

THE ADAM WALSH ACT: Step by Step

1. BAIL

a. Treatment Conditions: “*Rehab...I Say No, No, No*”

Challenge sex offender treatment requirements, which are discretionary under 18:3142(c)(1)(B)(x). Pretrial Services’ general counsel agrees that they are questionable on Fifth and potentially Sixth Amendment grounds. *See*:

http://jnet.ao.dcn/Probation_and_Pretrial_Services/Legal_Opinions_and_Articles/Pretrial/Pretrial_Sex_Assessments.html

b. Mandatory Electronic Monitoring: “*I Shall Be Released*”

Challenge electronic monitoring requirements, which are purportedly required but constitutionally suspect. *See* arguments and briefing in *United States v. Crowell*, *slip op.*, No. 06-M-1095 (W.D. N.Y., Dec. 7, 2006), 2006 WL 3541736.

2. DISCOVERY: “*Only You Know and I Know*”

18 U.S.C. §3509(m) purports to try to limit defense access to “any property or material that constitutes child pornography,” including mirror-image copies of computer hard drives seized from our clients, as long as it is “reasonably available” to the defense.

The definition of “reasonably available” was found to ultimately require turning over the hard drive to the defense. *United States v. Knellinger*, *slip op.*, No. 06-CR-126-REP (E.D.Va., Richmond, Jan. 25, 2007), Docket No. 71.

3. SENTENCING PENALTIES: “*The Weight*”

The notable mandatory minimums and increased offense levels (but not including every single change) for sex-offense-related conduct under Adam Walsh.

2A3.1 Sexual Abuse

Base offense level is raised to 38 to accommodate the new statutory mandatory minimum of 30 years under 18 U.S.C. §2241(c) for:

- crossing a state line with intent to have sex with a person under age 12; or
- within federal territorial jurisdiction, having sex with a person under age 12; or
- *with* one of the above jurisdictional hooks, having sex with anyone under 16, where the accused is more than 4 years older than the other one.

The offense level is 30 otherwise.

§2A3.3 Sexual Abuse of a Ward

Offense level is raised to 14 (from 12).

§2A3.4 Abusive Sexual Contact

Offense level is raised to 22 for violations of 18 U.S.C. §2241(a) or (b), and the maximum with the enhancements under 2A3.4(b)(1) is also raised to 22.

2G1.1 Commercial Sex Act w/Adult

The offense level is raised to 34 to accommodate the statutory 15-year mandatory minimum for sex trafficking involving adults using force, fraud, or coercion. 18 U.S.C. §1591(b).

The offense level is 14 otherwise.

2G1.3 Commercial Sex Act/Coercion-Enticement/Transportation of Minors for Same

This raises the offense levels to accommodate new statutory mandatory minimums for sex trafficking with minors under 18 U.S.C. §1591(b) is as follows:

- 15 years if trafficked person is under age 14 (offense level 34)
- 10 years if trafficked person is over 14 and under 18 (offense level 30)
- 10 years if person under age 18 is transported, coerced or enticed, 18:2422(a), 18:2423(a) (offense level is now 28).

2G2.6 Child Exploitation Enterprise

New 18 U.S.C. §2252A(g) sets a statutory mandatory minimum of 20 years for:

- 3+ *separate* incidents of child exploitation -- defined, by reference to chapter, as: federal sex offenses; making, distributing, *or possessing* child porn; trafficking under 18:1591; kidnaping a minor,
- involving >1 victim,
- in concert with 3+ people.

2J1.2 Obstruction of Justice

If a false statement under 18 U.S.C. §1001 deals with a sex offense under 18 U.S.C. §1591, or Chs. 109A-B, 110, 117, a 4-level increase is applied.

4. PSR OBJECTIONS: “*If this be error and upon me proved....*”

We are all urged to get the PSR changed to take out sexual misconduct allegations or details about convictions. This is easier said than done. 18 U.S.C. §3661 places no limitation on the information that may be presented to a court, and relied upon by it, at sentencing.

