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To: Senate Judiciary—Criminal Justice Committee

From: Robert L. Lane, Chief Appellate Counsel, Office of the Ohio Public Defender

Re: Opponent Testimony on SB 10, The Adam Walsh Act

Date: May 2, 2007

**The Adam Walsh Act should not be applied retroactively.**

The retroactive application of the Adam Walsh Act (AWA) will unfairly and adversely affect thousands of Ohioans who are currently registered under Ohio's sex offender registration and notification laws. Retroactive application will also result in lengthy and expensive constitutional challenges, litigation that Ohio can avoid simply by making its application of AWA prospective, only. Retroactive application will mean that the legal decisions of Ohio's trial-court judges, not to label offenders as sexual predators, will be overturned by the legislature, simply because the offenses underlying those decisions, which were committed many years ago, were Tier III offenses, as defined by the AWA.

From a constitutional standpoint, there are very few problems with prospective application of the AWA. If the AWA applies only to offenses that occur after the enactment of the new Ohio law, there will be relatively few challenges to that law. The new provisions, which would tie classification, registration, and notification tiers directly to the crime of conviction, should be considered punitive, and not remedial in nature. That direct correlation, linking conviction and sex offender label, makes the AWA very different from the provisions of HB 180 that were deemed to be remedial, and were upheld in *State v. Cook* (1998), 83 Ohio St.3d 404, and its progeny. Prospective application of AWA would avoid a lot of the problems that arose with the passage of HB 180.

The primary legal attacks that were launched in 1997, with the enactment of HB 180, were aimed at the retroactive application of that law, codified in R.C. 2950. Offenders who were in prison on January 1, 1997 for sexually oriented offenses were taken back to court for sexual predator hearings. All of those offenders had committed their offenses before the enactment of the law, and in many cases, the offenses predated the law, and the hearings, by more than ten years. Offenders and their attorneys waged extensive, and expensive, legal attacks on the retroactive application of HB 180. But once *Cook* was decided, and once it became clear that the United

States Supreme Court was not going to find that HB 180 was not a violation of the federal constitutional provisions against ex post facto laws, the broad-based constitutional challenges to HB 180 ceased. There were still case-specific and fact-specific challenges to individual sexual predator labels, but when the retroactivity and ex post facto arguments were resolved, the major litigation ended.

But AWA is different. Most of the factors of HB 180 that made that legislation "remedial," as opposed to "punitive," are missing from AWA. Over the years there has been a steady legislative erosion of those factors, culminating in AWA: gone is the ability of a court to remove a sexual predator label; gone is the right of an offender to live anywhere in the community, despite his or her label (the 1000-foot rule, and other residency and work restrictions); gone is the limited notification, now that all offenders, not just sexual predators and a few habitual sex offenders, are on internet registries; gone are procedural safeguards: a court hearing, with counsel; the right of confrontation; the right to present witnesses, including experts; the requirement that the State have the burden of proving not only that you committed a sexually oriented offense, but that you were likely to commit another sexually oriented offense in the future; and the right to appeal an adverse ruling. Under current law, a person who commits a rape might not be labeled a sexual predator, because that person is not likely to commit future crimes. And since SORN laws are supposed to be forward-looking, and aimed at protecting the public from future crimes, that makes more sense than automatically labeling someone based solely on the offense that they committed in the past.

There are probably thousands of offenders in Ohio who, over the past ten years, have pleaded guilty to sex offenses. Many of them pleaded guilty to offenses that would, under AWA, be Tier III offenses, but those offenders were labeled by a judge as sexually oriented offenders, and not sexual predators. In many cases, that least-severe label—sexually oriented offender—which is most similar to AWA's Tier I, was part of a plea bargain, agreed to by the State of Ohio, through the office of the county prosecutor, and made a part of a contract: the defendant agreed to give up his or her trial rights, agreed to go to prison, and in exchange, the State agreed that the defendant would not be labeled a sexual predator. But now, if AWA is made retroactive, many offenders will be notified that, because of the nature of the offense to which they pleaded guilty, and not because of a real, or perceived, future dangerousness, they will be placed in Tier III. The State of Ohio, which years ago agreed to the least-severe label, is now unilaterally making an onerous change in someone's life, a change that was neither anticipated nor necessary.

