POST-CONVICTION PROCEEDINGS RELATED TO SEX OFFENDER REGISTRATION & MONITORING

Jamie Markham
Assistant Professor, School of Government
919.843.3914; markham@sog.unc.edu

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.

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

Does an offender who moves to North Carolina after registering for several years in another state get credit for the time spent registered there? Probably not. G.S. 14-208.12A(a) refers only to the date of "initial

[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.

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.

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.

Regarding the first prong of the test, 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 not satisfied that the petitioner is not a current or potential threat to public safety.

Regarding the second prong of the test, 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 promulgated under the Spending Clause—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 originally 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. Because no states were in compliance by the original deadline, the U.S. Attorney General granted a blanket one-year extension, giving states until July 27, 2010, to comply.

Among other requirements, SORNA:

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

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—these are, after all, federal standards "required to be met as a condition for the receipt of federal funds." In light of the U.S. 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 second prong of the test could, therefore, reasonably be deferred until July 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 least serious category), 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. Thus, a court would not be able to grant a petition to terminate registration for an offender registered for what will be a tier II offense under SORNA until he or she had been registered for 25 years.

Under SORNA, 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 new 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 would be eligible to petition after 10 years as envisioned by G.S. 14-208.12A**.

Which North Carolina offenses would be tier I offenses under SORNA? It's impossible to know for sure (there is not a perfect overlap between our laws 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)
- 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 its program of satellite-based monitoring (SBM) of sex offenders in 2006. S.L. 2006-247. In general, SBM determinations should be made at sentencing. G.S. 14-208.40A. However, because the SBM law applies to some 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." 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 and Eligibility Criteria. To be eligible for SBM at all, a defendant must have a reportable conviction that requires sex offender registration. A crime must meet two criteria to be reportable. First, it must be listed in G.S. 14-208.6(4). Second, it must fall within the effective date language applicable to that crime. The attached flow chart keys the applicable effective date language for each reportable crime.

Once it has been established that a person has a reportable conviction, yet another effective date comes into play. The legislation that created the SBM regime (S.L. 2006-247) made the law applicable to those with a reportable conviction who: (1) committed their offense on or after August 16, 2006; (2) were sentenced to intermediate punishment on or after that date; (3) were released from prison by parole or post-release supervision on or after that date; or (4) complete a sentence on or after that date and are not on post-release supervision or parole.[2]

If a person falls within one of the effective-date provisions above and no SBM determination was made at sentencing, the Department of Correction (DOC) must make an initial determination on whether the person meets one of the following SBM eligibility criteria. The criteria fall into two broad categories: those requiring *lifetime* SBM, and those requiring monitoring for a period of time specified by the court. DOC refers to people in the latter category as *conditional* offenders.

[2] Some have argued that the 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), was simply made "effective December 1, 2007," with no reference to the retroactive application described in the 2006 law. Nevertheless, reported opinions concerning SBM have consistently referenced August 16, 2006 as the proper effective date, suggesting the 2007 law merely added a procedural gloss to the substance of the 2006 legislation.

Lifetime monitoring. The offender will be subject to lifetime SBM if he or she meets one of the following eligibility criteria:

- Sexually violent predator (G.S. 14-208.6(6)): There are about a dozen SVPs in North Carolina. Before classifying an offender as an SVP, the court must follow the procedure set out in G.S. 14-208.20. State v. Zinkand, 190 N.C. App. 765 (2008).
- Recidivist (G.S. 14-208.6(2b)): A recidivist is a person with a prior conviction for an offense described in G.S. 14-208.6(4). In addition to satisfying the effective date provisions above, an offender's current offense must have occurred on or after October 1, 2001 for the person to qualify as a recidivist. S.L. 2001-373.
- Aggravated offender (G.S. 14-208.6(1a)): An aggravated offense is one that includes a sexual act involving vaginal, anal, or oral penetration with a victim of any age through force or the threat of serious violence, or with a victim who is less than 12 years old regardless of force. An offense must have occurred on or after October 1, 2001 to be an aggravated offense. S.L. 2001-373.
- Convicted of rape or sexual offense with a minor by an adult (G.S. 14-27.2A; -27.4A). Note that this is a separate, substantive crime—not just a rape or sexual offense that happens to have been committed by an adult against a minor.

