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SEX OFFENDERS AND SEXUALLY VIOLENT PREDATORS

Beginning in the late 2000s, the Kansas Legislature started making significant amendments to the Kansas Offender Registration Act (referred to as KORA or Act in this memorandum) (KSA 2019 Supp. 22-4901 to 22-4911 and KSA 2019 Supp. 22-4913) to comply with the federal Adam Walsh Sex Offender Registration and Notification Act (SORNA). The purpose of the federal law is to protect the public, particularly children, from violent sex offenders by using a more comprehensive, nationalized system for registration of sex offenders. It calls for state conformity to various aspects of sex offender registration, including the information that must be collected, duration of registration requirement for classifications of offenders, verification of registry information, access to and sharing of information, and penalties for failure to register as required. Failure of a jurisdiction to comply would result in a ten percent reduction in Byrne Law Enforcement Assistance grants. Eighteen states, including Kansas, have substantially implemented SORNA. The other states are Alabama, Colorado, Florida, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming.

The Act outlines registration requirements for “offenders,” which is defined to include sex offenders, violent offenders, and drug offenders, in addition to persons required to register in other states or by a Kansas court for a crime that is not otherwise an offense requiring registration. The definitions of sex offenders, violent offenders, and drug offenders are based on the commission and conviction of designated crimes (KSA 2019 Supp. 22-4902). A first conviction of failure to comply with the provisions of the Act is a severity level 6 felony, a second conviction is a level 5 felony, and a third or subsequent conviction is a level 3 felony. Additionally, failure to comply with the Act for more than 180 consecutive days is considered an aggravated violation—a level 3 felony. Lower severity levels apply for violations that consist only of failure to pay the sheriff’s office the required registration fee. Designation of these offenses as person or nonperson crimes depends on the designation of the underlying offense requiring registration (KSA 2019 Supp. 22-4903).

Several entities collaborate to enforce the provisions of the Act. KSA 2019 Supp. 22-4904 lists the duties of each entity in its own subsection as follows:

- (a) Courts (at the time of conviction or adjudication);
- (b) Staff of a correctional facility;
- (c) Staff of a treatment facility;
- (d) Registering law enforcement agencies;

- (e) Kansas Bureau of Investigation (KBI);
- (f) Attorney General;
- (g) Kansas State Department of Education;
- (h) Secretary of Health and Environment; and
- (i) The clerk of any court of record.

Registration Requirements

KSA 2019 Supp. 22-4905 describes registration requirements. An offender must register in person with the registering law enforcement agency within three business days of entering any county or location of jurisdiction in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school. Exceptions exist for anyone physically unable to register in person, at the discretion of the registering law enforcement agency. Additionally, sex offenders must report in person four times per year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment, or is attending school. Violent offenders and drug offenders, at the discretion of the registering law enforcement agency, are required to report in person three times each year and by certified letter one time each year. An offender must register during the month of the offender's birth, and every third, sixth, and ninth month occurring before and after the offender's birthday. With some exceptions, the offender must pay a \$20 fee each time.

SB 20 (2013) amended this requirement to provide that registration is complete even when the offender does not remit the registration fee, and failure to remit full payment within 15 days of registration is a class A misdemeanor, or, if within 15 days of the most recent registration two or more full payments have not been remitted, a severity level 9 person felony.

Offenders must also register in person within three business days of commencement, change, or termination of residence, employment status, school attendance, or other information required on the registration form, with the registering law enforcement agency where last registered and provide written notice to the KBI. Similarly, an offender must register within three business days of any name change. Finally, the offender must submit to the taking of an updated photograph when registering or to the documenting of any changes in identifying characteristics; renew any driver's license or identification card annually; surrender any driver's licenses or identification cards from other jurisdictions when Kansas is the offender's primary residence (an exception exists for active duty members of the military and their immediate family); and read and sign registration forms indicating whether these requirements have been explained.

Special conditions exist for registration in certain circumstances. If in the custody of a correctional facility, the law requires offenders to register with that facility within three business days of arrival, but does not require them to update their registration until discharged, paroled, furloughed, or released on work or school release from a correctional facility. If the offender is involuntarily committed under the Kansas Sexually Violent Predator Act, the committing court must notify the registering law enforcement agency of the county where the offender resides during the commitment. The offender must register within three business days of arrival of the county of commitment, but is not required to update such registration until placement in a

reintegration facility, on transitional release, or on conditional release, at which point the regular responsibility for compliance resumes. If receiving inpatient treatment at any treatment facility, the offender must inform the registering law enforcement agency of the offender's presence at the facility and the expected duration of the treatment.

