

# SEX OFFENDER REGISTRATION AND MONITORING

James Markham  
Assistant Professor, UNC School of Government  
Chapel Hill, NC  
November 19, 2010

**Scope note.** This manuscript sets forth the basic law on sex offender registration and satellite-based monitoring (SBM) in North Carolina. Part I of the paper sets out which offenders must register in North Carolina and for how long. It also touches on offenders' registration verification requirements and the criminal ramifications of failing to comply with them. Finally, Part I covers the process through which offenders may petition to terminate registration.

Part II summarizes North Carolina's program for satellite-based monitoring (SBM) of sex offenders. It sets out the law's effective date coverage and basic eligibility criteria, as well as the hearing procedure for determining which offenders are monitored for life and which are monitored for a period of time determined by the court. Part II briefly addresses how monitoring requirements are enforced and how offenders can request termination of SBM enrollment.

This paper does not address the various restrictions (such as residential and employment restrictions) applicable to registered sex offenders in North Carolina. Nor does it cover in detail the various constitutional challenges that have been mounted against sex offender registration and monitoring over the years. Finally, it does not address registration of certain delinquent juveniles under G.S. 14-208.26.

## I. Sex Offender Registration

North Carolina's sex offender and public protection registry has existed since 1996. The registry, available online at <http://sexoffender.ncdoj.gov>, is designed to share information about registered offenders with the public and to promote information sharing between law enforcement agencies.<sup>1</sup> The process for determining whether a person is required to register begins with a determination as to whether he or she has a *reportable conviction*.

### A. Reportable convictions

North Carolina residents and certain nonresident workers and nonresident students who have a *reportable conviction* must register with the sheriff on the sex offender and public protection registry

---

This manuscript benefits from legislative summaries prepared annually by School of Government faculty member John Rubin. See *2008 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN 2008/06 (Nov. 2008), available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0806.pdf>; *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN 2008/01 (Jan. 2008), available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0801.pdf>; *2006 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN 2007/03 (Jan. 2007), available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0703.pdf>.

<sup>1</sup> G.S. 14-208.5.

in their county of residence.<sup>2</sup> “Reportable conviction” is defined in G.S. 14-208.6(4) to include the offenses set out below.

The list of reportable offenses has grown over time, and the General Assembly has not always used the same effective-date language when adding crimes to the list. Some effective dates are based on the date the offender is convicted or released from a penal institution, some are based on offense date, and some are unclear. None of the dates appear in the General Statutes; they are instead found in the Session Laws. Thus, when determining whether a particular offense is reportable, it is important to consider the effective date provision of the legislation that added that crime to the statutory list of reportable offenses to be sure the offense is covered.

### **1. North Carolina convictions that are reportable.**

The following North Carolina convictions are reportable convictions for adults and, except as noted, for juveniles tried as adults.<sup>3</sup>

**A final conviction for an offense against a minor.** The following three crimes are offenses against a minor under G.S. 14-208.6(1i), but only if they are committed against a minor and the person committing the offense is not the minor’s parent.<sup>4</sup> The court of appeals has interpreted *parent* to mean only a victim’s biological or adoptive parent; the term does not include a stepparent, caregiver, or other person acting in loco parentis.<sup>5</sup> The law does not expressly say so, but *minor* in this context probably means a victim under 18 years of age.

- Kidnapping (G.S. 14-39)
- Abduction of children (G.S. 14-41)
- Felonious restrain (G.S. 14-43.3)

These crimes were all made reportable by legislation that was made effective April 1, 1998.<sup>6</sup> That law did not specify whether it was based on offenses committed on or after that date, convictions on or after that date, or releases from prison on or after that date. At a minimum, it applies to offenses committed on or after that date.

**A final conviction for a sexually violent offense.** The following crimes are sexually violent offenses under G.S. 14-208.6(5) if they fall within the applicable effective date provision:

- First-degree rape (G.S. 14-27.2) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]

---

<sup>2</sup> G.S. 14-208.7(a).

<sup>3</sup> Effective April 1, 1998, a juvenile transferred to superior court pursuant to G.S. 7B2200 who is convicted of sexually violent offense or an offense against a minor as defined in G.S. 14-208.6 shall register just as an adult convicted of the same offense must register. G.S. 14-208.6B; S.L. 1997-516. Convictions for peeping crimes by juveniles transferred to superior court are never reportable.

<sup>4</sup> Prior to December 1, 1999, the definition of offense against a minor also excluded offenses committed by the victim’s “legal custodian.” That exception was eliminated by S.L. 1999-363.

<sup>5</sup> State v. Stanley, \_\_ N.C. App. \_\_, 697 S.E.2d 398 (2010).

<sup>6</sup> S.L. 1997-516.

- Rape of a child by an adult offender (G.S. 14.27.2A) [committed on or after December 1, 2008. S.L. 2008-117]
- Second-degree rape (G.S. 14-27.3) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- First-degree sexual offense (G.S. 14-27.4) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Sexual offense with a child by an adult offender (G.S. 14-27.4A) [committed on or after December 1, 2008. S.L. 2008-117]
- Second-degree sexual offense (G.S. 14-27.5) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Sexual battery (G.S. 14-27.5A) [committed on or after December 1, 2005. S.L. 2005-130]
- Attempted rape or sexual offense (G.S. 14-27.6) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Intercourse and sexual offense with certain victims (G.S. 14-27.7) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Statutory rape or sexual offense of a person who is 13, 14, or 15 years old by a defendant who is at least six years older (G.S. 14-27.7A(a)) [committed on or after December 1, 2006. S.L. 2006-247]
- Subjecting or maintaining a person for sexual servitude (G.S. 14-43.13) [committed on or after December 1, 2006. S.L. 2006-247]
- Incest between near relatives (G.S. 14-178) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Employing or permitting a minor to assist in offenses against public morality and decency (G.S. 14-190.6) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Felonious indecent exposure (G.S. 14-190.9) [committed on or after December 1, 2005. S.L. 2005-226]
- First-degree sexual exploitation of a minor (G.S. 14-190.16) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Second-degree sexual exploitation of a minor (G.S. 14-190.17) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Third-degree sexual exploitation of a minor (G.S. 14-190.17A) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Promoting the prostitution of a minor (G.S. 14-190.18) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Participating in the prostitution of a minor (G.S. 14-190.19) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Taking indecent liberties with children (G.S. 14-202.1) [convicted or released from penal institution on or after January 1, 1996. S.L. 1995-545]
- Solicitation of a child by computer or other electronic device to commit an unlawful sex act (G.S. 14-202.3) [committed on or after December 1, 2005. S.L. 2005-121]
- Taking indecent liberties with a student (G.S. 14-202.4) [convicted or released from penal institution on or after December 1, 2009. S.L. 2009-498]

- Parent or caretaker commit or permit an act of prostitution with or by a juvenile (G.S. 14-318.4(a1)) [convicted or released from penal institution on or after December 1, 2008. S.L. 2008-220]
- Commission or allowing of a sexual act upon a juvenile by a parent or guardian (G.S. 14-318.4(a2)) [convicted or released from penal institution on or after December 1, 2008. S.L. 2008-220]

### **Inchoate offenses and aiding and abetting**

**Attempts.** A conviction for an attempt to commit an offense against a minor or a sexually violent offense is a reportable conviction.<sup>7</sup> Attempts were made reportable by legislation effective April 1, 1998.<sup>8</sup> That law did not specify whether it was based on offenses committed on or after that date, convictions on or after that date, or releases from prison on or after that date. At a minimum, it applies to attempts committed on or after that date. If the target offense has an effective date later than April 1, 1998, use the effective date for the target offense.

