

Sex Offender Pamphlet



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DISCLAIMER

All information in this handbook is subject to change, and should only be used as a starting point for further investigation and study of current law and practice.



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SEX OFFENDER PAMPHLET

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SEX OFFENDER PAMPHLET

I. IS THE OFFENDER REQUIRED TO REGISTER?

A. BRIEF HISTORICAL BACKGROUND

During the 1990s, increased media coverage of sex crimes led to the passage of state and federal laws aimed at tracking people convicted of sex offenses. As a result, all fifty states and the District of Columbia have some form of sex offender registry. Indiana created its sex offender registry effective July 1, 1994. The registry has been significantly expanded over the years with major revisions in 2001, 2003, 2006, and 2007. It has also been expanded to include offenders who have committed certain violent offenses, even if the offenses had no sexual component.

B. WHO IS LIKELY NOT REQUIRED TO REGISTER AT ALL

1. *Ex Post Facto* Concerns

Since the passage of the Indiana Sex Offender Registration Act (“INSORA”), the legislature has amended the act several times to add offenses that trigger the requirement to register. Not every offender convicted of an offense that *today* would trigger the requirement to register is in fact required to register. If the offense was committed before July 1, 1994 (the date INSORA became effective), the offender should not be required to register. If the offense was committed before INSORA was amended to include that offense as one that triggers the requirement to register, the offender should *not* be required to register.

Wallace v. State, 905 N.E.2d 371 (Ind. 2009) (requiring offender, who had committed his offense prior to effective date of INSORA, to register constituted retroactive punishment in violation of the *Ex Post Facto* Clause of the Indiana Constitution).

Hevner v. State, 919 N.E.2d 109 (Ind. 2010) (requiring offender, who had committed his offense before INSORA was amended to include the offense as one that triggered the requirement, to register amounted to retroactive punishment).

Where the commission date range includes dates both before and after the effective date of INSORA, an offender may be required to register.

Harlan v. State, 971 N.E.2d 163 (Ind. Ct. App. 2012) (requiring offender, who admitted during his guilty plea that he committed his crime between January 1, 1992 “through and including” December 31, 1994, to register did not constitute retroactive punishment).

D.O.C. notification policy for offenders nearing release: Near an offender's release date, a D.O.C. staff member notifies the offender of his registration obligations. The D.O.C.'s policy, however, is to notify any offender who has committed a triggering offense (as defined by the current version of the statute) that he must register, regardless of the commission date of the offense. Thus, offenders who should not be required to register, pursuant to Wallace, have been notified by the D.O.C. that they were required to register. Thus, the D.O.C.'s notice cannot be relied upon in determining whether an offender is required by law to register.

The following chart illustrates who should *not* be required to register. To use the chart, find the offense (listed in alphabetical order) in the left column. If an offender committed the offense before the corresponding date in the right column, he should not be required to register.

INDIANA OFFENDERS NOT REQUIRED TO REGISTER
DUE TO EX POST FACTO CONCERNS

<u>OFFENSE</u>	<u>COMMITTED BEFORE</u>
Attempt to commit any of the following offenses: <ul style="list-style-type: none"> • child exploitation, child molesting, child seduction, child solicitation • criminal confinement (if victim was under 18) • criminal deviate conduct • incest • kidnapping (if victim was under 18) • rape • sexual battery • sexual misconduct with a minor as a Class A or B felony • vicarious sexual gratification 	July 1, 2001
Child exploitation	July 1, 1994
Child molesting	July 1, 1994
Child seduction	July 1, 1994
Child sexual trafficking (IC 35-42-3.5-1.3)	July 1, 2018
Child solicitation	July 1, 1994
Conspiracy to commit any of the following offenses: <ul style="list-style-type: none"> • child exploitation, child molesting, child seduction, child solicitation • criminal confinement (if victim was under 18) • criminal deviate conduct • incest • kidnapping (if victim was under 18) • rape • sexual battery • sexual misconduct with a minor as a Class A or B felony • vicarious sexual gratification 	July 1, 2001
Criminal confinement (if victim was under 18) **see NOTE below	July 1, 1998

<u>OFFENSE</u>	<u>COMMITTED BEFORE</u>
Criminal deviate conduct – (if victim was under 18) – (if victim was 18 or older)	July 1, 1994 July 1, 1997
Human trafficking (IC 35-42-3.5-1(c), -(d) before amended; now IC 35-42-3.5-1.4) -- (if victim was under 18)	July 1, 2007
Incest – (if victim was under 18) – (if victim was 18 or older)	July 1, 1994 July 1, 1997
Kidnapping (if victim was under 18) **see NOTE below	July 1, 1998
Murder	July 1, 2007
Possession of child pornography – (if defendant had prior unrelated conviction for same offense) – (if defendant's first conviction for this offense)	July 1, 2005 July 1, 2007
Promoting prostitution as a Class B felony	July 1, 2007
Promotion of child sexual trafficking (IC 35-42-3.5-1.2(a)) Promotion of human sexual trafficking (IC 35-42-3.5-1.1) Promotion of human trafficking (IC 35-42-3.5-(a) before amended) – (if victim was under 18) – (if victim was 18 or older) Promotion of human trafficking of a minor (IC 35-42-3.5-1(b) before amended) Promotion of sexual trafficking of a younger child (IC 35-42-3.5-1.2(c))	July 1, 2018 July 1, 2018 July 1, 2007 July 1, 2016 July 1, 2016 July 1, 2018
Rape – (if victim was under 18) – (if victim was 18 or older)	July 1, 1994 July 1, 1997
Sexual battery – (if victim was under 18) – (if victim was 18 or older)	July 1, 1996 July 1, 1997
Sexual misconduct by a service provider with a detained/supervised child	July 1, 2012
Sexual misconduct with a minor – (as a Class A or B felony) – (as a Class C felony)	July 1, 1995 July 1, 2001
Sexual trafficking of a minor (IC 35-42-3.5-1(b), -(c) before amended)	July 1, 2007

<u>OFFENSE</u>	<u>COMMITTED BEFORE</u>
Vicarious sexual gratification	July 1, 1994
Voluntary manslaughter	July 1, 2007

NOTE: Effective July 1, 2007, Indiana law no longer required all offenders convicted of criminal confinement or kidnapping, where the victim was a minor, to register. Those offenders who were the parent or guardian of the minor victim were no longer required to register. Thus, if an offender is registering as a result of a criminal confinement or kidnapping conviction that involved a minor for whom the offender was a parent or guardian, s/he may be eligible for relief from the registration obligation under Indiana Code section 11-8-8-22. However, the factual determination regarding the age of the victim and the relationship between the victim and the offender, for purposes of determining whether one must register after a criminal confinement conviction, is made by the D.O.C. Healey v. Carter, 109 N.E.3d 1043 (Ind.Ct.App. 2018).

2. Out-of-State Triggering Convictions

The plain language of INSORA requires offenders to register who have committed “a crime under the laws of another jurisdiction, including a military court, that is substantially equivalent” to any triggering offense in Indiana.

But if the commission date of the out-of-state offense occurred before Indiana’s registry was created, must the offender register in Indiana? Yes, if the offender was required to register in any other jurisdiction before his relocation to Indiana.

In Tyson v. State, 51 N.E.3d 88 (Ind. 2016), an offender committed an offense in Texas that, had it been committed in Indiana, would not have triggered his requirement to register. However, because the offense did trigger a requirement for him to register in Texas at that time, and that occurred years before Indiana added out-of-state offenders to the registry, the Indiana Supreme Court held there was no *ex post facto* violation when the State required the offender, now residing in Indiana, to register.

In State v. Zerbe, 50 N.E.3d 368 (Ind. 2016), an offender committed an offense in Michigan that did not trigger a requirement to register in Michigan (or in Indiana, had it been committed here). However, upon the offender’s release from prison, Michigan required him to register. This was before 2006, when Indiana added a requirement that offenders with qualifying out-of-state convictions must also register. The Indiana Supreme Court held that because Indiana’s 2006 amendment added no new obligation for the offender, there was no *ex post facto* violation in requiring the offender, now residing in Indiana, to register. Zerbe expressly *overruled* Burton v. State, 977 N.E.2d 1004 (Ind. Ct. App. 2012), trans. denied.

