

The Doing Time Times

Federal Defender Services
Of Wisconsin, Inc.



SUMMER 2007
Issue No. 8

OUT FRONT

This Summer's edition provides updates on developments that could lead to improved sentencing practices in the federal courts. The United States Supreme Court's current docket of cases that are sequels to the *Booker* case, may clarify the authority of the courts to impose below-guideline sentences. (Khan, "Sequels to *Booker*" at 3). Also, the Sentencing Commission's changes to the crack cocaine guidelines are likely to lead to better reasoned sentences. ("U.S. Sentencing Commission Proposed Changes to Crack Cocaine Guidelines" at 14).

A rarely-used sentencing statute, 18 U.S.C. § 3582(c), is now poised to assist the cause of sentencing fairness. The statute (on the books since 1984) permits a federal judge to reduce a term of imprisonment where "extraordinary and compelling reasons warrant such a reduction." The statute gives the BOP the sole right to seek relief

under the statute. At the same time Congress directed the Sentencing Commission to set out factors that a court should consider in reviewing a § 3582(c) motion. For some twenty years the Commission did nothing to facilitate the BOP process.

The statute was intended to give sentencing courts broad authority to determine that a previously imposed sentence had become too harsh in light of subsequent developments, such as illness, infirmities, extraordinary family needs, and acts of heroism. Without Sentencing Commission action, the BOP filed an average of only forty-six sentence reduction motions in each of the last five years. See, e.g. *Morales v. United States*, 353 F.Supp. 2d 204 (D. Mass. 2005) (court declines request for "compassionate relief" to facilitate a heart transplant because BOP did not file motion).

Through the advocacy efforts of Federal Defenders (for example, Steve Sady in Oregon), The National

Association of Criminal Defense Lawyers, and others, the Sentencing Commission has finally proposed an amended policy statement spelling out what situations are “extraordinary and compelling.” The proposed policy statement can be found at www.ussc.gov/2006guid at *Final/UserFrldly.pdf*. Once it becomes effective, Federal Defender communities and others will be pushing the BOP to avoid its previously pinched view of when it would be appropriate to petition for a sentence reduction under “extraordinary and compelling circumstances.”

Jim Walrath, Executive Director
 FEDERAL DEFENDER SERVICES
 OF WISCONSIN, INC.

TABLE OF CONTENTS

By The Numbers 3

Supreme Court News

Sequels To Booker: Rita, Claiborne, Gall, and Kimbrough 3

Legislative News

Adam Walsh: Federal Civil Commitment of “Sexually Dangerous Persons.” 6

What The Act Does and Does Not Do 9

Post-Adam Walsh Sex Offender Legislation: The Safe NOW Act and The Kids Act 12

U.S. Sentencing Commission Proposes Changes To Crack Guidelines 14

Update on Good-Time Bill 14

Update on Gang Crime Bill 15

Resources for Inmates

Prisoner Re-entry Programs: Michigan and Wisconsin 16

BY THE NUMBERS

From the 2006 *Sourcebook of Federal Sentencing Statistics* available at www.ussc.gov:

- In 2006, 86.7 percent of all federal offenders were men, a slightly higher percentage than the 86.4 percent figure from 2005.
- The racial and ethnic composition of federal offenders remained fairly stable, with Hispanics accounting for 43.1 percent of all federal offenders in 2006, followed by white offenders (29.1%) and black offenders (23.8%).
- The average age of federal offenders sentenced in 2006 was 34.8 years.
- Thirty-six percent of all defendants sentenced under the guidelines in 2006 were convicted of drug offenses. Cocaine accounted for the largest number of drug violations (43.9%) (with powder cocaine cases accounting for 22.8 percent of all drug cases and crack cocaine cases accounting for 21.1 percent of all drug cases), followed by marijuana (25.1%) and methamphetamine (21.0%).
- The other common crimes were immigration offenses (24.5%), firearms offenses (11.7%), fraud (9.7%) and non-fraud white collar offenses (4.8%).

SEQUELS TO BOOKER: RITA, CLAIBORNE, GALL AND KIMBROUGH

Hussain Khan, 3rd Year Law Student, Marquette University Law School, Keith Heidmann, 2007 graduate, Marquette University Law School

The Supreme Court, in January 2005, decided *United States v. Booker*, 543 U.S. 220, which declared that the sentencing guidelines were advisory rather than mandatory. This term the Supreme Court began to confront *Booker's* impact and the meaning of its advisory guidelines decision in *United States v. Rita*, Case No. 06-5754 and *United States v. Claiborne*, Case No. 06-5618. The cases were argued on February 19, 2007.

***Rita*-Presumption of Reasonableness In Reviewing Within-Guidelines Sentences**

In *Rita*, which was decided on June 21, 2007, the issue is whether a presumption of reasonableness for within-guidelines sentences is consistent with the *Booker* decision. The Supreme Court held 8-1 that appellate courts may indeed apply a presumption of reasonableness in reviewing sentences that fall within federal guidelines. However, the Court went on to say that such a presumption is not binding on appellate courts and does not apply at all to sentencing courts.