**Solicitations and conspiracies.** A conviction for solicitation or conspiracy to commit an offense against a minor or a sexually violent offense is a reportable conviction.<sup>9</sup> Solicitation and conspiracy are reportable for offenses committed on or after December 1, 1999, unless the target offense has a later effective date.<sup>10</sup>

**Aiding and abetting.** A conviction for aiding and abetting an offense against a minor or a sexually violent offense is reportable only if the court sentencing the defendant finds under G.S. 14-208.6(4)(a) that the registration of that defendant furthers the purposes of sex offender registration, set out in G.S. 14-208.5.<sup>11</sup> Form AOC-CR-615 includes a check-box for the court to note this finding. Aiding and abetting offenses committed on or after December 1, 1999, may be reportable, unless the underlying offense has a later effective date.<sup>12</sup> Aiding and abetting secretly peeping is never reportable.

### **Secretly peeping**

The peeping crimes set out below are reportable convictions only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.<sup>13</sup> Inchoate

---

<sup>7</sup> G.S. 14-208.6(4)(a).

<sup>8</sup> S.L. 1997-516.

<sup>9</sup> G.S. 14-208.6(1m); -208.6(5).

<sup>10</sup> S.L. 1999-363.

<sup>11</sup> Those purposes are “to assist law enforcement agencies’ efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.” G.S. 14-208.5.

<sup>12</sup> S.L. 1999-363.

<sup>13</sup> G.S. 14-208.6(4)(d). Under G.S. 14-202(l), the sentencing court must consider whether the defendant is a danger to the community and whether requiring the defendant to register as a sex offender would further the purposes of the registry, set out in G.S. 14-208.5. *See* note 11, *supra*. If the court rules that the person is a danger to the community and that the person shall register, it must enter an order saying so. Form AOC-CR-615 includes a check-box for the court to note these findings.

peeping crimes and aiding and abetting peeping are never reportable, and juveniles tried as adults for peeping crimes are not required to register.

- Felony peeping (G.S. 14-202(d), (e), (f), (g), and (h)) [committed on or after December 1, 2003. S.L. 2003-303]
- Second or subsequent convictions for misdemeanor peeping (G.S. 14-202(a) or (c)) [committed on or after December 1, 2003. S.L. 2003-303]
- Second or subsequent convictions for misdemeanor peeping through use of a mirror or other device (G.S. 14-202(a1)) [committed on or after December 1, 2004. S.L. 2004-109].

## **2. Reportable convictions from other jurisdictions**

### **Convictions from other states.**

Some convictions from other states require registration in North Carolina if the offender establishes residency here. There are two ways convictions from other states may be considered reportable in North Carolina.

First, out-of-state convictions are reportable if they are substantially similar to an offense against a minor or a sexually violent offense, including conspiracies and solicitations to commit those offenses and aiding and abetting those offenses, but not attempts.<sup>14</sup> The effective date of the similar North Carolina offense determines whether the out-of-state conviction is covered. Peeping crimes from other states are not reportable under this provision of the law.

Second, convictions from another state of an offense that requires registration under the laws of that state are reportable in North Carolina, regardless of whether a conviction for a similar North Carolina crime requires registration here.

When added to the law in 2006, the second provision was made applicable to offenses committed on or after December 1, 2006, and to offenders who moved into North Carolina on or after that date.<sup>15</sup> Legislation passed in 2010 broadened that effective-date provision to make it applicable to any offender with a conviction for an offense that requires registration in another state, regardless of its offense date and regardless of the date the offender moved to North Carolina. However, that amendment to the effective date provision of the 2006 legislation had an effective date of its own: it was made “effective October 1, 2010, and appli[cable] to any person required to register as a sex offender under Article 27A of Chapter 14 of the General Statutes, any person serving an active sentence or on supervised probation, parole, or post-release supervision, for any offense, on or after that date, and any person convicted of a felony offense on or after that date.” Under that language, the change only applies to offenders who (1) are already registered in North Carolina for another crime, (2) are still in contact with the North Carolina criminal justice system by virtue of being incarcerated or under community supervision, or (3) come back into contact with the criminal justice system by virtue of a subsequent felony offense.<sup>16</sup>

---

<sup>14</sup> G.S. 14-208.6(4)(b).

<sup>15</sup> S.L. 2006-247.

<sup>16</sup> S.L. 2010-174.

## **Federal convictions**

A final conviction in a federal jurisdiction (including a court martial) of an offense substantially similar to an offense against a minor or a sexually violent offense, including conspiracies and solicitations to commit those offenses and aiding and abetting those offenses, but not attempts.<sup>17</sup> Eligible offenders convicted or released from a penal institution on or after April 3, 1997, must register under this law, unless the similar North Carolina offense has a later effective date.<sup>18</sup>

### **B. Who must register, and when**

**North Carolina residents.** North Carolina residents with a reportable conviction must register with the sheriff of the county where they reside. If an offender with a reportable conviction moves to North Carolina from another state, he or she must register within three business days of establishing residence here or whenever he or she has been in North Carolina for 15 days, whichever comes first.<sup>19</sup> Offenders convicted of a reportable crime in North Carolina who serve a sentence of active imprisonment must register within three business days of release from a penal institution or arrival in a county to live outside a penal institution. Offenders not sentenced to active imprisonment must register immediately upon conviction.<sup>20</sup>

**Nonresident students and nonresident workers.** Nonresident students and nonresident workers who have a reportable conviction or who are required to register in their state of residence must register with the sheriff of the county where they attend school or work.<sup>21</sup> A nonresident student is a person who is not a resident of North Carolina but who is enrolled in any type of school in North Carolina on a part-time or full-time basis.<sup>22</sup> A nonresident worker is likewise a person who is not a resident of North Carolina, but who carries on a vocation here for more than 14 (presumably consecutive) days, or for an aggregate period exceeding 30 days in a calendar year. Both part-time and full-time workers are covered, regardless of whether they receive compensation or any government or educational benefit.<sup>23</sup>

**Prerelease notification.** When an inmate who will be subject to registration upon release from a penal institution is due to be released, officials at the institution must inform the offender of his or her duty to register. Officials must provide the notice at least 10 but not more than 30 days prior to the inmate's release, and they must obtain a written statement from the inmate that he or she received the notice.<sup>24</sup> A

---

<sup>17</sup> G.S. 14-208.6(4)(d).

