

No.

IN THE SUPREME COURT OF THE UNITED STATES

DARNELL HUEY, STEVEN WEIS, ANTHONY GRIFFIN, JESSE VILLA and
JOSEPH WATKINS, Petitioners

v.

STATE OF KANSAS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
KANSAS SUPREME COURT

APPENDIX

- Appendix A – Kansas Supreme Court decision in *State v. Huey*, decided August 11, 2017
- Appendix B – Kansas Court of Appeals decision in *State v. Huey*, decided April 25, 2014
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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 109,690

STATE OF KANSAS,
Appellee,

v.

DARNELL LEE HUEY,
Appellant.

SYLLABUS BY THE COURT

1. The legislature intended the Kansas Offender Registration Act (KORA) to be civil and nonpunitive for all classes of offenders.
2. Because the legislature intended KORA to be a regulatory scheme that is civil and nonpunitive, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 25, 2014. Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Opinion filed August 11, 2017. Judgment of the Court of Appeals affirming in part, vacating in part, and remanding to the district court is affirmed as to the issues subject to review. Judgment of the district court is affirmed as to the issues subject to review.

Samuel Schirer, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jodi E. Litfin, deputy district attorney, argued the cause, and *Chadwick J. Taylor*, district attorney, and *Derek Schmidt*, attorney general, were with her on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: Any fact necessary to increase the punishment for an offense other than a prior conviction must be established by a guilty plea or proved beyond a reasonable doubt to a jury. *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In this case, Darnell Lee Huey pleaded guilty to robbery and aggravated burglary and was ordered to register as a violent offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, after a district court judge found he used a deadly weapon to commit those offenses. This fact was not established by Huey's guilty pleas. On appeal, Huey argues the registration requirement violates the *Booker/Apprendi* rule because the fact that he used a deadly weapon should have been found by a jury. The persuasiveness of his challenge turns on whether KORA's requirements constitute punishment for his crimes.

This court has previously held that KORA's deadly weapon finding must be admitted through a guilty plea or submitted to a jury because KORA's requirements constitute punishment as applied to individuals required to register on the basis of such a finding. See *State v. Charles*, 304 Kan. 158, 177, 372 P.3d 1109 (2016). But, as noted in *Charles*, its application in subsequent appeals was in doubt because, on the same day it was decided, this court overruled the caselaw on which it relied, holding in *State v. Petersen-Beard*, 304 Kan. 192, 209, 377 P.3d 1127, *cert. denied* 137 S. Ct. 226 (2016), that KORA registration for sex offenders was not cruel and unusual punishment under the Eighth Amendment to the United States Constitution. See *Charles*, 304 Kan. at 179 (acknowledging *Petersen-Beard* "may influence whether the KORA holding of this case is available to be relied upon by violent offenders whose appeals have yet to be decided").

As signaled in the *Charles* decision, we now hold *Charles* is not viable authority for Huey or other violent offenders as to whether KORA is punitive. That issue may be resolved only upon an evidentiary record supplying the clearest proof to overcome the legislature's intent that KORA be a regulatory scheme that is civil and nonpunitive. Huey raised his challenge as to KORA's claimed punitive nature for the first time on appeal and did not develop an evidentiary record in the district court. And without that, we cannot conduct the appropriate analysis to determine KORA's alleged punitive effects on violent offenders such as Huey. Accordingly, we affirm the offender registration order. See *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017), slip op. at 10.

FACTUAL AND PROCEDURAL BACKGROUND

Huey forced his way into an apartment using what was described as a "'skinny weapon' that had a pistol grip in the front and rear." He demanded money from the occupants. When police arrived, Huey was seen fleeing with property belonging to the resident. He was eventually apprehended—but no weapon was found.

Huey was charged with aggravated burglary, aggravated robbery, theft, and criminal possession of a firearm. He agreed to plead guilty to aggravated burglary and to a reduced charge of robbery. In exchange, the State agreed to dismiss the remaining counts and filed an amended complaint as part of the agreement. The revised charges to which Huey pleaded guilty did not allege he used a "deadly weapon" to commit either offense.

At the plea hearing, the State explained to the district court that the evidence would show Huey "entered the residence without permission," "made a demand . . .

wanting some money," and "by force or threat of force took property belonging to [the victim], specifically he took a couple of bottles of prescription medication" The State asked the court to take judicial notice of the evidence presented at the preliminary hearing.

The court accepted the pleas and found Huey guilty, but it did not at that time inform him of any duty to register under KORA. Similarly, KORA registration was not mentioned in the written plea agreement. The district court sentenced Huey to concurrent sentences of 57 months' imprisonment for the robbery conviction and 32 months for the aggravated burglary conviction. It ordered the sentences to run consecutive to another sentence imposed in a separate Shawnee County case. As to offender registration, which is the subject of this appeal, the State argued,

"I believe this Court did hear the evidence that was presented at the preliminary hearing. I believe there is sufficient evidence for the Court to make that finding beyond a reasonable doubt that a firearm was used in the commission of the crime and that the defendant should be required to register as a violent offender. Those would be the recommendations of the State."

Huey's counsel responded,

"As to the issue of the firearm, I would note the discovery revealed that one of the individuals believed that Mr. Huey had a firearm and he indicated to law enforcement at the time he was questioned he did not have a firearm; he had a crowbar. The crowbar was found—or a crowbar was found at the scene, apparently. . . . I think it was important for the court that he did not have a firearm that was retrieved for purposes of this offense."

The State admitted "there was maybe some conflicting information in the discovery" on whether a firearm was used but noted the preliminary hearing witnesses testified one was used. The court ruled, "I'm going to make the finding that a firearm was used in the course of this event and order offender registration."

The KORA checklist in the written journal entry reflects a deadly weapon finding, and the court imposed a 10-year registration requirement. But the court mistakenly checked a box applicable to first-time statutory violent offenders, rather than first-time offenders whose duty to register turned on a deadly weapon finding.

Huey timely appealed, alleging three sentencing errors. First, he argued the postrelease supervision term imposed by the district court constituted an illegal sentence. His second and third claims asserted violations of *Apprendi*'s general prohibition on sentence-enhancing judicial fact finding: calculating his sentence using his criminal history score and imposing KORA requirements based on the finding that he used a deadly weapon to commit the crimes.

A Court of Appeals panel vacated the postrelease supervision term and remanded for resentencing on that issue. *State v. Huey*, No. 109,690, 2014 WL 1707807, at *2 (Kan. App. 2014) (unpublished opinion). This question is no longer in dispute. As to the two *Apprendi* arguments, the panel rejected both. We granted Huey's petition for review on the two *Apprendi* claims.

Jurisdiction is proper. K.S.A. 20-3018(b) (petition for review of Court of Appeals' decision); K.S.A. 60-2101(b) (providing Supreme Court jurisdiction over cases subject to review under K.S.A. 20-3018).

CRIMINAL HISTORY USE

At the outset, we discard Huey's challenge to his criminal history being used in calculating his sentence because we have repeatedly rejected that claim in many other cases. See, *e.g.*, *State v. Johnson*, 304 Kan. 924, 956, 376 P.3d 70 (2016); *State v. Ivory*, 273 Kan. 44, 45-48, 41 P.3d 781 (2002). Huey acknowledges this but wishes to preserve the issue for federal appellate review. Huey offers no argument why our precedent should be overruled. *Cf. Johnson*, 304 Kan. at 956 (rejecting *Ivory* claim based on defendant's failure to advance new argument). We continue to adhere to the *Ivory* line of cases and will not address this claim further in this appeal. This leaves only the judicial fact-finding claim.

HUEY IS REQUIRED TO REGISTER

In the district court, Huey did not raise an *Apprendi* challenge to the finding that he used a deadly weapon to commit his offenses. This issue was advanced for the first time on appeal, and so it is not surprising there is no evidentiary basis supporting the argument that KORA requirements are punishment as applied to violent offenders. Instead, Huey contends three generic aspects of the statutory scheme support his claim: (1) stigma attached to offender registration, *i.e.*, disclosure on the Internet; (2) potential imprisonment for failure to register; and (3) the \$20 registration fee.

We considered each of these in holding in *Petersen-Beard* that the lifetime registration requirements imposed on sex offenders do not constitute punishment. See *Petersen-Beard*, 304 Kan. at 201-02, 205 (Internet dissemination and registration fee). But see 304 Kan. at 192 (Johnson, J., dissenting) (arguing registration requirements with which compliance enforced by potential for "going to prison for a new felony" constituted an affirmative disability or restraint on the offender). And while Huey

attempts to distinguish his case from *Petersen-Beard* by arguing that "[p]eople who commit person felonies are not, as a class, comparable to sex offenders," he offers no new perspectives regarding these or any other features of the registration scheme as they may pertain to violent offenders.

Standard of Review

"Whether a defendant's constitutional rights as described under *Apprendi* were violated by a district court at sentencing raises a question of law subject to unlimited review." *State v. Dickey*, 301 Kan. 1018, 1036, 350 P.3d 1054 (2015); see also *Charles*, 304 Kan. at 176 (applying de novo review to constitutionality under *Apprendi* of KORA's judicial deadly weapon fact-finding requirement).

Discussion

The legislature intended KORA to be civil and nonpunitive for all classes of offenders currently subject to its provisions. See *Meredith*, 306 Kan. ___, slip op. at 8, see also *State v. Myers*, 260 Kan. 669, 696, 923 P.2d 1024 (1996) ("We hold that KSORA's registration requirement does not impose punishment; thus our ex post facto inquiry as to registration ends."), *cert. denied* 521 U.S. 1118 (1997). Only the clearest proof that the scheme is ""so punitive either in purpose or effect as to negate the [legislature's] intention"" will suffice to override the legislature's nonpunitive intent and transform what has been denominated a civil remedy into a criminal penalty. *Meredith*, 306 Kan. ___, slip op. at 7 (quoting *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 [2003])). We hold Huey has failed to make that showing.

Because Huey raised his *Apprendi* challenge for the first time on appeal, he offered no evidence and the district court made no findings. Consequently, Huey offers

no fact-based arguments on the factors we must consider in determining whether the Act's effects render it punitive as applied to violent offenders. See *Meredith*, 306 Kan. ___, slip op. at 10 ("[A]nalysis of the [*Kennedy v.*] *Mendoza-Martinez*[, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963),] factors requires a robust record because the effects prong of the applicable legal test obliges an appellate court to premise its legal conclusion on at least some fact-intensive questions—*i.e.*, the legitimacy of the public safety interests at stake, the effectiveness of the alternative purpose to promote public safety, etc.").

Without a record, we cannot conclude the effects of KORA's registration requirements as to violent offenders are so punitive as to override the legislature's intent that KORA be a civil remedy. Therefore, Huey has not demonstrated, as he must, that the registration requirements constitute punishment. Because the registration requirements did not increase Huey's punishment under the law of this case, it was not necessary that Huey's use of a deadly weapon be found beyond a reasonable doubt by a jury.

We affirm the lower courts' judgment on the issues subject to our review.

BEIER, J., dissenting: I respectfully dissent from the majority's decision in this case.

I would not explicitly or implicitly overrule *State v. Charles*, 304 Kan. 158, 372 P.3d 1109 (2016). I have previously written:

"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. It is no less so for a drug offender than for a sex offender or a violent offender. It is no less so when the Ex Post Facto Clause is before us than when *Apprendi* or the Eighth Amendment is before us." *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017), slip op. at 11-12 (Beier, J. dissenting).

As with the defendant in the *Meredith* case, relied upon by my colleagues in the majority, Darnell Lee Huey has met any burden of proof he bears on whether the imposition of the requirement of registration qualifies as punishment. Under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny, Huey cannot be subjected to that requirement on the basis of a judge-made fact finding that he used a deadly weapon. I would therefore vacate the requirement.

ROSEN and JOHNSON, JJ., join the foregoing dissent.

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 109,690

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DARNELL LEE HUEY,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Opinion filed April 25, 2014.
Affirmed in part, vacated in part, and remanded with directions.

Samuel Schirer, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, assistant district attorney, *Chadwick J. Taylor*, assistant county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, C.J., MCANANY, J., and JAMES L. BURGESS, District Judge Retired,
assigned.

Per Curiam: Darnell Lee Huey pled guilty to and was convicted of one count of robbery and one count of aggravated burglary. The district court sentenced Huey to concurrent sentences of 57 months' imprisonment and 36 months' postrelease supervision for the robbery and 32 months' imprisonment and 36 months' postrelease supervision for the aggravated burglary. After hearing arguments on the issue, the district court also found that Huey had used a gun in the commission of his crimes; accordingly, the district court ordered him to register as an offender under the Kansas Offender Registration Act

(KORA), K.S.A. 22-4901 *et seq.* for 10 years. Huey appeals, arguing that the district court: (1) imposed an illegal sentence when it sentenced him to 36 months' postrelease supervision; (2) violated his constitutional rights when it ordered him to register as an offender based upon the factual finding that he used a gun in the commission of his crimes when the State had not proven that fact beyond a reasonable doubt to a jury; and (3) violated his constitutional rights when it considered his criminal history score in calculating his sentence when the State had not alleged the criminal history in the complaint or proven it beyond a reasonable doubt to a jury.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2011, pursuant to a plea agreement, Huey pled guilty to one count of robbery and one count of aggravated burglary, both severity level 5 nondrug person felonies. At the plea hearing, the State alleged that on or about May 9, 2010, in Shawnee County, Huey entered Jimmie Ailsworth's apartment without permission and committed robbery, demanding money and taking some bottles of prescription medication. The State also asked the district court to take judicial notice of the evidence previously presented at the preliminary hearing. At the plea hearing, the State did not assert explicitly that Huey used a deadly weapon in the commission of his crimes, although witnesses at the preliminary hearing had so testified. After Huey admitted he had committed the acts the State alleged, the district court accepted Huey's guilty pleas and found him guilty of robbery and aggravated burglary.

The district court held the sentencing hearing on May 24, 2011. At the hearing, as part of its sentencing recommendation, the State asked the district court to find that Huey used a firearm in the commission of the crime and accordingly order Huey to register as a violent offender. In response, Huey noted that although witnesses to the crime believed he had a firearm, Huey maintained it was a crowbar, not a gun. The district court sentenced Huey to concurrent sentences of 57 months imprisonment and 36 months'

postrelease supervision for the robbery and 32 months imprisonment and 36 months' postrelease supervision for the aggravated burglary.

After pronouncing this part of the sentence, the district court allowed additional argument on Huey's use of a firearm. The State pointed out two witnesses had testified at the preliminary hearing that Huey used a firearm. Huey emphasized that he had always indicated that he used a crowbar, not a firearm, and that a firearm was never recovered. After hearing arguments, the district court found that Huey committed the crimes with a deadly weapon—a firearm—and ordered him to register as a violent offender for 10 years from the earliest of his date of parole, discharge, or release. Huey timely filed his notice of appeal. In March 2013, the district court dismissed Huey's appeal for failure to docket with this court. The following month, this court granted Huey's timely application to reinstate the appeal.

ANALYSIS

Did the district court impose an illegal sentence?

In his first issue, Huey argues that the district court imposed an illegal sentence when it sentenced him to 36 months' postrelease supervision for his crimes because the controlling statute only allows 24 months' postrelease supervision. The State agrees.

A sentence that does not conform to the statutory provision is an illegal sentence. See *State v. Trotter*, 296 Kan. 898, 902, 295 P.3d 1039 (2013). Whether a sentence is illegal is a question of law over which an appellate court has unlimited review. 296 Kan. at 902. Additionally, this issue requires interpretation of a sentencing statute over which appellate courts also exercise unlimited review. See *State v. Jackson*, 297 Kan. 110, 112, 298 P.3d 344 (2013).

Huey committed the crimes at issue here in May 2010; at the time, the relevant sentencing statute in effect was K.S.A. 2009 Supp. 22-3717(d)(1)(B), which stated:

"Except as provided in subparagraphs (D) and (E), persons sentenced for nondrug severity levels 5 and 6 crimes and drug severity level 3 crimes must serve 24 months, plus the amount of good time and program credit earned and retained pursuant to K.S.A. 21-4722, and amendments thereto, on postrelease supervision."

Subparagraph (D) allows for a departure to 60 months if the district court finds that the crime of conviction was sexually motivated and subparagraph (E) allows for a reduction of postrelease supervision under other circumstances. See K.S.A. 2009 Supp. 22-3717(d)(1)(D)-(E). Neither allows for an increase to 36 months.

The district court convicted Huey of two severity level 5 person felonies. See K.S.A. 21-3426 (stating that robbery is a severity level 5 person felony); K.S.A. 21-3716 (stating that aggravated burglary is a severity level 5 person felony). Under the clear language of K.S.A. 2009 Supp. 22-3717(d)(1)(B), the district court was required to sentence Huey to 24 months' postrelease supervision. The sentence of 36 months' postrelease supervision did not conform to the statutory provision and was therefore illegal. The postrelease supervision portion of Huey's sentence must be vacated, and the case remanded for resentencing in conformity with the statute.

Did the district court violate Huey's constitutional rights under Apprendi when it required Huey to register as a violent offender?

For his second issue, Huey argues that the district court violated his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), when it made a factual finding that he used a firearm in the commission of his crimes and thus ordered him to register as a violent offender. The *Apprendi* Court held that "[o]ther 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." 530 U.S. at 490. Huey contends that ordering him to register as a violent offender increased the penalty for his crime and, because the fact that he used a firearm in committing the crime was not proven beyond a reasonable doubt to a jury, the order violated the rule in *Apprendi*. The State replies that this court has previously and correctly rejected Huey's argument.

Huey's argument requires interpretation of KORA and consideration of its constitutionality, which are questions over which this court exercises unlimited review. See *State v. Cheeks*, 298 Kan. 1, 4, 310 P.3d 346 (2013) ("We engage in a de novo review of the constitutionality of a statute."); *Jackson*, 297 Kan. at 112 (stating that appellate courts have unlimited review of interpretation of sentencing statutes).

Huey failed to object to the registration requirement before the district court, which would generally preclude him raising a constitutional issue on appeal. See *State v. Haberlein*, 296 Kan. 195, 212, 290 P.3d 640 (2012). Huey's case, however, fits within a recognized exception to this general rule: "consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights." *State v. Tague*, 296 Kan. 993, 1000, 298 P.3d 273 (2013) (listing three exceptions to the general prohibition of constitutional arguments raised for the first time on appeal). Despite his failure to object in district court, this court may consider Huey's argument.

K.S.A. 2009 Supp. 22-4902(a)(7), the provision in KORA which covered the requirements of Huey's registration, included as an offender "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." The district court explicitly found, on the record, that Huey used a firearm in the commission of his crimes. Therefore, K.S.A. 22-4906(a)(1) required Huey, as an offender, to register "for a period of 10 years after paroled, discharged or released, whichever date is most

recent." As stated above, Huey asserts that registration increased the penalty for his crime and, therefore, *Apprendi* required that the factual finding upon which his registration rested—that he used a deadly weapon in the commission of his crime—be proved to a jury beyond a reasonable doubt.

Huey concedes that this court has previously decided this issue adversely to his position, citing *State v. Unrein*, 47 Kan. App. 2d 366, 372, 274 P.3d 691 (2012), *rev. denied* 297 Kan. 1256 (2013), and *State v. Chambers*, 36 Kan. App. 2d 228, 235-39, 138 P.3d 405, *rev. denied* 282 Kan. 792 (2006). *Unrein*, in fact, is directly on point and rejected many of the arguments that Huey raises here. Like Huey, Patrick Unrein asserted that the district court violated *Apprendi* by ordering him to register under KORA because he used a deadly weapon in the commission of his crime. Also like Huey, *Unrein* acknowledged *Chambers*, in which another panel of this court held that a sentencing judge's finding of sexual motivation to commit the crime which, in turn, led to requiring registration under KORA did not increase Chambers' sentences and therefore did not implicate *Apprendi*. See *Unrein*, 47 Kan. App. 2d at 370 (quoting *Chambers*, 36 Kan. App. 2d at 239).

As Huey now does, *Unrein* argued that *Chambers* was wrongly decided "'because it narrowly interpreted the rule in *Apprendi* by holding that it should only be applied to increased sentences, not increased punishment.'" 47 Kan. App. 2d at 370. The *Unrein* court rejected this argument, stating: "In fact, *Chambers* distinguished an increased sentence (that implicates *Apprendi*) from increased punishment (that does not implicate *Apprendi*) based, in part, on Kansas Supreme Court precedent" which this court is duty-bound to follow. 47 Kan. App. 2d at 370-71. Specifically, the cited portion of *Chambers* examined prior Kansas Supreme Court caselaw on the application of *Apprendi* and concluded:

"In [the Kansas Supreme Court cases examined], *Apprendi* was not applicable because the defendants' sentences were not increased beyond the statutory maximum terms. This is true even though the consequences of the district courts' factual findings clearly increased the defendant's punishment. If *Apprendi* does not apply to a sentencing judge's imposition of imprisonment rather than probation based upon a nonjury factual finding that a defendant used a firearm in the commission of a crime or was a gang member, it is not evident how a sentencing judge's determination that a crime was sexually motivated, which results in a defendant's obligation to comply with the comparatively mild sanction of registration, implicates the Sixth and Fourteenth Amendments to the Constitution of the United States." *Chambers*, 36 Kan. App. 2d at 238.

Huey attempts to distinguish the precedent the *Chambers* court relied upon by pointing out that those cases related to district courts imposing prison sentences rather than probation. Yet the *Chambers* court clearly noted this distinction in the language quoted above, finding that if *Apprendi* did not apply when the factual finding led a court to move from probation to imprisonment, it would not apply when the finding led a court to require the relatively milder sanction of registration in addition to the rest of the sentence. The *Chambers* rationale, adopted by *Unrein*, remains persuasive, and Huey presents no persuasive reason for this court to alter its position.

Again like *Unrein*, Huey contends that the stigma attached to offender registration constitutes punishment. See *Unrein*, 47 Kan. App. 2d at 371. The *Unrein* court rejected this argument as well, citing *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), in which the United States Supreme Court held that posting sex offender registration on the Internet did not constitute punishment despite any stigma attached. *Unrein*, 47 Kan. App. 2d at 371. The *Unrein* court concluded: "If the stigma attached to public registration as a sex offender is not punishment, the notoriety that [one] might experience for being listed as an individual who used a deadly weapon during the commission of two crimes is also not punishment." 47 Kan. App. 2d at 371.

Huey also asserts that the Kansas Supreme Court's decision in *State v. Myers*, 260 Kan. 669, 699, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1996), is contrary to this conclusion. He claims that the *Myers* court found that "registration repercussions are great enough to be considered punishment." This overstates *Myers*' holding. In *Myers*, our Supreme Court examined the Kansas Sex Offender Registration Act (KSORA)—the precursor to KORA—to determine whether its registration and public disclosure provisions violated the Ex Post Facto Clause of the United States Constitution when applied to an offender who committed his underlying crime prior to the date on which KSORA took effect. Although the *Myers* court ultimately found that the public disclosure provision, as applied, was prohibited ex post facto punishment, it also specifically stated: "We hold that KSORA's registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends." 260 Kan. at 671, 696. The *Myers* court's holding on the punitive nature of public disclosure of registrant information has arguably been undermined by the United States Supreme Court's decision in *Doe*, but that does not affect Huey's argument here. See *State v. Brown*, No. 107,512, 2013 WL 2395319, at *2 (Kan. App. 2013) (unpublished opinion) (discussing *Doe*'s effect on *Myers*), *petition for rev. filed* June 24, 2013.

