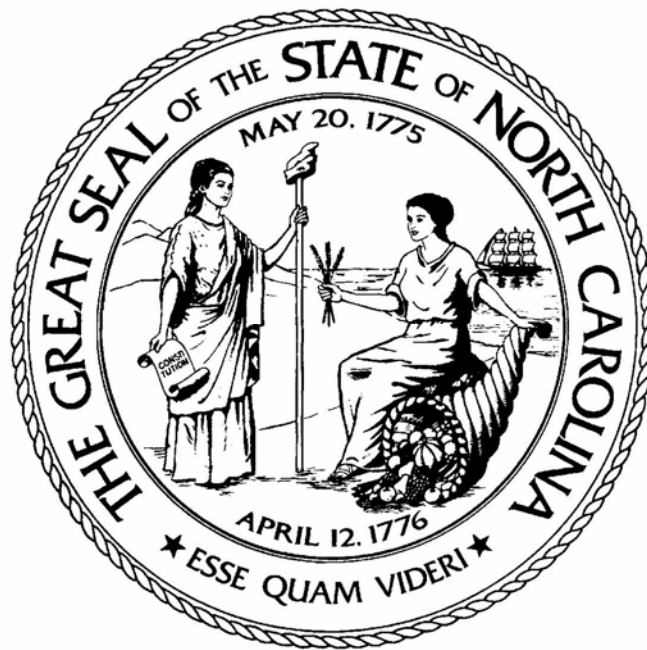


HOUSE SELECT COMMITTEE ON RESTITUTION



REPORT TO THE 2005
GENERAL ASSEMBLY OF NORTH CAROLINA

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**HOUSE SELECT COMMITTEE
ON RESTITUTION**
*State Legislative Building
Raleigh, North Carolina 27603*

Representative Rick Eddins, Co-Chair

Representative Hugh Holliman, Co-Chair

January 19, 2004

TO THE MEMBERS OF THE 2005 GENERAL ASSEMBLY:

The House Select Committee on Restitution submits to you for your consideration its report.

Respectfully Submitted,

Rep. Rick Eddins, Co-Chair

Rep. Hugh Holliman, Co-Chair

HOUSE SELECT COMMITTEE ON RESTITUTION

2004-2005 MEMBERSHIP

Representative Rick Eddins, Cochair
Representative Hugh Holliman, Cochair
Representative Bernard Allen
Representative Beverly Earle
Representative Mitch Gillespie
Representative James Harrell
Representative Carolyn Justus
Representative Louis Pate
Representative Arthur Williams
Representative Keith Williams

Staff:

Trina Griffin, Legislative Analyst
Carol Bowers, Committee Clerk

PREFACE

In 2004, the House Select Committee on Preventing Unjust Profiteering from Crime was established to study the issue of preventing criminal offenders from profiting from their crimes. During its course of study, the Committee also examined problems associated with the collection and distribution of restitution for crime victims, a significant amount of which goes unpaid or unclaimed. Since the impetus for that Committee's study was House Bill 911, the No Profit from Crime Act, and its work was focused primarily on the complex constitutional issues associated with a rewrite of that bill, the Committee had insufficient time to fully develop legislative solutions regarding restitution. Consequently, the House Select Committee on Restitution was established in the following interim to reexamine the processes for the collection and payment of restitution in this State and to determine methods for reducing the number of restitution payments that go unpaid or unclaimed. The order from the Office of the Speaker of the House of Representatives authorizing the Committee is set out in Appendix A.

CURRENT LAW

When sentencing a defendant convicted of a criminal offense, the court is required to determine whether the defendant should be ordered to make restitution to any victim or the victim's estate for any injuries or damages arising directly from the offense. In determining the amount of restitution, the court must consider certain factors, such as the value of any property damaged or destroyed; in the case of physical injury, the cost of necessary medical and related professional services, any physical or occupational therapy, and income lost by the victim; and in the case of the victim's death, the cost of funeral and related services. However, an order of restitution may not include compensation for pain and suffering, according to a recent North Carolina Court of Appeals case.¹ In determining the amount of restitution to be made, the court must also take into account the resources of the defendant, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution. The court may order the defendant to make restitution to a person other than the victim, or to any organization, corporation, or association, including the Crime Victims Compensation Fund, that provided assistance to the victim. Generally, a restitution order is enforceable in the same manner as a civil judgment. A restitution order does not, however, abridge the right of a victim to bring a civil action against the defendant, but any amount paid by the defendant under the terms of a restitution order are credited against any judgment

¹ *State of North Carolina v. Wilson*, 580 S.E.2d 386, 2003 N.C.App. LEXIS 1045 (June 3, 2003).

rendered against the defendant in favor of the same victim in a civil action arising out of the criminal offense committed by the defendant.

COMMITTEE PROCEEDINGS

The House Select Committee on Restitution met four times since its inception on September 14, 2004. The final meeting of the Committee prior to the convening of the 2005 General Assembly took place on January 19, 2004, at which the Committee discussed and approved its final report to be submitted to the House.

At its first meeting on October 21, 2004, the Committee heard from seven speakers. Ms. Mel Chilton, Director of NC Victims Assistance Network spoke on the importance of restitution for victims that are suffering both financially and emotionally. She suggested some proposals for the committee to consider, including the enhancement of work programs within the prison system, requiring the consideration of future earning potential when ordering restitution, and making restitution mandatory in cases involving loss of life or serious injury. Ms. Chilton concluded her remarks by noting that restitution is an obligation that should never be waived. A summary of her remarks is attached in Appendix B.

Mr. Frank Parrish, District Attorney for the 1st District and President of the Conference of District Attorneys, addressed the duties of a district attorney with regard to restitution and identified areas for improvement. He explained that district attorneys are required to collect and present accurate information regarding a victim's damages to the presiding judge. He also explained that the problems with restitution are different in superior court compared to district court. Mr. Parrish noted that the distribution of restitution could be improved if victims were required to provide their social security numbers for identification, although he acknowledged that victims are often reluctant to do so because of privacy concerns. A second recommendation was to have magistrates gather restitution information from the victims or make the restitution worksheets available to save time.

