



Out of the Shadows

North Carolina Conference of District Attorneys

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How to Contact the Child Abuse Resource Prosecutor

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Upcoming Trainings

National:

The 24th Annual San Diego International Conference On Child and Family Maltreatment
Sponsor: Chadwick Center for Children and Families
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Child Abuse Resource Manuals

We have additional copies of both the Child Abuse Resource Manual: Sexual Abuse and the Child Abuse Resource Manual: Physical Abuse and Homicide for prosecutors available. If your office is in need of extra copies, please contact Laura Parker at Laura.E.Parker@nccourts.org or at 919.890.1500.

SATELLITE-BASED MONITORING OF SEX OFFENDERS

By: Jamie Markham, Assistant Professor of Public Law and Government, UNC School of Government

Like many states, North Carolina has a program to monitor certain sex offenders using Global Positioning System (GPS) technology. North Carolina's satellite-based monitoring (SBM) regime requires eligible offenders to wear an ankle bracelet and tracking device that continuously transmit the offenders' whereabouts to the Department of Correction's Division of Community Corrections (DCC), which manages the program. Confusing to begin with, the law has been modified in each legislative session since its enactment in 2006, making it hard for all parties—prosecutors, defendants, judges, and DCC—to apply the law properly. A series of recent opinions from the Court of Appeals of North Carolina address some of the previously unanswered questions about SBM.

First, the Basics. To be eligible for SBM at all, a defendant must have a reportable conviction that requires sex offender registration. A crime must meet two criteria to be reportable. First, it must be listed in G.S. 14-208.4. Second, it must fall within the effective date language applicable to that crime. A flow chart available at <http://sogweb.sog.unc.edu/blogs/ncclaw/wp-content/uploads/2009/07/sex-offender-flow-chart-july-09.pdf> keys the applicable effective date language for each reportable crime.

Once it has been established that a person has a reportable conviction, yet another effective date comes into play. The legislation that created the SBM regime (S.L. 2006-247) made the law applicable to those with a reportable conviction who: (1) committed their offense on or after August 16, 2006; (2) were sentenced to intermediate punishment on or after that date; (3) were released from prison by parole or post-release supervision on or after that date; or (4) complete a sentence on or after that date and are not on post-release supervision or parole.

If a person is covered by one of these provisions, a determination must be made as to whether he or she will be subject to SBM. For defendants sentenced after December 1, 2007, that determination should be made at sentencing under G.S. 14-208.40A using form AOC-CR-615. For those convicted and sentenced before the law was passed, determinations are made at a "bring-back" hearing under G.S. 14-208.40B, using form AOC-CR-616. Under legislation passed this year (S.L. 2009-387), the district attorney schedules bring-back hearings for offenders DOC has initially determined may qualify for SBM, and then represents DOC at the hearing. At the hearing itself, the court determines whether an offender will be subject to lifetime monitoring, SBM for a period specified by the court (conditional monitoring), or not subject to SBM at all.

Lifetime monitoring. The offender will be subject to lifetime SBM if he or she falls within one of the following four categories:

- Sexually violent predator (G.S. 14-208.6(6)): There are fewer than a dozen SVPs in North Carolina. Before classifying an offender as an SVP, the court must follow the procedure set out in G.S. 14-208.20. *State v. Zinkand*, 190 N.C. App. 765 (2008).
- Recidivist (G.S. 14-208.6(2b)): A recidivist is a person with a prior conviction for an offense described in G.S. 14-208.6(4). The current offense must have taken place on or after October 1, 2001 for the person to qualify as a recidivist. S.L. 2001-373.
- Aggravated offender (G.S. 14-208.6(1a)): An aggravated offense is one that includes a sexual act involving vaginal, anal, or oral penetration with a victim of any age through force or the threat of serious violence, or with a victim who is less than 12 years old regardless of force. An offense must occur after October 1, 2001 to be an aggravated offense. S.L. 2001-373.
- Convicted of rape or sexual offense with a minor by an adult (G.S. 14-27.2A; -27.4A). Note that this is a separate, substantive crime—not just a rape or sexual offense that happens to have been committed by an adult against a minor.

Conditional monitoring. The offender will be subject to SBM for a period specified by the court if he or she committed an offense that involved the "physical, mental, or sexual abuse of a minor," and, based on a DOC risk assessment (an actuarial instrument called a Static-99) or other facts found by the judge, requires the "highest possible level of supervision and monitoring." The SBM period is in the court's discretion, although it may be no longer than the time for which the offender must register. The term of "physical, mental, or sexual abuse of a minor" is not defined by statute, but the definition of "abused juvenile" in G.S. 7B-101 provides a sensible starting point for analyzing whether an offense involves abuse.

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SATELLITE-BASED MONITORING OF SEX OFFENDERS (CONT.)