Here are some ideas only:

- Push the probation officer? The Probation Office’s Publication (or Monograph) 107, The Presentence Investigation Report, says:

“The probation officer should carefully evaluate any allegations about the defendant, particularly when such information cannot be independently verified and is not particularly relevant to sentencing. While the Court may consider a vast amount of information in determining an appropriate sentence, it is important that the probation officer distinguish between information that is factual, inferred, or alleged. The Court is not bound by the Federal Rules of Evidence at sentencing when considering whether a fact has been proven by a preponderance of the evidence, but information should have a ‘sufficient indicia of reliability to support its probable accuracy.’ See, U.S.S.G. §6A1.3, comment.” III-2.
- *Analogize* to cases that apply a clear-and-convincing standard of proof when proposed sentencing increases under the sentencing guidelines have an “extremely disproportionate effect on the sentence relative to the offense of conviction.” See *United States v. Mezas-de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000); *United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006). What could be more “extremely disproportionate” than civil commitment?
- The court should correct inaccurate allegations about the client because the information in the PSI impacts choice of facility, parole eligibility and relationships to various social service agencies on his release. *United States v. Bartholomew*, 974 F.2d 39 (5th Cir. 1992). Being stigmatized and segregated for treatment as a sex offender implicates a liberty interest, *Neal v. Shimoda*, 131 F.3d 318 (9th Cir. 1997).

Also resist over-reaching in the imposition of supervised release conditions. Discretionary supervised release conditions can only be imposed if (1) reasonably related to the nature and circumstances of the offense, to the defendant’s history and characteristics, to the deterrence of further criminal conduct by the defendant, or to the protection of the public from further criminal conduct by the defendant; and (2) they involve no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence, protection of the public, and rehabilitation. *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006).

In these cases, specifically resist:

- Physiological testing in the form of the penile plethysmograph (PPG). *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006).
- Physiological (but not as intrusive) testing by means of the Abel screen. *In re Ready*, 824 N.E.2d 474, 476 (Mass.App. 2005) (rejecting its use at a civil commitment proceeding).
- Medication requirements. *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004).
- Residence restrictions. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), *cert. den.*, 126 S.Ct. 757 (2005), upheld a statutory Iowa residence-restriction for sex offenders, but amicus in that case identified studies that show these restrictions do not increase public safety. Amicus Brief of the Association for Treatment of Sexual Abusers, *Doe v. Miller*, No. 05-428, November 3, 2005 (<http://www.atsa.com/pdfs/AmicusBr-DoevMiller.pdf>, last visited May 3, 2007). Human Rights Watch also has more recently finished a study concluding the same. <http://hrw.org/reports/2007/us0907/>, “No Easy Answers - Sex Offenders in the US.”

5. WHILE YOUR CLIENT IS IN CUSTODY:

a. Placement in a SOMP: “Where or When”

Do what you can to keep up with your client while he is in the Bureau of Prisons, so you can keep track of whether he is given a Public Safety Factor (PSF) as a sex offender. All these clients will be reviewed for civil commitment. He also may be sent to a Sex Offender Management Programs. These are planned for, but not necessarily up and running yet, at:

Petersburg, VA (Low, Medium)
Tucson, AZ (Medium, High)
Devens, MA (FMC)

Butner, NC (Low, Medium I, II, FMC)
Marianna, FL (Medium)

From the AO website for probation officers:

The Certification Review Branch at the Federal Bureau of Prisons is available to assist probation officers with tracking inmates that are in the review process for potential civil commitment pursuant to the Adam Walsh Act. Tony Jimenez, Administrator, has advised that officers may contact his staff directly at 202-307-3570 for information regarding inmates that are being reviewed for potential commitment. Please have the inmate’s register number when you call for an inquiry. If you have any questions please contact Michelle Spidell at 202-502-1617 or Michelle_Spidell@ao.uscourts.gov.

b. Releases for Treatment: “Rehab...I Say No, No, No” - Extended Mix

Clients should generally resist placement for treatment and should not cooperate with the civil commitment evaluation process. This includes not signing any releases of information.

If your client is communicating with you, or if you know he’s going to be subject to civil commitment, it is likely that this process will occur, in the short run, at Butner or Devens. The FPDs there would greatly appreciate your putting together a little package of material about your client for them so they can get a jump on working his case up. *Remember:* he’s being held past his release date.

6. SUPERVISED RELEASE: “Hellhound on My Trail”

If your client is released, fortunately, he’ll be under intensive supervision by the Probation Office, unfortunately.

If treatment has been ordered, the one item of physiological testing that is fairly universal is the polygraph. These generally involve a past-sexual history polygraph, plus so-called “maintenance” polygraphs given periodically. Clients should be advised that they have a Fifth Amendment right to refuse to answer questions asked that would incriminate them during treatment generally. *United States v. Saechao*, 418 F.3d 1073, 1078 (9th Cir. 2005); *United States v. Antelope*, 395 F.3d 1128, 1140-41 & n.5 (9th Cir. 2005).