Conditional monitoring. The offender will be subject to SBM for a period specified by the court if he or she committed an offense that involved the "physical, mental, or sexual abuse of a minor," *and*, based on a DOC risk assessment (an actuarial instrument called a Static-99) or other facts found by the judge, requires the "highest possible level of supervision and monitoring." The term "physical, mental, or sexual abuse of a minor" is not defined by statute, but the definition of "abused juvenile" in G.S. 7B-101(1) provides a sensible starting point for analyzing whether an offense involves abuse. As to the risk assessment, the Static-99 is a ten-question actuarial instrument developed in Canada for use with adult male sex offenders. Probation officers are trained to administer the assessment, which establishes a risk level for the offender—low, moderate, or high. Even if a risk assessment doesn't score high, the court may still find other facts to support a determination that the offender requires the highest possible level of supervision and monitoring, and then order SBM based on that determination.[3] State v. Morrow, __ N.C. App. __ (Oct. 6, 2009). The court could use form AOC-CR-618 to make such additional findings.

Hearing Notice and Procedure. If DOC determines, based on an initial evaluation, that the offender falls into one of the eligibility categories described above, the district attorney must schedule a bring-back hearing under G.S. 14-208.40B. Notice of the hearing should be sent by certified mail to the offender's registry

[3] It is unclear from *Morrow* what type of facts are sufficient to support a finding that an offender who did not score high on the Static-99 nonetheless requires the highest possible level of supervision and monitoring. The court of appeals said the trial court's finding in *Morrow* that the defendant was 11 or 12 years older than the victim was insufficient, but suggested in dicta that the defendant's failure to attend at least seven session of sexual abuse treatment would probably suffice.

address, or it may be provided in person if the offender is still in prison (DOC typically aims to hold the bring-back hearing immediately prior to a person's release). State v. Wooten, __ N.C. App. __ (Dec. 16, 2008). The notice must indicate the basis of DOC's preliminary determination that the offender must enroll in SBM, including an indication of the SBM eligibility category or categories into which DOC believes the offender falls and a brief summary of the factual basis behind the determination. State v. Stines, __ N.C. App. __ (Oct. 6, 2009).

Previously, the law required DOC to schedule the hearing, but legislation passed this year (S.L. 2009-387) shifts scheduling responsibility to the DA and requires the DA to represent DOC at the hearing. Under that same legislation, an indigent offender is entitled to appointed counsel at a bring-back hearing.

At the hearing itself, the court determines whether an offender will be subject to lifetime monitoring, SBM for a period specified by the court (conditional monitoring), or not subject to SBM at all. That determination should be made based on facts found under the procedure set out in G.S. 14-208.40A, which requires the DA to present any evidence that the offender meets one of the SBM eligibility criteria set out above, and allows the offender to present any evidence that the district attorney's evidence is not correct. If the court finds that the offender falls within the lifetime SBM category, it must order the offender to enroll in SBM for life. If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, it must order DOC to complete a risk assessment within 30 to 60 days—although most offenders before the court for a bring-back hearing already will have completed a Static-99, and the statute allows the court to use an assessment done within six months of the date of the hearing. If, based on the assessment or other facts, the court determines that the offender requires the highest possible level of supervision and monitoring, it should order SBM for a specified time period. The SBM period for conditional offenders is in the court's discretion, although it may be no longer than the time for which the offender must register. Additionally, the period should be for a discrete period of time, not a range of time with a minimum and maximum. *Morrow.*

