

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.)

Prepared By: Judiciary Committee

BILL: SB 562

INTRODUCER: Senator Fasano

SUBJECT: Literary Accounts/Memorabilia/Sales

DATE: January 24, 2006

REVISED: 01/26/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Chinn</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/3 amendments</u>
2.	<u></u>	<u></u>	<u>CJ</u>	<u></u>
3.	<u></u>	<u></u>	<u></u>	<u></u>
4.	<u></u>	<u></u>	<u></u>	<u></u>
5.	<u></u>	<u></u>	<u></u>	<u></u>
6.	<u></u>	<u></u>	<u></u>	<u></u>

Please see last section for Summary of Amendments

Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill extends current authority for state liens on the literary proceeds of convicted felons to include proceeds from the sale of memorabilia. This bill also broadens state liens on profits accruing to a convicted felon to include that of a representative of a convicted felon. Real or personal property currently subject to a civil restitution lien is extended to include profits from the sale of memorabilia.

This bill substantially amends sections 944.512 and 960.291, Florida Statutes.

II. Present Situation:

Marketability of Criminal Notoriety

There have been numerous high-profile cases that involved a person convicted of a crime entering into a book or movie deal, with payment given as consideration in exchange for the rights to the story of the crime(s). These can be classified as speech-related activities. Additionally, in recent decades, a market has emerged for non-speech-related objects that are associated with crime, especially murder, so much so that the items are commonly coined as

“murderabilia.” These include such items as murderer trading cards or figurines, letters, paintings, and even hair and fingernail clippings from convicted murderers.¹

¹ Tracey B. Cobb, *Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 Hous. L. Rev. 1483, 1503-1504 (2003).

The Origin of the Son of Sam Law

From 1976 through 1977, David Berkowitz committed numerous murders in New York City. He came to be known as the serial killer the “Son of Sam” for the alias he used in signing letters to the police and media prior to his arrest.² In 1977, the New York Legislature enacted a notoriety-for-profit statute, the first of its kind in the nation, in response to the sale of David Berkowitz’s story to a publisher.³ This statute, commonly known as the Son of Sam Law, required any entity contracting with an accused or convicted person to forward that contract, as well as any income generated through that contract, to a victim’s board, which would subsequently distribute the funds to victims of that person.⁴

The original New York law was applied just 10 times.⁵ Ironically, the law never applied in the case of David Berkowitz.⁶ In 1991, New York’s Son of Sam law was overturned by the U.S. Supreme Court in the case of *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*.⁷ In this case, the state victim’s board ordered a publishing house to turn over its contract for the rights to an infamous organized crime figure’s story.⁸ The Court classified the regulation as content-based, thereby triggering a strict-scrutiny analysis.⁹ Although the state could prove a compelling state interest, the Court held, it failed to show that the law was narrowly tailored to achieve its objective. Specifically, the Court determined the law to be significantly overinclusive, as it applied to works on any subject that express the author’s thoughts or recollections about his or her crime, whether or not it is tangential. By way of example, the Court indicated that had the law been in effect at various times in history:

it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*....¹⁰

Conversely, the Court indicated that a regulation would be content neutral where it was “intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others.”¹¹ As such, the regulation would be subject to a lower level of scrutiny.¹²

² Jessica Yager, *Investigating New York’s 2001 Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. Sch. L. Rev. 433, 438 (2003-2004).

³ *Id.*

⁴ N.Y. Exec. Law s. 632-a.

⁵ Yager, *supra* note 2, at 439.

⁶ Kathleen Howe, *Is Free Speech Too High a Price to Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 Loy. L.A. Ent. L. Rev. 341, 345 (2004).

⁷ 502 U.S. 105, 112 S.Ct. 501 (1991).

⁸ Howe, *supra* note 6, at 346; the subject of the book is Henry Hill, whose story was eventually memorialized in the film “*Wiseguy: Life in a Mafia Family*.”

⁹ *Simon v. Schuster, Inc.*, 502 U.S. at 118.

¹⁰ *Id.* at 121.

¹¹ *Id.* at 122.

