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OPINION	:	No. 81-121
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of	:	<u>OCTOBER 12, 1982</u>
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THE HONORABLE RUTH L. RUSHEN, DIRECTOR, DEPARTMENT OF CORRECTIONS, requests an opinion on the questions which we have phrased as follows:

1. Who is responsible for the collection of penalty assessments levied against criminal defendants for the benefit of crime victim programs?
2. May a penalty assessment be levied against a criminal defendant who does not have a present ability to pay such assessment?
3. Is the payment under Penal Code section 2713.1, which is made to a prisoner upon release from prison, subject to postjudgment garnishment prior to that release to collect unpaid penalty assessments?

## CONCLUSIONS

1. The clerk of the court is responsible for the collection of penalty assessments levied against criminal defendants for the benefit of crime victim programs.
2. A penalty assessment may be levied by the trial court without regard to the criminal defendant's present ability to pay such assessment.
3. The payment under Penal Code section 2713.1, which is made to a prisoner upon release from prison, is not subject to postjudgment garnishment prior to that release to collect unpaid penalty assessments.

## ANALYSIS

The Legislature has provided for the levying of penalty assessments in criminal cases and a portion of these assessments are allocated to the crime victim indemnification program. Penal Code section 1464, operative as of January 1, 1982<sup>1</sup> (Stats. 1981, ch. 1171, § 14) provides in part as follows:

"(a) Subject to the provisions of Section 1206.8, there shall be levied an assessment in an amount equal to four dollars (\$4) for every ten dollars (\$10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses, including all offenses involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code, except offenses relating to parking or registration or offenses by pedestrians or bicyclists, or where an order is made to pay a sum to the general fund of the county pursuant to subparagraph (iii) of paragraph (3) of subdivision (a) of Section 258 of the Welfare and Institutions Code. Any bail schedule adopted pursuant to Section 1269b may include the necessary amount to pay the assessments established by this section and Section 1206.8 for all matters where a personal appearance is not mandatory and the bail is posted primarily to guarantee payment of the fine.

"(b) Where multiple offenses are involved, the assessment shall be based upon the total fine or bail for each case. When a fine is suspended, in

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<sup>1</sup> This section will be replaced on January 1, 1983, by a new section 1464 which, in turn, will be replaced on January 1, 1986, by another version. (Stats. 1981, ch. 1171, §§ 11 and 15.) These future statutes do not substantially change present procedures for collection of penalty assessments for the benefit of crime victims.

whole or in part, the assessment shall be reduced in proportion to the suspension.

"(c) When any deposited bail is made for an offense to which this section applies, and for which a court appearance is not mandatory, the person making such deposit shall also deposit a sufficient amount to include the assessment prescribed by this section for forfeited bail. If bail is returned, the assessment made thereon pursuant to this section, shall also be returned

"(d) In any case where a person convicted of any offense, to which this section applies, is in prison until the fine is satisfied, the judge may waive all or any part of the assessment, the payment of which would work a hardship on the person convicted or his immediate family.

"(e) After a determination by the court of the amount due, the clerk of the court shall collect the same and transmit it to the county treasury. The portion thereof attributable to Section 1206.8 shall be deposited in the appropriate county fund and the balance shall then be transmitted to the State Treasury to be deposited in the Assessment Fund, which is hereby created. The transmission to the State Treasury shall be carried out in the same manner as fines collected for the state by a county.

"(f) The moneys so deposited shall be distributed as follows:

"....."

"(2) Once a month there shall be transferred into the Indemnity Fund an amount equal to 24.58 percent of the funds deposited in the Assessment Fund during the preceding month. Such funds shall be available for appropriation by the Legislature in accordance with the provisions of subdivision (b) of Section 13967 of the Government Code.

"....."

The first question: Who is responsible for collecting the penalty assessments levied for the benefit of crime victim programs? When the question was framed the penalty assessment provision for crime victims' relief was part of Government Code section 13967 (Stats. 1980, ch. 530, § 3.5) and while providing that the trial court levy such an assessment it did not specify the means of collection. However, Government Code section 13967 was amended in 1981 (Stats. 1981, ch. 166, § 3) to delete references to penalty assessments. As we have seen, under Penal Code section 1464 the municipal or justice court determines

the assessment due and the clerk of the court collects it and transmits it to the county treasury.<sup>2</sup> The amount collected is transmitted to the state treasury for deposit in the assessment fund. Once a month 24.58 percent of the assessment fund is transferred to the indemnity fund set up by Government Code section 13967(b) for aid to crime victims. Consequently, under present law, there is no uncertainty about the procedure for collecting assessments payable to the indemnity fund.<sup>3</sup>

The second question: May a penalty assessment be levied against a person who does not have a present ability to pay? This matter was considered in *In re Antazo* (1970) 3 Cal.3d 100. In *Antazo* the convicted defendant was ordered to pay a fine and also an assessment under Penal Code section 13521.<sup>4</sup> Being indigent, he could pay neither and was forced to "work off" the sum owed in jail at a specified rate per day. His codefendant, subject to the same judgment, paid and was not confined. Without making any distinction between the fine and the assessment, the court concluded that providing a rich offender but not a poor offender with the opportunity to escape confinement was discriminatory. The court stated at page 104:

"We cannot countenance such a difference in treatment and, absent any compelling state interest necessitating it, we conclude that it constitutes an invidious discrimination on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment."