Finally, in Ammons v. State, 50 N.E.3d 143 (Ind. 2016), an offender committed an offense in Indiana before the creation of Indiana's registry. When he was released to parole, the law at the time in Indiana required him to register. The offender moved to Iowa, where he was also required to register. In 2013, when the offender moved back to Indiana, the law at the time required offenders to register if they had a duty to register in any other jurisdiction. The Indiana Supreme Court held there was no *ex post facto* violation. Citing its decision in Zerbe, the Court stated that the change in law imposed no new obligation on the offender, since he was already required to register in another jurisdiction.

Lovett v. State, 47 N.E.3d 657 (Ind. Ct. App. 2015), trans. denied (holding Indiana's requirement to register did not constitute *ex post facto* violation where offender, who moved to Indiana in 2003, was required to register in Washington prior to his move for a 1991 offense in that state).

Andrews v. State, 978 N.E.2d 494 (Ind. Ct. App. 2012), trans. denied (holding Indiana's requirement to register constituted *ex post facto* violation where offender, who moved to Indiana in 1997, was not required to register in Massachusetts prior to his move for a 1984 Massachusetts offense).

State v. Hough, 978 N.E.2d 505 (Ind. Ct. App. 2012), trans. denied (holding Indiana's requirement to register constituted *ex post facto* violation where offender, prior to moving to Indiana in 1998, was not required to register in Pennsylvania for 1993 offense committed there).

3. Effect of Probation or Parole

Even if an offender is not required to register under Wallace, standard conditions of probation and parole stipulations for sex offenders usually require an offender to register during his term of probation/parole. See, e.g., Ind. Code § 11-13-3-4(g) ("As a condition of parole, the parole board . . . shall . . . require a parolee who is a sex or violent offender (as defined in IC 11-8-8-5) to register with a local law enforcement authority under IC 11-8-8").

It does not appear that a challenge has been made by an offender exempted from registration requirements under Wallace who has encountered such a parole stipulation/condition of probation. But at least two arguments can be made on behalf of the offender:

- Indiana Code section 11-13-3-4(g) authorizes the parole board to require registration during parole for "a parolee is who a sex offender (as defined in IC 11-8-8-4.5)." An offender could argue that since he is not required to register, pursuant to Wallace, he is not a "sex offender" as defined by Indiana

Code section 11-8-8-4.5. But cf. Whitener v. State, 982 N.E.2d 439 (Ind.Ct.App. 2013) (although Defendant was not required to register as a sex offender because he did not fall under the statutory definition of a sex offender, the trial court properly required him to register as a condition of probation); see also Weiss v. Indiana Parole Board, 838 N.E.2d 1048 (Ind. Ct. App. 2005) (upholding registration as a condition of parole).

- An offender could also raise a separation-of-powers argument. If a trial court has ordered that an offender be removed from the registry (or not required to register upon release) under Wallace, the Indiana Parole Board (an agency of the executive branch of government) cannot reopen a final judgment and thereby exercise a function reserved to the judiciary.

Lemmon v. Harris, 949 N.E.2d 803 (Ind. 2011) (implying that if there was a judicial determination made that an offender was not an SVP, requiring him to register as one could violate the separation of powers provision in the Indiana Constitution).

IMPORTANT NOTE: Even if an offender is not required to register in Indiana under Wallace/Hevner, he may still be required to register in other jurisdictions. Under the federal Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection Act), an offender is required to register in each jurisdiction where the offender lives, works, or attends school. An offender can be criminally prosecuted by the federal government if he fails to do so. However, federal jurisdiction is triggered only when the offender engages in interstate or international travel (i.e., if he moves to another state, if he takes a vacation lasting more than 7 days, etc.) after the enactment of SORNA (July 1, 2006). See Carr v. United States, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010). See also Andrews v. State, 978 N.E.2d 494 (Ind. Ct. App. 2012), trans. denied (rejecting State's argument that offender who cannot be required to register under Wallace may still be required to register in Indiana under federal SORNA).

C. WHO IS REQUIRED TO REGISTER

1. If the triggering offense was committed in Indiana

Offenders who have committed one or more of the following offenses, after the offense was added to INSORA as a triggering offense, are required to register under Indiana Code section 11-8-8-5:

Child exploitation (IC 35-42-4-4).

Child molesting (IC 35-42-4-3).

Child seduction (IC 35-42-4-7).

Child sexual trafficking (IC 35-42-3.5-1.3).

Child solicitation (IC 35-42-4-6).

Criminal confinement (IC 35-42-3-3), if victim was under 18 and offender was not victim's parent/guardian.

Criminal deviate conduct (IC 35-42-4-2) (before its repeal on July 1, 2014).

Human trafficking (IC 35-42-3.5-1(c), -(d) (before amended); now IC 35-42-3.5-1.4), if victim was under 18.

Incest (IC 35-46-1-3).

Kidnapping (IC 35-42-3-2), if victim was under 18 and offender was not victim's parent/guardian.

Murder (IC 35-42-1-1).

Possession of child pornography (IC 35-42-4-4).

Promoting prostitution as a Class B or Level 4 felony (IC 35-45-4-4).

Promotion of child sexual trafficking (IC 35-42-3.5-1.2(a))

Promotion of human trafficking (IC 35-42-3.5-1(a) (before amended), if victim

Promotion of human sexual trafficking (IC 35-42-3.5-1.1).

Promotion of human trafficking of a minor (IC 35-42-3.5-1(b) (before amended)).

Promotion of sexual trafficking of a younger child (IC 35-42-3.5-1.2(c)).

Rape (IC 35-42-4-1).

Sexual battery (IC 35-42-4-8).

Sexual misconduct by a service provider with a detained or supervised child (IC 35-44.1-3-10(c)).

Sexual misconduct with a minor as a Class A or Class B, or Level 1, 2, or 4 felony (IC 35-42-4-9).

Sexual misconduct with a minor as a Class C or Level 5 felony (IC 35-42-4-9) (unless the following:

- if offense was committed after June 30, 2007, offender is not more than 4 years older than victim; or if offense was committed before July 1, 2007, offender is not more than 5 years older than victim; and
- sentencing court found that offender should not be required to register as a sex offender)

Sexual trafficking of a minor (IC 35-42-3.5-1(b), -(c)).

Vicarious sexual gratification (IC 35-42-4-5) (including performing sexual conduct in presence of minor)

Voluntary manslaughter (IC 35-42-1-3).

Attempt to commit any of the offenses listed above (see Ind. Code § 1-1-2-4).

Conspiracy to commit any of the offenses listed above (see Ind. Code § 1-1-2-4).

Also, certain juvenile offenders are required to register as a sex or violent offender. *See* Section III.

2. If the triggering offense was committed in another jurisdiction but the offender “resides” in Indiana

An offender who committed a crime in another jurisdiction, including a military court, must register as a sex or violent offender in Indiana, pursuant to Indiana Code section 11-8-8-7, if:

- (1) the offense was substantially equivalent to any of the offenses previously listed, or the offender was required to register as a sex or violent offender in another jurisdiction; and
- (2) the offender:
 - (a) spends or intends to spend at least 7 days in Indiana during a 180-day period;
 - (b) owns real property in Indiana and returns to Indiana at any time;
 - (c) works or carries on a vocation, or intends to work or carry on a vocation, for a period exceeding 7 consecutive days or 14 total days during any calendar year in Indiana, regardless of whether the offender is financially compensated, volunteers, or acts for governmental or educational benefit; or
 - (d) enrolls or intends to enroll in any educational institution (including any secondary school, trade, or professional institution) or postsecondary educational institution.

Herron v. State, 918 N.E.2d 682 (Ind. Ct. App. 2009) (holding defendant, who was required by Arizona to register as a sex offender for life when he committed his offense in 1983, is a “sex offender” required to register for life under INSORA).

But see preceding section I.B.2. for a discussion on whether offenders who were not required to register in original state when offense was committed are required to register in Indiana.

II. WHAT ARE REGISTRANTS REQUIRED TO DO?

The category into which a registrant falls determines the requirements imposed upon him. There are two main categories of registrants: general offenders and sexually violent predators (“SVP”). All sexual violent predators and some general offenders also fall into a third category: offenders against children (“OAC”).

