

POST-CONVICTION PROCEEDINGS: PETITIONS TO TERMINATE SEX OFFENDER REGISTRATION

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A. Length of Registration

There are two categories of sex offender registration in North Carolina: lifetime registration and registration for up to 30 years. G.S. 14-208.6A.

Lifetime registration. Under G.S. 14-208.23, lifetime registration applies to three categories of defendants:

- Recidivists. G.S. 14-208.6(2b).
- Aggravated offenders. G.S. 14-208.6(1a).
- Sexually violent predators. G.S. 14-208.6; 14-208.20.

These registrants are described in Part 3 of Article 27A of G.S. Chapter 14, and are thus sometimes referred to as Part 3 offenders.

Most of the case law on each category of lifetime registration has arisen in the context of the satellite-based monitoring law, which is summarized on the Sex Offender Registration and Satellite-Based Monitoring chart. Because the registration law refers to the same statutory definitions as the SBM law, it is reasonable to assume that the same principles apply in both contexts.

30-year registration. All other registrants have a 30-year registration period. These registrants are described in Part 2 of Article 27A of G.S. Chapter 14, and are thus sometimes referred to as Part 2 offenders. These registrants may petition to terminate registration after 10 years under G.S. 14-208.12A.

B. Types of Termination

Automatic termination. From 1996 to 2006, non-lifetime registrants were subject to a 10-year registration period that terminated automatically after 10 years. That provision was amended in 2006 to extend the registration period from 10 years to 30, and to require a petition to terminate in lieu of automatic termination. The new law was made applicable to “persons for whom the period of registration would terminate on or after [December 1, 2006].” S.L. 2006-247. Thus, aside from a

narrow cohort of registrants who initially registered between January 1, 1996 (when the registry began) and November 30, 1996, registration does not terminate automatically. In re Hamilton, ___ N.C. App. ___, 725 S.E.2d 393 (2012).

Termination of 30-year registration. Thirty-year registrants may petition to terminate their registration ten years from the date of initial county registration, as described below. G.S. 14-208.12A.

Termination of lifetime registration. Lifetime registration is discontinued only if the conviction requiring registration is reversed, vacated, or set aside, or if the registrant has been granted an unconditional pardon of innocence. G.S. 14-208.6C.

C. Termination Hearing Procedure

Forms. Use form AOC-CR-262, *Petition and Order for Termination of Sex Offender Registration*.

Venue. If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed in the district where the person was convicted. G.S. 14-208.12A(a). A court in another district is without jurisdiction to hear the petition. In re Dunn, ___ N.C. App. ___ (Jan. 15, 2013) (dismissing and vacating a denial of a petition by a Cumberland County judge for an offender with a Montgomery County conviction). If the reportable conviction is for an offense that occurred in another state, the petition shall be filed in the district where the person resides. G.S. 14-208.12A(a). These petitioners must also provide notice to the sheriff of the county of conviction that they are petitioning to terminate their registration, and include with their petition an affidavit indicating that they have done so.

Counsel. There is no statute granting a right to appointed counsel for a petition to terminate registration. 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.

Evidence. The petitioner may present evidence in support of his or her petition, and the district attorney may present evidence in opposition to the requested relief. G.S. 14-208.12A(a2).

Effect of denial. If the court denies the petition, the registrant may petition the court again one year from the date of the denial of the original petition to terminate. G.S. 14-208.12A(a3).

D. Terminating Registration—Findings

A judge may terminate a non-lifetime (Part 2) registrant's requirement to register upon making the following findings. Even if the court is able to make all of the findings, "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's

discretion.” In re Hamilton, __ N.C. App. __, 725 S.E.2d 393, 399 (highlighting the “may” in G.S. 14-208.12A). Each of the required findings is considered in turn.

1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.

Only non-lifetime (Part 2) offenders may petition for termination of registration. Lifetime (Part 3) registrants may only terminate registration in the limited circumstances described in G.S. 14-208.6C.

