1. a. No. The legislation that made sexual battery a reportable crime applies only to offenses committed on or after December 1, 2005. (S.L. 2005-130).

b. No. Crime against nature is never a reportable conviction.

c. Yes. Though the crime took place in 1995, indecent liberties with children is reportable for those convicted *or released from prison* on or after January 1, 1996.

2. a. No. Assault on a female is never reportable.

b. Yes, if the court finds that the crime involved the "physical, mental, or sexual abuse of minor" (an undefined term). G.S. 15A-1343(b2). I think this situation could be construed as physical abuse or perhaps sexual abuse – items 8 and 9 on Page Two, Side Two of form AOC-CR-603 guide the court through the *mandatory* probation conditions that apply depending on what type of abuse occurred.

3. Yes, in the court's discretion. G.S. 14-208.12A says a person may petition to terminate registration if he or she "has not been arrested for any crime that would require registration under this article since completing the sentence." Some have argued that failure to register is an "offense requiring registration"—i.e., if you don't register as required, you've committed that offense. It seems clear to me, however, that "offense requiring registration" in this context means "reportable conviction." Because failure to register is not itself a reportable conviction, I don't think an arrest for failure to register is a per se bar to a petition to terminate registration. Of course, the court is free to consider a registrant's failure to register under the third prong of G.S. 14-208.12A(a1): that the petitioner is not a current or potential threat to public safety.

4. a. Yes. 30 years. Offenses committed before October 1, 2001 cannot be "aggravated offenses" requiring lifetime registration. S.L. 2001-373.

b. No. The offender is not subject to lifetime registration because this is not an aggravated offense (it took place before October 1, 2001). The offender is not subject to monitoring for a period of time specified by the court because the offense did not involve a minor.

c. Maybe. If the victim was 16, this act could be considered sexual abuse of a minor, and could thus subject the defendant to SBM for a period specified by the court – if the court also determined that the defendant required the "highest possible level of supervision and monitoring." That determination could stem from a Static-99 (DOC's risk assessment tool) rating the person as high risk, or from other facts found by the court. State v. Kilby, __ N.C. App. __ (2009) (July 21, 2009).

5. a. This question is meant to get at the issue of whether a court may, when determining whether a crime was an aggravated offense, consider only the elements of the crime of conviction, or whether it may also look behind the conviction to the facts of what actually occurred. In this first

variation of the hypothetical, however, it doesn't matter whether one looks at the facts – even though the real offense involved oral penetration, it was not by force, and was not with a victim under 12 years old. Thus, it could never be an aggravated offense. That leaves the possibility that this could be considered sexual abuse of a minor, which, in conjunction with a determination that the defendant requires the highest possible level of supervision and monitoring, would place the offender under SBM for a period determined by the court.

b. If the victim was 11, this could be an aggravated offense ("sexual act" involving "oral penetration" with a "victim who is less than 12 years old," G.S. 14-208.6(1a)), subjecting the defendant to lifetime SBM, *if* you look at the facts of what actually happened. The appellate courts have answered many questions about SBM recently, but they haven't yet told us what "evidence" a court may consider when determining whether a particular offense is an aggravated offense, and under what rules and to what standard of proof it ought to consider that evidence. (To be fair, the General Assembly hasn't weighed in either.)

6. Yes. These are essentially the facts of *State v. Wooten*, discussed here. The court concluded that the defendant's prior offense, despite having occurred years before the sex offender registry came into existence, was still an offense "*described* in G.S. 14-208.6(4)." Provided the offender has at least one offense that occurred after October 1, 2001 (S.L. 2001-373) and otherwise falls within the effective date provisions for SBM (essentially, convicted or released from prison after August 16, 2006, as set out in S.L. 2006-247), he or she is subject to SBM for life.

7. a. Judges and officials from DOC's Division of Community Corrections (DCC) have told me how the procedure set out in G.S. 14-208.40A(d) puts them in a bit of a bind. If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, it is supposed to order DOC to do a risk assessment, the results of which will guide the court's determination of whether the offender requires the highest possible level of supervision and monitoring. The statute says DOC shall have 30 to 60 days to complete the assessment, but many times the parties (including DCC) agree that they don't want to wait that long. Some judges are continuing sentencing for 30 to 60 days to give DCC time to complete the assessment. Some judges are proceeding with sentencing, assuming the offender will be brought back into court to complete the SBM determination process when the Static-99 is complete. And other judges are putting off the SBM determination altogether, with the idea that the determination can be made later at a bring-back hearing. Form AOC-CR-615 doesn't help (through no fault of AOC—the form simply tracks the statute), as it assumes the court will already have the risk assessment results.

According to DCC, its *strong* preference is that the judge continue sentencing for a short period of time (hours, not days) to give a probation officer time to complete the risk assessment before the court begins the SBM determination hearing. It is much easier, they say, for an officer to complete the Static-99 at that point than it is to get the assessment done while the offender is in prison.

b. & c. Previously, it was unclear exactly what the risk assessment score meant. Could an offender who rates something other than high risk still be deemed to require the highest possible level of supervision and monitoring? Or is a high risk assessment a *sine qua non* for conditional monitoring?

The court of appeals considered these questions in State v. Kilby. Mr. Kilby had committed multiple offenses that involved sexual abuse of a minor, but the DOC risk assessment rated him as a moderate risk. The court nonetheless found that the defendant required the highest possible level of supervision of monitoring and ordered him to SBM for 5–10 years. Mr. Kilby argued on appeal that a moderate risk assessment, without more, is insufficient to support the conclusion that he required the highest level of supervision and monitoring. The court of appeals agreed and reversed the trial court.

The court began by noting that "the highest possible level of supervision and monitoring," though undefined, must just mean SBM, because SBM is the *only* form of supervision or monitoring provided for in the statute – there's nothing any higher, so it's the highest. Although it could not "discern any direct correlation" between the risk assessment results and the SBM determination, the court said it was error to order SBM for a defendant who posed a moderate risk when there were no additional findings indicating that he required the highest possible level of supervision and monitoring. No need even to remand the case for findings, the court said, because the State presented no evidence on which such findings could be based. To the contrary, all the evidence from the hearing indicated that Mr. Kilby was a pretty cooperative guy. (I wonder: could the court have properly rested its determination on a "factual finding" that Mr. Kilby was convicted of one count of second degree sexual offense and six counts of indecent liberties with a child? Your thoughts?)

Here's what I take away from *Kilby*: If the court wants to order conditional SBM for an offender with a Static-99 risk level other than high, it apparently may do so. But first, it must make findings of fact in support of its determination that the person requires the highest possible level of supervision and monitoring. Forms AOC-CR-615 and AOC-CR-616 don't leave space for such findings, but a judge could use AOC-CR-618, a generic form for additional findings, to set out the facts supporting his or her determination.