The specific registration requirements for each category are discussed in detail later in this section. Below is a chart identifying the categories for each triggering offense and showing where in this pamphlet to find the specific registration requirements for an offender who is convicted of that offense.

**OFFENDER CATEGORIES AND SECTION REFERENCES FOR
EACH TRIGGERING OFFENSE**

OFFENSE (including attempt or conspiracy to commit)	CATEGORIES	REFER TO SECTION(S)
Child exploitation	General & OAC & SSO	A, C, D
Child molesting – as a Class C felony – as a Class A or Class B, or Level 1, 2, 3, or 4 felony	General & OAC & SSO SVP & OAC & SSO	A, C, D A, B, C, D
Child seduction	General & OAC & SSO	A, C, D
Child sexual trafficking (IC 35-42-3.5-1.3)	General	A
Child solicitation	General & OAC & SSO	A, C, D
Criminal confinement (if victim was under 18 and offender was not victim's parent/guardian)	General	A
Criminal deviate conduct (before its repeal on July 1, 2014)	SVP & OAC	A, B, C
Human trafficking (IC 35-42-3.5-1(c), -(d), before amended, now 35-42-3.5-1.4, if victim was under 18)	General	A
Incest	General	A
Kidnapping (if victim was under 18 and offender was not victim's parent/guardian)	General & OAC	A & C
Murder	General	A
Possession of child pornography	General & SSO	A, D
Promoting prostitution (as a Class B felony)	General	A
Promotion of child sexual trafficking (IC 35-42-3.5-1.2(a)) Promotion of human sexual trafficking (IC 35-42-3.5-1.1) Promotion of human trafficking (IC 35-42-3.5-1(a), before amended, if victim was under 18) Promotion of human trafficking of a minor (IC 35-42-3.5-1(b), before amended) Promotion of sexual trafficking of a younger child (IC 35-42-3.5-1.2(c))	General	A
Rape	SVP & OAC	A, B, C

OFFENSE (including attempt or conspiracy to commit)	CATEGORIES	REFER TO SECTION(S)
Sexual battery	General	A
Sexual misconduct by a service provider with a detained child	General	A
Sexual misconduct with a minor	General & SSO	A, D
Sexual trafficking of a minor (IC 35-42-3.5-1(b), -(c), before amended)	General	A
Vicarious sexual gratification <ul style="list-style-type: none"> – under IC 35-42-4-5 (a)(1) or (a)(2) – under IC 35-42-4-5 (b)(1) as a Class A or B, or Level 2, 3, or 4 felony – under IC 35-42-4-5 (b)(2) – under IC 35-42-4-5 (b)(3) as a Class A or B, or Level 2, 3, or 4 felony – before July 1, 2014, as a Class C felony if the victim was under 16 and was directed, aided, induced, or caused to engage in sexual conduct with an animal other than a human being – all other 	SVP & OAC & SSO SVP & OAC & SSO SVP & OAC & SSO SVP & OAC & SSO SVP & OAC & SSO General & SSO	A, B, C, D A, B, C, D A, B, C, D A, B, C, D A, B, C, D A, D
Voluntary manslaughter	General	A

A. GENERAL OFFENDERS

1. Length of registration period

This category of offenders is generally required to register annually for a period of 10 years after release from prison or a juvenile detention facility, or after placement on parole or probation, whichever occurred last. Ind. Code § 11-8-8-19.

However, if the offender committed his offense between July 1, 1994 and June 30, 1995, he may only be required to register during his period of probation/parole. During that time period, Indiana law required offenders to register only while they were on probation/parole. See Ind. Code § 5-2-12-13 (1994). The law changed effective July 1, 1995 to increase the registration period to 10 years. In Healey v. State, 986 N.E.2d 825 (Ind. Ct. App. 2013), an offender who committed his offense in September 1994 successfully argued that under the Indiana Constitution's *Ex Post Facto* Clause, the 1995 change in law did not apply to him. The Court of Appeals

held that the extension of the offender's registration period amounted to retroactive punishment.

However, the registration period is for life for general offenders if one of the following applies:

- the triggering offense was committed against a victim under the age of 12 by an offender at least 18 years of age;
- the offender proximately caused serious bodily injury or death to the victim;
- the offender used force or the threat of force against the victim or a member of the victim's family, unless the offense was Class D or Level 6 felony sexual battery;
- the offender rendered the victim unconscious or otherwise incapable of giving voluntary consent; or
- the offender has committed at least two unrelated triggering offenses.

See Ind. Code § 11-8-8-19. For these offenders, there is no opportunity for early removal from the registry.

The law requiring lifetime registration for some general offenders did not become effective until July 1, 2001. If such an offender committed his offense before July 1, 2001, he may not be required to register for life with no opportunity for early removal because application of the change in law constitutes retroactive punishment in violation of the Indiana Constitution's *Ex Post Facto* Clause. Gonzalez v. State, 980 N.E.2d 312 (Ind. 2013). See also McVey v. State, 56 N.E.3d 674 (Ind. Ct. App. 2016) (same); Flanders v. State, 955 N.E.2d 732 (Ind. Ct. App. 2011), trans. denied (same).

Effective July 1, 2008, Indiana law was amended to allow an offender's registration period to be tolled during any period that the offender is incarcerated. Ind. Code § 11-8-8-19. See Bridges v. State, 109 N.E.3d 453 (Ind. Ct. App. 2018). Yet applying the reasoning from the Courts' opinions in Healey and Gonzalez, an argument can be made that the tolling provision applies only to those offenders who committed triggering offenses after July 1, 2008.

But see State v. Summers, 62 N.E.3d 451 (Ind. Ct. App. 2016), trans. denied (holding application of tolling provision to Indiana offender with out-of-state conviction that predated Indiana's tolling provision did not amount to *ex post facto* violation where other state had tolling provision at time offender committed his offense).

NOTE: The Indiana Court of Appeals has held that “two unrelated offenses,” for purposes of this statute, does *not* mean the same as “two prior unrelated felony convictions” under the general habitual offender statute. “The absence of ‘prior’ and ‘felony convictions’ in SORA makes it clear that the legislature intended for the statute to apply broadly, that is, to multiple sex offenses without regard to their sequence or status of adjudication.” Nichols v. State, 947 N.E.2d 1011 (Ind. Ct. App. 2011). Thus, “two unrelated offenses” applies to offenses independent of one another, not offenses in any particular sequence. Id.

NOTE: A violent offender is required to register only for a period of 10 years, unless he has been designated a sexually violent predator, he was over 18 years old and the victim was less than 12 years old, or he has been convicted of at least two prior unrelated triggering offenses; if that is the case, he is required to register for life. Gibson v. Ind. Dep’t of Correction, 899 N.E.2d 40 (Ind. Ct. App. 2008), trans. denied.

2. Registration

To “register” means to report *in person* to a local law enforcement authority and provide the information required. Ind. Code § 11-8-8-4. The registrant’s photograph is also taken at that time.

The registrant must initially register within 7 days of release from a facility; placement on parole, probation, or home detention; or arrival at the place where the registrant is required to register. Ind. Code § 11-8-8-7(g). Indiana Trial Rule 6(A) sets forth the proper method of computing the 7-day time frame. Dobeski v. State, 64 N.E.3d 1257 (Ind. Ct. App. 2016).

The registrant must register in *each county* in which he:

- resides (spends or intends to spend at least 7 days during a 180-day period);
- owns real property;
- is or intends to be employed or carry on a vocation, regardless of whether he is financially compensated (see Todd v. State, 900 N.E.2d 776 (Ind. Ct. App. 2009)); or
- is or intends to be enrolled as a student.

See Ind. Code § 11-8-8-7. Any changes must be reported to law enforcement within 72 hours. Ind. Code § 11-8-8-11.

General offenders must register, as described above, yearly. Ind. Code § 11-8-8-7(i). If a registrant lives in transitional housing or is homeless, he must report *in person* to a local law enforcement authority at least once every 7 days. Ind. Code § 11-8-8-12.

Annually, local law enforcement will contact each registrant in a manner approved by the department to verify the registrant’s current residence(s). Ind. Code § 11-8-8-13.

