

Comments On
Criminal Forms: Sex Offender Registration Termination

These comments are filed in response to Invitation SPR20-16 by Ira Mark Ellman, Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Tara Ellman, M.B.A., consultant.

We applaud this effort to create forms facilitating the petition process, especially for petitioners who may apply without the assistance of an attorney. Many of our comments below are intended to further this goal by improving the forms' clarity or making them more complete. In a few places, however, we believe the forms misstate California law.

1. Registrants with non-California registerable convictions

A. Error in eligibility statement on the information form, CR-415-INFO.

This form states in Section 2 that to be eligible to petition for relief under Section 290.5 you must be "required to register...as a result of a California state court conviction." This statement is incorrect.

Section 290.5(a)(1) allows petitions on behalf of Tier One and Tier Two registrants "required to register pursuant to Section 290". There are two groups required to register under Section 290. Subdivision (c) imposes a registration requirement on those with California convictions. Subdivision (d) explains these registration rules apply to a "person described in subdivision (c), *or who is otherwise required to register pursuant to the Act*" (emphasis added). Both groups, subdivision (d) says, shall register "for 10 years, 20 years, or life", depending upon their tier classification. The only way those in either group who are placed in Tiers One or Two can register for 10 or 20 years is through the petition process established by Section 290.5. Both Subdivisions (d) and (c) are thus necessarily referenced by the language in Section 290.5(a)(1) allowing petitions on behalf of those "required to register pursuant to Section 290".

The rest of Section 290 points the same way. Section 290(a) defines "the Act" as "Sections 290 to 290.024, inclusive". It thus includes Section 290.005, the section addressing individuals with non-California sexual convictions equivalent to California registerable offenses. They are thus among those to whom Section 290(d) refers when it references individuals "otherwise required to register under the Act". Section 290(d)(4)(A) references Section 290.005 explicitly, directing that individuals with non-California convictions be placed in the same tier as those with the equivalent California convictions "described in subdivision (c)". If there is no equivalent California registerable offense, subdivision (d)(4)(B) places them in Tier Two. The section's careful directions explaining how each registrant with a non-California conviction should be classified into a California tier has the obvious purpose of identifying those entitled to petition for removal after either ten or twenty years.

A rule limiting petitions to those whose triggering conviction was in California state court would exclude all California residents prosecuted in federal court for an offense committed in California, including a registrable offense committed on Indian land or on federal land such as national parks. It would exclude all Californians convicted in the court of another state in which they resided temporarily to attend school, or for their work. These exclusions would violate the policy adopted by the legislature, which is to treat all similar offenses similarly, without regard to where they were committed or the court in which they were prosecuted. They are inconsistent with the core policy purpose of the Act, which was to allow relief from California registration for all those in Tier One or Two who live here.

For the these reasons, Section 2 of CR-415-INFO should be amended to delete, in the first bullet point, the words “as a result of a California state court conviction.”

B. Adapting petition procedures for registrants with non-California offenses

The form itself, CR-415, appears to proceed on the same mistaken assumption that every petitioner’s registration obligation arises from a California state court conviction. Section One of the form asks the petitioner to state the “county or counties where petitioner was convicted of an offense requiring registration.” It asks for the county, but not the state, on the apparent premise that the answer is necessarily a California county. Section 9 requires an affirmation that the petition and proof of registration was served on the District Attorney and law enforcement agency of the country of conviction, as well as (where they differ) the registering county. The references to the county of conviction are inapt for federal convictions, as state counties are not a geographical entity that defines federal prosecutorial jurisdiction. And of course there is no federal “district attorney”. The same references will also be inapt for convictions in the courts of some other states, as the titles and jurisdictional rules relevant to the prosecuting attorney vary. All the questions on the form referencing the county of conviction should thus be labeled to make clear they apply only to petitioners whose registration obligation arises from a California state court conviction.

The question, then, is how the form should handle cases of petitioners whose relevant conviction is federal or foreign. The statute itself says nothing about notice or service in these cases. The relevant sentences of § 290.5(a)(2) say:

The petition shall be served on the registering law enforcement agency and the district attorney in the county where the petition is filed and on the law enforcement agency and the district attorney of the county of conviction of a registerable offense if different than the county where the petition is filed. The registering law enforcement agency and the law enforcement agency of the county of conviction of a registerable offense if different than the county where the petition is filed shall, within 60 days of receipt of the petition, report to the district attorney and the superior or juvenile court in which the petition is filed regarding whether the person has met the requirements for termination pursuant to subdivision (e) of Section 290.

