ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4663 HJUD HB 106 - HB 121

235

5-0378Ba
Cook

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 add a new (4)

~~the ability of the dependent~~

#2 Adopted

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

2/25/87

#4

Adopted

AMENDMENT

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, Ln 20-21 Delete (2) Adopted

AMENDMENT #4

Offered in the House BY: SUND
TO: CSHB 106 (Finance)

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Withdrawn

Dee #5

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

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

IN THE HOUSE

HOUSE BILL NO. 106

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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 AS 12.55.045(a) is repealed and reenacted to read:

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

(1) public policy that favors requiring criminals to compensate their victims;

(2) fact that a victim may encounter difficulty in obtaining an enforceable civil judgment;

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

(4) need of the victim and society for punitive compensation to be extracted from the defendant.

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

(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 the defendant should not be sentenced

to imprisonment for nonpayment. If the defendant fails to establish [COURT FINDS] by a preponderance of the evidence that the defendant did not intentionally refuse or fail [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. If the defendant was not given a suspended sentence of imprisonment conditioned upon paying a fine or restitution, a [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. 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. The state may enforce payment of a fine and the restitution recipient may enforce payment of a restitution order against a defendant under AS 09.35 as if the order were a civil judgment enforceable by execution [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].

Lots of worse violators out

Define: Counseling

Include Live Drug & Alcohol

Code of Civil Procedure Execution of Judgments

Equal Protection for Indigent Defendant

"will fill the jails"

Takes away discretion of Judge

Constitutional Problems

debtor prison

to imprisonment for nonpayment. If the defendant fails to establish [COURT FINDS] by a preponderance of the evidence that the defendant did not intentionally refuse or fail [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. If the defendant was not given a suspended sentence of imprisonment conditioned upon paying a fine or restitution, a [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. 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. The state may enforce payment of a fine and the restitution recipient may enforce payment of a restitution order against a defendant under AS 09.35 as if the order were a civil judgment enforceable by execution [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].

contempt of court

12.55.025(f) see.

redundant →

discriminates against poor

counseling defined ??

Lomick v. AMC Ct of Appeals upheld debtor prison

12.55.045(d) →

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB106

REQUEST: _____ Publish Date : _____

Revision Date: _____ Agency Affected: Department of Administratio

Title : "An Act relating to the payment BRU Public Defender Agency
of criminal fines and restitution."

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 Phone : 279-7541
Division : Public Defender Agency Date : February 20, 1987

Approved by Commissioner : _____ Date : 2/26/87
Agency : Dept. Administration

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

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

REQUEST:

Revision Date:

Agency Affected: Administration

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

BRU: Office of Public Advocacy

Sponsor: Davidson, 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		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 2/22/87

Approved by Commissioner: for Garrey Peska
Date: 2/26/87
Agency: Department of Administration

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

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

to imprisonment for nonpayment. If the defendant fails to establish [COURT FINDS] by a preponderance of the evidence that the defendant did not intentionally refuse or fail [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. If the defendant was not given a suspended sentence of imprisonment conditioned upon paying a fine or restitution, a [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. 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. The state may enforce payment of a fine and the restitution recipient may enforce payment of a restitution order against a defendant under AS 09.35 as if the order were a civil judgment enforceable by execution [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].

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

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

IN THE HOUSE

HOUSE BILL NO. 106

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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

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

(1) public policy that favors requiring criminals to compensate their victims;

(2) fact that a victim may encounter difficulty in obtaining an enforceable civil judgment;

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

(4) need of the victim and society for punitive compensation to be extracted from the defendant.

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

(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 the defendant should not be sentenced

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB106
REQUEST: _____ Publish Date : _____

Revision Date: _____ Agency Affected : Department of Administratio
Title : "An Act relating to the payment BRU: Public Defender Agency
of criminal fines and restitution." "
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 Phone : 279-7541
Division : Public Defender Agency Date : February 20, 1987

Approved by Commissioner : _____ Date : 2/26/87
Agency : Dept. Administration

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

page ____ of ____

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

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

REQUEST:

Revision Date:

Agency Affected : Administration

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

BRU; Office of Public Advocacy

Sponsor : Davidson, 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		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Brant McGee, Public Advocate
Phone : 274-1684
Division : Office of Public Advocacy
Date : 2/22/87

Approved by Commissioner : for Garrey Peska
Date : 2/26/87
Agency : Department of Administration

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 x $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 2/26/87

Commissioner Garrey Peska — Date 2/26/87
Department of Administration

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION : CSHB 106(FIN)AM
PUBLISH 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)

Susan E. Knighton

Prepared by : Susan E. Knighton, Director — Phone : 465-3376
Division : Administrative Services — Date : 1-15-88

Approved by Commissioner : Susan Humphrey-Barnett — Date : 2-19-88
Agency : Department of Corrections

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

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB 106
Publish Date :

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 : Dept. of Corrections
BRU : Operations
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	-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 Commissioner : Acting 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:
Title: An act relating to the payment of criminal fines and restitution
Sponsor: Davidson, Brown, Goll, ...
Requestor: House Judiciary Committee

Agency Affected: Alaska Court System
BRU: Trial Courts
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						
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:

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 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 Fabe, 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 x $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

Dana Fabe
Public Defender

DF:sh

MEMORANDUM

3/23/87

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

HB 106 (Davidson, 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

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 (d) 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 the our attention that an amendment may be proposed to delete this wording. The Network has absolutely no objections to this.

Margot 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 45.45.010, 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 affirmance of the Board's decision is REVERSED and REMANDED with directions to further remand to the Board for proceedings in accordance with this opinion.

MOORE, J., not participating.

(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. 1981); Okla.Stat.Ann. tit. 85 § 42 (West Supp. 1982-83); Pa.Stat.Ann. tit. § 77, 717.1 (Purdon 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-pejorative" 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).

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

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 ⇐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 ⇐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 ⇐1208.1(2)

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

4. Embezzlement ⇐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 ⇐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 ⇐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 *Brezenoff v. State*, 658 P.2d 1359. AS 12.55.045(a).

7. Criminal Law ⇐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 wager 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 degree[2] for the money converted after January 1, 1980 and one count of embezzlement by an employee[3] 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 460 (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 12.55.045(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 condemnation[4] 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-

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 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.

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 (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 that 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] $25,000[7] and $6,500[8] in similar offenses

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.

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.

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(c)[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

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.
>
> 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 *Brezenoff*. 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 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-

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 restitution 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. *Brezenoff 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 ⇐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 ⇐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.

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.-

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 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 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).

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 Westerburg, Birch, Horton, Bittner, Pestinger & Anderson, Anchorage, for appellant.

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?

John
This troubles me too
Pete

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.

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 Goll
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 andthose grants provided 15% of the total funding or 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

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 Stone[illegible]g'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 coworkers 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, 1986 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 P. Ripley when he came to her house uninvited 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

Bill Version : HB 106
Publish Date :

REQUEST:

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

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

HOUSE BILL NO. 106

February 17, 1987

An Act relating to the payment of criminal fines and restitution

Barbara Miklos
Executive Director
Council on Domestic Violence and Sexual Assault

DEPARTMENT OF PUBLIC SAFETY

House Bill 106, Section 1 (a), permits payment of restitution by a defendant convicted of an offense to a public or private nonprofit organization that has provided counseling, medical or shelter services to the victim.

