Determining the Defendant's Registration, Satellite Monitoring, and Other Obligations under the Sex Offender Laws

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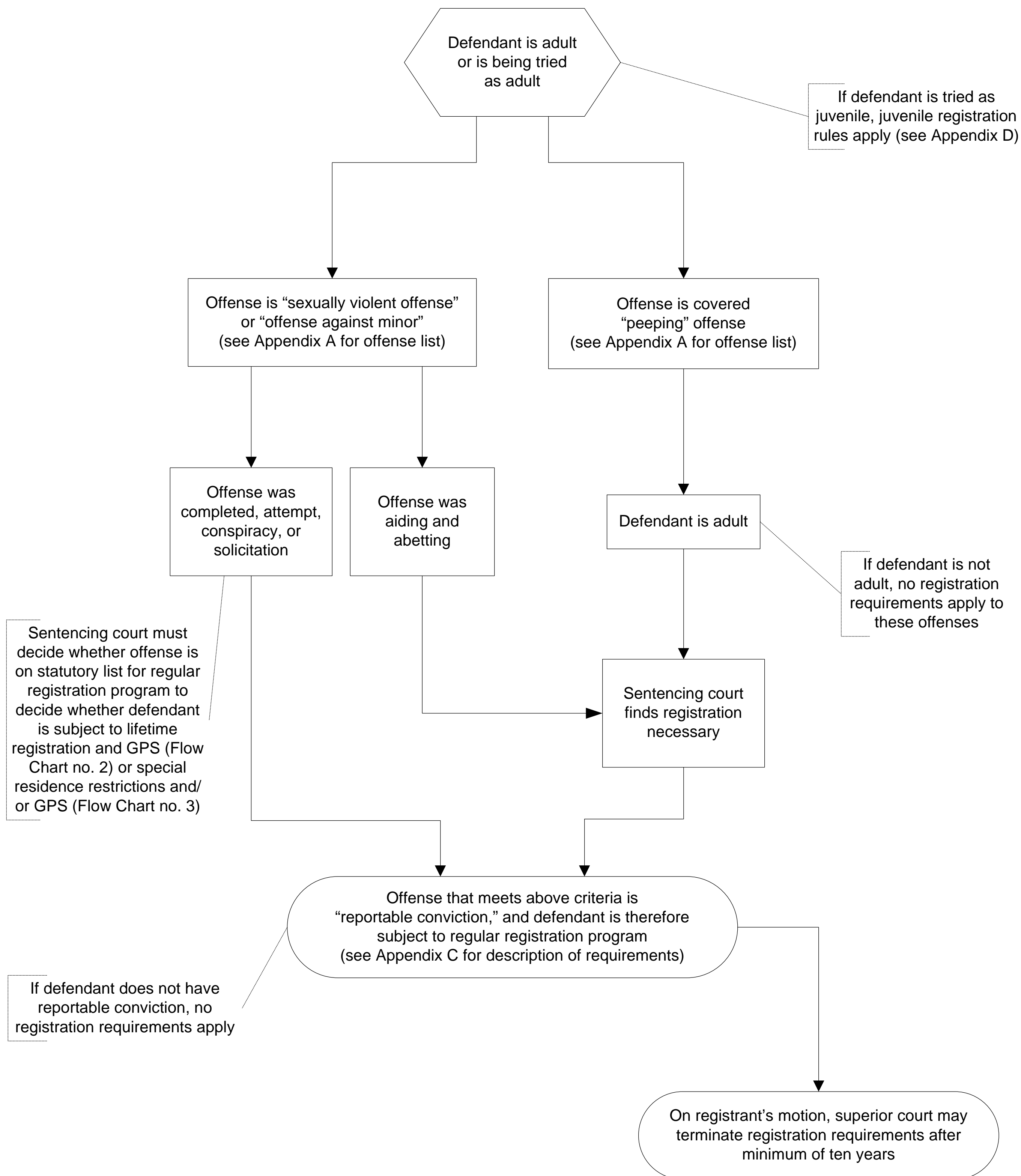
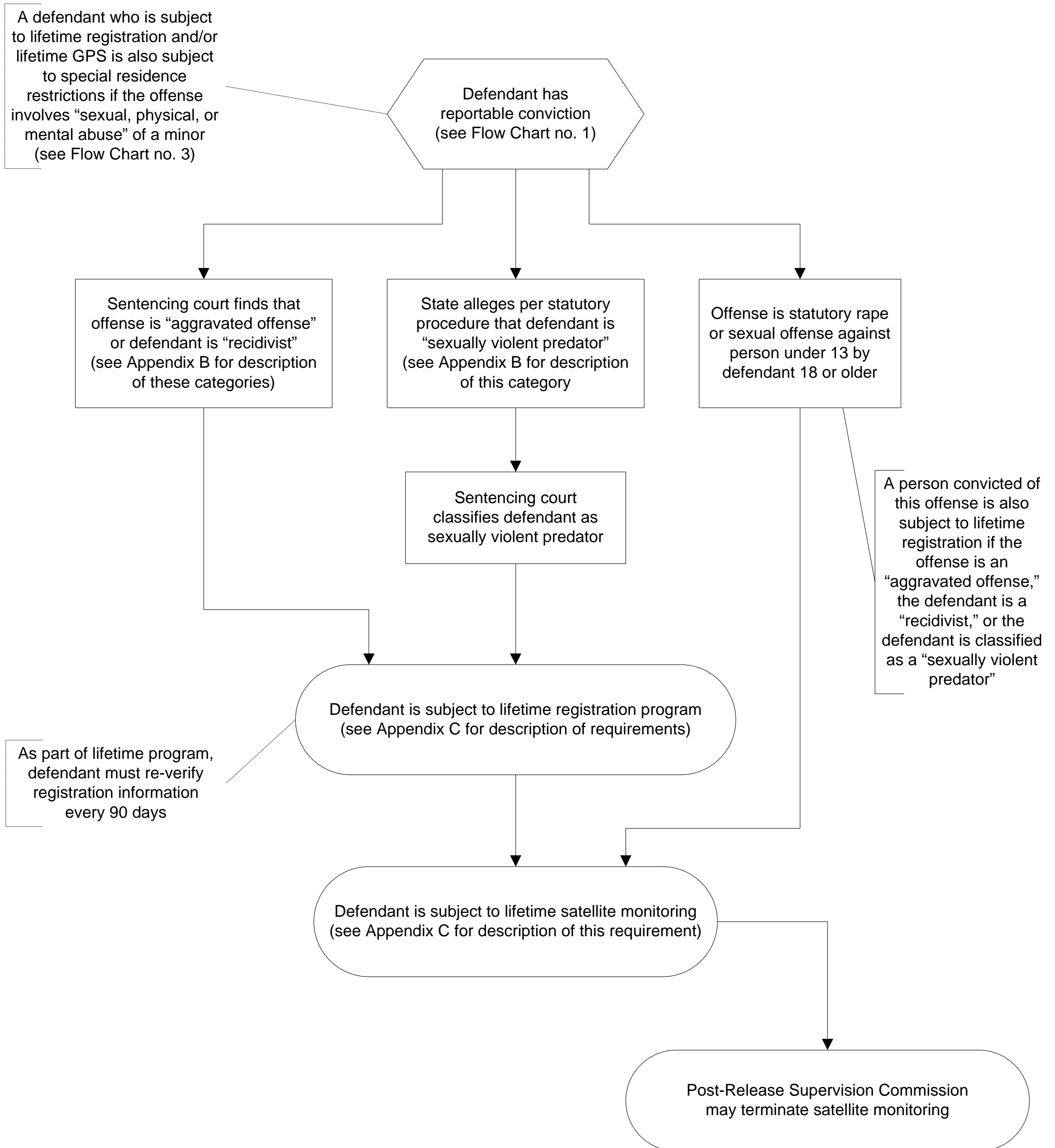
Note about Flow Charts

The flow charts on the following three pages of this handout lay out a process for determining whether a defendant meets the prerequisites for sex offender registration and related requirements. The flow charts are designed for use in cases involving sentences imposed on or after December 1, 2007. For sentences imposed before December 1, 2007, the substance of those prerequisites was the same. For example, the defendant must have had a “reportable conviction” (as defined in Appendix A) to be subject to sex offender registration. The sentencing court’s role in determining those prerequisites was not as clear, however. In many instances the sheriff of the registering county made key determinations after sentencing, such as whether the defendant had been convicted of an “aggravated offense” (as defined in Appendix B) and was therefore subject to lifetime registration. This handout does not address any legal issues involved in the making of such post-sentence determinations. If, however, a court is asked to review those determinations (or to make those determinations in the first instance) for cases sentenced before December 1, 2007, the flow charts and accompanying appendices may be used to determine whether the prerequisites for registration and related requirements have otherwise been met.

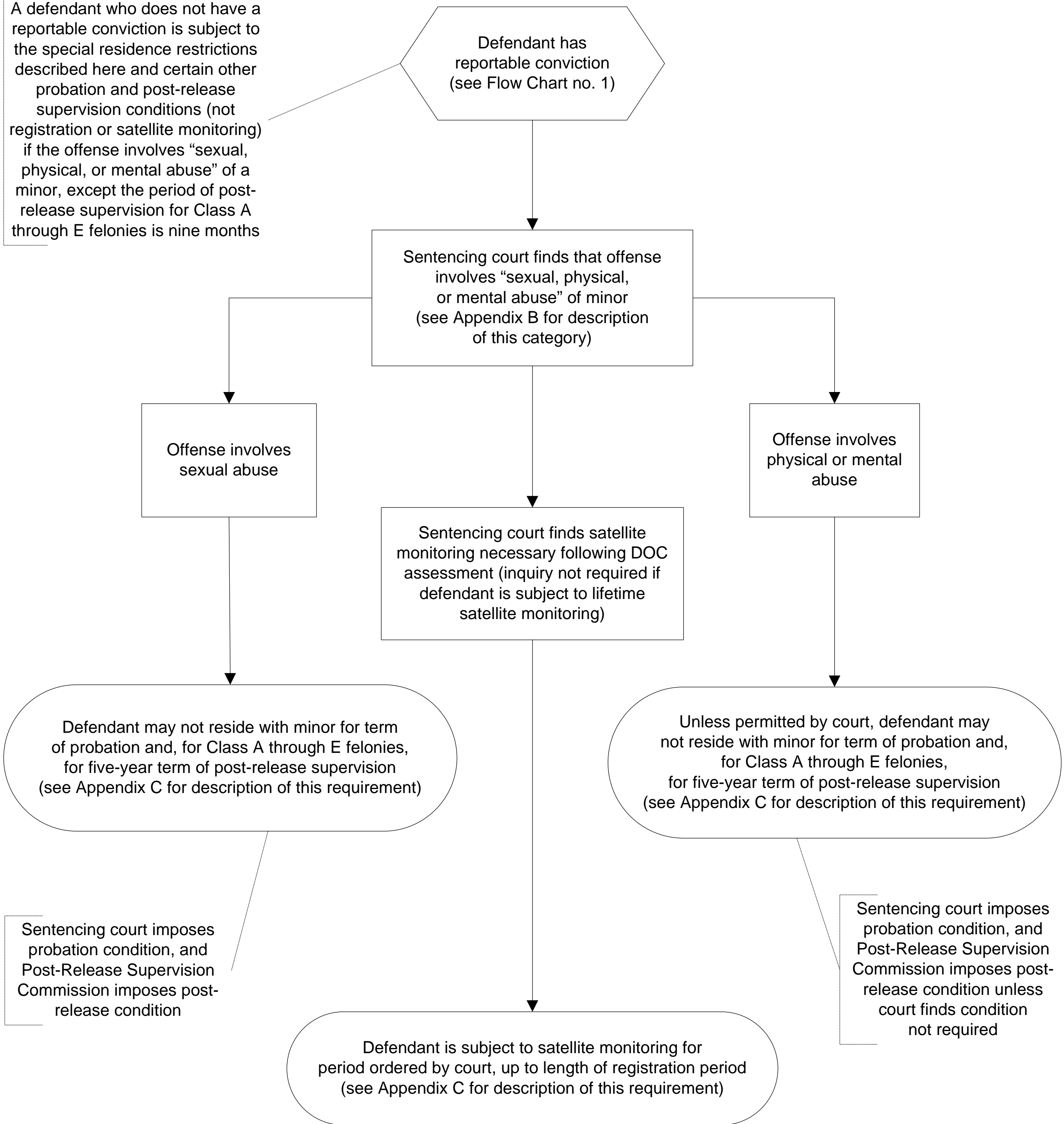
Flow Chart No. 1
Is the defendant subject to regular sex offender registration requirements?



