

# Adam Walsh Act: Pretrial Litigation including Pretrial Release and Discovery and Prophylactic Measures to Protect our Clients

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## I. Adam Walsh Act and Pretrial Release

### A. Modifications to 18 U.S.C. § 3142 (Section 216 of the Act)

\*\*\*Note: Act affects more than just sex related offenses

#### 1. Electronic Monitoring Mandatory – See 18 U.S.C. §3142(c)(1)(B).

In any cases that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251(A), 2252(a)(1) , 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii). (Emphasis added).

#### 2. Adds number of offenses for which the court must hold a detention hearing and consider whether conditions of release will reasonably assure appearance and safety of the community and other persons. See 18 U.S.C. § 3142(f)(1)(E).

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other

dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or ...

3. Modifies the factors for the Court to consider in determining conditions of release. See 18 U.S.C. § 3142(g)(1).

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

#### B. Practical Effects of changes

1. Court given more offenses for which it must hold a detention hearing at the request of the government – in other words, list of offenses where presumption of detention exists seems to have expanded
2. Court given new factor it must consider regarding detention – whether offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device  
\*\*\*Note: Plain language implies that felon-in-possession cases are subject to the new language of statute
3. Government has easier time arguing danger when it comes to offenses involving either (a) minor victim, (b) firearms, (c) dangerous weapons, (d) failure to register as a sex offender
4. Electronic Monitoring mandatory if case involves child pornography and sexual exploitation generally, where there is a child victim, or the client is charged with failure to register as a sex offender
  - a. Simple rule: in child porn and sexually explicit material cases, if minimum mandatory 5 years or more applies, EM mandatory

- b. Simple possession cases re child porn and/or sexually explicit material – EM not mandatory but likely to be requested by USPO
  - c. 2 types of EM
    - 1. traditional ankle bracelet hooked up to phone
    - 2. GPS – new monitoring that some jurisdictions already have in place and were specifically developed for these type of cases
5. Additional conditions required include restrictions on personal associations (staying away from locations with children), restrictions on place of abode (may have to find new residence if kids in home or located near school, daycare, etc.), and curfew

### C. Other Conditions sought by USPO

- 1. Warrant-less searches of person, property, computer, papers, etc. – Act DOES NOT specifically create that however USPO/government may argue for it under subparagraph (xiv)(any other condition that is reasonably necessary to assure the ... safety of any other person and the community)
- 2. Child Porn cases – USPO seeks one of the following:
  - a. Client cannot have access to a computer; or,
  - b. Client cannot have access to a computer with internet; or,
  - c. Monitoring of Client's computer
    - 1. Usually must be paid for by client
    - 2. USPO can access any part of computer at anytime
    - 3. 2 methods
      - a. IPPC Impulse control: program loaded onto client's computer and then sends "screen-shots" to company server; USPO can access company server at any time to see what client is viewing/accessing; no record kept on client's computer
      - b. Before/after recording: USPO uses program to take a picture of client's computer in terms of web sites and image files when client begins supervision; USPO then takes second picture at any time during

supervision; compares pictures and new sites are displayed to USPO; program also allows USPO to search for keywords and access links to web sites accessed

3. No contact with children unless supervised/presence by another adult – even one’s own children

D. Challenging Bail Conditions in Court – *See United States v. Crowell, 2006 WL 3541736 (W.D.N.Y. 2006)*

1. Procedural Due Process Argument: Act violates due process by imposing requirements without a predicate finding or individualized assessment by a neutral judicial officer that the conditions are necessary to assure your client’s appearance or the safety of the community
  - a. *United States v. Crowell, 2006 WL 3541736 (W.D.N.Y. 2006)*(“insofar as the Adam Walsh Amendments mandate the imposition of specific conditions for the pretrial release of criminal defendants accused of certain crimes, the Amendments violate procedural due process required by the Fifth Amendment, the separation of powers doctrine, and the Excessive Bail Clause of the Eighth Amendment”)
  - b. *United States v. Salerno, 481 U.S. 739, 749 (1987)*(upholding pretrial detention against due process challenge only because the Bail Reform Act specifically requires individualized assessment and proof of defendant’s dangerousness by clear and convincing evidence)
2. Violation of Separation of Powers Doctrine: *See United States v. Crowell, 2006 WL 3541736 (W.D.N.Y. 2006)*
  - a. Separation of powers violated when Congress requires a rule for the Court to follow without permitting the courts to exercise their judicial powers independently
  - b. Setting of bail has always been recognized as an exercise of judicial power and a part of bail is the conditions that the defendant is subject to
  - c. By imposing a specific rule to be applied based on specified charges denies the judiciary of its right to

exercise its authority to set bail, including conditions of bail – Congress is asking the court to act as its agent and that violates the separation of powers doctrine

