No. FIFTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

****

IN THE MATTER OF:	)	
	)	From New Hanover
KEVIN McCLAIN	)	

****

PETITION FOR DISCRETIONARY REVIEW
UNDER N.C.G.S. §7A-31(c)

****

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No. FIFTH JUDICIAL DISTRICT

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PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. §7A-31(c)

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioner Kevin McClain respectfully petitions this Court to certify for discretionary review the judgment of the Court of Appeals affirming the trial court's denial of his petition for removal from the sex offender registry. Mr. McClain seeks this Court's review on the bases that (1) the case involves a constitutional principal of major significance, namely, the question of whether Article II, § 1 of the North Carolina Constitution prohibits the General Assembly from delegating its legislative power to Congress, and (2) the Court of Appeals' decision conflicts with a consistent line of prior decisions by this Court, including *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc*, 285 N.C. 467, 206 S.E.2d 141 (1974), that have interpreted Article II, § 1 to bar the delegation of legislative power. In support of his petition, Mr. McClain shows the following:

STATEMENT OF THE CASE

This case came on for a hearing at the 13 June 2012 session of New Hanover County Superior Court, before Judge Walter H. Godwin, Jr., upon Kevin McClain's Petition for Termination of Sex Offender Registration. (R pp 17-18)[1] Judge Godwin denied Mr. McClain's petition in an order signed the day of the hearing. (R p 18) Mr. McClain first registered as a sex offender on 7 August 2001 following his guilty plea to indecent liberties. (R pp 11, 17) Mr. McClain filed written notice of appeal. (R p 25) On 16 April 2013, the Court of Appeals affirmed the denial of Mr. McClain's petition in a published decision.[2] (Appendix)

STATEMENT OF THE PERTINENT FACTS

When the trial court ruled on Kevin McClain's petition for removal from the sex offender registry, it found as fact that he was "not a current or potential threat to public safety." (R p 18) It also found that:

> 1. [Mr. McClain] was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense [of indecent liberties].
>
> 2. [Mr. McClain] 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 [7 August 2001].

[1] The Record on Appeal will be referred to as "R." The trial transcript will be referred to as "T."
[2] The Court of Appeals withdrew the opinion issued on 16 April 2013 and filed a corrected version on 26 April 2013. The corrected version is attached to this petition as an appendix.

> 3. Since the Date of Conviction [29 January 2001], [Mr. McClain] has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.
>
> 4. Since the completion of his sentence for [indecent liberties], [Mr. McClain] has not been arrested for any offense that would require registration under Article 27A of Chapter 14.
>
> 5. [Mr. McClain] timely served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.

(R p 18) The court also found as fact that Mr. McClain did not meet the following condition set forth on the form order:

> 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.

(R p 18) The court concluded as a matter of law that Mr. McClain was "NOT entitled to the relief requested" and denied his petition. (R p 18)

Mr. McClain informed the court during the hearing that he was convicted of a felony for failure to comply with obligations under the sex offender registry law. (T p 2) His attorney stated that, as a result of that conviction, he would not be able to show that he had the "clean record" required for removal under the federal Sex Offender Registration and Notification Act ("SORNA") if that statute were applied to his case. (T pp 9-10) Mr. McClain objected to the application of SORNA. (T p 10, 12, R pp 19-22) At the hearing and on appeal, Mr. McClain argued that the

adoption of unspecified future federal standards into State law violated Article I, §2 of the North Carolina Constitution. He also argued, for preservation purposes, that the Court of Appeals' prior decision in *In the Matter of Hamilton*, ___ N.C. App. ___, ___, 725 S.E.2d 393 (2012), incorrectly interpreted the "other federal standards" language in N.C.G.S. § 14-208.12A to incorporate SORNA. The Court of Appeals rejected Mr. McClain's constitutional argument and acknowledged that it was bound by its statutory interpretation in *Hamilton*.

REASONS WHY CERTIFICATION SHOULD ISSUE

I. THE COURT OF APPEALS' PUBLISHED OPINION ON THE DELEGATION OF LEGISLATIVE POWER CONTRADICTS THIS COURT'S PRIOR DECISIONS INTERPRETING ARTICLE II, § 1 OF THE NORTH CAROLINA CONSTITUTION.