<sup>18</sup> S.L. 1997-15.

<sup>19</sup> This requirement has been deemed constitutional on its face and as applied to an offender who was provided actual notice by South Carolina of his duty to register as a convicted sex offender. Notice of the requirement to register in another state was sufficient to put defendant on notice to inquire into the applicable law in North Carolina when he relocated here. *State v. Bryant*, 359 N.C. 554 (2005).

<sup>20</sup> G.S. 14-208.7.

<sup>21</sup> G.S. 14-208.7(a1).

<sup>22</sup> G.S. 14-208.6(1k).

<sup>23</sup> G.S. 14-208.6(1).

<sup>24</sup> G.S. 14-208.8(a).

failure by correctional officials to follow the precise letter of the notification statute does not, however, excuse an offender from his or her obligation to register.<sup>25</sup>

**Notification at sentencing.** In cases not resulting in active imprisonment, the court pronouncing sentence should inform the offender of his or her duty to register and require the offender to sign a written statement indicating that he or she was so informed.<sup>26</sup> The court should use Form AOC-CR-261 to provide this notice.

### C. Length of registration

There are two broad categories of adult sex offenders in North Carolina, Part 2 registrants and Part 3 registrants (so named for the portion of Article 27A of Chapter 14 of the General Statutes that sets out the law applicable to them). Part 2 is the default category; Part 3 status, discussed in detail below, is reserved for more serious offenders. Strictly speaking, the determination of whether a person is a Part 2 or Part 3 registrant is made by the sheriff's office when the person registers. As a practical matter for most offenders, however, a court will make the decision when it determines whether a person is required to enroll in satellite-based monitoring.<sup>27</sup>

**Part 2 registrants.** The registration period for Part 2 registrants has changed over time. Prior to 2006, a Part 2 registrant had to register for 10 years from his or her date of initial county registration, after which the registration requirement would terminate automatically. In 2006, the General Assembly amended the 10-year requirement to provide that registration does not terminate automatically after 10 years; rather, the registrant had to petition the superior court to terminate the requirement after 10 years.<sup>28</sup> Until terminated, the registration period continued indefinitely. In 2008, the law was amended again to impose a 30-year baseline registration requirement, reducible to 10 by petition to the superior court under G.S. 14-208.12A.<sup>29</sup> That change appears to impose a 30-year maximum period of registration for Part 2 registrants, after which registration automatically terminates. The effective-date clause states that the change applies to registrations made on or after December 1, 2008. By using the term "made", the General Assembly appears to have intended for the change to apply to individuals who begin registration *or* are still required to register on or after December 1, 2008.<sup>30</sup>

---

<sup>25</sup> State v. Harris, 171 N.C. App. 127 (2005) (upholding a defendant's conviction for failure to register as a sex offender despite the fact that the Department of Correction notified him of his obligation to register only five days prior to his release from prison).

<sup>26</sup> G.S. 14-208.8(b).

<sup>27</sup> See Part II, *infra*.

<sup>28</sup> S.L. 2006-247. This legislation was made effective December 1, 2006, and applicable to "persons for whom the period of registration would terminate on or after that date." Thus, only a relatively small cohort of non-lifetime registrants, placed on the registry between its inception in January of 1996 and November 30, 1996, would have seen their registration terminate automatically without any requirement to petition the superior court.

<sup>29</sup> S.L. 2008-117.

<sup>30</sup> An alternative interpretation is that the 2008 amendments apply only to offenders who register *for the first time* on or after December 1, 2008. That interpretation creates two subcategories of offenders within the category of offenders who may petition to terminate registration after ten years: (1) those who began registering before December 1, 2008, who would apparently have to register indefinitely if unable to terminate registration; and (2) those who began registering on or after December 1, 2008, who would have to register for an absolute maximum of thirty years if unable to terminate registration before then. The Attorney General of North Carolina interprets the law this way. See N.C. Dep't Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public*

It is unclear whether time spent on another state's registry should count toward an offender's registration period in North Carolina. A publication from the Attorney General of North Carolina suggests that it should not count.<sup>31</sup>

**Part 3 registrants.** Registrants covered under Part 3 of Article 27 must register for life. Offenders who are *recidivists*, who are convicted of an *aggravated offense*, or who are classified as *sexually violent predators* are covered by Part 3.<sup>32</sup> Those italicized terms are defined as follows:

***Aggravated offense.*** An aggravated offense is one that includes a sexual act involving vaginal, anal, or oral penetration by force or the threat of serious violence, or a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.<sup>33</sup> Only offenses occurring after October 1, 2001, can be aggravated offenses.<sup>34</sup> If the court of appeals' interpretation of "aggravated offense" for SBM-determination purposes also applies to registration determinations, then whether or not an offense is aggravated may be determined only through an evaluation of the bare elements of the conviction offense.<sup>35</sup>

***Recidivists.*** A recidivist is an offender with a prior conviction for an offense described in G.S. 14-208.6(4), the statute defining a reportable conviction.<sup>36</sup> At least one of an offender's offenses must have taken place after October 1, 2001, for the person to qualify as a recidivist.<sup>37</sup> If the court of appeals' interpretation of "recidivist" for SBM-determination purposes also applies to registration determinations, then a prior offense need not itself be reportable (based on effective date) in order to qualify an offender as a recidivist.<sup>38</sup>

***Sexually violent predator.*** A sexually violent predator (SVP) is a person convicted of a sexually violent offense (not an offense against a minor, peeping crime, or crime from another jurisdiction) who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses.<sup>39</sup> This classification is rare in North Carolina; there are fewer than 20 SVPs in the state. Before classifying an offender as an SVP, the court must follow the procedure set out in G.S. 14-208.20.<sup>40</sup>

---

*Protection Registration Programs* (Nov. 2009), at 18, available at <http://ncdoj.gov/Protect-Yourself/Find-Sex-Offenders/SexOffenderRegPrograms.aspx>.

<sup>31</sup> *Id.* at 35.

<sup>32</sup> G.S. 14-208.23.

<sup>33</sup> G.S. 14-208.6(1a).

<sup>34</sup> S.L. 2001-373.

<sup>35</sup> *State v. Davison*, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 510 (2009). It is not necessarily the case, though, that an elements-based approach is required in the context of registration. The court of appeals' decision in *Davison* rested largely on language found in G.S. 14-208.40 and -208.40A—provisions applicable only to SBM determinations, not to registration obligations. *See infra* pages 14–15.

<sup>36</sup> G.S. 14-208.6(2b).

<sup>37</sup> S.L. 2001-373.