The other Kansas Supreme Court case Huey cites to support his statement that offender registration is punishment, *State v. Scott*, 265 Kan. 1, 961 P.2d 667 (1998), addressed public disclosure under KSORA rather than registration under KORA. See 265 Kan. at 9, 14 (referring to the issue as involving the "public access provisions of the KSORA," comparing the KSORA's public access provisions with those in offender registry statutes in other states, and holding that "the legislature did not inflict a cruel or unusual punishment upon Scott by permitting public access to his registration information"). Thus, *Myers* and *Scott* are not authority that should persuade this court to turn away from the sound reasoning in *Unrein* and *Chambers*. See also *State v. Weis*, 47 Kan. App. 2d 703, 719, 280 P.3d 805 (2012) ("The stigma [Weis] might expect to suffer from registration is not an increase in sentence or punishment but a collateral

consequence of his registration as an offender. Accordingly, we do not believe the trial court's factual finding [of use of a deadly weapon] violated . . . *Apprendi*."), *petition for review filed July 16, 2012*.

Next, Huey points out that the *Chambers* court did not address the fact that if a defendant fails to register as ordered or otherwise violates the requirements of KORA, he may face additional imprisonment. The implication is that this potential imprisonment renders KORA punitive. The *Unrein* court, however, addressed this argument as well, concluding that an offender's "exposure to further criminal liability if he would violate KORA is necessary for the efficacy of the regulatory scheme. The purpose of registration is public safety, [citation omitted], and the threat of criminal liability is not punishment but a means to this end." 47 Kan. App. 2d at 372. Huey offers no response to this sensible rationale; accordingly, this court should again follow the reasoning of *Unrein*.

Huey does, however, take issue with the *Unrein* court's characterization of KORA's \$20 registration fee as nonpunitive. The *Unrein* court concluded that

"the \$20 fee is not punishment but a way to reimburse sheriff's offices for services provided in the regulatory scheme. See K.S.A. 2010 Supp. 22-4904(e) ('All funds retained by the sheriff . . . shall be credited to a special fund . . . which shall be used solely for law enforcement and criminal prosecution . . . and which shall not be used as a source of revenue to reduce the amount of funding otherwise made available to the sheriff's office.');

State v. Robinson, 281 Kan. 538, 543, 132 P.3d 934 (2006) (characterizing BIDS fees as 'recoupment' and 'not fines or, indeed, any part of the punishment or sanction')." 47 Kan. App. 2d at 372.

Huey claims this reasoning is flawed, stating that the use of the fee does not necessarily reflect the purpose of the fee and comparing it to a probation fee. Multiple panels of this court, however, have repeatedly rejected this argument and adopted the conclusion that the \$20 fee is for recoupment, not punitive purposes. See *Weis*, 47 Kan.

App. 2d at 719; *State v. Byers*, No. 108,564, 2013 WL 3867862, at *6 (Kan. App. 2013) (unpublished opinion); *State v. Hall*, No. 106,903, 2013 WL 646482, at *4 (Kan. App. 2013) (unpublished opinion), *rev. denied* 297 Kan. 1250 (2013). Huey neither acknowledges these cases nor provides authority to persuasively support his request that this court now change direction. Accordingly, this argument fails.

Huey's citation to *Southern Union Co. v. United States*, 567 U.S. ___, 132 S. Ct. 2344, 2357, 183 L. Ed. 2d 318 (2012), is also inapplicable. Huey correctly asserts that *Southern Union Company* held that criminal fines are penalties to which *Apprendi* applies. 132 S. Ct. at 2357. This holding has no bearing on the instant case, however, because this court has repeatedly held that the \$20 registration fee required under KORA is not a criminal fine; rather, it is a recoupment fee.

As shown above, this court has previously addressed and rejected all of Huey's arguments as to why KORA's registration requirements trigger *Apprendi*'s protections by using a factfinding not proven to a jury to increase the punishment for his crimes by requiring him to register. Huey has not presented any persuasive argument that should convince this court to revisit its earlier rationale. The district court's finding that Huey used a deadly weapon in the commission of his crimes and subsequent order that Huey register under KORA did not implicate Huey's rights as detailed in *Apprendi*.

Did the district court violate Huey's constitutional rights under Apprendi when it sentenced him based in part on his criminal history?

For his final issue, Huey argues that the district court violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution, as recognized in *Apprendi*, when it sentenced him based in part on his criminal history without first requiring the State to allege his criminal history in the complaint and prove it beyond a reasonable doubt to a jury. Huey concedes that the Kansas Supreme Court has

already decided this issue against him, but he raises it to preserve it for federal review. See *State v. Ivory*, 273 Kan. 44, 45-48, 41 P.3d 781 (2002).

This court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its earlier position. *State v. Shaw*, 47 Kan. App. 2d 994, 1006, 281 P.3d 576 (2012), *rev. denied* 297 Kan. 1255 (2013). There is no indication that the Kansas Supreme Court is departing from its position on this issue. Therefore, the district court did not violate *Apprendi* when it considered Huey's criminal history without requiring that it be proven beyond a reasonable doubt to a jury.

Affirm in part, vacated in part, and remanded with directions.

APPENDIX C



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CLERK OF THE APPELLATE COURT
CASE NUMBER: 109690

Court: Supreme Court

Case Number: 109690

Case Title: STATE OF KANSAS, APPELLEE,
V.
DARNELL LEE HUEY, APPELLANT.

Type: Motion for Rehearing or Modification by Appellant,
Darnell Huey.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in black ink, appearing to read "Dan Biles", written over a horizontal line.

/s/ Dan Biles, Justice

APPENDIX D

NOT DESIGNATED FOR PUBLICATION

No. 104,295

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

STEVEN HOWARD WEIS,
Appellant.

MEMORANDUM OPINION

Review of the judgment of the Court of Appeals in 47 Kan. App. 2d 703, 280 P.3d 805 (2012). Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed August 18, 2017. Judgment of the Court of Appeals affirming the district court is affirmed as to the issue subject to review. Judgment of the district court is affirmed as to the issue subject to review.

Heather Cessna, of Kansas Appellate Defender Office, and *Rachel L. Pickering*, of the same office, were on the briefs for appellant.

Ellen H. Mitchell, county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

Per Curiam: Steven Howard Weis was convicted of two counts of reckless aggravated battery and ordered to register as a violent offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, after a district court judge found Weis used a deadly weapon to commit those offenses. For the first time on appeal,

Weis argues his registration requirement violates *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because the fact was not submitted to a jury and proved beyond a reasonable doubt. The persuasiveness of that challenge turns on whether KORA's requirements constitute punishment for his crimes. We affirm the offender registration order.

The outcome of Weis' appeal is controlled by *State v. Meredith*, 306 Kan. __, __ P.3d __ (No. 110,520, filed August 4, 2017), slip op. at 10, and *State v. Huey*, 306 Kan. __, __ P.3d __ (No. 109,690, filed August 11, 2017). Like the appellants in those cases, Weis offers no fact-based arguments on the factors we must consider in determining whether the Act's effects render it punitive as applied to violent offenders because he raises his *Apprendi* challenge—and, consequently, his argument that the registration requirements are punishment—for the first time on appeal. See *Meredith*, 306 Kan. at __, slip op. at 10 ("[A]nalysis of the [*Kennedy v. Mendoza-Martinez*], 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963),] factors requires a robust record because the effects prong of the applicable legal test obliges an appellate court to premise its legal conclusion on at least some fact-intensive questions—*i.e.*, the legitimacy of the public safety interests at stake, the effectiveness of the alternative purpose to promote public safety, etc.").

Without a factual record, we cannot conclude that KORA's registration requirements imposed on violent offenders are so punitive as to override the legislature's intent that KORA be a civil remedy. Therefore, Weis has not demonstrated, as he must, that the registration requirements constitute punishment. Because the registration requirements did not increase Weis' punishment under the law of this case, it was not necessary that his use of a deadly weapon be found beyond a reasonable doubt by a jury.

We affirm the lower courts' judgment on the issue subject to our review.

* * *

BEIER, J., dissenting: Consistent with my votes in *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017); and *State v. Huey*, 306 Kan. ___, ___ P.3d ___ (No. 109,690, filed August 11, 2017), I respectfully dissent from the majority's decision in this case.

"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. It is no less so for a drug offender than for a sex offender or a violent offender. It is no less so when the Ex Post Facto Clause is before us than when *Apprendi* or the Eighth Amendment is before us." *Meredith*, 306 Kan. at ___, slip op. at 11-12 (Beier, J., dissenting).

ROSEN and JOHNSON, JJ., join the foregoing dissent.

APPENDIX E

No. 104,295

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

STEVEN HOWARD WEIS,
Appellant.

SYLLABUS BY THE COURT

1.

The admissibility of any and all other crimes and civil wrongs evidence, including res gestae evidence, is governed by K.S.A. 60-455.

2.

Determining whether evidence was properly admitted pursuant to K.S.A. 60-455 requires several steps. The appellate court must determine that the fact to be proven is material, *e.g.*, concerning intent, motive, knowledge, or identity. In other words, the court must determine whether the fact has a legitimate and effective bearing on the decision in the case. The appellate court standard for reviewing materiality is de novo. The appellate court must also determine whether the material fact is disputed, *i.e.*, the element or elements being considered must be substantially at issue in the case. The appellate court must also determine whether the evidence presented is relevant to prove the disputed material fact, *i.e.*, whether it has any tendency in reason to prove that fact. The appellate court reviews relevance—in particular, the probative element—of K.S.A. 60-455 evidence for abuse of discretion. The burden of proof is on the party alleging the discretion is abused. The court must also determine whether the probative value of the

evidence outweighs the potential for producing undue prejudice. The appellate standard for reviewing this determination is abuse of discretion.

3.

When a party has objected to an instruction at trial, the instruction will be examined on appeal to determine if it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury.

4.

When a party neither suggests an instruction nor objects to its omission at trial, the instruction will be examined to determine if the giving or failure to give the instruction was clearly erroneous. Under the clearly erroneous standard of review, an appellate court must be able to declare a real possibility existed that the jury would have returned a different verdict if the trial error had not occurred.

5.

When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

6.

Under the facts of this case, the district court's factual finding that the defendant used a deadly weapon in the commission of reckless aggravated battery which resulted in the court's order for the defendant to register under the Kansas Offender Registration Act, K.S.A. 2010 Supp. 22-4902(a)(7), did not violate the Sixth and Fourteenth Amendments to the Constitution of the United States.

Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed June 15, 2012.
Affirmed.

Rachel L. Pickering, of Kansas Appellate Defender Office, for appellant.

Ellen H. Mitchell, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before PIERRON, P.J., GREEN and BUSER, JJ.

BUSER, J.: A jury found Steven H. Weis (Steven) guilty of two counts of reckless aggravated battery, K.S.A. 21-3414, and one count of criminal use of a weapon, K.S.A. 21-4201(a)(1). Steven appeals his convictions and sentencing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose from a disturbance between Steven and Anthony Napoleone, Thomas Nece, and Justin Lakkari in the early morning hours of Sunday, July 13, 2008. Anthony and Justin were friends. Steven had been dating Alicia Napoleone, Anthony's sister and Thomas' stepsister. At the time of this incident, Steven was living on a farm near Brookville. Alicia lived in Salina.

There was some evidence that Steven was not on friendly terms with Anthony, Thomas, and Justin. Specific disagreements, however, were not admitted at trial. These included that Anthony disliked Steven for introducing Alicia to methamphetamine use, that Steven had fought Justin after hitting Justin's girlfriend, and that Steven had fought Thomas in a bar. The trial court reasoned that even if the four men "had 20 fights in the past or 20 arguments in the past," "those matters were settled" and were not "really relevant as to what happened" on July 13, 2008.

On Saturday evening, July 12, 2008, Alicia went out drinking with Anthony, Thomas, Justin, and others. Alicia had met the group at a house belonging to Ryan and Chelsea Haden. The plan was to ride in the Hadens' van and visit drinking establishments. At about 1:30 a.m., on Sunday, July 13, 2008, Alicia was still out partying with the group when Steven called to say he was on his way to Salina to spend the night with her.

After receiving Steven's phone call, Alicia left the group and started walking towards her house. Steven soon arrived with his stepbrother, who was giving him a ride. The men picked up Alicia and drove to the Hadens' house to retrieve Alicia's vehicle, an older Jeep in poor mechanical condition. After Steven's stepbrother left, Steven and Alicia discovered the Jeep would not start. By that time, the group which had been partying returned to the Hadens' house. From this point on, the accounts of what occurred were dramatically different.

At trial, Alicia testified that she and Steven began walking to her house after one of the group approached the Jeep. Steven agreed, adding "[t]hat's when I found out that her friends, family were there." Steven said he told Alicia, "I was going to go, she can come if she wanted to," and that Alicia had to run "around the Jeep to catch up with me." Of note, Steven and Alicia specifically denied there was any argument or violence between them while they were at or around the Jeep.

Alicia testified that she soon noticed Anthony, Thomas, and Justin following them. According to Alicia, Anthony and Thomas started yelling at Steven, calling him "a bitch and a pussy," and "telling him to come back and fight." Alicia said she told Steven to keep walking.

Alicia said Anthony, Thomas, and Justin continued to follow them, and she "eventually turned around to kind of stop it, because it was just kind of monotonous." She

again told Steven to keep walking. Alicia testified that Anthony passed by her towards Steven with a look of anger on his face. Alicia tried to talk to Thomas and Justin, but they soon bolted past. Alicia testified she turned around and "all four of them . . . were all kind of fighting together."

In his defense, Steven's testimony substantially corroborated Alicia's testimony. Steven said the followers were "shouting, hey, pussy, come back here and fight" and that he recognized Anthony's voice among them. Steven said Alicia "stopped to talk to her brothers and she told me to keep walking." He said he heard "somebody running up behind me" and that when he turned it was Anthony "about a foot away from me . . . and just yelling, leave his sister alone or he was going to kick my ass." Steven testified Thomas ran up "waiving [*sic*] something shinny [*sic*]" and the "[n]ext thing I know Anthony is tackling me at my feet." Steven said he did not swing at Anthony and that he was eventually able to free himself and run away.

Anthony, Thomas, Justin, and the other State's witnesses provided a markedly different account. Anthony testified that after the group had returned to the couple's house, he noticed Steven and Alicia arguing in the Jeep. Anthony said he then saw Steven "smack her in the face." Anthony said he "took a deep breath and minded my own business for a second."

Anthony stated that Steven then left the Jeep and that Alicia followed him. But, according to Anthony, Steven "smacked her again" and "turned back to me and said, what's the matter, pussies, you not going to fight me tonight, something like that." Anthony said this statement "pushed my button . . . [s]o, I started walking after him." When asked why he had followed Steven, Anthony answered, "Because I was angry that he had hit my sister."

Anthony testified that Steven and Alicia stopped together "and waited for me." Anthony admitted, "I was screaming at him," but he could not recall at trial what he had said. Anthony said Alicia was screaming as well, but at trial he had "no idea" what she said. His next memory was Steven taking a swing at him. Anthony said he ducked and fell to the ground. He was unable to feel his legs.

Thomas testified regarding the events in the early morning. He testified that he was entering the Hadens' house when "someone said that Steven and Alicia were out front arguing and then Justin said that he . . . saw him hit her." Thomas recalled that Steven and Justin "exchanged some words," and then Steven "turned around. He said, what, you pussies don't want to fight tonight." At that point, Thomas said, Steven "backhanded" Alicia.

Thomas said he approached Steven and told him, "[H]ey, man, you can't be doing that shit, what's your problem." Thomas said Steven replied, "[expletive deleted] you, whatever, I'll do what I want, pussies, [you] can't do anything to stop me, or something like that." Thomas agreed with Anthony that Steven and Alicia stopped together, and he agreed with Alicia that it was Anthony who approached the couple because "that's his blood sister, so he's like, you know, I'll go take care of this." Soon after, according to Thomas, Steven "grabbed Anthony and hit him in the back, and then Anthony was laying [sic] on the ground."

Justin also testified at trial. He was inside the Hadens' house when he heard someone yell. He looked out and saw Steven and Alicia outside the Jeep. Justin said he "witnessed [Steven] either punch or slap [Alicia]. I don't know exactly what it was. But he hit her."

Justin said Steven and the other men were yelling at each other, but he could not recall in detail what each one said. He did remember that Anthony "said something about

hitting my sister. He said, why don't you do that over here, or something like that, in front of my face."

Justin said Anthony and Thomas followed Steven and Alicia as they walked away, but "I couldn't see very well. I didn't have my glasses on." Justin and his wife followed at some distance while the four individuals "kept yelling at each other." Eventually, when "Anthony had gotten close to Steven," Steven "kind of turned around and punched." Justin said Anthony fell to the ground and did not get up.

Justin said he put Steven in a bear hug, that the two fell and wrestled on the ground, and that Steven managed to break loose and began hitting him. Justin said he was scratched and cut, but that he never saw a weapon. There was broken glass at the scene because Alicia threw beer bottles at Thomas and Justin during the fight.

The State also called Thomas' wife, Lynnsey Nece, and Justin's wife, Jennifer Ruston Lakkari, whose testimony was generally consistent with that of Anthony, Thomas, and Justin. Lynnsey, who as the designated driver was not drinking that night, testified, "I heard Steven say, what, you don't want to fight tonight, pussies. And then about that time it looked as if he had struck Alicia." Anthony's girlfriend, Shannon Jay, similarly agreed with the account given by Anthony, Thomas, and Justin.

In his defense, Steven called Jeremy Watkins, an investigator with the Salina Police Department, who interviewed Anthony at the hospital after the fight. Watkins said Anthony told him that "he didn't like Steven and Alicia being together, and that he went out to talk to Alicia and try to get her to come back to the house and stay away from Steven." Anthony did not tell Watkins that Steven had slapped Alicia.

Whatever triggered the fight, the tragic result was that Anthony's spinal column was severed by the broken tip of a knife which lodged in his spine and paralyzed him

from the rib cage down. Forensic testing matched the broken tip with a knife found at the scene. Additionally, Thomas suffered numerous stab wounds, and DNA taken from the remaining portion of the knife's blade matched a DNA sample taken from Thomas.

At trial, Steven denied the possession or use of the knife. But when Steven called 911 after the fight, he reported that someone had been stabbed. And when interviewed by the police soon thereafter, Steven said he "didn't know" if he had carried a knife. Steven told the police he "hit one of the men," that "he might have had something in his hand," and that he "might have had some keys in his hand." At trial, however, Steven admitted that he had no keys during the fight.

The State charged Steven with aggravated battery against Anthony, Thomas, and Justin and with criminal use of a weapon. The jury returned guilty verdicts on the lesser included offenses of reckless aggravated battery as to Anthony and Thomas, but acquitted Steven of aggravated battery with respect to Justin. The jury also returned a guilty verdict on the criminal use of a weapon charge. The district court sentenced Steven to 41 months' imprisonment. He appeals.

ADMISSION OF K.S.A. 60-455 EVIDENCE

Prior to trial, the State moved to admit evidence under K.S.A. 60-455 that Steven slapped Alicia in the presence of the group shortly before the stabbing. The State argued the slap was "necessary . . . to prove motive" and "relevant to show the reason why the altercation began." Additionally, the State argued that because Steven's defense theory "involve[s] self-defense," together with the victims' statement, "motive is a material issue in this case."

The trial court conducted a K.S.A. 60-455 hearing. Steven's counsel disputed the propriety of an instruction on motive, arguing the only possible motive shown by the

challenged evidence was "the reason these three people attacked my client." The trial court allowed the evidence, but it did not instruct the jury on motive. Rather, it instructed the jury: "Evidence has been admitted tending to prove that the defendant committed battery against Alicia Napoleone. This evidence may be considered solely for the purpose of explaining the events leading up to the altercation on July 13, 2008."

In *State v. Gunby*, 282 Kan. 39, 57, 144 P.3d 647 (2006), our Supreme Court directed: "Henceforth, admissibility of any and all other crimes and civil wrongs evidence will be governed by K.S.A. 60-455." Steven asserts in passing that the trial court admitted "res gestae evidence . . . independent of K.S.A. 60-455." Our general rule is to disregard passing assertions, *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010), but Steven's assertion is contrary to the record.

The trial court did not admit the evidence Steven slapped Alicia independent of K.S.A. 60-455. The State moved for the admission of this evidence pursuant to that statute and at the hearing the trial judge announced, "I have before me today the State's Motion to Admit Evidence pursuant to K.S.A. 60-455." The trial court then carefully conducted a thorough analysis of the challenged evidence in accordance with the dictates of K.S.A. 60-455 and *Gunby*. Given this record, we see no reason to consider a supposed use of res gestae evidence independent of K.S.A. 60-455. We will consider Steven's primary argument, however, that the trial court "did not *correctly apply* the K.S.A. 60-455 three-part test . . . set out in *Gunby*." (Emphasis added.)

Our Supreme Court has refined the test for the admissibility of evidence under K.S.A. 60-455 since *Gunby*:

"Determining whether evidence was properly admitted pursuant to K.S.A. 60-455 requires several steps. The appellate court must determine that the fact to be proven is material, *e.g.*, concerning intent, motive, knowledge, or identity. In other words, the

court must determine whether the fact has a legitimate and effective bearing on the decision in the case. The appellate court standard for reviewing materiality is *de novo*. The appellate court must also determine whether the material fact is disputed, *i.e.*, the element or elements being considered must be substantially at issue in the case. The appellate court must also determine whether the evidence presented is relevant to prove the disputed material fact, *i.e.*, whether it has any tendency in reason to prove that fact. The appellate court reviews relevance—in particular, the probative element—of K.S.A. 60-455 evidence for abuse of discretion. The burden of proof is on the party alleging the discretion is abused. The court must also determine whether the probative value of the evidence outweighs the potential for producing undue prejudice. The appellate standard for reviewing this determination is abuse of discretion." *State v. Hollingsworth*, 289 Kan. 1250, Syl. ¶ 6, 221 P.3d 1122 (2009).

Steven claims the evidence that he slapped Alicia was not in dispute, was not material, and was more prejudicial than probative. We address these claims in order.

Steven maintains the evidence was not disputed based solely on the testimony of Anthony, Thomas, and Justin that they "chose to pursue" Steven "after they either saw or heard that Steven had slapped Alicia." Of course, this was their testimony. But Steven and Alicia both specifically *denied* that Steven slapped Alicia. If Steven did not slap Alicia, then Anthony, Thomas, and Justin chose to pursue Steven for another reason. Regardless, the challenged evidence was highly disputed. As detailed earlier, we may easily determine that the challenged evidence was in dispute.

We next consider whether the evidence was material—whether it had a legitimate and effective bearing on the decision in the case. Steven argues it did not because it "did not tend to prove *any element of the crimes charged*." (Emphasis added.) Whether or not the evidence was material to the elements of the crimes, we believe it was very material to Steven's claim of self-defense.

