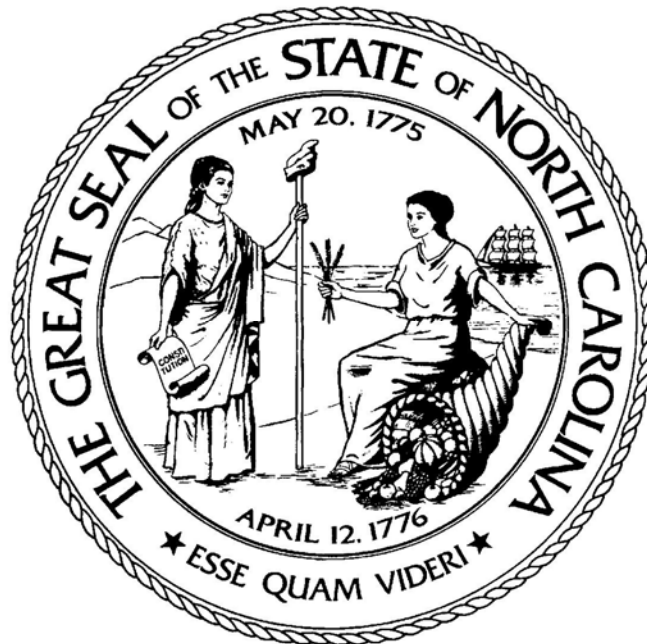


**HOUSE SELECT COMMITTEE  
ON PREVENTING UNJUST PROFITEERING  
FROM CRIME**



**REPORT TO THE 2004  
GENERAL ASSEMBLY OF NORTH CAROLINA  
2003 SESSION**

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**HOUSE SELECT COMMITTEE ON  
PREVENTING UNJUST PROFITEERING FROM CRIME**  
*State Legislative Building  
Raleigh, North Carolina 27603*

*Representative Rick Eddins, Co-Chair*

*Representative Hugh Holliman, Co-Chair*

**May 5, 2004**

**TO THE MEMBERS OF THE 2004 GENERAL ASSEMBLY (2003 Regular Session):**

The House Select Committee on Preventing Unjust Profiteering from Crime submits to you for your consideration its report.

Respectfully Submitted,

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Rep. Rick Eddins, Co-Chair

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Rep. Hugh Holliman, Co-Chair

# PREVENTING UNJUST PROFITEERING FROM CRIME COMMITTEE

## 2004 MEMBERSHIP

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

### Staff:

Trina Griffin, Legislative Analyst  
Cindy Hobbs, Committee Clerk

## PREFACE

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In both the 2001 and 2003 sessions of the General Assembly, Representative Rick Eddins introduced a bill that would prevent certain criminals from profiting from their crimes by redirecting those profits to the crime victims. Neither House Bill 798 from the 2001 General Assembly nor House Bill 911 from the 2003 General Assembly passed. This issue was included in the 2003 Studies Bill, which also failed to pass. Consequently, this Select Committee was established to study this legislative proposal in an effort to examine the complex constitutional and civil procedure issues associated with this bill. The order from the Office of the Speaker of the House of Representatives authorizing the Committee is set out in Appendix A.

## BACKGROUND

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In 1977, David Berkowitz, who was dubbed the "Son of Sam," committed a series of murders in New York creating a media frenzy. Before the investigation was even complete, publishers were offering to pay huge sums of money for the rights to his story. In a hasty response, the New York State Legislature enacted a law prohibiting criminals from using their notoriety for profit. This became known as the "Son of Sam" law. Interestingly, this law never actually applied to Berkowitz. He was found incompetent to stand trial, which exempted him from the law. In addition, Berkowitz voluntarily donated the royalties he received from a book chronicling his criminal activity to his victims and their estates.

New York's law provided that when any person entered into a contract with a person accused or convicted of committing a crime, and the contract involved the reenactment or recounting of the crime in a book, movie, television show, magazine article, or other similar media outlet, the contracting party had to submit a copy of the contract and pay over to the state all profits that would otherwise be paid to the offender. These funds would be held for the benefit of the offender's victims, or in some cases, contributed to the state victim compensation fund. Following New York's lead, 41 additional states and the federal government enacted similar Son of Sam laws.

New York's statute went little used for almost 10 years. Then came a case involving a prominent New York mobster named Henry Hill. In 1981, Hill contracted with an author to write a biography detailing his life of crime. The pair then entered into a publishing agreement with Simon & Schuster, Inc. Published in 1986, the book, which recounted many of Hill's crimes, became a bestseller and was the basis of the Oscar award-winning film, *Goodfellas*. The same month the book was published, the New York State Crime Victims Board ordered Simon & Schuster, Inc. to submit copies of the contract, to turn over records of all payments to Hill, and to suspend future



payments. Simon & Schuster, Inc. brought suit against the Board challenging the constitutionality of New York's Son of Sam law. The case was ultimately heard by the United States Supreme Court.

In 1991, the Supreme Court held that the law was an unconstitutional violation of the First Amendment right to free speech.<sup>1</sup> When reviewing free speech cases, the level of scrutiny with which the court examines those cases depends on the nature of the regulation. If a law places a burden on speech because of its content (referred to as a content-based regulation), then it will be subject to the strictest level of review. The law will only be justified if the state can prove that the regulation was necessary to serve a compelling state interest and the regulation is narrowly drawn to achieve that end. This level of review is referred to as "strict scrutiny" and is the hardest threshold to overcome in free speech cases.

In this case, the Court determined that since the law targeted only profits that resulted from speech-related activities (such as books, movies, interviews, etc.), the law was content-based, and subject to strict scrutiny. The law imposed a financial burden on speakers because of the content of their speech. For example, under the New York law, an offender could write a cookbook and keep the profits, but if he wrote a book detailing his crime, he could not.

The Court emphasized that the state had no compelling interest in shielding readers and victims from negative emotional responses to a criminal's public retelling of his misdeeds. The protection of offensive and disagreeable ideas is at the core of the First Amendment. However, the Court acknowledged that states do have a compelling interest in ensuring that victims of crime are compensated by those that harm them and in preventing wrongdoers from dissipating their assets before victims can recover. But the Court found that the law was not narrowly written. The law was overbroad because it applied not only to convicted offenders, but also to those accused of a crime and those who "voluntarily and intelligently admitted to the commission of a crime" even if the

person was never prosecuted. In addition, the law made no distinctions between materials that were substantially about the crime and those in which the mention of the crime was only tangential or insignificant. The Court pointed out that books by persons such as St. Augustine, Thoreau, and Malcolm X would have fallen under the purview of the law since they all had mentioned in their works, crimes they had committed.

The Court struck down the statute as unconstitutional because it failed to satisfy the strict scrutiny analysis. The Court ended its opinion by reiterating that its opinion only applied to New York's law, as drafted, prompting some observers to note that legislation more narrowly tailored would likely withstand constitutional challenge.

This case calls into question the constitutionality of all notoriety for profit statutes with similar language. Currently, at least 27 states have similar, if not identical Son of Sam laws on their books. However, a number of legislatures have since amended their laws in an attempt to make them constitutional.

California was among the handful of states that revised its Son of Sam statute in response to the *Simon & Schuster* decision. In that case, the Court had specifically identified as problematic the fact that New York's law was overbroad because (1) it included people who had never even been prosecuted or convicted, and because (2) it covered works where the mention of a crime was tangential or insubstantial. In order to address those concerns, the revised law limited its scope to persons actually convicted of felonies, and it excluded profits where the crime was mentioned "in mere passing."

This revised California statute was challenged in the highly publicized case of *Keenan v. Superior Court*.<sup>2</sup> In that case, a high school student named Barry Keenan devised a plan in 1963 with two friends to kidnap Frank Sinatra, Jr. and demand a \$240,000 ransom. Sinatra was released after a few days and Keenan served a prison term for kidnapping. Thirty-five years later, Keenan sought to cash in on his experience

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<sup>1</sup> *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).

by attempting to sell the rights to the story. Sinatra sued under California's revised Son of Sam law. In 2002, the California Supreme Court found part of the statute unconstitutional under the First Amendment. Even with the revisions, the statute still applied to "all proceeds from the sale of materials that include or are based on the story of a felony for which a convicted felon was convicted." The statute defined the term "story" to exclude those stories with just a "passing mention" of the felony.

The Court held that the statute was not narrowly tailored because it penalized the content of speech to an extent far beyond that necessary to compensate victims. The court observed that the statute not only confiscated funds received from the telling of the story of the crime, but seized proceeds from speech or expression on any theme or subject which includes the story of the felony, except by "mere passing mention." The court concluded that the effect of the statute was to discourage "the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds." The court struck down part of the law, and the United States Supreme Court denied certiorari in October of 2002.

While these two cases have been the most highly publicized, the Supreme Court of Rhode Island also struck down that State's Son of Sam law.

Although 42 states technically have a Son of Sam law, at least 27 of them are almost identical to the New York law that was held unconstitutional. Eleven states have revised statutes, none of which have been challenged on constitutional grounds; five states repealed their statutes without reenacting new statutes; and three states have never enacted a Son of Sam law, including North Carolina. For a listing of these states, see the chart in Appendix B. The Special Forfeiture Statute<sup>3</sup> is a federal law that provides for special forfeiture to the government of proceeds received or to be received by criminals convicted of violent crimes from the sales of literary rights to their stories about their crimes and for the deposit of those proceeds in the Crime Victims Fund.

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<sup>2</sup> *Barry Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718 (Sup. Ct. 2002), cert. denied, 537 U.S. 818 (2002).

<sup>3</sup> 18 U.S.C. 3681 and 3682.

However, according to the U.S. Department of Justice, this statute has fallen into disuse because there is little doubt, if any, that it is inconsistent with the First Amendment.

Among the states that have revised their notoriety for profit statutes in an attempt to make them constitutional, the most common change has been to expand the law to cover any profit received, directly or indirectly, from crimes, not just profits from speech-related activities. For instance, Iowa targets "fruits of the crime" defined as "any profit which, were it not for the commission of the felony, would not have been realized." Oklahoma's amended law applies to "any proceeds or profits from any source, as a direct or indirect result of the crime or sentence, or the notoriety which the crime or sentence has conferred upon the defendant." In contrast, Tennessee targets "all income, from whatever source derived, which is owing to the defendant after the date of the crime." Another common change has been to restrict the notoriety for profit statutes to convicted offenders.

A third common change has little to do with conforming the statutes to judicial decisions, but relates to the emergence of an underground trade in objects associated with crime or specific criminals. These objects include both manufactured items representative of criminals or crimes, such as murderer trading cards, figurines, or t-shirts, as well as non-manufactured items that once belonged to the criminal, such as hair and fingernail clippings, letters and paintings – even dirt from John Wayne Gacy's basement has been sold over the Internet. Internet sites like Yahoo and eBay facilitated the proliferation of this practice where people can enter into anonymous transactions at arm's length.<sup>4</sup>

The traditional Son of Sam laws do not prevent criminals from profiting through non-speech-related activities. Generally, those laws only apply to the recounting or reenactment of a crime through speech-related activities, such as movies and books. For example, under the traditional law, a criminal could not profit from a book deal

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<sup>4</sup> In 2001, eBay voluntarily elected to ban the sale of crime memorabilia, but reserves the right to exercise its discretion regarding certain items.

involving the retelling of his crime, but he could profit by selling his autograph, his photograph, or his artwork. In response to this growing industry, a small number of states amended their Son of Sam statutes in an attempt to restrict profiteering from tangible goods owned by a criminal or associated with a crime where the value of that good has been enhanced due to the notoriety of the criminal. These restrictions on profiteering may apply to the offender as well as to third parties selling items related to the crime. Moreover, these amendments usually only require the criminal to turn over that percentage of the profits that reflects the increase in value due to the person's notoriety. For example, if Charles Manson were to sell his car, he would be able to keep the fair market value of the car, but he would be required to forfeit any additional amount he received reflecting his notoriety.

In 2000, California amended its law to cover profiteers. The *Keenan* case did not present a challenge to that portion of the law. Thus, the Court did not address the constitutionality of this provision, which it found to be severable. In 2001, Texas amended its Son of Sam statute by requiring that any increased value gained from the notoriety of the crime be turned over to the state's attorney general. New York's revised law, although not aimed at crime memorabilia, is also broad enough to cover the proceeds from the sale of crime memorabilia. In 2003, three other state legislatures had crime memorabilia amendments pending but none of those measures passed.

Based on the cases, several conclusions may be drawn about notoriety for profit laws. Legislation that specifically prohibits a criminal from profiting from the retelling or reenactment of his crime through books or movies or some other form of media violates the First Amendment. Legislation that prohibits a criminal from profiting from the retelling of his crime as long as the crime is the main focus of the story and not mentioned only in mere passing is also unconstitutional. What remains unclear is whether prohibiting criminals from keeping any profits from crime, from whatever source, whether it is from selling book or movie rights or selling a car or t-shirt, is constitutional. Arguably, this type of regulation appears content-neutral; it doesn't

apply to speech-related activity on its face. Therefore, it would be subject to a lower level of scrutiny and may withstand constitutional challenge. However, the Supreme Court has cautioned that even a regulation that is neutral on its face may be content-based if its purpose is to regulate speech because of the message it conveys. Moreover, the Court has said that states have no compelling interest in shielding victims from a criminal's retelling of the crime. Therefore, if a court were to find that the purpose of this legislation is to place a disincentive on the retelling of criminal activity because of the message it conveys, then it too could be held unconstitutional even though the regulation also applies to non-speech related activity.