<sup>38</sup> *State v. Wooten*, 194 N.C. App. 524 (2008) (holding that a defendant's conviction for indecent liberties from 1989—well before that crime required registration—could nonetheless qualify as a prior conviction for the purpose of qualifying the offender as a recidivist when he committed a reportable offense in 2006). *See infra* page 15.

<sup>39</sup> G.S. 14-208.6(6).

<sup>40</sup> *See State v. Zinkand*, 190 N.C. App. 765 (2008) (vacating a trial court's determination that an offender was a sexually violent predator when the court failed to follow the proper statutory procedure).



## D. Verification of information

**Periodic verification.** Part 2 registrants must verify their registration information twice each year—on the anniversary date of their initial registration and again 6 months after that date.<sup>41</sup> Part 3 registrants must verify their information in person every 90 days after their initial registration date.<sup>42</sup>

**Changes of address.** If a registrant changes address, he or she must report to the sheriff in person and provide written notice of the new address within three business days of the change. If the move is to a different county, the registrant must also report to the sheriff of the new county and provide written notice of his or her new address within 10 days of the change.<sup>43</sup>

If the move is to a different state, the registrant must report in person to the sheriff of the county of current residence at least three business days before he or she intends to leave the state. If the registrant has indicated an intent to move to another state but then decides to remain in North Carolina, the registrant must, within three business days of the date upon which he or she was scheduled to leave North Carolina, report in person to the sheriff's office to inform the sheriff of his or her intent to remain in the state.<sup>44</sup>

Sometimes it is not clear precisely when a registrant has changed his or her address. The Supreme Court of North Carolina has said that a person has changed addresses when he or she establishes a new residence, defining residence as the “actual place of abode where he or she lives, whether permanent or temporary,” where “certain activities of life” occur.<sup>45</sup> Residence in this context, the court said, is not the same as domicile. Applying this definition, the supreme court determined that a defendant changed her address (and was thus guilty of failing to inform the sheriff of the change) when she moved in with her father for 5 to 6 weeks, even though she continued to visit, receive mail, and occasionally sleep overnight at her old address, her boyfriend's house.

A homeless registrant must update his or her registration information with the sheriff upon changing addresses, even if the new address is “a homeless shelter, a location under a bridge or some similar place.” For purposes of sex offender registration, every offender does, at all times, have an address of some sort.<sup>46</sup>

**Notice of temporary residence in another county.** A registrant who establishes a temporary residence—including a hotel, motel, or other transient lodging place—in another county must give notice of the temporary residence to the sheriff in his or her county of registration. A person must comply with this notification requirement if he or she is employed and maintains a temporary residence in another county for more than 10 business days within a 30-day period or for an aggregate period of 30 days in a calendar year. The registrant must provide the information within 72 hours after he or she knows or should know that he or she will be living and working in another county for the time frames set out above.<sup>47</sup>

---

<sup>41</sup> G.S. 14-208.9A.

<sup>42</sup> G.S. 14-208.24.

<sup>43</sup> G.S. 14-208.9(a).

<sup>44</sup> G.S. 14-208.9(b).

<sup>45</sup> State v. Abshire, 363 N.C. 322 (2009).

<sup>46</sup> State v. Worley, \_\_ N.C. App. \_\_, 679 S.E.2d 857 (2009).

<sup>47</sup> G.S. 14-208.8A.

**Failure to register.** Failing to register—either altogether, or by failing to comply with verification or change-of-address procedures—is a Class F felony.<sup>48</sup>

### **E. Terminating the registration requirement**

There are several ways in which a person’s obligation to register can end.

First, a registered offender who ceases to be a resident of North Carolina is no longer required to register in North Carolina, unless he or she is a covered nonresident worker or student.<sup>49</sup>

Second, a registrant’s obligation to register ends if the conviction requiring registration is reversed, vacated, or set aside, or if the registrant has been granted an unconditional pardon of innocence for the offense that required registration.<sup>50</sup>

Third, a Part 2 registrant may, after 10 years on the registry, petition the superior court in his or her county of residence to terminate the registration requirement. An offender is first eligible to petition 10 years after his or her date of “initial county registration.”<sup>51</sup> It is not clear whether this refers only to the person’s initial registration in North Carolina, or whether time spent on another state’s registry may also be counted.<sup>52</sup> Form AOC-CR-262 doubles as the registrant’s petition to terminate registration and the court’s order following a hearing.

The district attorney in the district in which the petition was filed must be given at least three weeks’ notice of the petition before the hearing is held. The prosecutor may, at the hearing, present evidence in opposition to the requested relief, or otherwise demonstrate the reasons why the petition should be denied.<sup>53</sup> There is no statutory right to appointed counsel at the hearing for indigent petitioners.

The superior court may grant a petition to terminate registration if the offender satisfies three criteria:

- (1) The petitioner demonstrates that he or she has not, since completing his or her sentence, been *arrested* (not convicted) for any crime that would require registration.
- (2) The requested relief complies with the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the state.
- (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.<sup>54</sup>

---

<sup>48</sup> G.S. 14-208.11.

<sup>49</sup> *See supra* page 6.

<sup>50</sup> G.S. 14-208.6C.

<sup>51</sup> G.S. 14-208.12A.

<sup>52</sup> *See supra* note 31 and accompanying text.

<sup>53</sup> G.S. 14-208.12A(a2).

<sup>54</sup> G.S. 14-208.12A(a1).

Regarding G.S. 14-208.12A(a1)(1), an offender who has been arrested (or even convicted) for failing to register as a sex offender under G.S. 14-208.11 is not categorically barred from obtaining relief from the court on account of the first prong. Failure to register is not itself a reportable conviction, and thus does not “require registration” under Article 27A. Of course, any offender who has been arrested for failing to register may fail the third prong of the test if the judge believes the petitioner is a current or potential threat to public safety. It is not clear whether an arrest for a reportable crime that is later deemed improper would nonetheless serve to disqualify an offender from removal from the registry under the first prong.

As for the second prong, its meaning is not entirely clear. For over a decade, North Carolina law on sex offender registration has flowed from mandates set out in federal law. States must enact laws that meet those standards, or risk losing certain federal grant funds. The Jacob Wetterling Act (1994) was the initial federal legislation that established minimum requirements for the states to register sex offenders.<sup>55</sup> It has since been amended by Megan’s Law (1996),<sup>56</sup> the Pam Lychner Act (1996),<sup>57</sup> the Jacob Wetterling Improvements Act (1997),<sup>58</sup> the Adam Walsh Act (2006),<sup>59</sup> and the KIDS Act of 2008.<sup>60</sup>

Title I of the Adam Walsh Act, called the Sex Offender Registration and Notification Act, or SORNA, enacted a substantially more stringent set of standards for sex offender registration. The act originally required states to substantially implement these new standards by July 27, 2009, with up to two one-year extensions granted by the Attorney General of the United States, or lose 10% of Byrne Justice Assistance Grant funds. Because no states were in compliance by the original deadline, the Attorney General granted a blanket one-year extension, giving states until July 27, 2010, to comply. Then, in 2010, the Attorney General granted another extension to July 27, 2011, to all states except Delaware, Florida, and Ohio, which have already substantially complied with SORNA.<sup>61</sup>

Among other requirements, SORNA:

- Broadens the offenses for which a state must require registration;
- Requires states to make SORNA registration requirements retroactive for certain offenders;
- Imposes regular adult registration requirements on certain juveniles; and
- Establishes a three-tier schedule of offense classification, with new minimum registration periods for each tier.<sup>62</sup>

---

<sup>55</sup> Pub. L. No. 103-322, 108 Stat. 1796, 2038–42 (1994).