3. Residency

A registrant must report his principal residence address and any other address at which he spends more than 7 nights in a 14-day period. Ind. Code § 11-8-8-8(a). If a registrant does not reside at the registered address or location, he commits failure to register, a Level 6 felony. Ind. Code § 11-8-8-17.

A registrant (with the exception of those registering as a result of murder or voluntary manslaughter convictions) is prohibited from establishing a new residence within 1 mile of the victim's residence, unless the registrant obtains a waiver under Indiana Code section 35-38-1-33. A registrant who establishes a new residence within 1 mile of the victim's residence and knew or reasonably should have known that the new residence was located within the 1-mile radius, commits invasion of privacy, a Class A misdemeanor. Ind. Code § 35-46-1-15.1. The offense is elevated to a Level 6 felony if the registrant has a prior unrelated conviction for the same offense. Ind. Code § 35-46-1-15.1.

Any change in residence must be reported to law enforcement within 72 hours. Ind. Code § 11-8-8-11. If the registrant moves to a different Indiana county, the law requires the registrant to not only report the change in residence to the county in which the registrant is moving but to the county from which the registrant has moved. Failure to do so can lead to convictions in both counties. See Montgomery v. State, 14 N.E.3d 76 (Ind. Ct. App. 2014) (upholding two convictions for failure to register where registrant moved to a different county in Indiana and failed to alert either county of the move).

Likewise, moving out of state is a change that must be reported both in the state where the registrant is moving and in Indiana. Failure to do so can result in a conviction in Indiana for failure to register. See Moore v. State, 45 N.E.3d 832 (Ind. Ct. App. 2015), trans. denied (upholding failure to register conviction where defendant moved to Kentucky without notifying Indiana, thereby violating law that required offender to live at registered address); Johnson v. State, 925 N.E.2d 793 (Ind. Ct. App. 2010), trans. denied.

4. Additional requirements/restrictions

A registrant must obtain either a valid driver's license or state identification card and keep it in his possession at all times. The ID must contain a current address and current physical description unless the change was made within the last 30 days. Otherwise, he commits Class A misdemeanor failure of a sex or violent offender to possess identification (it is a Level 6 felony if the registrant has a prior unrelated conviction based on his failure to comply with any registration requirement). Ind. Code § 11-8-8-15.

A registrant cannot petition for a name change unless it is due to marriage; if it is due to marriage, the registrant must re-register in each county required by statute (as discussed above) within 7 days of the name change. Ind. Code § 11-8-8-16.

5. Penalties

If a registrant fails to register in person, when required, and in every county required by statute, makes a material misstatement or omission on the registration form, or does not reside at the registered address or location, he commits a Level 6 felony. The offense is elevated to a Level 5 felony if the registrant has a prior unrelated conviction, in Indiana or in another jurisdiction, based on his failure to comply with any registration requirement. Ind. Code § 11-8-8-17.

6. Internet usage restriction for some registrants

As a condition of probation or parole after a conviction for a sex offense (as defined in IC 11-8-8-4.5(a)), the court shall prohibit the use of a social networking web site or an instant messaging or chat room program to communicate, directly or through an intermediary, with a child less than 16 years of age. However, the court may permit communication using these mediums with the offender's own child, stepchild, or sibling; or another relative specifically named in the court order. Ind. Code § 35-38-2-2.7.

As a rule of a community transition program, a person convicted of a sex offense (as defined in IC 11-8-8-4.5(a)) may not use a social networking web site or an instant messaging or chat room program to communicate, directly or through an intermediary, with a child less than 16 years of age. However, the rules may permit the offender to communicate using these mediums with the offender's own child, stepchild, or sibling; or another relative specifically named in the applicable rules. Ind. Code § 11-10-11.5-11.

A sex offender (as defined in IC 11-8-8-4.5(a)) prohibited under the terms of probation, parole, or rule of community transition program from using a "social networking web site" or an instant messaging or chat room program to communicate with a person under the age of 16 commits Class A misdemeanor sex offender internet usage violation. The offense is elevated to a Level 6 felony if the registrant has a prior unrelated conviction for the same offense. Ind. Code § 35-42-4-12(b). It is a defense that the person reasonably believed that the child was at least 16 years of age. Ind. Code § 35-42-4-12(c).

A "social networking web site" is defined as an Internet web site that facilitates the introduction between 2 or more people, requires a person to register or create an account, username, or password to become a member of the site and to communicate

with other members, allows a member to create a web page or a personal profile, and provides a member with the opportunity to communicate with another person. It does not include an email program or message board program. Ind. Code § 35-31.5-2-307.

Doe v. Prosecutor, Marion County, 705 F.3d 694 (7th Cir. 2013) (holding IC 35-42-4-12, which criminalizes registered sex offenders use of social networking websites, instant messaging services or chat programs that “the offender knows allow a person who is less than 18 years of age to access or use the web site or program,” is unconstitutional. Though content neutral, the statute broadly prohibits substantially protected speech rather than specifically targeting the evil of improper communications to minors.) See also Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (same); Harris v. State, 985 N.E.2d 767 (Ind. Ct. App. 2013), trans. denied.

But cf. Patton v. State, 990 N.E.2d 511 (Ind. Ct. App. 2013) (holding probation condition that prohibited offender from accessing certain websites did not impermissibly impinge on his First Amendment rights); see also Bratcher v. State, 999 N.E.2d 864 (Ind. Ct. App. 2013), trans. denied.

NOTE: The General Assembly amended Ind. Code § 35-42-4-12 effective July 1, 2013, in response to Doe to only prohibit the use of a social networking web site or an instant messaging or chat room program to communicate, directly or through an intermediary, with a child less than 16 years of age as a condition of parole, probation, or a rule of a community transition program. However, it could be argued this did not address the underlying problem that Ind. Code § 35-42-4-12 still broadly prohibits substantially protected speech rather than specifically targeting the evil of improper communications to minors.

B. SEXUALLY VIOLENT PREDATORS (“SVP”)

1. Definition

A sexually violent predator is defined as a person who suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly commit a sex offense. Ind. Code § 35-38-1-7.5(a). An offender is required to register as an SVP if he has either: (1) committed an offense that requires registration “by operation of law”; or (2) has been determined to be an SVP after an evidentiary hearing, which may be combined with the sentencing hearing, has been conducted on the matter.

2. Registration “by operation of law”

At the sentencing hearing, the court must indicate on the record whether the offender is automatically required to register as an SVP by operation of law. Ind. Code § 35-38-1-7.5(d).

But see Stockert v. State, 44 N.E.3d 78 (Ind. Ct. App. 2015), trans. denied (holding that designation is determined by statutes and not by trial court, even where court erroneously informed offender that he need only register for ten years); see also Nichols v. State, 947 N.E.2d 1011 (Ind. Ct. App. 2011), reh’g denied.

A trial court cannot excuse a defendant from being designated as an SVP, regardless of the terms of any agreement between the parties. Raley v. State, 86 N.E.3d 183 (Ind. Ct. App. 2017).

Offenders at least 18 years of age, who have committed one or more of the following offenses after June 30, 1994, are automatically designated as an SVP by operation of law:

Child molesting as a Class A or Class B, or Level 1, 2, 3, or 4 felony (IC 35-42-4-3).

Criminal deviate conduct (IC 35-42-4-2) (before its repeal).

Rape (IC 35-42-4-1).

Vicarious sexual gratification as a Class A or Class B felony (IC 35-42-4-5).

Vicarious sexual gratification (IC 35-42-4-5):

- under IC 35-42-4-5 (a)(1) or (a)(2)
- under IC 35-42-4-5 (b)(1) as a Class A or B, or Level 2, 3, or 4 felony
- under IC 35-42-4-5 (b)(2)
- under IC 35-42-4-5 (b)(3) as a Class A or B, or Level 2, 3, or 4 felony
- before July 1, 2014, as a Class C felony if the victim was under 16 and was directed, aided, induced, or caused to engage in sexual conduct with an animal other than a human being

Attempt to commit any of the above-listed offenses (see Ind. Code § 1-1-2-4).

Conspiracy to commit any of the above-listed offenses (see Ind. Code § 1-1-2-4).

An offense in another jurisdiction that is substantially similar to any of the above-listed offenses (see Ind. Code § 1-1-2-4).