It is also unclear whether prohibiting third parties from profiting from the sale of crime memorabilia is constitutional. While it is doubtful that a state may constitutionally prohibit a person from manufacturing and selling crime-related items, it may be able to prevent criminals from profiting from the sale of personal tangible goods, such as hair or nail clippings.

Since the challenges to date have focused on the First Amendment issue, few if any courts have offered any guidance on the procedural safeguards that would need to be in place before a state can confiscate the profits owed to a criminal under an otherwise legally enforceable contract.

## CURRENT LAW

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North Carolina has never enacted a Son of Sam statute. In North Carolina, there are three methods by which a crime victim may recover compensation for a crime committed against him or her: (1) obtain a restitution order, (2) file a claim with the Crime Victims Compensation Commission, or (3) file a civil lawsuit and recover a money judgment.

Restitution. - 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.<sup>5</sup> 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

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<sup>5</sup> *State of North Carolina v. Wilson*, 580 S.E.2d 386, 2003 N.C.App. LEXIS 1045 (June 3, 2003).

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

Crime Victims Compensation Fund. - A crime victim may apply to the Crime Victims Compensation Commission for an award to compensate the victim for economic loss resulting from criminally injurious conduct. In order to obtain an award, the claimant must file an application within two years of the criminally injurious conduct, the economic loss must have occurred within one year of the conduct, and the conduct must have been reported to law enforcement within 72 hours of its occurrence. In using its discretion to determine whether a claim should be denied, the Commission may take into consideration whether the offender would benefit from the award, whether the victim was participating in the criminal conduct, or whether the victim was incarcerated at the time of the offense. Any award will be reduced to the extent the loss will be recouped by a collateral source. There is also a limit of \$200 per week on any award for the compensation of replacement services loss, a dependent's economic loss, and a dependent's replacement services loss. Compensation for work loss and household support loss may not exceed \$300 per week. Total compensation payable to a victim and all other claimants for loss resulting from the criminally injurious conduct may not exceed \$30,000 in the aggregate. A court may require a defendant to pay restitution regardless of whether the victim receives compensation from the Crime Victims Compensation Fund.



Civil Action. - A person may bring a civil action in tort, including a wrongful death action, to recover a money judgment for actual, and possibly, punitive damages. A money judgment is enforced by execution against the judgment debtor's property.

The enforcement of a restitution order and a money judgment will depend on the resources of the offender and may be paid from any of the defendant's assets, but not necessarily from assets related to the commission of the crime. An award from the Crime Victims Compensation Fund is paid from State and federal funds. A restitution order and an award from the Fund are limited to economic losses whereas a plaintiff in a civil action may recover damages for pain and suffering and, under certain circumstances, punitive damages.

## COMMITTEE PROCEEDINGS

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The House Select Committee on Preventing Unjust Profiteering from Crime met five times since its inception on January 21, 2004. The final meeting of the Committee prior to the convening of the 2004 Regular Session of the 2003 General Assembly took place on May 5, 2004, at which the Committee discussed and approved its final report to be submitted to the House.

### NO PROFIT FROM CRIME

The Committee spent considerable time examining the constitutional implications of a notoriety for profit law and heard from several speakers, including crime victim advocates, scholars and legal experts with expertise in First Amendment jurisprudence, and representatives from various State agencies.

At its first meeting, the Committee began its work with an overview of notoriety for profit laws and an examination of House Bill 911. Trina Griffin, counsel for the committee, gave a three-part presentation. First, she provided the members with background information on the origins of these laws, an explanation of their constitutional challenges, and a summary of their status in the 50 states.<sup>6</sup> Second, Ms. Griffin explained the current law in North Carolina regarding compensation for crime victims. She explained that there are three methods by which a crime victim may recover compensation for a crime committed against him or her: (1) obtaining a restitution order, (2) filing a claim with the Crime Victims Compensation Commission, or (3) filing a civil lawsuit and recovering a money judgment.<sup>7</sup> Third, Ms. Griffin provided the Committee with a section-by-section analysis of House Bill 911, which can be found in Appendix C. The bill incorporates language from other state statutes.

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<sup>6</sup> For more detailed information, see the BACKGROUND section of this report.

<sup>7</sup> For more detailed information, see the CURRENT LAW section of this report.

Specifically, the definition of "profits from crime" can be found in at least 11 other state statutes, and it contains the crime memorabilia and constructive trust provisions of the California statute.

Will Polk, Director of Victims and Citizens Services with the Attorney General's Office, was among the speakers who addressed the Committee. He provided the Committee with an overview of the constitutional issues the committee members should consider when drafting a notoriety for profit or Son of Sam law for North Carolina. His presentation notes are attached in Appendix D.

Mr. Polk stated that the first consideration should be to develop a law that does not run afoul of the Free Speech Clause of the First Amendment of the U.S. Constitution and the 14<sup>th</sup> Amendment and a similar provision of the North Carolina Constitution. Specifically, Mr. Polk stated that the legislation should avoid a content-based restriction on speech. Mr. Polk also cautioned the Committee with regard to vagueness, retroactivity, and statute of limitations issues.

Following a general constitutional overview, Mr. Polk gave an analysis of House Bill 911, pointing out several "red flags" and suggesting language that may improve the legislation's ability to withstand constitutional challenge. He indicated that although the compelling interest section of the bill would likely satisfy First Amendment scrutiny, the definition of "profits from crime" may be too similar to language in other statutes previously found to be unconstitutional. He suggested that a severability clause should be added to the bill so that if one part of the bill is determined to be unconstitutional, the whole bill would not be jeopardized.

The Attorney General provided the Committee with a written statement, found in Appendix E, offering his support of the concept behind this bill and of the Committee's efforts to draft this legislation.

Rodney A. Smolla, Dean and professor at the University of Richmond School of Law, who has an extensive background in the area of First Amendment law, was invited by the Committee to review House Bill 911 and offer comment. For additional information on his background, see Appendix F. Mr. Smolla began his presentation by

stating that the goals of this type of legislation, those being to compensate victims and to disgorge ill-gotten gains from criminals, are laudable. Moreover, he stated that the law should capture as much profit as possible while minimizing the risk of constitutional challenge. Mr. Smolla pointed out that this type of law would only be activated in the rare instance of a notorious crime with the potential for substantial profits. With those introductory points being said, Mr. Smolla proceeded to give the committee his bill drafting suggestions.

Content-neutrality is the most critical factor. The bill should be drafted in entirely neutral terms. He suggested that it not mention books, movies, or any other similar media outlet. In order to withstand constitutional challenge, the definition of "profit from crime" should include all types of profits derived from crime, not just those that are derived from expressive activity. By having a content-neutral statute, the legislation should not be subject to strict scrutiny analysis, but rather the less stringent rational basis analysis, and would be removed from the purview of the *Simon & Schuster* and *Keenan* cases.

The bill should also distinguish between offenders and third parties. Mr. Smolla's recommendation was that the bill should apply to offenders with regard to all profits from crime, but that third parties, if included in the bill, should only be restricted from keeping profits from the sale of crime memorabilia. Expanding the bill's application to third parties beyond the sale of tangible items related to the crime or belonging to the offender would likely run afoul of the First Amendment. Mr. Smolla also encouraged the committee to delete the media exception entirely.

In response to questions from the members, Mr. Smolla also indicated that some sort of hearing mechanism prior to confiscating the assets would strengthen the bill, but that making a portion of the profits available for the offender's legal defense is not necessary. With regard to retroactivity, Mr. Smolla stated that if profit from crime is never the legitimate property of an offender to begin with, then making the bill retroactive should not be a problem. However, he stated that the bill should be

prospective with regard to third parties and that the bill should definitely include a severability clause.

The Committee also heard from Mark Prak, an attorney who chairs the Constitutional Rights section of the North Carolina Bar Association. Mr. Prak commented that the focus should be narrow and that the way is currently written is too broad. He suggested that crime victims need the benefit of a program similar to the guardian ad litem program for children to help educate crime victims and assist them in navigating the legal system to recover from the offenders who have harmed them. He added that organizations like the Academy of Trial Lawyers and the Bar Association might be willing to assist in that regard.

Jim Drennan, a faculty member with the Institute of Government, addressed the statutory clarity of the language in the bill and stated that this is a complex drafting issue with no easy answers. His written analysis can be found in Appendix G.

Since this issue has the potential to impact offenders that are incarcerated, the Committee sought input from the Department of Corrections. Tracy Little, Deputy Secretary with the Department of Corrections, informed the members that the Department has a policy, found in Appendix H, prohibiting inmates from conducting personal business while in the Department's custody.

The Committee heard from a number of crime victim advocates and members of the Crime Victims Compensation Commission. Mel Chilton, Executive Director of the North Carolina Victims Assistance Network (NCVAN), expressed NCVAN's strong support for House Bill 911, and outlined its three main benefits as follows:

- It provides financial assistance to innocent victims of violent crime.
- It provides cost savings to the State by having the proceeds from crime transferred to the Victims Compensation Fund.
- It protects victims from secondary victimization and discourages the sensationalizing of victims' tragedies.

NCVAN's letter in support of House Bill 911 is attached in Appendix I.

Dick Adams, Chairman of the North Carolina Crime Victims Compensation Commission, and Janice Carmichael, Executive Director of the North Carolina Crime Victims Compensation Commission, also addressed the Committee. Ms. Carmichael informed the Committee that the Commission currently has approximately 1,500 claims pending that cannot be paid due to lack of funding. A copy of the Commission's most recent report is included in this report at Appendix J.

After hearing presentations by committee counsel and testimony by several constitutional legal experts, it was clear to the Committee that the key to drafting a constitutionally sound notoriety for profit law is its content-neutrality. The United States Supreme Court has made it clear that a law placing a financial disincentive on the reenactment or retelling of a crime violates the First Amendment. In response, several states have revised their laws targeting all profit from crime, such as the profit derived from the sale of tangible artifacts belonging to a criminal, rather than profit derived exclusively from expressive activity. However, since none of these revised statutes have been challenged on constitutional grounds, it is unclear whether the definition of "profit from crime" is sufficiently content-neutral to withstand constitutional scrutiny. Notably, Mr. Smolla observed that a court hearing any of these cases could have held that a state may never seize or place a financial disincentive on profit from crime, but in fact the courts have acknowledged that preventing criminals from profiting from their crimes and compensating victims from those who have harmed them are indeed compelling interests. Moreover, the courts have suggested that, if narrowly tailored, a Son of Sam law may be valid.

Mr. Smolla contended that the "profit from crime" definition in House Bill 911, and found in 11 other state laws, was content-neutral because it is defined broadly to cover any and all income generated from the commission of a crime, regardless of whether that income is derived from expressive activity and would include non-expressive activity such as the sale of crime memorabilia. However, the Committee is keenly aware that a court could find this legislation unconstitutional as applied in a given factual situation. Given this uncertainty, the Committee revisited at its April 14

meeting another state's approach that it had briefly considered earlier in its deliberations.

New York's revised Son of Sam law targets both profit from crime as well as "funds of a convicted person." Funds of a convicted person includes all income, with the exception of earned income and child support income, and not just funds generated from the commission of the crime. There is a strong argument that including all funds of an offender may solve the First Amendment issue. However, it is unclear whether this approach raises alternative constitutional infirmities, such as due process or takings issues. Notably, the revised legislation has been challenged several times, but has not been overturned. In light of this alternative approach which the Committee did not have the opportunity to fully explore due to time constraints, the Committee decided to include Legislative Proposal #2, *Crime Victims Financial Recovery Assistance Act*, in its report as a possible alternative to Legislative Proposal #1.

Because the leading Son of Sam cases have been decided on First Amendment grounds, case law provides little guidance on what constitutes a constitutionally sound procedure by which profit from crime may be seized and paid to victims. The Committee examined the laws of numerous states and found that all states with Son of Sam laws typically have adopted one of three procedures:

- Contracting parties are required to submit contracts for profit from crime to the state and pay over to the state any monies owed under the contract, which is held in escrow for the victims. Victims are then authorized to bring a civil action to recover the escrowed funds. Only one state has been identified that requires some sort of due process hearing prior to the funds being turned over to the state.
- Contracting parties are required to submit contracts for profit from crime to the state and profit from crime is placed in a constructive or involuntary trust for the benefit of victims. Victims are then authorized victims to bring a civil action to claim the profits.
- Contracting parties are required to submit contracts for profit from crime to the state and the state crime victims board is required to provide notice of profit from crime to victims. The statute of limitations for bringing a civil action is revived and begins to run once profits are discovered. This method is usually accompanied by authority for the state crime victims board to

secure assets, through injunction or attachment, etc., for the benefit of victims prior to the victim being notified or filing suit.

Given its limited time frame, the Committee did not have adequate time to fully evaluate all of these procedural options. However, the Committee has included these options as possible alternatives in its report.

### RESTITUTION

Although the impetus for this Committee's work was House Bill 911, which deals exclusively with redirecting "profit from crime" to crime victims, a recurring topic of discussion among the Committee was how to improve the current methods by which crime victims are compensated for injuries they sustained as the result of the crimes committed against them. Specifically, crime victim advocates expressed concern over the extent to which restitution orders go unpaid and the inability of the Crime Victims Compensation Fund to pay pending claims due to lack of funding.