Flow Chart No. 2
Is the defendant subject to lifetime registration and/or lifetime GPS?



Flow Chart No. 3
Is the defendant subject to special residence restrictions and/or GPS, in addition to regular registration requirements?



Appendix A

Sexually Violent Offenses, Offenses against Minors, Peeping Offenses, and Selected Offenses NOT Subject to Sex Offender Registration Requirements

"Sexually Violent Offenses" and Effective Dates

GS 14-208.6(5) lists the offenses that are "sexually violent offenses." If listed in that statute, the offense is a "sexually violent offense" although it may or may not involve an act of violence. Likewise, if not a listed offense, it is NOT a "sexually violent offense" regardless of whether it involves an act of a sexual nature. The offense also must be within the effective date enacted by the General Assembly for that offense. *But see infra* Federal Guidelines on Sex Offender Registration (discussing potential impact of federal retroactivity requirements).

If an offense is a "sexually violent offense," it is a "reportable conviction" under GS 14-208.6(4), except if the offense is aiding and abetting, which requires a finding by the sentencing court that registration furthers the purpose of the sex offender article. A defendant with a reportable conviction is subject to regular sex offender registration requirements, described in Appendix C.

Statute	**Offense**	**Offense Class**	**Effective Date**
14-27.2	First-degree rape (forcible or statutory)	Class B1 felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-27.2A	Statutory rape of person under 13 by defendant 18 or older	Class B1 felony	Offenses committed on or after Dec. 1, 2008
14-27.3	Second-degree rape	Class C felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-27.4	First-degree sexual offense (forcible or statutory)	Class B1 felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-27.4A	Statutory sex offense against person under 13 by defendant 18 or older	Class B1 felony	Offenses committed on or after Dec. 1, 2008
14-27.5	Second-degree sexual offense	Class C felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-27.5A	Sexual battery	Class A1 misdemeanor	Offenses committed on or after Dec. 1, 2005
14-27.6	Attempted rape or sexual offense (repealed 1994)		Convicted or released from penal institution on or after Jan. 1, 1996

Statute	Offense	Offense Class	Effective Date
14-27.7	Intercourse and sexual offense with certain victims	Violation of 14-27.7(a), Class E felony; violation of 14-27.7(b), Class G felony or Class A1 misdemeanor[1]	Convicted or released from penal institution on or after Jan. 1, 1996
14-27.7A(a)	Statutory rape or sexual offense against person who is 13, 14, or 15 years old by defendant who is at least six years older	Class B1 felony	Offenses committed on or after Dec. 1, 2006
14-43.13	Sexual servitude	Class C or F felony	Offenses committed on or after Dec. 1, 2006
14-178	Incest between near relatives	Class B1, C, or F felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-190.6	Employing or permitting minor to assist in offenses against public morality and decency	Class I felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-190.9(a1)	Felony indecent exposure	Class H felony	Offenses committed on or after Dec. 1, 2005
14-190.16	First-degree sexual exploitation of minor	Class D felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-190.17	Second-degree sexual exploitation of minor	Class F felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-190.17A	Third-degree sexual exploitation of minor	Class I felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-190.18	Promoting prostitution of minor	Class D felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-190.19	Participating in prostitution of minor	Class F felony	Convicted or released from penal institution on or after Jan. 1, 1996

1. GS 14-27.7(a) deals with acts by a parental substitute or custodian and was in effect when the original sex offender legislation was enacted in 1995. A violation of that subsection is clearly subject to sex offender registration requirements. GS 14-27.7(b) deals with acts by school personnel and was added in 1999. A violation of that subsection may be subject to sex offender registration requirements. GS 14-208.6(5), which defines “sexually violent offense,” refers generally to “GS 14-27.7 (intercourse and sexual offense with certain victims).” That language, part of the original sex offender legislation in 1995, was not revised in 1999. Indecent liberties by school personnel with a student in violation of GS 14-202.4, also added in 1999, is not a reportable conviction.

Statute	Offense	Offense Class	Effective Date
14-202.1	Indecent liberties	Class F felony	Convicted or released from penal institution on or after Jan. 1, 1996
14-202.3	Solicitation of child by computer to commit unlawful sex act	Class H felony	Offenses committed on or after Dec. 1, 2005
14-318.4(a1)	Committing or permitting prostitution on child under 16 by parent or caretaker	Class E felony	Convicted or released from penal institution on or after Dec. 1, 2008[2]
14-318.4(a2)	Committing or allowing sexual act on child under 16 by parent or guardian	Class E felony	Convicted or released from penal institution on or after Dec. 1, 2008[3]
Attempt	Attempt to commit offense listed above. GS 14-208.6(4)a.		Applies as set out above for completed offense, beginning April 1, 1998 (not specified whether offense, conviction, or other triggering event must occur on or after that date)
Solicitation or conspiracy	Solicitation or conspiracy to commit offense listed above. GS 14-208.6(5).		Applies as set out above for completed offense, beginning with offenses committed on or after Dec. 1, 1999
Aiding and abetting	Aiding and abetting offense listed above if sentencing court finds that registration furthers purpose of sex offender article. GS 14-208.6(4)a.		Applies as set out above for completed offense, beginning with offenses committed on or after Dec. 1, 1999
Offense by juvenile transferred to superior court	Juvenile transferred to superior court and convicted of "sexually violent offense." GS 14-208.6B.		Applies as set out above for offense by adult, beginning April 1, 1998 (not specified whether offense, conviction, or other triggering event must occur on or after that date)

2. If this offense was committed before Dec. 1, 2008, the person may not be subject to five years of post-release supervision. *See infra Sex Offender Legislation,* at p. 28 (discussing constitutionality of retroactively requiring a longer period of post-release supervision).

3. *See* note 2.

Statute	Offense	Offense Class	Effective Date
Out-of-state conviction	(1) A final conviction in another state of an offense, which if committed in this state, is substantially similar to a “sexually violent offense”; (2) a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state. GS 14-208.6(4)b.		(1) Applies as set out above for offense committed in NC; (2) applies to offenses committed or individuals who move into this state on or after Dec. 1, 2006
Federal conviction	A final conviction in a federal jurisdiction of an offense that is substantially similar to a “sexually violent offense.” GS 14-208.6(4)c.		Applies as set out above for NC offense, beginning with persons convicted or released on or after April 3, 1997, except that for federal court martials, may apply to offenses committed on or after Dec. 1, 2001

“Offenses Against a Minor” and Effective Dates

An offense listed in GS 14-208.6(1i) is an “offense against a minor” if committed against a minor and the defendant was not the minor’s parent. (For offenses committed before Dec. 1, 1999, an “offense against a minor” did not include offenses committed by the minor’s parent or legal custodian.) The offense also must be within the effective date enacted by the General Assembly for that offense. *But see infra* Federal Guidelines on Sex Offender Registration (discussing potential impact of federal retroactivity requirements).

If an offense is an “offense against a minor,” it is a “reportable conviction” under GS 14-208.6(4), except if the offense is aiding and abetting, which requires a finding by the sentencing court that registration furthers the purpose of the sex offender article. A defendant with a reportable conviction is subject to regular sex offender registration requirements, described in Appendix C.

Statute	Offense	Offense Class	Effective Date
14-39	Kidnapping	Class C or E felony	April 1, 1998 (not specified whether offense, conviction, or other triggering event must occur on or after that date)
14-41	Abduction of child	Class F felony	April 1, 1998 (not specified whether offense, conviction, or other triggering event must occur on or after that date)
14-43.3	Felonious restraint	Class F felony	April 1, 1998 (not specified whether offense, conviction, or other triggering event must occur on or after that date)
Attempt	Attempt to commit offense listed above. GS 14-208.6(4)a.		April 1, 1998 (not specified whether offense, conviction, or other triggering event must occur on or after that date)
Solicitation or conspiracy	Solicitation or conspiracy to commit offense listed above. GS 14-208.6(1i).		Applies as set out above for completed offense, beginning with offenses committed on or after Dec. 1, 1999
Aiding and abetting	Aiding and abetting offense listed above if sentencing court finds that registration furthers purpose of sex offender article. GS 14-208.6(4)a.		Applies as set out above for completed offense, beginning with offenses committed on or after Dec. 1, 1999
Offense by juvenile transferred to superior court	Juvenile transferred to superior court and convicted of “offense against minor.” GS 14-208.6B.		April 1, 1998 (not specified whether offense, conviction, or other triggering event must occur on or after that date)

Statute	Offense	Offense Class	Effective Date
Out-of-state conviction	(1) A final conviction in another state of an offense, which if committed in this state, is substantially similar to an “offense against a minor”; (2) a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state. GS 14-208.6(4)b.		(1) Applies as set out above for offense committed in NC; (2) applies to offenses committed or individuals who move into this state on or after Dec. 1, 2006
Federal conviction	A final conviction in a federal jurisdiction of an offense that is substantially similar to an “offense against a minor.” GS 14-208.6(4)c.		Applies as set out above for NC offense, except that for federal court martials, may apply to offenses committed on or after Dec. 1, 2001

“Peeping” Offenses and Effective Dates

A “peeping” offense in violation of one of the statutes listed in GS 14-208.6(4)d. is a “reportable conviction” if the sentencing court issues an order pursuant to GS 14-202(*l*) requiring the individual to register. The offense also must be within the effective date enacted by the General Assembly for that offense. A “peeping” offense that meets these requirements is a “reportable conviction,” subject to regular sex offender registration requirements, described in Appendix C.

A “peeping” offense by a 13, 14, or 15 year-old transferred to superior court for trial as an adult is not subject to either adult or juvenile registration requirements. GS 14-208.6B. There are no provisions requiring registration for an attempt, solicitation, conspiracy, aiding and abetting offense, out-of-state conviction, or federal conviction involving “peeping.”

Statute	Offense	Offense Class	Effective Date
14-202(d), (e), (f), (g), or (h)	Peeping offense in violation of indicated statutes if court orders registration	Class H or I felony	Offenses committed on or after Dec. 1, 2003
14-202(a), (a1), (c)	Second or subsequent peeping offense in violation of indicated statutes if court orders registration	Class A1 or 1 misdemeanor	Offenses in violation of 14-202(a) or (c) committed on or after Dec. 1, 2003; offenses in violation of 14-202(a1) committed on or after Dec. 1, 2004

Selected Offenses NOT Subject to Sex Offender Registration Requirements

The offenses listed below do not constitute reportable convictions. *But see infra* Federal Guidelines on Sex Offender Registration (discussing potential impact of federal definitions of offenses subject to registration). Because the offenses do not constitute reportable convictions under GS 14-208.6(4), an attempt, conspiracy, or solicitation to commit these offenses, or aiding and abetting these offenses, does not constitute a reportable conviction.

Statute	Offense	Offense Class
14-27.7A(b)	Statutory rape or sexual offense against person who is 13, 14, or 15 years old by defendant who is more than four but less than six years older than person	Class C felony
14-39	Kidnapping (other than kidnapping that is “offense against minor”)	Class C or E felony
14-43.11	Human trafficking	Class C or F felony
14-43.12	Involuntary servitude	Class C or F felony
14-177	Crime against nature	Class I felony
14-190.9(a)	Misdemeanor indecent exposure	Class 2 misdemeanor
14-202.4	Indecent liberties by school personnel with student	Class I felony or Class A1 misdemeanor
14-204	Prostitution	Class 1 misdemeanor
14-204.1	Loitering for purpose of prostitution or committing crime against nature	Class 1 misdemeanor

Appendix B

“Aggravated Offenses,” “Recidivists,” “Sexually Violent Predators,”
Rape or Sexual Offense against Person under 13, and
Offenses Involving “Sexual, Physical, or Mental Abuse” of Minor

Aggravated Offenses

Definition

An “aggravated offense” is a criminal offense that includes either a sexual act involving (i) vaginal, anal, or oral penetration through force or the threat of serious violence or (ii) vaginal, anal, or oral penetration with a person less than 12 years old. GS 14-208.6(1a).