The Fifth Amendment issues are actually laid out very nicely in the Pretrial Services General Counsel letter noted above.

7. CIVIL COMMITMENT: "Twisted"

1 CLIENT IS IN BOP CUSTODY OF SOME KIND.

2 BOP CERTIFIES PER 18:4247, USAO FILES PETITION, 18:4248(a)

3 C's RELEASE STAYED BY FILING, 18:4248(a)

4 PSYCH EVALUATION OF C PERFORMED, 18:4248(b), IN 30-45 DAYS, WITH NO MORE THAN ONE ADDITIONAL 30-DAY EXTENSION, AFTER PETITION FILED, 18:4247(b)

Any offense, where the BOP believes he "has engaged or attempted to engage in sexually violent conduct or child molestation" (18:4247(a)(5)), making him a sexually dangerous person ("SDP") *at any time*;

No p/c required -- an issue if petition is not based on *convicted* conduct. Briefing available on this topic. Also raise other constitutional challenges here.

Due process challenge available here. A possible issue as to release pending hearing.

C may also get his own evaluation done. Questions: Is there a 5th Amendment privilege here? Don't know. Should civil discovery rules apply? Probably. What experts should we use? Not sure. Should we avoid evaluation? Don't know. *Be sure to talk to lots of people about these issues.*

AND

US v. Comstock, 2007 WL 2588815 (9/7/07)

he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." (18:4247(a)(6)), making him sexually dangerous to others.

"Child molestation" is not defined. A conviction for the conduct is NOT *not* required.

5 HEARING, 18:4247(d), 4248(c)

6 IF SEXUAL DANGEROUSNESS FOUND, AG TO ASK STATE TO TAKE C. IF STATE WON'T, AG TO HOUSE HIM TILL THE STATE WILL, OR TILL HE ISN'T DANGEROUS, 18:4248(d)

7 C MAY SEEK REVIEW AFTER 180 DAYS, 18:4247(h)

8 ONCE C NO LONGER DANGEROUS, BOP TO "PROMPTLY" SO CERTIFY, FOLLOWED BY CONDITIONAL RELEASE, 18:4248(e)

Burden of proof is on gov't and is clear and convincing evidence, 18:4248(d), but on which issues?

...And habeas or §1983 are available as to both the confinement and the conditions of confinement. It is supposed to be in a "suitable facility," 18:4247(a)(2), with treatment.

These parts of the statute are identical to other civil commitment statutes that are constitutional. This supervision may be lifetime. Violation of a treatment order is required before revocation of release may be upheld. *United States v. Woods*, 995 F.2d 894 (9th Cir. 1995).

If client not *convicted* of a sex offense, argue that burden is BRD on *whether C is a SDP*, 18:4247(a)(5), even if the gov't's dangerousness burden, 18:4247(a)(6), is only clear and convincing. F.P.D.s in Butner and Boston have the most up-to-date information and briefing.

**8. Sex Offender Registration & Notification Act (SORNA): “Ball of Confusion”
Effective 7/27/06...or before...or...or...**

(Don't Be Late) Registration

42 U.S.C. §16911

Sets out relevant definitions, including Tier I, II, and III offenses that require registration for varying periods of time; the definition of a “sex offense;” coverage of consensual sexual conduct; the definition of a “registry;” the definition of a “jurisdiction,” setting out the law’s geographic reach.

42 U.S.C. §16913

Imposes requirement of initial registration in each “jurisdiction” in which a person resides, is a student, or is an employee, within three business days after sentencing if not in custody, and *before* release from custody on an offense requiring registration.

Updated registration in person required in at least one applicable jurisdiction within three business days after change of name, residence, employment, or student status.

42 U.S.C. §16914

Sets out information that the person must provide: name; SSN; residence address(es); employment address(es); school address(es); vehicle description and license plate; and any other information added by the Attorney General. The Attorney General has appeared to *add* aliases, internet identifiers, phone numbers, immigration documents, and professional licenses.

Also setting out requirements that the jurisdiction must meet, including photo, fingerprint, DNA, and copy of identification.

