

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

ANDREW CHRISTOPHER CROWELL,

Defendant.

06-M-1095-LGF

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW RELATING
TO THE AMENDMENTS TO THE BAIL REFORM ACT AS SET FORTH IN THE ADAM
WALSH CHILD PROTECTION AND SAFETY ACT OF 2006**

THE UNITED STATES OF AMERICA, by and through its attorney, Terrance P. Flynn, United States Attorney for the Western District of New York, by Allison P. Gioia, Assistant United States Attorney, hereby submits its response to the defendant's memorandum of law relating to the amendments to the Bail Reform Act of 1984 as set forth in the Adam Walsh Child Protection and Safety Act of 2006. The defendant's memorandum of law, coupled with the assertions made by counsel for the defendant on or about October 19, 2006, during an impromptu court appearance, purport to establish that the amendments to the Bail Reform Act of 1984 as provided for in the Adam Walsh Child Protection and Safety Act of 2006 are unconstitutional. Specifically, defendant's attempt to convince this Court that certain mandatory conditions of pre-trial release as provided for in the Adam Walsh Child Protection and Safety Act of 2006 violate the 5th Amendment procedural due process clause, the separation of powers doctrine and the 8th Amendment prohibition against excessive bail is fatally flawed and misapplies basic

constitutional principles. Simply stated, defendant Crowell asserts no actual, objective basis on which to form a constitutional challenge to the amendments to the Bail Reform Act.

FACTS

Congress has explicitly recognized that child pornography offenses, including distribution and receipt, are "crimes of violence."¹ Congress understood that the children used in the production of child pornography were the "primary victims" when it passed legislation prohibiting the sexual abuse and exploitation of children through pornographic means. United States v. Boos, 127 F.3d 1207, 1210 (9th Cir. 1997). Congress' legislative history for 18 U.S.C. § 2252 states that the statute "was born out of a 'deep and abiding concern for the health and welfare of the children and youth of the United States,' and was enacted in order 'to protect and benefit such children.'" Id. at 1211 (citing S. Rep. No. 95-438, at 40). Because most child pornography related crimes are considered to be crimes of violence, Title 18, United States Code, Section 3142(f)(1) provides that for crimes of violence there is a rebuttable presumption that there are no conditions or combination

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18 U.S.C. § 3156(a)(4) states: the term "crime of violence" means - (A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; (B) any other offense that is a felony and that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or (C) any felony under chapter 109A, 110, or 117.

of conditions to reasonably assure the safety of any other person and the community.

On July 27, 2006, President Bush signed HR 4472, Pub. L. No. 109-248 (the "Adam Walsh Child Protection and Safety Act of 2006", hereinafter, the "Adam Walsh Act") into law. The provisions of the Adam Walsh Act became effective July 27, 2006. The preamble to the Adam Walsh Act states: "An Act [t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, [and] to promote Internet safety ..." HR 4472, Pub. L. No. 109-248. Among its many provisions, the Adam Walsh Act delineated certain "Improvements to the Bail Reform Act to Address Sex Crimes and Other Matters". The Bail Reform Act, section 3142(c)(1)(B), as amended at the end of the subsection, provides in pertinent part as follows:

"In any case that involves a minor victim under Section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under Section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii) and (viii)."

Subparagraphs (iv), (v), (vi), (vii) and (viii) referenced above provide for the following conditions:

(iv) abide by specified restrictions on

personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

...

See Title 18, United States Code, Section 3142.

While the government's research has revealed no House of Representatives or Senate Reports on HR 4472, Senator Dorgan from North Dakota on July 20, 2006, clearly articulated the purpose for the legislation:

This is a piece of legislation about protecting children. I don't know what is second place in the lives of many people, but I know what is in first place, and that is the protection of children. They cannot protect themselves. It is our responsibility as parents; it is our responsibility in this country to do the things necessary to protect our children.

...

Martha Stewart is thrown in jail. They put Martha in jail for 6 months, and when she gets out of Federal prison, she gets out of Federal prison wearing an ankle bracelet, an electronic bracelet that allows law enforcement to track her whereabouts.

