

# TERMINATING SEX OFFENDER REGISTRATION

James Markham  
Associate Professor, UNC School of Government  
919.843.3914  
markham@sog.unc.edu

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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.

*30-year registration.* Non-lifetime registrants have a 30-year registration period. These registrants are described in Part 2 of Article 27A of G.S. Chapter 14, and are therefore 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 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, 220 N.C. App. 350 (2012). Applying the 2006 amendments to offenders whose registration would not terminate automatically before December 1, 2006 is not impermissibly retroactive. *Id.*; In re Hall, 238 N.C. App. 322 (2014).

*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.

*Erroneous registration.* Sometimes a defendant will argue that he or she never should have been required to register based on his or her conviction. In that circumstance, a declaratory judgment action is the more appropriate way of obtaining a ruling on the issue than a petition to terminate. In re Bunch, 227 N.C. App. 258 (2013) (concluding that the issue of whether a Michigan conviction required registration in North Carolina was not preserved for appellate review because it was not contested by the State at the trial level).

### 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 superior court 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, 225 N.C. App. 43 (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.

For petitions filed on or after July 21, 2017, recently revised G.S. 14-208.12A indicates that federal convictions are to be treated as out-of-state convictions for the purposes of this statute regardless of where they occurred. S.L. 2017-158. Thus, petitioners on the registry for a federal conviction should petition in their district of residence. Previously, the proper venue for a federal conviction that occurred in North Carolina was unclear.

*Counsel.* There is no statute granting a right to appointed counsel for a petition to terminate registration. There may, however, be an argument that an indigent petitioner is entitled to counsel as a constitutional matter. IDS will compensate attorneys in these matters if the court determines the petitioner indigent, appoints counsel, and orders payment.

*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). Termination hearings are not exempt from the Rules of Evidence. Rule 1101.

*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*, 220 N.C. App. 350 (2012).

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: when a conviction is reversed, vacated, or set aside, or if the registrant has been granted an unconditional pardon of innocence for the offense requiring registration.

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; registration on another state’s registry does not start the running of the ten-year period. *In re Borden*, 216 N.C. App. 579 (2011) (disallowing credit for time spent on Kentucky’s registry).

A trial court has jurisdiction to hear a petition filed before 10 years have elapsed, although such a petition generally should be denied. *Cf. In re Hutchinson*, 218 N.C. App. 443 (2012) (affirming a petition granted after fewer than 10 years of registration when the State failed to contest the issue in the trial court).

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 may, however, play a role in the court's determination of whether 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. However, the General Assembly 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 of course 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. By local practice, some districts require the petitioner to provide a mental health assessment as part of the court's assessment of the petitioner's risk, but there is no statutory requirement for such an assessment.

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 court may not remove a petitioner from the registry unless doing so would comply with federal standards related to registration. The federal Sex Offender Registration and Notification Act (SORNA) provides "federal standards applicable to the termination of a registration requirement" within the meaning of G.S. 14-208.12A, and trial judges must take it into account when considering a petition to

terminate registration. In re Hamilton, 220 N.C. App. 350 (2012). The incorporation of federal standards into state law by way of G.S. 14-208.12(a1)(2) is not an unconstitutional delegation of the North Carolina General Assembly's lawmaking authority to Congress. State v. McClain, 226 N.C. App. 465 (2013).

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 if the defendant has a "clean record" as defined by federal law.
- Tier II offenses require registration for at least 25 years.
- Tier III offenses require registration for life.

**Determining the Applicable Tier.** How exactly should the court go about determining the federal tier into which a North Carolina crime would fall? The trial generally must base its determination on the elements of the offense of conviction, not on the facts underlying that conviction. State v. Moir, \_\_\_ N.C. \_\_\_, 794 S.E.2d 685 (2016).

There is an exception to that rule for tier classifications related to **victim age**. Tier classifications that depend on victim age must, under the federal framework, be obeyed even for crimes that do not include victim age as an element. See 73 Fed. Reg. 38030, 38053.

The court may also conduct a limited review of the facts set out in certain reliable documents, such as the indictment, the jury instructions, or a plea agreement, to determine the defendant's specific crime of conviction under a **divisible statute**. Once the crime is identified, however, the review of those additional facts ends, and the court evaluates the tiering of the conviction in an elements-based way. Examples of statutes that might be divisible are indecent liberties with children (the supreme court in *Moir* remanded for consideration of that crime's divisibility) and second-degree sexual exploitation of a minor. This approach of using reliable documents to identify the crime of conviction and then evaluating that crime in an elements-based way is known as the **modified categorical approach**.

**A suggested tiering for every reportable offense is set out in *SORNA Tiers for North Carolina Sex Crimes*, included as an appendix to this outline.**

**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. Tier I registrants without a clean record would not be able to petition successfully (assuming other requirements are satisfied) until they have registered for at least 15 years. Tier II registrants could petition successfully after 25 years of registration. The court could never grant a petition for a Tier III registrant, so those registrants will remain on the registry until the state-mandated 30-year registration period expires. Some registrants (those convicted of any rape, for example) will be aggravated offenders subject to lifetime registration, and thus ineligible to petition for removal from the registry in any event.

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).