

Satellite Based Monitoring for Sex Offenders
Fall 2008 Superior Court Judges Conference
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SBM Bench Guide¹

1. Determine whether the offense is a **reportable conviction** (14-208.6(4))
 - offense against a minor: 14-208.6(1i) - kidnapping, abduction of children, felonious restraint of minor by non-parent
 - sexually violent offense: 14-208.6(5) - rape, sex offense, indecent exposure, sexual exploitation of minor, prostitution of minor, solic. child by computer to commit sex act, indecent liberties
 - attempt to commit any of the above (and sometimes aid/abet: 14-208.6(4)(a))
 - some peeping offenses: 14-208.6(4)(d)
 - *refer to statutes listed above for full list of qualifying convictions*

2. IF the offense is a reportable conviction, determine if the defendant:
 - is a **sexually violent predator** (14-208.20)
 - DA must provide notice; these are VERY RARE
 - Prior to sentencing, court shall order a presentence investigation by a *board of experts*
 - At sentencing, “after taking the presentencing report under advisement,” make written findings of fact
 - NOTE: this is different than a “sexually violent *offense*”
 - Is a **recidivist** (14-208.6(2b))
 - Prior “reportable conviction” [see above]
 - Was convicted of an **aggravated offense** (14-208.6(1a))
 - Any criminal offense that includes either:
 - Vaginal, anal, oral penetration through the use of force or threat of serious violence, or
 - Vaginal, anal, oral penetration with a victim under 12
 - Was convicted of an **offense involving the physical, mental, or sexual abuse of a minor**

3. IF sexually violent predator, recidivist, or convicted of aggravated offense:
LIFETIME MONITORING (use AOC-CR-615)

4. IF defendant was convicted of **rape involving minor or sex offense involving minor** (14-27.2A or 14-27.4A): **LIFETIME MONITORING** (use AOC-CR-615) [effective for offenses committed on/after December 1, 2008]

¹ Satellite-based monitoring hearings occur either at the time of sentencing (14-208.40A), or at a later “bring back” hearing (14-208.40B), when no determination has been made.

5. IF the offense involved physical, mental, or sexual abuse of minor (but not one of the four above (predator, recidivist, aggravated, rape/sex offense minor): **COURT-DETERMINED MONITORING PERIOD** (use AOC-CR-615)

- To determine monitoring period:
 - Order DOC to conduct a risk assessment (STATIC-99), allowing at least 30 days but not more than 60 days to complete
 - Court shall determine, based on DOC risk assessment, whether the offender requires the highest possible level of supervision and monitoring.
 - If so, order enrollment in SBM for court specified (discretionary) length of time (probably no longer than the period of registration, under 14-208.40(a)(2)(ii) and 14-208.43(d1).
 - If not, do not order enrollment in SBM

NOTE ALSO: mandatory special conditions of probation for reportable offenses, sex abuse of minor, and physical or mental abuse of minor (AOC-CR-603 page two, side two)

NOTE AS WELL: If the dates of offense or conviction are prior to October 1, 2001, the statutes may not apply (the definitions, such as “aggravated” came into effect on that date).

NEW STATUTES

House Bill 933 (effective for offenses committed on/after December 1, 2008)

1. Rape and Sex Offenses Involving Child

- 14-27.2A: Rape of child under 13 (when defendant is at least 18)
 - Note: a lesser included offense is 14-27.2(a)(1), rape of child under 13 when defendant is at least 12 and four years older
- 14-27.4A: Sex Offense with child under 13 (defendant at least 18)
 - Note: a lesser included offense is 14-27.4(a)(1), sex offense with child under 13 when defendant is at least 12 and four years older
- Sentencing and SBM effects
 - Sentenced according to structured sentencing, but mandatory minimum 300 months active for convictions of rape of child or sex offense of child
 - Upon a finding of “egregious aggravation,” the court may deviate from structured sentencing, and from the mandatory minimum of 300 months active, up to and including life imprisonment without parole
 - Egregious aggravation may be found when “the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes”
 - Findings of fact required for a finding of egregious aggravation, including:
 - “Further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors was designed to cover,” and/or
 - “based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim”
 - For these offenses, mandatory SBM for life

Unresolved Questions

- *submit “egregious aggravation” to jury?*
- *Notice required as with “regular” aggravators?*
- *Plead in indictment like non-statutory aggravators?*

