 18, 1987
Page 2

Thank you for the opportunity to comment on this legislation.

Sincerely,



Karla L. Forsythe
Staff Counsel

KLF:bs

cc: Representative Cliff Davidson
Representative Kay Brown
Representative Peter [REDACTED]
Representative Ron Larson
Representative Curt Menard
Representative Robin Taylor
Representative Niilo Koponen
Representative Max F. Gruenberg
Representative Jim Zawacki
Arthur H. Snowden, II, Administrative Director
Susan Miller, Manager, Special Projects

2/18/87-5

compensatory damages by such victim in—

- (A) any Federal civil proceeding; and
- (B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

- (A) the end of the period of probation, if probation is ordered;
- (B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and
- (C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the

offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

Another provision of the Act, set forth in Section 6 of Pub.L. 97-291 (The Witness Protection and Restitution Act of 1982), states in pertinent part:

Within two hundred and seventy days after the date of enactment of this Act [October 12, 1982], the Attorney General shall develop and implement guidelines for the Department of Justice consistent

ALASKA WOMEN'S LOBBY

POST OFFICE BOX 10-1571, ANCHORAGE, ALASKA 99510

February 16, 1987

Honorable John Sund, Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Chairman Sund and members of the committee:

The Alaska Women's Lobby would like to lend it's support to HB 106. We are in favor of attempts to make the current system of restitution to victims more enforceable.

When there has been a financial burden placed on the victim as a result of the criminal conduct of the defendant it is important that the victim be compensated for her/his expenses.

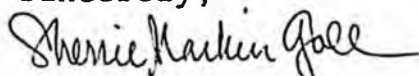
In cases involving family violence the victim often has immediate out of pocket expenses to cover necessary medical and dental costs. With passage of this legislation, if the victim has been provided counseling and shelter services by a private nonprofit domestic violence program, that program will be authorized to collect restitution for the cost of services provided if the victim chooses to breach the confidential nature of her stay at the shelter.

The programs which shelter and treat victims of family violence are facing drastic reductions in funding in the proposed budget. The Council on Domestic Violence and Sexual Assault which funds the statewide network of programs was cut 12.5% in July and faces another 15% reduction in General Funds in FY88. In addition the social service block grants in Anchorage and Fairbanks have been removed from the budget and those grants provided 15% of the total funding for domestic violence programs in those cities.

Funding is decreasing at a time when economic stress is increasing the potential for family abuse. Under these circumstances legislation which would provide for the offender to pay for the services provided to the victim, could only be of benefit to the state as we try to deal with the grave social problem of family violence.

Thank you for your consideration.

Sincerely,



Sherrie Markin Goll
for the Alaska Women's Lobby

Fbks Miner week of 2/23/87

Battle scene after domestic shooting— one dead, one bleeding, TV droning on

By KRIS CAPPS
Staff Writer

Kenneth N. Jensen lay helpless for five hours in Maria Stoneking's house, bleeding from gunshots to his neck and leg. Stoneking lay nearby, dead. The television they had been watching droned on.

Stoneking's 2-year-old son and 7-year-old daughter were asleep in another room.

At about 7:30 a.m., the 23-year-old Eielson man was somehow able to direct the little girl to the telephone. She dialed 911.

When Alaska State Troopers arrived, Jensen identified James Steven Stoneking as his attacker. That was later confirmed by the 7-year-old daughter, who said her father had been there that night.

Although details were sketchy, it appears that the two children were asleep in another room, when the shots were fired. Stoneking then entered the daughter's room and she recognized him even though he wore a ski mask.

Jensen was due to undergo surgery today at Bassett Army Hospital. The two children are now being cared for by friends.

James Steven Stoneking, known as "Steve" to his friends,

has been charged with murder and assault. He was arrested later at his apartment.

Clutching a Bible, Stoneking, 34, was escorted by Alaska State Troopers Tuesday to a hearing in Fairbanks District Court. His bail remains set at \$750,000 and the Fairbanks Grand Jury will hear the case today.

Meanwhile, District Court Judge Hugh H. Connelly set Stoneking's bail at \$250 for a separate charge of criminal trespass.

He is accused of breaking into his wife's North Pole home at 2751 Silver St., on Feb. 8, ignoring a judge's order to stay away from her.

The couple was in the process of getting divorced and Maria C. Stoneking, 32, had just received another emergency order to keep her estranged husband away from her. She told a judge he had threatened to kill her and continued to break into her home, on the pretense of collecting his personal property.

Stoneking, who had served in the U.S. Air Force for 14 years, was in the process of leaving the military. Since May 1986, he was a member of the Alaska Air National Guard, assigned to the 168th Air Refueling Squadron.

He was a supply man who acted as liaison between supply and maintenance departments.

According to the Air National Guard, at the time of the shooting, Stoneking was on leave pending his resignation, effective Feb. 28. He resigned for personal reasons, a military spokesman said.

One acquaintance remembered him as a hard worker who did a good job. He talked to co-workers frequently about his personal life and had been referred to professional counseling.

Maria Stoneking was the fourth person to die during the past 11 months following an apparent domestic dispute.

Other victims include:

- Carmen Dore, who was shot and killed April 29, 1985 by Jack Dore, husband of 10 years. Friend and neighbor Carl Emory was also wounded in the attack. Jack Dore then killed himself. A judge had ordered Dore to stay away from his wife and police were looking for him.

- Kinton Cook, who was shot and killed July 6, 1986 by his ex-wife Megan R. Ripley when he came to her house invited at 3.5 Mile Old Nenana Highway and cornered her in a bedroom.

A coroner's jury later found the shooting justifiable homicide. A court order was in effect at the time, prohibiting Cook from having any contact with Ripley.

- Dixie Gutman Thompson, who was found stabbed to death last September. Her ex-husband Carl K. Thompson goes to trial on a charge of first-degree murder next month. Dixie Thompson had restraining orders against Carl Thompson early in 1986.

Fairbanks judges say they treat domestic violence cases seriously and provide relief in the form of restraining orders whenever possible. In most cases, judges say, the restraining orders work. They view these four cases as exceptions, but have no theories as to why they are occurring so frequently.

Victims often delude themselves into thinking they have more protection than they really have, said District Court Judge Christopher Zimmerman. He said he tries to help victims in his courtroom be realistic about their situation.

"I tell them, this isn't a bullet-proof shield," he said.

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____

Bill Version : HB 106

Publish Date : _____

Revision Date: _____
 Title: An Act relating to the payment of
 criminal fines and restitution
 Sponsor: Davidson, Brown, Goll, etc.
 Requestor: House Judiciary

Agency Affected: Public Safety
 BRU: Council on Domestic Violence
 and Sexual Assault
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

JNR
2/17/87

Prepared by: Barbara Miklos, Executive Director *BGM*
 Division: Council on Domestic Violence & Sexual Assault

Phone: 465-4356
 Date: 2-17-87

Approved by Commissioner: *[Signature]*
 Agency: Public Safety

Date: 2/17/87

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 - Senate Secretary

