

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

06-M-1095 (LGF)

-vs-

MEMORANDUM OF LAW

ANDREW CHRISTOPHER CROWELL,

Defendant.

INTRODUCTION

For the following reasons, the Adam Walsh amendments to the Bail Reform Act of 1984 are unconstitutional and the proposed modification to defendant's conditions of release cannot be imposed.

BACKGROUND

On or about September 27, 2006, the defendant, Andrew Crowell, made his initial appearance before this Court on a Criminal Complaint charging him with knowingly transporting and shipping or attempting to transport and ship an interstate or foreign commerce child pornography in violation of 18 U.S.C. § 2252(a)(1)(A)(B) and 2252(b)(1). At that time, a bail hearing was held. Pretrial Services recommended certain conditions of release and the government and the defense did not oppose those conditions. This Court ordered Mr. Crowell released on the following conditions:

1. Report to Pretrial Services within 24 hours of release;
2. Execute an Appearance Bond in the amount of \$10,000.00, fully secured;
3. Surrender any passports to the Clerk of the Court;

4. Obtain no new Passport;
5. Travel restriction to the Central District of Illinois and the Western District of New York;
6. Submit to a mental health evaluation and/or treatment as approved by Pretrial Services;
7. Refrain from possessing a firearm, destructive device, or other dangerous weapons; and,
8. Defendant is prohibited from possessing or downloading any child pornography as defined in 18 U.S.C. § 2256 or any analogous state offense.

See Order setting conditions of release, Dkt. No. 4.

Thereafter, defense counsel was contacted by United States Pretrial Services and advised that their office was of the opinion that the Adam Walsh Child Protection and Safety Act of 2006, Pub.L.No. 109-248, 120 S.Ct. 587 (HR4472), applied to Mr. Crowell's case.¹ Specifically, Pretrial is of the opinion that the Adam Walsh Act modified the Bail Reform Act, as codified at 18 U.S.C. § 3142 *et. seq.*, to require certain mandatory conditions in child pornography cases. Although not originally imposed, Pretrial Services has requested that this Court impose the following additional conditions:

1. The defendant shall not have any contact with minors without the direct supervision of a responsible adult;
2. The defendant will refrain from direct or indirect contact with victim(s), witness(es), or family of victim(s) or witness(es); and,
3. The defendant will participate in the following home confinement program component and abide by all the requirements of the program which will

¹ Hereinafter "Adam Walsh Act" or "the Act."

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.

See Pretrial Services Memorandum, dated October 5, 2006.² At the request of the Court, Pretrial Services contacted defense counsel to inquire whether Mr. Crowell would voluntarily agree to this modification of his conditions of release. After further research, defense counsel advised Pretrial Services that a constitutional challenge would be raised to these mandatory provisions and requested a hearing.

On or about October 19, 2006, the parties appeared before this Court for oral argument on the proposed modification. Defendant argued that the mandatory nature of the conditions of release under the Adam Walsh Act violate Mr. Crowell's right under the Fifth Amendment to the United States Constitution to procedural due process. Further, during oral argument, the Court raised the issue of whether or not the enactment violated the Separation of Powers Clause of the Constitution, as well. After consultation on the record with counsel for the government, it was determined that an abbreviated briefing schedule would be entered, so that the Court could fully

² The Pretrial Services Memorandum actually lists 6 different mandatory conditions. This Court has already imposed 3 of the 6 conditions at the bail hearing. Specifically, this Court has already directed the defendant to report to Pretrial Services, has imposed a travel restriction, and has prohibited the possession of any firearm, destructive device or other dangerous weapon. Because those conditions were imposed without objection at a bail hearing where the defendant was given an opportunity to be heard and where the Court maintain and exercised its discretion in imposing them, they are not a part of defendant's objections as outlined herein.

consider the matter and issue a written Decision and Order. Defendant now files this Memorandum of Law as directed by the Court.

For the following reasons, the amendments 18 U.S.C. § 3142 pursuant to the Adam Walsh Act, violate the Constitution of the United States.

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).³

18 U.S.C. § 3142(c)(1)(B) (2006)(as amended)(emphasis added).

This Amendment, if read to require this Court to impose the above-referenced conditions of release in every case without any discretion to do otherwise (but see pt. A, *infra*), violates the United States Constitution and cannot be imposed.

A. If the government advises this Court that these provisions are not mandatory, but rather discretionary, and the Court shares that opinion, then this matter is moot.

On October 19, 2006, at oral argument before this Court, the government suggested that this amendment to Bail Reform Act was not mandatory and that this Court could schedule a hearing and determine whether or not to impose the suggested conditions. Pretrial does not share this opinion. If the Court concludes that these conditions are not mandated, then this issue is moot.