2. Sex offender unlawfully on premises (14-208.18)
 - Unlawful for registered persons who have violated Article 7A (in general, rape and sex offenses) or any offense where victim under 16 at time of offense, to knowingly be at the following:
 - Any place intended primarily for the use, care, or supervision of minors, including schools, children's museums, child care centers, nurseries, playgrounds
 - Within 300 feet of above-type facilities when located at malls, shopping centers, etc
 - At any place where minors gather for regularly scheduled educational, recreational, or social programs
 - Exceptions for medical care, parent at school, vote (must notify principal)
3. Other sex offenses have been moved one class higher (*see also Senate Bill 132*):
 - First degree sexual exploitation of a minor is a Class C Felony (14-190.16)
 - Second degree sexual exploitation of a minor is a Class E Felony (14-190.17)
 - Third degree sexual exploitation of a minor is a Class H Felony (14-190.17A)
 - Promoting prostitution of a minor is a Class C Felony (14-190.18)
4. New Registration Requirements
 - Period of Registration is 30 years (can petition Superior Court after 10 years) [note: current law requires 10 year registration]
 - Must register within 3 days and notify sheriff of change of address within 3 days [note: current law allows 10 days]
 - Day cares, schools shall register to receive email notification when registered sex offender moves within one mile radius
5. Bond issues in probation violation/post-release supervision cases of sex offenders
 - Probation Violation case: prior to release with or without bail, if a registerable offense, court must make finding that probationer is not a danger to the public (15A-1345(b))
 - Post-release Supervision case: for a registerable offense, notwithstanding above, releasee shall be detained without bond until the preliminary hearing is conducted (probable cause hearing within 7 working days of arrest)

Senate Bill 1736

(Definitions effective December 1, 2008 and additional registration requirements effective for persons requiring to be registered on or after May 1, 2009 (those already subject to registration prior to May 1, 2009 and who continue to be subject to registration after May 1, 2009 do not violate the law so long as they provide the additional required information at the first verification of information that occurs after May 1, 2009)

In general, the new law requires that online identifying information be included in the registry, and creates a database of online identities that can be accessed by internet and other electronic companies to screen new users or compare its users to the registry.

1. New definitions in 14-208.6 –internet, email, entity, online identifier, etc.
2. Registration information to be provided includes “online identifiers”
3. Person required to register who changes “online identifier” or obtains new “online identifier” must inform Sheriff within 10 days
4. “Online identifier” information in registry may be released to internet “entities”
5. Two crimes have been added to the definition of “sexually violent offense,” thus making those crimes reportable:
 - G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile)
 - G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by a parent or guardian)
 - Section 12 of the bill makes these crimes reportable for “persons convicted on or after [Dec. 1, 2008], and to all persons released from a penal institution on or after that date.”

Unresolved question: House Bill 933 ratified 3 days later than Senate Bill 1736, and changed all registration deadlines in the existing 14-208.9 from 10 days to 3 days, but did not address the new section (e) of 14-208.9 created in Senate Bill 1736

Senate Bill 132

(except for a portion of the bill relating to civil liability for online networking sites, the act applies to offenses committed on or after December 1, 2008.)

1. New definitions in 14-190.13 – “harmful to minors,” “material,” “sexual activity,” etc.
2. Some sex offenses have been moved one class higher (*see also House Bill 933*):

- a. First degree sexual exploitation of a minor is now a Class C Felony (14-190.16(d)).
 - b. Second degree sexual exploitation of a minor is now a Class E Felony (14-190.17(d)).
 - c. Third degree sexual exploitation of a minor is now a Class H Felony (14-190.17A(d)).
 - d. Solicitation of child by computer to commit an unlawful sex act is still a Class H Felony, unless the defendant or someone else actually appears at the meeting location, then the violation is a Class G Felony (14-202.3(c)).
2. Registered sex offenders are banned from using commercial social networking sites (14-202.5). A violation is a Class I Felony.
 3. Registered sex offenders are banned from obtaining name changes.

NEW FORMS

AOC-CR-601,602,603, 604

- Felony and Misdemeanor judgment forms (active and suspended)
- Forms now have two relevant findings blocks:
 - Reportable conviction. If so, go to
 - Special conditions (if probation) and to AOC-CR-615
 - Physical/mental or sexual abuse of minor
 - for use when you want to use special conditions for sexual/physical/mental abuse of minor, but the conviction offense is not “reportable offense,” under 14-208.6(4) ie, assault on a child
- Mandatory Special conditions have changed
 - Use #7 for all reportable convictions
 - Use #8 if involves sexual abuse of minor but is not reportable (rare, usually in cases of plea to lesser charge)
 - Use #9 if involves physical or mental but not sexual abuse, and not reportable

AOC-CR-615

Old form: one side for lifetime SBM and one side for court-determined SBM

New form: one side for active sentence and one side for suspended sentence

AOC-CR-261 (Notification to Defendant of Requirement to Register)

- Court pronouncing sentence shall conduct, *at the time of sentencing*, the notification procedures (inform of requirement, obtain registration information – ok to have probation obtain registration information)

AOC-CR-618 (Blank Findings Form)

- To find egregious aggravators

CASELAW

North Carolina Courts

State v. Sakobie, 165 N.C. App. 447 (2004).

