

MEMORANDUM

TO: Defenders
 FR: Amy Baron-Evans, Sara Noonan
 RE: Adam Walsh Act - Part I
 DA: October 19, 2006

The Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act” or “Act”) was signed into law on July 27, 2006. It established a complex and onerous national sex offender registry law (which will be the subject of a forthcoming Adam Walsh Act - Part II), and made significant changes to sexual abuse, exploitation and transportation crimes, including creating new substantive crimes, expanding federal jurisdiction over existing crimes, and increasing (often by a factor of two or greater) statutory minimum and/or maximum sentences. The Act did away with the statute of limitations altogether for most sex crimes, placed unfair and unworkable restrictions on discovery in child pornography cases, created new barriers to and strict conditions for pretrial release, added searches without probable cause as a discretionary condition of probation and supervised release for persons required to register as sex

offenders, expanded the government’s authority to take DNA from persons not convicted of any crime, and added a new provision for civil commitment of “sexually dangerous persons.” It also enacted certain victim rights in state prisoner habeas proceedings and a right of sex crime victims to receive damages of \$150,000 in civil actions.



Rep. Mark Foley (R.Fl.), one of the bill’s primary sponsors and (now former) Chair of the House Caucus on Missing and Exploited Children, photographed with Adam Walsh’s father.

This paper gives a brief overview of the Adam Walsh Act and suggests *some* (certainly not all) legal challenges that can be raised to its provisions. The sex offender registry provisions and new offenses for persons required to register under federal or state law will be the subject of a further memo, Adam Walsh Act - Part II, to be distributed shortly. Please let us know of anything we’ve missed or misconstrued, and of any important developments in your cases that might be helpful to others.

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I. Changes to Crimes, Penalties and Procedures

A. New and Expanded Crimes

The Act establishes new crimes or expands federal jurisdiction over existing crimes in nine areas, including child abuse, kidnapping, obscenity, child pornography, use of the Internet to distribute obscenity or drugs, and record-keeping.

1. Expansions of Federal Jurisdiction

Felony Child Abuse and Neglect. The Act adds felony child abuse and neglect to the Major Crimes Act's list of offenses that are subject to federal prosecution when committed by an Indian against the person or property of another Indian or other person "within the Indian country." See 18 U.S.C. § 1153(a). Thus, felony child abuse or neglect within Indian country is now a federal crime, the precise definition and punishment of which depends on the law of the state in which the reservation is located. See 18 U.S.C. § 1153(b).

Like other aspects of the Adam Walsh Act, see Part I, B, *infra*, this expansion of the Major Crimes Act, if enforced, will have a disproportionate impact on the American Indian population. Though Indians constitute only about 1.5% of the population, they have the third highest rate of reported child abuse and neglect nationally.¹ In South Dakota, for example, almost half of all child abuse and neglect reports are for Indian children, despite the fact that Indians comprise only around 14% of the state's population. Keep in mind that Major Crimes Act offenses not defined and punished under federal statutes are defined *and punished* in accordance with state law. See 18 U.S.C. § 1153(b).

Kidnapping. The Act expands federal jurisdiction to reach any kidnapping in which the defendant crossed state lines or used an instrumentality of interstate commerce during the commission or in furtherance of the crime, even if the kidnapping itself is accomplished wholly intrastate. See 18 U.S.C. § 1201(a)(1). This provision will likely be applied to cases where the defendant used the Internet or made a telephone call during the course of the kidnapping, thereby effectively federalizing virtually all kidnapping offenses. See, e.g., *United States v. Giordano*, 442 F.3d 30, 39 (2nd Cir. 2006) (telephone, even when used on wholly intrastate basis, constitutes instrumentality of interstate commerce under 18 U.S.C. § 2425); *United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir. 2006) (Internet is an instrumentality of interstate commerce for purposes of 18 U.S.C. § 2252A(a)(2)(B) regardless of whether images were transmitted across state lines).²

Obscenity. The Act expands the obscenity statutes to reach anyone who produces obscene matter with the intent to transport the matter in interstate commerce for the purpose of selling or distributing it, 18 U.S.C. § 1465, as well as anyone who is engaged in the business of producing with the intent to distribute or sell obscene matter, 18 U.S.C. §, 1466. The practical effect of these changes is to relieve the government of having to prove that the defendant actually transported, transferred or sold obscene material. Because of this, depending on the government's proof, a prosecution under either statute may raise Commerce Clause problems. See *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

You should also note that expanding sections 1465 and 1466 to cover the act of "producing" obscene material with intent to transport, transfer or sell will have a different impact on the statutory rebuttable presumptions depending upon the statute at issue. Under section 1465, the government would still have to prove that the defendant actually transported the obscene material in order to obtain the

¹ See Administration on Children, Youth and Families, *Child Maltreatment 2004*, Table 3-12 (2004), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf>.

² In addition to expanding federal jurisdiction, the Act establishes a new mandatory minimum sentence of twenty-five years for kidnapping a person under the age of eighteen. See 18 U.S.C. 3559(f)(2); Part I, B, *infra*.

benefit of the rebuttable presumption. This is not so for section 1466, which creates a rebuttable presumption only upon proof of an *offer* to sell or transfer, irrespective of whether the material was actually transported by the defendant.

