

July 31, 2007

Director Laura Rogers  
U.S. Dept. of Justice, SMART Office  
810 7th Street, NW  
Washington, DC 20531  
Transmitted via email: GetSMART@usdoj.gov

**Re: Docket No. OAG 121: Comments on the Proposed Guidelines for Sex Offender Registration and Notification**

Dear Director Rogers:

Thank you for the opportunity to submit comments to the Proposed National Guidelines for Sex Offender Registration and Notification, which guide Ohio and other states as they work to implement the Adam Walsh Child Protection and Safety Act of 2006.

The Ohio General Assembly spent much of this year working on Senate Bill 10, which is intended to implement the Adam Walsh Act in Ohio. Most of the debate in the legislature and among interested parties centered around three issues: the retroactive application of the bill's classification, registration, and notification requirements; the inclusion of juvenile sex offenders on a public registry; and the question of what constitutes "substantial" compliance with the guidelines.

Several lengthy committee hearings and meetings of interested parties resulted in a final version of the legislation that was marginally more acceptable to the various interested parties than was the as-introduced version of the bill. The final version, however, signed into law on June 30, continues to be laden with issues that will be challenged in Ohio's court system for many years to come.

We offer suggested changes to the Proposed Guidelines below. We believe these changes will assist other states in their legislative processes as they work to implement the Adam Walsh Act, and will result in legislation and registration systems that are less likely to face lengthy and costly legal challenges.

**Retroactivity**

The Adam Walsh Act itself is not retroactive. Instead, it delegates authority to the Department of Justice to interpret and administer the Act's registration provisions, and to determine the applicability of those provisions to offenders who were convicted prior to the enactment of the Act.<sup>1</sup> The Guidelines for implementation of the Adam Walsh Act require that the Act be applied retroactively to persons with convictions for sex offenses who are incarcerated or under supervision; who are already subject to a pre-existing sex offender registration system; and who re-enter the justice system because of another crime, regardless of whether it is a sex offense.

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<sup>1</sup> 42 U.S.C. Sec. 16913(d) provides that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offender 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 [the initial registration provisions] of this section."

Congress did not mandate that all sex offenders be reclassified, and certainly did not require that those offenders who have completed their period of registration be re-registered under the new provisions of the Adam Walsh Act. Applying the Adam Walsh Act's classification, registration, and notification requirements retroactively as outlined in the Proposed Guidelines will unnecessarily subject states to lengthy and expensive constitutional challenges that could be avoided simply by applying the Act prospectively only.

Retroactive application of the Adam Walsh Act presents separation of powers issues, as state legislatures, acting on a directive handed down by the executive branch of the federal government, will be reversing decisions made by judges. In Ohio, the retroactive application of Senate Bill 10 means that thousands of legal decisions of trial court judges, to not label offenders as sexual predators, will be overturned by the legislature—simply because the offenses underlying those decisions, which were committed many years ago, fall into a certain Tier, as defined by the Act.

Plea deals that predate the enactment of the Adam Walsh Act and states' implementation legislation raise additional legal problems. There are thousands of offenders in Ohio who, since the enactment of Ohio's current sex offender registration system ten years ago, have plead guilty to sex offenses. Many of them plead guilty to offenses that would, under the Adam Walsh Act, be Tier III offenses. But those offenders were labeled, by a judge, as sexually oriented offenders (similar to Tier I), not as sexual predators (similar to Tier III). In many cases, that label of sexually oriented offender was part of a plea bargain, agreed to by the State of Ohio, through the office of the county prosecutor.

Those plea deals are contracts: the defendant agreed to give up his or her right to trial and agreed to go to prison, and in exchange, the State agreed that the defendant would not be labeled a sexual predator. But now, with Senate Bill 10 being applied retroactively, thousands of offenders will be notified that, because of the offense to which they plead guilty, they are being reclassified as Tier III offenders, with registration and verification duties lasting a lifetime. The State of Ohio, which years ago entered into these contracts and agreed to less-severe labels, is now unilaterally altering thousands of contracts. And, as a result, making onerous changes in thousands of people's lives, changes that were neither anticipated nor necessary.

