

No.

IN THE SUPREME COURT OF THE UNITED STATES

ANGEL WHEELER, Petitioner

v.

STATE OF KANSAS, Respondent

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
KANSAS COURT OF APPEALS**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments of the United States Constitution preclude the State of Kansas from requiring a person to register as “violent offender,” pursuant to the Kansas Offender Registration Act (“KORA”), on the basis of judicial fact-finding.

LIST OF PARTIES

The parties to this case are as stated in the caption, Angel Wheeler, petitioner, and the State of Kansas, respondent. In the courts below, petitioner was referred to as appellant-defendant and the respondent was referred to as appellee-plaintiff.

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OPINIONS BELOW

The Kansas Supreme Court in *State v. Petersen-Beard*, 377 P.3d 1127 (2016) found that KORA registration does not constitute punishment within the meaning of the United States Constitution when imposed upon sex offenders. Later, the Kansas Supreme Court found that KORA registration does not constitute punishment under the United States Constitution when imposed upon “violent offenders,” on the basis of judicial fact-finding. *State v. Huey*, 399 P.3d 211 (Kan. 2017). Anticipating the Kansas Supreme Court’s ruling in *Huey*, the Kansas Court of Appeals, in this case, upheld an offender registration order predicated upon a judicial finding that Ms. Wheeler committed a person felony with a deadly weapon. *State v. Wheeler*, No. 114,518 (September 30, 2016)(unpublished opinion). Subsequently, the Kansas Supreme Court denied review of the Kansas Court of Appeals’ decision.

STATEMENT OF JURISDICTION

The Kansas Supreme Court is the court of last resort in Kansas. The Kansas Supreme Court denied review of Kansas Court of Appeals opinion holding that KORA registration could be imposed on the basis of judicial fact-finding on August 29, 2017.

The question presented in this case is whether the Sixth and Fourteenth Amendments of the United States Constitution preclude the State of Kansas from requiring a person to register as “violent offender,” pursuant to KORA, on the basis of judicial fact-finding. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) because Wheeler claimed a title, right, privilege, or immunity under the United States Constitution, and the Kansas Supreme Court declined to review an order denying that claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Constitutional provisions involved are the Sixth and

Fourteenth Amendments:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. [U.S. Const. amend. VI];

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. Const. amend. XIV, § 1]

The Kansas statutes involved in this case are K.S.A. 21-5413(b)(1)(B), and the statutory provision through which KORA registration was imposed, K.S.A. 22-4902(e)(2). K.S.A. 21-5413(b)(1)(B) provides:

Aggravated battery is: [...]

knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted. (Emphasis added).

K.S.A. 22-4902(e)(2) provides:

“Violent offender” includes any person who: [...]

on or after July 1, 2006, is convicted of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony.

STATEMENT OF THE CASE

Angel Wheeler pled guilty to one count of aggravated battery. That offense required proof of bodily harm caused by a deadly weapon *or* bodily harm caused in a manner whereby great bodily harm, disfigurement or death could be inflicted. At sentencing, the district court imposed a 32 month prison sentence followed by 12 months of postrelease supervision. In addition, the court made a factual finding that Ms. Wheeler committed aggravated battery with a deadly weapon. This finding required Ms. Wheeler to register as a violent offender for 15 years following her release from prison.

Ms. Wheeler appealed from the district court finding requiring her to register as a violent offender. On appeal, she asserted that the district court violated her constitutional right to a jury trial by ordering violent offender registration on the basis of judicial fact-finding. The Kansas Court of Appeals rejected that claim, and the Kansas Supreme Court, subsequently, denied her petition for review.

REASONS FOR GRANTING THE WRIT

1. **This Court should grant this petition to resolve whether offender registration, in its current form, constitutes punishment within the meaning of the United States Constitution.**

Introduction

The district court, in this case, imposed violent offender registration requirements by making a factual finding that Ms. Wheeler used a deadly weapon during the commission of a person felony. If KORA registration is punishment, within the meaning of the United States Constitution, the court's offender registration order is unconstitutional. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.")

