

No.

IN THE SUPREME COURT OF THE UNITED STATES

STEVE MEREDITH, BARBARA HILL, JOSEPH DONALDSON, KEVIN
HIRSCHBERG, BRYAN BROWN, DJUAN RICHARDSON, WILLIE
SCUDERI, and THOMAS BURDICK, 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. Meredith*, decided August 4, 2017
- Appendix B – Kansas Court of Appeals decision in *State v. Meredith*, decided July 11, 2014
- Appendix C – Kansas Supreme Court order in *State v Meredith* denying motion for rehearing, decided October 2, 2017

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- Appendix Y -- Kansas Supreme Court decision in *State v. Simmons*, decided December 1, 2017
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- Appendix AA -- K.S.A. 2011 Supp. 22-4906 et seq. (Kansas Offender Registration Act)

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 110,520

STATE OF KANSAS,
Appellee,

v.

STEVEN MEREDITH,
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Review of the judgment of the Court of Appeals in an unpublished opinion filed July 11, 2014. Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed August 4, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed and remanded with directions.

Kai Tate Mann, of Kansas Appellate Defender Office, argued the cause, and *Adam D. Stolte*, of the same office, was with him on the briefs for appellant.

Bethany C. Fields, deputy county attorney, argued the cause and *Barry Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: When Steven Meredith committed his qualifying drug offense, the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, required him to register for 10 years. However, the 2011 KORA amendments extended Meredith's registration period to 15 years. For the first time on appeal, Meredith argues that any retroactive imposition of the 15-year registration period violates the Ex Post Facto Clause of the United States Constitution. But the Ex Post Facto Clause is implicated only when *punishment* is retroactively imposed. We hold that the legislature intended KORA to be a civil, nonpunitive remedial scheme, and Meredith has failed to demonstrate by the clearest proof that KORA's effects on drug offenders are sufficient to overcome the legislature's nonpunitive intent. Therefore, we conclude that the current 15-year KORA registration period applies to Meredith. Accordingly, we affirm and remand for correction of the 2013 nunc pro tunc journal entry of judgment that states otherwise.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2009, Meredith pled no contest to possession of methamphetamine with intent to distribute in violation of K.S.A. 2008 Supp. 65-4161(a). At the time Meredith committed the offense, KORA required him to register as an offender for 10 years. See K.S.A. 22-4902(a)(11)(C); K.S.A. 22-4906(a)(1). The district court sentenced Meredith to 24 months' probation and imposed an underlying 30-month prison sentence.

Although the court did not inform Meredith of his duty to register as a drug offender at the plea hearing or sentencing, the 2009 journal entry of judgment stated that Meredith was required to register. However, the journal entry erroneously stated that Meredith violated K.S.A. 65-4159 or K.S.A. 65-7006 and "such manufacture or possession was for personal use." The offender registration supplement attached to the

journal entry showed that Meredith was required to register, but the second page—which would specify the length of registration—is missing from the record on appeal. Thus, the court did not pronounce—and the journal entry did not specify—the number of years Meredith was required to register.

Over the next few years, Meredith struggled to successfully complete his probation. On May 21, 2012, the court terminated Meredith's probation when it discovered that Meredith had tested positive for methamphetamine. The court did not reference Meredith's KORA registration requirement in either open court or in the probation revocation journal entry of judgment.

On February 15, 2013, Meredith moved through counsel "for clarification on the status of the defendant's need to register." In the motion, Meredith noted that he was not informed of any duty to register at the time of his conviction or sentencing. Upon his release from prison in 2012, however, the Department of Corrections ordered Meredith to register. According to the motion, Meredith had since registered. The motion did not assert an ex post facto violation but simply asked the court to "hold a hearing on the matter for final determination." The 2011 KORA amendments had purportedly increased Meredith's registration period to 15 years. See K.S.A. 2011 Supp. 22-4906(a).

On June 4, 2013, the district court held a hearing on Meredith's motion. Defense counsel began the hearing by asking: "I just have two questions to ask the Court: 1.) Whether or not Mr. Meredith should have to register; and 2.) If he does have to register, under which rule should he be registering?" Regarding the first question, the court reviewed the transcript from the plea hearing and concluded it did not make a finding that the possession was for Meredith's personal use. Thus, the court rejected this rationale for not applying KORA.

Regarding the second question, defense counsel argued:

"Just to clarify for Mr. Meredith, since he was convicted in 2008, and sentencing journal entry reflect that, at the time, I believe he had to register for 10 years as a drug offender But we're looking now, five years later, once he's finally notified he has to register, and he's been in compliance since January of this year. Which rules would apply to him? He would ask that the 2008 ones apply."

The court ultimately concluded that "the current laws all apply, and there is a three-day window for him reporting most changes in his life. And for the timeframe, 15 years applies." The court ordered that a nunc pro tunc order be prepared to correct the error in the 2009 journal entry of judgment that Meredith was convicted of K.S.A. 65-4159 or K.S.A. 65-7006. The court further found that Meredith was subject to KORA's requirements and the current version of the Act applied.

The district court then filed the 2013 nunc pro tunc entry of judgment, which fixed the error in the original entry but erroneously stated that Meredith's registration period was for 10 years rather than 15 years. Meredith appealed from the June 4, 2013, decision, arguing for the first time that retroactively imposing the increased registration period of 15 years on him violates the Ex Post Facto Clause.

The Court of Appeals affirmed, first holding that the ex post facto claim was procedurally barred because Meredith's counsel did not raise the issue before the district court. The court also affirmed the case on the merits, holding that the current version of KORA does not violate the Ex Post Facto Clause. Lastly, the court remanded the case to the district court to correct the length of registration error through a nunc pro tunc journal entry. *State v. Meredith*, No. 110,520, 2014 WL 3397182, at *4 (Kan. App. 2014) (unpublished opinion).

We granted Meredith's petition for review.

ANALYSIS

As the Court of Appeals noted, Meredith's ex post facto claim is unpreserved because he failed to raise it in district court. See, e.g., *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) (generally, "alleged constitutional violations cannot be raised for the first time on appeal"). Furthermore, Meredith has failed to cite a preservation exception on appeal. See 301 Kan. at 1043 ("an exception must be invoked by the party asserting the claim for the first time on appeal"); Supreme Court Rule 6.02(a)(5) (2017 Kan. S. Ct. R. 34). However, Meredith filed his brief before we cautioned in *State v. Williams*, 298 Kan. 1075, 319 P.3d 528 (2014), that "[f]uture litigants should consider this a warning and comply with Rule 6.02(a)(5) by explaining why an issue is properly before the court if it was not raised below—or risk a ruling that an issue improperly briefed will be deemed waived or abandoned." 298 Kan. at 1085. As such, we will afford Meredith the benefit of an exception. *State v. Swint*, 302 Kan. 326, 335, 352 P.3d 1014 (2015).

Meredith argues that retroactive imposition of KORA's 15-year registration period on him—as a drug offender—violates the Ex Post Facto Clause. We recently resolved analogous questions in the context of sex offender registration. In *State v. Petersen-Beard*, 304 Kan. 192, Syl. ¶¶ 1-2, 377 P.3d 1127, cert. denied 137 S. Ct. 226 (2016), we concluded that lifetime sex offender registration does not constitute "punishment" for purposes of applying the federal Constitution and therefore could not violate federal or state constitutional prohibitions against cruel and unusual *punishment*. In so holding, we recognized that "if KORA's lifetime sex offender registration requirement is punishment for either ex post facto or double jeopardy purposes, it must necessarily also be punishment for Eighth Amendment purposes. The reverse would likewise be true." 304

Kan. at 196. In *State v. Reed*, 306 Kan. ____, ____ P.3d ____ (No. 110,277, this day decided), slip op. at 8, we explicitly extended the *Petersen-Beard* holding from an Eighth Amendment context to an ex post facto context. That is, KORA registration for sex offenders is not punishment and, therefore, retroactive application of KORA's tolling provision in K.S.A. 22-4906(b) to sex offenders does not violate the Ex Post Facto Clause. 306 Kan. at ____, slip op. at 8.

Meredith asks us to deviate from the course we charted in *Petersen-Beard* and *Reed* and hold that KORA registration *is*, in its effect, punishment for the class of offenders to which he belongs—drug offenders. However, the record in this case is insufficiently developed for Meredith to persuasively argue KORA's allegedly punitive effects on drug offenders as a class separate and distinct from sex offenders. Because Meredith has failed to meet his burden, we affirm.

"The constitutionality of a statute is a question of law over which this court exercises plenary review." *Petersen-Beard*, 304 Kan. at 194. We begin with the presumption that KORA is constitutional. As we stated in *Petersen-Beard*:

"'We presume statutes are constitutional and must resolve all doubts in favor of a statute's validity.' *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014). 'It is not the duty of this court to criticize the legislature or to substitute its view on economic or social policy; it is the duty of this court to safeguard the constitution.' *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 562, 186 P.3d 183 (2008)." 304 Kan. at 194.

Article I, § 10 of the federal Constitution states: "No State shall . . . pass any . . . ex post facto Law." Any statute "which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as *ex post facto*." *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925); see *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L. Ed. 162 (1810) ("An *ex post facto* law is one which renders an act

punishable in a manner in which it was not punishable when it was committed."). "[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [Citations omitted.]" *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). The retroactive increase in the severity of punishment may violate the Ex Post Facto Clause. *State v. Cook*, 286 Kan. 766, 771, 187 P.3d 1283 (2008).

In *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the United States Supreme Court summarized and restated the well-established "intent-effects test" to determine whether a statutory scheme is punishment for ex post facto purposes:

"We must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil.'" *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-249 (1980)). Because we 'ordinarily defer to the legislature's stated intent,' *Hendricks, supra*, at 361, "'only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' [citations omitted]."

If the legislature's intent is nonpunitive, courts must evaluate the actual effect of the act in question using the seven factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). In so doing, the court must decide whether those effects furnish the "clearest proof" that the scheme is punitive

despite the legislature's intent. *Smith*, 538 U.S. at 92; *Petersen-Beard*, 304 Kan. at 195. The *Mendoza-Martinez* factors are:

"Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." 372 U.S. at 168-69.

We have repeatedly held that the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme. In *State v. Myers*, 260 Kan. 669, 681, 923 P.2d 1024 (1996), we concluded that the legislative history of KORA's predecessor, the Kansas Sex Offender Registration Act (KSORA), revealed a nonpunitive public safety purpose. In *Doe v. Thompson*, 304 Kan. 291, 317, 373 P.3d 750 (2016), *overruled by Petersen-Beard*, 304 Kan. 192, we determined that KORA's intent was nonpunitive because "*Myers* found a nonpunitive purpose of public safety in the legislative history of KSORA" and the defendant "points us to no subsequent legislative history that would lead us to overturn *Myers*' holding on the intent portion of the analysis." *Petersen-Beard* did not disturb this holding and affirmed that the legislature intended lifetime sex offender registration to be nonpunitive. 304 Kan. at 195.

Likewise here, no subsequent legislative history leads us to deviate from these holdings, which remain compelling for the classes of non-sex offenders identified in the current iteration of KORA—drug and violent offenders. Accordingly, we hold that the legislature intended KORA registration for all classes of offenders to be civil and nonpunitive.

Thus, "[b]ecause the legislature did not intend for KORA's lifetime sex offender registration scheme to be punishment, we must next turn to the effect of those provisions to determine whether, by 'the clearest proof,' those effects 'override legislative intent.'" *Petersen-Beard*, 304 Kan. at 195 (quoting *Smith*, 538 U.S. at 92). In light of *Petersen-Beard* and *Reed*, the precise question before us is whether there is any reason in fact or law to treat the three classes of offenders—sex, drug, and violent—differently during the effects analysis. We have already held—after a full consideration of the available facts presented in the *Thompson/Petersen-Beard* line of cases—that there is insufficient proof of the punitive effects of KORA on the class of sex offenders to override the nonpunitive legislative intent. Therefore, any member of a non-sex offender class subject to KORA must demonstrate conclusively that the act as applied to a non-sex offender has a significantly different *effect*—*i.e.*, it is punitive. Here, Meredith fails to demonstrate that significantly different effect.

Instead, Meredith presents essentially the same arguments we considered and rejected in *Petersen-Beard* without drawing a material distinction between drug and sex offenders that would persuade us that KORA has a punitive effect on drug offenders. He argues broadly that drug offenders present less public safety risk than sex offenders, making KORA registration more burdensome for drug offenders. But, the record is not factually developed to support such sweeping assertions—perhaps because the issue is only raised for the first time on appeal.

Similarly, in *Smith*, the Supreme Court rejected the lower courts' conclusion that the Alaska sex offender registration scheme would make offenders completely unemployable, stating: "This is conjecture. . . . The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords." 538 U.S. at 100. Without a factual

record before us, we likewise cannot accept Meredith's speculative arguments as "clear proof" that his obligation to register under KORA is punitive.

An analysis of the *Mendoza-Martinez* 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. Indeed, in *Smith* the Supreme Court relied in part for its holding on social science data concerning recidivism and public safety. 538 U.S. at 105. We do not have access to similar data concerning drug or violent offenders in the record as it has been presented to us.

As such, we cannot conduct a full and fair analysis using the *Mendoza-Martinez* factors in the instant case because Meredith produced no factual record and made no arguments below concerning KORA's punitive effects on drug offenders as a class distinct from sex offenders. In the absence of such a record, we are obligated to conclude that Meredith has failed to demonstrate by the clearest proof that KORA registration has a punitive effect on drug offenders. Therefore, we affirm that Meredith is subject to the current 15-year registration requirement and remand for correction of the 2013 nunc pro tunc journal entry of judgment to reflect this.

Our holding today does not fully foreclose future ex post facto challenges to KORA registration for non-sex offenders. But, we emphasize that non-sex offenders who hope to satisfy the *Mendoza-Martinez* factors must produce a record that distinguishes—by the "clearest proof"—the effects of KORA on those classes of offenders from the Act's effects on sex offenders as a class.

Affirmed and remanded.

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

In the four Kansas Offender Registration Act cases argued before *State v. Petersen-Beard*, 304 Kan. 192, 194, 377 P.3d 1127 (2016)—that is, in *State v. Redmond*, 304 Kan. 283, 371 P.3d 900 (2016); *State v. Buser*, 304 Kan. 181, 371 P.3d 886 (2016); and *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016), all of which dealt with sex offenders and application of the federal Ex Post Facto Clause, and in *State v. Charles*, 304 Kan. 158, 372 P.3d 1109 (2016), which dealt with a violent offender and the necessity that a jury find all facts necessary for imposition of certain punishments under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)—I agreed with three of my colleagues that Kansas' offender registration requirement constitutes punishment.

I would have extended the holdings of those four cases in *Petersen-Beard*, which asked whether the requirement of offender registration constituted not only punishment but also cruel and unusual punishment under the Eighth Amendment. I therefore joined Justice Lee A. Johnson's dissent in *Petersen-Beard*, explicitly agreeing with the result he would have reached and implicitly agreeing with all of the merits-based arguments Justice Johnson advanced to support his result. *Petersen-Beard*, 304 Kan. at 211-25 (Johnson, J., dissenting).

I decline to change course today. 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. Defendant Steven Meredith has met any burden of proof that he bears on this point, and his term of registration could not be extended by legislative action after its original imposition by the district judge. Its 5-year extension by application of the 2011 amendments to KORA violated the Ex Post Facto Clause.

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

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 110,520

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

STEVEN MEREDITH,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed July 11, 2014. Affirmed and remanded with directions.

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

Bethany C. Fields, deputy county attorney, *Barry Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, P.J., BUSER and SCHROEDER, JJ.

Per Curiam: The district court ordered Steven Meredith to register as a drug offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.* See K.S.A. 22-4902(a). Meredith appeals, contending KORA "has become so burdensome that retroactive imposition of current registration requirements violates the Ex Post Facto [C]lause of the United States and Kansas Constitutions." We affirm the district court's registration order which requires a 15-year registration period. We remand for correction of the journal entry nunc pro tunc.

FACTUAL AND PROCEDURAL BACKGROUND

On April 27, 2009, Meredith pled no contest and was found guilty of conspiracy to distribute methamphetamine in violation of K.S.A. 65-4161 and K.S.A. 21-3302. The offense date of this conviction was May 15, 2008. On July 13, 2009, District Judge Paul Miller sentenced Meredith to 30 months' incarceration but granted probation. At the sentencing, the district court did not order Meredith to register under KORA.

On July 28, 2009, the district court filed its journal entry of judgment. The journal entry showed Meredith had violated K.S.A. 65-4161, but with regard to registration it indicated he had violated both that statute and K.S.A. 65-4159. A box was checked on the offender registration supplement showing that Meredith was required to register for a drug conviction. But the additional page of the supplement, which would typically show the length of the registration, was not attached.

Subsequently, the State moved to revoke Meredith's probation. On November 30, 2009, Meredith stipulated to violating his probation. The district court sanctioned Meredith by imposing 60 days in the county jail and stated that it would attempt to arrange for inpatient treatment for him.

At some point—the record is unclear—Meredith was in the custody of the Kansas Department of Corrections due to another criminal case. On May 9, 2011, while still in prison, Meredith moved through counsel "to reconsider the sentence imposed at the time of probation revocation and to consider a lesser sentence" in the present case. No transcript is in the record, but apparently a hearing was held, and on June 20, 2011, the district court "modifie[d] sanction ordered and orders the release of [Meredith]." The district court also ordered "that [probation] be reinstated with original terms and conditions and costs."

On July 1, 2011, the State moved to modify Meredith's probation by extending it. The district court extended Meredith's probation for 1 year or "until all obligations are completed in full."

The State again moved to revoke Meredith's probation on February 3, 2012. Meredith stipulated to the violations and his probation was revoked on May 21, 2012.

On May 31, 2012, the district court filed the journal entry of judgment from the latest revocation hearing. The district court imposed the original 30-month sentence of imprisonment but the journal entry of judgment did not refer to a registration requirement under KORA.

On February 15, 2013, Meredith's counsel filed a motion with the district court "for clarification on the status of the defendant's need to register." She alleged Meredith had been released from imprisonment, and that "upon his release was ordered by [the Department of Corrections] to register as a drug offender. He has since been registering." Defense counsel asked for a hearing "on the matter for final determination."

On June 4, 2013, the parties, including Meredith, appeared for a hearing before Judge John F. Bosch. Meredith's counsel stated, "I just have two questions to ask the Court: 1.) Whether or not Mr. Meredith should have to register; and 2.) If he does have to register, under which rule should he be registering under?" After considerable discussion, the district court answered the questions by stating that Meredith would have to register, and he would have to do so for 15 years.

Meredith filed a notice of appeal from all adverse rulings, including "the rulings on June 4, 2013 requiring him to register under KORA . . . and that the current iteration of KORA applies."

On June 10, 2013, the district court filed a journal entry stating Meredith "was convicted of a violation of K.S.A. 65-4161; therefore, he is subject to the KORA." It also determined that "[a]lthough the Defendant was not informed at the time of sentencing, he is subject to KORA and must register." Finally, the district court ordered that Meredith must "follow the KORA rules that are in effect at the present time." The district court, however, did not specify the actual length of the registration period that applied to Meredith.

That same day, the district court filed its journal entry of judgment nunc pro tunc. This document showed the proper crime of conviction, K.S.A. 65-4161, but it attached a completed offender registration supplement showing Meredith should register for 10 years, not for 15 years as stated in open court.

DID THE KORA REGISTRATION ORDER VIOLATE THE EX POST FACTO CLAUSE?

Meredith predicates his appeal on two key facts. First, Meredith observes that his plea to conspiracy to distribute methamphetamine occurred on May 15, 2008, and that at the time of the offense, the legislature mandated registration for a 10-year period. Second, Meredith notes that subsequent amendments to the KORA statute (which were in effect at the time of Judge Bosch's June 4, 2013, order) required individuals convicted of conspiracy to distribute methamphetamine to register for 15 years. From this factual basis, Meredith contends that "[r]etroactively imposing this increased registration period on Mr. Meredith violates the Ex Post Facto Clause of the United States Constitution."

Preliminarily, as noted by the State, this constitutional issue is being raised for the first time on appeal. Although in his brief Meredith claims he "asked the district court to clarify whether his requirement to register under the [KORA] violated the [E]x [P]ost [F]acto [C]lause of the United States Constitution," our review of Meredith's pleadings and argument reveal that no such constitutional argument was ever presented to the

district court. At the very most, Meredith's counsel asked Judge Bosch, "Which rules apply to [Meredith]? He would ask that the 2008 ones apply. But ask the Court to make the determination of which rules to apply regarding KORA."

Meredith's failure to raise the Ex Post Facto issue in the district court is consequential. "[C]onstitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review." *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012) Although there are exceptions to this general rule, Supreme Court Rule 6.02(a)(5) (2013 Kan. Ct. R. Annot. 39) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. See *State v. Breeden*, 297 Kan. 567, Syl. ¶ 2, 304 P.3d 660 (2013) (declining to consider issue for this reason). Meredith has made no argument why the Ex Post Facto issue should be considered exceptional and, therefore, appropriate for appellate review. Accordingly, we affirm the district court's ruling because Meredith's issue is procedurally barred on appeal.

We also affirm the district court's ruling on the merits. "Two elements must be present for a criminal or penal law to be ex post facto: It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *State v. Cook*, 286 Kan. 766, Syl. ¶ 3, 187 P.3d 1283 (2008). "Not only the retroactive criminalization of an act but also the retroactive increase in the severity of punishment may violate ex post facto prohibitions." 286 Kan. 766, Syl. ¶ 4. Our court exercises unlimited review of these constitutional matters. See *Martin v. Kansas Parole Board*, 292 Kan. 336, 342, 255 P.3d 9 (2011).

It is undisputed by the parties that 10 years was the registration period at the time Meredith committed his violation of K.S.A. 65-4161. See K.S.A. 22-4906(a)(1). It is similarly undisputed that 15 years is the current registration period. See K.S.A. 2013 Supp. 22-4906(a)(1)(N) and (Q).

We conclude the current version of KORA which provides for a 15-year registration period does not violate the Ex Post Facto Clause because "the registration requirement is not punishment." *State v. Evans*, 44 Kan. App. 2d 945, 948, 242 P.3d 220 (2010). This is in distinction to "an increase in the period of parole or postrelease supervision," which is "undeniably part of the sentence imposed." *Martin*, 292 Kan. at 343. So while "[a]n increase in the period of parole or postrelease supervision constitutes an increase in punishment for ex post facto purposes," that is not the case with registration. 292 Kan. 336, Syl. ¶ 1.

On appeal, Meredith attempts to show KORA also is punishment, but he does not cite *Evans*, where our court held that KORA does not implicate the Ex Post Facto Clause. 44 Kan. App. 2d at 948. Meredith does cite *State v. Unrein*, 47 Kan. App. 2d 366, 372, 274 P.3d 691 (2012), *rev. denied* 297 Kan. 1256 (2013), where our court held a sentencing court could order registration based on a finding not submitted to the jury—once again, because KORA is not punishment. Meredith argues our "reasoning" in *Unrein* "is flawed," but this court relied on *Smith v. Doe*, 538 U.S. 84, 99, 123 S. Ct. 1140, 155 L. Ed. 2d 164, *reh. denied* 538 U.S. 1009 (2003), where the United States Supreme Court held that Alaska's sex offender registration (which is similar to KORA) was not punishment for ex post facto purposes. *Unrein*, 47 Kan. App. 2d at 371-72.

Meredith also attempts to distinguish the current version of KORA from the registration scheme considered in *Smith* based on evidence such as data from websites and published articles. But none of this material is in the record on appeal because Meredith did not raise the ex post facto argument in the district court. The record is simply inadequate for review on this point. See *State v. McCullough*, 293 Kan. 970, 999, 270 P.3d 1142 (2012) (appellant has burden of designating a record which affirmatively shows prejudicial error). Having considered the merits of Meredith's argument, we affirm the district court's ruling that the current version of KORA applies to Meredith and it requires that he register for a period of 15 years.

Finally, in order to avoid any confusion, we remand the case to the district court to correct the previously filed journal entry of judgment nunc pro tunc which incorrectly memorialized the district court's ruling. See *State v. Meeks*, No. 109,243, 2014 WL 113458 (Kan. App. 2014) (unpublished opinion); *State v. Jackson*, 291 Kan. 34, 40, 238 P.3d 246 (2010). This journal entry should state that the district court ordered Meredith to register under the current provisions of KORA for a period of 15 years.

Affirmed and remanded with directions.

APPENDIX C



ELECTRONICALLY FILED
2017 Oct 02 PM 3:04
CLERK OF THE APPELLATE COURT
CASE NUMBER: 110520

Court: Supreme Court

Case Number: 110520

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

Type: Motion for Rehearing or Modification (re:
Opinion)by Appellant, Steven Meredith.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in black ink, appearing to be "Caleb Stegall", written over a circular stamp or seal.

/s/ Caleb Stegall, Justice

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 111,226

STATE OF KANSAS,
Appellee,

v.

BARBARA ANNEMARIE HILL,
Appellant.

SYLLABUS BY THE COURT

Non-sex offenders seeking to avoid retroactive application of provisions of the Kansas Offender Registration Act (KORA) must, in order to satisfy the "effects" prong of the test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), produce a record that distinguishes—by the "clearest proof"—KORA's effect on those classes of offenders from the Act's effects on sex offenders as a class.

Review of the judgment of the Court of Appeals in an unpublished opinion filed May 8, 2015. Appeal from Crawford District Court; LORI A. BOLTON FLEMING, judge. Opinion filed August 11, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Korey A. Kaul, of Kansas Appellate Defender Office, was on the briefs for appellant.

Michael Gayoso, Jr., county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Barbara Annemarie Hill entered an *Alford* plea to one count of possession of pseudoephedrine with intent to manufacture and one count of possession of methamphetamine. At the time she committed these offenses—May 2, 2010—the law required persons convicted of such crimes to register as a drug offender, "unless the court ma[de] a finding on the record that the possession of such product was intended to be used to manufacture a controlled substance for [Hill's] personal use." K.S.A. 2009 Supp. 22-4902(a)(11)(B). At the time of her sentencing in December 2012, however, the Kansas Legislature had removed the personal use exception. See K.S.A. 2012 Supp. 22-4902(f)(2); see also L. 2011, ch. 95, sec. 2.

Hill asked the court to apply the pre-2011 version of KORA and make a finding that she possessed pseudoephedrine with the intent to manufacture methamphetamine for her personal use. The State argued that the current version of the statute retroactively applied to Hill, though it conceded that if the pre-2011 version applied, Hill would not be required to register because it would stipulate that she had manufactured methamphetamine for both sale to others and for personal use. See *State v. Mishmash*, 295 Kan. 1140, 290 P.3d 243 (2012) (holding that defendant who had been convicted of unlawful manufacture of a controlled substance was not required to register where the defendant was manufacturing the controlled substances for both personal use and for sale to others).

The court held a nonevidentiary hearing and, after taking the matter under advisement, filed a journal entry stating that the 2011 amendments to KORA applied to Hill and she was required to register. Hill appealed the district court's order regarding her registration requirement. The Court of Appeals ultimately held that the "duty to register is

a civil penalty, not punitive, and retroactive application does not violate the Ex Post Facto Clause of the United States Constitution." *State v. Hill*, No. 111,226, 2015 WL 2342392, at *2 (Kan. App. 2015) (unpublished opinion). We granted her petition for review.

We recently analyzed KORA in this context using the intent-effects test set forth by the United States Supreme Court and concluded lifetime sex offender registration does not constitute "punishment" for purposes of applying any provision of the federal Constitution. *State v. Petersen-Beard*, 304 Kan. 192, 198-209, 377 P.3d 1127 (2016) (relying on the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963]). We therefore held that the 2011 version of KORA could not violate federal prohibitions against cruel and unusual punishment. See 304 Kan. at 208. And not long ago, we "explicitly extend[ed] the holding of *Petersen-Beard* to apply to ex post facto challenges." *State v. Reed*, 306 Kan. ___, ___ P.3d ___ (No. 110,277, filed August 4, 2017), slip op. at 8.

Therefore, to prevail, Hill must demonstrate that drug offenders as a class are sufficiently distinguishable from the class of sex offenders such that the effects of the law become punitive rather than civil when applied to drug offenders. We recently confronted this question in *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017). In that case, we declined to hold that KORA registration is punishment where "the record . . . is insufficiently developed for [the defendant] to persuasively argue KORA's allegedly punitive effects on drug offenders as a class separate and distinct from sex offenders." *Meredith*, 306 Kan. at ___, slip op. at 6; see *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("Because we 'ordinarily defer to the legislature's stated intent,' [citation omitted] 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' [citations omitted]."); see also *State v. Myers*, 260 Kan. 669, 923 P.2d

1024 (1996) (holding that the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) (upholding *Myers*' determination that the legislature intended to enact a nonpunitive scheme), *overruled on other grounds by Petersen-Beard*, 304 Kan. 192. We further explained in *Meredith* that such an inquiry "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." *Meredith*, 306 Kan. at ____, slip op. at 10.

Hill's claim suffers from the same flaw. She is unable to satisfy the "clearest proof" standard because the record below has not been sufficiently developed. As a result, we cannot—at this time—hold that KORA's registration requirements as applied to drug offenders are punishment and subject to the limitations of the Ex Post Facto Clause.

Affirmed.

