MEMORANDUM

TO: Defenders, CJA Counsel
FR: Amy Baron-Evans
RE: Adam Walsh II: Sex Offender Registry / Failure to Register, Supplement 2
DA: September 1, 2007

Since the first Supplement to Adam Walsh II, dated May 7, 2007, AFPDs have won a raft of dismissals, and DOJ has published "SMART" Guidelines which can be used to good effect in some ways and challenged in others.

TABLE OF CONTENTS

I. Caselaw and Briefs. 1
  A. Positive Caselaw. 1
  B. Negative/Wrong Caselaw. 8
II. "SMART" Guidelines. 9
  A. Retroactivity, *Ex Post Facto*, Notice. 9
  B. Impossible to Comply. 13
  C. Conviction. 13
  D. Re-Definition of Sex Offenses. 15
  E. Tier Levels. 16
  F. Registration Information; Where, When, How. 17
  G. Spending Clause/Tenth Amendment. 18
III. Some Useful Facts. 18
  A. Relevant Dates. 18
  B. General Description of Wetterling Act. 18
  C. Some Differences Between the Wetterling Act and SORNA. 22
IV. Sentencing Guidelines, effective 11/1/07. 23
  A. USSG §§ 2A3.5, 2A3.6. 23
  B. Adam Walsh-Related Increases. 24

I. Caselaw & Briefs

A. Positive Caselaw

The briefing for these cases can be obtained from PACER, the AFPD who won the case, or -- for McCoy and Terwilliger -- at http://www.fd.org/odstb_AdamWalsh.htm.

United States v. Bobby Smith, 481 F. Supp. 2d 846 (E.D. Mich., Mar. 8, 2007), AFPD Jim Gerometta
(1) D who traveled in ISC before date of enactment of SORNA (7/27/06) not covered by plain language "travels," which is forward looking. (2) Application to such a D would be *ex post facto* because it raises *criminal* penalty from one year (for a first offense) under

prior law, 42 USC 14072(i), to 10 years under 18 USC 2250(a). Smith v. Doe inapplicable because it was about *civil* registration requirements.

United States v. Kapp & Duncan, 487 F. Supp. 2d 536 (M.D. Pa. May 16, 2007), AFPDs Fred and Lori Ulrich
SORNA does not apply by its terms to D convicted of a sex offenses before SORNA was enacted who was indicted before AG's 2/28/07 "interim rule" announcing SORNA retroactive (but who, unlike Bobby Smith, traveled after SORNA enacted). Because SORNA does not apply by its own terms (delegating to AG authority to declare whether retroactive, AG did not do so until months after D's indictment), the court was "constrained to avoid Defendants' substantial arguments that Congress impermissibly delegated its power to establish retroactive laws in violation of the nondelegation doctrine, or that Defendants' indictments violate the Ex Post Facto, Due Process, or Commerce Clauses."

United States v. Marvin L. Smith, 2007 WL 1725329 (S.D. W. Va. June 13, 2007), AFPD Edward H. Weis
D was convicted of West Virginia state sex offenses in 1995. He registered under W. Va. law when he was released in 2005 and was given notice at that time that he was required to register in any state to which he traveled. He traveled to Illinois and Florida after SORNA was enacted, did not register in those states, and was indicted in April 2007 for failing to register under SORNA in November 2006. Held: SORNA was not applicable to D at the time of his alleged violation, i.e., November 2006.

> (1) Not retroactive on its face until 2/28/07 By its terms, SORNA did not apply retroactively to persons convicted of a sex offense before July 27, 2006, until February 28, 2007 when the AG issued the interim rule. SORNA was not retroactive until then -- the rule was issued for the explicit purpose of making it retroactive.
>
> (2) Specific Notice of *SORNA* Registration Requirements is Required 42 USC 16917(b) requires the AG to prescribe rules for notifying persons who cannot comply with 42 USC 16917(a), which requires an appropriate official to inform the person "of the duties of a sex offender *under this title*," explain such duties, have the person sign a form stating duty has been explained and is understood, and register the person before release or within three days of sentencing if not to incarceration. Since D was released in 2005, he could not have been notified under subsection (a), so he fell into the category of offenders in subsection (b) for whom the AG was required to prescribe rules for notification.
>
> On May 30, 2007, DOJ published "SMART" Guidelines for comment. The court relied on Example 2 in Part IX to find that any notice D received upon release in 2005 regarding state sex offender registration requirements was not sufficient notice of registration duties *under SORNA*. See 72 Fed. Reg. 30210, 30228 (May 30, 2007). "With respect to sex offenders [like the D in this case] with pre-SORNA or pre-SORNA-implementation convictions who remain in the prisoner,

> supervision, or registered sex offender populations at the time of implementation . . . jurisdictions should endeavor to register them in conformity with SORNA as quickly as possible, *including fully instructing them about the SORNA requirements, obtaining signed acknowledgments of such instructions, and obtaining and entering into the registry all information about them required under SORNA*." *Id.* (emphasis supplied).
>
> "Not until the issuance of the Attorney General's interim rule and these proposed Guidelines [not to mention implementation by the jurisdiction which still has not occurred] was there any way to notify or register past offenders. When Mr. Smith was arrested [in November 2006], he could not have *knowingly* violated SORNA, as SORNA did not apply to him. His registration under West Virginia's laws was not sufficient to notify him of any requirement to comply with SORNA."

United States v. Barnes, 2007 WL 2119895 (S.D.N.Y. July 23, 2007), AFPD Peter Tsapatsaris
D was convicted of a sex offense in NY in 2000, registered as a sex offender in NY in 2001 upon release, and allegedly moved to NJ in 2005 without informing authorities in NY or NJ. Indictment alleged he failed to update from 1/07 up to and including 2/28/07, the date of his arrest. Held: Arrest on the same day as AG's promulgation of interim rule making SORNA retroactive violated the Due Process Clause because of a failure of notice.

SORNA gave the AG "the authority to specify the applicability of" SORNA to persons convicted before July 27, 2006 [or its implementation by the jurisdiction], and to "prescribe rules for the registration of any such persons." "Rather than prescribing a complete set of final rules dealing with the mechanics of registration," on 2/28/07, (former) AG Gonzales promulgated "the only interim rule heretofore issued," making SORNA retroactive but failing to prescribe rules for registration.

Rejects government's argument that notice under state law pre-existing SORNA provided sufficient notice that he was required to register under SORNA because (1) notice that failure to register is a misdemeanor does not suffice to give notice that failure to register is a felony punishable by up to 10 years, (2) it was impossible for any sex offender who moved before SORNA was enacted [or its implementation by the jurisdiction] to comply with its terms unless he fortuitously registered within 3 days where state law allowed 10 days.