2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above.

A non-lifetime registrant may petition the superior court ten years from the date of initial county registration. G.S. 14-208.12A(a). “Initial county registration” refers to a registrant’s initial registration with a sheriff in North Carolina; prior time on another state’s registry does not count. In re Borden, __ N.C. App. __, 718 S.E.2d 683 (2011) (disallowing credit for time spent on Kentucky’s registry).

3. Since the Date Of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.

A person is ineligible to terminate registration if convicted of a subsequent offense requiring registration. G.S. 14-208.12A(a). Such an offender would, at that point, be a recidivist subject to lifetime registration in any event. A conviction for violating registration obligations, such as failure to register (G.S. 14-208.11) or a violation of residential restrictions (G.S. 14-208.16), is not a disqualifying conviction, because those offenses do not themselves require registration. Such convictions might nevertheless lead a judge to deny a termination petition on the grounds that the petitioner is a current or potential threat to public safety.

4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.

A person is ineligible to terminate registration if he or she has been *arrested* for any crime that would require registration since completing his or her sentence. G.S. 14-208.12A(a1)(1). On its face, that language could be construed as barring termination if the petitioner is ever arrested for such an offense, regardless of the disposition of the case. The legislature may not have intended to bar termination for an arrest on a charge that is later dismissed or for which a person is acquitted. The “arrest” provision may have been added to bar termination for a person with a pending charge at the time of the petition to terminate.

Only arrests for crimes requiring registration are disqualifiers under G.S. 14-208.12A(a1)(1). As described above, arrests for violations of registration obligations are not disqualifying under this provision, but may be relevant to the court’s evaluation of whether the petitioner presents a threat to public safety.

5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.

The district attorney in the district in which the petition is filed must be given at least three weeks’ notice of the petition before the hearing is held. G.S. 14-208.12A(a2).

6. The petitioner is not a current or potential threat to public safety.

This finding appears to be a matter within the trial court’s discretion.

7. The relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, 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.

The Jacob Wetterling Act was a federal law enacted by Congress in 1994 that established federal sex offender registration standards. It did not apply to the states directly; rather, it provided that if a state did not substantially comply with the standards, it would lose 10 percent of federal Byrne Justice Assistance grant funds. Portions of the Wetterling Act have been amended and repealed since 1994. In 2006, Congress enacted the Adam Walsh Act, Title I of which is the Sex Offender Registration and Notification Act, or SORNA. SORNA sets out a comprehensive registration program that states are required to meet as a condition for receiving certain federal funds.

After a series of extensions, the SORNA compliance deadline (July 27, 2011) has passed. As of this writing, North Carolina is one of 36 states not in compliance with SORNA. Thus, the federal standards, relevant portions of which are described below, have not been directly adopted as a matter of state law.

Nevertheless, they may apply indirectly by virtue of G.S. 14-208.12A(a1)(2), which allows a judge to grant a petition to terminate registration only when the “requested relief complies with the provisions of 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” In the only North Carolina case to consider the issue, *In re Hamilton*, ___ N.C. App. ___, 725 S.E.2d 393, 398 (2012), the court of appeals wrote that the Adam Walsh Act provides “federal standards applicable to the termination of a registration requirement” within the meaning of G.S. 14-208.12A(a1)(2). Thus, when considering a petition to terminate

registration, it appears that a trial judge must consider whether the request would comply with the substance of the federal standards—even though North Carolina has yet to enact them directly as a matter of state law.¹

The most important aspect of the SORNA standards for these purposes is the minimum permissible registration length. SORNA establishes three different tiers of offenses, each with a different registration period. Under 42 U.S.C. § 16915(a):

- Tier I offenses require registration for at least 15 years, reducible to 10 years in certain circumstances described below.
- Tier II offenses require registration for at least 25 years.
- Tier III offenses require registration for life.

To evaluate whether removal from the registry would comply with federal standards (and thus comply with G.S. 14-208.12A(a1)(2), it appears that the judge must determine the tier into which the offender’s conviction would fall.