The language in the form understandably tracks the statutory language. Indeed, the reason the form's sections dealing with service assume the conviction was a California conviction is that this portion of the statute suggests the same assumption when it uses the same language directing service on the "district attorney" of the "county of conviction". Even more telling is that this same portion of the statute imposes a duty on the law enforcement agency of the county of conviction: it "shall, within 60 days of receipt of the petition, report to the district attorney and the superior or juvenile court in which the petition is filed regarding whether the person has met the requirements for termination pursuant to subdivision (e) of Section 290." The legislative assumption that the required service was on a California law enforcement agency is obvious, as the legislature has no authority to impose any such reporting duty on a non-California law enforcement agency. Nor can it impose on non-California agencies a duty to acknowledge receipt of the petition, on draft form CR-416, or otherwise, or expect them to report on whether the petitioner has met requirements imposed by California law. One simply cannot read the statute to impose such obligations on non-California agencies beyond the legislature's authority to regulate through statutory language that does not mention them. The unavoidable conclusion, which the committee apparently shared, is that the portion of the statute requiring notice to the district attorney and law enforcement agency of the "county of conviction" applies only to convictions in a California state court.

In sum, while the statute clearly contemplates petitions from registrants with non-California convictions, it imposes no requirement to notice non-California law enforcement agencies or prosecutors. Perhaps that is an oversight. Or perhaps not. The legislature could have chosen to require petitioners whose registration requirement arises from a state court conviction to file their petition in the county of their conviction. But it instead adopted the more convenient rule, for petitioners, requiring filing in the county where they live, but with notice to authorities in the county of conviction. For non-California convictions, no analogous choice was presented; the legislature could not require filing in another jurisdiction's courts. The only possibility was to require filing in the petitioner's home county. Perhaps they therefore thought notice to the other jurisdiction was also unnecessary, or perhaps they didn't think of the question at all. One cannot tell.

If the legislature contemplated an analogous notice requirement for non-California law enforcement agencies, it would have understood the analogy would necessarily be imperfect. No obligation to respond could be imposed on them. But whether intentionally or by inadvertence, the legislature created no such analogous notice requirement. Whether there should be one is a legislative question. The Judicial Council cannot fashion a notice requirement that the statute itself does not impose. Nor is there any reason to think such a requirement crucial. The essential characteristics of the non-California conviction are necessarily already known to the California Department of Justice, because it could not otherwise have placed the petitioner in the correct California tier, and untiered registrants are ineligible to petition. And of course, the California law enforcement authorities in the petitioner's county of residence do not need legislative or administrative authorization to consult with or request information from the petitioner's jurisdiction of conviction. Indeed, Section 290.5(a)(2) contemplates just such inquiries when it provides that the registering law enforcement agency shall refer any unassessed non-California

registerable convictions that it identifies to the Department of Justice to determine their potential impact on the petitioner's tier classification.¹

In sum, the following changes should be made in CR-415 to accommodate the reality that some petitioners will have no California conviction requiring registration:

a. In Section 1a, the request to identify “the county or counties where petitioner was convicted of an offense requiring registration” should be amended to read: “If the petitioner was convicted by a California court of an offense requiring registration, indicate the county or counties in which the conviction occurred.”

b. For the convenience of the court, district attorney, and law enforcement authorities of the county in which the petition is filed, the Council may wish to add an additional line in Section 1 after the above, such as: “If you are required to register in California because of a judgment of conviction rendered by a federal court, or a court of another state or jurisdiction, please identify that court.” Adding this line is not crucial, however, because this information about the petitioner's foreign conviction should already be included in the petitioner's registration file. It had to be part of that file in order for the Department of Justice to determine the petitioner's equivalent California offense, and thus his appropriate tier classification. If the petitioner has no tier classification, he of course is ineligible to file for relief from registration.

c. In Section 9 of the form, language must be added to the third and fourth rows in the box to indicate they do not apply if the petitioner's registration obligation is based upon a non-California conviction, as indicated by the petitioner's answer to Question 1.

