

No.

IN THE SUPREME COURT OF THE UNITED STATES

AMI LATRICE SIMMONS, Petitioner

v.

STATE OF KANSAS, Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether retroactive application of enhancements to the Kansas Offender Registration Act (“KORA”) violates the Ex Post Facto Clause.

LIST OF PARTIES

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

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OPINIONS BELOW

In *State v. Petersen-Beard*, 377 P.3d 1127 (Kan. 2016), the Kansas Supreme Court overruled another decision it had issued on the same day and held that KORA did not constitute punishment under the federal Constitution as it applied to sex offenders. Later, the Kansas Supreme Court also held that KORA did not constitute punishment as it applied to non-sex offenders. *State v. Meredith*, 399 P.3d 859 (August 4, 2017), *petition for certiorari* pending 17-7301 (U.S. filed December 29, 2017). Citing *Meredith*, the Kansas Supreme Court subsequently rejected identical claims for similarly situated persons, including petitioner. *State v. Simmons*, 405 P.3d 1190 (Kan. December 1, 2017).

STATEMENT OF JURISDICTION

The Kansas Supreme Court is the court of last resort in Kansas. The Kansas Supreme Court rejected Ms. Simmon's claim that retroactive application of KORA amendments violated the Ex Post Facto Clause in its opinion issued on December 1, 2018.

The question presented in each case is whether retroactive application of amendments to KORA violate the Ex Post Facto Clause. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) because each petitioner claimed a title, right, privilege, or immunity under the United States Constitution, Article 1, section 10, and the Kansas Supreme Court denied that claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Constitutional provision involved in this case is the Ex Post Facto Clause:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. [U.S. Const. art. 1, § 10];

The Kansas statute involved in this case is the Kansas Offender Registration Act. K.S.A. 2011 Supp. 22-4901 *et. seq.* This statutory scheme is attached as Appendix C.

STATEMENT OF THE CASES

In this case, petitioner had been convicted of a state offense and had been sentenced pursuant to Kansas law. At the time of her offense, Ms. Simmons did not have to register as an offender in Kansas pursuant to the Kansas Offender Registration Act (“KORA”). After amendments to KORA in 2011, Ms. Simmons was required to register as a drug offender. She was subsequently charged with failure to register and asserted that the registration requirement violated the Ex Post Facto Clause. The state trial court disagreed and found Ms. Simmons guilty and she appealed.

Ultimately, the Kansas Supreme Court rejected the Ex Post Facto claims, holding that the super-registration scheme set out in the amended KORA did not constitute “punishment” and therefore, did not implicate the Ex Post Facto Clause.

REASONS FOR GRANTING THE WRIT

- 1. This Court should grant this petition to resolve the split in the federal circuits as well as state courts (including the Kansas Supreme Court itself) regarding whether increasingly punitive super-registration schemes constitute punishment for purposes of the Ex Post Facto Clause.**

Introduction

The Kansas Supreme Court cited its own previous holding that “there is insufficient proof of the punitive effects of KORA on the class of sex offenders to override the nonpunitive legislative intent.” *State v. Meredith*, slip op. at 9 (citing *State v. Petersen-Beard*, 377 P.3d 1127 (Kan. 2016), *cert. denied* 137 S. Ct. 226 (2016)). The Kansas Supreme Court went on to hold that that the record was not sufficient to conduct an analysis “concerning KORA’s punitive effects on drug offenders as a class distinct from sex offenders.” Slip op. at 10. As a result, in each case, the Kansas Supreme Court held that each petitioner was subject to the super-registration scheme required by KORA. *See, e.g., State v. Meredith*, slip op. at 10. However, in each case, a three-justice minority concluded that the “maximally invasive, maximally pervasive, and infinitely more public incarnation” of KORA was punishment. *See e.g., State v. Meredith*, Slip op. at 11 (Beier, J., dissenting).

In sum, the Kansas Supreme Court itself is split 4 to 3 on the question of whether KORA registration is punishment – a split which has changed upon the

sole circumstance of a one-justice change of the personnel of that court.