The North Carolina Courts Commission studied the issue of restitution for a number of years, and in 1998, the General Assembly adopted several of its recommendations, including:

- Provisions for the enforcement of restitution orders as civil judgments so that a victim can continue to collect beyond the period of probation.
- A requirement that of the monies paid to the court by a defendant, restitution to the victim be disbursed first before other costs, fines, and attorneys fees.
- In order to streamline execution of these judgments, an exception to the statutory exemptions for execution of restitution orders.

Despite these improvements, the Committee heard from victim advocates who indicated that restitution orders are rarely ever paid. The Committee also heard testimony, however, that the main obstacle to getting a restitution order paid is the defendant's inability to pay.

In order to gain a better understanding of the restitution process, the Committee invited the Honorable Henry W. "Chip" Hight, Jr., resident superior court judge for the Ninth District (Franklin, Granville, Vance, and Warren Counties) to explain how the process operates in criminal district and superior court. Judge Hight stated that in



criminal cases where the victim has suffered some sort of injury or loss, the district attorney typically interviews the victim(s) and completes a Restitution Worksheet, an example of which is attached in Appendix K, which is then provided to the judge during sentencing. Based on certain statutory guidelines, the judge makes a determination about restitution and the order is entered at the time judgment is made. He added that restitution may or may not be part of a defendant's probation.

The Administrative Office of the Courts provided the Committee with statistical data, found in Appendix L, on amounts of restitution ordered by judicial district and amounts collected. Based on these statistics, only 24% of restitution ordered in all criminal cases in North Carolina was paid.

The Committee contrasted the AOC data with information it heard from Jan Pueschel, Wake County Clerk of Superior Court, who indicated that her office collects approximately 60% of restitution ordered, but disburses less than half of what is collected because the victims never claim the money. The greatest challenge her office faces is locating the victims. She cited that many victims fail to file the necessary contact information with the court initially or fail to keep their contact information updated.

The fact that a significant amount of restitution funds remain unclaimed and ultimately escheat to the State prompted Committee questions about redirecting those escheated funds to the Crime Victims Compensation Fund. However, committee counsel informed the members that there are constitutional limitations on the Escheat Fund that would likely preclude legislation redirecting those funds.

In commenting on restitution generally, Ms. Pueschel identified a "loophole" that she believes could be corrected. She pointed out that first-time misdemeanants petitioning for expunction are not required to show that they have paid any outstanding restitution orders that have been entered against them.

The Committee also heard from Tracy Little, Deputy Secretary with the Department of Corrections, who addressed the Department's program on restitution and work release. Her remarks are attached in Appendix M. The work-release

program has been in place since 1957. Ms. Little stated there are 34,000 prisoners and 1,100 of those participating in the program. They work in the private sector for at least minimum wage.

One of the 1998 recommendations of the North Carolina Courts Commission was a requirement that of the monies paid to the court by a defendant, restitution to the victim be disbursed first before other costs, fines, and attorney fees.<sup>8</sup> However, among the list of priorities for disbursement of work release earnings of inmates, restitution is fifth after costs for housing the inmate, transportation costs to and from the work site, allowance for incidentals, and child support obligations.<sup>9</sup> Mel Chilton, Executive Director of the North Carolina Victims Assistance Network, informed the Committee that South Carolina had recently enacted legislation modifying the disbursement priorities of work release earnings so that more funds were being directed toward restitution. A copy of this legislation is attached in Appendix N. Under this legislation, 20% of an inmate's work release earnings are deducted for payment of any restitution orders; if there is no restitution order, then that amount is transferred to the state victim compensation fund. Ms. Chilton encouraged the Committee to consider enacting similar legislation in North Carolina, and indicated that David Jordan, Director of Research for the South Carolina Legislative Corrections and Peneology Committee, would be a valuable resource should the Committee decide to pursue this issue. Given the late date at which the Committee received this information, it did not have time to fully explore this issue and did not recommend any changes to the work release earning disbursement statute at this time.

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<sup>8</sup> G.S. 7A-304.

<sup>9</sup> G.S. 148-33.1.

## COMMITTEE FINDINGS AND RECOMMENDATIONS

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The House Select Committee on Preventing Unjust Profiteering makes the following findings and recommendations:

### NO PROFIT FROM CRIME

**FINDINGS:** The Committee finds the following:

1. Current North Carolina law recognizes, in its slayer statute for example, the age-old legal principle that a person should not be permitted to benefit or profit from his own wrongdoing.
2. Profit from crime does not lawfully belong to the person who perpetrated the crime because the profit was acquired as the result of the commission of illegal acts.
3. Victims have a special relationship to any profit from crime committed against them, including the personal belongings and memorabilia of a convicted felon whose criminal actions and resulting notoriety enhance the value of those belongings and memorabilia.
4. The State has a compelling interest in preventing criminals from profiting from their crimes.
5. The State has a compelling interest in compensating crime victims by those who have harmed them.
6. While mechanisms, such as restitution orders and civil actions, exist for victims to recover compensation from their offenders, victims are often unaware when an offender acquires assets and have inadequate resources to maneuver the legal system.
7. A victim who has a restitution order or civil judgment against an offender should be able to enforce the order or judgment against an offender's assets, including profit from crime.

**RECOMMENDATION:** Therefore, the Committee recommends Legislative Proposal #1, *No Profit from Crime Act*, which would provide a mechanism to secure assets accruing to convicted felons as the result of the crime for which they were convicted for the benefit of the crime victims.

## CRIME VICTIMS FINANCIAL RECOVERY ASSISTANCE ACT

**FINDINGS:** The Committee finds the following:

1. While there is a constitutionally sound argument to be made that "profit from crime" as defined in Legislative Proposal #1 is sufficiently content-neutral, uncertainty remains regarding its ability to withstand First Amendment challenge.
2. New York, which has had extensive experience with its Son of Sam statute and whose original statute was at the center of the leading case on this issue, has adopted an alternative approach that is much broader in scope than Legislative Proposal #1.
3. New York's law includes both profit from crime and funds of a convicted person in its Son of Sam law. The inclusion of funds that are completely unrelated to the commission of crime tends to negate any argument that the statute is content-based, since the source of the funds is entirely irrelevant, unlike the other notoriety for profit laws that still tie profits to the crime.
4. While its breadth of New York's statute may resolve the First Amendment problem, it may raise other problems, such as due process or takings issues. However, the statute has been challenged several times and has yet to be overturned.
5. The New York approach has merits worthy of additional consideration.

**RECOMMENDATION:** Therefore, the Committee recommends Legislative Proposal #2, *Crime Victims Financial Recovery Assistance Act*, as an alternative to Legislative Proposal #1. This proposal would notify victims of the existence of assets and would provide a mechanism for securing those assets to better enable a victim to enforce a restitution order or civil judgment against an offender. The proposal also revives the statute of limitations in certain civil actions where there are newly discovered profits from crime or funds belonging to an offender.

## RESTITUTION

**FINDINGS:** The Committee finds the following:

1. Restitution was studied in depth as recently as 1998 by the North Carolina Courts Commission, which recommended several improvements to the restitution statutes that have been enacted by the General Assembly.
2. Although it had insufficient time to fully develop legislative solutions, the Committee found that restitution orders are rarely ever paid due largely to three factors: the defendant's inability to pay, the clerk's inability to locate victims, and a victim's inability to locate or identify when a defendant has assets and difficulty navigating the legal system to enforce those orders.

3. A loophole exists in the expunction statute permitting a person to expunge his record without requiring that the person pay outstanding restitution orders.

**RECOMMENDATION:** Therefore, the Committee recommends Legislative Proposal #3, *Require Payment of Restitution for Expunction*, which would require a person to pay any outstanding restitution orders in order to obtain an expunction of his record.

# **LEGISLATIVE PROPOSAL #1**

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**NO PROFIT FROM CRIME ACT**

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# LEGISLATIVE PROPOSAL #1:

A RECOMMENDATION OF THE HOUSE SELECT COMMITTEE ON  
PREVENTING UNJUST PROFITEERING FROM CRIME  
TO THE 2004 GENERAL ASSEMBLY, 2003 SESSION

**AN ACT TO PREVENT CRIMINALS FROM PROFITING FROM  
THEIR CRIMES AND TO AUTHORIZE CRIME VICTIMS TO  
RECOVER PROFITS GENERATED AS THE RESULT OF THE CRIMES  
COMMITTED AGAINST THEM.**

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*SHORT TITLE:* No Profit from Crime Act.

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*SPONSORS:*

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*BRIEF OVERVIEW:* This legislative proposal provides a mechanism to secure assets accruing to convicted felons as the result of the crime for which they were convicted for the benefit of the crime victims.

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*FISCAL IMPACT:* No estimate available.

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*EFFECTIVE DATE:* This proposal would become effective when it becomes law and apply to contracts for profit from crime entered into on or after that date.

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A copy of the proposed legislation and a bill analysis begin on the next page.

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003**

H

D

**BILL DRAFT 2003-SVz-8 [v.10] (4/1)**

**(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
4/29/2004 11:20:47 PM**

Short Title: No Profit from Crime Act. (Public)

Sponsors: Representatives Eddins, Holliman (Primary Sponsors); and Unknown.

Referred to:

A BILL TO BE ENTITLED  
AN ACT TO PREVENT CRIMINALS FROM PROFITING FROM THEIR  
CRIMES AND TO AUTHORIZE CRIME VICTIMS TO RECOVER PROFITS  
GENERATED AS THE RESULT OF THE CRIMES COMMITTED AGAINST  
THEM.

The General Assembly of North Carolina enacts:

**SECTION 1.** Sections 1 through 25 of Chapter 15B are redesignated as Article 1 of Chapter 15B. The Revisor of Statutes is authorized to make changes in the newly designated Article 1 that will reflect the results of the recodification.

**SECTION 2.** Chapter 15B of the General Statutes is amended by adding a new Article to read:

"Article 2.

"The No Profit from Crime Act.

"§ 15B-30. Declaration of policy and purpose.

The General Assembly of North Carolina hereby declares as a matter of public policy that:

- (1) No person who commits a crime should thereafter gain monetary profit as the result of committing the crime.
- (2) Victims of crime have a special relationship to any profit from the crime committed against them, including the personal belongings and memorabilia of a convicted felon whose criminal actions and resulting notoriety enhance the value of those belongings and memorabilia.
- (3) To the extent profit from crime would not have been realized but for an offender's commission of illegal acts, an offender does not have



an equitable interest in the profit and allowing the offender to retain the profit would result in the offender's unjust enrichment.

The General Assembly finds that the State has a compelling interest in ensuring that persons convicted of crimes do not profit from those crimes, and that victims of crime are compensated by those who have harmed them.

In order to carry out this public policy and to satisfy these compelling interests, the General Assembly has enacted of the provisions of this Article declaring that profit from crime does not lawfully belong to the offender, is subject to seizure by the State, and is to be held in trust for the benefit of the victims.

### **§15B-31. Definitions.**

The following definitions apply in this Article:

- (1) Civil Action. – A civil action filed by an eligible person against an offender seeking damages for physical or emotional injury proximately caused by the offender as a result of the felony for which the offender was convicted.
- (2) Commission. – The Crime Victims Compensation Commission established under G.S. 15B-3.
- (3) Contracting party. – Any person, firm, corporation, partnership, association, or other legal entity that contracts for, pays, or agrees to pay an offender consideration that it knows or reasonably should know may constitute profit from crime.
- (4) Convicted. – A finding or verdict of guilty by a jury or by entry of a plea of guilty or no contest or a finding of not guilty by reason of insanity.
- (5) Crime memorabilia. – Any tangible property belonging to or that belonged to an offender prior to conviction, the value of which is increased by the notoriety gained from the conviction of a felony.
- (6) Eligible person. –
  - a. A victim of the crime for which the offender was convicted.
  - b. A surviving spouse, parent, or child of a deceased victim of the crime; or
  - c. Any other person dependent for the person's principal support upon a deceased victim of the crime.

However, 'eligible person' does not include the offender or an accomplice to the offender.
- (7) Felony. – An offense defined as a felony by any North Carolina or United States statute that was committed in North Carolina and that resulted in physical or emotional injury, or death, to another person.
- (8) Offender. – A person who has been convicted of a felony or that person's legal representative or assignee.
- (9) Profit from crime. – Any income, assets, or property generated from the commission of a crime for which the offender was convicted, including any income, assets, or property generated from the sale of

crime memorabilia or obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of the crime, as well as any gain from the sale, conversion, or exchange of the income, assets, or property. 'Profit from crime' does not include voluntary donations or contributions to an offender used to assist in the appeal of a conviction, provided the donation or contribution is not given in exchange for some material of value.

- (10) Victim. – Any natural person who suffers physical or emotional harm, or the threat of physical or emotional harm as the result of the commission of a felony.

**§ 15B-32. Notice of contract.**

(a) Notice to Commission. – An offender who contracts for profit from crime and any contracting party shall, within 30 days of the agreement, submit to the Commission a copy of the contract or reduce to writing the terms of any oral agreement or obligation to pay.

(b) Penalties. – Any person who willfully fails to comply with subsection (a) of this section is subject to a civil penalty of not less than ten thousand dollars (\$10,000) for each offense and not more than an amount equal to three times the contract amount.

If two or more persons are subject to the penalties provided in this section, the persons shall be jointly and severally liable for the payment of the penalty imposed.

After providing notice and opportunity to be heard, the Commission may by order assess the penalties prescribed by this subsection. If the penalties are not paid within 30 days from the date of the order, any penalty assessed under this section shall bear interest at the rate of one percent (1%) per month, compounded monthly. An action to recover a civil penalty assessed under this section may be brought by the Commission within three years after the cause of action accrues.

