Petitions for Removal from the Sex Offender Registry: The Wetterling Finding -- Part I

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A recent case from the court of appeals sheds some light on a frequently asked question about petitions for removal from the sex offender registry. The case, *In re Hamilton*, considered a trial court's refusal to grant a petition because granting it would not comply with the federal Jacob Wetterling Act, as amended, and other related federal standards. It's an issue I wrote about in this prior post, but given this new case (and the passage of three years) it's time for an update.

In *Hamilton*, the petitioner pled guilty to taking indecent liberties with a child in August 2001. He registered as a sex offender that same month. Almost exactly ten years later, in August 2011, the trial court heard his petition to terminate his registration. The trial judge denied the petition based solely on a finding that allowing Mr. Hamilton off the registry would not comply with applicable federal law.

Mr. Hamilton made two arguments on appeal. The first, styled as an issue of "mootness," was that his registration should have terminated automatically after ten years based on the law that existed when he was first placed on the registry. The registry used to work that way, the court of appeals noted, but the petition procedure put in place by the General Assembly in 2006 was made applicable to "persons for whom the period of registration would terminate on or after December 1, 2006." S.L. 2006-247, sec. 10.(b). The change therefore included Mr. Hamilton, whose registration would have run until at least 2011. (John Rubin noted this issue on page 2 of his 2006 legislative summary, available here. The upshot is that only a narrow cohort of registrants who initially registered between January 1, 1996 and November 30, 1996, would see their registration terminate automatically after 10 years.) The court of appeals rejected the argument.

The second argument—which is really the one that I want to discuss—was that the trial court erred when it found that removing Mr. Hamilton from the registry would not comply with federal law. The connection to federal law stems from G.S. 14-208.12A(a1)(2), which says that a court may grant a petition for removal only if "[t]he 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." That requirement appears as finding #7 on Side Two of Form AOC-CR-262, *Petition and Order for Termination of Sex Offender Registration*; I'll refer to it here as the "Wetterling finding." Hamilton argued that removing him from the registry would *not* run contrary to federal standards for minimum registration length.

To evaluate Hamilton's argument, the court of appeals had to look to the federal standards themselves. Those standards are set out in the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248—the successor to the Jacob Wetterling Act. As I discussed in the prior post linked in the opening paragraph above, one portion of that law is the Sex Offender Registration and Notification Act, or SORNA. SORNA sets out a comprehensive registration program that jurisdictions (states, the District of Columbia, U.S. territories, and Indian tribes) must "substantially implement" to avoid losing 10 percent of certain federal grant funds each year. 42 U.S.C. 16925(a).

As of today, 44 jurisdictions (15 states, two territories, and 27 tribes) have substantially implemented SORNA. North Carolina is not one of them, an issue I discussed in this prior post. Nevertheless, the federal standards exist and are,

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within the language of G.S. 14-208.12A(a1)(2), "required to be met as a condition for the receipt of federal funds by the State." The original SORNA compliance deadline was July 27, 2006. North Carolina, like just about every other state, received a series of extensions that pushed the deadline to July 27, 2011. Before that deadline passed, there was a decent argument that a judge could sign off on the Wetterling finding on an order granting a petition to come of the registry without really digging in to whether the requested relief would comply with federal standards—the standards did not apply to the state directly, and they weren't *yet* required to be met to receive our full federal grant allotment. Now that that date has passed, it seems that a court can probably only let someone off the registry when doing so would comply with federal standards.

That's what the court of appeals did in *Hamilton*, walking through the Adam Walsh Act and noting that it sets out different minimum registration durations for different offenses according to a tiered system. Tier I sex offenders must register for 15 years, tier II offenders must register for 25 years, and tier III offenders must register for life. 42 U.S.C. 16915(a). The law also provides that tier I offenders may have their minimum registration period reduced from 15 years to 10 if they have a "clean record" as defined in 42 U.S.C. 16915(b)(1). 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 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.

In *Hamilton*, the parties apparently all agreed that Mr. Hamilton's crime of indecent liberties with a minor would be a tier I offense. Thus, it would comply with federal requirements to allow him to come off the registry after 15 years. Further, the appellate court's review of the record indicated that Mr. Hamilton had not been convicted of any new felonies; had not been convicted of any new sex crimes; had successfully completed his probation; and had successfully completed sexual abuse treatment as a condition of his probation. He therefore satisfied the "clean record" definition and it would thus comply with federal requirements to come off the registry after 10 years. Based on that analysis the court of appeals vacated the trial court's finding that removing Hamilton from the registry would not comply with federal standards. The court remanded the case to allow the trial court to decide in its discretion whether to grant Hamilton's petition.

Hamilton strikes me as an important case, helpful in developing an analytical framework that trial courts can use when deciding whether or not to make the Wetterling finding. As a threshold matter, *Hamilton* illustrates how North Carolina's decision not to enact a SORNA-compliant regime does *not*—as I have heard some people say—mean that no one can get off the registry for now. The Wetterling finding is *not* asking the court to decide whether North Carolina is, as a state, in compliance with federal law. (We are not.) Nor does the finding require the court to predict *precisely* what a SORNA-compliant regime enacted by the General Assembly might look like. (Remember, SORNA sets a floor that jurisdictions are free to exceed.) Rather, the question before the court is: *Is there a hypothetical, SORNA-compliant regime in which this person could come off the registry now?* That determination is inherently speculative; it is the United States Department of Justice that will ultimately decide whether whatever legislative action North Carolina takes in response to SORNA "substantially complies" with federal requirements. But until our legislature acts, that appears to be what courts must do.

And it won't always be as easy as it turned out to be in *Hamilton*, in which the parties—and the court of appeals—agreed that indecent liberties with a minor would be a tier I offense. Part two of this post will set out an analytical framework that courts can use when deciding whether or not they can make the Wetterling finding.

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