

# Sex Offender Registration & Monitoring



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**\*\*NOTE: PORTIONS OF THIS HANDOUT MAY BE OUT OF DATE IN LIGHT OF RECENT CASES. PLEASE CALL OR REFER TO MORE RECENT MATERIALS IF YOU HAVE QUESTIONS.\*\***

## Sex Offender Registration

**Duration of registration.** Three categories of offenders are required to register for life.

1. Those who committed an **aggravated offense**. An aggravated offense is one that includes a sexual act involving vaginal, anal, or oral penetration, either by force or with a victim who is less than 12 years old. G.S. 14-208.6(1a). Only offenses occurring after October 1, 2001, can be aggravated offenses. S.L. 2001-373.
2. **Recidivists**. A recidivist is an offender with a prior conviction for an offense described in the statute defining a reportable conviction. G.S. 14-208.6(2b). At least one offense must have taken place after October 1, 2001, for the person to qualify as a recidivist. S.L. 2001-373.
3. **Sexually violent predators**. A sexually violent predator (SVP) is a person convicted of a sexually violent offense who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses. G.S. 14-208.6(6). This classification is rare in North Carolina; there are about a dozen SVPs in the state. Before classifying an offender as an SVP, the court must follow the procedure set out in G.S. 14-208.20. *See State v. Zinkand*, 190 N.C. App. 765 (2008).

Other offenders must maintain registration for 30 years following the date of original county registration, unless, after 10 years of registration, they successfully petition the superior court to shorten their registration time period under G.S. 14-208.12A.

**Petitions to terminate registration.** The requirement to petition to terminate registration is a relatively new feature of North Carolina's sex offender registration regime; prior to 2006, the registration requirement for non-lifetime registrants terminated automatically after 10 years.

The superior court may grant a petition to terminate registration if:

- (1) The petitioner demonstrates that he or she has not, since completing his or her sentence, been arrested for any crime that would require registration.

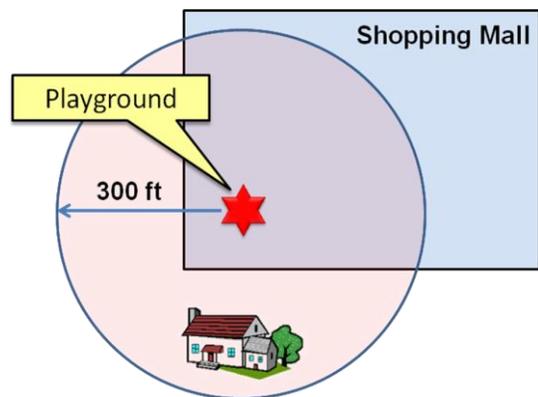
- (2) The requested relief complies with the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the state.
- (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

Superior court judges are having difficulty with the second prong of the test requiring compliance with federal law. For over a decade, our state law on sex offender registration has flowed from federal mandates—states must enact laws that meet federal standards or they lose certain federal grant funds. The Jacob Wetterling Act (1994) was the initial federal legislation that established minimum standards for states to register sex offenders. It has since been amended by Megan’s Law (1996), the Pam Lychner Act (1996), the Jacob Wetterling Improvements Act (1997), and, most recently, by the Adam Walsh Act (2006). Title I of the Adam Walsh Act, called the Sex Offender Registration and Notification Act, or SORNA, enacted a new and more stringent set of standards for sex offender registration. The act originally required states to substantially implement these new standards by July 27, 2009, but Attorney General Holder extended the deadline to July 26, 2010. (No state had complied by the original date.) Arguably, then, SORNA requirements are not yet “required to be met as a condition for the receipt of federal funds,” meaning consideration of the second prong of the test could perhaps be deferred until 2010. For courts that determine that it cannot be deferred, however, the vast majority of offenders would be ineligible to petition until at least 15 (if not 25) years from their date of initial county registration under SORNA’s new minimum registration requirements.

A blanket adoption by a state statute of prospective federal legislation, or of federal administrative rules yet to be adopted, may be an unconstitutional delegation of state legislative power. *See, e.g., Hutchins v. Mayo*, 197 So. 495 (Fla. 1940) (holding that a state statute providing that fruit should be graded according to standards “as now fixed by the [USDA], or as standards may hereinafter be modified or changed,” unlawfully delegated state legislative power to a federal agency).

**Sex offender unlawfully on the premises (G.S. 14-208.18).** Legislation passed in 2008 made it a Class H felony for certain registered offenders “to knowingly be at” any of the following locations:

- (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.
- (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.
- (3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.



