SEX OFFENDERS: REQUESTS TO TERMINATE, BRING-BACK HEARINGS

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I. Requests to Terminate Sex Offender Registration under G.S. 14-208.12A

Registered sex offenders not subject to the lifetime registration requirement of G.S. 14-208.23—that is, those who are not recidivists, aggravated offenders, or sexually violent predators[1]—may petition the superior court to terminate their registration if they meet certain criteria. The requirement to petition to terminate registration is a relatively new feature of North Carolina's sex offender registration regime; prior to 2006, the registration requirement for non-lifetime registrants terminated automatically after ten years. Today, how long an offender will be required to register if he or she does not petition for termination depends on when the offender initially registered. According to the North Carolina Attorney General's interpretation of legislation enacted in 2008, those who initially registered before December 1, 2008 must register for life unless they successfully petition the superior court to terminate registration. Those who initially registered on or after December, 1, 2008 must register for 30 years following the date of initial county registration unless they successfully petition the court.[2]

Hearing Procedure and Frequently Asked Questions

Use form AOC-CR-262, *Petition and Order for Termination of Sex Offender Registration*. Note: The finding of fact regarding 10 years of "compliance" with registration requirements (check-box #2 on Side 2) is not grounded in G.S. 14-208.12A or any other law. According to AOC legal staff, that check-box was meant to be a finding that the offender had been *subject to* registration for the requisite period before petitioning for termination. In other words, an offender who has had some transgression related to his registration (e.g., a late semiannual update to the sheriff) is not *per se* barred from a successful petition to terminate. Information about such transgressions may, of course, be considered by the judge in evaluating the registrant's threat to public safety.

When may the registrant petition to terminate? An offender is first eligible to petition 10 years from the date of initial county registration. G.S. 14-208.12A(a).

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[1] Lifetime registration will only be terminated if the registrant's conviction is reversed, vacated, or set aside, or if the registrant is granted an unconditional pardon of innocence. G.S. 14-208.6C.

[2] The effective-date clause in the statute that created the 30-year registration requirement states that the changes in the law apply to "registrations made on or after December 1, 2008." S.L. 2008-118, sec. 22. This language arguably applies to individuals who begin registration *or* are still required to register on or after December 1, 2008, though the Attorney General has not interpreted it that way. N.C. Dep't of Justice, *The North Carolina Sex Offender and Public Protection Registration Programs* (March 2009), available at http://www.jus.state.nc.us/NCJA/SEXOFFEN.pdf.

Does an offender who moves to North Carolina after registering for several years in another state get credit for the time spent registered there? Apparently not. G.S. 14-208.12A(a) refers only to the date of "initial county registration," which appears to refer to registrations in this State in the "county where the person resides." G.S. 14-208.7.

Whom does the registrant petition? The superior court in the district where he or she *resides*. G.S. 14-208.12A(a).

Notice to the District Attorney. The DA in the district in which the petition is filed must be given at least 3 weeks' notice of the petition before the hearing is held. The DA may, at the hearing, present evidence in opposition to the requested relief.

What type of proceeding is the termination hearing? AOC has advised clerks to treat termination hearings as a part of the criminal action; the hearings probably are not special proceedings under G.S. 1-3. As such, additional court costs should not be assessed on petitioners. The statute does not provide for any such fee, unlike, for instance, the statutes governing petitions for certain expunctions. *See, e.g.*, G.S. 15A-145(e) (assessing a $125 fee).

Is the registrant entitled to appointed counsel at the termination hearing? No, not as a statutory matter under Chapter 14 or Chapter 7A. There is an argument that, in light of the complicated nature of the hearing, a registrant has a right to appointed counsel as a matter of constitutional due process, though there are no cases finding such a right. Some states provide for appointed counsel at hearings to review sex offender classification. *Loe v. Sex Offender Registry Board*, 901 N.E.2d 140 (Mass. Ct. App. 2009) (discussing the statutory right to counsel in Massachusetts).

Under what circumstances may the court grant the petition? The court may grant a petition if:

(1) The petitioner demonstrates that he or she has not, since completing his or her sentence, been *arrested* 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.

Note that the decision to terminate is always in the court's discretion; even if the petitioner satisfies the requirements of G.S. 14-208.12A(a1), the statute says the court "may"—not shall—grant relief.

Can a registrant's petition be granted if he or she has ever been arrested for failure to register? Technically, yes. 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 is concerned about a potential threat to public safety.

What is the Jacob Wetterling Act, and how am I supposed to know if the requested relief complies with federal law? This second prong of the test raises a number of issues. 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.").