2. New Crimes

a. Child Exploitation Enterprise

The Adam Walsh Act creates five new crimes relating to the sexual exploitation of children. One is the new “child exploitation enterprise,” which carries a mandatory minimum of twenty years for any defendant who “violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.” Note that the list of predicate offenses includes sex trafficking involving an *adult* under section 1591(b)(1), which is perhaps a drafting error, and statutory rape, as well as rape, abusive sexual contact, kidnapping, possession of child pornography, and coercing or transporting a minor to engage in prostitution or other criminal sexual activity.

It is hard to tell how this statute will be used by prosecutors. Theoretically, it could encompass a fact pattern where a defendant used an Internet chat room on three separate occasions to solicit images involving sexually explicit depictions of a male and a female child from at least three other chat room participants, even if the defendant never actually possessed any child pornography at any time and even if the images discussed did not even exist. See 18 U.S.C. §§ 2252A(a)(3), 2252A(g)(2). It may be charged against people who did not themselves commit “a series of felony violations constituting three or more separate incidents” or know that they were members of a “child exploitation enterprise.” If so, recall that the RICO statute withstood fair warning and vagueness challenges because it requires each defendant to commit a minimum of two criminal predicates that constitute a pattern of related and continuous acts of racketeering, in connection with a group associated for a common purpose.³ A statute violates the fair warning requirement of the Due Process Clause and is void for vagueness, if people of ordinary intelligence would not know that they were violating it and/or it invites arbitrary or discriminatory enforcement. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Kolendar v. Lawson*, 461 U.S. 352, 357 (1983); *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

As with all offense-based mandatory minimums, defense counsel can challenge the twenty-year mandatory minimum on constitutional grounds, including separation of powers, equal protection, due process, and grossly disproportionate punishment. See Part I, B, *infra*.

b. Internet-Based Crimes

Two new crimes require use of the Internet as an element. The first carries a ten year maximum penalty for any person who knowingly embeds words or digital images into the source code of a website (meaning both the viewable and nonviewable content of a webpage) with the intent to deceive a person into viewing obscene material. See 18 U.S.C. § 2252C(a). If the intent was to deceive a minor into viewing material harmful to minors, the maximum penalty is twenty years. *Id.* at § 2252C(b).

The Act also criminalizes the knowing use of the Internet to distribute a date rape drug with knowledge or reasonable cause to believe either (A) that the drug would be used to engage in “criminal sexual conduct” or (B) that the person receiving the drug is not an “authorized purchaser,” subject to a twenty-year maximum. See 21 U.S.C. § 841(g)(1)(A)-(B).

Section 841(g) lists three specific drugs designated as “date rape drugs” by Congress: gamma

³ See, e.g., *United States v. Bennett*, 984 F.2d 597, 605-06 (4th Cir. 1993); *United States v. Dischner*, 974 F.2d 1502, 1510-11 (9th Cir. 1992); *United States v. Swiderski*, 593 F.3d 1246, 1249 (D.C. Cir. 1979); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975).

hydroxybutyric acid (“GHB”) and its analogues, ketamine, and flunitrazepam. See 21 U.S.C. § 841(g)(2)(A)(i)-(iii). Note that ketamine is not listed in the Drug Quantity Table in U.S.S.G. § 2D1.1. It is a Schedule III drug, sometimes known as “Special K.” See 21 C.F.R. 1308.13. Schedule III drugs have a marijuana equivalence of 1 gram per unit, capped at 59.99 kilograms of marijuana. See Drug Equivalency Table.

Section 841(g) also authorizes the Attorney General to designate “any substance” as a date rape drug pursuant to the rulemaking procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553. See 18 U.S.C. § 841(g)(2)(A)(iv). A defendant charged under section 841(g) for distributing any substance so classified by the Attorney General can argue that section 841(g)(2)(A)(iv)’s delegation of authority is a violation of the non-delegation doctrine. “Congress is manifestly not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). It may only leave to “selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.” *Id.* This is possible only where Congress “lay(s) down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform” *Touby v. United States*, 500 U.S. 160, 165 (1991) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (brackets in original) (upholding 21 U.S.C. § 811, which sets forth specific steps pursuant to which the Attorney General can amend the controlled substance schedules in the Controlled Substances Act). In section 841(g), Congress has not defined “date rape drug” or otherwise provided the procedural safeguards that saved section 811 from being an unconstitutional delegation. *Cf. Touby*, 500 U.S. at 165 (discussing numerous safeguards set forth in section 811, only one of which addressed the procedural mechanism of agency rulemaking).

You should look at *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), where the Supreme Court held that the Attorney General had exceeded his rule-making authority under the Controlled Substances Act in criminalizing doctor-assisted suicide because it was beyond his expertise and inconsistent with the statutory purpose and design, and *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), where the Court upheld the Controlled Substances Act as applied to intrastate distribution of marijuana for medical reasons against a Commerce Clause challenge. These cases do not address the non-delegation doctrine, but you may find something relevant there, whether helpful or harmful. That is beyond the scope of this paper.

c. Record-Keeping Requirements

Finally, the Adam Walsh Act creates two new crimes related to record-keeping requirements for those working in the sex industry. The first expands 18 U.S.C. § 2257’s existing record-keeping requirements, which require that anyone producing visual depictions of “actual sexually explicit conduct” maintain records on each performer’s name, date of birth, and other identifying information, to include depictions consisting of digital images or digitally-manipulated images of real people. It also requires information regarding the location of those records to be posted on every page of a website, and adds the refusal to permit the Attorney General to inspect the records as grounds for criminal liability. The second statute applies section 2257’s requirements and criminal provisions to anyone who produces images of “simulated sexual conduct.” See 18 U.S.C. § 2257A. Penalties include imprisonment of up to one year for a first offense, and a minimum of two and maximum of ten years for subsequent offenses. Unlike section 2257, section 2257A also provides for a five-year maximum penalty if a defendant violates section 2257A’s record-keeping requirements in an effort to conceal a substantive offense involving child pornography or sex trafficking. See *id.* at § 2257A(i)(2).

