SEX OFFENDER REGISTRATION & MONITORING

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SEX OFFENDER REGISTRATION

Who must register? Under G.S. 14-208.7, four categories of people are required to register in North Carolina:

1. Residents with a reportable conviction. See the attached flow chart to determine whether a particular offense is reportable, paying careful attention to the effective date language applicable to each offense.
2. People present in the state for 15 days who have a reportable conviction, or who are required to register in their state of residence.
3. Nonresident students who have a reportable conviction, or who are required to register in their home state. A nonresident student is a person enrolled in any type of school in North Carolina on a full-time or part-time basis.
4. Nonresident workers who have a reportable conviction, or who are required to register in their home state. A nonresident worker is a person who works in the state on a full-time or part-time basis, with or without compensation, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year.

How long must a person register? Three categories of offenders are required to register for life. Each category is discussed in greater detail in the portion of this handout covering satellite-based monitoring.

1. Those who committed an **aggravated offense**. An aggravated offense is one that includes engaging in a sexual act involving vaginal, anal, or oral penetration, either by force or with a victim who is less than 12 years old. G.S. 14-208.6(1a). Only offenses occurring after October 1, 2001, can be aggravated offenses. S.L. 2001-373.
2. **Recidivists**. A recidivist is an offender who has a prior conviction for an offense described in the statutory section that defines a reportable conviction. G.S. 14-208.6(2b).
3. **Sexually violent predators.** A sexually violent predator (SVP) is a person convicted of a sexually violent offense who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses. G.S. 14-208.6(6).

Other offenders must maintain registration for at least 30 years following the date of original county registration, unless, after 10 years of registration, they successfully petition the superior court to shorten their registration time period under G.S. 14-208.12A. Use **form AOC-CR-262**, *Petition and Order for Termination of Sex Offender Registration*, to conduct a hearing on a petition to terminate registration. These petitions are heard by the superior court in the district where the offender *resides*.

Questions regarding petitions to terminate registration:

When may the registrant petition to terminate? An offender is first eligible to petition 10 years from the date of initial county registration. G.S. 14-208.12A(a). An offender who moves to North Carolina after having registered in another state for some period of time probably does not get credit for that time.

Under what circumstances may the court grant the petition? The court *may* grant a petition if:

(1) The petitioner demonstrates that he or she has not, since completing his or her sentence, been *arrested* for any crime that would require registration.
(2) The requested relief complies with the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the state.
(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

What is the Jacob Wetterling Act? For over a decade, our state law on sex offender registration has flowed from federal mandates—states must enact laws that meet federal standards or lose certain federal grant funds. The Jacob Wetterling Act (1994) was the initial federal legislation that established minimum standards for states to register sex offenders. It has since been amended by Megan's Law (1996), the Pam Lychner Act (1996), the Jacob Wetterling Improvements Act (1997), and, most recently, by the Adam Walsh Act (2006). Title I of the Adam Walsh Act, called the Sex Offender Registration and Notification Act, or SORNA, enacted a new and more stringent set of standards for sex offender registration.

Among other requirements, SORNA establishes a three-tier schedule of offense classification, with new minimum registration periods for each tier. For tier 1 offenses, the required registration period is 15 years (reducible to 10 years in some cases); for tier 2 offenses, the period is 25 years; and for tier 3 offenses, the period is life.

Because North Carolina will eventually need to adopt these new minimum periods to continue to receive federal funds, a court arguably ought to refuse to terminate registration for offenders who have not been registered for the amount of time that will be required under SORNA. However, on April 10, 2009, North Carolina applied to the U.S. Department of Justice for a one-year extension to comply with SORNA, which was granted. Arguably, then, SORNA requirements are not yet "required to be met as a condition for the receipt of federal funds," meaning consideration of the second prong of the test could reasonably be deferred until July 2010.