The following offenders are also considered an SVP by operation of law:

- those who commit a sex offense while having a previous unrelated conviction for a triggering sex offense
- those who commit a sex offense while having a previous unrelated juvenile adjudication for a triggering sex offense; but only if, after considering expert testimony, the court finds by clear and convincing evidence that the offender is likely to commit another sex offense
- those who commit a sex offense while having a previous juvenile adjudication for which they were already order to register as a sex or violent offender.

Ind. Code § 35-38-1-7.5(b).

However, an offender who otherwise would be required to register as an SVP by operation of law need only register as a general offender if *all* of the following criteria are met:

- (1) the victim was not less than 12 years old at the time the offense was committed.
- (2) the offender was not more than 4 years older than the victim.
- (3) the relationship between the offender and the victim was a dating or ongoing personal relationship.
- (4) the offense committed was not rape, criminal deviate conduct, or criminal confinement; did not involve the use or threat of use of deadly force; did not result in serious bodily injury; and was not facilitated by furnishing the victim, without the victim's knowledge, with a drug or controlled substance.
- (5) the offender had not committed another sex offense (either as an adult or a juvenile).
- (6) the offender did not have a position of authority or substantial influence over the victim.
- (7) the court finds that the offender should not be considered an SVP.

Ind. Code § 35-38-1-7.5(h).

An offender who commits a subsequent triggering offense (including a delinquent act that would be a sex offense if committed by an adult) is automatically designated as an SVP by operation of law. Ind. Code § 35-38-1-7.5(b)(2)-(4).

Lemmon v. Harris, 949 N.E.2d 803, (Ind. 2011) (converting Defendant’s ten-year registration requirement into a lifetime requirement when he committed his offense prior to the SVP statute’s enactment did not constitute retroactive punishment. The “by operation of law” clause of the SVP statute does not act to reopen a final judgment where the record is silent on whether the sentencing court made an SVP determination and thus does not offend the separation of powers provision of the Indiana Constitution). See also Flanders v. State, 955 N.E.2d 732 (Ind. Ct. App. 2011), trans. denied (same); Hollen v. State, 994 N.E.2d 1166 (Ind. Ct. App. 2013); Seales v. State, 4 N.E.3d 821 (Ind. Ct. App. 2014), trans. denied.

Jensen v. State, 905 N.E.2d 384 (Ind. 2009) (applying the 2006 amendment requiring lifetime registration to offender who had completed his executed sentence prior to the amendment did not violate the *Ex Post Facto* Clause of the Indiana Constitution).

Vickery v. State, 928 N.E.2d 648 (Ind. Ct. App. 2010) (following the reasoning in Jensen, Defendant failed to demonstrate that INSORA, as applied to him, violates the Indiana constitutional provision against *ex post facto* laws). See also Harlan v. State, 971 N.E.2d 163 (Ind. Ct. App. 2012) (same).

POSSIBLE ARGUMENTS: In Harris, the Court held the separation of powers argument failed because the record was silent on whether an SVP determination was made and thus the ‘by operation of law’ clause in the amended statute “did not change a judicial determination that Defendant was not an SVP to him being an SVP.” Id. at 815. Arguably, if a sentencing court *did* consider the SVP classification and instead imposed the ten-year requirement, the “operation of law” language would reopen a final judgment and violate the separation of powers provision of the Indiana Constitution.

3. Registration by hearing

If the offender is not designated as an SVP by operation of law, the prosecutor may request a hearing be conducted to determine if the offender should be classified as an SVP. If the motion is granted, the court must appoint two psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at a hearing. Ind. Code § 35-38-1-7.5(e). After considering the expert testimony, the court shall determine if the person should register as an SVP. Ind. Code § 35-38-1-7.5(e).

Mays v. State, 982 N.E.2d 387 (Ind. Ct. App. 2013) (holding that unanimity among experts is unnecessary to support an SVP determination).

Edwards v. State, 952 N.E.2d 862 (Ind. Ct. App. 2011) (upholding separate evaluations done at same time because statute does not specify how experts must

conduct their evaluations, and somewhat conclusory reports and testimony could support SVP determination where experts were subject to cross-examination at hearing).

Baugh v. State, 933 N.E.2d 1277 (Ind. 2010) (affirming SVP determination on grounds of invited error where defense counsel failed to object to State’s decision not to present testimony from experts at SVP hearing but simply to rely on conclusory written reports).

Scott v. State, 895 N.E.2d 369 (Ind. Ct. App. 2008) (holding that State must prove only that offender is “likely” to reoffend; offender is likely to reoffend if, because of a mental abnormality or personality disorder, the person presents a substantial danger – that is, a serious and well-founded risk – that he will commit the statutorily enumerated sex or violent crimes in the future; court declined to read a “more likely than not” or precise mathematical standard into word “likely” in Indiana’s SVP statute).

Marlett v. State, 878 N.E.2d 860, 872 (Ind. Ct. App. 2007), trans. denied (holding that a propensity for violence alone is not enough to warrant an SVP classification; instead, there must be a propensity to commit one or more of the enumerated sex offenses in Indiana Code section 11-8-8-4.5(a)).

Williams v. State, 895 N.E.2d 377 (Ind. Ct. App. 2008) (rejecting defendant’s claim that burden of proof is clear and convincing evidence; sufficient evidence existed to support SVP determination despite one psychologist’s opinion that defendant was not an SVP and presented a low risk of reoffending).

Westbrook v. State, 770 N.E.2d 868 (Ind. Ct. App. 2002) (noting that statute only requires court to consult with experts; expert opinions are not binding upon court and unanimity is not required); but see Phelps v. State, 914 N.E.2d 283 (Ind. Ct. App. 2009) (holding evidence was insufficient to support court’s SVP determination where offender had no prior criminal history, neither expert opined that offender was an SVP, and State presented no evidence tending to show that offender had mental abnormality or personality disorder).

4. Additional requirements/restrictions

In addition to the requirements/restrictions imposed on a general offender, an SVP must comply with the following requirements, as shown on this chart:

ADDITIONAL REQUIREMENTS/RESTRICTIONS FOR SVP'S

<u>REQUIREMENT/RESTRICTION</u>	<u>PENALTY FOR NONCOMPLIANCE</u>	<u>AUTHORITY</u>
Initial registration: must register in each required county within 72 hours of release, placement on parole/probation/home detention, or arrival in county where residing, working, or attending school	Same as general offenders	IC 11-8-8-7(h)
Subsequent registrations: must register and be photographed in each required county, <i>in person</i> , every 90 days	Same as general offenders	IC 11-8-8-14(b)
Address verification: every 90 days, local law enforcement will verify the registrant's current residence(s) in a manner approved by the department	Same as general offenders	IC 11-8-8-13
Possession of driver's license or state ID: must obtain and possess at all times a valid ID that includes a current address and current physical description, unless the change was made within the last 30 days	Level 6 felony	IC 11-8-8-15(c)(1)
Duty to notify: must notify local law enforcement, <i>in person</i> , when offender will be absent from principal residence more than 72 hours, where he will be, and the duration of his absence; must also notify proper authority in location being traveled to, if staying for more than 72 hours	Class A misdemeanor (Level 6 felony if prior unrelated conviction based on failure to comply with any registration requirement)	IC 11-8-8-18
Employment near children: cannot knowingly or intentionally work for compensation or as a volunteer: (1) on school property, (2) at a youth program center, or (3) at a public park *but only if triggering offense occurred after June 30, 2006	Level 6 felony (Level 5 felony if prior unrelated conviction based on failure to comply with any registration requirement)	IC 35-42-4-10

<u>REQUIREMENT/RESTRICTION</u>	<u>PENALTY FOR NONCOMPLIANCE</u>	<u>AUTHORITY</u>
Residency restrictions: cannot knowingly or intentionally “reside” within 1,000 feet of school property (excluding property of postsecondary educational institution), youth program center, or public park *but only if triggering offense occurred after June 30, 2006 *cannot be granted a waiver while on probation/parole to reside within 1,000 feet of school property or within 1 mile of victim	Level 6 felony	IC 35-42-4-11 IC 11-13-3-4(g)(2) IC 35-38-2-2.2(4) IC 35-38-2-2.5(f)
Internet usage: cannot knowingly or intentionally use social networking web site or instant messaging or chat room program	If restriction is a condition of probation or parole, Class A misdemeanor (Level 6 felony if prior unrelated conviction based on failure to comply with any registration requirement)	IC 35-42-4-12(e)
General parole: parole is for life		IC 35-50-6-1(e)
Bail: if arrested for subsequent sex or violent offense, may not be admitted to bail without hearing		IC 35-33-8-3.5
Guardian in general: cannot serve or continue to serve as a guardian		IC 29-3-7-7(1)
Guardian over juvenile: cannot serve or continue to serve as a guardian or custodian of child		IC 30-30-1-2.5(1)
Adoption: cannot adopt a child		IC 31-19-11-1(d)

5. Length of registration period

When the SVP designation was added to INSORA effective July 1, 1998, the offender was required to register for an indefinite period of time. Effective July 1, 2003, an SVP is required to register for life.