Tier I. Tier I is a residual category that includes sex offenders other than tier II and tier III sex offenders. 42 U.S.C. § 16911(2). Thus, the only way to identify tier I offenses is to know which offenses fall into tiers II and III.

Tier II. Tier II offenses (defined in 42 U.S.C. § 16911(3)) are described in U.S. Department of Justice (USDOJ) guidelines on SORNA as (1) offenses involving the use of minors in prostitution; (2) offenses against minors involving sexual contact—i.e., any sexual touching of or contact with the intimate parts of the body, either directly or through the clothing; and (3) offenses involving the production or distribution (but not the mere possession) of child pornography. 73 Fed. Reg. 38030, 38053–54.

More specifically, Tier II offenses are those other than Tier III offenses (described below) that are punishable by imprisonment for more than one year, and fall into one of the following three categories (A, B, or C):

- A. Are comparable to or more severe than the following offenses, when committed against a minor (or an attempt or conspiracy to commit them):

¹ There may be some 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.”).

1. Sex trafficking as defined in 18 U.S.C. § 1591;
2. Coercion and enticement under 18 U.S.C. § 2422(b);
3. Transportation with intent to engage in criminal sexual activity under 18 U.S.C. § 2423(a);
or
4. Abusive sexual contact under 18 U.S.C. § 2244. Abusive sexual contact generally requires, among other things, that the defendant engage in or cause “sexual contact” with or by another person, defined in 18 U.S.C. § 2246(3) as the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

B. That involve:

1. Use of a minor in a sexual performance;
2. Solicitation of a minor to practice prostitution; or
3. Production or distribution of child pornography.

C. That occur after the offender becomes a tier I sex offender.

Tier III. Tier III offenses (defined in 42 U.S.C. § 16911(4)) are those that are punishable by imprisonment for more than 1 year and fall into one of the following three categories (A, B, or C):

A. Are comparable to or more severe than the following offenses (or an attempt or conspiracy to commit them):

1. Aggravated sexual abuse under 18 U.S.C. § 2241 or sexual abuse under 18 U.S.C. § 2242. “Sexual abuse” crimes generally require, among other things, the commission of a “sexual act,” defined in 18 U.S.C. § 2246 as contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the anus; penetration of the anal or genital opening of another by a hand, finger, or any object; or direct touching, not through the clothing, of the genitalia of a person under 16.
2. Abusive sexual contact under 18 U.S.C. § 2244 (described above in the tier II offense definition) when committed against a minor under 13 years old.

B. Involve kidnapping of a minor (unless committed by a parent or guardian).

C. That occur after the offender becomes a tier II sex offender.

If the petitioner’s registration offense does not match up with any of the descriptions set out above, then North Carolina would be permitted under SORNA to treat it as a tier I offense.

Determining the Applicable Tier. How exactly should the court go about determining whether a registration offense meets the tier II or tier III definitions? Federal regulations say that when assessing whether an offense satisfies the tier II or tier III classification, “jurisdictions generally may premise the determination on the elements of the offense, and are not required to look to underlying conduct that is not reflected in the offense of conviction.” 73 Fed. Reg. at 38053. Federal regulations make an exception to the elements-based approach for tier classifications that depend on victim age: those requirements must be obeyed even for crimes whose *elements* do not specify that the victim must be below the threshold age if the victim was *in fact* below it. *Id.*

If such an approach is permissible for jurisdictions, then that is the test a judge should use under G.S. 14-208.12A(a1)(2) when evaluating whether removing a person from the registry would run afoul of the minimally restrictive SORNA-compliant regime. Under that approach, a crime like indecent liberties with a child—which can, by its elements, be committed in ways that do not involve “sexual contact” or “sexual acts” as defined above—could be a tier I offense in a SORNA-compliant regime. See Jessica Smith, *North Carolina Crimes: A Guidebook on the Elements of Crime* 247–48 (7th ed. 2012) (collecting cases on indecent liberties, including, for example, a case involving a defendant who French kissed a child and another in which the defendant secretly videotaped a teenager trying on clothes).²

