PREPARED TESTIMONY BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

THE ADAM WALSH CHILD PROTECTION & SAFETY ACT'S SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA):

BARRIERS TO TIMELY COMPLIANCE BY STATES

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Majority Witness

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My name is Emma Devillier. I am here on behalf of Attorney General James D. "Buddy" Caldwell, as an Assistant Attorney General for the State of Louisiana where I serve as Chief of A.G. Caldwell's Sexual Predator Unit. I come before you this afternoon as someone who has been a frontline prosecutor of sexual offenders for over a decade and also as a representative of A.G. Caldwell, who has thirty years of experience as a frontline prosecutor. It should first be said that A.G. Caldwell and I believe that establishing some uniformity among the states regarding sex offender registration laws is a worthwhile goal. Ultimately, a reasonable degree of uniformity will lead to increased compliance by offenders and fewer legal defenses for those who continue to be non-compliant. A.G. Caldwell and I also speak to you today as parents, who want to know if there is a predator next door. As prosecutors and parents, we understand what it takes to successfully prosecute sex offender and child predator cases, how registration issues affect the administration of justice in some of those cases and we understand a parent's desire to have information that will allow them to protect their children against such predators. We, however, believe very strongly that SORNA, did not get it right. SORNA is not the pinnacle of good public policy where sex offender tracking is concerned. In fact, in some respects it is not good policy at all. When you look at what Louisiana has done to craft and implement a tough and targeted policy of mandatory sex offender registration which maintains the integrity of the criminal justice system and does not impede the administration of justice, it will become abundantly clear to you where SORNA falls short of the mark and why states are having difficulty adhering to it.

We all believe in mandatory sex offender and child predator registration, but if we do not do it right we are helping the true predators go undetected. The devil is in the details. I am here to tell you why Louisiana has not and why other states probably will not come into compliance with the current legislation and to respectfully implore you to take a hard look at what it will take to have an effective public policy that accomplishes effective tracking of sex offenders and child predators while not impeding the administration of justice.

A.G. Caldwell and I are grateful to Chairman Robert C. "Bobby" Scott, Ranking Member Louie Gohmert, and the other esteemed members of the subcommittee for the opportunity to testify regarding the current *Barriers to Implementation of the Sex Offender Registration and Notification Act* (hereinafter referred to as "**SORNA**") and for your commitment to exploring and crafting sex offender registration and notification policy that works to enhance public safety.

The Office of the Attorney General of Louisiana suggest that the Subcommittee delay the July 27, 2009 enforcement date of SORNA and create task forces to examine the significant barriers to implementing the Act. This is not just an arbitrary suggestion. It is an informed and educated analysis developed over time.

The Hurdles of Implementing SORNA in Louisiana

I was the Assistant Attorney General responsible for coordinating Louisiana's efforts to implement SORNA compliant legislation. In fact, I was one of the first Assistant Attorneys General in the country to work with the SMART Office when it first opened for business. Between late 2006 and mid-2007, my office worked closely with all stakeholders (District Attorneys, Sheriffs, Corrections officials, etc) to help craft Louisiana's version of SORNA, House Bill 970, which passed in the 2007 Regular Session of the Louisiana Legislature which session concluded in June of 2007. Because Louisiana was trying to comply within the first year of passage of the Adam Walsh Act, key members of the Louisiana Legislature and I had the dubious charge of trying to get SORNA compliant legislation passed before the release of the SORNA Final Guidelines. After passing HB 970 in the 2007 Regular Session, Louisiana submitted the legislation to the SMART office for determination of substantial compliance. Despite best efforts, in late fall of 2007, the SMART Office determined that though the State of Louisiana had made "substantial efforts to achieve compliance with SORNA", the State had "not achieved substantial compliance with SORNA." Former Director of the SMART Office,

Laura Rogers, stated that Louisiana had failed to enact all provisions of SORNA.