d. Sex Offender Registry Crimes

The Adam Walsh Act established a new offense of Failure to Register as a sex offender, with a 10-year maximum, or a consecutive mandatory minimum of 5 years for committing a crime of violence while being required to register and failing to register. See 18 U.S.C. § 2250. It also created a new consecutive mandatory minimum of 10 years for being required by Federal or other law to register as a sex offender and committing an enumerated felony offense involving a minor, including kidnapping and various sex offenses. See 18 U.S.C. § 2260A. These offenses will be discussed in more detail in the forthcoming [Adam Walsh Act - Part II](#).

B. New Penalties

In addition to the changes described above, the Adam Walsh Act creates a staggering number of sentence increases – including new or higher mandatory minimums for more than fifteen separate offenses.

1. New Mandatory Minimums and Statutory Maximums

- New mandatory minimums for a “crime of violence against the *person* of an individual who has not attained the age of 18.” Murder carries a mandatory minimum of life for death-eligible murder and thirty years otherwise. 18 U.S.C. § 3559(f)(1). Kidnapping and maiming carry a mandatory minimum of 25 years. *Id.* at § 3559(f)(2). All other crimes of violence against the person of a minor resulting in serious bodily injury or committed with a dangerous weapon (which is not defined in the code and therefore could be anything from a firearm to a foot to a pencil) carry a mandatory minimum of 10 years in prison. *Id.* at § 3559(f)(3).
- New mandatory minimum of 15 years for sex trafficking accomplished through force, fraud, or coercion or involving a minor under 14 (no mandatory minimum in former statute); statutory maximum remains at life. 18 U.S.C. § 1591(b)(1). For sex trafficking without force, fraud, or coercion involving a person between 14 and 17, the Act imposes a new mandatory minimum of 10 years and increases the statutory maximum to life. *Id.* at § 1591(b)(2).
- New mandatory minimum of 30 years for aggravated sexual abuse where the victim is less than 12, or where the victim is between 12 and 15 (and is at least 4 years younger than the defendant) and the crime is accomplished by force, threat, rendering the victim unconscious, or impairing the victim’s ability to appraise or control conduct (no mandatory minimum in former statute). See 18 U.S.C. § 2241(c).
- Sexual abuse now carries a statutory maximum of life, up from twenty years. See 18 U.S.C. § 2242.
- Tripled the statutory maximum for sexually abusing a ward to 15 years, see 18 U.S.C. § 2243(b), up from the 5-year maximum Congress enacted seven months prior in the Violence Against Women Act.
- New statutory maximum of life (up from 10 years) for sexual contact that would have violated section 2241(c) had it been a sexual act. See 18 U.S.C. § 2244(a)(5).
- Doubled the mandatory minimum for coercing or transporting a minor to engage in criminal sexual activity to 10 years (up from 5) and increased the statutory maximum from 30 years to life. See 18 U.S.C. §§ 2422(b), 2423(a)
- Increased mandatory minimum for child pornography-related charges to thirty years if death results. See 18 U.S.C. § 2251(e).
- More than doubled the statutory maximum to 10 years (previously 4 years) for using a misleading domain name on the Internet with intent to deceive a minor into viewing material harmful to minors. See 18 U.S.C. § 2252B.
- Increased penalties for using a minor outside of the United States to produce a sexually explicit depiction of a minor with the intent that it be imported into the United States to a minimum of 15, maximum of 30 years for a first offense (formerly no minimum, 10-year maximum), a minimum of 25, maximum of 50 years for second offense, and a minimum of 35, maximum life for subsequent offenses (formerly no minimum, 20-year maximum). See 18 U.S.C. § 2260(c)(1). Transporting, receiving, shipping, distributing, selling or

possessing a sexually explicit depiction of a minor with the intent that it be imported into the United States now carries a minimum of 5, maximum of 20 years for the first offense, and a minimum of 15, maximum of 40 years for subsequent offenses. *Id.* at § 2260(c)(2).

- Increased punishment for failure to report child abuse from a class B misdemeanor to a Class A misdemeanor, meaning it is now punishable by up to 1 year imprisonment. See 18 U.S.C. §2258.
- Extended 18 U.S.C. § 2245 to authorize the death penalty where the defendant murders a person in the course of committing an enumerated sex crime. Remarkably, despite adding new predicate offenses to section 2245, the Act added a new requirement that the defendant commit “murder” in the course of committing the predicate offense. This narrows the statute from its prior version, which had authorized the death penalty merely if “death resulted.”

2. Potential Challenges to Mandatory Minimums

Given the courts’ growing discomfort with existing mandatory minimums (and negative attention in the press), defense counsel should raise constitutional challenges to the new and increased mandatory minimums contained in the Adam Walsh Act. Obviously, these arguments are not slam dunk winners, but you should raise and preserve them (or others that come to mind) nonetheless.