¹ “If an offense which may require registration pursuant to Section 290.005 is identified by the registering law enforcement agency which has not previously been assessed by the Department of Justice, the registering law enforcement agency shall refer that conviction to the department for assessment and determination of whether the conviction changes the tier designation assigned by the department to the offender.”

2. Other mistakes of law

a. Section 4 of the INFO form, in the first bullet point, tells the petitioner he is only eligible if “you are not subject to pending criminal charges”. This is wrong. You are ineligible if there are pending criminal charges that could affect your tier designation, but other criminal charges do not affect eligibility. See Section 290.5(a)(2).

b. Page 9 of the INFO form helpfully distinguishes the four different kinds of petitions:

Tier 1 (adult)

Tier 2 (adult)

Tier 2 (10 year registration exception)

Tier 3 (20-year exception when tier 3 is based solely on risk assessment)

There is, however, a difficulty with the two exception categories. These difficulties may be beyond the Council’s ability to fix, but they should at least be noted. The law is clear that petitions on behalf of tier 1 and 2 petitioners filed under Section 290.5(a)(2) trigger a hearing only when the DA of the county in which the petition is filed requests it within the 60-day period allowed. If there is no request, the petition will normally be granted. But there are no similar provisions in Section 290.5(b), which governs the two "exception" petitions. Section 290.5(b) mentions neither the DA nor the law enforcement agency, and contains no statement that the petition must be served on them, that they must act within any particular time period, or that the DA may request a hearing. The statute just says that "the court shall determine whether community safety would be significantly enhanced."

The forms do not reflect these procedural distinctions between the two regular petitions, and the two exception petitions. four categories of petition. Section 3 of the INFO form does contain a table setting forth the minimum registration period required, for each of the four petition categories, before a petition is filed. Section 7 of the petition form asks ask the petitioner to identify which of the four categories the petition falls into. But there is nothing to suggest any difference in the petition process. Apparently, the Council interprets the statute as importing the procedural provisions set out in subdivision 290.5(a) into subdivision § 290.5(b), so that they apply to petitions filed under both subdivisions. It is not clear to us that the section can be read this way. But if the Council chooses to go forward with this interpretation, we have two observations. First, the forms must somewhere explain this interpretation of the statute, for the benefit of attorneys assisting petitioners as well as *pro se* petitioners. Second, if the Council’s position is that the procedural provisions set out in § 290.5(a) also apply to petitions filed under § 290.5(b), then surely all of these procedural provisions must apply. There is no basis for importing some of them into subdivision (b), but not others. This means § 290.5(b) petitions also trigger time limits within which the district attorney must file a hearing request, and the rule that the petition is normally granted if he files no request within that 60-day time period.

3. CR-418–The Order, and CR-417, Response by District Attorney

a. Section 3 of CR-418 provides a form for summary denial. It contains 2 checkboxes identifying specific reasons for the summary denial, and a third that simply states “other” with a single blank line for further explanation. The statute provides for more than two bases for summary denial. We believe the order should identify the basis for the summary denial as explicitly as possible, especially as petitioners may reapply, and more guidance as to *when* they can reapply would help relieve the petitioner and the court of the burdens of unripe re-applications . An expanded set of checkboxes would make it easy for the court to do this. We suggest below a revised version of this portion of the form to do this. If the petition is rejected summarily because it is filed before the end of the mandatory minimum registration period, the order should include the date on which the petitioner will be eligible to apply, a date the court will necessarily have determined in order to conclude the petition was filed prematurely. If the court’s calculation included an extension of the mandatory minimum period because of either a statutory tolling requirement or additional period triggered by a conviction for failure to register, that fact should also be noted, to help forestall mistaken appeals by petitioners unaware of these extension rules.

Our suggested revision of this portion of the form is set forth here. (The italicized language in this suggested revision would be included if the Council chooses to import provisions of § 290.5(a) into the criteria for granting a petition under § 290.5(b).)