...

This legislation is going to save lives. Again I ask the question, and it is so

fundamental: If we send Martha Stewart home with an electronic bracelet on her ankle, we can't do that to violent sex offenders when the psychiatrists at the institute of incarceration have said, "we believe this person to be at high risk for real offending?" Nearly three-quarters of the violent sex offenders are going to repeat that offense when released from prison. We know that from statistics. Do we have an obligations to protect children? The answer is, you bet we do, and it is long past the time. That is why this legislation is so very important.

See <http://thomas.loc.gov>. The government is presently unaware of a single case where the issue of the constitutionality of the Adam Walsh Act amendments to the Bail Reform Act has been addressed.

On September 11, 2006, a Criminal Complaint was issued charging the defendant with one count of knowingly transporting and shipping and attempting to transport and ship child pornography in interstate and foreign commerce. Specifically, the Criminal Complaint alleged that on or about May 23, 2006, the defendant, sought entry into Canada from the United States at the Queenston-Lewiston port of entry. Prior to permitting his entry into Canada, the Canadian Border Services Agency conducted a search of the defendant's vehicle and located an Apple laptop computer. A border search of the defendant's computer revealed child pornography. The defendant was initially charged in Canada. The Canadian charges were to be dismissed in deference to the charges brought here in the United States.

Pursuant to this Court's Arrest Warrant, the defendant was arrested on September 27, 2006 and made his initial appearance before this Court on that day. During the initial appearance, the government did not seek to have the defendant detained, rather, the government agreed that the defendant should be released on certain conditions recommended by the Pre-trial Services Officer. Thereafter, the Court agreed to release the defendant on certain conditions. Specifically, the defendant was released on \$10,000 cash bail and the following conditions of his release were also imposed:

- (1) the defendant shall not commit any offense in violation of federal, state or local law while on release in this case;
- (2) the defendant shall immediately advise the court, defense counsel and the U.S. Attorney in writing before any change in address or telephone number;
- (3) the defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed as directed;
- (4) report to Pretrial Services within 24 hours of release and as directed thereafter;
- (5) surrender any passport;
- (6) obtain no new passport;
- (7) restrict travel to Central District of Illinois for work and Western District of New York for court and attorney meetings;
- (8) submit to a mental health evaluation;
- (9) refrain from possessing any firearm,

destructive device of other dangerous weapon;
and

(10) not possess or download any child pornography.

Thereafter, the defendant was released from custody subject to the conditions set forth above and following the posting of the \$10,000 cash bail.

On or about October 5, 2006, the Pre-trial Services Officer, in recognition of the requirements contained in the Adam Walsh Act, requested a bail review conference in order that certain additional release conditions could be imposed as required by the Adam Walsh Act amendments to the Bail Reform Act. Specifically, the Pre-trial Services Officer requested that the following additional mandatory conditions be imposed:

(1) the defendant shall not have any contact with minors without the direct supervision of a responsible adult;

(2) the defendant will refrain from direct or indirect contact with victim(s), witness(es), or family of victim(s) or witness(es); and

(3) the defendant will participate in the following home confinement program component and abide by all the requirements of the program which will include electronic monitoring or other location verification system.

As noted by the Pre-trial Services Officer, the defendant is to be subject to a curfew as directed by the Pre-trial Services Officer.

In other words, the defendant would be restricted to his residence every day as directed and to ensure that the defendant is complying with that curfew, the defendant would be monitored by electronic monitoring.

The defendant objected to the imposition of these additional conditions and requested a hearing claiming that the mandatory conditions violate: (1) his right to procedural due process, as guaranteed by the 5th Amendment of the United States Constitution; (2) the separation of powers doctrine; and (3) his right to be free from the imposition of excessive bail as provided for in the 8th Amendment of the United States Constitution. On October 19, 2006, this Court, in considering the arguments posited by the Federal Public Defender's Office in connection with unrelated child pornography cases, held an impromptu status conference on the above-captioned case. Based on the oral arguments presented by the Federal Public Defender's Office and the United States Attorney's Office in other similar, but unrelated cases, this Court ordered the Federal Public Defender's Office to submit its memoranda of law in connection with all three similarly situated cases and further ordered the government to submit its responses. This memorandum is filed in response to the defense submission.