The following arguments are for offense-based mandatory minimums, *i.e.*, where the mandatory minimum is based on jury-found facts or the defendant’s guilty plea. Mandatory minimums based on judicial factfinding (which the Adam Walsh Act does not contain) should be challenged on the basis that *Harris v. United States*, 536 U.S. 545 (2002) is no longer good law. See Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule Harris*, 18 Fed. Sent. Rep. 4, 2006 WL 2433749 (April 2006).

Eighth Amendment -- Mandatory minimums *should* violate the Eighth Amendment where the harshness of the penalty is grossly disproportionate to the gravity of the offense. See *Ewing v. California*, 538 U.S. 11, 20 (2003) (O’Connor, J., concurring in the judgment) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (Kennedy, J., concurring in part and concurring in the judgment)). District courts and individual appeals court judges have increasingly expressed impassioned disgust over the irrational, inhumane and absurd results wrought by mandatory minimum and consecutive mandatory minimum sentences, though no federal court has yet refused to impose or uphold them. See *United States v. Hungerford*, ___ F.3d ___, 2006 2923703 ** 5-9 (9th Cir. Oct. 13, 2006) (Reinhardt, J., concurring in the judgment) (concurring in the judgment affirming 159-year sentence under 924(c) for mentally ill 52-year-old woman with no record who never touched a gun because precedent required it, but the sentence is cruel, unjust, irrational and shocks the conscience); *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah Nov. 16, 2004) (sentence for twenty-four-year-old first offender to a consecutive mandatory minimum term of 55 years based on three convictions in the same trial for possessing a firearm was “grossly disproportionate . . . unjust, cruel, and even irrational” but court nevertheless imposed sentence), *aff’d* 433 F.3d 738 (10th Cir. Jan. 9, 2006); *United States v. Ezell*, 417 F.Supp.2d 667, 672-73 (E.D. Penn. 2006) (sentence of 125 years for six armed robbery convictions was “unduly harsh” where guideline range would be between 168 and 210 months but court nevertheless imposed sentence); *United States v. Ciskowski*, 430 F.Supp.2d 1283 (M.D. Fla. 2006) (similar concerns, same result).

In what may be a harbinger of federal constitutional jurisprudence to come, however, the Arizona Supreme Court held in 2003 that the state’s mandatory consecutive minimum law subjected the defendant to grossly disproportionate punishment and was unconstitutional as applied. See *State v. Davis*, 79 P.3d 64 (Ariz. 2003) (vacating 52-year mandatory sentence for engaging in sexual intercourse with two different pre-pubescent girls based on underlying facts), *cert. denied*, *Arizona v. Davis*, 541 U.S. 1037 (2004); *but see State v. Berger*, 134 P.3d 378, 385 (Ariz. 2006) (upholding 200-year sentence resulting from mandatory 10-year consecutive sentences imposed for twenty counts of possession of child pornography where defendant’s conduct manifested a long-term interest in gruesome exploitation of children). *Davis* and *Berger* together demonstrate that the underlying facts are *critical* when considering a fair and appropriate sentence for a sex crime. It is easy to imagine, for example, a defendant who on several

occasions viewed child pornography, but did not purposefully target (through search terminology or otherwise) or actively download it, being subjected to a child exploitation enterprise charge under section 2252A(g) by an over-zealous prosecutor eager to try out the new law (and its accompanying mandatory minimum of 20 years for a first-time offender). In such a case, where the defendant lacks virtually all of the characteristics of a child predator (at which Adam Walsh is purportedly aimed), there may be some room to successfully argue that the Act imposes a "grossly unfair" sentence as applied to his particular case.

Equal Protection -- Congress has been informed for years that mandatory minimums are costly, have little effect on crime control, and have a disparate impact on minorities.⁴ Justice Kennedy recently spoke out against mandatory minimums as unjust and unwise.⁵ Even the Director of the Office of National Drug Control Policy told Congress that the current policy of imprisoning low-level offenders for years is ineffective in reducing crime and only breaks generation after generation of poor minority young men.⁶

The evidence is clear that federal sexual abuse prosecutions have a disproportionate impact on Native Americans, who comprise only 4.5 percent of all federal defendants but 56 percent of those sentenced for sexual abuse.⁷ Between October 2005 and June 2006, the average sentence for sexual abuse was 102.3 months, the third highest of all, with only murder and kidnapping higher.⁸ The vast majority of non-Indians who commit similar offenses do so under circumstances in which there is no federal jurisdiction, and therefore are subject to prosecution and sentencing only in state court, where they are subject to significantly lower sentences. In November 2003, the Native American Advisory Group reported (based on data obtained by the Sentencing Commission) that the average sentence for state sex offenses in South Dakota was 81 months, for state sex offenses in New Mexico was 25 months, and for state sex offenses in Minnesota was 53 months.⁹ The Adam Walsh Act's 30-year mandatory minimum for § 2241(c) (and any increases the Sentencing Commission adopts for sexual abuse crimes in response to Adam Walsh) will exacerbate the disparate impact on this group. Given the mounting evidence against mandatory minimums in general, and the well documented disparate impact on Indians of federal sexual

⁴ See Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 21-22 (2004); U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* (May 2002); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 103rd Cong., 1st Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, *Justice on Trial* (2000).

⁵ Report of the ABA Justice Kennedy Commission, Summary of Recommendations, <http://www.abanet.org/media/kencomm/summaryrec.pdf>; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

⁶ Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

⁷ U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 4 (2005), available at <http://www.ussc.gov/ANNRPT/2005/table4.pdf>.