BEIER, J., dissenting: Consistent with my votes in *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016); *State v. Reed*, 306 Kan. ____, __ P.3d __ (No. 110,277, filed August 4, 2017); and *State v. Meredith*, 306 Kan. ____, __ P.3d __ (No. 110,520, filed August 4, 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

NOT DESIGNATED FOR PUBLICATION

No. 111,226

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BARBARA ANNEMARIE HILL,
Appellant.

MEMORANDUM OPINION

Appeal from Crawford District Court; LORI A. BOLTON FLEMING, judge. Opinion filed May 8, 2015. Affirmed.

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

Michael Gayoso, Jr., county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., GREEN and LEBEN, JJ.

Per Curiam: This is an appeal of an order directing an offender to register as a drug offender. After her conviction for possession of pseudoephedrine, Barbara A. Hill contends the district court erroneously ordered her to register as an offender. She claims there is a personal use exemption under the registration statute in effect at the time she committed her crime that would exempt her from having to register if the court had made the appropriate factual findings. We hold the district court correctly ruled that the registration law in effect at the time of her sentencing applies and the court properly ordered her to register. Accordingly, we affirm.

Hill did not contest these charges.

In 2012, Hill entered an *Alford* plea to one count of possession of pseudoephedrine with intent to manufacture and one count of possession of methamphetamine. The offenses occurred on May 2, 2010. When Hill committed the crimes, the Kansas Offender Registration Act, K.S.A. 2012 Supp. 22-4901, *et seq.*, applied. It was presumed one would have to register as a drug offender; however, there was a personal use exemption. The personal use exemption was eliminated from the Act in 2011.

Hill moved the court to make factual findings that she had "possessed ephedrine/pseudoephedrine with the intent to manufacture methamphetamine for personal use." She argued the 2009 statute governed, and the district court had to first determine if she was required to register under the 2009 statute before considering the 2012 amendments.

The State argued that amendments to the Act applied retroactively, and because the 2012 version did not require a personal use finding, Hill was required to register. The State also conceded that if the 2009 amendments applied, then Hill would not have to register because the possession was for personal use and she would not have been classified as an offender.

When sentencing Hill, the district court applied K.S.A. 2012 Supp. 22-4902(f)(2), which was the statute in effect at the time of sentencing. The district court did not make any factual finding regarding Hill's statutory "personal use" exemption. The district court held it was not required to make this factual finding under the current version of the Act.

In this appeal, Hill argues the retroactive application of 2012 amendments to the Act violates the Ex Post Facto Clause of the United States Constitution. The State

contends the registration act does not impose punishment and any amendments can be applied retroactively without violating the Ex Post Facto Clause.

The rules that guide us.

Interpretation and application of a statute is a question of law over which appellate courts have unlimited review. *State v. Schuster*, 273 Kan. 989, 991, 46 P.3d 1140 (2002).

The two statutes in dispute are K.S.A. 2009 Supp. 22-4902 and K.S.A. 2012 Supp. 22-4902. K.S.A. 2009 Supp. 22-4902, in pertinent part, provides:

"(a) 'Offender' means: . . . (11) Any person who has been convicted of: . . . (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 by K.S.A. 65-7006, prior to its repeal or K.S.A. 2009 Supp. 21-36a09 or 21-36a10, and amendments thereto, *unless the court makes a finding on the record that the possession of such product was intended to be used to manufacture a controlled substance for such person's personal use.*" (Emphasis added.)

When the legislature amended the Act in 2011, the personal use language was removed from K.S.A. 22-4902. When Hill was sentenced in December 2012, the applicable amended statute was K.S.A. 2012 Supp. 22-4902(f)(2).

We follow the reasoning in a prior case.

In *State v. Simmons*, 50 Kan. App. 2d 448, 329 P.3d 523 (2014), *petition for rev. filed* July 25, 2014, a panel of this court stated: "[T]he legislature intended the KORA registration requirements to be imposed automatically by operation of law without court

involvement and to represent nonpunitive collateral consequences of judgment that are distinct from, and not a part of, a criminal sentence." 50 Kan. App. 2d at 463. The district court found Simmons guilty for failing to register after she had registered on at least 11 prior occasions. Simmons argued it was an illegal sentence because she was not required to register as a drug offender when she was convicted for her crimes. Because the panel determined that registration was not a part of the defendant's sentence, there was no merit to Simmons' illegal sentence claim. 50 Kan. App. 2d at 463.

We agree with the *Simmons* court. The registration requirement is not a part of Hill's sentence. We now turn to her Ex Post Facto Clause argument.

Both the United States Supreme Court and the Kansas Supreme Court have held that the duty to register is a civil penalty, not punitive, and retroactive application does not violate the Ex Post Facto Clause of the United States Constitution. See *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).

We are duty bound to follow the Kansas Supreme Court precedent, unless there is some indication the Supreme Court is departing from its previous position. *State v. Ottinger*, 46 Kan. App. 2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012). Since there is no indication our Supreme Court is departing from the *Myers* decision, we must follow this controlling precedent.

Affirmed.

APPENDIX F



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CLERK OF THE APPELLATE COURT
CASE NUMBER: 111226

Court: Supreme Court

Case Number: 111226

Case Title: STATE OF KANSAS, APPELLEE;
V.
BARBARA ANNEMARIE HILL, APPELLANT.

Type: Motion for Rehearing or Modification by Appellant,
Barbara Hill.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in black ink, appearing to be "Caleb Stegall", written over a circular stamp or seal.

/s/ Caleb Stegall, Justice

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 109,671

STATE OF KANSAS,
Appellee,

v.

JOSEPH V. DONALDSON,
Appellant.

SYLLABUS BY THE COURT

Non-sex offenders seeking to avoid retroactive application of provisions of the Kansas Offender Registration Act (KORA) must, in order to satisfy the "effects" prong of the test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), produce a record that distinguishes—by the "clearest proof"—KORA's effect on those classes of offenders from the Act's effects on sex offenders as a class.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 15, 2014. Appeal from Sedgwick District Court; CLARK V. OWENS II, judge. Opinion filed August 11, 2017. Judgment of the Court of Appeals, affirming in part and dismissing in part the judgment of the district court, is affirmed. Judgment of the district court is affirmed.

Heather Cessna, of Kansas Appellate Defender Office, was on the briefs for appellant.

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

The opinion of the court was delivered by

STEGALL, J.: The State charged Joseph V. Donaldson with one count each of aggravated kidnapping, aggravated battery, and criminal threat. The events leading to these charges occurred in June 2011. A jury later convicted him as charged, and after finding that Donaldson had a criminal history score of A, the court sentenced him to a total controlling 592-month prison sentence. By virtue of his aggravated kidnapping conviction, the court imposed lifetime registration pursuant to the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*

Donaldson appealed, alleging several errors, including that his lifetime offender registration violates the Ex Post Facto Clause. At the time he committed the crimes, Donaldson would have been subject to registration only if the victim of the aggravated kidnapping charge was under the age of 18. See K.S.A. 2010 Supp. 22-4902(a)(4)(B); K.S.A. 2010 Supp. 22-4906(a). After the State charged Donaldson but prior to trial, our legislature amended KORA in such a way that Donaldson is currently subject to lifetime registration. See L. 2011, ch. 95, sec. 6; K.S.A. 2011 Supp. 22-4906(d)(10) (providing for lifetime registration for any offender who has been convicted of aggravated kidnapping). According to Donaldson, because the State did not present any evidence that the victim was under the age of 18 and because the pre-2011 version of KORA applied, he should not be subject to registration.

The Court of Appeals rejected Donaldson's claim, holding that registration is not punishment, so the 2011 amendments could be applied retroactively to him. *State v. Donaldson*, No. 109,671, 2014 WL 4080074, at *11-12 (Kan. App. 2014) (unpublished opinion). The panel further affirmed his conviction and sentence, and we granted review solely to address his ex post facto claim.

We recently analyzed KORA in this context using the intent-effects test set forth by the United States Supreme Court and concluded lifetime sex offender registration does not constitute "punishment" for purposes of applying any provision of the federal Constitution. *State v. Petersen-Beard*, 304 Kan. 192, 198-209, 377 P.3d 1127 (2016) (relying on the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963]). We therefore held that the 2011 version of KORA could not violate federal prohibitions against cruel and unusual punishment. See 304 Kan. at 208. And not long ago, we "explicitly extend[ed] the holding of *Petersen-Beard* to apply to ex post facto challenges." *State v. Reed*, 306 Kan. ___, ___ P.3d ___ (No. 110,277, filed August 4, 2017), slip op at 8.

Therefore, to prevail, Donaldson must demonstrate that violent offenders as a class are sufficiently distinguishable from the class of sex offenders such that the effects of the law become punitive rather than civil when applied to violent offenders. We recently confronted a nearly identical question in *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017). In that case, we declined to hold that KORA registration is punishment where "the record . . . is insufficiently developed for [the defendant] to persuasively argue KORA's allegedly punitive effects on drug offenders as a class separate and distinct from sex offenders." *Meredith*, 306 Kan. at ___, slip op. at 6; see *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("Because we 'ordinarily defer to the legislature's stated intent,' [citation omitted] 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," [citations omitted]."); see also *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996) (holding that the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) (upholding *Myers*' determination that the legislature intended to enact a nonpunitive scheme), *overruled on other grounds by Petersen-Beard*,

304 Kan. 192. We further explained in *Meredith* that such an inquiry "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." *Meredith*, 306 Kan. at ____, slip op. at 10.

Donaldson's claim suffers from the same flaw. He is unable to satisfy the "clearest proof" standard because the record below has not been sufficiently developed. As a result, we cannot—at this time—hold that KORA's registration requirements as applied to violent offenders are punishment and subject to the limitations of the Ex Post Facto Clause.

Affirmed.

BEIER, J., dissenting: Consistent with my votes in *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016); *State v. Reed*, 306 Kan. ____, __ P.3d ____ (No. 110,277, filed August 4, 2017); and *State v. Meredith*, 306 Kan. ____, __ P.3d ____ (No. 110,520, filed August 4, 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. 109,671

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOSEPH V. DONALDSON,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; CLARK V. OWENS II, judge. Opinion filed August 15, 2014. Affirmed in part and dismissed in part.

Heather Cessna, of Kansas Appellate Defender Office, for appellant.

Lesley A. Isherwood, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, C.J., POWELL and SCHROEDER, JJ.

Per Curiam: Joseph Donaldson appeals his convictions and sentence after being found guilty by a jury of aggravated kidnapping, aggravated battery, and criminal threat. Donaldson claims the district court erred by (1) denying his pretrial motion for new counsel, (2) denying his motion for new trial alleging ineffective assistance of counsel, (3) denying his request for a no-sympathy jury instruction, (4) instructing the jury on multiple acts, (5) allowing the State to introduce K.S.A. 2013 Supp. 60-455 evidence of prior abuse between Donaldson and the victim, (6) imposing lifetime registration in violation of the Ex Post Facto Clause of the United States Constitution, and (7) increasing

his sentence based on his criminal history, including his prior juvenile adjudications, without requiring the State to prove the criminal history to a jury beyond a reasonable doubt. Finding no reversible error, we affirm the district court's judgment.

This case arises from an incident of domestic violence between Donaldson and his wife, Nicole Donaldson (Nicole). On the evening of June 5, 2011, Donaldson was at home with Nicole and their 2 1/2-year-old son; Nicole was also 6 months pregnant with their second child. After dinner, Nicole was in the kitchen washing dishes when Donaldson entered the kitchen and asked her what she was doing. Nicole responded, "Nothing." Donaldson told her that they needed to talk in the bedroom about their relationship so that he could teach her how to show respect.

In the bedroom, Donaldson started yelling at Nicole, stating that she never respected him or his name and it was time for him to teach her some respect. He ordered her into the attached bathroom and directed her to look into the mirror and repeat after him that she will respect him, honor his name, and do what he says. Nicole complied but Donaldson started hitting her, claiming she gave the wrong answer. He struck her repeatedly in the face, on her back, and across her legs. Nicole started to cry and screamed for him to stop, but he refused.

Donaldson started ripping off Nicole's clothes telling her she needed to shower because she was a "dirty filthy whore." Nicole showered and when she opened the shower door, Donaldson grabbed her around the neck and slammed her against the wall, lifting her off the ground. Donaldson eventually released his grip but refused to allow her to get dressed. Donaldson stepped back into the bedroom but returned a few minutes later with several plastic coat hangers and began to strike Nicole repeatedly. She screamed in pain, prompting Donaldson to yell at her to "shut up" and "be quiet."

Nicole tried to walk out of the bathroom but Donaldson pushed her to the floor. Moments later, Donaldson grabbed her by the hair and pulled her to a standing position. Donaldson then placed her in a chokehold. Nicole started to feel dizzy and light-headed; she thought she was going to pass out. Donaldson started punching her in the back of the head and pushed her back onto the floor. He told Nicole that he would kill her if she had a miscarriage because of what she had forced him to do.

The abuse continued throughout the night. The next morning, Donaldson ordered Nicole to take another shower and then told her to feed their son and show him some love and respect. Donaldson refused to let Nicole get dressed. Once in the kitchen, Donaldson ordered Nicole to get on the floor but to avoid putting pressure on the baby. Nicole assumed a position on her hands and knees at which point Donaldson poured cold water over her wounds and hit her multiple times with a spatula. Donaldson eventually got on the floor in front of Nicole and told her she was not worth it; he would never be able to teach her respect, so he was just going to kill her.

Donaldson went into the living room for a few minutes and then returned to the kitchen. He told Nicole he was going to take a nap and afterwards he was going to kill her. Donaldson went to the bedroom and shut the door. Nicole threw on some dirty clothes she found in the laundry room. Donaldson came out and asked Nicole if she was aware that he intended to kill her. She said "yes" and Donaldson warned her that she had 10 minutes to prepare to die. When Donaldson went back to the bedroom, Nicole grabbed her son and car keys and fled from the apartment.

Nicole drove to a friend's house and called the police. The police went to the apartment and spoke to Donaldson. Donaldson told Officer Kelly Sheffler that if Nicole was injured, she caused the injuries to herself. Donaldson also told Sheffler that Nicole needed help; she was raped when she was 13 years old and was sold into prostitution. At that point, Sheffler arrested Donaldson for domestic violence.

On June 8, 2011, the State charged Donaldson with one count each of aggravated kidnapping, aggravated battery, and criminal threat. The district court heard multiple pretrial motions, including Donaldson's pro se motion claiming he was entitled to new counsel because his appointed attorney was providing ineffective assistance. The district court afforded Donaldson and trial counsel an opportunity to address each of Donaldson's claims and concluded that Donaldson failed to show justifiable dissatisfaction with his attorney and declined to appoint new counsel.

The district court also conducted a hearing on the State's motion to allow K.S.A. 2013 Supp. 60-455 evidence. The State wanted to introduce evidence of prior abuse between Donaldson and Nicole to explain why Nicole did not attempt to escape sooner. The district court granted the motion but advised the State it was limited to eliciting prior physical altercations to explain why Nicole did not attempt to escape.

At the jury trial commencing on August 29, 2012, Donaldson testified that on the night of the alleged incident, he left the apartment and went to a local bar called Mojoe's. He said that he ran into some friends at the bar, stayed there until 1:30 a.m., and got home around 2 a.m. The next morning, he left the apartment around 11 a.m. to get breakfast. Donaldson testified that during a significant portion of the timeframe in which he was allegedly beating Nicole, he was actually playing his PlayStation. He testified that Nicole was jealous of his gaming and told the jury that he did not have the PlayStation to prove how much he played that evening because someone had taken it. Donaldson testified that Nicole had mental health diagnoses of "bipolar, manic, having suicidal thoughts," and anxiety. He denied threatening, choking, and confining Nicole with the intent to injure her.

After hearing the evidence, the jury found Donaldson guilty as charged. Two months later, Donaldson filed a motion for new trial alleging ineffective assistance of counsel. The district court appointed new counsel to represent Donaldson at the

evidentiary hearing and heard testimony from Donaldson and his trial counsel. The district court denied Donaldson's motion for new trial, concluding that he failed to establish ineffective assistance of counsel.

On March 14, 2013, the district court imposed a presumptive sentence of 592 months' imprisonment and ordered Donaldson to be subject to lifetime registration as a violent offender. Donaldson timely appealed the district court's judgment.

PRETRIAL MOTION TO APPOINT NEW COUNSEL

Donaldson argues that the district court erred in refusing to appoint him new counsel prior to trial. Specifically, Donaldson contends (1) there was an inherent conflict of interest between himself and defense counsel and the district court failed to adequately inquire into this conflict and (2) the district court applied the strict standards of *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 (1984) (analysis for ineffective assistance of counsel) rather than the lesser justifiable dissatisfaction with counsel standard.

Generally, appellate courts review a district court's refusal to appoint new counsel under an abuse of discretion standard. *State v. Sappington*, 285 Kan. 158, ¶ 4, 169 P.3d 1096 (2007). Judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). The party asserting the district court abused its discretion bears the burden of showing such abuse. *State v. McCullough*, 293 Kan. 970, 996, 270 P.3d 1142 (2012).

Prior to the jury trial, Donaldson asked the district court for new counsel. At a pretrial hearing, he read aloud to the court 12 reasons he wanted new counsel to replace Jason Smartt, his previously appointed attorney: (1) Donaldson had only met with Smartt

for less than 10 minutes total prior to his preliminary hearing; (2) Smartt had not allowed him to hear certain audio evidence; (3) Smartt waited 10 months before trying to procure evidence from Nicole that Donaldson alleged was "key evidence"; (4) despite Donaldson's request, Smartt had failed to provide transcripts of hearings at which Smartt spoke with Nicole about the PlayStation but at which Donaldson was not present; (5) Smartt had failed to sufficiently attempt to track down the PlayStation; (6) Smartt had not looked at Nicole's Facebook account, which Donaldson believed contained important information; (7) Smartt failed to procure certain video evidence or to show Donaldson that he had tried to get the video evidence, which Donaldson believed would show he was not at the house on the night in question; (8) Smartt failed to obtain the testimony of two witnesses Donaldson believed would testify that Nicole had willingly participated in bondage and sadomasochistic activities; (9) Smartt failed to obtain evidence to show that Nicole had lied in testimony about her medication and her mental health status; (10) Smartt failed to file a motion Donaldson had given him months earlier to file; (11) Smartt refused to help Donaldson write or understand the paperwork involved in the case, despite Donaldson's vision problems and dyslexia; and (12) Smartt spent most of his visits with Donaldson discussing pleas and the violent offender registry, while Donaldson believed they should spend more time talking about his case strategy.

The district judge asked Smartt to respond to the allegations, and he attempted to do so. Ultimately, Smartt asserted that he had provided effective assistance of counsel but stated that he did not know whether Donaldson had a justifiable dissatisfaction with his performance that would warrant the appointment of new counsel. The district judge then went through each of Donaldson's complaints individually. After a lengthy discussion, the judge concluded:

"[F]rom what I have heard throughout the issues on here regarding his counsel, I do not find that there is any ineffective assistance of counsel. And I don't find any other grounds that will justify changing counsel at this late, late date before the trial that any problems

in communication are not apparent here in the courtroom. They've been freely discussing back and forth, so I don't think that there is a lack of [communication]. And certainly nothing on Mr. Smartt's part about working on his client on this. It sounds like he's been working diligently on the case, so I don't think there is grounds for change of counsel."

First, Donaldson argues that the district court violated his right to effective counsel at all stages of the proceedings under the Sixth Amendment to the United States Constitution by failing to appoint a conflict-free attorney to argue his pro se motion for new counsel. However, a defendant only has a constitutional right to counsel at critical stages of the proceedings. *State v. Andrews*, 228 Kan. 368, 377, 614 P.2d 447 (1980); see *Coleman v. Alabama*, 399 U.S. 1, 7, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970). Critical stages are those that amount to trial-like confrontations during which counsel could help the accused in meeting his or her adversary. See *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012) (defendant cannot be presumed to make critical decisions without counsel's advice); *Rothgery v. Gillespie County*, 554 U.S. 191, 212 & n.16, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008).

In *State v. Bristor*, 236 Kan. 313, 317, 691 P.2d 1 (1984), the Kansas Supreme Court noted that the critical stage analysis had extended the applicability of the Sixth Amendment right to counsel beyond the confines of the trial itself to various pretrial confrontations. For example, a pretrial lineup, a preliminary hearing, an arraignment, and sentencing are all critical stages of the proceedings. 236 Kan. at 317-18. However, the *Bristor* court further noted that some pretrial confrontations are not critical stages, such as presentation of a photographic display or the taking of an exemplar of the defendant's handwriting. 236 Kan. at 318.

In determining whether a pretrial confrontation is a critical stage, appellate courts focus on two factors. The first is whether the presence of counsel is "necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to

cross-examine the witnesses against him." *United States v. Wade*, 388 U.S. 218, 227, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). The second factor is whether "potential substantial prejudice" to the defendant's right is inherent in a particular confrontation and whether the presence of counsel would help avoid such prejudice. 388 U.S. at 227.

Donaldson's request for new counsel falls outside the scope of a critical stage because the pretrial hearing did not involve a confrontation at which an attorney would be needed to help Donaldson convey his claims. We note with significance that Donaldson did not request an attorney to argue his motion for new counsel. The absence of counsel did not permanently deprive Donaldson of any rights because the district court conducted an extensive investigation into Donaldson's claims, allowing Donaldson to voice his complaints, and the district court made an inquiry into each one.

Next, Donaldson argues that the district court applied the stricter standards of the *Strickland* analysis for ineffective assistance of counsel, rather than the justifiable dissatisfaction with counsel standard. To establish ineffective assistance of counsel, the defendant must establish (1) that counsel's performance was constitutionally deficient, which requires a showing that counsel made errors so serious that his or her performance was less than that guaranteed by the Sixth Amendment to the United States Constitution, and (2) that counsel's deficient performance prejudiced the defense, which requires a showing that counsel's errors were so severe as to deprive the defendant of a fair trial. *State v. Cheatham*, 296 Kan. 417, 431, 292 P.3d 318 (2013).

In contrast, to warrant the appointment of new counsel, a defendant must show "justifiable dissatisfaction" with his or her appointed counsel. A defendant can demonstrate "justifiable dissatisfaction" by showing a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between the defendant and his or her appointed attorney. *State v. McGee*, 280 Kan. 890, 894, 126 P.3d 1110 (2006). Not all disagreements, however, between a defendant and his or her

attorney about how to proceed in a case amount to a complete breakdown in communication. See *State v. Sykes*, 35 Kan. App. 2d 517, 530-32, 132 P.3d 485, *rev. denied* 282 Kan. 795 (2006). The Kansas Supreme Court has stated: "As long as the trial court has a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel [citation omitted]." *State v. Ferguson*, 254 Kan. 62, 70, 864 P.2d 693 (1993) (quoting *State v. Banks*, 216 Kan. 390, 394, 532 P.2d 1058 [1975]).

Despite Donaldson's contentions to the contrary, the record demonstrates that the district court used the "justifiable dissatisfaction" analysis in analyzing Donaldson's request for new counsel. Specifically, after Donaldson recited his claims and defense counsel provided a preliminary response, the district court noted that pursuant to Kansas caselaw the touchstone of the inquiry was whether there had been a complete breakdown of communication. Later during the hearing, trial counsel clarified that the motion before the district court was not one alleging ineffective assistance of counsel but rather whether counsel should be replaced because of defendant's justifiable dissatisfaction. The district court ultimately concluded, "I do not find that there is any ineffective assistance of counsel. And I don't find any other grounds that will justify changing counsel at this late, late date before the trial that any problems in communication are not apparent here in the courtroom." Considering the record as a whole, the district court applied the appropriate "justifiable dissatisfaction" standard.

Turning to the merits of Donaldson's motion for new counsel, Donaldson argues that his disagreements with Smartt over evidence, trial strategy, witnesses, and the direction of Donaldson's defense were significant and they were no longer effectively communicating. As previously stated, to warrant substitute counsel, a defendant must show justifiable dissatisfaction with appointed counsel. Justifiable dissatisfaction includes a showing of a conflict of interest, an irreconcilable conflict, or a complete

breakdown in communications between counsel and the defendant. *McGee*, 280 Kan. at 894. However, "[t]he lack of cooperation or communication between defendant and trial counsel does not in and of itself constitute a violation of the Sixth Amendment [of the United States Constitution] right to counsel." *Ferguson*, 254 Kan. at 71. This court has found that even when the communication between a defendant and his or her counsel may be argumentative, there is no complete breakdown in communication if they continue to communicate. *State v. Benfield*, No. 92,178, 2005 WL 1089046, at *2 (Kan. App. 2005) (unpublished opinion).

The district court is charged with safeguarding a defendant's Sixth Amendment right to counsel. *State v. Vann*, 280 Kan. 782, 789, 127 P.3d 307 (2006). So when a district court "becomes aware of a possible conflict of interest between an attorney and a defendant charged with a felony, the court has a duty to inquire further." 280 Kan. at 789 (quoting *State v. Taylor*, 266 Kan. 967, 979, 975 P.2d 1196 [1999]). The district court's failure to inquire after becoming aware of a potential attorney-client conflict is an abuse of discretion. *State v. Sharkey*, 299 Kan. 87, 98, 322 P.3d 325 (2014); *Vann*, 280 Kan. at 789.

Here, the district court allowed Donaldson to voice his 12 complaints against his trial counsel. The district court made an adequate inquiry into each of Donaldson's complaints and found no justification to change counsel and no apparent problems in communication. Therefore, the district court had a reasonable basis for believing the attorney-client relationship had not deteriorated to the point requiring the appointment of new counsel. Donaldson failed to show justifiable dissatisfaction with his counsel due to a complete breakdown in communication. See *McGee*, 280 Kan. at 894; *Ferguson*, 254 Kan. at 71. The record reveals that trial counsel did everything possible to prepare Donaldson's case for trial and diligently represented Donaldson. Accordingly, the district court did not abuse its discretion by refusing to appoint Donaldson new counsel prior to trial.

MOTION FOR NEW TRIAL

Next, Donaldson argues that the district court erred by denying his posttrial motion for new trial alleging ineffective assistance of trial counsel. In response, the State argues that Donaldson's motion was untimely under K.S.A. 2013 Supp. 22-3501(1) and this court lacks jurisdiction to consider it.

Generally, the decision to grant or deny a motion for a new trial rests in the sound discretion of the district court. *State v. Fulton*, 292 Kan. 642, 648, 256 P.3d 838 (2011). However, the State's claim that Donaldson's motion for new trial was untimely under K.S.A. 2013 Supp. 22-3501(1) involves statutory interpretation which is a question of law over which an appellate court has unlimited review. *State v. Jolly*, 291 Kan. 842, 845-46, 249 P.3d 421 (2011). Furthermore, the existence of jurisdiction is a question of law subject to unlimited review. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006).

K.S.A. 2013 Supp. 22-3501 governs motions for new trial, and states in part:

"(1) The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 14 days after the verdict or finding of guilty or within such further time as the court may fix during the 14-day period."

Our Supreme Court recently addressed the 14-day time period set out in K.S.A. 2013 Supp. 22-3501(1) and concluded that this deadline is mandatory, not discretionary.

State v. Holt, 298 Kan. 469, 473-79, 313 P.3d 826 (2013); see also *State v. Lee*, 45 Kan. App. 2d 1001, 1022, 257 P.3d 799 (2011) (district court lacked jurisdiction to consider motion for new trial filed outside the statutory time limit). A defendant filing a motion for new trial on grounds other than newly discovered evidence must do so within 14 days after the verdict or finding of guilty or the motion is untimely. *Holt*, 298 Kan. at 479. The *Holt* court explained: "A plain reading of [K.S.A. 2013 Supp. 22-3501(1)] requires that any extension be granted within the 14-day period following the verdict or finding of guilty." 298 Kan. at 479.

Here, the jury found Donaldson guilty on August 31, 2012. On September 4, 2012, Donaldson filed a motion for new trial which did not raise any claim of ineffective assistance of counsel. Approximately 2 months after his trial, on October 25, 2012, newly appointed defense counsel filed a supplemental motion for new trial, alleging ineffective assistance of counsel. There is nothing in the record to indicate that Donaldson or defense counsel filed a request for an extension of the 14-day period. Thus, under these circumstances, Donaldson's motion for new trial alleging ineffective assistance of counsel was untimely and the district court lacked jurisdiction to consider it. Because the district court lacked jurisdiction to consider Donaldson's motion, this court does not have jurisdiction to review it on appeal. See *State v. Phinney*, 280 Kan. 394, 400, 122 P.3d 356 (2005) (if district court never acquired jurisdiction to rule on a matter, an appellate court does not acquire jurisdiction over the matter on appeal). Accordingly, we dismiss Donaldson's claim that the district court erred by denying his motion for new trial.

NO-SYMPATHY JURY INSTRUCTION

Next, Donaldson argues the district court erred in refusing to give his proposed no-sympathy jury instruction. At trial, Donaldson requested the following proposed jury instruction, which originally appeared at PIK Crim. 3d 51.07: "You must consider this case without favoritism or sympathy for or against either party. Neither sympathy nor

prejudice should influence you." Donaldson argued at trial that there were unusual circumstances in this case because the jury heard evidence that Nicole was subjected to a 17-hour incident involving physical abuse; at the time, Nicole was 6 months pregnant and there was a small child in the home. The district court declined to give the instruction, finding that appellate courts generally disapprove of such instructions.

