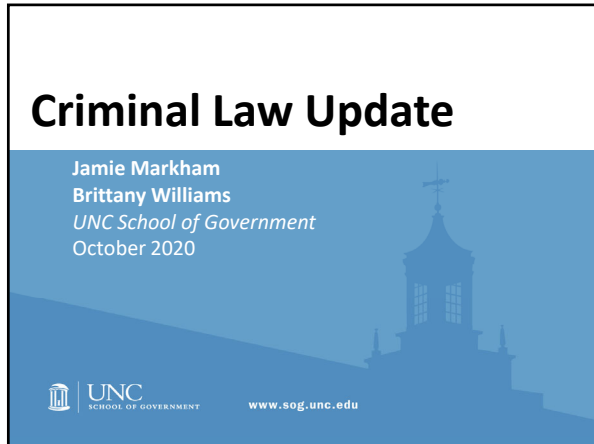



# Criminal Law Update

Jamie Markham  
Brittany Williams  
UNC School of Government  
October 2020



1

---

---

---

---

---

---

---

---

## Welcome Brittany Williams

2

---

---

---

---

---

---

---

---



3

---

---

---

---

---

---

---

---



4

---

---

---

---

---

---

---

---



5

---

---

---

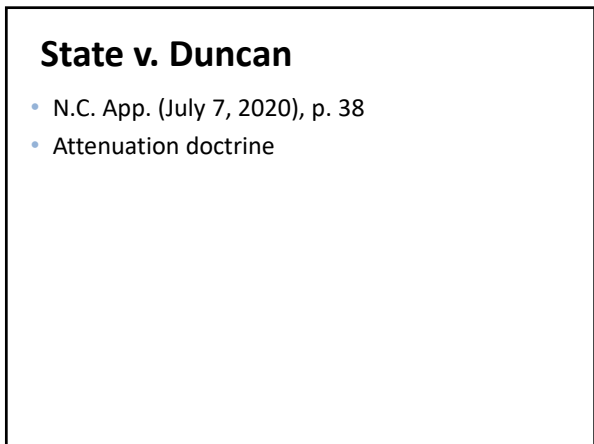
---

---

---

---

---



6

---

---

---

---

---

---

---

---

**State v. Duncan**

- Traffic stop for a taillight
- Officer observed closed pocketknife in the console and asked defendant to exit the vehicle
- During a pat-down, officer felt grape-sized bulge in the defendant’s pocket

---

---

---

---

---

---

---

---

7

**State v. Duncan**

Officer Isaacs held onto the object from outside the pocket while he lifted Defendant’s jacket and reached inside with his left hand. Officer Isaacs then reached inside the exterior pocket to access what he had been feeling with his right hand. Defendant objected as Officer Isaacs moved his hand inside the exterior pocket by asserting: “What are you doing? Come on, man. This is not a *Terry* frisk, man. You’re illegally searching me, man.”

---

---

---

---

---

---

---

---

8

**State v. Duncan**

- Defendant fled and was apprehended
- Officer found a bag with cocaine in the surrounding area and other drugs on the defendant’s person

---

---

---

---

---

---

---

---

9

### State v. Duncan

- Trial court: Motion to suppress DENIED
  - Terry frisk was invalid, however . . .
  - The evidence was admissible under the attenuation doctrine on the basis of defendant’s flight and subsequent search incident to arrest

---

---

---

---

---

---

---

---

10

**Attenuation Doctrine**  
**Utah v. Strieff (U.S., 2016)**

Exception to the exclusionary rule, allowing evidence to be admitted when the connection between the illegal police conduct and the evidence is remote or has been interrupted by some intervening circumstance.

---

---

---

---

---

---

---

---

11

### State v. Duncan

- Three factors to consider:
  - Temporal proximity
  - Presence of intervening circumstances
  - Purpose and flagrancy of the officer’s conduct

---

---

---

---

---

---

---

---

12

### State v. Duncan

- Court of Appeals:
  - Attenuation doctrine does not apply
    - Temporal proximity
      - “Only minutes” elapsed
    - Presence of intervening circumstances
      - Flight from an unlawful search was not a new crime
    - Purpose and flagrancy of the officer’s conduct
      - Officer proceeded with a “flagrantly unconstitutional search” despite the defendant’s accurate complaint that “This is not a Terry frisk, man,” and request to call a supervisor
  - New trial