If an offender is transient, the law requires the offender to report in person to the registering law enforcement agency of the county or location of jurisdiction within three business days of arrival, and every 30 days thereafter, or more often at the discretion of the registering law enforcement agency. If traveling outside the United States, the offender must report in person to the registering law enforcement agency and the KBI 21 days prior to travel and provide an itinerary including destination, means of transport, and duration of travel. In an emergency, an offender must report within three business days of making arrangements for travel outside of the United States.

Duration of Registration

Pursuant to the Act, offenders are required to register for 15 or 25 years or for life, depending on the offense. Those crimes requiring registration for 15 years are capital murder; murder in the first degree; murder in the second degree; voluntary manslaughter; involuntary manslaughter; criminal restraint, when the victim is less than 18; promoting the sale of sexual relations; a sexually motivated crime; a person felony where a deadly weapon was used; sexual battery; manufacture or attempted manufacture of a controlled substance; possession of certain drug precursors; distribution of certain controlled substances; any of the following when one of the parties is less than 18—adultery, patronizing a prostitute, or lewd and lascivious behavior; attempt, conspiracy, or criminal solicitation of any of these crimes; and convictions of any person required by court order to register for an offense not otherwise required by the Act.

Those crimes requiring registration for 25 years are criminal sodomy, when one of the parties is less than 18; indecent solicitation of a child; electronic solicitation; aggravated incest; indecent liberties with a child; unlawful sexual relations; sexual exploitation of a child; aggravated sexual battery; promoting prostitution, if the person selling sexual relations is 14 through 17 years of age; or any attempt, conspiracy, or criminal solicitation of any of these crimes.

Those crimes requiring registration for life are second or subsequent convictions of an offense requiring registration; rape; aggravated indecent solicitation of a child; aggravated indecent liberties with a child; criminal sodomy; aggravated criminal sodomy; aggravated human trafficking; sexual exploitation of a child; promoting prostitution, if the person selling sexual relations is under 14 years of age; kidnapping; aggravated kidnapping; or any attempt, conspiracy, or criminal solicitation of any of these crimes. Additionally, any person declared a sexually violent predator is required to register for life.

Offenders 14 years of age or older who are adjudicated as a juvenile offender for an act that would be considered a sexually violent crime when committed by an adult, and which is a severity level 1 nondrug felony or an offgrid felony, also must register for life.

For offenders 14 years of age or older who are adjudicated as a juvenile offender for an act that would be considered a sexually violent crime when committed by an adult, and which is not a severity level 1 nondrug felony or an off-grid felony, a court may:

- Require registration until the offender reaches the age of 18; 5 years after adjudication; or, if confined, 5 years after release from confinement (whichever occurs later);
- Not require registration if it finds on the record substantial and compelling reasons; or
- Require registration, but with the information not open to the public or posted on the Internet. (The offender would be required to provide a copy of such an order to the registering law enforcement agency at the time of registration, which in turn would forward the order to the KBI.) An offender required to register pursuant to the Act cannot expunge any conviction or part of the offender's criminal record while the offender is required to register.

Public Access to Offender Registration Information and the KBI Registered Offender Website

KSA 2019 Supp. 22-4909 provides information provided by offenders pursuant to the Act is open to inspection by the public and can be accessed at a registering law enforcement agency, as well as KBI headquarters. Additionally, the KBI maintains a website with this information (<http://www.accesskansas.org/kbi/ro.shtml>), as do some registering law enforcement agencies. A the provisions of this statute, added by 2012 HB 2568, prohibits disclosure of the address of any place where the offender is an employee or any other information about where the offender works on a website sponsored or created by a registering law enforcement agency or the KBI. While that information is not available online, it remains publicly available and may be obtained by contacting the appropriate registering law enforcement agency or by signing up for community notification through the KBI website.

Additionally, when a court orders expungement of a conviction or adjudication requiring registration, the offender must continue registering, although the registration is not open to inspection by the public or posted on the Internet.

If the offender has an additional conviction or adjudication requiring registration that is not expunged, registration for that conviction or adjudication remains open to the public and may be posted on the Internet, unless the registration is ordered restricted.