The defendant in *Rita* was convicted of perjury, obstruction of justice and making false statements. He was

sentenced to thirty-three months in prison, a sentence which was within the guideline range and the statutory maximum. On appeal the defendant argued the sentence was unreasonable.

The Fourth Circuit found that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory. Additionally, the Fourth Circuit held that because the district court sentenced the defendant within the applicable guideline range the sentence was presumptively reasonable.

The Supreme Court affirmed the Fourth Circuit's finding that Rita's sentence was reasonable. First, the Court held that in reviewing sentences, courts of appeals may use the presumption that sentences within federal sentencing guidelines are reasonable. In the majority opinion, Justice Breyer states that such a presumption simply reflects the fact that both the Commission which created the guidelines and the sentencing judge are carrying out the same statutory goal of reaching a proper sentence in a particular case.

Second, the Court held that the presumption of reasonableness for within guidelines sentences is not binding on appellate courts. At present, some circuits apply this presumption and others do not, and the Court left this decision to the individual courts of appeals, holding

that both approaches are proper under the law.

Third, the Court emphasized that if used at all, a presumption of reasonableness for within guidelines sentencing can only be used by appellate courts reviewing sentences for abuse of discretion. Such a presumption cannot be used by a sentencing court when determining a proper sentence. The Court reaffirmed that sentencing judges must consider a number of factors other than the federal sentencing guidelines in determining sentences. The sentencing court, then, has the power, and in some circumstances, the obligation to hand down sentences that are outside the normal guideline range.

In sum, the *Rita* decision does not substantively change or clarify the law's interpretation of *Booker*. Instead, it affirms the law as it is presently applied in both appellate and sentencing courts.

Claiborne and Gall-Extraordinary Justifications For Extraordinary Below-Guidelines Sentences

The issue presented in *Claiborne* was whether a sentencing judge must find extraordinary justifications in order to impose an extraordinary below-guidelines sentence.

In an unfortunate twist of events, Mario Claiborne was killed on May 31, 2007, prior to a decision from the Supreme Court in his case.

Consequently, on June 4, 2007, the Supreme Court dismissed Claiborne's case as moot, leaving the legal community to wonder what will become of the very important issue presented by Claiborne's case.

On June 11, 2007, the Supreme Court agreed to hear another case out of the 8th Circuit, *Gall v. United States*, which raises the same issue that had been presented by *Claiborne*: whether a court must have extraordinary justifications in order to impose an extraordinary below-guideline sentence.

In *Gall*, the defendant was convicted of conspiracy to distribute ecstasy. His advisory guideline range was 30 months imprisonment. In sentencing *Gall* to 36 months of probation the sentencing judge stated:

"Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life. Indeed, a sentence of imprisonment may work to promote

not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."

The government appealed and the 8th Circuit reversed, noting that "[i]n essence, this amount to a 100% downward variance," that the variance was thus "extraordinary," and that "this extraordinary variance is not supported by extraordinary justifications."

***Kimbrough*-Discretion of Sentencing Judge To Disagree With Policies of Sentencing Commission or Congress**

On June 11, 2007, the Supreme Court granted *certiorari* in *Kimrough v. United States*, Case No. 06-6330. In *Kimrough*, the 4th Circuit reversed a below-guideline range sentence in a crack cocaine case, holding that a "sentence that is outside the guideline range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."

In *Kimrough*, the defendant faced a guideline range of 228 to 270 months, or 19 to 22½ years of prison. The defense argued for a sentence of 15 years, citing in part to the findings of the Sentencing Commission reports that the crack/powder cocaine ratio exaggerates the relative harmfulness of crack.

The judge, noting that the sentencing law directed the court to impose a sentence sufficient but not greater than necessary to serve the sentencing factors, called a sentence of 19 to 22½ years “ridiculous.” The judge said that the 100-to-1 punishment disparity drove the offense level in the case higher than necessary to do justice. The judge sentenced Kimbrough to 15 years. The government appealed.

This case is important, not only in crack cases, but because it addresses the broader issue of whether in an advisory sentencing regime the sentencing judge can disagree with policy positions of the Sentencing Commission, or Congress for that matter.

Decisions in *Gall* and *Kimbrough* are expected in 2008.

**ADAM WALSH:
FEDERAL CIVIL COMMITMENT
OF “SEXUALLY DANGEROUS
PERSONS.”**

James Carroll, 3rd Year Law Student, Marquette University Law School

On July 27, 2006, President Bush signed the Adam Walsh Child Protection and Safety Act into law. The White House touted the Act as “build[ing] on the administration’s progress in protecting children from ‘exploitation and danger.’”¹ The

¹ Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006, <http://www.whitehouse.gov/news/releases/2>

Act’s main components include increased federal penalties for crimes against children, expansion of the National Sex Offender Registry, and the creation of regional Internet Crimes against Children Task Forces and of a National Child Abuse Registry.²

Title I of the Act comprises the Sex Offender Registration and Notification Act (“SORNA”).³ SORNA is noteworthy for several reasons. As of July 27, 2009, it repeals the current sex offender law.⁴ SORNA applies to any sex offender, defined as anyone who was “convicted of a sex offense.” For such persons, failure to comply with SORNA subjects a person to a maximum of 10 years imprisonment with a consecutive mandatory minimum of 5 years if a crime of violence was committed during the period he failed to comply.⁵ The requirements of SORNA will be featured in the next issue of the *Doing Time Times*.