<sup>56</sup> Pub. L. No. 104-145, 110 Stat. 1345 (1996).

<sup>57</sup> Pub. L. No. 104-236, 110 Stat. 3093 (1996).

<sup>58</sup> Pub. L. No. 105-119, 111 Stat. 2440 (1997).

<sup>59</sup> Pub. L. No. 109-248, tit. I, 120 Stat. 590–611 (2006).

<sup>60</sup> Pub. L. No. 110-400, 122 Stat. 4224 (2008).

<sup>61</sup> The Attorney General’s memorandum granting the extension is available at [http://www.ojp.usdoj.gov/smart/pdfs/SORNA\\_Extensions\\_Granted.pdf](http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf).

<sup>62</sup> A full discussion of SORNA and the United States Department of Justice regulations implementing the law is available at Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification; Notice, 73 Fed. Reg. 38,030 (July 2, 2008) [hereinafter *Final Guidelines*]. The Department of Justice also issued Supplemental Guidelines in 2010, to respond to the KIDS Act and to address other issues arising in jurisdictions’ implementation of SORNA. The Supplemental Guidelines, which have yet to become final at the time of this writing, are available at 75 Fed. Reg. 27,362 (May 14, 2010).

Because North Carolina will eventually need to adopt these new minimum periods to continue to receive federal funds, a court arguably ought to refuse to terminate registration if doing so would run afoul of SORNA requirements. These are, after all, federal standards “required to be met as a condition for the receipt of federal funds.”<sup>63</sup> In light of the Attorney General’s blanket extension, however, SORNA requirements technically are not *yet* “required to be met as a condition for the receipt of federal funds.” Consideration of the SORNA requirements, therefore, reasonably be deferred until July 2011.

If, however, a court hearing a petition chooses not to defer that consideration, the SORNA requirement most germane to petitions to terminate registration is the establishment of new minimum registration periods. For tier 1 offenses (the least serious category), the required registration period is 15 years; for tier 2 offenses, the period is 25 years; and for tier 3 offenses, the period is life. The registration period for tier I offenses can be reduced from 15 to 10 years if the offender has a “clean record” during his or her period of registration, as that term is defined by federal law and U.S. Department of Justice regulations. To have a clean record, the offender must meet the following requirements during the first 10 years of his or her registration:

- The offender must not be convicted of any offense punishable by more than 1 year in prison;
- The offender must not be convicted of any new sex crime;
- The offender must successfully complete any period of supervised release without revocation; and
- The offender must complete a certified sex offender treatment program.<sup>64</sup>

Under this interpretation of the law, only offenses that would fall in SORNA tier 1, when committed by offenders who satisfy the clean record rules, would be eligible to petition after 10 years as envisioned by G.S. 14-208.12A. It is impossible to know for sure (there is not a perfect overlap between North Carolina law and the language and definitions used in federal law), but the following crimes would probably be considered tier I offenses:

- Sexual Battery (14-27.5A)
- Subjecting a Person to Sexual Servitude (14-43.13)
- Incest between Near Relatives (14-178) (if the victim was not a minor)
- Felony Indecent Exposure (14-190.9(a1))
- Third Degree Sexual Exploitation of Minor (14-190.17A)
- Peeping offenses (14-202)

---

<sup>63</sup> There is an argument that this sort of blanket adoption by a state statute of prospective federal legislation, or of federal administrative rules yet to be adopted, is an unconstitutional delegation of state legislative power. *See, e.g., Hutchins v. Mayo*, 197 So. 495 (Fla. 1940) (holding that a state statute providing that fruit should be graded according to standards “as now fixed by the [USDA], or as standards may hereinafter be modified or changed,” unlawfully delegated state legislative power to a federal agency); *Plastic Pipe & Fittings Ass’n v. Cal. Bldg. Comm’n*, 22 Cal. Rptr. 3d 393 (Cal. App. 2004) (“An unconstitutional delegation of legislative authority occurs if a statute authorizes another person or group to make a fundamental policy decision.”).

<sup>64</sup> 42 U.S.C. § 16915; Final Guidelines, *supra* note 62, at 38,068–69.

A person registered for one of those crimes who did not have a clean record would have to register for at least 15 years. A person registered based on any other crime would have to register for at least 25 years before being eligible to petition for termination under this interpretation of the law.

**Denied petitions.** If the court denies the petition to terminate registration, the registrant may petition the court again one year from the date of the denial.<sup>65</sup>

## II. Satellite-Based Monitoring of Sex Offenders

Like many states, North Carolina has a program to monitor certain sex offenders using Global Positioning System (GPS) technology. North Carolina's satellite-based monitoring (SBM) regime requires eligible offenders to wear an ankle bracelet and tracking device that continuously transmits offenders' whereabouts to the Department of Correction's Division of Community Corrections (DCC), which manages the program. Confusing to begin with, the law has been modified several times since its enactment in 2006, making it difficult to apply. The law has also been challenged repeatedly on statutory and constitutional grounds. This portion of the manuscript sets out the basic eligibility requirements for SBM enrollment, the nature of the hearing to determine whether an offender must enroll, and a short summary of the various legal challenges to the program.

### A. Eligibility for SBM

To be eligible for SBM, a defendant must first have a reportable conviction that requires sex offender registration. If the defendant has a reportable conviction, the court should make a finding to that effect on the judgment at sentencing (there is a check-box for doing so). The court should proceed to determine whether the defendant must enroll in SBM, and if so for how long. The categories of offenders who must enroll are described below.

**Effective date.** A preliminary question regarding eligibility for SBM is whether the person falls within the effective date language of the legislation that enacted the SBM law. That language made the law applicable to those with a reportable conviction who:

- Committed their offense on or after August 16, 2006;
- Were sentenced to intermediate punishment on or after that date;
- Were released from prison by parole or post-release supervision on or after that date; or
- Complete a sentence on or after that date and are not on post-release supervision or parole.<sup>66</sup>

If the offender's reportable conviction brings him or her within the effective date language of the SBM law, the court should then determine whether the offender falls within one of the categories of offenders that must enroll in SBM.