The self-defense instruction, which was patterned, in part, from PIK Crim. 3d 54.22, entitled "Initial Aggressor's Use of Force," provides:

"A person who initially provokes the use of force against himself is not permitted to use force to defend himself unless the person reasonably believes that he is in present danger of death or great bodily harm, and he has used every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the other person or the person has in good faith withdrawn from physical contact with the other person and indicates clearly to the other person that he desires to withdraw and stop the use of force, but the other person continues or resumes the use of force." (Emphasis added.)

Steven does not challenge this instruction on appeal. Therefore, if the jury had decided the case based on self-defense, it would have had to consider whether Steven initially provoked the use of force against himself. Evidence that Steven slapped Alicia in the presence of her family members would certainly have been material to that finding. The slap could have been understood as an integral part of Steven's taunts to Anthony, Thomas, and Justin—a display of violent mastery over Alicia coupled with a mocking, verbal challenge to her male family members.

Steven denied the slap and the taunt, and Alicia supported his testimony. But whether Steven had slapped Alicia contemporaneously with his taunts to her family members was a question for the jury. See *State v. Hunt*, 257 Kan. 388, 394, 894 P.2d 178 (1995). The evidence that Steven slapped Alicia was therefore material under K.S.A. 60-455. See *Gunby*, 282 Kan. 39, Syl. ¶ 3 ("The list of material facts in K.S.A. 60-455 is exemplary rather than exclusive."); *State v. Corchado*, 188 Conn. 653, 668, 453 A.2d 427 (1982) (evidence that defendant had slapped manslaughter victim "was relevant because it clearly had a bearing on the existence of facts the jury were ultimately required to determine, i.e., on the issue of self-defense").

The final step in the K.S.A. 60-455 analysis is to consider whether the evidence that Steven slapped Alicia was more prejudicial than probative. Steven denies the evidence was probative because "the witnesses could have been instructed to say that they were concerned about Alicia and thus, decided to follow the couple." This argument seems to concede the probative nature of the evidence while proposing to recharacterize it to the jury in a watered-down fashion. For a trial court to order an eyewitness to testify not to perceived facts, but in a manner reformulated by the trial court seems fraught with peril. Moreover, to have instructed eyewitnesses to testify "they were concerned about Alicia" without informing the jury as to why, in fact, they were concerned about her would leave the jury without relevant and probative evidence surrounding the circumstances of this incident. It would also have unfairly and inaccurately withheld from the jury the visceral impact of Steven's taunting as alleged by the State's witnesses. If the jury was to decide self-defense as instructed, it could not have done so from manufactured and vague testimony.

In fact, Steven essentially concedes the probative nature of the challenged evidence in this case by stating: "For three days, the jury heard over ten times from several State witnesses that Steven had struck Alicia. With this type of testimony, the jury could have been misled that Steven was the initial aggressor because he first struck Anthony's and [Thomas'] sister." We agree the jury could have reached this conclusion, but that does not mean it would have been "misled." The jury was not obliged to find, as Steven maintains on appeal, that "Anthony, [Thomas], and Justin were the initial aggressors."

Evidence that Steven slapped Alicia was also not unfairly prejudicial. From the perspective of the State's eyewitnesses, it was an integral part of the conflict, not an act gratuitously introduced to suggest, as Steven maintains on appeal, that he "without hesitating, battered people." It was therefore distinguishable from the sort of propensity evidence which is more typically prejudicial than probative. See *State v. Cook*, 45 Kan.

App. 2d 468, 474, 249 P.3d 454 (2011) ("[T]he only purpose of presenting evidence of his prior marijuana conviction was to show his propensity to possess marijuana.").

For all of these reasons, the trial court did not err in admitting evidence, in accordance with K.S.A. 60-455, that Steven slapped Alicia immediately before the stabbing.

JURY INSTRUCTIONS

As mentioned earlier, the trial court provided a limiting instruction regarding how the jury should properly consider the K.S.A. 60-455 evidence. The trial court also instructed the jury on self-defense. The trial court omitted the following sentence from the "Use of Force in Defense of Person" pattern instruction, PIK Crim. 3d 54.17: "When use of force is permitted as (self-defense) . . . there is no requirement to retreat." Additionally, the trial court also gave a non-PIK self-defense instruction based on *State v. Bradford*, 27 Kan. App. 2d 597, 601-02, 3 P.3d 104 (2000): "Self-defense requires intentional conduct. A charge of recklessness involves an unintentional act. Self-defense is not available as a defense against a charge of reckless conduct."

Steven raises two challenges to the jury instructions. First, he claims error in the wording of the K.S.A. 60-455 limiting instruction. Steven now contends the trial court should have instructed the jury "that the battery evidence could be consider[ed] for proving motive. If the jury had been properly instructed that the evidence could be used to show motive, then the jury could have considered Steve[n]'s motive." Steven does not explain how the evidence he slapped Alicia showed his motive to commit the charged crimes or, if it did, how the jury's use of the evidence for that purpose would have assisted him at trial. Steven's counsel at the instructions conference, a different counsel than at the K.S.A. 60-455 hearing, did object to the omission of motive, although the basis was unclear.

Secondly, Steven complains that the self-defense instructions omitted the no-duty-to-retreat language. The State correctly notes that "[t]here is no explanation on the record" why the no-duty-to-retreat language was omitted. The record does show that the trial court and counsel "spent considerable time reviewing the jury instructions" off the record, so perhaps the omission was not inadvertent. In any event, neither party objected to the omission when the jury instructions were submitted to the jury.

"When a party has objected to an instruction at trial, the instruction will be examined on appeal to determine if it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury." *State v. Appleby*, 289 Kan. 1017, 1059, 221 P.3d 525 (2009). "An appellate court reviewing a [trial] court's giving or failure to give a particular instruction applies a clearly erroneous standard where a party neither suggested an instruction nor objected to its omission." *State v. Martinez*, 288 Kan. 443, 451, 204 P.3d 601 (2009); see K.S.A. 22-3414(3). Clear error is shown where an appellate court is "firmly convinced there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred. [Citation omitted.]" 288 Kan. at 451-52.

Critical to the application of this law in the present case is the fact that the jury did not base its verdict on self-defense. The jury was instructed, as noted above, that self-defense did not apply to reckless conduct, and Steven does not appeal this instruction. Of course, jurors are presumed to follow their instructions. See *State v. Reid*, 286 Kan. 494, Syl. ¶ 18, 186 P.3d 713 (2008). Additionally, the prosecutor informed the jurors that if "you find that the elements of reckless agg[ravated] battery are met," then "self-defense is not available. It is not a defense to reckless agg[ravated] battery." Because the jury convicted Steven only on the lesser included offenses of reckless aggravated battery, and because the criminal use of a weapon conviction did not turn on the use of the knife but only on the possession or carrying the knife, the jury had no need to consider self-defense with regard to these two crimes.

Quite simply, the omission of motive from the K.S.A. 60-455 limiting instruction did not come into play. As Steven's counsel observed at the K.S.A. 60-455 hearing, the "motive" suggested by such an instruction would be the motive of Anthony, Thomas, and Justin to fight Steven. That would go to the initial aggressor question, but since the jury convicted on reckless, not intentional, conduct, the materiality of such a motive was no longer at issue. Given the jury's verdict, Steven could not have been prejudiced by the omission.

Moreover, if the trial court had written the limiting instruction as Steven now urges, the jurors might have inferred, as Steven does on appeal, that the motive in question was *Steven's* motive to commit the charged crimes. In *State v. Carapezza*, 286 Kan. 992, 998, 191 P.3d 256 (2008), for example, a district court allowed evidence of a defendant's drug habit as *res gestae* evidence "without applying the analysis required by K.S.A. 60-455." Of course, that was improper, but our Supreme Court went on to consider under the statute whether the evidence was "probative of the motive for robbing" the victim. 286 Kan. at 999. Motive is one of the material facts listed in K.S.A. 60-455, and our Supreme Court thought the evidence "[p]roviding a motive for Carapezza's involvement establishes a material or logical connection to the inference that she participated in the crime." 286 Kan. at 999.

In the present case, however, we see no reason why the jury should have considered evidence that Steven slapped Alicia as *his* motive for aggravated battery on Anthony, Thomas, or Justin. The risk in providing that instruction is that the jury could have inferred a motive of pure malice, which could very easily have become an inference of propensity—which is exactly the danger that a K.S.A. 60-455 limiting instruction is designed to prevent. Under the unique facts of this case, we believe the trial court properly limited the jury's consideration of the K.S.A. 60-455 evidence.

We do not hold that the K.S.A. 60-455 limiting instruction given in the present case was the best or sole way to instruct the jury. Notably, Steven does not appeal the language used in the instruction, only the omission of a reference to motive. Our holding is that, given the evidence before it, the trial court did not err by omitting motive.

The other aspect of the instructions Steven appeals, the omission of the no-duty-to-retreat language, also did not come into play. That language again applied only to self-defense, and self-defense did not apply to any of the crimes of conviction. Thus there was not a real possibility the jury would have rendered a different verdict if it was instructed as Steven suggests. A more likely result would have been juror confusion based on the tension between the no-duty-to-retreat language and the initial-aggressor instruction, which required the initial aggressor to have "used every reasonable means to escape."

SUFFICIENCY OF THE EVIDENCE

On appeal, Steven does not contest that Anthony suffered great bodily harm or that Thomas sustained bodily harm from a knife. Instead, Steven contends there was no substantial evidence to prove that he was the person who used a knife during the commission of either of the aggravated batteries. Similarly, Steven argues, with respect to the criminal use of a weapon conviction, "[n]ot one State's witness could testify that he or she saw [him] possessing or carrying" the knife.

Our standard of review provides:

"When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." [Citation omitted.] *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011).

We begin our analysis with an obvious fact. Someone used, and therefore possessed or carried, the knife which injured Anthony and Thomas. There was testimony that Anthony was the first of the three men to reach Steven, and the evidence indicated he fell almost immediately when the tip of the knife severed his spinal column. There was also testimony that Steven struck Anthony in the back immediately preceding his fall. Thomas was apparently the next to reach Steven, and his blood was found on the blade of the knife. All of this evidence, viewed in the light most favorable to the prosecution, points to Steven's use of the knife.

This inference is greatly strengthened by Steven's inculpatory statements after the fight. Steven called 911 and said someone had been stabbed. When asked by the police if he had carried a knife, Steven said he did not know. More importantly, he said he might have had something in his hand when he hit one of the men, perhaps his keys. This admission, with an attempt at mitigation—the substitution of keys for a knife—shows a consciousness of guilt. See *Appleby*, 289 Kan. at 1061 (discussing law on "evidence to establish the defendant's consciousness of guilt"). Viewed in the light most favorable to the prosecution, a rational factfinder could have found Steven guilty beyond a reasonable doubt of both crimes of conviction.

OFFENDER REGISTRATION PURSUANT TO THE KANSAS OFFENDER REGISTRATION ACT

The trial court ordered Steven to register as an offender under K.S.A. 2010 Supp. 22-4902(a)(7) based on its finding that he had used a deadly weapon in the commission of reckless aggravated battery. This statute is part of the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.* Steven contends the district court's finding violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution under *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d

435 (2000), because a jury did not make the finding which resulted in an increased penalty for Steven's crimes.

This is a new argument on appeal, but we will consider it because it alleges a violation of fundamental rights. See *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010). Our review is unlimited. See *McComb v. State*, 32 Kan. App. 2d 1037, 1041, 94 P.3d 715, *rev. denied* 278 Kan. 846 (2004).

Steven acknowledges *State v. Chambers*, 36 Kan. App. 2d 228, 239, 138 P.3d 405, *rev. denied* 282 Kan. 792 (2006), where this court held a district court could find a crime was sexually motivated for purposes of sex offender registration. The *Chambers* panel reasoned that because sex offender registration under KORA did not increase the maximum sentence, it did not engage the protections announced in *Blakely* and *Apprendi*. Steven contends, however, "[t]he *Chambers* decision was wrong because it narrowly interpreted the rule in *Apprendi* by holding that it should only be applied to increased sentences, not increased punishment."

Chambers distinguished between sentences and punishment based on precedent of the Kansas Supreme Court. See 36 Kan. App. 2d at 237-39. This court is required to follow such precedent absent some indication our Supreme Court is departing from its previous position. *State v. Jones*, 44 Kan. App. 2d 139, 142, 234 P.3d 31 (2010), *rev. denied* 292 Kan. 967 (2011).

Chambers also cited *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), where the United State Supreme Court held sex offender registration posted on the Internet was not punishment for ex post facto purposes. The Court reached this conclusion despite the "adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism." 538 U.S. at 99. The Court reasoned the "purpose and principal effect of notification are to inform the public for its own safety,

not to humiliate the offender." 538 U.S. at 99. Since Steven alleges he is subject to "punishment" based on "the certain stigma attached" to offender registration, we can rely on *Smith* here.

Steven provides no evidence of stigma. We are therefore left with whatever inferences we might make from the registration itself. We do not believe these inferences are sufficient to show Steven was deprived of his fundamental rights. If under *Smith* the stigma attached to sex offender registration is not punishment, the stigma Steven might be expected to suffer from offender registration is not punishment.

Steven also mentions he must perform certain duties connected with registration or face prosecution under K.S.A. 22-4903, and he also must pay a \$20 fee whenever reporting to a sheriff's office. See K.S.A. 2010 Supp. 22-4904(e). But Steven cites no authority holding these requirements are punishment, and he provides no reasoning supporting the conclusion. This is akin to waiving or abandoning an issue on appeal. See *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010).

If we were to consider the registration requirements, we would interpret them as part of the regulatory scheme and not as punishment. In *Smith*, for example, the "[w]idespread public access" caused by posting sex offender registration on the Internet was "necessary for the efficacy of the scheme." 538 U.S. at 99. The "attendant humiliation" was "but a collateral consequence of a valid regulation." 538 U.S. at 99.

Here as well, enforcement of the registration requirements is critical to the efficacy of the scheme. Steven's exposure to further criminal liability under K.S.A. 22-4903 is not punishment for his crimes but a means to effect the intent behind registration, which is public safety. See *State v. Cook*, 286 Kan. 766, 774, 187 P.3d 1283 (2008).

We also believe the \$20 fee is not punitive but a reasonable way to reimburse sheriffs' offices for services provided in the regulatory scheme. See K.S.A. 2010 Supp. 22-4904(e) ("All funds retained by the sheriff . . . shall be credited to a special fund . . . which shall be used solely for law enforcement and criminal prosecution . . . and which shall not be used as a source of revenue to reduce the amount of funding otherwise made available to the sheriff's office."); *State v. Robinson*, 281 Kan. 538, 543, 132 P.3d 934 (2006) (characterizing BIDS fees as "recoupment" and "not fines or, indeed, any part of the punishment or sanction").

Finally, subsequent to briefing and oral argument in this case, in *State v. Unrein*, 47 Kan. App. 2d 366, Syl., 274 P.3d 691 (2012), our court specifically rejected legal arguments similar to those raised by Steven in the present case. In short, *Unrein* is dispositive of this issue.

The stigma Steven might expect to suffer from registration is not an increase in sentence or punishment but a collateral consequence of his registration as an offender. Accordingly, we do not believe the trial court's factual finding violated *Blakely* and *Apprendi*. Steven has not shown he was deprived of his fundamental constitutional rights.

CUMULATIVE ERROR

Finally, Steven contends he was deprived of a fair trial by cumulative error. Since we have not found error, we do not find cumulative error. See *State v. Cofield*, 288 Kan. 367, 378, 203 P.3d 1261 (2009). We also conclude based on the strength of the evidence that any error which might have occurred did not deprive Steven of a fair trial. See *State v. Edwards*, 291 Kan. 532, 553, 243 P.3d 683 (2010).

Affirmed.

* * *

GREEN, J., dissenting: I respectfully dissent from that part of the majority opinion which holds that the trial court properly admitted evidence of an uncharged slapping incident between Steven Weis and his girlfriend, Alicia Napoleone, under K.S.A. 60-455. Moreover, I dissent from that part of the majority opinion which holds that the trial court's self-defense instruction, which omitted the no-duty-to-retreat language from this instruction, did not deny Steven a fair trial.

Admitting Evidence Under K.S.A. 60-455

In instructing the jurors on how they could consider the evidence of the uncharged slapping incident, the trial judge stated, "Evidence has been admitted tending to prove that the defendant committed battery against Alicia Napoleone. This evidence may be considered solely for the purpose of explaining the events leading up to the altercation on July 13, 2008." Steven seeks a new trial contending that the evidence relating to the uncharged slapping incident was not relevant to the crimes charged.

A trial court's analysis of whether evidence is admissible under K.S.A. 60-455 requires several steps. First, the court must determine whether the evidence is relevant to prove a material fact, *e.g.*, whether the fact concerns intent, motive, knowledge, or identity. Appellate review for materiality is *de novo* and the list of material facts in K.S.A. 60-455 is exemplary rather than exclusive. See *State v. Gunby*, 282 Kan. 39, Syl. ¶¶ 1-3, 144 P.3d 647 (2006).

Second, the court must determine whether the material fact is in dispute. If it is in dispute, the trial court must then determine whether the evidence is relevant to prove the disputed material fact. Appellate courts review the trial court's relevance determination for abuse of discretion. Third, the court must determine whether the probative value of the evidence outweighs the potential for creating undue prejudice. Appellate review of

this determination is also for abuse of discretion. Finally, if the court decides to admit the evidence, the court must give a limiting instruction notifying the jury of the specific purpose for the admission of the K.S.A. 60-455 evidence. *State v. Riojas*, 288 Kan. 379, 383, 204 P.3d 578 (2009).

Trial Court's Ruling on State's Motion to Admit K.S.A. 60-455 Evidence

Before trial, the trial court heard arguments on the State's motion to admit K.S.A. 60-455 evidence. The State argued that the evidence was relevant to show motive and to show the reason why the altercation began. In determining that the evidence that Steven slapped Alicia was admissible under K.S.A. 60-455, the trial court stated the following:

"Well, the incident that the State is wishing to present evidence on alleges immediately preceded the altercation in this case between the Defendant and the three alleged victims.

"The Court does believe that evidence is relevant, certainly to explain how the altercation began would be relevant to explain the course of conduct with the alleged victims approaching the Defendant and his girlfriend and so the Court is going to find that that evidence would be relevant to explain how the altercation began, the course of conduct between the parties, and it would also be relevant on the issues of motive, intent and identity and the Court does find that those material facts are in dispute."

Also before trial, Steven moved the court to reconsider its decision to admit the K.S.A. 60-455 evidence. The trial court denied Steven's motion. Steven further objected to the cautionary instruction that the trial court planned to read after the witnesses testified about the K.S.A. 60-455 evidence. Steven argued that the instruction should state that the evidence was relevant to show motive because the State argued in its motion that the slapping evidence was relevant to show motive. The trial judge disagreed and stated:

"It seems to me that that evidence would be relevant primarily to show the, you know, events leading up to the altercation or what happened immediately preceding the altercation.

....

"Well, I think I'm just going to rule that the battery incident that immediately preceded this altercation is relevant for the purpose of proving or showing how the altercation began.

....

"And leave out the motive."

During trial, multiple witnesses testified that they saw Steven slap Alicia on the night when the charged incidents occurred. Steven objected each time, arguing that the evidence was inadmissible under K.S.A. 60-455. The trial court overruled Steven's objections. After each witness testified that Steven slapped Alicia, the trial court instructed the jury as follows: "Evidence has been admitted tending to prove that the defendant committed battery against Alicia Napoleone. This evidence may be considered solely for the purpose of explaining the events leading up to the altercation on July 13, 2008."

Later, at the instruction conference, Steven again objected to the form of the limiting instruction. Steven argued that originally the court admitted the evidence to show motive, but the court failed to include motive in its limiting instruction. The trial court determined that it was not going to change the limiting instruction because it had consistently given this limiting instruction throughout the trial.

Relevancy

The first question, then, is whether the evidence in question was relevant to prove a material fact. There are two elements of relevant evidence: a materiality element and a probative element. *State v. Houston*, 289 Kan. 252, 261-62, 213 P.3d 728 (2009). Even if

the court determines that the evidence is both probative and material, the trial court must still determine whether the probative value of the evidence outweighs its prejudicial value. *State v. Hart*, 44 Kan. App. 2d 986, 1006, 242 P.3d 1230 (2010), *rev. granted* 292 Kan. 967 (2011) (pending).

K.S.A. 60-455 provides several examples of facts that are per se material. Those examples include the following: "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 60-455. As stated earlier, this list of material facts in K.S.A. 60-455 is exemplary rather than exclusive. *Gunby*, 282 Kan. at 56.

Res Gestae

Steven argues that the trial court erroneously admitted evidence that he allegedly slapped Alicia on the night of the altercation. The trial court implicitly admitted the evidence as *res gestae*, stating that it was relevant solely to explain the events leading up to the altercation. If the trial court admitted this evidence independent of K.S.A. 60-455(b), this would have been improper. *Gunby*, 282 Kan. 39, Syl. ¶ 5. Thus, the trial court was required to measure the admission of the slapping incident against any applicable exclusionary rules. *Gunby*, 282 Kan. at 59-63.

As stated earlier, there are three requirements that must be met for evidence to be admissible under K.S.A. 60-455. First, the evidence must be relevant for a legitimate purpose other than to show propensity. Second, the evidence must be relevant to a material issue which is disputed in the case. Third, the probative value of the evidence must outweigh its potential for unfair prejudice to the defendant. *Gunby*, 282 Kan. at 48.

Here, the evidence of Steven slapping Alicia was not inextricably intertwined with the charged offenses. Although the evidence that Steven slapped Alicia helped explain

the reason for the victims' anger, the slapping incident was unnecessary to the understanding about Steven's altercation with the alleged victims. For example, there was a clear break between the alleged slapping incident and Steven's confrontation with the alleged victims. The alleged victims testified that they followed Steven and Alicia for a few blocks after they saw Steven allegedly slap Alicia. This fact is very important because it means that the altercation did not immediately begin after the alleged slapping incident. These were separate incidents. It was possible to give a complete and intelligent account of the altercation between Steven and the alleged victims without delving into the details of the alleged slapping incident. For example, the altercation involving the charged offenses could have been explained sufficiently by Anthony's testimony that he did not like Steven dating his sister, Alicia. And on the night of the charged offenses, Anthony wanted Alicia to stop walking with Steven and return to her friends' house. Thus, the evidence of Steven allegedly slapping Alicia was irrelevant to the charged crimes.

For the sake of argument, even if the evidence of Steven slapping Alicia was relevant, this evidence was not relevant to prove a material fact under K.S.A. 60-455. In this case, the trial court held that the evidence was admissible to explain the events leading up to the altercation. This is not one of the factors explicitly listed in K.S.A. 60-455; however, as stated earlier, the list of material facts in K.S.A. 60-455 is exemplary rather than exclusive. *Gunby*, 282 Kan. at 56.

Nevertheless, the State does not argue that "explaining the events leading up to the altercation" is a viable material fact under K.S.A. 60-455. In fact, I could find no decision where our Supreme Court has recognized the admission of other crimes evidence based on a material fact not explicitly listed in K.S.A. 60-455. Yet, I acknowledge that materiality could have been shown outside the eight statutory factors under certain circumstances: For example, if other evidence existed that Steven had threatened Alicia with a knife just before the altercation occurred between Steven and Alicia's brothers and

friend, Steven's possession of a knife would have been relevant and material, since Steven denied possessing a knife during the altercation which was the basis for the charged offenses. But no such facts exist in our case. As a result, the *res gestae* evidence was inadmissible for a lack of materiality because it had no legitimate bearing on any material fact in dispute.