Court Decisions Regarding Offender Registration

In *State v. Myers*, 260 Kan. 669 (1996), the Kansas Supreme Court rejected an *ex post facto* challenge to the registration requirements, holding they did not unconstitutionally increase the punishment for the applicable crimes. However, the *Myers* court did hold that the public disclosure of registrant information would be punitive and an *ex post facto* violation when imposed retroactively.

Subsequent Kansas appellate court decisions noted that the *Myers* holding that public disclosure applied retroactively is unconstitutional was cast into doubt by the U.S. Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2D 164 (2003). The *Smith* court held that Alaska's offender registration scheme, including public disclosure of registrant information via a website, was nonpunitive and its retroactive application not an *ex*

post facto violation. (See *State v. Brown*, No. 107,512, unpublished opinion filed May 24, 2013.) A petition for review in *Brown* was filed June 24, 2013, but was placed on hold in January 2014.

In April 2016, the Kansas Supreme Court (Court) held in three cases challenging the retroactive application of increased registration periods on *ex post facto* grounds that the 2011 version of the Act was punitive in effect and therefore could not be applied retroactively. (See *Doe v. Thompson*, 304 Kan. 291 (2016); *State v. Buser*, 304 Kan. 181 (2016); and *State v. Redmond*, 304 Kan. 283 (2016).)

On the same day, the Court also released an opinion in a case challenging lifetime postrelease registration for sex offenders under the Act as an unconstitutional cruel or unusual punishment. (See *State v. Petersen-Beard*, 304 Kan. 192 (2016).) Using *Smith* and its progeny as a template for analysis, the *Petersen-Beard* court held that registration did not constitute punishment, the analysis of whether the requirements constitute punishment is identical for all constitutional provisions, and therefore the contrary holdings of *Thompson*, *Buser*, and *Redmond* are overruled. (For a procedural description of how these cases came to be issued and overruled the same day, see Justice Johnson's dissent in *Petersen-Beard*.)

In August 2017, the Court explicitly extended the holding of *Petersen-Beard* in a case challenging retroactive application of tolling requirements for sex offender registration under KORA, stating that such retroactive application does not violate the *ex post facto* clause. (See *State v. Reed*, 306 Kan. 899, 399 P.3d 865 (2017).)

In a decision issued the same day as *Reed*, the Court declined to hold that retroactive application of increased registration requirements for drug offenders under KORA violates the *ex post facto* clause. (See *State v. Meredith*, 306 Kan. 906, 399 P.3d 859 (2017).) However, the *Meredith* court stated that its decision, due to an insufficient record on appeal, would not “fully foreclose future *ex post facto* challenges to KORA registration for non-sex offenders,” but that future challenges would have to distinguish the effects of KORA on such offenders from its effect on sex offenders.

Development of Sex Offender Policy

Consistent with Kansas' early compliance with SORNA, the Kansas Legislature has been at the forefront of state and federal efforts to deal with the problem of sex offenders and sex predators. In addition to the SORNA amendments, since 1993 the Kansas Legislature has passed the Kansas Offender Registration Act; passed the Civil Commitment of Sexually Violent Predators Act; reinstated the death penalty for various acts of intentional and premeditated murder following the rape or sodomy of the victim or following the kidnapping of the victim; made life without parole the sentence for those persons convicted of a capital murder crime who are not given the sentence of death; nearly quadrupled the length of time more serious offenders, including sex offenders, serve in prison; lengthened the statute of limitations for sex crimes; and required DNA testing.

Legislation enacted in 2006 (SB 506) authorized the creation of the Sex Offender Policy Board (SOPB) under the auspices of the Kansas Criminal Justice Coordinating Council (KCJCC). The bill established the SOPB to consult with and advise the KCJCC on issues and policies relating to the treatment, sentencing, rehabilitation, reintegration, and supervision of sex offenders and to report its findings to the KCJCC, Governor, Attorney General, Chief Justice of the Supreme Court, Chief Clerk of the House of Representatives, and Secretary of the Senate. The SOPB's first report examined four topics: utilization of electronic monitoring, public

notification pertaining to sex offenders, management of juvenile sex offenders, and restrictions on the residence of released sex offenders. The second report addressed the topics of treatment and supervision standards for sexual offenders, suitability of lifetime release supervision, and safety education and prevention strategies for the public.

