

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

06-CR-291-S

v.

WILLIAM J. SWIAT,

Defendant.

**DEFENDANT'S RESPONSE TO GOVERNMENT'S APPEAL OF MAGISTRATE
JUDGE FOSCHIO'S DECISION AND ORDER**

INTRODUCTION

On December 7, 2006, United States Magistrate Judge Leslie G. Foschio entered a Decision and Order finding recent amendments to the Bail Reform Act of 1984, as set forth in the Adam Walsh Child Protection and Safety Act of 2006, an unconstitutional violation of the Eighth Amendment's Excessive Bail Clause, the Procedural Due Process Clause of the Fifth Amendment and the Separation of Powers doctrine.

For the following reasons, Magistrate Judge Foschio's Decision and Order should be affirmed by this Court.

BACKGROUND

On or about September 28, 2006, the defendant, William John Swiat, was arraigned on a four-count indictment charging him with possessing, receiving and/or distributing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and 2252A(a)(2)(B). These charges

stem from an investigation by the Federal Bureau of Investigation, which culminated in the search of Mr. Swiat's home on January 27, 2006, and resulted in the seizure of, *inter alia*, a computer and Mr. Swiat's alleged confession.

After his arrest on September 28, 2006, a bail hearing was held. The government did not move for pretrial detention as it did not believe Mr. Swiat to be a risk of flight or a danger to the community.¹ At the hearing, Pretrial Services recommended certain conditions of release. The government and the defense agreed to those conditions. Judge Foschio ordered Mr. Swiat released on the following conditions:

1. The defendant shall not commit any offense in violation of federal, state or local law while on release in this case;
2. The defendant shall immediately advise the court, defense counsel and the U.S. Attorney in writing before any change in address and telephone;
3. The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed as directed. The defendant shall appear at United States District Court as directed;
4. The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed;
5. The defendant is placed in the custody of [his mother,] Margaret Swiat;
6. The defendant shall Report to Pretrial Services within 24 hours of release . . . and as directed thereafter;
7. The defendant shall refrain from any use of alcohol;

¹ Had the government believed Mr. Swiat to be a flight risk or a danger, presumably the government would have arrested him more promptly instead of allowing him to remain in the community for nine months after the culmination of their investigation and search of his home.

8. The defendant shall refrain from any use or unlawful possession of a narcotic drug or other controlled substances as defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner;
9. The defendant shall submit to any method of testing required by the pretrial services office or the supervising officer for determining whether the defendant is using a prohibited substance . . . ;
10. The defendant shall participate in a program of inpatient or outpatient substance abuse therapy and counseling approved by pretrial services . . . ;
11. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing required as a condition of release;
12. The defendant shall report within 72 hours, to Pretrial Services any contact with any law enforcement personnel, including, but not limited to, any arrest, questioning, or traffic stop;
13. The defendant shall continue in mental health treatment;
14. The defendant is prohibited from possessing or downloading any child pornography as defined in 18 U.S.C. § 2256;
15. The defendant must provide the U.S. Probation Office advance notification of any computer(s), automated service(s), or connected device(s) that he will use during the term of supervision. The U.S. Probation Office is authorized to install any application as necessary on computer(s) or connected device(s) owned or operated. The U.S. Probation Office shall randomly monitor the defendant's computer(s), connected device(s) and/or storage media. The defendant shall consent to and cooperate with unannounced examinations of any computer equipment owned or used by the defendant, including but not limited to retrieval and copying of all data from the computer(s), connected device(s), storage media, and any internal or external peripherals, and may involve removal of such equipment for the purpose of conducting a more thorough inspection.

See Order Setting Conditions of Release, Dkt. No. 4. As noted, the government did not object to Mr. Swiat's release on these conditions, nor did it appeal Judge Foschio's Order.