After 10 years, an SVP may petition the court for removal of the SVP designation. The court may either dismiss the petition or conduct a hearing to determine if the person should no longer be considered an SVP. If a hearing is conducted, the court

must appoint two psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at the hearing. After considering the expert testimony, the court shall determine if the person should no longer be considered an SVP. Ind. Code § 35-38-1-7.5(g).

NOTE: A person who is designated an SVP by operation of law for committing a subsequent triggering offense may not petition to have the SVP designation removed. Ind. Code § 35-38-1-7.5(g). But see Flanders v. State, 955 N.E.2d 732 (Ind. Ct. App. 2011), trans. denied (holding that application of change in law that occurred after commission of offense that eliminated opportunity to petition to have SVP designation removed constituted retroactive punishment in violation of *Ex Post Facto* Clause of the Indiana Constitution).

C. OFFENDERS AGAINST CHILDREN (“OAC”)

1. Definition

An offender against children is an offender who has either (1) been found to be a sexually violent predator; or (2) been convicted of one or more of the following offenses:

Child molesting (IC 35-42-4-3).

Child exploitation (IC 35-42-4-4(b)).

Child seduction (IC 35-42-4-7).

Child solicitation (IC 35-42-4-6).

Kidnapping (IC 35-42-3-2), if victim was under 18 and offender was not victim’s parent/guardian.

Attempt to commit any of the above-listed offenses (see Ind. Code § 1-1-2-4).

Conspiracy to commit any of the above-listed offenses (see Ind. Code § 1-1-2-4).

An offense in another jurisdiction that is substantially similar to any of the above-listed offenses (see Ind. Code § 1-1-2-4).

An offender is labeled an OAC by operation of law if the above conditions are met. Ind. Code § 35-42-4-11(a).

The OAC label can only be applied to offenders who committed their triggering offense on or after July 1, 2006. Bleeke v. Lemmon, 6 N.E.3d 907 (Ind. 2014); Cundiff v. State, 66 N.E.3d 956 (Ind. Ct. App. 2016). If the offender’s triggering offense occurred before July 1, 2006, he cannot be convicted of violating the residency restriction statute (IC 35-42-4-11) or the unlawful employment statute (IC 35-42-4-10). This is true even if the offender is an SVP.

2. Additional restrictions

An OAC is required to comply with the following restrictions, in addition to the restrictions already imposed upon him as either a general offender or a sexually violent predator:

- An OAC cannot knowingly or intentionally work for compensation or as a volunteer on school property, at a youth program center, or at a public park. If he does, he commits Level 6 felony unlawful employment near children by a sexual predator (it is a Level 5 felony if the offender has a prior unrelated conviction based on his failure to comply with any registration requirement). Ind. Code § 35-42-4-10.
- An OAC cannot knowingly or intentionally “reside” within 1,000 feet of school property (excluding property of a postsecondary educational institution), a youth program center, or a public park; or live within 1 mile of the victim’s residence. If he does, he commits Level 6 felony sex offender residency offense.

Ind. Code § 35-42-4-11(c).

To “reside” means to spend more than 3 nights in a place in any 30-day period. Ind. Code § 35-42-4-11(b).

Retroactivity of the residency restriction statute: Pollard v. State, 908 N.E.2d 1145 (Ind. 2009).

Prior to April 4, 1997 (the date of conviction), Pollard committed a sex offense that triggered the requirement to register. Effective July 1, 2006, the residency restriction statute prohibited OAC’s from residing within 1,000 feet of school property, a youth program center, or a public park. See Ind. Code § 35-42-4-11. Pursuant to the statute, Pollard was labeled an OAC. Pollard’s residence was located within an area prohibited under the statute. He had owned the property for 20 years.

The State charged Pollard with a Class D felony for violating the residency restriction statute. The trial court granted Pollard’s motion to dismiss on *ex post facto* grounds. The State appealed, and the Court of Appeals affirmed.

On transfer, the Supreme Court of Indiana held that “as applied to Pollard, the statute violates the prohibition on *ex post facto* laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed *when his crime was*

committed.” Pollard, 908 N.E.2d at 1154 (emphasis added). Thus, if an offender owned his home and committed the offense before the residency restriction statute became effective, he cannot be required to relocate.

But see Gaither v. IDOC, 971 N.E.2d 690 (Ind. Ct. App. 2012) (holding no *ex post facto* violation existed where offender who committed his offense and owned property long before passage of residency restriction statute was subject to residency restrictions as condition of probation, since trial courts enjoy wide latitude in fashioning terms of probation and would have had ability to impose residency restriction at time offender committed offense).

But what if an offender committed an offense before the effective date of the residency restriction statute but bought his home after the effective date of the statute? This situation was addressed in Sewell v. State, 973 N.E.2d 96 (Ind. Ct. App. 2012). In Sewell, an offender committed his offense in 2000, well before the residency restriction statute became effective. However, his attempt to move into the protected zone did not occur until after the effective date of the statute. The Court of Appeals held that because the offender did not own his residence before his conviction and did not reside in property that only later fell into the protected zone, there was no *ex post facto* violation.

But what if the offender owned his home before the effective date of the residency restriction statute but committed an offense after the effective date? Or what if the offender both committed an offense and bought his home *after* passage of the residency restriction statute, but a school, youth program center, or park was established within 1,000 feet of his home? Pollard refers to such situations as a “substantial housing disadvantage,” but otherwise leaves these questions unanswered. Id. at 1150.

See Mann v. Georgia Dep’t of Correction, 653 S.E.2d 740 (Ga. 2007) (holding that attempt to oust offender from his home by threatening to prosecute him for violating residency restriction statute, where offender purchased his home before children’s daycare moved within 1,000 feet of his home, amounted to unconstitutional regulatory taking without just and adequate compensation).

POSSIBLE ARGUMENTS: Besides an *ex post facto* challenge, other constitutional challenges to the residency restriction statute could also be raised, including a violation of substantive due process rights, a claim that the restriction is cruel and unusual punishment, or a claim that the restriction interferes with a contractual obligation.

3. Discretionary Removal of the Label

An offender who has two or more unrelated convictions for offenses listed under Section C.1 cannot petition for removal of the OAC designation. For all other offenders, after ten years an OAC may petition the court for removal of the OAC designation. The court may either dismiss the petition or conduct a hearing to determine if the person should no longer be considered an OAC. If a hearing is conducted, the court must appoint two psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at the hearing. After considering the expert testimony, the court shall determine if the person should no longer be considered an OAC. Ind. Code § 35-42-4-11(d).

D. SERIOUS SEX OFFENDERS (“SSO”)

1. Definition

A serious sex offender is a person required to register as a sex offender under IC 11-8-8 who has either (1) been found to be a sexually violent predator; or (2) been convicted of one or more of the following offenses:

Child molesting (IC 35-42-4-3).

Child exploitation (IC 35-42-4-4(b)).

Possession of child pornography (IC 35-42-4-4(c)).

Vicarious sexual gratification (IC 35-42-4-5).

Child seduction (IC 35-42-4-7).

Child solicitation (IC 35-42-4-6).

Sexual misconduct with a minor (IC 35-42-4-9).

Attempt to commit any of the above-listed offenses (see Ind. Code § 1-1-2-4).

Conspiracy to commit any of the above-listed offenses (see Ind. Code § 1-1-2-4).