Moreover, I have difficulty in concluding, as the majority does, that the slapping incident was material because of Steven's claim of self-defense. The majority says that evidence that Steven slapped Alicia in the presence of her family members would have been material to whether Steven had initially provoked the use of force against himself. It seems disingenuous of the majority to argue on one hand that Steven's claim of self-defense was material under K.S.A. 60-455 and argue on the other hand that Steven was not harmed by the trial court's omission of the no-duty-to-retreat language from the self-defense instruction. Indeed, the majority says that the jury had no need to consider the self-defense instruction based on Steven's crimes of conviction. Thus, it would seem that the majority wants to "have one's cake and eat it too."

Motive

The State also argues that the evidence was relevant to show motive. The trial court, however, did not instruct the jury to consider the evidence based on motive. Yet, it is still necessary to determine whether the evidence was admissible to show motive. See *State v. Reid*, 286 Kan. 494, 510, 186 P.3d 713 (2008) (while "knowledge" was not given as the reason for the trial court's admission of the evidence, that court's conclusion can be upheld on review if it was right even though the court's given reason may have been wrong). But "[t]he erroneous admission of evidence of a crime under one exception in K.S.A. 60-455 is not made harmless merely by the fact it would have been admissible under another exception not instructed on." *Reid*, 286 Kan. at 511 (quoting *State v. McCorgary*, 224 Kan. 677, 686, 585 P.2d 1024 [1978]).

Our Supreme Court explained that "motive is the moving power that impels one to action for a definite result." [Citations omitted.] Evidence of motive is an attempt to explain why a defendant did what he or she did. [Citations omitted.]" *State v. Wells*, 289 Kan. 1219, 1227, 221 P.3d 561 (2009).

In *State v. Engelhardt*, 280 Kan. 113, 128, 119 P.3d 1148 (2005), our Supreme Court stated: "Motive supplies the jury with some degree of explanation, responding to a juror's natural tendency to wonder why a defendant behaved in the manner described by the State. Often it is a prominent feature of the State's theory of its case."

In its brief, the State contends that the battery against Alicia shows why the victims were following Steven. The State further contends that the fact that the victims were following Steven is relevant to show Steven's motive in stabbing them. The State's argument is a non sequitur, which means it does not follow.

In arguing that the evidence was relevant to a material fact, the State, in its brief, resorted to reasoning in the deductive form: "The defendant struck Alicia, her brothers and friend confronted him and the defendant stabbed them. The evidence was relevant to show the defendant's motive." This syllogism may be reconstructed to read as follows:

Major premise:	A struck B;
Minor premise:	B's brother and friend confronted A;
Conclusion:	Therefore, A stabbed B's brothers and friend.

Thus, from these premises one would be forced to conclude from the evidence of A slapping B alone that A would more likely than not stab B's brother and friend. This conclusion does not necessarily follow from the premises by which it is supposed to be supported. It might, at most, furnish a reason why Alicia's brothers and friend would confront Steven. But the premises do not support an inference that men who strike their

girlfriends are more likely than not to stab their girlfriends' brothers and friend when confronted by them.

Although the evidence helped explain the motive for the victims' actions, it did not help to explain Steven's motive. Of course, there are times when a defendant's motive is relevant. One example comes to mind from several scenes from a famous movie: "The Godfather." In that movie, Sonny, Don Vito Corleone's hot-headed son, played by James Caan, severely beats his brother-in-law, Carlo Rizzi, for brutalizing Michael, Fredo, and Sonny's sister, Connie. Sonny also threatens to kill Carlo if he ever beats his sister again. An angry Carlo plans his revenge against Sonny by aiding a rival crime family in Sonny's murder.

As part of the plan, Carlo beats Connie to lure the hot-headed Sonny away from the heavily fortified and guarded Corleone compound. When Sonny learns that Carlo has battered Connie again, he, unaccompanied by his body guards, gets into a car and races away from the compound to make good on his earlier threat to kill Carlo. On the way, Sonny is ambushed at a toll booth and shot to death by several men carrying Thompson submachine guns. Connie's beating by Carlo was relevant to show motive in Carlo's plan to seek revenge against Sonny for his earlier beating by Sonny. And Connie's beating by Carlo was the first link in luring Sonny away from the heavily guarded compound so Sonny could be ambushed and killed; it, also, was relevant to show that Carlo participated in the plan to kill Sonny.

Similarly, if there were other evidence that Steven had threatened to harm Alicia's brothers and friend and that Steven had slapped Alicia to provoke an altercation between him and Alicia's brothers and friend so he could harm them, this evidence would be relevant to show motive for harming Alicia's brothers and friend. Moreover, this evidence would be relevant to rebut Steven's self-defense claim that he was an innocent bystander in the altercation. But no such motive evidence exists in this case.

A review of the record in this case fails to show how the lone evidence of Steven slapping Alicia could be used to show Steven's motive in committing the alleged crimes, other than showing Steven's propensity to commit the alleged crimes of battery. As stated earlier, prior bad acts evidence is not admissible to show the defendant's propensity to commit the charged crimes. K.S.A. 60-455(a).

Because the evidence fails to show Steven's motive, the prior bad acts evidence was inadmissible to show motive under K.S.A. 60-455(b).

Probative versus Prejudicial

Even if the alleged slapping evidence was relevant, this does not mean it should automatically be admitted. Indeed, relevant evidence of prior crimes is inadmissible if the prejudicial impact of the evidence outweighs its probative value. *State v. Davis*, 213 Kan. 54, 58, 515 P.2d 802 (1973). In *Davis*, our Supreme Court explained the types of prejudice that can occur with admitting prior bad acts evidence:

"First, a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed." *Davis*, 213 Kan. at 58.

There is no question that the evidence that Steven slapped Alicia was prejudicial to Steven. The other crimes evidence established that not only is Steven a violent person but also a person who would batter a defenseless woman. A trial court should be conscious of the possibility of prejudicing the jury and should avoid doing so. *Davis*, 213 Kan. at 58. Here, the prejudicial effect of the evidence outweighed any probative value.

On the other hand, to the extent that the State argues that the evidence was relevant to show why the altercation began, in this case the relevant altercation was between Steven and the alleged victims, not Steven and Alicia. The State also contends that this evidence was relevant because the slap occurred just before the altercation. Although this is true, the slapping evidence was not so inextricably intertwined with Steven's altercation with the victims because there was a clear break between the alleged slap and Steven's altercation with the alleged victims. The alleged victims testified that they followed Steven and Alicia for several blocks after they saw Steven allegedly slap Alicia. This means that the altercation did not immediately start after the victims allegedly saw Steven slap Alicia. Based on these facts, it was clearly possible to give a complete and intelligent account of the altercation between Steven and the victims without mentioning the alleged slap. See *Burgos v. State*, 865 So. 2d 622, 624 (Fla. Dist. App. 2004) (domestic battery evidence was not inextricably intertwined because there was a "clear break" between that incident and defendant's confrontation with the officers). This evidence should not have been admitted.

Moreover, the trial court, which granted the State's motion to admit evidence of the alleged slapping incident, paved the way for the State to elicit detailed testimony from the State's witnesses that Steven had slapped Alicia. For example, the evidence was first mentioned in the State's opening statement. Then, multiple witnesses testified that they saw Steven slap Alicia. And finally, the evidence was again mentioned in the State's closing arguments. Moreover, after each witness testified about the slap, the trial court gave the following limiting instruction: "Evidence has been admitted tending to prove that the defendant committed battery against Alicia Napoleone. This evidence may be considered solely for the purpose of explaining the events leading up to the altercation on July 13, 2008."

Yet, when the trial court instructed the jury on how it was to use this evidence, it neglected to tell the jury that it was not to use the evidence about Steven allegedly

slapping Alicia as proof of Steven's character or as propensity evidence. With no such limiting instruction, the jury could infer that if Steven slapped Alicia, he also provoked and illegally battered the alleged victims, an inference which K.S.A. 60-455 specifically intends to prohibit. Although we do not know how this evidence was considered by the jury, the danger was that the jury might believe that Steven's character was such that he had a propensity to engage in conduct of the sort charged. Thus, the jury might believe that Steven had acted in conformity with that character on the occasion at issue in the charged offenses. See *State v. Gunby*, 282 Kan. 39, 48-49, 144 P.3d 647 (2006) (quoting *Davis*, 213 Kan. at 58).

As many times as this evidence was presented to the jury, it is readily apparent that it was unfairly prejudicial to Steven. The record in this case clearly demonstrates that undue prejudice would have resulted from the admission of the other crimes evidence. Therefore, even if this evidence would have rendered the probable existence of a fact in issue, it would still be inadmissible because the probative value of the evidence was substantially outweighed by the prejudicial effect of the evidence.

Harmless Error

Because I have determined that the prior bad acts evidence should not have been admitted under K.S.A. 60-455, the next step is to determine whether the error was harmless.

The erroneous admission of K.S.A. 60-455 evidence does not automatically require reversal. "[T]he admission of K.S.A. 60-455 evidence without the explicit relevance inquiries, particularized weighing of probative value and prejudicial effect, or prophylactic limiting instruction is not inevitably so prejudicial as to require automatic reversal. On the contrary it may be harmless." *Gunby*, 282 Kan. at 57. As a result, we must now determine whether the admission of the evidence that Steven slapped Alicia

was harmless under K.S.A. 60-261, which states that error in the admission of evidence is not "ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice." See *State v. Boggs*, 287 Kan. 298, 318, 197 P.3d 441 (2008).

Here, as stated earlier, the evidence that Steven slapped Alicia was continuously brought up throughout the trial. Because the charges in this case involved aggravated battery, other acts of battery were highly prejudicial to Steven. Therefore, this propensity evidence prejudiced Steven and likely affected the outcome of the trial.

The admission of evidence that Steven slapped Alicia had a real likelihood of changing the result of the trial. Thus, the trial court's error in admitting the evidence was not harmless.

The Trial Court Erred in Instructing the Jury on the Use of Force in Defense of a Person

The majority holds that the trial court's self-defense instruction, which omitted the no-duty-to-retreat language from this instruction, did not deny Steven a fair trial. I disagree.

During the trial, Steven requested a self-defense instruction. The proposed instruction, based on PIK Crim. 3d 54-17, read as follows:

"Defendant claims his use of force was permitted as self-defense.

"Defendant is permitted to use force against another person when and to the extent that it appears to him and he reasonably believes such force is necessary to defend himself against the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

"When use of force is permitted as self-defense, there is no requirement to retreat." (Emphasis added.)

The trial court agreed to give the instruction; however, the instruction the trial court gave the jury omitted the last paragraph of the PIK instruction. The instruction the jury received failed to include the paragraph that told the jury that if it determined that Steven had acted in self-defense, Steven did not have a duty to retreat.

"An appellate court reviewing a district court's giving or failure to give a particular instruction applies a clearly erroneous standard where a party neither suggested an instruction nor objected to its omission." *State v. Martinez*, 288 Kan. 443, 451, 204 P.3d 601 (2009); see K.S.A. 22-3414(3).

"An instruction is clearly erroneous only if the reviewing court is firmly convinced there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." *Martinez*, 288 Kan. at 451-52.

Trial courts are not required to use PIK instructions, but it is strongly recommended. Modifications or additions to the PIK instructions should only be made if the particular facts of a case require it; however, absent such need, PIK instructions should be followed. *State v. Dixon*, 289 Kan. 46, Syl. ¶ 10, 209 P.3d 675 (2009).

Steven made no objection to the trial court's self-defense instruction. Therefore, the clearly erroneous standard applies.

Steven points out that the State argued to the jury that he did not try to walk away or try to avoid a physical confrontation with the victims, which Steven contends makes the missing language mandatory. Steven contends that without this last sentence of the

instruction, the jury could have believed that Steven was required to retreat. The State responds by noting that the statement in closing was made in reference to Instruction 13.

Instruction 13 reads as follows:

"A person who initially provokes the use of force against himself is not permitted to use force to defend himself unless the person reasonably believes that he is in present danger of death or great bodily harm, and he has used every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the other person or the person has in good faith *withdrawn from physical contact with the other person and indicates clearly to the other person that he desires to withdraw and stop the use of force*, but the other person continues or resumes the use of force." (Emphasis added.)

Instruction 13 makes the missing no-duty-to-retreat language crucial because the prosecutor strongly argued that Steven had a duty to retreat before the altercation started. During cross-examination, the prosecutor asked Steven if he had run for help or had called 911:

"Q. And did you run up and knock on somebody's door?

"A. No; I did not.

"Q. And did you run to your grandma's house?

"A. No; I did not.

"Q. She lived right in that area, didn't she?

"A. We didn't get that far.

"Q. Did you pick up your cell phone and call 9-1-1 and say I'm in fear for my life?

"A. No; I did not."

The prosecutor continued to argue that Steven had a duty to retreat in closing argument. In stressing that Steven did not retreat, the prosecutor asked the jury:

"Did the defendant use other—use every reasonable means to escape such danger? The State contends that he did not. The defendant did not run. He did not call 9-1-1. He didn't run to the neighbor's house. He didn't pound on the door. He didn't get to his grandma's house. He didn't call his brother and say, come back for me, I'm—these guys are following me, I think I'm about to be killed or in danger of great bodily harm. . . . In this case the defendant did not use every reasonable means to escape."

This type of language just quoted by the State is problematic with our Supreme Court pronouncement in *State v. Scobee*, 242 Kan. 421, 748 P.2d 862 (1988). In *Scobee*, the court held that a no-duty-to-retreat instruction should have been given in Scobee's trial because "[t]he prosecution . . . built its case around the failure of [Scobee] to retreat" when two assailants set upon him in the driveway of his home. 242 Kan. at 428. Here, the State also built its case around Steven's failure to retreat. Thus, the State argued that Steven could not rely on his self-defense theory because he should have retreated before using force.

To argue, as the majority does, that because self-defense did not apply to any of Steven's crimes of conviction, there is not a real possibility the jury would have rendered a different verdict even if the jury had been instructed that Steven had no duty to retreat under the self-defense instruction is to set up a "straw man" argument. The majority seems to use this argument as a ploy to respond to an argument of its choosing and not one that is actually presented. The majority's assertion ignores that the State had charged Steven with one count of intentional aggravated battery with great bodily harm and two counts of aggravated battery intentionally causing bodily harm with a deadly weapon. Moreover, the jury was required to determine if Steven was guilty of any of the intentional aggravated battery charges before moving on to the lesser charges of reckless aggravated battery.

Thus, the question is not whether the jury had a need to consider self-defense with regard to Steven's two crimes of conviction. The question is whether there is a real

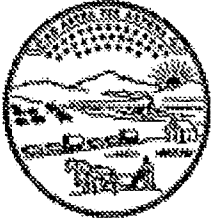
possibility that the jury would have ruled differently had it been instructed that Steven had no duty to retreat under the self-defense instruction when it deliberated the three intentional aggravated battery charges.

Because the evidence was disputed as to who was the initial aggressor, the no-duty-to-retreat language was key to Steven's self-defense theory. There is a reasonable possibility the jury would have acquitted Steven entirely of one or more of the charges had the trial court given a no-duty-to-retreat instruction. Thus, the majority's conclusion is flawed when it says that "there is not a real possibility the jury would have rendered a different verdict if it was instructed as Steven suggests." Slip op. at 16.

On the contrary, the omitted no-duty-to-retreat language from the self-defense instruction gutted Steven's self-defense theory. The only instruction that the jurors heard on the issue of retreat told them that Steven had a duty to retreat if he provoked the use of force against himself. The trial court, however, failed to tell the jury that Steven had no duty to retreat under the self-defense instruction. As the majority correctly states, jurors are presumed to follow their instructions. Therefore, this omission in the self-defense instruction might have led the jury to believe that Steven first had to retreat before he was entitled to defend himself. Even if some of the jurors believed that Steven had acted in self-defense, they might have believed that they were precluded from finding him not guilty entirely of the charges because he had failed to retreat from the altercation. Consequently, Steven did not receive a fair trial when the no-duty-to-retreat language was omitted from the self-defense instruction; this omitted language was central to his self-defense theory.

There is a real possibility that the jury would have ruled a different way had it been properly instructed. I would reverse the convictions and remand for a new trial.

APPENDIX F



ELECTRONICALLY FILED
2017 Oct 02 PM 3:09
CLERK OF THE APPELLATE COURT
CASE NUMBER: 104295

Court: Supreme Court

Case Number: 104295

Case Title: STATE OF KANSAS, APPELLEE,
V. APPELLANT.
STEVEN HOWARD WEIS,

Type: Motion for Rehearing or Modification by Appellant,
Steven Weis.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in cursive script, appearing to read "Lawton R. Nuss".

/s/ Lawton R. Nuss, Chief Justice

APPENDIX G

NOT DESIGNATED FOR PUBLICATION

No. 110,823

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ANTHONY E. GRIFFIN,
Appellant.

MEMORANDUM OPINION

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 19, 2014. Appeal from Sedgwick District Court; GREGORY L. WALLER, judge. Opinion filed August 18, 2017. Judgment of the Court of Appeals affirming the district court is affirmed as to the issue subject to review. Judgment of the district court is affirmed as to the issue subject to review.

Corrine E. Johnson, of Kansas Appellate Defender Office, was on the brief for appellant.

Lesley A. Isherwood, assistant district attorney, *Emily M. Barclay*, legal intern, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

Per Curiam: Anthony Griffin was convicted of aggravated battery and aggravated assault and ordered to register as a violent offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, after a district court judge found Griffin used a deadly weapon to commit those offenses. For the first time on appeal, Griffin argues his registration requirement violates *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because the fact was not submitted

to a jury and proved beyond a reasonable doubt. The persuasiveness of that challenge turns on whether KORA's requirements constitute punishment for his crimes. We affirm.

The outcome of Griffin's challenge regarding judicial factfinding is controlled by *State v. Meredith*, 306 Kan. __, __ P.3d __ (No. 110,520, filed August 4, 2017), slip op. at 10, and *State v. Huey*, 306 Kan. __, __ P.3d __ (No. 109,690, filed August 11, 2017). Like the appellants in those cases, Griffin offers no fact-based arguments on the factors we must consider in determining whether the Act's effects render it punitive as applied to violent offenders because he raises his *Apprendi* challenge—and, consequently, his argument that the registration requirements are punishment—for the first time on appeal. See 306 Kan. at __, *Meredith*, slip op. at 10 ("[A]nalysis of the [*Kennedy v. Mendoza-Martinez*], 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963),] factors requires a robust record because the effects prong of the applicable legal test obliges an appellate court to premise its legal conclusion on at least some fact-intensive questions—*i.e.*, the legitimacy of the public safety interests at stake, the effectiveness of the alternative purpose to promote public safety, etc.").

Without a factual record, we cannot conclude that KORA's registration requirements imposed on violent offenders are so punitive as to override the legislature's intent that KORA be a civil remedy. Therefore, Griffin has not demonstrated, as he must, that the registration requirements constitute punishment. Because the registration requirements did not increase Griffin's punishment under the law of this case, it was not necessary that his use of a deadly weapon be found beyond a reasonable doubt by a jury.

We affirm the lower courts' judgment on the issue subject to our review.

* * *

BEIER, J., dissenting: Consistent with my votes in *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017); and *State v. Huey*, 306 Kan. ___, ___ P.3d ___ (No. 109,690, filed August 11, 2017), I respectfully dissent from the majority's decision in this case.

"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. It is no less so for a drug offender than for a sex offender or a violent offender. It is no less so when the Ex Post Facto Clause is before us than when *Apprendi* or the Eighth Amendment is before us." *Meredith*, 306 Kan. at ___, slip op. at 11-12 (Beier, J., dissenting).

ROSEN and JOHNSON, JJ., join the foregoing dissent.

APPENDIX H

NOT DESIGNATED FOR PUBLICATION

No. 110,823

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ANTHONY E. GRIFFIN,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; GREGORY L. WALLER, judge. Opinion filed December 19, 2014. Affirmed.

Corrine E. Johnson, of Kansas Appellate Defender Office, for appellant.

Emily M. Barclay, legal intern, *Lesley A. Isherwood*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., MCANANY, J., and BURGESS, S.J.

Per Curiam: Anthony E. Griffin appeals from the district court's denial of his motion to withdraw his guilty pleas to various crimes and from the sentences imposed for the resulting convictions.

We need not recount the facts constituting Griffin's crimes and the procedural history that followed. The parties are well acquainted with them.

Griffin entered into a plea agreement with the State on the day his jury trial was set to begin. He agreed to plead no contest to aggravated battery and aggravated assault

charges. In exchange, the State agreed to dismiss the charge of attempted first-degree murder and to recommend concurrent sentences. Griffin was free to argue for a lesser sentence. Griffin advised the court that he understood the terms of the plea agreement, that his attorney had explained the charges and potential sentences, and that he understood the court was not bound by the parties' agreement. Griffin also stated that in exchange for his pleas, no one had made any promises other than as set forth in the written plea agreement.

The State presented the factual basis for these crimes and described Griffin's use of a handgun in committing them. Griffin told the court he did not contest those facts. The court found Griffin's pleas were knowingly and voluntarily made, accepted them, found Griffin guilty, and advised him that he would have to register as a violent offender.

Sixteen days later, and before sentencing, Griffin moved to withdraw his plea. He claimed that his attorney promised to get his bond reduced or get him placed on pretrial services until the sentencing hearing and that counsel failed to do so. He alleged he relied on this promise in making the plea agreement. Griffin also argued that his counsel improperly permitted his "sealed past" to be brought up during the plea hearing.

The judge who presided over Griffin's plea hearing also heard Griffin's motion to withdraw his pleas. At the hearing on Griffin's motion, Griffin testified that on the day the trial was to commence his lawyer told him he did not think Griffin would win at trial. Griffin testified he had a civil case against the county for injuries he suffered in the county jail, and his criminal defense lawyer told him he would have to plead no contest in the criminal case in order to win the civil case. Griffin claimed his lawyer told him that under the plea agreement, he would receive a 64-month sentence, but the lawyer said he was "pretty sure" he could get Griffin probation and pretrial services if he pled no contest. Griffin complained about the prosecutor's comments during the plea hearing

about a prior conviction that had been expunged. After the plea hearing Griffin obtained new counsel who moved for a bond reduction but that motion had been denied.

Griffin's attorney testified he was prepared to go to trial but spent considerable time reviewing with Griffin the plea agreement and the sentencing guidelines grid boxes. He informed Griffin that his prior expunged conviction could be included in his criminal history. He denied discussing Griffin's civil claim in connection with the plea negotiations in the criminal case. He denied promising Griffin that he would receive probation if he pled no contest. In fact, he said he told Griffin he should expect to get some prison time. He admitted he failed to ask the court to reduce Griffin's bond, but noted that when substitute counsel later made the request the court denied it.

The district court overruled the motion based on the standards set forth in *State v. Edgar*, 281 Kan. 30, 127 P.3d 986 (2006), and *State v. Aguilar*, 290 Kan. 506, 231 P.3d 563 (2010). In doing so, the court found that Griffin failed to show good cause, his counsel had been effective, and Griffin had been fully informed of his rights and the consequences of the plea. Further, there was no prejudice from counsel's failure to seek a bond reduction because a later bond reduction motion had been denied.