This case is like Example 2 in the AG's interim rule, but:

> Simply stating that the sex offender [who was convicted and registered before SORNA and is then found in another state without having registered] can be held criminally liable for failure to register does not provide constitutionally effective fair warning when that sex offender is arrested on the exact day that the rule is promulgated and is subject to drastically different penalties. The Attorney General gave no direction in the interim rule, and has yet to do so since the rule's

> promulgation, as to how much time a sex offender who falls under § 16913(d) and who moved prior to SORNA's enactment has to register once SORNA became applicable to him. . . . SORNA not only delegates authority to the Attorney General to determine which sex offenders are covered, but also provides that the Attorney General has the duty to notify sex offenders of their registration requirements. *See* 42 U.S.C. § 16917. . . . Just as in *Lambert*[*v. California*, 355 U.S. 225 (1958)], the failure to act leading to criminal penalty in this case is in the failure to register after crossing the border between two jurisdictions as required by a statute of which [the defendant] was not aware. This case is even more compelling that Lambert because SORNA was made applicable to Defendant the same day as his arrest. This Court does not find persuasive the government's argument that because Defendant had notice of the state requirement, notice of SORNA's entirely different penalty sufficed. . . . [T]he [Supreme] Court stated that Lambert, "on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder." *Id*. Arresting Defendant on the day SORNA was made applicable to him without allowing him the opportunity to avoid its penalty by registering is . . . unfair and a violation of Defendant's due process rights. The Due Process Clause also encompasses the notion of fair warning. As explained by the Supreme Court in *United States v. Lanier*, 520 U.S. 259 (1997) the fair warning requirement is based on the principle "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 265. Defendant cannot be said to have known that SORNA was applicable to him until the date of his arrest. While he was aware that his conduct was proscribed under state law, he was unaware that it was proscribed under federal law with the result being stiffer penalties for the same behavior. This Court rejects the position taken by the government and the court in *Hinen* that knowledge of the state law requiring registration is equivalent to knowledge of SORNA's requirements. . . . The Constitutional mandate that defendants be given adequate notice and fair warning applies not only to what conduct is criminal but to the punishment which may be imposed. *Cf. United States v. Kilkenny*, No. 05 Cr. 6847 (2d Cir. July 5, 2007).

<u>United States v. Muzio</u>, 2007 WL 2159462 (E.D. Mo. July 26, 2007), AFPD Felicia A. Jones
D was convicted of a sex offense in Oklahoma in 1998, registered under state law when released in 2005, updated in 2006. Indictment alleged he traveled to Missouri and failed to register there between August and December 2006. Held: D was not covered by SORNA at the time of his alleged failure to register, and therefore its application to him would violate the *Ex Post Facto* Clause.
(1) Statutory Construction: 42 USC 16913(d) unequivocally authorized the AG to "specify the applicability" of SORNA to sex offenders convicted before July 26, 2006 or its implementation in the jurisdiction. AG did this on 2/28/07. Until then, SORNA had only prospective applicability. D allegedly traveled and failed to register before 2/28/07.

(2) Since SORNA did not apply to D when he traveled and failed to register, *i.e.*, it was not a crime at the time, the prosecution violates the *Ex Post Facto* Clause.

United States v. Heriot, 2007 WL 2199516 (D.S.C. July 27, 2007), AFPD Katherine Evatt
Here's a good use of taxpayer dollars. D convicted in 1989, registered prior to release under SC law, updated every year thereafter, told SC authorities on June 1, 2006 he was moving to FL, went to FL and registered there on June 5, 2006, left FL June 7, 2006 when turned out of homeless shelter, traveled to VA where stayed with relatives then returned to SC no later than June 30, 2006, re-registered in SC March 7, 2007. Indictment alleges traveled June 2006 then failed to register or update in SC on or about October 10, 2006. Held: SORNA did not apply to D because he had no obligation to register under SORNA until 2/28/07. This construction of the statute avoids the need to resolve the constitutional issues.

United States v. Sallee, No. CR-07-152-L (W.D. Okla. Aug. 13, 2007) (unpublished), available on http://www.fd.org/odstb_AdamWalsh.htm, AFPD William P. Earley
D was convicted of a sex offense in Oregon in 1996, traveled to and was present in Oklahoma no later than August 2004. Indictment alleged D failed to update registration from 9/22/06 through 4/3/07 after traveling to Oklahoma.
(1) D was not required to update before 2/28/07, effective date of AG's regulation. Explicitly agrees with Kapp, Muzio and disagrees with Hinen, Manning, Templeton and concludes the obvious – that SORNA delegated authority to the AG to decide whether it was retroactive to all persons convicted of a sex offense before the date of enactment [or implementation by the jurisdiction], AG did not do that until 2/28/07.
(2) Since the indictment also alleged that D failed to update after 2/28/07, court addressed whether § 2250 could be applied to a person who traveled two years before SORNA was enacted. It cannot as a matter of statutory construction because government conceded travel is required to establish federal jurisdiction and federal criminal liability and "travels" is present tense. Further, applying 2250 to a person who traveled before SORNA was enacted would violate the *Ex Post Facto* Clause because it increased the penalty from a one-year misdemeanor to a ten-year felony; rejects gov's arg that it is a continuing offense; the offense is complete on the 11th day after travel when D still has not registered in the new jurisdiction. [To be clear, the Wetterling Act offense occurs on the 11th day; the SORNA offense occurs on the 4th day.]

United States v. Stinson, Criminal Action No. 3:07-00055 (S.D. W. Va. Sept. 7, 2007), available on http://www.fd.org/odstb_AdamWalsh.htm, probably will be published, AFPD Edward H. Weis
After a bench trial, the court found D not guilty because conviction would violate the *Ex Post Facto* Clause.

D pled guilty in 1993 to a sex offense in Michigan. After being paroled in 1996, he registered under state law and updated his registration whenever he moved to a different address in Michigan. In 2005, he moved to W. Va. to take care of his aunt (who had just had bypass surgery) and his cousin (who had lupus), and got a job there. He did not tell

Michigan he was leaving because he was afraid he would not be allowed to go, and did not register in W. Va. because he feared he could not get a job. In Feb. 2007, he traveled to Ohio to visit family and go fishing, then returned to W. Va., where he was arrested on March 8, 2007. The only travel alleged in the indictment was 2005 and some unspecified date in February 2007.

D admits he is guilty of a Wetterling Act misdemeanor for moving without registering in 2005, but he was not indicted for that offense, but for violating 18 USC 2250(a), a felony with a ten-year maximum penalty. Congress directed the AG to decide if SORNA was retroactive and to prescribe rules for the notification and registration of sex offenders convicted before the date of enactment or implementation by the jurisdiction. AG issued interim rule stating that SORNA covered those with past offenses on February 28, 2007. D's change of address in 2005 occurred before SORNA was enacted and the government presented no evidence that D traveled to Ohio or back to W. Va. after the AG issued its interim rule on Feb. 28, 2007.