ARGUMENT

**THE PLAIN LANGUAGE OF THE STATUTE REQUIRES THE IMPOSITION OF THE
ADDITIONAL PRE-TRIAL RELEASE CONDITIONS**

Where, as here, the statutory language is clear and unambiguous, Courts are not at liberty to adopt an interpretation different from that directed by the language. See generally, Rubin v. United States, 449 U.S. 424 (1981); Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); United States v. Payden, 75 F.2d 202 (2d Cir. 1985); United States v. Holroyd, 732 F.2d 1122 (2d Cir. 1984). There is no articulable basis on which this Court should conclude that this is one of the rare and exceptional circumstances justifying a departure from this fundamental rule of statutory construction. See United States v. Holroyd, 732 F.2d 1122, supra.

In his memorandum of law, defendant Crowell suggests that if the Court concludes that the conditions sought to be imposed by the Pre-trial Services Officer are not mandatory, then the issues presented in defendant Crowell's memorandum of law are moot. To be clear, it is the government's position that the pre-trial release conditions sought to be imposed by the Pre-trial Services Officer in recognition of the requirements contained in the Adam Walsh Act are mandatory. The statutory language could not be any more clear, if a defendant is charged with certain enumerated offenses and it

is the Court's determination that the defendant is to be released, certain conditions of that pre-trial release must be imposed.

**THE DEFENDANT CANNOT SUSTAIN HIS HEAVY BURDEN TO SUCCESSFULLY
MOUNT A FACIAL CHALLENGE TO THE BAIL REFORM ACT, AS AMENDED BY
THE ADAM WALSH ACT**

The constitutionality of legislative enactments may be challenged in two ways, a "facial challenge" to the law alleging that the law is unconstitutional in all of its applications or an "as applied challenge" to the law alleging that the law is unconstitutional as applied to the particular facts presented. As the Supreme Court has repeatedly noted, facial challenges are appropriate, if at all, only in exceptional circumstances. As the Supreme Court noted in United States v. Salerno, "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987).

The Supreme Court's decision in United States v. Salerno sets forth a general test governing facial challenges in federal courts. Indeed, in order to succeed on a facial challenge, the challenger bears a "heavy burden" and "must establish that no set of circumstances exists under which the Act would be valid." Legal

scholars have opined that facial challenges can take at least two qualitatively different forms. First, a facial challenge may be asserted as an "overbreadth facial challenge" predicating facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law. Second, a facial challenge may be asserted as a "valid rule facial challenge" predicating facial invalidity on a constitutional defect inherent in the statute itself independent of the statute's application to particular cases. The general test as articulated in Salerno applies only to valid rule facial challenges.

A careful reading of defendant Crowell's memorandum of law can lead to only one conclusion, the defendant is undertaking a facial challenge to the Adam Walsh Act amendments to the Bail Reform Act. Specifically, defendant Crowell is alleging that the law is unconstitutional in all of its applications. As will be discussed in greater detail below, defendant Crowell cannot carry his heavy burden and this Court must, under controlling Supreme Court and Second Circuit caselaw, conclude that the Adam Walsh Act amendments to the Bail Reform Act do not violate the 5th Amendment, the separation of powers doctrine and the 8th Amendment.