Since many agencies that provide services to victims have inadequate funding, additional financial support is needed. It is difficult to determine if this provision will engender much money for domestic violence and sexual assault programs because its use may not be appropriate in most cases. Domestic violence and sexual assault programs cannot reveal clients' identities without the express permission of the victim and guarantee for the victim's safety. However, there may be instances where this could be accomplished and the perpetrator should be held accountable to the victim and pay for harm done to her as well as services received.

Although the Council on Domestic Violence and Sexual Assault does not have the legal expertise to comment upon the legal complications of this bill, the Council supports the concept of this legislation.

William R. Nix
Acting Commissioner

HB

114

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 13, 1987

Representative John Sund
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

It is my understanding that the House Judiciary Committee will be hearing HB 114 relating to surety insurance next Wednesday, February 18.

This bill would enable the courts to refuse to accept bail bonds from a surety who has not paid forfeited bonds. By way of background, the primary bail statute [AS 12.30.020(b)(5)] authorizes the court to accept bail bonds with sufficient solvent sureties. Under current law, corporate sureties (i.e., insurance companies) are licensed and regulated by the Division of Insurance (see generally, AS 21.27) AS 21.63.020 states that a surety insurer which is qualified to act as surety or guarantor as authorized in the insurance statutes, and which executes a bond, is entitled to recognition:

> ...all courts, judges, ... shall accept and treat accordingly the bond, undertaking, obligation, recognizance or guarantee when so executed by the insurer, as conforming to and fully and completely complying with every requirement of every law, charter, ordinance, rule or regulation.

The court has no statutory power over corporate sureties. As long as the surety is licensed and in good standing with the Division of Insurance, under current law the court must accept bail bonds properly written by a surety.

(1)

The court does not want to assume licensing or regulatory authority over corporate sureties writing bail bonds. That power appropriately lies with the Division of Insurance. However, it would be desirable for the court to have the ability to refuse to accept bail bonds from a corporate surety if forfeited bonds are unpaid and delinquent, even if the Division of Insurance has not yet completed an investigation or taken any action against the license of such a surety or its agent. The proposed legislation would give the court that authority.

With regard to the language of the proposed bill, the court system suggests a minor wording change in paragraph (b), to read as follows:

> (b) A court may, under AS 12.30.020(b), refuse to accept a surety bond if the surety is more than 90 days delinquent in making payment on a [FORFEITED] bond <u>previously executed by the surety and forfeited by the court.</u> The 90-day period begins the day that the surety receives notice of the forfeiture of the bond.

The language would clarify the relationship between the forfeited bond and the bond which the court is refusing to accept.

Thank you for considering these comments. I will be glad to answer any questions from the committee.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
Staff Counsel

KLF:bs

cc: Arthur H. Snowden, II, Administrative Director
Stephanie J. Cole, Deputy Administrative Director

2/13/87-5

(2)

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.	3-10-87	1:30p.m.
H. JUD.	2-18-87	1:30p.m.
H. JUD.	2-16-87	1:30p.m.

5-0458B
Ford
2/18/87

Original sponsor: Judiciary Committee

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 114 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to surety insurance."

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

* Section 1. AS 21.63.020 is repealed and reenacted to read:

Sec. 21.63.020. SURETY BONDS. (a) If a surety bond or other surety obligation is required or permitted by law, the bond or other obligation may be executed by a surety insurer as authorized under this title. A bond executed by a surety insurer is full and complete compliance with every requirement of law that the bond or other obligation must be executed by a surety. Except as provided under (b) of this section, a surety bond or other surety obligation executed under this section may not be refused for failure to conform to law.

(b) A court may, under AS 12.30.020(b), refuse to accept a surety bond if the surety is more than 90 days delinquent in making payment on a bond previously executed by the surety and forfeited by the court. The 90-day period begins the day that the surety receives notice of the forfeiture of the bond.

Prospective only — bonds issued after date certain.

5-0458B
Ford
2/18/87

Original sponsor: Judiciary Committee

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 114 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to surety insurance."

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

* Section 1. AS 21.63.020 is repealed and reenacted to read:

Sec. 21.63.020. SURETY BONDS. (a) If a surety bond or other surety obligation is required or permitted by law, the bond or other obligation may be executed by a surety insurer as authorized under this title. A bond executed by a surety insurer is full and complete compliance with every requirement of law that the bond or other obligation must be executed by a surety. Except as provided under (b) of this section, a surety bond or other surety obligation executed under this section may not be refused for failure to conform to law.

(b) A court may, under AS 12.30.020(b), refuse to accept a surety bond if the surety is more than 90 days delinquent in making payment on a bond previously executed by the surety and forfeited by the court in accordance with the rules of court. The 90-day period begins the day that the surety receives notice of the forfeiture of the bond.

Section 2. This Act applies only to bonds forfeited after the effective date of this Act

Proposed by Alaska Court System

3/10/87

CS FOR HOUSE BILL NO. 114 (JUDICIARY)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to surety bonds."

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

*Section 1. AS 12.30.020(b) is amended to read:

(b) If a judicial officer determines under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to other persons and the community, the judicial officer may

(1) place the person in the custody of a designated person or organization agreeing to supervise the person;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the person to return to custody after daylight hours on designated conditions;

(4) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security, a sum not to exceed 10 percent of the amount of the bond; the deposit to be returned upon the performance of the condition of release;

(5) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash; or

(6) impose any other condition considered reasonably necessary to assure the defendant's appearance as required and the safety of other persons and the community.

The court may refuse to accept a bond from a surety if the court determines that refusal is in the best interest of the state.

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
STAFF COUNSEL

303 K Street
Anchorage, Alaska 99501

(907) 264-8228

March 10, 1987

Representative John Sund
Chair, House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

Thank you for forwarding Mr. George's letter regarding HB 114. The court system has no objection to the approach proposed by Mr. George. I have attached a proposed draft amending AS 12.30.020(b) along the lines he suggests. It is my understanding that the Committee will discuss this bill at its meeting this afternoon.

A copy of this letter will be delivered to Mr. Haggart's office today. Also, I am forwarding a copy of Mr. George's letter to the court rules revisor, and asking him to bring it to the attention of the Criminal Rules Committee.

The court system appreciates your efforts and the efforts of your staff to help formulate a workable amendment to meet the court's concerns.