On or about October 5, 2006, defense counsel was contacted by United States Pretrial Services and advised that their office was of the opinion that amendments contained in the Adam Walsh Child Protection and Safety Act of 2006, Pub.L.No. 109-248, 120 Stat. 587 (HR 4472),² applied to Mr. Swiat's case. Specifically, Pretrial was of the opinion that the Adam Walsh Act modified the Bail Reform Act of 1984, as codified at 18 U.S.C. § 3141 *et. seq.*, to require certain mandatory conditions of release in child pornography cases. Although not originally imposed, Pretrial Services requested that the following additional conditions be imposed:

1. The defendant shall not travel outside of the Western District of New York, unless court permission is granted to travel elsewhere;
2. The defendant shall not have any contact with minors without the direct supervision of a responsible adult;
3. The defendant will refrain from direct or indirect contact with victim(s), witness(es), or family of victim(s) or witness(es);
4. The defendant shall not possess any firearm, destructive device, or other dangerous weapon; and
5. The defendant will participate in the following home confinement program component and abide by all the requirements of the program which will include electronic monitoring or other location verification system. You shall pay all or part of the cost of the program based on your ability to pay as determined by the officer.

Curfew; you are restricted to your residence everyday as directed by the officer.³

² Hereinafter “Adam Walsh Act,” “the Act” or “Adam Walsh amendments”.

³ In its argument, the government suggests that the only mandatory condition really at issue is the condition requiring a curfew monitored electronically. To be clear, the defendant contests all of the mandatory conditions imposed by the Adam Walsh Act. Oddly, the government also suggests that all other conditions, aside from EMS, are routinely imposed in every case. See Gov. Brief, p. 31. This is not

See Pretrial Services Memorandum, dated October 5, 2006.⁴ At Judge Foschio's request, Pretrial Services contacted defense counsel to inquire whether Mr. Swiat would voluntarily agree to this modification of his conditions of release. The defendant objected to the imposition of the additional conditions on Constitutional grounds and requested a hearing. The defendant argued that the mandatory provisions violated his rights under the Procedural Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment and the Separation of Powers doctrine.

On December 7, 2006, Magistrate Judge Foschio issued a Decision and Order finding that the Adam Walsh amendments to the Bail Reform Act of 1984 were unconstitutional violations of the Excessive Bail Clause, Procedural Due Process and the Separation of Powers doctrine. See United States v. Crowell, et. al., 2006 W.L. 3541736 (W.D.N.Y. Dec. 7, 2006).⁵ On December 20, 2006, the government moved, without opposition, for an extension of time within which to

even remotely true, as evidenced by the Order setting conditions of release in this case (and the two companion cases) where most of the mandatory conditions were not included as conditions of release.

⁴ The Pretrial Services Memorandum actually listed 6 different mandatory conditions. However, the court imposed 1 of the 6 conditions at the bail hearing. Specifically, it directed the defendant to report to Pretrial Services. Because this condition was imposed without objection at a bail hearing where the defendant was given an opportunity to be heard and where the court maintained and exercised its discretion in imposing it, it was not objected to by the defense.

⁵ In addition to Mr. Swiat's case, the same constitutional challenge was raised in two other cases: United States v. Crowell, 06 M 1095, 07 MR 9S (W.D.N.Y.); and, United States v. Bremer, 06 CR 304S (W.D.N.Y.). Judge Foschio's Decision and Order addressed all three defendants, listing Mr. Crowell first. All three decisions are now on appeal to this Court. For simplicity, all references are to the Westlaw cite for United States v. Crowell.

appeal this Decision, which was granted on December 22, 2006. See Dkt. Nos. 16 and 17. On January 22, 2007, the government appealed Judge Foschio's Decision to this Court. See Gov. Brief, Dkt. No. 18.

For the following reasons, the amendments to 18 U.S.C. § 3142, pursuant to the Adam Walsh Act, violate the Constitution of the United States. Judge Foschio's Decision and Order should be affirmed by this Court.

ARGUMENT

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006, which amended, *inter alia*, 18 U.S.C. § 3142(c)(1)(B) to read as follows:

(c) Release on conditions. – (1) If the judicial officer determines that the release described in Section (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

* * * *

(B) subject to the least restrictive further conditions, or a combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

[be subjected to any condition or combination of conditions listed in 3142(c)(1)(B) (i) through (xiv)].