An offense in another jurisdiction that is substantially similar to any of the above-listed offenses (see Ind. Code § 1-1-2-4).

An offender is labeled an SSO by operation of law if the above conditions are met. Ind. Code § 35-42-4-14(a). Unlike the “offender against children” label, retroactive application of the SSO label to a registrant does not violate Indiana’s *Ex Post Facto* Clause. McVey v. State, 56 N.E.3d 674 (Ind. Ct. App. 2016).

State v. Kirby, 120 N.E.3d 574 (Ind. Ct. App. 2019) (unlawful-entry statute was not unconstitutional as applied to defendant, because it was not excessive punishment to prohibit him from attending his sons’s school events due to prior conviction for child solicitation).

2. Additional restrictions

An SSO cannot knowingly or intentionally enter school property. If he does, he commits unlawful entry by a serious sex offender, a Level 6 felony. Ind. Code § 35-42-4-14(b). However, it is a defense to a prosecution for this offense if a religious institution or house of worship is located on the school property; the person enters the school property for the sole purpose of attending worship service or receiving religious instruction and only when classes or other school activities are not being held; and the person enters school property not earlier than 30 minutes prior to the beginning of the worship service or religious instruction and leaves the school property no later than 30 minutes after the conclusion of the worship service or religious instruction. Ind. Code § 35-42-4-14(c).

NOTE: Shortly after the law took effect on July 1, 2015, the ACLU of Indiana filed a lawsuit challenging the prohibition on freedom to worship grounds. The lawsuit was jointly dismissed after the parties agreed that serious sex offenders were not prohibited from attending worship services at churches that had parochial schools. The State acknowledged that the statutory definition of “school property” exempted nearly every parochial school because it is the church, and not the school, that owns the property in question. See John Doe et al. v. Allen and Elkhart County Prosecutors et al.

Moreover, in John Doe et al. v. Boone County Prosecutor, 85 N.E.3d 902 (Ind. Ct. App. 2017), the Court of Appeals rejected the State’s argument that any church with a childcare or children’s Sunday School program would be considered “school property” for purposes of the unlawful entry statute.

In response to these cases, the General Assembly created the defense described above to allow SSOs to attend worship services at churches. See Ind. Code § 35-42-4-14(c), which took effect July 1, 2018.

III. JUVENILE OFFENDERS

A. WHO IS REQUIRED TO REGISTER

Effective July 1, 1996, the General Assembly added certain juveniles to the list of offenders required to register. A juvenile is required to register as a sex or violent offender if all of the following are true:

- (1) the juvenile has committed a delinquent act;
- (2) the juvenile is at least fourteen years of age;
- (3) the juvenile is on probation, is on parole, or is discharged from a D.O.C. facility, secure private facility, or juvenile detention facility as a result of an adjudication as a delinquent child for an act that would be a “sex or violent offense” [see Section I.C] that required registration if committed by an adult; and
- (4) the court finds by clear and convincing evidence that the juvenile is likely to repeat an act that would be a “sex or violent offense” requiring registration.

Ind. Code § 11-8-8-4.5, -5.

NOTE: Only juveniles who were adjudicated a delinquent child *after* June 30, 1996 may be required to register. Ind. Code § 11-8-8-0.2.

The court is required to hold an evidentiary hearing to determine whether the juvenile is likely to be a repeat sex or violent offender. J.C.C. v. State, 897 N.E.2d 931, 934 (Ind. 2008).

An “evidentiary hearing” under J.C.C. requires the following: an opportunity for the juvenile to challenge the State’s evidence and present evidence of his own; continued representation by counsel at that hearing and any subsequent hearings on the matter; and a decision based solely on the evidence presented during the hearing. N.L. v. State, 989 N.E.2d 773 (Ind. 2013).

When a juvenile is placed in a D.O.C. facility, secure private facility, or juvenile detention facility, the hearing cannot be held until after the juvenile is released from the facility, so that the juvenile has the opportunity to be rehabilitated during his detention. Ind. Code § 11-8-8-4.5(b)(2)(B), -5(b)(2)(B); J.D.M. v. State, 68 N.E.3d 1073 (Ind. 2017); J.C.C. v. State, 897 N.E.2d 931, 934 (Ind. 2008).

A determination that a juvenile must register as a sex or violent offender cannot be made a part of the initial disposition following a true finding or a part of the decree of disposition. B.K.C. v. State, 781 N.E.2d 1157, 1169 (Ind. Ct. App. 2003).

In making a determination as to whether the juvenile is likely to reoffend, the court must consider expert testimony regarding whether the child is likely to repeat an act that would be a “sex or violent offense” if committed by an adult. Ind. Code §§ 11-8-8-4.5(c), -5(c).

“[A]n evaluation of whether a juvenile has been rehabilitated while in detention is a prerequisite to finding clear and convincing evidence that the juvenile is likely to repeat.” J.C.C. v. State, 897 N.E.2d 931, 936 (Ind. 2008) (reversing order requiring juvenile to register where court relied on expert opinion that was based solely on juvenile’s pre-dispositional acts). A child may not be ordered to register as a sex offender unless the trial court expressly finds, based exclusively on evidence received at an evidentiary hearing as required by J.C.C., that clear and convincing evidence exists that the child is likely to commit another sex offense. N.L. v. State, 989 N.E.2d 773 (Ind. 2013).

B.J.B. v. State, 805 N.E.2d 870 (Ind. Ct. App. 2004) (explaining that reports from psychological evaluations done before juvenile’s treatment were not, by themselves, sufficient to show juvenile was likely to reoffend).

In re Z.H., 850 N.E.2d 933 (Ind. Ct. App. 2006), trans. denied (reversing order requiring juvenile to register where juvenile had completed treatment goals but there was no expert testimony concerning juvenile’s risk of reoffending after completing treatment).

B. GENERAL OFFENDER/SVP/OAC

Similar to adult offenders, juveniles who are ordered to register must comply with the same requirements and restrictions as general offenders. [See Section II.A].

If a juvenile is considered an “offender against children,” as defined by Indiana Code section 35-42-4-11(a), he is further restricted on where he can live and work or volunteer. [See Section II.C].

Finally, if the juvenile is required to register as a sex offender, the prosecutor may request the court to determine whether he is a sexually violent predator. If the court grants the prosecutor’s motion, the court must appoint two psychologists or psychiatrists with expertise in criminal behavioral disorders to evaluate the juvenile and must hold a hearing at which the experts testify. In making the determination, the court must consider the expert testimony. Ind. Code § 35-38-1-7.5(e).

Before a juvenile is required to register as a sex or violent offender, it must be proved by clear and convincing evidence that he is likely to commit another sex or violent offense. Ind. Code § 11-8-8-4.5, -5. This standard is very similar to what must be shown to classify a juvenile as a sexually violent predator. But there are differences.

- First, the court is required in both instances to hold a hearing and to consider expert testimony. When determining whether a juvenile should be classified as an SVP, the court must consider the testimony of at least two psychologists or psychiatrists, with expertise in criminal behavioral disorders. Ind. Code § 35-38-1-7.5(e). But Indiana law does not require the court to consider testimony from a certain type or specific number of experts before deciding whether a juvenile is required to register.
- Second, the definition of a “sexually violent predator” suggests that the State must prove that the juvenile has a “mental abnormality or personality disorder” that will likely cause him to reoffend. Ind. Code § 35-38-1-7.5(a). See also Williams v. State, 895 N.E.2d 377, 385 (Ind. Ct. App. 2008) (“[A] person is ‘likely’ to reoffend for purposes of the Indiana SVP statute if, because of a mental abnormality or personality disorder, the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit the statutorily-enumerated sex or violent crimes in the future.”) No such requirement exists before finding that a juvenile must register as a general sex or violent offender.

IV. REMOVAL FROM THE REGISTRY

Registrants either register for a period of 10 years or for life. A person required to register for 10 years cannot petition for early removal from the registry unless the registrant can show that the requirement to register constitutes an *ex post facto* punishment due to a change in the law. Indiana Code section 11-8-8-22 governs such removal petitions.

A person required to register for life may petition for early removal on two grounds. First, the registrant may petition for early removal if the registrant can show that the requirement to register constitutes an *ex post facto* punishment due to a change in law. Indiana Code section 11-8-8-22 governs such removal petitions.