Sincerely,

Karla L. Forsythe
Staff Counsel

KLF:bs

Att.

cc: Arthur H. Snowden, II, Administrative Director
Stephanie J. Cole, Deputy Administrative Director
William T. Cotton, Court Rules Attorney
Richard Haggart
John George, Director, Division of Insurance

3/10/87-1

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____ Bill Version: HB 114
Publish Date:

Revision Date:
Title: An act relating to surety insurance
Sponsor: House Judiciary Committee
Requestor: House Judiciary Committee

Agency Affected: Alaska Court System
BRU: Trial Courts
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	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
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:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

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

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

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

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 114
REQUEST: Publish Date:

Revision Date: 1-6-88 Agency Affected: Alaska Court System
Title: An act relating to surety insurance BRU: Trial Courts
Sponsor: House Judiciary Committee Components:
Requestor: House Judiciary Committee

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	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
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:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Jan Strandberg

Prepared by: Jan Strandberg, General Counsel Phone: 264-8228
Division: Alaska Court System Date: 1-6-88

Stephanie Cole for

Approved by: Arthur H. Snowden, II, Administrative Director Date: 1-6-88
Agency: Alaska Court System

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

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
STAFF COUNSEL

303 K Street
Anchorage, Alaska 99501

(907) 264-8228

March 10, 1987

Representative John Sund
Chair, House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

Thank you for forwarding Mr. George's letter regarding HB 114. The court system has no objection to the approach proposed by Mr. George. I have attached a proposed draft amending AS 12.30.020(b) along the lines he suggests. It is my understanding that the Committee will discuss this bill at its meeting this afternoon.

A copy of this letter will be delivered to Mr. Haggart's office today. Also, I am forwarding a copy of Mr. George's letter to the court rules revisor, and asking him to bring it to the attention of the Criminal Rules Committee.

The court system appreciates your efforts and the efforts of your staff to help formulate a workable amendment to meet the court's concerns.

Sincerely,

Karla L. Forsythe
Staff Counsel

KLF:bs

Att.

cc: Artnur H. Snowden, II, Administrative Director
Stephanie J. Cole, Deputy Administrative Director
William T. Cotton, Court Rules Attorney
Richard Haggart
John George, Director, Division of Insurance

3/10/87-1

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 24, 1987

Representative John Sund
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

The Alaska Court System offers several comments in response to testimony presented at the committee's hearing on House Bill 114 relating to surety insurance.

Mr. Adkerson questions the need for this legislation. In his view the Division of Insurance has adequate authority to address the problem of unpaid bonds. He also believes that properly forfeited bonds are being paid in a timely manner.

This legislation was proposed in response to an actual problem facing the court system. A surety (now no longer operating in the state) had an authorized agent who was writing bail bonds, some of which were subsequently forfeited when a defendant failed to appear. These forfeited bonds were not being paid; many were over one year old. The Division of Insurance indicated that an investigation was under way but was not in a position to take immediate action. When the court became aware of the extent of the problem, the court undertook to examine its options to control such a situation. Although the court system had every reason to believe that it would never receive payment on these forfeited bonds, under existing law the courts had no authority to decline to accept further bonds from this surety until some definitive action was taken by the Division of Insurance. This legislation would prevent this situation from recurring in the future. The bill focuses on corporate rather than private sureties because a continuing pattern of unpaid forfeited bonds arises with a surety who is writing bonds in volume, rather than with a private surety who usually is posting security only in one case.

Although in some jurisdictions courts closely regulate bail bondsmen, the Alaska Court System believes this responsibility properly lies with the executive branch. The court is not seeking to undertake a executive branch collection function. The court simply seeks the ability to decline to accept bonds if a surety has not paid bonds in the past. This is in keeping with good business practice and avoids the need to create additional bureaucratic procedures.

Mr. Adkerson suggests three changes to House Bill 114. First, Mr. Adkerson proposes that the bill specifically state that the court can refuse to accept a bond only after notice and hearing. The court system proposes instead that House Bill 114 be redrafted to provide that the court may refuse to accept payment only after a bond has been forfeited in accordance with court rules. At present, Criminal Rule 41(d) requires notice and hearing before bonds are forfeited. A proposal currently under consideration by the Criminal Rules Committee requires notice to the surety but would provide for a hearing only upon request, with forfeiture to occur after 60 days elapses from notice without a request for hearing. The mechanics of forfeiting bonds are matters well within the court's administrative authority under the rules of practice and procedure.

The court system proposes the following language (underlined):

> "A court may, under AS 12.30.202(b), refuse to accept a surety bond if the surety is more than 90 days delinquent in making payment on a bond <u>previously executed by the surety and forfeited by the court in accordance with Rules of Court.</u> The 90-day period begins the day that the surety receives notices of the forfeiture of the bond."

Second, Mr. Adkerson suggests that 120 days should elapse before the court can refuse to accept further bonds. In the view of the court system, even three months may be excessively lengthy. The court needs to take action as quickly as reasonably possible, and 90 days affords more than sufficient time for a surety to make payment.

Finally, Mr. Adkerson proposes that this measure apply only to bonds executed after the effective date of the act. The court system alternately proposes that this measure apply to any bonds forfeited after the effective date of this act, since the language proposed above would specifically require compliance with court rules.

The committee also asked the court system to review paragraph (a) of this bill, which redrafts the existing statute. The redraft does not modify any existing rights, and is much easier to understand than the existing law.

The court system respectfully disagrees with Representative Gruenberg's view that this bill is in bad shape, and believes that the bill as currently drafted with the modifications suggested by the court system will provide an easy, understandable and fair procedure for assisting the court in exercising its fiduciary responsibilities to the State of Alaska with regard to delinquent bail bonds.

I hope this information is helpful to the committee. Please let me know if I can provide further information.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
Staff Counsel

KLF:ls

cc: Arthur H. Snowden, II, Administrative Director
Stephanie J. Cole, Deputy Administrative Director
Representative Max F. Gruenberg, Jr.
Vice Chairwoman Fran Ulmer
Representative Sam Cotten
Representative Mike Navarre
Representative Ramona Barnes
Representative Robin Taylor
Richard Haggart

2/24/87-2

REQUESTED REPLACEMENT LANGUAGE FOR HOUSE BILL 114
SUBMITTED BY MR. FRED ADKERSON, OWNER OF FRED'S BAIL BONDING

(b) The Court may, under A.S. 12.30.020(b), refuse to accept a surety bond if the surety is more than 120 [90] days delinquent in making payment on a forfeited bond, PROVIDED HOWEVER, THAT THE COURT MAY NOT REFUSE TO ACCEPT A SURETY BOND UNDER THIS SUBSECTION IF THE FORFEITURE GIVING rise to the delinquency occurred without notice and hearing. The 120-DAY [90-day] period begins the day that the surety receives notice of the forfeiture of the bond AND AFTER NOTICE AND HEARING.

(c) The provisions of Subsection (b) apply only to bonds executed after the effective date of this act.

TESTIMONY OF RICHARD G. HAGGART

ON BEHALF OF FRED ADKERSON, OWNER OF FRED'S BAIL BONDING
BEFORE THE HOUSE JUDICIARY COMMITTEE
FEBRUARY 17, 1987

Mr. Chairman, Madam Vice Chairman, members of the Committee:

My name is Richard Haggart and I am appearing today with and on behalf of Mr. Fred Adkerson with respect to House Bill 114, "An act relating to surety insurance."

As this Committee knows, Mr. Adkerson and his business is deeply affected by any legislation touching on the rights and responsibilities of corporate sureties in this State.