Assuming the second prong is valid, what does it mean? For over a decade, our state law on sex offender registration has flowed from federal mandates—states must enact laws that meet federal standards or lose certain federal grant funds. The Jacob Wetterling Act (1994) was the initial federal legislation that established minimum standards for states to register sex offenders. It has since been amended by Megan's Law (1996), the Pam Lychner Act (1996), the Jacob Wetterling Improvements Act (1997), and, most recently, by the Adam Walsh Act (2006). Title I of the Adam Walsh Act, called the Sex Offender Registration and Notification Act, or SORNA, enacted a new and more stringent set of standards for sex offender registration. The act required states to substantially implement these new standards by July 27, 2009, with up to two one-year extensions, or lose 10% of Byrne Justice Assistance Grant funds.

Among other requirements, SORNA:

- Broadens the offenses for which a state must require registration;
- Requires states to make registration requirements fully retroactive for all covered offenses;
- 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.

Legislation proposed this session (H 1317) would bring North Carolina closer to SORNA compliance, but not all the way—the bill does not address retroactivity or juveniles. On April 10, 2009, North Carolina applied to the U.S. Department of Justice for a one-year extension to comply with SORNA. Arguably, then, SORNA requirements are not yet "required to be met as a condition for the receipt of federal funds," meaning consideration of the second prong of the test could reasonably be deferred until 2010.

Assuming they apply now, how do these federal mandates affect petitions to terminate registration? The most germane change is the establishment of new minimum registration periods. For tier 1 offenses, the required registration period is 15 years (reducible to 10 years in some cases, described below); for tier 2 offenses, the period is 25 years; and for tier 3 offenses, the period is life. 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 for offenders who have not been registered for the amount of time that will be required under SORNA. Thus, an

offender registered for what would be a tier II under SORNA would not be eligible to petition for termination until he or she had been registered for 25 years.

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.

U.S. Dep't of Justice, *National Guidelines for Sex Offender Registration and Notification*, p. 57-58, available at http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

Under this interpretation of the law, **only tier I offenses committed by offenders who satisfy the clean record rules are eligible to petition after 10 years as envisioned by G.S. 14-208.12A**.

Which offenses would be tier I offenses? I can't say for sure, as there is not a perfect overlap between our laws and the language and definitions used in federal law. My best guess is as follows:

- 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)
- Indecent Liberties with Children (14-202.1) (unless the crime involved "sexual contact," defined as any sexual touching of or contact with the intimate parts of the body, either directly or through the clothing)

A person registering based on **any other crime** would have to register for ***at least*** **15 years** before being eligible to petition for termination under this interpretation of the law.

Finally, what happens if the petition is denied? If the court denies the petition to terminate registration, the registrant may petition the court again one year from the date of the denial. G.S. 14-208.12A(a3).

II. Satellite-Based Monitoring Determination Hearings Under G.S. 14-208.40B ("Bring – Back" Hearings)

North Carolina first enacted satellite-based monitoring (SBM) of sex offenders in 2006. S.L. 2006-247. For offenders sentenced after the law was passed, SBM determinations are made at sentencing. However, because the law was written to apply also to offenders who were convicted and sentenced *before* the law was passed, the General Assembly had to create a post-conviction procedure for enrolling covered offenders. It did so in 2007. S.L. 2007-213. That procedure, codified in G.S. 14-208.40B, has come to be known colloquially as a "bring-back hearing." This outline provides an update on some of the issues raised by the law. Note: Bring-back hearings are the only post-conviction SBM hearings that should come before a judge. Requests to terminate SBM should be filed with the Post-Release Supervision and Parole Commission under G.S. 14-208.43.

Use form AOC-CR-616. That form guides the judge through the required findings.

Effective Dates. For SBM to apply at all, the offender must have been convicted of a reportable offense. The effective dates vary by crime, depending on the enacting language used by the General Assembly when it made the offense reportable. Effective dates are keyed on the attached flow chart.

For an offender convicted of a reportable offense, an SBM hearing must be held for:

- Offenses committed on or after August 16, 2006;
- Any person sentenced to intermediate punishment on or after that date;
- Any person released from prison by parole or post-release supervision on or after that date; and
- Any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. S.L. 2006-247.

Previously, some had argued that effective date coverage for SBM hearings ought to stem from the 2007 law that created them. That law, first passed as S.L. 2007-213 and later modified by a technical correction in S.L. 2007-484, sec. 42(b), simply made the law "effective December 1, 2007," with no reference to the retroactive application described in the 2006 law. In **State v. Wooten, __ N.C. App. __, 669 S.E.2d 749 (2008)**, however, the Court of Appeals looked only to the August 16, 2006 effective date, suggesting that the 2007 law merely added a procedural gloss to the substance of the 2006 legislation.