AS THE DEFENDANT HAS BEEN AFFORDED ALL THE PROCEDURAL DUE PROCESS TO WHICH HE IS ENTITLED, HE IS NOT ENTITLED TO A HEARING

The Supreme Court has recognized that under the Bail Reform Act, the Court, in determining whether a person charged with a crime should be released on bail, has two options:

The Bail Reform Act of 1984 provides a federal court with two choices when dealing with a criminal defendant who has been "charged with an offense" and is awaiting trial, 18 U.S.C. § 3142(a) The court may either (1) "release" the defendant on bail or (2) order him "detained" without bail. A court may "release" a defendant subject to a variety of restrictive conditions, If, however, the court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," § 3142(e), the court "shall order the detention of the person," *ibid.*, by issuing a "detention order" "direct[ing] that the person be committed to the custody of the Attorney General for confinement in a corrections facility," § 3142(i)(2). Thus, under the language of the Bail Reform Act of 1984, a defendant suffers "detention" only when committed to the custody of the Attorney General; a defendant admitted to bail on restrictive conditions, as respondent was, is "released."

Reno v. Koray, 515 U.S. 50, 57 (1995). That is, a person charged with a crime may be either released or detained.

In considering defendant's due process claim, the Second Circuit, citing Supreme Court precedent, has "explained that

procedural due process is a flexible standard that can vary in different circumstances depending on the private interest that will be affected by the official action as compared to the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process." United States v. Abuhamara, 389 F.3d 309, 318 (2d Cir. 2004) (quotations and citations omitted). As the Court went on to note, "[a] court must carefully balance these competing concerns, analyzing the risk of an erroneous deprivation of the private interest if the process were reduced and the probable value, if any, of additional or substitute safeguards." Id.

Here, the balancing involves the government's interest in "protecting children", see, Comments of Senator Dorgan, with the defendant's interest, while being released on bail, in being free from electronic monitoring while on bail.² Assuming *arguendo*, that the imposition of electronic monitoring on a person released on bail implicates a constitutionally protected interest, such a deprivation may occur only in accordance with procedural

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Indeed, whether defendant's interest may properly be characterized as a constitutionally cognizable liberty interest is, in the government's view, questionable at best. As the Second Circuit has stated, "there is no relinquishment of any significant right when a defendant elects bail. The defendant accepting the conditions of bail is simply trading jail-type confinement for something less restrictive." Cucciniello v. Keller, 137 F.3d 721, 724 (2d Cir. 1998).

safeguards. These procedural safeguards in turn must be evaluated in light of the significance of the interest affected, the risk of erroneous determination through the procedures used, and the probable value of additional safeguards. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Here, the Bail Reform Act requires the judicial officer initially to determine whether probable cause exists to believe that the defendant has committed one of the designated offenses. 18 U.S.C. § 3142(c). Such determination was made when the judge signed the complaint. That probable cause finding then triggers the dangerousness to the community presumption and a separate finding regarding that provision, under a different standard, must be made. Accordingly, separate due process analysis is required for each finding.

The probable cause finding serves three purposes. First, it is determinative of the issue whether the defendant may be held at all or required to post bail. Second it permits further inquiry into the question of dangerousness, and, finally, it gives rise to the presumption that the defendant is dangerous. In evaluating the process due the first requirement we are guided by Gerstein v. Pugh, 420 U.S. 103 (1975). Gerstein involved an arrest and detention under a prosecutor's information. Analyzing the question under the fourth amendment the Court held that the arrestee was entitled to a determination of probable cause by a judicial officer prior to any extended detention. Id. at 114. The Court went on to state, however, that the arrestee was not entitled to "the full panoply of adversary safeguards - counsel, confrontation, cross-examination, and compulsory process for

witnesses." Id. at 119-20. Hence, because the Bail Reform Act provides for a determination of probable cause by a judicial officer prior to extended detention, 18 U.S.C.A. § 3142(e) (West 1985), the Act satisfies procedural due process. Indeed, the Act provides for an adversarial proceeding and representation by counsel, 18 U.S.C.A. § 3142(f) (West 1985), neither of which was required in Gerstein, 420 U.S. at 121-23. Furthermore, the second and third functions of the probable cause determination - permitting further inquiry into dangerousness and giving rise to the presumption of dangerousness - are not so significant, standing alone, that a stricter procedural standard than that of Gerstein ought to be required. This is so because different procedural safeguards apply in the dangerousness inquiry.