The clear proceeds of penalties assessed under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

**§15B-33. Determination of profits from crime; action to escrow profits from crime; due process hearing; establishment and notice of escrow account; duration of escrow account.**

(a) Determination by Commission. – Within 30 days from the receipt of the agreement or notice of payment, the Commission shall determine the following:

- (1) Whether the terms of the agreement include profit from crime.
- (2) Whether there are eligible persons, and if so, the identity of those eligible persons.

(b) Notice to Interested Parties. – If the Commission determines that the terms of the agreement include profit from crime and that there are eligible persons, the Commission shall notify immediately in writing by certified mail, return receipt requested, the contracting party, the offender, and all known eligible persons of its determination.

(c) Action to Escrow Profit from Crime. – The Commission may bring an action in a court of competent jurisdiction to require that any money or consideration representing profit from crime, which would otherwise be owing to the offender, be deposited into an interest-bearing escrow account for the benefit of all eligible persons. Upon filing of the action, the Commission shall provide notice of the action to all interested parties, including the contracting party, the offender, and all known eligible persons.

(d) Venue. – The proper venue for an action brought under subsection (c) of this section is the county in which the contracting party resides, the county in which the offender resides, or the county in which the profit from crime is located.

(e) Establishment of Escrow Account. – Upon notice and hearing, the court shall order all profit from crime to be deposited into an interest-bearing escrow account for the benefit of the eligible persons, naming the Commission as trustee, and identifying all eligible persons who may file a claim for distribution under this Article if the Commission proves both of the following:

- (1) The contract or agreement includes profit from crime.
- (2) It is more probable than not that there are eligible persons.

In the event that profit from crime has been commingled with other assets, income, or property that do not constitute profit from crime, the court shall use equitable tracing principles to determine the income, assets, or property that constitutes profit from crime. The court shall order only profit from crime to be placed in an escrow account.

(f) Right to Judicial Review. – Any interested party who is aggrieved by the court's order is entitled to judicial review.

(g) Notice of Establishment of Escrow Account. – Once an escrow account is established, the Commission shall make reasonable efforts to notify all eligible persons of the escrow account and their rights under this Article. The notice shall specify the existence of the escrow account, the amount on deposit, and the eligible person's right to make a claim for distribution against the monies in the escrow account within three years of the date the escrow account is established in accordance with G.S. 15B-33. The cost of notification shall be paid from the escrow account.

(h) Interest. – Interest earned on the monies deposited in an escrow account accrue to the benefit of the payees of the account.

(i) Duration of Escrow Account. – An escrow account established under this section shall continue until all timely filed claims for distribution have been disbursed to eligible persons. Upon the expiration of the escrow account, the Commission shall deposit any funds remaining in the escrow account in the Crime Victims Compensation Fund.

#### **§ 15B-34. Distribution of profits from crime; proration of claims.**

(a) Claim for Distribution. – An eligible person may, within three years from the establishment of the escrow account, seek a distribution from the escrow account by filing a claim with the Commission. The claimant must present the following:

- (1) An unpaid order for restitution entered against the offender as the result of the felony for which the offender was convicted;
- (2) An unpaid money judgment entered against the offender by a court of competent jurisdiction for physical or emotional injury proximately caused by the offender as a result of the felony for which the offender was convicted; or
- (3) In the event a civil action is pending, a copy of the complaint.

(b) Payment of Claim. – Subject to the limitations of this section, the Commission shall satisfy one hundred percent of an eligible person's claim from the escrow account, less any amount awarded to the eligible person from the Crime Victims Compensation Fund, but in no event shall the amount paid out from the escrow account exceed the amount in escrow. No compensation may be disbursed until all pending claims have been settled or reduced to judgment.

(c) Multiple Claimants. –

- (1) Payment of claims. – If there are two or more eligible persons who may file a claim for distribution, then no compensation may be disbursed until all eligible persons have filed a claim for distribution and all civil actions have been reduced to judgment, or until the expiration of three years from the date the escrow account was established and no civil action is pending, whichever occurs first.
- (2) Proration of claims. – If there are two or more eligible persons who have filed a claim for distribution and the proceeds in the escrow account are insufficient to satisfy all orders for restitution and judgments, the proceeds shall be distributed on a pro rata basis based on the ratio that the amount of an order for restitution or a money judgment bears to the total amount of all restitution orders and eligible persons' judgments against the offender that have been claimed under this section.

#### **§ 15B-35. Subrogation by the Crime Victims Compensation Fund.**

A claim for distribution brought under G.S. 15B-34 is subject to subrogation by the Crime Victims Compensation Fund.

#### **§ 15B-36. Responsibilities of the Commission.**

(a) Authority to Establish Policies for Administering Program. – The Commission shall establish general policies and guidelines for administering the escrow accounts and for payment of claims for distribution.

(b) Notice of Claim to Eligible Persons. – Upon the filing of a claim for distribution, the Commission shall:

- (1) Notify all other known eligible persons of the filing of the claim for distribution by certified mail, return receipt requested, where the eligible persons' names and addresses are known to the Commission.
- (2) Publish, at least once a year for three years from the date of the establishment of the escrow account, a legal notice in newspapers of

general circulation in the county in which the crime was committed and in counties contiguous to that county advising any eligible person of the existence of profit from crime. The Commission may, in its discretion, provide for additional notice as it deems necessary.

**§15B-37. Conviction overturned or pardon issued.**

If the conviction for the criminal offense from which profit from crime is realized is reversed, vacated, or set aside, or if the offender has been granted an unconditional pardon of innocence for the criminal offense, the escrow account established pursuant to G.S. 15B-33(e) shall be extinguished, and any monies shall be returned to the rightful owner.

**§ 15B-38. Evasive action void.**

Any action taken by an offender, whether by way of execution of a power of attorney, creation of corporate entities, or otherwise, to defeat the purpose of this Article shall be void as against the public policy of this State.

**SECTION 2.** The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

**SECTION 3.** This act is effective when it becomes law and applies to contracts for profit from crime entered into on or after that date.

# BILL ANALYSIS OF LEGISLATIVE PROPOSAL #1: NO PROFIT FROM CRIME ACT

BY: TRINA GRIFFIN, RESEARCH DIVISION

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**SUMMARY:** *This legislative proposal provides a mechanism to secure assets accruing to convicted felons as the result of the crime for which they were convicted for the benefit of the crime victims.*

**BILL ANALYSIS:** The purpose of Legislative Proposal #1 is to prevent convicted criminals from profiting from their crimes by redirecting those profits to the crime victims.

*Declaration of Policy and Purpose.* – The bill declares as a matter of public policy that no person who commits a crime should thereafter gain monetary profit as the result of committing the crime. Furthermore, the bill declares that convicted felons do not possess equitable title to profit from their crimes and that as such the property is subject to seizure by the State for the benefit of the victims. This section also sets out the twin compelling State interests, as recognized by the United States Supreme Court, supporting the bill.

*Profit from Crime.* – "Profit from crime" is defined as any income, assets, or property generated from the commission of a crime for which the offender was convicted, including any income generated from the sale of crime memorabilia or obtained through unique knowledge obtained during the commission of the crime. Crime memorabilia is defined as tangible property belonging to or that belonged to an offender prior to conviction, the value of which is increased by the offender's notoriety.

*Notice Provisions.* – The bill requires both the contracting party and the offender to submit to the Crime Victims Compensation Commission within 30 days a copy of any contract that includes profit from crime. Willful failure to comply will result in a civil penalty of not less than \$10,000 and not more than three times the contract amount.

*Determination by Commission.* – Within 30 days from receipt of the contract, the Commission must determine whether the contract includes profit from crime and whether there are eligible persons, and if so, the identity of those eligible persons. If the Commission determines that the contract does include profit from crime and that there are eligible persons, the Commission must then notify all interested parties of its determination.

*Action to Escrow Profit from Crime.* – The Commission may bring an action to require any money or consideration representing profit from crime be deposited into an interest-bearing escrow account for the benefit of all eligible persons.

*Establishment of Escrow Account.* – If at hearing the Commission proves that the contract includes profit from crime and that it is more probable than not that there are eligible persons, the court shall order that all profit from crime be deposited into an escrow account and shall identify all eligible persons who may file a claim for distribution.

*Claims for Distribution.* –An eligible person may, within three years from the establishment of the escrow account, seek a distribution from the account by filing a claim with the Commission. The claimant must present one of the following: (1) an unpaid restitution order, (2) an unpaid money judgment, or (3) in the event a civil action is pending, a copy of the complaint.

*Eligible Persons.* – A person who suffers physical or emotional harm, or the threat of physical or emotional harm as the result of the commission of a felony for which the offender is convicted, or if the person is deceased as the result of the crime, the victim's spouse, parent, child, or any other person dependent for the person's principal support upon the deceased victim.

*Payment of Claim.* – The Commission will pay 100% of the person's claim, less any amount awarded to the eligible person from the Crime Victims Compensation Fund. No compensation may be disbursed until all pending claims have been settled or reduced to judgment. If there are two or more eligible persons who have filed a claim and the funds in the escrow account are insufficient, the proceeds shall be distributed on a pro rata basis based on the ratio representing the amount the person's restitution order or civil judgment bears to the total amount of restitution orders and eligible persons' judgments against the offender.

**TECHNICAL CONSIDERATIONS:** Since the focus of the Committee's discussion was centered primarily on the concept of "seizing" profit from crime and the First Amendment implications, it did not have ample time to full flesh out the all of the procedural details associated with redirecting those profits to the victims. Therefore, the procedural elements of this proposal may need additional fine-tuning. The bill authorizes the Commission to "bring an action" seeking to have a court order that profit from crime be placed in an escrow account. The nature of this action and any ancillary procedural requirements that are typically associated with a civil action are somewhat unclear. The intent of this action is to protect the due process rights of an offender prior to seizing his property. The Committee recognizes that this proposal may need to be modified if the bill is considered during the 2004 Session, and that input from the Attorney General's Office, the Bar Association or Academy of Trial Lawyers, the Administrative Office of the Courts, or any other relevant agency or organization could improve the bill.

# **LEGISLATIVE PROPOSAL #2**

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## **CRIME VICTIMS FINANCIAL RECOVERY ASSISTANCE ACT**

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## LEGISLATIVE PROPOSAL #2:

A RECOMMENDATION OF THE HOUSE SELECT COMMITTEE ON  
PREVENTING UNJUST PROFITEERING FROM CRIME  
TO THE 2004 GENERAL ASSEMBLY, 2003 SESSION

**AN ACT TO PREVENT CRIMINALS FROM PROFITING FROM  
THEIR CRIMES AND TO BETTER ENABLE CRIME VICTIMS TO  
SATISFY RESTITUTION ORDERS AND CIVIL JUDGMENTS  
ENTERED AGAINST THEIR OFFENDERS FROM THE OFFENDERS'  
ASSETS, WHICH MAY INCLUDE PROFIT FROM CRIME.**

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**SHORT TITLE:** Crime Victims Financial Recovery Assistance Act.

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**SPONSORS:**

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**BRIEF OVERVIEW:** This bill would prevent criminals from profiting from their crimes and would better enable crime victims to satisfy restitution orders and civil judgments entered against their offenders from the offender's assets, which may include profit from crime.

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**FISCAL IMPACT:** No estimate available.

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**EFFECTIVE DATE:** This act would be effective when it becomes law, and apply to contracts for profit from crime entered into on or after that date or funds of an offender that have accrued on or after that date.

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A copy of the proposed legislation and a bill analysis begin on the next page

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

H

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BILL DRAFT 2003-SVz-8A [v.4] (4/1)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
5/6/2004 3:18:08 PM

Short Title: Crime Victim Financial Recovery Assist. Act. (Public)

Sponsors: Representatives Eddins, Holliman (Primary Sponsors); and Unknown.

Referred to:

1 A BILL TO BE ENTITLED  
2 AN ACT TO PREVENT CRIMINALS FROM PROFITING FROM THEIR  
3 CRIMES AND TO BETTER ENABLE CRIME VICTIMS TO SATISFY  
4 RESTITUTION ORDERS AND CIVIL JUDGMENTS ENTERED AGAINST  
5 THEIR OFFENDERS FROM THE OFFENDERS' ASSETS, WHICH MAY  
6 INCLUDE PROFIT FROM CRIME.

7 The General Assembly of North Carolina enacts:

8 SECTION 1. Sections 1 through 25 of Chapter 15B are redesignated as  
9 Article 1 of Chapter 15B. The Revisor of Statutes is authorized to make changes in  
10 the newly designated Article 1 that will reflect the results of the recodification.

11 SECTION 2. Chapter 15B of the General Statutes is amended by adding a  
12 new Article to read:

13 "Article 2.

14 "The Crime Victim Financial Recovery Assistance Act.

15 "§ 15B-30. Declaration of policy and purpose.

16 The General Assembly of North Carolina hereby declares as a matter of public  
17 policy that:

18 (1) No person who commits a crime should thereafter gain monetary  
19 profit as the result of committing the crime.

20 (2) Victims of crime have a special relationship to any profit from the  
21 crime committed against them, including the personal belongings  
22 and memorabilia of a convicted felon whose criminal actions and  
23 resulting notoriety enhance the value of those belongings and  
24 memorabilia.

1           (3) To the extent profit from crime would not have been realized but for  
2           an offender's commission of illegal acts, an offender does not have  
3           an equitable interest in the profit and allowing the offender to retain  
4           the profit would result in the offender's unjust enrichment.