---

---

---

---

---

---

---

---

13

### State v. Gore

- N.C. App. (June 16, 2020), p. 40
- Cell-Site Location Information (CSLI)

---

---

---

---

---

---

---

---

14

### State v. Gore

- Defendant argued that CSLI connecting him to a murder violated his federal and state constitutional rights

**Carpenter v. United States (U.S., 2018)**  
 Warrantless acquisition of historical CSLI is an unreasonable search under the Fourth Amendment

---

---

---

---

---

---

---

---

15

### State v. Gore

- Federal Constitution: Good faith exception
  - Court order (2016) predated *Carpenter* (2018), and was thus based on good faith understanding of prevailing law
- State Constitution: Pen register / trap & trace order based on probable cause met warrant requirement

---

---

---

---

---

---

---

---

---

---

16

### State v. Gore

**Application for a pen register/trap & trace (G.S. 15A-262)**  
 - Order may issue if judge finds “reasonable suspicion” that a felony or serious misdemeanor has been committed, reasonable grounds to suspect that the named person committed it, and that the results of the procedure will be of material aid.

- Here, judge’s order went beyond the statutory requirements for “reasonable suspicion” and “reasonable grounds” and found Probable Cause
- The order thus met the warrant requirement

---

---

---

---

---

---

---

---

---

---

17

### State v. Gore

- Concurring opinion: Would have extended good faith exception to defendant’s argument under the State Constitution




---

---

---

---

---

---

---

---

---

---

18

**North Carolina Criminal Law**  
A UNC School of Government Blog

**Conducting Surveillance and Collecting Location Data in a Post-Carpenter World, Part III**  
Posted on Oct. 12, 2020, 5:09 pm by Shea Denning • 0 comment



This post is the third in a series examining the impact of *Carpenter v. United States*, 585 U.S. \_\_\_, 138 S.Ct 2206 (2018) on electronic surveillance and the obtaining of location and other types of information from third parties. The first post summarized post-Carpenter decisions relating to surveillance by pole camera and tower dumps. The second examined post-Carpenter rulings on the obtaining of real-time surveillance information through satellite-based Global Positioning System data (GPS) or cell site location information (CSLI). This post examines the use of cell site simulators and the obtaining of other information about a person's on-line activities or accounts from third parties.

**Cell site simulators.** Cell site simulators (also called Stingrays or Hailstorms) mimic cell phone towers by producing a boosted signal that "muscles out" the signals from legitimate cell



19

---

---

---

---

---

---

---

---

---

---

**Confessions**

20

---

---

---

---

---

---

---

---

---

---

**Confessions**

- State v. Lee, N.C. App. (July 7, 2020), p. 41
  - Defendant in custody, suspected of killing his aunt
  - Properly *Mirandized*
  - Defendant told police that he would tell them "whatever you want to know" if they could arrange a face-to-face meeting with his family
  - Detective told him could arrange it, but only if he told "everything, every detail."

21

---

---

---

---

---

---

---

---

---

---

### Confessions

- State v. Lee, N.C. App. (July 7, 2020), p. 41

Improper influence of hope or fear implanted in the defendant’s mind by law enforcement officers can render a confession involuntary.

For a promise or inducement to be improper, it must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.

State v. Pruitt, 286 N.C. 442 (1975).

---

---

---

---

---

---

---

---

---

---

22

### Confessions

- State v. Lee, N.C. App. (July 7, 2020), p. 41
  - Here, the “inducement” was defendant’s idea
  - Officers never offered any relief from the charges
  - Trial court’s denial of motion to suppress affirmed

---

---

---

---

---

---

---

---

---

---

23

### *Harbison Errors*

---

---

---

---

---

---

---

---

---

---

24



### Harbison

- State v. McAllister, N.C. (Sept. 25, 2020), p. 8
  - Implied admissions as *Harbison* error

State v. Harbison, 315 N.C. 175 (1985)  
 Defense counsel's admission of guilt without the client's prior consent is per se ineffective assistance of counsel.