Smith v. Doe is irrelevant as it addressed only whether Alaska's registration and notification requirements were *ex post facto*, and not the issue presented here, which is whether the government may enforce penalties for failure to register against a D covered by the interim rule but who traveled before the rule was issued.

Quoting from *Weaver v.* Graham, 450 U.S. 24, 30-31 (1981):

> Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

The court found persuasive *Sallee*, *Bobby Smith*, and *Heriot* (where the Ds traveled before SORNA's enactment), but relied directly on *Muzio*, where, as here, the D was convicted before SORNA's enactment, but he traveled in ISC after SORNA's enactment and before the interim rule. As in *Muzio*, traveling and failing to register was not a crime at the time the D did those things, and therefore the prosecution presented the classis *Ex Post Facto* Clause violation.

The court agreed with *Bobby Smith* and *Sallee* that failing to register is not a continuing violation but is complete when the D travels and fails to register within the prescribed time period [10 days under the Wetterling Act, 3 days under SORNA]. *See also Toussie v. United States*, 397 U.S. 112, 119 (1970) (continuing duty to register for the draft did not turn a failure to register into a continuing offense).

United States v. McCoy, No. 1:06cr72 (W.D. Va.), dismissed by the government, March 2007. Motion to dismiss filed by AFPDs Nancy Dickenson and Christine Spurell is available on http://www.fd.org/odstb_AdamWalsh.htm.
D pled to attempted rape in 1984, was paroled 1991, parole ended 1992, well before Virginia had a sex offender registry. Upon release on an unrelated (non-sex) charge in 2003, a state PO directed D to register, and he did, though he was not required to register under any state or federal law. (VA's registry was established in 1994 and did not apply to convictions before its effective date.) Indictment alleged D violated section 2250 by traveling to W.Va. in the fall of 2006 and failing to register or update thereafter. AFPDs argued (1) never was required to register under any law, (2) no regs making SORNA retroactive, (3) VA has not implemented SORNA, (4) delegation to AG to decide if retroactive violates non-delegation doctrine, (5) failure of any notice of SORNA violates Due Process Clause, (6) SORNA violates substantive due process because a person who was not convicted of an offense specified by Congress, or whose conviction was set aside, may be subjected to registration, notification and prosecution, (7) violates *Ex Post Facto* Clause (good briefing on why SORNA & section 2250 are unlikely to be upheld under *Smith v. Doe*), (8) section 2250 violates Commerce Clause.

United States v. Terwilliger, No. 07CR1254-BTM (S.D. Cal.) – AFPD Shereen Charlick's Memorandum in support of Terwilliger's motion to dismiss, whih has not been decied, is posted at http://www.fd.org/odstb_AdamWalsh.htm. Shereen develops some novel and interesting arguments for dismissal including that (1) there is no federal power to require anyone to register for a state offense in the first place, (2) section 2250 does not by its terms criminalize a failure to register by a person convicted of a state offense, (3) Congress did not delegate to the AG the authority to make SORNA retroactive with respect to updating a registration as opposed to initial registration, (4) even if it did, retroactive application would violate the *Ex Post Facto* Clause, (5) the AG's "interim rule" violates the APA because it was not published for comment, (6) Congress' delegation to the AG violates the non-delegation doctrine, (7) the prosecution violates the Due Process Clause in that the D had no notice of SORNA requirements and it would be impossible for him to receive the required notice and register because no jurisdiction had yet implemented SORNA, (8) SORNA violates the Tenth Amendment, and (9) SORNA violates the right to travel.

United States v. Madera, 474 F.Supp.2d 1257 (M.D. Fla. 2007), AFPD Clarence Counts lost a good motion to dismiss, but the silver lining is that in April 2007, the court sentenced D to time served and 4 years probation based on the government's insistence in opposing dismissal on *ex post facto* grounds that SORNA is merely regulatory, not punitive.

United States v. Templeton, 2007 WL 445481 (W.D.Okla. Feb. 7, 2007). Despite excellent briefing by AFPD Tony Lacy, the court denied the motion to dismiss. This case was very winnable at trial because the D was not required to register under any state law or the Wetterling Act, he received no notice of SORNA and he did not travel after SORNA was enacted. It was winnable on appeal because there were no regs making SORNA retroactive and the prosecution was *ex post facto* in any event. Tony was set to

go, but D's Mom got him a "real" lawyer. On May 30, 2007, the government dismissed the section 2250 count but D pled to a Wetterling Act violation of which he was not guilty and for which he was sentenced to a guideline sentence of 8 months. Thanks, Mom!

B. Negative/Wrong Caselaw

The negative decisions are Templeton from W.D. Okl., Madera and Mason from M.D. Fla., Markel, Manning, Marcantonio, Hulen and Torres from W.D. Ark., Hinen, Roberts and Sawn from W.D. Va. Without discussing each one, here are the primary problems with the reasoning of these cases.

First, they rely on Smith v. Doe, 538 U.S. 84 (2003) to hold **that** there is no *ex post facto* problem. Smith v. Doe is inapposite because the issue in that case was whether Alaska's civil registration requirements were in fact punitive and therefore *ex post facto*. In contrast, 18 USC 2250 is a *criminal* statute which either criminalizes a failure to register that was not a federal crime before (for example, the sex offense was not subject to a registration requirement under pre-existing law), or raises the statutory maximum from one year to ten years (as pointed out in Bobby Smith, Muzio, Sallee). Further, as detailed in Adam Walsh II: Sex Offender Registration and Notification / Failure to Register at 37-43 (Nov. 2006), the registration and notification provisions of SORNA alone are far more punitive in purpose and effect than the Alaska statute at issue in Smith v. Doe.

Second, some (e.g., Mason) treat notice of a state registration requirement, before SORNA was enacted, as sufficient notice of SORNA requirements. Some of the positive cases, e.g., Marvin L. Smith, Barnes, the plain language of SORNA, see 42 USC 16917(a), and the "SMART" Guidelines, refute this position.

Third, some (Hinen, Roberts, Templeton) misinterpret the statute as saying that delegation to the AG to decide whether SORNA is retroactive to persons convicted of sex offenses before the date of enactment or implementation by the jurisdiction, see 42 USC 16913(d), does not apply to persons who were convicted before that time and were "able" to register as required by the then-non-existent 42 USC 16913(b) (*i.e.,* before release from prison or not less than 3 days after sentencing if not sentenced to imprisonment). Thus, the fact that the AG did not promulgate its "interim rule" purporting to make SORNA retroactive until February 28, 2007 is supposedly of no moment with respect to such persons. The positive cases (e.g., Kapp, Barnes, Muzio, Sallee) undertake a more careful statutory construction to reject this position.

