

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 296

SPONSOR: Senator Fasano

SUBJECT: State Liens/Proceeds of Sales of Certain Literary Accounts/Profits of Sales of Certain Memorabilia

DATE: February 10, 2004 REVISED: 02/18/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Lang	JU	Favorable
2.	Clodfelter	Cannon	CJ	Fav/1 amendment
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill revises Florida’s law on notoriety for profit and the civil restitution lien law. Specifically, the bill extends the scope of the state’s authority to place a priority lien on income received from sales or transfers of anything, including memorabilia or any right, if the value is enhanced by notoriety gained from the commission of a felony for which a felon was convicted.

This bill substantially amends the following sections of the Florida Statutes: 944.512 and 960.291.

II. Present Situation:

Notoriety for Profit Law

Over 40 states and the federal government have enacted “notoriety for profit” laws (or more commonly known as *Son of Sam* laws¹) in response to efforts by criminals to profit from the sales of their criminal stories or information for literary, publishing, or other media purposes. The wordings of these laws vary from state to state.

The public’s growing fascination and interest in crime stories and crime-related details and materials is expanding a demand that extends to memorabilia or other tangible personal property that is either directly related to the crime or the criminal offender regardless of the property’s actual connection to a crime committed. For example, recent sales trends include artwork, autographs, songs, or other personal effects such as hair or fingernail clippings, letters, or

¹ The original Son of Sam law was enacted in New York when convicted murderer David Berkowitz (who terrorized New York City during the summer of 1977) courted and was courted by media to sell the rights to his story. Berkowitz earned the nickname of “Son of Sam” based on a handwritten note left at a crime scene.

manufactured items representative of the criminals or crimes, such as trading cards. Although such items are often of little intrinsic value, the values are enhanced by the notoriety of the criminal offender or the crime. Historically, *Son of Sam* laws do not prevent criminals from commercializing and profiting from these non-speech related activities.

Florida was one of the first states to enact a criminal anti-profit law. Section 944.512, F.S., imposes a statutory lien in favor of the State over the proceeds that are paid or payable to a convicted felon or to anyone else on the felon's behalf from the sale of any literary, cinematic or other account of the crime. The lien attaches automatically at the time of the conviction. The law provides for subsequent restitution to victims through a hierarchical distribution scheme as follows:

1. Twenty-five percent of the proceeds goes to the felon's dependents and if none, then this portion goes to the Crimes Compensation Trust Fund for victims.
2. Twenty-five percent of the proceeds goes to victims or victims' dependents, and if damages are less than twenty-five percent or there are no victims or dependents, then the remainder of this portion goes to the Crimes Compensation Trust Fund.
3. The remainder of the total proceeds is equally allocated for court costs associated with prosecution including jury fees, expenses, court reporter fees, and per diem for state attorneys, with the proceeds going to the General Revenue Fund.
4. The remainder of the proceeds goes to the Crimes Compensation Trust Fund.

The Department of Corrections is authorized and directed to notify the Department of Legal Affairs when an activity becomes subject to a lien under the notoriety for profit law. The Attorney General is then authorized and directed to take action to enforce the lien.

Civil Restitution Lien

In 1994, Florida enacted a civil restitution lien law that is cumulative to the anti-profit law. Sections 960.29 - 960.298, F.S., apply to the convicted person's personal or real property, including any royalties, commissions, sale proceeds, financial settlement, or any other thing of value accruing to the convicted felon or on his or her behalf, and any such property that comes into his or her possession after the lien. Homestead property is exempted pursuant to s. 4, Art. X of the *Florida Constitution*. The law is tailored to compensate victims for their injuries and losses, and to allow the state to recoup for costs associated with the prosecution and incarceration of convicted offenders.

At the time of conviction, a convicted felon is deemed civilly liable to crime victims, the state and local entities, and other aggrieved parties, any of whom may then petition the court for an order entering a civil restitution lien order. Although there is no priority entitlement as to multiple civil restitution lien orders, the law specifies the amount that a victim and state and local entities are entitled to recover:

- The victim is entitled to recover liquidated damages in the amount of the actual damages award.
- The state and local entities are entitled to recover incarceration and other correctional costs, and liquidated damages of \$250,000 for a capital or life felony offense and liquidated damages of \$50 per day for any lesser offense.