The statute is silent as to what evidentiary rules apply at the hearing, and the appellate courts have yet to address the issue. It would appear that the rules of evidence apply—Rule 1101 of the evidence code says the rules apply to all court proceedings except those exempted by statute, and SBM hearings are not exempted. It is unclear, though, what standard of proof applies at the hearing. By default it seems a preponderance of the evidence standard would apply in a civil determination such as this, but a heightened standard (proof by clear and convincing evidence, or proof beyond a reasonable doubt) arguably applies as a matter of due process. *See* United States v. Comstock, 507 F. Supp. 2d 522, 551–59 (E.D.N.C. 2007) (collecting cases on what process is due in relation to a particular infringement on liberty).

Constitutional Issues

Ex Post Facto. Satellite-based monitoring is non-punitive, and thus does not implicate the Ex Post Facto Clause as applied to offenders who committed their crimes before the SBM law was enacted. State v. Bare, __ N.C. App. __ (2009). In *Bare*, the court of appeals concluded that the General Assembly intended SBM to be a civil regulatory scheme to protect the public, and the regime was not so punitive in purpose to negate the legislature's intent to

deem it civil. Several times the court noted a lack of evidence in the record to support the defendant's arguments, raising the possible argument that the opinion's holding would be limited to the facts of that case. Three weeks later, however, the court cited to *Bare* without qualification in *State v. Anderson*, __ N.C. App. __ (July 7, 2009), to say "[t]his court has already held that the provisions of the satellite-based monitoring program are civil in nature, not punitive." In four subsequent cases, *State v. Wagoner*, __ N.C. App. __ (Sept. 1, 2009), *State v. Morrow*, __ N.C. App. __ (Oct. 6, 2009), *State v. Hagerman*, __ N.C. App. __ (Nov. 3, 2009), and *State v. Vogt*, __ N.C. App. __ (Nov. 3, 2009), a court of appeals judge (Elmore) dissented on the ex post facto issue, working through the seven-factor test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to conclude that SBM is, in fact, punitive. The dissents in those cases will bring the issue before the Supreme Court of North Carolina.

Apprendi (Sixth Amendment Jury Trial Right). Because SBM is not part of a defendant's criminal punishment, it does not violate his or her Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the court (and not a jury) to find the facts necessary to impose it. State v. Hagerman, __ N.C. App. __ (Nov. 3, 2009). Judge Elmore dissented, which will likely bring the issue before the state high court.

Unresolved Issues. It remains an open question whether the court may, when deciding whether a particular offense was "aggravated," consider only the elements of the conviction offense, or whether it may also consider the facts underlying the conviction. Can indecent liberties with a child, for example, ever be an aggravated offense when it does not have penetration as an element? In *Hagerman*, discussed immediately above, the court of appeals affirmed a case in which the trial court found that the defendant's indecent liberties convictions were aggravated offenses, but the defendant in that case did not argue that the determination should, as a matter of statutory interpretation, have been limited to the elements of the conviction offense. Instead, he only argued the Sixth Amendment constitutional issue. The Nebraska Supreme Court adopted a facts-based interpretation of that state's very similar law. *State v. Hamilton*, 763 N.W.2d 731 (Neb. 2009) ("[A] sentencing judge . . . may make this [aggravated offense] determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report."). In an analogous context—determining whether a prior crime meets the definition of a "violent felony" under the federal Armed Career Criminal Act—the Supreme Court and the Fourth Circuit have adopted a "modified categorical" approach. James v. United States, 550 U.S. 192 (2007); United States v. Harcum, __ F.3d __ (Nov. 17, 2009). Under that approach a court may look the elements of the prior crime plus, when necessary, certain reliable documents to determine whether a prior crime was violent. The Court has approved the use of charging documents, jury instructions, and plea agreements, United States v. Shepard, 544 U.S. 13 (2005), but disapproved the use of police reports and complaint applications, *id.* at 20–23.