In our Compliance Audit by the SMART Office, Louisiana was told that in some instances HB 970 had exceeded what is required by SORNA. By this time, Louisiana had no choice but to wait for the release of the final guidelines to be issued before making another attempt at full compliance. However, some, though not all, of the changes recommended in the compliance audit were enacted in the 2008 regular session of the Louisiana Legislature. The Final Guidelines were not released until July 1, 2008, *after* the 2008 Regular Session of the Louisiana Legislature and a full year after Louisiana had originally submitted HB 970 to the SMART Office. Additionally, **Louisiana takes issue with the guideline's interpretation of the substantial compliance language in the Act to mean actual (strict) compliance is required**. **There is a huge difference in substantial compliance with the intended purposes of the Act, versus actual compliance with the poorly drafted and illogically formulated provisions of the final guidelines as hereinafter discussed.**

This entire experience has been difficult for several reasons. *First*, Louisiana received very little guidance from the SMART Office. Though Louisiana tried very hard to work with the SMART Office, we received no clear instruction or guidance on whether the legislation we were proposing was sufficient or even close to being in "substantial compliance" with SORNA. *Second*, the SORNA final Guidelines are not practical. We experienced great difficulty in determining which of our State's substantive sex crimes belonged in which tier. The elements of Louisiana's sex crimes do not fit neatly into the elements of each tier proposed by SORNA. The Final Guidelines do not take into account the elements of a sex crime that vary from jurisdiction to jurisdiction. *Third*, it is quite obvious that the SMART office interprets "substantial compliance" to mean **"actual" or "strict compliance**. The SORNA Final Guidelines determined that SORNA offered jurisdictions a "floor" in which to comply, not a guideline. In this vein, Louisiana was even advised in its compliance audit by the SMART office that it would have to amend some of its substantive sex crimes in order to comply. *Fourth*, as a

prosecutor who has specialized in sex crimes, I can tell you that SORNA's offense-based (at least as interpreted by the SMART Office), retroactive system is overinclusive, overly burdensome on the state, exorbitantly costly, and will actually do more to erode community safety than to strengthen it. This is generally true, I am advised, not just for Louisiana but for most states.

FIRST HURDLE: LACK OF TIMELY AND ACCURATE GUIDANCE

Louisiana seeks this extension because the implementation phase has been delayed by lack of proper guidance from the SMART office. As outlined previously, though perhaps through no fault of the SMART office, there were undue delays by the SMART office in responding to the request for guidance from Louisiana. Though our criminal statutes were outlined to the SMART office before the beginning of our legislative session in 2007, we did not get a response until well after the session was over. Additionally, this response was not a firm one as the final guidelines were not published until after the end of the 2008 legislative session. After reviewing the final guidelines, Louisiana believes in some instances they are ill conceived and are not practical or advisable for the good of the criminal justice system and Louisiana seeks this extension in order have an opportunity to discuss these issues with the Congress. Even former Director of the SMART office, Laura Rogers, in her recent comments to the Surviving Parents Coalition, agrees that though the drafters of the Adam Walsh Act had good intentions, "they did not consult professional child abuse prosecutors or those with frontline experience and knowledge." Having been a legislator, I am acutely aware that even with the best intentions and the best attempt to consult all stakeholders, mistakes in the drafting of legislation is difficult to avoid, particularly when it is as comprehensive as the Adam Walsh Act. Those mistakes are inevitable and understandable. What would not be understandable is not addressing those mistakes once they become apparent.

SECOND HURDLE: GUIDELINES ARE NOT PRACTICAL

The final guidelines indicate that all state sex offenses must be "tiered" by comparing the state sex offense to the described federal offense to determine if the state sex offense is comparable to or more severe than the federal offense. This is fairly consistent with the AWA. However, the problem comes in the interpretation as to how that comparison is performed. The problem in trying to compare our offenses to the federal offenses is that the federal offenses differentiate seriousness based on facts not necessarily made elements in the State definition of the crime.

To understand the problem you will first have to understand that the Federal statutes to which the state statutes are to be compared are distinguished between sexual acts and sexual contact and require categorization based on the method used (physical force/drugs) to complete the sexual act or contact and the age of the victim. For example the guidelines require that any offense which involves force and penetration must fall into tier 3 and require lifetime registration and any offense involving penetration or any type of sexual touching (through the clothes or otherwise) of a child under 12 requires lifetime registration whether or not force or drugs were used to accomplish the task. Given that requirement, in which tier should Louisiana's indecent behavior statute be categorized? The indecent behavior statute in Louisiana requires lewd and lascivious behavior upon the person or in the presence of a child under the age of seventeen when there is an age difference of greater than two years between the child and the perpetrator. The elements of the indecent behavior do not necessarily include a sexual act (penetration or direct touching of the genitals) or sexual contact (fondling of genitals through the clothing). Indecent behavior could be accomplished by performing a sexual act in the presence of a child. A good prosecutor will not list the nature of the lewd or lascivious behavior except to state that it happened upon the person OR in the presence of a child and that the child was under the age of sixteen and the perpetrator was more than two years older. The prosecutor will always only plead the facts he necessarily has to prove because he will be held to whatever facts are alleged.