Ms. Tracy Little, Deputy Secretary with the Department of Correction, provided the committee with an overview of the work-release program and the distribution of those earnings. She also explained how restitution payments are monitored and collected for those offenders on probation. Currently, there are 1,100 inmates out of 36,000 on work release. She identified the minimum requirements that inmates must meet for work-release eligibility. Of particular interest to the committee members, Ms. Little pointed out that an inmate's legal obligation to the state is complete when he or she is released without supervision. Therefore, for low-level felons (Class F-I under structured sentencing) the obligation to pay restitution ends once the offender is released, unless the order has been reduced to civil judgment, which is required for Crime Victims' Rights Act cases where the order is in excess of \$250. Class B1-E felons, who are generally released under post-release supervision, may be ordered by the Post-Release Supervision and Parole Commission to make restitution payments while on supervised release. A community corrections officer will monitor those payments. Ms. Little explained that probationers make restitution payments directly to the clerk of court, who is responsible for distributing those payments. The failure to pay is considered a nonemergency technical violation, for which there is a continuum of sanctions. She further explained that the goal of the probation officer is to keep the offender working, staying in compliance with the law, and making payments. Therefore, it is rare for an offender to have his probation revoked and sentence activated for failure to pay as a one-time nonemergency violation. If the offender's probation is revoked and his sentence activated, his ability to continue making restitution payments will depend largely on whether the offender is placed on work release during the incarceration period. Even so, the obligation to pay restitution ends once the sentence is completed, unless it has previously been reduced to civil judgment. Ms. Little cited that in FY 03-4, probationers paid \$17.8 million in restitution. For more information, Ms. Little's presentation notes are attached as Appendix C.

Next, Karen Jones, Senior Research and Policy Associate, NC Sentencing and Policy Advisory Commission explained that, in 1993, the General Assembly directed the

Commission to study restitution policy. Although the recommendations were not adopted at that time, the Courts Commission later studied the same issue and made many of the same recommendations, which were ultimately enacted. A report on the Commission's recommendations in 1995 may be found in Appendix D.

Tom Andrews, General Counsel with Administrative Office of the Courts, discussed distribution priorities and welcomed clarification on disbursing monies. Specifically, he pointed out that the statutes do not address the priority of the community service and the supervision fees. Thus, the AOC has followed generally accepted accounting principles that require current ongoing obligations to be paid before past due obligations are paid. Mr. Andrews' presentation notes may be found in Appendix E.

Next, Whit Gibson, Clerk of Superior Court in Scotland County, explained how Scotland County disburses monies as soon as possible. He spoke to how victims perceive how the system works and the conflicts. The clerks follow judge's orders and feel victims should be considered first in allocation of restitution payments. As for specific recommendations, he indicated that the system of joint and several liability of defendants needs to be overhauled and suggested consideration of an income tax intercept or debt setoff system. A summary of his remarks may be found in Appendix F.

Gregg Stahl, Administrative Office of the Courts, spoke on how the collection rate of offender fees could be improved and shared recommendations. He provided the Committee with a copy of the same report presented to the Appropriations Chairs and Justice and Public Safety Subcommittee, a copy of which is attached as Appendix G.

On November 30, 2004, the Committee held its second meeting and Ms. Trina Griffin, Committee Counsel, presented the Committee with a compilation of proposals that had been identified either by agencies and other interested parties or as the result of research into what other states are doing in this area. This compilation may be found in the chart attached as Appendix H. After much discussion, the Committee agreed to focus on the following proposals:

- Income withholding
- Tax refund intercept
- Use of third party collection agencies to collect unpaid restitution.
- Use of bankcards for payment of restitution
- Establishment of an offender-funded, court-operated collections program.
- Making payment of funeral expenses mandatory in loss of life cases.
- Prohibiting a defendant's ability to pay from being a factor in determining the amount of restitution to be ordered.

At the third meeting on January 13, 2005, the Committee heard from Ms. Moira Rowley, Vice President, Court Services with Affiliated Computer Services, Inc. (ACS), which is a technology-based outsourcing solutions company with a focus on servicing states and local governments. Ms. Rowley explained several types of broad-based compliance programs used by states to improve collection of restitution. Specifically, she indicated that a number of states add a fee, often a percentage of the debt owed, for nonpayment to fund other elements of their collections operations. She also responded to specific questions of the committee members regarding third party collections. Her resume and presentation notes are attached as Appendix I.

Mr. Gregg Stahl with the Administrative Office of the Courts also addressed the Committee regarding AOC's concerns about several of the proposals being considered by the Committee. Specifically, he pointed out that the use of the Setoff Debt Collection Act to collect restitution owed to private individuals would represent a shift in the underlying policy of that act. Currently, the Setoff Debt Collection Act provides a mechanism for the government to collect government debt. Moreover, if restitution were collected through debt setoff, it would impact the collection of indigent attorney fees, which are currently collected by AOC through debt setoff. Another issue is the fact that the Department of Revenue charges a 15% fee for debt setoff. Thus, the proposal should address whether the fee is waived or whether a crime victim would receive only 85% of monies collected. With regard to the idea of an offender-funded

collections program, Mr. Stahl cautioned the Committee about structuring a fee-based program for two reasons. First, the fee could be interpreted as a fine that is constitutionally required to go to local school boards. Second, the fee could also be interpreted as a payment ordered by the court to reimburse the state for its general overhead attributable to prosecution costs, which has been held unconstitutional by the state Supreme Court. Ultimately, the Committee agreed that staff should work with the AOC in improving the bill draft to address some of these issues.

Finally, Ms. Debbie Kimbrell from Goldsboro, a crime victim, spoke to the Committee about the loss of her husband and her experience with the court system. Her husband was killed in a car accident by a person whose license had been revoked. He was ultimately convicted of misdemeanor death by vehicle but no restitution was ever ordered because the judge found that the defendant did not have the ability to pay restitution. She urged the Committee to make changes in the law so that a defendant's ability to pay is not a factor in setting a restitution amount in order to hold offenders accountable for the damage they cause

After hearing from the speakers, the Committee reviewed the proposed bill draft, and agreed that it would include the draft in its report with one additional change. The Committee wanted to add a section requiring the AOC to study the use of third party collection for collecting restitution and other court fines, fees, and costs and report back to this Committee. The Committee also concluded that it needed additional time to study the issues related to improving the collection and distribution of restitution and would seek to extend the life of the Committee.