¹² Howe, *supra* note 6, at 367.

Other Notoriety-for-Profit Laws

After the law passed in New York, other jurisdictions followed suit, resulting in 47 states enacting Son of Sam laws, as well as Congress.¹³ New Hampshire, North Carolina, and Vermont do not have Son of Sam laws.¹⁴ Additionally, Son of Sam laws have been repealed and not replaced in seven states.¹⁵ Therefore, 40 states currently have notoriety-for-profit laws.¹⁶

Following the *Simon & Schuster* decision, many states amended their Son of Sam laws in attempts to meet the U.S. Supreme Court's requirement that they be narrowly tailored.¹⁷ Although a few states have had their laws challenged, none of these cases has reached the U.S. Supreme Court.¹⁸

Twenty-one states apply their Son of Sam laws to those accused of, as well as convicted of, crimes. Seventeen states limit application to people who are actually convicted of crimes. While the majority of states apply the law to all crimes, eight states limit the law to felonies. Connecticut limits applicability to profits resulting from crimes of violence. In Wisconsin, applicability is limited to money received from the commission of serious crimes, as defined by state criminal code.¹⁹

Many states grant standing to victims for civil actions grounded in tort, and others extend existing authority through general restitution/reparation law.²⁰ In the case of tort actions, in 26 states the statute of limitations is extended to begin to run on the date when the targeted funds are discovered or an escrow account for these funds is created.²¹ Additionally, some states limit recovery to profits from a crime, while others broaden recovery to include all funds or assets of a convicted person.²²

Some other states have had their notoriety-for-profit laws challenged, and, again, none of these cases has reached the U.S. Supreme Court. Although other courts have routinely reiterated that it is a commendable goal for the state to prevent criminals from profiting from the notoriety of their crimes, "the protection of offensive and disagreeable ideas is at the core of the First Amendment."²³

¹³ Yager, *supra* note 2, at 457-458.

¹⁴ *Id.* at 457.

¹⁵ *Id.* at 458; these are: Illinois, Louisiana, Massachusetts, Missouri, Nevada, Texas, and California.

¹⁶ *Id.*

¹⁷ Howe, *supra* note 6, at 350.

¹⁸ *Id.* Laws that have been challenged include those in New York, California, Maryland, Washington, and Florida.

¹⁹ Yager, *supra* note 2, at 465-466.

²⁰ *Id.* at 459-460.

²¹ *Id.* at 458-459.

²² *Id.* at 462.

²³ Roy Whitehead and Walter Block, *Taking the Assets of Criminals to Compensate Victims of Violence: A Legal and Philosophical Approach*, 5 J.L. Soc'y 229, 235 (2003).

Florida Statutory Law

Son of Sam Law

Florida's law is based on a general restitution theory, rather than through creation of an action in tort. Section 944.512(1), F.S., provides for a state lien for the following:

royalties, commissions, proceeds of sale, or any other thing of value payable to or accruing to a convicted felon or a person on her or his behalf, including any person to whom the proceeds may be transferred or assigned by gift or otherwise, from any literary, cinematic, or other account of the crime for which she or he was convicted.

Convictions are defined as guilty verdicts by a judge or jury, or a guilty or nolo contendere plea by the defendant, whether or not there is an adjudication of guilt.²⁴ The lien attaches at the time of conviction in either county or circuit court.²⁵ Where the case is appealed, monies are required to be held in the Revolving Escrow Trust Fund of the Department of Legal Affairs until the case is resolved.²⁶

Monies are required to be distributed in the following order:

- Dependents of the convicted felon receive 25 percent, and, where there are no dependents, this percentage is distributed to the Crimes Compensation Trust Fund to be awarded to crime victims.
- Victim(s) of the crime or their dependents receive 25 percent up to the extent of their damages as decided by the court in a lien enforcement proceeding. Where there are no victims or dependents, or if their damages are less than 25 percent of the proceeds, this portion or its balance is distributed to the Crimes Compensation Trust Fund.
- After payment is made for the above, court costs shall be determined and certified by the prosecuting attorney to include jury fees and expenses, court reporter fees, and reasonable per diem for attorneys prosecuting on behalf of the state, along with costs of imprisonment, to be deposited into the state's General Revenue Fund.
- Any amount remaining is to be forwarded to the Crimes Compensation Trust Fund.²⁷