The SMART offices compliance audit of Louisiana's 2007 legislation stated that Indecent Behavior should not be listed as a tier I crime (requiring 15 years of registration) because it could involve a sexual act or contact with a minor. The audit stated that this crime should be listed as a tier II (requiring 25 years of registration) and, if the victim was under the age of 12, it should be listed in tier III (requiring lifetime registration). The audit and the final guidelines state that the age of the victim should be controlling as to the tier of the offense, whether or not it is an element of the offense. This is not enforceable. If the age of the victim is not in the bill of information how will you hold the offender accountable for a fact that has not been established in a court of law? The guidelines state that you will have to look at the underlying facts of the offense to determine the age of the victim. How does this possibly afford due process? Basically, the guidelines seem to be stating that we must allow some bureaucrat to determine what the underlying facts of a conviction were and then apply the appropriate tier to that offense based on the determination of this bureaucrat**. We are essentially basing an offender's future legal obligation to register on facts that have not been established in a court of law.** Because SORNA requires that time period of registration and number of in-person renewals per year be tied to the elements of the offense of conviction, the Louisiana legislature thought it necessary to have a judicial determination of these facts. Therefore, we placed offenses in tier I which did not necessarily include the types of elements described in SORNA for tier II and tier III placement. The SMART office's test was the opposite, if the elements of tier II or tier III were not necessarily excluded, then it should be placed into the higher tier. This means all offenses involving a child victim must require a 25 year or lifetime registration period.

If no crimes against children are left in tier I, i.e., indecent behavior with a juvenile, prosecutors who run into difficulty with a reluctant and terrified victim will have to go outside of the sex offense statutes to accomplish a plea where there will be no resulting sex offender/child predator registration required. Even though the courts have ruled

that registration is regulatory and not intended to be punitive, the courts did recognize that registration does have punitive effects. When these punitive effects interfere with getting a plea in a child sex case because the offender refuses to plead to anything that requires 25 year or lifetime registration and you have no sex offense in tier I that you can offer because your victim is seven and traumatized about trial, the prosecutor will go outside of the child sex crimes statutes to effectuate a plea. This is not based on laziness or not caring, it is based on the realities of what we, as sex crimes prosecutors, deal with on a regular basis in trying to seek justice while not re-victimizing the victim.

Registration is supposed to be a product of a conviction. In order to maintain prosecutorial discretion which is essential for the administration of justice, if registration is to be offense based, it must be based on the facts as alleged in the bill of information. If the facts in the bill of information leave doubt as to the specific act involved or the specific age of the victim which would establish that the offender's actions were of the type described as a tier II or tier III offense, then the offense should be categorized in tier I.

Sex cases involving minor victims are the most difficult cases to prove. Often your whole case comes down to the word of a child versus that of an adult. Many of these offenses are not reported until the perpetrator (often a family member) is separated from the victim through divorce or a change in living circumstances. There is rarely any physical evidence. The child is often reluctant to participate in a public trial. We cannot mandate sex offenders register until we convict them. Good public policy will not impede a prosecutor's ability to get a plea is these most difficult cases. The current requirements of SORNA will impede this process much to the detriment of public safety and criminal justice.