This Court has consistently held that Article II, § 1 of the North Carolina Constitution prohibits the General Assembly from delegating its legislative power to "any other department or body." *Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth*, 237 N.C. 52, 60, 74 S.E.2d 310, 316 (1953); *Durham Provision Co. v. Daves*, 190 N.C. 7, 10, 128 S.E.2d 593, 594 (1925). The non-delegation rule does not impinge on the Legislature's ability to consider existing enactments of Congress and adopt them as its own. In this case, however, the Court of Appeals affirmed a different species of legislative act – the prospective incorporation of unspecified future acts of Congress and federal administrative agencies through the words "any other federal standards." A prospective incorporation of this kind

blindly leaves to Congress the determination of what State law will be. Under this Court's precedents, the Legislature's surrender of such power to another body violated the non-delegation rule. *Coastal Highway*, 237 N.C. at 60-61, 74 S.E.2d at 316. The Court of Appeals opinion ignored the constitutional problem and analyzed the language of the 2006 statute as if it had explicitly adopted the 2012 requirements of SORNA. This Court should grant discretionary review in order to correct the Court of Appeals' error and reaffirm a core constitutional doctrine.

In 2006, the General Assembly changed the minimum period for registration on the State sex offender registry and created a process for removal from the registry by petition after ten years. Ch. 247, sec. 5.(a) and 10.(a), 2006 Sess Laws 1065, 1068 and 1072. The Legislature crafted new requirements for a removal petition and prohibited trial courts from granting relief unless the petitioner could meet the following condition:

> The relief requested 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.

N.C.G.S. § 14-208.12A(a1)(2). The Jacob Wetterling Act, as amended, 42 U.S.C. § 14071 (2006), and its implementing regulations were the law of the land at the time of the statute's passage and would remain in full force for several more years.

Compliance with the Jacob Wetterling Act was not the issue in this case. The sole basis for the trial court's conclusion that Mr. McClain was not entitled to

relief was his inability to show compliance with the requirements of a current federal law, the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16911, *et seq*. Although passed in 2006, SORNA by its own terms did not repeal and replace the Jacob Wetterling Act until the United States Attorney General could develop the software necessary for its implementation. Pub. L. No. 109-248, title I, § 129, 120 Stat. 600 (2006). Moreover, SORNA's implementing regulations did not exist in 2006. As late as 2010, states had to comply with the Jacob Wetterling Act, not SORNA, to receive federal funds. *See* 42 U.S.C. § 14071(g) (2010). North Carolina never adopted SORNA once it came into force, and the Legislature has yet to pass even a resolution calling for a committee to investigate "[w]hether the State should comply with the requirements of SORNA." H.R. 772, 2011 Gen. Assem.

Although neither N.C.G.S. § 14-208.12A nor any other provision of North Carolina's sex offender laws makes reference to SORNA, the Court of Appeals held in *In the Matter of Hamilton* that the reference to "any other federal standards" served to incorporate the law that repealed and replaced the Jacob Wetterling Act. ___ N.C. App. ___, ___, 725 S.E.2d 394, 398 (2012). Neither party in *Hamilton* raised a constitutional challenge to that interpretation, which read the 2006 statute as incorporating any future acts of Congress and federal regulations applicable to termination from a sex offender registry. This case

confronted the Court of Appeals with the constitutional implications of its ruling in *Hamilton*.

Article II, § 1 of the North Carolina Constitution declares that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." Almost ninety years ago, this Court recognized "a maxim of constitutional law that when the sovereign power of the State has vested such authority in the Legislature, ordinarily it may not be delegated by that department to any other department or body." *Durham Provision Co.*, 190 N.C. at 10, 128 S.E.2d at 594. Three decades later, in *Carolina-Virginia Coastal Hwy.*, this Court reaffirmed the "settled principle of fundamental law" that "the Legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body." 237 N.C. at 60, 74 S.E.2d at 316. The Court held that the determination of whether construction of a toll road would be "in the public interest" was "purely a legislative question" and could not be delegated to the unguided discretion of a municipal board. *Id*. at 63, 74 S.E.2d at 318. The statute purporting to delegate such authority thus violated the State Constitution. *Id*.

In 1974, this Court applied the non-delegation doctrine to a law that, like the one at issue here, did not involve a subordinate State agency or municipal entity. In *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc*., the Court noted that it

was already "well settled that the Legislature may not delegate its power to make laws even to an administrative agency of the government." 285 N.C. 467, 475, 206 S.E.2d 141, 147 (1974). The Court then held that "it follows, necessarily," that the Legislature may not delegate that same power to a private corporation. *Id.* It follows, with equal necessity, that the Legislature may not surrender its duty to make laws to the future enactments of Congress. While this Court has not addressed that specific scenario, other state courts have consistently held that "an incorporation by state statute of rules, regulations, and statutes of federal bodies to be promulgated subsequent to the enactment of the state statute constitutes an unlawful delegation of legislative power." *State v. Williams*, 583 P.2d 251, 254-55 (Ariz. 1978) (holding that Arizona could only rely on federal laws and regulations in force at the time an incorporating statute was passed in order to support a criminal charge); *see also State v. Urquhart*, 310 P.2d 261, 264-65 (Wash. 1957) (collecting cases).