United States v. Perry, 788 F.2d 100, 113-114 (3d Cir. 1986). Here, too, "because the Bail Reform Act provides for a determination of probable cause by a judicial officer prior to [the imposition of the conditions in question], . . . , the Act satisfies procedural due process." Id., at 113.

Moreover, with regard to the dangerousness inquiry, i.e., the dangerousness of a person charged with one of the enumerated offenses being released on bail, "the dangerousness determination involves a prediction of the [person]'s likely future behavior. Such a prediction explores not the external world of past events but the inner territory of the [person]'s intentions. By its very nature such a prediction is a far more speculative and difficult

undertaking than the reconstruction of past events [such as it issue in most criminal prosecutions]." Id.

In the government's view, the procedures provided in the statute are sufficient to guarantee procedural due process. Balancing a defendant's diminished interest in obtaining what is assuredly a "less restrictive" alternative than confinement,³ Cucciniello v. Keller, 137 F.3d at 724, with the Congressional determination regarding heightened concerns regarding future dangerousness - - especially considering the vulnerableness of the potential victims - - concerns which are embodied in the Act, demonstrate that procedural due process has been met.

The cases cited by defendant Crowell in support of his assertion that the Adam Walsh Act amendments to the Bail Reform Act are unconstitutional, unlike the case of Connecticut Department of Public Safety v. Doe, cited below, fail to provide this Court with any substantive guidance. In fact, defendant Crowell's extensive reliance on United States v. Salerno, 481 U.S. 739 (1987) is misplaced. As a threshold matter, Salerno addresses a substantive due process challenge to the Bail Reform Act, a challenge that is easily distinguishable from the procedural due process challenge

³As opposed to the threshold confinement/no confinement issue for which a defendant is entitled to due process.

raised by the defendant here. Salerno also addresses an Eighth Amendment challenge to the Bail Reform Act.

Critically, Salerno addressed the question of whether pre-trial detention following an adversary hearing where the government demonstrated by clear and convincing evidence that no release conditions would reasonably assure the safety of any other person and the community violated substantive due process. The Supreme Court concluded that the Bail Reform Act fully comports with constitutional requirements. In so holding, the Supreme Court stated that "the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." 481 U.S. at 748. Here, we are well beyond the threshold question raised in Salerno. This Court has already concluded that the defendant will not be detained, rather, he will be released on certain conditions; the defendant has already been afforded that due process to which he is entitled.

As with the challenge to the Bail Reform Act based upon substantive due process arguments, the Supreme Court in Salerno also concluded that the Bail Reform Act survived a challenge founded upon the Eighth Amendment. In addressing pre-trial release, the Eighth Amendment provides that excessive bail shall

not be required. In Salerno, the respondents claimed that the Eighth Amendment granted them a right to bail calculated solely upon considerations of flight. According to the respondents in Salerno, "since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it violates the Excessive Bail Clause." 481 U.S. at 752. In concluding that the Bail Reform Act did not, on its face, violate the Excessive Bail Clause of the Eighth Amendment, the Supreme Court stated:

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend the adversary hearing.

481 U.S. at 755. Relying in part on the passage cited above and other passages throughout the Salerno opinion, defendant Crowell attempts to superimpose the procedural safeguards attendant in an adversary hearing to determine whether a defendant should be detained onto the latter determination of on what conditions the defendant is to be released. In so doing, defendant Crowell is improperly extending the holding of Salerno and the procedural safeguards discussed therein to the determination of the conditions

to be imposed on a defendant who is to be released. Defendant Crowell offers no legal support for this extension of the Salerno holding.