At the outset we want to make clear that Mr. Adkerson has doubts about the need for this legislation. At the present time, the Division of Insurance has full authority to regulate corporate sureties, and to Mr. Adkerson's knowledge, is doing so. The problem meant to be addressed by this legislation simply does not exist: bonds forfeited after hearing are in fact being paid by solvent corporate sureties in a timely manner. While another bail bonding company did fail to pay off a number of bonds, this was because of the bankruptcy of the bondsmen's insurance company. We respectfully suggest that the legislation sought by the court system in House Bill 114 would have only a nominal affect on reducing losses due to bankruptcy of the surety.

Second, it is unclear why corporate sureties are being singled out in this legislation. A large number of the bonds issued in the criminal courts of this State are secured by private cash, private property, or private surety. When bonds of private sureties are forfeited, the court system has made no effort to collect or enforce the underlying security. To Mr. Adkerson's knowledge, not one piece of real property has been taken, nor one promissory note pursued where private sureties have been involved in a forfeiture; when the court system is leaving hundreds of thousands of dollars of forfeited security on the table each year, it is a fair question to ask where the resources and expertise to enforce this legislation against corporate sureties will be coming from. Even more important, why is the State focusing on corporate sureties and ignoring the large number of private sureties that have, to date, been allowed to thumb their nose at the court system without consequence?

Finally, the Division of Insurance which currently regulates corporate sureties in all respects, is fully empowered to act against any corporate surety who violates state law. It is perhaps worth considering whether the Insurance Division should explain why it cannot handle its regulatory responsibilities to the satisfaction of the court system. Dividing responsibilities of regulatory measures among different bureaucracies invites mismanagement and confusion both from a governmental standpoint,

and for those who are regulated. Before such a step is taken, it should be clearly demonstrated that there is a substantial need for the divided authority. There simply has not been any such showing with respect to House Bill 114.

Mr. Adkerson's previous comments have been directed to whether or not House Bill 114 should be enacted at all; if it is enacted, however, there are two absolutely vital modifications to be made in the legislation. First, it must be made explicit that the 90 day waiting period following a forfeiture begins to run only when the forfeiture was ordered after proper notice and hearing.

If this change is not made, the very existence of Mr. Adkerson's business is threatened. At the present time, there are a number of outstanding bonds which have been technically ordered forfeited by the court, but which Mr. Adkerson has not yet paid. The reason for this failure to pay is that all of these forfeitures took place without hearing or without notice to Mr. Adkerson. A great many of the forfeitures went unnoticed until recently when the matter was brought to the attention of the court system by Mr. Adkerson himself.

So far, three different District Court Judges in Anchorage have held the forfeitures without notice and hearing as required under Criminal Rule 41 are improper, and Mr. Adkerson cannot therefore be deemed in default on the bond. Whether or not

hearings and notice can take place now, in some cases years after the fact, is a matter which is under negotiation between Mr. Adkerson and the court system and which must necessarily be determined on a case by case basis.

The point is, however, that Mr. Adkerson is technically more the ninety days in arrears on a large number of these bonds, at least as far as they are recorded in the state court system computer. As this legislation is written, Mr Adkerson would become immediately subject to the penalty provisions of the legislation and could be forced to either shut down his business, or immediately up pay all outstanding bonds, regardless of whether he had ever had an opportunity to contest the forfeiture at hearing or even has been given notice of the forfeiture. Such a result would be fundamentally unfair and is simply not necessary in the context of the stated objectives of this legislation's sponsors. To cure this problem, Mr. Adkerson is submitting separate draft language which amends Subsection (b) of House Bill 114.

The second important change which needs to be made is to make the Bill prospective in effect only. Thus, Mr. Adkerson requests that this legislation be amended so that it will effect only bonds issued after a future date certain. Consequently, Mr. Adkerson respectfully requests the Committee to add a new Subsection (c) that specifically states the legislation covers

only surety bonds executed after the effective date of the Bill, if enacted.

A third change, not as important as the first two, but nonetheless significant would be to extend the waiting period between forfeiture and when the court system could impose penalties, from 90 to 120 days. Mr. Adkerson does a volume business in corporate surety bonds; hundreds are written every month. Given the volume of the business, and the tightness of court calendars, Mr. Adkerson believes a longer period of time in which to work out problems that arise on disputed bonds would be appropriate. For this reason, we urge the Committee to expand the waiting period in House Bill 114 from 90 to 120 days before the court may impose penalties on a non-paying or contesting surety.

In conclusion, we respectfully ask the Committee to look searchingly at this legislation and determine whether or not putting the court system in the enforcement and collection business, is appropriate. We also urge the Committee to take a good close look at the Division of Insurance, and if they are not in fact doing their job, find out why that is the case. We also urge the Committee to consider very seriously whether or not the problem perceived by the court system exists to the degree and extent that makes this kind of a legislative solution necessary or appropriate.

If some legislation is ultimately necessary, however, the changes Mr. Adkerson has requested in House Bill 114 are vital to the continued existence of his business. While bail bonding is hardly the world's most glamorous profession, it provides an important service in a society where the right to bail is constitutionally mandated. Most of Mr. Adkerson's clients are persons of slender income and limited resources. Each month in the State of Alaska, two to three hundred people are released on bond of a corporate surety. Without the availability of a bondsman, these people would fill to overflowing the State's already overcrowded jails. In this regard, Mr. Adkerson serves an important and useful role in our criminal justice system. The changes he has requested will permit him to continue that role; if they are not adopted and this legislation goes forward, the existence of his business would be unfairly and immediately threatened, without advancing any reasonable interest of the State of Alaska or its court system.

Thank you for your attention. Mr. Adkerson and I stand ready to answer any questions the Committee may have.

WORK:44

Rule 41. Bail.

(a) **Admission to Bail.** The defendant in a criminal proceeding is entitled to be admitted to bail pursuant to AS 12.30.010—12.30.080.

(b) **Prosecuting Attorney — Appearance and Notice.** The prosecuting attorney may appear and be heard in all proceedings relating to bail. The judge or magistrate, in his discretion, may require that notice of such proceedings be given the prosecuting attorney.

(c) **Surrender of Defendant.** At any time before forfeiture of the undertaking or the cash deposit in lieu thereof, the sureties on the undertaking or the owner of the deposit may surrender the defendant to the custody of a peace officer or the defendant may surrender himself to the officer. There shall be delivered to the officer at the time of surrender a certified copy of the undertaking or a certificate as to the cash deposit executed by the clerk of court. The peace officer shall thereupon detain the defendant in custody as upon a commitment and acknowledge the surrender by a written certificate.

(d) **Forfeiture.**

(1) *Declaration.* If the person released on bail on the giving or pledging of security fails to appear before a court or judicial officer as required, the judge or magistrate before whom the person released was to appear shall set a time for hearing to determine if the nonappearance was willful. Notice of the hearing shall be furnished and opportunity to be heard shall be granted to the prosecuting attorney, the defendant, the defense attorney, and the person giving or pledging the security. Nothing in this section shall interfere with the issuance of a summons or bench warrant for a person who fails to appear as required before a court or judicial officer.

