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NO.
STATE OF NEBRASKA
OFFICIAL
MAR 19 1993
DEPT. OF JUSTICE

DATE: March 19, 1993

SUBJECT: Constitutionality of LB 619, an Act Relating To Crimes

REQUESTED BY: Senator Dwite A. Pedersen, 39th District

WRITTEN BY: Don Stenberg, Attorney General
Sam Grimminger, Deputy Attorney General

You have inquired whether LB 619, which provides for a surcharge to be paid by criminal defendants, is valid under the Nebraska constitution. The surcharge, applied to criminal defendants who are convicted, plead guilty, or *nolo contendre*, is to be deposited into the Victims' Compensation Fund and the Crime Victim and Witness Assistance Fund.

In our opinion, this Act and the mechanism it creates to provide funding for the Victims' funds does not violate the Nebraska constitutional provisions of Article VII, Section 5, which provides that any fines or penalties be paid to the counties to be applied to the common schools. Although the Nebraska Supreme Court as recently as 1990 declined to determine the constitutionality of restitution as provided in Neb. Rev. Stat. §§ 29-2280 to 29-2289 (Reissue 1989), it is our opinion that the surcharge would not operate as a fine or penalty for the purposes of Neb. Const. Art. VII, § 5, but would properly be characterized as liquidated damages collected for the benefit of those who have suffered uncompensated injury by the wrongful acts of criminals.

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As a preliminary matter, we note that a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. ***In Re Application A-16642***, 236 Neb. 671, 463 N.W.2d 591 (1990). Further, the party claiming a statute to be unconstitutional has the burden of clearly establishing its unconstitutionality. ***Haman v. Marsh***, 237 Neb. 699, 467 N.W2d 836, (1991). The Nebraska Supreme Court is also obligated to endeavor to interpret a challenged statute in a manner consistent with the Constitution. ***In Re Application U-2***, 226 Neb. 594, 413 N.W.2d 290.

Section 5, Article VII of the Constitution provides: "All fines [and] penalties...arising under the general laws of this state, shall belong and be paid over to the counties respectively...All such fines [and] penalties shall be appropriated exclusively to the use and support of the common schools...where the [penalty or fine] shall accrue." In the drafting of LB 619, it appears the legislature was aware of the above section, as the statute provides: "In addition to any fine or other penalty prescribed by law, a defendant...shall be assessed a surcharge of twenty-five dollars." LB 619 § 1, (1) (1993) (emphasis added). Section 1 (5) further distinguishes between the surcharge and penalties and fines. It is clearly legislative intent that the surcharge not be classified as a fine or penalty for the purposes of Article VII, Section 5. That intent does not control, however, if the Supreme Court determines that despite the legislative intent the legal effect of the surcharge is as a penalty or fine.

Whether an amount collected from a defendant in a civil or criminal action is a penalty or fine has been recurrently addressed by the Supreme Court. See ***Graham v. Kibble***, 9 Neb. 182, 2 N.W. 455 (1879), ***Phoenix Ins. Co. v. Bohman***, 28 Neb. 251, 44 N.W. 111 (1889), ***Clearwater Bank v. Kurkonski***, 45 Neb. 1, 63 N.W. 133 (1895), ***Sunderland Bros. Co. v. Chicago, B. & Q. R.R. Co.***, 104 Neb. 319, 177 N.W. 156 (1920), reh'g 104 Neb. 322, 179 N.W. 546 (1920). The Court has continued to make individual determinations under the section, and a review of the more recent cases is illuminating.

In ***School District of the City of Omaha v. Adams***, 147 Neb. 1060, 26 N.W.2d 24 (1946), an amount was collected from the estate of the deceased as a statutory penalty for failure to list certain property for taxation. In the course of determining the proper allocation of funds between the school district and other governmental entities, the Court addressed the constitutionality of the tax penalty in light of Article VII, Section 5:

> Clearly a statutory provision for liquidated damages in favor of a private person where it is not so oppressive as to offend constitutional requirements as to due process, although in the form of a penalty, does not create a penalty that must be apportioned to the use and support of the common schools within the meaning of Section 5, Article VII, of the Constitution.

Id. at 1064. The Court drew a distinction between remedial and penal statutes, in that penal statutes are enforced for punishment and deterrence. Remedial statutes are for the purpose of adjusting the rights of the parties as between themselves in respect to the wrong alleged. The Court in ***Adams*** noted the tax penalty served a punitive function as to the wrongdoer, but was remedial as to the taxing bodies. Thus the penalty was held to not be of the type contemplated in Article VII, Section 5. *Id.* at 1066.

Where damages of a party are difficult to measure, the Court has held that liquidated damages statutes will not be construed as a penalty:

> It is clearly within the province of the Legislature to provide for liquidated damages in favor of a private person, although in the form of a penalty, if the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible of measurement by ordinary pecuniary standards. But where it appears that the provision provides for the payment of an amount clearly in excess of compensatory damages, it is a penalty and violates the due process clause of the Constitution when considered with Article VII, Section 5, thereof.

Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960). Although the matter in ***Abel*** was civil rather than criminal, the reasoning of the court should be relevant in any restitution analysis. The liquidated damages in LB 619 also differ from contractual liquidated damages in two important respects. The surcharge in LB 619 is applied to a fund for all victims of crime, not just for damages between the parties, and the criminal may have paid an amount for fines or penalties or in restitution to the actual victim. However, the mechanism of funding a reserve for the payment of compensation is more efficient and may provide for compensation

to victims when the criminal is unable to pay any amount of restitution. In addition, the twenty-five dollar amount is an insignificant amount given the difficulty in determining any precise amount of damages that was inflicted on victims in criminal acts. Neb. Rev. Stat. § 81-1817 (Reissue 1987) provides that compensation for losses and expenses are compensable from the Victims' Compensation Fund only to the extent the victim is not compensated by the offender or certain other parties. Thus the legislature, by charging criminals an amount for liquidating damages which victims have not recovered, provides the victims with a compensatory amount. The surcharge is not punitive in nature.

As early as 1913 the propriety of liquidated damages in a compensatory scheme was clearly established. The United States Supreme Court, surveying Nebraska case law in this area noted: "These cases (referring to ***Graham***, ***Phoenix Insurance***, and others finding penalties) are distinguishable...and the [Nebraska Supreme Court], in the case at bar, explicitly distinguished them from cases in which liquidated damages were provided for. In other words, the court decided that the statute imposed only compensatory damages, fixing them at a sum certain because of the difficulty 'of the ascertainment of the actual damages suffered by the aggrieved person.'" ***Chicago, B. & Q. R.R. Co. v. Cram***, 228 U.S. 70, 84 (1913) (emphasis added). LB 619 may come closest to resembling an early case dealing with a county official convicted of embezzlement. In ***Everson v. State***, 66 Neb. 154, 92 N.W. 137 (1902), the convicted criminal was statutorily required to pay double the amount embezzled for the use of the party whose money he had embezzled. The court admitted the amount was a fine in the most accurate definition of that term, but stated: "[T]his court has said, in a case involving the same principle, that Section 5 of Article 8 (now article 7) was not intended to deprive the legislature of the power to pass statutes of this character, whereby a fixed sum, in the nature of liquidated damages, is given to one who has suffered injury by the wrongful act..." *Id.* at 158.

In ***DeCamp v. City of Lincoln***, 202 Neb. 727, 277 N.W.2d 83 (1979), the Court determined that court costs were not penalties or fines within the meaning of Article VII, Section 5 of the Constitution. Court costs were recognized as different from fines and penalties at the time of enactment of the constitution, so it followed that the framers were aware that they would not be included in the provisions of Article VII, Section 5. In reply to the plaintiffs contention that the court costs were actually penalties in disguise, the Court stated: "The purpose of the costs appears to be compensatory and the record does not contradict that conclusion." *Id.* at 735. This was contrasted with an earlier case, ***School District of McCook v. City of McCook***, 163 Neb. 817, 81

N.W.2d 224 (1957) in which the Court determined that amounts paid for parking meter violations were punitive in nature. As in ***Adams***, the determination of the punitive or compensatory nature of the statute continued to be controlling.

However, the Court in 1990 left open the issue of whether restitution is constitutional under Article VII, Section 5. In ***State v. Yost***, 235 Neb. 325, 455 N.W.2d 162 (1990), an award including restitution was reviewed for abuse of discretion. The court noted on it's own volition that an issue as to the constitutionality of restitution existed. The court cited ***State v. War Bonnet***, 229 Neb 681, 428 N.W.2d 508 (1988) and ***State v. Duran***, 224 Neb. 774, 401 N.W.2d 482 (1987) holding that restitution ordered by a court is a criminal penalty imposed as punishment for a crime, but also cited ***State v. Arvizo***, 233 Neb. 327, 444 N.W.2d 409 (1989) and ***State v. Mentzer***, 233 Neb. 843, 448 N.W.2d 409 (1989) holding that restitution ordered is properly payable to the victim. The court appears to have invited a future party to challenge Neb. Rev. Stat. §§ 29-2280 to 29-2289, which provide for restitution to victims.

In ***Duran***, the Court held that restitution under Neb. Rev. Stat. § 29-2280 was a criminal penalty. They noted the use of the words "sentencing court" and "sentence" in the statute, and held that as the statute became effective <u>after</u> the date of the crime, to allow restitution under § 29-2280 would be invalid as an ex post facto law. In ***War Bonnet***, the Court held that under § 29-2280 restitution was a criminal penalty, and that the defendant must be made aware of the possibility of restitution before entering a plea bargain. Both cases are distinguishable from the effect of LB 619 however, in that they deal with restitution as it applies to the defendant. As was noted in ***Adams***, a penalty can be both punitive as to the wrongdoer, but remedial to the victim. Thus for the purposes of ex-post facto laws and knowledge of possible penalties, restitution is penal in nature. However, for the purposes of Article VII, Section 5, and from the viewpoint of a victim, the surcharge is clearly compensatory in nature. The Courts decisions in ***Arvizo***, and ***Mentzer*** allowed restitution to the victim, implicitly holding that restitution is properly payable to the victims. To be properly payable to the victims, the Court must have determined that restitution is compensatory in nature if it is applied properly in respect to its penal nature.

In our opinion, the provisions of LB 619 are compensatory in nature, and thus are not fines or penalties for the purposes of Article VII, Section 5 of the Constitution. ***School District of City of Omaha v. Adams, supra, DeCamp v. City of Lincoln, supra.*** The fact that the surcharge is a fixed amount does not alter the analysis, ***Abel v. Conover, supra,*** and ***Everson v. State, supra.*** As compensatory in nature, the surcharge is constitutional. See Op. Att'y Gen. 87-013 (Wyo. 1987).

Sincerely,

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Approved By:

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04-10-0