At the sentencing hearing the court denied Griffin's departure motion and imposed the standard presumptive sentence on the primary count with concurrent terms on the remaining counts. The court found Griffin committed his crimes with a firearm, requiring Griffin to register as a violent offender.

Griffin appeals. He claims the court erred in denying his motion to withdraw his pleas in spite of his showing of good cause. We apply the abuse of discretion standard in our review of this claim. *State v. Kenney*, 299 Kan. 389, 393, 323 P.3d 1288 (2014). In doing so, we consider whether there is substantial evidence to support the district court's findings on at least these three factors: (1) whether Griffin was represented by competent

counsel; (2) whether Griffin was misled, coerced, mistreated, or unfairly taken advantage of in the plea arrangement; and (3) whether Griffin's pleas were fairly and understandingly made. These factors are not exclusive. *State v. Fritz*, 299 Kan. 153, 154, 321 P.3d 763 (2014).

Here, Griffin's statements to the court at his plea hearing and the testimony of his plea hearing counsel at the hearing on Griffin's motion provide substantial evidence to support the district court's finding that Griffin failed to show good cause to withdraw his pleas. The judge who presided over Griffin's motion as well as his earlier plea hearing was in the best position to assess Griffin's credibility and whether his pleas were fairly and understandingly made. Evidence that the district court informed Griffin of the legal consequences of entering his pleas and the specific constitutional rights he was waiving by doing so support the district court's findings. See *State v. Lackey*, 45 Kan. App. 2d 257, 270-71, 246 P.3d 998, *rev. denied* 292 Kan. 968 (2011).

With respect to the bond reduction claim, Griffin fails to show he was prejudiced by counsel's failure to act. There is no indication Griffin's plea hearing counsel would have been any more successful than substitute counsel whose later effort to have Griffin's bond reduced was a failure.

We conclude the district court did not abuse its discretion in denying Griffin's motion.

Next, Griffin argues that the use of his prior convictions to enhance his sentences violates his due process rights as set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Aside from the fact that Griffin failed to raise this issue before the district court, our Supreme Court resolved this issue contrary to Griffin's position in *State v. Ivory*, 273 Kan. 44, 47-48, 41 P.3d 781 (2002), and on many occasions since then. We are bound by *Ivory*, and this contention fails.

Finally, Griffin argues that the sentencing judge violated *Apprendi* when he, rather than a jury, made the factual finding that Griffin used a deadly weapon in the commission of his crimes and, based upon that finding, ordered Griffin to register as a violent offender.

Aside from the fact that Griffin failed to raise this issue before the district court, in a number of cases our court has determined that factual determinations under the Kansas Offender Registration Act, K.S.A. 2013 Supp. 22-4901 *et seq.*, do not implicate *Apprendi* because they do not affect the length of the sentence imposed. See *State v. Unrein*, 47 Kan. App. 2d 366, 372, 274 P.3d 691 (2012), *rev. denied* 297 Kan. 1256 (2013); *State v. Franklin*, 44 Kan. App. 2d 156, 160-62, 234 P.3d 860 (2010); *State v. Chambers*, 36 Kan. App. 2d 228, 238-39, 138 P.3d 405, *rev. denied* 282 Kan. 792 (2006). We adhere to the reasoning in those cases and are not persuaded by Griffin's arguments on this point.

Affirmed.

APPENDIX I



ELECTRONICALLY FILED
2017 Oct 02 PM 3:30
CLERK OF THE APPELLATE COURT
CASE NUMBER: 110823

Court: Supreme Court

Case Number: 110823

Case Title: STATE OF KANSAS, APPELLEE,
V.
ANTHONY E. GRIFFIN, APPELLANT.

Type: Motion for Rehearing or Modification (re: Opinion)
by Appellant, Anthony Griffin

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in cursive script, appearing to read "Lawton R. Nuss".

/s/ Lawton R. Nuss, Chief Justice

APPENDIX J

NOT DESIGNATED FOR PUBLICATION

No. 112,107

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JESSE VILLA,
Appellant.

MEMORANDUM OPINION

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 10, 2015. Appeal from Reno District Court; JOSEPH L. MCCARVILLE, III, judge. Opinion filed August 18, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Samuel Schirer, of Kansas Appellate Defender Office, was on the brief for appellant.

Keith E. Schroeder, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

Per Curiam: Jesse Villa was convicted of aggravated battery and ordered to register as a violent offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, after a district court judge found Villa used a deadly weapon to commit the offense. For the first time on appeal, Villa argues his registration requirement violates *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because the fact was not submitted to a jury and proved beyond a reasonable

doubt. The persuasiveness of this challenge turns on whether KORA's requirements constitute punishment for his crime. We affirm the registration order.

The outcome of Villa's appeal is controlled by *State v. Meredith*, 306 Kan. ___, ___ P.3d __ (No. 110,520, filed August 4, 2017), slip op. at 10 and *State v. Huey*, 306 Kan. ___, ___ P.3d __ (No. 109,690, filed August 11, 2017). Like the appellants in those cases, Villa offers no fact-based arguments on the factors we must consider in determining whether the Act's effects render it punitive as applied to violent offenders because he raises his *Apprendi* challenge—and, consequently, his argument that the registration requirements are punishment—for the first time on appeal. See *Meredith*, 306 Kan. at ___, slip op. at 10 ("[A]nalysis of the [*Kennedy v.*] *Mendoza-Martinez*[, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963),] factors requires a robust record because the effects prong of the applicable legal test obliges an appellate court to premise its legal conclusion on at least some fact-intensive questions—*i.e.*, the legitimacy of the public safety interests at stake, the effectiveness of the alternative purpose to promote public safety, etc.").

Without a factual record, we cannot conclude that KORA's registration requirements imposed on violent offenders are so punitive as to override the legislature's intent that KORA be a civil remedy. Therefore, Villa has not demonstrated, as he must, that the registration requirements constitute punishment. Because the registration requirements did not increase Villa's punishment under the law of this case, it was not necessary that his use of a deadly weapon be found beyond a reasonable doubt by a jury.

Affirmed.

* * *

BEIER, J., dissenting: Consistent with my votes in *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017); and *State. v. Huey*, 306 Kan. ___, ___ P.3d ___ (No. 109,690, filed August 11, 2017), I respectfully dissent from the majority's decision in this case.

"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. It is no less so for a drug offender than for a sex offender or a violent offender. It is no less so when the Ex Post Facto Clause is before us than when *Apprendi* or the Eighth Amendment is before us." *Meredith*, 306 Kan. at ___, slip op. at 11-12 (Beier, J., dissenting).

ROSEN and JOHNSON, JJ., join the foregoing dissent.

APPENDIX K

NOT DESIGNATED FOR PUBLICATION

No. 112,107

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JESSE VILLA,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Opinion filed April 10, 2015. Affirmed.

Samuel Schirer, of Kansas Appellate Defender Office, for appellant.

Keith E. Schroeder, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, P.J., POWELL, J., and MERLIN G. WHEELER, District Judge, assigned.

Per Curiam: Jesse Villa appeals the district court's factual finding that Villa committed a crime with a deadly weapon, resulting in the requirement that he register as a violent offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.* Villa argues that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the district court violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution when it made this factual finding because such a fact should have been proven to a jury beyond a reasonable doubt. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2014, Villa was charged with severity level 4 aggravated battery after Villa struck Lawrence Butler with a wrench. As part of his plea agreement with the State, Villa pled guilty to a reduced charge of severity level 7 aggravated battery.

At Villa's sentencing and over his objection, the district court made a factual finding that Villa used the wrench as a deadly weapon, triggering the KORA requirement that he register as a violent offender. The district court sentenced Villa to a 24-month term of probation, subject to an underlying 27-month prison sentence, and ordered him to register as an offender for a period of 15 years.

Villa timely appeals.

DID THE DISTRICT COURT VIOLATE VILLA'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS?

For the first time on appeal, Villa alleges the district court violated *Apprendi* by making a factual finding which requires him to register as a violent offender, resulting in an increased punishment and violating his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Villa concedes he did not object to the district court's factual finding that the wrench used in the commission of the crime was a deadly weapon on the basis that it violated *Apprendi* but argues we should consider it now because it presents a question of law which implicates a denial of his fundamental rights. See *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010). We agree.

Villa's argument requires interpretation of KORA and an examination of its constitutionality, both of which are questions of law over which we exercise unlimited

review. See *State v. Cheeks*, 298 Kan. 1, 4, 310 P.3d 346 (2013) ("We engage in a de novo review of the constitutionality of a statute.").

Under *Apprendi*, "[o]ther 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." 530 U.S. at 490. The policy rationale behind *Apprendi* is that a court violates the United States Constitution if it invades the jury's territory by finding facts at sentencing. See *Shepard v. United States*, 544 U.S. 13, 25, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) ("[T]he Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence.").

KORA requires a "violent offender" to register. KORA defines a violent offender, in part, as any person who "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." K.S.A. 2014 Supp. 22-4902(e)(2). The district court found Villa used the wrench as a deadly weapon in the commission of his crime; therefore, KORA required Villa to register as an offender for 15 years. K.S.A. 2014 Supp. 22-4906(a)(1)(M).

Villa claims the district court violated his rights under *Apprendi* when it made a factual finding that the wrench used in the commission of his crime was a deadly weapon, triggering the requirement that he register as a violent offender under KORA. Villa argues that ordering him to register as a violent offender increased the penalty for his crime and the fact that he used a deadly weapon in committing the crime should have been submitted to a jury and proven beyond a reasonable doubt. Unfortunately for Villa, as both parties note, this court has previously rejected such an argument many times. See, e.g., *State v. Weis*, 47 Kan. App. 2d 703, 719, 280 P.3d 805 (2012), *petition for rev. filed July 16, 2012*; *State v. Unrein*, 47 Kan. App. 2d 366, 372, 274 P.3d 691 (2012), *rev.*

denied 297 Kan. 1256 (2013); *State v. Franklin*, 44 Kan. App. 2d 156, 160-62, 234 P.3d 860 (2010), *rev. denied* 297 Kan. 1250 (2013); *State v. Chambers*, 36 Kan. App. 2d 228, 235-39, 138 P.3d 405, *rev. denied* 282 Kan. 792 (2006); *State v. Huey*, No. 109,690, 2014 WL 1707807, at *3-6 (Kan. App. 2014) (unpublished opinion); *State v. Byers*, No. 108,564, 2013 WL 3867862, at *6 (Kan. App. 2013) (unpublished opinion); *State v. McCall*, No. 107,112, 2013 WL 1149682, at *2 (Kan. App.) (unpublished opinion), *rev. denied* 297 Kan. 1253 (2013); *State v. Hall*, No. 106,903, 2013 WL 646482, at *4 (Kan. App.) (unpublished opinion), *rev. denied* 297 Kan. 1250 (2013); *State v. Dobyons*, No. 106,228, 2012 WL 3289968, at *1-2 (Kan. App. 2012) (unpublished opinion), *rev. denied* 297 Kan. 1249 (2013); *State v. Fields*, No. 105,543, 2012 WL 3171795, at *8 (Kan. App. 2012) (unpublished opinion), *rev. denied* 297 Kan. 1250 (2013); *State v. Everett*, No. 103,067, 2011 WL 3250559, at *4-5 (Kan. App. 2011) (unpublished opinion), *rev. denied* 297 Kan. 1250 (2013). Villa argues these cases were wrongly decided and points out that the Kansas Supreme Court has not yet ruled on the issue.

Villa repeats similar arguments raised by the defendants in many of the cases cited above, including *Chambers* and *Unrein*, all of which have been rejected by our court. Accordingly, we see no reason to itemize all the arguments again other than to reaffirm our rejection of them as well. Notably, Villa focuses on the punitive and burdensome nature of registration and the stigma attached to it. However, "both the United States Supreme Court and the Kansas Supreme Court have held that the duty to register is a civil penalty that is remedial in nature and intended to protect public safety, not to impose punishment." *State v. Simmons*, 50 Kan. App. 2d 448, 458, 329 P.3d 523 (2014) (citing *Smith v. Doe*, 538 U.S. 84, 105-06, 123 S. Ct. 1140, 155 L. Ed. 2d 164 [2003]; *State v. Myers*, 260 Kan. 669, 671, 681, 695-96, 923 P.2d 1024 [1996], *cert. denied* 521 U.S. 1118 [1997]). In particular, concerning Villa's argument that the stigma of registration constitutes punishment, we agree with the panel in *Unrein* when it observed: "If the stigma attached to public registration as a sex offender is not punishment, the notoriety

that [one] might experience for being listed as an individual who used a deadly weapon during the commission of . . . crimes is also not punishment." 47 Kan. App. 2d at 371.

Villa also complains that if a defendant does not register as ordered or otherwise violates the conditions of KORA, then that defendant may face additional imprisonment. The implication is that this potential imprisonment makes KORA punitive. However, the *Unrein* court addressed this argument too, finding that an offender's "exposure to further criminal liability if he would violate KORA is necessary for the efficacy of the regulatory scheme. The purpose of registration is public safety, [citation omitted], and the threat of criminal liability is not punishment but a means to this end." 47 Kan. App. 2d at 372. We agree.

Finally, Villa disagrees with the *Unrein* court's characterization of KORA's registration fee as nonpunitive. The *Unrein* court held that

"the \$20 fee is not punishment but a way to reimburse sheriff's offices for services provided in the regulatory scheme. See K.S.A. 2010 Supp. 22-4904(e) ('All funds retained by the sheriff . . . shall be credited to a special fund . . . which shall be used solely for law enforcement and criminal prosecution . . . and which shall not be used as a source of revenue to reduce the amount of funding otherwise made available to the sheriff's office.');

State v. Robinson, 281 Kan. 538, 543, 132 P.3d 934 (2006) (characterizing BIDS fees as 'recoupment' and 'not fines or, indeed, any part of the punishment or sanction')." 47 Kan. App. 2d at 372.

Villa alleges *Unrein*'s reasoning is flawed, stating the way the State chooses to use the fee does not necessarily reflect the purpose of the fee and providing as authority *Southern Union Company v. United States*, 567 U.S. ___, 132 S. Ct. 2344, 2357, 183 L. Ed. 2d 318 (2012), which held that criminal fines are penalties to which *Apprendi* applies. We remain unpersuaded. *Southern Union* has no bearing on the instant case given our court's repeated holdings that KORA's registration fee is not a criminal fine and

that the fee is for recoupment, not punitive purposes. See *Weis*, 47 Kan. App. 2d at 719; *Byers*, 2013 WL 3867862, at *6; *Hall*, 2013 WL 646482, at *4.

Accordingly, because neither registration under KORA nor the imposition of the KORA registration fee constitute punishment implicating *Apprendi*, the district court did not violate Villa's Sixth and Fourteenth Amendment rights by making a factual finding that triggered Villa's obligation to register as a violent offender.

Affirmed.

APPENDIX L



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CLERK OF THE APPELLATE COURT
CASE NUMBER: 112107

Court: Supreme Court

Case Number: 112107

Case Title: STATE OF KANSAS, APPELLEE,
V.
JESSE VILLA, APPELLANT.

Type: Motion for Rehearing or Modification by Appellant,
Jesse Villa.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in cursive script, appearing to read "Lawton R. Nuss".

/s/ Lawton R. Nuss, Chief Justice

APPENDIX M

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 110,702

STATE OF KANSAS,
Appellee,

v.

JOSHUA HAROLD WATKINS,
Appellant.

SYLLABUS BY THE COURT

1.

The legislature intended the Kansas Offender Registration Act (KORA) to be civil and nonpunitive for all classes of offenders.

2.

Because the legislature intended KORA to be a regulatory scheme that is civil and nonpunitive, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 22, 2014. Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Opinion filed September 8, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Patrick H. Dunn and Adam D. Stolte, of Kansas Appellate Defender Office, were on the briefs for appellant.

Keith E. Schroeder, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Joshua H. Watkins was convicted of aggravated assault on a law enforcement officer, felony fleeing and eluding, and driving while suspended. He was required to register under the Kansas Offender Registration Act, K.S.A. 22-4901 *et seq.*, based on the district court's finding that he used a deadly weapon in the commission of the offenses. Watkins presents two arguments on appeal: (1) because the registration requirements constitute an increased penalty for his offenses, the requirements could not be imposed based on the judicial factfindings under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and (2) the court erred by imposing an increased sentence based on his criminal history, which was not proved to a jury beyond a reasonable doubt.

The persuasiveness of Watkins' deadly-weapon-finding *Apprendi* claim turn on whether KORA's requirements constitute punishment for his underlying aggravated assault on a law enforcement crime. We have rejected similar claims and do so again in this case. See *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017), slip op. at 10; *State v. Huey*, 306 Kan. ___, ___ P.3d ___ (No. 109,690, filed August 11, 2017), slip op. at 8. We reject Watkins' criminal-history *Apprendi* claim as we have repeatedly done in many other cases. See, e.g., *State v. Johnson*, 304 Kan. 924, 956, 376 P.3d 70 (2016); *State v. Ivory*, 273 Kan. 44, 45-48, 41 P.3d 781 (2002). We will not address that issue further in this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Watkins pleaded no contest to aggravated assault on a law enforcement officer, a level 6 person felony; fleeing and eluding, a level 9 nonperson felony; and driving while suspended, a class B misdemeanor. The district court sentenced him to 37 months'

imprisonment and 24 months' postrelease supervision. The court further ordered Watkins to register under KORA because it found he used a truck as a deadly weapon in the commission of the aggravated assault. Watkins timely appealed.

For the first time on appeal, Watkins argued the registration requirements violated his Sixth and Fourteenth Amendment rights because the predicate deadly weapon finding was not submitted to a jury and proved beyond a reasonable doubt. And he asserted the same error regarding the district court's use of his criminal history at sentencing. Watkins acknowledged he did not raise these issues to the district court. He nonetheless argued both arguments could be brought for the first time on appeal because they turn on a legal question, citing *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002).

The Court of Appeals addressed his arguments on the merits because doing so was "necessary to serve the ends of justice or to prevent the denial of fundamental rights" *State v. Watkins*, No. 110,702, 2014 WL 4231269, at *1 (Kan. App. 2014) (unpublished opinion) (citing *State v. Tague*, 296 Kan. 993, 1000, 298 P.3d 273 [2013] [listing three exceptions to the general prohibition of arguments raised for the first time on appeal]). The panel rejected both claims. See 2014 WL 4231269, at *4-5.

Watkins petitioned for review of the panel's decisions on his ex post facto and *Apprendi* claims, which we granted. Jurisdiction is proper. K.S.A. 20-3018(b) (petition for review of Court of Appeals decision); K.S.A. 60-2101(b) (providing Supreme Court jurisdiction over cases subject to review under K.S.A. 20-3018).

MEREDITH CONTROLS THE OUTCOME

In *Meredith*, we held that the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme. We further held that, to overcome that intent, only the "clearest proof" concerning the effects of KORA on the class of drug or violent offenders would suffice. 306 Kan. at ___, slip op. at 4. Watkins made no such showing. His arguments are at best the same ones that were not persuasive in *Huey*, and we have previously considered similar arguments and held that lifetime registration requirements imposed on sex offenders do not constitute punishment. See *State v. Petersen-Beard*, 304 Kan. 192, 201-02, 205, 377 P.3d 1127, *cert. denied* 137 S. Ct. 226 (2016). But see 304 Kan. at 218 (Johnson, J., dissenting) (arguing registration requirements with which compliance enforced by potential for "going to prison for a new felony" constituted an affirmative disability or restraint on the offender). We hold Watkins failed to make the required showing, so we have no basis upon which to override the legislative intent previously determined in our caselaw.

Because it is necessary for Watkins to establish KORA's requirements constitute punishment to prevail on both his deadly weapon-use-finding *Apprendi* claim, his inability to do so is fatal. Relying on *Meredith*, we applied in *Huey* the same principles in rejecting the defendant's argument that a factual finding required to trigger KORA requirements with respect to a conviction must comport with *Apprendi*. 306 Kan. at ___, slip op. at 3.

Without a factual record, we cannot conclude that KORA's registration requirements as to violent offenders are so punitive as to override the legislature's intent that KORA be a civil remedy. Therefore, Watkins has not demonstrated, as he must, that the registration requirements constitute punishment. And because the registration

requirements did not increase his punishment under the law of this case, it was not necessary that the deadly weapon-use finding be made by a jury.

Affirmed.

STEGALL, J., not participating.

MICHAEL J. MALONE, Senior Judge, assigned.¹

* * *

MALONE, J., concurring: I write separately to express my disagreement with this court's decision in *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127, *cert. denied* 137 S. Ct. 226 (2016), and its progeny, but explain how the principle of stare decisis now compels me to concur with the majority opinion in this case.

In September 2014, as a senior judge, I was assigned to the Supreme Court to hear and decide cases until a vacancy on the court was permanently filled. See K.S.A. 20-2616(b) ("A retired justice or judge so designated and assigned to perform judicial service or duties shall have the power and authority to hear and determine all matters covered by the assignment."); see also Kan. Const. art. 3, § 6(f) ("The supreme court may assign a district judge to serve temporarily on the supreme court."); Rule 601B, Application, III (A) (2017 Kan. S. Ct. R. 429) ("A retired judge under contract to the senior judge program shall be deemed a part-time judge.").

¹**REPORTER'S NOTE:** Senior Judge Malone was appointed to hear case No. 110,702 vice Justice Stegall under the authority vested in the Supreme Court by K.S.A. 20-2616.

In that capacity, I sided with the majority opinions in *State v. Buser*, 304 Kan. 181, 371 P.3d 886 (2016), *State v. Redmond*, 304 Kan. 283, 371 P.3d 900 (2016), and *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016), holding that the 2011 KORA statutory scheme was punitive and retroactive application to sex offenders violated the Ex Post Facto Clause. Likewise in *State v. Charles*, 304 Kan. 158, 179, 372 P.3d 1109 (2016), I agreed with the majority that violent offender registration is punishment and its imposition required a jury finding regarding the use of a deadly weapon under *Apprendi*.

Before these opinions were filed, Court of Appeals Judge Caleb Stegall was sworn in to fill the vacancy on the Supreme Court which ultimately changed the balance of the court on this issue. Justice Stegall authored *Petersen-Beard*, wherein the newly constituted permanent court held lifetime postrelease registration for sex offenders was *not* punishment for purposes of the Eighth Amendment and Section 9 of the Kansas Constitution Bill of Rights. 304 Kan. at 209. All of the opinions were filed on the same day. However, the *Petersen-Beard* majority overruled contrary holdings in *Buser*, *Redmond*, and *Thompson*. 304 Kan. at 192-93. Also, the *Charles* court acknowledged that *Petersen-Beard* may influence future reliance on it as precedent. 304 Kan. at 179.

Two subsequent cases cited in this opinion were decided by the full permanent court, and they are potentially at odds with my reasoning in *Buser/Thompson/Redmond/Charles*. In *Meredith*, the majority held the defendant failed to demonstrate that KORA registration was punishment for drug offenders by offering the "clearest proof" to overcome the legislature's nonpunitive civil intent. 306 Kan. at ___, slip op. at 2. In *Huey*, the majority held that *Charles* was not "viable authority" that KORA was not punitive for violent offenders; that Huey did not demonstrate that the registration requirements constituted punishment; and thus the factual finding that he used a deadly weapon did not need to be decided by a jury. 306 Kan. at ___, slip op. at 3. The basis for these decisions rests in part on the reasoning of *Petersen-Beard*.