The Court of Appeals missed the constitutional issue and found that "[r]ather than abdicating or delegating legislative authority to make new guidelines to the federal government, the North Carolina legislature is attempting to bring its program in line with the external federal standards with which it needs to comply in order to receive federal funding." *In the Matter of McClain*, No. COA12-1258, slip op. at 8 (26 April 2013). This statement ignores two keys facts: (1) federal

funding was contingent on compliance with the Jacob Wettlering Act, not SORNA, when the Legislature passed the law, and (2) the State has never complied with SORNA or taken any steps to receive federal funds for compliance. Under the Court of Appeals' holding, the meaning of North Carolina law must change whenever Congress enacts new laws and declares that compliance will be required for receipt of federal funds. This result cannot be read other than as a delegation to the United States Congress of the power to set public policy and make law in North Carolina without further review from the Legislature.

The Court of Appeals' analysis also confused another aspect of the non-delegation doctrine that had no relevance to this case. In its decisions on non-delegation, this Court has recognized a distinction between the unconstitutional delegation of legislative power and the Legislature's ability to delegate ministerial and fact-finding duties to subordinate agencies charged with executing the laws. As this Court explained in *Carolina-Virginia Coastal Highway*:

> Here we pause to note the distinction generally recognized between a delegation of the power to make law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first **may not be done**, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances.

237 N.C. at 61, 74 S.E.2d at 316 (emphasis added); *accord, Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 748, 392 S.E.2d 352, 356 (1990). The Court of Appeals' decision has turned this doctrine on its head.

In upholding the Legislature's delegation to Congress of the authority to determine the prerequisites for removal from the state sex offender registry, the Court of Appeals cited the ministerial exception. *McClain*, slip op. at 7. It then reasoned that the Legislature "is not creating a framework and then asking Congress or another federal agency to determine facts or fill in that framework; these statutes comprise two parallel sex offender notification and registration programs, state and federal, existing side-by-side." *Id.* at 8. Under this Court's precedents, the factors cited by the Court of Appeals would require a conclusion that the delegation at issue was unconstitutional, even if it were a delegation to an administrative agency tasked with executing the law. More troublingly, the Court of Appeals misapplied a distinction that has no relevance to this situation. Congress does not have the task of executing the State laws on the sex offender registry and has no ministerial role in their application. The prospective incorporation of congressional acts is a pure delegation of legislative power to a separate legislative body in its lawmaking function. The Court of Appeals' explanation of its holding runs contrary to reason and contradicts multiple prior decisions by this Court. This Court should grant discretionary review in order to reaffirm the doctrine of non-delegation under the North Carolina Constitution.

Finally, the Court of Appeals ended its opinion with the false suggestion that the trial court's application of SORNA did not prejudice Mr. McClain, because

"the trial court could still have exercised its discretion to deny petitioner's request to terminate his registration requirement." *McClain*, slip op. at 10. This comment ignored the law. Under N.C.G.S. § 14-208.12A(a1), the trial court had no discretion to grant Mr. McClain's request for termination from the sex offender registry unless it found that he met the Wetterling compliance requirement. Once the trial court found that Mr. McClain did not meet that requirement because of SORNA, it had no choice but to deny Mr. McClain's petition. The trial court found that Mr. McClain was not "a current or potential threat to public safety" and met every other requirement of the law. (R p 18) If this Court reverses the trial court's decision regarding the application of SORNA, the trial court will for the first time be able to exercise its discretion to grant or deny Mr. McClain's petition.

II. THIS COURT CAN ADDRESS AND CORRECT THE COURT OF APPEALS' PRIOR ERRONEOUS INTERPRETATION OF THE SEX OFFENDER REGISTRATION REMOVAL STATUTE AND AVOID THE CONSTITUTIONAL PROBLEM BY APPLYING THE STATUTE'S PLAIN LANGUAGE.