3. Eighth Amendment Argument – Excessive Bail Clause: See *United States v. Crowell*, 2006 WL 3541736 (W.D.N.Y. 2006)
  - a. Proposed conditions of release must be compared to the interests the government is trying to protect which include: 1) assuring defendant's appearance at trial, 2) protecting safety of the community, and 3) protecting children from potential sexual abuse and/or sexual exploitation through creation of porn for distribution.
  - b. Imposing these conditions on all defendants based on charges alone – regardless of personal characteristics of defendant and circumstances of the offense or without any consideration that the same objectives the government wants to protect can be achieved with less restrictive release conditions – subjects defendant to excessive bail in violation of Eighth Amendment
  
4. Fourth Amendment Violation – Specifically with regard to request for warrant-less search condition of pretrial release
  - a. Act does not create that specific condition
  - b. *United States v. Scott*, 450 F.3d 863 (9<sup>th</sup> Cir. 2006)(despite defendant's consent, warrant-less searches imposed as a condition of pretrial release requires showing of probable cause)

## II. Discovery after the Adam Walsh Act

### A. Applicable Statutes

#### 1. 18 U.S.C. § 3509(m)

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any

request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or materials by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial

2. Rule 16(a)(1)(e)

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of the these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

B. Challenges to make

1. Request Protective Order from court limiting disclosure and requesting return of copies at the end of the case – consistent with 3509(m)(1) in that the material is still in the care, custody, and control of the court. *See United States v. Butler* (988 F.2d 537 (5<sup>th</sup> Cir. 1993)(with protective order, considered under control of the court)

2. Federal Rule of Criminal Procedure 16: Section 3509(m) essentially nullifies Rule 16 when it comes to child porn and provides for no discovery

*See United States v. Fabrizio*, 341 F.Supp.2d 47 (D. Mass. 2004)(copies of computer images ordered to be produced and turned over to defense to enable investigation into the computer records to establish when and how the images got to the computer, as well as to allow for the defense to recreate the government's analysis)

3. Violates presumption of innocence: already assumes that the material is child porn which is in fact an element of the offense
4. Attorney-Work Product violated
  - a. defense expert known to government – what if defense then chooses not to use expert?
  - b. government agent present when expert doing analysis may reveal defense strategy
  - c. any analysis on computer by expert will leave roadmap for government to view
5. Constitutional challenges – *See United States v. Knellinger*, 471 F.Supp.2d 640 (E.D.Va. 2007)(provisions do not unduly burden defendant's Fifth and Sixth Amendment rights to due process and fair trial, however mirror image of hard drive ordered to be turned over to the defendant because not given ample opportunity to examine hard drive at government facility)
  - a. Violates Due Process: creates an uneven playing field by restricting access to defendants
    1. Costly for use of expert at government facility
    2. Extreme burden to have to view it at government facility
    3. What about the incarcerated defendant? And if he/she wants to proceed pro se?
    4. Can't have meaningful conversation with expert or defendant in presence of government
    5. Almost impossible to review once trial has begun/essentially no access to materials once trial has begun
    6. Right to have expert put at issue
  - b. Violates Sixth Amendment

1. Confrontation Clause: Impedes defendant's ability to confront witnesses and prepare for cross-examination. *See Kentucky v. Stincer*, 482 U.S. 739, 738 n.9 ("rule that precludes a defendant from access to information before trial may hinder that defendant's opportunity for effective cross-examination at trial, and ...such rule equally may violate the Confrontation Clause.")
2. Compulsory Process: Impedes defendant's ability to present own version of the facts
3. Effective Assistance of Counsel: Right to reasonable investigation included within right to have effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984)

C. What defense needs to do from a practical standpoint.

*See United States v. Knellinger*, 471 F.Supp.2d 640 (E.D.Va. 2007)(Defense introduced testimony from one computer forensic expert, two digital video experts, and a trial attorney with extensive experience handling child pornography cases re infeasibility of accomplishing hard drive analysis at government facilities)