Fourth, some of the cases (e.g. Mason) say it is OK to delegate to the AG the decision as to whether SORNA is retroactive, citing Mistretta. This is wrong. Congress *itself* must declare a law retroactive. INS v. St. Cyr, 533 US 289, 316 (2001) ("A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result."); Landgraf v. USI Film Products, 511 U.S. 244, 272-73 (1994) ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price

to pay for the countervailing benefits."). Obviously, applying SORNA retroactively violates this rule, since the statute says: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section." 42 U.S.C. § 16913(d).

II. "SMART" Guidelines

The "SMART" Guidelines (hereinafter "guidelines" and posted at http://www.fd.org/odstb_AdamWalsh.htm) are for the purpose of providing "guidance and assistance" to jurisdictions in implementing SORNA, so they can be deemed in compliance by the "SMART" Office by the due date, July 27, 2009, and not lose federal funding. The guidelines were published for comment 5/30/07, *see* Fed. Reg. 30210-01, 2007 WL 1540140 (May 30, 2007), the comment period closed 8/1/07, and it is possible they will change in final form. It is unclear exactly what these are or will be -- rules, regulations, or some sort of general information. In important ways, they provide support against the very kinds of failure to register prosecutions the government has been bringing. In other ways, they purport to expand SORNA's reach, which if used as a basis for a failure to register prosecution, should be challenged.

A. Retroactivity, *Ex Post Facto*, Notice

1) In the "Supplementary Information" section and the Introduction by (former) AG Alberto Gonzales, the guidelines state that SORNA contains a "comprehensive revision of the national standards" contained in the Wetterling Act, provides a "new comprehensive set of minimum standards," and a "comprehensive new set of standards." 72 Fed. Reg. at 30210, 30211.

What is new, the AG says, is (1) extension to Indian tribal jurisdictions, (2) requiring registration where the person resides, works and goes to school, (3) "more extensive registration information," (4) adding periodic in-person appearances, (5) broadening the availability of information to the public, and (6) the duration of registration. *Id.* at 30211.

Important differences not mentioned in these introductory sections include (but may not be limited to) (1) the increased maximum sentence for failure to register from one to ten years, (2) different deadlines for initial registration and updating changed information, depending on the deadlines under pre-existing state law, (3) new offenses that require registration, depending on which offenses required registration under the Wetterling Act and pre-existing state law, and (4) territories, which are covered by SORNA, were not required to have sex offender registries under the Wetterling Act.

The guidelines state that "[a]ll states currently have sex offender registration and notification programs and have *endeavored* to implement the Wetterling Act standards in their existing programs." 72 Fed. Reg. at 30210 (emphasis supplied). Thus, there is no

guarantee that any client was ever required to register under any pre-existing law. Further, *no* client likely to be prosecuted at this point in time was ever informed of SORNA's registration requirements because (as far as we know) only Ohio has enacted legislation to implement SORNA and that was quite recent.

To identify specific differences between SORNA and prior law for purposes of an *ex post facto* or notice argument, check the pre-existing law of the jurisdiction, and the Wetterling Act. A general description of the Wetterling Act and some of the differences between it and SORNA is below in Part III.

2) According to these guidelines (and contrary to cases like Hinen, Roberts and Templeton) Congress delegated to the AG the authority to "specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction" (as the statute says) and the AG did so in his 2/28/07 "interim rule." *Id*. at 30212. As in the "interim rule," these guidelines claim that there is no *ex post facto* problem based solely on Smith v. Doe. *Id*.

3) The need for ***specific notice of SORNA requirements, signing a form, and registration by the jurisdiction*** is emphasized throughout. *See, e.g.,* 72 Fed. Reg. 30226. Part IX, 72 Fed. Reg. at 30227-29, is particularly important in this respect. Though some courts have treated pre-SORNA notice of a duty to register under the law of some state as a sufficient proxy for notice of SORNA requirements, this is WRONG.

The guidelines state that the jurisdiction has the duty to inform and explain "his or duties under SORNA," require the person to read and sign a form stating that those duties have been explained and that he or she understands, and ensure that the person is registered, "i.e., obtain[] the required registration information for the sex offender and submit[] that information for inclusion in the registry." Congress directed the AG to prescribe rules for when this is not "feasible."

These guidelines set forth those rules – for "retroactive classes," federal and military offenders, offenders incarcerated in a jurisdiction in which they were not convicted, and those with foreign convictions. Of particular interest are the rules for federal offenders and retroactive classes. For retroactive classes, notice can be given if the person is convicted before the jurisdiction implements SORNA but released after it implements SORNA. It will not be feasible, however, to register a person before release or within 3 days of sentencing if:

- A person was convicted and released before SORNA of an offense for which the jurisdiction did not require registration, or of a sex offense in tribal court. "*If* the person remains under supervision when the tribe implements SORNA, registration will be required by the SORNA standards . . . ." (Example 1)
- A person was required to register for life "but the information concerning registration duties he was given at the time of release did not include telling him that he would have to appear periodically in person to verify and update the registration information (as required by [42 USC § 16916]), because the

jurisdiction did not have such a requirement at the time. So the sex offender will have to be required to appear periodically for verification and will have to be given new instructions about that as part of the jurisdiction's implementation of SORNA." (Example 2)

- A person was convicted of an offense for which SORNA requires lifetime registration at a time when the jurisdiction had no sex offender registry, then re-enters the system after the jurisdiction has implemented SORNA based on a conviction for robbery. "The jurisdiction will need to require the sex offender to register based on his 1980 conviction for a sex offense when he is released from imprisonment for the robbery offense." (Example 3)

The guidelines sum up as follows: "With respect to sex offenders with pre-SORNA or pre-SORNA-implementation convictions who remain in the prisoner, supervision, or registered sex offender populations at the time of implementation – illustrated by the first and second bullets above -- jurisdictions should endeavor to register them in conformity with SORNA as quickly as possible, including fully instructing them about the SORNA requirements, obtaining signed acknowledgments of such instructions, and obtaining and entering into the registry all information about them required under SORNA." It is then recognized that it may take some time to get all of these people registered. Then: "In cases in which a sex offender reenters the system based on conviction of some other offense--illustrated by the third example above--and is sentenced or released from imprisonment following the jurisdiction's implementation of SORNA, the normal SORNA initial registration procedures and timing requirements will apply, but with the new offense substituting for the predicate registration offense as the basis for the time frame."

Nothing is said about any requirement to give notice to or register anyone who does not remain in or re-enter the system. What follows, it seems, is that they are not required to register or be given notice under the terms of the statute and the procedures it authorized the AG to adopt.

4) The date of implementation by the jurisdiction limits retroactivity. The relevant date is not the date SORNA was enacted, but the (later, if ever) date of the "jurisdiction's implementation of a conforming registration program." 72 Fed. Reg. at 30212. The deadline for this is July 27, 2009, with two one-year extensions possible without losing federal funds. *Id*. at 30213. Thus far, only Ohio has adopted rules or legislation to implement a "sex offender registry conforming to the requirements of" SORNA, 42 U.S.C. § 16912(a). Jurisdictions can get extra funding for implementing early, but no funds have been appropriated, so there is no incentive to do so. *Id*. at 30214.

