

More SBM Fallout from the Supreme Court

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I mentioned in my [last post](#) that *State v. Bowditch* was not the only satellite-based monitoring (SBM) case recently decided by the Supreme Court of North Carolina. The court also affirmed four other decisions from the court of appeals and decided it had improvidently allowed discretionary review in another. Although those decisions turned in part on the underlying question of whether SBM is punishment, there were different issues at stake in each case. This post summarizes the various issues that we can now consider to have been resolved—either by affirmance or avoidance—after *Bowditch* and its companion cases.

[State v. Hagerman](#). The trial court determined that the defendant, convicted of four counts of indecent liberties with a child based on acts that occurred in 2005, was an aggravated offender and ordered him to enroll in SBM for life. The defendant did not raise any *ex post facto* argument, but instead argued that SBM enhanced his punishment in violation of his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the trial court's aggravated-offense determination rested on facts not conceded by the defendant or found by a jury beyond a reasonable doubt. Over a dissent, the court of appeals concluded that SBM is part of a civil regulatory scheme and thus does not implicate a defendant's Sixth Amendment jury-trial rights under *Apprendi* at all. [The supreme court affirmed](#). (It appears to me the defendant should not have been required to enroll in lifetime SBM as a statutory, not constitutional, matter—as discussed below, indecent liberties can never, by its elements, be an aggravated offense. The defendant did not raise the issue in his brief.)

[State v. Morrow](#). The trial court found that the defendant, convicted of indecent liberties with a child based on acts that occurred in 2005, committed an offense involving the sexual abuse of a minor. The court then found, based on the defendant's "moderate risk" Static-99 score, that the defendant required "the highest possible level of supervision and monitoring" and ordered him to enroll in SBM for "7-10 years." The court of appeals held that SBM was not punishment and thus did not violate the Ex Post Facto Clause—a conclusion obviously upheld by the supreme court's reasoning *Bowditch*. The court of appeals *also* held in *Morrow* that G.S. 14-208.40B(c) does not limit a trial court to the Static-99 when determining whether a defendant requires the highest possible level of supervision and monitoring. Thus a finding of "high risk" is not a necessary prerequisite to an order to enroll in SBM, provided the trial court makes findings of fact (based on evidence presented by the State) in support of its determination that the defendant might pose a risk higher than that indicated by the Static-99 score alone. Additionally, the court of appeals held that the trial court erred by ordering the defendant to enroll in SBM for a range of "7-10" years. It should have ordered enrollment for a definite length of time (e.g., "7 years"), not an indeterminate range. The latter conclusions do not necessarily flow from the supreme court's holding in *Bowditch*, but they were [equally affirmed](#).

[State v. Vogt](#). The trial court found, based on the defendant's convictions for indecent liberties with a child in 2006 and third degree sexual exploitation of a minor in 2005, that he was a recidivist under G.S. 14-208.6(2b) and ordered him to enroll in SBM for life. The court of appeals rejected his *ex post facto* argument, refusing to take judicial notice of DOC's interim policy on sex offender management to aid the court's analysis of the SBM regime's purportedly punitive effect. There was some discussion in *Vogt* as to whether imposition of SBM violated the defendant's negotiated plea agreement, but, based on the way the issue was briefed, the appellate court never had to reach it to decide the case. [The supreme court affirmed](#).

[State v. Wagoner](#). The trial court found, based on the defendant's convictions of reportable crimes in 1996 and 2005, that he was a recidivist and ordered him to enroll in SBM for life. In addition to rejecting the defendant's ex post facto argument, the court of appeals reached several additional issues. The defendant argued that he received ineffective assistance of counsel based on his lawyer's failure to raise a double jeopardy argument at the SBM determination hearing. The court of appeals rejected this argument on two fronts. First, it noted that a "claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that SBM is not a criminal punishment." Second, the court concluded that even if it were to consider the defendant's ineffective assistance argument, the underlying double jeopardy argument would fail because SBM is a civil regime that doesn't implicate the double jeopardy clause. The court of appeals also held that the defendant's negotiated plea was not rendered invalid by the later imposition of SBM, for the reasons set out in [State v. Bare](#), discussed [here](#). The [supreme court affirmed](#) all of the above. (As an aside, there's a collateral consequence argument under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), discussed [here](#), lurking in all of this. Jeff has been imploring me to write about it—he noted an Eleventh Circuit case on point [here](#)—and eventually I will.)

Finally, [State v. Singleton](#). The trial court ordered the defendant to enroll in SBM for life based on its conclusion that his 2006 conviction for indecent liberties with a child was an aggravated offense. The court of appeals reversed, citing its prior conclusion in [State v. Davison](#) that a trial court may consider only the "bare elements" of the crime of conviction when determining whether a particular offense was aggravated. The court of appeals rejected the State's argument that the trial court ought also to be permitted to consider uncontested evidence set out in the factual basis for the defendant's guilty plea. The supreme court initially granted the State's petition for discretionary review, 696 S.E.2d 697 (2010), but then determined when it issued *Bowditch* that discretionary review had been improvidently allowed. So, the decision of the court of appeals—and thus the elements-based approach to aggravated-offense determinations—stands. (I'm not sure why the supreme court's [order declining to review Singleton](#) describes the court of appeals opinion as unpublished. It was a published decision.)