A more detailed discussion of petitions to terminate sex offender registration is posted at **http://www.sog.unc.edu/faculty/smithjess/documents/Tab08-01_Post-ConvictionSexOffenderIssuesMarkham.pdf**

Sex offender unlawfully on the premises (G.S. 14-208.18). Legislation passed in 2008 made it a Class H felony for certain registered offenders "to knowingly be at" any of the following places:

1. On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to schools, museums, child care centers, nurseries, and playgrounds.
2. Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors.
3. Any place where minors gather for regularly scheduled educational, recreational, or social programs.

First, note that this law does not apply to all registered sex offenders. It applies only to those who committed an offense in Article 7A of Chapter 14 (rape, sexual offense, statutory rape or sexual offense, sexual battery, and intercourse with certain victims), or whose offense involved a victim who was under the age of 16 at the time of the offense.

The law includes limited exceptions for emergency medical care, certain school activities, and voting, but does not include any First Amendment exception that might accommodate the offender's ability to attend church or maintain other associations. Covered offenders would not be allowed within 300 feet of a church nursery, and the church itself may be a place where minors gather for regularly scheduled educational, recreational, or social programs (e.g., youth group, Sunday school). Defendants will argue that the law impinges on their fundamental rights without being narrowly tailored to achieve a compelling state interest. They will also argue that the statute is unconstitutionally vague in failing to make clear, for example, whether these restrictions apply at all times, or only when minors are actually present. A pending federal lawsuit in Georgia addresses that state's ban on sex offenders volunteering or working at a church.

Sex offender registration and plea bargains. The requirement to register is offense-specific, and may not be bargained away for a reportable conviction. Likewise, a person should not be required to register pursuant to a plea bargain or as a condition of probation for a non-reportable conviction.

What constitutes an address for registration purposes? In *State v. Abshire* (N.C., June 18, 2009), the Supreme Court of North Carolina defined "address" as the actual location where someone lives, whether permanently or temporarily, where certain activities of life occur. Residence in this context is not the same as domicile. The Supreme Court rejected the definition offered by the Court of Appeals ("a place where a registrant resides and where that registrant receives mail or other communications.") *State v. Abshire*, __ N.C. App. __, 666 S.E.2d 657 (2008). Applying its definition, the Supreme Court determined that a defendant changed her address (and was thus guilty of failing to update inform the sheriff of the change) when she moved in with her father for 5-6 weeks, even though she continued to visit and receive mail at her old address.

Registration of homeless offenders. A homeless registrant must update his or her registration information with the sheriff upon changing addresses, even if the new address is "a homeless shelter, a location under a bridge or some similar place." *State v. Worley* (N.C. Ct. App., June 16, 2009).

SATELLITE-BASED MONITORING

North Carolina first enacted satellite-based monitoring (SBM) of sex offenders in 2006. Eligible offenders wear an ankle bracelet and tracking device that continuously transmits their whereabouts to DCC, which manages the program. For offenders sentenced after December 1, 2007, SBM determinations should be made at sentencing under G.S. 14-208.40A using form AOC-CR-615. For offenders convicted and sentenced before the law was passed, follow the "bring back hearing" procedure in G.S. 14-208.40B, using form AOC-CR-616. There are two types of SBM: lifetime SBM and SBM for a period specified by the court.

1. ***Lifetime SBM***. Offenders subject to lifetime sex offender registration (aggravated offenders, recidivists, and sexually violent predators) who fall within the SBM effective date provisions set out below are also subject to lifetime SBM.

   Aggravated offenders. See *Unresolved Issues* below.

   Recidivists. A recidivist is a person with a prior conviction for an offense described in G.S. 14-208.6(4). Under the legislation that gave us that definition (S.L. 2001-373), it clear that at least one of a person's offenses must have taken place after October 1, 2001 for the person to qualify as a recidivist. But what about the prior offense(s)? Does it matter how far back in time they occurred, or whether they are themselves reportable? Under *State v. Wooten*, __ N.C. App. __, 669 S.E.2d 749 (2008), the answer to those questions is no. In that case, a defendant with a prior conviction of indecent liberties from 1989 and a second conviction for the same offense in 2006 was properly deemed a recidivist, and thus subject to lifetime monitoring.