COMMITTEE FINDINGS AND RECOMMENDATIONS

The House Select Committee on Restitution makes the following findings and recommendations:

FINDINGS: The Committee finds the following:

1. Based on recent statistics compiled by the AOC, only 24% of restitution ordered in all criminal cases is paid in a given year.
2. Restitution is among the lowest collectible categories of debt.
3. Many states have enacted broad-based compliance programs or statutory mechanisms to improve enforcement of restitution orders, such as income withholding, tax intercept, late fees, court-operated collections programs, third party collection agencies, diverting a percentage of work-release earnings to victim compensation programs, revoking or extending probation for nonpayment, and converting restitution to civil judgments.
4. Of particular importance to crime victims is the accountability of the offender. Specifically, orders for restitution should not be determined based upon a defendant's ability to pay, they should not become unenforceable upon completion of a person's sentence, and they should be due and payable at the time of sentencing to encourage prompter payment.
5. Orders of restitution should be made without regard for the ability of the defendant to pay but judges should be able to take into consideration ability to pay in setting a payment schedule.
6. There should be more consistency among county clerks of court with regard to their practice of entering restitution information into the court's database.
7. The General Assembly should further study and consider the benefits of outsourcing collection functions to third parties.
8. A fee-based, court-operated collections program may raise constitutional issues in North Carolina if the fee is interpreted as either a fine or as a means to reimburse the State for its "normal overhead." The General Assembly should further study and consider the costs and benefits of establishing a fee-based collections program.

RECOMMENDATIONS: Therefore, the Committee recommends the Legislative Proposal titled *Restitution Changes and Study*, which would require payment of funeral expenses mandatory in loss of life cases, prohibit a defendant's ability to pay from being a factor in determining the amount of restitution ordered, authorize income

withholding for restitution, require the AOC to collect restitution through debt setoff, and to require the AOC to study third party collection.

The Committee also recommends that the committee be extended so that it may continue its study of the issued related to the improvement of collecting and distributing restitution.

LEGISLATIVE PROPOSAL

RESTITUTION CHANGES AND STUDY

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005**

S

D

BILL DRAFT 2005-SVz-2 [v.4] (12/13)

**(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
1/18/2005 2:11:41 PM**

Short Title: Restitution Changes and Study.

(Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED
AN ACT TO IMPROVE THE COLLECTION AND DISTRIBUTION OF
RESTITUTION FOR CRIME VICTIMS IN NORTH CAROLINA AND TO
DIRECT THE ADMINISTRATIVE OFFICE OF THE COURTS TO STUDY
THIRD PARTY COLLECTION FOR THE COLLECTION OF RESTITUTION
AND OTHER COURT COSTS.

The General Assembly of North Carolina enacts:

RESTITUTION FOR FUNERAL EXPENSES MANDATORY

SECTION 1. G.S. 15A-1340.34(b) is amended by adding a new subsection to read:

"(b) If the defendant is being sentenced for an offense for which the victim is entitled to restitution under Article 46 of this Chapter, the court shall, in addition to any penalty authorized by law, require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant. If the defendant is being sentenced for an offense that resulted in the death of the victim, the court shall order the defendant to make restitution for necessary funeral and related services. If the defendant is placed on probation or post-release supervision, any restitution ordered under this subsection shall be a condition of probation as provided in G.S. 15A-1343(d) or a condition of post-release supervision as provided in G.S. 148-57.1."

**ABILITY TO PAY NOT A FACTOR IN DETERMINING AMOUNT OF
RESTITUTION**

SECTION 2. G.S. 15A-1340.36 reads as rewritten:

"(a) Amount of Restitution. – In determining the amount of restitution to be made, the court shall not take into consideration the economic circumstances of the defendant or the defendant's ability to pay resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court shall state on the record the reasons for such an order.record."

(b) Payment of Restitution. – Orders for restitution shall be due and payable at the time that the order of conviction is entered. If the defendant alleges that he or she cannot pay the full amount of restitution, the ~~The~~ court may require the defendant to make full restitution no later than a certain date or, if the circumstances warrant, may allow the defendant to make restitution in installments over a specified time period. In determining the manner in which the restitution is to be paid, the court shall consider the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's future earning potential, the defendant's obligation to support dependents, and any other matter that pertain to the defendant's ability to make restitution. After making the determinations required by subsections (a) and (b) of this section, the court shall enter an order for restitution which sets forth the total amount of restitution the defendant owes all persons, the total amount of restitution owed each person, and the manner in which the restitution is to be paid.

(c) Payment of Restitution While Incarcerated. – When an active sentence is imposed, the court shall consider whether it should recommend to the Secretary of Correction that restitution be made by the defendant out of any earnings gained by the defendant if the defendant is granted work-release privileges, as provided in G.S. 148-33.2. The court shall also consider whether it should recommend to the Post-Release Supervision and Parole Commission that restitution by the defendant be made a condition of any parole or post-release supervision granted the defendant, as provided in G.S. 148-57.1.

INCOME WITHHOLDING

SECTION 3. Article 81C of Chapter 15A of the General Statutes is amended by adding a new section to read:

§ 15A-1340.39. Income withholding order.

(a) Entry of order. – When restitution is required of a defendant who will not be commencing an active sentence and who is employed, the court shall, at the time of ordering restitution, enter a separate order for income withholding. The

withholding order must direct the employer to deduct from all income due and payable to the offender an amount required by the court, subject to the restrictions set forth in 15 U.S.C. 1673, to meet the defendant's restitution obligation. The withholding order must include an instruction to the employer that upon receipt of a copy of the withholding order the employer shall do all of the following:

- (1) Immediately begin to withhold the defendant's income when the defendant is usually paid.
- (2) Send each amount withheld to the agency to which restitution has been ordered to be paid at the address set forth in the order within seven business days of the withholding.
- (3) Identify each amount sent to the agency by indicating the court's docket number.