When the district court refuses to give a requested instruction, an appellate court reviews the evidence in a light most favorable to the party requesting the instruction. *State v. Ransom*, 288 Kan. 697, 713, 207 P.3d 208 (2009). An appellate court "examine[s] the jury instructions as a whole, without focusing on any single instruction, in order to determine whether they properly and fairly state the applicable law or whether it is reasonable to conclude that they could have misled the jury." *State v. Williams*, 42 Kan. App. 2d 725, 726, 216 P.3d 707 (2009), *rev. denied* 290 Kan. 1104 (2010). A district court "is required to instruct the jury on the law applicable to the defendant's theories if there is evidence to support the theories." *State v. Baker*, 281 Kan. 997, 1004, 135 P.3d 1098 (2006).

The no-sympathy instruction, PIK Crim. 3d 51.07, has been removed from the Pattern Instructions for Kansas and is disapproved for general use. *Baker*, 281 Kan. at 1004-05; see *State v. Rhone*, 219 Kan. 542, 545, 548 P.2d 752 (1976). A district court should give the no-sympathy instruction only under very unusual circumstances where the court believes that the jury may be influenced by sympathy or prejudice. *State v. Williams*, 299 Kan. ___, ___, ___ P.3d ___, 2014 WL 2979289 (2014) (Case No. 108,586, filed July 3, 2014) (citing *Baker*, 281 Kan. at 1004).

Here, the trial testimony was that Donaldson subjected his pregnant wife to a 17-hour ordeal while their 2 1/2-year-old son was in the residence. The facts in this case are not analogous to those in *Rhone* and are not sufficiently unusual to require the district court to give a no-sympathy instruction. Considered as a whole, the instructions given by

the district court fairly and accurately instructed the jury on the law. The district court did not err by failing to give the requested no-sympathy jury instruction.

JURY INSTRUCTION ON MULTIPLE ACTS

Next, Donaldson argues for the first time on appeal that the district court erred in instructing the jury on multiple acts. At trial, the district court instructed the jury as follows: "The State claims distinct multiple acts which each could separately constitute the crime of aggravated battery or the lesser included offense of battery. In order for the defendant to be found guilty of aggravated battery or battery, you must unanimously agree upon the same underlying act." Donaldson argues that the use of the word "could" in the pattern multiple acts jury instruction constituted error because the jury may have interpreted the instruction as a directed verdict.

In response, the State argues that Donaldson's claim is precluded by the invited error doctrine because at trial Donaldson requested the jury instruction that he now complains about on appeal. Alternatively, the State asserts that the jury instruction was legally and factually appropriate.

Because Donaldson did not object below to the district court's multiple acts instruction, this court applies the clearly erroneous standard of review. K.S.A. 2013 Supp. 22-3414(3). To find an instruction clearly erroneous, an appellate court must be firmly convinced that the jury would have reached a different verdict without the error. *State v. Betancourt*, 299 Kan. 131, 135, 322 P.3d 353 (2014).

Here, Donaldson requested the jury instruction upon which he now bases his claim of error. Thus, the invited error rule applies and precludes his claim for relief. The Kansas Supreme Court has stated that an appellate court need not consider whether it was clearly

erroneous for a district court to give a jury instruction when the challenge is precluded by the invited error rule. *State v. Jones*, 295 Kan. 804, 811-12, 286 P.3d 562 (2012).

Furthermore, the district court instructed the jury using the exact language of PIK Crim. 4th 68.100, which is an accurate statement of the current law on multiple acts. See *State v. King*, 297 Kan. 955, 981, 305 P.3d 641 (2013) ("When several acts are alleged, any one of which *could* constitute the crime charged, the court is presented with a multiple acts case that requires the jury to be unanimous as to which one of the acts the defendant committed."). (Emphasis added.) Thus, the jury instruction was legally and factually appropriate at Donaldson's trial.

K.S.A. 2013 SUPP. 60-455 EVIDENCE

Next, Donaldson argues that the district court erred in admitting evidence under K.S.A. 2013 Supp. 60-455 of his past physical violence toward Nicole. Donaldson claims the prejudicial effect of this evidence outweighed its probative value. The State responds that the evidence was admissible for the purpose of establishing the relationship of the parties. Alternatively, the State argues that any error in admitting the evidence was harmless.

The fact that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove such person's disposition to commit a crime. K.S.A. 2013 Supp. 60-455(a). However, "such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 2013 Supp. 60-455(b). To determine whether evidence of a defendant's past physical violence should be admitted under K.S.A. 2013 Supp. 60-455, a district court applies a three-step analysis:

"• First, the district court must determine whether the fact to be proven is material, meaning that this fact has some real bearing on the decision in the case. The appellate court reviews this determination independently, without any required deference to the district court.

"• Second, the district court must determine whether the material fact is disputed and, if so, whether the evidence is relevant to prove the disputed material fact. In making this determination, the district court considers whether the evidence has any tendency in reason to prove the disputed material fact. The appellate court reviews this determination only for abuse of discretion.

"• Third, if the fact to be proven was material and the evidence was relevant to prove a disputed material fact, then the district court must determine whether the probative value of the evidence outweighs the potential for undue prejudice against the defendant. The appellate court also reviews this determination only for abuse of discretion." *State v. Torres*, 294 Kan. 135, 139-40, 273 P.3d 729 (2012) (citing *State v. Inkelaar*, 293 Kan. 414, 424, 264 P.3d 81 [2011]).

Prior to trial, the State filed a motion to admit evidence under K.S.A. 2013 Supp. 60-455 that Donaldson had previously engaged in violent altercations with Nicole. In the motion, the State alleged that based on Nicole's previous experience with Donaldson, she believed that the physical abuse would stop if she remained in the bathroom and complied with Donaldson's demands. At the hearing, the district court applied the three-step analysis. The district court determined that the evidence was relevant to prove a material fact, *i.e.*, the confinement aspect of the aggravated kidnapping charge, why the victim was held against her will and felt she was not free to leave. The district court went on to conclude that while the evidence of past physical altercations would be prejudicial, the failure to introduce such evidence would make it difficult to explain why Nicole did not immediately attempt to leave. Thus, the district court concluded the probative value outweighed any prejudicial effect.

At trial, Nicole testified that there had been prior incidents where Donaldson had been violent to her. She explained that on the evening of June 5, 2011, she did not

immediately try to get away because she did not want to make the situation worse. Nicole testified that in the past, when Donaldson was violent, she would do what he said and then the violence would stop. At the conclusion of trial, the district court gave the jury the following limiting instruction: "Evidence has been admitted tending to prove that the defendant committed crimes other than the present crime charged. This evidence may be considered solely for the purpose of proving the relationship of the parties."

Application of the three-step analysis

The first step in the K.S.A. 2013 Supp. 60-455 analysis is whether the evidence was relevant to prove a material fact. An appellate court reviews that step of the analysis *de novo*. Here, the evidence was relevant to prove the relationship of the parties and why Nicole did not immediately attempt to escape. Without the admission of Donaldson's prior violent behavior, the jury would question why Nicole endured the abuse for nearly 17 hours without attempting to escape. Thus, the district court was correct in finding that the evidence was relevant to prove a material fact.

The second step in the analysis is to determine if the material facts were in dispute. The appellate court reviews this determination for an abuse of discretion. Judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). Here, the relationship between the parties was a material fact that was in dispute. Donaldson attempted to establish that Nicole fabricated the allegations by eliciting evidence she suffered from mental health issues and abused drugs. Donaldson never stipulated that when he became violent in the past, Nicole would do what he said and the violence would stop. In addition, Donaldson's intent to hold Nicole against her will to inflict bodily harm or to terrorize her obviously was in dispute at trial. The district court did not abuse its discretion when it determined that the evidence was relevant to prove a disputed fact.

The third step in the K.S.A. 2013 Supp. 60-455 analysis—whether the probative value of the evidence outweighs the potential for undue prejudice against the defendant—is also reviewed by the appellate court for an abuse of discretion. As the district court explained, the State's failure to introduce evidence proving the relationship of the parties would make it difficult to explain why Nicole did not immediately attempt to leave the apartment when Donaldson commenced the violence. The district court instructed the jury to consider the evidence for the limited purpose of establishing the relationship of the parties. We agree with the district court's conclusion that the probative value of the evidence outweighed any prejudicial effect.

Finally, even if the district court erred in admitting the evidence, any such error was harmless. Violations of K.S.A. 2013 Supp. 60-455 are subject to the harmless standard of K.S.A. 2013 Supp. 60-261. See *State v. Preston*, 294 Kan. 27, 35-36, 272 P.3d 1275 (2012). Under that standard, the party benefitting from the error has the burden to show "there is no reasonable probability the error affected the trial's outcome in light of the entire record." *State v. McCullough*, 293 Kan. 970, Syl. ¶ 9, 270 P.3d 1142 (2012). Here, Nicole consistently reported throughout the investigation and during the trial her account of what transpired during the incident. Moreover, the photographs admitted at trial corroborated her account. Accordingly, the State met its burden and established there was no reasonable probability that any K.S.A. 2013 Supp. 60-455 error affected the outcome of Donaldson's trial.

LIFETIME OFFENDER REGISTRATION

Next, Donaldson argues that the district court erred in imposing lifetime offender registration because at the time he committed aggravated kidnapping, registration was only required if the victim was under the age of 18. He argues there was no evidence that Nicole was under the age of 18 at the time he committed this offense. Thus, Donaldson argues that the district court's order imposing lifetime registration violated the Ex Post

Facto Clause of the United States Constitution. The State argues that offender registration is not punitive; thus, the district court's order did not violate the Ex Post Facto Clause.

Resolution of this issue requires statutory and constitutional interpretation. An appellate court exercises unlimited review of this issue. *State v. Johnson*, 297 Kan. 210, 215, 301 P.3d 287 (2013).

In *State v. Myers*, 260 Kan. 669, 671, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997), the defendant was convicted of sexual battery and rape and he was ordered to register as a sex offender at sentencing. The defendant argued that because the registration requirement was not in place at the time of his offense, it violated the Ex Post Facto Clause as applied to him. The *Myers* court disagreed and concluded that the registration requirement was for public safety. 260 Kan. at 681. The court ultimately held that the registration requirement was not a form of punishment triggering ex post facto protections. 260 Kan. at 696; see also *State v. Evans*, 44 Kan. App. 2d 945, 948-49, 242 P.3d 220 (2010) (retroactive application of changes in registration requirements does not violate the Ex Post Facto Clause).

The United States Supreme Court also has upheld the constitutionality of offender registration laws. In *Smith v. Doe*, 538 U.S. 84, 105-06, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the Court held that Alaska's sex offender registration act was not punitive and did not violate the Ex Post Facto Clause. The *Smith* Court held that the registration requirement served to "make a valid regulatory program effective and [did] not impose punitive restraints in violation of the Ex Post Facto Clause." 538 U.S. at 102.

As the State notes, this court is duty bound to follow the Kansas Supreme Court's holding in *Myers*, absent some indication the court is departing from its previous position. See *State v. Ottinger*, 46 Kan. App. 2d 647, 655, 264 P.3d 1027 (2011), *rev. denied*, 294 Kan. 946 (2012). Likewise, this court is bound by the United States Supreme

Court's holding in *Smith*. See *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P.2d 665, *cert. denied* 361 U.S. 846 (1959) (the interpretation placed on the Constitution and laws of the United States by the decisions of the United State Supreme Court is controlling upon state courts and must be followed). Donaldson cites to no authority suggesting any intention on the part of the Kansas Supreme Court to depart from its holding in *Myers*. Accordingly, we reject Donaldson's claim that the order imposing lifetime registration violated the Ex Post Facto Clause of the United States Constitution.

APPRENDI ISSUE

Finally, Donaldson argued that the district court erred by increasing his sentence based on his criminal history, including his prior juvenile adjudications, without requiring the State to prove the criminal history to a jury beyond a reasonable doubt. Donaldson argues that under *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), any fact that increases the maximum penalty a defendant can receive must be included in the charging document, put before a jury, and proved beyond a reasonable doubt.

Donaldson acknowledges that this issue previously has been decided against him by the Kansas Supreme Court in *State v. Ivory*, 273 Kan. 44, 46-47, 41 P.3d 781 (2002), and *State v. Hitt*, 273 Kan. 224, 225, 42 P.3d 732 (2002), *cert. denied* 537 U.S. 1104 (2003). As previously stated, this court is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position. *Ottinger*, 46 Kan. App. 2d at 655. There is no indication that the Kansas Supreme Court is departing from its previous position in *Ivory* and *Hitt*.

Affirmed in part and dismissed in part.

APPENDIX I



ELECTRONICALLY FILED
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CLERK OF THE APPELLATE COURT
CASE NUMBER: 109671

Court: Supreme Court

Case Number: 109671

Case Title: STATE OF KANSAS, APPELLEE,
V.
JOSEPH V. DONALDSON, APPELLANT.

Type: Motion for Rehearing or Modification by Appellant,
Joseph Donaldson.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in black ink, appearing to be "Caleb Stegall", written over a circular stamp or seal.

/s/ Caleb Stegall, Justice

APPENDIX J

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 109,689

STATE OF KANSAS,
Appellee,

v.

KEVIN ADDISON HIRSCHBERG,
Appellant.

SYLLABUS BY THE COURT

Non-sex offenders seeking to avoid retroactive application of provisions of the Kansas Offender Registration Act (KORA) must, in order to satisfy the "effects" prong of the test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), produce a record that distinguishes—by the "clearest proof"—KORA's effect on those classes of offenders from the Act's effects on sex offenders as a class.

Review of the judgment of the Court of Appeals in an unpublished opinion filed May 9, 2014. Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Opinion filed August 11, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Carol Longenecker Schmidt, of Kansas Appellate Defender Office, was on the briefs for appellant.

Chadwick J. Taylor, district attorney, *Jodi Litfin*, senior assistant district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

STEGALL, J.: In December 2010, Kevin Addison Hirschberg sold a bag of methamphetamine to an undercover officer. He later pled guilty to one count of possession with intent to sell, deliver, or distribute methamphetamine. Prior to his plea, the Kansas Legislature amended the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, lengthening the amount of time Hirschberg was required to register as a drug offender from 10 years to 15 years. See L. 2011, ch. 95, sec. 6; K.S.A. 2011 Supp. 22-4906(a)(1)(O). During the sentencing hearing, Hirschberg asked the court to impose a 10-year registration period, but the court overruled the objection and imposed a 15-year period, finding that the 2011 amendments applied retroactively. It ultimately sentenced him to 40 months' imprisonment and 24 months' postrelease supervision. Hirschberg appealed.

A panel of our Court of Appeals rejected the merits of Hirschberg's claim that retroactively applying the amendments to him violates the Ex Post Facto Clause. *State v. Hirschberg*, No. 109,689, 2014 WL 1887646, at *2 (Kan. App. 2014) (unpublished opinion). It also disagreed that the district court violated his constitutional rights pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), when it used his prior criminal convictions to increase his sentence without requiring the State to prove them to a jury beyond a reasonable doubt. 2014 WL 1887646, at *2 (citing *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 [2002]). We granted review solely to address the ex post facto claim.

We recently analyzed KORA in this context using the intent-effects test set forth by the United States Supreme Court and concluded lifetime sex offender registration does not constitute "punishment" for purposes of applying any provision of the federal

Constitution. *State v. Petersen-Beard*, 304 Kan. 192, 198-209, 377 P.3d 1127 (2016) (relying on the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963]). We therefore held that the 2011 version of KORA could not violate federal prohibitions against cruel and unusual punishment. See 304 Kan. at 208. And not long ago, we "explicitly extend[ed] the holding of *Petersen-Beard* to apply to ex post facto challenges." *State v. Reed*, 306 Kan. ___, ___ P.3d ___ (No. 110,277, filed August 4, 2017), slip op. at 8.

Therefore, to prevail, Hirschberg must demonstrate that drug offenders as a class are sufficiently distinguishable from the class of sex offenders such that the effects of the law become punitive rather than civil when applied to drug offenders. We recently confronted this question in *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017). In that case, we declined to hold that KORA registration is punishment where "the record . . . is insufficiently developed for [the defendant] to persuasively argue KORA's allegedly punitive effects on drug offenders as a class separate and distinct from sex offenders." *Meredith*, 306 Kan. at ___, slip op. at 6; see *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("Because we 'ordinarily defer to the legislature's stated intent,' [citation omitted] 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," [citations omitted]."); see also *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997) (holding that the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) (upholding *Myers*' determination that the legislature intended to enact a nonpunitive scheme), *overruled on other grounds by Petersen-Beard*, 304 Kan. 192. We further explained in *Meredith* that such an inquiry "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." *Meredith*, 306 Kan. at ____, slip op. at 10.

Hirschberg's claim suffers from the same flaw. He is unable to satisfy the "clearest proof" standard because the record below has not been sufficiently developed. As a result, we cannot—at this time—hold that KORA's registration requirements as applied to drug offenders are punishment and subject to the limitations of the Ex Post Facto Clause.

Affirmed.

BEIER, J., dissenting: Consistent with my votes in *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016); *State v. Reed*, 306 Kan. ____, __ P.3d __ (No. 110,277, filed August 4, 2017); and *State v. Meredith*, 306 Kan. ____, __ P.3d __ (No. 110,520, filed August 4, 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. 109,689

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

KEVIN ADDISON HIRSCHBERG,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Opinion filed May 9, 2014.
Affirmed.

Carol Longenecker Schmidt, of Kansas Appellate Defender Office, for appellant.

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

Before BRUNS, P.J., PIERRON and STANDRIDGE, JJ.

Per Curiam: Kevin Addison Hirschberg pled no contest to one count of possession with intent to sell, deliver, or distribute methamphetamine. On January 27, 2012, the district court sentenced Hirschberg to 40 months' imprisonment and ordered him to register as an offender for 15 years after his release from prison. On appeal, Hirschberg contends that the imposition of a 15-year registration requirement violates the Ex Post Facto Clause of the United States Constitution and that the district court erred in failing to require that his criminal history be proven to a jury beyond a reasonable doubt. Because we find neither of Hirschberg's contentions to have merit, we affirm.

Ex Post Facto Clause

Hirschberg contends the district court erred in ordering him to register as an offender for a 15-year period when the law at the time he committed the crime—December 7, 2010—called for a 10-year registration period. It is undisputed that the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, was amended in 2011 to increase the registration period applicable to Hirschberg from 10 to 15 years. See K.S.A. 2011 Supp. 22-4906(a)(1)(O). Likewise, it is undisputed that the law in existence at the time Hirschberg committed his crime called for a 10-year registration period. See K.S.A. 2010 Supp. 22-4902(a)(11)(C); K.S.A. 2010 Supp. 22-4906(a)(1). As such, Hirschberg argues the increased registration period cannot be applied against him retroactively without violating the Ex Post Facto Clause of the United States Constitution.

The constitutionality of a statute presents a question of law over which we have unlimited review. See *State v. Gaona*, 293 Kan. 930, 957, 270 P.3d 1165 (2012). Moreover, we must presume that statutes are constitutional and resolve all doubts in favor of a statute's validity. *State v. Britt*, 295 Kan. 1018, 1031, 287 P.3d 905 (2012).

Under the Ex Post Facto Clause, "any statute . . . which makes more burdensome the punishment for a crime, after its commission . . . is prohibited" *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925); see *State v. Jaben*, 294 Kan. 607, 612, 277 P.3d 417 (2012). Kansas appellate courts and the United States Supreme Court, however, have found that offender registration statutes do not impose punishment; they impose civil penalties. See *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, 696, 923 P.2d 1024 (1996), *cert denied* 521 U.S. 1118 (1997); *State v. Evans*, 44 Kan. App. 2d 945, 948, 242 P.3d 220 (2010).

In *State v. Myers*, the defendant was convicted of sexual battery and rape prior to the enactment of the Kansas Sex Offender Registration Act (KSORA), which later became KORA. The defendant argued that because KSORA was not in place at the time of his offense, it violated the Ex Post Facto Clause as applied to him. The Kansas Supreme Court disagreed and concluded the registration requirements were remedial and, as such, constitutional. Moreover, the *Myers* court found that the purpose of the registration requirement was not punishment but public safety. 260 Kan. at 671, 681.

In *Smith v. Doe*, 538 U.S. at 105-06, the United States Supreme Court held that a similar registration requirement under Alaska's sex offender registration act was not punishment. Rather, the Court held that registration requirements served to make a valid regulatory program effective. Thus, imposing the act's requirements is not a punitive restraint that violates the Ex Post Facto Clause. 538 U.S. at 102.

In *State v. Evans*, a panel of this court was asked to decide whether an amendment to KORA could be retroactively applied without violating the Ex Post Facto Clause. In deciding that it could, the panel looked to *Myers* as authority for the proposition that offender registration requirements do not constitute punishment. Hence, the *Evans* court held that the retroactive application of changes in the registration requirements did not violate the Ex Post Facto Clause. 44 Kan. App. 2d at 948.

Until the Kansas Supreme Court signals an intent to depart from its holding in *Myers*, we are duty bound to follow its conclusion that offender registration requirements do not violate the Ex Post Facto Clause. See *State v. Jones*, 44 Kan. App. 2d 139, 142, 234 P.3d 31 (2010), *rev. denied* 292 Kan. 967 (2011) (stating this court is "required to follow Kansas Supreme Court precedent unless there is some indication the court is departing from its previous decision"). Likewise, we are bound by the United States Supreme Court's interpretation of a similar offender registration scheme under the Ex Post Facto Clause in *Smith v. Doe*. See *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P.2d

665, *cert. denied* 361 U.S. 846 (1959) (The United States Supreme Court's interpretation of the Constitution is controlling on state courts and must be followed.). We, therefore, conclude that the district court's imposition of a 15-year registration requirement did not violate the Ex Post Facto Clause of the United States Constitution.

Apprendi Issue

Hirschberg also contends that the district court violated his rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In particular, he argues that the district court could not consider his criminal history unless it was proven to a jury beyond a reasonable doubt. Nevertheless, Hirschberg concedes that the Kansas Supreme Court has previously decided this issue and states that he simply wishes to preserve the claim for federal review. See *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 (2002).

As indicated above, 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 that the district court appropriately considered Hirschberg's criminal history in determining his sentence.

Affirmed.

APPENDIX L



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CASE NUMBER: 109689

Court: Supreme Court

Case Number: 109689

Case Title: STATE OF KANSAS, APPELLEE,
V.
KEVIN ADDISON HIRSCHBERG, APPELLANT.

Type: Motion for Rehearing or Modification by Appellant,
Kevin Addison Hirschberg.

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. 110,472

STATE OF KANSAS,
Appellee,

v.

THOMAS BURDICK,
Appellant.

SYLLABUS BY THE COURT

Non-sex offenders seeking to avoid retroactive application of provisions of the Kansas Offender Registration Act (KORA) must, in order to satisfy the "effects" prong of the test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), produce a record that distinguishes—by the "clearest proof"—KORA's effect on those classes of offenders from the Act's effects on sex offenders as a class.

Review of the judgment of the Court of Appeals in an unpublished opinion filed May 8, 2015. Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed August 11, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Meryl Carver-Allmond, of Capital Appellate Defender Office, was on the briefs for appellant.

Bethany C. Fields, deputy county attorney, *Barry Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In 2009, Thomas Burdick pled no contest to one count of distribution of cocaine. Pursuant to a plea agreement, the district court sentenced him to 30 months' imprisonment and ordered 24 months' postrelease supervision. At the time he committed the crime, Burdick was required to register as a drug offender pursuant to the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.* See K.S.A. 2008 Supp. 22-4902(a)(11)(C). Under that version of KORA, offenders had to register with the county sheriff "[w]ithin 10 days of the offender coming into any county in which the offender resides or temporarily resides for more than 10 days." K.S.A. 22-4904(a)(2).

By the time Burdick was released from prison in December 2012, the legislature had changed KORA by requiring offenders to "register in person upon any commencement, change or termination of residence location . . . within *three* business days of such commencement, change or termination." (Emphasis added.) K.S.A. 2012 Supp. 22-4905(g); see L. 2011, ch. 95, sec. 5 (reducing the time to update registration to 3 days). Thereafter, Burdick changed residences several times, and law enforcement arrested him for failing to timely update his registration.

Prior to trial, Burdick submitted a "motion to dismiss for ex post facto punishment by 2011 redux of Kansas Offender Registration Act," which the court denied. A jury eventually convicted Burdick of one count of violating KORA for failing to report a change of residence within 3 business days between January 9, 2013, and January 11, 2013. Among Burdick's several complaints on appeal, he claimed that applying the 2011 KORA amendments to him violated the Ex Post Facto Clause of the United States Constitution. The Court of Appeals disagreed, holding that registration is not punishment, so the 2011 amendments could be applied retroactively to him. *State v. Burdick*, No.

110,472, 2015 WL 2342145, at *6-7 (Kan. App. 2015) (unpublished opinion). Burdick petitioned for review on only this issue, and we granted review.

Burdick argues that his conviction is invalid because when he was first required to register, he had 10 days—rather than 3—to notify authorities about a change in residence. We recently analyzed KORA in this context using the intent-effects test set forth by the United States Supreme Court and concluded lifetime sex offender registration does not constitute "punishment" for purposes of applying any provision of the federal Constitution. *State v. Petersen-Beard*, 304 Kan. 192, 198-209, 377 P.3d 1127 (2016) (relying on the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963]). We therefore held that the 2011 version of KORA could not violate federal prohibitions against cruel and unusual punishment. See 304 Kan. at 208. And not long ago, we "explicitly extend[ed] the holding of *Petersen-Beard* to apply to ex post facto challenges." *State v. Reed*, 306 Kan. ___, ___ P.3d ___ (No. 110,277, filed August 4, 2017), slip op. at 8.

Therefore, to prevail, Burdick must demonstrate that drug offenders as a class are sufficiently distinguishable from the class of sex offenders such that the effects of the law become punitive rather than civil when applied to drug offenders. We recently confronted this question in *State v. Meredith*, 306 Kan. ___, ___ P.3d ___ (No. 110,520, filed August 4, 2017). In that case, we declined to hold that KORA registration is punishment where "the record . . . is insufficiently developed for [the defendant] to persuasively argue KORA's allegedly punitive effects on drug offenders as a class separate and distinct from sex offenders." *Meredith*, 306 Kan. at ___, slip op. at 6; see *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("Because we 'ordinarily defer to the legislature's stated intent,' [citation omitted], 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a

criminal penalty,' [citations omitted]."); see also *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996) (holding that the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) (upholding *Myers*' determination that the legislature intended to enact a nonpunitive scheme), *overruled on other grounds by Petersen-Beard*, 304 Kan. 192. We further explained in *Meredith* that such an inquiry "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." *Meredith*, 306 Kan. at ____, slip op. at 10.

Burdick's claim suffers from the same flaw. He is unable to satisfy the "clearest proof" standard because the record below has not been sufficiently developed. As a result, we cannot—at this time—hold that KORA's registration requirements as applied to drug offenders are punishment and subject to the limitations of the Ex Post Facto Clause.

Affirmed.

BEIER, J., dissenting: Consistent with my votes in *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016); *State v. Reed*, 306 Kan. ____, __ P.3d ____ (No. 110,277, filed August 4, 2017); and *State v. Meredith*, 306 Kan. ____, __ P.3d ____ (No. 110,520, filed August 4, 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 N

NOT DESIGNATED FOR PUBLICATION

No. 110,472

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

THOMAS BURDICK,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed May 8, 2015. Affirmed.

Meryl Carver-Allmond, of Capital Appellate Defender Office, for appellant.

Bethany C. Fields, deputy county attorney, *Barry Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., GREEN and LEBEN, JJ.

Per Curiam: Thomas Burdick was convicted in a jury trial of one count of violating the Kansas Offender Registration Act (KORA) for failure to register his change of residence within 3 business days as required by K.S.A. 2014 Supp. 22-4905(g). Burdick appeals his conviction, raising two arguments. First, Burdick argues that the trial court erred by refusing "to give an appropriate instruction differentiating between [his] obligations under the KORA to report changes in temporary lodging versus his obligation to report changes in his permanent residence." Second, Burdick argues that his conviction violates the Ex Post Facto Clause of the United States Constitution because KORA

registration requirements are more burdensome than when he was first required to register. There is no merit in these contentions. Accordingly, we affirm.

In 2009, Burdick pled no contest to one count of distribution of cocaine in violation of K.S.A. 2008 Supp. 65-4161(a). As a result of his conviction, Burdick was sentenced to 30 months' imprisonment and subject to KORA registration. Offenders subject to KORA must "register in person upon any commencement, change or termination of residence location . . . within three business days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered" K.S.A. 2014 Supp. 22-4905(g).

When Burdick was released from prison in December 2012, he had an approved parole plan to reside at the Manhattan Emergency Shelter (MES). Nevertheless, in late December 2012, Burdick stopped residing at MES. On January 3, 2013, Burdick informed the Riley County Police Department that his new residence was 3591 Letter Rock Road in Riley County.

Despite giving the police this address, on January 3, 2013, Burdick rented a hotel room at America's Best Value Inn. On January 4, 2013, he renewed and stayed in the same hotel room. Burdick contends that he checked out of the hotel room on January 5, 2013, because he could not afford to stay another night. The hotel manager, however, contends that Burdick stayed in the hotel room without paying on January 5, 2013, and January 6, 2013.