The recent Ninth Circuit decision in United States v. Scott, 450 F.3d 863 (9th Cir. 2006) is likewise distinguishable from the challenge presented here on procedural due process grounds. The defendant's extensive reliance on the Scott decision is misplaced. First, the matter presented to the district court and thereafter, the Ninth Circuit in Scott involved a Fourth Amendment suppression issue, a completely different issue from that presented here. Specifically, in Scott, the defendant sought to suppress a shotgun and statements made to police officers after a search conducted pursuant to the pre-trial release conditions imposed following the defendant's release on state drug charges. The Fourth Amendment issue presented on appeal, one of first impression in any federal circuit, was whether police may conduct a search based on less than probable cause of an individual released while awaiting trial. Following the defendant's arrest on state drug possession charges, the defendant was released on his own recognizance and was required to comply with certain conditions of release, including random drug testing and a search of his home for drugs. The government conceded that the conditions imposed were merely checked off by a judge from a standard list of pre-trial release conditions and were

not imposed as the result of findings made after a hearing. The government further conceded that there was no probable cause to test the defendant for drugs and accordingly, the test violated the 4th Amendment. Consequently, the Ninth Circuit concluded that because probable cause to search the defendant's home, which led to the discovery of the shotgun and the defendant's statements, did not exist until after the positive drug test, the shotgun and the statements had to be suppressed.

Conspicuously absent from the defendant's memorandum of law was any mention of the two separate admonitions by the Ninth Circuit concerning the federal bail system and legislative findings to justify the imposition of certain release conditions. That portion of the Scott opinion that relates to the imposition of pre-trial release conditions supports the government's position that the Congressionally mandated conditions required by the revisions to the Bail Reform Act by the Adam Walsh Act are constitutional. The Ninth Circuit expressly noted that were the issues presented in Scott in the context of the federal system, the Congressional finding recognizing some connection between drug use and nonappearance at trial, may have necessitated a different result. Scott, 450 F.3d 863 at n. 8. Moreover, the Ninth Circuit specifically stated: "[w]e do not hold that the government can never justify drug-testing as a condition of pre-trial release.

Such a condition may well be justified based on a legislative finding, or an individualized finding that the defendant's ability to appear in court will be impaired absent drug-testing." Scott, 450 F.3d 863 at n. 12. The conditions at issue here, electronic monitoring, restrictions on personal associations, place of abode, or travel, avoid all contact with an alleged victim of the crime and with a potential witness, report to pretrial services, comply with a specified curfew and refrain from possessing a firearm, destructive device, or other dangerous weapon, were unquestionably the result of Congressional action or to borrow from the Ninth Circuit, "a legislative finding". Contrary to the defendant's assertions, the government is not short-circuiting process and claiming that the mere fact of the defendant's arrest is sufficient to establish that the conditions are required. Congress has made the determination that persons charged with certain crimes must be subject to certain pre-trial release conditions.

Where, as here, the defendant asserts a right to a hearing under the Due Process Clause of the 5th Amendment, the defendant must demonstrate that the facts he seeks to establish in that hearing are relevant to the underlying statutory scheme. Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 8 (2003). Not only does the defendant fail to make that showing, but the defendant fails to mention any fact about which a hearing is

needed. Rather, the defendant summarily concludes, without elaboration, that the amendments to the Bail Reform Act "strip the Bail Reform Act of certain constitutionally required procedural safeguards." See Defendant Crowell's Memorandum of Law at p. 8. To the contrary, the amendments to the Bail Reform Act contained in the Adam Walsh Act are only triggered where, as here, there has been a judicial determination, made within the framework of the Bail Reform Act that, (1) the defendant has been charged with one or more of certain enumerated offenses and (2) the defendant ought to be released on bail rather than be detained. Such judicial process affords the defendant procedural due process. Indeed, the statutory scheme as recited in the amended Bail Reform Act could not be any more clear -- a defendant, charged with certain enumerated offenses, who is to be released on bail based on a judicial determination, must be released on certain conditions, to include, at a minimum, electronic monitoring, restrictions on personal associations, place of abode, or travel, avoid all contact with an alleged victim of the crime and with a potential witness, report to pretrial services, comply with a specified curfew and refrain from possessing a firearm, destructive device, or other dangerous weapon. Once the judicial determination has been made and the defendant is to be released on conditions, the legislative directive regarding what those conditions must be is beyond challenge on procedural due process grounds.