(b) Expiration of Order. – The income withholding order is effective as long as the order for restitution upon which it is based is effective or until further order of the court.

STATE INCOME TAX REFUND OFFSETS

SECTION 4. G.S. 105A-2(2) is amended by adding a new sub-subdivision to read:

"b1. A sum that a claimant agency collects and disburses as required by a court order, such as restitution."

SECTION 4.1. G.S. 105A-2(9) is amended by adding a new sub-subdivision to read:

"c. A county clerk of court."

AOC STUDY ON THIRD PARTY COLLECTION

SECTION 5. The Administrative Office of the Courts shall study the use of third party collection as a means to improve the collection of restitution and other court fines, fees, and costs. The Administrative Office of the Courts shall report its findings and recommendations to the 2006 Regular Session of the 2005 General Assembly upon its convening.

EFFECTIVE DATE

SECTION 6. Sections 5 and 6 of this act become effective when they become law. The remainder of this act becomes effective for restitution orders entered on or after December 1, 2005.

Bill Analysis of Legislative Proposal: RESTITUTION CHANGES AND STUDY

BY: TRINA GRIFFIN, RESEARCH DIVISION

BILL ANALYSIS: This legislative proposal makes four changes with regard to restitution and directs the Administrative Office of the Courts to conduct a study.

Restitution for Funeral Expenses Mandatory

Under current law, a defendant who is being sentenced for an offense resulting in the death of the victim is not required to make restitution for the victim's funeral expenses. While the court is directed to consider funeral expenses in determining the restitution amount, the court must also consider a defendant's ability to pay. Section 1 of the proposal would require the court to order a defendant who is being sentenced for an offense that resulted in the death of the victim to make restitution for necessary funeral and related expenses.

Ability to Pay Not a Factor in Determining Amount of Restitution

When determining the amount of restitution to order against a defendant, current law requires the court to take into consideration the resources of the defendant including all real and personal property owned by the defendant, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution. Section 2 of the proposal would require that the court not take into consideration the economic circumstances of the defendant when determining the amount of restitution. Instead, the court may consider these factors in establishing a payment schedule. It further requires the court to include the payment schedule in the order for restitution.

Income Withholding

Under North Carolina law, garnishment is only permitted in a limited number of circumstances. These include child support obligations, delinquent taxes, charges for ambulance services in certain counties, collection on judgments for hospital services rendered, and to recoup fraudulent public assistance program payments. Federal law also caps the amount that may be garnished from a person's wages at 25% of weekly earnings or the amount by which a person's disposable weekly earnings exceed 30 times the federal minimum hourly wage, whichever is less. Section 3 of the proposal would require the court, when entering a restitution order against a defendant who is not being sentenced to active time and who is employed, to enter a separate income withholding order directing the defendant's employer to deduct an amount required by the court to meet the defendant's

restitution obligations. The employer would be required to withhold the required amounts and remit the funds to the appropriate clerk of court, who would then disburse the funds.

State Income Tax Refund Offsets

Under the current Setoff Debt Collection Act, the Department of Revenue sends the income tax refund of an individual who owes money to a State or local agency to that agency in payment of the debt rather than to the individual. The individual's income tax refund is therefore set off against the debt the individual owes to the State or local agency. Section 4 of the proposal would amend the act to require clerks of court to submit debts for unpaid restitution to the Department of Revenue for setoff against the defendant's income tax refund, if owed one.

AOC Study of Third Party Collection for Restitution

Section 5 of the proposal requires the Administrative Office of the Courts to study the use of third party collection agencies to collect restitution and other court fees, fines, and costs and to report to the 2006 Regular Session of the 2005 General Assembly upon its convening.

APPENDIX A

COMMITTEE AUTHORIZATION

James B. Black
Speaker



Richard T. Morgan
Speaker

Office of the Speaker
North Carolina House of Representatives
Raleigh, North Carolina 27601-1096

**TO THE HONORABLE MEMBERS OF THE
NORTH CAROLINA HOUSE OF REPRESENTATIVES**

WHEREAS, a significant amount of restitution remains unclaimed and unpaid due to a variety of reasons that include the defendant's inability to pay, the clerk of court's inability to locate victims, victims' inability to identify and locate assets of a defendant, and the difficulty victims face in navigating the legal system to enforce restitution orders; and

WHEREAS, the prior House Select Study Committee on Preventing Unjust Profiteering from Crime began to review the methods by which crime victims are compensated for injuries sustained as the result of the crimes committed against them and determined that further review is needed;

NOW, THEREFORE:

Section 1. The **House Select Committee on Restitution** is established by the Speakers, effective September 14, 2004, as a select committee of the House pursuant to G.S. 120-19.6(a) and Rule 26(a) of the Rules of the House of Representatives of the 2003 General Assembly.

Section 2. The Select Committee consists of 10 members. The individuals listed below are appointed as members of the Select Committee. Members serve at the pleasure of the Speakers of the House of Representatives.

Rep. Rick Eddins, Co-Chair
Rep. Hugh Holliman, Co-Chair
Rep. Bernard Allen
Rep. Beverly Earle
Rep. Mitch Gillespie
Rep. James Harrell
Rep. Carolyn Justus
Rep. Louis Pate
Rep. Arthur Williams
Rep. Keith Williams

Section 3. The Select Committee shall study the processes for the collection and payment of restitution in this State, and shall determine the methods for reducing the number of restitution payments that go unclaimed. The Select Committee shall incorporate the work to be conducted under Section 26.1 of Senate Bill 1152, S.L. 04-161, into its study and produce one report that contains the recommendations of the Committee, the Administrative Office of the Courts, and the Department of Correction on this subject.

Section 4. The Select Committee may meet during the interim period between regular sessions upon the call of its cochairs.

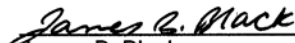
Section 5. The Select Committee shall report on the results of its study, including any proposed legislation, to the members of the House of Representatives on or before the convening of the of the 2005 General Assembly by filing a copy of the report with the Speakers' offices and the Legislative Library. The Committee terminates upon the convening of the 2005 General Assembly, or upon the filing of its final report, whichever occurs first.