Prior to becoming a permanent member of this court, then Judge Stegall sat on the Court of Appeals panel that rendered the *per curiam* decision we are now reviewing. Accordingly, Justice Stegall recused himself from this case and I am once again serving in his stead. In this regard I am faced with two choices: (1) hold that *Petersen-Beard*, *Meredith*, and *Huey* were wrongly decided, once again changing the composition of the majority resulting in different results for different defendants; or (2) concurring with the majority opinion based on caselaw subsequently decided by the full permanent court. The doctrine of stare decisis compels the latter.

This court does "not overrule precedent lightly and must give full consideration to the doctrine of stare decisis." *State v. Sherman*, 305 Kan. 88, 107, 378 P.3d 1060 (2016).

"Once a point of law has been established by a court, it will generally be followed by the same court and all courts of lower rank in subsequent cases when the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by a court. The application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law."

"Stare decisis is not a rigid inevitability but a prudent governor on the pace of legal change. A court of last resort will follow that rule of law unless clearly convinced it was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." 305 Kan. 88, Syl. ¶¶ 2, 3.

Additionally, in my role as a judge assigned to hear this case, I am mindful of Chief Justice McFarland's admonition: "While fidelity to the doctrine of stare decisis is not an 'inexorable command,' we should be highly skeptical of reversing an earlier decision *where nothing has changed except the composition of the court.*" (Emphasis

added.) *State v. Marsh*, 278 Kan. 520, 577, 102 P.3d 445 (2004) (McFarland, C.J., dissenting), *rev'd and remanded on other grounds* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), *vacated in part on other grounds on remand* 282 Kan. 38, 102 P.3d 445 (2006).

While I strongly stand by the position that KORA's statutory scheme is so punitive in effect that it negates the ostensibly implied legislative intent to deem it civil, *Thompson*, 304 Kan. at 327-28, I respectfully recognize that the full court's majority has clearly spoken on this matter since my participation in *Buser/Thompson/Redmond/Charles*. To add to Chief Justice McFarland's caution, my assignment to this case does nothing but temporarily change the composition of the court. Indeed, many other KORA cases are pending before the full permanent court, so accepting *Petersen-Beard*, *Meredith*, and *Huey* as binding precedent in this case will ensure "stability and continuity" of prior decisions. Whereas, departing from this precedent would cause more harm than good because it would result in conflicting opinions by this court creating uncertainty and diminishing the legitimacy of continuing judicial review. 305 Kan. 88, Syl. ¶¶ 2, 3.

The doctrine of stare decisis compels my concurrence in this case. Under *Petersen-Beard*, *Meredith*, and *Huey*, Watkins has not demonstrated that KORA registration requirements for violent offenders are punishment and thus he was not entitled to relief under *Apprendi*.

* * *

BEIER, J., dissenting: Consistent with my earlier votes in *State v. Huey*, 306 Kan. ___, ___ P.3d ___ (No. 109,690, filed August 11, 2017), slip op. at 8-9, and in related cases, see *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017),

slip op. at 11-12; *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127, *cert. denied* 137 S. Ct. 226 (2016), I respectfully dissent from the majority's decision in this case.

As I have previously written:

"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. It is no less so for a drug offender than for a sex offender or a violent offender. It is no less so when the Ex Post Facto Clause is before us than when *Apprendi* or the Eighth Amendment is before us." *Meredith*, 306 Kan. at ____, slip op. at 11-12 (Beier, dissenting).

Defendant Joshua Harold Watkins has met any burden of proof he bears on whether the imposition of the requirement of registration qualifies as punishment. Under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny, Watkins cannot be subjected to that requirement on the basis of a judge-made fact finding that he used a deadly weapon. I would therefore vacate the requirement.

ROSEN and JOHNSON, JJ., join the foregoing dissent.

APPENDIX N

NOT DESIGNATED FOR PUBLICATION

No. 110,702

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOSHUA HAROLD WATKINS,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Opinion filed August 22, 2014. Affirmed.

Adam D. Stolte, of Kansas Appellate Defender Office, for appellant.

Keith E. Schroeder, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before LEBEN, P.J., PIERRON and STEGALL, JJ.

Per Curiam: Joshua Harold Watkins raises two sentencing issues under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), following his plea of no contest to aggravated assault on a law enforcement officer, felony fleeing and eluding, and driving while suspended. He received a 37-month controlling sentence. Watkins argues the district court, not a jury, determined he used a deadly weapon under the Kansas Offender Registration Act (KORA), K.S.A. 22-2501 *et. seq.*, and he contends a jury should have also determined his criminal history beyond a reasonable doubt.

First, Watkins argues the district court violated his constitutional rights under *Apprendi* when it made a factual finding he intentionally swerved his pickup truck at the officer and almost collided with the officer's patrol car. The court found Watkins had used his truck as a deadly weapon in the commission of his crimes and thus ordered him to register as a violent offender. The *Apprendi* Court held: "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." 530 U.S. at 490. Watkins contends that ordering him to register as a violent offender increased the penalty for his crime and because the fact that he used the truck as a deadly weapon in committing the crime was not proven beyond a reasonable doubt to a jury, the order violated the rule in *Apprendi*. The State replies this court has previously and correctly rejected Watkins' argument.

Watkins' argument requires interpretation of KORA and consideration of its constitutionality, which are questions over which we exercise unlimited review. See *State v. Cheeks*, 298 Kan. 1, 4, 310 P.3d 346 (2013) ("We engage in a de novo review of the constitutionality of a statute."). Watkins objected to the conclusion by the district court that he had used the truck as a deadly weapon. However, Watkins did not make the procedural objection that a jury, not the district court, should make this determination. As a threshold matter, we must determine whether Watkins' argument has been properly preserved for our review. As a general rule, a party may not raise a new legal theory, including constitutional grounds, for the first time on appeal. *Trotter v. State*, 288 Kan. 112, 124, 200 P.3d 1236 (2009). Watkins' case, however, fits within a recognized exception to this general rule: "[C]onsideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights." *State v. Tague*, 296 Kan. 993, 1000, 298 P.3d 273 (2013) (listing three exceptions to the general prohibition of constitutional arguments raised for the first time on appeal). Despite his failure to raise the argument in the district court, we will consider Watkins' argument.

K.S.A. 2013 Supp. 22-4902(e)(2), the provision in KORA which covered the requirements of Watkins' registration, includes as a violent offender "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." The district court explicitly found, on the record, that Watkins had used his truck as a deadly weapon. Therefore, K.S.A. 2013 Supp. 22-4906(a)(1) required Watkins, as a violent offender, to register for a period, if incarcerated, of "15 years after the date of parole, discharge or release, whichever date is most recent, or, if not confined, 15 years from the date of conviction." Watkins asserts that registration increased the penalty for his crime and, therefore, *Apprendi* required that the factual finding upon which his registration rested—that he used a deadly weapon in the commission of his crime—be proved to a jury beyond a reasonable doubt.

Watkins concedes this court has previously decided this issue adversely to his position, citing *State v. Unrein*, 47 Kan. App. 2d 366, 372, 274 P.3d 691 (2012), *rev. denied* 297 Kan. 1256 (2013), and *State v. Chambers*, 36 Kan. App. 2d 228, 235-39, 138 P.3d 405, *rev. denied* 282 Kan. 792 (2006). *Unrein* is directly on point and rejects many of the arguments Watkins raises here. 47 Kan. App. 2d at 369-73. Like Watkins, Unrein asserted the district court had violated *Apprendi* by ordering him to register under KORA because he used a deadly weapon in the commission of his crime. Also like Watkins, Unrein acknowledged *Chambers*, in which another panel of this court held that a sentencing judge's finding of sexual motivation to commit the crime which, in turn, led to requiring registration under KORA did not increase Chambers' sentences and therefore did not implicate *Apprendi*. See *Unrein*, 47 Kan. App. 2d at 370 (quoting *Chambers*, 36 Kan. App. 2d at 239).

As Watkins now does, Unrein argued that *Chambers* was wrongly decided "because it narrowly interpreted the rule in *Apprendi* by holding that it should only be applied to increased sentences, not increased punishment." 47 Kan. App. 2d at 370. The

Unrein court rejected this argument, stating: "In fact, *Chambers* distinguished an increased sentence (that implicates *Apprendi*) from increased punishment (that does not implicate *Apprendi*) based, in part, on Kansas Supreme Court precedent" which we are duty-bound to follow. 47 Kan. App. 2d at 370-71. Specifically, the cited portion of *Chambers* examined prior Kansas Supreme Court caselaw on the application of *Apprendi* and concluded:

"In [the Kansas Supreme Court cases examined], *Apprendi* was not applicable because the defendants' sentences were not increased beyond the statutory maximum terms. This is true even though the consequences of the district courts' factual findings clearly increased the defendant's punishment. If *Apprendi* does not apply to a sentencing judge's imposition of imprisonment rather than probation based upon a nonjury factual finding that a defendant used a firearm in the commission of a crime or was a gang member, it is not evident how a sentencing judge's determination that a crime was sexually motivated, which results in a defendant's obligation to comply with the comparatively mild sanction of registration, implicates the Sixth and Fourteenth Amendments to the Constitution of the United States." *Chambers*, 36 Kan. App. 2d at 238.

Watkins attempts to distinguish the precedent the *Chambers* court relied upon by pointing out that those cases related to district courts imposing prison sentences rather than probation. Yet the *Chambers* court clearly noted this distinction in the language quoted above, finding that if *Apprendi* did not apply when the factual finding led a court to move from probation to imprisonment, it would not apply when the finding led a court to require the relatively milder sanction of registration in addition to the rest of the sentence. The *Chambers* rationale, adopted by *Unrein*, remains persuasive, and Watkins presents no persuasive reason for this court to alter its position.

Again like *Unrein*, Watkins contends the stigma attached to offender registration constitutes punishment. The *Unrein* court rejected this argument as well, citing *Smith v.*

Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), in which the United States Supreme Court held that posting sex offender registration on the Internet did not constitute punishment despite any stigma attached. *Unrein*, 47 Kan. App. 2d at 371. The *Unrein* court concluded: "If the stigma attached to public registration as a sex offender is not punishment, the notoriety that [one] might experience for being listed as an individual who used a deadly weapon during the commission of two crimes is also not punishment." 47 Kan. App. 2d at 371.

Watkins also asserts the Kansas Supreme Court's decisions in *State v. Scott*, 265 Kan. 1, 6, 961 P.2d 667 (1998), and *State v. Myers*, 260 Kan. 669, 699, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997), are contrary to this conclusion because the registration repercussions due to the public access provisions are great enough to be considered punishment. This overstates the holding in *Myers*. The *Myers* court examined the Kansas Sex Offender Registration Act (KSORA)—the precursor to KORA—to determine whether its registration and public disclosure provisions violated the Ex Post Facto Clause of the United States Constitution when applied to an offender who committed the underlying crime prior to the date on which KSORA took effect. Although *Myers*, 260 Kan. at 671, court ultimately found the public disclosure provision, as applied, was prohibited ex post facto punishment. It also specifically stated: "We hold that KSORA's registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends." 260 Kan. at 696. The *Myers* court's holding on the punitive nature of public disclosure of registrant information has arguably been undermined by the United States Supreme Court's decision in *Doe*, but that does not affect Watkins' argument here. See *State v. Brown*, No. 107,512, 2013 WL 2395319, at *2 (Kan. App. 2013) (unpublished opinion) (discussing *Doe's* effect on *Myers*), *petition for rev. filed* June 24, 2013.

The other Kansas Supreme Court case Watkins cites to support his statement that offender registration is punishment, addressed public disclosure under KSORA rather

than registration under KORA. See *Scott*, 265 Kan. at 9, 14 (referring to the issue as involving the "public access provisions of the KSORA," comparing the KSORA's public access provisions with those in offender registry statutes in other states, and holding that "the legislature did not inflict a cruel or unusual punishment upon Scott by permitting public access to his registration information"). Thus, *Myers* and *Scott* are not authority that should persuade us to turn away from the sound reasoning in *Unrein* and *Chambers*. See also *State v. Weis*, 47 Kan. App. 2d 703, 719, 280 P.3d 805 (2012) ("The stigma [Weis] might expect to suffer from registration is not an increase in sentence or punishment but a collateral consequence of his registration as an offender. Accordingly, we do not believe the trial court's factual finding [of use of a deadly weapon] violated . . . *Apprendi*."), *petition for rev. filed July 16, 2012*.

Next, Watkins points out the *Chambers* court did not address the fact that if a defendant fails to register as ordered or otherwise violates the requirements of KORA, he or she may face additional imprisonment. The implication is that this potential imprisonment renders KORA punitive. The *Unrein* court, however, addressed this argument as well, concluding that an offender's "exposure to further criminal liability if [the offender] would violate KORA is necessary for the efficacy of the regulatory scheme. The purpose of registration is public safety, [citation omitted], and the threat of criminal liability is not punishment but a means to this end." 47 Kan. App. 2d at 372. Watkins offers no response to this sensible rationale; accordingly, we again follow the reasoning of *Unrein*.

Next, Watkins takes issue with the *Unrein* court's characterization of KORA's \$20 registration fee as nonpunitive. The *Unrein* court concluded that "the \$20 fee is not punishment but a way to reimburse sheriffs offices for services provided in the regulatory scheme." 47 Kan. App. 2d at 372. Watkins claims this reasoning is flawed, stating that the use of the fee does not necessarily reflect the purpose of the fee and comparing it to a probation fee. Multiple panels of this court, however, have repeatedly rejected this

argument and adopted the conclusion that the \$20 fee is for recoupment, not punitive purposes. See, e.g.) *Weis*, 47 Kan. App. 2d at 719; *State v. Byers*, No. 108,564, 2013 WL 3867862, at *6 (Kan. App. 2013) (unpublished opinion); *State v. Hall*, No. 106,903, 2013 WL 646482, at *4 (Kan. App. 2013) (unpublished opinion), *rev. denied* 291 Kan. 1250 (2013).

Watkins' citation to *Southern Union Co. v. United States*, 567 U.S. ___, 132 S. Ct. 2344, 2357, 183 L. Ed. 2d 318 (2012), is also inapplicable. He correctly asserts *Southern Union Company* held that criminal fines are penalties to which *Apprendi* applies. 132 S. Ct. at 2357. This holding has no bearing on the instant case, however, because this court has repeatedly held that the \$20 registration fee required under KORA is not a criminal fine; rather, it is a recoupment fee. See *Unrein*, 47 Kan. App. 2d at 372.

The Kansas Court of Appeals has previously addressed and rejected all of Watkins' arguments as to why KORA's registration requirements trigger *Apprendi*'s protections by using a factfinding not proven to a jury to increase the punishment for his crimes by requiring him to register. Watkins has not presented any persuasive argument that convinces us to revisit our court's earlier rationale. The district court's finding that Watkins used a deadly weapon in the commission of his crimes and its subsequent order that he register under KORA did not implicate Watkins' rights as detailed in *Apprendi*.

For his other issue, Watkins contends the district court violated his rights under *Apprendi* when his criminal history was not proven to a jury beyond a reasonable doubt. Nevertheless, Watkins concedes the Kansas Supreme Court has previously decided this issue and states he simply wishes to preserve the claim for federal review. See *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002).

We are bound to follow precedent from the Kansas Supreme Court unless there is an indication that it is departing from its position. *State v. Ottinger*, 46 Kan. App. 2d 647,

655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012). Recently, our Supreme Court declined to depart from its holding in *Ivory*. See *State v. Frierson*, 298 Kan. 1005, 1022, 319 P.3d 515 (2014). Thus, we conclude the district court appropriately considered Watkins' criminal history in determining his sentence.

Affirmed.

APPENDIX O

12-CR-942

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 110,702

STATE OF KANSAS,
Appellee,

v.

JOSHUA HAROLD WATKINS,
Appellant.

ORDER

The court has considered and denies Appellant's motion for rehearing or modification.

Appellant's notice of service pursuant to K.S.A. 2016 Supp. 75-764(c)(1) is noted.

Appellant's notice of intent to file a petition for writ of certiorari to the United States Supreme Court is noted.

Pursuant to K.S.A. 2016 Supp. 22-3605(b)(1), the mandate on this court's September 8, 2017, opinion is stayed until further notice by this court.

Appellant is directed to file a report with this court on the status of the filing of a petition for writ of certiorari no later than January 17, 2018.

BY ORDER OF THE COURT this 19th day of October 2017.



LAWTON R. NUSS,
Chief Justice

APPENDIX P

2016 Kansas Statutes

22-4901. Citation of act. K.S.A. 22-4901 through 22-4911 and 22-4913, and amendments thereto, shall be known and may be cited as the Kansas offender registration act.

History: L. 1993, ch. 253, § 17; L. 1994, ch. 107, § 1; L. 1997, ch. 181, § 7; L. 2011, ch. 95, § 1; July 1.

2016 Kansas Statutes

22-4902. Definitions. As used in the Kansas offender registration act, unless the context otherwise requires:

- (a) "Offender" means:
 - (1) A sex offender;
 - (2) a violent offender;
 - (3) a drug offender;
 - (4) any person who has been required to register under out-of-state law or is otherwise required to be registered; and
 - (5) any person required by court order to register for an offense not otherwise required as provided in the Kansas offender registration act.
- (b) "Sex offender" includes any person who:
 - (1) On or after April 14, 1994, is convicted of any sexually violent crime;
 - (2) on or after July 1, 2002, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
 - (3) has been determined to be a sexually violent predator;
 - (4) on or after July 1, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:
 - (A) Adultery, as defined in K.S.A. 21-3507, prior to its repeal, or K.S.A. 2016 Supp. 21-5511, and amendments thereto;
 - (B) criminal sodomy, as defined in K.S.A. 21-3505(a)(1), prior to its repeal, or K.S.A. 2016 Supp. 21-5504(a)(1) or (a)(2), and amendments thereto;
 - (C) promoting prostitution, as defined in K.S.A. 21-3513, prior to its repeal, or K.S.A. 2016 Supp. 21-6420, prior to its amendment by section 17 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013;
 - (D) patronizing a prostitute, as defined in K.S.A. 21-3515, prior to its repeal, or K.S.A. 2016 Supp. 21-6421, prior to its amendment by section 18 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013; or
 - (E) lewd and lascivious behavior, as defined in K.S.A. 21-3508, prior to its repeal, or K.S.A. 2016 Supp. 21-5513, and amendments thereto;
 - (5) is convicted of sexual battery, as defined in K.S.A. 21-3517, prior to its repeal, or subsection (a) of K.S.A. 2016 Supp. 21-5505, and amendments thereto;
 - (6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of an offense defined in this subsection; or
 - (7) has been convicted of an offense that is comparable to any crime defined in this subsection, or any out-of-state conviction for an offense that under the laws of this state would be an offense defined in this subsection.
- (c) "Sexually violent crime" means:
 - (1) Rape, as defined in K.S.A. 21-3502, prior to its repeal, or K.S.A. 2016 Supp. 21-5503, and amendments thereto;
 - (2) indecent liberties with a child, as defined in K.S.A. 21-3503, prior to its repeal, or K.S.A. 2016 Supp. 21-5506(a), and amendments thereto;
 - (3) aggravated indecent liberties with a child, as defined in K.S.A. 21-3504, prior to its repeal, or K.S.A. 2016 Supp. 21-5506(b), and amendments thereto;
 - (4) criminal sodomy, as defined in K.S.A. 21-3505(a)(2) or (a)(3), prior to its repeal, or K.S.A. 2016 Supp. 21-5504(a)(3) or (a)(4), and amendments thereto;
 - (5) aggravated criminal sodomy, as defined in K.S.A. 21-3506, prior to its repeal, or K.S.A. 2016 Supp. 21-5504(b), and amendments thereto;
 - (6) indecent solicitation of a child, as defined in K.S.A. 21-3510, prior to its repeal, or K.S.A. 2016 Supp. 21-5508(a), and amendments thereto;
 - (7) aggravated indecent solicitation of a child, as defined in K.S.A. 21-3511, prior to its repeal, or K.S.A. 2016 Supp. 21-5508(b), and amendments thereto;
 - (8) sexual exploitation of a child, as defined in K.S.A. 21-3516, prior to its repeal, or K.S.A. 2016 Supp. 21-5510, and amendments thereto;
 - (9) aggravated sexual battery, as defined in K.S.A. 21-3518, prior to its repeal, or K.S.A. 2016 Supp. 21-5505(b), and amendments thereto;
 - (10) aggravated incest, as defined in K.S.A. 21-3603, prior to its repeal, or K.S.A. 2016 Supp. 21-5604(b), and amendments thereto;
 - (11) electronic solicitation, as defined in K.S.A. 21-3523, prior to its repeal, and K.S.A. 2016 Supp. 21-5509, and amendments thereto;
 - (12) unlawful sexual relations, as defined in K.S.A. 21-3520, prior to its repeal, or K.S.A. 2016 Supp. 21-5512, and amendments thereto;
 - (13) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or K.S.A. 2016 Supp. 21-5426(b), and amendments thereto, if committed in whole or in part for the purpose of the sexual gratification of the defendant or another;
 - (14) commercial sexual exploitation of a child, as defined in K.S.A. 2016 Supp. 21-6422, and amendments thereto;
 - (15) any conviction or adjudication for an offense that is comparable to a sexually violent crime as defined in this subsection, or any out-of-state conviction or adjudication for an offense that under the laws of this state would be a sexually violent crime as defined in this subsection;
 - (16) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of a sexually violent crime, as defined in this subsection; or
 - (17) any act which has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim. As used in this paragraph, "sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.
- (d) "Sexually violent predator" means any person who, on or after July 1, 2001, is found to be a sexually violent predator pursuant to K.S.A. 59-29a01 et seq., and amendments thereto.
- (e) "Violent offender" includes any person who:
 - (1) On or after July 1, 1997, is convicted of any of the following crimes:
 - (A) Capital murder, as defined in K.S.A. 21-3439, prior to its repeal, or K.S.A. 2016 Supp. 21-5401, and amendments thereto;
 - (B) murder in the first degree, as defined in K.S.A. 21-3401, prior to its repeal, or K.S.A. 2016 Supp. 21-5402, and amendments thereto;
 - (C) murder in the second degree, as defined in K.S.A. 21-3402, prior to its repeal, or K.S.A. 2016 Supp. 21-5403, and amendments thereto;
 - (D) voluntary manslaughter, as defined in K.S.A. 21-3403, prior to its repeal, or K.S.A. 2016 Supp. 21-5404, and amendments thereto;
 - (E) involuntary manslaughter, as defined in K.S.A. 21-3404, prior to its repeal, or K.S.A. 2016 Supp. 21-5405(a)(1), (a)(2) or (a)(4), and amendments thereto. The provisions of this paragraph shall not apply to violations of K.S.A. 2016 Supp. 21-5405(a)(3), and amendments thereto, which occurred on or after July 1, 2011, through July 1, 2013;
 - (F) kidnapping, as defined in K.S.A. 21-3420, prior to its repeal, or K.S.A. 2016 Supp. 21-5408(a), and amendments thereto;
 - (G) aggravated kidnapping, as defined in K.S.A. 21-3421, prior to its repeal, or K.S.A. 2016 Supp. 21-5408(b), and amendments thereto;
 - (H) criminal restraint, as defined in K.S.A. 21-3424, prior to its repeal, or K.S.A. 2016 Supp. 21-5411, and amendments thereto, except by a parent, and only when the victim is less than 18 years of age; or
 - (I) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or K.S.A. 2016 Supp. 21-5426(b), and amendments thereto, if not committed in whole or in part for the purpose of the sexual gratification of the defendant or another;
 - (2) 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;
 - (3) has been convicted of an offense that is comparable to any crime defined in this subsection, any out-of-state conviction for an offense that under the laws of this state would be an offense defined in this subsection; or
 - (4) is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.
- (f) "Drug offender" includes any person who, on or after July 1, 2007:
 - (1) Is convicted of any of the following crimes:
 - (A) Unlawful manufacture or attempting such of any controlled substance or controlled substance analog, as defined in K.S.A. 65-4159, prior to its repeal, K.S.A. 2010 Supp. 21-36a03, prior to its transfer, or K.S.A. 2016 Supp. 21-5703, and amendments thereto;
 - (B) possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to manufacture a controlled substance, as defined in K.S.A. 65-7006(a), prior to its repeal, K.S.A. 2010 Supp. 21-36a09(a), prior to its transfer, or K.S.A. 2016 Supp. 21-5709(a), and amendments thereto;

(C) K.S.A. 65-4161, prior to its repeal, K.S.A. 2010 Supp. 21-36a05(a)(1), prior to its transter, or K.S.A. 2016 Supp. 21-5705(a)(1), and amendments thereto. The provisions of this paragraph shall not apply to violations of K.S.A. 2010 Supp. 21-36a05(a)(2) through (a)(6) or (b) which occurred on or after July 1, 2009, through April 15, 2010;

(2) has been convicted of an offense that is comparable to any crime defined in this subsection, any out-of-state conviction for an offense that under the laws of this state would be an offense defined in this subsection; or

(3) is or has been convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

(g) Convictions or adjudications which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction or adjudication. Any conviction or adjudication set aside pursuant to law is not a conviction or adjudication for purposes of this section. A conviction or adjudication from any out-of-state court shall constitute a conviction or adjudication for purposes of this section.