---

---

---

---

---

---

---

---

25

### Harbison

- State v. McAllister, N.C. (Sept. 25, 2020), p. 8
  - Defendant charged with assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape
  - During a videotaped interview, defendant admitted to “smacking” and “grabbing” the victim, but denied forcing her to have sex

---

---

---

---

---

---

---

---

26

### Harbison

- State v. McAllister, N.C. (Sept. 25, 2020), p. 8

“Now the State went to great length to use the defendant’s statements. These are his words . . . . You heard him admit that things got physical. You heard him admit that he did wrong, God knows he did. . . . Now, they run with his one admission and say . . . Everything else [the victim] said must be true.”

---

---

---

---

---

---

---

---

27

### Harbison

- State v. McAllister, N.C. (Sept. 25, 2020), p. 8
  - Defendant argued *Harbison* error in that his lawyer impliedly conceded guilt on the assault on a female charge
  - Court of Appeals: No *Harbison* violation when counsel merely admits an element of the offense, but does not admit defendant’s guilt
  - Supreme Court: *Harbison* goes beyond express admissions of guilt and also encompasses implied admissions

---

---

---

---

---

---

---

---

28

### Harbison

- State v. McAllister, N.C. (Sept. 25, 2020), p. 8
  - Defense counsel’s argument here was an implied admission of guilt on the assault on a female charge
    - Vouched for the truth of the defendant’s interview
    - Asked the jury to acquit on all charges except for assault on a female
  - Remand for evidentiary hearing on whether defendant gave prior authorization

---

---

---

---

---

---

---

---

29

### Harbison

- State v. Crump, N.C. App. (Sept. 1, 2020), p. 9
  - “Admission to an element” rule survives *McCoy v. Louisiana* (U.S. 2018)

---

---

---

---

---

---

---

---

30

**Juvenile Life Without Parole  
(Miller v. Alabama)**

---

---

---

---

---

---

---

---

31

**Miller v. Alabama (2012)**

- *Mandatory* life imprisonment without parole for a homicide committed by a minor is cruel and unusual punishment

---

---

---

---

---

---

---

---

32

**Miller fix legislation**

- Created life with possibility of parole option for first-degree murder defendants under 18
- If felony murder rule → life with parole
- If not felony murder →
  - Defendant may submit mitigating evidence
  - Court holds hearing, considers mitigating factors
  - Court makes findings on “absence or presence of any mitigating factors”
  - Court decides between life without parole or life with possibility of parole after 25 years

---

---

---

---

---

---

---

---

33

### State v. Kelliher

- N.C. App. (Oct. 6, 2020), p. 25
  - *De facto* life without parole

---

---

---

---

---

---

---

---

34

### State v. Kelliher

- N.C. App. (Oct. 6, 2020), p. 25
  - 17-year-old defendant sentenced to consecutive life without parole sentences in 2004
  - *Miller* resentencing in 2018: Defendant received consecutive sentences of life with the possibility of parole after 25 years
  - COA:
    - Miller applies to *de facto* life sentences
    - A defendant’s aggregate sentence should be considered
    - 50 years is a *de facto* life sentence

---

---

---

---

---

---

---

---

35

### Satellite-Based Monitoring




---

---

---

---

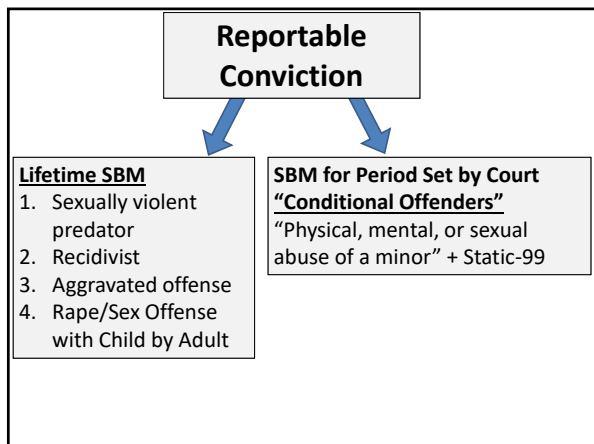
---

---

---

---

36




---

---

---

---

---

---

---

---

37

**State v. Grady (N.C., 2019)**

- Satellite-Based Monitoring (SBM) is facially unconstitutional for all recidivists once supervision (probation/parole/PRS) ends