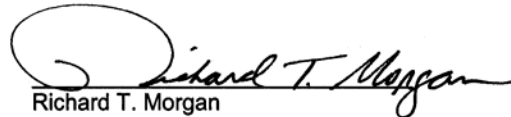
Section 6. The Select Committee is vested with the authority contained in Article 5A of Chapter 120 of the General Statutes.

Section 7. Members of the Select Committee shall receive per diem, subsistence, and travel allowance at the rate established in G.S. 120-3.1.

Section 8. The expenses of the Select Committee are considered expenses incurred for the operation of the House of Representatives and shall be paid pursuant to G.S. 120-35 from funds available to the House for its operations. Individual expenses of \$5,000 or less, including per diem, travel, and subsistence expenses of members of the Committee, and clerical expenses shall be paid upon the authorization of a co-chair of the Committee. Individual expenses in excess of \$5,000 shall be paid upon the written approval of the Speakers of the House of Representatives.

Effective this 14th day of September, 2004.


James B. Black
Speaker


Richard T. Morgan
Speaker

APPENDIX B

REMARKS BY MEL CHILTON, NCVAN

APPENDIX C

PRESENTATION NOTES OF TRACY LITTLE, DEPARTMENT
OF CORRECTION

Department of Correction

Work Release and Restitution Issues

October 21, 2004

Work Release

An Overview

Work Release is a program that allows select inmates to work in the community while they are incarcerated. Inmates on work release leave the prison during the work period and return to the prison at the end of the work period. Wages earned by inmates on work release help defray the costs of incarceration, provide support for dependents and present an opportunity for the offender to meet restitution and reparation obligations. Approximately 1,120 inmates currently have jobs through the work release program.

Statutory Authority: N.C.G.S. §148-33.1; 148-33.2.

General Requirements for Work Release Eligibility

- A sentence of less than five years OR within 3 years of a release date
- No pending felony charges or felony detainers
- Suitable employment
 - Salary pays at least current minimum wage
 - Employer insurance program
 - Appropriate workplace supervision
- Suitable prison facility within normal commuting distance
- Minimum custody level 3
- No escape within six months or major infraction with three months of placement
- No significant victim conflicts related to housing or community-based participation

Work Release Disbursements

Priority of Payments²

Statutory Authority: N.C.G.S. § 148-33.1

PAYMENT PRIORITY BY CATEGORY
(1) Per diem
(2) DOC and private transportation
(3) Inmate draw
(4) Child support
(5) Restitution/Fines/Court Courts/Attorney's Fees
(6) Judgments and court orders
(7) Special payments

² These are deductions made from net income after the employer has withheld all statutory deductions (taxes and FICA) and authorized deductions required by the employer.

Work Release Numbers (FY 03-04)

- Average Account Balance \$2,078
- Amount paid to General Fund \$4,202,755

Restitution Issues for Probationers/Parolees

Statutory Authority: N.C.G.S. § 15A-1340.34 et seq.

- Sentencing court determines amount of fines, costs, fees and restitution
- Offenders make payments directly to the Clerk of Court
- Officers access AOC's Financial Management System to see amount paid, how the Clerk's office applied the payment and the remaining balance
- Officers confirm payments based on level of supervision
 - Community Level 1 every month
 - Community Level 2 every 2 months
 - Community Level 3 every 3 months
 - Intermediate Level every month
- Failure to pay is considered a non-emergency technical violation
- Officers work with offenders to help them meet obligations
- Court may extend period of supervision to allow the offender to continue to pay outstanding indebtedness

Restitution Numbers for Probation/Parole/Post-Release (FY 2003-04)

- Total Number of Offenders 178,789
- Offenders with Restitution Obligations 56,486
- Restitution Payments from DCC Offenders \$17,778,616.93

APPENDIX D

STATUS REPORT OF VICTIM RESTITUTION RECOMMENDATIONS, NC SENTENCING AND POLICY ADVISORY COMMISSION (1995)

APPENDIX E

PRESENTATION NOTES OF TOM ANDREWS, ADMINISTRATIVE OFFICE OF THE COURTS

DISTRIBUTION PRIORITIES

Thomas J. Andrews
General Counsel
North Carolina Administrative Office of the Courts

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1. *Before the Victims Rights Act*

2. *Victim's Rights Act Amendment*

III. THE COMMUNITY SERVICE AND PROBATION SUPERVISION FEES IN RELATION TO THE SUBSECTION (D) CATEGORIES

1. *Community Service Fee and Probation Supervision Fee Have Highest Distribution Priority*

2. *Judge's Option to Order Restitution Paid Ahead of these Fees*

IV. SUMMARY EXAMPLE

V. LEGISLATIVE CLARIFICATION WOULD BE WELCOME

DISCUSSION

I. WHAT DOES DISTRIBUTION PRIORITY MEAN, WHEN DOES IT MATTER, HOW DOES IT WORK

In criminal cases, the idea of distribution priority means that all the money paid into court by a defendant on probation is distributed to the persons entitled to receive payments in a set order of priority.

Distribution priority matters only when the defendant has made some, but not all, of the payments due as a condition of probation. Priority does not matter if the defendant pays nothing. No one receives anything. Priority does not matter if the defendant pays everything. Everyone is paid in full.

When the defendant pay only part of what s/he owes, the concept of distribution priorities means that persons entitled to the first priority receive all money paid by the defendant until they are paid in full. When the first priority is paid in full, the next money received from the defendant goes to persons entitled to the second priority, and so forth.

This idea is illustrated by analogy to a set of bowls on a hill. Water is poured from a bucket into the highest bowl on the hill. The water keeps pouring until the highest bowl is full. When highest bowl is full the water overflows into the second highest bowl on the hill until that bowl is full, and so forth. When the bucket is empty one of the bowls will be only partly full and all the lower bowls lower will remain empty.

Priority is a common idea in our legal system. For example, it applies in:

- Bankruptcy and receivership, where claims against the debtor are paid in a set order of priority, and
- Decedent's estates, where claims against the decedent's estate are also paid in a set order of priority.