(h) "School" means any public or private educational institution, including, but not limited to, postsecondary school, college, university, community college, secondary school, high school, junior high school, middle school, elementary school, trade school, vocational school or professional school providing training or education to an offender for three or more consecutive days or parts of days, or for 10 or more nonconsecutive days in a period of 30 consecutive days.

(i) "Employment" means any full-time, part-time, transient, day-labor employment or volunteer work, with or without compensation, for three or more consecutive days or parts of days, or for 10 or more nonconsecutive days in a period of 30 consecutive days.

(j) "Reside" means to stay, sleep or maintain with regularity or temporarily one's person and property in a particular place other than a location where the offender is incarcerated. It shall be presumed that an offender resides at any and all locations where the offender stays, sleeps or maintains the offender's person for three or more consecutive days or parts of days, or for ten or more nonconsecutive days in a period of 30 consecutive days.

(k) "Residence" means a particular and definable place where an individual resides. Nothing in the Kansas offender registration act shall be construed to state that an offender may only have one residence for the purpose of such act.

(l) "Transient" means having no fixed or identifiable residence.

(m) "Law enforcement agency having initial jurisdiction" means the registering law enforcement agency of the county or location of jurisdiction where the offender expects to most often reside upon the offender's discharge, parole or release.

(n) "Registering law enforcement agency" means the sheriff's office or tribal police department responsible for registering an offender.

(o) "Registering entity" means any person, agency or other governmental unit, correctional facility or registering law enforcement agency responsible for obtaining the required information from, and explaining the required registration procedures to, any person required to register pursuant to the Kansas offender registration act. "Registering entity" shall include, but not be limited to, sheriff's offices, tribal police departments and correctional facilities.

(p) "Treatment facility" means any public or private facility or institution providing inpatient mental health, drug or alcohol treatment or counseling, but does not include a hospital, as defined in K.S.A. 65-425, and amendments thereto.

(q) "Correctional facility" means any public or private correctional facility, juvenile detention facility, prison or jail.

(r) "Out-of-state" means: the District of Columbia; any federal, military or tribal jurisdiction, including those within this state; any foreign jurisdiction; or any state or territory within the United States, other than this state.

(s) "Duration of registration" means the length of time during which an offender is required to register for a specified offense or violation.

(t) (1) Notwithstanding any other provision of this section, "offender" shall not include any person who is:

(A) Convicted of unlawful transmission of a visual depiction of a child, as defined in K.S.A. 2016 Supp. 21-5611(a), and amendments thereto, aggravated unlawful transmission of a visual depiction of a child, as defined in K.S.A. 2016 Supp. 21-5611(b), and amendments thereto, or unlawful possession of a visual depiction of a child, as defined in K.S.A. 2016 Supp. 21-5610, and amendments thereto; or

(B) adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a crime defined in subsection (t)(1)(A).

(2) Notwithstanding any other provision of law, a court shall not order any person to register under the Kansas offender registration act for the offenses described in subsection (t)(1).

History: L. 1993, ch. 253, § 18; L. 1994, ch. 107, § 2; L. 1997, ch. 181, § 8; L. 1999, ch. 164, § 29; L. 2001, ch. 208, § 10; L. 2002, ch. 55, § 1; L. 2002, ch. 163, § 6; L. 2003, ch. 123, § 3; L. 2006, ch. 214, § 6; L. 2007, ch. 183, § 1; L. 2008, ch. 74, § 1; L. 2009, ch. 32, § 44; L. 2010, ch. 147, § 8; L. 2011, ch. 95, § 2; L. 2012, ch. 149, § 1; L. 2013, ch. 127, § 1; L. 2014, ch. 117, § 2; L. 2016, ch. 96, § 7; July 1.

Revisor's Note:

Section was also amended by L. 2010, ch. 74, § 11, L. 2010, ch. 122, § 4, and L. 2010, ch. 155, § 9, but those versions were repealed by L. 2010, ch. 147, § 9, and L. 2010, ch. 155, § 26.

Section was amended twice in the 2011 session, see also 22-4902a.

Section was amended twice in the 2013 session, see also 22-4902b.

2016 Kansas Statutes

22-4903. Violation of act; aggravated violation; penalties; new and separate offense; prosecution, venue. [See Revisor's Note] (a) Violation of the Kansas offender registration act is the failure by an offender, as defined in K.S.A. 22-4902, and amendments thereto, to comply with any and all provisions of such act, including any and all duties set forth in K.S.A. 22-4905 through 22-4907, and amendments thereto. Any violation of the Kansas offender registration act which continues for more than 30 consecutive days shall, upon the 31st consecutive day, constitute a new and separate offense, and shall continue to constitute a new and separate offense every 30 days thereafter for as long as the violation continues.

(b) Aggravated violation of the Kansas offender registration act is violation of the Kansas offender registration act which continues for more than 180 consecutive days. Any aggravated violation of the Kansas offender registration act which continues for more than 180 consecutive days shall, upon the 181st consecutive day, constitute a new and separate offense, and shall continue to constitute a new and separate violation of the Kansas offender registration act every 30 days thereafter, or a new and separate aggravated violation of the Kansas offender registration act every 180 days thereafter, for as long as the violation continues.

(c)(1) Except as provided in subsection (c)(3), violation of the Kansas offender registration act is:

(A) Upon a first conviction, a severity level 6 felony;

(B) upon a second conviction, a severity level 5 felony; and

(C) upon a third or subsequent conviction, a severity level 3 felony.

Such violation shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act. If the offender is required to be registered under both a person and nonperson underlying crime, the violation shall be designated as a person crime.

(2) Except as provided in subsection (c)(3), aggravated violation of the Kansas offender registration act is a severity level 3 felony.

Such violation shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act. If the offender is required to be registered under both a person and nonperson underlying crime, the violation shall be designated as a person crime.

(3) Violation of the Kansas offender registration act or aggravated violation of the Kansas offender registration act consisting only of failing to remit payment to the sheriff's office as required in K.S.A. 22-4905(k), and amendments thereto, is:

(A) Except as provided in subsection (c)(3)(B), a class A misdemeanor if, within 15 days of registration, full payment is not remitted to the sheriff's office;

(B) a severity level 9 felony if, within 15 days of the most recent registration, two or more full payments have not been remitted to the sheriff's office.

Such violation shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act. If the offender is required to be registered under both a person and nonperson underlying crime, the violation shall be designated as a person crime.

(d) Prosecution of violations of this section may be held:

(1) In any county in which the offender resides;

(2) in any county in which the offender is required to be registered under the Kansas offender registration act;

(3) in any county in which the offender is located during which time the offender is not in compliance with the Kansas offender registration act; or

(4) in the county in which any conviction or adjudication occurred for which the offender is required to be registered under the Kansas offender registration act.

History: L. 1993, ch. 253, § 19; L. 1999, ch. 164, § 30; L. 2003, ch. 123, § 4; L. 2006, ch. 212, § 20; L. 2007, ch. 183, § 2; L. 2011, ch. 95, § 3; L. 2012, ch. 149, § 2; L. 2013, ch. 127, § 2; L. 2016, ch. 97, § 4; July 1.

Section was amended twice in the 2016 session, see also 22-4903a.

2016 Kansas Statutes

- 22-4904. Registration of offender; duties of court, correctional facility, treatment facility, registering law enforcement agency, Kansas bureau of investigation, attorney general; notification of schools and licensed child care facilities.** (a) (1) At the time of conviction or adjudication for an offense requiring registration as provided in K.S.A. 22-4902, and amendments thereto, the court shall:
- (A) Inform any offender, on the record, of the procedure to register and the requirements of K.S.A. 22-4905, and amendments thereto; and
 - (B) if the offender is released:
 - (i) Complete a notice of duty to register, which shall include title and statute number of conviction or adjudication, date of conviction or adjudication, case number, county of conviction or adjudication, and the following offender information: Name, address, date of birth, social security number, race, ethnicity and gender;
 - (ii) require the offender to read and sign the notice of duty to register, which shall include a statement that the requirements provided in this subsection have been explained to the offender;
 - (iii) order the offender to report within three business days to the registering law enforcement agency in the county or tribal land of conviction or adjudication and to the registering law enforcement agency in any place where the offender resides, maintains employment or attends school, to complete the registration form with all information and any updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto; and
 - (iv) provide one copy of the notice of duty to register to the offender and, within three business days, send a copy of the form to the law enforcement agency having initial jurisdiction and to the Kansas bureau of investigation.
- (2) At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication.
- (3) Upon commitment for control, care and treatment by the Kansas department for aging and disability services pursuant to K.S.A. 59-29a07, and amendments thereto, the court shall notify the registering law enforcement agency of the county where the offender resides during commitment of such offender's commitment. Such notice shall be prepared by the office of the attorney general for transmittal by the court by electronic means, including by fax or e-mail.
- (b) The staff of any correctional facility or the registering law enforcement agency's designee shall:
- (1) At the time of initial custody, register any offender within three business days:
- (A) Inform the offender of the procedure for registration and of the offender's registration requirements as provided in K.S.A. 22-4905, and amendments thereto;
 - (B) complete the registration form with all information and updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto;
 - (C) require the offender to read and sign the registration form, which shall include a statement that the requirements provided in this subsection have been explained to the offender;
 - (D) provide one copy of the form to the offender and, within three business days, send a copy of the form to the Kansas bureau of investigation; and
 - (E) enter all offender information required by the national crime information center into the national sex offender registry system within three business days of completing the registration or electronically submit all information and updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto, within three business days to the Kansas bureau of investigation;
- (2) notify the Kansas bureau of investigation of the incarceration of any offender and of the location or any change in location of the offender while in custody;
- (3) prior to any offender being discharged, paroled, furloughed or released on work or school release that does not require the daily return to a correctional facility:
- (A) Inform the offender of the procedure for registration and of the offender's registration requirements as provided in K.S.A. 22-4905, and amendments thereto;
 - (B) complete the registration form with all information and updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto;
 - (C) require the offender to read and sign the registration form, which shall include a statement that the requirements provided in this subsection have been explained to the offender;
 - (D) photograph the offender's face and any identifying marks;
 - (E) obtain fingerprint and palm prints of the offender; and
 - (F) provide one copy of the form to the offender and, within three business days, send a copy of the form and of the photograph or photographs to the law enforcement agency having initial jurisdiction and to the Kansas bureau of investigation; and
- (4) notify the law enforcement agency having initial jurisdiction and the Kansas bureau of investigation seven business days prior to any offender being discharged, paroled, furloughed or released on work or school release.
- (c) The staff of any treatment facility shall:
- (1) Within three business days of an offender's arrival for inpatient treatment, inform the registering law enforcement agency of the county or location of jurisdiction in which the treatment facility is located of the offender's presence at the treatment facility and the expected duration of the treatment, and immediately notify the registering law enforcement agency of an unauthorized or unexpected absence of the offender during the offender's treatment;
 - (2) inform the registering law enforcement agency of the county or location of jurisdiction in which the treatment facility is located within three business days of an offender's discharge or release; and
 - (3) provide information upon request to any registering law enforcement agency having jurisdiction relevant to determining the presence of an offender within the treatment facility.
- (d) The registering law enforcement agency, upon the reporting of any offender, shall:
- (1) Inform the offender of the duty to register as provided by the Kansas offender registration act;
- (2) (A) explain the procedure for registration and the offender's registration requirements as provided in K.S.A. 22-4905, and amendments thereto;
- (B) obtain the information required for registration as provided in K.S.A. 22-4907, and amendments thereto; and
 - (C) require the offender to read and sign the registration form, which shall include a statement that the requirements provided in this subsection have been explained to the offender;
- (3) complete the registration form with all information and updated information required for registration, as provided in K.S.A. 22-4907, and amendments thereto, each time the offender reports to the registering law enforcement agency. All information and updated information reported by an offender shall be forwarded to the Kansas bureau of investigation within three business days;
 - (4) maintain the original signed registration form, provide one copy of the completed registration form to the offender and, within three business days, send one copy of the completed form to the Kansas bureau of investigation;
 - (5) forward a copy of any certified letter used for reporting pursuant to K.S.A. 22-4905, and amendments thereto, when utilized, within three business days to the Kansas bureau of investigation;
 - (6) obtain registration information from every offender required to register regardless of whether or not the offender remits payment;
 - (7) upon every required reporting, update the photograph or photographs of the offender's face and any new identifying marks and immediately forward copies or electronic files of the photographs to the Kansas bureau of investigation;
 - (8) enter all offender information required by the national crime information center into the national sex offender registry system within three business days of completing the registration or electronically submit all information and updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto, within three business days to the Kansas bureau of investigation;
 - (9) maintain a special fund for the deposit and maintenance of fees paid by offenders. All funds retained by the registering law enforcement agency pursuant to the provisions of this section shall be credited to a special fund of the registering law enforcement agency which shall be used solely for law enforcement and criminal prosecution purposes and which shall not be used as a source of revenue to reduce the amount of funding otherwise made available to the registering law enforcement agency; and
 - (10) forward any initial registration and updated registration information within three business days to any out-of-state jurisdiction where the offender is expected to reside, maintain employment or attend school.
- (e) (1) The Kansas bureau of investigation shall:
- (A) Forward all additions or changes in information to any registering law enforcement agency, other than the agency that submitted the form, where the offender expects to reside, maintain employment or attend school;
 - (B) ensure that offender information is immediately entered in the state registered offender database and the Kansas registered offender

website, as provided in K.S.A. 22-4909, and amendments thereto;

(C) transmit offender conviction or adjudication data, fingerprints and palm prints to the federal bureau of investigation; and
(D) ensure all offender information required by the national crime information center is transmitted into the national sex offender registry system within three business days of such information being electronically submitted to the Kansas bureau of investigation.

(2) The director of the Kansas bureau of investigation may adopt rules and regulations necessary to implement the provisions of the Kansas offender registration act.

(f) The attorney general shall, within 10 business days of an offender being declared a sexually violent predator, forward to the Kansas bureau of investigation all relevant court documentation declaring an offender a sexually violent predator.

(g) The state department of education shall annually notify any school of the Kansas bureau of investigation internet website, and any internet website containing information on the Kansas offender registration act sponsored or created by the registering law enforcement agency of the county or location of jurisdiction in which the school is located, for the purpose of locating offenders who reside near such school. Such notification shall include information that the registering law enforcement agency of the county or location of jurisdiction where such school is located is available to the school to assist in using the registry and providing additional information on registered offenders.

(h) The secretary of health and environment shall annually notify any licensed child care facility of the Kansas bureau of investigation internet website, and any internet website containing information on the Kansas offender registration sponsored or created by the registering law enforcement agency of the county in which the facility is located, for the purpose of locating offenders who reside near such facility. Such notification shall include information that the registering law enforcement agency of the county or location of jurisdiction where such child care facility is located is available to the child care facilities to assist in using the registry and providing additional information on registered offenders.

(i) Upon request, the clerk of any court of record shall provide the Kansas bureau of investigation copies of complaints, indictments, information, journal entries, commitment orders or any other documents necessary to the performance of the duties of the Kansas bureau of investigation under the Kansas offender registration act. No fees or charges for providing such documents may be assessed.

History: L. 1993, ch. 253, § 20; L. 1994, ch. 107, § 3; L. 1996, ch. 224, § 4; L. 1997, ch. 181, § 9; L. 1999, ch. 164, § 31; L. 2000, ch. 150, § 2; L. 2001, ch. 208, § 11; L. 2003, ch. 123, § 5; L. 2006, ch. 214, § 7; L. 2007, ch. 183, § 3; L. 2010, ch. 135, § 35; L. 2011, ch. 95, § 4; L. 2012, ch. 149, § 3; L. 2013, ch. 127, § 3; L. 2016, ch. 64, § 2; July 1.

2016 Kansas Statutes

22-4905. Duties of offender required to register; reporting; updated photograph; fee; driver's license; identification card. Any offender required to register as provided in the Kansas offender registration act shall:

- (a) Except as otherwise provided in this subsection, register in person with the registering law enforcement agency within three business days of coming into 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. Any such offender who cannot physically register in person with the registering law enforcement agency for such reasons including, but not limited to, incapacitation or hospitalization, as determined by a person licensed to practice medicine or surgery, or involuntarily committed pursuant to the Kansas sexually violent predator act, shall be subject to verification requirements other than in-person registration, as determined by the registering law enforcement agency having jurisdiction;
- (b) except as provided further, for any: (1) Sex offender, including a violent offender or drug offender who is also a sex offender, report in person four times each year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment or is attending a school; and (2) violent offender or drug offender, report in person four times each year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment or is attending a school, except that, at the discretion of the registering law enforcement agency, one of the four required reports may be conducted by certified letter. When utilized, the certified letter for reporting shall be sent by the registering law enforcement agency to the reported residence of the offender. The offender shall indicate any changes in information as required for reporting in person. The offender shall respond by returning the certified letter to the registering law enforcement agency within 10 business days by certified mail. The offender shall be required to report to the registering law enforcement agency once during the month of the offender's birthday and every third, sixth and ninth month occurring before and after the month of the offender's birthday. The registering law enforcement agency may determine the appropriate times and days for reporting by the offender, consistent with this subsection. Nothing contained in this subsection shall be construed to alleviate any offender from meeting the requirements prescribed in the Kansas offender registration act;
- (c) provide the information required for registration as provided in K.S.A. 22-4907, and amendments thereto, and verify all information previously provided is accurate;
- (d) if in the custody of a correctional facility, register with the correctional facility within three business days of initial custody and shall not be required to update such registration until discharged, paroled, furloughed or released on work or school release from a correctional facility. A copy of the registration form and any updated registrations for an offender released on work or school release shall be sent, within three business days, to the registering law enforcement agency where the offender is incarcerated, maintains employment or attends school, and to the Kansas bureau of investigation;
- (e) if involuntarily committed pursuant to the Kansas sexually violent predator act, register within three business days of arrival in the county where the offender resides during commitment. The offender shall not be required to update such registration until placed in a reintegration facility, on transitional release or on conditional release. Upon placement in a reintegration facility, on transitional release or on conditional release, the offender shall be personally responsible for complying with the provisions of the Kansas offender registration act;
- (f) notwithstanding subsections (a) and (b), if the offender is transient, report in person to the registering law enforcement agency of such county or location of jurisdiction in which the offender is physically present within three business days of arrival in the county or location of jurisdiction. Such offender shall be required to register in person with the registering law enforcement agency every 30 days, or more often at the discretion of the registering law enforcement agency. Such offender shall comply with the provisions of the Kansas offender registration act and, in addition, shall:
 - (1) Provide a list of places where the offender has slept and otherwise frequented during the period of time since the last date of registration; and
 - (2) provide a list of places where the offender may be contacted and where the offender intends to sleep and otherwise frequent during the period of time prior to the next required date of registration;
- (g) if required by out-of-state law, register in any out-of-state jurisdiction, where the offender resides, maintains employment or attends school;
- (h) register in person upon any commencement, change or termination of residence location, employment status, school attendance or other information as provided in K.S.A. 22-4907, and amendments thereto, within three business days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered and provide written notice to the Kansas bureau of investigation;
- (i) report in person to the registering law enforcement agency or agencies within three business days of any change in name;
- (j) if receiving inpatient treatment at any treatment facility, inform the treatment facility of the offender's status as an offender and inform the registering law enforcement agency of the county or location of jurisdiction in which the treatment facility is located of the offender's presence at the treatment facility and the expected duration of the treatment;
- (k) submit to the taking of an updated photograph by the registering law enforcement agency on each occasion when the offender registers with or reports to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment or attends school. In addition, such offender shall submit to the taking of a photograph to document any changes in identifying characteristics, including, but not limited to, scars, marks and tattoos;
- (l) remit payment to the sheriff's office in the amount of \$20 as part of the reporting process required pursuant to subsection (b) in each county in which the offender resides, maintains employment or is attending school. Registration will be completed regardless of whether or not the offender remits payment. Failure of the offender to remit full payment within 15 days of registration is a violation of the Kansas offender registration act and is subject to prosecution pursuant to K.S.A. 22-4903, and amendments thereto. Notwithstanding other provisions herein, payment of this fee is not required:
 - (1) When an offender provides updates or changes in information or during an initial registration unless such updates, changes or initial registration is during the month of such offender's birthday and every third, sixth and ninth month occurring before and after the month of the offender's birthday;
 - (2) when an offender is transient and is required to register every 30 days, or more frequently as ordered by the registering law enforcement agency, except during the month of the offender's birthday and every third, sixth and ninth month occurring before and after the month of the offender's birthday; or
 - (3) if an offender has, prior to the required reporting and within the last three years, been determined to be indigent by a court of law, and the basis for that finding is recorded by the court;
- (m) annually renew any driver's license pursuant to K.S.A. 8-247, and amendments thereto, and annually renew any identification card pursuant to K.S.A. 2016 Supp. 8-1325a, and amendments thereto;
- (n) if maintaining primary residence in this state, surrender all driver's licenses and identification cards from other states, territories and the District of Columbia, except if the offender is presently serving and maintaining active duty in any branch of the United States military or the offender is an immediate family member of a person presently serving and maintaining active duty in any branch of the United States military;
- (o) read and sign the registration form noting whether the requirements provided in this section have been explained to the offender; and
- (p) report in person to the registering law enforcement agency in the jurisdiction of the offender's residence and provide written notice to the Kansas bureau of investigation 21 days prior to any travel outside of the United States, and provide an itinerary including, but not limited to, destination, means of transport and duration of travel, or if under emergency circumstances, within three business days of making travel arrangements.