In Connecticut Department of Public Safety v. Doe, 538 U.S. 1, supra, the Supreme Court considered whether the Second Circuit properly concluded that the public disclosure of Connecticut's sex offender registry deprived registered sex offenders of a liberty interest and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be currently dangerous. The Supreme Court reversed the Second Circuit because due process does not require the opportunity to prove a fact that is not material to the statutory scheme at issue. In reaching this conclusion, the Supreme Court assumed, *arguendo*, that the respondent had been deprived of a liberty interest; even assuming this fact, the Court stated "due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute." Connecticut Department of Public Safety v. Doe, 538 U.S. at 7.

In Connecticut Department of Public Safety v. Doe, the respondent was a convicted sex offender subject to Connecticut's Megan's Law requiring all persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses and felonies committed for a sexual purpose, to register with the Connecticut Department of Public Safety. In filing his action against the Connecticut Department of Public Safety, Doe argued that he was not a dangerous sexual offender and that the

Connecticut law deprived him of a liberty interest - his reputation combined with the alteration of his status under state law - without notice or a meaningful opportunity to be heard. Id. at 6. In reversing the Second Circuit and finding that the respondent's procedural due process rights had not been violated, the Supreme Court stated, "the fact that respondent seeks to prove - that he is not currently dangerous - is of no consequence under Connecticut's Megan's Law. As the DPS Website explains, the law's requirements turn on an offender's conviction alone - a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." Id. at 7. Here too, defendant's right to procedural due process was satisfied when he, consistent with the provisions of the Bail Reform Act, sought and secured his release on bail.

Indeed, there is no dispute, defendant Crowell has been charged in a Criminal Complaint with violating Title 18, United States Code, Section 2252(a)(1) (transportation of child pornography), an offense which clearly triggers the application of the recent amendments to the Bail Reform Act. At his initial appearance, the government did not seek to have the defendant detained, rather, the government concurred with the recommendation of the Pre-trial Services Officer that the defendant should be released on certain conditions. Not unlike the Connecticut statute at issue in Connecticut Department of Public Safety v. Doe, where

the question turned on whether the defendant had been convicted of a criminal offense against a minor, here, the question of what pre-trial release conditions are to be imposed turns on Congress' determination that defendants charged with certain offenses are dangerous and further that those same defendants can only be released on certain conditions. There are no facts that could be elicited at a hearing that could impact upon that legislative determination, either the defendant has been charged with a crime that triggers the amendments or he has not. The answer here is simple, the defendant has been charged with transportation of child pornography thereby triggering the mandatory release conditions, including, electronic monitoring, restrictions on personal associations, place of abode, or travel, avoid all contact with an alleged victim of the crime and with a potential witness, report to pretrial services, comply with a specified curfew and refrain from possessing a firearm, destructive device, or other dangerous weapon. Any suggestion that the defendant does not pose a danger to society or that these mandatory conditions are excessive must fail for the same reasons those arguments failed in Doe. The threshold issue of defendant's dangerousness was addressed when a judicial determination was made that defendant Crowell was entitled to release on bail. Defendant Crowell seeks to revisit or otherwise refine the dangerousness issue by seeking apparently to disprove the applicability of the legislative determination

contained in the Adam Walsh Act. Notwithstanding defendant Crowell's assertions, however, Congress has determined that for those crimes of violence against children for which a rebuttable presumption exists that there are no conditions or combination of conditions of release that will reasonably assure the appearance of the person and the safety of the community, if the defendant is to be released certain mandatory conditions must be imposed.