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Attached to this testimony is a copy of a letter, sent by David J. Diroll, Executive Director of the Ohio Criminal Sentencing Commission, to the AWA Study Committee. This letter expresses the concerns of the Sentencing Commission that the AWA, if applied retroactively, would result in constitutional battles, and that it could be more cost-effective for Ohio to apply AWA prospectively, only. And depending on how the federal guidelines are written, Ohio could substantially implement the AWA, without making the AWA retroactive. The State of Ohio has the right—and the duty—under the AWA, to protect the rights that are guaranteed to its citizens by the Ohio Constitution.

In conclusion, I urge this Committee, and the Ohio General Assembly, not to impose the provisions of the Adam Walsh Act retroactively.

Robert L. Lane  
Chief Appellate Counsel  
Office of the Ohio Public Defender

# OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Thomas J. Moyer  
Chairman

David J. Diroll  
Executive Director

To: Adam Walsh Act Study Committee  
From: David Diroll  
Re: Implementation of the Adam Walsh Act  
Date: March 23, 2007

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As the Adam Walsh Act (AWA) study committee prepares to meet on March 29, the Sentencing Commission wishes to share concerns about applying the AWA to Ohio's Sex Offense Registration and Notification (SORN) Law. These comments are also relevant as the General Assembly considers S.B. 10, sponsored by Senator Steve Austria, which states the General Assembly's intent to implement the AWA in Ohio.

At the March 15 Sentencing Commission meeting, two Butler County magistrates—Bob Krebs and Lori Keating—led a discussion on the constitutionality of applying the AWA to Ohio law. As the discussion unfolded, it became obvious that the AWA's application to Ohio troubled not only the Commission's defense attorneys, but also its judges, prosecutors, and victims' representative. In fact, the group voted unanimously (Chief Justice Tom Moyer abstaining) to relay these concerns to the General Assembly.

This memo quickly recaps Ohio's current approach to sexual offender classification and the changes suggested by the AWA. It then turns to the constitutional issues raised at our meeting. The most serious concerns would arise if the AWA were applied retroactively to reclassify sex offenders who were already labeled under Ohio's current SORN Law.

## **Current Ohio SORN Law**

Current Ohio law requires judges to hold post-conviction hearings to determine whether a sexual offender belongs in one of three categories (Sexually Oriented Offender, Habitual Sexual Offender, and Sexual Predator). In deciding whether an offender should be labeled as a Sexual Predator (the most restrictive sanction, requiring registration for life), the court must hear evidence and determine that the offender is likely to commit future sex offenses. That is, judges have the authority to

determine SORN labels for convicted offenders, based on their belief that, in the future, the offender poses a palpable risk of recidivism.

### **Adam Walsh Act Changes**

The federal AWA provides fiscal incentives for states to substantially implement its provisions that include placing sexual offenses into three tiers for purposes of registration and community notification. As we understand it, states will “substantially comply” with the AWA only to the extent that they categorize sex offenses into these tiers and label, register, and track offenders by virtue of the categories.

Thus, under the AWA, the legislature will effectively decide the appropriate SORN categories for offenders, since inclusion in a category is based solely on the crime committed. There would no longer be a judicial hearing. The decision rests exclusively on the offender’s crime, not on the propensity for re-offending.

Moreover, the feds believe that the AWA should be made retroactive. This means that offenders who are already subject to SORN requirements imposed after a judicial hearing will be reclassified and reassigned to new SORN categories based solely on the offense committed.

### **Constitutional Concerns**

While the new federal approach is efficient, implementing the AWA in Ohio raises constitutional issues, especially if the AWA were applied retroactively. Here are the arguments in a nutshell.

- Because the AWA automatically ties SORN requirements to the crime committed, the penalties seem to be criminal and not civil in nature. Persons may be punished twice (prison + registration) for the same offense—particularly if AWA applies retroactively—possibly violating the protection against double jeopardy.
- The retroactive application of AWA in Ohio may constitute *ex post facto* legislation.
- The retroactive application of the three tiers under AWA would require a legislative reclassification of persons who have already been classified by a court, arguably an unconstitutional infringement of the separation of power doctrine.