Effective date

The “aggravated offense” category applies to offenses committed on or after Oct. 1, 2001. The lifetime satellite monitoring requirement for “aggravated offenses,” enacted Aug 16, 2006, applies as described in Appendix C (aggravated consequences).

Recidivists

Definition

A “recidivist” is a person who has a prior conviction for an offense described in GS 14-208.6(4), the subsection describing reportable convictions. GS 14-208.6(2b). The definition does not include a person convicted at the same time of multiple offenses.

Effective date

The “recidivist” category applies to offenses committed on or after Oct. 1, 2001. Under this language, the second or subsequent offense must have been committed on or after Oct. 1, 2001, but the prior offense could have been committed before Oct. 1, 2001. The North Carolina Court of Appeals has held further that the prior offense need not have been subject to sex offender registration requirements as long it is an offense described in GS 14-208.6(4). *State v. Wooten,* ___ N.C. App. ___, 669 S.E.2d 749 (2008), *rev. denied,* 363 N.C. 138 (2009). In *Wooten,* the defendant was convicted of indecent liberties in 1989 and completed his or her sentence before the sex offender registration law took effect in 1996. The Court held that the defendant was appropriately considered a recidivist for a second reportable conviction for an offense committed after Oct. 1, 2001.

The lifetime satellite monitoring requirement for “recidivists,” enacted Aug 16, 2006, applies as described in Appendix C (aggravated consequences).

Sexually Violent Predators

Definition

A “sexually violent predator” is a person who meets the definition in GS 14-208.6(6) and who has been designated as a “sexually violent predator” in accordance with the procedures in GS 14-208.20. The procedure is rarely used. *See generally State v. Zinkland,* ___ N.C. App. ___, 661 S.E.2d 290 (2008) (trial judge erred in ruling that the defendant was a sexually violent predator without compliance with the provisions in GS 14-208.20), *rev. denied,* 362 N.C. 513 (2008).

Effective Date

The "sexually violent predator" category became effective April 1, 1998. No triggering date was specified, but at the least it applies to offenses committed on or after date. The lifetime satellite monitoring requirement for "sexually violent predators," enacted Aug 16, 2006, applies as described in Appendix C (aggravated consequences).

Statutory Rape or Sexual Offense against Person under 13 by Defendant 18 or older

Definition

See GS 14-27.2A (rape), 14-27.4A (sexual offense).

Effective Date

These statutes apply to offenses committed on or after Dec. 1, 2008. Thus, for acts committed before that date, a person is not subject on this ground to the consequences described in Appendix C (aggravated consequences).

Offenses Involving Sexual, Physical, or Mental Abuse of Minor

Definition

There is no statutory definition of these terms.

Effective date

The category of offenses involving "sexual, physical, or mental abuse" of a minor became effective Dec. 1, 1996. No triggering date was specified, but at the least it applies to offenses committed on or after that date. The satellite monitoring provisions for this category, enacted Aug. 16, 2006, apply as described in Appendix C (aggravated consequences).

Appendix C

Regular and Aggravated Sex Offender Registration Consequences

Regular Consequences

Unless otherwise indicated, the following consequences apply to all defendants who have a reportable conviction.

- Minimum registration requirement of ten years, which may be terminated by superior court judge after minimum satisfied. GS 14-208.12A. Former law automatically terminated registration period after ten years.
    - Minimum applies to anyone whose registration period had not ended as of August 16, 2006. Thus, minimum covers both persons who are convicted after Aug. 16, 2006, AND persons who were convicted before Aug. 16, 2006, but who had not completed their required registration period before Aug. 16, 2006.
    - Minimum may increase to fifteen years if federal standards requiring fifteen-year minimum are adopted in NC. Higher minimum may be reduced to ten years if certain conditions met. *See infra* Federal Guidelines on Sex Offender Registration (length of registration).
    - GS 14-208.6A states that registration is for thirty years, with the opportunity to petition to shorten the registration period after ten years. This provision appears to establish a thirty-year maximum and appears to be applicable to any person still required to register on or after Dec. 1, 2008. *See infra* 2008 Legislation Affecting Criminal Law and Procedure (discussing thirty-year registration period).
- Address, photo, and offense publicly accessible on Internet at sexoffender.ncdoj.gov/. GS 14-208.14, 14-208.15. Effective May 1, 2009, online identifiers also must be provided to sheriff, but they are not publicly accessible. GS 14-208.7(b), 14-208.9(e), 14-208.9A(a)(3).
- Effective Dec. 1, 2008, registrant may not use commercial social networking websites as defined in GS 14-202.5. Ban does not include Internet websites that provide only one discrete service, such as email or instant messaging.
- Effective Dec. 1, 2008, ban on name change by registrant. GS 14-202.6.
- In-person verification of registration information with sheriff every six months. GS 14-208.9A.
- Various other registration obligations, such as requirement to give notice of address change and certain employment changes. GS 14-208.9.
- Effective Dec. 1, 2008, time limit of three business days (rather than previous ten days) to register, re-verify information, and provide notice of certain changes in status, such as change of address. GS 14-208.7, 14-208.9, 14-208.9A.
- Class F felony for most violations of registration requirements. GS 14-208.11.
- Additional required conditions of probation, such as participating in treatment as ordered by the court and, effective for persons placed on probation on or after Dec. 1, 2007, submitting to warrantless searches. GS 15A-1343(b2).
- If reportable conviction is Class A through E felony, five years of post-release supervision (instead of nine months) with additional required conditions, such as participating in treatment as ordered by Post-Release Supervision and Parole Commission and, effective for persons placed on post-release supervision on or after Dec. 1, 2007, submitting to warrantless searches. GS 15A-1368.2(c), 15A-1368.4(b1).
- Certain conduct prohibited by virtue of having reportable conviction (unrelated to registration, probation, or post-release supervision obligations):
    - Effective for offenses committed on or after Dec. 1, 2008, it is a Class H felony for a registrant to be on or near certain locations regularly used by minors if the offense of registration is an offense under GS Ch. 14, Art. 7A (including any degree of rape or sexual offense and sexual battery) or is an offense that involved a victim under 16 (including indecent liberties under GS 14-202.1). GS 14-208.18. A school may expel a student who is subject to the ban. GS 115C-391(d)(2).

- Class G felony to reside near school, subject to certain exceptions. GS 14-208.16 (no violation if ownership or use of nearby property changes after residence established); Sec. 11(c) of S.L. 2006-247 (H 1896) (no violation if residence established before Dec. 1, 2006).
  - Class F felony to work or volunteer at place where minor is present if registrant instructs, supervises, or cares for minors. GS 14-208.17(a).
  - Class F felony for any person, including presumably a registrant, to accept minor into care or custody from another knowing that a person who resides at that location is required to register. GS 14-208.17(b).
  - Class 1 misdemeanor for first offense, and Class H felony for subsequent offense, to provide certain babysitting services. GS 14-321.1.
- Restrictions on pretrial release if registrant arrested for violation of probation or post-release supervision. GS 15A-1345(b), 15A-1368.6(b1).

Aggravated Consequences

Aggravated Offenses, Recidivists, and Sexually Violent Predators

In addition to regular registration consequences, the following consequences apply if the defendant is convicted of an offense that is a reportable conviction AND the offense is an aggravated offense, the defendant is a recidivist, or the defendant is classified as a sexually violent predator.

- Lifetime registration requirement, instead of ten-year minimum, terminated only if conviction reversed, vacated, or set aside, or unconditional pardon of innocence granted. GS 14-208.23, 14-208.6C.
  - In-person re-verification of registration information with sheriff every ninety days instead of every six months. GS 14-208.24.
- Lifetime satellite monitoring (may be terminated by Post-Release Supervision and Parole Commission). GS 14-208.40(a)(1), 14-208.40A(c), 14-208.40B(c), 14-208.43.
  - Satellite monitoring is also a required condition for term of probation and, if offense is Class A through E felony, for five-year period of post-release supervision. GS 15A-1343(b2)(7), 15A-1368.4(b1)(6).
  - Class F felony for not enrolling in program if required to do so, Class E felony for tampering with satellite monitoring equipment, and Class 1 misdemeanor (effective for offenses committed on or after Dec. 1, 2007) for failing to provide necessary information to DOC or failing to cooperate with DOC's rules for program.
  - Satellite monitoring provisions apply to offenses committed on or after Aug. 16, 2006. They also apply to offenses committed before Aug. 16, 2006, if the defendant is sentenced on or after that date (except if the defendant is sentenced to community punishment, an option that is not available for most of these offenses). *See* effective-date language, reprinted below, for certain defendants sentenced before Aug. 16, 2006.

Statutory Rape or Sexual Offense against Person under 13 by Defendant 18 or Older
(effective for offenses committed on or after Dec. 1, 2008)

In addition to regular registration requirements, a defendant convicted of this offense is subject to the following consequences:

- Mandatory minimum sentence of imprisonment of 300 months and, if egregious aggravation is found, life imprisonment without parole. *But see infra* 2008 Legislation Affecting Criminal Law and Procedure (discussing difficulties of applying egregious aggravation provision).
- Lifetime satellite monitoring on release from prison (may be terminated by Post-Release

Supervision and Parole Commission).

- If the offense constitutes an aggravated offense, the defendant is a recidivist, or the defendant is classified as a sexually violent predator, the defendant must register for life on release from prison and must re-verify registration information with sheriff every ninety days.

Offenses Involving Sexual, Physical, or Mental Abuse of Minor

In addition to regular registration consequences, the following consequences apply if the defendant is convicted of an offense that is a reportable conviction AND the offense involves "sexual, physical, or mental abuse" of a minor. A defendant who has a reportable conviction and is subject to the aggravated consequences immediately above is also subject to the probation and post-release supervision restrictions below if the offense involves "sexual, physical, or mental abuse" of a minor.[*]

- Potential of satellite monitoring for period ordered by court, up to length of registration period. GS 14-208.40(a)(2), 14-208.40A(d),(e), 14-208.40B(c) (describing criteria for when monitoring may be ordered).
    - If imposed, satellite monitoring is also a condition for term of probation and, if offense is Class A through E felony, for five-year period of post-release supervision. GS 15A-1343(b2)(8), 15A-1368.4(b1)(7).
    - Class F felony for not enrolling in program if required to do so, Class E felony for tampering with satellite monitoring equipment, and Class 1 misdemeanor (effective for offenses committed on or after Dec.1, 2007) for failing to provide necessary information to DOC or failing to cooperate with DOC's rules for program.
    - Satellite monitoring provisions apply to offenses committed on or after Aug. 16, 2006. They also apply to offenses committed before Aug. 16, 2006, if the defendant is sentenced on or after that date (except if the defendant is sentenced to community punishment, an option that is not available for most of these offenses). *See* effective-date language, reprinted below, for certain defendants sentenced before Aug. 16, 2006.
- Restrictions on residing with minor (including own child) as condition of probation and, if offense is Class A through E felony, as condition of post-release supervision, as follows:
    - For offenses involving sexual abuse of minor, mandatory condition of probation and post-release supervision that registrant not reside with minor. GS 15A-1343(b2)(4), 15A-1368.4(b1)(4).
    - For offenses involving physical or mental abuse of minor, condition of probation and post-release supervision that registrant not reside with minor unless court finds it permissible. GS 15A-1343(b2)(5), 15A-1368.4(b1)(5).