Though less publicized than those provisions related to sex offender registration, the Act also provides means for the Bureau of Prisons or

006/07/20060727-7.html (last visited Feb. 15, 2007).

² *Id.*

³ 42 U.S.C. §§ 16901-16962 (2006).

⁴ There is significant confusion as to exactly when and how SORNA does take effect, but it is clear that the law must be implemented in all jurisdictions by the July 2009 date.

⁵ For a more detailed examination of SORNA, see Memorandum from Amy Baron-Evans and Sara F. Noonan (National Sentencing Resource Counsel) to Federal Defenders available at www.fd.org.

the Office of the Attorney General to certify prisoners as “sexually dangerous persons.”⁶ The following briefly reviews the history of civil commitments of sex offenders, outlines this process and examines the overall significance of this new legislation.

(1) History Of Civil Commitment For Sex Offenders.

Sex offender commitment laws have been a part of the American legal landscape for the better part of a century. In the 1930s, states began to adopt so-called “sexual psychopath” laws that re-directed sex offenders into treatment facilities, reflecting what one commentator has called the “prevailing therapeutic optimism of the time.”⁷ While such laws were less prevalent by the 1970s, they became popular again in the modern context because they allow incapacitation of repeat sex offenders beyond the sentences mandated by determinate sentencing schemes.⁸ Such laws were formed to be constitutional by the Supreme Court’s decision in *Kansas v. Hendricks*,⁹ and are now common

⁶ 18 U.S.C. §4248(a) (2006). Such persons can include those in Bureau of Prisons custody, those who have been declared mentally incompetent to stand trial but who remain in the custody of the Attorney General, and those against whom criminal charges have been dropped due to mental condition. *Id.*

⁷ Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 Cardozo Pub. L. Pol’y & Ethics J. 489, 489 (2006).

⁸ *Id.* at 489-90.

⁹ 521 U.S. 346 (1997). The court rejected petitioner Leroy Hendricks’s contentions that

nationwide.¹⁰ The Adam Walsh Act now marks the federal government’s first foray into civil commitment of sex offenders.

(2) Initial Certification as a “Sexually Dangerous Person.”

The Adam Walsh statute first defines a sexually dangerous person as having “engaged or attempted to engage in sexually violent conduct or child molestation.”¹¹ The statute then adds that the person in question must be “sexually dangerous to others,”¹² i.e. “suffer[ing] from a serious mental illness, abnormality, or disorder”¹³ that would cause the person to “have serious difficulty in refraining from sexually violent conduct or child molestation if released.”¹⁴ In other words, a sexually dangerous person is any person in federal custody who is deemed likely to commit a similar offense in the future. Note that the offense for which a person is in federal custody need *not* be a sex offense for that person to be certified as a “sexually dangerous person.”

Given this statutory definition, a two-part question logically follows: Who

Kansas’ Sexually Violent Predator Act violated substantive due process, the Double Jeopardy clause, and the Ex Post Facto clause. See Justin Engel, Comment, *Constitutional Limitations on the Expansion of Involuntary Civil Commitment for Violent and Dangerous Offenders*, 8 U. Pa. J. Const. L. 841, 842-45 (2006).

¹⁰ *Id.* at 841.

¹¹ *Id.* at §4247(a)(5) (2006).

¹² *Id.*

¹³ *Id.* at §4247(a)(d).

¹⁴ *Id.*

makes the decision to certify a person as sexually dangerous, and what criteria do they use in doing so? The answers to these questions are not entirely clear. According to the statute, a person may be certified as a sexually dangerous person by the Attorney General or by “any individual authorized by the Attorney General or the Director of the Bureau of Prisons.”¹⁵ The statute does not offer any further insight as to which individuals are appropriate to fulfill this role, nor does it provide guidance for them in making such a determination.

(3) Hearing Following Initial Certification.

The lack of clear guidelines for initially classifying a person as sexually dangerous is particularly troubling given the immediate consequences of that decision. Most importantly, certification stays the release of the incarcerated person until a hearing has been held.¹⁶ At this hearing, the person in question must be represented by counsel, which will be appointed for him if he is indigent.¹⁷ The hearing must feature many of the attributes of a full adversarial proceeding, including the right of the person in question “to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses.”¹⁸ Also, the court

¹⁵ *Id.* at §4248(a).

¹⁶ *Id.*

¹⁷ *Id.* at §4247(d).