In this case, the Kansas Court of Appeals determined that violent offender registration was not punishment, and, therefore, did not implicate the *Apprendi* rule. Slip op. at 6. Debatably, this conclusion ran contrary then-existing Kansas Supreme Court precedent. *State v. Charles*, 372 P.3d 1109, Syl. ¶ 7 (2016). But, after Ms. Wheeler filed a petition for review, the Kansas Supreme Court overruled itself, and explicitly held that violent offender registration is presumptively non-punitive. *State v. Huey*, 399 P.3d 211, 214-15 (Kan. 2017).

In *State v. Huey* (which is currently precedent within the State of Kansas), a majority of the Kansas Supreme Court indicated that violent offender registration could, hypothetically, be punishment within the meaning of the United States Constitution. But the *Huey* majority held that it would need a compelling evidentiary record before it could make a finding that violent offender registration is punitive. *Huey*, 399 P.3d at 214-15.

Three justices dissented from the *Huey* majority. In their view, all varieties of KORA registration are punitive. Writing for the minority, Justice Beier explained:

Kansas' requirement of offender registration — especially in its modern, maximally invasive, maximally pervasive, and infinitely more public incarnation — is punishment, certainly in effect if not in intent. *Huey*, 399 P.3d at 215 (Brier, J., dissenting) *quoting State v. Meredith*, 306 Kan. --, 399 P.3d 859, 865 (2017) (Brier, J., dissenting).

In sum, the Kansas Supreme Court is split 4 to 3 on the question of whether KORA registration is punishment.

The Punitive Aspects of KORA

On April 22, 2016, in *Doe v. Thompson*, 373 P.3d 750 (Kan. 2016), the Kansas Supreme Court held that now-existing KORA registration requirements are punitive. Unfortunately for Ms. Wheeler, *Doe* was overruled on the same day it was decided. *State v. Petersen-Beard*, 377 P.3d 1127 (Kan. 2016).

In *Doe*, the Kansas Supreme Court noted the differences between the current version of KORA and an offender registration scheme which this Court deemed non-punitive in *Smith v. Doe*, 538 U.S. 84, 103 (2003). Specifically:

- KORA applies to a broader group of offenders.

The 2011 KORA applies to sex offenders, violent offenders, and drug offenders (with no personal use exception). K.S.A.2011 Supp. 22-4902. ASORA only applied to sex offenders and child kidnappers. Alaska Stat. § 12.63.010 (2000).

- KORA requires frequent in-person reporting regardless of registration changes.

KORA requires in-person quarterly reporting for sex offenders in each location where the offender resides, maintains employment, or attends school. K.S.A.2011 Supp. 22-4905(b). Additionally, transient offenders must register in person in the location where the offender is physically present every 30 days. K.S.A.2011 Supp. 22-4905(e). ASORA did not require in-person reporting after initial registration. Alaska required annual written verification for nonaggravated sex offenses and quarterly written verification for aggravated offenses. Alaska Stat. § 12.63.010(d) (2000).

- KORA often requires longer registration terms.

For the majority of first-time sex offenses, KORA requires 25 years or lifetime registration. K.S.A.2011 Supp. 22-4906. For first-time nonaggravated sex offenses, the ASORA required 15-year registration. Alaska Stat. § 12.63.020 (2000).

- KORA requires additional registration information.

In addition to the registration information offenders were required to provide under ASORA, KORA registration requires: alias dates or places of birth; temporary lodging information; telephone numbers; social security number; occupation; name of any anticipated

employer and anticipated place of employment; photocopies of current driver's licenses and identification cards; aircraft and watercraft license plates and registration information; information concerning where motor vehicles, aircraft, and watercraft are habitually parked or otherwise kept; professional licenses, designations, and certifications; preconviction mental health treatment; schools attended or expected to be attended; travel and immigration documents; name and telephone number of probation, parole, or community corrections officer; email addresses; all online identities used on the Internet; any information relating to membership in online social networks; DNA exemplars; and the sex and date of birth of each victim. Compare K.S.A.2011 Supp. 22-4907 with Alaska Stat. § 12.63.10 (2000).

- KORA requires in-person registration updates.

KORA additionally requires in-person registration updates within 3 days of any information change. K.S.A.2011 Supp. 22-4905(g). ASORA required a written update for a change of residence. Alaska Stat. § 12.63.010(c) (2000).

- KORA requires additional information dissemination to the public.