In any case that involves a minor victim under Section 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 at paragraphs (iv), (v), (vi), (vii), and (viii).

18 U.S.C. § 3142(c)(1)(B) (2006)(as amended by the Adam Walsh Act, H.R. 4472, Title II § 216)(underscore added). These mandatory condition are as follows:

- (iv) abide by specified restrictions on personal associations, place of abode, or travel;
- (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
- (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
- (vii) comply with a specified curfew;
- (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon

18 U.S.C. § 3142(c)(1)(B)(iv) - (viii).

The Adam Walsh amendments, requiring the Court to impose the above-referenced conditions of release in every case without any discretion to do otherwise, violate the United States Constitution.

I. The Conditions of Release Mandated by the Adam Walsh Act Violate the Excessive Bail Clause of the Eighth Amendment to the United States Constitution

Magistrate Judge Foschio properly found that the mandatory conditions of release, as dictated by the Adam Walsh Act, violate the Eighth Amendment to the United States Constitution. The Eighth Amendment directs that “excessive bail not be required.” U.S. Const. amend. VIII. This Clause requires bail to be set on an individual basis by the courts and not by

Congress. “[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.” Stack v. Boyle, 342 U.S. 1, 4 (1951)(holding monetary bail set uniformly in a multi-defendant case without individualized consideration violated the Excessive Bail Clause). In resolving a challenge under the Excessive Bail Clause, the Supreme Court has instructed that:

The only substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be “excessive” in light of the perceived evil. Of course, to determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response.

United States v. Salerno, 481 U.S. 739, 754 (1987). Thus, the questions to be weighed by this Court are (1) what government interest is the amendment meant to address, and (2) is the government’s response excessive.

A. There is no Identifiable Government Interest Addressed by the Adam Walsh Amendments to the Bail Reform Act of 1984

Although Congress offered reasons for enacting other provisions of the Adam Walsh Act, it did not offer any reason whatsoever for the amendments to the Bail Reform Act in particular. In enacting Title II, section 216 of the Adam Walsh Act, the section that amended the bail statute, Congress made no findings identifying its rationale for the amendments. See Adam Walsh Act, H.R. 4472, Title II § 216. This is contrary to the government’s assertion that in passing the Adam Walsh amendments set forth above, “Congress made numerous findings . . . significant to the issues raised in this appeal . . .”. See Gov. Brief, at p. 7. In an attempt to fill this void, the government misleadingly refers this Court to the Congressional findings outlined in Title V,

section 501 of the Act, setting them forth at length in their brief. See Gov. Brief p.p. 7-9. These findings by Congress come well after the amendments at issue here and reference provisions of the Adam Walsh Act that enhance statutory penalties for child pornography offenses, and create new offenses. In fact, simply reviewing these findings highlights the fact that not one references, even generally, the pretrial release of the accused. Thus, the “congressional findings” contained in Title V have absolutely nothing to do with the bail statute and are irrelevant to this Court’s inquiry.

Nor does anything in the Congressional record offer a basis for the addition of these mandatory conditions. See Children’s Safety and Violent Crime Reduction Act of 2006, 152 Cong. Rec. S 8012-02 (July 20, 2006), 2006 WL 2034118. Not one of the Senators who spoke on behalf of the Act in total, mentioned these amendments. In its brief, the government misrepresents the comments of Senator Dorgan of North Dakota as providing the rationale for these amendments. See Gov. Brief at p. 18 (“If we send Martha Stewart home with an electronic bracelet on her ankle, we can’t do that to violent sex offenders . . .?”). A closer review of these comments reveal that Senator Dorgan was referencing post-conviction release when he suggested that conditions of release should include electronic monitoring, not pretrial release. See 152 Cong. Rec. S 8012-02, S 8017, 2006 WL 2034118 (Cong. Rec.).