When the manager of a different hotel contacted the police alleging that Burdick stayed at her hotel without paying, the police began investigating whether Burdick actually resided at the Letter Rock Road address. The police went to the Letter Rock Road address and discovered that Burdick and the son of the owner of the Letter Rock Road property were friends. Although Burdick was receiving mail at the Letter Rock

Road address, the owner stated that he had not given Burdick permission to stay on his property and as far as he knew, Burdick had never stayed on his property. Burdick did not contact the police or his parole officer about a change of residence after January 3, 2013. Consequently, when Burdick returned to MES on January 11, 2013, the police arrested him for failing to update his residency registration information within 3 business days.

The State ultimately charged Burdick with one count of violation of KORA for failure to report a change of residence within 3 business days between January 9, 2013 and January 11, 2013, as provided in K.S.A. 2014 Supp. 22-4905(g). The State additionally charged Burdick with one count of theft of hotel services from America's Best Value Inn on January 5, 2013, and January 6, 2013, in violation of K.S.A. 2012 Supp. 21-5801(a)(1) and (b)(4).

Before his jury trial, Burdick filed several motions. The motions included a "Motion to Dismiss for Ex Post Facto Punishment by 2011 Redux of Kansas Offender Registration Act," a motion for mental state jury instruction, and a motion not to use the KORA definition of reside. All three motions were denied.

At his jury trial, both the State and the defense presented conflicting evidence concerning Burdick's whereabouts between January 3, 2013, the date Burdick informed the police he resided at the Letter Rock Road address, and January 11, 2013, the date Burdick was arrested. After the defense rested, the trial judge, the State, and the defense attorney discussed the proposed jury instructions. The defense attorney made only one objection concerning the instruction on theft. Following this discussion, the jury returned and the trial judge read the final instructions to the jury. Then, the State and defense made closing arguments and the jury began deliberating. During jury deliberations, the jury asked the trial judge the following question: "According to [jury instruction] Number 4, are we to disregard where the defendant stayed prior to January the 9th?" Although the defense attorney mentioned that an instruction concerning temporary residency as

detailed in K.S.A. 2014 Supp. 22-4907(a)(6) might answer the jury's question, the trial judge, the State, and the defense attorney ultimately agreed on a different answer.

The jury found Burdick guilty of violating KORA and not guilty of theft of services. Next, the defense attorney filed a motion for acquittal and a motion for a new trial. Burdick argued that the trial court erred in not granting his proposed jury instruction concerning temporary residency. Both motions were denied.

At sentencing, the trial judge granted both a downward durational and dispositional departure to 24 months' probation.

Did the Trial Court Err by Failing to Give the Jury Instruction Concerning Temporary Residency Registration Requirements?

On appeal, Burdick argues that the trial court erred when it denied his requested "instruction on his duty under the KORA to report changes in temporary lodging." Burdick bases this argument on K.S.A. 2014 Supp. 22-4907(a)(6) which requires an offender to provide information on his "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" at registration. Burdick contends that the trial court erred in refusing to give his requested instruction because the instruction was a correct statement of the law. Moreover, Burdick argues that "there was evidence to support [the instruction], and [the instruction] could have affected the verdict."

For jury instruction issues, the analytical steps with associated standards of review are as follows:

"(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in [*State v. Ward*], 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012))." *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 (2012).

Nevertheless, K.S.A. 2014 Supp. 22-3414(3) states that a party cannot claim error regarding the trial court's "giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give an instruction is clearly erroneous." As a result, if a party does not object to the trial court's failure to give a specific jury instruction, the party cannot claim error unless that error was clearly erroneous.

In this case, Burdick's argument regarding the jury instruction fails because he never requested an instruction on temporary residency registration requirements before the jury retired. Furthermore, the trial court's failure to give that instruction was not clearly erroneous because Burdick never asked for such an instruction. For example, upon reviewing the record, it is clear that Burdick failed to request the jury instruction explaining temporary residency requirements under KORA. Before trial, Burdick made two motions concerning jury instructions, but neither of those motions dealt with the temporary residency requirements. In the first motion, Burdick moved to include a jury instruction highlighting how unfair KORA is because one can violate KORA without a culpable mental state. In the second motion, Burdick requested that the trial court not include an instruction on the term "reside" as defined in K.S.A. 2014 Supp. 22-4902

because it improperly shifts the burden from the State. The trial court denied both motions.

During trial but before the jury began to deliberate, the trial court held an on-the-record discussion outside the presence of the jury concerning the jury instructions. The trial judge went through each of the jury instructions, asking if either the State or defense had any objections. Burdick only had one objection during this conference. He objected to the language "exerted unauthorized control over services" in the theft instruction. Burdick additionally requested an instruction on the role of the jury and again requested an instruction on the unfairness of KORA concerning the lack of culpable mental state. Both requests were denied. At the end of the conference, the trial judge asked the defense if it was ready to proceed and the defense attorney stated he had no further issues and was ready to proceed. Immediately after the jury instructions conference, the trial judge read the final jury instructions to the jury, closing arguments were made, and the jury began to deliberate. As a result, Burdick failed to request an instruction on temporary residency requirements before the jury began to deliberate.

Nevertheless, Burdick asserts in his brief that an off-the-record conversation about the temporary residency jury instruction occurred before the formal jury instructions conference. Burdick bases this assertion on statements he made during an on-the-record discussion about answering the jury's question. During this discussion, Burdick stated that he had previously requested the jury instruction explaining temporary residency requirements as stated in K.S.A. 2014 Supp. 22-4907(a)(6) in an off-the-record conversation. First, it is important to note that despite Burdick's assertion, neither the trial court nor the State agreed or admitted that such a conversation had ever occurred off-the-record. Thus, outside of his own assertions, nothing in the record supports that this off-the-record conversation occurred. More importantly, however, Burdick's argument ignores that whether he had an off-the-record discussion about this jury instruction before

the jury began deliberating is irrelevant because he failed to comply with the requirements of K.S.A. 2014 Supp. 22-3414(3).

K.S.A. 2014 Supp. 22-3414(3) clearly states the proper procedure regarding requesting jury instructions. First, a "party may file written requests that the court instruct the jury on the law as set forth in the requests." K.S.A. 2014 Supp. 22-3414(3). Then, K.S.A. 2014 Supp. 22-3414(3) requires that the trial court rule on all proposed jury instructions and objections and the court reporter "record all objections to the instructions given or refused by the court, together with modifications made, and the rulings of the court." Since requests for jury instructions should be filed as written requests and a court reporter must record all objections and rulings of the court, it is evident that K.S.A. 2014 Supp. 22-3414(3) requires that a party make a request for a jury instruction on the record. This conclusion is further supported by the fact K.S.A. 2014 Supp. 22-3414(3) requires that "[a]ll instructions given or requested must be filed as a part of the record in the case." Thus, whether Burdick made an off-the-record request for a temporary residency jury instruction is of no effect. This is because K.S.A. 2014 Supp. 22-3414(3) requires not only that a request be made before the jury begins deliberations but also that the request be made on the record.

Furthermore, it is worth noting that after the defense attorney suggested that an instruction on temporary residency may answer the jury's question about how to apply jury instruction Number 4 to certain evidence, the defense attorney, the State, and the trial judge all agreed on an alternative answer. When the trial judge asked the defense attorney if he had any objections to the answer, the attorney stated that he did not. As a result, Burdick never objected to the exclusion of a jury instruction on temporary residency on the record during the course of the trial.

Because Burdick failed to request the jury instruction on the record before the jury retired to consider the verdict, under K.S.A. 2014 Supp. 22-3414(3), he must demonstrate

that the trial court's failure to give the instruction was clearly erroneous. This court uses a two-step process in determining whether the failure to give an instruction was clearly erroneous: (1) the court must determine whether there was error at all, which "requires demonstrating that giving the instruction would have been legally and factually appropriate based on an unlimited review of the entire record;" and, (2) "[i]f the court finds error, it moves to an inquiry of whether reversal is warranted based on an assessment of whether it is firmly convinced that the jury would have reached a different verdict if the instruction had been given." *State v. Cameron*, 300 Kan. 384, 389, 329 P.3d 1158 (2014).

Burdick cannot establish that the trial court's failure to give the temporary residency jury instruction was clear error. In some past cases, this court has found that a party's failure to request an instruction prevented a finding of clear error based on the trial court's failure to include the instruction. For instance, in *State v. Dumars*, 33 Kan. App. 2d 735, 751, 108 P.3d 448, *rev. denied* 280 Kan. 986 (2005), this court determined that the failure of the defense to request a "custom instruction preclude[d] any conclusion that there was clear error." Moreover, in *State v. Antwine*, 4 Kan. App. 2d 389, 395, 607 P.2d 519 (1980), this court found that "it was not error for the court to fail to give a cautionary instruction to the jury when no such instruction was requested by counsel."

Nevertheless, our Supreme Court in *State v. Pabst*, 273 Kan. 658, 660, 44 P.3d 1230 (2002), stated the following: "'It is well established that this court reviews a trial court's failure to give an instruction by a clearly erroneous standard where the party neither requested the instruction nor objected to its omission.'" Even under this more lenient standard than *DuMars* and *Antwine*, Burdick is unable to show that the trial court's failure to give the temporary residency jury instruction was clear error. First, even on appeal, Burdick has not provided the proposed jury instruction that he claims should have been given. Second, the violation of the temporary residency requirements is found under K.S.A. 2014 Supp. 22-4907(a)(6). Nevertheless, Burdick was not charged with

violating the temporary residency requirements. Instead, Burdick was charged with violating KORA under K.S.A. 2014 Supp. 22-4905(g). Instruction number 4, which is contained in the record, properly and fairly stated the elements for this charge. "Error cannot be predicated on the refusal to give an instruction when its substance is adequately covered in other instructions." *Black v. Don Schmid Motor, Inc.*, 232 Kan. 458, 474, 657 P.2d 517 (1983).

Thus, on this record, Burdick has not shown any clear error in the trial court's jury instructions.

Is Burdick's Conviction Invalid Because It Violates the Ex Post Facto Clause of the United States Constitution?

Next, Burdick argues that the 2011 amendments to KORA have made the law penal in nature. Thus, Burdick contends that the 2011 amendments violate the Ex Post Facto Clause of the United States Constitution. Burdick specifically asserts that his conviction is invalid because when he was first required to register as an offender he had 10 days, not 3 days, to inform the police about a change in residence. Based on precedent, however, Burdick's argument fails.

Whether a statute is constitutional is a question of law over which appellate courts have unlimited review. *State v. Simmons*, 50 Kan. App. 2d 448, 453, 329 P.3d 523 (2014). Moreover, under our ordinary rules of statutory construction,

""[t]he constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond reasonable doubt.

[Citations omitted.]"" *State v. Carr*, 300 Kan. 1, 285, 331 P.3d 544 (2014) (quoting *State v. Brown*, 280 Kan. 898, 899, 127 P.3d 257 [2006]).

A statute violates the Ex Post Facto Clause when it punishes an act as a crime that was not a punishable act when committed or "makes more burdensome the punishment for a crime after its commission." *State v. Myers*, 260 Kan. 669, Syl. ¶ 5, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997). Nevertheless, the prohibition against ex post facto laws only applies to laws which are punitive. *Myers*, 260 Kan. at 677.

In *Myers*, after an extensive review of the Kansas Sex Offender Registration Act (KSORA), our Supreme Court held that the legislature created KSORA for a nonpunitive public safety purpose. 260 Kan. at 681. The *Myers* court ultimately held that the registration requirements under KSORA were remedial and thus constitutional. 260 Kan. at 671. Moreover, in *Smith v. Doe*, 538 U.S. 84, 105-106, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the United States Supreme Court determined that Alaska's sex offender registration act was nonpunitive and did not violate the Ex Post Facto Clause.

Burdick acknowledges the *Myers* and *Smith* decisions but maintains that since the 2011 amendments to KORA this court can no longer ignore that registration is a punishment. To support this argument, Burdick challenges several of the 2011 amendments to KORA and discusses how registration is a punishment under the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), factors. In his brief, Burdick specifically takes issue with the 2011 KORA amendments that have increased the penalty for failure to register; created a registration fee; expanded the definition of offenders who must register; heightened reporting requirements, including increased frequency of registration, length of registration, and notification of residency changes and traveling plans; and increased the information subject to public disclosure.

Yet, this court has consistently rejected Burdick's arguments. In *State v. Byers*, Nos. 108,564, 2013 WL 3867862, at *6 (Kan. App. 2013) (unpublished opinion), and *State v. Watkins*, No. 110,702, 2014 WL 4231269, at *4 (Kan. App. 2014) (unpublished opinion), this court rejected that the increased punishment for failure to register was penal because punishment for failure to register was a collateral consequence of KORA necessary for KORA to work. This court has also rejected the argument that payment of a registration fee is penal because the fee is not a punishment but a way to reimburse the sheriff's office. See *State v. Hall*, No. 106,903 2013 WL 646482, at *4 (2013) (unpublished opinion), *rev. denied* 297 Kan. 1250 (2013) (citing *State v. Weis*, 47 Kan. App. 2d 703, 719, 280 P.3d 805 [2012]).

Burdick's remaining arguments were addressed in the recent case *State v. Simmons*. Simmons argued that the application of the 2007 amendments of KORA to people who had been convicted of drug crimes before those amendments violated the Ex Post Facto Clause of the United States Constitution. Like Burdick, Simmons alleged that "the expanded scope of the offenders who are required to register, the heightened reporting obligations, and the more aggressive public notification provisions implemented since the court in *Myers* considered the constitutionality of KSORA in 1996" required a finding that the new amendments were penal in nature and in violation of the Ex Post Facto Clause. *Simmons*, 50 Kan. App. 2d at 464. In rejecting Simmons' argument, this court stated:

"Although the changes Simmons points out between KSORA as it was upheld in *Myers* and the KORA version applied to her are significant, ultimately they are matters of degree rather than differences of kind. Thus, absent some indication the Kansas Supreme Court intends to retreat from its decision in *Myers*, it remains controlling authority. Likewise, many of the registration features challenged by Simmons were included in the Alaska sex offender registration act upheld by the United States Supreme Court in *Smith*. [Citation omitted.]" 50 Kan. App. 2d at 464-65.

Consequently, this court has previously addressed and rejected all of Burdick's arguments concerning the invalidity of his conviction based on an Ex Post Facto Clause violation. Moreover, as stated in *Simmons*, *Myers* remains controlling authority and this court is bound to follow our Supreme Court precedent absent 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). For these reasons, Burdick's conviction for failure to comply with KORA registration is valid and does not violate the Ex Post Facto Clause.

Affirmed.

APPENDIX O



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CLERK OF THE APPELLATE COURT
CASE NUMBER: 110472

Court: Supreme Court

Case Number: 110472

Case Title: STATE OF KANSAS, APPELLEE,
V.
THOMAS BURDICK, APPELLANT.

Type: Motion for Rehearing or Modification by Appellant,
Thomas Burdick.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in black ink, appearing to be "Caleb Stegall", written over a circular stamp or seal.

/s/ Caleb Stegall, Justice

APPENDIX P

NOT DESIGNATED FOR PUBLICATION

No. 107,512

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRYAN EUGENE BROWN,
Appellant.

MEMORANDUM OPINION

Review of the judgment of the Court of Appeals in an unpublished opinion filed May 24, 2013. Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Opinion filed August 18, 2017. Judgment of the Court of Appeals affirming the district court is affirmed on the issues subject to review. Judgment of the district court is affirmed on the issues subject to review.

Carol Longenecker Schmidt, of Kansas Appellate Defender Office, was on the briefs for appellant.

Chadwick J. Taylor, district attorney, *Jodi Litfin*, senior assistant district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

Per Curiam: Bryan Eugene Brown pleaded no contest to one count of failing to register as an offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, and one count of attempted failure to register. On appeal, Brown argued for the first time that the registration requirement violated the Ex Post Facto Clause of the United States Constitution because at the time of his underlying drug offense he was not required to register under KORA. The Court of Appeals rejected this claim. *State v. Brown*, No. 107,512, 2013 WL 2395319 (Kan. App. 2013) (unpublished opinion). On

review, we affirm based on our denial of a similar claim in *State v. Shaylor*, 306 Kan. ___, ___ P.3d ___ (No. 108,103, this day decided).

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, Brown was charged with possession of cocaine with the intent to sell. He pleaded no contest in 2006 and was sentenced to 30 months' imprisonment and 24 months' postrelease supervision. At that time, KORA did not require drug offenders to register. See K.S.A. 2003 Supp. 22-4902.

In 2007, the Kansas Legislature amended KORA to impose offender registration requirements on persons who had been convicted of various drug offenses—including possession with intent to sell. See K.S.A. 22-4902(a)(11)(C). Brown failed to comply with KORA in 2010 and 2011. He pleaded no contest to one count of failing to register and one count of attempted failure to register. The district court sentenced Brown to 57 months' imprisonment and 24 months' postrelease supervision for the registration violation and a concurrent 12-month prison term for the attempted violation.

On appeal, Brown presented three issues: (1) whether imposition of a registration requirement violated the Ex Post Facto Clause; (2) if so, whether the court lacked a sufficient factual basis for his plea; and (3) whether the court violated his Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), when it sentenced him to an increased sentence based upon his prior criminal history without requiring that the State put it before a jury and prove it beyond a reasonable doubt. The Court of Appeals affirmed the district court's judgment. *Brown*, 2013 WL 2395319, at *5.

Brown petitioned the court for review. We granted review on the KORA issues only. 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).

SHAYLOR CONTROLS THE OUTCOME

In *Shaylor*, the defendant appealed from her conviction for failure to register as a drug offender under the KORA. At the time of her conviction for manufacture of methamphetamine in 2002, KORA did not impose a requirement on drug offenders. See K.S.A. 2002 Supp. 22-4902. But in 2007, the legislature amended the definition of "offender" for registration purposes to include any person convicted of unlawful manufacture of any controlled substance or controlled substance analog "unless the court makes a finding on the record that the manufacturing or attempting to manufacture such controlled substance was for such person's personal use." K.S.A. 22-4902(a)(11)(A); *Shaylor*, 306 Kan. at ___, slip op. at 2.

The *Shaylor* court held that the persuasiveness of Shaylor's ex post facto claim turned on whether KORA's requirements constitute punishment for her underlying drug crime. We noted that the legislative intent in enacting KORA was to establish 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 5. From this perspective, we further observed that Shaylor made no such showing and held that "[w]ithout a factual record, we cannot conclude that KORA's registration requirements as to drug offenders are so punitive as to override the legislature's intent that KORA be a civil remedy." 306 Kan. at ___, slip op. at 5.

Similarly, Brown made no factual record below. Therefore, he has not demonstrated, as he must, that the registration requirements constitute punishment. And because the registration requirements did not increase Brown's punishment under the law of this case, the retroactive application of KORA registration to his drug conviction does not violate the Ex Post Facto Clause. This holding disposes of all of Brown's issues subject to review.

We affirm the lower courts' judgment on the issues 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 Q

NOT DESIGNATED FOR PUBLICATION

No. 107,512

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRYAN EUGENE BROWN,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Opinion filed May 24, 2013. Affirmed.

Carol Longenecker Schmidt, of Kansas Appellate Defender Office, for appellant.

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

Before STANDRIDGE, P.J., ATCHESON, J., and HEBERT, S.J.

ATCHESON, J.: Defendant Bryan Eugene Brown appeals from a 57-month prison sentence he received in Shawnee County District Court for failing to register as a convicted drug offender. Brown contends that because he was not required to register at the time of his drug offense, the State is unconstitutionally punishing him by relying on later changes expanding the registration scheme. Given the legal latticework the Kansas Supreme Court has built around the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, Brown's argument fails, notwithstanding the anomalous result that he will spend nearly twice as long in prison for failing to register as he did on the original

drug conviction.[1]

[1]When enacted, KORA applied only to defendants convicted of specified sex crimes and was known as the Kansas Sex Offender Registration Act. The Act was later broadened to require defendants convicted of various violent, though not sexually related, offenses to register. The Act's title was modified to reflect that expanded scope by eliminating the word "sex." In this opinion, we refer generally to KORA as encompassing the original Act unless otherwise indicated.

The facts may be briefly stated. In 2004, Brown was charged in Jefferson County District Court with possession of cocaine with the intent to sell, a felony. He entered a plea in January 2006, and, for reasons that are neither relevant nor particularly obvious, he was not sentenced until March 2007. Brown received a standard guidelines sentence of 30 months in prison and 24 months' postrelease supervision.

The Kansas Legislature amended KORA, as of July 1, 2007, to require persons who had been convicted of various drug offenses, including possession of cocaine with intent to sell, to register under the Act. So the changes to KORA required Brown to register and otherwise comply with the Act.

The Shawnee County district attorney, in separate cases, charged Brown with failing to register under KORA in 2010 and 2011. The cases were consolidated for disposition. Brown pled no contest to one count of failing to register and one count of attempted failure to register. The district court imposed a mid-level guidelines sentence of 57 months' imprisonment for failing to register and a concurrent 12-month sentence on the attempt. Brown has appealed, challenging the constitutionality of applying KORA to persons, such as himself, who were not required to register at the time of their underlying criminal offenses. See *State v. Huerta*, 291 Kan. 831, 839-40, 247 P.3d 1043 (2011) (constitutional challenge to sentencing regimen rather than to individual sentence may be

raised on direct appeal).[2]

[2]On appeal, the parties are untroubled by the peculiar legal fiction of an attempted failure to register under KORA as a crime. See K.S.A. 21-3301(a) (defining attempts). Facially, at least, an attempted failure to perform an affirmative act seems indistinguishable from a failure itself—unless the attempt amounts to completion of the act, in which case there would be no failure and, hence, only an attempted failure. Rather than contemplate those implications further, we follow the parties' lead and decline to look for trouble.

Brown contends that applying KORA as amended in mid-2007 to persons who had already been convicted of drug crimes amounts to unconstitutional punishment violating the Ex Post Facto Clause of the United States Constitution. U.S. Const. Art. 1, § 10. A statute violates ex post facto protections if it retroactively either criminalizes conduct that had not been proscribed or increases the punishment for conduct already treated as criminal. *Carmell v. Texas*, 529 U.S. 513, 540, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); *State v. Myers*, 260 Kan. 669, Syl. ¶ 5, 923 P.3d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997). Brown argues that imposing the registration requirements of KORA on him increases the punishment for his drug conviction. The issue calls for constitutional and statutory interpretation in light of fixed and undisputed facts. As such, the question is one of law over which appellate courts exercise unlimited review. See *State v. Turner*, 293 Kan. 1085, 1086, 272 P.3d 19 (2012); *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010).

The argument depends upon the proposition that registration under KORA is punishment. Kansas Supreme Court precedent rejects that characterization of the Act's registration requirements. See *State v. Hemby*, 264 Kan. 542, 555-56, 957 P.2d 428 (1998) (endorsing holding in *Myers*, 260 Kan. at 695-96, that rejects ex post facto challenge to registration requirements because they are not punitive); *Myers*, 260 Kan. at 695-96 (registration requirements of KORA do not constitute punishment and, therefore, are not subject to ex post facto limitations); see also *State v. Scott*, 265 Kan. 1, Syl. ¶ 4, 961 P.2d 667 (1998) (KORA registration not punishment and, therefore, attack on Act as

unconstitutionally cruel and unusual punishment fails); *Smith v. Doe*, 538 U.S. 84, 105-06, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (upholding Alaska's statutory registration scheme for sex offenders, which has components similar to KORA, against ex post facto challenge).

The *Myers* decision essentially controls. After offering a detailed analysis of state and federal offender registration laws and of the legislative purpose behind KSORA, the *Myers* court concluded the duty to register served a sound public safety interest, was enacted to further that public interest, and did not impose obligations so onerous as to be punitive in their effect. 260 Kan. at 681, 695-96. The requirements, therefore, simply were not a form of punishment triggering ex post facto protections. In arriving at that conclusion, the court considered only the impact of the registration obligations themselves. The court did not mention, let alone weigh, the punishment imposed under KSORA for a failure to register. The obvious implication must be that the punishment for failing to register is not a factor to be considered in the ex post facto determination.[2]

[2]The *Myers* decision looked in detail at the public disclosure of registrant information separately from the duty to register and found that aspect of KORA to be punitive and an ex post facto violation. *Myers*, 260 Kan. at 700-02. That aspect of *Myers* has been called into question by *Smith*, 538 U.S. at 105-06, holding that Alaska's sex offender registration and public disclosure scheme, similar to KORA, did not violate the Ex Post Facto Clause. Here, Brown does not specifically rely on or argue the public disclosure aspects of KORA as a constitutional defect that would prevent the registration requirements of the Act from applying to him.

To bolster his position, Brown surveys the history of KORA. The Act was adopted in 1993 and originally applied only to persons convicted of specified sex crimes. The legislature later expanded mandatory registration to various violent crimes and, in 2007, to drug crimes involving the manufacture of or the intent to distribute proscribed controlled substances.

As the legislature expanded the scope of convictions requiring registration, it also made those requirements more onerous. Both in its original form and in 2007, the Act

required registration for 10 years following conviction, exclusive of any time the offender served in prison. The legislature has since extended the registration period to 15 years for drug offenses, and KORA now requires lifetime registration upon a second conviction for a covered drug offense. The Act imposes lifetime registration for first convictions of particular sex offenses. Originally, KORA required a convicted offender to register with the sheriff in the county where he or she resided and to report any address changes. As of 2010, the offender had to register with the sheriff in the counties where he or she resides, holds gainful employment, and attends school. The offender had to promptly report new places of residence, work, or education. And the offender had to report in person to the sheriff's department in his or her county of residence three times a year to verify the accuracy of the information already provided. The offender had to pay a \$20 fee to the sheriff's department each time. Now an offender must report four times a year, although a sheriff's department may permit one report to be made by certified mail.

Brown's argument that the heightened reporting obligations create an ex post facto violation has been foreclosed in the caselaw. The changes Brown points out between KORA, as it was upheld in *Myers* and *Hemby*, and the version applied to him are significant. But ultimately they are matters of degree rather than differences of kind. So absent some indication the Kansas Supreme Court has begun a retreat from those decisions—and we are aware of none—they remain controlling authority. Likewise, many of the registration features Brown attacks were included in the Alaska sex offender registration act the United States Supreme Court upheld in *Smith*, further undercutting his argument. See 538 U.S. at 90-91.

Brown also points to the criminal penalties imposed on him for failing to register in conformity with KORA as supporting his ex post facto challenge. Those penalties have been ratcheted up over the years. Under the original Act, a failure to comply was a misdemeanor punishable by up to a year in jail. In 1999, the legislature upped the penalty to a severity level 10 nonperson felony. Under the version of KORA amended in 2006 and in effect when Brown failed to register, the penalty had been increased to a severity

level 5 person felony, with each 30-day period of noncompliance treated as a separate violation. Now, the penalties range from a severity level 6 person felony for a first conviction to a severity level 3 person felony for a third conviction or a continuing failure to register exceeding 180 days. But as we have said, the Kansas Supreme Court, in *Myers*, tacitly rejected an ex post facto argument based on the punishment imposed for failing to register as opposed to the purpose and character of the registration requirements themselves. The United States Supreme Court explicitly rejected that argument in *Smith*, 538 U.S. at 102. Noting that a sex offender who fails to register under the Alaska act faces criminal prosecution, the Court found that punishment to be independent of the offense triggering registration and, therefore, irrelevant to the ex post facto analysis. 538 U.S. at 102.

Brown makes no argument that the KORA registration requirements have a punitive impact on drug offenders as a class—and, thus, on him—because those offenders have demonstrably different characteristics or their crimes differ materially from convicted sex offenders as a class. In *Scott*, the court noted the legislative purpose in first adopting KORA rested on the substantial danger of recidivism among convicted sex offenders and the often devastating impact those crimes have on victims. 265 Kan. at 9-10. Those penological concerns about sex offenders continue to drive legal conclusions about how they can and should be treated in the criminal justice system. See *State v. Mossman*, 294 Kan. 901, 909-10, 281 P.3d 153 (2012); cf. *Smith*, 538 U.S. at 93 (Alaska registration act expressly cites sex offenders' "high risk of reoffending" as a justification and cites preservation of public safety as a purpose); 538 U.S. at 103 (Court mentions studies showing sex offenders to be far more likely to reoffend than other convicted criminals). Nobody in this case has attempted to reconstruct the legislative intent or purpose in expanding KORA to drug offenders.

We have not presumed some material differences between persons convicted of drug trafficking crimes, on the one hand, and sex offenses, on the other, in arriving at our legal conclusions. If there were such differences, the substantial criminal penalties now

imposed for failing to register—here Brown will have served far longer in prison for failing to register than for the drug offense triggering the duty to register—might suggest disproportionality. *Cf. Smith*, 538 U.S. at 102 (Noting that only an ex post facto challenge had been made to Alaska's sex offender reporting statutes, the Court expressly reserved comment on "other [possible] constitutional objections" to that scheme.).

Brown separately argues that his pleas on the charges in this case were factually defective because he was not subject to KORA registration. The argument simply repackages the ex post facto challenge and fails for the same reason.