¹⁸ *Id.*

may order a psychological or psychiatric examination and accompanying report and consider this report¹⁹ in reaching its conclusion as to whether there is “clear and convincing evidence that the person is a sexually dangerous person.”²⁰

(4) Results Of The Hearing.

If the court concludes that the person in question has been properly certified as a sexually dangerous person, that person is “commit[ted] . . . to the custody of the Attorney General.”²¹ Once this occurs, the Attorney General must attempt to place the person in the custody of the state in which the person is domiciled or was tried.²² If this state refuses to accept responsibility for the custody, care, and treatment of the sexually dangerous person, the person is to be placed in a “suitable facility”²³ by the Attorney General. The person will then remain in such a facility until the appropriate state is willing to accept the person or until the person is no longer considered sexually dangerous to others.²⁴ As with other terms in the Adam Walsh Act, there is no explanation provided as to what constitutes a “suitable facility.”

¹⁹ *Id.* at §4248(b). This report must include the person’s current symptoms and medical history, a description of the analytical methods used by the examiner, and that examiner’s findings and diagnosis/prognosis. *Id.* at §4247(c)(1-4).

²⁰ *Id.* at §4248(d).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

(5) Discharge.

The statute does provide for discharge of a committed sexually dangerous person.²⁵ The director of the facility in which the person resides must alert the court that: (1) the person is no longer sexually dangerous at all, or (2) the person is no longer sexually dangerous provided that certain conditions are applied to the person's release.²⁶ Upon such notification, a new hearing is held to decide whether the person should be released according to the director's recommendation.²⁷ If the court concludes by a preponderance of the evidence that the person is no longer sexually dangerous at all, it must order the person's immediate release.²⁸ If it concludes that the person will not be sexually dangerous given "a prescribed regimen of medical, psychiatric, or psychological care or treatment," it must order release subject to such a regimen.²⁹ A released person's failure to comply with these conditions can result in reclassification as sexually dangerous and re-commitment to a "suitable facility."³⁰

²⁵ *Id.* at §4248(e).

²⁶ *Id.*

²⁷ *Id.* This hearing is essentially identical procedurally to the original commitment hearing. *See supra* Sub-section 2.

²⁸ 18 U.S.C. §4248(e).

²⁹ *Id.*

³⁰ *Id.* at §4248(f).

(6) Ramifications.

Any information provided to BOP or other officials by a sex offender can be used against the offender by the government. Whether divulged during prior psychological evaluations, in a pre-sentence interview, or in sex offender or substance abuse treatment programs, disclosures by an offender about any past thoughts or actions may end up contributing to his classification as a "sexually dangerous person" requiring civil commitment.³¹

WHAT THE ACT DOES AND DOES NOT DO

Robert LeBell, Kostich, LeBell, Dobroski & Morgan, LLP (excerpt from presentation for Federal Defender Services on the Adam Walsh Act on April 5, 2007)

What The Act Does

1. Permits a lifetime commitment for federal inmates, probationers and individuals on supervised release, for the purpose of "treatment."
2. Requires commitment to a state or federal "suitable facility"
3. Permits the Attorney General (AG) or anyone else designated by the AG or Bureau of Prisons (BOP) to initiate civil proceedings.

³¹ For a good overview of these matters, see "The Federal Sexually Dangerous Person Commitment Act," compiled by Robert LeBell (On file with Federal Defender Services of Wisconsin, Inc.).

4. Permits, does not obligate, the court to order a psychiatric or psychological exam.
5. Requires a respondent to be represented by counsel for indigent respondents.
6. Permits the appointment of counsel for indigent respondents.
7. Permits the respondent the right to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses.
8. Establishes “clear and convincing” as the burden of proof.
9. Permits discharge from commitment at the request of the facility director if, after a hearing, the court finds by a preponderance of the evidence that he is no longer an Sexually Violent Person (SVP).
10. Permits institution of civil proceedings against anyone who is a “sexually dangerous person.”
11. Defines “sexually dangerous person” as one who has engaged in or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.
12. Defines “sexually dangerous to others” as a person who suffers from a serious mental illness, abnormality, or disorder, as a result of which he would have serious difficulty refraining from sexually violent

conduct or child molestation if released.

What The Act Does Not Do

1. Does not discuss the right to the appointment of defense experts.
2. Does not establish a standard or burden of proof for risk to reoffend.
3. Does not permit a jury trial.
4. Does not discuss discovery procedures.
5. Does not describe what is “sexually violent conduct.”
6. Does not establish a time by which to initiate proceedings.
7. Does not describe the requirements for the certification that a person is sexually violent.
8. Does not discuss whether the respondent has the right to remain silent.
9. Does not discuss whether the respondent has the right not to participate in any court ordered evaluation.
10. Does not provide for a probable cause determination.
11. Does not limit previous sexually violent conduct to that which occurred while in federal custody.