The complete lack of Congressional findings in support of these amendments stands in stark contrast to the Congressional findings made when the Bail Reform Act of 1984, itself, was enacted. In 1984, Congress specifically identified the perceived problem and explained how the

legislation would address its concern. “[It is] the committee’s determination that federal bail law must address the alarming problem of crimes committed by persons on release and must give courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.” S.Rep., No. 98-225, 98th Cong., 1st Sess. 26 (1983), reprinted in 1984 U.S.Cong. & Admin. News 3182, 3187-88. The Supreme Court relied on these Congressional findings in concluding that the Bail Reform Act was constitutional. United States v. Salerno, 481 U.S. 738, 750 (1987).

Accordingly, the defense maintains, that there is no identifiable government interest justifying the Congressional mandate to impose these conditions of release. Since there is no government interest underlying the imposition of these restrictions, any restriction imposed under the Act is excessive.

B. Even if this Court were to Discern a Government Interest Underlying these Amendments, the Government’s Response -- Mandating Conditions of Release in Every Case -- is Excessive

Even if this Court concludes, as Judge Foschio did, that these amendment’s “further advance the public’s valid interest in protecting children from sexual abuse and exploitation through the production or possession of [] pornography. . . .” Crowell 2006 WL 3541736 * 7, the mandates of the Adam Walsh amendments are an excessive response. First, it is unclear how conditions like a travel restriction, limits on associations and confinement to one’s home, actually address this concern, especially where, as here, the offense charged relates to viewing

images on a computer while in one's home. There is no rational relationship between these conditions and the suggested concern. As Judge Foschio properly found:

[T]he imposition of such conditions on all defendants charged with certain crimes, regardless of the personal characteristics of each defendant and circumstances of the offense, without any consideration of factors demonstrating that those same legitimate objectives cannot be achieved with less onerous release conditions, will subject a defendant, for whom such conditions are, in the court's judgment, unnecessary, to excessive bail in violation of the Eighth Amendment.

Id. at * 7.

The government argues, without support, that Congress can dictate the conditions of release for certain offenses without individualized consideration. Specifically, it avers that the Court's role in considering the defendant's individual characteristics is only in determining whether or not he should be released or detained. See Govt. Brief, p. 16 ("However, Magistrate Judge Foschio did in fact consider the personal characteristics of the defendant in reaching the conclusion that the defendant should not be detained, but rather, the defendant should be released from custody"). First, this assertion completely misrepresents the record in this case. The government did not move for detention, so Judge Foschio had no occasion to decide whether or not to detain the defendant. Rather, at arraignment, when asked its position with respect to detention or release, the government agreed to the release of the defendant on the conditions set forth in the Pretrial Services Report. Those conditions did not include the mandatory Adam Walsh conditions. Second, the government's suggestion that United States v. Salerno, supra, supports this proposition, misconstrues the holding of that case.

In Salerno, the Supreme Court addressed the constitutionality of the Bail Reform Act of 1984 under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment. The Bail Reform Act of 1984 authorized the detention of individuals charged with certain serious offenses, not just based on risk of flight, but also based upon potential danger to the community. The now-familiar provisions of that Act allow the government to move to detain an individual charged with certain offenses and the court to order that person's detention after an adversary hearing. The Act also expanded the power of the court to impose greater conditions of release when bail is set.

In interpreting the Bail Reform Act, the Supreme Court found it did not violate the Excessive Bail Clause of the Eighth Amendment because the governmental response to a "perceived evil" was not excessive. Id. at 754. Through the Congressional record, the Court identified the goal of this legislation as addressing Congress' finding that offenders arrested on extremely serious charges ". . . are more likely to be responsible for dangerous acts in the community after arrest." Salerno, 481 U.S. at 750 citing S.Rep. No. 98-225, at 6-7. The Court found that the government's response to this concern was not excessive in violation of the Eighth Amendment because the Bail Reform Act allowed the court to balance these competing interests on an individualized basis:

The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no conditions of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this Congressional determination, based as it is upon that primary concern of every government - a concern for

the safety and, indeed, the lives of its citizens - on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

Salerno, 481 U.S. at 755 (emphasis added).