⁸ Sentencing Commission, Preliminary Quarterly Data Report, Table 18 (FY 2006 through June 30, 2006), http://www.ussc.gov/Blakely/Quarter_Report_3Qrt_06.pdf.

⁹ See Report of the Native American Advisory Group at 21-22 & n.38 (Nov. 4, 2003).

abuse prosecutions in particular, mandatory minimums should be challenged as failing even the rational basis test under the Equal Protection Clause.

Due Process Right to Individualized Sentencing – The death penalty is prohibited as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and the sentencer in a capital case must be able to give effect to all mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 602-04 (1978). These principles may be able to be extended to mandatory minimum sentencing, at least where the result is mandatory life, or effectively mandatory life.

Separation of Powers – The prosecutor has sole power to charge an offense that carries a mandatory minimum sentence and sole power to lower that sentence. Offense-based mandatory minimums therefore unite the power to prosecute and the power to sentence within the Executive Branch, aggrandizing the power of the Executive and encroaching upon the Judiciary's constitutionally assigned sentencing function. See *Mistretta v. United States*, 488 U.S. 361, 382, 391 n.17 (1989). (In enticement and certain child pornography cases, the government also creates the offense. AFPDs Dennis Terez and Vanessa Malone recently argued to the Sixth Circuit that the vast majority of these cases are government stings in which no actual minor is involved. It may be wise for Defender Offices to start keeping track of the number of sting v. real minor cases, as it is not a statistic that the government is likely to reveal.)

An article by Professor Rachel Barkow argues, *inter alia*, that “the danger of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a sufficient judicial check. That is, . . . the key problem with these laws is their *mandatory* nature, not whether they set a floor or ceiling. Thus, under a formalist analysis that looked to the criminal jury’s role in the separation of powers [which Prof. Barkow encourages], the Court would reject not only those laws that require judges (not juries) to increase a defendant’s maximum sentence but also those laws that require judges (not juries) to set a minimum sentence.”¹⁰

C. Other Lowlights, Other Challenges

1. Statute of Limitations

There is no longer a statute of limitations for any felony listed in Chapter 109A (Sexual Abuse), Chapter 110 (Sexual Exploitation and Other Abuse of Children) except for violations of the record-keeping requirements set forth in sections 2257 and 2257A, and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), or for charges under sections 1201 (kidnapping of a minor) or 1591 (sex trafficking).

This will violate the *Ex Post Facto* Clause in any case in which the statute of limitations ran before the law was enacted. See *Stogner v. California*, 539 U.S. 607, 611, 617-18 (2003) (holding that application of a California law permitting prosecution for sex-related child abuse within one year of the victim's report to police to an offense whose prosecution was time-barred at the time the law was enacted was unconstitutionally *ex post facto*).

The lack of any statute of limitations for sex crimes can also be challenged under the Equal Protection Clause. Statutes of limitations “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). Currently, the most serious and difficult to detect offenses in the criminal code are subject to a five-year statute of limitations. See 18 U.S.C. § 3282. Terrorism offenses are subject to an eight-year statute of limitations. See 18 U.S.C. § 3286. There seems to be no rational justification for subjecting defendants in sex offense cases to extraordinary unfairness.

The lack of any statute of limitations may create a due process problem, assuming that the

¹⁰ Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1043 (Feb. 2006).

defendant proves actual prejudice to the defense *and* the reason for the delay is not sufficiently justifiable. See *United States v. Lovasco*, 431 U.S. 783, 789-90 (1979) (actual prejudice from a delayed charge is not enough to establish a due process violation). Most circuits, however, have interpreted *Lovasco* to require a showing that the government acted in bad faith in delaying the indictment.

2. Bail

Added to the list of offenses for which the court must hold a hearing upon motion of the government to determine whether there are conditions of release that will reasonably assure the person's appearance and the safety of any person and the community are "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 dangerous weapon [not defined anywhere], or involves a failure to register [as a sex offender] under section 2250." See 18 U.S.C. § 3142(f)(1)(E). In regard to the "nature and circumstances of the offense charged," the 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." See 18 U.S.C. § 3142(g)(1).

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, 2425, or 2250 (failure to register), any pretrial release order must contain a condition of electronic monitoring and each of the conditions at (iv)-(viii). *Id.* at § 3142(c)(1). Because the Act would impose these requirements without a finding that it is necessary to assure the defendant's appearance or the safety of anyone, this requirement may violate due process. See *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).

Perhaps spurred on by the Supreme Court's recent decision in *Samson v. California*, 126 S.Ct. 2193 (2006) (suspicionless search of parolee pursuant to written consent does not violate Fourth Amendment), we hear that prosecutors are demanding consent to warrantless searches as a condition of their agreement to pretrial release. The Adam Walsh Act did not create such a condition. In *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), the Ninth Circuit held that this was an "unconstitutional condition," and thus warrantless searches imposed as a condition of pretrial release require a showing of probable cause, despite the defendant's consent. *Scott* appears to be the only case in which this issue has been decided.

3. DNA Collection from Persons Arrested, Facing Charges, Convicted, or Detained, regardless of Type of Offense.

Since 2001, BOP has been required to collect a DNA sample from each individual in its custody who "is, or has been" *convicted* of a "qualifying Federal offense," which are "the following Federal offenses, as determined by the Attorney General:" any felony, any offense under chapter 109A, any crime of violence as defined in 18 U.S.C. § 16, or any attempt or conspiracy to commit such an offense. See 42 U.S.C. 14135a(a)(1), (d) (2005). The AG promulgated a regulation designating offenses that appear to be within the listed categories (though we have not checked). See 28 C.F.R. § 28.2. Failure to cooperate in such collection is a misdemeanor. See 42 U.S.C. 14135a(a) (5) (2005).