(2) *Judgment of Forfeiture.* If after the hearing the judge or magistrate determines that the nonappearance of the person released on bail was willful, the security, given or pledged, shall be forfeited. An appeal may be taken of the judgment of forfeiture in the manner of other appeals.

See AS 21.09.150 (B)(3) Director shall revoke the certificate of any company who fails to pay a final judgement with in 30 days

(3) *Enforcement.* Execution shall issue on judgments of forfeiture in the same manner as on other judgments for the payment of money. (Amended by Supreme Court Order 157 effective February 15, 1973)

Generally:
CROSS REFERENCES: Crim. Forms 55—59, 61—64, 66, 69—72
(a) **CROSS REFERENCES:** AS 12.30.010—AS 12.30.080 (as amended by c. 20 SLA. 1966); Crim. Forms 53, 54
(c) **CROSS REFERENCES:** AS 12.30.020; Crim. Form 60
(d)(1) **CROSS REFERENCE:** Crim. Form 65
(d)(2) **CROSS REFERENCES:** Crim. Forms 67, 68

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

P.O. BOX D
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2515

March 3, 1987

Mr. John Hartel
Office of
Representative John L. Sund
P.O. Box V
Juneau, AK 99811

Dear Mr. Hartel:

Re: Bail Bond Forfeiture - HB 114

Per your request I have reviewed HB 114. It appears to me that (a) properly falls within the insurance code. I have no problem with this wording although it certainly limits the scope of who can be a surety.

Part (B) seems better suited to be added to AS 12 rather than AS 21. As I perceive the problem being addressed, the proposed subsection (B) is ineffective. First, I believe the court should be able to refuse to accept a surety bond from a particular surety if it feels it is in the state's best interest regardless of other delinquencies. Second, I believe the problem the court has with its collection is its failure to meet the requirements set out in the court's own criminal rule 41 to forfeit a surety bond. Once a bond is properly forfeited, AS 21.09.150(b)(3) can be used to leverage payment. Proper forfeiture could be expedited if the court rule were changed to provide that the date for the defendant's appearance is also automatically the date the surety must appear to show why the bond should not be forfeited if the defendant does not show up. Then the judge could order the bond forfeited if the defendant is not present and the surety does not appear to contest the forfeiture. Once forfeited, the court orders payment from surety, and failing to receive payment within 30 days, notifies the Division of Insurance.

The only statutory change required, if my previous comments are true, is to provide the courts the statutory ability to refuse a particular surety if it deems it in the state's best interest. This would apply to corporate as well as personal surety, negating the need for changes to subsection (a). All other changes could be incorporated in a new court rule.

Thank you for allowing me to comment.

Sincerely,

John L. George
Director

JLG/sa2792s
30387a

08-H11LH

Rule 41. Bail.

(a) **Admission to Bail.** The defendant in a criminal proceeding is entitled to be admitted to bail pursuant to AS 12.30.010—12.30.080.

(b) **Prosecuting Attorney — Appearance and Notice.** The prosecuting attorney may appear and be heard in all proceedings relating to bail. The judge or magistrate, in his discretion, may require that notice of such proceedings be given the prosecuting attorney.

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(d) **Forfeiture.**

(1) *Declaration.* If the person released on bail on the giving or pledging of security fails to appear before a court or judicial officer as required, the judge or magistrate before whom the person released was to appear shall set a time for hearing to determine if the nonappearance was willful. Notice of the hearing shall be furnished and opportunity to be heard shall be granted to the prosecuting attorney, the defendant, the defense attorney, and the person giving or pledging the security. Nothing in this section shall interfere with the issuance of a summons or bench warrant for a person who fails to appear as required before a court or judicial officer.

(2) *Judgment of Forfeiture.* If after the hearing the judge or magistrate determines that the nonappearance of the person released on bail was willful, the security, given or pledged, shall be forfeited. An appeal may be taken of the judgment of forfeiture in the manner of other appeals.

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(c) CROSS REFERENCES: AS 12.30.020; Crim. Form 60
(d)(1) CROSS REFERENCE: Crim. Form 65
(d)(2) CROSS REFERENCES: Crim. Forms 67, 68

Introduced: 2/11/87
Referred: Judiciary and
Finance

IN THE HOUSE BY THE JUDICIARY COMMITTEE

HOUSE BILL NO. 114

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to surety insurance."

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

* Section 1. AS 21.63.020 is repealed and reenacted to read:

Sec. 21.63.020. SURETY BONDS. (a) If a surety bond or other surety obligation is required or permitted by law, the bond or other obligation may be executed by a surety insurer as authorized under this title. A bond executed by a surety insurer is full and complete compliance with every requirement of law that the bond or other obligation must be executed by a surety. Except as provided under (b) of this section, a surety bond or other surety obligation executed under this section may not be refused for failure to conform to law.

(b) A court may, under AS 12.30.020(b), refuse to accept a surety bond if the surety is more than 90 days delinquent in making payment on a [forfeited] bond. The 90-day period begins the day that the surety receives notice of the forfeiture of the bond.

Previously executed by the surety and forfeited by the court.

HB

121

STEVE COWPER
GOVERNOR

H13121

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that repeals AS 12.45.150, an obsolete statute that provides for the payment of costs for "malicious prosecutions" brought by private persons. 1/ This provision has been the cause of some confusion regarding who has the authority to institute criminal charges. In recent months several persons in the Kenai area have attempted to file "criminal charges" against other persons, primarily police officers who have arrested them, citing AS 12.45.150 as their authority to do so.

Well-established principles of statutory construction require that the language of AS 12.45.150 be interpreted in conjunction with AS 44.23.020(b)(3), which places responsibility in the attorney general to "prosecute all cases involving violation of state law." 2/ Thus AS 12.45.150 does not provide authority for

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1/ The precursor of present AS 12.45.150 appears to first have been adopted in 1900; it was apparently based upon an 1882 statute from Oregon. See Ann. Alaska Codes, Pt. II, ch. 19, § 193-194 (Carter 1900). The provision was included in the first codification of Alaska's criminal laws after statehood. See § 6.16, ch. 34, SLA 1962. Except for minor technical amendments (for example, ch. 8, SLA 1971, a revisor's bill which made technical corrections relating to the court system, inserted the word "judge" in four places in the statute), the language of AS 12.45.150 has remained virtually unchanged since 1900.