This split in Kansas, a 4-3 split in this case along with several other cases involving similar questions pertaining to KORA, is reflective of a wide split across the country as to whether various offender super-registration laws that have been made far more invasive and pervasive in the past several years are punishment so as to prevent retroactive application. In reviewing the nature of KORA and its amendments, it is clear that the Kansas super-registration scheme is punishment in effect and in intent.

2011 KORA amendments create a super-registration scheme

On April 22, 2016, the Kansas Supreme Court issued *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) and on the same day it overruled itself in *State v. Peterson-Beard*, 304 Kan. 192, 198-209, 377 P.3d 1127 (2016). In *Doe*, the Kansas Supreme Court found that KORA, after the 2011 amendments, constituted punishment. It noted the differences between the super-registration scheme set out in the current version of KORA and the fairly simply and non-intrusive offender registration scheme that this Court held was not punitive in *Smith v. Doe*, 538 U.S. 84, 103 (2003):

- KORA applies to a much broader group of offenders.

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

Alaska Stat. § 12.63.010 (2000).

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

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

- KORA often requires longer registration terms.

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

- KORA requires additional registration information.

In addition to the registration information offenders were required to provide under ASORA, KORA registration requires: alias dates or places of birth; temporary lodging information; telephone numbers; social security number; occupation; name of any anticipated employer and anticipated place of employment; photocopies of current driver's licenses and identification cards; aircraft and watercraft license plates and registration information; information concerning where motor vehicles, aircraft, and watercraft are habitually parked or otherwise kept; professional licenses, designations, and certifications; preconviction mental health treatment; schools attended or expected to be attended; travel and immigration documents; name and telephone number of probation, parole, or community corrections officer; email addresses; all online identities used on the Internet; any information relating to membership in online social networks; DNA exemplars; and the sex

and date of birth of each victim. Compare K.S.A.2011 Supp. 22-4907 with Alaska Stat. § 12.63.10 (2000).

- KORA requires in-person registration updates.

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

- KORA requires additional information dissemination to the public.

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

- KORA imposes costly registration fees.

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

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

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

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

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

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

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

- KORA imposes draconian penalties for violations.

Under the 2011 KORA, a first conviction is a severity level 6 person felony, a second conviction is a severity level 5 person felony, a third conviction is a severity level 3 person felony, and a violation continuing for more than 180 days is a severity level 3 person felony. K.S.A.2011 Supp. 22-4903. In Kansas, nondrug felony offenses are generally scaled 1-10, with 1 being the most serious. A severity level 3 person felony is the same as a conviction for kidnapping or attempted second-degree murder. Under ASORA, the penalty for a first-time failure to register was a class A misdemeanor. Alaska Stat. § 11.56.840 (2000). The penalty for a second time failure to register or failure to register with the intent to escape detection or identification and to facilitate the person's commission of a sex offense or child kidnapping was a class C felony, the lowest severity level felony in Alaska. Alaska Stat. § 11.56.835, § 11.81.250 (2000).

Doe, 304 Kan. at 317-20.

In *Petersen-Beard*, issued the same day as *Doe*, a slightly different majority of the Kansas Supreme Court held 4-3 that these exact same differences did not amount to punishment and therefore could be imposed retroactively. 304 Kan. at 198-209.

Nationwide split of authority

Kansas certainly is not the only state to dramatically amend its offender registration law since *Smith*. Just recently, in *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016) *cert. denied* 138 S. Ct. 55 (2017), the Sixth Circuit noted:

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

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

Ex Post Facto clause).

In contrast, the Sixth Circuit found Michigan's expanded registration laws punitive such that they cannot be applied retroactively. *Does*, 834 F.3d at 705 (citing *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008)); see also *Commonwealth v. Muniz*, 164 A.3d 1189, 1218 (Pa. 2017) (finding retroactive application of Pennsylvania's offender registration act violates its ex post facto clause).

By 1996, every state had enacted some form of an offender registration law. *Smith*, 538 U.S. at 90. In the intervening years, states have amended and greatly expanded their offender registration acts. Further, many of the offender registration acts include similar provisions. Enforcement of those provisions should not vary based upon which state or circuit an offender resides in. The disparate conclusions regarding enhanced registration schemes warrants review by this Court. When the Kansas Supreme Court issues different decisions on the same day on the same question, it is evidence that *Smith* is no longer sufficient guidance on this important question.