Effective January 5, 2006 (through the Violence Against Women Act (VAWA)), Congress added to the above that the "Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested or from non-United States persons who are detained under the authority of the United States." Demonstrating Congress' increasing willingness to hand over legislative power to the Executive at the expense of individual rights, the AG is apparently free to collect DNA from these unconvicted persons regardless of the type of offense of which they have been accused. The only limit is that they must be "in custody." Failure to cooperate in such collection is a misdemeanor. See 42 U.S.C. 14135a(a)(1)(A), (B), (a)(5), (d) (2006).

The Adam Walsh Act broadened this yet again. The Attorney General may collect DNA samples,

“as prescribed by the Attorney General in regulation,” from individuals who are “facing charges, or convicted.” Failure to cooperate in such collection is a misdemeanor. See 42 U.S.C. 14135a(a)(1)(A), (B), (a)(5), (d) (as amended July 27, 2006). “Facing charges” apparently adds persons who are currently charged by indictment, information or complaint, but are not currently under arrest. “Convicted” apparently adds persons convicted of offenses that are not felonies, violations of chapter 109A, or crimes of violence. Again, they must at least be “in custody.”

It does not appear that the Attorney General has promulgated any regulation to implement the broadened DNA collection power created by VAWA and SORNA. Until a regulation is promulgated, it should be argued that the power may not be exercised.

DNA collection has been upheld against Fourth Amendment challenge because the individuals from whom samples were collected were already proven guilty of a crime, thus heightening the government’s legitimate interest in monitoring them and diminishing their expectation of privacy. *E.g.*, *United States v. Kincade*, 379 F.3d 813, 833-36 (9th Cir. 2004) (en banc). See also *Samson v. California*, 126 S. Ct. 2193, 2197-2202 (2006) (upholding suspicionless search of parolee based on diminished liberty interest at least where parolee was clearly informed this would be a condition of parole, and state’s interest in supervision). This rationale does not apply to persons “arrested” or “facing charges.” Nor should the “special needs” test for suspicionless searches support DNA collection under this law, since a general interest in crime control does not constitute a “special need.” *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Illinois v. Lidster*, 540 U.S. 419 (2004).

4. Discovery

The Act requires that any material that “constitutes” child pornography “remain in the care, custody, and control of either the Government or the court.” It is not to be copied, photographed, duplicated or otherwise reproduced for defense counsel, so long as the government provides “ample opportunity for inspection, viewing, and examination.” See 18 U.S.C. § 3509(m)(1)-(2).

Note: This issue is being fully litigated before Judge Robert Payne in *United States v. Knellinger*, No. 3:06CR00126 (E.D. Va.) with *amicus* briefing by the Federal Defender Office in E.D. Va. and NACDL (due October 19, 2006), and a hearing the week of November 6, 2006, which will include expert testimony from national technical and legal experts. Judge Payne has ordered *amici* to address whether and the extent to which section 3509(m) restricts the rights of defendants under the Due Process Clause, the Confrontation Clause, the Compulsory Process Clause, and the right to Assistance of Counsel. Defense counsel in the case, **Ian Friedman**, has consented to giving out his phone number and email address for those who want to obtain copies of briefs and (possibly) transcripts: ifriedman@inflaw.com, (216) 928-7700. Without having reviewed those materials, our thoughts are as follows.

If the concern were really to prevent distribution of child pornography as the Act claims, that concern could easily be remedied through a protective order from the court limiting disclosure and requiring all copies to be returned at the end of the case. In fact, you can argue that a protective order is consistent with section 3509(m), in that the evidence would remain in the “care, custody, and control” of the court at all times via the protective order.

The alternative to a protective order is not to accept compliance with the Act – which would hinder the preparation of the defense by forcing counsel to review often highly technical evidence such as hard drive images without their own equipment and constrained by time, and would require divulging the identity of potential defense experts before counsel even has an opportunity to know whether the expert will be helpful or harmful to the case - but to challenge its constitutionality.

In cases before the Adam Walsh Act, federal courts found that restrictions on providing copies of alleged child pornography to defense counsel would hinder the preparation of the defense and thus ordered the material produced pursuant to Rule 16. See, *e.g.*, *United States v. Fabrizio*, 341 F.Supp.2d 47 (D. Mass. 2004) (Rule 16 requires that computer image be produced to enable defense experts to conduct thorough analysis of computer records and to recreate government’s analysis); *United States v. Hill*, 322 F.Supp.2d 1081 (D.C. Cal. 2004). Since the Act nullifies Rule 16 with respect to this kind of evidence,

defense counsel should seek a ruling that the “no discovery” provision is unconstitutional. See, e.g., *Westerfield v. Superior Court*, 121 Cal.Rptr.2d 402, 404-05 (Cal. App. Ct. 2002) (Construing state statute prohibiting the dissemination of child pornography to prohibit defense counsel from receiving copies of alleged pornographic images “exalts absurdity over common sense.” “[R]equiring the defense to view-and apparently commit to memory-the ‘thousands’ of images at the computer crimes office obviously impacts Westerfield’s right to effective assistance of counsel and his right to a speedy trial.”).

