What is the "Civil Commitment Program for Dangerous Sex Offenders"?

Title III of the Adam Walsh Child Safety and Protection Act of 2006 established the Jimmy Ryce Civil Commitment Program for Dangerous Sex Offenders. Under this new program, anyone in the custody of the Bureau of Prisons may be civilly committed after serving their sentence if they are certified as a "sexually dangerous person." The Supreme Court upheld the constitutionality of the program in *United States v. Comstock*, 560 U.S. 126 (2010). Every inmate with a sex offense conviction, and even those inmates convicted for a non-sex offense but who have a sex offense public safety factor (or some other basis triggering an evaluation), will be evaluated for a civil commitment.

Under the Act, "sexually dangerous" means that the defendant has engaged or attempted to engage in sexually violent conduct or child molestation and that he or she suffers from a serious mental illness, abnormality or disorder, resulting in serious difficulty refraining from sexually violent conduct or child molestation if released.

Once a certificate to civilly commit a defendant has been filed, the defendant is entitled to a hearing, but must remain in the custody of either the Attorney General or the Bureau of Prisons until the issue is resolved. The court may order that a psychiatric or psychological assessment examination be conducted before the hearing. At the hearing to determine if the person is a sexually dangerous person, the standard of proof is clear and convincing evidence. This is a lower standard of proof than "proof beyond a reasonable doubt," the standard used in criminal prosecutions. If the court finds that the person is a sexually dangerous person, the court will order the person's commitment to the custody of the Attorney General unless and until it is determined that the person is no longer sexually dangerous if released. This could be for life. Since this judicial hearing is *not* a criminal proceeding, the person subject to it is not entitled to a jury trial, nor do the usual rules of evidence apply. In other words, it may be easier for the government to have a person committed under the Act than it would be to convict such person if he were actually charged with a criminal offense.

It is important to understand that the "sexually violent conduct or child molestation" does not have to be the crime that the individual is incarcerated for, or even anything for which the person has ever been arrested. The "sexually violent conduct or child molestation" could have occurred while the person was incarcerated or at any other time in the past. Thus, if an individual has admitted in a past statement, or if an individual makes a statement (perhaps while participating in a presentence sex offender evaluation, post-sentence treatment program, or in an exit interview with a prison official) that's actual or attempted "sexually violent conduct or child molestation," such a statement could be used as the basis for the government to begin proceedings under the Act.

It is clear under the Act that individuals who are certified as sexually dangerous persons have the right to an attorney for their hearing, so if you believe that you could be certified as a sexually dangerous person you should contact our office or the Office of the Federal Public Defender in the jurisdiction where you are incarcerated. It is important to understand that anything you say to Bureau of Prisons (BOP) staff, including Case Managers, Counselors, Unit Team Managers, Psychologists, and Correctional Officers, or to Court Officers, such as Pretrial Services Officers

and Probation Officers, could be used as a basis to certify you as a sexually dangerous person. In addition, such statements could be used as evidence in an Adam Walsh Act hearing. Therefore, if an interview is sought to discuss your sexual history and/or preferences, or you are questioned about those matters in any context, you should refuse to answer on the basis of the Fifth Amendment until you have had the chance to speak with your lawyer.

If, after the hearing, the court finds that the defendant is sexually dangerous, the Attorney General must either commit him to state custody for treatment or place him in a "suitable [federal] facility" until either the state agrees to assume custody or he no longer qualifies as "sexually dangerous."

Who is At Risk of Being Certified a "Sexually Dangerous Person"?

Anyone in the custody of the Bureau of Prisons. As emphasized above, everyone who has been charged with a federal crime – no matter what the charge – is at some risk of civil commitment, or at least of being certified a "sexually dangerous person" by the Bureau of Prisons. Currently it appears that you are most at risk if: (1) you have been convicted of a sexual contact offense; (2) your presentence report contains any information suggesting a previous sexual offense or an inclination, however slight, toward sexual misconduct; (3) you have a history of undetected misconduct that you may have discussed before or during custody or while on probation or supervised release; (4) you have a history of psychological treatment and/or diagnoses suggesting any form of sexual deviance and/or antisocial personality disorder; and (5) you are likely to invent sex offense histories or interests to please someone, like a counselor or probation officer.