"Where one of two reasonable constructions [of a North Carolina statute] will raise a serious constitutional question, the construction which avoids this question should be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977). The statutory provision at issue makes no statement that the Legislature intended to incorporate subsequently-enacted federal law when it created the petition removal process in 2006. There were, in fact, "other federal standards

applicable to the termination of a registration requirement" and "required to be met as a condition for receipt of federal funds" in effect at the time. N.C.G.S. § 14-208.12A(a1)(2). It is reasonable to construe this language from the statute as a reference to the federal regulations then in effect rather than as a blanket incorporation of future enactments of Congress. The Court of Appeals was unable to resolve this case through statutory interpretation, because it was bound a prior panel's decision on that issue in *In the Matter of Hamilton*, ___ N.C. App. ___, 725 S.E.2d 393 (2012). *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This Court should grant review in order to address both arguments and resolve the meaning of the statute in a manner consistent with the North Carolina Constitution and the statute's plain language.

CONCLUSION

Under the application of the plain language of N.C.G.S. § 14-208.12A, Kevin McClain met every statutory requirement for removal from the sex offender registry after ten years. The trial court concluded that he was not entitled to removal as a matter of law because the Court of Appeals' erroneous interpretation of § 14-208.12A forced it to apply a federal law that was not in force when the State statute was passed and has never been adopted in this State. The application of that law to Mr. McClain was in error as a matter of statutory interpretation and violated the North Carolina Constitution. Mr. McClain respectfully requests that

this Court grant discretionary review in order to review the Court of Appeals' published decision in his case.

ISSUES TO BE BRIEFED

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in his brief for review:

I. **THE TRIAL COURT ERRED BY DENYING MR. McCLAIN'S PETITION FOR REMOVAL FROM THE SEX OFFENDER REGISTRY ON THE BASIS THAT HIS REQUESTED RELIEF FAILED TO COMPLY WITH CURRENT FEDERAL LAW, BECAUSE TO THE EXTENT THAT NORTH CAROLINA GENERAL STATUTES § 14-208.12A INCORPORATED SUBSEQUENT FEDERAL LAW IT WAS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY AND DEPRIVED MR. MCCLAIN OF LIBERTY OTHER THAN BY THE LAW OF THE LAND IN VIOLATION OF THE NORTH CAROLINA CONSTITUTION.**

II. **BY ITS PLAIN LANGUAGE, THE NORTH CAROLINA SEX OFFENDER REGISTRATION REMOVAL STATUTE DID NOT INCORPORATE THE FEDERAL SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, BECAUSE THE NORTH CAROLINA LEGISLATURE DID NOT SPECIFY ITS INTENT THAT "OTHER FEDERAL STANDARDS" SHOULD INCLUDE SUBSEQUENTLY-ENACTED LAWS.**

Respectfully submitted, this the 20th day of May, 2013.

By Electronic Submission:
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KEVIN MCCLAIN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Discretionary Review has been duly served upon William P. Hart, Jr., Assistant Attorney General, North Carolina Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602, by deposit in the United States mail, first-class and postage prepaid.

This the 20th day of May, 2013.

By Electronic Submission:
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No. FIFTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

****

IN THE MATTER OF:)
)
) From New Hanover
KEVIN McCLAIN)

****

CONTENT OF APPENDIX

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NO. COA12-1258

NORTH CAROLINA COURT OF APPEALS

Filed: 26 April 2013

IN THE MATTER OF:

KEVIN MCCLAIN

New Hanover County
Nos. 00 CRS 020969-72

Appeal by petitioner from order entered 13 June 2012 by Judge Walter H. Godwin, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 March 2013.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by John F. Carella, Assistant Appellate Defender, for petitioner-appellant.

MARTIN, Chief Judge.

Petitioner Kevin McClain pled guilty to the felony offense of indecent liberties with a child on 29 January 2001. He was sentenced to fifteen to eighteen months imprisonment, thirty-six months of supervised probation, and was required to register as a sex offender under the North Carolina Sex Offender and Public Protection Registration Program, N.C.G.S. §§ 14-208.7-19A, which he did on 7 August 2001.

After ten years, McClain petitioned the Superior Court of New Hanover County to be removed from the sex offender registry. Petitioner admitted at the subsequent hearing on 13 June 2012 that during the past ten years he was "convicted of a felony for failure to comply with obligations under the sex offender registry law and served a period of imprisonment," and as a result, he did not have a "clean record." The court denied McClain's petition for removal from the registry on the grounds that the requested relief did not comply with federal standards as outlined in N.C.G.S. § 14-208.12A(a1)(2).

