

Getting Tough on Sex Offenders: The Adam Walsh Act & Ohio SB 10

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The Adam Walsh Child Protection and Safety Act of 2006, herein (AWA) became law on July 27, 2006, and is likely the most wide-ranging, progressive, and punitive sex offender legislation ever enacted. This legislation responds to public and political concern about sex offenders and recognizes a handful of highly publicized sexual homicides towards child victims including Jacob Wetterling, Jessica Lunsford, Megan Kanka, and Adam Walsh. The State of Ohio's enactment of the AWA is incorporated through Senate Bill 10.



On October 15, 2007, the Office of the Ohio Public Defender, the Ohio Justice & Policy Center, ACLU of Ohio Foundation, and Equal Justice Foundation filed a direct action in the Supreme Court of Ohio, challenging the constitutionality of Senate Bill 10's retroactive application. The complaint asserts that SB 10 violates the ex post facto, double jeopardy, and separation of powers provisions of the Ohio Constitution and the United States Constitution. The purpose of this article is to provide a brief description of some of the significant areas of this new legislation.

Title I of the AWA is referred to as the Sex Offender Registration and Notification Act (SORNA) which creates a national registry of state-convicted sex offenders and essentially is an efficient, uniform, and organized databank enabling law enforcement officers to track their whereabouts. The attorney general of each state is responsible to develop and support software to enable them to establish and operate uniform sex offender registries and Internet registry sites. The Dru Sjodin National Sex Offender Public Website is to be maintained by the U.S. Attorney General and includes relevant information for each offender listed on a jurisdiction's website and make relevant information publicly accessible.

Convicted sex offenders must register prior to their release from prison, and other offenders within three days of a non-imprisonment sentence according to a three tier system: Tier I requires 15 years; 25 years for Tier II, with the most serious offenders (Tier III) registering for life and appearing in person every three months to verify their information. **Table I, following this article, displays Ohio's SB 10 3 classification tier per AWA.**

The SORNA registration and notification requirements will also apply retroactively to all sex offenders despite many who were convicted and labeled before the AWA law's enactment (the bill was signed into law on July 27, 2006). Defendants will challenge this retroactivity under the Ex Post Facto Clause. In essence, to violate the Ex Post Facto Clause, the law must be punitive in nature. In *Smith v. Doe*, the U.S. Supreme Court found that the Alaska legislature's community notification scheme for sex offenders was civil and not punitive or criminal in nature and the objective of the law was to protect the public, which was a legitimate non-punitive governmental aim.

The SORNA automatic registration and publication law attempts to trump many existing state laws that have independently handled their sex offender community notification and registration laws. Simply, SORNA imposes automatic sex offender status, tier classification, and public notification on the Internet based on conviction of an enumerated sex offense, without a hearing to assess risk of recidivism or current/future sexual dangerousness.

Defendants will challenge federal Due Process regarding the fairness of public notification about registered sex offenders without first providing them a hearing to determine if they are currently dangerous. The State of Ohio has its own version of Megan's Law (community notification and registration law-House Bill 180), which has distinguished three classes of sex offenders (sexually oriented offender, habitual sex offender, and sexual predator) based on their likelihood of sexually reoffending, necessitating a risk assessment by a forensic psychologist and/or psychiatrist. In contrast, the AWA does not concern itself with an offender's level of risk; rather it bases its classification system on the severity of the sex offense they committed. Notably, in the field of sex offender risk assessment, severity and heinousness of offense is not consistently or highly correlated and associated with one's risk of future sex offending.

States that fail to conform with the federal guidelines of SORNA within three years will be subject to a 10% reduction of Edward Byrne Memorial Criminal Justice Assistant Grant funds. Offenders who fail to register according to SORNA requirements are also subject to a maximum of 10 years' imprisonment. Further, the AWA amends the Immigration and Nationality Act and designates a failure to register as a sex offender as a deportable offense, and prevents aliens who have committed sex offenses against children from having family-based petitions for citizenship approved unless determined by the Secretary of the Department of Homeland Security.

The new registration and notification also applies to juvenile sex offenders who are at least 14 years of age at the time of the offense and the offense adjudicated is comparable to or more severe than, the federal offense of aggravated sexual abuse. Juveniles are also subject to the same three-tier classification system regarding timeframes, i.e., 15, 25, and life. Juveniles must be subject to registry information available on the Internet and are required to appear in person to verify their address and other registry information and provide a photo. Many are in opposition to this law as it perhaps violates the rehabilitative objectives of juvenile court and handles juvenile offenders similarly to adults. Further, the law does not consider that the pathways and risk of future sex offending for juveniles are much different than for adults and that most juveniles who commit sex offenses during adolescence do not commit them as adults.

The AWA creates new crimes and increases federal jurisdiction over existing federal offenses including child abuse, kidnapping, obscenity, child pornography, use of the Internet to distribute obscenity or drugs, and recordkeeping. The AWA expands kidnapping if the offender used an instrument of interstate commerce during the commission or in furtherance of the crime, even if the kidnapping offense itself occurred intrastate. A defendant may be charged with kidnapping if he utilized the Internet or telephone intrastate during the act of kidnapping. The AWA restructures obscenity laws with the effect of abating the prosecution to have to prove that a defendant transported or sold obscene material.

The AWA creates federal offenses involving the sexual exploitation of children, including the “child exploitation enterprise.” Two new federal offenses require use of the Internet, including the depositing of words or digital images into the source code of a website, with intent to deceive a person into viewing obscene material as well as using the Internet to distribute a date rape drug.



