

ADAM WALSH ACT:
IMPLEMENTATION, IMPLICATIONS
AND CHALLENGES

*Understanding How the Adam Walsh Act
Changes Pretrial Release*

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What the Adam Walsh Act Means For Pretrial Release

A. *Highlights*

1. Court must now consider “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.”
2. On motion of the government, the court must hold a hearing to determine whether there exist conditions of release that will reasonably assure the person’s appearance and the safety of any person and the community if charged with an offense(s) involving either (a) a minor victim, (b) firearms, (c) dangerous weapons, or (d) the failure to register as a sex offender.
 - The Act does not change the presumption under 18 U.S.C. § 3142(f) for those cases where defendant is charged with a “crime of violence” (*see* 18 U.S.C. § 3156(a)(4) for qualifying offenses) or those offenses under 18 U.S.C. § 3142(f)(1), rather it effectively adds to the list of applicable offenses.
 - Importantly, as it relates to pretrial release, the Act affects more than just sex or child related offenses. Those firearm offenses which do not fall within the definition of a “crime of violence” are subject to this new test.
3. Electronic monitoring as a condition of release is mandatory in cases involving child pornography and sexual exploitation generally, where there is a child victim or the defendant has been charged with the failure to register as a sex offender. No predicate finding that such measures are necessary to assure the defendant’s appearance or safety is required.
4. The Act did *NOT* create a warrant-less search as a condition of pretrial release. But, the Act does allow for warrant-less searches when the defendant is on probation/supervised release.

B. *The Statute – 18 U.S.C. § 3142*

Section 216 of the Adam Walsh Act modifies 18 U.S.C. § 3142 (Release or detention of a defendant pending trial).

Three principal (*i.e.*, intended) changes

1. Electronic monitoring

In any case that involves a minor victim under section [18 U.S.C.] 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 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 in subparagraphs (iv), (v), (vi), (vii), and (viii).* (Emphasis added.)

2. Adds number of offenses to list of those for which court must consider whether conditions of release will reasonably assure appearance and safety of the community and other persons by adding the following language to the statute:

(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 the failure to register under section 2250 of title 18, United States Code; or

3. Modifies 18 U.S.C. § 3142(g)(1) to read as follows:

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;

C. *Practically Speaking*

1. Revised statute provides new factor for the Court to consider regarding detention.

- In the Western District of Wisconsin, government takes the position that the revised statute does *NOT* create a new presumption.
- 2. Government can now better argue danger of the defendant.
- 3. Any case involving a firearm is now subject to revised statute to the extent that the offense conduct was not already a “crime of violence.”
 - *E.g.*, possession of an antique machine gun, 18 U.S.C. § 922(o).
 - Plain language of the statute implies that felon-in-possession is subject to new language. In the Western District of Wisconsin, the government takes the position that this is not the case.
- 4. Electronic Monitoring takes two forms: EMP or GPS
 - (In Western District of Wisconsin) U.S.P.O. evaluates whether release is appropriate on case-by-case basis.
 - If release is found to be appropriate, then if defendant is charged with distribution of child pornography, some sort of electronic monitoring will be used.
 - Where possession of child pornography is charged, electronic monitoring is considered on case-by-case basis.

D. *Challenging Bail Conditions Arising from Adam Walsh Act*

1. Act violates due process by imposing requirements without a predicate finding that the conditions are necessary to assure the defendant’s appearance or the safety of anyone.
 - *See, United States v. Salerno*, 481 U.S. 739, 749 (1987)(upholding pretrial detention against due process challenge only because Bail Reform Act specifically requires individualized assessment and proof of defendant’s dangerousness by clear and convincing evidence).

- *United States v. Crowell*, 2006 WL 3541736 (W.D.N.Y.) In denying the government’s motion to modify the conditions or release in a child pornography distribution prosecution so as to conform the conditions with the requirements of the Adam Walsh Act, the court held that “insofar as the Adam Walsh Amendments mandate the imposition of specific conditions for each Defendant’s pretrial release, the Amendments violate the Excessive Bail Clause of the Eighth Amendment, procedural due process guaranteed by the Fifth Amendment, and the separation of powers doctrine.”

2. Conditions of Pretrial Release Permit Violation Fourth Amendment

- To the extent that the government seeks to interpose a warrant-less search condition of *pretrial release*, such a requirement is not within the Adam Walsh Act.

See, United States v. Scott, 450 F.3d 863 (9th Cir. 2006)(warrant-less searches imposed as a condition of pretrial release requires showing or probable cause, despite defendant’s consent). *Compare Sampson v. California*, __ U.S. __, 126 S.Ct. 2193 (2006)(suspicion-less search of parolee pursuant to written consent does not violate Fourth Amendment).

E. *More Generally, How the Adam Walsh Act Affects U.S. Pretrial Services*

1. Now is the time to raise issues with U.S.P.O.

- No guidance to date by Administrative Office of U.S. Courts.
- Interpretation of Act is still fluid.

2. Other conditions the U.S.P.O. is seeking is guided by the Act

- In child pornography offenses, U.S.P.O. seeks either to monitor computer use or to impose a condition that the defendant not use or possess a computer.

- Internet monitoring: two methods; both can create problems for defendants

- IPPC Impulse control

Cost of \$24/month to defendant (\$10 /month to U.S.P.O.). Payment through PayPal.

Program once loaded onto defendant's computer sends "screen-shots" to company server. U.S.P.O. can then access the company server to see what defendant has been viewing/accessing.

Program does not create a record on defendant's computer.

- Before/after recording

Program used by U.S.P.O. to "take a picture" of what web sites and image files are on computer when defendant begins monitoring/supervision. That "picture" is then compared with a second "picture" taken at any time. Any new sites are then displayed to U.S.P.O. Program also allows U.S.P.O. to search for keywords and access links to web sites accessed.

3. *Pre-Sentence Reports*

Because the Adam Walsh Act makes reference to Sex Offender Management and Treatment Programs, we can expect to see these terms used in Pre-Sentence Report – and used to justify lengthy sentences and/or conditions of supervision.

The Act instructs BOP to make available "appropriate treatment to sex offenders who are in need of and suitable for treatment." See § 622 of the Act (modifying 18 U.S.C. § 3621).

Sex offender management programs monitor the defendant's mail, phone calls and behavior for things that BOP deems inappropriate for someone convicted of a sex crime.

"Management" has no effect on security classification or protection afforded to a susceptible individual within a BOP institution.

"Management" does *NOT* include treatment or counseling.

"Management" is *NOT* "treatment in the most effective manner." See 18 U.S.C. § 3553(a)(2)(D).

— BOP has only one treatment program with 112 beds (FMC Butner, North Carolina).

4. *Supervised Release*

— If a defendant is required to register it is now a discretionary condition of probation or supervised release that he submit his person, property, house, residence, vehicle, papers, computer, electronic communications or data storage devices or media and effects to search at any time, with or without warrant by any law enforcement officer or probation officer with reasonable suspicion concerning a violation fo a condition of probation or supervised release or unlawful conduct.

See Sampson v. California, __ U.S. __, 126 S.Ct. 2193 (2006).

No plans for U.S.P.O. search "squads" in Western District of Wisconsin.