Sex Offender Registration for Out-of-State Offenses

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There are about 25,000 people on North Carolina's sex offender registry. Over 8,000 of them are registered for crimes committed in other states or in federal court. There are issues.

There are two pathways to registration in North Carolina for an out-of-state crime: **substantial similarity** and **registration required in another state**.

Substantial similarity. An out-of-state conviction is a reportable conviction in North Carolina if it is "substantially similar to an offense against a minor or a sexually violent offense." G.S. 14-208.6(4)b. A version of the same rule applies for federal convictions, including convictions by court martial. G.S. 14-208.6(4)c.

What is the process for evaluating substantial similarity? No statute or appellate case gives a comprehensive answer. Is in an element-to-element comparison, like what we use when we score out-of-state convictions for prior record level points? Probably, *see* State v. Springle, 244 N.C. App. 760 (2016), but we don't know for sure. At a minimum we know the inquiry must go beyond the name of the offense alone. Sexual battery in North Carolina is a misdemeanor; sexual battery in Florida (Fla. Stat. 794.011) is basically rape. Whatever approach we use should take into consideration not only the substantive elements of the crime, but also the effective date language that made North Carolina's version of the offense reportable. For instance, crimes similar to our sexual battery should only be reportable if they were committed on or after December 1, 2005, when that crime was made reportable here.

Even if you settled on an approach for evaluating substantial similarity, there are still some wrinkles worth noting. For example, "offense against a minor" (G.S. 14-208(1m), covering kidnapping and related crimes) and "sexually violent offense" (G.S. 14-208.6(5), covering what we generally think of as sex crimes) are defined terms that spell out *most* of North Carolina's reportable crimes—but not all of them. Peeping crimes (G.S. 14-202) and sale of a minor (G.S. 14-43.14(e)) are neither offenses against a minor nor sexually violent offenses. Similar out-of-state crimes therefore cannot be reportable based on substantial similarity (although they might nonetheless be reportable here based on the *registration required in another state* pathway that I'll discuss in a moment). Same goes for *attempts* to commit sexually violent offenses and offenses against a minor, which (oddly, and unlike conspiracies and solicitations) are not actually included within the definitions of those offense categories themselves. I'm doubtful that out-of-state convictions based on an aiding and abetting theory should be reportable here based on substantial similarity when our law says that aiding and abetting is reportable only when the sentencing court finds that registration would further the purposes of the registry. G.S. 14-208.6(4)a.

Registration required in another state. The other pathway to reportability for an out-of-state offense is when the conviction "requires registration under the sex offender registration statutes" of the crime of conviction. G.S. 14-208.6(4)b. That category was added to our law in 2006 to address the possibility that a person could evade registration by moving to North Carolina if the underlying crime was not substantially similar to any crime requiring registration here. Initially applicable only to those who moved to North Carolina on or after December 1, 2006, it was broadened in 2010 to cover those who moved here before 2006 if they were convicted of a felony; served an active sentence; or were placed on probation, parole, or post-release supervision on or after October 1, 2010. G.S. 2010-174.

This pathway is probably simpler than substantial similarity, but it's by no means easy. It's unclear, for example, whether it covers a crime that once required registration in another state, but for which the person would no longer have to register there today—an issue I discussed here.

Who figures it out? When a defendant is convicted of a reportable crime in North Carolina, the sentencing court typically makes some determination as to whether the crime requires registration as a sex offender—perhaps as part of the mandatory satellite-based monitoring hearing required by G.S. 14-208.40A, or to give the defendant notice of the requirement to register as required by G.S. 14-208.8(b).

It's a different story, though, when a person moves here from another state. Under our current practice, it is typically an employee of the local sheriff's office who makes the call as to whether a conviction from elsewhere triggers registration here. And some registrants have argued that that violates their constitutional rights to due process and equal protection.