DEFENDANT'S SEPARATION OF POWERS AND 8TH AMENDMENT ARGUMENTS MUST FAIL

On the one hand, the defendant claims that Congress, by enacting mandatory conditions of release, has unconstitutionally encroached upon the power of the Judiciary to oversee the fixing of bail. On the other hand, the defendant claims that those same amendments violate the 8th Amendment prohibition on excessive bail. Both arguments defy logic. In fact, the defendant's separation of powers argument turns the Eighth Amendment's excessive bail prohibition on its head. The Eighth Amendment's prohibition of excessive bail was adopted to guard against judicial circumvention of legislative decisions to make certain offenses bailable; it was not meant to limit legislative discretion to decide which offenses are bailable and which are not. For the same reasons that the Supreme Court in Salerno held that the Bail Reform Act did not violate the Excessive Bail Clause of the Eighth Amendment as

discussed above, this Court must likewise find that the Adam Walsh Act amendments to the Bail Reform Act do not violate the Eighth Amendment.

With respect to defendant Crowell's argument that the Adam Walsh Act amendments to the Bail Reform Act violate the separation of powers doctrine, that argument must also fail. Defendant Crowell's argument is premised on a flawed reading of the statute. Contrary to defendant's reading of the statute, the court is required to make certain findings before the mandatory conditions set forth in the Adam Walsh Act amendments to the Bail Reform Act must be imposed. First, the court must find that the defendant has been charged with an offense that triggers the statute. Second, the court must find that notwithstanding the rebuttable presumption that there are no conditions or combination of conditions that would ensure the defendant's appearance in court and the safety of the community, pre-trial detention is not warranted. And finally, the court must order the imposition of conditions of release that, at a minimum, include the mandatory conditions enumerated in the Bail Reform Act as amended.

As is evident from the plain language of the Bail Reform Act, as amended, the amendments vest no discretion in the courts with respect to determining whether the conditions of pre-trial release

should apply to a particular defendant. Although defendant Crowell argues that the Adam Walsh Act amendments to the Bail Reform Act deprive the courts of any discretion, such deprivation does not rise to the level of constitutional infirmity. The Adam Walsh Act amendments to the Bail Reform Act are an exercise of the public-policy making function of Congress to ensure the safety of the community and to verify that defendants are compliant with certain conditions of release, e.g. curfew, as monitored by electronic monitoring. It seems defendant Crowell's chief complaint is the inflexible rule Congress has created where, as here, a defendant is charged with an enumerated offense. Thus, while the Adam Walsh Act amendments to the Bail Reform Act may be the source of a complaint on the part of effected defendants, it is not a separation of powers problem. Finally, the Bail Reform Act is one of many instances when a judicial decision is dictated by statute without implicating separation of powers principles. See, e.g. 18 U.S.C. § 3123(a) (if the Court finds that the attorney for the government has made a proper certification regarding materiality of information likely to be obtained, the Court shall issue a pen register/trap and trace order); 18 U.S.C. § 3143(a)(2) ("the judicial officer shall order that a person who has been found guilty of an offense described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained"); 18 U.S.C. § 6003 (the court

shall issue an order requiring the testimony of a witness who has received immunity); 18 U.S.C. § 3162 (the court shall dismiss an indictment if trial is not brought within the appropriate time); § 3, 18 U.S.C. App. III (court shall enter a protective order on motion by the United States). For the foregoing reasons, defendant Crowell's separation of powers argument must fail.

CONCLUSION

For the reasons stated above, defendant Andrew Christopher Crowell cannot satisfy his heavy burden of mounting a facial challenge to the Adam Walsh Act amendments to the Bail Reform Act. Accordingly, Crowell's request for a declaration that the Adam Walsh Act amendments to the Bail Reform Act are unconstitutional must be denied and defendant Crowell's conditions of release must be modified consistent with the mandatory conditions of release as articulated in the Bail Reform Act.

Dated: Buffalo, New York
November 6, 2006

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

06-M-1095-LGF

ANDREW CHRISTOPHER CROWELL,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2006, I electronically filed the foregoing GOVERNMENT'S RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW RELATING TO THE AMENDMENTS TO THE BAIL REFORM ACT AS SET FORTH IN THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006 with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant on this case:

Marianne Mariano, Esq.

S/SHARON A. SOUTHWORTH