The court summarily denies the petition because it finds petitioner is ineligible because he or she is

- 1. Registered in tier 1 or tier 2, and
 - has not met the mandatory minimum registration period for that tier. Unless petitioner is convicted of a new offense extending it, the mandatory minimum registration period will be met as of _____ [*Insert date*]
 - The mandatory minimum period that would otherwise have applied was extended to the above date as a result of petitioner’s incarceration between _____ and _____ [*Insert dates*]
 - The mandatory minimum period was extended because of the petitioner’s conviction for failure to register.
 - has not met one or more of the other criteria listed in Section 290.5(a)(2):
 - required proof of current registration is missing from the petition
 - there are pending charges against petitioner which could extend the time to complete the registration requirements of the tier or change petitioner’s tier status
 - petitioner is in custody, or on parole, probation, or supervised release.
- 2. Registered in tier 2, and
 - has not met all the criteria for a 10-year registration exception in section 290.5(b)(1) and (2)

- *has not met one or more of the other criteria listed in Section 290.5(a)(2):*
 - *required proof of current registration is missing from the petition*
 - *there are pending charges against petitioner which could extend the time to complete the registration requirements of the tier or change petitioner's tier status*
 - *petitioner is in custody, or on parole, probation, or supervised release.*
- 3. Registered in tier 3 solely on the basis of a risk assessment score, and
 - has not met all criteria for a 20-year registration exception in section 290.5(b)(3).
 - *has not met one or more of the other criteria listed in Section 290.5(a)(2):*
 - *required proof of current registration is missing from the petition*
 - *there are pending charges against petitioner which could extend the time to complete the registration requirements of the tier or change petitioner's tier status*
 - *petitioner is in custody, or on parole, probation, or supervised release.*

The same changes should be made to the checkboxes in Section 2(c) of CR-417, the form for response by the district attorney. Changes to CR-417 should also include the presumptive ripeness date, as well as the same items identifying the reason for extending the period, tolling or a failure-to-register conviction, that the district attorney relies upon in calculating that date.

b. Section 4 of CR-418 is the checkbox for denying the petition after a hearing. Under § 290.5 the petition of an eligible petitioner can be denied only if the court finds “the community safety would be significantly enhanced by the petitioner’s continued registration. That means that the court must find both that the petitioner is a significant danger to those in his or her community, and also that continued registration will significantly reduce that danger. We would urge the Council to include this clarification of the standard, either here, or, perhaps more aptly, in Section 9 of the CR-415 INFO form

4. Additional information that should be provided to petitioners.

We applaud the committee’s effort to provide the petitioner accurate information about this process in these forms, largely through Form CR-415-INFO. We believe, however, that in certain places a fuller explanation should be provided, or a slightly modified presentation would be more accurate. The suggestions below refer to Form CR-415-INFO unless otherwise noted.

1. Section 6 tells registrants their petition must include “proof that you are current with your registration.” Petitioners need more guidance to know exactly what’s needed to satisfy this requirement. Presumably, a receipt from the petitioner’s registering agency acknowledging completion of his most recent required registration would suffice; if so, Section 6 should state that explicitly. But as the statute does not establish any exclusive method of proof, other documents may also suffice. The form should include any practical alternatives to a receipt that the committee believes acceptable.

We also note that the wording on the draft form in the first sentence of Section 6 (“proof you are current with your registration”) departs from the statutory language. Section §290.5(a)(1) requires “proof of the person’s current registration as a sex offender”. It seems clear the statutory requirement is met by a receipt from the registering agency showing petitioner is currently registered, as it would establish the petitioner’s “current registration.” The different phrasing on the draft form, however, could be mistakenly read to require the petitioner to prove every item of his registration is “current”, even though California law does not require such continuous updating of every item included in a registrant’s periodic registration renewals. (Section 290.12(a), only requires most registrants “to register annually, within five working days of his or her birthday, to update his or her registration”; Subdivisions (b) and (c) do require transients and those adjudicated “sexually violent predators” to update at 30 or 90 day intervals, respectively.) We therefore suggest the language of the form, here and in Section 7, be revised to conform it to the language of the statute.

2. Section 8 offers a single sentence on the time frame for the court’s decision, saying only it “may take four months or longer”. We believe this section should provide petitioners a more complete explanation of the specific deadlines set forth in § 290.5(a)(2). In particular, the form should explain that

a. the law enforcement agency has 60 days to report, to the court and the district attorney, whether the registrant is eligible to petition, unless it discovers a conviction not previously considered by the Department of Justice. In that case it may delay while the Department of Justice considers whether the newly-identified conviction requires placing petitioner in a different tier.

b. If the district attorney desires a hearing on the petition, it must request it within 60 days after receiving law enforcement’s eligibility report.

c. The statute states that if the district attorney does not request a hearing, “the petition for termination shall be granted”, so long as the petitioner provided the required proof of current registration, and the registering agency reported the petitioner is eligible to petition. This important fact should be stated here.