Effective date provision for satellite monitoring

Section 15(*l*) of SL 206-247 (H 1896) contains the effective-date provision for the satellite monitoring provisions. It states: "Unless otherwise provided in the section, this section is effective when it becomes law [Aug. 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to 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. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

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[*]A defendant who does not have a reportable conviction is subject to the indicated residence restrictions and certain other probation and post-release supervision conditions (not registration or satellite monitoring) if convicted of an offense involving sexual, physical, or mental abuse of a minor, except the period of post-release supervision for Class A through E felonies is nine months instead of five years. GS 15A-1343(b2), 15A-1368.2(c), 15A-1368.4(b1).

Appendix D

Juvenile Sex Offender Registration Requirements

Applicability

GS 14-208.26 requires registration of a juvenile tried in juvenile court if all of the following conditions are present:

- The juvenile is adjudicated delinquent of:
  - a violation of GS 14-27.2 (first-degree rape), GS 14-27.3 (second-degree rape), GS 14-27.4 (first-degree sexual offense), GS 14-27.5 (second-degree sexual offense), or GS 14-27.6 (attempted rape or sexual offense, repealed in 1994)
  - attempt, conspiracy, or solicitation to commit these offenses; or
  - aiding and abetting these offenses;
- The juvenile was eleven years of age or older at time of offense; and
- The judge presiding at the dispositional hearing finds under the statutory standard that the juvenile should be required to register.

Requirements

- The juvenile court counselor is responsible for obtaining from the juvenile and providing to the sheriff the juvenile's current address.
- Registration information (juvenile's name, offense, address) is not public record and is not accessible via Internet. GS 14-208.29.
- Registration terminates when juvenile turns 18 years old or juvenile court jurisdiction terminates, whichever occurs first. GS 14-208.30.
- Division of Criminal Statistics retains information about juvenile. GS 14-208.31.
- Juvenile who is required to register may be subject to GS 14-208.16 and 14-208.17, which make it a crime for a registrant to reside near school or engage in certain activities involving minors; GS 14-208.18, which prohibits certain registrants from being on or near locations regularly used by minors; and GS 115C-391(d)(2), which authorizes expulsion from school. *See* Appendix C, Regular Consequences, above.
- *See infra* Federal Guidelines on Sex Offender Registration, which would require juveniles 14 or older who are adjudicated delinquent of certain offenses to register as adults.

Effective date

The juvenile registration requirements took effect Oct. 1, 1999, except that an attempt, conspiracy, solicitation, or aiding and abetting offense must have been committed on or after Dec. 1, 1999.

SEX OFFENDER REGISTRATION AND MONITORING
(*current as of May 7, 2009*)
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SEXUALLY VIOLENT OFFENSES (14-208.6(5))

✯ 1° Rape (14-27.2) ✯ 2° Rape (14-27.3)
✯ 1° Sex Offense (SO) (14-27.4) ✯ 2° SO (14-27.5)
ϟ Sexual Battery (14-27.5A)
✯ Att. Rape/SO (14-27.6)
✯ Intercourse/SO w/ cert. victims (14-27.7)
◆ Stat. Rape (13-15 y.o., D 6+ y. older)(14-27.7A(a))
◆ Sexual Servitude (14-43.13) ✯ Incest (14-178)
✯ Minor Assist in Pub. Morality Off. (14-190.6)
ϟ Felony Indecent Exposure (14-190.9(a1))
✯ 1° Sex. Exploitation of Minor (SEM) (14-190.16)
✯ 2° SEM (14-190.17) ✯ 3° SEM (14-190.17A)
✯ Promoting Prostitution of Minor (14-190.18)
✯ Participating in Prost. of Minor (14-190.19)
✯ Indecent Liberties w/ Children (14-202.1)
ϟ Computer Solicitation of Child (14-202.3)
🚘 Rape of Child by Adult Offender (14-27.2A)
🚘 SO w/child by Adult Offender (14-27.4A)
◎ Parent/caretaker prostitution (14-318.4(a1))
◎ Parent commit/allow sexual act (14-318.4(a2))

<u>Key to effective dates for crime to be reportable</u>:
✯ Convicted or released from penal institution on/after Jan. 1, 1996. S.L. 1995-545.
ϟ Committed on/after Dec. 1, 2005. S.L. 2005-226; 2005-121; 2005-130.
◆ Committed on/after Dec. 1, 2006. S.L. 2006-247.
🚘 Committed on/after Dec. 1, 2008. S.L. 2008-117.
◎ Convicted or released from penal institution on/after Dec. 1, 2008. S.L. 2008-220.

OFFENSES AGAINST A MINOR (14-208.6(1i))

Kidnapping (14-39)
Abduction of Children (14-41)
Felonious Restraint (14-43.3)

▪S.L. 1997-516 made offenses against a minor reportable. At a minimum, that law applies to offenses committed on or after April 1, 1998.
▪Offender must not be the minor's <u>parent</u>.
▪For offenses committed before Dec. 1, 1999, offenses committed by a <u>legal custodian</u> were also excluded (S.L. 1999-393).

INCHOATE OFFENSES / AIDING & ABETTING:

▪<u>Attempt</u>: S.L. 1997-516 made attempts reportable. At a minimum, applies to offenses committed on or after April 1, 1998 (unless target offense has a later effective date).
▪<u>Conspiracy & Solicitation</u>: S.L. 1999-363 made solicitations and conspiracies reportable. Applies to offenses committed on/after Dec. 1, 1999 (unless target offense has a later effective date).
▪<u>Aiding & Abetting</u>: S.L. 1999-393 made aiding & abetting reportable <u>only</u> if the court finds, pursuant to 14-208.6(4)(a), that registration furthers purposes of Art. 27A, set out in 14-208.5. Applies to offenses committed on/after Dec. 1, 1999 (unless target offense has later date).

SECRETLY PEEPING (14-208.6(4)(d))

▪2nd/subseq. conviction AND court issues order under 14-202(*l*) requiring individual to register:
–Misd. Peeping (14-202(a) or (c)) (offenses committed on/after Dec. 1, 2003). S.L. 2003-303.
–Misd. Peeping w/ Mirror or Device (14-202(a1)) (offenses committed on/after Dec. 1, 2004). S.L. 2004-109.
▪Conviction AND court issues order 14-202(l):
–Felony Peeping (14-202 (d), (e), (f), (g), or (h)) (offenses committed on/after Dec. 1, 2003). S.L. 2003-303.
▪Notes:
–Peeping not covered under 14-208.6B requiring regular registration for juveniles tried as adult.
–Inchoate and A&A peeping NOT reportable

REPORTABLE CONVICTION

Requires a 30-year registration period. 14-208.7, S.L. 2008-117, effective for registrations made on/after Dec. 1. 2008. Offenders may petition for deregistration after 10 yrs. 14-208.12A.

FEDERAL CONVICTION

▪Conviction in federal jurisdiction (including court martial) for offense <u>substantially similar</u> to NC Offense Against a Minor or Sexually Violent Offense (includes inchoate offenses). Applies to those convicted/released from penal institution on/after April 3, 1997, S.L. 1997-15, unless N.C. offense has a later effective date.

CONVICTION FROM OTHER STATE

▪Conviction from another state <u>substantially similar</u> to NC Offense Against a Minor or Sexually Violent Offense (includes inchoate offenses). Use effective date of relevant NC offense. Peeping offenses NOT covered.
▪Any conviction from another state that requires registration in that state. Applies to all who move to NC on/after Dec. 1, 2006, and to offenses committed on/after Dec. 1, 2006, regardless of move to NC. S.L. 2006-247, § 19(e).

SATELLITE-BASED MONITORING (SBM) DETERMINATION

▪For D sentenced o/a Dec. 1, 2007, SBM determined at sentencing. 14-208.40A. S.L. 2007-484 §42(b)
▪For D sentenced prior to Dec 1, 2007, conduct a 14-208.40B "bring back hearing" for those who:
–Committed a reportable offense on/after Aug. 16, 2006; or
–Were sentenced to intermediate punishment on/after Aug. 16, 2006; or
–Were released from prison by parole or PRS on/after Aug. 16, 2006; or
–Complete a sentence on/after Aug. 16, 2006 (meaning unclear). S.L. 2006-247 § 15(*l*).
▪Bring back procedure: DOC makes initial determination that D fits one of criteria above; hearing in county of residence; standard of proof unclear; no provision for appeal in statute; 15-day notice by certified mail or in-person notice for inmates. *State v. Wooten,* 669 S.E.2d 749 (2008).

IF COURT FINDS (EITHER AT SENTENCING OR BRING-BACK HEARING) THAT THE OFFENDER …

A. IS A SEXUALLY VIOLENT PREDATOR (14-208.6(6) and 14-208.20) (rare, only 10 in N.C.)
▪DA gives notice of intent to seek SVP classification; board of 4 experts investigates whether offender suffers mental abnormality per 14-208.6(6); court makes SVP determination

B. IS A RECIDIVIST (14-208.6(2b))
▪Person w/ prior conviction for offense described in 14-208.6(4) (i.e., "reportable")
▪Definition established by S.L. 2001-373, applies to offenders whose second/subsequent offense was committed on/after Oct. 1, 2001; first offense can count regardless of offense date. *Wooten*.

C. COMMITTED AN AGGRAVATED OFFENSE (14-208.6(1a))
▪Criminal offense that includes a sexual act involving:
–Vaginal, anal, oral penetration through force or threat of serious violence; or,
–Vaginal, anal, or oral penetration with a victim under 12
▪Only offenses committed on/after Oct. 1, 2001 can be Aggravated. S.L. 2001-373.
▪18 U.S.C. 2246 suggests "oral penetration" is only oral-genital contact, not French kissing)
▪Unclear whether the court, per 14-208.40A/B, should look at <u>elements</u> of offense of conviction *OR* the <u>facts</u> of the acts committed. Consider the following in developing arguments for/against:
–14-208.40A/B use terms "offender's conviction" and "conviction offense," perhaps suggesting an elements-based approach; use of term "evidence" suggests facts approach
–In State v. Hamilton, 277 Neb. 593 (Apr. 10, 2009), Neb. Supreme Ct. adopts a facts-based approach, allowing court to look at the record, pre-sentencing report, & factual basis for plea.
–Federal cases suggest elements-based approach is proper: Taylor, 495 U.S. 575 (1990); James, 127 S. Ct. 1586 (2007); Shepard, 544 U.S. 13 (2005) (police reports shouldn't be used).

D. COMMITTED RAPE OR SEX OFFENSE WITH MINOR BY ADULT (14-27.2A; -27.4A)

…THEN OFFENDER IS SUBJECT TO:

LIFETIME REGISTRATION (14-208.23)
▪Discontinued only if conviction reversed, vacated, or pardoned (14-208.6C)

LIFETIME SATELLITE-BASED MONITORING (SBM) (14-208.41)
▪1 year after completion of sentence and any supervision period, offender may petition Parole Commission for termination of SBM (14-208.43)

E. COMMITTED OFFENSE INVOLVING PHYSICAL, MENTAL, OR SEXUAL ABUSE OF MINOR <u>AND</u> IS HIGHEST RISK LEVEL ON DOC RISK ASSESSMENT (STATIC-99)
▪Abuse of a minor is an undefined term; first appeared in S.L. 1996-18-es2 (regarding probation conditions); at a minimum applies to offenses committed on/after Dec. 1, 1996.
▪14-208.40(a)(2) suggests DOC risk assessment <u>must</u> be HIGH for court to order SBM
▪14-208.40A/B suggest court discretion ("court shall determine") in spite of DOC risk assessment (i.e., judge may order SBM even if DOC risk assessment shows MODERATE or LOW risk).

…THEN OFFENDER IS SUBJECT TO:

SBM FOR A PERIOD OF TIME SPECIFIED BY THE COURT
▪Limited by length of registration (14-208.40(a)(2)(ii) and -208.43(d1))
▪DCC calls these "conditionals" (as opposed to mandatory categories above)

The following summary is of legislation enacted by the 2008 General Assembly concerning sex offender registration and monitoring. It is excerpted from John Rubin, *2008 Legislation Affecting Criminal Law and Procedure,* ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06 (UNC School of Government, Nov. 2008), online at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0806.pdf.