5           The General Assembly finds that the State has a compelling interest in ensuring  
6           that persons convicted of crimes do not profit from those crimes, and that victims of  
7           crime are compensated by those who have harmed them.

8           The General Assembly further finds that crime victims have difficulty satisfying  
9           restitution orders or civil judgments entered against their offenders because the  
10           victims often lack the expertise and resources to identify or locate assets that an  
11           offender may have.

12           In order to carry out this public policy and to satisfy these compelling interests,  
13           the General Assembly has enacted of the provisions of this Article providing a  
14           mechanism by which crime victims are notified of the existence of an offender's  
15           assets and are authorized to bring an action to recover those assets.

16           **§15B-31. Definitions.**

17           The following definitions apply in this Article:

18           (1) Commission. – The Crime Victims Compensation Commission  
19           established under G.S. 15B-3.

20           (2) Convicted. – A finding or verdict of guilty by a jury or by entry of a  
21           plea of guilty or no contest or a finding of not guilty by reason of  
22           insanity.

23           (3) Crime memorabilia. – Any tangible property belonging to or that  
24           belonged to an offender prior to conviction, the value of which is  
25           increased by the notoriety gained from the conviction of a felony.

26           (4) Earned income. – Income derived from one's own labor or through  
27           active participation in a business, as distinguished from income, for  
28           example, from dividends or investments.

29           (5) Eligible person. –  
30           a. A victim of the crime for which the offender was convicted.  
31           b. A surviving spouse, parent, or child of a deceased victim of  
32           the crime; or  
33           c. Any other person dependent for the person's principal  
34           support upon a deceased victim of the crime.

35           However, 'eligible person' does not include the offender or an  
36           accomplice to the offender.

37           (6) Felony. – An offense defined as a felony by any North Carolina or  
38           United States statute that was committed in North Carolina and that  
39           resulted in physical or emotional injury, or death, to another person.

- 1                   (7) Funds of an offender. – All funds and property received from any  
2 source by an offender, excluding child support and earned income,  
3 where the offender:  
4                   a. Is an inmate serving a sentence with the Department of  
5 Corrections or a prisoner confined at a local correctional  
6 facility or federal correctional institute, and includes funds  
7 that a superintendent, sheriff, or municipal official receives  
8 on behalf of an inmate or prisoner and deposits in an inmate  
9 account to the credit of the inmate or deposits in a prisoner  
10 account the credit of the prisoner; or  
11                   b. Is not an inmate or prisoner but who is serving a sentence of  
12 probation, conditional discharge, or post-release supervision.  
13                   (8) Offender. – A person who has been convicted of a felony or that  
14 person's legal representative or assignee.  
15                   (9) Profit from crime. – Any income, assets, or property obtained  
16 through or generated from the commission of a crime for which the  
17 offender was convicted, including any income, assets, or property  
18 generated from the sale of crime memorabilia or obtained through  
19 the use of unique knowledge obtained during the commission of, or  
20 in preparation for the commission of the crime, as well as any gain  
21 from the sale, conversion, or exchange of the income, assets, or  
22 property. 'Profit from crime' does not include voluntary donations or  
23 contributions to an offender used to assist in the appeal of a  
24 conviction, provided the donation or contribution is not given in  
25 exchange for some material of value.  
26                   (10) Victim. – Any natural person who suffers physical or emotional  
27 injury, or the threat of physical or emotional injury, as the result of  
28 the commission of a felony.

29 **§ 15B-32. Notice of contract or agreement to pay.**

- 30                   (a) Notice to Commission. –  
31                   (1) Every person, firm, corporation, partnership, association, or other  
32 legal entity, or representative of a person, firm, corporation,  
33 partnership, association, or entity, that knowingly contracts for,  
34 pays, or agrees to pay to an offender (i) profit from crime or (ii)  
35 funds of an offender where the value or aggregate value of the  
36 payment or payments exceeds ten thousand dollars (\$10,000), shall  
37 submit to the Commission a copy of the contract or reduce to  
38 writing the terms of any oral agreement or obligation to pay as soon  
39 as practicable after discovering the payment or intended payment  
40 constitutes profit from crime or funds of an offender.

1           (2) Whenever the payment of obligation to pay involves funds of an  
2 offender that a superintendent, sheriff, or municipal officer receives  
3 or will receive on behalf of an inmate serving a sentence with the  
4 Department of Correction or a prisoner confined at a local  
5 correctional facility and deposits or will deposit in an inmate  
6 account the credit of an inmate or prisoner and the value of such  
7 funds exceeds or will exceed ten thousand dollars (\$10,000), the  
8 State or subdivision of the State shall also give written notice to the  
9 Commission.

10          (3) Whenever the State or a subdivision of the State makes a payment  
11 or has an obligation to pay funds of an offender and the value or  
12 aggregate value of such funds exceeds or will exceed ten thousand  
13 dollars (\$10,000), the State or subdivision of the State shall also  
14 give written notice to the Commission.

15          (4) In all other instances where the payment or obligation to pay  
16 involves funds of an offender and the value or aggregate value of  
17 the funds exceeds or will exceed ten thousand dollars (\$10,000), the  
18 offender who receives or will receive the funds shall give written  
19 notice to the Commission.

20          (b) Notice to Eligible Persons. – The Commission shall, upon receipt of a  
21 notice of a contract, an agreement to pay, or payment of profit from crime or funds of  
22 an offender, notify in writing by certified mail, return receipt requested, all known  
23 eligible persons where the eligible persons' names and addresses are known to the  
24 Commission. The Commission may, in its discretion, provide for additional notice as  
25 it deems necessary.

26          (c) Penalties. – Any person or entity, other than the State, a subdivision of the  
27 State, or a person who is a superintendent, sheriff or municipal official required to  
28 give notice pursuant to this section, who willfully fails to comply with subsection (a)  
29 of this section is subject to a civil penalty up to the amount of the payment or  
30 obligation to pay, plus one thousand dollars (\$1,000) or ten percent (10%) of the  
31 payment of obligation to pay, whichever is greater.

32          After providing notice and opportunity to be heard, the Commission may by order  
33 assess the penalties prescribed by this subsection. If the penalties are not paid within  
34 30 days from the date of the order, any penalty assessed under this section shall bear  
35 interest at the rate of one percent (1%) per month, compounded monthly. An action  
36 to recover a civil penalty assessed under this section may be brought by the  
37 Commission within three years after the cause of action accrues.

38          The clear proceeds of penalties assessed under this subsection shall be remitted to  
39 the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

40 **§ 15B-33. Civil action to recover profits or funds; responsibilities of the**  
41 **Commission.**

1        (a) Civil Action. – Notwithstanding any inconsistent provision of law with  
2 respect to the timely bringing of an action, an eligible person may, within three years  
3 of the discovery of any profit from crime or funds of an offender, bring a civil action  
4 in a court of competent jurisdiction to recover money damages from an offender.

5        (b) Notice by Eligible Persons. – Upon filing an action under subsection (a) of  
6 this section, the eligible person shall give notice to the Commission of the filing by  
7 delivering a copy of the summons and complaint to the Commission. The eligible  
8 person may also give notice to the Commission prior to filing the action so as to  
9 allow the Commission to apply for any appropriate provisional remedies, which are  
10 otherwise authorized to be invoked prior to the commencement of an action.

11        (c) Responsibilities of Commission. – Upon receipt of a copy of a summons  
12 and compliant, or upon receipt of notice from the eligible person prior to filing an  
13 action, the Commission shall immediately take action to:

14            (1) Notify all other known eligible persons of the filing of the civil  
15 action by certified mail, return receipt requested, where the eligible  
16 persons' names and addresses are known to the Commission.

17            (2) Publish, at least once every six months for three years from the date  
18 of the discovery of the profit from crime or funds of an offender, a  
19 legal notice in newspapers of general circulation in the county in  
20 which the crime was committed and in counties contiguous to that  
21 county advising any eligible person of the existence of profit from  
22 crime or funds of an offender. The Commission may, in its  
23 discretion, provide for additional notice as it deems necessary.

24            (3) Avoid the wasting of the assets identified in the complaint as the  
25 profit from crime or funds of an offender in any manner consistent  
26 with subsection (d) of this section.

27        (d) Authority to Avoid Wasting of Assets. – The Commission, acting on  
28 behalf of all eligible persons, shall have the right to apply for any and all provisional  
29 remedies that are also otherwise available to the plaintiff in the civil action brought  
30 under subsection (a) of this section, such as attachment, injunction, constructive trust,  
31 and receivership. On a motion for a provisional remedy, the moving party shall state  
32 whether any other provisional remedy has previously been sought in the same action  
33 against the same defendant. The court may require the moving party to elect between  
34 those remedies to which it would otherwise be entitled.

35        (e) Enforcement of Judgment. – Notwithstanding any other provision of law to  
36 the contrary, a judgment obtained pursuant to this section shall not be subject to  
37 execution or enforcement against the first one thousand dollars (\$1,000) deposited in  
38 an inmate account to the credit of the inmate or in a prisoner account to the credit of  
39 the prisoner. In addition, where the civil action involves funds of an offender and  
40 those funds were recovered by the offender pursuant to a judgment obtained in a civil  
41 action, a judgment obtained pursuant to this section may not be subject to

1 enforcement or execution against the first ten percent (10%) of any compensatory  
2 damages awarded to the offender in a civil action.

3 **§ 15B-34. Subrogation by the Crime Victims Compensation Fund.**

4 Claims on profit from crime or funds of an offender are subject to subrogation by  
5 the Crime Victims Compensation Fund pursuant to G.S. 15B-18.

6 **§15B-35. Conviction overturned or pardon issued.**

7 If profit from crime is subject to a provisional remedy on behalf of eligible  
8 persons and the conviction for the criminal offense from which profit from crime is  
9 realized is reversed, vacated, or set aside, or if the offender has been granted an  
10 unconditional pardon of innocence for the criminal offense, those funds shall be  
11 returned to the rightful owner.

12 **§ 15B-36. Evasive action void.**

13 Any action taken by an offender, whether by way of execution of a power of  
14 attorney, creation of corporate entities, or otherwise, to defeat the purpose of this  
15 Article shall be void as against the public policy of this State.

16 **SECTION 2.** The provisions of this act are severable. If any provision of  
17 this act or its application is held invalid, that invalidity shall not affect other  
18 provisions or applications that can be given effect without the invalid provision or  
19 application.

20 **SECTION 3.** This act is effective when it becomes law and applies to  
21 contracts for profit from crime entered into on or after that date or funds of an  
22 offender that have accrued on or after that date.

23

# BILL ANALYSIS OF LEGISLATIVE PROPOSAL #2: CRIME VICTIMS FINANCIAL RECOVERY ASSISTANCE ACT

BY: TRINA GRIFFIN, RESEARCH DIVISION

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*SUMMARY: This bill would prevent criminals from profiting from their crimes and would better enable crime victims to satisfy restitution orders and civil judgments entered against their offenders from the offender's assets, which may include profit from crime.*

## ANALYSIS:

*Declaration of Policy and Purpose.* – The bill declares as a matter of public policy that no person who commits a crime should thereafter gain monetary profit as the result of committing the crime. Furthermore, the bill declares that convicted felons do not possess equitable title to profit from their crimes and that as such the property is subject to seizure by the State for the benefit of the victims. This section also sets out the twin compelling State interests, as recognized by the United States Supreme Court, supporting the bill.

*Profit from Crime.* – "Profit from crime" is defined as any income, assets, or property generated from the commission of a crime for which the offender was convicted, including any income generated from the sale of crime memorabilia or obtained through unique knowledge obtained during the commission of the crime. Crime memorabilia is defined as tangible property belonging to or that belonged to an offender prior to conviction, the value of which is increased by the offender's notoriety.

*Funds of an Offender.* – All funds and property received from any source by an offender, excluding child support and earned income, where the offender is (i) an inmate serving a sentence with the Department of Corrections or a prisoner confined at a local correctional facility or federal correctional institute, or (ii) Is not an inmate or prisoner but who is serving a sentence of probation, conditional discharge, or post-release supervision.

*Notice Requirement.* – The following entities that knowingly enter into a contract for or pay or agree to pay profit from crime or funds of an offender are responsible for providing notice the Commission:

- The contracting party
- The State or a subdivision of the State whenever the payment of obligation to pay involves funds of an offender that a superintendent, sheriff, or municipal officer receives or will receive on behalf of an inmate serving a sentence with the Department of Correction or a prisoner confined at a local correctional facility and the amount exceeds \$10,000



- The State or a subdivision of the State when it makes a payment or has an obligation to pay funds of an offender and the value exceeds \$10,000.00
- In all other instances where the payment or obligation to pay involves funds of an offender and the value or aggregate value of the funds exceeds or will exceed \$10,000.00, the offender who receives or will receive the funds shall give written notice to the Commission.

*Civil Action.* - An eligible person may, within three years of the discovery of any profit from crime or funds of an offender, bring a civil action in a court of competent jurisdiction to recover money damages from an offender.

*Authority to Avoid Wasting of Assets.* - The Commission, acting on behalf of all eligible persons, shall have the right to apply for any and all provisional remedies that are also otherwise available to the plaintiff in the civil action, such as attachment, injunction, constructive trust, and receivership.

*Enforcement of Judgment.* - A judgment obtained pursuant to this section shall not be subject to execution or enforcement against the first \$1,000.00 deposited in an inmate account to the credit of the inmate or in a prisoner account to the credit of the prisoner. In addition, where the civil action involves funds of an offender and those funds were recovered by the offender pursuant to a judgment obtained in a civil action, a judgment obtained pursuant to this section may not be subject to enforcement or execution against the first ten percent (10%) of any compensatory damages awarded to the offender in a civil action.