This law does not apply to all registered sex offenders. It applies only to those who committed an offense in Article 7A of Chapter 14 (rape, sexual offense, statutory rape or sexual offense, sexual battery, and intercourse with certain victims), or whose offense involved a victim who was under the age of 16 at the time of the offense.

The second and third prongs of this statute are generating a lot of questions. The 300-foot rule in subdivision (2) would appear to bar an offender from going within the length of a football field of a church nursery or fast food restaurant playground, among other places. Subdivision (3) may also bar offenders from religious facilities that also host educational or social programs (e.g., Sunday school, youth group). Though the law includes limited exceptions for emergency medical care, certain school activities, and voting, it does not include an exception that might accommodate offenders' ability to exercise their religious beliefs or maintain other associations. Defendants will argue that the law improperly impinges on their fundamental rights, and that it is unconstitutionally vague in failing to make clear, for example, whether these restrictions apply at all times, or only when minors are actually present. With respect to the free exercise argument, the State will argue that the statute is a "neutral law of general applicability" and therefore not subject to strict scrutiny. *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, two men were fired for using peyote for sacramental purposes. Because peyote use violated Oregon's criminal law, the state denied them unemployment benefits after the firing. The Court upheld the denial, reasoning that a generally applicable criminal law which is religiously indifferent can be enforced despite a free exercise claim for exemption.

**What constitutes an address for registration purposes?** In *State v. Abshire*, 363 N.C. 322 (2009), the Supreme Court of North Carolina defined "address" as the actual location where someone lives, whether permanently or temporarily, where certain activities of life occur. Residence in this context, the court said, is not the same as domicile. Applying its definition, the supreme court determined that a defendant changed her address (and was thus guilty of failing to update inform the sheriff of the change) when she moved in with her father for 5 – 6 weeks, even though she continued to visit and receive mail at her old address.

**Registration of homeless offenders.** A homeless registrant must update his or her registration information with the sheriff upon changing addresses, even if the new address is "a homeless shelter, a location under a bridge or some similar place." *State v. Worley*, \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 857 (2009).

## **Satellite-Based Monitoring of Sex Offenders**

**Satellite-based monitoring (SBM), generally.** To be eligible for SBM at all, a defendant must have a reportable conviction that requires sex offender registration, and that falls within the effective date language of the SBM law. 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 falls within one of those categories, the court must determine 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. For those convicted and sentenced before the law was passed, determinations are made at a “bring-back” hearing under G.S. 14-208.40B. 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 (the first three of which are the same as the categories subject to lifetime registration):

1. *Sexually violent predator* (G.S. 14-208.6(6));
2. *Recidivist* (G.S. 14-208.6(2b));
3. *Aggravated offender* (G.S. 14-208.6(1a));
4. Convicted of rape or sexual offense with a minor by an adult (G.S. 14-27.2A; -27.4A).

*Conditional monitoring.* The offender will be subject to SBM for a period specified by the court if he or she is determined (in the “qualification phase”) to have committed an offense that involved the “physical, mental, or sexual abuse of a minor,” and, based on a DOC risk assessment (the “risk assessment phase,” currently conducted using a variation on an actuarial instrument called a Static-99) 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.

## **SBM Case Law**

**State v. Wooten**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 749 (2008). 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. Held: (1) A prior conviction need not be itself reportable to qualify a person as a recidivist. Rather, it need only be “described” in the statute defining reportable offenses. (2) A failure to follow the precise letter of the SBM statute’s notice provisions did not amount to a jurisdictional flaw.

**State v. Bare**, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 518 (2009). Recidivist offender, convicted in 2002 but released from prison in 2007, was required to enroll in SBM for life. Held: SBM does not violate the Ex Post Facto Clause by increasing the punishment for a crime. The legislature intended SBM to be a civil regulatory scheme. Further, the regulatory scheme is not so punitive either in purpose or effect as to negate the General Assembly’s intent to deem it civil in nature.

*A note on the ex post facto issue.* The test courts generally apply to determine whether a sanction is punitive stems from *Smith v. Doe*, 538 U.S. 84 (2003) (upholding Alaska’s sex offender registration law against a challenge that it amounted to retroactively-applied punishment). Courts first examine whether the

legislature intended the regime to impose a punishment. If so, the analysis stops there. If not, the court then examines whether the regime is so punitive in purpose or effect as to negate the legislature's intent to deem it civil. To make this determination the court weighs the following seven factors, initially set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and cited in *Smith v. Doe*:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether it has historically been regarded as a punishment;
3. Whether it comes into play only on a finding of scienter;
4. Whether its operation will promote the traditional aims of punishment, retribution and deterrence;
5. Whether the behavior to which it applies is already a crime;
6. Whether an alternative purpose to which it may rationally be connected is assignable for it; and
7. Whether it appears excessive in relation to the alternative purpose assigned.