The AWA has enumerated sentencing enhancements for various sex crimes including, but not limited to, crimes of violence against the person of an individual who has not attained the age of 18; sex trafficking; aggravated sexual abuse; sexual abuse; child pornography-related charges; using a misleading domain name on the Internet to deceive a minor into viewing material harmful to minors; and using a minor outside of the U.S. to procure a sexually explicit depiction of a minor with intent to import the depiction of that minor into the U.S.; and failure to report child abuse. The law creates stricter federal punishment for offenders who commit conduct relating to child prostitution.

Section 3509(m) of the AWA mandates that in any criminal proceeding, any material that constitutes child pornography shall remain in the care, custody, and control of the Government, but if the defendant requests to review such material, the Government must make the material reasonably available to the defendant at a government facility. Consequently, the AWA restricts and undermines defense attorneys’ ability to access evidence regarding computer pornography crimes and ultimately affects their ability to prepare for trial.

Challenges on behalf of defendants charged with computer-based sex offenses have been made across the country. Defense attorneys have argued that the evidentiary restrictions imposed by the AWA interfere with defendants’ Due Process and Fair Trial rights. The justification advanced for the passage of the restrictive law is that with each viewing of the images, new harm is perpetrated upon the children depicted in the images. This rationale may be seen as flawed when one considers the fact that various parties including prosecutors, judges, jurors, and court staff may see the images as litigation proceeds.

To date, the only successful challenge to the evidentiary restriction imposed by Section 3509(m) of the AWA occurred in the matter of *United States v. Knellinger*, No. 3:06-CR-126 in the United States District Court for the Eastern District of Virginia. In that case, defense counsel argued that the Defendant could not properly prepare for his trial when caused to prepare under the watch and schedule of the government. Numerous experts from across the country testified that they could not carry out their evidentiary analysis on the Defendant’s computer hard drive under the restrictions created by Section 3509(m). According to the Court, because the government did not make the evidence reasonably available to defense counsel, the government did not provide “ample opportunity” for viewing and inspection of the evidence as required by statute. As such, the Court ordered that a mirror image of the hard drive be turned over to defense counsel for trial preparation.

The AWA also eliminates the statute of limitations for many sex crimes and allows any offender who must register under the SORNA to be subject to searches, without a warrant, by law enforcement and/or probation.

The Federal Bureau of Prisons will be providing both sex offender management and sex offender treatment programs. The BOP is required to provide appropriate treatment to sex offenders who are in need of rehabilitation and who are deemed appropriate for such treatment. Sex offender management programs will monitor sex offenders’ behaviors through the BOP, assessing for inappropriate activity. These programs do not provide sex offender treatment programming.

Historically, the BOP’s only sex offender treatment program at FCI Butner is limited in space. This lack of focus and priority by the Government on the treatment of federal sex offenders will have an impact on the civil commitment of these offenders. Many of the sex offenders who will be petitioned for potential civil commitment may not have been offered sex offender treatment programming during their incarceration, and will only be able to participate after they are found to be commitment eligible.

Accordingly, perhaps the most significant feature of the AWA is the civil commitment statute pursuant to 18 U.S.C. § 4248 (civil commitment of a sexually dangerous person). The AWA’s civil commitment scheme includes two primary objectives:

- 1) Assisting in funding states who do not currently utilize this type of legislation, to establish, enhance, or operate effective civil commitment programs for sexually dangerous persons;
- 2) to mandate the civil commitment of sexually dangerous federal offenders



Currently, 20 states in the union entertain civil commitment statutes confining high risk sexually violent predators after they serve their full prison terms. Many states have continued to reject these civil commitment bills, primarily due to the extraordinary funding they require relevant to the provisions of treatment for this population as well as legal representation and expert witness fees needed to properly evaluate their risk of sexual recidivism. The AWA authorizes grants to states that do not have civil commitment.

Secondly, the Attorney General, or any individual authorized by the Attorney General or the Director of the Bureau of Prisons, may certify any sex offender who is in the custody of the Federal Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241 (d), or against whom all criminal charges have been dismissed solely due to the mental condition of the offender, as a sexually dangerous person. This certificate must be delivered to the clerk of the court for the district in which the person is confined.

A “sexually dangerous person” means that the defendant has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others. The phrase “sexually dangerous to others” means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation if released.

Prior to the civil commitment hearing, which is adversarial in nature, the court may order that a psychiatric and/or psychological examination of the defendant be conducted and the subsequent report(s) be filed with the court. The adversary hearing includes a determination by the court (not by civil jury trial) with the standard of clear and convincing evidence, whether the defendant is a sexually dangerous person. If found to be a sexually dangerous person, the defendant will be committed to the custody of the Attorney General. Before discharge from commitment,

the court shall hold a hearing to determine whether the offender, now a civil respondent, should be released. The legal threshold relevant to release includes proof by a preponderance of the evidence that the individual is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regiment of medical, psychiatric, or psychological care or treatment.

Conclusion

The United States Government recently passed the Adam Walsh Child Protection and Safety Act of 2006, herein Adam Walsh Act (AWA). The law incorporates many facets of a “get tough on sex offenders” national political agenda. The new legislation enacted the Children’s Safety and Violent Crime Reduction Act of 2006 and created a National Sex Offender Registry with uniform standards for the registration of sex offenders. Community notification requirements have expanded to juvenile sex offenders. Classification of all sex offenders is based on a crime-specific tier system rather than a risk assessment/management procedure. The AWA enhances penalties on the most serious sexual crimes against children and attempts to prevent the distribution of child pornography. The statute limits discovery to the defense and supports the civil commitment of high risk federal sex offenders after they have fulfilled their prison sentences.



Adam Walsh