The bottom line is that, any person charged with any federal crime, no matter what it is, may have something in his background that will draw the attention of the Bureau of Prisons.

How Do We Minimize the Risk?

It is very important that you understand the risks of self incrimination and/or civil commitment and how to protect yourself from those risks.

Be truthful with your lawyer. You should honestly confide in our office about your background so that we can better advise and protect you. You need to consider the risk of both a potential civil commitment and of a new federal prosecution. State prosecutions are also very possible, as federal authorities can report information of sexual abuse to state authorities.

Say nothing, sign nothing. If you provide information to federal authorities, be it a probation officer, doctor, counselor, agent or prosecutor, you risk having that information used against you later in a civil commitment proceeding. Thus, if you are offered anything that sounds like an offer to reduce or prevent civil commitment, you should be on guard immediately, remain silent, and ask to speak to an attorney. Before you say anything or sign anything, talk with an attorney.

Do not discuss sexual history or volunteer for sex offender treatment without first consulting an attorney. Defendants on pretrial or presentence release, and those who are

incarcerated, are often required to undergo a psychological evaluation, or ordered to participate in sex offender or other treatment, most commonly as a condition of release. Those sentenced to probation or supervised release are routinely required to answer all inquiries made by the probation officer, participate in treatment as required by the probation officer, and waive the confidentiality of any treatment session. If necessary, we will oppose any condition that requires you to answer questions about your sexual history, fill out sexual history questionnaires, submit to polygraph testing, or any other process that could result in self-incrimination.

While the Bureau of Prisons may constitutionally impose "adverse consequences" for refusing to participate in treatment by denying certain privileges, it cannot cross the line into unconstitutional compulsion. Unconstitutional compulsion exists if your term of imprisonment is extended. Thus, although you may be "penalized" while in custody, (e.g. having prison privileges reduced if you refuse to participate in treatment), your sentence cannot be increased. However, you can be held longer than your original sentence if you talk about your sexual history and thereby provide the necessary support for a certification as a "sexually dangerous person." Do not discuss your sexual history or volunteer for sex offender treatment without talking with an attorney first.

Plead the Fifth. The Fifth Amendment protects you from answering official questions put to you in any proceeding – civil or criminal, formal or informal – where the answers might incriminate you, or prove your guilt, in future criminal proceedings. The Ninth Circuit Court of Appeals has held that a person on supervised release cannot be forced with the threat of revocation and imprisonment to detail his sexual history in treatment without being given immunity from future prosecution.

Forcing you to choose between potentially incriminating yourself and having your pretrial or presentence release, probation, or supervision revoked constitutes compulsion in violation of the Fifth Amendment. In order to plead the Fifth (use your Fifth Amendment right), you must say out loud: "I invoke my Fifth Amendment right to remain silent." The right to remain silent applies in probation interviews and treatment sessions, but you must assert that right. If you are asked to take a polygraph test, you should always first discuss taking the polygraph with your attorney before you agree to take one. If you are taking a polygraph, and don't want to answer a question, you must affirmatively invoke your Fifth Amendment right to remain silent. You must understand that when your attorney is not present you must say the magic words – "I invoke my Fifth Amendment right to remain silent" – even if you have good reason to believe you will suffer repercussions for doing so.

Stay in contact with your lawyer both while in custody and after you're released. Stay in contact with us throughout your sentence. Remain silent and contact us immediately if sex offender treatment is discussed with you, if you are transferred to a sex offender management program, or if you are told you are going to be "further evaluated" for § 4248 or civil commitment purposes.

If you are not civilly committed, when you are released by the BOP to begin serving your term of supervised release, you may be placed in a sex offender treatment program in the community. You retain your Fifth Amendment rights while you are on supervised release and while in any

treatment program. If there is even the slightest chance that you may incriminate yourself, whether it involves a sex offense or some other criminal activity, assert your Fifth Amendment right to remain silent by saying out loud you are exercising your Fifth Amendment rights and contact your lawyer immediately. Even better, if you think you may have to assert your Fifth Amendment rights, contact your lawyer right then, before you are put in the situation where you have to assert your rights.

This advice applies to any new conditions of supervision suggested or demanded by your probation officer: if your probation officer requests that you agree to a new or modified conditions of supervision, contact your attorney.