Court upholds registration statutes as civil and not a criminal penalty, and thus not an unconstitutional ex post facto law.

Standley v. Town of Woodfin, 362 N.C. 328 (2008).

Ordinance preventing registered sex offenders from knowingly being on or in town parks upheld.

- Right to intrastate travel not affected because not a right of function necessary to carry out daily life activities
- Not a fundamental right – simply not comparable to other fundamental rights which require narrow tailoring (right to marry, have children, marital privacy, etc)
- Ordinance meets rational basis test (“it is not necessary for the courts to determine the actual goal or purpose of the governmental action at issue; instead, any conceivable legitimate purpose is sufficient”): protection of minors and others from sexual attacks is a legitimate governmental interest and the ordinance is rationally related to that interest

State v. Abshire (no cite yet, COA07-1185)

Court defines “address” as the place where a person resides and receives mail. Defendant convicted for failure to comply with sex offender registration. Vacated (but with dissent).

Defendant required to register by providing certain information, including “home address,” which is not defined. Registered at new address, soon thereafter defendant and her kids began spending the night at defendant’s parents’ house (not the registered address). Slept at registered address intermittently, received mail, did laundry, fed pets at registered address as well. Testified she did not intend to move to defendant’s parents’ house. Court of Appeals held insufficient evidence that defendant changed her address, defining “home address” in this context as “a place where a registrant resides and where that registrant receives mail or other communication.” The Court distinguishes “home address” and “domicile.” The Court found that the

State did not present evidence of any other indicia that defendant had changed her residence (removal of personal belongings, didn't completely stop sleeping at registered address, did not stop holding registered address out to the public as her address). Dissent would hold that an address is the place where the person is actually living, whether temporary or permanent, consistent with Supreme Court's definition of residence (again, distinguishing domicile).

Question: will homeless be in compliance with law by listing homeless shelter or some other residence where they reside for some period of time, leave, but continue to receive mail and other communications? Is the purpose of the statute met?

State v White, 162 N.C. App. 183 (2004).

Court of Appeals held that the State does not have to prove that the defendant had actual knowledge of his violation of registration statute, or that the defendant intended to violate the statute.

Court goes on to analyze federal and state ex post facto issues jointly. Based on US Supreme Court holding in Smith v. Doe, 538 U.S. 84 (2003), upholding Alaska sex offender registration law, and utilizing the Mendoza-Martinez factors (see page 11 below), the NC Court of Appeals finds NC sex offender registration law is not an unconstitutional ex post facto law.

State v. Williams, 660 S.E. 2d 200, 2008 N.C. App. LEXIS 870 (2008).

Defendant convicted of second-degree rape and sentenced to active term. Defendant is not a resident of North Carolina, or a non-resident student or non-resident worker, and therefore claims the registration and surveillance statutes do not apply. Court finds defendant was not ordered to register. Court finds that the defendant is subject to registration because the law states the defendant shall register within 10 days of his release (and he was sentence to an active term), and that the requirement to enroll in SBM goes into force upon completion of his sentence.

The Court declined to speculate on whether or how the program might be implemented upon defendant's return to Arizona or Nevada because there was no evidence available regarding the DOC policies and procedures of the program in such situations.

Helpful caselaw on SBM from other jurisdictions

Doe v. Bredesen, 507 F 3d 998 (2007) (6th Circuit)

SBM is not an unconstitutional ex post facto law.

After conviction, Tennessee enacts a more stringent registration program (from 10 years to lifetime) and SBM program, both of which apply to defendant retroactively. Doe alleges effect on lifestyle and freedom of movement because of the obvious nature of the GPS box, effect on GPS of being inside his home and other buildings, improper GPS transmissions, among other effects. The Court examines the case on ex post facto issues:

- Whether the legislature intended to establish civil proceedings
- If so, whether the scheme is so punitive in purpose or effect to negate civil intent
- Uses the Mendoza-Martinez factors to determine ex post facto issue:
 - Whether the scheme has traditionally been regarded as punishment. The Court held registration and surveillance not traditional punishments, and wearing the GPS box is not akin to public shaming.
 - Whether the scheme imposes an affirmative disability or restraint. The Court held the length of incarceration not increased, offenders not prevented from changing jobs or residences or traveling, and that registration and surveillance less harsh than other sanctions courts have held to be non-punitive
 - Whether the scheme promotes the traditional aims of deterrence. The Court held that there were deterrent effects, but that does not negate the overall remedial and regulatory nature of the act
 - Whether the scheme has a rational connection to a nonpunitive purpose. The Court held that the statute's recitation of statistics in its preamble allowed a rational conclusion that sex offenders present an unusually high risk of recidivism, and that stringent registration and surveillance can reduce the risk and protect the public, and when there is a rational connection to a nonpunitive purpose, the court should not substitute its judgment for that of the legislature. Additionally, the requirement of a rational connection is not demanding: a statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.
 - Whether the scheme is excessive in relation to its regulatory purpose. The Supreme Court had previously held that this is not an exercise in determining whether the legislature has made the best possible choice,

but rather whether it is reasonable in light of the nonpunitive objective. The Court held the scheme was not excessive in this case.