In *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), *petition for rehearing en banc denied*, 521 F.3d 680 (2008), the United States Court of Appeals for the Sixth Circuit applied the *Mendoza-Martinez* factors to determine that Tennessee's SBM regime was nonpunitive. By contrast, the Supreme Judicial Court of Massachusetts applied the factors and held Massachusetts's SBM regime to be punitive in effect. *Commonwealth v. Cory*, 454 N.E.2d 187 (Mass. 2009).

**State v. Anderson**, \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 165 (2009). Recidivist offender, ordered at sentencing to enroll in SBM for life after his 2007 conviction for misdemeanor sexual battery. Held: Because SBM is civil in nature, its imposition does not violate a defendant's right to be free from double jeopardy.

**State v. Kilby**, \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 430 (2009). Defendant, released from prison in 2007 after committing a crime involving the "physical, mental, or sexual abuse of a minor" in 2002, was ordered to enroll in SBM for "five to ten years." Held: The trial court erred in finding that the defendant required the "highest possible level of supervision and monitoring" when the Department of Correction risk assessment (Static-99) found that the defendant posed only a moderate risk, and the judge made no other findings of fact in support of its conclusion.

**State v. Wagoner**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Sept. 1, 2009). Holding, over a dissent, that requiring the defendant to enroll in SBM does not violate the constitutional prohibition against ex post facto laws or double jeopardy.

**State v. Causby**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Sept. 15, 2009). Following *Kilby* on similar facts.

### **Additional Issues Related to SBM**

**Aggravated offenses: Elements or facts?** Aggravated offenders are one of the categories of offenders subject to lifetime satellite-based monitoring. An aggravated offense is defined as an offense that includes either (i) a sexual act involving vaginal, anal, or oral penetration with a victim of any age by force; or (ii) a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old. G.S. 14-108.6. It

remains an open question whether the court should, when deciding whether a particular offense was aggravated, consider only the elements of the conviction offense, or whether it should also consider the facts underlying the conviction. Analyzing Nebraska’s similar law, the Nebraska Supreme Court adopted a facts-based approach. *State v. Hamilton*, 763 N.W.2d 731 (Neb. 2009) (“[A] sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense . . . has been committed. Instead, the court may make this determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report.”).

#### **§ 14-208.40A. Determination of satellite-based monitoring requirement by court.**

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the **district attorney shall present to the court any evidence** that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the **conviction offense** was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. **The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.**

The offender shall be allowed to present to the court any evidence that the district attorney's evidence is not correct.

**Rules of evidence.** Because SBM determination happens at sentencing (or at a sentencing-like hearing), there is a question as to whether the rules of evidence apply. Under Rule 1101, the rules of evidence apply to all actions and proceedings in the courts of North Carolina, except as provided in Rule 1101(b) or by statute.

**Standard of proof.** The SBM hearing statute places the burden of production on the State, but it does not articulate a burden of persuasion. If SBM is not part of a defendant’s criminal punishment, the findings required to enroll a defendant in the program do not necessarily need to be made beyond a reasonable doubt. Ordinarily a civil matter would be decided by a preponderance of the evidence. There is an argument, though, that a heightened standard of proof may be required as a matter of due process. In *United States v. Comstock*, 507 F.Supp. 2d 522 (E.D.N.C. 2007), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2828 (2009), for example, the district court concluded that even a “clear and convincing” standard of proof was inadequate in the context of involuntary commitment of sex offenders under the Adam Walsh Act. The district court opinion includes a helpful collection of cases in its analysis of what process is due in relation to a particular deprivation of liberty. *Comstock*, 507 F. Supp. 2d at 551–59.

## **On the Horizon: The Adam Walsh Act (SORNA)**

Among other requirements, the Sex Offender Registration and Notification Act:

- Broadens the offenses for which a state must require registration;
- Increases the amount of information registered offenders must provide to state authorities;

- Requires states to make registration requirements fully retroactive for all covered offenses;
- Imposes regular adult registration requirements on certain juveniles; and
- Establishes a three-tier schedule of offense classification, with new minimum registration periods (15 years, 25 years, and life) for each tier.