II. DISTRIBUTION PRIORITIES UNDER G.S. 7A-304(D).

A. Generally

G.S. 7A-304(d) currently reads as follows:

“A-304. Costs in criminal actions.

. . .

(d)(1) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

- a. Sums in restitution to the victim entitled thereto;
- b. Costs due the county;
- c. costs due the city;
- d. fines to the county school fund;
- e. Sums in restitution prorated among the persons other than the victim entitled thereto;
- f. Costs due the State;
- g. Attorney's fees, including appointment fees assessed pursuant to G.S. 7A-455.1.”

Under subsection (d), payments made by a defendant on probation are distributed first to the victim entitled to restitution until all the ordered restitution has been paid. Any further payments received from the defendant are then disbursed to the county until all costs due it are paid, and so forth. At some point, if the payments stop, some priority will be only partly paid and the lower priorities will not be paid at all.

Restitution will be discussed below. As to the other priorities:

“Costs due the county” include:

- The facilities fee (\$12.00 for district court and \$30.00 for superior court), if the case was disposed in a county facility, and
- a \$5.00 fee for each arrest or service of process in the case, other than those by a municipal law enforcement officer

“Costs due the city” include:

- the facilities fee, if the case was disposed in a municipal facility, and
- A \$5.00 fee for each arrest or service of process in the case by a city law enforcement officer.

“Fines due the county” are all fines assessed in the case.

“Costs due the State” include:

- contributions totaling \$7.00 to several law enforcement officer benefit funds, and
- a fee for the support of the General Court of Justice (\$76.00 in district court and \$83.00 in superior court), which is remitted to the State Treasurer.

“Attorney’s fees” include the fees and expenses of the defendant’s court-appointed attorney, if ordered repaid as a condition of probation.

Note that some priority categories contain two or more subcategories. Subsection (d) does not create priorities among these subcategories, nor does it specify that they be satisfied pro rata from the funds available for each priority category. If a priority category is only partially paid, the available money is disbursed to the person entitled to receive it (county, city, State Treasurer) who decides how to allocate it among the subcategories.

B. Restitution

1. *Before the Victims Rights Act*

Before the enactment of the Crime Victims Rights Act in 1998, subsection (d) read as follows:

“(d) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

- (1) Costs due the county;
- (2) Costs due the city;
- (3) Fines to the county school fund;
- (4) Sums in restitution prorated among the persons other entitled thereto;
- (5) Costs due the State;
- (6) Attorney's fees.”

Under this statute, all restitution received the fourth distribution priority. The victim received no restitution until the costs due the county, the costs due the city and the fines due the county

school fund were fully paid. Conversely, no money was distributed to pay the costs due the State or attorney's fees until restitution was paid in full.

Further, there was no distinction between types of restitution. The fourth priority included restitution due the victim, restitution ordered paid on behalf of the victim to satisfy debts for medical care, etc, and restitution ordered paid to an insurance company that had already compensated the victim for injuries suffered.

The fourth priority for restitution applied "unless otherwise ordered by the presiding judge." Therefore the presiding judge always had the option of moving restitution up to the first distribution priority under subsection (d). And long before the VRA was enacted, our sentencing forms contained an option that allowed the judge to order that the restitution be paid before any other subsection (d) priority.

2. *Victim's Rights Act Amendment*

The Victim's Rights Act legislation amended subsection (d) to read:

"(d) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

(1) Sums in restitution to the victim entitled thereto;

~~(1)~~(2) Costs due the county;

~~(2)~~(3) Costs due the city;

~~(3)~~(4) Fines to the county school fund;

~~(4)~~(5) Sums in restitution prorated among the persons other than the victim entitled thereto;

~~(5)~~(6) Costs due the State;

~~(6)~~(7) Attorney's fees."

As a result, there are now two distribution priorities for restitution. Restitution to the "victim entitled thereto" has the first distribution priority and is paid in full before any lower priorities receive anything. Restitution to persons other than the victim has the fifth distribution priority, and is paid only after all the higher priorities are paid in full.

There can be only one person in the first priority, since the word "victim" is singular. There could be more than one person in the fifth priority, since the word "persons" is plural and restitution is prorated among them.

Who is the "victim entitled thereto" and who are the "persons other than the victim?" The victim is a person who qualifies as a victim under the Victims Rights Act. Persons other than the victim are everyone else to whom restitution is ordered. Persons other than the victim include:

- All victims of offenses committed before December 1, 1998,
- Victims of crimes not listed in the definition of a victim in the Victims Rights Act,

- Persons who were not directly and proximately harmed as a result of the defendant's commission of the offense,
- Persons who provided assistance, medical care, insurance benefits or compensation to the victim.

(The reasoning that supports these conclusions is set out in a footnote³)

For restitution to victims who meet the VRA definitions, first priority distribution is mandatory. The court does not need to make any reference in the judgment to the distribution priority of that restitution. For restitution to persons other than the victim, fifth priority distribution is the default priority. Unless "otherwise ordered by the presiding judge" it remains in the fifth priority. The presiding judge may order otherwise, but restitution shall still "be made to the victim . . . before it is made to any other person, organization, corporation or association." G.S.15A-1340.37(b). Our sentencing forms continue to contain an option that allows the judge to order that all restitution be paid before any other subsection (d) priority. When this option is checked, restitution to the victim is paid first, restitution to persons other than the victim is paid second, and the other subsection (d) priorities are paid if any funds remain.

III. THE COMMUNITY SERVICE AND PROBATION SUPERVISION FEES IN RELATION TO THE SUBSECTION (D) CATEGORIES

A community service fee (currently a one time fee of \$200.00) must be paid by defendants who are ordered to perform community service in a DWI conviction or as a condition of probation or deferred prosecution in any other criminal case. G.S. 20-179.4(c), 143B-262.4(b). A probation supervision fee (currently \$30.00 per month for each month of supervision) must be paid by defendants who are placed on supervised probation. G.S. 15A-1343(c1). What is the distribution priority for these fees?

1. *Community Service Fee and Probation Supervision Fee Have Highest Distribution Priority*

Currently, payments received from the defendant are disbursed to satisfy the community service fee and the probation supervision fee before any moneys are disbursed to satisfy any of the subsection (d) priorities, unless the court orders otherwise. Here is why.