³ These 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

At Mr. Crowell's initial appearance, a bail hearing was actually held. The Court, in its discretion, has already directed that Mr. Crowell be released on certain, specified conditions. The Court imposed these conditions at the time of the bail hearing in its discretion. No other conditions were set at that time and Mr. Crowell has not violated the conditions as imposed by the Court, warranting further modification. If it is the government's position that the amendment enacted by the Adam Walsh Act is not mandatory, then defendant's issue is moot and the condition of release initially imposed should stand without the proposed modifications.

B. The Conditions of Release Mandated by the Adam Walsh Act Violate the 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. V. "It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint. . . . the 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 on citations omitted). The question of release or detention under the Bail Reform clearly implicates a fundamental liberty interest. United States v. Salerno, 481, U.S. 739 (1987). 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. United States v. Scott, 450 F.3d 863 (9th Cir. 2006). From this country's inception, its citizenry has ranked as fundamental the right to be free from unwarranted conditions of release, as evidenced by the Excessive Bail

Clause of the Eighth Amendment. 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.

The United States Supreme Court upheld the constitutionality of the detention provision of the Bail Reform Act of 1984 in United States v. Salerno, *supra*. The Court concluded as follows:

The [Bail Reform] 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 the community which no condition 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 the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

Salerno, 481 U.S. at 754. The Court squarely rested its conclusion that the Act was constitutional on the numerous procedural safeguards:

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 person.

Salerno, 481 U.S. at 750. The mere fact that a person is charged with a crime is not enough, 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 their 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 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”).

The Adam Walsh Amendments strip the Bail Reform Act of these constitutionally required procedural safeguards for defendants accused of certain offense. The requirements of the Due Process Clause have not been met because the condition 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.

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. The Ninth Circuit recently held that a requirement under Nevada law, that a defendant charged with certain offenses, consent to the search of his home and to drug testing before he or she will be released, without a hearing before a neutral decisionmaker, violates the defendant’s due process rights.

United States v. Scott, supra. In Scott, the Ninth Circuit found as follows:

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 requirements 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 bases. The arrest alone did not establish defendant’s dangerousness; it merely triggered the ability to hold a hearing during which such a determination might be made. It follows that if the 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 Adam Walsh amendments violate the Due Process Clause and cannot be enforced.

C. Conditions of Release Mandated by the Adam Walsh Act Violates the Separation of Powers Clause to the United States Constitution.

The 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, 293 (1926); and see THE FEDERALIST No. 47, at 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”).

The Adam Walsh amendments violate the separation of powers doctrine. While Congress has the power to pass legislation addressing conditions of bail, it is Judiciary that is ultimately charged with determining whether or not an accused shall be released and under what conditions. The Eight Amendment to the Constitution requires that the Judiciary oversee the imposition of bail on an individual basis. It commands that “excessive bail not be required,” U.S. Const. Amend. VIII. Thus, monetary bail cannot be set at a figure higher than necessary to reasonable assure a specific individual’s return to court. Stack v. Boyle, 342 U.S. 1, 5 (1951). “[T]he fixing of bail for any **individualized** defendant must be based upon standards relevant to the purpose of assuring the presence of **that** defendant.” Id. at 4 (emphasis added). The same is true for the imposition of any conditions of release. Assessing and setting a reasonable monetary or other conditions of release, in each individual case is the purview of the courts, not the legislature. Congress, by enacting mandatory conditions of release has unconstitutionally encroached upon the power of the Judiciary to oversee “the fixing of bail,” violating the separation of powers doctrine.

D. The Conditions of Release Mandated by the Adam Walsh Act violates the Excessive Bail Clause of the Eighth Amendment to the Constitution.

Again, the Eighth Amendment commands that “excessive bail not be required.” U.S. Const. Amend. VIII. Although the Supreme Court, in Salerno, held that the Bail Reform Act did not violate the Excessive Bail Clause, it so found because the statute allowed for detention after a full-blown hearing regarding the individual accused of a crime. The excesses of bail or condition of release must be made on a case by case basis because the constitution requires such an individualized analysis. Stack v.Boyle, 342 U.S. 1, 5 (1951).

The Adam Walsh amendments on their face violate this Clause by requiring set conditions in every case, stripping the judiciary of the ability to ensure against the imposition of excessive bail by setting condition on an individualized basis. More particularly, in this case, this Court has already assessed and set appropriate conditions of release, conditions which did not include those enumerated above. Any conditions now added based solely on a Congressional mandate, violates this defendant’s right against excessive bail under the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Adam Walsh amendments to the Bail Reform Act of 1984 are unconstitutional and the proposed modification to defendant's conditions of release cannot be imposed.

DATED: Buffalo, New York, October 25, 2006.

/ s/Marianne Mariano

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2006, 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:

1. Allison P. Gioia
Assistant United States Attorney
Western District of New York
138 Delaware Avenue, Federal Centre
Buffalo, New York 14202

And, I hereby certify that I have sent this document via email to the following non-CM/ECF participant(s).

1. n/a

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