---

<sup>65</sup> G.S. 14-208.12A(a3).

<sup>66</sup> S.L. 2006-247. In *State v. Cowan*, No. COA09-1415, 2010 WL 3965099 (N.C. Ct. App. Sept. 21, 2010), the court of appeals held that the effective date of the 2006 law (August 16, 2006), and not the date of the 2007 law that added the SBM determination hearing procedure, was the proper date for determining eligibility for SBM.

**Eligibility categories.** There are two broad types of SBM enrollment: lifetime monitoring and monitoring for a period of time specified by the court.

### 1. Lifetime monitoring

The court must order an offender to enroll in SBM for life if he or she falls within one of the categories set out in G.S. 14-208.40(a)(1) (sexually violent predator, recidivist, or person convicted of an aggravated offense) or G.S. 14-208.40(a)(3) (person convicted of rape or sexual offense of a child by an adult offender under G.S. 14-27.2A and -27.4A, respectively). With the exception of the last category, these are the same categories that trigger lifetime sex offender registration. Each category is discussed below.

*Aggravated offenses.* An aggravated offense is one that includes a sexual act involving vaginal, anal, or oral penetration by force or threat of serious violence, or a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.<sup>67</sup> Only offenses occurring after October 1, 2001, can be aggravated offenses.<sup>68</sup>

Whether or not an offense is aggravated may be determined only through an evaluation of the bare elements of the crime of conviction. The court may not look at the facts behind the conviction—learned, perhaps, through a plea colloquy, police report, or some other source—to consider whether the offender’s actual conduct fits within the statutory definition of an aggravated offense.<sup>69</sup> For instance, the crime of child abuse by committing or allowing the commission of a sexual act upon a child less than 16 under G.S. 14-318.4 can never be an aggravated offense. That crime only requires proof that the defendant committed a “sexual act,” and the court cannot know—without looking at additional facts—whether the particular sexual act was one that involved vaginal, anal, or oral penetration.<sup>70</sup> Additionally, that crime does not require a showing of force and only requires proof that the victim was less than 16. Thus, the court cannot know, without looking at facts behind the elements of the conviction, whether the victim was under 12, as required for a non-forcible crime to fit within the definition of an aggravated offense. Under this elements-based approach, indecent liberties with a child<sup>71</sup> and sexual battery<sup>72</sup> also are not aggravated offenses. As of the time of this writing, second-degree rape is the only crime the appellate courts have affirmed as an aggravated offense in a case where the issue was squarely before the court.<sup>73</sup>

---

<sup>67</sup> G.S. 14-208.6(1a).

<sup>68</sup> S.L. 2001-373.

<sup>69</sup> State v. Davison, \_\_ N.C. App. \_\_, 689 S.E.2d 510 (2009) (“[T]he trial court erred when making its determinations by considering Defendant’s plea colloquy in addition to the mere fact of his conviction.”).

<sup>70</sup> State v. Phillips, \_\_ N.C. App. \_\_, 691 S.E.2d 104 (2010). “Sexual act” is defined in G.S. 14-27.1 as including cunnilingus, fellatio, analingus, anal intercourse, or penetration by any object of the genital or anal opening of another person’s body. Penetration is not an essential element of crimes involving fellatio, cunnilingus, or analingus. See JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 168 (6th ed. 2007). By this rationale, it would appear that first- and second-degree sexual offense—or any other crime with a sexual act as an element—are not aggravated offenses.

<sup>71</sup> State v. Singleton, \_\_ N.C. App. \_\_, 689 S.E.2d 562 (2010).

<sup>72</sup> State v. Brooks, \_\_ N.C. App. \_\_, 693 S.E.2d 204 (2010).

<sup>73</sup> State v. Oxendine, \_\_ N.C. App. \_\_, 696 S.E.2d 850 (2010) (second-degree rape is a crime involving constructive force, and thus an aggravated offense); State v. McCravey, \_\_ N.C. App. \_\_, 692 S.E.2d 409 (2010) (holding

**Recidivists.** A recidivist is an offender with a prior conviction for an offense described in G.S. 14-208.6(4), the statute defining a reportable conviction.<sup>74</sup> At least one of an offender's offenses must be reportable and have taken place after October 1, 2001, for the person to qualify as a recidivist.<sup>75</sup> A prior offense need not itself be reportable (based on its offense date or date of conviction) in order to qualify an offender as a recidivist. Rather, the prior conviction need only be of an offense that would be reportable if committed today.<sup>76</sup>

**Sexually violent predators.** A sexually violent predator (SVP) is a person convicted of a sexually violent offense (not an offense against a minor, peeping crime, or crime from another jurisdiction) who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses.<sup>77</sup> This classification is rare in North Carolina; there are fewer than 20 SVPs in the state. Before classifying an offender as an SVP, the court must follow the procedure set out in G.S. 14-208.20.<sup>78</sup>

**Convicted of rape or sexual offense of a child by an adult offender.** A defendant who is at least 18 years of age who engages in vaginal intercourse with a victim who is a child under the age of 13 years is guilty of the crime of rape of a child by an adult offender, a Class B1 felony.<sup>79</sup> A similar defendant who commits a sexual act against a similar victim is guilty of sexual offense with a child by an adult offender, likewise a Class B1 felony.<sup>80</sup> Note that these are distinct substantive crimes, created in 2008 and applicable only to offenses committed on or after December 1, 2008.<sup>81</sup> Offenders convicted of these crimes must, upon termination of their active punishment, enroll in SBM for life.<sup>82</sup>

## 2. Monitoring for a period of time specified by the court

The court may order an offender to enroll in SBM for period in its discretion if the offender satisfies all of the following criteria: (1) is convicted of a reportable conviction; (2) is required to register as a Part 2 registrant; (3) has committed an offense involving the physical, mental, or sexual abuse of a minor; and (4) based on a Department of Correction risk assessment, requires the "highest possible level of supervision and monitoring."<sup>83</sup>

---

second-degree rape under G.S. 14-27.3(a)(1) is a crime that necessarily involves force or the threat of serious violence, and is thus an aggravated offense).

<sup>74</sup> G.S. 14-208.6(2b).

<sup>75</sup> S.L. 2001-373.

<sup>76</sup> *State v. Wooten*, 194 N.C. App. 524 (2008) (holding that a defendant's conviction for indecent liberties from 1989—well before that crime required registration—could nonetheless qualify as a prior conviction for the purpose of qualifying the offender as a recidivist when he committed a reportable offense in 2006).

<sup>77</sup> G.S. 14-208.6(6).

<sup>78</sup> *See State v. Zinkand*, 190 N.C. App. 765 (2008) (vacating a trial court's determination that an offender was a sexually violent predator when the court failed to follow the proper statutory procedure).

<sup>79</sup> G.S. 14-27.2A.