In addition to the information made available to the public under ASORA, KORA disseminates: any other offenses for which the offender has been convicted or adjudicated; temporary lodging information; address of any place where the offender will be a student; and professional licenses, designations, and certifications the offender holds. K.S.A.2011 Supp. 22-4909(b)(3), (5), (8), and (10); Alaska Stat. § 18.65.087 (2000).

- KORA imposes costly registration fees.

KORA requires that offenders remit a \$20 fee, four times per year, in each location where an offender resides, maintains employment, or attends school. K.S.A.2011 Supp. 22-4905(k). ASORA allowed the department of public safety to adopt fees for registration and required that fees be based upon actual costs and be set at a level not to discourage registration. Alaska Stat. § 18.65.087(d)(3) (2000).

- KORA requires provision of notice for travel outside the United States.

Under KORA, an offender must give 21 days' notice of international travel except in emergency situations. K.S.A.2011 Supp. 22-4905(o). No restriction on travel was included in ASORA.

- KORA requires annual driver's license and identification card renewal and the Motor Vehicle Drivers' License Act requires a distinguishing number on the KORA registrant's driver's licenses.

K.S.A.2011 Supp. 22-4905(l); K.S.A.2014 Supp. 8-243(d). ASORA did not contain similar requirements.

- Kansas considers whether a parent is subject to KORA or is residing with a person subject to KORA in determining child custody, residency, and parenting time.

K.S.A.2011 Supp. 23-3203(h), (j). Alaska's domestic relations code did not require consideration of registered offender status. See Alaska Stat. §§ 25.20.090 (2000); 25.24.150 (2000).

- KORA imposes burdensome penalties for violations.

Under the 2011 KORA, a first conviction is a severity level 6 person felony, a second conviction is a severity level 5 person felony, a third conviction is a severity level 3 person felony, and a violation continuing for more than 180 days is a severity level 3 person felony. K.S.A.2011 Supp. 22-4903. Under ASORA, the penalty for a first-time failure to register was a class A misdemeanor. Alaska Stat. § 11.56.840 (2000). The penalty for a second time failure to register or failure to register with the intent to escape detection or identification and to facilitate the person's commission of a sex offense or child kidnapping was a class C felony, the lowest severity level felony in Alaska. Alaska Stat. § 11.56.835 (2000); Alaska Stat. § 11.81.250 (2000).

Doe, 373 P.3d at 765-66.

KORA is Punishment

KORA, as it is currently enacted, is punishment. This becomes clear upon reviewing factors set forth by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Those factors are:

1. Whether the sanction involves an affirmative disability or restraint.
2. Whether it has historically been regarded as a punishment.
3. Whether it comes into play only on a finding of scienter.
4. Whether its operation will promote the traditional aims of punishment-retribution and deterrence.
5. Whether the behavior to which it applies is already a crime.
6. Whether an alternative purpose to which it may rationally be connected is assignable for it.
7. Whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 170.

KORA currently requires an offender to report in person four times per year in any county in which the offender lives, works, or goes to school. K.S.A. 22-4905(b). The statutory scheme also requires that the offender pay a \$20 fee each time he or she reports, in each county where he lives, works, or goes to school. K.S.A. 22-4905(k). Further, an offender must also notify law enforcement 21 days prior to travel outside the United States. K.S.A. 22-4905(o). These

restrictions constitute an affirmative disability or restraint.

Not only are the reporting requirements an affirmative restraint, these reporting requirements are similar to the reporting requirements for individuals on parole, postrelease or probation. Anyone that is released, but under some form of supervision, is required to keep the authorities of their residence and employment. *Doe*, 373 P.3d at 768. Such reporting is, at the very least, analogous to traditional with probation requirements.

Further, failure to report can result in severe criminal sanctions. The crime of violating KORA is triggered by a conviction of a criminal offense, no additional finding of scienter is required. It is, for all practical purposes, a strict liability crime. K.S.A. 22-4903(a). The first offense is a severity level 6 offense; a second offense is a severity level 5 offense, while a third or subsequent offense is a severity level 3 offense. K.S.A. 2011 Supp. 22-4903(c)(1)(A)-(C). Depending on an individual's criminal history, protracted failure to report result in a sentence as much as 228 months incarceration. *See* K.S.A. 2016 21-6804. Yet, despite the severity of sanctions underlying the act, there is no connection between the onerous requirements of KORA and the purported goal of the act, which is to protect the public.