In drafting the Bail Reform Act of 1984, Congress fully comported with the dictates of the Eighth Amendment. It explicitly recognized that “excessive bail not be required” by including a crucial parsimony clause directing that the accused, when released, be “subject to the least restrictive further conditions, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community” 18 U.S.C. § 3142(c)(1)(B). This clause is still a part of the bail statute, as amended, and stands in complete contrast to the newly enacted mandatory provisions.

Fatally absent from the Adam Walsh amendments to the Bail Reform Act of 1984 are the “numerous procedural safeguards” outlined in Salerno. In the instant case, after holding a bail hearing at which both the government and defendant had an opportunity to be heard, the court concluded that the defendant should be released on conditions that did not include the mandatory conditions. The government not only did not object or appeal this determination, it agreed to it in the first place. As Judge Foschio found, the release conditions required here “were less stringent than those required by the Adam Walsh Amendment. Thus, conditioning defendant’s release [] on the proposed additional conditions as mandated by the amendments would subject defendant [] to excessive bail. Accordingly, the proposed additional conditions of release sought

to be imposed by the terms of the amendments violate the Eighth Amendment’s prohibition against excessive bail.” Crowell, 2000 WL 3541736 *6.

II. The Conditions of Release Mandated by the Adam Walsh Act Violate Defendant’s Right to Procedural Due Process under the Fifth Amendment to the United States Constitution

The Due Process Clause of the Fifth Amendment provides that the government shall not deprive a person of “life, liberty, or property without due process of law.” U.S. Const. amend. V. The concept of due process has both substantive and procedural requirements. The defendant does not argue that the Adam Walsh amendments violate substantive due process. However, even where substantive due process is not at issue, the procedures by which a government action is implemented must be fair and comport with the Due Process Clause. The Second Circuit has recently found that an ex parte, in camera submission by the government during a post-trial bail hearing violated the defendant’s Fifth Amendment right to procedural due process. In so doing, the Circuit noted:

The Supreme Court [in Mathews v. Eldridge, 424 U.S. 319 (1976)] explained that procedural due process is a flexible standard that can vary in different circumstances depending on “the private interest that will be affected by the official action” as compared to “the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process.” . . . A court must carefully balance these competing concerns, analyzing “the risk of an erroneous deprivation’ of the private interest if the process were reduced and the ‘probable value, if any, of additional or substitute safeguards.’”

United States v. Abuhamra, 389 F.3d 309, 318 (2d Cir. 2004)(quoting Hamdi v. Rumsfeld, ___ U.S. ___, 124 S.Ct. 2633, 2646 (2004)(quoting Mathews v. Eldridge, 424 U.S. at 335)).

A. A Person Accused of an Offense has a Fundamental Liberty Interest in Being Free from Unwarranted, Excessive Conditions of Pretrial Release

“It is an established part of our constitutional jurisprudence that the term ‘liberty’ in the Due Process Clause extends beyond freedom from physical restraint . . . [T]he interest denominated as a ‘liberty’ [must not only] be ‘fundamental’ but also . . . an interest traditionally protected by our society.” Michael H. v. Gerald D., 491 U.S. 110, 121-22 (1989) (internal quotations and citations omitted). The question of release or detention under the Bail Reform Act clearly implicates a fundamental liberty interest. United States v. Salerno, *supra*. So, too, do Congressionally mandated conditions of release which grossly restrict the freedom of a person accused, but not convicted, of a crime within the community. See Reno v. Koray, 515 U.S. 50, 56 (1995)(“the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et. seq.*, is the body of law that authorizes federal courts to place presentence restraints on a defendant’s liberty . . .). From this country’s inception, its citizenry has ranked as fundamental the right to be free from unwarranted conditions of release, as evidenced in the Excessive Bail Clause of the Eighth Amendment. U.S. Const. amend. VIII; see also, United States v. Scott, 450 F.3 863 (9th Cir. 2006). In fact, this fundamental liberty interest was engrafted into the Bail Reform Act in the parsimony provision of the Act itself. 18 U.S.C. § 3142(c)(1)(B)(a defendant who is to be released is to be “subject to the least restrictive condition, or combination of conditions . . .”). The mandatory conditions outlined in the Adam Walsh Act -- which include confinement to one’s home for a period of time each day, monitored electronically -- implicate a liberty interest. Accordingly, before such conditions may be imposed, the accused must be afforded due process.