---

---

---

---

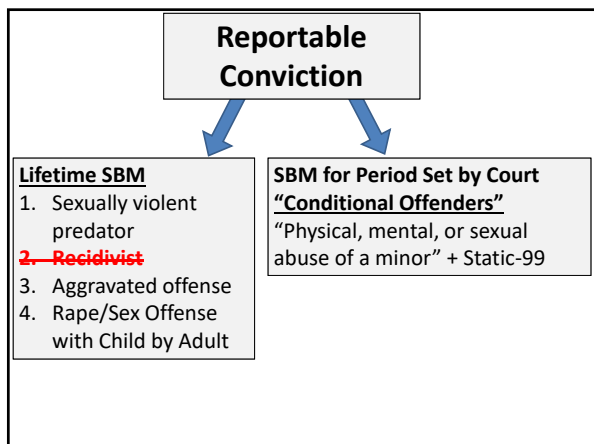
---

---

---

---

38




---

---

---

---

---

---

---

---

39

### Satellite-Based Monitoring

- State v. Hutchens, N.C. App. (June 16, 2020), p. 29
  - Grady analysis extended to aggravated offender; lifetime SBM unreasonable as applied in this rape case
    - Efficacy: No evidence of reduced recidivism
- State v. Strudwick, N.C. App. (Oct. 6, 2020), p. 27
  - In a rape case (aggravated offender), State could not demonstrate the reasonableness of a search that won't happen for 30 years due to the defendant's prison sentence

---

---

---

---

---

---

---

---

---

---

40

### Satellite-Based Monitoring

- State v. Thompson, N.C. App. (Oct. 6, 2020), p. 33
  - Lifetime SBM for sexual offense by an adult with a child was unreasonable
    - Prison sentence won't be complete for 50 years
  - 10-year SBM for sexual act by a substitute parent or custodian (conditional offender) was reasonable
    - Individualized assessment
    - "Not significantly burdensome and lengthy, especially given that the defendant will subject to [PRS] for half that period."

---

---

---

---

---

---

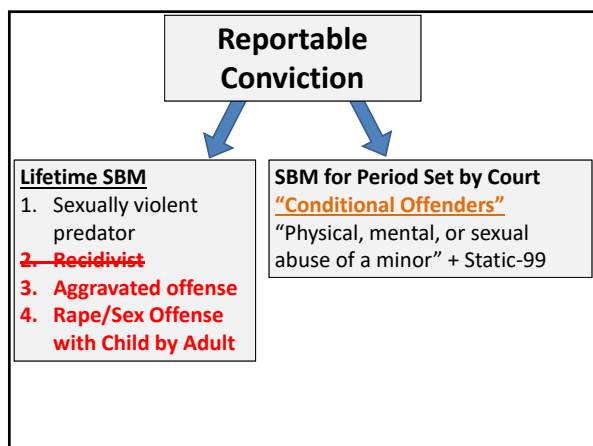
---

---

---

---

41




---

---

---

---

---

---

---

---

---

---

42

## Efficacy

- State v. Lindquist (Aug. 18, 2020), p. 30
  - Lifetime SBM ordered in a rape case
  - Ambiguous reference to “the California Study”

---

---

---

---

---

---

---

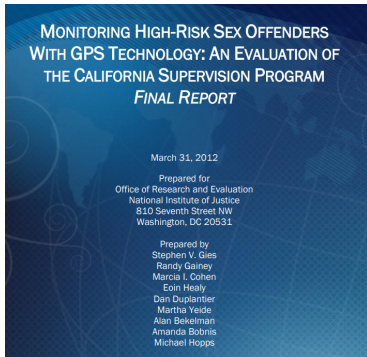
---

---

---

43

## Studies




---

---

---

---

---

---

---

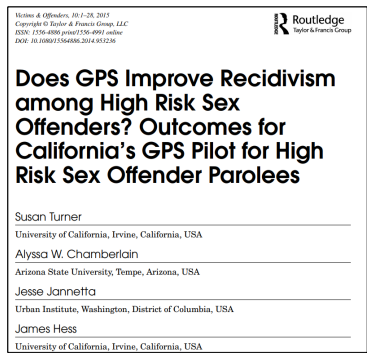
---

---

---

44

## Studies




---

---

---

---

---

---

---

---

---

---

45

## Efficacy

- State v. Lindquist (Aug. 18, 2020), p. 30
  - Lifetime SBM ordered in a rape case
  - Ambiguous reference to “the California Study”
  - Remand for clarification

---

---

---

---

---

---

---

---

46



---

---

---

---

---

---

---

---

47



---

---

---

---

---

---

---

---

48