Recent Cases. After deferring the issue *State v. Williams*, 190 N.C. App. 173 (2008) (“[W]e find that issue not yet ripe for our review.”), the court of appeals first weighed in on SBM last year in *State v. Wooten*, ___ N.C. App. ___, 669 S.E.2d 749 (2008). In *Wooten*, the defendant was ordered to enroll in SBM for life as a recidivist based on two convictions for indecent liberties with a minor, one in 1989 and one in 2006. Mr. Wooten first argued that the court lacked jurisdiction because he did not receive notice of the hearing in the manner set out in 14-208.40B(b), that is, via certified mail “sent to the address provided by the offender pursuant to G.S. 14-208.7.” Notice in this manner would have been impossible, of course, because Mr. Wooten had not yet been released from prison when he received the notification. The court held that the failure to follow the precise letter of the statute’s notice provisions did not amount to a jurisdictional flaw. Second, the defendant argued that his 1989 conviction for indecent liberties should not qualify him as a recidivist because that conviction was not reportable. The court disagreed, holding that a prior conviction need only be “described” in the statute defining reportable offenses; it need not be itself reportable. (Recall, though, that for a person to be a recidivist, the current reportable conviction must have occurred on or after October 1, 2001.)

In its next case, *State v. Bare*, ___ N.C. App. ___, 677 S.E.2d 518 (2009), the court held that lifetime SBM does not increase an offender’s punishment, and therefore does not implicate the Ex Post Facto Clause. The court concluded that the General Assembly intended SBM to be a civil regulatory scheme to protect the public, and the regime was not so punitive in purpose to negate the legislature’s intent to deem it civil. Several times the court noted a lack of evidence in the record to support the defendant’s arguments, raising the possible argument that the opinion’s holding would be limited to the facts of that case. Three weeks later, however, the court cited to *Bare* without qualification in *State v. Anderson*, ___ N.C. App. ___, 679 S.E.2d 165 (2009), to say “[t]his court has already held that the provisions of the satellite-based monitoring program are civil in nature, not punitive.” In two subsequent cases, *State v. Wagoner*, ___ N.C. App. ___, (2009), and *State v. Morrow*, ___ N.C. App. ___, (2009), a court of appeals judge dissented on the ex post facto issue, working through the seven-factor test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to determine that SBM is, in fact, punitive. Mr. Wagoner appealed to the supreme court, which will hear his case based on the dissent.

State v. Kilby, ___ N.C. App. ___, ___ 679 S.E.2d 430 (2009), was the court’s first conditional offender case. As mentioned above, an offender is subject to monitoring for a period of time specified by the court if the court finds that an offense involved the “physical, mental, or sexual abuse of a minor” and determines, based on a DOC risk assessment (currently, the Static-99), that the offender requires the “highest possible level of supervision and monitoring.” G.S. 14-208.40A(d) and -208.40B(c). The Static-99 generates a risk level—low, moderate, or high—based on the offender’s answers to ten questions. In *Kilby* (and again in *State v. Causby*, ___ N.C. App. ___, 683 S.E.2d 262 (2009)), the court said it was improper to order SBM for a moderate-risk defendant, absent some additional factual finding in support of the order. Several weeks later in *State v. Morrow*, the court held that a trial court could look to “any proffered and otherwise admissible evidence” to determine whether a defendant ought to enroll in SBM—the court is not limited to the DOC’s risk assessment. As for the type of additional findings that the court of appeals might deem sufficient to support a conclusion that a low- or moderate-risk defendant requires the highest possible level of supervision and monitoring, the court in *Morrow* said a finding that the defendant was 11 or 12 years older than the victim was insufficient, but it suggested that a finding related to his failure to attend sexual abuse treatment sessions would suffice.

In its most recent case, the court of appeals held that SBM, though not punishment, was a substantial infringement on liberty. *State v. Stines*, ___ N.C. App. ___, (2009). As such, a person being called into court for a bring-back hearing should be given notice of the SBM-eligibility category (i.e., recidivist, aggravated offender, sexually violent predator, or conditional offender) into which DOC has determined he or she falls, and a brief summary of the factual basis for that determination. Based on *Stines*, DCC is developing a new, more robust bring-back hearing notification procedure.

Unresolved Issues. It remains an open question whether the court may, when deciding whether a particular offense was “aggravated,” consider only the elements of the conviction offense, or whether it may also consider the facts underlying the conviction. Can indecent liberties with a child, for example, ever be an aggravated offense when it does not have penetration as an element? The Nebraska Supreme Court adopted a facts-based approach under that state’s very similar law. *State v. Hamilton*, 763 N.W.2d 731 (Neb. 2009) (“[A] sentencing judge . . . may make this [aggravated offense] determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report.”). Additionally, North Carolina’s appellate courts have yet to rule on what evidence may be considered at an SBM determination hearing, and under what procedural rules. It would appear under the evidence code that the rules of evidence apply at the hearings (Rule 1101 says the rules apply to all court proceedings except those exempted by statute, and SBM hearings are not exempted), but it is unclear what standard of proof must be met. By default it seems a preponderance of the evidence standard would apply to a civil determination such as this, but a heightened standard arguably applies as a matter of due process. See *United States v. Comstock*, 507 F. Supp. 2d 522, 551–59 (E.D.N.C. 2007) (collecting cases on what process is due in relation to a particular infringement on liberty). This and other issues will be before the appellate court.