Thus, in a case in which the jurisdiction has not yet implemented SORNA, or implemented it after the defendant traveled in interstate commerce, or after the defendant was convicted of a federal sex offense, it would be impossible for the statute to apply by its own terms, *see* 42 U.S.C. § 16924, so the court may not need to reach the *ex post facto* question.

SORNA need not be implemented by statute, but can be implemented by administrative rules, policies and procedures. 72 Fed. Reg. at 30213. The jurisdiction has not implemented SORNA until it has "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and the SMART Office has determined that it has done so. *Id*. As provided by 42 U.S.C. § 16925(b), if SORNA is in any way inconsistent with the jurisdiction's Constitution according to its highest court in some respect (e.g., states that adopted a risk assessment model with due process hearings as a matter of constitutional law), the SMART Office can authorize reasonable alternative measures. 72 Fed. Reg. at 30214. There are special requirements for how Indian tribes can accept or reject being a "registration jurisdiction." *Id*. at 30215.

If there is a question in your mind whether or not the jurisdiction has implemented SORNA, request documentation directly from the SMART Office, check the jurisdiction's statutes and administrative rules to see whether it is actually carrying out the requirements as interpreted and explained in these Guidelines, and/or move for the information in discovery.

5) The guidelines acknowledge that jurisdictions will not be able to identify those purportedly covered by the AG's retroactive interim rule "where the predicate convictions predate the enactment of SORNA or the jurisdiction's implementation of the SORNA standards in its registration program, particularly where such sex offenders have left the justice system and merged into the general population long ago." *Id*. at 30212.

The only persons with old convictions who will be able to be identified are those who "remain in (or reenter) the system because:
• They are incarcerated or under supervision, either for the predicate sex offense or for some other crime;
• They are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or
• They hereafter reenter the jurisdiction's justice system because of conviction for some other crime (whether or not a sex offense)." *Id*.

"Sex offenders in **these three classes** are within the cognizance of the jurisdiction . . . Accordingly, a jurisdiction will be deemed to have substantially implemented the SORNA standards with respect to sex offenders whose predicate convictions predate the enactment of SORNA or the implementation of SORNA in the jurisdiction's program **if it registers these sex offenders, when they fall within any of the three classes described above, in conformity with the SORNA standards**. (For more about the registration of sex offenders in these classes, see the discussion under 'retroactive classes' in Part IX of these Guidelines.)." *Id*. at 30212-13 (emphasis supplied).

6) A jurisdiction is not required to apply SORNA retroactively if the period of registration has passed. *Id*. at 30213. The "clean record" reduction for Tier I and III offenders is not mentioned, but argue that it applies if the requirements are met. A "clean record" means (A) no conviction for an offense punishable by more than one year, (B) no conviction for any "sex offense" as defined in 42 U.S.C. § 16911(5)-(8), (C) successful

completion of "any periods" of supervised release, probation and parole, and (D) successful completion of "an appropriate sex offender treatment program" certified by a jurisdiction or the Attorney General. *See* 42 U.S.C. § 16915. The durational requirements are as follows:

- For Tier I offenders, 15 years, reduced by 5 years if "clean record" for 10 years
- For Tier II offenders, 25 years, no relief for "clean record"
- For Tier III offenders, LIFE, or 25 years if "clean record" for that long *and* the offense was a delinquent adjudication

B. Impossible to Comply

It would be impossible to comply in certain situations, for example, if the person "is hospitalized *and* unconscious" at the time of a scheduled appearance, or has to deal with a family emergency. This is OK as long as the jurisdiction's rules require the person to notify the responsible official and reschedule. 72 Fed. Reg. at 30214.

C. Conviction

Relief from conviction under state law. According to these guidelines, a person need not register or continue to register if the conviction is "reversed, vacated, or set aside, or if the person is pardoned for the offense on the ground of innocence." 72 Fed. Reg. at 30216. With no authority whatsoever, they continue: "This does not mean, however, that nominal changes or terminological variations that do not relieve a conviction of substantive effect negate the SORNA requirements. For example, the need to require registration would not be avoided by a jurisdiction's having a procedure under which the convictions of sex offenders in certain categories (e.g., young adult sex offenders who satisfy certain criteria) are referred to as something other than 'convictions,' or under which the convictions of such sex offenders may nominally be 'vacated' or 'set aside,' but the sex offender is nevertheless required to serve what amounts to a criminal sentence for the offense. Rather, an adult sex offender is 'convicted' for SORNA purposes if the sex offender remains subject to penal consequences based on the conviction, however it may be styled. Likewise, the sealing of a criminal record or other action that limits the publicity or availability of a conviction, but does not deprive it of continuing legal validity, does not change its status as a 'conviction' for purposes of SORNA." *Id.*

In many states, a pardon on *any* ground (not just innocence), and various dispositions with various names, *e.g.*, expunction, set aside, sealing, vacatur, deferred adjudication, etc., render a conviction, even if a sentence was served, null and void. Whether a person stands "convicted" under state law should be a matter of state law, since SORNA can only be implemented with respect to state convictions by the states. The AG's pronouncement that a person the state deems not convicted to be convicted is unauthorized lawmaking. Moreover, there is no Commerce Clause or other federal authority for Congress, much less the AG, to order a citizen to register for something the state deems not to be a conviction.

Tribal convictions

Here, the guidelines are narrower than the statute, providing that a jurisdiction need not require registration based on a tribal court conviction resulting from proceedings in which "(i) The defendant was denied the right to the assistance of counsel, and (ii) the defendant would have had a right to the assistance of counsel under the United States Constitution in comparable state proceedings." 72 Fed. Reg. at 30216. If the jurisdiction *does* require registration for such convictions, and such a conviction is used in a failure to register prosecution, argue that it violates the Due Process Clause.

Foreign Convictions

Congress delegated to the AG (author of the torture memo) the authority to decide under what circumstances foreign convictions were "not obtained with sufficient safeguards for fundamental fairness and due process." 42 U.S.C. § 16911(5)(B). The AG is not a court with power to decide the constitutionality of anything, so the delegation and the guideline itself violates Separation of Powers by usurping a judicial function. Not surprisingly, the AG and his minions did a poor job on this section.

According to the guideline, convictions obtained in the following foreign countries must be counted (even if in fact obtained without fundamental fairness and due process):

- Canada
- Great Britain
- Australia
- New Zealand
- Any foreign country if the U.S. State Department, in its Country Reports on Human Rights Practices, has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial in that country during the year in which the conviction occurred.

72 Fed. Reg. at 30216. If you can show that your client was convicted in one of these countries without an impartial tribunal, right to respond and present evidence, or counsel, it should not form the basis of a failure to register prosecution as a matter of due process, despite this guideline.