The effect of *Antazo* was to bar a trial judge from sending a defendant to jail or prison solely because he was unable to pay the monetary penalty. (*In re Siegel* (1975) 45 Cal.App.3d 843, 846.) However, as *Antazo* makes clear, such a penalty may nevertheless be imposed upon an indigent in certain circumstances (3 Cal.3d 100, 116):

"[O]ur holding is simply that an indigent who would pay his fine if he could, must be given an option comparable to an offender who is not indigent. When the indigent offender refuses to avail himself of such

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<sup>2</sup> Courts within a county may also levy surcharges or assessments for the benefit of capital improvements in criminal justice facilities and systems. Such penalties are collectible in the manner prescribed by section 1464 but are retained by the county. (Pen. Code § 1206.8; Gov. Code §§ 68073.1, 68073.2 and 68073.4.)

<sup>3</sup> In 64 Ops.Cal.Atty.Gen. 826, 831 (1981) we concluded that the district attorney has the primary responsibility of executing on a criminal judgment for a fine when the defendant refuses to make payment. Since a penalty assessment is attached to a fine (62 Ops.Cal.Atty.Gen. 249, 253 (1979)), the district attorney would also have the primary responsibility of enforcing the penalty segment of such a judgment.

<sup>4</sup> Section 13521 was repealed in 1981. (Stats. 1981, ch. 166, § 9.)

alternatives at the inception, or defaults or otherwise fails to meet the conditions of the particular alternative which is offered him without a showing of reasonable excuse, the indigent offender becomes in the eyes of the court exactly the same as the contumacious offender who is not indigent. When either of these conditions obtain the offender's indigency ceases to be dispositive and he may, consistently with the mandate of the equal protection clause, be relegated to 'working out' his fine by imprisonment."

Accordingly, we conclude that an assessment under Penal Code section 1464 may be levied against a person who does not have the ability to pay but that person may not be confined *solely* because his indigency prevents him from paying.<sup>5</sup>

The third question: Is the payment under Penal Code section 2713.1, which is made to a prisoner upon release from prison, subject to postjudgment garnishment<sup>6</sup> prior to release to collect unpaid penalty assessments?

Penal Code section 2713.1 provides as follows:

"In addition to any other payment to which he is entitled by law, each prisoner upon his release shall be paid the sum of two hundred dollars (\$200), from such appropriations that may be made available for the purposes of this section.

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<sup>5</sup> A different situation is presented when a statute prohibits the imposition of a fine upon an indigent defendant. Under Government Code section 13967, upon a person being convicted of a crime of violence, a fine of between \$10 and \$10,000 must be levied if the trial court finds that the defendant has the present ability to pay and that the economic impact of the fine upon the defendant's dependents will not place them on public welfare. An assessment under Penal Code section 1464 is an increment to the fine. (62 Ops.Cal.Atty.Gen. 249, 253 (1979).) Consequently, if the defendant does not have an ability to pay he cannot be fined under Government Code section 13967 and there would be no fine upon which an increment, i.e., assessment under Penal Code section 1464, might be placed.

<sup>6</sup> Judgments are enforced by writs of execution which authorize the seizure of the judgment debtor's property. (C.C.P. § 681.) The procedure allowing execution on the judgment debtor's property in the custody of third parties is usually referred to as postjudgment garnishment and is carried out by service on the third party of a writ of execution and notice of levy (C.C.P. § 688(b)) or of a writ of attachment and notice of attachment (C.C.P. § 488.330). Where the third party is a state department, board, office or commission, the procedures of Code of Civil Procedure section 710(a)(1) must be followed. A full discussion of postjudgment garnishment is beyond the scope of this opinion. (See 30 Cal.Jur.3d 329-338.)

"The department may prescribe rules and regulations (a) to limit or eliminate any payments provided for in this section to prisoners who have not served for at least six consecutive months prior to their release in instances where the department determines that such a payment is not necessary for rehabilitation of the prisoner, and (b) to establish procedures for the payment of the sum of two hundred dollars (\$200), within the first 60 days of a prisoner's release.

"The provisions of this section shall not be applicable if a prisoner is released to the custody of another state or to the custody of the federal government."

The statute operates upon the release of the prisoner, and there is no entitlement on the part of the prisoner to the money until that event occurs. These are not funds of the prisoner held in trust for him.<sup>7</sup> Release from prison may occur upon completion of the prison sentence, upon commutation of sentence or pardon, upon parole or upon the setting aside of the conviction. The \$200 payment is made to a person who is no longer a prisoner and such money is placed directly in his custody.

The Legislature makes appropriations to the Department of Corrections from which these payments are made to prisoners upon their release. Is the contingent interest of a prisoner in such appropriations subject to postjudgment garnishment?