- The Court determined that the two other factors were not germane in this case (whether the conduct was already a crime, and whether the scheme came into effect only upon a finding of scienter).

Dissent in this case would hold that SBM program subjects the wearer to public ridicule, similar to public shaming and humiliation that are well recognized historical forms of punishment. Dissent holds it is not an affirmative disability or restraint. Dissent holds it promotes a traditional aim of punishment (deterrence). Dissent holds there is a rational connection to a non-punitive purpose. Dissent holds SBM is excessive with respect to its non-punitive purpose.

- Note: SBM in Tenn is only for term of formal supervision, not for life

Kennedy v. Mendoza-Martinez, 372 U.S 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

Factually, the case is about draft evasion and a federal statute that divested draft dodgers of citizenship without sufficient procedural safeguards. The US Supreme Court laid out a multi-part test to determine whether a statute is civil or criminal, and thus subject to ex post facto review.

The seven factors considered have been held to be “neither exhaustive nor dispositive” but rather a useful framework in the court’s determination. See Smith, 538 U.S. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 179. Those factors include:

- (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.

Smith v. Doe, 538 US 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

In evaluating whether a statutory sex offender registration scheme imposed an affirmative disability or restraint, the U.S. Supreme Court inquired about the effects of the Act saying, “if the disability or restraint is minor and indirect, its effects are unlikely to be punitive.” The Court found that sex offender registration provisions did not prevent sex offenders from pursuing activities, leaving them free to change jobs and residences. The Court rejected the argument that the registration provisions make it harder for sex offenders to obtain jobs and residences because of the easy access the provisions give to the public of the offenders’ criminal status. The Court said that such consequences “flow not from the Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record.”

Issues on the Horizon

1. Fact v. elements based test

Is the court to base SBM findings on the facts as presented, or solely on the elements of the conviction? For example, the elements necessary for conviction of indecent liberties do not require victim under the age of 12 or penetration, but both could be present, and would support a finding that the offense was an aggravated offense. In this situation, a strict application of the elements based test would not lead to SBM; strict application of a facts based test would lead to SBM.

2. “Evidence” for purposes of SBM

The statute requires that the DA present “evidence” ... at the time of sentencing. Does “evidence” require sworn testimony or the introduction of exhibits that conform to the Rules of Evidence, or is a factual basis presented by the district attorney sufficient? “Evidence” usually means sworn testimony, but at sentencing, the rules of evidence do not generally apply.

3. Court Determined Length of SBM

If DOC returns a STATIC-99 on a defendant and indicates something other than a HIGH level of risk, may the Court nonetheless order a period of SBM? Watch State v. Kilby, currently on appeal.

4. Dates

When were the various statutes enacted? If the law was not in effect at the time a crime was committed, is it applicable? For example, if “aggravated” was defined as of October 1, 2001, would an offense committed prior to that date “count” for purposes of determining whether a person is a recidivist? The North Carolina Department of Corrections as a general rule believes at least one qualifying conviction must be subsequent to October 1, 2001 in order for the person to qualify as a recidivist.

5. Ex post facto issues

Is the retroactive application of SBM a violation of the constitutional prohibitions on ex post facto laws? Is a person who was sentenced for a rape in 1980 and who is released from prison this year subject to additional punishment by the requirement that the person be subject to SBM for life? Or is SBM a civil scheme designed primarily to protect the public and assist law enforcement?

6. Pending legislation

Jessica’s Law (Senate Bill 2063) [*not enacted at this time – passed the Senate, currently in House Judiciary II Committee*]

- Clarify purpose of sex offender registration and monitoring in 14-208.5
- Adds to Indecent Liberties a new section, 14-201.1(c), which requires findings regarding whether the offender is at least 18 years old and whether the offender touched in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothes covering them, of a victim less than 13 years old (or forced or enticed the victim to touch the offender).
- Modifies the definition of “aggravated offense” to include
 - victims less than 13 years old (current law states 12 years old)
 - Indecent Liberties where facts found that meet 14-201.1(c)
- Specifically legislates that SBM is retroactive and applies to any person released from prison by parole or post-release supervision, sentenced to intermediate punishment, or completes a sentence on or after August 16, 2006.
- Widens “bring back” provision to include situations in which the court did not make a determination at the time of sentencing or because the sentencing occurred prior to August 16, 2006.
- Raises fee from \$90.00 to \$95.00