   Sexually Violent Predators (SVP). Currently, there are 13 SVPs in North Carolina. Before classifying an offender as an SVP, be sure to follow the procedure set out in G.S. 14-208.20 (the DA files notice of intent to seek the classification, the court orders a presentence investigation under G.S. 15A-1332(c), a board of experts is convened, and the court makes written findings at a final hearing). *State v. Zinkand*, __ N.C. App. __, 661 S.E.2d 290 (2008) (error for the trial court to classify the defendant as an SVP based on the State's oral motion at sentencing).

2. ***SBM for a period specified by the court ("Conditional offenders")***. Offenders whose crime involved the physical, mental, or sexual abuse of a minor, and who the court determine, based on a DOC risk assessment called a Static-99 (discussed in greater detail below), require the highest possible level of supervision and monitoring. The SBM period is in the court's discretion, although it may be no longer than the time for which the offender must register.

Effective Dates. For SBM to apply at all, the offender must have been convicted of a reportable offense. To determine if an offense is reportable, see the attached flow chart. Under the effective date language of the

legislation that created the SBM regime (S.L. 2006-247), for an offender convicted of a reportable offense, an SBM hearing must be held for:

- Offenses committed on or after August 16, 2006;
- Any person sentenced to intermediate punishment on or after that date;
- Any person released from prison by parole or post-release supervision on or after that date; or
- Any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole.

Previously, some had argued that effective date coverage for SBM hearings ought to stem from the 2007 law that created them. That law, first passed as S.L. 2007-213 and later modified by a technical correction in S.L. 2007-484, sec. 42(b), simply made the law "effective December 1, 2007," with no reference to the retroactive application described in the 2006 law. In *Wooten*, however, the Court of Appeals looked only to the August 16, 2006 effective date, suggesting that the 2007 law merely added a procedural gloss to the substance of the 2006 legislation.

Jurisdiction to hold a bring-back hearing. In *Wooten*, the Court of Appeals held that a failure to follow precisely the statutory notice procedures for a bring-back hearing set out in G.S. 14-208.40B (notification of the offender of the hearing via certified mail at his or her registration address) did not deprive the court of jurisdiction to hold the hearing.

Ex Post Facto. Under the effective date language described above, SBM applies retroactively to some offenders whose crimes took place before the monitoring regime was enacted. In *State v. Bare* (N.C. Ct. App., June 16, 2009), the Court of Appeals unanimously held that **lifetime SBM does not increase an offender's punishment, and therefore does not implicate the Ex Post Facto Clause**. The court concluded that the General Assembly intended SBM to be a civil regulatory scheme to protect the public, and the regime was not so punitive in purpose to negate the legislatures's intent to deem it civil. The court noted at several points that it lacked sufficient evidence or affidavits in the record to support the defendant's arguments.

Among other factors, the court noted that:

- Lifetime monitoring is less harsh than other civil penalties, like revocation of a professional license, and certainly less restrictive than a civil commitment procedure for violent sexual predators, upheld by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997).
- The device offenders must wear (3.25" x 1.75", less than 1 lb.) is not dissimilar to other electronic devices, such as a cell phone, walkie-talkie, or personal organizer;
- The regime is not excessive because the Post-Release Supervision and Parole Commission has authority to terminate monitoring in certain circumstances.

The court of appeals also rejected the defendant's argument that the trial court violated G.S. 15A-1022(a) by failing to inform the defendant that SBM would be a direct consequence of his no contest plea. The court noted first that because SBM is not punishment, G.S. 15A-1022(a) is not implicated. Moreover, because SBM is determined separately at a determination hearing (at sentencing, or at a bring-back hearing), it is not an automatic, direct result of the defendant's plea.