2/ There are rare instances in solely private disputes where it might be appropriate for private litigants to "prosecute" cases of criminal contempt as a way of

(Footnote Continued)

the private prosecution of a criminal case (i.e., motions, pretrial hearings, trial, appeals, etc.). Instead, the statute refers only to a person who unilaterally, and without the advice or concurrence of the police or prosecutors, "voluntarily appears before a judge" to complain about a matter or before a grand jury to testify. At that point the attorney general, through a state prosecutor, has the statutory authority under AS 44.23.020 to review the matter and to handle the case as appropriate. 3/

The primary purpose of AS 12.45.150 was not to authorize the filing of criminal actions by private persons, but rather to make it clear that malicious accusations, or those lacking probable cause, will subject the complainant to immediate judgment "for the costs of disbursements of the action." However, the statute is poorly drafted and, as already noted, has created confusion in lay persons as to their independent authority to file private criminal actions. Moreover, to the extent that the statute provides for a judgment of costs to be rendered automatically and "immediately" it is probably unconstitutional as a violation of due process. It does not allow a person to have his "day in court" to try to show that the accusation was in good faith. Thus the statute might also be a disincentive for people who might otherwise bring close or marginal cases to the attention of a judge or grand jury. The repeal of the statute will eliminate any lingering confusion regarding the existence of "private prosecutors", while leaving the common law protections against malicious prosecutions intact.

The filing of a criminal action is obviously a very serious matter. The fact that a criminal charge has been filed against a person may have a negative effect upon that person's reputation, position in the community, employment opportunities, etc. The need to defend oneself against criminal charges may also impose a

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(Footnote Continued)

enforcing orders in contested divorce cases. See, e.g., Diggs v. Diggs, 662 P.2d 950 (Alaska 1983). In all other situations, however, AS 44.23.020(b)(3) gives the attorney general sole responsibility for handling criminal matters.

3/ Also see Rule 7(c), Alaska Rules of Criminal Procedure, which permits prosecution by indictment only if the indictment is signed by the prosecuting attorney.

great deal of financial expense and emotional strain. Thus the power to institute criminal proceedings ought not to rest with a private party involved in some sort of vendetta or a personal dispute with another.

There is no such thing as a "private prosecutor" in Alaska, nor should there be. Because AS 12.45.150 is apparently being interpreted by some persons as implicitly recognizing such a procedure, and because it probably violates due process requirements, this obsolete statute should be repealed.

Sincerely,

Steve Cowper
Governor

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 CMFR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 2-24-87 1:30 p.m.

H. JUD. 2-23-87 1:30 p.m.

(7)

HOUSE COMMITTEE REPORT

Date referred: 2/11/87 FURTHER REFERRALS: Finance

DATE: 2-24-87

The Judiciary Committee has considered HB 121

"An Act repealing a provision related to payment of costs by private prosecutor."

RECOMMENDS:

[ ] replace with _____ [ ] 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

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[✓] same as previous zero fiscal note published 2/11/87

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Robin L. Taylor (Do Not Pass Removes common law right in statute law)

Chairman's signature

LETTER OF INTENT
HOUSE JUDICIARY COMMITTEE
HOUSE BILL 121

By repealing AS 12.45.150, the Legislature does not intend to limit the present practice allowing the filing, by private parties, of motions for orders to show cause for criminal contempt of court.

Rep. John Sund, Chair,
House Judiciary Committee

MEMORANDUM

April 8, 1987

TO: Rep. John Sund

FROM: J. Hartle, PA

RE: House Bill 121

19. HB 121 (Rules/Governor) An Act repealing a provision related to payment of costs by private prosecutor

A. Heard in Judiciary 2/23, 2/24
B. Passed out "Do Pass" 2/24
C. Status: H. Floor
D. Purpose: Repeals provision for immediate cost recovery against malicious prosecution by private prosecutor.
E. Issue: Kenai use of provision to imply right of private prosecution.
F. Issue: Why not have private prosecutors:
1) An individual is not constrained by the same public purpose and ethical considerations that a D.A. must follow.
2) Remedies are available in civil court.
3) The Court System doesn't know how to handle it.
G. In File:
1) HB 121
2) Letter from Karla Forsythe
3) Kenai Court Case
4) Governor's transmittal letter
5) Repealed statute
6) Statute giving authority to the Dept. of Law to prosecute all criminal cases.

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☒ CRIMINAL DIVISION CENTRAL OFFICE
POUCH KC
JUNEAU, ALASKA 99811
PHONE: (907) 465-3428

☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

DEPARTMENT OF LAW

CRIMINAL DIVISION

October 2, 1986

Mr. Arthur H. Snowden, II
Administrative Director
Alaska Court System
303 K Street
Anchorage, Alaska 99501

Dear Art:

Your letter of September 22 to Attorney General Brown jogged my memory about the need to amend or repeal AS 12.45.150. I agree that the statute is beginning to cause quite a few problems, particularly in Kenai, by giving people the idea that they have the authority to prosecute criminal charges on their own. The Department of Law will therefore propose that the Governor introduce legislation to cure this misperception. For your information, we have opened a legislative file on this subject (No. 773-87-0067) in order to facilitate the drafting and review of the proposed bill.

Your letter included a copy of Mary Anne Henry's 1977 internal office memorandum on this subject, which I had never seen, and although I agree with her assessment of the problems that can be created by private prosecutors, I do not agree with her conclusion that AS 12.45.150 in fact authorizes private prosecutions. To that extent the memorandum does not, and never has, represented the position of the department.

It has always been our position that AS 12.45.150 must be read as consistent with AS 44.23.020(a)(3), which places responsibility in the Attorney general to "prosecute all violations of state law." There are rare instances in solely private disputes where it may be appropriate for private litigants to "prosecute" cases of criminal contempt as a way of enforcing orders in contested divorce cases. See, e.g., Diggs v. Diggs, 663 P.2d 950 (Alaska 1983). However, in all other cases we view AS 44.23.020(a)(2) as giving the attorney general sole responsibility over the handling of criminal matters.

In order to be consistent with AS 44.23.020 we have interpreted AS 12.45.150 to refer not to the actual prosecution of a case (i.e., motions, pretrial hearings, trial, appeals, etc.) but only to a person who unilaterally, and without the

advice or concurrence of the police or prosecutors, "voluntarily appears before a judge" to swear out a complaint or before a grand jury to testify. At that point the attorney general has the statutory authority under AS 44.23.020 to review the matter and to dismiss or compromise the case as appropriate. See also Criminal Rule 7(c), which permits prosecution by indictment only if signed by the prosecutor. 1/

In our view, the primary purpose of AS 12.45.150 is to make it clear that malicious accusations, or those lacking probable cause, will subject the complainant to immediate judgment "for the costs or disbursements of the action."

We have consistently advised all prosecutors who have run into cases involving these complainants that they should handle the cases just like any other. Therefore I believe that the procedure currently in operation in Kenai, whereby such complaints are simply filed in the clerk's office pending review by the district attorney, is adequate under the present statute. Nonetheless, the statute should be amended. I will keep you advised on the progress of any legislation on this subject.

Very truly yours,

HAROLD M. BROWN
ATTORNEY GENERAL

By: Dean J. Guaneli
Dean J. Guaneli
Assistant Attorney General

DJG:so-17

cc: Jim Ayers
Director/Legislative Relations

Art Peterson
Assistant Attorney General

1/ Several years ago a tenacious Rodney Wolff wrote to the Ombudsman and the grand jury foreman in an attempt to testify before a Fairbanks grand jury about some very shady business practices (see Wolff v. Arctic Bowl, Inc., 560 P.2d 758 (Alaska 1977)) and alleged perjury. The prosecutor finally relented and let him testify, but drew the line at letting Wolff and his attorney, Clem Stephenson, act as a private prosecutor. The grand jury even returned an indictment, which the prosecutor refused to sign.