In Bunch v. Britton, __ N.C. App. __, 802 S.E.2d 462 (2017), the plaintiff, a former registrant, sued the administrator of the county sheriff's sex offender registration program and the head of the statewide sex offender registry for requiring him to register in North Carolina for a conviction from Michigan. He argued (among other things) that the administrators' actions violated his liberty interests under the state constitution's law of the land clause, N.C. Const. art. 1, § 19, to the extent that he was required to register without a prior opportunity to be heard. The court of appeals disagreed, characterizing the administrators' obligation to place the plaintiff on the registry as a mandatory, nondiscretionary act for an offender like the plaintiff, whose crime at one time required registration in Michigan. The process due, the court said, was in Michigan, where the plaintiff could have sought removal from the registry before moving to North Carolina. 802 S.E.2d at 476.

Other courts, including a federal judge in the Eastern District of North Carolina, have reached a different result. In Meredith v. Stein, 355 F. Supp. 3d 355 (E.D.N.C. 2018), a plaintiff-registrant sued the state attorney general and others in federal court, arguing that "the mechanism through which North Carolina places those convicted of out-of-state sex offenses on the sex offender registry violates his procedural due process rights under the Fourteenth Amendment . . . ." The judge agreed, finding that North Carolina's approach deprives a plaintiff of a cognizable liberty interest through constitutionally inadequate procedures.

> North Carolina provides nothing at all. Rather, each county sheriff's office can decide unilaterally whether any out-of-state offense is "substantially similar" to any reportable North Carolina conviction. The sheriff's deputies responsible for making the determinations do not need to consult with legal counsel, even though substantial similarity has been described as a "question of law." *Id. at 365.*

Because "the substantial similarity determination is a complicated one," *id.*, the judge granted the plaintiff's request for declaratory judgment, concluding that North Carolina's process violates the plaintiff's procedural and due process rights "until and unless North Carolina modifies its process to afford plaintiff notice and the opportunity to be heard," *id.* at 366. The court also permanently enjoined the defendants from placing the plaintiff on the registry or prosecuting him for failing to register without giving prior notice and an opportunity to be heard. *Id.* at 366–67. The judge's order is limited to this particular plaintiff, but other sheriffs may wish to consult with legal counsel to determine whether their local approach is susceptible to a similar litigation.

Sometimes registration in North Carolina for an out-of-state offense will be straightforward, but sometimes it won't. Even in relatively clear-cut cases, sheriffs must determine not only whether a person will have to register in North Carolina, but also for how long. And that requires a determination of whether the person falls within one of the categories of offenders that require lifetime registration, like recidivists and those convicted of an aggravated offense. It's complicated.

To illustrate, I did some random sampling of the registry. I looked at 50 registrants who are registered for life as "aggravated" offenders—those who were purportedly convicted of an aggravated offense, which is defined in G.S. 14-208.6(1a) as one that includes a sexual act involving vaginal, anal, or oral penetration by force or the threat of serious violence, or with a victim who is less than 12 years old. Of those 50 registrants, 13 were registered for life for out-of-state crimes that were too old (committed before October 1, 2001—the effective date for the definition of an aggravated offense, S.L. 2001-373) to ever meet the definition of an aggravated offense. Several others were categorized as aggravated for out-of-state crimes that looked more like indecent liberties than rape.

For what it's worth, those registered for in-state crimes didn't fare much better in my sample. An additional 15 of them were designated as aggravated offenders for crimes that, under our statutes and case law, are not aggravated. And I'm only counting the ones that were *clearly* not aggravated, either because of their offense date or due to the bright-line rules that have emerged from over a decade of case law. For example, the person's registration offense was indecent liberties or sexual offense—crimes we know are *never* aggravated under the elements-based approach our appellate courts have mandated for these determinations. *See* State v. Green, 229 N.C. App. 121 (2013) (forcible sexual offense is not aggravated); State v. Singleton, 201 N.C. App. 620 (2010) (indecent liberties with a child). In total, over half of the 50 records I reviewed appeared to be miscategorized as aggravated offenders—subject to lifetime registration and the more frequent verification required of "Part 3" registrants. G.S. 14-208.24 (verification every 90 days).