Right to Appointed Counsel. The bring-back hearing statute does not establish a right to counsel at the hearing. Nevertheless, because defendants whose SBM obligation is determined at sentencing under G.S. 14-208.40A will have access to appointed counsel, there is an argument that counsel ought also to be available for determinations made under G.S. 14-208.40B.

Aggravated Offenses: Elements vs. Facts. Aggravated offenders are one of the categories of offenders subject to lifetime satellite-based monitoring. An aggravated offense is defined as an offense that includes either (i) a sexual act involving vaginal, anal, or oral penetration with a victim of

any age by force; or (ii) a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old. G.S. 14-108.6. It remains an open question whether the court should, when deciding whether a particular offense was "aggravated," consider only the elements of the conviction offense, or whether it should also consider the facts underlying the conviction. The one reported case we had previously cited as favoring an elements-based approach, *State v. Mastne*, 725 N.W.2d 862 (Neb. Ct. App. 2006), was overruled by the Nebraska Supreme Court in *State v. Hamilton*, 763 N.W.2d 731 (Neb. 2009) ("[A] sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense . . . has been committed. Instead, the court may make this determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report."). Regardless of what evidence you consider, remember that only offenses committed on or after October 1, 2001 can be aggravated offenses. S.L. 2001-373.

Department of Correction Risk Assessment: the Static-99. If an offender is not a recidivist, aggravated offender, or sexually violent predator, but the court finds that he or she committed an offense that involved the physical, mental, or sexual abuse of a minor, the court must order DOC to do a risk assessment on the offender (unless one has been done within six months of the date of the hearing). The assessment DOC uses is based on something called a Static-99, a ten-question actuarial instrument developed in Canada for use with adult male sex offenders. The instrument is normalized for use with adult males age 18 and older; it is not designed to assess women. After the officer scores the main portion of the instrument and determines a risk level (Low, Moderate, or High), the chief probation officer can override the risk level to High if the offender has any new sex crime charges pending, has been non-compliant with treatment, has been diagnosed as a pedophile, or falls within one of the lifetime SBM categories. If the chief probation officer overrides the risk level to High, that's the level DOC will report to the court. If, based on the risk assessment, the court determines that the offender requires the "highest possible level of supervision and monitoring," then the judge must order the offender to enroll in SBM for a period of time specified by the court.

There is disagreement about whether the court may order SBM for a term of years when the DOC risk assessment rates the offender as something less than High. That question is pending before the Court of Appeals in *State v. Kilby*.

Ex Post Facto. As discussed above, SBM applies retroactively to some offenders whose crimes took place before the monitoring regime was enacted. There are numerous cases pending before the Court of Appeals in which the defendant argues that SBM is a form of punishment, and that retroactive application therefore violates the Ex Post Facto Clause. Thus far, the leading case on the issue is *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), *petition for rehearing en banc denied*, 521 F.3d 680 (6th Cir. 2008), in which the Sixth Circuit upheld Tennessee's SBM regime against an ex post facto challenge, determining that the regime was not punishment. The test courts generally apply to determine whether a sanction is punitive stems from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). In the absence of clear legislative intent as to the penal nature of a statute, the *Mendoza-Martinez* Court set out seven factors a court should consider in making the determination:

- Whether the sanction involves an affirmative disability or restraint;

- Whether it has historically been regarded as a punishment;
- Whether it comes into play only on a finding of scienter;
- Whether its operation will promote the traditional aims of punishment: retribution and deterrence;
- Whether the behavior to which is applies is already a crime;
- Whether an alternative purpose to which it may rationally be connected is assignable for it; and
- Whether it appears excessive in relation to the alternative purpose assigned.

Our Court of Appeals applied these factors in determining that North Carolina's sex offender registry was a "civil regulatory scheme to protect the public," and not criminal punishment implicating the Ex Post Facto Clause. *State v. White*, 162 N.C. App. 183 (2004). The ex post facto argument as applied to SBM was raised but not reached by our Court of Appeals in *State v. Wooten*. I expect the court to address it in one or more of the following cases: *State v. Chandler* (COA08-885), *State v. Morrow* (COA08-867), *State v. Kilby* (COA08-655), *State v. Wagoner* (COA08-982), *State v. Long* (COA08-846), *State v. Brewington* (COA08-980), or *State v. Bare* (COA08-818).

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