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## Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501 (1991)

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## CASE SUMMARIES

### **Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,** *112 S.Ct. 501 (1991).*

#### **Introduction**

The plaintiff, Simon & Schuster, Inc., brought suit against members of the New York State Crime Victims Board seeking an order declaring New York's 'Son of Sam' statute violative of the First and Fourteenth Amendments. The Supreme Court held that: (1) the Son of Sam statute was presumptively inconsistent with the First Amendment;<sup>1</sup> and (2) the statute was not narrowly tailored to achieve the state's interest in compensating victims of crime.<sup>2</sup>

#### **Facts**

New York's Son of Sam law was enacted in response to the publicity surrounding serial killer David Berkowitz, known in the media as the 'Son of Sam', in the summer of 1977. By the time of his capture, the rights to his story were worth a considerable amount. The New York legislature was outraged that Berkowitz would profit handsomely for his crimes, while the victims went uncompensated. Thus, the legislature enacted N.Y. Exec. Law §632-a, the Son of Sam statute.<sup>3</sup>

Under the Son of Sam law, any entity who contracts with an accused or convicted criminal for the depiction of a crime must submit to the Crime Victims Board a copy of the contract, and furthermore, relinquish any monies under the contract to the Board.<sup>4</sup> The Board deposits the money promptly into an escrow account. Then, any victim who receives a money judgment in a civil action against the accused or convicted criminal within five years from the date the account is established may receive money from the account. The account is also available to pay the accused or convicted criminal's creditors. The term 'person convicted of a crime' is defined broadly and applies even to those persons who are never accused or convicted of a crime, but who admit to committing a crime in a book or other work. Most often, the statute has been enforced against persons who have committed highly publicized crimes. Ironically, the statute was never enforced against David Berkowitz.

Henry Hill was arrested and convicted in 1980. He received immunity from prosecution by testifying against several former colleagues and has since

entered the Federal Witness Protection program. In August 1981, Hill entered into a book contract with author Nicholas Pileggi. The following month, Simon & Schuster entered into a publishing agreement with Hill and Pileggi, under which both Hill and Pileggi would receive payments. The result was *Wiseguy: Life in a Mafia Family*. In the book, Hill recounts his involvement in numerous criminal activities covering a span of twenty-five years in one of America's mafia families. The book was a commercial success, with more than a million copies in print, and was later converted into the film *Goodfellas*.

On January 31, 1986, the Crime Victims Board notified Simon & Schuster that the publishing company had violated the Son of Sam statute. The Board ordered Simon & Schuster to provide them with copies of all contracts with Hill and to turn over to the Board any monies payable to Hill in the future. The Board also ordered Hill to turn over all payments which he had already received. Simon & Schuster complied with the Board's order, then filed suit in August 1987 claiming the Son of Sam law violated the First Amendment. Simon & Schuster sought an injunction barring the statute's enforcement. The District Court entered judgment for the Board, finding the statute consistent with the First Amendment. A divided Court of Appeals affirmed. On writ of certiorari, the Supreme Court reversed.

#### **Legal Analysis**

The Court found the Son of Sam statute violated the First Amendment. First, the Court examined whether the Son of Sam law established a financial disincentive to create or publish works with a particular content; a presumptive violation of the First Amendment. The Court reiterated its prior ruling that a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."<sup>5</sup> The Court found the Son of Sam law was such a content-based statute. It placed a burden on income derived from the expressive activity of the accused or convicted criminal without placing a similar burden on other sources of that person's income.<sup>6</sup> Also, the law was directed at works with a specific content.<sup>7</sup> The effect of the statute was inconsistent with the First Amendment principle that government may not use its powers to drive certain speech from the marketplace of ideas.<sup>8</sup>