Penal Code section 1206 states that a fine in a criminal action "constitutes a lien in like manner as a judgment for money rendered in a civil action"; Penal Code section 1214 states respecting a fine that "execution may be issued thereon as on a judgment in a civil action." The fine and the penalty are affixed together in the criminal judgment. (57 Ops.Cal.Atty.Gen. 619, 622 (1974); 23 Ops.Cal.Atty.Gen. 113, 116 (1954); see also footnote 2, *supra*.) Consequently, the judgment for the fine and the penalty assessment may be enforced by civil process. In the situation presented, that process is found in Code of Civil Procedure section 710, which provides in part as follows:

"(a) Whenever a judgment for the payment of money is rendered by any court of this state against a defendant to whom money is owing and unpaid by this state or by any county, city and county, city or municipality, quasimunicipality, district or public corporation, the judgment creditor may

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<sup>7</sup> Under Penal Code sections 2085 and 2713 the Department of Corrections must account for a prisoner's money in its custody. (See *In re Ferguson* (1961) 55 Cal.2d 663, 676, cert. den. 368 U.S. 864; *Emmanuel v. Sichofsky* (1926) 198 Cal. 713, 715.) In 10 Ops.Cal.Atty.Gen. 49 (1947) we determined that moneys held by prison authorities in trust for inmates may be attached by creditors unless otherwise exempt from attachment.

file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

"1. If such money is owing and unpaid by this state to such judgment debtor, said judgment creditor shall file said abstract or transcript and affidavit with the state department, board, office or commission owing such money to said judgment debtor prior to the time such state department, board, office or commission presents the claim of such judgment debtor therefor to the State Controller. Said state department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact of the filing of such abstract or transcript and affidavit and state the amount unpaid on said judgment as shown by said affidavit and shall also note any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the State of California by reason of advances for expenses or for any other purpose. Thereupon the State Controller, to discharge such claim of such judgment debtor, shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due such judgment debtor on such claim, after deducting from such claim an amount sufficient to reimburse the state department, board, office or commission for any amounts advanced to said judgment debtor or by him owed to the State of California, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor."

For our discussion of Code of Civil Procedure section 710 the judgment debtor is the prisoner who has not paid the penalty assessment, the judgment creditor is the county which has imposed the assessment and the state department is the Department of Corrections which is obligated by Penal Code section 2713.1 to make a \$200 payment to the prisoner upon his release. We conclude that since the \$200 is not "owing and unpaid" prior to the prisoner's release, the fund appropriated for such payment may not be garnished in that amount under Code of Civil Procedure section 710.

In *Dept. of Water & Power v. Inyo Chem. Co.* (1940) 16 Cal.2d 744, the State of California obtained a judgment in damages against a chemical company. Previously the chemical company had won a judgment of damages against the City of Los Angeles which judgment had been affirmed on appeal but was unpaid. Pursuant to Code of Civil Procedure section 710, the State of California levied against the City of Los Angeles to garnish the money payable to the chemical company by the city under the chemical company's earlier judgment. One of the questions before the Supreme Court was whether

or not the obligation of the city was "owing and unpaid." The court first construed section 710 (16 Cal.2d at p. 751):

"Let us here consider the significance of the wording of section 710 of the Code of Civil Procedure providing a special form of levy of execution for the benefit of any person who holds a judgment against a defendant 'to whom money is owing and unpaid'. Certainly there is nothing in the clear and unequivocal language of this garnishment provision to indicate its application should be limited to contractual obligations, or that it applies to tort liability of the city only if such liability has been fixed by final judgment. Rather it seems to us that the correct interpretation of said section 710 is that money is 'owing and unpaid' within the meaning thereof if there is an *existing and unsatisfied legal liability*, without regard to whether such liability arises in tort or in contract, and without regard to whether such liability is fixed and established by *final* judgment or by some other means." (Emphasis in original.)

The court then found in favor of the garnisher, the State of California (16 Cal.2d at 755):

"Said section 710 by its authorization of a levy when there is 'money owing and unpaid,' only requires a fixed liability in a fixed amount. The liability of the City of Los Angeles was liquidated at least to the aforesaid extent, when the decision of this court determining that liability in said amount existed became final and so constituted the law of the case. The levy of the state was subsequent to this point of finality and hence reached the moneys determined to be 'owing and unpaid' by the city to the judgment debtor of the state."

The money owed by the city to the chemical company was an existing and unsatisfied legal liability of the city for the benefit of the chemical company.

Prior to release of the prisoner the Department of Corrections does not have an existing and unsatisfied legal liability to pay the prisoner \$200. The liability under Penal Code section 2713.1 only arises when the prisoner is actually released. In *McDaniel v. City and County of San Francisco* (1968) 259 Cal.App.2d 356 the city employee's retirement contributions were refundable to him under the city's charter upon termination of his employment before retirement. When that event—termination of employment—occurred the contributions were "owing and unpaid" and the employee's judgment creditor properly levied against the city under section 710. By contrast, the \$200 is neither owing nor unpaid to the prisoner until the occurrence of a specific event, namely, his release from prison.



Accordingly, we conclude that the payment under Penal Code section 2713.1, which is made to a prisoner upon release from prison, is not subject to postjudgment garnishment prior to that release to collect unpaid penalty assessments.

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