B. Before A Defendant Can be Deprived of this Liberty Interest, the Due Process Clause Requires More than just a Judicial Determination as to Release or Detention of a Defendant

As noted, United States v. Salerno, supra, the Bail Reform Act of 1984 survived both a substantive and procedural challenge under the Due Process Clause of the Fifth Amendment. In upholding the constitutionality of the detention provisions of the Bail Reform Act, the Supreme Court squarely rested its conclusion on the numerous procedural safeguards contained therein:

Nor is the [Bail Reform] Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any persons.

Salerno, 481 U.S. at 750. Despite the government's repeated assertions to the contrary, the mere fact that a person is charged with a crime is not enough; the Constitution requires more. The process required includes: (1) the right to a hearing before a judicial officer; (2) where the defendant is represented by counsel; (3) with the right to testify on his or her own behalf, proffer information and cross-examine witnesses called by the government. Id. at 751-52. Far from mandated, the outcome of a detention hearing is determined by the neutral judicial officer after careful consideration of the delineated statutory factors. Id.; and see Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004)(a U.S. citizen captured on the battlefield and detained as an enemy combatant is entitled to "notice of the factual basis of his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker").

Nor does the fact that the Adam Walsh amendments impact conditions of pretrial release, as opposed to detention, alleviate the constitutional requisite of due process. See Reno v. Koray, supra. The Ninth Circuit recently held that a requirement under Nevada law, that a defendant charged with certain offenses consent to the search of his or her home and to drug testing before he or she will be released, without a hearing before a neutral decisionmaker, violates the Fourth Amendment. United States v. Scott, supra. In Scott, the Ninth Circuit observed:

While the Supreme Court has upheld the constitutionality of pretrial detention on grounds of dangerousness, the Court stressed that the statute it was upholding contained important safeguards, including the requirement that the defendant be accused of a particularly serious crime and that dangerousness be proved to a neutral judicial officer by clear and convincing evidence. . . . Neither Salerno nor any other case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime. To the contrary, Salerno was explicit about what must occur under the Federal Bail Reform Act - beyond arrest - before a pretrial criminal defendant could be detained: "In a full-blown adversary hearing, the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." Salerno, 481 U.S. at 750. Thus, the Supreme Court upheld the constitutionality of a bail system where pretrial defendants could be detained only if the need to detain them was demonstrated on an individualized basis. The arrest alone did not establish defendant's dangerousness; it merely triggered the ability to hold a hearing during which such determination might be made. It follows that if a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by showing that the defendant poses a heightened risk of misbehaving while on bail. The government cannot as it is trying to do in this case, short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required.

United States v. Scott, 450 F.3d at 874 (emphasis added).

The government argues that the only process due a defendant at a bail hearing is a judicial determination on whether or not he or she should be released. Although it cites to Reno v. Koray, supra, in support of its argument, that case has nothing to do with due process. The Court in Koray held that time spent residing at a Community Confinement Center (halfway house) as a condition of pretrial release does not count toward a sentence of imprisonment. In reaching its decision, the Court was not required to analyze the Bail Reform Act against the requirements of procedural due process. Rather, it engaged merely in an analysis of statutory construction and the meaning of the language employed by the various statutes implicated, none of which has any bearing here.⁶

In a further effort to give weight to its baseless claim, the government attempts to convince this Court that the Supreme Court did not address the issue of Procedural Due Process in United States v. Salerno, supra, and that both the defendant's and Judge Foschio's reliance on that decision is misplaced. However, a careful reading of Salerno (indeed, even a cursory reading of it) reveals that the government is mistaken. The Supreme Court specifically acknowledged, in setting forth the standard under which to review the defendant's substantive and procedural due process challenge, that "[w]hen government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a

⁶ If the decision in Koray is of any relevance to this Court's inquiry it would be the Supreme Court's recognition that pretrial conditions of release are a restraint on defendant's liberty, *i.e.*, such conditions implicate a liberty interest. See, supra at II, section A.

fair manner . . . This requirement has traditionally been referred to as ‘procedural’ due process.’”
Salerno, 481 U.S. at 746 (internal citation omitted).