Sex Offender Legislation

The General Assembly passed three major acts in 2008 related to sex offenders, creating new sex offenses, increasing the punishment for existing offenses, and tightening restrictions on convicted offenders. These changes follow major changes enacted in 2006 and 2007 involving sex offenders and may be a prelude to an additional set of changes in 2009, when the General Assembly will consider whether to adopt new federal standards on sex offenders. The discussion below begins with a description of the Jessica Lunsford Act for North Carolina, S.L. 2008-117 (H 933), named after a young girl in Florida who was raped and killed in 2005. Various laws, commonly known as Jessica's Laws, have been introduced around the country to increase the punishment for and restrictions on sex offenders. North Carolina's version likewise takes a tough stance on sex offenders. The discussion then describes the impact of the other two sex offender laws enacted by the 2008 North Carolina General Assembly. It closes by summarizing the key provisions of the federal standards under consideration in North Carolina and other states.[1]

Jessica's Law

Rape and sex offense against a child under age 13. Under G.S. 14-27.2, first-degree statutory rape is defined as vaginal intercourse with a victim under the age of 13 when the perpetrator is at least 12 years old and at least four years older than the victim. Under G.S. 14-27.4, other serious sex acts (such as oral sex acts) constitute first-degree statutory sexual offense if the same age criteria are met. Both crimes are Class B1 felonies, the second highest class of felony in North Carolina. Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 (H 933) adds G.S. 14-27.2A and 14-27.4A to create the crimes of rape and sex offense against a child when the child is under the age of 13 and the perpetrator is at least 18 years old. Like first-degree statutory rape and first-degree statutory sex offense, these new offenses are Class B1 felonies. The difference is that the new offenses carry significantly greater penalties. First-degree statutory rape and statutory sex offense are designated as lesser offenses of the new offenses.

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1. A fourth act, the technical corrections bill, S.L. 2008-187 (S 1632), revises G.S. 14-208.41(b) to clarify that a person must submit to satellite monitoring only if ordered by the court following a hearing under G.S. 14-208.40A or 14-208.40B. Previously, the statute stated that a person had to submit to satellite monitoring if ordered by the court *or* required by the Department of Correction. The deletion of the latter phrase is consistent with statutory changes made in 2007 by the General Assembly, which explicitly placed the responsibility on the court to decide whether a person met the statutory criteria for imposition of satellite monitoring.

A fifth act, the studies bill, S.L. 2008-181 (H 2431), creates the Joint Legislative Study Committee on Civil Commitment of Sexual Predators, consisting of ten members, five appointed by the Speaker of the House and five appointed by the President Pro Tem. of the Senate. This committee is directed to study the state's laws on incapacity to proceed to trial and involuntary commitment, including whether these laws adequately address issues involved when defendants are charged with committing a sex offense against a child, are found incapable of proceeding to trial, and do not meet the criteria for involuntary commitment. The committee must make a final report of its findings and recommendations to the 2009 General Assembly.

The first difference is that a person convicted of one of the new offenses must be sentenced to an active punishment of at least 300 months regardless of regular structured sentencing rules. Ordinarily, a person convicted of a Class B1 felony can receive a low of 144 months active imprisonment to a high of life in prison without parole, depending on the seriousness of the person's prior record level and the presence of aggravating or mitigating factors. The new statutes state that structured sentencing applies to these offenses, subject to the 300-month mandatory minimum (and the life imprisonment provision described below). Thus, a person convicted of one of the new offenses may be sentenced to more than 300 months if the person's prior record level and any aggravating factors warrant a greater sentence under structured sentencing.

Second, the new statutes provide that when the defendant is released from prison, he or she must submit to satellite monitoring for life under the sex offender monitoring statutes. The act makes conforming changes to other statutes to apply the procedures for imposing lifetime satellite monitoring to the new offenses. Thus, revised G.S. 14-208.40A provides that upon conviction, the court at sentencing must determine whether the offense was a violation of the new statutes and, if so, order lifetime satellite monitoring. Under revised G.S. 14-208.43(a), a person ordered to submit to lifetime satellite monitoring based on one of the new offenses may petition the Post-Release Supervision Commission to terminate the requirement. The act also amends G.S. 14-208.6(5) to add the new offenses to the definition of *sexually violent offense,* which triggers registration as a sex offender. As with other offenses requiring registration, the length of registration is for a minimum of ten years unless the offense is an *aggravated offense* (as defined in G.S. 14-208.6(1a)), the person is a *recidivist* (as defined in G.S. 14-208.6(2b)), or the court classifies the person as a *sexually violent predator* (per the procedure in G.S. 14-208.20), in which case registration is for life.

Third, G.S. 14-27.2A(c) and 14-27.4A(c) provide that if the court finds *egregious aggravation,* it may sentence the defendant to up to life in prison without parole, regardless of whether the person could receive such a punishment under regular structured sentencing rules. The statutes place the responsibility of determining *egregious aggravation* on the sentencing judge, but this procedure is likely unconstitutional. In *Blakely v. Washington,* 542 U.S. 296 (2004), the U.S. Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. In light of this constitutional requirement, the jury, not the sentencing judge, would likely have to determine *egregious aggravation*.

This procedural defect may make the *egregious aggravation* provisions difficult to implement without further legislative action. One problem is that the new statutes do not contain a procedure for submitting the question of *egregious aggravation* to the jury, although this problem may be within the trial courts' authority to remedy. North Carolina faced a similar issue when the U.S. Supreme Court decided *Blakely* and effectively invalidated the portion of North Carolina's sentencing statutes directing the sentencing judge to decide aggravating factors. The General Assembly revised the sentencing statutes to address this defect, but for cases not covered by the revised statutes the North Carolina appellate courts held that trial judges could fashion a procedure for submitting aggravating factors to the jury. *See State v. Blackwell,* 361 N.C. 41 (2006). Trial judges may have comparable authority to remedy the constitutional defect in the new rape and sex offense statutes by fashioning a procedure for submitting the issue of *egregious aggravation* to the jury. A second and perhaps bigger problem, however, lies in the imprecise definitions of *egregious aggravation* in the new statutes, which were designed for application by

judges accustomed to exercising discretion, not for juries normally charged with finding concrete facts. The new statutes state that *egregious aggravation* may be found if “the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17 [structured sentencing].” The term also can include “further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover.” It also may be considered “based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.” In light of these definitions, it may be difficult without legislative clarification for a jury to follow a judge’s instructions and determine whether an offense involves *egregious aggravation.*

Last, a person convicted of rape under new G.S. 14-27.2A “has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape” and has no rights “related to the child under Chapter 48 [adoptions] or Subchapter 1 of Chapter 7B [abuse, neglect and dependency] of the General Statutes.” The same disqualifications apply to first- and second-degree rape under G.S. 14-27.2 and 14-27.3.

Thirty-year registration for offenses not subject to lifetime registration. Before 2006, a person subject to registration in North Carolina had to register for ten years unless he or she was subject to lifetime registration. In 2006, the General Assembly amended the ten-year requirement to provide that registration does not terminate automatically after ten years; rather, the person must petition the superior court to terminate the requirement after ten years. Until terminated, the registration period continues indefinitely. S.L. 2008-117 amends G.S. 14-208.6A and 14-208.7 to impose a thirty-year registration requirement. The change appears to impose a maximum period of registration, after which registration automatically terminates.[2] A person still may petition the court to terminate registration after ten years (pursuant to the procedure in G.S. 14-208.12A). The new thirty-year requirement exceeds the federal standards, still to be considered by North Carolina, for two of three categories of sex offenders (discussed below under Federal Guidelines on Sex Offender Registration). The effective-date clause states that the change applies to registrations made on or after December 1, 2008. By using the general term “made”, the General Assembly appears to have intended for the change to apply to individuals who begin registration *or* are still required to register on or after December 1, 2008.[3]

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2. The new statutory wording is not entirely clear, but the interpretation in the text has the most statutory support. Revised G.S. 14-208.6A states that the General Assembly’s objective is to establish a thirty-year registration requirement, with the right to petition to shorten the registration period after ten years. This language indicates that the thirty-year requirement is intended as a maximum, with the possibility of earlier termination. Revised G.S. 14-208.7 states that a person must maintain registration for at least thirty years unless the person petitions after ten years to terminate registration. The use of the term “at least” suggests that the thirty-year requirement does not terminate automatically; rather, the registrant still must petition to terminate after thirty years. Such an interpretation, however, is difficult to square with the ten-year termination provision. Because the statute already affords a person the right to petition to terminate after ten years, there would seem to be no need for the General Assembly to provide separately that a person may petition to terminate after thirty years. In addition, the registration statutes contain a procedure for petitioning to terminate after ten years, including specific criteria that a registrant must meet. There is no procedure specified for termination after thirty years and no indication that the General Assembly intended to impose the criteria applicable to termination after ten years to termination after thirty years.

3. The effective date clause could be interpreted as applying only to registrations initiated on or after December 1, 2008, because generally speaking a person registers initially and verifies his or her information thereafter. Such an

Three-day time limit on changes in status. Several of North Carolina's statutes impose a ten-day time limit for sex offenders to register or give notice of certain changes in their status. G.S. 14-208.7 has required residents who are released from a penal institution, as well as nonresidents who move to North Carolina, to register within ten days of their release or arrival. G.S. 14-208.9 has imposed a ten-day time limit on giving notice of a change of address, intent to move to another state (or to remain in North Carolina after giving notice of an intent to leave), enrollment or termination of enrollment at an institution of higher education, and employment or termination of employment at an institution of higher education. And, G.S. 14-208.9A has required return of a semi-annual verification of address form within ten days. S.L. 2008-117 reduces all of the time limits in these statutes from ten days to three business days. These changes anticipate the federal standards to be considered by the General Assembly in 2009. The act is effective for offenses committed on or after December 1, 2008, which in this context means that a violation of the new time limits on or after that date is punishable as a failure to register under G.S. 14-208.11, a Class F felony.

The act also amends G.S. 14-208.9A(c), which requires a person to appear at the local sheriff's office for the taking of a photograph on the sheriff's request, by changing the time limit from 72 hours to three business days. A violation of this provision remains a Class 1 misdemeanor, punishable under that subsection rather than under G.S. 14-208.11. The General Assembly apparently overlooked G.S. 14-208.8A, which sets a 72-hour time limit on the giving of notice of out-of-county residence for purposes of temporary employment; that provision was not changed. The General Assembly also enacted new provisions, discussed further below, requiring registrants to provide the sheriff's office with online identifiers when they register and re-verify information. If they obtain a new or modified online identifier, they have ten days to notify the sheriff of the change.

Last, the act amends G.S. 14-208.27 and 14-208.28, which have directed the juvenile court counselor responsible for a juvenile who is required to register to advise the sheriff of a change of address of the juvenile and to return the semi-annual verification form to the sheriff. The act reduces the time limit for these actions from ten days to three business days. No penalties are provided for a violation.

Ban on sex offenders in locations used primarily by minors. Over the last several years the General Assembly has made it a crime for those required to register as sex offenders to reside within 1,000 feet of a child care center or elementary or secondary school (*see* G.S. 14-208.16), work at places where a minor is present if their responsibilities would include instruction, supervision, or care of a minor (*see* G.S. 14-208.17(a)), accept minors into their care or custody (*see* G.S. 14-208.17(b)), or provide babysitting services (*see* G.S. 14-321.1). Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 enacts a considerably broader ban on where sex offenders may be present. Under new G.S. 14-208.18, it is a Class H felony for a person

1. who is required to register as a sex offender based on

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interpretation, however, would create two subcategories of offenders within the category of offenders who may petition to terminate registration after ten years, a curious distinction. Those people who began registering before December 1, 2008, would have to register indefinitely if unable to terminate registration, and those people who began registering on or after December 1, 2008, would have to register for thirty years if unable to terminate registration.

    a. any offense in G.S. Chapter 14, Article 7A (including any degree of rape or sexual offense and misdemeanor sexual battery), or
    b. any offense where the victim was under the age of 16 (including indecent liberties under G.S. 14-202.1)
2. knowingly
3. to be
    a. on the premises of any place intended primarily for the use, care, or supervision of minors, including schools, child care centers, playgrounds, and children's museums,
    b. 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, including malls, shopping centers, or other property open to the general public, or
    c. at any place where minors gather for regularly scheduled educational, recreational, or social programs.