12. Does not require proof of a recent overt act.
13. Does not define a serious mental illness, abnormality or disorder.
14. Does not provide for periodic reviews.
15. Does not require commitment to a hospital, only to a "facility."
16. Does not restrict the institution of civil proceedings to the AG's office.
17. Does not require the appointment of a mental health expert before conducting the commitment hearing.
18. Does not limit the duration of the commitment.
19. Does not define what must be achieved before discharge or release is permitted.
20. Does not permit discharge or release petition by the respondent.
21. Does not provide any time period by which the commitment hearing should be held.
22. Does not indicate whether the rules of evidence are applicable to the hearing.
23. Does not delineate post-commitment procedure.
24. Does not provide for the promulgation of rules to effectuate the act.
25. Does not require periodic reexaminations.
26. Does not establish pretrial motion procedure.
27. Does not establish whether the Federal Rules of Criminal procedure are applicable.
28. Does not require proof of the least restrictive alternative.
29. Does not establish whether collateral attacks on underlying convictions are permitted.
30. Does not require that the prior sexual misconduct result in a conviction.
31. Does not establish any basis for release/bond pending resolution of the hearing.
32. Does not establish any means by which to challenge competency.

POST-ADAM WALSH SEX OFFENDER LEGISLATION:

The Safe NOW Act & The KIDS Act

James Carroll, 3rd Year Law Student, Marquette University Law School

The Adam Walsh Child Protection and Safety Act ("Adam Walsh"), signed into law in July of 2006, was a broad-ranging legislative response to child abuse, particularly child sexual abuse.³² Since its passage, the Act has spawned several additional bills in the legislative pipeline related to sex offenders. Two of these bills, the Safe NOW Act and the KIDS Act, are discussed below.

The Safe NOW Act

Among its many provisions, Adam Walsh included a requirement that the Attorney General convene a National Sex Offender Risk Classification Task Force ("the Task Force") to study and report on "risk-based sex offender classification systems."³³ This section of the Adam Walsh Act is a more general version of the Safe NOW Act of 2006, a separate bill previously introduced by Congressman Paul Gillmor (OH).³⁴

³² Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006, <http://www.whitehouse.gov/news/releases/2006/07/20060727-7.html> (last visited Feb. 15, 2007).

³³ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, Title V, Section 637 (2006).

³⁴ H.R. 4815, 109th Cong. (2006).

On January 5, 2007, Congressman Gillmor introduced the Safe NOW Act of 2007 ("Safe NOW"), a bill identical in content to the 2006 version.³⁵ According to the Safe NOW Project, a lobbying organization whose stated mission is to "create, promote, and advocate for community-based strategies and resources that eliminate child sexual abuse,"³⁶ the bill was re-introduced "to send a message to Congress of the full intent for a National Sex Offender Risk Classification Task Force."³⁷

The central purpose of Safe NOW is the creation of "guidelines for the establishment of a risk-based sex offender classification system for use in sex offender registries."³⁸ In other words, the ultimate goals of the bill are: (1) the standardized classification of sex offenders according to the threat that they pose to the community, and (2) use of such a classification system to alert the public and law enforcement to the most dangerous registered sex offenders.³⁹

Safe NOW sets forth in some detail the composition of the Task Force. The Task Force is to be chosen by the Attorney General and is to consist of twenty members, including sixteen

³⁵ H.R. 291, 110th Cong. (2007); *see also* H.R. 4815, 109th Cong.

³⁶ <http://www.safenowproject.org/about.htm> (last visited Feb. 15, 2007).

³⁷ <http://www.safenowproject.org/news.htm> (last visited Feb. 15, 2007).

³⁸ H.R. 291, 110th Cong. § 1 (2007).

³⁹ *Id.*

representatives of various advocacy groups,⁴⁰ professional organizations,⁴¹ and government agencies,⁴² and three academics specializing in sex offender risk-assessment. The Task Force is to be characterized by the diversity of its members and by their “knowledge... in the fields of sex offender management, community education, risk assessment of sex offenders, and sex offender victim issues.”

As of February 2, 2007, the Safe NOW Act had been referred to the House Subcommittee on Crime, Terrorism, and Homeland Security.

The KIDS Act

It is no secret that crime stories often make the headlines. Recently, few crime stories have received more attention in the national media than those about online sexual predators. Whether publicly exposed on programs such as Dateline NBC’s popular “To Catch a Predator” series or attempting to contact young people through social networking websites like MySpace.com, online sexual predators are big news.