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that due process required that a defendant be given funds to retain a psychiatrist in order to raise a defense of mental impairment. *Id.* at 84. Underlying the Court’s holding was the principle that, in some cases, a “fair opportunity” to defend oneself includes the opportunity to present expert testimony. *Id.* at 74-76. Of course, the first step toward presenting expert testimony is for the expert to form an opinion, and to do that, the expert needs to examine the evidence. In defending a charge involving child pornography, this means that an expert will need to examine the hard drive in order to determine, for example, whether the images are in fact child pornography, were purposely downloaded, or were placed there by someone else, a time-consuming process that requires highly specialized forensic equipment. *Fabrizio*, 341 F.Supp.2d at 49. An expert will also want to recreate the government’s search to identify challenges to its evidence. *Id.*

Forcing defense experts and counsel to conduct their work on government computers would unfairly constrain them in terms of time and equipment. It would leave a roadmap of the process and its results which the government could then access for its own trial preparation. And it would necessarily force defendants to disclose to the government the fact that an expert had been retained to assist the defense investigation. These effects likely violate the Fifth Amendment Due Process Clause and the Sixth Amendment right to effective assistance of counsel. The right to effective assistance of counsel includes the right to have counsel conduct a reasonable investigation. See *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Due process includes the right to use an expert where necessary to assist with that investigation. See *Smith v. McCormick*, 914 F.2d 1153, (9th Cir. 1990) (due process and equal protection right to psychiatric assistance set forth in *Ake* “means the right to use the services of the psychiatrist in whatever capacity defense counsel deems appropriate – including to decide, with the psychiatrist’s assistance, *not* to present to the court particular claims of mental impairment”) (emphasis added). Obviously, defense counsel cannot use an expert to assist in understanding what arguments *not* to present – and thus cannot adequately investigate possible defenses – if the identity of all defense experts is automatically disclosed to the government well before they have even had the opportunity to formulate an opinion. Indeed, requiring defense counsel to disclose an expert’s identity necessarily trammels on the right to maintain confidentiality over attorney work product: “[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference.” *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The Court in *Ake* implicitly recognized this in referring to the indigent defendant’s right to “make an *ex parte* threshold showing” that expert psychiatric testimony will be relevant in his or her case. See *Ake*, 470 U.S. at 82-83 (emphasis added); see also *Williams v. State*, 958 S.W.2d 186, 193-96 (Tex. Crim. App. 1997) (right to *ex parte* application for expert funds grounded in rights to due process and attorney work product). Enforcement of the Act would thus violate defendants’ due process right to have an expert assist in their defense under *Ake*, along with their right to the effective assistance of counsel in investigating viable defenses under *Strickland*.

Finally, enforcement of section 3509 would violate the presumption of innocence by assuming that what the government alleges is child pornography is, in fact, child pornography. Cf. *United States v. Turner*, 367 F.Supp.2d 319, 325-26 (E.D. N.Y. 2005) (identifying “crime victims” for purposes of according them rights under the Crime Victim Rights Act before there is a conviction would infringe upon the defendant’s presumption of innocence).

Defense counsel should raise all of these issues with the court, submit a strong expert affidavit setting forth what investigation needs to be done in the case and why it cannot reasonably be done at a government office, and request access to copies of the evidence pursuant to a protective order. See *Fabrizio*, 341 F.Supp.2d at 48-49.

5. Probation/Supervised Release

For a defendant required to register under the Sex Offender Registration and Notification Act (to be covered in Adam Walsh Act Part II), it is now a discretionary condition of probation or (if the person is also a “felon”) of supervised release, that s/he submit his/her 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 a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation/supervised release or unlawful conduct, *and* otherwise in the lawful discharge of the officer’s duties. See 18 U.S.C. §§ 3563(b)(23); 3583(d)(3).

6. Sex Offender Management and Treatment Programs

BOP is required to make available “appropriate treatment to sex offenders who are in need of and suitable for treatment,” including both sex offender management programs and sex offender treatment programs. See 18 U.S.C. §3621(f)(1). These are not the same. Sex offender management programs monitor sex offenders’ mail, phone calls, and behavior for things that BOP deems inappropriate for someone convicted of a sex crime. They do not provide treatment or counseling, do not count towards lower security classifications, and do nothing to protect incarcerated sex offenders from the general prison population. Keep this in mind in case the government tries to sell the court a bill of goods at sentencing that BOP’s sex offender management program will provide “treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2)(D).

While sex offender treatment programs offer therapeutic help to incarcerated sex offenders, at present BOP has only one such program. It is located in Butner, North Carolina and has only 112 beds.¹¹ This is far from home for most of the Indian population who comprise the majority of federal sex abuse offenders. Unless and until BOP creates more sex offender treatment programs, prison will continue to offer little to nothing in the way of rehabilitation and treatment for sex offenders.

Counsel should be aware that the sex offender treatment program requires participants to admit guilt as a precondition to entering the program, something defendants with active appeals cannot do, and, apparently, to admit other sexual misconduct in the course of treatment.¹²

7. Civil Commitment

For any person who is in the custody of the Bureau of Prisons *or* deemed incompetent *or* against whom all criminal charges have been dismissed solely because of the person’s mental condition, the Attorney General and/or the Director of the Bureau of Prisons may certify that the person is a “sexually dangerous person.” See 18 U.S.C. § 4248(a). Under the Act, “sexually dangerous” means that the defendant has engaged or attempted to engage in sexually violent conduct or child molestation and that he suffers from a serious mental illness, abnormality or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation if released. See 18 U.S.C. § 4247(a)(5)-(6). The Act does not set forth any standards upon which the Attorney General or the Director must base their certification of a person’s “sexual dangerousness” beyond this definition.