The statute contains a technical flaw with respect to the first element of the offense, stating that a person is subject to the ban "if the offense requiring registration is described in subsection (b) of this section." Subsection (c) actually describes the covered offenses. Despite the incorrect reference, the courts may find that the statute adequately identifies the prior offenses covered by the ban. Greater difficulty may lie in consistently applying other elements of the offense. Several of the terms used are general in nature and are not defined in the statute—for example, *schools, child care centers,* and *playgrounds* (in what is designated as element 3a, above), locations *intended primarily for the use, care, or supervision of minors,* which an offender may not *be* within 300 feet of (in element 3b), or *regularly scheduled programs* (in element 3c).

The statute includes a limited number of exceptions. Notwithstanding the ban, a parent or guardian of a minor may take the minor to a location that provides emergency medical care if the minor is in need of such care. A parent or guardian who is otherwise subject to the ban also may be present on school property if he or she (a) has a student enrolled in the school, (b) is there solely to attend a conference to discuss the student or in response to a request by the principal or designee for reasons relating to the welfare or transportation of the student, *and* (c) complies with the notice and supervision requirements in the statute. The statute also exempts voting, attendance at public school if permitted by the local school board pursuant to new G.S. 115C-391(d)(2), discussed next, and receipt of medical treatment or mental health services by a juvenile. The statute contains no other exceptions.

New G.S. 14-208.18 applies to juveniles who have been required to register pursuant to the sex offender registration statutes, banning them from the areas described above unless one of the exceptions applies. Any juvenile required to register is covered by the ban (unless an exception applies) because the only offenses for which a juvenile can be required to register are rape and sex offense, both of which are subject to the new ban. The act also adds new G.S. 115C-391(d)(2) to give local school boards the authority to expel any student who is covered by the ban, including juveniles who have been adjudicated delinquent and have been required to register and juveniles who have been tried and convicted as adults of an offense covered by the ban (listed in G.S. 14-208.18). The new statute states that a local school board's decision to expel a student must be based on "clear and convincing evidence" but does not specify to what the clear and convincing evidence standard should be applied. The new provision does not contain an age minimum, but it could apply to a juvenile 11 years of age or older because, under the sex

offender registration statutes, a juvenile may be required to register for an offense committed when he or she was 11 years of age or older. *Compare* G.S. 115C-391(d)(1) (this statute allows a local school board to expel a student 14 years of age or older for certain reasons). Before ordering expulsion, the board must consider whether there is an alternative program that may be offered by the local school unit to provide educational services. If the board decides to provide services to a student on school property, school personnel must supervise the student at all times.

Notice to schools. G.S. 14-208.29 has allowed registration information of juveniles who have been required to register to be released to law enforcement agencies only. Effective December 1, 2008, S.L. 2008-117 revises that statute to require registry information for any juvenile enrolled in a local school to be forwarded to the local school board. The statute does not specify who is responsible for forwarding this information, but presumably the responsibility falls to the local sheriff's office that maintains the information.

The act also adds G.S. 14-208.25A [recodified as 14-208.19] to require all licensed day care centers and the principals of all elementary, middle, and high schools to register with the North Carolina Sex Offender and Public Protection Registry to receive e-mail notification when a registered sex offender moves within a one-mile radius of the day care center or school.

Restrictions on release for probation violations or violations of post-release supervision. G.S. 15A-1345(b) requires a probationer arrested for a violation of probation conditions to be taken before a judicial official to have conditions of release set pending a probation revocation hearing. If the probationer meets those conditions, he or she is entitled to release pending the revocation hearing. Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 revises G.S. 15A-1345(b) to impose a form of preventive detention on certain probationers. *See generally United States v. Salerno,* 481 U.S. 739 (1987) (discussing constitutional limits on denial of pretrial release to criminal defendants). The revised statute requires the court, prior to allowing release, to find that the probationer is not a danger to the public if he or she "has been convicted of an offense at any time that requires registration under Article 27A of Chapter 14 [the article containing the sex offender registration statutes] or an offense that would have required registration but for the effective date of the law establishing the Sex Offender and Public Protection Registration Program [the title of the article containing the sex offender registration statutes]." This language appears to require that courts deny release to such a probationer, regardless of the offense for which the person is currently on probation and regardless of the date of conviction of the sexually-related offense, unless the court finds that the probationer is not a danger.

The act also modifies G.S. 15A-1368.6(b), which affords a preliminary hearing to a person who is released on post-release supervision and who is arrested for an alleged violation of post-release conditions. The statute provides that if the hearing is not held within seven working days after arrest, the person is entitled to release pending the hearing. The act adds G.S. 15A-1368.6(b1) to prohibit release prior to a preliminary hearing, regardless of when it is held, if the person was released on post-release supervision for an offense subject to registration. Although new 15A-1368.6(b1) appears to do away with the requirement for release of a supervisee if a preliminary hearing is not held within seven days, supervisees are still entitled as a matter of constitutional due process to a preliminary hearing "as promptly as convenient after arrest while information is fresh and sources are available." *See Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

Sex offender registry checks. G.S. 115C-332 requires local school boards to conduct criminal history checks of school personnel and of contractors and their employees who perform

duties customarily performed by school personnel. Effective December 1, 2008, S.L. 2008-117 adds G.S. 115C-332.1 to require local boards of education to include the following terms in any contract with *contractual personnel,* defined as individuals whose job involves direct interaction with students and who are not covered by G.S. 115C-332. The contract must require the employer of any *contractual personnel* to conduct an annual check of such personnel on the state and national sex offender registries and must prohibit any contractual personnel who are listed on those registries from having direct interaction with students.

Study of federal guidelines. S.L. 2008-117 directs the North Carolina Attorney General to study the federal sex offender guidelines, finalized in 2008, to the federal Sex Offender Registration and Notification Act (SORNA). The Attorney General must report any recommended actions to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by December 1, 2008. The federal guidelines are discussed below, after the discussion of the other sex offender acts enacted in 2008 by the North Carolina General Assembly.

Other Sex Offender Changes

Changes in definitions for child pornography offenses and increase in punishment. G.S. 14-190.14 through 14-190.19 contain several offenses related to child pornography. Those offenses are keyed to the definitions in G.S. 14-190.13. Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 (S 132) amends G.S. 14-190.13 to expand the definition of *sexual activity,* an element of many of the child pornography offenses, to include the "lascivious exhibition of the genitals or pubic area of any person." *Compare* 18 U.S.C. 2256 (using same terminology as part of definition of federal child pornography offenses).

Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 also increases the punishment for various offenses involving children. Most of the changes are identical to the increases in punishment enacted by S.L. 2008-117 (S 933) (see discussion of Jessica's Law, above), except that S.L. 2008-218 also increases the punishment for a violation of G.S. 14-202.3 (solicitation of a child by computer to commit unlawful sex act) from a Class H to a Class G felony, if either the defendant or the person for whom the defendant was arranging the meeting actually appears at the meeting location. A violation of the statute that does not involve this additional element remains a Class H felony.

Expansion of registration to include felony child abuse involving prostitution and sexual acts. G.S. 14-208.6 lists the offenses that subject a person to sex offender registration requirements and related consequences. The principal category is *sexually violent offense* as defined in G.S. 14-208.6(5). S.L. 2008-220 (S 1736) expands that category by including a violation of G.S. 14-318.4(a1) (committing or permitting act of prostitution on child under age 16 by his or her parent or caretaker) and a violation of G.S. 14-318.4(a2) (committing or allowing sexual act on child under age 16 by his or her parent or legal guardian). The act states that the change applies to persons convicted or released from a penal institution on or after December 1, 2008, not just to offenses committed on or after that date.[4]

4. Also added to the definition of *sexually violent offense,* effective for offenses committed on or after December 1, 2008, are the new offenses of rape and sexual offense against a child under age 13 (see discussion of Jessica's Law, above).

The act does not specifically describe the impact of the addition of these offenses, which are both Class E felonies, on post-release supervision (PRS). Under G.S. 15A-1368.2(c), a person convicted of a Class B1 through E felony who is subject to sex offender registration and who is sentenced to active imprisonment must serve five years of PRS after release from prison instead of the usual nine months. By making the above offenses subject to sex offender registration, the General Assembly automatically made the offenses subject to this five-year requirement. The question is whether the General Assembly intended to make the five-year requirement retroactive—that is, whether a person who commits an offense before December 1, 2008, is subject to it. The effective-date clause does not provide a clear answer because the changes made by the act do not specifically address PRS. If courts construe the act as applying retroactively with respect to PRS, the requirement may be subject to constitutional challenge. *See, e.g., Purvis v. Commonwealth,* 14 S.W.3d 21 (Ky. 2000) (post-release supervision is a form a punishment, barring retroactive application).

Inclusion of online identifier in required registration information. The sex offender registration provisions require covered offenders to provide specified information to the local sheriff's office, such as the person's photograph and address. S.L. 2008-220 amends several registration statutes to require that an offender provide to the sheriff any *online identifier* (defined in new G.S. 14-208.6(1n)) that the offender uses or intends to use. The offender must do so when he or she initially registers (*see* G.S. 14-208.7(b)), periodically re-verifies information (*see* G.S. 14-208.9A(a)(3)), and changes an online identifier or obtains a new one (*see* G.S. 14-208.9(e)). All of these provisions require the offender to appear before the sheriff in person to provide the information. A failure to inform the sheriff of any new online identifiers or changes to online identifiers within ten days is, like most other failures to comply with registration obligations, a Class F felony under G.S. 14-208.11(a). These changes apply to any person who initially registers or who must maintain registration on or after May 1, 2009. The act also states that a person registered prior to May 1, 2009, is not in violation of the online identifier requirements if he or she provides the information at the first required deadline for the person to verify his or her registry information on or after May 1, 2009.

Also effective May 1, 2009, new G.S. 14-208.14 directs the North Carolina Division of Criminal Statistics to maintain in the central sex offender registry the online identifier information of registrants. New G.S. 14-208.15A authorizes the Division to release online identifiers to entities that provide Internet and other electronic communications services (as defined in new G.S. 14-208.6(1d), (1f), (1g), and (1i)) for the purpose of screening users and comparing the information held by an entity with the information in the central registry. The new statute also provides that when an electronic service entity receives a complaint or report of certain criminal violations, such as soliciting a minor by computer to commit an unlawful sex act, the entity must report the information and the online identifier of the person who allegedly committed the offense to the Cyber Tip Line at the National Center for Missing and Exploited Children.

Online identifier information in the central registry, as well as in the local sheriff's office, is *not* available for public inspection. G.S. 14-208.10 and 14-208.15 identify the information open to the public, and those statutes were not amended to include online identifiers. New G.S. 14-208.15A(d) also directs the Division to adopt rules regarding the release and use of online identifier information, including a requirement that the information not be disclosed for any purpose other than for screening users and comparing information as provided in the new statute.

An entity that complies in good faith with new G.S. 14-208.15A is immune from civil and criminal liability for (a) refusing to provide service to a person on the basis that the entity reasonably believed that the person was subject to sex offender registration requirements, and (b) a person's criminal or tortious acts against a minor with whom the person had communicated on the entity's system. This provision does not require that entities deny all services to a person subject to sex offender requirements. Under new 14-202.5, discussed next, a registered sex offender may not access certain social networking websites but is not barred from using discrete electronic services, such as email or instant messaging services.

Ban on use of certain websites. Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 adds new G.S. 14-202.5 to make it a Class I felony for a person

- who is registered as a sex offender
- to access a *commercial social networking Web site*
- where the person knows that the site permits minor children to become members or to create or maintain personal web pages on the site.