**Double Jeopardy.** Tying SORN registration penalties to the offense for which a person is convicted makes the restrictions look like criminal punishments, not civil remedies. The reason the Ohio Supreme Court upheld Ohio’s SORN Law in *State v. Cook*, 83 Ohio St.3d 404 (1998) was

because SORN provisions were viewed as civil restrictions, not criminal penalties. In *Cook*, there were several factors regarding the determination in SORN cases which rendered them civil:

- [I]n making a determination as to whether an offender is a sexual predator, the judge must consider all relevant factors, including, but not limited to: the offender's age; prior criminal record; the age of the victim . . . ; whether the . . . offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim or prevent the victim from resisting; if the offender previously has been convicted of . . . any criminal offense, whether the offender completed any sentence imposed for the prior offense, and if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in available programs for sex offenders; any mental illness or mental disability of the offender; the nature of the offender's sexual conduct with the victim and whether that contact was part of a demonstrated pattern of abuse; whether the offender . . . displayed cruelty or threatened cruelty; and any additional behavioral characteristics. R.C. 2950.09(B)(2)(a) through (j).
- The conclusion by the trial court that an offender is a sexual predator must be supported by clear and convincing evidence. R.C. 2950.09(B)(3).
- The offender and the prosecutor may appeal as a matter of right the judge's determination regarding sexual predator status. *Id.*
- Upon expiration of the applicable time period, an offender who has been adjudicated a sexual predator may petition the court to obtain an entry stating that the offender is no longer a sexual predator. R.C. 2950.09(D).

Of course, if the offender were placed in Tier III solely because he committed a sexual battery or a rape, none of these protections will be present. No judicial determination will be made. And, since the SORN restrictions are directly tied to the offense, the argument that they are criminal, rather than civil, is much stronger than in the *Cook* case. For these reasons, the AWA-based law would tread much closer to Double Jeopardy infringement than prior law did.

***Ex Post Facto* Legislation.** Applying the AWA retroactively to persons already sentenced and labeled under current law may run afoul of the proscription against *ex post facto* (or otherwise unconstitutionally retroactive) legislation under Section 10, Article 1, of the U.S. Constitution and Section 2, Article 28, of the Ohio Constitution.

The first reaction might be to cite *State v. Cook*, which explicitly upheld Ohio's SORN Law against such challenges. However, *Cook* analyzed the original version of Ohio's SORN Law, enacted in 1997 as H.B. 180. Ohio's SORN Law has since undergone significant revisions, including its repeal and replacement by S.B. 3 in 2002. Ohio's SORN Law is not the same law the Ohio Supreme Court analyzed in 1998. Moreover, with the new AWA provisions grafted onto it, even the purpose of protecting the public in the future from criminals who are *likely to recidivate* will be weaker. The direct tie between criminal offense and AWA tier level supports the argument that the retroactive application of SORN provisions under the AWA could be seen as an *ex post facto* (criminal) law.

**Separation of Powers.** By implementing the AWA provisions retroactively in Ohio, the General Assembly may be promoting a violation of the separation of powers doctrine. Under current law, the judge determines whether, and to what extent, the offender is required to register. If the AWA is enacted retroactively, then the same individuals will be reclassified (but not re-sentenced) into the three new tiers based on the legislative determination of the offense type. The reclassification will occur long after the offender had been afforded an opportunity to defend himself at trial and after his opportunity to appeal his conviction and argue against his SORN label. Such an incursion into the judicial function by the legislature would be scrutinized by Ohio courts.

## **Conclusion**

In summary, there are likely to be constitutional battles ahead if the General Assembly adopts the AWA provisions *retroactively*. Conversely, if the provisions were made prospective only, then many of the constitutional infirmities would disappear. And, although it may be taxing to administer two SORN systems simultaneously, it may be more cost-effective to do so than to fight the challenges (not to mention the burden of reclassifying every sex offender ever sentenced in Ohio) that a retroactively enacted AWA in Ohio will spawn.

Moreover, under the terms of the not-yet-released federal guidelines for implementing the AWA, states that make a convincing argument that certain AWA provisions will violate their States' constitution may still be considered to have "substantially implemented" the AWA. Based on the above arguments, we believe that such a position has been supported and that, if the AWA is not implemented retroactively, Ohio will still be in substantial compliance with the terms of the Act.

c: Sen. Tim Grendell