History: L. 1993, ch. 253, § 21; L. 1994, ch. 107, § 4; L. 1997, ch. 181, § 10; L. 1999, ch. 164, § 32; L. 2001, ch. 208, § 12; L. 2003, ch. 123, § 6; L. 2006, ch. 214, § 8; L. 2010, ch. 135, § 36; L. 2011, ch. 95, § 5; L. 2012, ch. 149, § 4; L. 2013, ch. 127, § 4; L. 2016, ch. 64, § 3; July 1.

2016 Kansas Statutes

- 22-4906. Time period in which required to register; termination of registration requirement.** (a) (1) Except as provided in subsection (c), if convicted of any of the following offenses, an offender's duration of registration shall be, if confined, 15 years after the date of parole, discharge or release, whichever date is most recent, or, if not confined, 15 years from the date of conviction:
- (A) Sexual battery, as defined in K.S.A. 21-3517, prior to its repeal, or subsection (a) of K.S.A. 2016 Supp. 21-5505, and amendments thereto;
 - (B) adultery, as defined in K.S.A. 21-3507, prior to its repeal, or K.S.A. 2016 Supp. 21-5511, and amendments thereto, when one of the parties involved is less than 18 years of age;
 - (C) patronizing a prostitute, as defined in K.S.A. 21-3515, prior to its repeal, or K.S.A. 2016 Supp. 21-6421, prior to its amendment by section 18 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013, when one of the parties involved is less than 18 years of age;
 - (D) lewd and lascivious behavior, as defined in K.S.A. 21-3508, prior to its repeal, or K.S.A. 2016 Supp. 21-5513, and amendments thereto, when one of the parties involved is less than 18 years of age;
 - (E) capital murder, as defined in K.S.A. 21-3439, prior to its repeal, or K.S.A. 2016 Supp. 21-5401, and amendments thereto;
 - (F) murder in the first degree, as defined in K.S.A. 21-3401, prior to its repeal, or K.S.A. 2016 Supp. 21-5402, and amendments thereto;
 - (G) murder in the second degree, as defined in K.S.A. 21-3402, prior to its repeal, or K.S.A. 2016 Supp. 21-5403, and amendments thereto;
 - (H) voluntary manslaughter, as defined in K.S.A. 21-3403, prior to its repeal, or K.S.A. 2016 Supp. 21-5404, and amendments thereto;
 - (I) involuntary manslaughter, as defined in K.S.A. 21-3404, prior to its repeal, or subsections (a)(1), (a)(2) or (a)(4) of K.S.A. 2016 Supp. 21-5405, and amendments thereto;
 - (J) criminal restraint, as defined in K.S.A. 21-3424, prior to its repeal, or K.S.A. 2016 Supp. 21-5411, and amendments thereto, except by a parent, and only when the victim is less than 18 years of age;
 - (K) any act which has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
 - (L) conviction of any person required by court order to register for an offense not otherwise required as provided in the Kansas offender registration act;
 - (M) conviction 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;
 - (N) unlawful manufacture or attempting such of any controlled substance or controlled substance analog, as defined in K.S.A. 65-4159, prior to its repeal, K.S.A. 2010 Supp. 21-36a03, prior to its transfer, or K.S.A. 2016 Supp. 21-5703, and amendments thereto;
 - (O) possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to manufacture a controlled substance, as defined by subsection (a) of K.S.A. 65-7006, prior to its repeal, subsection (a) of K.S.A. 2010 Supp. 21-36a09, prior to its transfer, or subsection (a) of K.S.A. 2016 Supp. 21-5709, and amendments thereto;
 - (P) K.S.A. 65-4161, prior to its repeal, subsection (a)(1) of K.S.A. 2010 Supp. 21-36a05, prior to its transfer, or subsection (a)(1) of K.S.A. 2016 Supp. 21-5705, and amendments thereto; or
 - (Q) any attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.
- (2) Except as otherwise provided by the Kansas offender registration act, the duration of registration terminates, if not confined, at the expiration of 15 years from the date of conviction. Any period of time during which any offender is incarcerated in any jail or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration.
- (b) (1) Except as provided in subsection (c), if convicted of any of the following offenses, an offender's duration of registration shall be, if confined, 25 years after the date of parole, discharge or release, whichever date is most recent, or, if not confined, 25 years from the date of conviction:
- (A) Criminal sodomy, as defined in subsection (a)(1) of K.S.A. 21-3505, prior to its repeal, or subsection (a)(1) or (a)(2) of K.S.A. 2016 Supp. 21-5504, and amendments thereto, when one of the parties involved is less than 18 years of age;
 - (B) indecent solicitation of a child, as defined in K.S.A. 21-3510, prior to its repeal, or subsection (a) of K.S.A. 2016 Supp. 21-5508, and amendments thereto;
 - (C) electronic solicitation, as defined in K.S.A. 21-3523, prior to its repeal, or K.S.A. 2016 Supp. 21-5509, and amendments thereto;
 - (D) aggravated incest, as defined in K.S.A. 21-3603, prior to its repeal, or subsection (b) of K.S.A. 2016 Supp. 21-5604, and amendments thereto;
 - (E) indecent liberties with a child, as defined in K.S.A. 21-3503, prior to its repeal, or subsection (a) of K.S.A. 2016 Supp. 21-5506, and amendments thereto;
 - (F) unlawful sexual relations, as defined in K.S.A. 21-3520, prior to its repeal, or K.S.A. 2016 Supp. 21-5512, and amendments thereto;
 - (G) sexual exploitation of a child, as defined in K.S.A. 21-3516, prior to its repeal, or K.S.A. 2016 Supp. 21-5510, and amendments thereto, if the victim is 14 or more years of age but less than 18 years of age;
 - (H) aggravated sexual battery, as defined in K.S.A. 21-3518, prior to its repeal, or subsection (b) of K.S.A. 2016 Supp. 21-5505, and amendments thereto;
 - (I) promoting prostitution, as defined in K.S.A. 21-3513, prior to its repeal, or K.S.A. 2016 Supp. 21-6420, prior to its amendment by section 17 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013, if the person selling sexual relations is 14 or more years of age but less than 18 years of age; or
 - (J) any attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.
- (2) Except as otherwise provided by the Kansas offender registration act, the duration of registration terminates, if not confined, at the expiration of 25 years from the date of conviction. Any period of time during which any offender is incarcerated in any jail or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration.
- (c) Upon a second or subsequent conviction of an offense requiring registration, an offender's duration of registration shall be for such offender's lifetime.
- (d) The duration of registration for any offender who has been convicted of any of the following offenses shall be for such offender's lifetime:
- (1) Rape, as defined in K.S.A. 21-3502, prior to its repeal, or K.S.A. 2016 Supp. 21-5503, and amendments thereto;
 - (2) aggravated indecent solicitation of a child, as defined in K.S.A. 21-3511, prior to its repeal, or subsection (b) of K.S.A. 2016 Supp. 21-5508, and amendments thereto;
 - (3) aggravated indecent liberties with a child, as defined in K.S.A. 21-3504, prior to its repeal, or subsection (b) of K.S.A. 2016 Supp. 21-5506, and amendments thereto;
 - (4) criminal sodomy, as defined in subsection (a)(2) or (a)(3) of K.S.A. 21-3505, prior to its repeal, or subsection (a)(3) or (a)(4) of K.S.A. 2016 Supp. 21-5504, and amendments thereto;
 - (5) aggravated criminal sodomy, as defined in K.S.A. 21-3506, prior to its repeal, or subsection (b) of K.S.A. 2016 Supp. 21-5504, and amendments thereto;
 - (6) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or subsection (b) of K.S.A. 2016 Supp. 21-5426, and amendments thereto;
 - (7) sexual exploitation of a child, as defined in K.S.A. 21-3516, prior to its repeal, or K.S.A. 2016 Supp. 21-5510, and amendments thereto, if the victim is less than 14 years of age;
 - (8) promoting prostitution, as defined in K.S.A. 21-3513, prior to its repeal, or K.S.A. 2016 Supp. 21-6420, prior to its amendment by section 17 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013, if the person selling sexual relations is less than 14 years of age;
 - (9) kidnapping, as defined in K.S.A. 21-3420, prior to its repeal, or subsection (a) of K.S.A. 2016 Supp. 21-5408, and amendments thereto;
 - (10) aggravated kidnapping, as defined in K.S.A. 21-3421, prior to its repeal, or subsection (b) of K.S.A. 2016 Supp. 21-5408, and amendments thereto;
 - (11) commercial sexual exploitation of a child, as defined in K.S.A. 2016 Supp. 21-6422, and amendments thereto; or

(12) any attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2016 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

(e) Any person who has been declared a sexually violent predator pursuant to K.S.A. 59-29a01 et seq., and amendments thereto, shall register for such person's lifetime.

(f) Notwithstanding any other provisions of this section, for an offender less than 14 years of age who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902, and amendments thereto, the court shall:

(1) Require registration until such offender reaches 18 years of age, at the expiration of five years from the date of adjudication or, if confined, from release from confinement, whichever date occurs later. Any period of time during which the offender is incarcerated in any jail, juvenile facility or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration;

(2) not require registration if the court, on the record, finds substantial and compelling reasons therefor; or

(3) require registration, but such registration information shall not be open to inspection by the public or posted on any internet website, as provided in K.S.A. 22-4909, and amendments thereto. If the court requires registration but such registration is not open to the public, such offender shall provide a copy of such court order to the registering law enforcement agency at the time of registration. The registering law enforcement agency shall forward a copy of such court order to the Kansas bureau of investigation.

If such offender violates a condition of release during the term of the conditional release, the court may require such offender to register pursuant to paragraph (1).

(g) Notwithstanding any other provisions of this section, for an offender 14 years of age or more who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902, and amendments thereto, and such crime is not an off-grid felony or a felony ranked in severity level 1 of the nondrug grid as provided in K.S.A. 21-4704, prior to its repeal, or K.S.A. 2016 Supp. 21-6804, and amendments thereto, the court shall:

(1) Require registration until such offender reaches 18 years of age, at the expiration of five years from the date of adjudication or, if confined, from release from confinement, whichever date occurs later. Any period of time during which the offender is incarcerated in any jail, juvenile facility or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration;

(2) not require registration if the court, on the record, finds substantial and compelling reasons therefor; or

(3) require registration, but such registration information shall not be open to inspection by the public or posted on any internet website, as provided in K.S.A. 22-4909, and amendments thereto. If the court requires registration but such registration is not open to the public, such offender shall provide a copy of such court order to the registering law enforcement agency at the time of registration. The registering law enforcement agency shall forward a copy of such court order to the Kansas bureau of investigation.

If such offender violates a condition of release during the term of the conditional release, the court may require such offender to register pursuant to paragraph (1).

(h) Notwithstanding any other provisions of this section, an offender 14 years of age or more who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902, and amendments thereto, and such crime is an off-grid felony or a felony ranked in severity level 1 of the nondrug grid as provided in K.S.A. 21-4704, prior to its repeal, or K.S.A. 2016 Supp. 21-6804, and amendments thereto, shall be required to register for such offender's lifetime.

(i) Notwithstanding any other provision of law, if a diversionary agreement or probation order, either adult or juvenile, or a juvenile offender sentencing order, requires registration under the Kansas offender registration act for an offense that would not otherwise require registration as provided in subsection (a)(5) of K.S.A. 22-4902, and amendments thereto, then all provisions of the Kansas offender registration act shall apply, except that the duration of registration shall be controlled by such diversionary agreement, probation order or juvenile offender sentencing order.

(j) The duration of registration does not terminate if the convicted or adjudicated offender again becomes liable to register as provided by the Kansas offender registration act during the required period of registration.

(k) For any person moving to Kansas who has been convicted or adjudicated in an out-of-state court, or who was required to register under an out-of-state law, the duration of registration shall be the length of time required by the out-of-state jurisdiction or by the Kansas offender registration act, whichever length of time is longer. The provisions of this subsection shall apply to convictions or adjudications prior to June 1, 2006, and to persons who moved to Kansas prior to June 1, 2006, and to convictions or adjudications on or after June 1, 2006, and to persons who moved to Kansas on or after June 1, 2006.

(l) For any person residing, maintaining employment or attending school in this state who has been convicted or adjudicated by an out-of-state court of an offense that is comparable to any crime requiring registration pursuant to the Kansas offender registration act, but who was not required to register in the jurisdiction of conviction or adjudication, the duration of registration shall be the duration required for the comparable offense pursuant to the Kansas offender registration act.

History: L. 1993, ch. 253, § 22; L. 1994, ch. 107, § 5; L. 1997, ch. 181, § 11; L. 1999, ch. 164, § 33; L. 2001, ch. 208, § 13; L. 2002, ch. 55, § 2; L. 2005, ch. 202, § 1; L. 2006, ch. 214, § 9; L. 2007, ch. 183, § 4; L. 2010, ch. 66, § 1; L. 2010, ch. 155, § 10; L. 2011, ch. 95, § 6; L. 2012, ch. 149, § 5; L. 2013, ch. 127, § 5; L. 2014, ch. 117, § 3; July 1.

Revisor's Note:

Section was also amended by L. 2010, ch. 122, § 5, but that version was repealed by L. 2010, ch. 155, § 26.

Section was amended twice in the 2011 session, see also 22-4906a.

Section was amended twice in the 2013 session, see also 22-4906b.

2016 Kansas Statutes

22-4907. Information required in registration. (a) Registration as required by the Kansas offender registration act shall consist of a form approved by the Kansas bureau of investigation, which shall include a statement that the requirements provided in this section have been reviewed and explained to the offender, and shall be signed by the offender and, except when such reporting is conducted by certified letter as provided in subsection (b) of K.S.A. 22-4905, and amendments thereto, witnessed by the person registering the offender. Such registration form shall include the following offender information:

- (1) Name and all alias names;
 - (2) date and city, state and country of birth, and any alias dates or places of birth;
 - (3) title and statute number of each offense or offenses committed, date of each conviction or adjudication and court case numbers for each conviction or adjudication;
 - (4) city, county, state or country of conviction or adjudication;
 - (5) sex and date of birth or purported age of each victim of all offenses requiring registration;
 - (6) current residential address, any anticipated future residence and any temporary lodging information including, but not limited to, address, telephone number and dates of travel for any place in which the offender is staying for seven or more days; and, if transient, the locations where the offender has stayed and frequented since last reporting for registration;
 - (7) all telephone numbers at which the offender may be contacted including, but not limited to, all mobile telephone numbers;
 - (8) social security number, and all alias social security numbers;
 - (9) identifying characteristics such as race, ethnicity, skin tone, sex, age, height, weight, hair and eye color, scars, tattoos and blood type;
 - (10) occupation and name, address or addresses and telephone number of employer or employers, and name of any anticipated employer and place of employment;
 - (11) all current driver's licenses or identification cards, including a photocopy of all such driver's licenses or identification cards and their numbers, states of issuance and expiration dates;
 - (12) all vehicle information, including the license plate number, registration number and any other identifier and description of any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept;
 - (13) license plate number, registration number or other identifier and description of any aircraft or watercraft owned or operated by the offender, and information concerning the location or locations such aircraft or watercraft are habitually parked, docked or otherwise kept;
 - (14) all professional licenses, designations and certifications;
 - (15) documentation of any treatment received for a mental abnormality or personality disorder of the offender; for purposes of documenting the treatment received, registering law enforcement agencies, correctional facility officials, treatment facility officials and courts may rely on information that is readily available to them from existing records and the offender;
 - (16) a photograph or photographs;
 - (17) fingerprints and palm prints;
 - (18) any and all schools and satellite schools attended or expected to be attended and the locations of attendance and telephone number;
 - (19) any and all: E-mail addresses; online identities used by the offender on the internet; information relating to membership in any and all personal web pages or online social networks; and internet screen names;
 - (20) all travel and immigration documents; and
 - (21) name and telephone number of the offender's probation, parole or community corrections officer.
- (b) The offender shall provide biological samples for DNA analysis to the registering law enforcement agency as required by K.S.A. 21-2511, and amendments thereto. The biological samples shall be in the form using a DNA databank kit authorized by the Kansas bureau of investigation. The registering law enforcement agency shall forward such biological samples to the Kansas bureau of investigation. Prior to taking such sample, the registering law enforcement agency shall search the Kansas criminal justice information system to determine if such person's DNA profile is currently on file. If such person's DNA profile is on file with the Kansas bureau of investigation, the registering law enforcement agency is not required to take biological samples.

History: L. 1993, ch. 253, § 23; L. 1996, ch. 224, § 5; L. 1997, ch. 181, § 12; L. 2001, ch. 208, § 14; L. 2007, ch. 183, § 5; L. 2010, ch. 135, § 37; L. 2011, ch. 95, § 7; L. 2012, ch. 149, § 6; L. 2013, ch. 127, § 6; July 1.

2016 Kansas Statutes

22-4908. Person required to register shall not be relieved of further registration. No person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act. This section shall include any person with any out-of-state conviction or adjudication for an offense that would require registration under the laws of this state.

History: L. 1993, ch. 253, § 24; L. 1994, ch. 107, § 6; L. 1997, ch. 181, § 13; L. 1999, ch. 164, § 34; L. 2001, ch. 208, § 15; L. 2011, ch. 95, § 8; L. 2012, ch. 149, § 7; July 1.

Section was not amended in the 2012 session.

2016 Kansas Statutes

22-4909. Information subject to open records act; website posting; exceptions; nondisclosure of certain information. (a) Except as prohibited by subsections (c), (d), (e) and (f) of this section and subsections (f) and (g) of K.S.A. 22-4906, and amendments thereto, the statements or any other information required by the Kansas offender registration act shall be open to inspection by the public at the registering law enforcement agency, at the headquarters of the Kansas bureau of investigation and on any internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation that contains such statements or information, and specifically are subject to the provisions of the Kansas open records act, K.S.A. 45-215 et seq., and amendments thereto.

(b) Any information posted on an internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation shall identify, in a prominent manner, whether an offender is a sex offender, a violent offender or a drug offender. Such internet websites shall include the following information for each offender:

- (1) Name of the offender, including any aliases;
 - (2) address of each residence at which the offender resides or will reside and, if the offender does not have any present or expected residence address, other information about where the offender has their home or habitually lives. If current information of this type is not available because the offender is in violation of the requirement to register or cannot be located, the website must so note;
 - (3) temporary lodging information;
 - (4) address of any place where the offender is a student or will be a student;
 - (5) license plate number and a description of any vehicle owned or operated by the offender, including any aircraft or watercraft;
 - (6) physical description of the offender;
 - (7) the offense or offenses for which the offender is registered and any other offense for which the offender has been convicted or adjudicated;
 - (8) a current photograph of the offender; and
 - (9) all professional licenses, designations and certifications.
- (c) Notwithstanding subsection (a), information posted on an internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation shall not contain the address of any place where the offender is an employee or any other information about where the offender works. Such internet website shall contain a statement that employment information is publicly available and may be obtained by contacting the appropriate registering law enforcement agency or by signing up for community notification through the official website of the Kansas bureau of investigation.
- (d) Notwithstanding subsection (a), pursuant to a court finding petitioned by the prosecutor, any offender who is required to register pursuant to the Kansas offender registration act, but has been provided a new identity and relocated under the federal witness security program or who has worked as a confidential informant, or is otherwise a protected witness, shall be required to register pursuant to the Kansas offender registration act, but shall not be subject to public registration.
- (e) Notwithstanding subsection (a), when a court orders expungement of a conviction or adjudication that requires an offender to register pursuant to the Kansas offender registration act, the registration requirement for such conviction or adjudication does not terminate. Such offender shall be required to continue registering pursuant to the Kansas offender registration act, but shall not be subject to public registration. If a court orders expungement of a conviction or adjudication that requires an offender to register pursuant to the Kansas offender registration act, and the offender has any other conviction or adjudication that requires registration, such offender shall be required to register pursuant to the Kansas offender registration act, and the registration for such other conviction or adjudication shall be open to inspection by the public and shall be subject to the provisions of subsection (a), unless such registration has been ordered restricted pursuant to subsection (f) or (g) of K.S.A. 22-4906, and amendments thereto.
- (f) Notwithstanding subsection (a), the following information shall not be disclosed other than to law enforcement agencies:
- (1) The name, address, telephone number or any other information which specifically and individually identifies the identity of any victim of a registerable offense;
 - (2) the social security number of the offender;
 - (3) the offender's criminal history arrests that did not result in convictions or adjudications;
 - (4) travel and immigration document numbers of the offender; and
 - (5) internet identifiers of the offender.

History: L. 1993, ch. 253, § 25; L. 1994, ch. 107, § 7; L. 1997, ch. 181, § 14; L. 2001, ch. 208, § 16; L. 2005, ch. 202, § 2; L. 2006, ch. 214, § 10; L. 2011, ch. 95, § 9; L. 2012, ch. 149, § 8; July 1.

2016 Kansas Statutes

22-4911. Cause of action; not created. Nothing in the Kansas offender registration act shall create a cause of action against the state or an employee of the state acting within the scope of the employee's employment as a result of requiring an offender to register or an offender's failure to register. This includes, but is not limited to, the person or persons assigned to a registering law enforcement agency to register offenders, and the person or persons assigned to enter all offender information required by the national crime information center into the national sex offender registry system.

History: L. 1999, ch. 164, § 36; L. 2011, ch. 95, § 10; July 1.

2016 Kansas Statutes

22-4913. Offender residency restrictions; prohibition from adopting or enforcing; exceptions; definitions. (a) Except as provided in subsection (b), on and after June 1, 2006, cities and counties shall be prohibited from adopting or enforcing any ordinance, resolution or regulation establishing residential restrictions for offenders as defined by K.S.A. 22-4902, and amendments thereto.

(b) The prohibition in subsection (a), shall not apply to any city or county residential licensing or zoning program for correctional placement residences that includes regulations for the housing of such offenders.

(c) As used in this section, "correctional placement residence" means a facility that provides residential services for individuals or offenders who reside or have been placed in such facility due to any one of the following situations:

- (1) Prior to, or instead of, being sentenced to prison;
- (2) as a conditional release prior to a hearing;
- (3) as a part of a sentence of confinement of not more than one year;
- (4) in a privately operated facility housing parolees;
- (5) as a deferred sentence when placed in a facility operated by community corrections;
- (6) as a requirement of court-ordered treatment services for alcohol or drug abuse; or
- (7) as part of voluntary treatment services for alcohol or drug abuse.

Correctional placement residence shall not include a single or multi-family dwelling or commercial residential building that provides a residence to staff and persons other than those described in paragraphs (1) through (7).

History: L. 2006, ch. 214, § 2; L. 2008, ch. 57, § 1; L. 2011, ch. 95, § 11; July 1.