The lien order is enforceable just as any judgment would be in a civil action (i.e., levy, foreclosure). A civil restitution lien is valid for 20 years from the date of entry.

III. Effect of Proposed Changes:

Section 1 substantially amends s. 944.512, F.S., relating to a state's automatic priority lien over a convicted felon's sales or profits derived from any literary, cinematic or other account of a crime, to capture the sale of memorabilia or related property. A subsection for definitions is created to include the terms such as "conviction," "materials," "profits from the sale of memorabilia," "profiteer of the felony," and "story."

Specifically, this section creates a state's right to take the profits of a convicted felon's memorabilia through the establishment of a priority lien. That priority lien is established automatically by operation of law upon the person's conviction in court. Such funds are to be held in the Revolving Escrow Trust Fund of the Department of Legal Affairs if an appeal is pending. The hierarchical distribution scheme currently in place for proceeds derived from literary, cinematic, or other accounting of a crime is the same for profits derived from the sale or transfer of the memorabilia. Any media reporting on the felon or felon's memorabilia, anyone exercising First Amendment constitutional rights, or anyone whose works are protected by the First Amendment unless they are for commercial or speculative purposes, are not to be considered profiteers and consequently are exempt from the limitations imposed by the lien.

The bill amends current law to state that the Department of Corrections "shall" notify the Department of Legal Affairs when an activity falls within the ambit of the notoriety for profit law, and that the Attorney General "shall" take action to enforce the lien. As currently worded, these entities are "authorized and directed" to perform these functions. This wording change does not make a substantive change to the law.

Section 2 amends s. 960.291, F.S., to revise definitions governing the law on civil restitution for victims and the state and local governments. It conforms the definition of "conviction" to the definition created in s. 944.512, F.S. It revises the definition of "real or personal property" to reflect the expansion of the notoriety for profit law to the profits derived from the sale of memorabilia.

The bill provides an effective date of July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill implicates the First Amendment right of expression (speech and publication). In the only U.S. Supreme Court case dealing with a Son of Sam law, the Court found the law to be unconstitutional in 1991. This opinion is the standard by which all other similar laws have been reviewed. See *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 112 S. Ct. 501 (1991). Although the right of expression is a fundamental right, it is not an absolute right. However, if the law attempts to regulate the content of the speech, no matter how offensive or undesirable, then the law triggers a strict scrutiny standard of review. Under this standard of review, the state bears the burden of satisfying a compelling state interest and achieving this interest in the least intrusive manner or narrowly tailoring the law to achieve the stated interest.

The Court in *Simon & Schuster* determined that the New York Son of Sam law targeted speech-related activities but it accepted New York's compelling interests in prohibiting criminals from commercially and financially exploiting their crimes and in compensating victims if criminals did profit from their crimes. However, the Court struck down the country's first Son of Sam law as content-based legislation because it failed to be narrowly drawn to serve the state's interests. The New York law targeted all accounts of crimes (books, movies, interviews) and applied whether the person had ever been accused, charged or convicted, and whether the reference to the crime was tangential or incidental. Books written by 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. Since many states' Son of Sam laws were similarly patterned after the New York law, some states revised their laws to address constitutional concerns but met with limited degrees of success. See *Keenan v. Superior Court*, 40 P.3d 718 (Cal. 2002). (California court struck down the law as it permitted confiscation of all funds received from speech or expression on any theme or subject which includes the story of the crime which has "the effect of discouraging the creation and dissemination of a wide range of ideas and express works which have little or no relationship to the exploitation of one's criminal misdeeds.")