³ The amendment to G.S. 7A-304(d) was enacted by S.L. 1998-212, §19.4(k). S.L. 1998-212 was that year's appropriations act. Section 19.4 was the vehicle by which the Crime Victim's Rights Act and related provisions were enacted. It has its own separate heading, which reads in part, "CREATE THE CRIME VICTIMS RIGHTS ACT/ . . . /CHANGE THE ORDER OF PRIORITY FOR DISBURSEMENT OF FUNDS IN CRIMINAL CASES . . ." Section 19.4 is one coherent enactment. This section alone runs to 16 pages in the Ratified Bill published by the General Assembly when it was enacted. It has seventeen subsections. All of its subsections enact new laws or revise existing law to conform to the Crime Victims Rights Act. The subsection amending G.S. 7A-304(d) is one of those subsections. In this context the word "victim," which was introduced into subsection (d) by this amendment, has the same meaning in subsection (d) that it has in the Crime Victim's Rights Act. Victim is defined in the Victims Rights Act, in G.S. 15A-830(a)(7), as "a person against whom" one of the crimes listed in that section was committed. It is further defined in the restitution provisions of the Act, in G.S. 15A-1340.24(a), as a person directly and proximately harmed as a result of the defendant's commission of the offense."

Subsection (d) prioritizes only the categories of obligation specified in that paragraph. It does not purport to prioritize any other monetary obligations imposed as a condition of probation. The community service fee and the probation supervision fee are not mentioned by name in subsection (d). They are not “costs due the State,” because costs due that State are limited to the costs assessed under the provisions of Article 28 of Chapter 7A of the General Statutes, entitled “Uniform Costs and Fees in the Trial Divisions.” This point is made clear by G.S. 7A-320, which provides, “The costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees.”

There are only two choices for how to prioritize the community service fee and the probation service fee in relation to the obligations prioritized by subsection (d). These fees are either paid ahead of all the subsection (d) priorities or after all the subsection (d) priorities are fully paid in full. There is no statute or legal precedent that answers the question.

Highest priority distribution is most consistent with generally accepted bookkeeping and accounting principles. Current obligations are generally satisfied ahead of past due obligations. The community service fee and the probation supervision fee are current obligation, because they are fees for services currently being provided to the defendant. Subsection (d) obligations are all past due obligations, because they incurred as a consequence of the commission of the crime.

There is also a practical reason for giving these fees priority over the subsection (d) obligations. Highest priority classification is likely to produce more money for the subsection (d) priorities, especially restitution, than the lowest priority would. If these fees have the highest priority, and have been satisfied by whatever partial payments the defendant has made when the defendant’s probation is being reviewed, these fees can be waived or subordinated as an inducement to the defendant to complete the payment of his/her other obligations. If they have last priority this leverage is not available.

2. Judge’s Option to Order Restitution Paid Ahead of these Fees

The presiding judge may order that restitution be paid ahead of even the community service fee and the probation supervision fee. If the presiding judge does not do so, limited funds will be disbursed to pay fees before being disbursed for any restitution, including restitution to the victim and restitution to persons other than the victim.

Merely ordering that restitution be paid first among the subsection (d) priorities does not accomplish this goal. The court must specifically order that restitution be paid ahead of the community service fee and the probation supervision fee. Our sentencing forms contain an second option that allows the judge to order that all restitution be paid before the community service and probation supervision fees

IV. SUMMARY EXAMPLE

Assume that the defendant is ordered to pay the following:

- \$200.00 community service fee
- \$30.00 probation supervision fee per month
- \$500.00 restitution to the victim
- \$30.00 superior court facilities fee
- \$5.00 arrest fee to the county
- \$200.00 fine
- \$500.00 to the Crime Victim's Compensation Fund, for benefits it has paid the victim
- \$7.00 in contributions to law enforcement office benefit funds
- \$83.00 superior court general court of justice fee
- \$500.00 attorney's fee.

Assume further that the defendant's probation is revoked or terminated after 5 months of supervision, and that the payments received through that date total \$900.00.

If no restitution related option is checked on the form, the \$900.00 will be distributed as follows

- \$200.00 to the community service program
- \$150.00 to the Division of Community Correction, for 5 months of probation supervision,
- \$500.00 to the victim
- \$35.00 to the county as costs due the county
- \$15 to the county as partial payment of the fine
- Nothing to the Crime Victims' Compensation Fund, for the restitution ordered to it
- Nothing to the State Treasurer for costs due the State
- Nothing to the Indigent Person's Attorney Fee Fund for the attorney's fee.

The first restitution option on the judgment forms reads, "All payments received by the Clerk shall be distributed pro rata among the persons entitled to restitution in this priority // first among all G.S. 7A-304(d) priorities." If only this option is checked on the judgment form, the \$900.00 will be distributed as follows:

- \$200.00 to the community service program
- \$150.00 to DCC
- \$500.00 to the victim
- \$150 to the Crime Victims' Compensation Fund
- Nothing to anyone else

The second restitution option on the judgment forms reads, "All payments received by the Clerk shall be distributed pro rata among the persons entitled to restitution in this priority // first among all G.S. 7A-304(d) priorities // and before payment of community service and probation supervision fees." If this option is also checked on the judgment form, the \$900.00 will be distributed as follows:

- \$500.00 to the victim
- \$400.00 to the Crime Victims' Compensation Fund
- Nothing to anyone else.

V. LEGISLATIVE CLARIFICATION WOULD BE WELCOME

AOC has no position on the merits of the current priorities. However we would welcome any legislative clarification, especially these two questions:

- What priority does the General Assembly believe restitution should have in relationship to the community service fee, the probation supervision fee and any other obligations not listed in subsection (d)?
- How should the subcategories in the same distribution priority be treated when there is not enough money to pay all the subcategories in full?