On appeal, petitioner McClain contends it was error for the trial court to deny his petition for removal from the sex offender registry on the basis that it did not comply with N.C.G.S. § 14-208.12A(a1)(2), because the incorporation of the Adam Walsh Child Protection and Safety Act of 2006 ("the Adam Walsh Act") and the federal Sex Offender Registration and Notification Act ("SORNA") into N.C.G.S. § 14-208.12A(a1)(2) is an unconstitutional delegation of legislative authority under the North Carolina Constitution.

Although another panel of this Court recently decided *In re Hamilton*, __ N.C. App. __, 725 S.E.2d 393 (2012) (incorporating

and applying the requirements of the Adam Walsh Act under N.C.G.S. § 14-208.12A(a1)(2)), both parties agree that the constitutionality of the incorporation of those federal standards was not raised in that case. Therefore, because the instant case presents a question distinct from that at issue in *In re Hamilton*, we now consider petitioner's constitutional argument. *Cf. In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989) (holding that a court is bound by the decision of prior panels of the same court on the same issue). After careful consideration, we affirm the trial court's order.

We review this issue *de novo*. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated."). "This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Guilford Cty. Bd. Of Educ. v. Guilford Cty. Bd. Of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993).

After ten years on North Carolina's sex offender registry, "a person required to register under [N.C.G.S. § 14-208.7] may petition the superior court to terminate the 30-year

registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article." N.C. Gen. Stat. § 14-208.12A(a) (2011). The court "may" grant this relief if, among other conditions being met, "[t]he 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." N.C. Gen. Stat. § 14-208.12A(a1)(2).

The federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("the Jacob Wetterling Act"), which set up guidelines for state sex offender registration programs, was enacted on 26 November 1997. 42 U.S.C. § 14071(a)(1) (1997) (repealed 2006). Initially, under the Jacob Wetterling Act, "[a] person required to register under subsection (a)(1) of this section shall continue to comply with this section . . . until 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation . . . ." 42 U.S.C. § 14071(b)(6)(A) (repealed 2006). In October 1998, the Jacob Wetterling Act was amended to include additional requirements under the Pam

Lynchner Sexual Offender Tracking and Identification Act of 1996 ("the Pam Lynchner Act"). 42 U.S.C. § 14072 (repealed 2006). On 27 July 2006, the Jacob Wetterling and Pam Lynchner Acts were repealed, effective "the later of 3 years after July 27, 2006, or 1 year after the date on which the software described in [42 U.S.C. § 16923] is available." Act of July 27, 2006, Pub. L. No. 109-248, tit. I, § 129(b), 120 Stat. 600.

On the same day, the Adam Walsh Child Protection and Safety Act of 2006 was enacted to "protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below," and to "establish[] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901 (2006). The Adam Walsh Act makes it clear that it is intended to expand on and replace the Jacob Wetterling Act.[1] The Adam Walsh Act covers substantially the same subject matter previously covered by the Jacob Wetterling Act; in particular, it outlines and updates the requirements for sex offender registration and

[1] Jacob Wetterling is the first victim listed as inspiring the legislation in § 16901, which declares the purpose of the statute. 42 U.S.C. § 16901(1) (2006). Moreover, § 16902 of the Adam Walsh Act states "[t]his chapter establishes the Jacob Wetterling, Megan Nicole Kanka, and Pam Lynchner Sex Offender Registration and Notification Program." 42 U.S.C. § 16902 (2006).

notification in Part A of the statute. Pursuant to the Adam Walsh Act, the full registration period for what it deems a Tier 1 sex offender is fifteen years; it can be reduced to ten years, however, if the offender is not convicted of another sex offense or of an offense for which imprisonment of more than a year can be imposed, i.e., they have a "clean record," and if the offender successfully completes any periods of supervised release, probation, and parole and an appropriate sex offender treatment program. 42 U.S.C. § 16915 (2006).

Petitioner contends that incorporating the "clean record" requirement of the Adam Walsh Act into the North Carolina Sex Offender and Public Protection Registration Program, as was done in *In re Hamilton* by referring to "the 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 reciept of federal funds by the State" in N.C.G.S. § 14-208.12A(a1)(2) is an unconstitutional delegation of the North Carolina General Assembly's lawmaking authority. Specifically, petitioner argues that the statutory reference to "the Jacob Wetterling Act, as amended" and the "federal standards" language improperly incorporates future federal enactments to be promulgated by Congress.