As might be expected, Congress has responded to the threat of online sexual predators with a variety of

legislation. The Adam Walsh Act mandated the creation of regional Internet Crimes Against Children Task Forces. This year, lawmakers have further addressed online sexual predators by introducing the Keeping the Internet Devoid of Sexual Predators Act (“KIDS Act”).⁴³

The KIDS Act, introduced in both the House and Senate on January 30, 2007, counts among its sponsors prominent Senators John McCain (R-Ariz.) and Chuck Schumer (D-N.Y.).⁴⁴ Additionally, the bill was introduced with the support of MySpace, whose parent company News Corp. is currently facing several lawsuits filed by the families of underage girls sexually abused by people they met on the website.⁴⁵ The Act’s two main features are: (1) a requirement that all convicted sex offenders register any of their email and instant messaging addresses with the National Sex Offender Registry,⁴⁶ and (2) “criminalization of age misrepresentation in connection with online solicitation of a minor.”⁴⁷

Despite its bi-partisan support in Congress, the KIDS Act is not without its critics. The bill has been dismissed as a purely political maneuver by some,⁴⁸ while others

⁴⁰ H.R. 291, 110th Cong. § 3(c). Included are representatives of the Safe NOW Project, the National Association to PROTECT Children, and Parents for Megan’s Law, Inc. *Id.*

⁴¹ *Id.* Included are professional organizations for law enforcement officers, defense attorneys, and psychologists, among others. *Id.*

⁴² *Id.*

⁴³ H.R. 719, S. 431, 110th Cong. (2007).

⁴⁴ S. 431, 110th Cong. (2007).

⁴⁵ Joe Garofoli, *Bill to Curb Online Sexual Predators Criticized*, S.F. CHRON., Jan. 31, 2007, at A2.

⁴⁶ H.R. 719, S. 431, 110th Cong. § 2 (2007).

⁴⁷ *Id.* at § 5.

⁴⁸ Garofoli, *supra* note 4. For example, Connecticut Attorney General Richard Blumenthal, who is one of 34 attorneys general considering legal action against MySpace,

have pointed out that it is unlikely to be effective.⁴⁹ Critics have also complained that My Space's promotion of the bill sidesteps demands that the site change its minimum age from 14 to 16.⁵⁰ However, the bill's principal sponsor, Rep. Earl Pomeroy (D-N.D.), has defended it as "another step to protect children from sexual predators."⁵¹

As of January 30, 2007, the Senate version of the bill had been read twice and referred to the Committee on the Judiciary. On March 1, 2007, the House version was referred to the Subcommittee on Crime, Terrorism, and Homeland Security. As of the date of this publication, no further action has been taken on this proposed legislation.

The *Doing Time Times* will continue to monitor both of these bills and report on them in future issues.

U.S. SENTENCING COMMISSION PROPOSES CHANGES TO CRACK GUIDELINES

On May 1, 2007, the United States Sentencing Commission submitted to Congress proposed amendments to

describes the KIDS Act as political "window dressing." *Id.*

⁴⁹ *Id.* Parry Aftab, cyberspace attorney and director of WiredSafety.org, pointed out that online predators will be apprehended only if they are foolish enough to use a registered email or instant message identity in committing illegal acts online. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

the Guidelines. Among the proposals is an amendment to reduce the crack cocaine guidelines. Generally, this would result in a two-level reduction in most crack cases. That change will take effect November 1, 2007, unless Congress objects. The full text of all the amendments is available on the Sentencing Commission's website, www.ussc.gov.

To be clear, this change will not impact those already sentenced and doing time. Additionally, the proposed change to the guidelines does not affect the mandatory minimum sentences under 21 U.S.C. § 841 *et. al.* Only Congress can make those changes. To that end, the Commission also submitted another report to Congress entitled "Federal Cocaine Sentencing Policy" which recommends that Congress change the 100 to-1 crack/powder ratio that forms the basis of the mandatory minimum structure. That report is also available on the Commission's website.

UPDATE ON GOOD TIME PROPOSAL

James Carroll, 3rd Year Law Student, Marquette University Law School

On June 27, 2005, Representative Danny Davis (IL) introduced a bill in the House of Representatives designed to revive the parole system at the Federal level and to increase the amount of possible "good time" credit available to federal prisoners.

As in the present system, the “good time” provision dictates that a certain amount of credit accrues for each month of good time served.

However, unlike the present system, under this bill a “sliding scale” would be used to determine the total amount of “good time” credit earned. Potential credit ranges from five days per month (for a “short” sentence between six months and a year) to ten days per month (for a “long” sentence of ten years or more). Thus, good behavior would reduce longer sentences by approximately one third, while the shortest sentences will only be reduced by approximately one sixth. Since our last report on this legislation (Issue 7), the bill has not picked up any additional co-sponsors. It still has 12 co-sponsors, all of them Democrats. Recall that it takes 261 votes (3/5 of the 435 total number of Representatives) for legislation to pass. However, no action has occurred on the bill since it was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on August 23, 2005.

Thus, all rumors that the good time statute has changed are false.

GANG LAW UPDATE

James Carroll, 3rd Year Law Student, Marquette University Law School

On January 25, 2005, Senator Dianne Feinstein (D-CA) introduced a bill

known as the “Gang Prevention and Effective Deterrence Act of 2005.”⁵² Shortly thereafter, on February 17, 2005, an identical bill was introduced in the House of Representatives by Representative Adam B. Schiff (CA).⁵³ Noting the many harmful effects of street gangs on communities and on the economy, the bill sets forth several measures designed to combat such gangs. Included among these measures⁵⁴ are:

- (1) Provisions criminalizing recruitment of minors into a criminal street gang, participation in a criminal street gang, and commission of violent crimes to further the aims of a criminal street gang.⁵⁵
- (2) Provisions addressing the interstate nature of modern gang activity, including creation of a new offense for “multiple interstate murders”⁵⁶ and expansion of the Travel Act of 1961 to “allow for prosecution of gang members who cross state lines to obstruct justice, intimidate or retaliate against witnesses, jurors, informants, or victims.”⁵⁷
- (3) Provisions increasing penalties for various gang-related crimes,

⁵² S. 155, 109th Cong. (2005).