For a conviction from any other country, the jurisdiction need not require registration if it determines through any process or procedure it chooses that "the conviction does not constitute a reliable indication of factual guilt because of the lack of an impartial tribunal, because of denial of the right to respond to the evidence against the person or to present exculpatory evidence, or because of denial of the right to the assistance of counsel." *Id.*

But get this: "The foregoing standards do not mean that jurisdictions must incorporate these particular criteria or procedures into their registration systems, if they wish to register foreign sex offense convicts with fewer qualifications *or no qualifications*. Rather, . . . jurisdictions are free to require registration more broadly than the SORNA minimum." *Id*. at 30217 (emphasis supplied). So, what is the SORNA minimum? Apparently, "no qualifications." Obviously, requiring registration based on a

"conviction" obtained without procedural safeguards would violate the Due Process Clause.

D. Re-Definition of Sex Offenses

In telling jurisdictions which offenses for which they must require registration in order to be in compliance, these guidelines purport to broaden definitions of some of the sex offenses specified by Congress in SORNA. *See* 72 Fed. Reg. at 30217-18. Further, they bounce back and forth between requiring and rejecting the categorical approach, depending on which is more advantageous to the government. *But see* Adam Walsh II: Sex Offender Registration and Notification / Failure to Register at 18-22 (Nov. 2006) (discussing categorical versus factual approach, noting that courts are unlikely to adopt a factual approach if opposed by the defendant, but there is support for the defendant being entitled to a jury trial on actual facts), http://www.fd.org/pdf_lib/adam%20walsh%20part%20ii.pdf.

If a failure to register prosecution is based on any definition expanded by these guidelines beyond the terms of the statute, it should be dismissed because (1) the statutory element is that the person "is required to register under the Sex Offender Registration and Notification Act," 18 U.S.C. § 2250(a)(1), (2) the plain language of the statute lists what are "sex offenses" subject to SORNA and contains no authorization of the Attorney General to add any substantive crimes or broaden their definitions, (3) to the extent the Attorney General purports to do so, it is unauthorized lawmaking, (4) reading the statute as permitting the Attorney General to do so would mean that Congress violated Separation of Powers under the non-delegation doctrine, (5) the court must construe the statute to avoid constitutional doubt. *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

Here are some instances of apparent or possible broadening:

- "Attempt" and "conspiracy" specified in SORNA, *see* 42 U.S.C. § 16911(5)(A)(v), supposedly include offenses that are *not* defined as attempts or conspiracies, but "in substance amount to" attempt or conspiracy, such as "assault with intent to commit rape."
- "Kidnapping" and "false imprisonment" specified in SORNA, *see* 42 U.S.C. § 16911(7)(A), (B), supposedly include abduction and unlawful restraint, and while the statute explicitly excludes kidnapping and false imprisonment committed by a parent or guardian, the guideline states that "[i]t is left to jurisdictions' discretion" whether to require registration if the offender is a parent or guardian. True, the jurisdiction could require registration, but a federal failure to register prosecution could not be based thereon.
- "Solicitation to engage in sexual conduct" specified in SORNA, *see* 42 U.S.C. § 16911(7)(C), "should be understood broadly to include *any direction, request, enticement, persuasion, or encouragement* of a minor to engage in sexual conduct. 'Sexual conduct' should be understood to refer to any sexual activity involving physical contact." Registration for "solicitation" under 42 U.S.C. §

16911(7)(C) or (E) must be required for a conviction under any "general *attempt* or solicitation provision," or "whose elements include soliciting or *attempting*."

- "Criminal sexual conduct involving a minor" under 42 U.S.C. § 16911(7)(H) also includes "pandering," "procuring," and "pimping" apparently even if no "sexual conduct" occurred, and "is not limited to cases where the victim's age is an element of the offense," but requires registration "whenever the victim was in fact below the age of 18."
- "Any conduct that by its nature is a sex offense against a minor," *see* 42 U.S.C. § 16911(7)(I), we are told, "is intended [by whom?] to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense, such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons." The latter clause would encompass statutory rape that was consensual and so not "against" anyone, thus foreclosing a potential factual issue for trial. *See* Adam Walsh II: Sex Offender Registration and Notification / Failure to Register at 19-20 (Nov. 2006).

Persons not convicted of a sex offense but civilly committed as sexually dangerous and then released are *not* required to register under SORNA. *See* 72 Fed. Reg. at 30212. Thus, while a state might require such a person to register, failure to do so is not a federal crime.

E. Tier Levels

A person's tier level can make a big difference in various ways. *See* Adam Walsh Act II at 7-10; USSG § 2A3.5 (effective November 1, 2007). Which offenses purportedly qualify as Tier I, II or III are discussed at Part V of the SMART Guidelines. If the statutory language would place the defendant in a lower tier than these guidelines, the statute must control for the same reasons above in Part D.

Without attempting to identify every way in which the guidelines are consistent or inconsistent with the statute, we note just a few things. With respect to Tier I, it states: "For example, tier I includes a sex offender whose registration offense is not punishable by imprisonment for more than one year, a sex offender whose registration offense is the receipt or possession of child pornography, and a sex offender whose registration offense is a sexual assault against an adult that involves sexual contact but not a completed or attempted sexual act." 72 Fed. Reg. at 30219. If there is such a thing as "sexual assault against an adult that involves sexual contact but not a completed or attempted sexual act," it may be helpful to argue that that was your client's offense, as opposed to attempted sexual abuse which would put him in Tier III. Tier I also includes all tribal convictions because they are punishable by a year or less. *Id*. It would also include an 18-year-old boy who had consensual sex with his 13-year-old girlfriend, and a person convicted of sexual abuse of a minor or ward under 18 U.S.C. § 2243. *See* Adam Walsh II: Sex Offender Registration and Notification / Failure to Register at 7-8 (Nov. 2006).

The guidelines say that to be classified as Tier II, the age of the victim need not be an element of the offense; rather, it applies where "the victim was in fact below the age of 18." 72 Fed. Reg. at 30219. This may or may not be a fair reading of the list of Tier II offenses in § 16911(3)(A) where the statutory language is "when committed against a minor." However, the list of Tier II offenses in § 16911(3)(B) sets forth specific offenses that arguably require as an element a victim with the status of a minor.

F. Registration Information; Where, When, How

Part VI, 72 Fed. Reg. at 30220-23, discusses what information jurisdictions are required to collect and include in their registries. In several respects, the AG expands the information required by statute. However, as noted, this so-called "expansion authority" was explicitly granted by statute, *see* 42 U.S.C. § 16914(a)(7), (b)(8), in contrast to no authority having been granted to expand on the definitions of sex offenses or tier level requirements.