<sup>80</sup> G.S. 14-27.4A.

<sup>81</sup> S.L. 2008-117.

<sup>82</sup> G.S. 14-27.2A(b); -27.4A(b).

<sup>83</sup> G.S. 14-208.40(a)(2). The "highest possible level of supervision and monitoring" is not a defined term, but the court of appeals concluded in *State v. Kilby* that it must "simply refer[] to SBM, as the statute provides only for

There is no statutory definition setting out what offenses involve the “physical, mental, or sexual abuse of a minor.”<sup>84</sup> As a matter of case law, statutory rape of a victim who is 13, 14, or 15 years old by a defendant who is at least 6 years older than the victim<sup>85</sup> and indecent liberties with a child<sup>86</sup> have been deemed crimes involving the sexual abuse of a minor.

In addition to the uncertainty about what constitutes a crime involving the physical, mental, or sexual abuse of a minor, it is likewise unclear what information the court may consider in making its determination that a particular crime is covered. In *State v. Cowan*, the court of appeals assumed without deciding that the trial court could look only at the elements of the conviction offense when determining whether physical, mental, or sexual abuse was involved. With that assumption in place, the court determined that solicitation to commit indecent liberties with a child was a crime involving the sexual abuse of a minor, reasoning that a solicitation to commit an abusive crime still “involves” abuse.<sup>87</sup> The court did not, however, explicitly state which element of indecent liberties with a minor makes that crime “sexual abuse.” As for what other crimes might involve abuse of a minor, it may make sense to look to the definition of “abused juvenile” in G.S. 7B-101(1) as an analytical starting point.

The Department of Correction uses a variation on a 10-question actuarial instrument called a Static-99 to conduct the statutorily-required risk assessment.<sup>88</sup> The instrument, designed for use with male sex offenders who are at least 18 years of age at the time of release to the community, provides an estimate of an offender’s risk of reoffending.

## **B. SBM determination hearings**

If the court determines that a person has a reportable conviction, it must hold a hearing to determine whether the offender falls within one of the eligibility categories described above. Only a person within one of those categories may be ordered to submit to satellite monitoring.

For defendants sentenced after December 1, 2007, that SBM determination hearing should be held at sentencing under G.S. 14-208.40A. The court should use Form AOC-CR-615 to record its findings and order. If no determination is made at sentencing (either because the offender was sentenced before the SBM law came into effect, or for some other reason), the determination must be made at a hearing under G.S. 14-208.40B, sometimes referred to as a “bring-back” hearing.<sup>89</sup> The court should use Form AOC-CR-616 for bring-back hearings. The procedure for each type of hearing is summarized below.

---

SBM and does not provide for any lesser levels or forms of supervision and monitoring of a sex offender.” \_\_ N.C. App. \_\_, \_\_, 679 S.E.2d 430, 432 n.2.

<sup>84</sup> The term first appeared in the General Statutes in 1996 in the context of special supervision conditions for certain probationers and post-release supervisees. S.L. 1996-18-es2, § 20.14.

<sup>85</sup> *State v. Smith*, \_\_ N.C. App. \_\_, 687 S.E.2d 525 (2010).

<sup>86</sup> *State v. Morrow*, \_\_ N.C. App. \_\_, 683 S.E.2d 754 (2009), *aff’d*, No. 461A09, 2010 WL 3934237 (N.C. Oct. 8, 2010).

<sup>87</sup> *State v. Cowan*, No. COA09-1415, 2010 WL 3965099 (N.C. Ct. App. Sept. 21, 2010) (ruling that a solicitation to commit a sex crime still “involves” that crime, in that it creates a “substantial risk that such abuse will occur”).

<sup>88</sup> More information about the Static-99, including a sample coding form, is available at <http://www.static99.org>.

<sup>89</sup> G.S. 14-208.40B does not, however, grant a court authority to hold a second or subsequent determination hearing when a court has already held a hearing. In *State v. Clayton*, \_\_ N.C. App. \_\_, 697 S.E.2d 428 (2010), the court of appeals ruled that the “trial court did not have any basis to conduct another SBM hearing, where it had already held



**Hearings held at sentencing.** When an offender is convicted of a reportable conviction, the district attorney must, during the sentencing phase, present any evidence that the offender falls within one of the SBM eligibility criteria set out above. The prosecutor “shall have no discretion” to withhold any such evidence.<sup>90</sup> The defendant has the right to present any contrary evidence. The statutes do not say and North Carolina’s appellate courts have yet to rule squarely on what evidentiary rules apply at SBM determination hearings. Under Rule 1101 of the rules of evidence, the rules apply to all court proceedings except those exempted by statute. SBM hearings are not exempted.

After receipt of the evidence, the court must first determine whether the offender fits within one of the categories requiring lifetime enrollment in SBM. If so, the court must order the offender to enroll for life.<sup>91</sup>

If the court finds that the offender does not fall within any of the lifetime categories, but that he or she did commit an offense that involved the physical, mental, or sexual abuse of a minor, the court must order DOC to complete a risk assessment. DOC must be given at least 30 days but not more than 60 days to complete the assessment.<sup>92</sup> The statute does not specify the procedure for the court to follow after it receives the DOC risk assessment. Presumably, the court must hold an additional hearing, at which the state and defendant may be heard as to the report’s findings and the appropriateness of satellite monitoring. In practice, the assessment can be completed in a matter of hours, and some courts order DOC to complete it on the day of sentencing to avoid the need for a second hearing.<sup>93</sup> Other times DOC has completed the Static-99 before the defendant is sentenced, although there is no provision in G.S. 14-208.40A explicitly authorizing the court to use a risk assessment prepared in advance of a determination hearing held at sentencing.

Upon receipt of the results of the assessment, the court must determine whether, based on the assessment, the offender requires the highest possible level of supervision and monitoring. The court is not, however, limited to the results of the risk assessment when evaluating the offender’s candidacy for monitoring. It may also make additional findings of fact in support of its conclusion that an offender should enroll in monitoring.<sup>94</sup>

If the court orders monitoring for a period of time in its discretion, that period should be for a determinate length of time, not a range of years,<sup>95</sup> and not life.<sup>96</sup> The statutes do not explicitly set an outside limit on

---

an SBM hearing based upon the same reportable convictions in 2008,” even when the offender had not been required to enroll at the initial hearing, and new information suggested the offender had a high risk of reoffending.

<sup>90</sup> G.S. 14-208.40A(a).

<sup>91</sup> G.S. 14-208.40A(c).

<sup>92</sup> G.S. 14-208.40A(d).

<sup>93</sup> Though this practice streamlines the determination process, it arguably runs afoul of the statute itself. In *State v. Davison*, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 510 (2009), the court of appeals ruled that the trial court erred by ordering a same-day risk assessment without first making a finding that the defendant was not a recidivist. In a footnote, the court noted that “the trial court did not allow DOC the statutorily-mandated period of thirty to sixty days for the DOC to perform its risk assessment. However, Defendant did not argue this point in his brief.” *Id.* at 515, n.2.