Once a certificate has been filed, the defendant is entitled to an adversarial hearing, but must

¹¹ See Statement of Andres E. Hernandez before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives at 1-2, available at <http://energycommerce.house.gov/108/Hearings/09262006hearing2039/Hernandez.pdf>. See also Legal Resources Guide to the Bureau of Prisons at 33-34, available at http://www.bop.gov/news/PDFs/legal_guide.pdf.

¹² Statement of Andres E. Hernandez at 2-3. *And* Dr. Hernandez keeps at least data on the number of unreported sex crimes that participants admit in the course of treatment. He does this for scientific research purposes, but one wonders if and when he will be required to turn specific admissions over to law enforcement.

remain in the custody of either the Attorney General or the Bureau of Prisons pending resolution of the issue. See 18 U.S.C. §§ 4247(d), 4248(a)-(b). The court is authorized to order that a psychiatric or psychological assessment examination be conducted and a report submitted before the hearing. See 18 U.S.C. § 4248(b). If, after the hearing, the court finds by clear and convincing evidence that the defendant is sexually dangerous, the Attorney General must either commit him to state custody for treatment or place him in a “suitable facility” until either the state agrees to take him or he no longer qualifies as “sexually dangerous.” See 18 U.S.C. § 4248(d). This finding and the subsequent discharge of the commitment can be made only by order of the court and only when the director of the facility to which the defendant has been committed certifies that he is no longer sexually dangerous. If the government or the court wishes, a hearing on the matter must be held prior to discharge, after which the court can order the defendant discharged only upon a finding by a preponderance of the evidence that the person will not be sexually dangerous to others if released. See 18 U.S.C. § 4248(e)(1). Alternatively, a person may be conditionally discharged under the same procedures subject to the defendant’s compliance with a specific treatment regimen; he will then be subject to arrest and evaluation following his release if probable cause exists to believe that he is not following the prescribed treatment regimen. See 18 U.S.C. §§ 4248(e)(2), 4248(f).

The Act also increases the time in which a person can be deemed incompetent. Whereas section 4241 used to allow competency to be raised at any time prior to sentencing, it now allows it to be raised at any time after the commencement of any term of probation or supervised release and prior to the completion of the sentence, which means that the government can wait until a defendant has finished serving his prison term to move for a competency (or “sexually dangerous”) determination. See 18 U.S.C. § 4241(a).

Importantly, if charges against a defendant who has been committed to a facility are dismissed for reasons not related to his mental condition, and the director of the facility certifies that the defendant is sexually dangerous, the state in which the person is domiciled or was tried has 10 days to initiate state civil commitment proceedings. See 18 U.S.C. § 4248(g). Otherwise, the person must be released. See *id.*

8. Victim Rights

The Act permits civil actions brought by minor victims of sex crimes regardless of whether the person suffered an injury while he or she was a minor, and triples the statutory damages from \$50,000 to \$150,000. See 18 U.S.C. § 2255(a).

It also purports to permit victims certain rights in state prisoner habeas proceedings: the right not to be excluded, the right to be reasonably heard, the right to proceedings free from unreasonable delay, and the right to be treated with fairness and respect. See 18 U.S.C. § 3771(b)(2)(A). The right not to be excluded and the right to be reasonably heard apply only in “public” court proceedings. In most habeas cases, there will be one or two public hearings at most. If it is an evidentiary hearing, a victim in a rare case *may* be a fact witness but otherwise will have nothing relevant to say. This is because habeas proceedings involve the legal question of whether the petitioner is in custody in violation of the Constitution or laws of the United States. Victim allocution is not relevant to that question. Thus, an asserted right to be heard will typically not be “reasonable” within the meaning of section 3771(b)(2)(A). Habeas counsel should be prepared to object on relevance grounds to a request to be heard from a victim or victim advocate. See *United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005) (holding that victim’s proposed testimony at a detention hearing was not relevant to the issues).

It is unclear whether the right to proceedings free of unreasonable delay applies only to “public” proceedings. If not, victims can cause problems for habeas petitioners by filing petitions for mandamus. For some insights on mandamus proceedings and other aspects of the Crime Victims’ Rights Act, see Amy Baron-Evans, *Some Issues Likely to Arise Under the Crime Victim Rights Act* (Oct.3, 2006), available at www.fd.org.

9. Forfeiture

Property subject to criminal forfeiture for offenses involving obscene material, child pornography, or using misleading domain names, includes the obscene or pornographic material, any property constituting

or traceable to gross profits from the offense, and any property constituting or traceable to the means for committing or promoting the offense. See 18 U.S.C. §§ 1467, 2253. Criminal forfeiture is now governed by the procedures set forth in 21 U.S.C. § 853, see *id.*; civil forfeiture is governed by Chapter 46, see 18 U.S.C. § 981 *et seq.*

10. Rules of Evidence

The Act directs the Rules Committee to study the “necessity and desirability” of amending the Federal Rules of Evidence to remove the confidential marital communications privilege and the adverse spousal privilege in any case in which a spouse is charged with a crime against a child of either spouse or any child under the custody or control of either spouse. It is unclear at this time what action if any will be taken with respect to amending the Rules. If you have any insights or examples that might be presented to the committee in opposition to such a change, please let us know.