Some of the expanded information can affect clients' reporting obligations, and result in trouble or even a prosecution for failure to update if they fail to report such information, at least if the jurisdiction gave notice of the requirement to report it. Under 42 U.S.C. § 16914(a)(7), a "sex offender shall provide . . . to the appropriate official for inclusion in the sex offender registry . . . [a]ny other information required by the Attorney General." Proceeding under this authority, the guidelines tell jurisdictions that they must inform offenders that they must report the following additional information (which is a rough summary and should be read carefully):

- all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings,
- telephone numbers and any other designations used by sex offenders for purposes of routing or self-identification in telephonic communications,
- false or purported social security numbers,
- where homeless or otherwise mobile sex offenders habitually live with whatever definiteness is possible under the circumstances,
- information about any temporary lodging where the sex offender is staying for seven or more days, including identifying the place and the period of time the sex offender is staying there, **that is, vacation for a week or more**,
- information about passports, if they have passports, and for registrants who are aliens information about documents establishing their immigration status,
- for sex offenders without a fixed place of employment, places where they work with whatever definiteness is possible under the circumstances,
- all licensing that authorizes the registrant to engage in an occupation or carry out a trade or business,
- information about watercraft or aircraft owned or operated by the sex offender,
- real and any false date of birth.

Information that must be included, may be exempted, or must be exempted from web site publication is discussed in Part VII, 72 Fed. Reg. at 30223-26.

Definitions of places where the person "habitually lives," works or goes to school, which go beyond the statutory language, are discussed in Part VIII, 72 Fed. Reg. at 30226-27.

Timing and what happens with Initial Registration, Updating changed information (including **international travel**), In-Person Verification, Duration and Enforcement are discussed in Parts IX-XIII, 72 Fed. Reg. at 30227-34.

G. Spending Clause/Tenth Amendment

As in the 2/28/07 "interim rule," the AG is defensive regarding a Spending Clause or Tenth Amendment challenge. *See id.* at 30212. The Spending Clause only allows the federal government to use conditional funding to encourage the states to take certain actions. The Tenth Amendment prohibits the federal government from enlisting state officials in enforcing federal law, which this clearly does. *See, e.g.,* 72 Fed. Reg. 30214-16. In any event, the Spending Clause is not a source of federal power to require individuals to register as sex offenders for state offenses.

III. Some Useful Facts

A. Relevant Dates

July 27, 2006 – signed into law
July 27, 2008 – AG must provide software to all jurisdictions
July 27, 2009 – deadline for implementation by all jurisdictions
February 28, 2007 – AG "interim rule" deems SORNA retroactive for purposes of prosecution
May 30, 2007 – "SMART" Guidelines published for comment
August 1, 2007 – comment period for "SMART" Guidelines closed
??? What date was SORNA implemented in the jurisdiction in which the defendant resided, worked or went to school on the date he is alleged to have violated 18 USC 2250, if at all?

B. General Description of Wetterling Act

Under 42 U.S.C. §§, 14071-73, only States are required to establish a sex offender registry, under guidelines to be established by the Attorney General (AG). See 42 USC 14071(a)(1). The deadline to do so was within three years of September 13, 1994, with the possibility of a two-year extension. A State would lose 10% of funds otherwise allocated under 42 USC 3756 (formula grants) for failure to comply. Any State submitting an application stating that it is in compliance or making a good faith effort is required to be given a grant to offset costs.

Among the requirements of States are that a responsible official notify the person of the duty to register and to report changes and have the person read and sign a form saying the duty to register "has been explained." The State is required to verify the

address of any registrant at least annually, to report the information to the law enforcement agency with jurisdiction where the person expects to reside, to enter it into the State's "records or data system," and to transmit conviction data and fingerprints to the FBI. The State "may" disclose the information for any purpose permitted under state law, and "shall release *relevant information that is necessary to protect the public concerning a specific person* required to register," which shall include maintenance of an Internet site for such information. See 42 USC 14071(b)(2), (e).

The AG is directed to set up a "national database at the Federal Bureau of Investigation to track the whereabouts and movement" of persons convicted of a listed offense or determined to be a sexually violent predator (described below). See 42 USC 14072(b). States participate in the "national database" by transmitting current address and other information as required by AG guidelines. See 42 USC 14071(b)(2)(B). The FBI "may" release "*relevant information concerning a person* required to register under subsection (c) of this section [requiring direct registration with FBI if state does not have "minimally sufficient" program] *that is necessary to protect the public*." See 42 USC 14072(f).

The FBI "shall" release information in its database "(1) to Federal, State, and local criminal justice agencies for-- (A) law enforcement purposes; and (B) community notification in accordance with section 14071(d)(3) of this title [which does not exist]; and (2) to Federal, State, and local governmental agencies responsible for conducting employment-related background checks under section 5119a of this title." See 42 USC 14072(j).

On April 30, 2003, Congress enacted Pub. L. 108-21, Title VI, § 604(c), which directed the Crimes Against Children Section of the Criminal Division of the Department of Justice to "create a national Internet site that links all State Internet sites established pursuant to this section."

There is no requirement of automatic publication on a State or national website based on the mere fact of conviction of one of a list of offenses. Rather, it is up to the States (or the FBI in the case of a person residing in a state without a "minimally sufficient" program) to decide what information is "relevant" and "necessary to protect the public concerning a specific person." Many states do this through a risk classification system, in which level of risk is determined in a due process hearing, and the breadth and method of release of information about the specific offender varies by risk level.[1]

---

[1] The DOJ Guidelines state:

"States do, however, retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes and to specify standards and procedures for making these determinations. Several different approaches to this issue appear in existing state laws.

One type of approach, which is consistent with the requirements of the Act, involves particularized risk assessments of registered offenders, with differing degrees of information

To be required to register in a State where one resides, is employed or is a student, one must be:

- convicted of a State "criminal offense against a victim who is a minor" which is comparable to or exceeds:

  (i) kidnapping of a minor, except by a parent;

  (ii) false imprisonment of a minor, except by a parent;

  (iii) criminal sexual conduct toward a minor;

  (iv) solicitation of a minor to engage in sexual conduct;

  (v) use of a minor in a sexual performance;

  (vi) solicitation of a minor to practice prostitution;

  (vii) any conduct that by its nature is a sexual offense against a minor;

  (viii) production or distribution of child pornography, as described in section 2251, 2252 or 2252A of Title 18; or

  (ix) an attempt to commit an offense described in any of clauses (i) through (vii), if the State--

    (I) makes such an attempt a criminal offense; and

    (II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

  Conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger. See 42 USC 14071(a)(3)(A).

---

release based on the degree of risk. For example, some states classify registered offenders in this manner into risk levels, with registration information limited to law enforcement uses for offenders in the "low-risk" level; notice to organizations with a particular safety interest (such as schools and other child care entities) for "medium risk" offenders; and notice to neighbors for "high risk" offenders.

States also are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories. For example, states may decide to focus particularly on child molesters, in light of the vulnerability of the potential victim class, and on recidivists, in light of the threat posed by offenders who persistently commit sexual offenses.