Reduction for Clean Record. Under SORNA, registrants convicted of Tier I offenses who have a “clean record” as defined in 42 U.S.C. § 16915(b)(1) may have their registration period reduced from 15 years to 10 years. To have a clean record, the person must:

- Not be convicted of any subsequent offense for which imprisonment for more than 1 year may be imposed;
- Not be convicted of any subsequent sex offense;
- Successfully complete any period of supervised release, probation, and parole; and
- Successfully complete an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

U.S. Department of Justice guidelines on SORNA note that the requirement to “successfully complete” any period of supervised release, probation, and parole means “completing those periods without revocation.” 73 Fed. Reg. at 38068.

Conclusion. In light of the SORNA requirements on registration length, as viewed through the lens of G.S. 14-208.12A, it appears that the only registrants who may be removed from the registry after 10 years are those who committed a Tier I offense and who satisfy the clean record requirement described above. Other Tier I offenders would have to register for at least 15 years to enable the

² There is some argument that the indecent liberties crime describes two crimes, one that can be committed without any sort of contact, and one that requires an act “upon or with the body.” See *United States v. Vann*, 660 F.3d 771, 782 (4th Cir. 2011) (King, J., concurring).

court to make finding #7, and any other offender would have to register for at least 25 years or for life. In the only North Carolina case to date on the issue, *In re Hamilton*, __ N.C. App. __, 725 S.E.2d 393 (2012), the parties agreed that indecent liberties with a child was a Tier I offense. The court of appeals also determined that the petitioner satisfied the clean record requirements, and that it would thus comply with federal law to allow him off the registry after 10 years. The court described SORNA standards as though they are applicable by virtue of G.S. 14-208.12A(a1)(2), but in light of the parties' agreement at trial the issue was not fully litigated.

8. If the petitioner filed a previous petition for termination under G.S. 14-208.12A that was denied, one year or more has passed since the date of the denial.

If the court denies the petition, the registrant may petition the court again one year from the date of the denial of the original petition to terminate. G.S. 14-208.12A(a3).

9. If the conviction requiring the petitioner's registration occurred in another state, the petitioner (i) provided written notice to the sheriff of the county where the petitioner was convicted that the petitioner is petitioning the court to terminate the registration requirement and (ii) included with the petition an affidavit, signed by the petitioner, that verifies that the petitioner notified the sheriff of the county where the petitioner was convicted of the petition and that provides the mailing address and contact information for that sheriff.

This requirement is set out in G.S. 14-208.12A(a). It is unclear how the requirement applies, if at all, to a federal conviction for an offense that occurred in North Carolina.

E. Termination of Satellite-Based Monitoring (SBM)

Termination of Lifetime SBM. Requests to terminate lifetime SBM are to the Post-Release Supervision and Parole Commission under G.S. 14-208.43, not to the courts. The request may not be made until at least one year after the offender has served his or her sentence, including any period of probation, parole, or post-release supervision.

Relation to Registration. An order granting a petition to terminate sex offender registration also terminates SBM. G.S. 14-208.43(d1).

Additional resources:

1. John Rubin, Guide to Relief from a Criminal Conviction, Sex Offender Registration and Monitoring Obligations, www.sog.unc.edu/node/2676.
2. Jamie Markham, "Petitions for Removal from the Sex Offender Registry: The Wetterling Finding—Part I," *North Carolina Criminal Law, UNC School of Government Blog* (May 16, 2012), <http://nccriminallaw.sog.unc.edu/?p=3601>.
3. Jamie Markham, "Petitions for Removal from the Sex Offender Registry: The Wetterling Finding—Part II," *North Carolina Criminal Law, UNC School of Government Blog* (May 17, 2012), <http://nccriminallaw.sog.unc.edu/?p=3608>.