Not Fade Away

42 U.S.C. §16915

Setting out the duration for registration:

15 years for Tier I offenses unless clean record for 10 years -- then, 5 years off

25 years for Tier II offenses, no reductions allowed

Life for Tier III offenses unless the offense was one in which client was “adjudicated delinquent” and he maintains a clean record for 25 years -- then, 25 years

Clean record defined as :

no felony conviction;

no sex offense conviction (including misdemeanors);

successful completion of post-sentence supervision or parole; and

completed treatment.

42 U.S.C. §16916

Verification in person:

- Once a year for Tier I
- Every six months for Tier II
- Every three months for Tier III

42 U.S.C. §16917

Duty of notification by an “appropriate official” before release or “immediately after” sentencing where no custody imposed. The person’s signature on a form is required.

42 U.S.C. §16923

Requirement of software development for management of each jurisdiction’s registry and websites.

42 U.S.C. §16924

Implementation deadline is the later of July 27, 2009 or within one year of software becoming “available.” The Attorney General may authorize up to two one-year extensions.

You’ve Changed

The Attorney General’s regulation and subsequently-published “SMART” Guidelines for implementation of SORNA say it applies to persons convicted before 7/27/06, even if they did not have to register for a given offense before under state law, or even if their term of registration under state law had expired. 28 C.F.R. §72.1-3, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007); 72 Fed. Reg. 30210 (May 30, 2007).

If I Had a Hammer

18 U.S.C. §2250

Criminal offense of failure to register. Elements:

- D is required to register under SORNA, or must register for a qualifying federal conviction;
- Travels in interstate or foreign commerce, or enters or leaves or resides in Indian country;
- and
- Knowingly fails to register or update a registration as SORNA requires.

An affirmative defense if

- “Uncontrollable circumstances prevented the individual from complying;”
- He did not “contribute to” those circumstances “in reckless disregard” of the requirement;
- and
- He registered “as soon as” the uncontrollable circumstances “ceased to exist.”

§2250(c): a consecutive five-year mandatory minimum sentence (statutory maximum of 30 years) applies if D “commits” (doesn’t say “is convicted of”) a crime of violence.

18 U.S.C. §2260A

A 10-year mandatory minimum applies if D “commits” a federal kidnaping, almost any federal contact sex offense, and distribution or manufacture of child pornography: violations of 18:1201.

U.S.S.G. §2A3.5 Failure to Register

Base offense levels:

16 for Tier III offenders

14 for Tier II offenders

12 for Tier I offenders

Enhancements:

+6 for also committing a sex offense against someone “other than a minor”

+6 for also committing a felony, non-sex offense against a minor

+8 for also committing a sex offense against a minor

Reduction for:

-3 something close to the affirmative defense set out in the statute

U.S.S.G. §2A3.6 Aggravated Failure to Register

5-year mandatory minimum for §2250(c) and 10-year mandatory minimum for §2260A -- nothing more, nothing less. If more is imposed, it’s an upward departure.

SORNA ISSUES CHECKLIST

Thanks to Defender Services' Amy Baron Evans and Sara Noonan, who have a wonderfully useful Power Point presentation on SORNA -- not to mention the Adam Walsh Act page on the Defender Services website. This chart is a highly simplified version for use as an issue-spotter if your client is charged with the new SORNA crime, a violation of 18 U.S.C. §2250. The AG has tried to regulate many of these issues away. For now, since the law is so new, it's suggested that you raise and do what you can to preserve the appealability of these claims.

- WHAT** kind of conviction is alleged as a predicate requiring your client to register in the first place?
 - Is there a due process challenge (to a foreign or tribal conviction)?
 - Is there a challenge available because it is a juvenile conviction?
 - Was it diverted, expunged, or is there a certificate of rehabilitation under state law?
 - Is it, or isn't it, a Tier I, II, or III offense?

- WHEN**
 - ...was your client **CONVICTED** of the predicate offense?

At this time, most of the defendants have been convicted of the offense requiring registration before the Adam Walsh Act passed, so for now most can raise this ex post facto claim. If the conviction is for an extremely old Tier I or II offense and your client completed that sentence, had a "clean record," and *then* traveled before the Act passed, even the A.G. concedes that the law doesn't apply.

 - ...did your client **TRAVEL**?

There are other important retroactivity claims based on whether/when your client traveled before 7/27/2006, or before the A.G. issued his regulations and guidelines on 2/28/07.

- WHY** should your client **KNOW** he had a duty to register?