3. The initial 60-day period within which the law enforcement agency must ordinarily report to the court and the district attorney as to petitioner’s eligibility starts running when it receives the petition. It might be useful if CR-416, the form acknowledging the petition’s receipt, noted that fact, as reminder of this deadline for all parties.

4. Sections 6 and 7 contain helpful information to the petitioner on how to file the petition in court and how to serve it on the relevant parties. It is of course important for the petitioner to have proof of the dates of filing and service. This is obvious to lawyers but its importance may not be obvious to petitioners handling this on their own. Section 6 advises the petitioner to contact the court clerk as to the acceptable methods of filing in that court; it should also advise the petitioner to ask how proof of the filing, and of the date, is obtained for each method. Section 7 suggests personal service on agencies is the most reliable method; it should also advise the petitioner to get a copy of the signed Form CR-416 from the recipient agency at that time, or some other written acknowledgment of receipt. For agencies which accept electronic service, the petitioner should be advised to make sure he understands how to confirm

receipt of the petition electronically. For postal service, the form advises use of simple first class mail. It may be better to advise the petitioner to mail the documents by certified mail with a return receipt requested. Finally, we suggest that the INFO sheet give the petitioner some basic guidance as to how to access the docket sheet for his petition so that he can confirm that the court has received its copy of Form CR-416, the acknowledgment, within the prescribed ten day time limit.

5. Some small matters of clarity, etc.

a. The third bullet point just before Section 1 of CR-415 tells the petitioner he must provide copies of CR-416 to each agency he serves with the petition. It should make clear this is an unsigned or blank form. A pro se petitioner might think it means he must supply a copy of the form that is already signed.

b. Section 7 of CR-415 sets out four of the requirements for a Tier 3 petition, but omits two others which are required by § 290.5(b)(3):

1. The petitioner is not required to register for a section 288 offense (lewd or lascivious), and
2. The petitioner is not required to register for a 1192.7(c) offense (serious felony).

c. Service. It is helpful that Section 7 of the INFO explains service. We suggest this section contain an additional point, obvious to lawyers, that service must be made before the petition itself is filed, as implied by Section 9 of the petition form itself which requires the petitioner to indicate the date on which service was made and the method of service. It would probably also be useful if a cross reference to this material on the INFO sheet was included at the beginning of Section 9 of the petition, something like “See Section 7 of CR-415 INFO for an explanation of how and to whom service must be made.” Perhaps Section 9 should also remind the petitioner that a copy of CR-416 be included with the petition when it is served.

d. INFO sheet section 3: Perhaps it’s best to avoid the use of the word “toll”, which non-lawyers are unlikely to understand. E.g., one could replace the current second sentence of this section with this sentence: “Time spent in incarceration, placement, or commitment does not count toward the minimum required registration period, unless it was the result of an arrest that did not result in a conviction, adjudication, or revocation of probation or parole.”

e. INFO sheet section 4. This could be made clearer if it were divided into two sections, separating out the two exception provisions from the others. As it stands, the first word “only” in the first bolded sentence is wrong, because you do not have the reach the end of your registration period to apply under either of the exception categories. But the phrase would be correct if it were clear it applied only to the petitions referenced in the first two rows of the table in Section 3. If section 4 is limited to the two regular petition categories, then a new Section 5 could deal with the two exception categories.

A new Section 5 would contain the second bolded paragraph in current section 4. This paragraph needs to be corrected, which will make it a bit longer anyway. The paragraph mistakenly omits two additional attributes that would disqualify a Tier 3 applicant: the petitioner is also disqualified if required to register for a section 288 offense (lewd or lascivious) or a 1192.7(c) offense (serious felony).

f. INFO section 9. It may be clearer and more accurate to replace “Prosecuting agency” with “district attorney in the county where the petition is filed.” The current language might be read to suggest, erroneously, that the D.A. of the county of conviction can request a hearing.

The section should also make clear that there is no hearing if the DA does not request one, and that in such a case, the court must grant the petition if it finds “the required proof of current registration is presented in the petition, provided that the registering agency reported that the person met the requirement for termination pursuant to subdivision (e) of Section 290, there are no pending charges against the person which could extend the time to complete the registration requirements of the tier or change the person’s tier status, and the person is not in custody or on parole, probation, or supervised release.”