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# **LEGISLATIVE PROPOSAL #3**

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**REQUIRE PAYMENT OF RESTITUTION  
FOR EXPUNCTION**

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## **LEGISLATIVE PROPOSAL #3:**

**A RECOMMENDATION OF THE HOUSE SELECT COMMITTEE ON  
PREVENTING UNJUST PROFITEERING FROM CRIME  
TO THE 2004 GENERAL ASSEMBLY, 2003 SESSION**

**AN ACT TO REQUIRE A PERSON TO PAY ANY OUTSTANDING  
RESTITUTION ORDERS PRIOR TO THE EXPUNCTION OF THE  
PERSON'S CRIMINAL RECORD.**

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**SHORT TITLE:** Require Payment of Restitution for Expunction.

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**SPONSORS:**

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**BRIEF OVERVIEW:** This bill would require a person to pay any outstanding restitution orders prior to the expunction of the person's criminal record.

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**FISCAL IMPACT:** No fiscal impact.

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**EFFECTIVE DATE:** This proposal would become effective July 1, 2004, and apply to petitions for expunctions filed on or after that date.

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**A copy of the proposed legislation and a bill analysis begin on the next page**

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

H

D

BILL DRAFT 2003-SVz-9 [v.1] (4/13)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
4/13/2004 9:38:43 AM

Short Title: Require Payment of Restitution for Expunction. (Public)

Sponsors: Representatives Eddins, Holliman (Primary Sponsors); and Unknown.

Referred to:

A BILL TO BE ENTITLED

AN ACT REQUIRING A PERSON TO PAY ANY OUTSTANDING  
RESTITUTION ORDERS PRIOR TO THE EXPUNCTION OF THE PERSON'S  
CRIMINAL RECORD.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 15A-145 reads as rewritten:

**"§ 15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors.**

(a) Whenever any person who has (i) not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, or (ii) not yet attained the age of 21 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor possession of alcohol pursuant to G.S. 18B-302(b)(1), he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

- (1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or

misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

- (2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.
- (3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.
- (4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.
- (5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against him are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and (i) petitioner was not 18 years old at the time of the conviction in question, or (ii) petitioner was not 21 years old at the time of the conviction of possession of alcohol pursuant to G.S. 18B-302(b)(1), it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that the said misdemeanor conviction be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall

forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge.

(e) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars (\$65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent."

**SECTION 2.** This act becomes effective July 1, 2004, and applies to petitions for expunction filed on or after that date.

# BILL ANALYSIS OF LEGISLATIVE PROPOSAL #3 REQUIRE PAYMENT OF RESTITUTION FOR EXPUNCTION

BY: TRINA GRIFFIN, RESEARCH DIVISION

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**SUMMARY:** *This bill would require a person to pay any outstanding restitution orders prior to the expunction of the person's criminal record.*

**CURRENT LAW:** A person may file a petition for expunction of the person's criminal record if that person is a first offender and has been convicted of one of the following:

- A misdemeanor while under the age of 18; or
- Possession of alcohol while under the age of 21

A court, after a hearing, shall order the misdemeanor conviction expunged and the petitioner's status pre-arrest status restored if the petitioner shows the following, supported by affidavits:

- (1) That he has not been convicted of any felony or misdemeanor, other than a traffic violation, prior to the conviction in question or during the two-year period following that conviction.
- (2) That he is of good character and reputation in the community in which he lives.

The petition for expunction cannot be filed earlier than two years after the date of conviction or any period of probation. The petition must be accompanied by a \$65 filing fee.

**ANALYSIS:** Legislative Proposal #3 would add the requirement that the petitioner pay any outstanding restitution orders or civil judgments representing amounts ordered for restitution before the petitioner may be granted an expunction of his record.

The bill would become effective July 1, 2004 and apply to petitions for expunction filed on or after that date.

# APPENDIX A

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## COMMITTEE AUTHORIZATION



# APPENDIX B

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## 50-STATE OVERVIEW OF NOTORIETY FOR PROFIT LAWS

# 50-State Overview of Notoriety for Profit Laws

Updated: March 1, 2004

## A Brief Summary

- **42 states have active Son of Sam statutes; however, 28 of these are likely unconstitutional due to content-based restrictions on speech**
  - 35 have statutes that have not been replaced or struck down by a court
  - 6 repealed their Son of Sam statutes and then replaced them with active statutes
  - 1 left its Son of Sam statute active although the statute was struck down by a court\*\*
- **5 states have repealed their Son of Sam statutes without replacing them.**
- **3 states have never enacted Son of Sam statutes, including North Carolina.**
- **The Special Forfeiture Statute (18 U.S.C. 3681 and 3682) is a federal law that provides for special forfeiture to the government of proceeds received or to be received by criminals convicted of violent crimes from the sales of literary rights to their stories about their crimes and for the deposit of those proceeds in the Crime Victims Fund. However, according to the U.S. Department of Justice, this statute has fallen into disuse because there is little doubt, if any, that it is inconsistent with the First Amendment.**

Type I States (Content-based)		Type II States (Not content-based)	Type III States (Repealed statute without reenacting)	Type IV States (Never enacted statute)
Alabama	Minnesota	Colorado	Illinois	New Hampshire
Alaska	Mississippi	Iowa	Louisiana	North Carolina
Arizona	Montana	Maine	Massachusetts	Vermont
Arkansas	Nebraska	New York	Missouri	
California*	New Jersey	North Dakota	Nevada	
Connecticut	New Mexico	Oregon		
Delaware	Ohio	Pennsylvania		
Florida	Oklahoma	South Carolina		
Georgia	Rhode Island**	Tennessee		
Hawaii	South Dakota	West Virginia		
Idaho	Texas*	Wyoming		
Indiana	Utah			
Kansas	Virginia			
Kentucky	(double-check)			
Maryland	Washington			
Michigan	Wisconsin			

\*California and Texas have statutes that contain both content-based and non content-based elements. Both statutes as originally enacted were content-based, but were later amended in an attempt to reach any profits generated by the commission of a crime, not just those derived from "storytelling." The content-based section of California's statute was found unconstitutional in *Keenan v. Superior Court*, 40 P.3d 718 (Cal. Sup. Ct. 2002).

# APPENDIX C

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HOUSE BILL 911, 2003 GENERAL ASSEMBLY

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

H

1

HOUSE BILL 911

Short Title: No Profit from Crime.

(Public)

Sponsors: Representatives Eddins, Holliman (Primary Sponsors); and Gillespie.

Referred to: Judiciary I.

April 8, 2003

1 A BILL TO BE ENTITLED  
2 AN ACT TO PROVIDE CRIME VICTIMS WITH A CAUSE OF ACTION TO  
3 RECOVER PROFITS RECEIVED AS A RESULT OF THE CRIMES  
4 COMMITTED AGAINST THEM.

5 The General Assembly of North Carolina enacts:

6 **SECTION 1.** Chapter 15B of the General Statutes is amended by adding a  
7 new section to read:

8 "**§ 15B-26. Profit received as a result of commission of a crime.**

9 (a) The General Assembly finds that the State has a compelling interest in  
10 ensuring that persons convicted of crimes do not profit from those crimes, and that  
11 victims of crime are compensated by those who have harmed them.

12 The General Assembly further finds that these compelling interests outweigh any  
13 interest of the offender and the offender's representatives may have in obtaining  
14 property or otherwise profiting as a result of having committed a crime. The General  
15 Assembly also finds that these compelling interests outweigh a third party's right to  
16 realize profits from the sale of crime memorabilia, to the extent that those profits  
17 would not have been realized were it not for the commission of the crime.

18 (b) Definitions. – As used in this section:

19 (1) 'Convicted' includes persons convicted by entry of a plea of guilty  
20 or no contest, persons convicted after trial, and persons found not  
21 guilty by reason of insanity.

22 (2) 'Eligible person' includes any of the following persons:

23 a. A victim of the particular crime in question as defined in  
24 G.S. 15B-2(13);

25 b. A surviving spouse, parent, or child of a deceased victim of  
26 the crime; or

1 c. Any other person dependent for the person's principal  
2 support upon a deceased victim of the crime.

3 However, 'eligible person' does not include the offender who  
4 committed the criminally injurious conduct or an accomplice to that  
5 offender.

6 (3) 'Profit from a crime' includes:

7 a. Any property obtained through, or any income generated  
8 from, the commission of a crime for which the offender's was  
9 convicted;

10 b. Any property obtained by, or income generated from, the  
11 sale, conversion, or exchange of proceeds of a crime for  
12 which the offender was convicted, including any gain  
13 realized by that sale, conversion, or exchange; and

14 c. Any property that the offender obtained, or income  
15 generated, as a result of the offender's having committed the  
16 crime for which the offender was convicted, including any  
17 assets obtained through the use of unique knowledge  
18 obtained during the commission of, or in preparation for, the  
19 commission of the crime, as well as any property obtained  
20 by, or income generated from, the sale, conversion, or  
21 exchange of that property and any gain realized by that sale,  
22 conversion, or exchange.

23 (4) 'Profiteer of a crime' means any person, including the offender, who  
24 sells or transfers for profit any memorabilia or other property or  
25 thing of the offender, the value of which is enhanced by the  
26 notoriety gained from the commission of the crime for which the  
27 offender was convicted. 'Profiteer of a crime' shall not include a  
28 media entity reporting on the offender or on the sale of memorabilia  
29 or other property of the offender, nor shall it include a person  
30 selling books, magazines, newspapers, films, or sound recordings,  
31 or giving interviews or making live presentations of any type, in the  
32 exercise of that person's rights under the First Amendment to the  
33 United States Constitution. 'Profiteer of a crime' shall also not  
34 include a person selling or transferring any other expressive work  
35 protected by the First Amendment unless the sale or transfer is  
36 primarily for a commercial or speculative purpose.

37 (c) Notice of Profit From Crime. – If a person has been convicted of a crime,  
38 any person who knowingly contracts for, pays, or agrees to pay any profit from a  
39 crime to that person, and any profiteer of that crime, shall give written notice to the  
40 Commission of the payment or obligation to pay within 30 days after discovering that  
41 payment or intended payment is a profit from a crime or that the person is a profiteer

1 of a crime, and shall submit a copy of any contract or other agreement giving rise to  
2 the profit from a crime or the profit realized by the profiteer of a crime. The  
3 Commission, upon receipt of notice of a contract, an agreement to pay, or payment of  
4 profit from a crime, or that a person is a profiteer of a crime, shall notify all known  
5 eligible persons of the existence of the profit.

6 (d) Constructive Trust; Right of Action. – All profits from a crime and profits  
7 realized by profiteers of a crime shall be subject to a constructive trust for the benefit  
8 of eligible persons. A constructive trust established pursuant to this subsection shall  
9 continue for a period of five years from the date that profits from a crime or profits  
10 by a profiteer of a crime are realized. An eligible person may bring an action:

11 (1) To recover profits from a crime from a person convicted of a crime,  
12 the legal representative of that convicted person, or a person to  
13 whom profits of a crime have been transferred. If an eligible person  
14 brings an action within the five-year trust period, the trust character  
15 of the property shall continue until the conclusion of the action. The  
16 court may award an eligible person bringing an action pursuant to  
17 this subdivision a judgment of an amount no more than the total  
18 value of the profit from the crime minus any claims pursuant to  
19 subdivisions (1) and (2) of subsection (e) of this section.

20 (2) To recover profits realized from a profiteer of a crime. If an eligible  
21 person brings an action within the five-year trust period, the trust  
22 character of the property shall continue until the conclusion of the  
23 action. The court may award an eligible person bringing an action  
24 pursuant to this subdivision a judgment of an amount no more than  
25 the total value by which the sale or transfer was enhanced by the  
26 notoriety gained from the commission of the offense for which the  
27 offender was convicted minus any claims pursuant to subdivisions  
28 (1) and (2) of subsection (e) of this section.

29 An action pursuant to this subsection may be brought in the superior court of the  
30 county in which the eligible person resides, of the county in which the offender  
31 resides, or of the county in which the profits from crime or the profits realized by a  
32 profiteer of a crime reside.

33 (e) Priority of Claims. – Notwithstanding any other provision of law, claims  
34 on profits from crime and profits realized by profiteers of a crime subject to a  
35 constructive trust as provided in subsection (d) of this section shall have the  
36 following priorities:

37 (1) A court order of restitution.

38 (2) Subrogation by the Crime Victims Compensation Fund pursuant to  
39 G.S. 15B-18.

40 (3) A civil judgment of an eligible party.

1 At the end of the five-year trust period, any profits from a crime or profits  
2 realized by a profiteer of a crime that remain in the constructive trust after any claims  
3 shall be transferred to the Crime Victims Compensation Fund.

4 (f) Conviction Overturned or Pardon Issued. – If the conviction for the  
5 criminal offense from which profits from a crime are realized or profits by a profiteer  
6 of a crime are realized is reversed, vacated, or set aside, or if the offender has been  
7 granted an unconditional pardon of innocence for the criminal offense, the  
8 constructive trust established pursuant to subsection (d) of this section shall be  
9 extinguished, and any monies distributed pursuant to this section shall be returned to  
10 the rightful owner.

11 (g) Notice of Action. – Upon filing an action under subsection (d) of this  
12 section, an eligible person shall give notice to the Commission of the filing by  
13 delivering a copy of the complaint to the Commission. The eligible person may also  
14 give notice to the Commission prior to filing the action in order to allow the  
15 Commission to apply for any appropriate remedies that are otherwise authorized to  
16 be invoked prior to commencement of an action.