KORA is punishment

A review of the super-registration scheme found in KORA and its 2011 amendments leads to the conclusion that it is punishment and that retroactive application violates the Ex Post Facto Clause. This becomes clear upon reviewing factors set forth by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Those factors are:

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

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

The additional requirements placed on individuals after the 2011 amendments places an affirmative disability or restraint on offenders. First, an offender must report in person four times per year in any county in which the offender lives, works, or goes to school. K.S.A. 2011 Supp. 22-4905(b). The

statutory scheme also requires that the offender pay a \$20 fee each time he or she reports, in each county where he lives, works, or goes to school. K.S.A. 2011 Supp. 22-4905(k). Further, an offender must also notify law enforcement 21 days prior to travel outside the United States. K.S.A. 2011 Supp. 22-4905(o). These added restrictions constitute an affirmative disability or restraint.

Not only are the reporting requirements an affirmative restraint, these reporting requirements are similar to the reporting requirements for individuals on parole, postrelease or probation. Anyone that is released, but under some form of supervision, is required to keep the authorities of their residence and employment. *Doe*, 304 Kan. at 322. Such reporting is part and parcel with probation requirements and part and parcel with the punishment.

Further, failure to report can result in severe criminal sanctions. The crime of violating KORA is triggered by a conviction of a criminal offense, no additional finding of scienter is required. It is, for all practical purposes, a strict liability crime. K.S.A. 2011 Supp. 22-4903(a). The first offense is a severity level 6 offense; a second offense is a severity level 5 offense, while a third or subsequent offense is a severity level 3 offense. K.S.A. 2011 Supp. 22-4903(c)(1)(A)-(C).

Depending on an individual's criminal history, this could result in a sentence as much as 228 months incarceration. *See* K.S.A. 2016 Supp. 21-6804. Yet, despite the severity of sanctions underlying the act, there is no connection between the

onerous requirements of KORA and the purported goal of the act, which is to protect the public. As stated by Justice Johnson, “Too much is too little.” *Doe*, 304 Kan. at 326. The act lumps everyone into one group. It does not even *attempt* to differentiate between those who would be considered a risk to the public and those who are not. The result is that the purported purpose is not furthered by its various requirements, but it does serve as additional and severe punishment for those that fall under the statute.

Not only is the potential punishment under KORA severe, it is excessive. The excessive nature of KORA is reflected in that violations of KORA carry more severe penalties than many of the criminal offenses triggering the requirement to register in the first place. Under the 2011 KORA, the severity level increases with multiple violations. However, even an individual’s first violation is severe. The severity levels are: first conviction - severity level 6 person felony, second conviction - severity level 5 person felony, third conviction - severity level 3 person felony, and any continuing violation - severity level 3 person felony. K.S.A. 2011 Supp. 22-4903(c). Those required to register include a wide swath of convicted individuals including: sex offenders, violent offenders, and drug offenders. The “offenders” run the gamut from first-degree murder down to misdemeanors. For example, KORA requires an individual convicted of misdemeanor sexual battery to register. K.S.A. 2011 Supp. 22-4902(b)(5). Such

harsh sentences for what are otherwise considered low level felonies or even misdemeanors, establishes the excessive nature of the act.

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

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

Doe, 304 Kan. at 328. Given these provisions, the factors establish that KORA is punitive nature and cannot be applied retroactively.

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

Summary

Because the 2008 and 2011 amendments to KORA result in a super-registration scheme that is punitive in nature, they cannot be applied retroactively to offenses that were committed before their enactments. The Kansas Supreme Court is sharply divided on this question, reversing itself based on nothing but a change of one justice in the Court's personnel. And courts around the country are similarly split regarding whether super-registration schemes are punishment for purposes of the United States Constitution. For this reason, each petitioner respectfully requests that this Court issue a writ of certiorari and hold that KORA super-registration is punishment within the meaning of the United States Constitution, vacate the judgments of the Kansas Supreme Court, and remand with directions.

Respectfully submitted,

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