Under Florida law, the state's lien and right to recover is contingent upon conviction. Therefore, no temporary injunction or prior restraint can be made on sales until the person is convicted. The courts have not ruled on the issue of whether Florida's law is narrowly tailored to achieve the compelling state interest.² This bill revises the current

² Only two cases have construed the anti-profit statute (s. 944.512, F.S.). The first case involved *Rolling v. State*, 630 So.2d 635 (Fla. 1st DCA 1994) in which the state sought to restrain (before Rollings' conviction) the disbursement of proceeds from Rollings' account of the crimes he committed. The court ruled the injunction impermissible for reasons other than constitutionality. In the second case, *Rolling v. State*, 741 So.2d 627 (Fla. 1st DCA 1999), the state sought to enforce a lien on the convicted felon's profits under the antiprofit law and the civil restitution law. The court upheld the lien under the civil restitution law without ruling on the constitutionality of the anti-profit law. Notably, the parties did not address the validity of the lien obtained under the civil restitution law in their briefs.

law which imposes financial disincentives on speech-related or expressive types of activities that otherwise may chill the legitimate academic and commercial flow and exchange of information. The bill provides a qualifying exception for media and other First Amendment activities. Nevertheless, the bill does not change current law which permits a lien on all income derived from the sale or transfer relating to the crime for literary, cinematic, or other account purposes.

Although lien provisions relating to the memorabilia appear to apply only to the profits from the sale or transfer of such items, it could be construed as overinclusive because it includes all income received from anything sold or transferred including any right or memorabilia, the value of which is enhanced by the convicted felon's notoriety arising from the crime committed. The bill does exclude incidental or tangential references to the story of the crime that would otherwise subject the proceeds to a lien. Since there is no statute of limitations period, and the law applies to a representative (legal, designated or otherwise) of the convicted felon, the law could also be construed to reach any sale by an estate or descendent of a convicted felon.

The bill may also be unconstitutionally vague. A statute is void for vagueness when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited and, thus, invites arbitrary and discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The void for vagueness doctrine prohibits enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *See United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)); *see also State v. Wershow*, 343 So.2d 605 (Fla.1977). The bill carves out exceptions for media reporting on the felon or the sale of anything belonging to the felon, for a seller exercising his or her First Amendment rights, or for whomever is selling constitutionally protected expressive works unless for commercial or speculative purposes. Under the latter two exceptions, the person risks civil liability for failing to know what are unprotected and constitutionally protected activities until the state attempts to enforce a lien on the sale, settlement, gift, or transfer. Additionally, it is unclear what other purposes may underlie a sale, gift, settlement, or transfer other than for commercial or speculative purposes, even if it involves a museum or legitimate academic collector of crime-related artifacts.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

If enacted, the law may deter convicted felons and other representatives from further profiteering and exploitation of victims. The bill could also deter third-parties who have no personal or transactional relationship (e.g., witnesses, nonbrokers, academic collectors, or history curators, etc.) with the convicted felon or crime from engaging in

markets for the sale of a convicted felon's memorabilia, other tangible material, property, any right, or any other thing, regardless of its direct connection to the crime committed but whose value is enhanced by the notoriety gained from conviction for commission of a felony.

C. Government Sector Impact:

Little enforcement data is available regarding the notoriety for profit law and the civil restitution law. According to the Department of Legal Affairs, the only well-known case involved a recovery of \$17,000 in the Danny Rollings' case which was used to construct a victim memorial in Gainesville, Florida. It is unknown to what extent the Attorney General could exercise jurisdictional authority to enforce notoriety for profit law provisions in cases involving Internet sales by third-parties who are capitalizing on the notoriety of the criminal offender but without any relation, connection, or benefit to the criminal offender.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The existing statute applies to "proceeds," while the new lien on memorabilia applies to "profits." Although the definition of "profits from the sale of memorabilia" refers to "all income received from the sale or transfer" of memorabilia, the use of "profit" arguably creates an ambiguity. This may cause more difficulty in enforcing the lien because felons, their representatives, and profiteers can be expected to assert that procurement, transaction, and other costs must be deducted in order to determine profit.

VIII. Amendments:

1 by Criminal Justice:

The amendment restores the current language stating that the Department of Legal Affairs is "authorized and directed" to take action to enforce the lien.