<sup>94</sup> *Morrow*, 683 S.E.2d at 761 (holding that a “high” risk score is not a prerequisite to imposition of SBM).

<sup>95</sup> *Id.* (holding that the trial court erred by ordering enrollment for “7–10 years”).

<sup>96</sup> *State v. Cowan*, No. COA09-1415, 2010 WL 3965099 (N.C. Ct. App. Sept. 21, 2010).

monitoring; however, the period of monitoring could be for no longer than the period during which the person is “required to register,” as registration is a precondition for satellite monitoring.<sup>97</sup>

**Bring-back hearings.** G.S. 14-208.40B provides a procedure for returning to court an offender who has been convicted of a reportable offense if a court has not determined whether the offender must submit to satellite monitoring. In those instances, DOC must initially determine whether the offender falls into one of the SBM eligibility categories described above. If DOC determines that the offender falls into one of those categories, then the district attorney, representing DOC, must schedule a hearing in superior court for the county in which the offender resides.<sup>98</sup> DOC must notify the offender of its preliminary determination and the date of the scheduled hearing by certified mail. The hearing may be no sooner than fifteen days from the date notice was mailed, with receipt of notification presumed to be the date indicated on the certified mail receipt.<sup>99</sup> The notice must inform the offender of the specific category into which it believes the offender falls, and must give the offender a brief summary of its reasons for that determination.<sup>100</sup> If the court determines that the offender is indigent and entitled to counsel, it must assign counsel to represent the offender at the hearing.<sup>101</sup>

For the most part, the hearing procedure for bring-back hearings is the same as for hearings held at sentencing under G.S. 14-208.40A. Thus the district attorney presents evidence of the appropriate designation, the defendant presents contrary evidence, and the court determines whether the offender falls into one of the SBM eligibility categories. The court must obtain a DOC risk assessment for cases involving physical, mental, or sexual abuse of a minor, though for bring-back hearings the statute specifically authorizes DOC to use a risk assessment done within six months of the date of the hearing.<sup>102</sup> If, based on that risk assessment and any other facts found by the court, the court determines that the offender requires the highest possible level of supervision and monitoring, it orders the offender to enroll for a period of time specified by the court.<sup>103</sup>

**Appeals of SBM determinations.** SBM determinations are not criminal actions, but are rather part of a “civil regulatory regime.”<sup>104</sup> The right to appeal an SBM determination flows from G.S. 7A-27 (not from G.S. 15A-1442), and is therefore governed by the rules applicable to civil matters.<sup>105</sup> As such, under Rule 3(a) of the Rules of Appellate Procedure, a party must “[f]ile notice of appeal with the clerk of superior court and serv[e] copies thereof on all other parties.” Oral notice—permissible in criminal matters under Rule 4(a)(1)—is insufficient to confer jurisdiction to hear the appeal on the appellate division.<sup>106</sup>

---

<sup>97</sup> G.S. 14-208.40(a)(2)(ii).

<sup>98</sup> G.S. 14-208.40B(b).

<sup>99</sup> G.S. 14-208.40B(b). A failure to follow the precise letter of the notice provision does not deprive the court of jurisdiction to hold the hearing. It was permissible, for example, to give an inmate in-person notice of an SBM determination hearing, even though the statute mentions only notice by certified mail. *State v. Wooten*, 194 N.C. App. 524 (2008).

<sup>100</sup> *State v. Stines*, \_\_ N.C. App. \_\_, 683 S.E.2d 411 (2009).

<sup>101</sup> G.S. 14-208.40B(b).

<sup>102</sup> G.S. 14-208.40B(c). An assessment may, for example, have been done earlier as part of the offender’s probation supervision.

<sup>103</sup> *Id.*

<sup>104</sup> *State v. Bare*, 197 N.C. App. 461, 677 S.E.2d 518 (2009).

<sup>105</sup> *State v. Singleton*, \_\_ N.C. App. \_\_, 689 S.E.2d 562 (2010).

<sup>106</sup> *State v. Brooks*, \_\_ N.C. App. \_\_, 693 S.E.2d 204 (2010).

### **C. Enforcement of monitoring requirements.**

Any offender required to enroll in SBM who receives an active sentence must enroll and receive the appropriate monitoring equipment immediately upon his or her release from prison. Offenders sentenced to probation must report to the Division of Community Corrections immediately upon sentencing for enrollment, at which point the Division may order them to return at a designated time to receive the equipment.<sup>107</sup> Enrollees are required to cooperate with the Department for the entirety of their enrollment; DOC has authority to contact offenders at home or to require the offender to appear at a specific location for purposes of enrollment, equipment upkeep, or any other necessary purpose.<sup>108</sup> It is a Class F felony for a person to fail to enroll in SBM; a Class E felony to tamper with, remove, vandalize, or otherwise interfere with the proper functioning of the SBM equipment; and a Class 1 misdemeanor for an enrollee to fail to provide necessary information to DOC or to fail to cooperate with DOC guidelines and regulations for the program.<sup>109</sup>

### **D. Requests to terminate SBM**

Offenders ordered to lifetime enrollment in SBM may file a request for termination of monitoring with the Post-Release Supervision and Parole Commission. The request may not be submitted until at least one year after the offender has served his or her sentence, including any period of probation, parole, or post-release supervision. The Commission may terminate SBM if the offender has complied with the program, has not been convicted of any additional reportable convictions, and is not likely to pose a threat to the safety of others.

When the Commission is notified that a Part 2 offender has successfully petitioned to terminate his or her registration requirement under G.S. 14208.12A it must also terminate SBM upon the offender's request.<sup>110</sup>

### **E. Constitutional challenges to SBM.**

SBM is a civil regulatory regime and thus does not implicate the Ex Post Facto Clause,<sup>111</sup> double jeopardy,<sup>112</sup> or a defendant's Sixth Amendment right to a jury trial.<sup>113</sup>

---

<sup>107</sup> G.S. 14-208.40C.

<sup>108</sup> G.S. 14-208.42.

<sup>109</sup> G.S. 14-208.44.

<sup>110</sup> G.S. 14-208.43.

<sup>111</sup> *State v. Bowditch*, No. 448PA09, 2010 WL 3929430 (N.C. Oct. 8, 2010).

<sup>112</sup> *State v. Wagoner*, \_\_\_ N.C. App. \_\_\_, 683 S.E.2d 391 (2010), *aff'd*, No. 396A09, 2010 WL 3934235 (N.C. Oct. 8, 2010).

<sup>113</sup> *State v. Hagerman*, \_\_\_ N.C. App. \_\_\_, 685 S.E.2d 153, *aff'd*, No. 491A09, 2010 WL 3934327 (N.C. Oct. 8, 2010).