The Crime Board unsuccessfully advanced three arguments in favor of its position. The Board first

argued that the statute did not result in discriminatory financial treatment; thus seeking to distinguish the Son of Sam statute from the discriminatory tax in *Arkansas Writers' Project*.<sup>9</sup> The Court discounted this argument because the Son of Sam law created a financial disincentive to speak for those who had been accused or convicted of crimes. Escrowing all the speaker's speech-derived income rather than taxing only a percentage, as in *Arkansas Writers' Project*, did not save the statute. The Board's actions were held to be discriminatory.<sup>10</sup> Next, the Board argued that discriminatory financial treatment would be violative of the First Amendment only when the legislature was attempting to censor ideas. The Court dismissed this argument, holding that legislative intent is not determinative of whether a statute violates the First Amendment.<sup>11</sup> Finally, the Board argued that "even if the First Amendment prohibits content-based financial regulation specifically of the media, the Son of Sam law is different because it imposes a general burden on any 'entity' contracting with a convicted person to transmit that person's speech."<sup>12</sup> This argument was also found insufficient. Any 'entity' that entered into a contract subject to the Son of Sam statute was likely to be a medium of communication. Furthermore, the power to impose content-based financial disincentives on speech does not depend on the identity of the speaker.<sup>13</sup>

Having found that the Son of Sam law established a financial disincentive to create or publish works with a particular content, the statute could survive only if the state could show a compelling government interest and prove the statute was narrowly tailored to achieve that end.<sup>14</sup> The Court agreed that the State had a compelling government interest in seeing that victims of crime are compensated and that criminals do not profit from their crimes. However, the Board attempted to define the state's interest more narrowly, claiming that the state had an 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."<sup>15</sup> This interest was not compelling.<sup>16</sup> Although the state had an interest in compensating victims from the fruits of a crime, the state did not have an interest in limiting that compensation to profits from the subsequent expressive activity of the accused or convicted criminal.<sup>17</sup>

Finally, the Son of Sam statute was not narrowly tailored. In fact, it was "significantly overinclusive."<sup>18</sup> The statute was overinclusive for two reasons. First, the Son of Sam law applies to any work

the author might produce which even incidentally mentions the author's past wrongdoings. Second, the broad definition of 'person' within the statute causes it to apply to any author who mentions participation in wrongdoing, whether or not the author was actually accused or convicted of the crime. This could cause ridiculous results. The Court listed as examples works by David Thoreau, Emma Goldman, and Dr. Martin Luther King, Jr., all of which included acts of civil disobedience.<sup>19</sup> These works would fall within the scope of the Son of Sam statute because they mentioned the author's participation in acts of wrongdoing. Yet, to include these works within the statute's scope would not further the goals of the statute. In light of such potential results, the Court held the statute was not narrowly tailored to achieve the state's objective of compensating victims from the profits of crime.<sup>20</sup>

## Conclusion

In summary, the Court found New York's Son of Sam law presumptively inconsistent with the First Amendment.<sup>21</sup> Furthermore, it was not narrowly tailored to achieve a compelling state interest.<sup>22</sup> However, noting that many states have similar laws, the Court limited its holding to the New York law at issue without deciding the constitutionality of other similar state laws. Recognizing that many states will look to the Court's holding to formulate or reformulate their own statutes, Justice Kennedy in his concurrence stated his belief that the statute was violative of the First Amendment on its face and that inquiry into the government interest was unnecessary. In his opinion, Justice Kennedy thought it ill-advised to give the states reason to believe that such speech might be regulated if a compelling government interest was advanced which was narrowly tailored.<sup>23</sup> Ω

Gina Calabro

1. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991).

2. *Id.*

3. *Id.* at 504.

4. *Id.*

5. *Id.* at 507 (quoting *Leathers v. Medlock*, 111 S.Ct. 1438 (1991)).

6. *Id.* at 508.

7. *Id.*

8. *Id.*

9. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

10. 112 S.Ct. at 508.

11. *Id.* at 509.

12. *Id.*

13. *Id.*

14. *Id.*