Finally, Brown contends the district court improperly considered his criminal history in imposing sentence. He argues that the district court's use of his past convictions in determining an appropriate sentence impairs his constitutional rights because the fact of those convictions was not determined beyond a reasonable doubt by a jury. He relies on the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to support that proposition. Brown also acknowledges the Kansas Supreme Court has rejected that argument and has found the State's current sentencing regimen conforms to the Sixth and Fourteenth Amendments to the United States Constitution with respect to the use of a defendant's past convictions in determining a presumptive statutory punishment. *State v. Fischer*, 288 Kan. 470, Syl. ¶ 4, 203 P.3d 1269 (2009); *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002). We, therefore, decline his invitation to rule otherwise, especially in light of the Supreme Court's recent reaffirmation of *Ivory*. *State v. Peppers*, 294 Kan. 377, 379, 276 P.3d 148 (2012).

Affirmed.

APPENDIX R



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CLERK OF THE APPELLATE COURT
CASE NUMBER: 107512

Court: Supreme Court

Case Number: 107512

Case Title: STATE OF KANSAS, APPELLEE,
V.
BRYAN EUGENE BROWN, APPELLANT.

Type: Motion for Rehearing or Modification (re: Opinion)
by Appellant, Bryan Brown.

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 S

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 107,786

STATE OF KANSAS,
Appellee,

v.

DJUAN R. RICHARDSON,
Appellant.

SYLLABUS BY THE COURT

Non-sex offenders seeking to avoid retroactive application of provisions of the Kansas Offender Registration Act (KORA) must, in order to satisfy the "effects" prong of the test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), produce a record that distinguishes—by the "clearest proof"—KORA's effect on those classes of offenders from the Act's effects on sex offenders as a class.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 26, 2013. Appeal from Sedgwick District Court; BENJAMIN L. BURGESS, judge. Opinion filed November 9, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Heather Cessna and *Shawn E. Minihan*, of Kansas Appellate Defender Office, and were on the briefs for appellant.

Boyd K. Isherwood, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Djuan R. Richardson appeals the district court's denial of his presentence motion to withdraw plea as well as his request to appoint new counsel. Both motions were premised on the argument that Richardson should not have been required to register as a drug offender pursuant to the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, because doing so violates the Ex Post Facto Clause of the United States Constitution. Since we hold that Richardson cannot carry his burden to show "by the clearest proof" that KORA imposes punishment on drug offenders as a class separate and distinct from sex offenders as a class, we affirm the district court's decisions.

FACTUAL AND PROCEDURAL BACKGROUND

Richardson was convicted for sale of cocaine in 2003. After he was sentenced, the legislature expanded KORA to include certain drug offenders, including those convicted of sale of cocaine. L. 2007, ch. 183, sec. 1; see K.S.A. 2007 Supp. 22-4902(a)(11)(C). Following the change in the law, Richardson pled guilty to two counts of offender registration violations when he failed to register in April and May 2011. See K.S.A. 2010 Supp. 22-4904(c).

The district court conducted the initial sentencing hearing on February 21, 2012. Before sentencing could begin, however, Richardson's attorney informed the court that Richardson had filed a number of pro se motions that he had not yet seen. The court acknowledged that it had not seen the motions, so it postponed the sentencing hearing to give the parties time to address them. The court then asked Richardson: "[T]he motion is a pro se motion to withdraw the plea and to request new counsel, both; is that correct?" Richardson responded, "Yes, sir."

In fact, Richardson had filed a handwritten motion to withdraw plea arguing that KORA could not apply to him because drug offenders were not required to register at the time he committed the crime. Richardson further argued that his current trial counsel "should have been aware of the Law Stating that This Do Not Apply to the defendant." Richardson submitted the second motion through an inmate request form addressed to the clerk of the court. It stated:

"Comes now the defendant Pro Se, moves that this court grant the above motion for: Manifest in justice by my appointed attorney in misinforming me of K.S.A. 21-4903. In which the Offender Registration Law does not apply to me because I was sentenced in 2005, not after the date of July 1, 2007 as stated by Kansas Law."

On March 2, 2012, the court held a hearing to consider the motions. At the beginning of the hearing, the court and defense counsel disagreed about the scope of Richardson's motions—the court believed that Richardson only requested a plea withdrawal, but defense counsel thought Richardson also requested new counsel:

"The Court: . . . In this particular matter, there has been no request by [defense counsel] to withdraw as counsel. The motions as filed do not constitute motions requesting replacement of counsel for ineffective assistance. Rather, they make a claim with regard to legal advice that was given as to the applicability of the statute and what, in essence, is an ex post facto issue that's being raised.

"So have I correctly summarized where we are at this point?

. . . .

"[Defense counsel]: Well, no, your Honor. I think that he has in effect by stating that I have misinformed him, I think he is in effect stating that I have been ineffective and he wants new counsel. I think that's the legal effect of his motion, even though he didn't use those specific words.

"The Court: Well, I understand what you're saying, [defense counsel]. I do not consider the Motion to Withdraw Plea as a motion to remove you for counsel for ineffectiveness because he does not raise any issues of conflict of interest, any irreconcilable conflicts, or any breakdown in communication. So, accordingly, I'm not going to consider it as anything other than a Motion to Withdraw Plea."

Defense counsel then asked to withdraw as Richardson's counsel, explaining, "[Richardson] alleged . . . that I've misinformed him He does not feel that he should have been convicted, that the offender registration law did not apply to him. And he is correct, I did not advise him of that." The district court disagreed. Citing *State v. Armbrust*, 274 Kan. 1089, Syl. ¶ 3, 59 P.3d 1000 (2002), and *State v. Cook*, 286 Kan. 766, Syl. ¶ 5, 187 P.3d 1283 (2008), the court found that Richardson's underlying legal claim lacked any merit, so

"[t]he fact that [defense counsel] did not advise Mr. Richardson specifically of that, I do not consider to be ineffective assistance of counsel. Again, he has not raised ineffective assistance of counsel issues in any of the documents that have been filed. He has not raised any conflict of interest, any irreconcilable conflicts, any breakdown in communication."

The court then denied the motion to withdraw plea and proceeded with sentencing. It ultimately granted Richardson a downward durational departure and sentenced him to serve 30 months' imprisonment.

On appeal, Richardson argued that the district court should have permitted him to withdraw his plea because his attorney did not advise him of the ex post facto issue. Richardson also claimed that he was denied conflict-free counsel for the same reason. The Court of Appeals affirmed. *State v. Richardson*, No. 107,786, 2013 WL 3867329, at *4 (Kan. App. 2013) (unpublished opinion). The Court of Appeals relied on caselaw

upholding the constitutionality of sex offender registration. 2013 WL 3867329, at *2-3. The court reasoned that because Richardson's ex post facto claim was meritless, his "attorney did not provide inadequate assistance by failing to tell him about a legal argument that had no merit." 2013 WL 3867329, at *3.

With respect to new counsel, the court found no inadequacy in representation or conflict of interest. 2013 WL 3867329, at *3-4. "[A] conflict might have existed if Richardson's counsel had had to argue about his own ineffectiveness. . . . But the district court properly determined that there was no ineffectiveness on that score because there was no ex post facto argument to be made that had any merit." 2013 WL 3867329, at *3. Therefore, the court held, "The district court made a proper inquiry into whether new counsel should be appointed, and there are no facts here suggesting new counsel was needed." 2013 WL 3867329, at *1.

We granted Richardson's petition for review.

ANALYSIS

Richardson continues to argue that he presented the court with two distinct arguments—(1) that he should have been able to withdraw his pleas and (2) that he was entitled to new trial counsel. Yet, Richardson acknowledges in his brief before the Court of Appeals that both requests are premised upon the same argument—that retroactively requiring him to register violates the Ex Post Facto Clause of the United States Constitution.

Richardson moved to withdraw his guilty pleas shortly before sentencing.

"1. A district court has discretion under K.S.A. 2016 Supp. 22-3210(d)(1) to grant a motion to withdraw a guilty or no contest plea for good cause. Accordingly, appellate courts review a district court's decision to deny a presentence motion to withdraw a plea, including the underlying conclusion that the defendant has not established good cause, for an abuse of discretion. This generally means that the district court's decision is protected if reasonable persons could differ upon the propriety of the decision, as long as the discretionary decision is made within and takes into account the applicable legal standards. Applying an abuse of discretion standard does not involve reweighing evidence or assessing witness credibility.

"2. Factors a district court should consider in determining whether a defendant has established good cause to withdraw a plea include, but are not limited to, whether (1) the defendant was represented by competent counsel, (2) the defendant was misled, coerced, mistreated, or unfairly taken advantage of, and (3) the plea was fairly and understandingly made." *State v. Reu-El*, 306 Kan. 460, Syl. ¶¶ 1 & 2, 394 P.3d 884 (2017).

"A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *State v. Moore*, 302 Kan. 685, 692, 357 P.3d 275 (2015). Richardson bears the burden of establishing such an abuse of discretion. See *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011).

To set aside a guilty plea because of ineffective assistance of counsel, Richardson must show that "'counsel's performance fell below the standard of reasonableness and that there is a reasonable probability that but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial." *State v. White*, 289 Kan. 279, 285, 211 P.3d 805 (2009) (quoting *State v. Shears*, 260 Kan. 823, 830, 925 P.2d 1136 [1996]).

Based on the record before us, Richardson cannot prevail on his underlying ex post facto claim. We recently analyzed KORA in this context using the intent-effects test set forth by the United States Supreme Court and concluded lifetime sex offender registration does not constitute "punishment" for purposes of applying any provision of the federal Constitution. *State v. Petersen-Beard*, 304 Kan. 192, 198-209, 377 P.3d 1127 (2016) (relying on the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963]). We therefore held that the 2011 version of KORA could not violate federal prohibitions against cruel and unusual punishment. See 304 Kan. at 208. And not long ago, we "explicitly extend[ed] the holding of *Petersen-Beard* to apply to ex post facto challenges." *State v. Reed*, 306 Kan. 899, 904, 399 P.3d 865, (2017).

Therefore, to establish either that his attorney or the district court was wrong about the law—the gravamen of his claims—Richardson must demonstrate that drug offenders as a class are sufficiently distinguishable from the class of sex offenders such that the effects of the law become punitive rather than civil when applied to drug offenders. We recently confronted this question in *State v. Meredith*, 306 Kan. 906, 399 P.3d 859 (2017). In that case, we declined to hold that KORA registration is punishment where the record is insufficiently developed for the defendant to persuasively argue that the legislature's nonpunitive intent must give way to KORA's allegedly punitive effects on drug offenders as a class separate and distinct from sex offenders. 306 Kan. at 910; see *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("Because we 'ordinarily defer to the legislature's stated intent,' [citation omitted], 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," [citations omitted]."); see also *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996) (holding that the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) (upholding *Myers*' determination that the legislature

intended to enact a nonpunitive scheme), *overruled on other grounds by Petersen-Beard*, 304 Kan. 192. We further explained in *Meredith* that such an inquiry "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." *Meredith*, 306 Kan. at 913.

Richardson's claim suffers from the same flaw. He is unable to satisfy the "clearest proof" standard because the record below has not been sufficiently developed. As a result, we cannot—at this time—hold that KORA's registration requirements as applied to drug offenders are punishment and subject to the limitations of the Ex Post Facto Clause. This means that Richardson cannot show his attorney provided incorrect legal advice and cannot show the district court abused its discretion by denying his motion to withdraw plea. See *Reed*, 306 Kan. at 904 (holding that the district court did not abuse its discretion by denying defendant's motion to withdraw plea, which was based on an ex post facto challenge to KORA).

Finally, we recognize that Richardson filed an inmate request styled as a motion for new counsel. Despite defense counsel's objection, the trial court declined to interpret it as anything more than a duplicative ex post facto challenge. In order to warrant new counsel, Richardson would have to show justifiable dissatisfaction with his appointed counsel, which "may be demonstrated by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant." *State v. Marshall*, 303 Kan. 438, 448, 362 P.3d 587 (2015). But neglecting to give poor legal advice does not constitute justifiable dissatisfaction.

We take this opportunity, however, to remind district courts that they abuse their discretion if they become "aware of a potential conflict of interest between a defendant and his or her attorney but fail[] to conduct an inquiry." *State v. Pfannenstiel*, 302 Kan.

747, Syl. ¶ 5, 357 P.3d 877 (2015). Under the unique circumstances of this case, however, because Richardson cannot show by "the clearest proof" that KORA's civil intent is overridden by KORA's allegedly punitive effects on drug offenders as a class, the district court properly construed and disposed of Richardson's request.

Affirmed.

* * *

BEIER, J., dissenting: Consistent with my votes in *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016); *State v. Reed*, 306 Kan. 899, 399 P.3d 865 (2017); and *State v. Meredith*, 306 Kan. 906, 399 P.3d 859 (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 914 (Beier, J., dissenting).

The defendant has met any burden of proof he bore on this point, and he should be permitted to withdraw his plea for good cause shown.

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

APPENDIX T

NOT DESIGNATED FOR PUBLICATION

No. 107,786

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DJUAN R. RICHARDSON,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick County; BENJAMIN L. BURGESS, judge. Opinion filed July 26, 2013.
Affirmed.

Shawn E. Minihan, of Kansas Appellate Defender Office, for appellant.

Boyd K. Isherwood, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before LEBEN, P.J., BRUNS, J., and HEBERT, S.J.

LEBEN, J.: Djuan Richardson appeals the district court's denial of his motion to withdraw his guilty pleas to two counts of failing to report under the Kansas Offender Registration Act. The district court has the discretion to allow plea withdrawal before sentencing for good cause, and Richardson contends that he demonstrated good cause by showing that his attorney had failed to advise him of a key legal defense before he pled guilty.

But the district court properly concluded that the legal defense Richardson raised had no merit. We review the district court's denial of a motion to withdraw plea only for abuse of discretion, *State v. Williams*, 290 Kan. 1050, 1053, 236 P.3d 512 (2010), which occurs only when the district court based its decision on an error of fact or law or when its decision is so unreasonable that no person would agree with it. *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). We see no abuse of discretion here in failing to allow Richardson to withdraw his plea based on his attorney's failure to advise him of a defense that had no legal merit.

Richardson separately complains that the district court should have appointed new counsel to represent him at sentencing once Richardson had raised his complaint about his attorney's advice. We once again review the district court's decision for abuse of discretion, *In re Habeas Corpus Petition of Hoang*, 245 Kan. 560, 566-67, 781 P.2d 731 (1989), *cert. denied* 494 U.S. 1070 (1990), and we again find no abuse of discretion. The district court made a proper inquiry into whether new counsel should be appointed, and there are no facts here suggesting new counsel was needed. We therefore affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Richardson was convicted and sentenced in 2005 of selling cocaine in 2003. At the time Richardson committed that crime—and even at the time he was sentenced—the Kansas Offender Registration Act did not require drug offenders to register. But in 2007, the Kansas Legislature amended the statute to add those convicted of some drug offenses, including the sale of cocaine, to the list of those required to register. Richardson failed to register, and the State charged him in June 2011 with two counts of failing to do so (one count for April 2011 and one for May 2011). Richardson pled guilty.

Before sentencing, Richardson filed a motion to withdraw his guilty pleas. Richardson's motion was premised on the notion that the Kansas Offender Registration Act didn't apply to him since it didn't apply to drug offenders when he was convicted. Specifically, Richardson contended that applying the registration statute to him in this after-the-fact manner would violate the Ex Post Facto Clause of the United States Constitution. Based on the premise that the registration statute didn't apply to him, Richardson contended that his attorney had failed to provide adequate representation because the attorney hadn't advised Richardson that the registration statute didn't apply before Richardson pled guilty to violating that statute. At a hearing in the district court, Richardson also asked that new counsel be appointed to represent him.

The district court concluded that Richardson's legal premise was wrong, citing *State v. Cook*, 286 Kan. 766, 187 P.3d 1283 (2008); and *State v. Armbrust*, 274 Kan. 1089, 59 P.3d 1000 (2002). Although neither *Cook* nor *Armbrust* involved the addition of drug offenders to the list of those who must register, *Armbrust* concluded that the registration laws could be amended to require registration by people who had already been convicted of some crime, 274 Kan. at 1093-94, and *Cook* concluded that the punishment for failing to register could be increased after the date of the original offense that triggered the registration requirement, 286 Kan. at 775-76.

Because Richardson hadn't shown that his attorney had provided inadequate legal representation, the district court denied the motion to withdraw the guilty pleas. The court also denied the request for new counsel, concluding that the attorney in place was "very effective counsel, in [the district judge's] experience and judgment." The court proceeded with sentencing, granting a durational-departure sentence of 30 months on each count and making the sentences run concurrently. (The sentencing guidelines called for a sentence of 38 to 43 months on the first count and 31 to 34 months on the second count.)

Richardson has appealed to this court, contending that the district court should have granted his motion to withdraw his guilty pleas and that the district court should have appointed new counsel to represent him.

ANALYSIS

As we have already noted, we review both of the district court's decisions only for abuse of discretion. *Williams*, 290 Kan. at 1053; *Hoang*, 245 Kan. at 566-67. We will start with Richardson's claim that his attorney provided inadequate representation before Richardson pled guilty.

It's clear that Richardson was statutorily defined as an "offender" subject to registration duties after the 2007 amendments. See K.S.A. 22-4902(a)(11)(C); L. 2007, ch. 183, sec. 1. He doesn't claim otherwise. Instead, he claims that making his failure to register criminal would impose a new punishment for his prior sale-of-cocaine offense and thus violate the Ex Post Facto Clause of Article I, section 10 of the United States Constitution. Under that provision, "[a]ny statute . . . which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto." *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

But the United States Supreme Court has held that a sex-offender registration act—requiring those already convicted of certain offenses to register—doesn't violate the Ex Post Facto Clause because the registration program itself isn't punitive. *Smith v. Doe*, 538 U.S. 84, 105-06, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). See also *State v. Myers*, 260 Kan. 669, Syl. ¶ 1, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997) (finding that the Kansas offender-registration requirement was remedial, not punitive, in nature and didn't violate the Ex Post Facto Clause); *In re E.L.W.*, No. 106,241, 2012 WL 686861, at *3-4 (Kan. App. 2012) (unpublished opinion) (discussing *Smith* and *Myers*), *rev. denied* ___ Kan. ___ (May 20, 2013); *State v. Buser*, No. 105,982, 2013 WL

1149655, at *8 (Kan. App. 2013) (unpublished opinion) (same). In the Kansas cases of *Cook* and *Armbrust*, cited by the district court, the Kansas Supreme Court concluded that the registration laws could be amended to require registration by people who had already been convicted of some crime, *Armbrust*, 274 Kan. at 1093-94, and that the punishment for failing to register could be increased after the date of the original offense that triggered the registration requirement. *Cook*, 286 Kan. at 775-76.

While Richardson's registration-triggering offense was a drug crime and the cases we've just discussed all involved sex offenses, we see no reason that the analysis of the Ex Post Facto Clause should differ in Richardson's case. In two unpublished opinions, other panels of our court have agreed with that conclusion. See *State v. Brown*, No. 107,512, 2013 WL 2395319, at *1-4 (Kan. App. 2013) (unpublished opinion) (finding that inclusion of drug offenders in Kansas offender registration didn't violate Ex Post Facto Clause); *State v. Hall*, No. 106,903, 2013 WL 646482, at *3-4 (Kan. App. 2013) (unpublished opinion) (same), *petition for rev. filed* March 18, 2013.

Richardson's criminal offenses for failing to register took place in 2011, several years after the statutory amendment requiring that certain drug offenders register. The State is not punishing Richardson further for his sale-of-cocaine offense; it is punishing Richardson for his failure to register as required by law in 2011. There is no violation of the Ex Post Facto Clause here.

Additionally, Richardson briefly argues that the imposition of a \$20 registration fee constitutes punishment. But registration requirements such as this fee are simply a means to carry out the registration process and thereby to enhance public safety, not to punish. See *Cook*, 286 Kan. at 774; *State v. Weis*, 47 Kan. App. 2d 703, 719, 280 P.3d 805 (2012).

So the premise of Richardson's claim of inadequate representation—that his attorney failed to tell him that the registration requirement couldn't legally be applied to him—is simply not true. One of the usual requirements for setting aside a plea based on a claim of ineffective assistance of counsel is that the attorney's work was indeed below an objective standard of reasonableness. *Wilkinson v. State*, 40 Kan. App. 2d 741, Syl. ¶ 1, 195 P.3d 278 (2008), *rev. denied* 289 Kan. 1286 (2009). Richardson's attorney did not provide inadequate assistance by failing to tell him about a legal argument that had no merit. In these circumstances, we find no abuse of discretion in the district court's denial of his motion to withdraw his guilty pleas.

Richardson separately claims on appeal that the district court should have provided new counsel to him. Richardson's counsel asked to withdraw after Richardson claimed the attorney had failed to provide proper advice before Richardson entered the guilty pleas.

At the district-court level, to warrant the appointment of new counsel, a defendant must show "justifiable dissatisfaction" with counsel, which "may be demonstrated by showing a conflict of interest." *State v. Smith*, 291 Kan. 751, Syl. ¶ 1, 247 P.3d 676 (2011). Obviously, a conflict might have existed if Richardson's counsel had had to argue about his own ineffectiveness. See *State v. Robertson*, 30 Kan. App. 2d 639, 641, 44 P.3d 1283 (2002). But the district court properly determined that there was no ineffectiveness on that score because there was no *ex post facto* argument to be made that had any merit.

Although the underlying decision on appointing a new attorney is a discretionary one, whether a conflict of interest existed is generally a question of law on which we have unlimited review. See *State v. Diggs*, 272 Kan. 349, 355, 34 P.3d 63 (2001). And to show a conflict of interest resulted in ineffective representation, a defendant generally must prove a conflict of interest existed that affected the adequacy of the attorney's representation. *Boldridge v. State*, 289 Kan. 618, 622, 215 P.3d 585 (2009).

Richardson has not pointed to any inadequacy in the representation aside from his claim—which we have rejected—that the attorney should have advised him differently about the applicability of the registration requirement to him. The district court inquired into the potential conflict of interest and noted that Richardson's attorney was providing effective representation. We find no conflict of interest between Richardson and his attorney, and we conclude that the district court did not abuse its discretion in denying Richardson's request that new counsel be appointed.

The district court's judgment is affirmed.

APPENDIX U

11 CR 1654

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 107,786

STATE OF KANSAS,
Appellee,

v.

DJUAN R. RICHARDSON,
Appellant.

ORDER

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

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

Pursuant to K.S.A. 2016 Supp. 22-3605(b)(1), the mandate is stayed until further notice from this court.

The parties are directed to file a report with this court on the status of Appellant's petition for writ of certiorari no later than March 20, 2018.

BY ORDER OF THE COURT this 20th day of December 2017.

A handwritten signature in black ink, appearing to read "Lawton R. Nuss", is written over a horizontal line.

LAWTON R. NUSS, Chief Justice

APPENDIX V

IN THE SUPREME COURT OF THE STATE OF KANSAS

Nos. 107,114
107,115

STATE OF KANSAS,
Appellant/Cross-appellee,

v.

WILLIE J. SCUDERI,
Appellee/Cross-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.
3.
Charging documents do not bestow or confer subject matter jurisdiction on state courts to adjudicate criminal cases; the Kansas Constitution does.
4.
Charging document sufficiency is a question of law subject to de novo review.

5.

Charging documents need only show that a case has been filed in the correct court, e.g., the district court rather than municipal court; show that the court has territorial jurisdiction over the crime alleged; and allege facts that, if proved beyond a reasonable doubt, would constitute a Kansas crime committed by the defendant.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 19, 2013. Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed October 27, 2017. Judgment of the Court of Appeals affirming the district court is affirmed on the issues subject to review. Judgment of the district court is affirmed.

Keith E. Schroeder, district attorney, *Stephen D. Maxwell*, senior assistant district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellant/cross-appellee.

Patrick H. Dunn, of Kansas Appellate Defender Office, was on the briefs for appellee/cross-appellant.

The opinion of the court was delivered by

BILES, J.: Willie J. Scuderi seeks review of the decision by a panel of the Court of Appeals affirming two convictions and sentences for failure to register as required by the Kansas Offender Registration Act, K.S.A. 22-4901 et seq. He argues the panel erred because (1) the registration requirements are ex post facto punishment for a drug offense he committed before registration was required for such offenses; (2) his sentences were imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution because they were calculated using his criminal history, which was not submitted to a jury and proved beyond a reasonable doubt; and (3) the complaint initiating one of the convictions was deficient because it failed to allege he resided in the county where the State alleged he failed to register. We affirm.

We hold that the panel properly rejected Scuderi's ex post facto and criminal history score claims. See *State v. Shaylor*, 306 Kan. 1049, 1051-52, 400 P.3d 177 (2017) (holding defendant failed to demonstrate retroactive imposition of registration requirements for drug offense was punishment as required to prevail on ex post facto claim); *State v. Ivory*, 273 Kan. 44, 45-48, 41 P.3d 781 (2002) (holding Sixth and Fourteenth Amendments do not require jury findings on criminal history used to calculate sentence). We also affirm the panel's outcome on the defective complaint issue, although we do so using the analysis in *State v. Saylor*, 306 Kan. ___, ___ P.3d ___ (No. 110,048, this day decided), slip op. at 6-7 (holding charging documents do not bestow or confer subject matter jurisdiction on state courts to adjudicate criminal cases and further holding similarly worded charging document alleged facts that if proved beyond a reasonable doubt would constitute KORA violation).

FACTUAL AND PROCEDURAL BACKGROUND

In 2002, Scuderi was convicted of possession of methamphetamine with intent to sell, a violation of K.S.A. 65-4161. In 2010, the State charged Scuderi in two cases with failing to register under the Kansas Offender Registration Act, K.S.A. 22-4901 et seq.

Scuderi moved to dismiss the complaints because the prosecutions violated the Ex Post Facto Clause of the United States Constitution. He argued the registration requirement, which did not exist at the time of his original offense, retroactively increased the offense's punishment. He cited the in-person reporting requirements and the fees associated with registration.

During arguments on the motions, Scuderi's counsel "conced[ed] that the courts have held generally that the duty to register . . . is not punitive and not a violation of ex post facto." But counsel contended the prior cases did not address the \$20 registration

fee, which counsel "would consider a fine" Nor, he argued, did they consider the change from mail to in-person registration. Scuderi presented no evidence to support his arguments.

The district court denied the motions, reasoning that our appellate courts had determined the registration requirements of the Kansas Offender Registration Act are not punishment and therefore do not violate the Ex Post Facto Clause of the Constitution. The court cited *State v. Evans*, 44 Kan. App. 2d 945, 242 P.3d 220 (2010).

At a consolidated jury trial, Scuderi stipulated that in "February through April 2010, [he] was a person convicted of a crime that required [him] to register in writing to the sheriff's office in the county of his residence . . . and . . . prior to February 2010, knew of his requirement to so register." His defense was that the State did not prove he lived in Reno County, as necessary to trigger the requirement that he register there. The jury convicted on both charges.

Scuderi moved to arrest judgment in one of his cases (10CR241) because the complaint was not consistent with the relevant KORA provision. He advanced two issues regarding the complaint: (1) the alleged violation occurred after he was released from the county detention center, which was not an element of the offense; and (2) the complaint was silent on the requirement that the offender must reside or be temporarily domiciled in the county for more than 10 days. The omission, he argued, created a jurisdictional defect under *State v. Hall*, 246 Kan. 728, 793 P.2d 737 (1990), *overruled by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). While both case numbers are in the motion's caption, the motion itself referred only to 10CR241.

At sentencing, the court addressed Scuderi's posttrial motions on 10CR241. Scuderi's counsel said she would stand on her motion for judgment of acquittal or new

trial and that she "also ask[ed] the Court to consider [the motion to] arrest judgment and cit[ed] to the arguments contained therein and ask[ed] that the court grant that as well." The court responded, "[W]e're dealing strictly with 10 CR 241, although, if you want to adopt arguments in the other cases at this point, we can do that."

But before Scuderi's counsel could respond, the court solicited arguments from the State and immediately after that ruled, "Okay. I did hear the evidence and do find the jury as the factfinder could find the defendant guilty beyond a reasonable doubt, which they did, based on the evidence and I will overrule the motions." The record contains no further comment from Scuderi's counsel about the motion to arrest judgment.

After sentencing Scuderi in 10CR241, the district court turned to Scuderi's other case (10CR400). The district court noted "a motion for judgment of acquittal or in alternative for new trial on that also." Scuderi's counsel told the court, "Judge, again, I adopt my previous arguments with that case." The court denied "the motion for judgment of acquittal or for new trial."

The district court granted Scuderi's request for downward durational departures and sentenced him to concurrent 65-month prison terms for the KORA violations. The State appealed the sentencing departure, and Scuderi cross-appealed his convictions and sentencing.

The State argued there were no substantial and compelling reasons to support the durational departures. Scuderi claimed: (1) the registration requirement from which the convictions arose violated the Ex Post Facto Clause; (2) his sentences violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because they were calculated using his prior criminal history, which was not proved to a jury beyond a reasonable doubt; and (3) the district court lacked jurisdiction to enter a judgment in the

10CR400—not 10CR241—because the complaint failed to charge a crime. A Court of Appeals panel affirmed the judgments. *State v. Scuderi*, No. 107,114, 2013 WL 3791614, at *10 (Kan. App. 2013) (unpublished opinion).