If the client's obligation to register for a registerable offense expired under state law before 7/27/06 (enactment), or 2/28/07 (pronouncement of retroactivity), or it wasn't an offense requiring registration before, maybe there is a lack-of-notice claim.

- HOW** does your client **SIGNIFICANTLY BENEFIT** from waiving...
 - an Ex Post Facto claim?
 - a non-delegation claim?
 - a Commerce Clause claim?
 - a due process/lack-of-notice claim?
 - a Travel Act or right-to-travel claim?

...A misdemeanor under 42 U.S.C. §14072(i)?

...A break to probation under the advisory guidelines?

...Dismissal of a mandatory-minimum enhancement? (18:2250(c) or 2260A))

A SORNA CASELAW UPDATE

This is an update. For most of the caselaw, which has been decided between 7/27/06 and 9/1/07, see the Adam Walsh Act page on the Defender Services website. Many of these opinions refer to the earlier caselaw as well.

Granting dismissal on ex post facto grounds

United States v. Wilson, 2007 WL 3046290 (D.Utah, 10/16/07)

United States v. Gill, 2007 WL 2018909 (D.Utah, 10/15/07)

(same judge in these Utah cases)

United States v. Deese, 2007 WL 2778362 (W.D.Okla., 9/21/07)

United States v. Patterson, 2007 WL 2904099 (D.Neb., 9/21/07)

(magistrate recommended dismissal; briefing pending before the district court)

United States v. Cole, 2007 WL 2714111 (S.D.Ill., 9/17/07)

United States v. Stinson, 2007 WL 2580464 (S.D.W.Va., 9/7/07)

United States v. Dillenbeck, 2007 WL 2684838 (D.S.C., 9/7/07)

Here's one with, for some reason, only a Lexis cite:

United States v. Sallee, 2007 U.S. Dist. Lexis 68350 (W.D.Okla., 8/13/07)

Denying dismissal on ex post facto grounds

United States v. Ambert, 2007 WL 2949476 (N.D.Fl., 10/10/07)

(...and on Commerce Clause, right-to-travel, substantive due process -- registry impairs liberty interest -- grounds)

United States v. Mitchell, 2007 WL 2609764 (W.D.Ark., 9/6/07)

United States v. May, 2007 WL 2790388 (S.D.Iowa, 9/24/07)

(and non-delegation doctrine, notice, and Commerce Clause challenges)

Denying dismissal on other grounds

United States v. Lovejoy, 2007 WL 2812681 (D.N.D., 9/28/07)

(non-delegation doctrine, procedural due process/lack of notice, and Commerce Clause challenges)

SEX OFFENDER REGISTRATION & NOTIFICATION ACT: A Retroactivity Chart

DATE	EVENT
7/27/1981	A.G. guidelines: no retroactive application for clients who <i>finish</i> Tier II-offense sentences <i>before</i> this date.
7/27/1991	A.G. guidelines: no retroactive application for clients who <i>finish</i> Tier I-offense sentences <i>before</i> this date.
9/13/1994	Jacob Wetterling Act signed into law: 42:14071-14073 registration requirement, and federal misdemeanor offense for failure to register.
7/27/2006	Adam Walsh Act/SORNA signed into law: 42 U.S.C. §16911 et seq., registration requirement, and 18 U.S.C. §§2250, 2260A, failure-to-register, Class D felony w/10-year maximum.
2/28/2007	A.G. regulation published. Tries to declare the federal registration requirement retroactive; says prosecution allowed under §2250 for pre-SORNA priors. 28 C.F.R. §72.1-3, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007)
5/30/2007	A.G. “guidelines” for registration. 72 Fed. Reg. 30210 (May 30, 2007)
7/27/2008	Software to be ready that enables states to “establish and operate uniform sex offender registries and Internet sites.” 42 U.S.C. §16923
7/27/2009	Implementation by all jurisdictions to be complete; A.G. may give up to two 1-year extensions. 42 U.S.C. 16924

Advisory guideline for failure to register offense under 18 U.S.C. §2250 is U.S.S.G. §2A3.5, effective 11/1/2007. For updates see: <http://www.ojp.usdoj.gov/smart/guidelines.htm> or 72 Fed. Reg. 30210 (May 30, 2007) (sweeping “guidelines” for who must register).

Sentencing Commission says that the failure to register as a violation of supervised release will not apply till the jurisdiction implements SORNA.