

Lifetime SBM without Lifetime Registration

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The trial court's order regarding sex offender registration and satellite-based monitoring (SBM) in [State v. Johnson](#) was wrong in part. But also right in part. But ultimately wrong.

Robert Johnson was convicted of sexual offense with a child by an adult offender (under G.S. 14-27.4A at the time of his offense, now codified in [G.S. 14-27.28](#)) and sexual offense by a substitute parent. Based on those convictions, the trial court ordered him to register as a sex offender for life and enroll in SBM for life.

On appeal, the defendant argued that the lifetime registration order was erroneous.

The court of appeals agreed. The trial court based its lifetime registration order on its finding that the defendant had been convicted of an "aggravated offense." An aggravated offense, you may recall, is defined as one that includes "engaging in a sexual act involving vaginal, anal, or oral penetration," either through the use of force or the threat of serious violence, or with a victim who is less than 12 years old. [G.S. 14-208.6\(1a\)](#). Factually, the defendant's crimes appeared to fit the definition of an aggravated offense. He forced his wife's 10-year-old son to perform fellatio on him.

However, as discussed on this blog many times since 2009 (the first time was [here](#)), **the determination of whether an offense is aggravated is based only on the elements of the defendant's conviction offense, not on the facts underlying that conviction.** *State v. Davidson*, 201 N.C. App. 354 (2009). By the elements, sexual offense crimes require a "sexual act." "Sexual act" is defined to mean cunnilingus, fellatio, anilingus, anal intercourse, or the insertion of an object into another's anus or genitals. [G.S. 14-27.20\(4\)](#). Because some of those acts can be completed without penetration (cunnilingus, for example, requires mere stimulation by one person's tongue or lips of any part of a woman's genitalia—it does not require penetration, *State v. Ludlum*, 303 N.C. 666 (1981)), and because we evaluate whether an offense is aggravated based on the general elements of the offense, **no sexual offense is ever an aggravated offense.** Even if there's proof of penetration in a particular case, even if the defendant *admits* to penetration in a particular case, no sexual offense is an aggravated offense. Because the lifetime registration order was based on the trial court's finding that the defendant's convictions were aggravated, the court of appeals reversed the trial court.

Ordinarily lifetime registration and lifetime SBM go hand in hand; they both apply to the same categories of offenders (aggravated offenders, recidivists, and sexually violent predators). And so the appellate court's determination that Johnson's crimes were not aggravated offenses generally would mean no lifetime registration *and* no lifetime SBM.

There is, however, an additional category of offender subject to lifetime SBM: those with a conviction under [G.S. 14-27.23](#) (statutory rape of a child by an adult) or -27.28 (statutory sexual offense with child by an adult) (or their precursor offenses, formerly codified in G.S. 14-27.2A and -27.4A, respectively). Because Mr. Johnson was convicted under G.S. 14-27.4A, the court could properly have ordered him to enroll in SBM for life. So that portion of the order was correct.

Or at least it could have been correct. Even though the defendant fell into a lifetime SBM eligibility category, the court of appeals concluded that that the trial court erred by ordering SBM without first determining whether it was a

reasonable search in light of *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368 (2015). As discussed [here](#), the burden is on the State to establish the reasonableness of SBM. Because the State presented no evidence to demonstrate the reasonableness of SBM in Johnson's case, the court of appeals reversed the SBM order and remanded for a reasonableness determination under *Grady*. (Many recent SBM orders have been reversed on this ground.)

Assuming that the trial court finds SBM to be a reasonable search in Johnson's case, the defendant will be left in the slightly odd position of being subject to lifetime SBM but non-lifetime registration. It's not clear what will happen when, after 30 years, registration ends. A person subject to lifetime SBM may petition the Post-Release Supervision and Parole Commission for termination of SBM one year after the completion of the underlying sentence, including any related period of probation, parole, or post-release supervision. [G.S. 14-208.43\(a\)](#). The Commission receives relatively few such petitions, however, and—as far as I know—has never granted one.