Finally, the excessive nature of KORA is evident in its differences with the federal Sex Offender Registration and Notification Act ("SORNA").

SORNA differentiates between classes of offenders, whereas KORA is a one-size-fits-all scheme; KORA is not restricted to just sex offenders, whereas SORNA is; KORA has no mechanism for obtaining an early release from the registration requirement, whereas SORNA allows for a reduction in registration time for a clean record; KORA requires a special, annually renewed driver's license and child custody notification not found in SORNA; KORA requires more registration information than SORNA; KORA imposes a fee, whereas SORNA does not; and KORA has a broader definition of "resides" than SORNA. *See* 42 U.S.C. §§ 16911, 16914–16 (2012). In other words, looking at the statutory scheme as a whole, the effects of KORA are considerably more punitive than those of SORNA.

Doe, 373 P.3d at 771.

As stated by the *Doe* majority, "Too much is too little." 373 P.3d at 770. As KORA is currently enacted, it lumps all offenders into one group. It does not attempt to differentiate between those who would be considered a risk to the public and those who are not. The result is that its purported public safety purpose is not furthered by its many of its requirements. Thus, for many offenders, KORA operates exclusively to punish.

Nationwide split of authority

Kansas certainly is not the only state to struggle to evaluate amended and enhanced offender registration laws. Just recently, in *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016) *cert. denied* – S.Ct. --, 2017 WL 4339925 (2017), the Sixth Circuit noted:

Like many states, Michigan has amended its Sex Offender Registration Act (SORA) on a number of occasions in recent years for the professed purpose of making Michigan communities safer and aiding law enforcement in the task of bringing recidivists to justice. Thus, what began in 1994 as a non-public registry maintained solely for law enforcement use, see Mich. Pub. Act 295, § 10 (1994), has grown into a byzantine code governing in minute detail the lives of the state's sex offenders

834 F.3d at 697. Given the general expansion of registration laws, multiple states and federal circuits have addressed whether the amendments can be applied to offenders who committed offenses prior to the various amendments, which turns on evaluation of whether such enhanced schemes are punishment. Courts across the country have come to varying results. Several circuit courts and state courts have found offender registration laws are not punitive. *See generally Shaw v. Patton*, 823 F.3d 556, 571–72 (10th Cir. 2016) (finding Oklahoma's SORA did not have punitive effect); *Doe v. Cuomo*, 755 F.3d 105, 111–2 (2d Cir. 2014) (finding the notification and registration provisions were not punitive and did not violate the Ex Post Facto law); New York SORA) (upholding triennial in-person reporting for level-one offenders); *Litmon v. Harris*, 768 F.3d 1237, 1243 (9th Cir. 2014) (finding that application of California's registration provisions did not violate the Ex Post Facto clause).

In contrast, the Sixth Circuit found Michigan's expanded registration laws punitive such that they cannot be applied retroactively. *Does*, 834 F.3d at 705

(citing *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008); see also *Commonwealth v. Muniz*, 164 A.3d 1189, 1218 (Pa. 2017) (finding retroactive application of Pennsylvania's offender registration act violates the ex post facto clause).

By 1996, every state had enacted some form of an offender registration law. *Smith*, 538 U.S. at 90. In the intervening years, states have amended and greatly expanded their offender registration acts. Further, many of the offender registration acts include similar provisions. Enforcement of those provisions should not vary based upon which state or circuit an offender resides in and the varying applications of the Ex Post Facto clause in state and circuit courts warrant review by this Court.

Summary

KORA registration, as it is currently mandated, is punishment. Thus, it may not be imposed on the basis of judicial fact-finding. The Kansas Supreme Court is sharply divided on this question, reversing itself on the same day based on a change of one justice in the Court's make up. And courts around the country are split regarding whether enhanced registration schemes are punishment for purposes of the United States Constitution. For this reason, Ms.

Wheeler respectfully asks this Court issue a writ of certiorari, hold that KORA registration is punishment within the meaning of the United States Constitution, vacate the judgment of the Kansas Court of Appeals, and remand with directions.

Respectfully submitted,

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