17 (h) Responsibilities of the Commission. – Upon receipt of a copy of a  
18 complaint, the Commission shall immediately take action as necessary to:

19 (1) Notify all other known eligible persons of the alleged existence of  
20 profit from a crime or profit realized by a profiteer of a crime by  
21 certified mail, return receipt requested, where the eligible persons'  
22 names and addresses are known to the Commission;

23 (2) Publish, at least once a year for three years from the date it is  
24 initially notified by an eligible person under subsection (g) of this  
25 section, a legal notice in newspapers of general circulation in the  
26 county in which the crime was committed and in counties  
27 contiguous to that county advising any eligible person of the  
28 existence of profit from a crime or profit realized by a profiteer of a  
29 crime. The Commission may, in its discretion, provide for  
30 additional notice as it deems necessary; and

31 (3) Avoid the wasting of the assets identified in the complaint as the  
32 newly discovered profit from a crime or profit realized by a  
33 profiteer of a crime in any manner consistent with subsection (g) of  
34 this section.

35 (i) Other Remedies. – The Commission, acting on behalf of all eligible  
36 persons, shall have the right to apply for any and all remedies that are also otherwise  
37 available to an eligible person bringing an action under subsection (d) of this section,  
38 such as attachment, injunction, and receivership. On a motion for a remedy, the  
39 moving party shall state whether any other remedy has previously been sought in the  
40 same action against the same defendant. The court may require the moving party to  
41 elect between those remedies to which it would otherwise be entitled.

1       (j) Evasive Action Void. – Any action taken by a person convicted of a crime,  
2 whether by way of execution of a power of attorney, creation of corporate entities, or  
3 otherwise, to defeat the purpose of this section shall be void as against the public  
4 policy of this State.

5       (k) Penalties. – Any person who willfully fails to do any of the following is  
6 subject to a civil penalty of not less than ten thousand dollars (\$10,000) for each  
7 offense and not more than an amount equal to three times the contract amount:

8           (1) Give notice to the Commission of profit from a crime or profit  
9 realized by a profiteer of a crime within 30 days as required by  
10 subsection (c) of this section; or

11           (2) Submit a copy of the contract or other agreement described in  
12 subsection (c) of this section.

13       If two or more persons are subject to the penalties provided in this section, the  
14 persons shall be jointly and severally liable for the payment of the penalty imposed.

15       After providing notice and opportunity to be heard, the Commission may by order  
16 assess the penalties prescribed by this subsection. If the penalties are not paid within  
17 30 days from the date of the order, any penalty assessed under this section shall bear  
18 interest at the rate of one percent (1%) per month, compounded monthly. An action  
19 to recover a civil penalty assessed under this section may be brought by the  
20 Commission within six years after the cause of action accrues.

21       The clear proceeds of penalties assessed under this subsection shall be remitted to  
22 the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2."

23       **SECTION 2.** This act is effective when it becomes law and applies to  
24 profits realized on or after that date.



# APPENDIX D

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**PRESENTATION NOTES OF WILL POLK WITH THE  
ATTORNEY GENERAL'S OFFICE**

## Outline for No-Profit From Crime

### I. Introduction –

- a. My name is Will Polk, Director of the Victims and Citizens Services Section of Attorney General’s Office
- b. Purpose here today is to give an overview of some constitutional law considerations in drafting the No Profit from Crime or “Son of Sam” type of law for North Carolina
- c. The opinions that I give today are not an official opinion of the Attorney General’s office, or Attorney General Roy Cooper’s position on this particular piece of legislation, but it is information regarding this proposal and considerations that the General Assembly should look at when deliberating on this bill.
- d. Legislative staff gave an overview of the 42 states and the federal government have enacted legislation designed to prevent criminals from profiting from their crimes. Some of the information today may be repetitive, however I will comment on my opinion of some of the provisions in the current proposals.
- e. My presentation will go as follows:
  1. Overview of Constitutional Law Standards
  2. Overview of Construction and Application of Son of Sam Laws
  3. Analysis of North Carolina HB 911

### II. Overview of Constitutional Law Standards –

- a. First the challenge of developing these no-profit laws is to not run afoul of the Free Speech Clause of the First Amendment of the U.S. Constitution, which states that “Congress shall make no law ... abridging the freedom of speech. This applies to the states through the due process clause of the 14<sup>th</sup> amendment. We also have a similar provision in the N.C. Constitution in the Declaration of Rights in Article I, section 14.
- b. When dealing with Speech-related regulations there are two considerations that government body must consider when drafting legislation. The body must decide whether the law will be a *content-based restriction* or a *content-neutral restriction*. The type of restriction that will determine type of constitutional scrutiny the statute will be given.
  1. *Content-Based Restriction* – For a speech related content based

restriction the state must have a “compelling interest in restricting the content of the speech and must be narrowly tailored to achieve that end.” This is also known as a strict scrutiny standard.

2. *Content- Neutral Restriction* -- For a content neutral speech related regulation the State must have a “substantial government interest that would be achieved less effectively absent the regulation.” Or to put it another way “incidental burdens on speech may be upheld when justified by an important governmental interest in regulating non-expressive activity.

--ex: a noise control ordinance that requires all performers to use a city or states amplification equipment at a particular facility, it is not based on the performers message

- c. Note: States have a compelling interests in ensuring that crime victims are fully compensated by those who harm them and ensuring that criminals do not profit as a result of their crimes. However, the problems with these statutes are when a statute is drafted solely to further a State’s compelling state interest in “ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries.” *Simon v Shuster v. N.Y.* This is from the US Supreme Court Case that challenged the NY Son of Sam Law.<sup>10</sup>

- d. OVERVIEW OF CONSTRUCTION AND APPLICATION OF SON OF SAM LAW

- a. *ex post and retroactive issues* –

courts have found two elements for a criminal law to be ex post facto:

- i. It must be retroactive
- ii. apply to events that occurred prior to its enactment and it must disadvantage the offender affected by it.

Ex: US v MacDonald, “Fatal Vision” Jeff MacDonald had received funds from the book and movie deal. US gov’t tried to apply a forfeiture law to monies received. Court held that the was enacted 15 years after the murders and therefore did not apply to MacDonald.

- b. *Vagueness issues* –A statute is unconstitutionally vague if “men of common intelligence must necessarily guess at its meaning and differ as to its application.”

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<sup>10</sup> Note the original son of sam David Berkowitz has never challenged these laws/

- c. *Overbroad*- Prohibits statutory provisions from sweeping so broadly that they are tantamount to prohibiting protected speech altogether. So in the constitutional sense when it penalizes both protected and unprotected speech.

Ex: If a law is significantly overinclusive and not narrowly tailored to achieve a state objectives of compensating victims from profits of crime then it will be found unconstitutional.

--Generally, a statute being challenged on vagueness or overbreadth grounds must “provide fair warning to those within its scope,” have “clear standards for enforcement,” and not “inhibit the exercise of basis constitutional freedoms.”

Ex: If all applied to works on any subject provided such works expressed author’s though or recollections about his crime, however tangentially or incidentally, and the law has a broad definition of “person convicted of crime” enable the victim compensation board to escrow income of author who admitted in his work to having committed crime, whether or not he was ever actually accused or convicted, then the law will be struck. Ex. *New Yorks Son of Sam law* that was at issue in a 1991 US Supreme Court case.

Ex: Keenan: Court held that a section in the CA law was not narrowly tailored because it penalized the content of speech to an extent far beyond that necessary to transfer fruits of crime from the criminal to the uncompensated victim. The CA Supreme Court found that it went to far in confiscating funds on any theme or subject which includes the crime committed except for a mere passing mention. That in effect the law created a “chilling effect” on the creative process b/c it could impact items that have little or no relation to the persons’ criminal transactions.

Ex: Mass Opinion

d. construction and application-

- i. *Agents or representative of accused or convict*. There has been a case that has held that neither the author to whom a convict had released the rights to his life story for a consideration, nor the companies that had published the hardcover or paperback editions of the author’s book about him were agents or reps of the convict within the **purview** of a “son of sam” statute according to a New Jersey case.

- ii. *statute of limitations* – Most of these statutes allow for the statute of limitations to be tolled until the proceeds are given to the felon, whichever is later or the time period after the conviction whichever is later.

Ex: If a 5 year S.O.L is in the law.

### III. NC PROPOSED LAW

With aforementioned considerations, I will give a short analysis of the proposed N.C. statute and give my opinion on any potential red flags certain components of this legislation that has been raised in litigation from around the county

- a. *Compelling Interests* – Section 1. 15B-26(a) What I will call the purposes of the legislation

**1. The General Assembly finds that the State has a compelling interest in ensuring that persons convicted of crimes do not profit from those crimes, and that victims of crime are compensated by those who have harmed them.**

- (a) Potential Good Points: This would satisfy the State’s interest in ensuring that persons do not profit from criminal activity, and that victims are compensated by those that have harmed them.

1. Establish in Tort Law (can file individual legal action)

2. Currently order general restitution in trial courts.

- (b) Potential Problems: None

- (c) Recommendations: Appears to satisfy compelling interests test from Simon v. Schuster v. N.Y.

**2. “The General Assembly further finds that these compelling interests outweigh any interest of the offender and the offender's representatives may have in obtaining property or otherwise profiting as a result of having committed a crime.”**

- (a) Potential Good Points: Does not directly say storytelling or speech about the crime.

- (b) Potential Problems: Potentially a problem area in that states that it could be potentially overbroad when it states “obtaining property or otherwise profiting as a result of having committed a crime” This could

be a problem that it could be overinclusiveness of any work written by a criminal no matter what its subject matter or genre, provided the work mentioned or recognized a crime committed by the author.<sup>11</sup>

(c) Recommendations: This may be overcome by requiring that a persons convicted of the crime. Plus holding Supreme Court case was limited to NY law that was at issue. However CA Supreme Court recently took decided a case

**3. The General Assembly also finds that these compelling interests outweigh a third party's right to realize profits from the sale of crime memorabilia, to the extent that those profits would not have been realized were it not for the commission of the crime.**

(a) Potential Good Points: Targets people who sell items that were part of the crime scene. It is not targeting expression but regulating the sales of those activities may not implicate the First Amendment. (At least one court has found so. Mass Sup Crt.)

(b) Potential Problems: At least one case that I have reviewed may not allow this law to reach these profits. Potentially overbroad as well impacting anyone who has an interest in creating a story around them. Has not been litigated in the CA case so it is open ended.

(c) Recommendations: Maybe removing that provision from the bill.

b. *Definitions* –

**1. 'Convicted' includes persons convicted by entry of a plea of guilty or no contest, persons convicted after trial, and persons found not guilty by reason of insanity.**

a. It appears that this is an ok definition, it is limited to only persons convicted of a crime and does not have a the loose definition or problem of a person that has voluntarily admitted to a crime. (This was a problem in NY Son of Sam law)

2. Profit from a crimes-

(3) 'Profit from a crime' includes:

- a. Any property obtained through, or any income generated from, the commission of a crime for which the offender's was convicted;
- b. Any property obtained by, or income

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<sup>11</sup> Noted in Supreme Court cases, Autobiography of Malcolm X, MLK, Henry David Thoreu and others, in that it could potentially impact something that

generated from, the sale, conversion, or exchange of proceeds of a crime for which the offender was convicted, including any gain realized by that sale, conversion, or exchange; and

- c. Any property that the offender obtained, or income generated, as a result of the offender's having committed the crime for which the offender was convicted, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for, the commission of the crime, as well as any property obtained by, or income generated from, the sale, conversion, or exchange of that property and any gain realized by that sale, conversion, or exchange.

Potential Problems: Keenan implications may be present in this section, because it targets in confiscating funds on any theme or subject which includes the crime committed except for a mere passing mention. Plus any property may be over-inclusive.

- (4) 'Profiteer of a crime' means any person, including the offender, who sells or transfers for profit any memorabilia or other property or thing of the offender, the value of which is enhanced by the notoriety gained from the commission of the crime for which the offender was convicted. 'Profiteer of a crime' shall not include a media entity reporting on the offender or on the sale of memorabilia or other property of the offender, nor shall it include a person selling books, magazines, newspapers, films, or sound recordings, or giving interviews or making live presentations of any type, in the exercise of that person's rights under the First Amendment to the United States Constitution. 'Profiteer of a crime' shall also not include a person selling or transferring any other expressive work protected by the First Amendment unless the sale or transfer is primarily for a commercial or speculative purpose.

NB: This would probably would survive a challenge since it is not regulating speech, and the sales of such items does not involve expressive activity.

5. *Notice of Profit* --- Since it requires the submission of a contract to the Commission, it raises the potential problem in that leaves the question of

whether the commission is going to get into the substance of the contract between the criminal and the publisher.

A court could view this as a content-based restriction, even though the bill does not discriminate between particular viewpoints. Since requirements under HB911 require the submission of a contract based on the expressive works of the defendant it can be argued that this is a content based restriction.

--- Due Process concerns are met in section (d)

6. *Constructive Trust* – The placement of funds in this constructive trust could be viewed as a prior restraint on speech that could impact first amendment considerations.

As the US Supreme Court noted in the *Simon and Schuster* case, a Provision that puts a defendant's payments in escrow operates as a financial disincentive on both the defendant author and the publisher. The result of which may make a defendant or a publisher less likely to undertake a project, due to the money being tied up for a period of time and then no guarantee that he or she will ever see it.