A *commercial social networking Web site* is defined in G.S. 14-202.5(b) as an Internet website that meets the criteria listed in that subsection, including that it allows users to create web pages or personal profiles that contain information such as a nickname of the user, photographs, and links to other personal web pages of friends or associates. The definition excludes an Internet website that provides only one discrete service (photo sharing, e-mail, instant messaging, or chat room or message boards) or has as its primary purpose commercial transactions. G.S. 14-202.5(d) states that North Carolina has jurisdiction if the transmission that constitutes the offense either originates or is received in North Carolina.

The statute does not specifically define what it means for a person *to access* a commercial social networking website, but new G.S. 14-202.5A may provide some guidance. That statute provides (effective for acts occurring on or after May 1, 2009) that a commercial social networking website may be held civilly liable for damages for failing to make reasonable efforts to prevent a registered sex offender from accessing its website. It states that *access* means allowing the sex offender to utilize the website to do any of the activities described in G.S. 14-202.5(b)(2) through 14-202.5(b)(4)—that is, facilitating social introductions, creating web pages or personal profiles, and providing mechanisms to communicate with other users. Thus, using a commercial social networking website in these respects is prohibited; merely viewing such a website may not be.

Ban on name changes by sex offenders. Effective December 1, 2008, S.L. 2008-218 adds G.S. 14-202.6 and G.S. 101-6(c) to prohibit a registered sex offender from obtaining a name change. Name changes are handled by the clerk of superior court pursuant to the procedures in G.S. Chapter 101. The statutes do not appear to make a violation a crime, as they do not designate a violation as a criminal offense or provide for any criminal penalties.

Reporting of convictions not resulting in active time. S.L. 2008-220 requires the North Carolina Administrative Office of the Courts, in consultation with the North Carolina Department of Justice, Department of Correction, and Sheriffs' Association, to develop by December 1, 2008, a procedure to ensure timely notification to the Division of Criminal Information and to sheriffs of any person who is subject to sex offender registration and does not receive an active term of imprisonment.

Grants to sheriffs' offices. Effective July 1, 2008, S.L. 2008-220 authorizes the Governor's Crime Commission to award grants to sheriffs' offices to assist with enforcement of sex offender laws. Participating sheriffs' offices must provide non-state matching funds equal to 50% of the grant amount, one-half of which may be in the form of in-kind contributions. The act appropriates $250,000 from the General Fund for such grants, up to $25,000 of which may be awarded to each eligible sheriff's office.

Federal Guidelines on Sex Offender Registration

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act. Title I of the Adam Walsh Act is the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), which contains a new set of standards for sex offender registration. The U.S. Department of Justice (US DOJ) has issued guidelines ("Guidelines") interpreting and elaborating on the provisions of SORNA. States must substantially implement the new standards by July 27, 2009, with up to two one-year extensions, or lose 10% of their Byrne Justice Assistance Grant funds. (North Carolina has requested a one-year extension.) Many of the registration requirements adopted by North Carolina in the past have been in response to this type of federal directive. States may adopt more stringent requirements than required by federal law.

The summary below highlights some of the significant changes required by SORNA and the Guidelines, which may be found on the website of US DOJ's Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) office: www.ojp.usdoj.gov/smart/. It is by no means a comprehensive summary of the numerous requirements in SORNA and the Guidelines. S.L. 2008-117, discussed above, requires the North Carolina Attorney General to review the requirements and report to the General Assembly with recommended actions by December 1, 2008.

Retroactivity. One of the biggest changes required by the Guidelines is that states would have to make their registration requirements retroactive for covered offenses. Thus, subject to narrow exceptions, a person would have to register for those offenses regardless of the date of offense, conviction, or completion of his or her sentence. For example, if a person is convicted of sexual battery for an offense committed before December 1, 2005, the person does not currently have to register under North Carolina law. *See* S.L. 2005-130 (adding sexual battery to the offenses subject to registration, effective for offenses committed on or after December 1, 2005). Under the Guidelines, however, the person may be subject to registration for that offense. *See* II.C, IX of Guidelines (describing retroactivity requirement); *see also* IV.C of Guidelines (describing offenses subject to registration). Similarly, under the Guidelines, if a person were convicted of indecent liberties in 1980 and completed all of the incidents of his or her sentence by 1985, before any of the sex offender registration requirements took effect, the person still may be subject to registration. (If the person has been in the community longer than the registration period required by SORNA, a state may give the person credit for that time and not require registration.) Under the Guidelines, states need not seek out individuals who are subject to retroactive application of the registration requirements if they are no longer subject to oversight by the criminal justice system; however, if those individuals remain in or reenter the criminal justice system under the conditions described in the Guidelines, states would have to require that they register.

Offenses covered. The Guidelines would likely broaden the offenses that are subject to registration in North Carolina, although it is not yet certain what offenses North Carolina would have to add to the list of registration offenses to comply with the Guidelines. For example, the Guidelines require registration for any sexual offense whose elements involve "(i) any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person's body, either directly or through the clothing." *See* IV.C of Guidelines. This definition might require registration for a violation of G.S. 14-27.7A(b) (statutory rape or sexual offense against a person who is 13, 14, or 15 years old when the defendant is more than four but less than six years older than the person), which is currently not subject to registration under North Carolina law. Under the retroactivity provision discussed above, a person could be required to register for this and other offenses that are currently not subject to registration under any circumstance in North Carolina.

Juvenile registration. North Carolina currently has a limited sex offender registration program for juveniles who commit certain offenses. The information in the registry is not public for juveniles required to register; registration expires when the juvenile turns 18 or juvenile court jurisdiction ends; and the juvenile judge has discretion not to require registration for covered offenses. Under the Guidelines, certain juveniles would be subject to full registration requirements, including the longer registration periods required for adults (discussed below). As with offenses by adults, the new juvenile registration requirements may be retroactive for delinquency adjudications that predate implementation of the SORNA requirements.

The Guidelines (in IV.A) provide that the following convictions and delinquency adjudications of juveniles are subject to registration:

> "Convictions" for SORNA purposes include convictions of juveniles who are prosecuted as adults. It does not include juvenile delinquency adjudications, except under the circumstances specified in SORNA § 111(8). Section 111(8) provides that delinquency adjudications count as convictions "only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such an offense."
>
> Hence, SORNA does not require registration for juveniles adjudicated delinquent for all sex offenses for which an adult sex offender would be required to register, but rather requires registration only for a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes (or attempts or conspiracies to commit such crimes). Considering the relevant aspects of the federal "aggravated sexual abuse" offense referenced in section 111(8), it suffices for substantial implementation if a jurisdiction applies SORNA's requirements to juveniles at least 14 years old at the time of the offense who are adjudicated delinquent for committing (or attempting or conspiring to commit) offenses under laws that cover:
>
> - engaging in a sexual act with another by force or the threat of serious violence; or
> - engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim.
>
> "Sexual act" for this purpose should be understood to include any degree of genital or anal penetration, and any oral-genital or oral-anal contact. This follows from the relevant portions of the definition of sexual act in 18 U.S.C. 2246(2), which applies to the 8 U.S.C. 2241 "aggravated sexual abuse" offense.

Length of registration. The federal standards create three tiers of sex offenders, with varying registration periods and obligations. For a tier one offense, the required registration

period is 15 years; for a tier 2 offense, the period is 25 years; for a tier 3 offense, the period is life. The tiers determine other registration obligations, such as the frequency with which the person must verify his or her information with the sheriff or other registering entity. *See* V and XII of Guidelines for the offenses in each tier and the duration of registration. The fifteen-year registration requirement for tier 1 offenders can be reduced to ten years if the person meets certain conditions—namely, having a clean record as defined by the Guidelines. Also, a person classified as a tier 3 offender based on a juvenile delinquency adjudication can have the lifetime registration requirement reduced to 25 years in specified circumstances. The other required periods of registration are not subject to reduction.

A state is not required to establish the specific tiers described in the Guidelines as long as the minimum registration period for each category of offenders is satisfied. A state may require longer periods of registration.

POST-CONVICTION PROCEEDINGS RELATED TO SEX OFFENDER REGISTRATION & MONITORING

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I. Requests to Terminate Sex Offender Registration under G.S. 14-208.12A

Registered sex offenders not subject to the lifetime registration requirement of G.S. 14-208.23—that is, those who are not recidivists, aggravated offenders, or sexually violent predators[1]—may petition the superior court to terminate their registration if they meet certain criteria. The requirement to petition to terminate registration is a relatively new feature of North Carolina's sex offender registration regime; prior to 2006, the registration requirement for non-lifetime registrants terminated automatically after ten years. Today, how long an offender will be required to register if he or she does not petition for termination depends on when the offender initially registered. According to the North Carolina Attorney General's interpretation of legislation enacted in 2008, those who initially registered before December 1, 2008 must register for life unless they successfully petition the superior court to terminate registration. Those who initially registered on or after December, 1, 2008 must register for 30 years following the date of initial county registration unless they successfully petition the court.[2]

Hearing Procedure and Frequently Asked Questions

Use form AOC-CR-262, *Petition and Order for Termination of Sex Offender Registration*. Note: The finding of fact regarding 10 years of "compliance" with registration requirements (check-box #2 on Side 2) is not grounded in G.S. 14-208.12A or any other law. According to AOC legal staff, that check-box was meant to be a finding that the offender had been *subject to* registration for the requisite period before petitioning for termination. In other words, an offender who has had some transgression related to his registration (e.g., a late semiannual update to the sheriff) is not *per se* barred from a successful petition to terminate. Information about such transgressions may, of course, be considered by the judge in evaluating the registrant's threat to public safety.

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).

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[1] Lifetime registration will only be terminated if the registrant's conviction is reversed, vacated, or set aside, or if the registrant is granted an unconditional pardon of innocence. G.S. 14-208.6C.

[2] The effective-date clause in the statute that created the 30-year registration requirement states that the changes in the law apply to "registrations made on or after December 1, 2008." S.L. 2008-118, sec. 22. This language arguably applies to individuals who begin registration *or* are still required to register on or after December 1, 2008, though the Attorney General has not interpreted it that way. N.C. Dep't of Justice, *The North Carolina Sex Offender and Public Protection Registration Programs* (March 2009), available at http://www.jus.state.nc.us/NCJA/SEXOFFEN.pdf.

Does an offender who moves to North Carolina after registering for several years in another state get credit for the time spent registered there? Apparently not. G.S. 14-208.12A(a) refers only to the date of "initial county registration," which appears to refer to registrations in this State in the "county where the person resides." G.S. 14-208.7.

Whom does the registrant petition? The superior court in the district where he or she *resides*. G.S. 14-208.12A(a).

Notice to the District Attorney. The DA in the district in which the petition is filed must be given at least 3 weeks' notice of the petition before the hearing is held. The DA may, at the hearing, present evidence in opposition to the requested relief.

What type of proceeding is the termination hearing? AOC has advised clerks to treat termination hearings as a part of the criminal action; the hearings probably are not special proceedings under G.S. 1-3. As such, additional court costs should not be assessed on petitioners. The statute does not provide for any such fee, unlike, for instance, the statutes governing petitions for certain expunctions. *See, e.g.*, G.S. 15A-145(e) (assessing a $125 fee).

Is the registrant entitled to appointed counsel at the termination hearing? No, not as a statutory matter under Chapter 14 or Chapter 7A. There is an argument that, in light of the complicated nature of the hearing, a registrant has a right to appointed counsel as a matter of constitutional due process, though there are no cases finding such a right. Some states provide for appointed counsel at hearings to review sex offender classification. *Loe v. Sex Offender Registry Board*, 901 N.E.2d 140 (Mass. Ct. App. 2009) (discussing the statutory right to counsel in Massachusetts).

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.

Note that the decision to terminate is always in the court's discretion; even if the petitioner satisfies the requirements of G.S. 14-208.12A(a1), the statute says the court "may"—not shall—grant relief.