Another approach by which states can comply with the Act is to make information accessible to members of the public on request. This may be done, for example, by making registration lists open for inspection by the public, or by establishing procedures to provide information concerning the registration status of identified individuals in response to requests by members of the public. As with proactive notification systems, states that have information-on-request systems may make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning these offenders."

64 Fed. Reg. 572, 582 (Jan. 5, 1999).

- convicted of a State "sexually violent offense," which means an offense comparable to or exceeding:
  - aggravated sexual abuse under 18 USC 2241 (sexual act by force, threat that any person will be subjected to death, serious bodily injury or kidnapping, or rendering unconscious or substantially impaired),
  - sexual abuse under 18 USC 2242 (sexual act by threatening or placing in fear (other than that any person will be subjected to death, serious bodily injury or kidnapping) or if the victim is unable to appraise the nature of the conduct or is physically unable to decline), or
  - has as an element sexual contact with intent to commit aggravated sexual abuse or sexual abuse. See 42 USC 14071(a)(3)(B).
- a "sexually violent predator," meaning a person "convicted of a sexually violent offense" and "suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." "Mental abnormality" means "a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." "Predatory" means "directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization." See 42 USC 14071(a)(1), (a)(3)(C), (D), (E). Whether a person is a "sexually violent predator," who must also register, is made by a court after considering a recommendation of a Board of experts in the behavior and treatment of sex offenders, victims' rights advocates and law enforcement agency representatives, or is made in an alternative state procedure approved by the AG. See 42 USC 14071(a)(2). Only sexually violent predators must verify registration every 90 days. See 42 USC 14071(b)(3).
- convicted of a Federal offense under 18 USC 1201 (kidnapping) involving a minor victim, a Federal offense under chapter 109A (Sexual Abuse, sexual contact, sexual abuse of or contact with a minor or ward), 110 (Sexual exploitation of children), 117 (Transportation for Illegal Sexual Activity and Related Crimes), or "any other offense designated by the AG as a sexual offense for purposes of" 18 USC 4042(c)
- "sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119." See 42 USC 14072(i); 18 USC 4042(c).

The listed State offenses do not include adjudications of juvenile delinquency; do not include simple possession of child pornography; do not include conspiracies; include attempts only if the State makes it a crime and chooses to include it as a criminal offense against a minor; and conduct that is criminal under state or federal law solely because of the age of the victim if the perpetrator is 18 years old or younger does not count.

Registration and updates are pursuant to State law, which must ensure that the information goes to the law enforcement agency with jurisdiction where the person

resides. See 42 USC 14071(b)(4), (5). A person must comply with registration and update requirements for 10 years, or for life if s/he has one or more priors, or was convicted of an aggravated offense, or has been determined to be a sexually violent predator and that determination has not been terminated. See 42 USC 14071(b)(6), (a)(1)(B).

States are required to provide for registration of persons convicted of Federal Offenses. See 42 USC 14071(b)(7). If the State does not have a "minimally sufficient" sex offender registration program as described in 42 USC 14072(a)(3), and the person has been convicted of one of the listed offenses or been determined to be a sexually violent predator, s/he must register with the FBI. See 42 USC 14072(c).

The States are to provide unspecified "criminal penalties" for failure to register. The federal penalty is not more than one year, or not more than 10 years for a second or subsequent offense. See 42 USC 14072(i).

C. Some Differences Between the Wetterling Act and SORNA

Wetterling 42 USC 14071-73	**SORNA 42 USC 16901-62**
No juvenile	Some juvenile
No simple possession child porn	Simple possession child porn
No misdemeanors	Misdemeanors
No conspiracy	Conspiracy
No attempt unless state makes attempt a crime and requires registration	Attempt
No stat rape if D is 18 or younger	Stat rape unless the victim was at least 13 and D was no more than 4 years older
States only	Tribes and territories too
Can use risk assessment model	No hearing on risk, to challenge classification, to get out early
Can publish all, some or none on Internet	Automatic IN publication for all; may exclude Tier I other than "specified offense against a minor"
10 years duration	15 years (tier I) reduced by 5 years if "clean record" for 10 years
life if prior convictions, aggravated offenses or "sexually violent predator"	25 years (tier II), no relief for "clean record"
	Life (tier III) reduced to 25 years if "clean record" for that long *and* the offense was a delinquent adjudication
Fail to Reg 1-year misdemeanor	10-year max
10-year max if second or subsequent	
No prosecutions until SORNA	

IV. Sentencing Guidelines, effective 11/1/07

A. USSG §§ 2A3.5, 2A3.6

According to Application Note 1 to USSG § 5B1.3, SORNA requirements do not apply unless and until the jurisdiction implements SORNA.

The new failure to register guidelines, USSG §§ 2A3.5 and 2A3.6, for violations of 18 U.S.C. § 2250(a) and (c), are attached to Adam Walsh II: Sex Offender Registry / Failure to Register, Supplement 1.

Some ideas for challenging these guidelines, particularly § 2A3.5, are contained in the Defenders' March 6, 2007 Letter to the Commission, available at http://www.fd.org/pdf_lib/Sex_offense_amend_comments3607.pdf, objecting to the guideline as then proposed, some of the problematic features of which remain.

- Perhaps the most problematic feature is 2A3.5(b)(1), which can be read to permit enhancement for a "sex offense" the defendant "committed" but of which he was not convicted. The guideline, however, does not explicitly say so. Drawing on the arguments in Part I(A) of the Defenders' letter, argue that a conviction is required for the SOC is to apply.

- The Commission's definition of "minor" in Note 1 is contrary to the definition of "minor" in SORNA. *See* Defenders' March 6, 2007 Letter to the Commission, Part I(C).

- The Commission failed to fully implement the congressional directive to consider the seriousness of the offense that gave rise to the duty to register beyond the blunt instrument of tier levels. *See* Defenders' March 6, 2007 Letter to the Commission, Part I(D). Where the underlying sex offense was not serious enough to warrant the base offense level of 12, 14 or 16 corresponding to the tier level, argue that that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," "the Guidelines reflect an unsound judgment, or . . . do not generally treat certain defendant characteristics in the proper way," or "the case warrants a different sentence regardless." *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007).

- The Commission implemented the congressional directive to consider whether the person voluntarily attempted to correct the failure to register in the stingiest possible way. *See* Defenders' March 6, 2007 Letter to the Commission, Part I(E). You can do better by drawing on Part I(E) and (F) of the Defenders' letter and relying on *Rita*.

B. Adam Walsh-Related Increases

Effective November 1, 2007, guideline sentences for many sex offenses will be increased, some drastically. Part II of the Defenders' March 6, 2007 letter may provide fodder for arguing for a non-guideline sentence. Note that some of the guidelines the Commission finally adopted differ slightly from the original proposals the letter addresses.