Sex Offender Registration and Related Issues: Beating Back Banishment and Big Brother

Who must register?

- State resident
- Non-state resident student or worker
- Who has a “reportable conviction”
  - an “offense against a minor”
    - Kidnapping, abduction, felonious restraint
  - a “sexually violent offense”
    - felony sexual offenses and misdemeanor sexual battery
  - similar out of state offenses or federal offenses
  - some peeping offenses

What does “registration” mean?

- Go to Sheriff’s Office in person and fill out forms
  - name, address, height, weight, etc.
  - picture and fingerprints
  - school
  - employment
  - online identifiers (email, instant message screen name, user ID, chat or other Internet communication name)
- Within 3 business days after moving to state, release from prison, or immediately upon conviction
- For 30 years but can petition after 10 (yeah, right)
- Or for life (sexually violent predator, recidivist, or aggravated offense [penetration and force/threat])
What does “registration” mean?

- Every six months State sends verification letter
  - Must be returned in-person at Sheriff’s Office w/in 3 business days of receipt
  - Verifies address
  - Verifies online identifiers (Still in use? New ones?)
- New photo if you look different
- Random checks to see if you still live at your registered address

Residential Restrictions

- 14-208.16. Residential restrictions.
  (a) A registrant under this Article shall not knowingly reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located.
  (b) As used in this section, "school" does not include home schools as defined in G.S. 115C-563 or institutions of higher education, and the term "child care center" is defined by G.S. 110-86(3). The term "registrant" means a person who is registered, or is required to register, under this Article.
  (c) This section does not apply to child care centers that are located on or within 1,000 feet of the property of an institution of higher education where the registrant is a student or is employed.

Other Restrictions

- 14-208.17. Sexual predator prohibited from working or volunteering for child-involved activities; limitation on residential use.
  (a) It shall be unlawful for any person required to register under this Article to work for any person or as a sole proprietor, with or without compensation, at any place where a minor is present and the person’s responsibilities or activities would include instruction, supervision, or care of a minor or minors.
  (b) It shall be unlawful for any person to conduct any activity at his or her residence where the person:
    (1) Accepts a minor or minors into his or her care or custody from another, and
    (2) Knows that a person who resides at that same location is required to register under this Article.
Consequences for Violations

- Failure to Register/Verify/Change Address – Class F
- Residential Restrictions – Class G
- Work and Volunteer Restrictions – Class F
- Premises Restrictions – Class H
- Internet Restrictions – Class I

Premises Restrictions - 14-208.18

- 14-208.18. Sex offender unlawfully on premises.
  - (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
  - (c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:
    - (1) Any offense in Article 7A of this Chapter. [serious sex offenses]
    - (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

Premises Restrictions - 14-208.18(a)(1)

- (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.
### Premises Restrictions - 14-208.18(a)(2)

- Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

### Premises Restrictions - 14-208.18(a)(3)

- At any place where minors gather for regularly scheduled educational, recreational, or social programs.

### Practical Problems

- What is “knowingly” “be at?”
- Are the terms “premises” and “place” different?
- What is “primarily intended” and whose intent controls?
- How to measure 300 feet?
- What is “other property open to the general public?”
- What is “at any place?”
- What is “gather?”
- What are “regularly scheduled educational, recreational, and social programs?”
- Whose “schedule” controls?
Constitutional Problems

- 1st Amendment - Overbreadth
  - Expressive activity in public
  - Simply being in public
  - Going to church – Free Exercise but also Establishment Clause issue?
  - Assembly
  - Association

- 5th Amendment
  - Vague – arbitrary enforcement by LEOs, DAs, juries
  - Notice
  - Intrastate right to travel
  - Right to work, liberty interest in employment
  - Banishment – illegal in North Carolina
  - Compelling State Interest? (or just rational basis test?)
  - Narrowly Tailored?
  - Least Restrictive Means?
"Ban use of commercial social networking Web sites by sex offenders."

(a) Offense. – It is unlawful for a sex offender who is registered [] to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
Internet Restrictions - 14-202.5(b)

- (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

- (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

Web Restrictions: Practical Problems

- What constitutes “access?”
- What is “facilitates the social introduction?”
- Is a website entirely off-limits if there are sub-pages which are off-limits?
  - Amazon? (Does the commercial website exemption apply?)
  - Yahoo?
- Does the statute apply to devices other than desktop and laptop computers?

Web Restrictions: Constitutional Problems

- Overbreadth – No requirement to prove criminal intent
- 1st Amendment – Overbreadth
  - Expressive activity online
  - Simply [virtually] being in a public place
  - Online worship – Free Exercise but also Establishment Clause issue?
  - Assembly
  - Association
  - Press
- 5th Amendment – Vagueness
  - Vague – arbitrary enforcement by LEOs, DAs, juries
  - Notice
  - Right to work, liberty interest in employment
- Standing problems
  - Facial v. As-Applied challenges
Web Restrictions: Constitutional Problems

- Compelling State Interest? Narrowly Tailored? Least Restrictive Means?
  - Applies to all offenses
  - Applies to all offenders
- Miscellaneous challenges:
  - Ex Post Facto
  - Bill of Attainder
  - Substantive and Procedural Due Process
  - Right to Privacy
  - Arrest without Probable Cause

- State v. Packingham

What to Do?