The panel held the retroactively imposed KORA requirement was not an ex post facto law. It reasoned that because *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), established that offender registration is not "punishment," a retroactive change in the requirements does not violate the Ex Post Facto Clause. 2013 WL 3791614, at *6 (citing *State v. Evans*, 44 Kan. App. 2d 945, 242 P.3d 220 [2010]). Moreover, it reasoned, there is no ex post facto violation, "[s]o long as the actual criminal violation for which the defendant is being charged occurred after the effective date of the statute providing punishment for the violation" 2013 WL 3791614, at *6 (quoting *State v. Armbrust*, 274 Kan. 1089, Syl.¶ 3, 59 P.3d 1000 [2002]). The panel also asserted Scuderi's stipulation that the Act applied to him "preclude[d] any complaint . . . about the retroactive registration requirements . . ." because no relief is afforded to a party from his or her own "strategic choice at trial [that] has adverse consequences" 2013 WL 3791615, at *6.

The panel also affirmed Scuderi's sentences. It held the Sixth and Fourteenth Amendments to the United States Constitution, as interpreted by *Apprendi*, 530 U.S. 466, did not require Scuderi's criminal history used to calculate the sentences to be submitted to a jury and proved beyond a reasonable doubt. 2013 WL 3791614, at * 7 (citing *State v. Ivory*, 273 Kan. 44, 41 P.3d 871 [2002], *reaff'd by State v. Boggness*, 293 Kan. 743, 268 P.3d 481 [2012]). And it held there were substantial and compelling reasons to support the downward durational departure. 2013 WL 3791614, at *9.

Finally, the panel rejected Scuderi's jurisdictional argument, applying the analytical framework for reviewing defective complaint issues raised for the first time on

appeal as set out in *Hall*. The panel characterized the claim as raised for the first time on appeal because Scuderi's appellate argument focused only on 10CR400, while his motion to arrest judgment was advanced in 10CR241. 2013 WL 3791614, at *3.

The panel concluded K.S.A. 22-4904 required the charging document to allege "(1) Scuderi was required to register with the Sheriff of Reno County, Kansas, having resided or established temporary residence in Reno County for more than 10 days. . . ; and (2) Scuderi failed to register with the Sheriff of Reno County during the month of April [2010]." 2013 WL 3791614, at *4. The panel then noted that while Scuderi argued the complaint in 10CR400 failed to "allege the triggering element for registration . . . and . . . that he [lived] in Reno County," he did not brief how the omission affected his case in any of the three ways that could yield a jurisdictional defect under *Hall*. 2013 WL 3791614, at *4. But the panel emphasized it was not relying on Scuderi's trial court stipulation in its ruling. 2013 WL 3791614, at *4-5.

Ultimately, the panel held the district court had jurisdiction in 10CR400. It concluded Scuderi failed to show how the omission impaired his right to a fair trial or the preparation of his defense because he stipulated he was aware of the registration requirement, choosing to argue instead that he did not reside in Reno County. Moreover, the panel concluded the record did not indicate the conviction in 10CR400 affected a subsequent prosecution.

Scuderi petitioned for review of the panel's decision on each of the three issues he raised in his cross-appeal. The State did not seek our review on the sentencing departure issue. We granted review.

But while the matter was pending, we decided *Dunn*, which made significant changes to the law on charging document sufficiency, the effect of deficient charging

documents, and appellate review of deficient charging document claims. Among these, *Dunn* held charging document sufficiency does not implicate subject matter jurisdiction of state courts in criminal cases. 304 Kan. at 811-12. In supplemental briefing, Scuderi argued *Hall* must continue to apply because it was law at the time he filed his motion to arrest judgment.

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).

We will address in greater detail only the ex post facto claim and the defective complaint allegation. This court has repeatedly rejected *Apprendi* challenges to the use of criminal history scores, and we need not discuss Scuderi's further. See *Shaylor*, 306 Kan. at 1051; see also *State v. Johnson*, 304 Kan. 924, 956, 376 P.3d 70 (2016).

EX POST FACTO CHALLENGE

Scuderi argues his convictions violate the Ex Post Facto Clause of the United States Constitution because when the legislature imposed registration requirements on him after he committed the registrable drug offense, it retroactively increased the punishment for that crime. This argument is foreclosed by *Shaylor*. See 306 Kan. at 1052.

In *Shaylor*, the court rejected the same ex post facto claim. The court reasoned that the defendant must establish the KORA requirements constitute "punishment" to prevail on the claim. 306 Kan. at 1052. But because "the legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme[,] . . . 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 1052 (citing *State v. Meredith*, 306 Kan. 906, 911-

12, 399 P.3d 859 [2017]). The defendant's argument that the registration requirement was "punishment" consisted entirely of "mention[ing], without further factual development, only three statutory factors: (1) informing authorities of changes in domicile; (2) in-person reporting four times each year to verify [defendant's] registration information; and (3) paying a \$20 registration fee each time [defendant] reports." 306 Kan. at 1052.

In the district court, Scuderi similarly contended without factual development that the registration fees and in-person reporting requirements constitute punishment. His appellate arguments identify additional facets he believes make the requirements "punishment"—annual driver's license or identification card renewal and the offender designation on the document. But his arguments rely on the court's now-overruled decision in *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016), holding lifetime registration for sex offenders was punishment, and the dissenting opinion in the decision overruling it, *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016).

Scuderi also argues registration impacts drug offenders differently than sex offenders by making reintegration into society more difficult. He relies on testimony presented to the legislature when it was considering expanding the Act to include drug offenders. But Scuderi failed to create a factual record in support of his arguments.

As we did in *Shaylor*, we conclude Scuderi failed to demonstrate KORA's punitive effects override the legislature's intent that the requirements be nonpunitive. His *ex post facto* claim fails because he did not demonstrate the requirements are punishment.

SUFFICIENCY OF THE CHARGING DOCUMENT

Scuderi argues the 10CR400 conviction must be reversed because the complaint did not allege facts establishing his duty to register in Reno County. But the panel held

Scuderi raised the claim for the first time on appeal and therefore applied the more burdensome of the two defective complaint tests. Although there is now only one test, we first consider from a preservation perspective the impact of the panel's ruling that Scuderi is challenging for the first time on appeal the complaint in 10CR400.

Standard of Review/Preservation

The panel analyzed Scuderi's sufficiency-of-the-complaint argument using the bifurcated standard of review applicable under Kansas law at the time of its decision. Under that standard, if a defendant raised a timely challenge to a charging document's sufficiency in the district court, the conviction would be reversed on appeal if the document was "so defective that it [did] not, by any reasonable construction, charge an offense for which the defendant [was] convicted." *Dunn*, 304 Kan. at 806 (quoting *Hall*, 246 Kan. at 763). But when the defendant raised the claim for the first time on appeal, the claim would only "be allowed" if the defendant could establish the "claimed defect . . . (a) prejudiced the defendant in the preparation of his or her defense; (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution; or (c) limited in any way the defendant's substantial rights to a fair trial" 304 Kan. at 806 (quoting *Hall*, 246 Kan. at 765). The panel decided the issue on the latter standard.

Scuderi argues he was entitled to have his case decided under the *Hall* paradigm, rather than application of *Dunn*. This is wrong. "[T]he general rule in Kansas is that an overruling decision is applied retroactively to all similar cases pending as of the date of the overruling decision, regardless of when the cause of action accrued." *State v. Waterberry*, 248 Kan. 169, 172, 804 P.2d 1000 (1991) (holding *Hall*'s new rule regarding appellate review of sufficiency-of-information claims applied to all cases pending in state courts—trial and appellate—at time of decision). See also *State v. Mitchell*, 297 Kan. 118, 124-25, 298 P.3d 349 (2013) ("The general rule . . . is that a change in the law acts

prospectively, applying only 'to all cases, state or federal, pending on direct review or not yet final.'").

Scuderi argues his bid to apply *Hall* is bolstered by *Hall*'s declaration that the new rule in that case would apply only prospectively to prosecutions initiated after the date of the opinion. But *Waterberry* modified that portion of *Hall* and held the rule would apply in all cases pending when *Hall* was filed. Scuderi offers no other authority for why *Dunn* should not apply. *Dunn* applies, which changes the standard of review and preservation questions.

We must now address the effect of the panel's ruling that Scuderi is challenging the 10CR400 complaint for the first time on appeal. Under *Dunn*, whether the complaint was defective is a question of law subject to de novo review. 304 Kan. at 819.

"Charging documents do not bestow or confer subject matter jurisdiction on state courts to adjudicate criminal cases; the Kansas Constitution does. Charging documents only need to show that a case has been filed in the correct court . . . ; show that the court has territorial jurisdiction over the crime alleged; and allege facts that, if proved beyond a reasonable doubt, would constitute a Kansas crime committed by the defendant." 304 Kan. at 811.

Ordinarily a party wanting to pursue an issue on appeal must have preserved that issue in the court below. 304 Kan. at 817. If not, the defendant must demonstrate an exception to the usual rule applies. 304 Kan. at 818-19. "The very purpose of such a rule is to enable the court to consider [the claim] below—to prevent error—to avoid appeal." *Grant v. United States*, 291 F.2d 746, 748 (9th Cir. 1961). See also *State v. Levy*, 292 Kan. 379, 253 P.3d 341 (2011) (noting purpose of requiring contemporaneous objection to preserve evidentiary claim for appeal is to allow trial court opportunity to rule on issue).

Scuderi argues he preserved his challenge to the 10CR400 complaint because "[t]he district court allowed counsel to adopt . . . in both cases" the arguments contained in his motion to arrest judgment. But this skews the facts by ignoring that he never accepted the district court's offer, despite being aware the district court believed the motion only referred to 10CR241.

Nonetheless, we hold Scuderi preserved the defective complaint issue for appellate review. Scuderi raises the same basic issue he presented to the district court. And in responding to Scuderi's cross-appeal, which clearly challenged the complaint in only 10CR400, the State seemingly accepts this by stating Scuderi "did not directly challenge the sufficiency and wording of the [complaint] . . . until he filed a Motion for Arrest of Judgment" More notably, the State did not respond to Scuderi's supplemental brief with a preservation argument. Moreover, we discern some ambiguity in the record based on the timing of the district court's offer and the manner in which it bifurcated arguments and sentencing on the posttrial motions in the two cases.

Sufficiency of the Complaint in Case 10CR400

Scuderi argues the complaint was insufficient because it failed to allege he had resided or been temporarily domiciled in Reno County for more than 10 days. The complaint alleged:

"[O]n or about the 30th day of April, 2010, in said County of Reno and State of Kansas, one Willie J. Scuderi then and there being, did then and there, unlawfully, feloniously and willfully . . . intentionally fail to register in writing with the Sheriff of Reno County, Kansas for the month of April 2010, as required under the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., as amended, based on his previous conviction of sale of a controlled substance in Sedgwick County."

These allegations are substantively identical to those challenged on the same grounds in *Sayler*. Accordingly, *Sayler* controls the outcome here. In *Sayler*, we held:

"[A] 'charging document should be regarded as sufficient . . . when it has alleged facts that would establish the defendant's commission of a crime recognized in Kansas.' [*Dunn*] 304 Kan. at 811-12. '[T]he facts alleged, rather than the legal elements regurgitated, determine whether the charge is sufficient under the statute defining the crime.' 304 Kan. at 820. Since all crimes are defined by statute, our inquiry is informed by statute. We compare '[t]he legislature's definition of the crime charged . . . to the State's factual allegations of the defendant's intention and action. If those factual allegations, proved beyond a reasonable doubt, would justify a verdict of guilty, then the charging document is statutorily sufficient.' 304 Kan. at 812.

"K.S.A. 2011 Supp. 22-4903 provides an offender who fails 'to comply with any and all provisions of [KORA], including any and all duties set forth in K.S.A. 22-4905 through K.S.A. 22-4907' is guilty, '[u]pon a third or subsequent conviction, [of] a severity level 3, person felony.' K.S.A. 2011 Supp. 22-4905(b) requires sex offenders to '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.'

"The complaint here alleged Sayler had been convicted of a crime for which KORA compliance would be required and that Sayler failed to register with the county sheriff's office at the statutorily appointed time and the date registration was required. These facts are sufficient to constitute the crime of violating KORA's provisions. The basis for the State's allegation that Sayler breached his KORA obligations in a given county can be addressed before trial if there is a question. See, e.g., K.S.A. 22-3201(f) ('When a complaint . . . charges a crime but fails to specify the particulars of the crime sufficiently to enable the defendant to prepare a defense the court may, on written motion of the defendant, require the prosecuting attorney to furnish the defendant with a bill of particulars.').

"We further note Sayler could not successfully challenge his conviction by asserting the third type of *Dunn* error and arguing the charging document failed to impart notice that the State believed he was required to register in Kingman County based on his residence there. Sayler stipulated he had a duty to register and based his defense on his subjective intent in failing to do so. As Sayler conceded at oral argument, in this particular case he could not have been prejudiced because he did not dispute his statutory duty to register in Kingman County." Slip op. at 7-8.

Similarly, Scuderi stipulated he was required to register and his defense turned on whether he resided in Reno County, just as it would have if the charging document had been more precisely worded. Moreover, in Scuderi's case, since the trials were consolidated, the complaint in 10CR241 put Scuderi's residence in issue at the trial by alleging Scuderi had "com[e] into Reno county to reside or establish temporary residency" as of February 2010.

We agree with the panel's outcome on this issue, although our reasons differ because the panel did not have the benefit of *Dunn*.

Affirmed on the issues subject to review.

* * *

BEIER, J., dissenting: Consistent with my votes in *State v. Meredith*, 306 Kan. 906, 399 P.3d 859 (2017); and *State v. Huey*, 306 Kan. 1005, 399 P.3d 211 (2017), I respectfully dissent from the majority's decision in this case on the ex post facto challenge.

"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 914, (Beier, J., dissenting).

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

APPENDIX W

NOT DESIGNATED FOR PUBLICATION

Nos. 107,114
107,115

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant/Cross-appellee,

v.

WILLIE SCUDERI,
Appellee/Cross-appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed July 19, 2013. Affirmed, and cross-appeal denied.

Stephen D. Maxwell, senior assistant district attorney, *Keith E. Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellant/cross-appellee.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee/cross-appellant.

Before HILL, P.J., POWELL, J., and HEBERT, S.J.

Per Curiam: In this consolidated appeal of two convictions for failing to register as an offender, the State argues the district court had no substantial and compelling reasons to reduce Willie J. Scuderi's sentences and impose two concurrent downward durational departure sentences. Based upon the age of his prior convictions and after considering all of the support his grandparents could give him upon his release from prison, the district court reduced Scuderi's sentences. We will not substitute our judgment for the district court's judgment in this regard. Both factors are substantial and compelling, and we will not set aside the sentences imposed.

On the other side, Scuderi contends in his cross-appeal that in one of his convictions, the district court did not have jurisdiction because of a defect in the charging document. He claims the complaint failed to allege that he had resided in or was temporarily domiciled in Reno County for more than 10 days before he failed to register as an offender. Because Scuderi has failed to show us how this omission impaired his right to a fair trial or the preparation of his defense, we reject this claim.

Additionally, Scuderi attacks both failure to register convictions, contending the Kansas Offender Registration Act, K.S.A. 22-4901 *et seq.*, is an ex post facto law and therefore unconstitutional. We agree with the reasoning of another panel of this court that has rejected a similar argument. But here, because Scuderi stipulated during his trial that the 2007 amendments to the Act applied to his 2002 drug convictions, he is precluded from arguing to this court that the Act is unconstitutional. A defendant may not invite error and then complain of the error on appeal.

Finally, Scuderi argues the court erred because it determined his criminal history, not the jury, and thus violated the dictates of the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Kansas Supreme Court precedent to the contrary compels us to reject this argument.

Accordingly, we deny the cross-appeal.

Released from jail, Scuderi fails to register.

In case 10CR241 the State alleged Scuderi failed to register as a drug offender on February 27, 2010, in violation of K.S.A. 22-4904 after his release from the Reno County detention center on February 17, 2010. The State filed another complaint on May 18, 2010, in case 10CR400. This time, the State alleged Scuderi failed to register as a drug offender by April 30, 2010, also in violation of K.S.A. 22-4904. Both complaints were

based on Scuderi's 2002 Sedgwick County conviction for possession of methamphetamine with intent to sell, in violation of K.S.A. 65-4161.

The two cases were consolidated for trial. Scuderi asked the district court to dismiss the charges in both cases for lack of probable cause and because the postrelease registration requirements under the Act violated the Ex Post Facto Clause of the United States Constitution. The district court subsequently denied both motions to dismiss.

The jury found Scuderi guilty in both cases of failing to register as a drug offender, a severity level 5 person felony under K.S.A. 22-4903(a). Scuderi then filed a motion for judgment of acquittal or, in the alternative, a new trial in each case. After that, Scuderi filed a motion for arrest of judgment that alleged the amended complaint in 10CR241 was defective. And finally, just prior to sentencing, Scuderi filed a motion to impose a departure sentence in each case.

At the sentencing hearing, the parties agreed that Scuderi had a criminal history score of A. This finding set the presumptive sentencing range for each of Scuderi's severity level 5 person felony convictions at 136-130-122 months' incarceration. The district court then heard arguments on Scuderi's posttrial motions. The district court denied both of Scuderi's motions for judgment of acquittal or, in the alternative, a new trial, and his motion for arrest of judgment in case 10CR241. The district court did grant a downward durational departure sentence in each case and imposed concurrent 65-month prison terms.

The State appeals the district court's order granting the departure sentences. Scuderi cross-appeals his convictions and sentences.

In order to determine jurisdiction, we address first the defective complaint issue.

As always, the statute provides the basis for the argument. K.S.A. 2012 Supp. 22-3502 establishes the 14-day period when a motion to arrest judgment may be filed:

"The court on motion of a defendant shall arrest judgment if the complaint, information or indictment does not charge a crime or if the court was without jurisdiction of the crime charged. The motion for arrest of judgment *shall be made within 14 days after the verdict or finding of guilty*, or after a plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 14-day period." (Emphasis added.)

Turning to the claims in this case, we note the parties do not agree on which standard of review we should use on this point. If a defendant challenges a complaint as defective, the proper procedure is to file a motion for arrest of judgment under K.S.A. 2012 Supp. 22-3502 in the trial court. Where the defendant does so, the test to determine the sufficiency of the information focuses on technical considerations. *State v. Shirley*, 277 Kan. 659, 661-62, 89 P.3d 649 (2004). Under this test, a complaint or information that omits an essential element of a crime is fatally defective, and the conviction must be reversed for lack of jurisdiction. See *State v. Gonzales*, 289 Kan. 351, 366, 368, 212 P.3d 215 (2009). Even so, under this standard, a complaint or information "should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *State v. Micheaux*, 242 Kan. 192, 199, 747 P.2d 784 (1987). See also *State v. Huerta-Alvarez*, 291 Kan. 247, 255, 243 P.3d 326 (2010), where the court held that "the elements of the offense may be gleaned from the document as a whole."

But there is an alternative procedure. According to *State v. Hall*, 246 Kan. 728, Syl. ¶¶ 12-13, 793 P.2d 737 (1990), *overruled in part on other grounds by Ferguson v. State*, 276 Kan. 428, 78 P.3d 40 (2003), the Kansas Supreme Court adopted a common-sense rule for cases raising a defective complaint or information claim *for the first time on direct appeal*. See *State v. McElroy*, 281 Kan. 256, 261-62, 130 P.3d 100 (2006). The complaint or information is construed liberally in favor of validity, and the record is

reviewed as a whole. *State v. Gracey*, 288 Kan. 252, 256, 200 P.3d 1275 (2009). The sufficiency of the charging document will be determined on practical considerations. *State v. Waterberry*, 248 Kan. 169, 171, 804 P.2d 1000 (1991). To succeed, the defendant must show that the alleged defect either: (1) prejudiced the defendant's preparation of a defense; (2) impaired the defendant's ability to plead the conviction in any subsequent prosecution; or (3) limited the defendant's substantial rights to a fair trial. *Gonzales*, 289 Kan. at 368.

In this prosecution, the jury rendered its verdicts in cases 10CR241 and 10CR400 on September 27, 2011. Fourteen days later, on October 11, 2011, Scuderi filed his motion for arrest of judgment. Scuderi clearly exercised this remedy within the permitted 14 days to do so under K.S.A. 2012 Supp. 22-3502. And the district court ruled on the motion for arrest of judgment at sentencing. Thus, at first glance then, we should apply the pre-*Hall* standard. But, looking deeper, we note that Scuderi did not actually challenge the complaint in case 10CR400 before the district court.

Scuderi limited his motion for arrest of judgment to challenging the language in the amended complaint for case 10CR241 and the corresponding conviction arising from that complaint. Scuderi argued in his motion that the amended complaint in case 10CR241 was defective because it contained language that was not a statutory element of K.S.A. 22-4904(a)(1) and it did not specially allege that Scuderi resided or was temporarily domiciled in the county for more than 10 days as required under K.S.A. 22-4904(a)(1). And at sentencing, Scuderi only asked the district court to arrest judgment in case 10CR241 after it considered the arguments raised in his motion.

Other than listing the case number in the caption on his motion to arrest judgment, Scuderi made no argument about the complaint filed in case 10CR400. We hold, therefore, that Scuderi has raised this issue for the first time on appeal, and we thus apply the post-*Hall* standard of review. See *Gonzales*, 289 Kan. at 368.

The complaint in case 10CR400 did not deprive the district court of jurisdiction.

When the State charged Scuderi in case 10CR400 on May 18, 2010, for failing to register as a drug offender in violation of K.S.A. 22-4904(c), the Act stated: "(a) 'Offender' means . . . (11) any person who has been convicted of . . . (C) K.S.A. 65-4161, and amendments thereto." K.S.A. 22-4902(a)(11)(C). Convictions under K.S.A. 65-4161 involved the sale or distribution, or possession with intent to sell, of opiates, opium, narcotic drugs, or designated stimulants including methamphetamine. Under K.S.A. 22-4904(a)(1), "within 10 days of the offender coming into any county in which the offender resides or is temporarily domiciled for more than 10 days, the offender shall register with the sheriff of the county." And,

"[a]ny person who is required to register under this act shall report in person three times each year to the sheriff's office in the county in which the person resides or is otherwise located. The person shall be required to report once during the month of the person's birthday and every four months thereafter." K.S.A. 22-4904(c).

Finally, "[a]ny person who is required to register as provided in the Kansas offender registration act who violates any of the provisions of such act, including all duties set out in K.S.A. 22-4904 through 22-4907, and amendments thereto, is guilty of a severity level 5, person felony." K.S.A. 22-4903(a).

The complaint in case 10CR400 charged:

"[O]n or about the 30th day of April, 2010, in said County of Reno and State of Kansas, one WILLIE J. SCUDERI then and there being, did then and there, unlawfully, FELONIOUSLY and willfully:

....

"intentionally fail to register in writing with the Sheriff of Reno County, Kansas for the month of April 2010, as required under the Kansas Offender Registration Act, K.S.A. 22-4901 *et. seq.*, as amended, based on his previous conviction of Sale of a Controlled Substance in Sedgwick County.

....

"Contrary to the form of Statute K.S.A. 22-4904"

The complaint also informed Scuderi that such a violation was a severity level 5 person felony.

The record indicates Scuderi's birth month is April. Accordingly, K.S.A. 22-4904 requires that the State's charging document allege: (1) Scuderi was required to register with the Sherriff of Reno County, Kansas, having resided or established temporary residence in Reno County for more than 10 days (K.S.A. 22-4904[a][1]); and (2) Scuderi failed to register with the Sherriff of Reno County during the month of April (K.S.A. 22-4904)[c]).

Scuderi contends the complaint in case 10CR400 was defective because the State did not specifically allege the triggering element for registration contained in K.S.A. 22-4904(a)(1) and failed to allege that he resided in or temporarily was domiciled in Reno County. But Scuderi does not address the impact of this alleged omission within the context of a post-*Hall* analysis, and typically, an issue not briefed on appeal is deemed waived and abandoned. *State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011).

Even so, Scuderi had stipulated to already being aware of his requirements to register under the Act prior to the State filing the complaint in case 10CR400. In other words, he stipulated that the Act applied to him. Implicit in this stipulation is an admission that he was either residing in or was temporarily domiciled in Reno County long enough to trigger the application of the law.

During trial, the parties stipulated that Scuderi was required to register for 10 years under the Act because of his 2002 conviction and that Scuderi was aware of his obligations to register under the Act. Even though the written recitation of stipulated facts

provided to the jury, described as State's Exhibit 2, was not included in the record on appeal, the prosecutor stated the stipulated facts on the record during the following exchange:

"THE COURT: Okay. Why don't you read it into the record?

"MR. MAXWELL [prosecutor]: We've agreed to the [following] stipulation . . . : It is hereby agreed by and between the State of Kansas and the defendant the following are true facts admissible in the trial. That the months of February through April 2010, the defendant, Willie Scuderi, was a person convicted of a crime, to wit; possession of methamphetamine with intent to sell or deliver in Sedgwick County Kansas in August 2002, *and that conviction required the defendant to register in writing to the sheriff's office in the county of his residence for a period thereafter of 10 years pursuant to the Kansas Offender Registration Act and the defendant prior to February 2010, knew of his requirement to so register.* It's signed by the defendant, Defense Counsel, [and] myself and I would ask the Court to admit it as State's Exhibit 2."

"THE COURT: All right. And, Ms. Driscoll, this stipulation you reviewed with your client and you watched him sign?

"MS. DRISCOLL [defense counsel]: Yes, ma'am.

"THE COURT: All right. Mr. Scuderi, do you have any questions about that stipulation?

"THE DEFENDANT: No, ma'am." (Emphasis added.)

It is the general rule that parties are bound to their stipulated facts, and both trial and appellate courts must render judgment based on those facts. *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 269, 202 P.3d 7 (2009). But that is not the rule when it comes to questions of jurisdiction. See *State v. Belcher*, 269 Kan. 2, 9, 4 P.3d 1137 (2000). So, we do not rely upon Scuderi's stipulation in making our ruling.

In our view, Scuderi has not shown how this omission of the language in the complaint impaired his rights to a fair trial or the preparation of his defense, the first component in a post-*Hall* analysis. At trial, the defense strategy consisted of Scuderi

stipulating to both his legal obligation to register under the Act *and* his personal knowledge of those registration obligations prior to the filing of the complaints in both cases. He then argued to the jury that he did not have to register in Reno County because he never resided in that jurisdiction after his February 2010 release date from prison.

Finally, the record on appeal does not indicate Scuderi's conviction in case 10CR400 affected any subsequent prosecution. This is the second and final component of a post-*Hall* analysis.

We hold the charging deficiency in case 10CR400 of failing to allege in the complaint that Scuderi must have resided in or be temporarily domiciled in Reno County for more than 10 days did not invalidate Scuderi's conviction.

The Kansas Offender Registration Act is not an ex post facto law.

The legislature amended the Act on July 1, 2007. The amendments included a provision requiring certain drug offense convictions be subject to a 10-year postrelease registration requirement. K.S.A. 22-4906(a)(11). Drug offenders required to register include those convicted under K.S.A. 65-4161 and amendments thereto. K.S.A. 22-4902(a)(11)(C). The question here is whether the retroactive application of the 2007 amendment to K.S.A. 22-4906 violated the Ex Post Facto Clause of the United States Constitution. The Ex Post Facto Clause forbids state legislative enactments that impose a punishment for an act that was not punishable when it was committed or which impose additional punishments to those then prescribed. See U.S. Const. Art. I, § 10. A law is ex post facto if two critical elements are present: (1) the law is retrospective; and (2) the law disadvantages the offender affected by it. *State v. Jaben*, 294 Kan. 607, 612, 277 P.3d 417 (2012). Obviously, this is a question of law.

We note that neither the United States Supreme Court nor the Kansas Supreme Court considers offender registration requirements to be punishment. See *Smith v. Doe*,

538 U.S. 84, 123 S.Ct. 1140, 155 L. Ed. 2d 164 (2003); *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996) *cert. denied* 521 U.S. 1118 (1997). An act that is remedial cannot violate the Ex Post Facto Clause if it does not affect the penalty imposed upon a felon.

In denying Scuderi's motion to dismiss for violation of the Ex Post Facto Clause, the district court correctly relied on *State v. Evans*, 44 Kan. App. 2d 945, 242 P.3d 220 (2010). In *Evans*, this court considered whether an amendment to the Act could be retroactively applied without violating the Ex Post Facto Clause. At the time of Evan's crimes, the Act required sex offenders to register for 10 years after parole, discharge, or release. The 2007 amendment to the Act, however, required Evans to register throughout his lifetime. Relying on the holding in *Myers* that the offender registration requirement is not punishment, the *Evans* court held that the retroactive application of the change in registration requirements in the Act does not violate the Ex Post Facto Clause. 44 Kan. App. 2d at 948-49. We embrace that reasoning.

Again, in *State v. Armbrust*, 274 Kan. 1089, Syl. ¶ 3, 59 P.3d 1000 (2002), the Kansas Supreme Court held, "So long as the actual criminal violation for which the defendant is being charged occurred after the effective date of the statute providing punishment for the violation, there is no violation of the Ex Post Facto Clause." Scuderi violated K.S.A. 22-4904(a)(1) and K.S.A. 22-4904(c) well after the 2007 amendments to the Act became effective on July 1, 2007. Scuderi had more than adequate notice that it was illegal for him not to register as a drug offender—a requirement that Scuderi stipulated to knowing. Scuderi could have conformed his conduct to the requirements of the amended registration statutes. The 2007 amendment to the Act imposing a 10-year postrelease registration period for drug offenders does not violate the Ex Post Facto Clause.