Civil Restitution

Additional authority for civil restitution appears in statute, and is supplemental to other forms of restitution available to a lienholder.²⁸ The subject of the civil restitution lien is any real or personal property of the convicted offender owned at the time of conviction.²⁹ Where this does

²⁴ Section 944.512(1), F.S.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 944.512(2), F.S.

²⁸ Section 960.295, F.S.

²⁹ Section 960.294(1), F.S.

not satisfy the full amount of the lien, the lien may also attach to any real or personal property that the offender takes possession of after conviction.³⁰ Real or personal property includes:

any real or personal property owned by the convicted offender, or that a person possesses on the convicted offender's behalf, including, but not limited to, any royalties, commissions, proceeds of sale, or any other thing of value accruing to the convicted offender, or a person on the convicted offender's behalf. The term...specifically includes any financial settlement or court award payable or accruing to a convicted offender or to a person on behalf of the convicted offender.³¹

The convicted offender's homestead is excepted from attachment by lien, consistent with s. 4, Art. X of the State Constitution.³²

Florida Case Law

Florida's Son of Sam law has rarely been litigated. In *Rolling v. State ex rel. Butterworth*,³³ a temporary injunction was placed on the accused's proceeds from the recounting of his crimes. As there is no authority in law for a temporary injunction prior to conviction, the court ruled the injunction impermissible without reaching appellant's argument that the law poses an improper prior restraint on constitutionally protected speech.³⁴ In 1995, the state again attempted to attach a lien to Danny Rolling's proceeds, which became the subject of a Fifth District Court of Appeal case.³⁵ The court held that as no proceeds existed, no lien came into being.³⁶ Should proceeds arise from the crime in question, the court indicated a lien would attach automatically.³⁷ Again, the court declined to respond to constitutional challenges. Finally, in 1999, the First District Court of Appeal again heard a case involving a lien on the proceeds of Danny Rolling, this time specifically relating to a book detailing his crimes, art, and autographs being marketed by his then-wife.³⁸ Without ruling on the constitutionality of Florida's Son of Sam law, the court found support for the lien in general civil restitution law, including attaching it to the real or personal property of his then-wife, who the court concluded held it on the felon's behalf.³⁹

To date, the courts have not ruled on the constitutionality of Florida's Son of Sam law.

III. Effect of Proposed Changes:

This bill extends current authority for state liens on the literary proceeds of convicted felons to include of the sale of memorabilia.

³⁰ *Id.*

³¹ Section 960.291(7), F.S.

³² *Id.* Section 4, Art. X of the State Constitution provides that a homestead shall be exempted from forced sale and that no judgment, decree, or execution shall be a lien on the homestead.

³³ 630 So. 2d 635 (Fla. 1st DCA 1994).

³⁴ 630 So. 2d 635, 637 (Fla. 1st DCA 1994).

³⁵ *Rolling v. State*, 655 So. 2d 230 (Fla. 5th DCA 1995).

³⁶ *Id.* at 230-231.

³⁷ *Id.* at 231.

³⁸ *Rolling v. State ex rel. Butterworth*, 741 So. 2d 627 (Fla. 1st DCA 1999).

³⁹ *Id.* at 628-629.