The government attempts to distance itself from the Court’s decision in Salerno for good reason - - it is directly on point in support of defendant’s argument. The Adam Walsh amendments strip the Bail Reform Act of constitutionally required procedural safeguards for defendants accused of certain offenses. The requirements of the Due Process Clause have not been met because the conditions to be imposed have been mandated by Congress in every case, denying the defendant an opportunity for a hearing before a neutral judicial officer empowered with the discretion to choose not to impose them where the court concludes, as it did here, that such conditions are not warranted. As Judge Foschio concluded, after carefully examining the legislative history of the Bail Reform Acts of 1966 and 1984:

The Adam Walsh Amendments’ mandate imposing certain pretrial release conditions, based solely on the nature of the particular crimes charged, directly restricts the judicial discretion . . . which the Supreme Court has recognized as paramount to meet the requirements of procedural due process in the bail-setting process in federal courts.

Crowell, 2006 WL 3541736 at *9, citing Salerno, 481 U.S. at 751.

C. Congress Neither Identified the Government Interest Served by the Adam Walsh Amendments Nor Justified the Need for Less Process in Light of this Interest

As noted, supra, at part I, section A, Congress failed to identify any reason for amending the Bail Reform Act to include these mandatory conditions of release. The government argues that its interest is in “protecting children.” See Gov. Brief p.18. However, there is nothing in the Adam Walsh Act itself or the Congressional Record indicating that the bail statute was amended “to protect children.” Further, the government’s continued reliance on Senator Dorgan’s comments on the Senate floor in support of this aspect of its argument is misplaced and misleading. As noted previously, the government takes Senator Dorgan’s comments completely out of context, as this Court will surely conclude upon review. See 152 Cong. Rec. S 8012-02, S 8017, 2006 WL 2034118 . In fact, when Senator Dorgan’s comments are read in total, it is clear that he is referring to the release of a convict, *i.e.*, post-conviction, to the community after a period of incarceration, not the pretrial release of an accused.

The government also suggests in its brief that it is the dangerousness of the identified class of offenders that justifies the imposition of mandatory conditions of release. Again, this is not a rationale offered by Congress in passing this legislation. Ironically, despite this claimed “inherent dangerousness,” the government did not move to detain the defendant in this case.⁷ Furthermore, it agreed to the conditions recommended by Pretrial Services and did not request any additional conditions to address this so-called dangerousness.

⁷ In fact, the government waited nine months to arrest Mr. Swiat after the search of his computer, during which time he was at liberty in the community, subject to no conditions of supervision.

D. Allowing for a Judicial Determination of the Appropriate Conditions of Release on An Individual Basis Does Not Burden the Government

Since Congress has not actually identified its reasons for requiring these mandatory conditions, it is difficult to assess if they actually serve this unidentified purpose. Assuming *arguendo* that the purpose is to protect children, the government fails to explain why the bail statute, pre-Adam Walsh Amendments, failed to protect children, necessitating these mandatory conditions. The Bail Reform Act already allows the government to move to detain individuals who are truly dangerous to children. 18 U.S.C. § 3142(f)(1). When the government does so move, it benefits from a rebuttable presumption that no condition or combination of conditions will assure the defendant's appearance or safety of the community. 18 U.S.C. § 3142(e). It is the defendant's burden to overcome this presumption. When a court determines that a defendant should be released, there are numerous possible conditions of release that may be imposed to address any specific concern about an individual defendant. 18 U.S.C. § 3142(c)(1)(B)(i) - (xiv).