Can a registrant's petition be granted if he or she has ever been arrested for failure to register? Technically, yes. Failure to register is not itself a reportable conviction, and thus does not require registration under Article 27A. Of course, any offender who has been arrested for failing to register may fail the third prong of the test if the judge is concerned about a potential threat to public safety.

What is the Jacob Wetterling Act, and how am I supposed to know if the requested relief complies with federal law? This second prong of the test raises a number of issues. There is an argument that this sort of blanket adoption by a state statute of prospective federal legislation, or of federal administrative rules yet to be adopted, is an unconstitutional delegation of state legislative power. *See, e.g.*, *Hutchins v. Mayo*, 197 So. 495 (Fla. 1940) (holding that a state statute providing that fruit should be graded according to standards "as now fixed by the [USDA], or as standards may hereinafter be modified or changed," unlawfully delegated state legislative power to a federal agency); *Plastic Pipe & Fittings Ass'n v. Cal. Bldg. Comm'n*, 22 Cal. Rptr. 3d 393 (Cal. App. 2004) ("An unconstitutional delegation of legislative authority occurs if a statute authorizes another person or group to make a fundamental policy decision.").

Assuming the second prong is valid, what does it mean? 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. The act required states to substantially implement these new standards by July 27, 2009, with up to two one-year extensions, or lose 10% of Byrne Justice Assistance Grant funds.

Among other requirements, SORNA:

- Broadens the offenses for which a state must require registration;
- Requires states to make registration requirements fully retroactive for all covered offenses;
- Imposes regular adult registration requirements on certain juveniles; and
- Establishes a three-tier schedule of offense classification, with new minimum registration periods for each tier.

Legislation proposed this session (H 1317) would bring North Carolina closer to SORNA compliance, but not all the way—the bill does not address retroactivity or juveniles. On April 10, 2009, North Carolina applied to the U.S. Department of Justice for a one-year extension to comply with SORNA. 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 2010.

Assuming they apply now, how do these federal mandates affect petitions to terminate registration? The most germane change is the establishment of new minimum registration periods. For tier 1 offenses, the required registration period is 15 years (reducible to 10 years in some cases, described below); 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. Thus, an offender registered for what would be a tier II under SORNA would not be eligible to petition for termination until he or she had been registered for 25 years.

The registration period for tier I offenses can be reduced from 15 to 10 years if the offender has a "clean record" during his or her period of registration, as that term is defined by federal law and U.S. Department of Justice regulations. To have a clean record, the offender must meet the following requirements during the first 10 years of his or her registration:

- The offender must not be convicted of any offense punishable by more than 1 year in prison;
- The offender must not be convicted of any new sex crime;
- The offender must successfully complete any period of supervised release without revocation; and
- The offender must complete a certified sex offender treatment program.

U.S. Dep't of Justice, *National Guidelines for Sex Offender Registration and Notification*, p. 57–58, available at www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

Under this interpretation of the law, **only tier I offenses committed by offenders who satisfy the clean record rules are eligible to petition after 10 years as envisioned by G.S. 14-208.12A**.

Which offenses would be tier I offenses? I can't say for sure, as there is not a perfect overlap between our laws and the language and definitions used in federal law. My best guess is as follows:

- Sexual Battery (14-27.5A)
- Subjecting a Person to Sexual Servitude (14-43.13)
- Incest between Near Relatives (14-178) (if the victim was not a minor)
- Felony Indecent Exposure (14-190.9(a1)
- Third Degree Sexual Exploitation of Minor (14-190.17A)
- Peeping offenses (14-202)
- Indecent Liberties with Children (14-202.1) (unless the crime involved "sexual contact," defined as any sexual touching of or contact with the intimate parts of the body, either directly or through the clothing)

A person registering based on **any other crime** would have to register for ***at least*** **15 years** before being eligible to petition for termination under this interpretation of the law.

Finally, what happens if the petition is denied? If the court denies the petition to terminate registration, the registrant may petition the court again one year from the date of the denial. G.S. 14-208.12A(a3).

II. Satellite-Based Monitoring Determination Hearings under G.S. 14-208.40B ("Bring-Back Hearings")

North Carolina first enacted satellite-based monitoring (SBM) of sex offenders in 2006. S.L. 2006-247. For offenders sentenced after the law was passed, SBM determinations are made at sentencing. However, because the law was written to apply also to offenders who were convicted and sentenced *before* the law was passed, the General Assembly had to create a post-conviction procedure for enrolling covered offenders. It did so in 2007. S.L. 2007-213. That procedure, codified in G.S. 14-208.40B, has come to be known colloquially as a "bring-back hearing." This outline provides an update on some of the issues raised by the law. Note: Bring-back hearings are the only post-conviction SBM hearings that should come before a judge. Requests to terminate SBM should be filed with the Post-Release Supervision and Parole Commission under G.S. 14-208.43.

Use form AOC-CR-616. That form guides the judge through the required findings.

Effective Dates. For SBM to apply at all, the offender must have been convicted of a reportable offense. The effective dates vary by crime, depending on the enacting language used by the General Assembly when it made the offense reportable. Effective dates are keyed on the attached flow chart.

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; and
- 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. S.L. 2006-247.

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 **State v. Wooten, __ N.C. App. __, 669 S.E.2d 749 (2008)**, 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.

Right to Appointed Counsel. The bring-back hearing statute does not establish a right to counsel at the hearing. Nevertheless, because defendants whose SBM obligation is determined at sentencing under G.S. 14-208.40A will have access to appointed counsel, there is an argument that counsel ought also to be available for determinations made under G.S. 14-208.40B.

Aggravated Offenses: Elements vs. Facts. Aggravated offenders are one of the categories of offenders subject to lifetime satellite-based monitoring. An aggravated offense is defined as an offense that includes either (i) a sexual act involving vaginal, anal, or oral penetration with a victim of any age by force; or (ii) a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old. G.S. 14-108.6. 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."). Regardless of what evidence you consider, remember that only offenses committed on or after October 1, 2001 can be aggravated offenses. S.L. 2001-373.

Department of Correction Risk Assessment: the Static-99. If an offender is not a recidivist, aggravated offender, or sexually violent predator, but the court finds that he or she 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 (unless one has been done within six months of the date of the hearing). The assessment 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. That question is pending before the Court of Appeals in *State v. Kilby*.

Ex Post Facto. As discussed above, SBM applies retroactively to some offenders whose crimes took place before the monitoring regime was enacted. There are numerous cases pending before the Court of Appeals in which the defendant argues that SBM is a form of punishment, and that retroactive application therefore violates the Ex Post Facto Clause. Thus far, the leading case on the issue is *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), *petition for rehearing en banc denied*, 521 F.3d 680 (6th Cir. 2008), in which the Sixth Circuit upheld Tennessee's SBM regime against an ex post facto challenge, determining that the regime was not punishment. The test courts generally apply to determine whether a sanction is punitive stems from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). In the absence of clear legislative intent as to the penal nature of a statute, the *Mendoza-Martinez* Court set out seven factors a court should consider in making the determination:

- Whether the sanction involves an affirmative disability or restraint;
- Whether it has historically been regarded as a punishment;
- Whether it comes into play only on a finding of scienter;
- Whether its operation will promote the traditional aims of punishment: retribution and deterrence;
- Whether the behavior to which is applies is already a crime;

- Whether an alternative purpose to which it may rationally be connected is assignable for it; and
- Whether it appears excessive in relation to the alternative purpose assigned.

Our Court of Appeals applied these factors in determining that North Carolina's sex offender registry was a "civil regulatory scheme to protect the public," and not criminal punishment implicating the Ex Post Facto Clause. *State v. White*, 162 N.C. App. 183 (2004). The ex post facto argument as applied to SBM was raised but not reached by our Court of Appeals in *State v. Wooten*. I expect the court to address it in one or more of the following cases: *State v. Chandler* (COA08-885), *State v. Morrow* (COA08-867), *State v. Kilby* (COA08-655), *State v. Wagoner* (COA08-982), *State v. Long* (COA08-846), *State v. Brewington* (COA08-980), or *State v. Bare* (COA08-818).

State v. Wooten
N.C. Court of Appeals
December 16, 2008

The North Carolina Court of Appeals recently issued its decision in State v. Wooten, answering a few of the many lingering questions about satellite-based monitoring (SBM) of certain sex offenders in North Carolina.

Defendant Robert Lee Wooten was ordered to enroll in SBM for life under G.S. 14-208.40B, at what is commonly referred to as his "bring-back hearing" (that is, he was not ordered to SBM at his original sentencing hearing because SBM didn't exist at that time, but was rather *brought back* before the court later for a judicial determination). He was deemed a recidivist, based on his two convictions for indecent liberties with a minor, one in 1989 and one in 2006. The defendant's bring-back hearing was held on January 24, 2008, four days prior to the his expected release from prison.

Wooten first argued that the court lacked jurisdiction to hold the bring-back hearing because he did not receive notice of the hearing in the manner set out in 14-208.40B(b), that is, via certified mail "sent to the address provided by the offender pursuant to G.S. 14-208.7 [the sex offender registration statute]." Such notice would have been impossible, as the defendant had not yet been released from prison and therefore had yet to establish a registration address. **The court held that the failure to follow the statute's notice provisions—which were intended merely "to protect the due process rights of offenders who are not currently incarcerated"— did not amount to a jurisdictional flaw.**

The defendant next argued that his 1989 conviction for indecent liberties should not qualify him as a recidivist because that conviction was not itself reportable as that term is defined in 14-208.6(4). Generally, under the enacting language that added indecent liberties to the list of offenses requiring sex offender registration (S.L. 1995-545), convictions for indecent liberties are reportable when the offender was *convicted or released from a penal institution on or after January 1, 1996*. Though the defendant's 1989 conviction did not fall within this definition, **the court held that a prior conviction need not itself be reportable to be considered by a trial court making a recidivism determination.** Rather, the offense need only be "described" in the statute defining reportable offenses. Thus, under the court's reasoning in *Wooten*, **a prior conviction can qualify a person as a recidivist no matter how far back in time it occurred**.

In resolving *Wooten* the court discussed only the relevant date of a person's prior convictions; it did not need to reach the issue of the relevant effective date of second or subsequent convictions. The enacting language in S.L. 2001-373 made the definition of recidivist applicable to offenses *committed on or after October 1, 2001*. Thus, the offense date of the second or subsequent conviction must be on or after October 1, 2001. In Mr. Wooten's case, his second conviction was

based on an incident that occurred on October 31, 2001, making him subject to the recidivist provisions—if only by a few weeks.

In addition to clarifying the definition of recidivist and related effective dates, the court also answered a broader question about the effective date of the bring-back hearing statute and SBM more generally. North Carolina's SBM regime was initially enacted in 2006 (S.L. 2006-247) and made applicable to "any person sentenced to intermediate punishment on or after [August 16, 2006] and to any person released from prison by parole or post-release supervision on or after that date." SBM "also applies to 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." As originally enacted, the regime did not explicitly require a judicial determination of SBM eligibility. Legislation enacted in 2007 fixed that omission by adding the hearing requirements set out in G.S. 14-208.40A & B, but those statutes were merely made "effective" December 1, 2007 (S.L. 2007-484, §15(*l*))—leaving it unclear whether they applied to offenses committed on or after that date, or whether they simply applied a new procedural requirement for the same set of offenses covered by the 2006 legislation. **The court's opinion in *Wooten* suggests the latter, referring only to the 2006 enacting legislation and the August 16, 2006 effective date**. Some interpretive questions remain about the 2006 enacting language itself (for example, what does the session law mean by "any person who completes his or her sentence on or after [August 16, 2006]? Does that include offenders who complete a probationary sentence after that date, or just those released from prison?), but the court did not have to reach them in *Wooten*.

Finally, the court determined that the defendant's third argument, that he received ineffective assistance of counsel when trial counsel failed to present a legally sound argument that the SBM regime violates the Ex Post Facto clauses of the United States and North Carolina constitutions, was not properly preserved for appellate review. The ex post facto issue was therefore not resolved in *Wooten*, but the same issue will be before the Court of Appeals in numerous other cases in the coming months.