In addition, we are compelled to point out that Scuderi's actions during trial preclude any complaint he now makes about the retroactive registration requirements.

Scuderi elected to stipulate at trial that he was required to register as a drug offender under the Act for 10 years based on his prior Sedgwick County drug conviction. In other words, Scuderi stipulated that the 2007 amendment to the Act applied to his 2002 conviction.

Where a party's strategic choice at trial has adverse consequences, Kansas courts have refused to grant on appeal relief from those same choices. See *State v. Gray*, 235 Kan. 632, 635-36, 681 P.2d 669 (1984), where the defendant complained about a jury instruction he had asked the district court to delete as part of his trial strategy.

The district court properly determined the criminal history.

Scuderi contends the district court violated his Sixth and Fourteenth Amendment rights as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Specifically, Scuderi argues that the district court's use of his criminal history for sentencing purposes without requiring the State to prove it before the jury beyond a reasonable doubt enhanced his sentence in violation of *Apprendi*. Scuderi, however, concedes that the Kansas Supreme Court rejected this argument in *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002), but includes the issue to preserve it for federal review.

The Kansas Supreme Court has held that the use of criminal history scores to determine a defendant's sentence does not violate due process as interpreted by *Apprendi*. See *Ivory*, 273 Kan. at 46-48. Our Supreme Court recently reaffirmed *Ivory* in *State v. Boggness*, 293 Kan. 743, 755, 268 P.3d 481 (2012). The Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position. See *State v. Ottinger*, 46 Kan. App. 2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. ____ (May 4, 2012). Since there is no indication our Supreme Court is departing from the *Ivory* decision, Scuderi's argument is without merit.

We reject the State's attack on Scuderi's sentences.

The State appeals the departure sentences imposed by the court. A departure sentence is subject to appeal by either the defendant or the State. See K.S.A. 21-4721(a); *State v. Sampsel*, 268 Kan. 264, 271, 997 P.2d 664 (2000). We see no reason to disturb the sentences on appeal.

The standard of appellate review for a departure sentence depends on the question raised. Because the State does not challenge whether the record supports the departure sentences or the extent of the district court's downward durational departure, its challenge is limited to whether the factors considered by the district court are substantial and compelling reasons for departure. When the question is whether the sentencing judge erred in concluding "that particular mitigating factors constituted substantial and compelling reasons to depart in a particular case," appellate review is for an abuse of discretion. *State v. Spencer*, 291 Kan. 796, 807, 248 P.3d 256 (2011). According to the Kansas Supreme Court in *Fischer v. State*, 296 Kan. 808, Syl. ¶ 8, 295 P.3d 560 (2013), judicial discretion is abused if the judicial action is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the district court.

K.S.A. 21-4716(c) sets out the nonexclusive list of statutory mitigating factors that may justify a departure sentence. Sentencing courts, however, may consider other nonstatutory factors. In exercising such discretion, the sentencing court must state on the record at the time of sentencing the substantial and compelling reasons for the departure. K.S.A. 21-4716(a). "Substantial" means something real, not imagined; something with substance, not ephemeral. "Compelling" means that the circumstances of the case force the sentencing court "to abandon the status quo and to venture beyond the sentence that it would ordinarily impose." *State v. Blackmon*, 285 Kan. 719, 724-25, 176 P.3d 160 (2008). As long as one factor articulated by the sentencing court would justify the departure, the decision will be upheld on appeal. 285 Kan. at 725. Moreover, "[t]he

court's comments at the time of sentencing, not the written journal entry, govern as to the reasons for departure.' [Citations omitted.]" *Spencer*, 291 Kan. at 811.

Here, the district court granted Scuderi's motion seeking a departure from the presumptive sentencing range of 136-130-122 months' incarceration for each conviction and imposed concurrent downward durational departure prison terms of 65 months. See K.S.A. 2009 Supp. 21-4704. In granting a departure sentence of 65 months in case 10CR241, the district court judge stated:

"Okay. Mr. Scuderi, the State makes very good points about why I should just look at this presentence report and say the grid shows 130 months. Even saying that, though, I am going to grant you a departure to some extent. Ms. Driscoll has done a good job pointing out every possible way I could look at this to find that departure is appropriate. The most compelling one I see is that it has been a significant, about seven years since your last person felony.

"The fact that the law has changed, that's a tough one for me to use because Mr. Davidson [the prosecutor] has a point—just simply the point that your cases were rather drawn out doesn't really justify me. It's an interesting point to make those, and it does show our legislature changed . . . on what this crime deserves. So I'm going to depart to the extent of half the recommended sentence, which I mean, I'm going to give you a sentence of 65 months. That's a significant departure for you, although, it's still a significant amount of time, Mr. Scuderi. I hope you have, I hope you remember when you get out that your grandparents are going to help you and remember that if you need to make changes. I guess think about . . . this day and the break you got that enabled you to get out at the end of this sentence.

"Anyway. So I will impose 65 months on this sentence and impose the court fees and costs that are required. I will waive the attorney's fees because of the lengthy prison sentence. Okay. Based on—well, let's go ahead then to 10 CR 400."

When imposing the identical departure sentence in case 10CR400, the district court judge stated, "I will impose the [same] valid reason for departure . . . based on the

same statements I made previously and sentence the defendant to 65 months to run concurrently with 10 CR 241."

In the State's view, the district court only articulated one factor for granting the departure sentences—the age of Scuderi's prior person felony convictions—which the State argues was not a substantial and compelling reason for departure. To the contrary, Scuderi points to the district court's reference to his attorney having "'done a good job pointing out every possible way'" it could find a departure from the guidelines appropriate. The court's use of the phrase "most compelling" is evidence the district court "did not rely solely upon the age of his prior convictions" and had "implicitly found" all of the other departure factors raised in his motion for departure applicable.

We are limited to considering *only* the articulated reasons for departure stated on the record at sentencing. See *Spencer*, 291 Kan. at 811; *Blackmon*, 285 Kan. at 725. Accordingly, the dispositive question in this appeal is did the district court abuse its discretion in finding the age of Scuderi's last person felony convictions in 2003 for aggravated battery and criminal threat a substantial and compelling reason for departure? At least two cases indicate that the court could consider the age of a conviction as a compelling reason to depart.

In *State v. Richardson*, 20 Kan. App. 2d 932, 901 P.2d 1 (1995), the State appealed the district court's grant of a durational departure based on its findings that Richardson's presumptive imprisonment was based on juvenile adjudications from 14 years earlier, Richardson had never committed any person or violent crimes, and Richardson had no felony within the past 10 years. The panel upheld the departure, holding that a sentencing court may consider the time that has elapsed since the defendant's last felony and last person felony convictions a substantial and compelling reason for departure:

"Because the sentencing grid does not take into account the time elapsed since a defendant's last felony conviction, a sentencing court can consider this factor in sentencing. The time elapsed since a defendant's last felony conviction may provide a substantial and compelling reason for a departure sentence, depending upon the facts of the case. Whether this factor is a substantial and compelling reason for departure must necessarily be viewed in light of the purposes of the guidelines and the facts of the case.

". . . [G]iven the nonviolent nature of Richardson's current offense and the purposes of the guidelines, the sentencing court did not err as a matter of law when it examined Richardson's criminal history and concluded the time elapsed since Richardson's last felony and last person felonies were substantial and compelling reasons to depart from the presumptive sentence." *Richardson*, 20 Kan. App. 2d at 942-43.

See also *State v. Favela*, 259 Kan. 215, 236, 911 P.2d 792 (1996) (citing to *Richardson* and holding: "[T]he fact that the defendant had not previously committed any offense which would be deemed a felony if he had been an adult was properly used as a substantial and compelling reason justifying departure.").

In *State v. Heath*, 21 Kan. App. 2d 410, 901 P.2d 29 (1995), this court considered whether the district court erred in considering the age and dissimilarity of Heath's prior convictions as a mitigating factor. Relying on *Richardson*, the panel ruled the district court could consider the age of prior offenses in sentencing:

"We hold both the time elapsed between the last felony and the sentencing event and the similarity or relatedness of previous felonies and the sentencing event may be substantial and compelling reasons for departure. Whether the age and lack of similarity of Heath's prior offenses amounted to substantial and compelling reasons for departure must be viewed in light of the purposes of the guidelines and the facts of this case." 21 Kan. App. 2d at 415.

We note that, unlike the defendant in *Richardson*, the record indicates (1) Scuderi's location on the presumptive imprisonment grid box was based on adult adjudications, not juvenile adjudications; (2) prior to Scuderi's current convictions,

Scuderi had committed person or violent crimes. These included three person or off-grid felonies and one person misdemeanor convictions for possession of methamphetamine with intent to sell, aggravated battery, endangering a child, and criminal threat. Scuderi was also convicted of another person felony (fleeing and eluding) in the interval between his current convictions and sentencing; and (3) Scuderi had committed felonies 7 years earlier as opposed to 10 years. *Heath* is distinguishable because the court found that the district court had also stated on the record other substantial and compelling reasons for departure in addition to the time elapsed between the last felony and the current conviction. 21 Kan. App. 2d at 413. Because the district court in *Heath* only had to articulate one substantial and compelling factor for departure, the time lapse between convictions was not a necessary mitigating factor for departure. See *Blackmon*, 285 Kan. at 725. And it could also be argued that Scuderi's current convictions under the Act are related to his prior drug conviction in 2002.

Notwithstanding all of those distinctions, a careful reading of the sentencing transcript reveals the district judge considered the support of Scuderi's grandparents when granting a departure sentence. "I hope you remember when you get out that your grandparents are going to help you and remember that if you need to make changes." In *State v. Murphy*, 270 Kan. 804, 808, 19 P.3d 80 (2001), the Kansas Supreme Court "took judicial notice that Murphy had good family support" as one of the several factors the court considered in upholding a departure sentence. The family support here was evidenced during sentencing by the presence of Scuderi's grandparents in the courtroom and his grandfather's testimony. It is our conclusion that there is substantial competent evidence in the record supporting this factor as another reason for Scuderi's sentencing departure.

As we stated previously, as long as one factor relied upon by the sentencing court is substantial and compelling, the departure sentence will be upheld. *Blackmon*, 285 Kan.

at 725. The district court had a substantial and compelling reason justifying the departure sentences in these cases.

Sentences affirmed, and cross-appeal denied.

APPENDIX X

10 CR 241
10 CR 400

IN THE SUPREME COURT OF THE STATE OF KANSAS

Nos. 107,114
107,115

STATE OF KANSAS,
Appellee,

v.

WILLIE SCUDERI,
Appellant.

ORDER

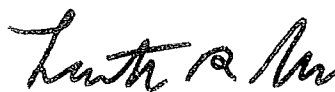
The court has considered and denies Appellant's motion for rehearing or modification.

Appellant's notice of service pursuant to K.S.A. 2016 Supp. 75-764 and notice of intent to file a petition for a writ of certiorari in the United States Supreme Court are noted.

Pursuant to K.S.A. 2016 Supp. 22-3605(b)(1), the mandate is stayed until further notice from this court.

The parties are directed to file a report with this court on the status of Appellant's petition for writ of certiorari no later than March 20, 2018.

BY ORDER OF THE COURT this 20th day of December 2017.



LAWTON R. NUSS,
Chief Justice

APPENDIX Y

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 108,885

STATE OF KANSAS,
Appellee,

v.

AMI LATRICE SIMMONS,
Appellant.

SYLLABUS BY THE COURT

Nonsex offenders seeking to avoid retroactive application of provisions of the Kansas Offender Registration Act (KORA) must, in order to satisfy the "effects" prong of the test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), produce a record that distinguishes—by the "clearest proof"—KORA's effect on those classes of offenders from the Act's effects on sex offenders as a class.

Review of the judgment of the Court of Appeals in 50 Kan. App. 2d 448, 329 P.3d 523 (2014). Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed December 1, 2017. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Rick Kittel, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Amy E. Norton, assistant county attorney, argued the cause, and *Charles Ault-Duell*, assistant county attorney, *Ellen Mitchell*, county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In 2005, Ami Latrice Simmons pled guilty to possession of cocaine with the intent to distribute and to selling cocaine. The district court sentenced her to serve 30 months in prison, and she was paroled in October 2008. While serving her prison sentence, the Kansas Legislature amended the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., to require drug offenders such as Simmons to register. After she was released on parole, Simmons alleges she was "ordered" or required to register by the Kansas Bureau of Investigation or the Kansas Department of Corrections, and she began to do so. The State does not contest the fact that Simmons was notified of her obligation to register by some agency of the executive branch of government.

In 2011, the State charged Simmons with failing to register as required by KORA. In response, Simmons argued the retroactive application of KORA violated the Ex Post Facto Clause of the United States Constitution. The district court disagreed. After a trial on stipulated facts, Simmons was found guilty and ordered to pay a \$200 DNA database fee.

Simmons appealed on three grounds: (1) she reasserted her ex post facto challenge; (2) she appealed the imposition of the DNA database fee; and (3) she argued that even if drug offender registration under KORA was not punishment and thus not subject to the Ex Post Facto Clause, it was nonetheless a part of her 2005 sentence which could not be modified by the executive branch. A panel of the Court of Appeals held the Legislature "intended the KORA registration requirements to be imposed automatically by operation of law without court involvement and to represent nonpunitive collateral consequences of judgment that are distinct from, and not a part of, a criminal sentence." *State v. Simmons*, 50 Kan. App. 2d 448, 463, 329 P.3d 523 (2014). As such, it rejected Simmons' unique claim that the executive branch had unlawfully modified her sentence. It also found no merit to her ex post facto challenge and concluded that she was statutorily required to pay a DNA database fee under the circumstances of this case.

We granted Simmons' petition for review. Finding no error below, we affirm.

ANALYSIS

Simmons first claims the application of KORA, as a whole, to her violates the Ex Post Facto Clause of article I, § 10 of the United States Constitution. We recently analyzed KORA in this context using the intent-effects test set forth by the United States Supreme Court and concluded lifetime sex offender registration does not constitute "punishment" for purposes of applying any provision of the federal Constitution. *State v. Petersen-Beard*, 304 Kan. 192, 198-209, 377 P.3d 1127 (2016) (relying on the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 [1963]). We therefore held that the 2011 version of KORA could not violate federal prohibitions against cruel and unusual punishment. See 304 Kan. at 208-09. And not long ago, we "explicitly extend[ed] the holding of *Petersen-Beard* to apply to ex post facto challenges." *State v. Reed*, 306 Kan. 899, 904, 399 P.3d 865 (2017).

Therefore, to establish that the application of KORA to her amounts to a retroactive punishment, Simmons must demonstrate that drug offenders as a class are sufficiently distinguishable from the class of sex offenders such that the effects of the law become punitive rather than civil when applied to drug offenders. We recently confronted this question in *State v. Meredith*, 306 Kan. 906, 399 P.3d 859 (2017). In that case, we declined to hold that KORA registration is punishment where the record is insufficiently developed for the defendant to persuasively argue that the Legislature's nonpunitive intent must give way to KORA's allegedly punitive effects on drug offenders as a class separate and distinct from sex offenders. 306 Kan. at 910; see *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("Because we 'ordinarily defer to the legislature's stated intent,' [citation omitted], 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' [citations omitted]."); see also *State v. Myers*, 260 Kan. 669, 923 P.2d

1024 (1996) (holding that the Legislature's intent in enacting KORA was to create a nonpunitive civil regulatory scheme); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) (upholding *Myers*' determination that the Legislature intended to enact a nonpunitive scheme), *overruled on other grounds by Petersen-Beard*, 304 Kan. 192. We further explained in *Meredith* that such an inquiry "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." 306 Kan. at 913.

Simmons' claim suffers from the same flaw. She is unable to satisfy the "clearest proof" standard because the record below has not been sufficiently developed. As a result, we cannot—at this time—hold that KORA's registration requirements as applied to drug offenders are punishment and subject to the limitations of the Ex Post Facto Clause.

Secondary to her ex post facto challenge, Simmons raises an issue of first impression in this court. Styled as an illegal sentence claim, Simmons challenges the authority of the executive branch to order her to register in the first instance. Simmons reasons that even if drug offender registration is not punishment for purposes of applying the Ex Post Facto Clause, it does arise out of and as a part of the underlying sentence. Therefore, the executive branch has no legal authority to order her to register because to do so would be, in effect, to illegally "modify" her sentence for the underlying drug conviction.

The Court of Appeals panel held:

"After careful review of the relevant provisions of the applicable statutes, the unambiguous language therein readily establishes that the legislature intended the KORA registration requirements to be imposed automatically by operation of law without court involvement and to represent nonpunitive collateral consequences of judgment that are distinct from, and not a part of, a criminal sentence. Because the registration requirement is not part of her sentence, we necessarily conclude there is no merit to Simmons' claim that her sentence was illegally modified." *Simmons*, 50 Kan. App. 2d at 463.

The parties spend most of their energy arguing from our prior caselaw defining the legal contours of a criminal sentence. But we need not follow either the lead of the panel below or that of the parties to resolve Simmons' illegal sentence claim as a question of law. Rather, her claim fails more prosaically on factual grounds. Simply put, Simmons' 2005 criminal sentence has not been "modified" because the obligation to register was imposed on her *after* she was sentenced by the district court. In a criminal proceeding, sentencing takes place when the trial court pronounces the sentence from the bench. *State v. Jackson*, 291 Kan. 34, 35, 238 P.3d 246 (2010); *State v. Garcia*, 288 Kan. 761, 765, 207 P.3d 251 (2009); *Abasolo v. State*, 284 Kan. 299, 304, 160 P.3d 471 (2007).

In *State v. Royse*, 252 Kan. 394, 397, 845 P.2d 44 (1993), the court defined what constitutes a criminal sentence:

"Ordinarily, in a legal sense, 'sentence' is synonymous with 'judgment' and denotes the action of a court of criminal jurisdiction formally declaring to the defendant the legal consequences of the guilt to which he has confessed or of which he has been convicted. *Roberts v. State*, 197 Kan. 687, Syl. ¶ 1, 421 P.2d 48 (1966). In criminal cases, the judgment must be rendered and sentence imposed in open court. The judgment in a criminal case, whether it imposes confinement, imposes a fine, grants probation, suspends the imposition of sentence, or imposes any combination of those alternatives, is effective upon its pronouncement from the bench."

In Simmons' case, the district court did not pronounce Simmons' duty to register at sentencing in the 2005 case or at any subsequent hearing on the subject, so it is simply not true that her sentence has been modified. Whatever role the executive branch played—even if it can be said the executive branch enforced a requirement on Simmons *inconsistent* with her sentence—the executive branch cannot have modified the sentence. The executive branch is not a court of criminal jurisdiction. And there is no claim the district court did anything after the 2005 sentencing proceeding. In other words, this particular defense against the subsequent criminal charge is factually off base. We need go no further to decide that Simmons' 2005 sentence was not illegal.

Lastly, Simmons claims the district court erred when it ordered her to pay the \$200 DNA database fee over her objection. Once again, this requires us to interpret a statute, which is a question of law subject to de novo review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015).

The key statute in our analysis is K.S.A. 2012 Supp. 75-724, which governs when a court must impose a DNA database fee. It provides in relevant part:

"(a) Any person convicted or adjudicated of an offense that, pursuant to K.S.A. 21-2511, and amendments thereto, requires submission of a DNA sample upon arrest, charging or placement in custody, shall pay a separate court cost of \$200 as a Kansas bureau of investigation DNA database fee upon conviction or adjudication.

"(b) The court shall order such fees regardless of whether the person's DNA sample was already on file with the Kansas bureau of investigation at the time such person was arrested, charged or placed in custody, unless the person can prove to the court that the person: (1) Has paid such fees in connection with a prior conviction or adjudication; and (2) did not submit specimens of blood or an oral or other biological sample authorized by the Kansas bureau of investigation to the Kansas bureau of investigation for the current offense of conviction or adjudication." K.S.A. 2012 Supp. 75-724(a)-(b).

Simmons contends because the KBI's regulations require that "[e]ach convicted offender . . . currently incarcerated and required to provide blood and saliva samples shall provide these samples before release, discharge, or parole," K.A.R. 10-21-6(j), and because she was previously incarcerated from June 2007 until October 2008, she "must have provided a DNA sample before release, discharge or parole."

Simmons, however, ignores her burden under K.S.A. 2012 Supp. 75-724. The statute plainly states the court "shall order such fees regardless of whether the person's DNA sample was already on file" unless the person can prove that he or she has "paid such fees in connection with a prior conviction or adjudication" and "did not submit [a DNA] sample . . . for the current offense of conviction or adjudication." K.S.A. 2012 Supp. 75-724(a)-(b).

Simmons does not direct our attention to a place in the record where she showed she previously paid a DNA database fee or demonstrated she did not submit a DNA sample for the current offense. The only reference in the record is her counsel's brief objection at sentencing that the State must already have her DNA because she was previously in the prison system. As the party asserting prejudicial error, Simmons has the burden of designating a record that demonstrates error. See *State v. Sisson*, 302 Kan. 123, 128, 351 P.3d 1235 (2015). "[W]ithout such a record, we presume the actions of the trial court were proper." *State v. Warren*, 302 Kan. 601, 616, 356 P.3d 396 (2015). Simmons has not met her burden on appeal, let alone her burden below. The district court did not err by imposing the \$200 DNA database fee.

Affirmed.

* * *

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

In the four Kansas Offender Registration Act cases argued before *State v. Petersen-Beard*, 304 Kan. 192, 194, 377 P.3d 1127 (2016)—that is, in *State v. Redmond*, 304 Kan. 283, 371 P.3d 900 (2016); *State v. Buser*, 304 Kan. 181, 371 P.3d 886 (2016); and *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016), all of which dealt with sex offenders and application of the federal Ex Post Facto Clause, and in *State v. Charles*, 304 Kan. 158, 372 P.3d 1109 (2016), which dealt with a violent offender and the necessity that a jury find all facts necessary for imposition of certain punishments under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)—I agreed with three of my colleagues that Kansas' offender registration requirement constitutes punishment.

I would have extended the holdings of those four cases in *Petersen-Beard*, which asked whether the requirement of offender registration constituted not only punishment but also cruel and unusual punishment under the Eighth Amendment. I therefore joined Justice Lee A. Johnson's dissent in *Petersen-Beard*, explicitly agreeing with the result he would have reached and implicitly agreeing with all of the merits-based arguments Justice Johnson advanced to support his result. *Petersen-Beard*, 304 Kan. at 211-25 (Johnson, J., dissenting).

I decline to change course today. 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. Defendant Ami Latrice Simmons has met any burden of proof that she bears on this point, and the KORA registration obligation could not be imposed on her by legislative action after her conviction and without violating the Ex Post Facto Clause.

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

APPENDIX Z

No. 108,885

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

AMI LATRICE SIMMONS,
Appellant.

SYLLABUS BY THE COURT

1.

An illegal sentence is where (1) the court lacked jurisdiction to sentence the defendant, (2) the character or the term of the punishment imposed as part of the sentence did not conform to the statute, or (3) the sentence was ambiguous as to how it was to be served.

2.

Interpretation of a statute is a question of law over which appellate courts have unlimited review. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings.

3.

The Kansas Offender Registration Act (KORA) requires offenders convicted of certain offenses to register for 15 years from the most recent of either the date of parole, discharge, or release or, if not confined, from the date of conviction. The list of specified offenses includes selling, offering for sale, or having in such person's possession with

intent to sell any opiates, opium, or narcotic drugs as defined in K.S.A. 65-4161, prior to its repeal. K.S.A. 2013 Supp. 22-4906(a)(1).

4.

KORA requires the staff of a facility where an offender is confined to inform the offender about the duty to register before the offender is released. K.S.A. 2013 Supp. 22-4904(b) (formerly K.S.A. 22-4905[a][1]).

5.

KORA requires an offender, upon release from confinement, to register with the county sheriff within 10 days of the offender coming into any county in which the offender intends to reside for more than 10 days. K.S.A. 2013 Supp. 22-4904(a)(1). Thereafter, the sheriff is required to explain the duty to register and the procedure involved and then to obtain the information required for registration. K.S.A. 2013 Supp. 22-4904(d) (formerly K.S.A. 22-4904[a][5]).

6.

KORA requires the court to notify all offenders subject to registration of the duty to register and the procedure for doing so. Notification must occur at the time of conviction. K.S.A. 2013 Supp. 22-4904(a). KORA requires the court to draft a written notice of duty to register if the offender is released instead of remanded to custody. K.S.A. 2013 Supp. 22-4904(a)(1)(B).

7.

Ordinarily, in a legal sense, "sentence" is synonymous with "judgment" and denotes the action of a court of criminal jurisdiction formally declaring to the defendant the legal consequences of the guilt which he or she has confessed or of which he or she has been convicted.

8.

In criminal cases, the judgment must be rendered and sentence imposed in open court. The judgment in a criminal case, whether it imposes confinement, imposes a fine, grants probation, suspends the imposition of sentence, or imposes any combination of those alternatives, is effective upon its pronouncement from the bench.

9.

The duty to register as an offender is a civil penalty that is remedial in nature and intended to protect public safety, not to impose punishment.

10.

KORA does not require a court or any other entity to affirmatively act or issue a judgment in order to impose a statutory duty on an offender to register.

11.

A criminal defendant has both a statutory right and a constitutional right to be present with counsel at all critical stages of the prosecution of the case against him or her.

12.

A district court sentences a defendant when it orally pronounces punishment and other terms and conditions associated with the disposition of the crime of conviction from the bench. As a general rule, a sentence is complete when the district court concludes the sentencing hearing and the court does not have jurisdiction to change a sentence thereafter.

13.

The offender registration requirements set forth in KORA arise automatically by operation of law without court involvement and represent nonpunitive collateral

consequences of judgment; thus, a duty to register under KORA is distinct from, and not part of, an offender's criminal sentence.

14.

A statute violates ex post facto protections if it retroactively either criminalizes conduct that had not been proscribed or increases the punishment for conduct already treated as criminal.

15.

Punishment triggered by the failure to register is not a factor to be considered in the ex post facto determination because an offender who fails to comply with a registration requirement will be prosecuted for that failure in a proceeding separate from the individual's original offense.

16.

Any person convicted of a felony must submit specimens of blood or an oral or other biological sample to the Kansas Bureau of Investigation. K.S.A. 2013 Supp. 21-2511(a). If the person is placed directly on probation, the court is required to order the specimen or sample collected within 10 days after sentencing. K.S.A. 2013 Supp. 21-2511(c)(1).

17.

Any adult arrested or charged with the commission or attempted commission of any felony is required to submit a specimen of blood or an oral or other biological sample at the same time such person is fingerprinted pursuant to the booking procedure. Before taking this specimen or sample, the custodial law enforcement agency shall search the Kansas criminal justice information system to determine if it is already on file. If it cannot be reasonably established that the sample is on file, the agency shall cause a

sample to be collected. If it is on file, the agency is not required to take a sample. K.S.A. 2013 Supp. 21-2511(e)(2)-(3).

18.

Any person convicted of an offense that requires the person to submit a specimen of blood or an oral or other biological sample upon arrest, charging, or placement in custody shall pay a separate court cost of \$200 as a DNA database fee upon conviction. The court shall order such fee regardless of whether the person's DNA sample was already in the database at the time such person was arrested, charged, or placed in custody, unless the person can prove to the court that the person: (1) Has paid such fees in connection with a prior conviction or adjudication; and (2) did not submit specimens of blood or an oral or other biological sample authorized by the Kansas Bureau of Investigation to the Kansas Bureau of Investigation for the current offense of conviction or adjudication. K.S.A. 2013 Supp. 75-724.

Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed June 27, 2014.

Affirmed.

Rick Kittel, of Kansas Appellate Defender Office, for appellant.

Charles Ault-Duell, assistant county attorney, *Ellen Mitchell*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before STANDRIDGE, P.J., BRUNS and POWELL, JJ.

STANDRIDGE, J.: Ami Latrice Simmons appeals from her conviction for failing to register as a drug offender. Specifically, Simmons argues retroactive application of 2007 legislation that requires her to register as a drug offender for a prior conviction that did not require registration at the time she originally was sentenced (1) illegally modifies the original sentence imposed and (2) violates the Ex Post Facto Clause of the United States

Constitution. She also challenges the \$200 DNA database fee imposed by the district court. Because an offender's statutory duty to register is imposed automatically by operation of law, without court intervention, as a collateral consequence of judgment with a stated objective of protecting public safety and not punishment, we necessarily conclude that the registration requirements—no matter when imposed—are not part of an offender's sentence. As such, Simmons' illegal sentence and ex post facto claims both fail. For the reasons stated below, her challenge to the \$200 DNA database fee imposed by the district court also fails.

FACTS

Simmons was convicted and sentenced in 2005 after pleading guilty to possession of cocaine with intent to distribute and sale of cocaine. When Simmons committed those crimes—and even when she was sentenced—the Kansas Offender Registration Act (KORA) did not require drug offenders to register. In 2007, however, KORA was amended to add certain drug offenders to the registration list. L. 2007, ch. 183, sec. 1. Although Simmons complied with her registration requirements until May 2011, she was charged in June 2011 with failing to register as required. Simmons filed a motion to dismiss the charges on grounds that the registration requirement violated "the Ex Post Facto Clause of the United States and Kansas Constitutions," but the motion was denied.