A registrant classified as a sexually violent predator may petition for early removal after registering for 10 years if the registrant can show that he has been rehabilitated and/or no longer poses a future danger. Indiana Code section 35-38-1-7.5(g) governs such discretionary removal petitions.

A. REMOVAL PETITIONS UNDER I.C. 11-8-8-22

A registrant may petition a court under Indiana Code section 11-8-8-22 for removal of the person's designation as an offender or to require the person to register under less restrictive conditions if:

- due to a change in federal or state law after June 30, 2007, the offender would not be required to register or would be required to register under less restrictive conditions, or
- the application or registration requirements constitute *ex post facto* punishment

If the registration period expires, or removal is granted under Indiana Code section 11-8-8-22, local law enforcement and the department shall ensure a registrant's information is no longer published to the public portal of the sex offender website. Ind. Code § 11-8-8-11; 11-8-8-19. The department shall also ensure information is no longer published for a registrant who is deceased. Ind. Code 11-8-2-13.

IMPORTANT NOTE: Only Indiana Code § 11-8-8-22 discusses "removal" of a registrant's information from the public portal of the sex offender website. The State may argue a court order is required before a registrant's information may be removed from the website.

1. What the petition must contain

The petition must:

- (1) be submitted under penalties of perjury;

- (2) list each jurisdiction in which the offender is required to register; and
- (3) list each of the offender's criminal convictions, including:
 - the date of the judgment of conviction,
 - the court that entered the judgment of conviction,
 - the offense; and
 - whether the offender was convicted in a trial or pleaded guilty.

Ind. Code § 11-8-8-22(k).

State v. Johnston, 65 N.E.3d 1061 (Ind. Ct. App. 2016) (reversing grant of registrant's motion for removal where petition failed to contain required information)

Wiggins v. State, 928 N.E.2d 837 (Ind. Ct. App. 2010) (stating that procedures outlined in IC 11-8-8-22 are necessary to allow courts to be fully informed of offender's circumstances, including offender's full criminal history, dates of offenses, and reasons for being required to register).

Clampitt v. State, 928 N.E.2d 210 (Ind. Ct. App. 2010) (affirming denial of offender's motion for removal of SVP status where offender failed to follow statutory requirements and failed to provide sufficient record to court to consider request).

2. Where to file the petition

A petition must be filed in the circuit or superior court of the county in which the offender resides the greatest amount of time. Offenders currently housed in the D.O.C. must file their petitions in the county where the facility is located. A non-resident must file in the county where he is employed the greatest amount of time or is a student. Ind. Code § 11-8-8-22(d).

3. When to file the petition

A removal petition under Indiana Code section 11-8-8-22 that is filed before the offender has begun registering may be considered prematurely filed if the petition requests only removal and not declaratory or injunctive relief. Lockhart v. State, 38 N.E.3d 215 (Ind. Ct. App. 2015) (affirming dismissal of removal petition for failure to state a claim upon which relief may be granted where offender's registration period did not begin for several years but offender requested only removal, not declaratory or injunctive relief).

4. How the court may rule on the petition

The court may either summarily dismiss the petition or set the matter for hearing not less than 60 days after the court gives notice that a hearing will be held. If the court sets a hearing, it must give notice to the following:

- the D.O.C.;
- the attorney general;
- the prosecuting attorney of:
 - the county where the petition was filed,
 - the county where the offender was most recently convicted, and
 - the county where the offender resides; and
- the sheriff of the county where the offender resides.

Ind. Code § 11-8-8-22(e).

State v. Johnston, 65 N.E.3d 1061 (Ind. Ct. App. 2016) (reversing grant of registrant's motion for removal where petition failed to contain required information)

In re State of Ohio Conviction Against Gambler, 939 N.E.2d 1128 (Ind. Ct. App. 2011) (reversing trial court's grant of offender's request for removal from registry where court failed to inform appropriate government actors and hold hearing on the matter).

TIP: The statute does *not* require that the offender serve the above-listed individuals; the statute only requires the court to notify those individuals if a hearing is set. Regardless, it is a good idea to serve the above-listed individuals with a courtesy copy of the petition so that they cannot claim later that they received insufficient notice.

5. If a hearing is held on the petition

If the court sets a hearing, the petitioner has the burden of proof. Ind. Code § 11-8-8-22(h). The attorney general may represent the State in lieu of the county's prosecuting attorney. Ind. Code § 11-8-8-22(f).

Following a hearing, the court may grant the petition if the court finds all of the following:

- (1) the law requiring the petitioner to register has changed since he was initially required to register;

- (2) the same conduct the petitioner engaged in before the law was changed would no longer require registration or would require less restrictive registration conditions if engaged in after the law changed; and
- (3) the petitioner has proved a defense that was previously unavailable before the law changed.

Ind. Code § 11-8-8-22(g).

The trial court has broad discretion to deny relief under Indiana Code section 11-8-8-22, even if all statutory requirements are met. Lucas v. McDonald, 954 N.E.2d 996 (Ind. 2011) (offender's request for relief from lifetime registration requirement denied even though sexual battery as a Class D felony was lowered from a lifetime to a 10 year registration requirement because the victim only agreed to the plea agreement because she believed the offender would be monitored for life).

PRACTICE POINTER: The statute reads, "The court has the discretion to deny a petition under this section, even if the court makes the findings under this subsection." Ind. Code § 11-8-8-22(g). It can be argued that this is not applicable if the court finds that requiring the offender to register constitutes *ex post facto* punishment, since courts cannot approve a continuing violation of one's constitutional right to be free from retroactive punishment.

If the petition is granted, the attorney general may initiate an appeal. Ind. Code § 11-8-8-22(l).

During these proceedings, whether the State is acting through the Attorney General, through the D.O.C., or through a local prosecutor, is of no consequence. "The State is the State is the State." Thus, when the State (via a deputy prosecutor) fails to timely appeal an adverse ruling in a removal case, the State (via the Attorney General and the D.O.C.) becomes bound by the ruling under principles of *res judicata*. Becker v. State, 992 N.E.2d 697 (Ind. 2013).

B. DISCRETIONARY REMOVAL PETITIONS UNDER I.C. 35-38-1-7.5

A registrant may petition a court under Indiana Code section 35-38-1-7.5(g) for removal of the person's designation as a sexually violent predator if the person has registered for at least 10 years. However, a registrant who has two or more unrelated convictions for an offense listed in Indiana Code section 11-8-8-4.5 for which the person is required to register cannot seek discretionary removal from the registry. Ind. Code § 35-38-1-7.5(g).

1. What the petition must contain

The statute does not list any specific information that must be contained in the petition.

2. Where to file the petition

The petition for discretionary removal is filed in the original criminal cause.

3. How the court may rule on the petition

The court may either summarily dismiss the petition or conduct a hearing to determine whether the SVP designation should be removed. Ind. Code § 35-38-1-7.5(g).

4. If a hearing is held on the petition

If the court conducts a hearing, the court shall appoint two psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the registrant and testify at the hearing. Ind. Code § 35-38-1-7.5(g).

5. Registrant may refile the petition yearly

If the court does not remove the SVP designation, the registrant may refile a petition no more than one time per year. Ind. Code § 35-38-1-7.5(g).

V. CORRECTION OF ERRORS ON REGISTRY PROFILES

Indiana implemented a new procedure, effective October 1, 2013, to fix errors made by the State on registry profiles. This was in response to Schepers v. IDOC, 691 F.3d 909 (7th Cir. 2012). In Schepers, an offender's registry profile erroneously labeled him as a "sexually violent predator." The Seventh Circuit Court of Appeals held that Indiana had violated offenders' due process rights by failing to provide any procedure to correct such errors. The new procedure can be found on the Indiana Sex and Violent Offender Registry's website.

VI. CHALLENGING COLLATERAL CONSEQUENCES OF SEX OR VIOLENT OFFENDERS

An offender cannot challenge the collateral consequences of a sex or violent offense, such as the requirement of registration, special offender restrictions, etc. through the post-conviction process. Kirby v. State, 95 N.E.3d 518 (Ind. 2018) (holding offender could not challenge constitutionality of serious sex offender restriction through post-conviction process).