In 2019, at the request of two members of the Kansas House of Representatives, the Kansas Judicial Council formed an advisory committee on sex offenses and registration to, among other things, undertake a comprehensive review of the Kansas Criminal Code's sex offense structure and related registration requirements for both juveniles and adults. In a December 2019 report, the advisory committee stated its comprehensive review would continue into 2020.

Sex Offender Residency Restrictions

In addition to creating the SOPB, 2006 SB 506 also prohibited cities and counties from adopting or enforcing any ordinance, resolution, or regulation establishing residential restrictions for offenders required to register under the Act. This provision was scheduled to expire on June 30, 2008. During the 2006 Interim, the Special Committee on Judiciary (Special Committee) was charged by the Legislative Coordinating Council with studying actions by other states and local jurisdictions regarding residency and proximity restrictions for sex offenders to discover any serious unintended consequences of such restriction and to identify actions Kansas might take that actually achieve the intended outcome of increasing public safety. The Special Committee held a joint hearing with the SOPB to receive testimony from experts in the field of public safety. The Special Committee recommended the Legislature wait to receive the report from the SOPB on the topic before any legislative action was taken.

On January 8, 2007, the SOPB issued a report on its findings regarding sex offender residency restrictions, with the following conclusions:

- Although residency restrictions appear to have strong public support, the SOPB found no evidence to support their efficacy. It is imperative that policymakers enact laws that actually will make the public safe and not laws giving the public a false sense of security;
- It is recommended the Legislature make permanent the moratorium on residency restrictions. However, the moratorium should not be intended to interfere with a locality's ability to regulate through zoning the location of congregate dwellings for offenders, such as group homes;
- Residency restrictions should be determined based on individually identified risk factors;
- The most effective alternative for protecting children is a comprehensive education program. It is recommended the necessary resources be provided to an agency determined appropriate by the Legislature to educate Kansas parents, children, and communities regarding effective ways to prevent and respond to sexual abuse. Such an education program should include all victims and potential victims of child sexual abuse; and
- In order for an effective model policy to be developed, the issue of sex offender residency restrictions should be referred to the Council of State Governments, the

National Governors Association, and similar organizations to prevent states and localities from shifting the population and potential problems of managing sex offenders back and forth among states.

During the 2008 Session, the Legislature passed SB 536 to:

- Eliminate the sunset provision on the prohibition on cities and counties from adopting or enforcing any ordinance, resolution, or regulation establishing residential restrictions for offenders;
- Add a provision to exempt any city or county residential licensing or zoning program for correctional placement residences that regulates housing for such offenders from the prohibition from adopting or enforcing offender residency restrictions;
- Add a provision that defines “correctional placement residence” to mean a facility that provides residential services for offenders who reside or have been placed in the facility as part of a criminal sentence or for voluntary treatment services for alcohol or drug abuse; and
- Clarify that a correctional placement residence does not include a single or multi-family dwelling or commercial residential building that provides residence to persons other than those placed in the facility as part of a criminal sentence or for voluntary treatment services for alcohol or drug abuse.

During the 2010 Interim, the Joint Committee on Corrections and Juvenile Justice Oversight studied the issue of residency restrictions and concluded that sex offender residency restrictions have no demonstrated efficacy as a means of protecting public safety.

Commitment of Sexually Violent Predators in Kansas

In Kansas, a sexually violent predator is a person who has been convicted of or charged with a “sexually violent offense” and who suffers from a mental abnormality or personality disorder, which makes the person likely to engage in repeat acts of sexual violence and who has serious difficulty in controlling such person’s dangerous behavior. Sexually violent predators are distinct from other sex offenders due to a higher risk to re-offend if their mental abnormality or personality disorder is left untreated. Those crimes considered “sexually violent offenses” are rape, KSA 2019 Supp. 21-5503; indecent liberties with a child and aggravated indecent liberties, KSA 2019 Supp. 21-5506; criminal sodomy and aggravated criminal sodomy, KSA 2019 Supp. 21-5504; indecent solicitation of a child and aggravated indecent solicitation, KSA 2019 Supp. 21-5508; sexual exploitation of a child, KSA 2019 Supp. 21-5510; aggravated sexual battery, KSA 2019 Supp. 21-5505; and aggravated incest, KSA 2019 Supp. 21-5604. “Mental abnormality” is defined as a congenital or acquired condition affecting the emotional or volitional capacity, which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. “Likely to engage in repeat acts of sexual violence” means the person’s propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others. Pursuant to the Kansas Sexually Violent Predator Act (KSA 2019 Supp. 59-29a01 *et seq.*), originally enacted in 1994, a sexually violent predator can be involuntarily committed to the Sexual Predator Treatment Program (SPTP) at Larned State Hospital. Civil commitment is different from a