⁵³ H.R. 970, 109th Cong. (2005).

⁵⁴ For a good overview of the bill’s provisions, see Senator Feinstein’s related materials at http://www.feinstein.senate.gov/booklets/gang_violence_prevention.pdf.

⁵⁵ See S. 155, (109th Cong.) at Title I(A), §§ 101-03.

⁵⁶ See *Id.* at Title II, § 201.

⁵⁷ See *Id.* at Title I(A), § 104.

including those making it easier for sixteen and seventeen year-olds to be prosecuted as adults in federal court for such crimes.⁵⁸

(4) Funds for a variety of federal anti-gang programs, such as the FBI's "Safe Streets" program and the "Gang Resistance Education and Training" (G.R.E.A.T.) program.⁵⁹

As of June 29, 2006, the Senate version of this bill had been taken under consideration by the Senate Committee on the Judiciary. The House version was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on April 4, 2005, but no further action has been taken.

PRISONER RE-ENTRY PROGRAMS IN MICHIGAN AND WISCONSIN

Hussain Khan, 3rd Year Law Student, Marquette University Law School

The Summer 2006 issue of the *Doing Time* Times newsletter featured an article titled "Life After Incarceration: Successfully Reentering Society." Reentry involves the use of programs targeted at promoting the effective reintegration of offenders back to communities upon release from prison and jail. Reentry programming, which often involves a comprehensive case management approach, is intended to assist offenders in acquiring the life skills

⁵⁸ See *Id.* at Title III, § 301.

⁵⁹ See *Id.* at Title I(A), §§ 110-11, 113-14.

needed to succeed in the community and become law-abiding citizens. A variety of programs are used to assist offenders in the reentry process, including pre-release programs, drug rehabilitation, vocational training, and work programs.

This article is a follow-up to the 2006 article, with the focus on the State of Michigan, a leader in prisoner reentry and the first state in the nation to develop and fully implement a comprehensive model of prisoner transition planning. In addition, the article examines federal reentry programs, Wisconsin's own initiatives in prisoner reentry, and the efforts of public officials in providing further assistance to state and federal programs.

Rising incarceration rates over the past quarter century have resulted in an increasing number of individuals being released from prison every year. Prisoner reentry, which is the process of leaving and returning to society, has become a pressing issue nationally. Nationwide, an estimated 630,000 prisoners were released from state and federal prisons in 2001, a fourfold increase over the past two decades.

Michigan By The Numbers

Michigan has experienced a similar trend in incarceration rates. Michigan prisons and camps as of May 2006 were holding 49,377 prisoners. Based on each inmate's sentence with the largest minimum

term, the offenses for which prisoners were incarcerated include: 24% sex crimes, 44% other violent crimes, 9% drug crimes, and 23% other nonviolent crimes. Over 62% of the inmates were serving their first prison term. The average cumulative minimum sentence was 8.2 years. Approximately 35% of all prisoners were serving sentences of 10 years or more. Nearly 31% of the prison population is past the potential earliest release date (ERD). Of those past the ERD, 76% have been denied parole throughout the current prison term and 24% have paroled but then returned as violators. There are 4,843 lifers. The prisoner population gender breakdown is about 96% male and 4% female. Prisoner ages range from 15 to 92, and the average age is 36. The racial breakdown is 52% Black, 45% White, 2% Hispanic, and less than 1% Asian, American Indian, or other. Substance abuse history data from pre-sentence investigation reports shows 57% with a history of drug and/or alcohol abuse (34% with past drug and alcohol abuse, 15% with past drug abuse only, and 8% with past alcohol abuse only). Michigan has experienced notable growth in the number of people being released from prison as well.

In 2003, 13,707 individuals were released from the State's prisons, an increase of 40% compared to the 9,752 released in 1990. With such an astounding increase in incarceration and release rates, the reentry challenges experienced by states and communities in Michigan and across

the country are a very real issue. Government leaders, correction officials, local organizations, and service providers are engaged in developing and implementing effective prisoner reentry strategies.

Michigan Prisoner Re-Entry Initiative (MPRI)

Michigan has created the Michigan Prisoner Reentry Initiative (MPRI) with the vision that every prisoner released from prison will have tools needed to succeed in the community. The mission of the program is to reduce crime by implementing a plan of services and supervision developed with each offender, delivered through state and local collaboration, from the time of their entry into prison through their transition, reintegration, and aftercare in the community. The goals of the Michigan program are: (a) to promote public safety by reducing the threat of harm to persons and their property by released offenders; and (b) to increase success rates of offenders who transition from prison by fostering effective risk management and treatment programming, offender accountability, and community and victim participation.

