



**TO: Members of the House Judiciary Committee**  
**FROM: Allen Gilbert, Executive director, ACLU of Vermont**  
**DATE: April 15, 2009**  
**SUBJECT: S. 125, expanding the Vermont sex offender registry**

**I wanted to let you know the ACLU's objections to S. 125, which you are scheduled to take up this week.** The bill proposes additional, far-reaching changes to Vermont's sex offender laws -- changes beyond those you approved earlier this session in S. 13

S. 125 is, in large part, a response to provisions in the federal "Adam Walsh" law. This law was passed by Congress in 2006. It was an attempt to force, onto the states, federal rules for dealing with sex offenders. Specifically, it takes from states the ability to develop and implement risk assessment systems that states judge to be most appropriate and effective. Broad expansion of sex offender registries, based on federal risk categories, is the main impact. Resistance to provisions of the federal law has been significant; it has already been successfully challenged in court (Nevada), and no state is currently in compliance with the law's provisions. The penalty for non-compliance is financial -- loss of some federal funds.

The major part of the bill deals with expansion of the online sex offender registry. We oppose this expansion, as we have opposed the online registry generally.

- **There is no evidence that online sex offender registries work.** This was the conclusion of the legislature's Sex Offender Supervision and Community Notification Study Committee in 2005. Since then, there has been additional research supporting this determination. Registries create the illusion the public is safer by knowing who has been jailed for sex offenses and, when released, where they live. As you learned earlier this year through consideration of S. 13, 90 percent of child sex offenders are family members or close acquaintances. They are not strangers. Internet registries target "stranger danger," which is not the chief problem in many sexual violence crimes. Further, registries stigmatize not only offenders, but by association their families. Registries also invite vigilante violence. In 2006 a Canadian man used the online Maine registry to target offenders. He traveled to their homes and killed two. Computer records show he also looked at Vermont's registry. Fortunately, the Vermont registry did not then list offenders' residential addresses. This bill would change that, however, providing offenders' precise home locations (changes to Sec. 8. 13 V.S.A. § 5411a).
- **Originally included in S. 13, and then also in S. 125, was a provision allowing prosecutors to bring information of a defendant's prior "bad acts" into court proceedings.** This change to Vermont criminal procedure rules had been

suggested during the summer/fall hearings of the Senate Judiciary Committee but rejected for inclusion in S. 13. Current court rules allow such evidence when an individual's past shows a pattern of specific behavior relevant to the crime at hand. This approach rests on the ancient belief that a criminal justice system should focus on the immediate charge a defendant faces, not general information about the person's past. While it is true that since the 1990s federal law has allowed such information to be brought into the trial record, the federal judiciary - including the then-Chief Justice of the U.S. Supreme Court, William Rehnquist - opposed the measure as contrary to basic judicial principles. The judiciary felt that the Congress -- then led in the House by Rep. Newt Gingrich -- did not understand the importance of fairness in judicial proceedings. The Senate Judiciary Committee on a 3-2 vote included the admission of prior bad acts when it passed out S. 125; however, the bill was amended on the floor to exclude the provision. You will no doubt hear testimony urging that the provision be put back in. We hope that you will not agree, and will leave the provision out of the bill. The fairness inherent in current court rules should be applied to all defendants, even those marginalized or despised.

**The ACLU feels that many of the provisions of S. 125 run contrary to established principles of fairness, do not increase public safety, and do nothing to aid in the rehabilitation of offenders. We do not think S. 125 should be acted on favorably, especially given the uncertainty surrounding the federal Adam Walsh law.**

Jefe:

The document you sent has some extra blank lines and a strange annotation about shazia ahmad being clueless.