criminal conviction. Instead of having a definitive time frame, civil commitment continues until the offender's mental abnormality or personality disorder has changed to the extent that he or she is safe to be released. Commitment can be accomplished only following a civil trial in which the court or a jury finds that a person is a sexually violent predator. A sexually violent predator would be required to complete the three phases of the treatment program, which include two inpatient phases at Larned State Hospital and one outpatient phase at one of the reintegration facilities. There is no time limit for completion of each phase. The offender must meet the predetermined requirements of the phase to progress.

Upon release from the secure facility, a person would go to a transitional release facility. These facilities cannot be located within 2,000 feet of a licensed child care facility, an established place of worship, any residence in which a child under 18 years of age resides, or a school or facility used for extracurricular activities of pupils enrolled in kindergarten through grade 12 (KSA 2019 Supp. 59-29a11(b)). Additionally, no more than 16 sexually violent predators may be placed in any one county on transitional release.

Once the court determines a person on transitional release may proceed to conditional release, the person must serve a minimum of five years in conditional release with no violations of the person's treatment plan before petitioning for final discharge.

The Secretary for Aging and Disability Services is required to issue an annual report to the Governor and Legislature detailing activities regarding transitional and conditional release of sexually violent predators. Such details include their number and location, the number of those who have been returned to treatment at Larned State Hospital and the reasons for the return, and any plans for the development of additional transitional or conditional release facilities.

Sexual Predator Treatment Program Expenditures and Patient Census

In FY 2020, expenditures for the SPTP totaled \$24.9 million, all from the State General Fund. The patient census for the program totaled 286 patients, including 244 patients in the SPTP main facility at Larned State Hospital, 9 patients in reintegration units at Larned State Hospital, 8 patients in reintegration units at Osawatomie State Hospital, 7 patients in reintegration units at Parsons State Hospital and Training Center; and 18 individuals on conditional release.

Recent Legislation and Related Activity

In 2013 and 2015, the Legislative Division of Post Audit (LPA) completed a two-part performance audit of the SPTP that looked at how the Kansas SPTP compared to similar programs in other states and best practice, what actions could be taken to reduce the number of offenders committed to the SPTP, and whether the SPTP is appropriately managed to ensure the safety and well-being of program staff and offenders. Further information regarding this performance audit, including the reports, may be found on the LPA website: www.kslpa.org.

During the 2015 Session, the Legislature passed House Sub. for SB 12. This bill created and amended law governing the civil commitment of sexually violent predators and the SPTP. Among other provisions, the bill included the following:

- Named the continuing and new law governing such civil commitment the “Kansas Sexually Violent Predator Act”;
- Adjusted the processes for identifying and evaluating persons who may meet the criteria of a sexually violent predator;
- Adjusted the processes for filing the petition alleging a person is a sexually violent predator and conducting the probable cause hearing and trial on such petition;
- Adjusted processes for post-commitment hearings and annual examinations;
- Adjusted standards and processes for transitional release, conditional release, and final discharge;
- Increased the limit on sexually violent predators who may be placed in any one county on transitional or conditional release from 8 to 16;
- Amended the statute setting forth rights and rules of conduct for sexually violent predators;
- Incorporated the Kansas Administrative Procedure Act, Kansas Judicial Review Act, and Office of Administrative Hearings into the procedures for addressing actions taken by the Kansas Department for Aging and Disability Services regarding SPTP residents; and
- Adjusted *habeas corpus* provisions for persons committed under the Act.

During the 2016 Session, the Legislature passed SB 407, which modified registration requirements for committed offenders and revived a statute in the Sexually Violent Predator Act related to transitional release that was inadvertently repealed by 2015 House Sub. for SB 12.

During the 2017 Session, the Legislature passed HB 2128, which amended the procedures for annual review, transitional release, and conditional release for committed offenders.

During the 2018 Session, the Legislature passed SB 266, which amended various provisions within the Act to, among other things, adjust procedures related to annual review, petition for final discharge, conditional release, and individual person management plans and appeals.