APPENDIX F

REMARKS OF WHIT GIBSON, CLERK OF SUPERIOR COURT

APPENDIX G

**REPORT TO APPROPRIATION CHAIRS AND JPS
SUBCOMMITTEE ON IMPROVING THE
COLLECTION RATE OF OFFENDER FEES,
PRESENTED BY GREGG STAHL, AOC**

APPENDIX H

CHART OF POSSIBLE PROPOSALS

House Select Committee on Restitution Possible Proposals

	Improving Collection & Distribution	Increasing Restitution Ordered
Generally	1. Income withholding (immediately or only upon default), debt setoff, tax refund intercept, etc.	23. Require that restitution orders include interest (accrues as of the date of sentencing or loss).
	2. Revoke driving privileges for non-payment.	24. Provide for recovery of attorney fees and costs incurred for collecting restitution.
By Victims	3. Give crime victims right to any information regarding offender's financial assets, income, or employment that is in possession of the district court or any community correctional service program.	
	4. Require victims to file SSN or have an alternative way to code the victims who request restitution.	
Within Court System	5. Have magistrate provide restitution worksheet to victims beforehand (when charges are filed). Earlier victim notification of restitution rights.	25. Require judge to order restitution ahead of community service/supervision fees in certain situations (e.g. loss of life, serious injury cases).
	6. Require prosecutors to request information about losses from victims.	26. Change monthly supervision fee to flat fee and adding program participation fees such as electronic monitoring, drug testing, drug assessment, and drug treatment.
	7. Require defendants to file a disclosure identifying all assets, income, and liabilities. Failure to disclose may be considered aggravating circumstance in sentencing.	27. Require that future earning potential be considered when ordering restitution. Restrict judge's ability to order partial restitution. Consider assets and earning potential when setting payment schedule. Even if defendant is currently unable to pay, a restitution plan must be presented that states the conditions under which the defendant will be making restitution.
	8. Authorize district attorneys to contract with private collection agencies, retaining a portion of the collection fee, for administrative expenses.	

	Improving Collection & Distribution	Increasing Restitution Ordered
	9. Use of bankcards.	
	10. Automate the origination of records in the FMS system.	
	11. Establish automated system by which clerk of court (and possibly community corrections) can monitor and cite back into court offenders who have failed to make payments (i.e. dunning letters, show cause orders, automatic docketing).	
	12. Clarify that restitution may be ordered to a person other than victim for economic loss for crimes which are not adjudicated or are not before the court (plea agreements/multiple victim situation)	
	13. Cases continued until payment made.	
	14. Expand use of criminal contempt.	
	15. Supervision fee not to be remitted after payment (prohibit judges from remit fees paid to supervision to be paid as other fees or costs).	
	16. Establish offender-funded collections program; offenders who cannot pay restitution at time of sentence must work with collections investigator to develop restitution payment schedule' payments to be monitored by collections investigator; offender must pay fee to cover costs (see Colorado statute)	
	17. Establish general offender assessment, penalty or surcharge that all offenders (not just those with ROs) must pay. The money can go to fund a collections program or to the victims comp fund.	
While on Probation	18. Authorize court to extend probation to allow offender time to satisfy RO	

	Improving Collection & Distribution	Increasing Restitution Ordered
	19. Encourage probation officers to place same emphasis on payment of restitution as they do on other conditions of probation.	
	20. Provide management information to probation officers and managers.	
	21. Training for probation officers on the use of the FMS system.	
	22. Require probation officers to review, twice a year, all cases in which restitution ordered; perform final review 60 days before expiration of probation; file written report with court if payments are not being made; give victim right to receive schedule of restitution payments & name and phone number of probation officer.	
While Incarcerated		28. Create new and/or enhance inmate work programs.
		29. Revise allocation of work-release earnings; require flat percentage off the top to go toward restitution.
		30. Require percentage of amount raised by inmate arts and crafts be applied toward restitution.

Technical Changes
Clarify distribution statute to indicate priority of community service and supervision fees (can codify current practice or move restitution ahead of these fees).
Clarify how subcategories within same distribution priority are to be treated when there is not enough money to pay all subcategories in full.
Modify joint and several liability of defendants with regard to payment of restitution.

APPENDIX I

PRESENTATION NOTES OF MOIRA ROWLEY WITH ACS, INC.

Restitution

Problem:

Not enough crime victims receiving restitution as compensation for monetary damage

CAUSES

Not enough restitution ordered (or orders not effective base for enforcement)

Non-payment or court-ordered restitution

Not paid because defendant does not have the means

Not paid because defendant with means chooses not to pay

Enforcement options:

Weigh cost, practicality, propriety, legality and the likelihood of recovery for most effective methods

Nature of restitution (direct payment by offender to those harmed) may limit our considerations about enforcement options.

Are there dual goals?

Make defendant pay

Ensure that crime victims are compensated

Make defendant pay

Structured, effective, broad based compliance programs

Many of the components listed in chart and considered by committee

Difficult to enforce – window of enforcement limited to term of probation

Ensure that crime victims are compensated

Revenue earmarked for payment to victims

May come from multiple sources

Not necessary paid by the offender

State Crime Victim Compensation Funds follow that model.

Can that model be expanded beyond charges where restitution is possible outcome?

Two approaches generating revenue for courts and state court systems

Fees added to all cases, or cases within given categories

Sanction percentages/fees on back end for non-payment

Restitution is among the lowest collectible categories of debt

Greater revenues and higher percentage of collectibility – limited jurisdiction traffic.

Compliance programs often include ability for State to add percentage fee for non-payment.

While effective enforcement/compliance programs increase the number of cases paid without invoking sanctions, there are still many, many cases that are not paid in a timely manner.

Therefore, this source of revenue remains viable.

Sanction percentages run a wide range – up to 40% in FL

Consider enacting legislation authorizing a high percentage

Carefully craft language so that funds may be used (or later challenges my invalidate, and put sentencing/judgments at risk)

: To support the costs and operation of the compliance program
For restitution to crime victims (general fund – follow rules for CVC)
Other ? ? ?

Use some of that money to remediate Court information/financial systems, or to resurrect the development/implementation of a new system

Use some as incentive to courts for timely and accurate data entry/information exchange.

Allocate portion of the overall percentage to CVC

Advantages:

More money likely to be paid to victims

Comprehensive program will increase revenues overall – not just restitution

Financial model makes it possible/profitable for private sector involvement

Costs are still paid by bad actors.