1. Absolutely must include an affidavit from your expert with details about what work needs to be done and why it can't be done at the government office.
  - a. include specific details about time and expense
  - b. file ex-parte if necessary
2. Keep journal regarding your experience at the FBI office
  - a. include details re time spent waiting, facilities used, restrictions set
  - b. keep track of anything FBI does while you are there in terms of recording/keeping log of what you and your expert are doing
  - c. keep track of what discovery is available when – sometimes new discovery or materials or programs presented only after your expert was present
  - d. Present to court asking for hearing to request protective order – not given reasonable availability or ample opportunity

3. Don't make it easy for FBI/government
  - a. "reasonable availability" for you and your expert may be evenings and weekends
  - b. request your incarcerated client's presence

### III. Prophylactic Measures – Theme: Control the Flow of Information

- A. If permitted in your District, try to speak with client prior to Pre-trial Services to advise them not to sign releases that may be used to obtain information from anywhere that may have information that is sexual in nature
  1. Release for records at prior state institutions
  2. Psychological records
  3. School records
  4. Hospital Records
- B. Every client's case must be reviewed in terms of the potential for civil commitment
  1. Absolutely must pull all priors and information from prior cases
  2. Have clients sign releases early to obtain records that may include information that is sexual in nature
  3. Advise client early about statements they may make to:
    - a. probation/supervising officer
    - b. Correction officers
    - c. Friends and family over the phone – recorded phone calls
    - d. Any treatment providers, especially mental health treatment providers whether condition of release or not
- C. Pre-Sentence Report (PSR)
  1. You must attend the PSR interview
  2. You must prepare your client for the interview in terms of telling them ahead of time what to discuss/not discuss
  3. DO NOT let them fill out the sexual history questionnaire, either at the interview or take home and complete on his/her own
  4. Reviewing police report – object to inclusion of any hearsay mentioning sex conduct, including police reports
- D. Seriously weigh Pros and Cons of treatment for clients charged with child porn

1. Pro: May be good mitigating factor to present to Judge at time of sentencing
2. Con: If probation obtains access to treatment information, may be used against client in terms of potential for civil commitment  
(Probation obtains access either if they are footing the bill, defense includes it in submission to court, or client signs release giving probation access to it)

Note: *See United States v. Zehntner*, 2007 WL 201106 (N.D.N.Y. 2007)(Defendant participated in mental health program as condition of release and report generated from that treatment; defendant moved to exclude the BOP from using the report in making a determination that defendant is a sexually dangerous person and therefore subjected to civil commitment; Court orders report turned over to BOP because important to identify programs for defendant however defendant retains "...right to assert his Fifth Amendment right at a later time)

E. Preemptive strike re finding of dangerousness at sentencing hearing: When the court makes its findings, request the court to include a finding that your client is not dangerous, especially in child porn cases

1. Familiarize yourself with the literature regarding the risks posed by offenders charged with similar offenses to your clients i.e. child porn lookers with no hands on offenses . *See also* BOP info attached
2. Find out who the experts are in your community in assessing "sexually dangerous persons"
3. Find out who the defense practitioners (most likely state court practitioners) are in your community with experience in defending "sexually dangerous persons", "sexual predators" or whatever they are called in your jurisdiction
4. As part of your sentencing mitigation strategy, consider using experts qualified and experienced in assessing and (testifying) about "sexually dangerous persons"

5. When the court makes its findings, request the court to include a finding that your client is not dangerous, especially in child porn case
  
- F. Must ask Judge to order probation to revise PSR, addendum to PSR insufficient
  - May want to ask Court to collect old PSR's to insure that only the new "revised" PSR is sent to BOP
  
- G. Advise your client about Sex Offender Treatment (SOTP/SOMP) within the BOP
  - As far as SOTP in concerned which is voluntary, advise client NOT TO VOLUNTEER
  
- H. Advise client of likelihood of warrant-less searches by probation while on supervision, whether it be while on probation or supervised release
  - Discretionary condition of probation or supervised release that he submit her person, property, house, residence, vehicle, papers, computer, electronic communications or data storgae devices or media and effects to search at any time, with or without a warrant by any law enforcement officer or probation officer with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct, *See Samson v. California*, 126 S.Ct. 2193 (2006).