But yes, I do not at all understand what's happening with Vt. Stat. Ann. tit. 13, § 5411a, which gets two different amendments in S. 125 as passed by the Senate. The two sections are mutually exclusive, so do you want me to check in with Michelle Childs this afternoon and see what the heck is going on? If the bill were to become law precisely as written, § 5411a(b)(5) will specify that an individual's home address be added to the information listed online, but § 5411a(d) will nonetheless specify that "[a]n offender's street address shall not be posted electronically." Because this information is currently stored at police stations (and available on request with some showing of need), perhaps the Senate meant that street address would be at police stations now, but still not online? My money is on sloppy drafting.

Re. testimony: I can if you want, but I am just jammed. If you think they're not going to listen, I'd rather spend my time getting our ducks in a row on Hagan and Brillon. What time would the hearing be?

Best,  
d.

Prison overcrowding, shazia ahmad, NY office, BBC. She seems clueless.

#### Listing juveniles adjudged delinquent of sex offenses on the Internet

We appreciate the committee's skepticism of the federal Adam Walsh Act mandate that juveniles be included on states' Internet sex offender registries, because of the lack of empirical evidence supporting the efficacy of such registries, and because of concerns over exposing juveniles to adult punishment. For the same reasons, the ACLU of Vermont thinks that the committee should not include juveniles on the Internet sex offender registry as proposed in § 6 of the discussion draft (appearing on page 9 of the draft). It is not simply the specter of retroactive applicability to juveniles that counsels keeping them off the registry, but the inherent inequity of exposing them to post-conviction measures designed for adults – post-conviction measures that Sen. Campbell has rightly pointed out as having become punitive. Both the Vermont and federal governments recognize the developmental differences between juvenile and adult criminal defendants by providing for separate criminal procedures for each, by barring certain punishments for juveniles, and by expending substantial sums on rehabilitative measures aimed at correcting delinquent behavior and guiding juvenile offenders to become productive members of society. The ACLU of Vermont is concerned that by exposing juveniles to the public shaming of Internet publication of their conviction details, Vermont will negate the entire purpose of the juvenile system and create a permanent criminal underclass of individuals who are marked at an early age for failure.

#### Permitting prior bad acts into evidence

With respect to the second substantive proposal in the draft bill, adoption of a new rule of evidence that will permit evidence of a criminal defendant's prior bad acts to be introduced against him or her at trial, the ACLU of Vermont urges the committee not to add the rule for two reasons. First, as a threshold consideration, there is no evidence that the existing Vermont Rules of Evidence are hobbling prosecution of sex offenders. Rule 404(b) already permits introduction of prior bad acts to prove "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," a broad range of purposes that effectively ensures that much prior bad act evidence can be admitted.

Secondly, Rule 413 represents a fundamentally dangerous alteration of our criminal justice system. Our system punishes bad *acts*, not bad *people*. By opening the door wider to admission of prior bad acts, Rule 413 will lead juries to convict defendants on the basis of generalities instead of proof that a specific defendant committed a specific act. The federal judicial branch recognized this danger when it declined to adopt Rule 413, which Congress nevertheless legislatively mandated. In its report to Congress, the federal judiciary's rulemaking body noted that 413 was "not supported by empirical evidence" and "could diminish significantly the protections that have safeguarded

persons accused in criminal cases,” which “form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law.” The federal judiciary listed as a “significant concern” the danger that 413 would lead to “convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.” The judiciary’s recommendation – signed by tough-on-crime jurists such as then-Chief Justice William Rehnquist – pointed out that of the various judicial committees [AGENCIES? DOJ IS NOT A COMMITTEE.....] to have considered proposed Rule 413, the lone supporter of the proposal was the Department of Justice.

If Vermonters are being asked to trade the traditional protections of our criminal justice system for a heavy thumb on the scale in favor of prosecutors, those seeking the change must provide compelling evidence justifying the trade-off. None has been forthcoming thus far, and the ACLU of Vermont and its 2,500 members urge the committee not to adopt proposed Rule 413.

If you would like me to appear before the committee personally, I can be reached at the ACLU office at 223-6304, x112.