Memorandum

Alaska Court System

TO: Ms. Karla Forsythe
Staff Counsel
Alaska Court System
303 K Street
Anchorage, AK 99501

DATE : September 4, 1986

SUBJECT: State vs Ben Holly
3KN S86-1478 Cr.
Private Party filing

FROM: Robin L. Turnbull
Clerk of Trial Courts
145 Main Street Loop, Rm 106
Kenai, AK 99611

Please review the attached copy of a private party complaint filed in Kenai on August 27, 1986. I accepted the complaint for filing as I have been advised that I can not refuse such filings. Mr. Smallwood advised me that the District Attorney's office refused to file a complaint against Mr. Holly, and the Kenai District Attorney's office has further advised that they will be filing a Dismissal of this action. This is the second such filing within the last three months, and I am in need of written policy or direction as to handle such matters.

Thank you,

Adm. F-2
Rev. 2-73

Clerk of the Trial Courts of Alaska Third C

Clerk of the Trial Courts
Deputy

IN THE DISTRICT COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

STATE OF ALASKA

PLAINTIFF

vs

BEN HOLLY

DEFENDANT

FELONY/[redacted]
CRIMINAL COMPLAINT
NO. 3KNS86-1478 CR

ASSAULT - THIRD DEGREE TWO COUNTS
AS 11.41.220 (a) (1)

CRIMINAL TRESPASS FIRST DEGREE
AS 11.46.320(a)

Complainant, JOHN L SMALLWOOD (CITIZEN)

personally appearing before me and being duly sworn, states that on or about the 22 day of JUNE, 1986, at or near the area of SOLDOTNA, in the Third (3RD) Judicial District, State of Alaska, BEN T HOLLY

Complaint (1) Recklessly Placed John L Smallwood in fear of imminent serious physical injury by means of a dangerous instrument, in violation of AS 11.41.220(a)(1)

Complaint (2) That Ben T. Holly did enter upon the private property, on the above date at APPROX 2:00 AM, uninvited, and for the purpose of stealing from the home & business of the Complainant at 391 Aspen Drive Located in the City of Soldotna Alaska and did remove through A bedroom window of the Complainant and did flee OFF from said private property to avoid Arrest and assaulted complainant, that was attempting to retrieve Stolen property.

John L Smallwood
(Signature of Complainant)

Sworn to and subscribed before me this 27th day of June, 1986

DISTRICT JUDGE
Deputy Magistrate

(SEAL)

MEMORANDUM State of Alaska

TO: Joe Balfe

DATE: February 17, 1977

FILE NO:

TELEPHONE NO:

FROM: Mary Anne Henry MKH

SUBJECT: Re: AS 12.45.150 Private Prosecution

It is not clear from the history of this statute what the legislative intent was behind its enactment. It is likely that the reasoning was the same as in other states, that is, private prosecution has always existed in our court system, so why change it now? At common law, criminal prosecution was purely adversary, each aggrieved party retained his own counsel to prosecute his private interest. Over the years, private prosecution statutes have simply remained on the books, even though public-funded prosecutorial offices have since been established. In fact, in most states where private prosecution is no longer valid or extremely limited, it has been the judicial branch that has taken the initiative.

The Alaska statute does give the court some control over the proceedings conducted by a private prosecutor. However, there is no mention of any powers that can be exercised by the District Attorney's office. The Nebraska Supreme Court has construed its statute that set up the system of public-financed District Attorneys as precluding private prosecution. McKay v. State, 132 N.W. 741 (Nebraska, 1911). See also State v. Peterson, 218 N.W. 387 (Wis., 1928). AS 44.23.020(b)(3) states that the attorney general shall "prosecute all cases involving violation of state law..." (Emphasis added) It could be argued, as it was in Nebraska, that this precludes a private person from actually prosecuting a criminal case. Of course, it is not clear at all whether that was the legislative intent, and it should be noted that the private prosecution statute was amended as late as 1971, with no acknowledgement of a possible conflict of statutes. Two state courts have allowed the procedure only if it has first been approved by the public prosecutor or the state. State v. Bartlett, 74 A. 18 (Me., 1909); Handley v. State, 106 So. 692 (Ala., 1925).

It can be argued that the power to dismiss or defer prosecution on any case should remain in the hands of the District Attorney. The reasoning is that if the exercise of such discretion is possessed by an attorney who owes his loyalty to a private party, it could lead to prolonged harassment, or even a form of blackmail. The answer to that

argument in Alaska would be that the courts are empowered by AS 12.45.150 to prevent such misuse of that discretion.

Finally, it appears that there would be no difference if the crime were a misdemeanor or a felony. At common law the private prosecutor also had the power to present his case to the grand jury, as well as take charge of the trial with the petit jury. I was unable to find any cases that made a distinction between felony and misdemeanor trials.

Recently, some state courts have decided that the existence of private prosecutors is repugnant to our system of criminal justice, and some have hinted that it may be a violation of the defendant's constitutional rights. Similar arguments could be presented to the Alaska courts.

First of all, it can be argued that "private prosecutor" is a contradiction in terms. A prosecutor is not an advocate in the ordinary sense of the term. He is a representative of the people and his duty is to see that justice is done. This does not necessarily require that conviction be the final outcome. He is to see that the criminal laws of the State are honestly and impartially administered, and he should not be prejudiced by motives of private gain. He determines what evidence is to be presented to the trier of facts and it is his duty to show the entire transaction, regardless of whether it tends to establish guilt or innocence. On the other hand, a private attorney owes his client total allegiance, and ethically he cannot act for an interest even slightly adverse to his client. This conflict in roles can be clearly seen in the following areas: 1) decision whether to prosecute; 2) plea bargaining; 3) sentence recommendations; 4) determination of what evidence to present, including exculpatory evidence. Private Prosecution, The Entrenched Anamoly, 50 NC Law Rev. 1171 (1972), Biemel v. State, 37 N.W. 244 (1888).

It is also arguable that the defendant's constitutional right to due process may be violated by the use of a private prosecutor, or even the presence of a private prosecutor assisting the public prosecutor. The issue then becomes whether the practice inherently is so prejudicial as to infringe on the defendant's fundamental right to a fair trial. Estes v. Texas, 381 U.S. 532 (1965). Any degree of influence by a private prosecutor who is paid to obtain a conviction could impermissably taint a procedure that demands prosecutorial impartiality. In State v. Harrington, 534 S.W.2d 44 (Mo., 1976) the Missouri Supreme Court stated:

> We believe, and hold, that the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair, and that it should not be permitted on retrial of this case or in any case tried after publication of this opinion in the Southwestern Reporter.

Since it would be difficult to determine in specific cases whether there has been an impermissable taint, it would be much easier to ban the use of private prosecutors in all criminal cases. Any countervailing state interest in using private prosecutors is, at best, miniscule.