THIRD HURDLE: SMART OFFICE DETERMINATION THAT SUBSTANTIAL COMPLIANCE MEANS ACTUAL (STRICT) COMPLIANCE

Louisiana addressed some of its concerns outlined above by banking on the "substantial compliance" language of the act. The substantial compliance language, we thought, would allow us to leave certain child sex cases in tier I so that prosecutors would have a place to go in child sex cases in which the victim recants or indicates that a trial is not something they can handle and registration for 25 years or life was a deterrent to getting a plea as charged. Again, even though the courts have found that registration is not part of the punishment for a crime but is regulatory, offenders surely do not see it that way. It is particularly burdensome in Louisiana because we require, in addition to publication of the information on the registry, that the offender send a post card with his picture and the details of his conviction to all of his neighbors within a certain radius of his home. This must be done every time the offender changes addresses and every five years, whether or not the offender has a change of address. Additionally, we require offenders to carry a driver's license or identification card with SEX OFFENDER in red letters across the bottom of the offender's photo. Also, in Louisiana, no matter the tier of your first sex offense conviction, a second conviction will require lifetime registration. Still further, if the offense of conviction requires registration for any period less than life, the prosecutor upon showing by a preponderance of the evidence that the offender poses a substantial risk of re-offending, the court may order the offender to register for life. All of these additional provisions go far beyond what is required by SORNA. By determining that "substantial compliance" means strict compliance, the SMART office has taken away Louisiana's ability to address the problems outlined above in a fashion that does no harm to the intent of the act. To the contrary, we believe that what Louisiana has done actually enhances public safety by maintaining prosecutorial discretion and targeting resources towards the worst offenders. Louisiana submits that no where in the Adam Walsh Act does the Act require strict compliance or suggest that

these are minimum standards which must be adhered to religiously. Such a requirement is unrealistic and impractical.

FOURTH HURDLE: RETROACTIVE APPLICATION OF THE ACT

With respect to sex offenders whose convictions predate the enactment or implementation of SORNA, the Guidelines require that a jurisdiction register the following offenders: (1) those who are incarcerated or under supervision for the registration offense or for some other crime; (2) those who are already subject to a pre-existing sex offender registration requirement; and (3) those who subsequently reenter the jurisdiction's justice system for a conviction for some other crime, even a non-sexual offense.

One of the practical problems with this retroactive provision is that it fails to give proper guidance to enable law enforcement to identify such offenders and to classify them in a tier. When the requirement of retroactive application of SORNA is taken into consideration, the problem of "tiering" offenses becomes even more evident. Even if the age of the victim or specific facts relating to the offense are put forth in the Bill of Information, law enforcement agencies tasked with enforcement of registration laws will spend countless man hours tracking down bills of information, often from out of state convictions, trying to ascertain the facts alleged in each bill rather than just looking at the criminal statute violated in the conviction to determine if it necessarily includes a forced sexual act or sexual contact with a child under the age of 12.

Retroactivity as required by the guidelines is also problematic in that it requires an offender who has long ago finished his legal obligation to register to register once again if he is subsequently convicted of any felony. States do have the discretion to give the offender credit for the time that has elapsed since he last registered, but that is small solace to an offender who under SORNA will have to register for life if convicted of the subsequent felony. Prosecutors have real concerns about the effect of this provision on the ability to get pleas in cases having nothing to do with a sex offense. For example, an offender who has a felony theft charge pending who twenty five years ago was convicted

of indecent behavior with a juvenile under the age of 12, will, if convicted of the felony theft charge, have to register again for the rest of his life, under the current requirements of the guidelines. Louisiana, therefore, adopted a limited retroactivity provision making the new registration periods applicable to all sex offenders who were under an active obligation to register as of the effective date of the act. Retroactivity was also limited in Louisiana because prior to 1999, a Judge could legally waive sex offender registration and many did, as part of a plea agreement. There was real concern that convictions could be overturned if the new registration statute was made to apply to these offenders. There is Louisiana case law supportive of the offender's right to withdraw his plea if the waiver was part of the plea agreement.

Furthermore, I ask you, how will juveniles who never had an existing duty to register be subjected to the Act? How would we find them? Louisiana, therefore, adopted a prospective only application for a very limited number of juvenile offenders age 14 and above adjudicated or convicted of only the most heinous acts – aggravated rape, forcible rape, 2nd Degree Kidnapping of a child under 13, aggravate kidnapping of a child under 13, aggravated incest involving penetration and aggravated crime against nature.

Another issue stemming from the retroactive provision of SORNA is the "recapturing" of offenders. Once a jurisdiction enacts SORNA legislation, that jurisdiction is required to "recapture" and register "retroactive" sex offenders within the following time frames" Tier I offenders within one year; Tier II offenders within six (6) months; and, Tier III offenders within three (3) months. How is this to be accomplished? We can barely keep up with the ones we know about now given our limited resources.