There is absolutely no additional burden on the government to allow for a judicial determination of whether to impose the now-mandatory conditions. As the government concedes, the Due Process Clause requires a judge to decide in the first instance whether or not to release the defendant. Further, the government agrees that a judge must decide if conditions in addition to the mandatory ones are warranted. Since a hearing must be held with respect to both of these judicial findings, the government suffers no real "burden . . . in providing for greater process. . ." as to the mandatory conditions themselves. Abuhamra, 389 F.3d at 318.

If the government had any specific concerns about this defendant at the time of his arrest, it was free to ask Judge Foschio to include any additional conditions of release it believed warranted. The defendant would have had an opportunity to be heard as to these conditions before their imposition. The government did not do so in this case because additional conditions were simply not warranted. In sum, the Congressional action, mandating conditions of release for a certain class of defendants, is an unjustified deprivation of the defendants' interest in being free from unwarranted and excessive conditions of release as determined by a neutral decisionmaker. "[T]he Amendments, by mandating the imposition of certain pretrial conditions, . . . eliminating an accused's right to an independent judicial determination as to required conditions of release, [is] in violation of the right to procedural due process . . . under the Fifth Amendment." Crowell, 2006 WL 3541736 * 10.

III. The Conditions of Release Mandated by the Adam Walsh Act Violate the Separation of Powers Doctrine Inherent in the United States Constitution

Judge Foschio properly found that the Adam Walsh amendments also violate the Separation of Powers doctrine. The United States Constitution purposely divides governing power among three branches of government: the Executive, the Legislative and the Judiciary. As Justice Brandeis observed, "The doctrine of the separation of powers was adopted [not] to promote efficiency but to preclude the exercise of arbitrary power." Myers v. United States, 272 U.S. 52, 85 (1926); and see THE FEDERALIST, No. 47, at p. 324 (James Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hand, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny."). "[W]ithin our

political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty.” Mistretta v. United States, 488 U.S. 361, 380 (1989).

As Judge Foschio observed:

Under the Constitution, in cases involving the Judicial Branch, the Supreme Court has guarded the separation of powers doctrine by condemning any enactment that “impermissibly threatens the constitutional integrity of the Judicial Branch.” Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986). It is well-established that the separation of powers doctrine is violated when Congress prescribes a rule of decision for courts to follow without permitting courts to exercise their judicial powers independently, including the consideration of relevant evidence. United States v. Klein, 80 U.S. 128, 146-47 (1871).

Crowell, 2006 WL 3541736 *11. The Adam Walsh amendments violate the Separation of Powers doctrine. While Congress has the power to pass legislation addressing conditions of bail, it is the Judiciary that is ultimately charged with the “fixing of bail,” *i.e.*, the determination whether or not an accused shall be released and under what conditions. The Eighth Amendment to the Constitution requires that the Judiciary oversee the imposition of bail on an individualized basis. Stack v. Boyle, *supra*. Judge Foschio concluded that, “the Adam Walsh amendments unmistakably and unduly encroach upon the judicial function, exclusively reserved by Article III of the Constitution to the Judicial Branch, in violation of the separation of powers established by the Constitution’s framework.” Crowell, 2006 WL 3541736 *11.

CONCLUSION

For the foregoing reasons, the Adam Walsh Amendments to the Bail Reform Act of 1984 are unconstitutional. Magistrate Judge Foschio's Decision and Order should be affirmed by this Court.

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/ s/Marianne Mariano

Marianne Mariano
Assistant Federal Defender
300 Pearl Street, Suite 450
Buffalo, New York 14202
(716) 551-3341
marianne_mariano@fd.org

TO: Marie P. Grisanti
Assistant United States Attorney
Western District of New York
138 Delaware Avenue, Federal Centre
Buffalo, New York 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

06-CR-291-S

WILLIAM J. SWIAT,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on **March 7, 2007**, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

Marie P. Grisanti
Assistant United States Attorney
Western District of New York
138 Delaware Avenue, Federal Centre
Buffalo, New York 14202

/s/ Marianne Mariano
Marianne Mariano
Office of the Federal Public Defender