This bill defines the following terms:

- A conviction is a finding of guilt or the acceptance of a guilty or nolo contendere plea, regardless of whether adjudication was withheld.
- Materials include a writing, sound or video recording, interview or appearance on a television or radio station, or any live presentation including or based upon the story the felony of which someone was convicted.
- Proceeds of a sale consist of all fees, royalties, commissions, real or personal property, or other consideration received by or owed to a representative of or a convicted felon for preparing or selling materials, the rights to materials, or the sale or distribution of materials, whether earned, accrued, or paid before or after the conviction.
- Profits from the sale of memorabilia means all income received from anything sold or transferred by a convicted felon, a representative of a convicted felon, or a profiteer of a felony, including any right or memorabilia, the value of which is enhanced by the notoriety of the offense, excluding voluntary donations to assist in criminal defense.
- A profiteer of a felony means any person who sells or transfers for consideration any memorabilia or other property or thing of a convicted felon, the value of which is enhanced by the notoriety of the offense, except media reporting or the exercise of constitutional rights through the sale of materials or other expressive work.
- A representative of a convicted felon indicates any person or entity who receives proceeds from the sale of memorabilia by designation, on behalf of, or in the stead of a convicted felon.
- A sale includes the lease, licensure, or any other transfer or alienation in or out of state.
- A story means a depiction, portrayal, or reenactment of a felony and excludes passing mention of a felony, such as in a footnote or bibliography.

Authority for state liens on profits accruing to a convicted felon is extended to include those accruing to a representative of a convicted felon. Under this bill, the state is entitled to liens for literary accounts, as well as memorabilia for a convicted felon, a representative of the convicted felon, or a profiteer of a felony, including any person who will receive profits from the transfer or assignment by gift of the sale of memorabilia. The lien attaches at the time of conviction in circuit court. If the case is appealed, the funds must be held in the Revolving Escrow Trust Fund of the Department of Legal Affairs until resolution of the case.

The proposed language includes conforming changes throughout ss. 944.512 and 960.291, F.S., to coincide with other revisions put forth in the bill.

This bill will take effect July 1, 2006.

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:

The Florida Son of Sam law is a form of content-based restriction, and therefore the law would be subject to strict-scrutiny review if it is challenged under the First Amendment. Statutes in other states have been invalidated in court for being overly broad in their regulation of works related to criminal activities.⁴⁰ The overbreadth doctrine holds that “if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of this chilling effect—even if it also prohibits acts that may legitimately be forbidden.”⁴¹ Under the doctrine, the concern is that a restriction also embraces constitutionally protected speech in its attempt to limit other speech.⁴² As courts have never ruled on the constitutionality of Florida’s Son of Sam law, it is uncertain whether the proposed revisions would affect a challenge based upon First Amendment grounds.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

To the extent that private enterprise profits from memorabilia of convicted felons, this bill may affect this industry’s ability to do so.

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 Rolling’s case, which was used to construct a victim memorial in Gainesville. 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. Therefore, money accruing to the Crimes Compensation Trust Fund and to

⁴⁰ *E.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating state statute); *Keenan v. Superior Court of Los Angeles County*, 40 P. 3d 718 (Cal. 2002), *cert. denied*, 537 U.S. 818 (2002) (invalidating state statute).

⁴¹ BLACK’S LAW DICTIONARY (8th ed. 2004). *See also, City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

⁴² *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

General Revenue could increase from this new source of funding (i.e., profits from memorabilia) but the impact, if any, would likely be minimal.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

Barcode 610766 by Judiciary:

Revises language creating an exception for the sale or transfer of materials protected under the First Amendment of the federal constitution, so that the wording is more consistent in its relation to the definition of “Profiteer of a felony.”

Barcode 211252 by Judiciary:

Revises language creating an exception for the sale or transfer of expressive works protected under the First Amendment of the federal constitution, so that the wording is more consistent in its relation to the definition of “Profiteer of a felony.” The amended language also substitutes the phrase “for the purpose of economic gain” for the phrase “a commercial or speculative purpose,” to more clearly characterize expressive works not falling under the exception created by this provision.

Barcode 411810 by Judiciary:

Adds public defender costs to the costs that may be recovered in association with the prosecution of a convicted felon, so that the language is consistent with other provisions referring to the distribution of funds accruing to the state that are proceeds from the convicted felon’s sale of materials and memorabilia, and financial settlements. Adding the public defenders to this section of the existing statute could increase the amount of reimbursement to General Revenue for the defense of convicted felons who profit from the sale of memorabilia associated with the crimes for which they are convicted.