Unresolved issues:

Aggravated Offenses: Elements vs. Facts. It remains an open question whether the court should, when deciding whether a particular offense was "aggravated," consider only the elements of the conviction offense, or whether it should also consider the facts underlying the conviction. The one reported case we had previously cited as favoring an elements-based approach, *State v. Mastne*, 725 N.W.2d 862 (Neb. Ct. App. 2006), was overruled by the Nebraska Supreme Court in *State v. Hamilton*, 763 N.W.2d 731 (Neb. 2009) ("[A] sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense . . . has been committed. Instead, the court may make this determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report."). Federal cases analyzing an analogous question have recommended an approach that allows the court to look at certain documents (e.g., charging document, transcript of a plea colloquy, written plea agreement, jury instructions), but not police records. *Shepard v. United States*, 544 U.S. 13 (2005).

Department of Correction Risk Assessment: the Static-99. If the court finds that an offender committed an offense that involved the physical, mental, or sexual abuse of a minor, the court must order DOC to do a risk assessment on the offender. DOC should be given 30 to 60 days to complete the assessment. The assessment tool DOC uses is based on something called a Static-99, a ten-question actuarial instrument developed in Canada for use with adult male sex offenders. The instrument is normalized for use with adult males age 18 and older; it is not designed to assess women. After the officer scores the main portion of the instrument and determines a risk level (Low, Moderate, or High), the chief probation officer can override the risk level to High if the offender has any new sex crime charges pending, has been non-compliant with treatment, has been diagnosed as a pedophile, or falls within one of the lifetime SBM categories. If the chief probation officer overrides the risk level to High, that's the level DOC will report to the court. If, based on the risk assessment, the court determines that the offender requires the "highest possible level of supervision and monitoring," then the judge must order the offender to enroll in SBM for a period of time specified by the court. There is disagreement about whether the court may order SBM for a term of years when the DOC risk assessment rates the offender as something less than High.

EXERCISES

1. Which of the following offenders are subject to sex offender registration?

    a. A defendant is convicted of sexual battery on January 15, 2008, based on acts that occurred on October 5, 2005.

    b. A defendant is convicted of crime against nature on November 12, 2008, based on acts that occurred on July 1, 2008.

    c. A defendant released from prison on July 1, 1996 after serving a 15-month sentence for an April 1995 conviction for taking indecent liberties with children.

2. A defendant pleads guilty to assault on a female based on acts involving his 12-year-old step-daughter. He pushed her after she refused his sexual advances. He is sentenced to 36 months of probation.

    a. Is this a reportable conviction?

    b. Is the defendant subject to any special conditions of probation?

3. A person subject to the 30-year sex offender registration requirement was arrested and charged with failure to register when he didn't respond to a semiannual verification form as required in G.S. 14-208.11. Can this offender successfully petition to terminate his registration requirement after 10 years under G.S. 14-208.12A?

4. In 2009, a defendant is convicted of first-degree rape based on an offense that occurred July 1, 2000. The victim was a 25-year-old woman.

    a. Is this a reportable conviction? If so, how long must this offender register?

    b. Is the offender subject to satellite-based monitoring? If so, for how long?

    c. Suppose the victim was a 16-year-old girl. Does this change your answer to (b)?

5. A 19-year-old defendant pleads guilty to taking indecent liberties with a 13-year-old girl. The offense, which involved consensual oral sex, took place January 12, 2009.

    a. Is the offender subject to satellite-based monitoring? If so, for how long?

    b. Suppose the victim was 11. Does this change your answer to (a)?

6. A defendant was convicted for taking indecent liberties in 1989. He was later convicted again for taking indecent liberties in 2005, given an active sentence, and released from prison in 2008. Is he subject to lifetime registration and lifetime satellite based monitoring as a recidivist?

7. In 2009, a defendant is convicted of felony indecent exposure under G.S. 14-190.9(a1). The victim was a 10-year-old girl. At sentencing you determine that the offender is not a recidivist, aggravated offender, or sexually violent predator. You do, however, find that the defendant committed an act involving the sexual abuse of a minor, so you order DOC to complete a risk assessment.

    a. Do you wait for DOC to complete the risk assessment before sentencing the defendant? (G.S. 14-208.40A(d) says DOC shall have 30 to 60 days to complete the assessment and report the results.)

    b. Suppose the assessment comes back MODERATE. What are your options?

    c. Suppose the assessment comes back HIGH. What are your options?