The National Reentry Policy Council developed a guide for states and other jurisdictions interested in pursuing improvements for prisoner reentry. The Reentry Policy Council Report includes a series of policy statements and recommendations to

guide the reentry planning and development process and to improve prisoner reentry services. Michigan has used this report extensively in developing its approach. The MPRI model is distinguished by three phases: (1) Getting Ready: The Institutional Phase; (2) Going Home: The Transition to the Community - Reentry Phase; and (3) Staying Home: The Community and Parole Discharge Phase.

Phase 1 involves a comprehensive and standardized intake procedure that is used to assess the individual's strengths, risks and needs. This assessment is then used to develop for each person an individualized plan that explains what programming should be provided during the incarceration to ensure that the return to the community is safe and successful.

The program allows for community-based physical and mental health care providers access to prisons and promotes delivery of services. The prisoner is also provided with effective substance abuse treatment if chemically dependent. The program emphasizes the importance of family and makes available services and supports for family members and children of prisoners to help establish, expand, and strengthen relationships between prisoners and their families.

The prisoners are provided with therapy, mentoring and a basic living skills program to improve offenders'

behaviors, attitudes, motivation to succeed in the community and maintain a crime-free life. In addition, prisoners are provided with education and vocational training based on employment market demand and public safety requirements.

Phase 2, "Going Home," provides opportunities to participate in work assignments and skill-building for future employment, facilitates access to affordable housing, provides for continuing community-based health care, and helps in gaining employment by connecting prisoners to employment services. An interesting aspect of this program is the involvement of the victims, families and communities. The program aims at preparing family members, victims, and relevant community members for the released individual's return to the community. In addition, the program provides returning prisoners with protection, counseling, services and support, as needed and appropriate. The Going Home phase focuses on providing the prisoner with the necessary tools to become a contributing member to their community.

Phase 3, "Staying Home," is aimed at ensuring that the released prisoner complies with his conditions of release, that there is an effective supervision strategy in place, and that the prisoner has access to the services as determined by the reentry program.

Michigan's Federal Re-Entry Program

The Michigan program has a federal counterpart in the Western District of Michigan, namely the Accelerated Community Entry (ACE) Program. This program is modeled after the method used in Michigan state drug courts and was started in October 2005. The program participants attend monthly hearings and are awarded quarterly certificates for progress towards their goals. Program participants bring their supporters with them to the meetings. These people include family, pastors, employers and others that have a sincere interest in that person's success, and want to be involved in positive results.

The program participants are also supported by various community representatives that are helping them succeed. The local community college and job placement agencies are also active supporters of ACE program. The Michigan-Western Office of Probation and Pretrial Services also provide their clients with access to Alcoholics Anonymous and Cocaine Anonymous, since substance abuse is a frequent contributor to the issues faced by the offenders.

Upon completion of the first year, participants no longer have to attend monthly hearings, but remain on supervised release. If the participants complete the second year successfully, the reward is a

recommendation for early discharge from supervision.

Wisconsin's Re-Entry Program

Wisconsin's Department of Corrections experimented with a pilot reentry project for individuals between the ages of 14 and 25. This program, named the "Going Home Project," involved male and female delinquent youth committed to a secured juvenile correctional facility returning to Milwaukee County (Milwaukee area) or Brown County (Green Bay area). Representatives from the correctional facility, committing county, community supervision staff, families, youth, schools, workforce development agencies and other community service providers worked cooperatively during three phases in order to address needs of the youth and family as well as to build upon strengths.

The first phase of the project, termed "Protect and Prepare," featured programs such as education, mental health and substance abuse treatment, job training, mentoring, and risk assessment. These were designed to prepare offenders to reenter society. Phase II, known as "Control and Restore," featured programs designed to work with offenders prior to and immediately following their release from correctional institutions. Services in this phase included education, monitoring, mentoring, life skills

training, job development, ongoing assessment and mental health and substance abuse treatment. Phase III, the “Sustain and Support” phase, focused on long-term support programs designed to connect individuals who have left the supervision of the justice system with a network of social service agencies and community-based organizations that provide ongoing support and foster mentoring relationships.

Upon conclusion of the pilot project, Wisconsin’s Department of Corrections incorporated the successful practices from the Going Home Project into its daily case management practices.

For a useful resource on reentry programs, go to www.reentry.net.

ACKNOWLEDGMENTS

We extend our appreciation and gratitude to Hussain Khan, James Carroll, and Keith Heidmann, of University of Marquette Law School for their work on this publication.

CONTACT US

If you wish to submit an article or suggestions for future newsletter, please write to us at:

FEDERAL DEFENDER SERVICES
OF WISCONSIN, INC.
ATTENTION: *Doing Time Times*
517 E. Wisconsin Avenue #182
Milwaukee, Wisconsin 53202