- File a motion to challenge the constitutionality of the statute
  - MAKE THE RECORD!!
  - Argue as-applied and facial
  - Assert all possible arguments (ex post facto, privacy, right to work)
  - Put on evidence
    - Witnesses for your side
    - Tell the arresting and investigating officer
    - Maps
    - Web pages
  - Challenge the State’s “compelling interest” with an expert and articles
- Request instructions that include intent element
  - Must be in writing
- Argue the facts of your case to the jury (nullification?)

Indictment and Proof Issues

- Premises restrictions indictment must allege:
  - It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section
  - (1) Any offense in Article 7A of this Chapter.
  - (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

- Internet restrictions indictment should allege:
  - It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site....
Satellite-Based Monitoring (SBM)

- 14-208.40 – establishes SBM and who is subject to it
  - Aggravated offense, recidivist, sexually violent predator – or
  - Required to register for reportable offense and offense involved physical, mental, or sexual abuse of minor AND based on DAC assessment requires “highest level of supervision and monitoring” – or
  - Convicted of 14-27.2A or 14-27.4A

SBM

- 14-208.40A – procedure after plea or trial
  - If aggravated offense, recidivist, or SVP or 14-27.2A or 14-27.4A
    - lifetime, can request termination per 14-208.43
  - If offense against a minor, court must order DAC to prepare risk assessment and DAC has 30 to 60 days to prepare
    - Imposition of SBM and term of years are discretionary
    - No procedure exists to terminate early
  - 14-208.40B – “bring back” hearing
    - Same procedure, but DAC assessment is already done
      - Per statute, supposed to be held in county of defendant’s “residence.” Court of Appeals has held this is venue, not jurisdiction
      - Query – should you object on venue if your client is in prison in another county? Why not?

SBM issues to litigate in lifetime cases

- What is an aggravated offense? 14-208.6(a1)
  - Review SOG publications and annotations to statute
- Who is a recidivist? 14-208.6(2b)
  - Same victim but different jurisdictions?
  - Successive trials after mistrial?
  - Different victims but same timeframe with convictions in different jurisdictions?
  - Statutory construction, Rule of Lenity, Avoid absurd results, Intent of GA, Due Process?
- Who is a sexually violent predator? 14-208.6(6) and 14-208.20 – notice, presentence report, & a hearing
SBM issues to litigate in discretionary cases: is SBM necessary?

- Does the person require the highest level of supervision and monitoring?
  - Object to the factual basis during plea or at least don’t concede facts that are not necessary for the offense
  - STATIC-99R (Challenge STATIC-99R altogether?)
    - Read the manual
    - Challenge the points
    - Know the law
  - Object to incompetent evidence (statements of DA)
  - Did State present any evidence showing SBM is required?
  - Present your own evidence
    - Witnesses
    - Letters
    - Sex offender evaluations
    - STATIC-99R Manual
    - Studies

Common problems with STATIC-99R

- Age doesn’t account for release date
- Age doesn’t account for aging
- Is a prior indecent exposure conviction a prior sex offense? Old indecent exposure was not predicated on sexual intent. Exposure alone was enough.
- Is an offense of prior conviction “bad” enough to count?
- Is the victim really a “stranger?”
- Judge cannot use facts already considered by STATIC-99 as additional findings of fact
**SBM issues to litigate in discretionary cases:**

**how long should he be on SBM?**

- **Period for SBM**
  - Must be a term of years (can’t be lifetime)
  - Cannot be a range (i.e., can’t be 8 to 10 years)

- **Object to any term of years where the State has presented no evidence to support a rational decision by the judge**

- **Suggest your own term of years (if your client agrees)**
  - Use STATIC-99R to justify your suggestion
  - Have a CYA letter

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**Other SBM issues to explore**

- **4th Amendment issues – Grady**
  - Watch for developments in this area and challenge SBM in all cases as an unreasonable search of your client in violation of federal and state constitutions. Require State to demonstrate reasonableness.

- **Agree to SBM, but a limited term as part of plea agreement? I have no idea if this is OK**

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**Appeal of SBM**

- **Must give written notice of appeal – oral notice of appeal in court is not enough**
  - Designate the judgment and order appealed from
  - File NOA at Clerk’s Office – Get file stamped
  - Hand deliver to DA’s Office (per Rules of Civil Procedure)
    - **DO NOT JUST PUT IN DA’s BOX IN CLERK’S OFFICE!**
    - *State v. Gordon*

- **Make sure your exhibits are admitted and are in the court file.**
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PUBLIC DEFENDER CONFERENCE 2015

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