Ohio's current sex offender registration system was also applied retroactively when it was first established. That retroactive application was later found to be constitutional by the Supreme Court of Ohio, which declared the registration requirements to be remedial, as opposed to punitive. But most of the factors that made that legislation remedial are missing from Ohio's implementation of the Adam Walsh Act: the ability of a court to remove a sexual predator label; the right of an offender to live anywhere in the community; limited notification, now that all offenders are on internet registries; and procedural safeguards, including a court hearing, with counsel, the right of confrontation, the right to present witnesses and experts, the requirement that the State have the burden of proving not only that a person committed a sexually oriented offense, but also that he or she is likely to commit another sexually oriented offense in the future, and the right to appeal an adverse ruling.

The cost to states and their court systems of the retroactive application of the Adam Walsh Act could take many forms: class action lawsuits; thousands of motions to withdraw pleas;

lawsuits for damages after offenders lose their jobs, are forced to move, or appear on an internet registry after being told they would not. And, perhaps most costly, defendants' unwillingness to enter into future plea agreements, knowing that at any time, any branch of government at any level may choose to breach the State's obligations in that contract.

The retroactive application of the Adam Walsh Act's classification, registration, and notification requirements runs afoul of fundamental fairness. It will unduly burden court systems and prove costly for the states. Congress, with its one-sentence delegation of authority to the Department of Justice, surely did not intend to levy such a cost on the states and their courts.

**Accordingly, we urge you to adopt guidelines that will allow states to apply the Act prospectively only, and to deem those states to be in substantial compliance with the implementation requirements of the Adam Walsh Act.**

### **Juvenile offenders**

This year marked the 40<sup>th</sup> anniversary of *In re Gault*, the landmark U.S. Supreme Court decision that granted many basic due process rights to children in juvenile court, including the right to advance notice of the charges, the right to a fair and impartial hearing, and the right to be represented by counsel. But *Gault* did not grant full due process protections to juveniles facing delinquency complaints. Notably absent are a child's right to a grand jury determination of probable cause and the right to an open and speedy trial by jury. And, at least in Ohio, juveniles have yet to fully realize the promises of *Gault*. A recent study found that two-thirds of children facing unruly or delinquency complaints are not represented by counsel when they appear in Ohio's juvenile courts.<sup>2</sup>

The Proposed Guidelines for the implementation of the Adam Walsh Act recognize that the burdens of sex offender registration and notification should not attach when full due process protections have not been guaranteed. For convictions arising from Indian tribal court and foreign court proceedings, the Guidelines provide:

It is recognized...that Indian tribal court proceedings may differ from those in other United States jurisdictions in that the former do not uniformly guarantee the same rights to counsel that are guaranteed in the latter. Accordingly, a jurisdiction may choose not to require registration based on a tribal court conviction resulting from proceedings in which...the defendant was denied the right to assistance of counsel...

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SORNA instructs that registration need not be required on the basis of a foreign conviction if the conviction "was not obtained with sufficient safeguards for fundamental fairness and due process for the accused..."

The Proposed Guidelines fail to acknowledge, however, that only limited due process protections are offered to children in juvenile court. By placing juvenile sex offenders age

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<sup>2</sup> This study compared the number of unruly and delinquency cases reported by the Supreme Court of Ohio's *2004 Ohio Courts Summary* to the number of unruly and delinquency cases reimbursed by the Office of the Ohio Public Defender during that same calendar year. The complete study can be found online at: [http://www.opd.ohio.gov/press/pr\\_03\\_09\\_06.htm](http://www.opd.ohio.gov/press/pr_03_09_06.htm).

14 and older on a public registry, the Adam Walsh Act imposes an adult sanction on juvenile defendants. It treats a select group of children who appear in juvenile court differently than other children who appear in juvenile court; it treats them more like adult sex offenders than like children. But it does so without regard to the limited due process protections offered to children in juvenile court.

The Proposed Guidelines recognize that lifetime inclusion on a public registry is far too severe a sanction to impose on someone whose full due process protections have not been guaranteed during Indian tribal court and foreign court proceedings. That recognition should be extended to children in juvenile court.

**Accordingly, we urge you to adopt guidelines that will allow states to include on the public registry only those juveniles who have been provided full due process protections, and to deem those states to be in substantial compliance with the implementation requirements of the Adam Walsh Act.**

The juvenile court system is based on the fundamental belief that children can be rehabilitated. Indeed, juveniles' inherent amenability to rehabilitation has been recognized by the United States Supreme Court. In its 2005 opinion in *Roper v. Simmons*, which declared the death penalty for juveniles unconstitutional, the Court stated:

The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Research tells us that juvenile sex offenders are especially amenable to treatment. According to the Ohio Association of County Behavioral Health Authorities, research shows that “with treatment, supervision and support, the likelihood of a youth committing subsequent sex offenses is about 4–10 percent.”<sup>3</sup> And a compilation of 43 follow-up studies of the re-arrest rates of 7,690 juvenile sex offenders found an average sexual recidivism rate of 7.78 percent,<sup>4</sup> which is significantly lower than the recidivism rate for adult offenders.