Waiving her right to a jury trial but reserving the right to appeal, Simmons' case went to a bench trial on the following stipulated facts.

"In March of 2005, the State filed a 13 count complaint against Ami Simmons in Saline County Case No. 2005 CR 359. The complaint alleged, among other things, that Simmons possessed cocaine with the intent to distribute it and that Simmons in fact sold cocaine, both in violation of K.S.A. 65-4161(a).

"On June 21, 2005, Simmons entered a guilty plea to possession of cocaine with the intent to distribute and the sale of cocaine. She was sentenced to 30 months in prison

with 24 months of post-release supervision, granted a border-box disposition to probation, and placed on 18 months of probation in October of 2005.

"Simmons' probation in 05 CR 359 was eventually revoked in May 2007, and Simmons was remanded to serve her 30-month prison sentence. Simmons was incarcerated from June 21, 2007, to October 22, 2008. She began serving her 24-month post-release supervision period when she was released.

"The Kansas Offender Registration Act (KORA) was amended effective July 1, 2007, L. 2007, ch.183, §1, to include offenders who had been convicted of K.S.A. 65-4161 offenses, including the sale of cocaine. K.S.A. 22-4902(a)(11)(C).

"Under K.S.A. 22-4906(a), Simmons' KORA registration obligations with the Saline County Sheriff's Office began on the date of her parole, October 22, 2008.

"On May 31, 2011, a Saline County Deputy Patrick Queen attempted to serve Simmons notice that she had failed to attend her May 2011 KORA compliance visit at her last reported address On that date, Deputy Queen was advised by the tenant . . . that Simmons no longer lived at that address. Simmons did not report her change of address.

"On June 1, 2011, Simmons called Saline County Sheriff's Office Compliance Officer Michelle McMillan by phone and advised that the missed visit was an oversight. McMillan instructed Simmons to come in immediately to complete her May 2011 compliance visit. Simmons did not reveal her location during the call.

"Beginning in December 2008 and continuing until June 8, 2011, Simmons acknowledged her registration responsibilities on 11 prior occasions, and she provided invalid addresses on 5 prior occasions to McMillan.

"On June 8, 2011, no reported telephone numbers for Simmons were valid, attempts to contact her through her former parole officer, Shawn Homan, were unsuccessful, and she had not completed her May 2011 compliance visit."

The district court found Simmons guilty of failing to register as required by KORA.

ANALYSIS

Illegal sentence

Under K.S.A. 22-3504(1), an illegal sentence is where (1) the court lacked jurisdiction to sentence the defendant, (2) the character or the term of the punishment imposed as part of the sentence did not conform to the statute, or (3) the sentence was ambiguous as to how it was to be served. *State v. Sims*, 294 Kan. 821, 825, 280 P.3d 780 (2012). Simmons argues her 2005 sentence was rendered illegal by the 2007 KORA amendments, which retroactively imposed upon her the requirement to periodically register as a drug offender. But Simmons' argument begs the question in that it assumes that the drug offender registration requirement is considered a part of her criminal sentence. For the reasons stated below, we find that it is not.

Resolution of this issue requires statutory construction. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *State v. Johnson*, 297 Kan. 210, 215, 301 P.3d 287 (2013).

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Urban*, 291 Kan. 214, 216, 239 P.3d 837 (2010). Generally, criminal statutes are strictly construed in favor of the accused. That rule is constrained by the rule that the interpretation of a statute must be reasonable and sensible in order to give effect to the legislative design and intent of the law. The rule of lenity arises only when there is any reasonable doubt as to meaning of the statute. *State v. Cameron*, 294 Kan. 884, 899, 281 P.3d 143 (2012).

K.S.A. 2013 Supp. 22-4902(a) of the registration act defines an "offender" as, among other things, a drug offender. Relevant here, the term "drug offender" is further defined in subsection (f) as:

- A person who, on or after July 1, 2007, is convicted of K.S.A. 65-4161; or
- A person who, on or after July 1, 2007, has been convicted of an offense that is comparable to any crime defined in the subsection, which includes K.S.A. 65-4161. See K.S.A. 2013 Supp. 22-4902(f)(1)(C) and (f)(2).

Before it was repealed in 2009, K.S.A. 65-4161 made it a crime to sell, offer for sale, or possess with intent to sell any opiates, opium, or narcotic drugs. Here, Simmons entered a guilty plea in 2005 to charges that she possessed cocaine with the intent to distribute and sold cocaine, both in violation of K.S.A. 65-4161(a); accordingly, she fits the definition of a drug offender, and thus an offender, under the registration act.

K.S.A. 2013 Supp. 22-4906(a)(1) requires offenders convicted of certain offenses to register for 15 years from the most recent of either the date of parole, discharge, or release or, if not confined, from the date of conviction. The list of specified offenses includes selling, offering for sale, or having in such person's possession with intent to sell any opiates, opium, or narcotic drugs as defined in K.S.A. 65-4161, prior to its repeal. See K.S.A. 2013 Supp. 22-4906(a)(1)(P). As a drug offender who, on or after July 1, 2007, had been convicted and confined for selling a narcotic drug, Simmons is now statutorily required to register as an offender for a period of 15 years from the date she was released from confinement.

Although conceding that if convicted and sentenced for her crimes today she would be subject to the current version of the statute and required to register, Simmons' claim of illegal sentence is grounded in the fact that she was not required to register as a drug offender when she was convicted for her crimes. And Simmons is factually correct;

based on the underlying crime of her conviction, she did not fit the definition of an offender under the 2005 version of the registration act. Thus, unlike most offenders who object to retroactive application of legislative amendments to KORA, there is no court order or journal entry in this case imposing any registration requirement on Simmons at all. In the absence of a court order, the question of whether the requirement to register is part of an offender's sentence turns on whether there is a statutory procedure for imposing the registration requirement on an offender like Simmons, who has never been subject to a court order to register.

In May 2007, Simmons' probation was revoked and she was remanded to serve her underlying prison sentence. By the time she was released from prison in 2008, the offender registration statute had been amended to make her subject to a 10-year postrelease registration requirement. K.S.A. 22-4906(a)(1). Pursuant to K.S.A. 22-4905(a)(1), the staff of the facility where Simmons was confined was required to inform her about the duty to register before she was released. Under subsection (a)(2)(A) of this statute, the staff of the facility was also required before she was released to:

"(i) Explain the duty to register and the procedure for registration;

"(ii) obtain the information required for registration as provided in K.S.A. 22-4907 and amendments thereto;

"(iii) inform the offender that the offender must give written notice of any change of address within 10 days of a change in residence to the law enforcement agency where last registered and the Kansas bureau of investigation;

"(iv) inform the offender that if the offender changes residence to another state, the offender must inform the law enforcement agency where last registered and the Kansas bureau of investigation of such change in residence and must register in the new state within 10 days of such change in residence;

"(v) inform the offender that the offender must also register in any state or county where the offender is employed, carries on a vocation or is a student;

"(vi) inform the offender that if the offender expects to or subsequently becomes enrolled in any institution of higher education in the state of Kansas on a full-time or

part-time basis or have any full-time or part-time employment at an institution of higher education in the state of Kansas, with or without compensation, for more than 14 days or an aggregate period exceeding 30 days in one calendar year, the offender must provide written notice to the Kansas bureau of investigation within 10 days upon commencement of enrollment or employment;

"(vii) inform the offender that if there is any change or termination in attendance or employment, at an institution of higher education, the offender must provide written notice to the Kansas bureau of investigation within 10 days of the change or termination;

"(viii) inform the offender of the requirement of an annual driver's license renewal pursuant to K.S.A. 8-247, and amendments thereto, and an annual identification card renewal pursuant to K.S.A. 2007 Supp. 8-1325a, and amendments thereto; and

"(ix) 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." K.S.A. 22-4905(a)(2)(A).

In the current version of KORA, the corresponding duties and responsibilities of staff members at the correctional facility are set forth in K.S.A. 2013 Supp. 22-4904(b).

Pursuant to K.S.A. 22-4904(a)(1), and as the prison staff was required to explain to her before she was released, Simmons was required upon her release to register with the county sheriff within 10 days of her coming into any county in which she intended to reside for more than 10 days. Thereafter, the sheriff was required to:

"(A) Explain the duty to register and the procedure for registration;

"(B) obtain the information required for registration as provided in K.S.A. 22-4907 and amendments thereto;

"(C) inform the offender that the offender must give written notice of any change of address within 10 days of a change in residence to the law enforcement agency where last registered and the Kansas bureau of investigation;

"(D) inform the nonresident student offender that the offender must give written notice to the sheriff and the Kansas bureau of investigation of any change or termination

of attendance at the school or educational institution the offender is attending, within 10 days of such change or termination;

"(E) inform the nonresident worker offender that the offender must give written notice to the sheriff and the Kansas bureau of investigation of any termination of employment at the offender's place of employment, within 10 days of such termination;

"(F) inform the offender that if the offender changes residence to another state, the offender must inform the law enforcement agency where last registered and the Kansas bureau of investigation of such change in residence and must register in the new state within 10 days of such change in residence;

"(G) inform the offender that the offender must also register in any state or county where the offender is employed, carries on a vocation or is a student;

"(H) inform the offender that if the offender expects to or subsequently becomes enrolled in any institution of higher education in the state of Kansas on a full-time or part-time basis or have any full-time or part-time employment at an institution of higher education in the state of Kansas, with or without compensation, for more than 14 days, or for an aggregate period exceeding 30 days in one calendar year, the offender must provide written notice to the Kansas bureau of investigation within 10 days upon commencement of enrollment or employment;

"(I) inform the offender that if there is any change or termination in attendance or employment at an institution of higher education, the offender must provide written notice to the Kansas bureau of investigation within 10 days of the change or termination;

"(J) inform the offender of the requirement of an annual driver's license renewal pursuant to K.S.A. 8-247, and amendments thereto, and an annual identification card renewal pursuant to K.S.A. 8-1325a, and amendments thereto; and

"(K) 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." K.S.A. 22-4904(a)(5).

In the current version of KORA, the corresponding duties and responsibilities of the registering law enforcement agency are set forth in K.S.A. 2013 Supp. 22-4904(d).

Like prison staff and registering law enforcement agencies, the statute has a provision requiring the district court to notify all offenders subject to registration of the

duty to register and the procedure for doing so. See K.S.A. 2013 Supp. 22-4904(a). Notification must occur at the time of conviction unless of course, like here, there was no duty to register when the offender was convicted. If the offender is released instead of remanded to custody, the district court is required to draft a written notice of duty to register. K.S.A. 2013 Supp. 22-4904(a)(1)(B). Significantly, there is no provision in this statute or the offender registration act as a whole that refers to, let alone authorizes, the court to order offender registration as a criminal sentence as punishment for an offender's conviction. This affirmative obligation imposed by statute on the court to inform an offender of the duty to register at the time of conviction is not an indication that the legislature intended offender registration as part of a criminal sentence. The Kansas law relating to sentencing is codified in the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2013 Supp. 21-6801 *et seq.*, and the offender registration statutory scheme is wholly separate and distinct from the KSGA.

The KORA statutory scheme outlined above establishes a statutory procedure that adequately informs and explains a newly imposed registration requirement to an offender who had no requirement to register at the time he or she was convicted and sentenced. And considering this statutory scheme in its entirety, the provisions therein reflect the legislature's clear intent that the registration requirement be imposed automatically by operation of law as a nonpunitive collateral consequence of judgment that is distinct from, and not part of, a criminal sentence.

Our Supreme Court has defined what constitutes a sentence:

"Ordinarily, in a legal sense, 'sentence' is synonymous with 'judgment' and denotes the action of a court of criminal jurisdiction formally declaring to the defendant the legal consequences of the guilt to which he has confessed or of which he has been convicted. *Roberts v. State*, 197 Kan. 687, Syl. ¶ 1, 421 P.2d 48 (1966). In criminal cases, the judgment must be rendered and sentence imposed in open court. The judgment in a criminal case, whether it imposes confinement, imposes a fine, grants probation,

suspends the imposition of sentence, or imposes any combination of those alternatives, is effective upon its pronouncement from the bench." *State v. Royse*, 252 Kan. 394, 397, 845 P.2d 44 (1993).

Although the registration requirement is a legal consequence of a conviction for designated crimes, 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. *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). And the Kansas offender registration statutory scheme itself specifically makes clear that the requirement to register need not be imposed by court order at all, let alone imposed by the court in open proceedings. As such, the registration requirements simply are not part of an offender's sentence.

Moreover, broad principles of criminal law weigh against a finding that registration requirements are part of an offender's sentence. A criminal defendant has both a statutory right and a constitutional right to be present with counsel at all critical stages of the prosecution of the case against him or her. See *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); K.S.A. 22-3405(1); *State v. Engelhardt*, 280 Kan. 113, 122, 119 P.3d 1148 (2005). Sentencing is a critical stage of a prosecution. *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *State v. Bristor*, 236 Kan. 313, 317-18, 691 P.2d 1 (1984) (citing *Mempa* with favor for the proposition that sentencing is a critical stage of a criminal proceeding to which the right to counsel applies). A district court sentences a defendant when it orally pronounces punishment and other terms and conditions associated with the disposition of the crime of conviction from the bench. *State v. McDaniel*, 292 Kan. 443, 445, 254 P.3d 534 (2011). As a general rule, a sentence is complete when the district court concludes the sentencing hearing. After the hearing, the district court no longer has jurisdiction to change a

sentence. See *State v. Hall*, 298 Kan. 978, 986, 319 P.3d 506 (2014) (Because restitution constitutes a part of a defendant's sentence, its amount can only be set by a sentencing judge with the defendant present in open court, and until any applicable restitution amount is decided, a defendant's sentencing is not complete.) (abrogating *State v. Cooper*, 267 Kan. 15, Syl. ¶ 2, 977 P.2d 960 [1999]). Those fundamental legal principles dictate the outcome here. If the legislature had intended the registration requirements to be part of an offender's sentencing, it would have provided a statutory procedure through which an offender could appear in open court for imposition of sentence or modification of sentence each time KORA was amended so as to affect that offender's registration requirements. There is no such procedure in KORA.

We readily acknowledge that our decision today directly conflicts with an unpublished decision reached by another panel of our court. *State v. Dandridge*, No. 109,066, 2014 WL 702408, at *3 (Kan. App. 2014) (unpublished opinion); see *State v. Urban*, 291 Kan. 214, 223, 239 P.3d 837 (2010) (panels of Kansas Court of Appeals not bound by prior rulings of another panel). "While we must carefully consider each precedent cited to us, we also must uphold our duty to correctly determine the law in each case that comes before us. In doing so, we sometimes find that we must respectfully disagree with the opinion of another panel." *Uhlmann v. Richardson*, 48 Kan. App. 2d 1, 13, 287 P.3d 287 (2012).

With limited analysis, the panel in *Dandridge* cited to several Kansas Supreme Court cases to support its finding that offender registration is part of a criminal sentence. 2014 WL 702408, at *3. Although we agree that our Supreme Court has issued various opinions over the last few years that reference offender registration as part of a sentence, we do not construe those references to mean that the Supreme Court has considered and decided the issue on its merits. For example, the offender registration issue presented in *State v. Mishmash*, 295 Kan. 1140, 290 P.3d 243 (2012), was a legal issue completely unrelated to sentencing. The offender registration statute in effect when *Mishmash* was

convicted defined an offender as "any person who has been convicted of: (A) [u]nlawful manufacture or attempting such of any controlled substance or controlled substance analog . . . *unless the court makes a finding on the record that the manufacturing or attempting to manufacture such controlled substance was for such person's personal use.*" (Emphasis added.) K.S.A. 2009 Supp. 22-4902(a)(11)(A). After the defendant was convicted, he requested the sentencing court make such a finding on the record. The State objected, arguing he traded some of the drugs for nonmonetary items. During the sentencing hearing, the parties presented evidence to support their respective positions. The court ultimately concluded on the record that Mishmash was not manufacturing solely for personal use and registration as a drug offender would be required.

Unlike the issue presented here, the issue in *Mishmash* on appeal was whether the phrase "personal use" as used in K.S.A. 2009 Supp. 22-4902(a)(11)(A) implies that the manufacturer of a drug must use the drug solely or exclusively in order for the manufacturer to fall outside the classification of an offender as that word is defined in the statute. 295 Kan. at 1142-45. The Supreme Court held the district court erred in ordering offender registration and "vacat[ed] that portion of the sentence requiring Mishmash to register as a drug offender." 295 Kan. at 1145. Notably, this is the only reference to sentencing that the court makes related to registration requirements; the court was not presented with nor did it address whether the registration requirements should be considered part of a criminal sentence.

In comparing the underlying convictions in *Mishmash* to the one here, the sentencing court's decision to consider testimony about Mishmash's intended purpose for the drugs he manufactured was necessary under the KORA framework. Like here, there was no question in *Mishmash* that the obligation to register was automatically imposed upon an offender by operation of law and not by court order. But the question in *Mishmash* was whether the defendant was an "offender" as defined by statute. If the court determined he was an offender as defined by the statute (did not manufacture for personal

use), he thereafter would be a person subject to the duty to register, which arises by operation of law and not by order of the court through sentencing. If the court determined that he was not an offender as defined by statute (manufactured for personal use), he would not be a person subject to the duty to register. The fact that the sentencing court decided to hear this testimony in the context of a sentencing hearing has no bearing on the issue presented or the Supreme Court's conclusion and certainly does not mean that the registration requirement was part of Mishmash's sentence.

Like *Mishmash*, the court's reference in *State v. Denmark-Wagner*, 292 Kan. 870, 884, 258 P.3d 960 (2011), to the registration requirement as part of the defendant's sentence is not a legal conclusion creating binding precedent but, again, appears to have been phrased that way for purposes of simplicity and brevity. Denmark-Wagner was convicted of one count of felony first-degree murder pursuant to the terms of a plea agreement. The court's journal entry of judgment noted that Denmark-Wagner would be required to register as a violent offender for his lifetime based on the felony first-degree murder conviction and a finding on the record that the crime of conviction was a felony committed with a deadly weapon. On appeal, the Kansas Supreme Court determined that Denmark-Wagner had just one qualifying conviction under the offender registration statute and therefore was only required to register as an offender for a period of 10 years. It was only those persons with two or more qualifying convictions under the offender registration statute that were required to register as an offender for life. K.S.A. 22-4906(a). The court concluded that "[t]he lifetime offender registration requirement of [Denmark-Wagner's] sentence does not conform to the statute and is illegal. It must be vacated." 292 Kan. at 884. Although there can be no dispute that the court used the word "sentence" in its decision on the merits of the issue presented—the number of qualifying convictions—use of the word, in and of itself, cannot be construed as a legal holding that the registration requirement is part of the defendant's sentence.

In *State v. Jackson*, 291 Kan. 34, 238 P.3d 246 (2010), the defendant was convicted of three counts of aggravated battery pursuant to the terms of a plea agreement. After sentencing, the district court ordered the parties to submit written briefs on the legal issue of whether Jackson's juvenile adjudications would count as prior qualifying convictions under the offender registration statute. The court's journal entry of sentencing provided that Jackson was subject to lifetime registration as a violent offender under K.S.A. 22-4902(a)(7) based on two qualifying convictions for crimes committed with a deadly weapon. On appeal, Jackson argued the sentencing court did not have jurisdiction to impose the registration requirement in the journal entry because the requirement was not pronounced from the bench at sentencing. Our Supreme Court was not persuaded by this argument:

"We find that the statutorily required imposition of lifetime registration is an incident of sentencing, akin to restitution. K.S.A. 22-4906 speaks of persons who are 'required to register' and of a 'registration requirement.' Because registration is a mandatory, not a discretionary, act, the order of registration is the same kind of standard order of probation cited by our Court of Appeals in [*State v.*] *Baldwin*[], 37 Kan. App. 2d 140, 144, 150 P.3d 325 (2007)]. Because the defendant has constructive notice of the registration requirement, it is implicit in every sentence that falls within the scope of K.S.A. 22-4906. The journal entry did not modify the sentence but simply carried out a statutory imperative. The sentencing court had jurisdiction to include the registration requirement in the journal entry without making it part of the sentence imposed from the bench." 291 Kan. at 37.

Like *Mishmash* and *Denmark-Wagner*, *Jackson* is factually and legally distinguishable from the case presented here. The legal question in *Jackson* was whether juvenile adjudications constitute prior qualifying convictions under KORA. Unlike *Mishmash* and *Denmark-Wagner*, however, at no point in the opinion did the Supreme Court in *Jackson* refer to the registration requirement as part of the defendant's sentence. In fact, the excerpt from the opinion set forth above is much more consistent with a

finding that the registration requirement is *not* a part of the defendant's sentence. See *Jackson*, 291 Kan. at 37. To that end, the court appeared to construe the KORA obligations as we have here: (1) a statutorily mandated outcome over which a sentencing court has no discretion (2) that arises automatically by operation of law (3) upon the qualifying conviction (4) of a person who meets the definition of an offender as defined by the statute. Construing the KORA obligations this way necessarily means that the statutory duty of an offender to register is a collateral consequence of judgment that is separate and distinct from a criminal sentence. This is consistent with the underlying policy of KORA as announced in *Myers*, 260 Kan. at 671, 681, 695-96 (registration provisions are remedial and intended to protect public safety, not as punishment) and the statutory and constitutional rights of a criminal defendant to be present with counsel at all critical stages of the prosecution, including sentencing. See *Gardner*, 430 U.S. at 358; *Engelhardt*, 280 Kan. at 122; see also *Hall*, 298 Kan. at 986 (Because restitution constitutes a part of a defendant's sentence, its amount can only be set by a sentencing judge with the defendant present in open court, and until any applicable restitution amount is decided, a defendant's sentencing is not complete.).

After careful review of the relevant provisions of the applicable statutes, the unambiguous language therein readily establishes that the legislature intended the KORA registration requirements to be imposed automatically by operation of law without court involvement and to represent nonpunitive collateral consequences of judgment that are distinct from, and not a part of, a criminal sentence. Because the registration requirement is not part of her sentence, we necessarily conclude there is no merit to Simmons' claim that her sentence was illegally modified.

Ex post facto

Simmons argues that applying the 2007 KORA legislation to persons who already had been convicted of drug crimes amounts to unconstitutional punishment violating the

Ex Post Facto Clause of the United States Constitution. U.S. Const. art. I, § 10. A statute violates ex post facto protections if it retroactively either criminalizes conduct that had not been proscribed or increases the punishment for conduct already treated as criminal. *Myers*, 260 Kan. 669, Syl. ¶ 5. In support of her particular ex post facto claim, Simmons contends imposing the registration requirements of KORA on her increases the punishment for her original 2005 drug convictions. Resolution of her claim requires us to interpret constitutional and statutory provisions on undisputed facts, which in turn presents a question of law over which appellate courts have unlimited review. *State v. Johnson*, 297 Kan. 210, 215, 301 P.3d 287 (2013).

Our Supreme Court's decision in *Myers* essentially controls the ex post facto issue presented by Simmons here. The court in *Myers* engaged in a lengthy analysis of state and federal offender registration laws and of the legislative purpose behind the Kansas Sex Offender Registration Act (KSORA), which is the sex offender component of the offender act at issue here. The court concluded that the duty to register served a sound public safety interest, was enacted to further that public interest, and did not impose obligations so onerous as to be punitive in their effect. 260 Kan. at 681, 695-96. The court ultimately held that the requirements were not a form of punishment triggering ex post facto protections. 260 Kan. at 696.

As Simmons asserts, the *Myers* court considered only the impact of the registration obligations themselves and not the punishment imposed under KSORA for failing to register. But the United States Supreme Court expressly has rejected the notion that punishment triggered by the failure to register is a factor to be considered in the ex post facto determination. *Smith*, 538 U.S. at 102. Specifically, the Court noted, "[a] sex offender who fails to comply with the [law's requirements] may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense." 538 U.S. at 101-02. Thus, a separate prosecution for violation of the KORA registration provisions is not a second prosecution for the

underlying offense but instead is punishment imposed as a result of the subsequent prosecution. As such, any punishment imposed under KORA for failing to register is irrelevant to the ex post facto analysis.

Although Simmons acknowledges the holdings in *Smith* and *Myers*, she suggests that both the United States Supreme Court and the Kansas Supreme Court might now reach a different result in analyzing the current version of KORA. Specifically, Simmons points to the expanded scope of the offenders who are required to register, the heightened reporting obligations, and the more aggressive public notification provisions implemented since the court in *Myers* considered the constitutionality of KSORA in 1996. Although the changes Simmons points out between KSORA as it was upheld in *Myers* and the KORA version applied to her are significant, ultimately they are matters of degree rather than differences of kind. Thus, absent some indication the Kansas Supreme Court intends to retreat from its decision in *Myers*, it remains controlling authority. Likewise, many of the registration features challenged by Simmons were included in the Alaska sex offender registration act upheld by the United States Supreme Court in *Smith*. See 538 U.S. at 90-91, 105-06.

DNA database fee

On July 25, 2012, Simmons was sentenced for failing to register and placed on probation for 24 months, with an underlying sentence of 27 months' imprisonment, as well as 24 months' postrelease supervision. At sentencing, the court noted that Simmons would be "required to submit a DNA sample, and there's a \$200.00 DNA database fee the court is required to charge for that." Simmons argues the district court erred in requiring her to submit the DNA sample and pay the fee because her DNA already is on file with the Kansas Bureau of Investigation (KBI) as a result of her prior incarceration.

Simmons' argument requires us to interpret the statutes authorizing the collection of DNA samples and DNA database fees. Interpretation of a statute is a question of law over which we exercise unlimited review. *Johnson*, 297 Kan. at 215.

K.S.A. 2013 Supp. 21-2511 is the statute that authorizes the collection of DNA samples. Although initially limited in scope to the collection of blood and saliva from certain offenders such as sex offenders, the legislature amended K.S.A. 21-2511(a) in 2002 to require any person convicted of a felony "to submit specimens of blood and saliva to the Kansas bureau of investigation in accordance with the provisions of this act." L. 2002, ch. 128, sec. 1. If the person is placed directly on probation, the court is required to order the sample collected within 10 days after sentencing. K.S.A. 2013 Supp. 21-2511(c)(1).

The legislature added subsection (e) to K.S.A. 21-2511 in 2006. L. 2006, ch. 171, sec. 2. This subsection extends the time period for collection from what used to be only the end of the legal process to the beginning of the legal process as well. Thus, after July 1, 2008, any adult arrested or charged with the commission or attempted commission of any felony is required to submit a specimen of blood or an oral or other biological sample "at the same time such person is fingerprinted pursuant to the booking procedure." K.S.A. 2013 Supp. 21-2511(e)(2). Before taking this DNA sample, however,

"the arresting, charging or custodial law enforcement agency shall search the Kansas criminal history files through the Kansas criminal justice information system to determine if such person's sample is currently on file with the Kansas bureau of investigation. In the event that it cannot reasonably be established that a DNA sample for such person is on file at the Kansas bureau of investigation, the arresting, charging or custodial law enforcement agency shall cause a sample to be collected. If such person's sample is on file with the Kansas bureau of investigation, the law enforcement agency is not required to take the sample." K.S.A. 2013 Supp. 21-2511(e)(3).

K.S.A. 2013 Supp. 75-724 is the statute that authorizes the collection of DNA database fees. This statute provides, in relevant part:

"(a) Any person convicted or adjudicated of an offense that, pursuant to K.S.A. 21-2511, and amendments thereto, requires submission of a DNA sample upon arrest, charging or placement in custody, shall pay a separate court cost of \$200 as a Kansas bureau of investigation DNA database fee upon conviction or adjudication.

"(b) The court shall order such fees regardless of whether the person's DNA sample was already on file with the Kansas bureau of investigation at the time such person was arrested, charged or placed in custody, unless the person can prove to the court that the person: (1) Has paid such fees in connection with a prior conviction or adjudication; and (2) did not submit specimens of blood or an oral or other biological sample authorized by the Kansas bureau of investigation to the Kansas bureau of investigation for the current offense of conviction or adjudication."

Having set forth the applicable law, we begin our analysis by noting that the record is unclear about whether Simmons submitted a DNA sample and/or whether the agency searched the Kansas criminal history files to determine whether her DNA already was on file at the time Simmons went through the booking procedure on her charge of failing to register. See K.S.A. 2013 Supp. 21-2511(e)(2) and (e)(3). Having noted this ambiguity in the record, however, resolving it is unnecessary to our decision on the issue presented. This is because under K.S.A. 2013 Supp. 75-724(b), the court was required to order Simmons to pay the DNA database fee upon conviction—regardless of whether the person's DNA sample was already on file with the KBI at the time such person was arrested, charged, or placed in custody—unless Simmons provided evidence to establish to the court that (1) she already paid the fee in connection with a prior conviction *and* (2) she was not ordered to submit a DNA sample for the current offense. Therefore, even if Simmons had submitted a DNA sample upon her release from prison in 2008 and that sample had been entered into the database, the court would still be required to order her to pay the fee unless she could prove she paid the fee for the prison test. See K.S.A. 2013

Supp. 75-724(b)(1). Because Simmons failed to sustain her burden of proof, her claim fails.

Affirmed.

APPENDIX AA

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 transfer, 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 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.

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.

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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.

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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.