Therefore, although AS 12.45.150 allows private prosecution in this state, and only a few states have stopped or severely limited the practice, a criminal defendant could present some valid arguments based on prejudice to him, unethical behavior on the part of the prosecutor, and perhaps even a violation of his constitutional rights.

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m C. Allen Foster, Attorney

f Seniority Rights, 75 HARV.

Robinson v. Lorillard demonstrates at least two important principles regarding the elimination of racial discrimination in employment. First, it shows the vigor with which the courts will attack the system that shows the signs of perpetuating discrimination. Secondly, it reveals that the costs of this necessary effort are very high.

LEE A. PATTERSON, II

Private Prosecution—The Entrenched Anomaly

Since the days of our Constitution's infancy, traditional judicial truisms have been superseded by the viable doctrines of "due process," "equal protection," and "judicial fairness." Notwithstanding this evolution, there remain seemingly impregnable citadels of judicial tradition. One such remnant of the past is the policy allowing private prosecution in criminal actions. Recently in *State v. Best*,[1] the North Carolina Supreme Court reiterated[2] its stand condoning the practice.

I. BACKGROUND AND STATE OF LAW

At common law criminal prosecution adhered to the pure form of the adversary system; each aggrieved party retained his own counsel to prosecute his private interest. The private prosecutor had the case laid before the grand jury and took charge of the trial before the petit jury.[3] Despite statutory provisions requiring a public prosecutorial system[4] and judicial repudiation of the procedure in some jurisdictions[5] private prosecution remains well entrenched.[6]

While adhering to the philosophy of the common law rule, the North Carolina courts have modified its application. Whereas the clas-

[1]280 N.C. 413, 186 S.E.2d 1 (1972).

[2]*See, e.g.*, State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943); State v. Carden, 209 N.C. 404, 183 S.E. 898, *cert. denied*, 298 U.S. 682 (1936); State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932).

[3]State v. Carden, 209 N.C. 404, 410, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936). *See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[4]*E.g.*, N.C. CONST. art. IV, § 18; N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[5]*E.g.*, McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911); Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890); Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[6]*E.g.*, Handley v. State, 214 Ala. 172, 106 So. 692, 694-95 (1925); Robinson v. State, 69 Fla. 521, 68 So. 649 (1915); State v. Bartlett, 105 Md. 212, 74 A. 18 (1909); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

sic interpretation precluded any challenge to the private prosecutor,[7] North Carolina courts have reserved the final determination for the discretion of the trial judge[8] but have intimated that the practice is not to be interferred with in the absence of a showing of abuse.[9] As justification for retaining the practice it has been tersely stated that it has "existed in our courts from their incipiency."[10]

Decisions in other jurisdictions reflect diverse judicial attitudes ranging from agreement with the common law view[11] to abolishment of the practice.[12] Various jurisdictions condition allowance of the procedure on the approval of the prosecutor,[13] the state,[14] or the court.[15] Language in some decisions espouses the public duty to carry out such prosecutions.[16] Indeed, in the face of a statute that banned private prosecutors, one court ruled that the definition of "private prosecutor" did not include an attorney hired by the complaining witness to prosecute.[17] On the other side of the spectrum it has been ruled in cases involving prosecuting for contingent fees that prosecuting for the private purse of the solicitor in such cases is abhorrent to the sense of justice.[18] Another court[19] construed a statute providing for publicly financed solicitors[20] as precluding private prosecution because of its inherent private motivation. Similarly, numerous cases forbid a prosecutor to appear in any capacity where he is financially backed or is appointed by any private interest.[21] Rulings on challenges to the private prosecutor appearing before the grand jury overwhelmingly hold that prejudice to the defendant is too damaging to be tolerated[22] because the prosecutor's position

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[7] *See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[8] State v. Davis, 203 N.C. 13, 26, 164 S.E. 737, 744 (1932).

[9] State v. Carden, 209 N.C. 404, 411, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936).

[10] State v. Best, 280 N.C. 413, 416, 186 S.E.2d 1, 3 (1972). *See also* State v. Lippard, 223 N.C. 167, 171, 25 S.E.2d 594, 597 (1943).

[11] Price v. Caperton, 62 Ky. 204, 1 Duv. 207 (1864).

[12] Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[13] State v. Bartlett, 105 Me. 212, 74 A. 18 (1909).

[14] Handley v. State, 214 Ala. 176, 106 So. 692, 694-95 (1925).

[15] State v. Kent, 4 N.D. 577, 62 N.W. 63 (1895).

[16] Robinson v. State, 69 Fla. 521, 68 So. 649 (1915).

[17] Warren v. State, 130 Tex. Crim. 448, 94 S.W.2d 430 (1935).

[18] Bacca v. Padilla, 26 N.M. 223, 190 P. 730 (1920).

[19] McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911).

[20] North Carolina has a similar statute. *See* N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[21] *E.g.*, Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890); Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[22] Nicholas v. State, 17 Ga. App. 873, 87 S.E. 817 (1916); Wilson v. State, 70 Miss. 595, 13 So. 22, (1893); Flege v. State, 93 Neb. 610, 142 N.W. 276 (1913); Hartgraves v. State, 5 Okla. Crim. 266, 114 P. 343 (1911).

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as an officer of the court demands a degree of impartiality unlikely in the private prosecutorial setting. Those decisions abolishing or severely restricting private prosecution have generally based their determinations on the contemporary judicial philosophy recognizing its almost complete morphasis since the concept of private prosecution emerged.

II. Conflict in Roles

Perhaps the one area which has changed most drastically since the inception of the doctrine permitting private prosecutors has been the role of the public prosecutor. From his sole function as procured advocate for a prosecution, the duties of the public prosecutor have taken on new dimensions. He is not an advocate in the ordinary sense of the word, but is the people's representative, and his primary duty is not to convict but to see that justice is done.[23] The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain.[24] It is his duty to show the whole transaction as it was, regardless of whether it tends to establish a defendant's guilt or innocence.[25]

Conversely, a privately retained attorney owes his client individual allegiance, and once employed he must not act for an interest even slightly[26] adverse to that of his client in the same general matter.[27] Therefore, in view of the ethical[28] and judicial[29] restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, "private prosecutor" is a contradiction in terms. The high standard of impartiality demanded of a prosecutor realistically cannot be expected of the private advocate.[30]

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[23]Berger v. United States, 295 U.S. 78, 88 (1935); NCSB Canons of Ethics No. 5.

[24]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[25]McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911). *See generally* 23A C.J.S. *Criminal Law* § 1081 (1961).

[26]Parker v. Parker, 99 Ala. 239, 13 So. 520 (1893).

[27]People v. Hanson, 290 Ill. 370, 371, 125 N.E. 268, 270 (1919); People v. Gerald, 265 Ill. 448, 107 N.E. 165 (1914).

[28]NCSB Canons of Ethics No. 5; *see* NCSB Canons of Ethics Nos. B, C.

[29]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[30]"The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success . . . [even though] counsel employed by outside parties . . . would not feel bound by any such rule of conduct. He appears as private counsel simply, to represent the wishes,