#### IV. QUESTIONS

#### V. CONCLUSION

As stated before these are considerations that must be taken into account when drafting this bill.

The most important consideration again is to draw up the statute that does not create a **CONTENT-BASED RESTRICTION** on speech. While there are some non-content based provisions in this legislation there are potentially some that court could find would be based on content.

If the legislature would like a formal opinion from our office, please request one. Again, the report I have given you today is not the official opinion of the Attorney General and has not gone through the advisory opinion process, it is however, an overview of the constitutional issues that could be raised if this bill ever becomes law.



# **APPENDIX E**

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## **STATEMENT BY THE ATTORNEY GENERAL**

ROY COOPER STATEMENT FOR HB911 “No Profit from Crime Act”

Convicted criminals should make good on their debts to victims, not line their own pockets with the winnings from crime. I wholeheartedly support your work to keep criminals from profiting from their illegal acts. North Carolina should join the 42 states that have laws preventing such profits. Just as importantly, victims of crime should be compensated by the criminals who have harmed them.

Thank you to the committee and those of you who work on behalf of crime victims for all your hard work in creating a law that can withstand legal challenge.

# APPENDIX F

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**BIO OF RODNEY A. SMOLLA,  
DEAN AND PROFESSOR OF LAW**

## RODNEY A. SMOLLA

Rod Smolla is the Dean of the University of Richmond School of Law. He is also the George E. Allen Professor of Law at Richmond. He was previously the Arthur B. Hanson Professor of Law at the College of William and Mary, Marshall-Wythe School of Law. From 1988 to 1996 he was Director of the Institute of Bill of Rights Law at William and Mary. He graduated from Yale in 1975 and Duke Law School in 1978, where he was first in his class. He then served as law clerk to Judge Charles Clark on the United States Court of Appeals for the Fifth Circuit. After practicing law in Chicago, he entered academic life, and taught at the De Paul, University of Illinois, and University of Arkansas law schools before beginning at William and Mary. He has also been a visiting professor at the University of Denver, University of Indiana, and Duke University law schools. He writes and speaks extensively on constitutional law issues, and is also active in litigation matters involving constitutional law.

His book *Free Speech in an Open Society* (Alfred A. Knopf 1992) won the William O. Douglas Award as the year's best monograph on freedom of expression. He was the Editor of *A Year in the Life of the Supreme Court* (Duke University Press, 1995), which won an ABA Silver Gavel Award. His book *Suing the Press: Libel, the Media, and Power* (Oxford University Press 1986) won the ABA Silver Gavel Award Certificate of Merit. He is also the author of *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press 1988). He is the author of three treatises: *Smolla and Nimmer on Freedom of Speech* (West Group, 2 volumes, 1996); *Federal Civil Rights Acts* (West Group, 2 volumes, 1994); and *Law of Defamation* (West Group 2<sup>nd</sup> Edition 2000, two volumes), and co-author of a casebook on constitutional law: *Constitutional Law: Structure and Rights in Our Federal System* (with Banks and Braveman, Lexis Publishing 2000). In 1999 he published a casebook on the First Amendment, entitled: *The First Amendment: Freedom of Expression, Regulation of Mass Media, Freedom of Religion* (Carolina Academic Press 1999). His recent book, *Deliberate Intent* (Crown Publishers) was published in July 1999. The book describes Rod Smolla's involvement in the notorious *Hit Man* case, in which he successfully represented the families of three murder victims in a suit against the publisher of a murder instruction manual used by a hit man for instructions in carrying out the murders. The book was made into a television movie by Fox and the FX Cable Network. He served as Chairman of the Association of American Law Schools Section on Defamation and Privacy Law. He served as Chairman of the Association of American Law Schools Section on Mass Communications Law. He has served on the American Bar Association Advisory Committee to the Forum on Mass Communications Law. He was the Director of the Annenberg Washington Program Libel Reform Project, and author of the Annenberg Libel Reform Report that emerged from the blue ribbon task force on that project. He served as an American Bar Association Delegate to the Uniform Commission on State Laws Drafting Committee on uniform libel reform legislation. He served on the First Amendment Advisory Board to the Media Institute. In 2002 he received an Outstanding Faculty Award from the State Council of Higher Education for Virginia.

Home:  
2423 Lake Loreine Lane  
Richmond, Virginia 23233  
Phone: (804) 754-3529  
Fax: (804) 754-7997

Office:  
Rodney A. Smolla  
George E. Allen Professor of Law  
University of Richmond  
T.C. Williams School of Law  
Office Phone: (804) 289-8197  
Fax: (804) 287-1819  
e-mail: Rsmolla@richmond.edu

# APPENDIX G

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REMARKS OF JIM DRENNAN WITH THE INSTITUTE  
OF GOVERNMENT

# Remarks of Jim Drennan with the Institute of Government

March 18, 2004

. . .The committee is obviously very interested in doing a good job of drafting in this area. And as I told you, the background materials you provided were excellent. My comments that follow are not intended to advocate for or against the adoption of this bill. We don't get into supporting or opposing bills at the Institute although we are always interested in helping legislators and staff members if we can, within those limits.

I realize my comments yesterday were not very concise. Here is what I should have said. Remember that I am not an expert in First Amendment issues, and this is based on the research I was able to do over the weekend. So let the buyer beware.

1. H 911 does address the specific defects that courts identified in the original Son of Sam laws. It does not explicitly target speech related to the commission of a crime, and it does include other sources of funds, so it is not likely to be judged to be underinclusive by focusing only on profits from telling the story. Whether it is found to be overinclusive and will reach more expressive speech than is necessary to serve the purpose of the statute will depend on how the courts construe the new language. If they read it to require unique knowledge of the crime in the expression and substantial focus on that unique knowledge, it will come closer to being narrowly targeted at the kind of speech the government can apparently make unprofitable for the writer and for which the proceeds may be used to compensate the victim.

2. H 911 uses language that other states have apparently used. Unfortunately none of those statutes has been tested. Thus it is not clearly unconstitutional, but is untested. In an arena as sensitive as the regulation of speech by the government, that is a potential area of concern. Of course acts of the legislature are presumed to be constitutional. That presumption appears to be based on an assumption that legislatures do exactly what this committee is doing--make a good faith effort to figure out what the constitutional limits are in the area it is regulating.

3. While the broad language used in H 911, if it passes the vagueness test (see 4 below), has substantially improved the chance that it will be found to be constitutional on its face, if it is only applied to reach speech-related conduct and no other kind of profits (or is applied to reach too much speech-related conduct), it may be subject to an "as applied" challenge if an action is brought to recover proceeds from a defendant. The California case suggests that possibility in the concurring opinion.

4. H 911, by using broad language (words like profit from crime and property obtained through the commission of a crime) does lead to the probability that it would be challenged as being too vague to pass constitutional muster. Because the earlier statutes were clear that they were seizing the profits from speech related conduct there was no serious vagueness issue. And I haven't really had time to figure out what the courts are doing with such challenges. So I'm not in a position to offer you an opinion about this issue right now. But I am pretty certain that with the new language, that issue is more likely to come up.

One way to test that in a preliminary way is to pose the following hypotheticals, to see if there is common agreement as to whether the money realized from the sale of the books or movies described is (1) obtained through the commission of the crime, (2) was income generated through the commission of the crime, or (3) is income generated as a result of the offender's having committed the crime, the latter of which includes the use of "unique knowledge obtained in the commission of the crime." Assume all these scenarios generate revenues and that there is a victim interested in recovering those proceeds.

--A person convicted of killing his wife writes a novel in which the subject of the story is wrongfully convicted, and the plot and setting mirror closely, but not identically, the facts of the crime for which he was convicted.

--The son (or friend) of the person in the above example writes a book about the crime, alleging that the defendant was wrongfully convicted, and in the book, relies heavily on the letters and communications from the defendant.

--A father, upon identifying who caused his son to become addicted to drugs, assaults and injures the person. The father is convicted of a low-level assault charge and the victim is injured, so that he is an eligible person under the statute. The father/defendant when he comes out of prison writes a book which acknowledges his crime, describes what led him to commit it, and in which he apologizes for the crime. In the rest of the book he writes passionately about the effects of drugs on the youth in his community.

--Same facts as the previous scenario, but most of the book, instead of being about drugs, is a call for reform of the justice system, from arrest through trial and imprisonment.

--A defendant who was well known as a professional athlete before committing a serious assault is convicted of the assault. The defendant serves his time and then comes out of prison and writes a book about his experience and about the crime. His degree of public recognition, while enhanced marginally by the offense, was very high before the crime as a result of his status as a professional athlete.

--A defendant imprisoned for life for murder is the subject of a book and movie about life in prison. He has no direct monetary stake in either the book or the movie, although the author intends to share profits from the project with the defendant's relatives.

--A defendant imprisoned for life after a high-profile murder trial for murder writes poetry about a variety of criminal justice topics.

5. There are two specific drafting issues that I would also mention. First, when I read subsection (d) on page two, I did not find any limit on what the judge can award an eligible person. Could a person who receives a minor injury get all the profits from a book that generates hundreds of thousands of dollars in revenue? Could the victim get pain and suffering damages? For survivors what is the measure of damages? Second, the language in the definition of profiteer of a crime that includes expressive works if done for a commercial or speculative purpose could pose problems, as several of the other folks told you. I concur.

Let me know if you have questions about any of this. As I said yesterday, this is pretty challenging drafting job. Good luck.

Jim

James C. Drennan  
Institute of Government  
Knapp Building  
University of North Carolina at Chapel Hill  
Chapel Hill, NC 27599-3330  
email: [drennan@iogmail.iog.unc.edu](mailto:drennan@iogmail.iog.unc.edu)  
Phone: (919) 966-4160  
Fax: (919) 962-0654



# **APPENDIX H**

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## **DEPARTMENT OF PRISONS POLICY ON CONDUCTING PERSONAL BUSINESS**

# APPENDIX I

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NCVAN LETTER IN SUPPORT OF HOUSE BILL 911

# APPENDIX J

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## NORTH CAROLINA CRIME VICTIMS COMPENSATION FUND REPORT

# APPENDIX K

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## RESTITUTION WORKSHEET

# APPENDIX L

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## RESTITUTION STATISTICS FROM THE ADMINISTRATIVE OFFICE OF THE COURTS

# **APPENDIX M**

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## **PRESENTATION NOTES OF TRACY LITTLE WITH THE DEPARTMENT OF CORRECTIONS**

# Work Release Disbursements

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

## Deductions by Employer

- 1) **Statutory Deductions (mandatory deductions from gross)**
  - Federal withholding tax
  - North Carolina State withholding tax
  - Federal Insurance Contributions Act (FICA) withholding
- 2) **Authorized Deductions (if required by employer)**
  - Uniform rental or cleaning, special tools, etc.
  - Inmate health insurance
  - Non-participating profit-sharing or 401(k)
- 3) **Garnishments**
  - If directed to employer, employer must withhold amount; garnishment attaches to gross earnings and payment priorities do not apply
  - If directed to Work Release Accounting Office, garnishment deducted from net earnings and payment priorities do not apply

## Department of Correction Deductions (deductions from net income)

- 1) **Per diem**
  - \$16 per day paid to the General Fund as a budgeted receipt
  - Goes to cost of upkeep
  - Charged per actual days worked, not to exceed 5 days per week
  - NOTE: Private providers like ECO get per diem for inmates they house
- 2) **DOC and private transportation**
  - Cost of transportation from prison to job site
  - Prison transportation is \$2.50 per day (also paid to General Fund)
  - Private transportation is up to \$7 per day
- 3) **Inmate weekly personal draw**
  - Covers incidental personal expenses
  - Maximum withdrawal = \$40 per week
  - Money usually spent at canteens, with canteen profits deposited into Inmate Welfare Fund
- 4) **Child support**
  - Established by court order, determination of dependency by Department of Social Services or an approved written request from the inmate
  - NOTE: inmate may not stipulate to more than recommended by Department of Social Services
  - If multiple orders, court orders have priority; if multiple court orders, funds shall be prorated
- 5) **Restitution and reparation**
  - By order or recommendation of the court
  - Includes restitution, court costs, fines and attorneys' fees
  - 75 percent of remaining inmate balance (excluding \$150 accumulated reasonable sum requirement) after per diem, transportation, personal draw and child support have been paid
  - DOC pays clerk one lump sum; Clerk determines distribution
- 6) **Judgments and court orders**
  - Includes garnishments, court-ordered alimony, etc.
  - Paid to Clerk of Court in designated county
- 7) **Special Payments**
  - Purchase work clothing
  - Pay debts
  - Provide support to family, others (ex. pay a utility bill)
  - Purchase gifts and personal items (ex. magazine subscription)
  - Pay outside transportation costs
  - Others as approved by facility head or designee (ex. Christmas draw)

**Department of Correction**  
**Work Release and Restitution Issues**

March 17, 2003

**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 (FY 2002-03)**

**Priority of Payments<sup>12</sup>**

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

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

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<sup>12</sup> 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**

▪ Average Time on Work Release (current WR inmates)	228 days
▪ Average Account Balance	\$1,922.10
▪ Amount paid to General Fund	\$4,156,384

### **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 2002-03)**

▪ Total Number of Offenders	178,946
▪ Offenders with Restitution Obligations	55,302
▪ Payments from DCC Offenders	\$16,631,306

# APPENDIX N

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## SOUTH CAROLINA LEGISLATION REGARDING DISBURSEMENT OF WORK RELEASE EARNINGS