Compliance Issues Plaguing Other Jurisdictions

I participate in a national sex offender management listserv and have engaged with other offices of Attorneys General through the National Association of Attorneys General to discuss issues related to SORNA implementation. Through this process I have learned that not only Louisiana but many other states are experiencing the same or similar difficulties as evidenced by the failure of any state to achieve substantial compliance as of this date. In addition to the above issues faced by Louisiana, discussions with other States through NAAG and otherwise, have raised other issues with regard to AWA compliance which need to be considered:

1) Many States currently have risk-based assessment schemes to determine the length and conditions of registration rather than offense-based schemes in which they have invested lots of time and money and which they believe accomplish the same goal as the AWA but just arrives there through a different avenue. These States have indicated that, at least informally, the SMART office has indicated that they will have to switch to an offense based scheme or be deemed to be non-compliant. Massuchusetts has jurisprudence which establishes that sex offenders have a state constitutional right to a risk assessment before being placed on a public registry.
2) Most other States have indicated similar problems with retroactivity as faced by Louisiana.
3) Some States are concerned that the inclusion of the sex offender's employment address and school address will impede reintegration of sex offenders into the community by making it much more difficult to obtain employment, de-stabilize offenders and be counter productive to public Safety.
4) Some States are concerned that quarterly registration will divert law enforcement resources away from the more important public safety task of compliance checks to do less important administrative tasks.

5) The requirement that the States get palm prints which can only be provided by agencies that use Livescan technology will prove too expensive and difficult for all registering agencies to acquire.
6) Whether those States who allow a sex offender to be relieved of the obligation to register by obtaining a certificate of rehabilitation will, due to the retroactivity requirement, have to revive those obligations. (The SMART office has now said any provisions to relieve an offender from registration before the allotted time periods in the AWA would not be in substantial compliance with the AWA)
7) The significant cost of compliance versus the loss of Byrne funds. SORNA Compliance motivated by loss of Byrne Funds
8) Some States have significant concerns about juvenile registration based on their constitutions, on public opinion or on their juvenile systems which are design to not permanently label a child in hopes of rehabilitation.

Conclusion

As a State AG, we support the idea of having more homogeneous sex offender registration laws across the nation. Louisiana specifically, submits that it has achieved "substantial compliance" as required by SORNA because we disagree with the SMART

office's interpretation of that language in the ACT to mean strict compliance. However, any such federal attempt to help all state's achieve this goal must take into consideration the varying states' current substantive criminal statutes and the varying sex offender registration laws and policies with the goal of making enforcement of such laws when an offender crosses state lines more feasible. To ensure that federal legislation in this regard is based on sound public policy and that it will be effectively implemented, all stakeholders must be brought to the table.

In addition to the issues highlighted above there are many more which need discussion. Not the least of which is SORNA's inadequate provision of sex offender registration computer programs to jurisdictions. The program made available only addresses the needs of the central registry in each jurisdiction. SORNA fails to recognize that the central registries would have no information but for the information provided by local law enforcement agencies which actually register the offenders. In order to meet the time restrictions required by SORNA on transfer of registration information from the local sex offender registrar to the central registry, local law enforcement must have the ability to transfer this information electronically. No provisions in the act address this essential element. Louisiana has addressed this by imposing a fee on all felony probationers which is paid into a technology fund to support the implementation of a web-based program for the collection, storage and transfer of this data to our central registry at no cost to the tax payer. We not only believe we are substantially compliant with SORNA we believe we have far exceeded its goals.

Respectfully, Attorney General Caldwell and I urge the members of this Subcommittee to consider an extension of the deadline for states to comply with the Act, the establishment of a task force comprised of prosecutors, law enforcement, state registries, corrections, experts in the field of sex offender management, victims and all other stakeholders in this complex issue to examine the practical effects of the Act on public safety and possible reform to address the concerns raised here and those recommended by the task force. Not to do so would jeopardize the viability of the

overall goal of SORNA and would put states at imminent risk of losing vital BYRNE grant dollars for worthy law enforcement programs beginning July of 2009.

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