The inclusion on a public registry of all children who are adjudicated delinquent of certain sex offenses is fraught with problems that undermine both the history of the juvenile court system and the purpose of the Adam Walsh Act. It ignores the very foundation of this country's juvenile court system, a belief—confirmed by scientific research—that children can and should be rehabilitated. And it dilutes the effectiveness of the public registry as a public safety tool, by flooding it with thousands of juvenile offenders, 90–96 percent of whom will never commit another sex offense.

Juveniles who are amenable to treatment and who are successfully rehabilitated have no place on a public registry of violent adult sex offenders. Those who interact with each child individually—specifically, juvenile court personnel working in conjunction with treatment

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<sup>3</sup> *Juvenile Sex Offenders*. Behavioral Health: Developing a Better Understanding. Vol. Three, Issue I.

<sup>4</sup> Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*. Child Maltreatment, Vol. 7, No. 4, Sage Publication, November 2002 (291-302).

providers—should continue to be allowed to determine whether a child’s offense was a youthful indiscretion, a manifestation of a mental illness or other behavioral health problem, or a sign of a child who is not amenable to treatment and who poses an ongoing threat to public safety.

Children who serve traditional juvenile dispositions and are successfully rehabilitated should be exempted from the public registry requirements of the Adam Walsh Act. Doing so would improve upon the overall function of the Act, by both maintaining the Act’s essential elements and protecting the juvenile who is redeemable. Doing so would maintain the essence of the Adam Walsh Act, but separate from it the aspects that are inconsistent with the juvenile court system’s efforts to rehabilitate juveniles. Doing so benefits not just the juvenile, but the system.

**Accordingly, we urge you to adopt guidelines that will allow states to include on the public registry only those juveniles who have been found to be not amenable to treatment, and to deem those states to be in substantial compliance with the implementation requirements of the Adam Walsh Act.**

### **Substantial compliance**

One question in particular was repeated throughout the legislative process as the Ohio General Assembly deliberated over Senate Bill 10: what, exactly, constitutes substantial compliance with the guidelines for implementation? The Adam Walsh Act requires “substantial” implementation, and the Proposed Guidelines purport to require “substantial” compliance. But the definition of “substantial” is unclear, and leaves states uncertain about their options to tailor the Act to their systems and needs.

The Proposed Guidelines offer that the “‘substantial’ compliance standard...contemplates that there is some latitude to approve a jurisdiction’s implementation efforts, even if they do not exactly follow in all respects the specifications of SORNA or these Guidelines.” However, the Guidelines also say that the Adam Walsh Act presents a set of *minimum* national standards, and that the Guidelines set a floor, not a ceiling, for states’ registration systems.

These two statements, taken together, imply that a state’s implementation efforts do not have to “follow in all respects” the Adam Walsh Act or the Guidelines, but only if the state chooses to exceed the requirements of the Act or the Guidelines. These two statements seem to define “substantial” compliance as something at or above 100 percent compliance. That, of course, is an illogical and unfounded definition of “substantial,” and clearly goes beyond what is required by the Adam Walsh Act.

In order for the Guidelines to be a useful tool for states as they work to implement the Adam Walsh Act, a clearer definition of substantial compliance is needed. States need the Guidelines to match the language and intent of the law in order to know how to implement the Adam Walsh Act. As they are currently written, the Proposed Guidelines imply that nothing less than strict compliance will be sufficient, while the Act requires only the substantial implementation of the federal law.

**We urge you to adopt clear guidelines that will allow states to substantially comply with the Adam Walsh Act not only by blindly enacting federal mandates, but also by crafting good public policy that both achieves the Act’s goals and is tailored to the unique systems and public policy goals of each state.**

Thank you for your thoughtful consideration of these comments. We will be happy to assist you as you work to revise the Proposed Guidelines for the implementation of the Adam Walsh Act.

Sincerely,

**The Office of the Ohio Public Defender**

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cc: Ohio Congressional delegation  
Governor Ted Strickland