Under article II, section 1 of the North Carolina Constitution, the General Assembly may not abdicate or delegate its authority to make law to departments of government or administrative agencies. *See* N.C. Const. art. II, § 1; ***N.C. Tpk. Auth. v. Pine Island, Inc.***, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965). Constitutional delegation of limited legislative authority occurs when the legislature has "declared the policy to be effectuated and has established the broad framework of law within which it is to be accomplished and standards for the guidance of the administrative agency," and simply "delegate[s] to such agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend." ***Foster v. N.C. Med. Care Comm'n***, 283 N.C. 110, 119, 195 S.E.2d 517, 523 (1973). Simply defining when particular conduct is unlawful by reference to an external standard, on the other hand, has not been deemed an unconstitutional delegation of legislative authority. *See State v. Rhoney*, 42 N.C. App. 40, 43, 255 S.E.2d 665, 667 (1979) (holding that an ordinance which gives authority to the Superintendent to approve the use of school property for certain extracurricular activities is not unconstitutional as a delegation of legislative authority).

Here, the legislature is not creating a framework and then asking Congress or another federal agency to determine facts or fill in that framework; these statutes comprise two parallel sex offender notification and registration programs, state and federal, existing side-by-side. Rather than abdicating or delegating legislative authority to make new guidelines to the federal government, the North Carolina legislature is attempting to bring its program in line with the external federal standards with which it needs to comply in order to receive federal funding.

The Adam Walsh Act explicitly requires jurisdictions to "substantially implement" its requirements in order to receive federal funds, as long as doing so is not unconstitutional under its state Constitution. 42 U.S.C. § 16925 (2006). Accordingly, there are provisions in N.C.G.S. § 14-208.7 ***et seq.*** which directly implement aspects of the Adam Walsh Act; these provisions, however, are spelled out and do not refer to the federal statute or requirements, they simply adopt the requirements specifically in the text of the statute.[2] The offending reference to "federal standards" in N.C.G.S. § 14-

[2] 42 U.S.C. §§ 16913 and 16916 require in-person initial registration and in-person updates to keep an offender's registration current; N.C.G.S §§ 14-208.7 and 14-208.9 added these requirements as well.

208.12A(a1)(2) of which the petitioner complains is the legislature's attempt to substantially implement the Adam Walsh Act's requirements by bringing North Carolina's conditions for removal from the sex offender registry in line with those recommended by the federal government in the Adam Walsh Act. Because we hold this action by the North Carolina legislature is not an unlawful delegation of its authority, we review the court's denial of the petition for removal using the framework employed by the Court in *In re Hamilton*.

Here, both parties agree that petitioner is a tier 1 sex offender pursuant to 42 U.S.C. § 16911.

> Thus, under the terms of section 16915, [p]etitioner's full registration period would be 15 years (subsection (a)), which could be reduced by five years (subsection (b)(3)(A)) if, after a period of ten years (subsection (b)(2)(A)), [p]etitioner had not committed another sex offense or other serious offense and had successfully completed any "periods of supervised release, probation, and parole" and "an appropriate sex offender treatment program" (subsection (b)(1)).

In re Hamilton, __ N.C. App. at __, 725 S.E.2d at 399.

Petitioner first registered pursuant to N.C.G.S. § 14-208.7 on 7 August 2001. He petitioned the trial court for removal on 29 May 2012, more than ten years later. Based on evidence at the hearing, the trial court found that evidence supported that

petitioner had satisfied all the requirements for removal except the requirement that the relief he requested complied with the provisions of the federal Jacob Wetterling Act, as amended, and "any other federal standards applicable to the termination of [the] registration requirement," because petitioner admitted at trial that he did not have a "clean record." Based on these findings of fact, the court correctly concluded that petitioner is not entitled to the relief requested, and must continue to maintain registration.

Moreover, we must also note that even if petitioner's argument that the provision incorporating the Adam Walsh Act was unconstitutional as an improper delegation of legislative authority had merit, the trial court could still have exercised its discretion to deny petitioner's request to terminate his registration requirement. *See In re Hamilton*, __ N.C. App. at __, 725 S.E.2d at 399 (holding that "after making findings of fact" the trial court is "free to employ its discretion in reaching its conclusion of law whether [p]etitioner is entitled to the relief he requests" because N.C.G.S. § 14-208.12A(a1) states that the trial court "may" grant petitioner relief if the terms of the statute are met). The trial court's order denying petitioner McClain's petition is affirmed.

Affirmed.

Judges HUNTER and STEPHENS concur.