

**Joint Committee on Corrections and Juvenile Justice Oversight
October 26, 2021
Judicial Council Report on Offender Registration**

**Testimony in Support of Registration Reform
presented by Jennifer Roth**

Dear Chairman Jennings, Vice Chair Baumgardner, and Committee Members:

A Kansas Judicial Council advisory committee worked for over two years on recommendations for legislative changes to registration. I was a member of that committee. My presentation focuses on three areas of the report: penalties for violations of the Kansas Offender Registration Act, changes to the drug registry, and changes to a certain category in the definition of “violent offender.” I prepared this testimony with two main goals, which are to share with you 1) how we got to where we are with registration and 2) why changes are necessary.

I have knowledge of and experience with the Kansas Offender Registration Act (hereafter “KORA”) via several avenues. I have testified about KORA-related bills since 2006. I was a member of the Kansas Sentencing Commission from 2009-2015. I have worked as a Kansas state public defender for 23 years, during which time I have handled KORA cases in district and appellate courts.

Brief history of the evolution of KORA

The Legislature created the first registry act on April 29, 1993. It was called the Habitual Sex Offender Registration Act, and required a person twice convicted of a sexually violent crime to register with the sheriff in the county where they lived. The information was open to law enforcement agencies only.

On April 14, 1994, the Act was amended/expanded and renamed the Kansas Sex Offender Registration Act. That same year, the Legislature expanded the law to allow public access to registrants’ information at the sheriff’s office.

In 1997, the Act was again renamed and has since remained the Kansas Offender Registration Act. Homicides and certain crimes with victims under 18, were added that same year. Since 1997, additional sex offenses have been added to the list. Juvenile adjudications for sex offenses were added in 2002. In 2006, people “convicted of any person felony [where a finding was made that] a deadly weapon was used in the commission of such person felony” were added.

In 2007, SB 204 added people convicted of manufacturing, possession of precursors, and drug distribution or possession with intent to distribute (regardless of amount) (not including marijuana). The Legislature included a personal use

exception to the registration requirement for manufacturing. SB 204 also did away with the KBI sending out compliance letters and instead required in-person visits to the local sheriff's office(s) three times a year for all offenders. In 2011, attempts, conspiracies, and solicitations of the enumerated drug offenses were added.

In 2011, SB 37 dramatically changed KORA. The stated reason was to bring Kansas into "substantial compliance" with federal law (SORNA) in order to avoid the loss of Byrne Grant money. At that time, there were four states in "substantial compliance"; today, after SORNA has been the law for 15 years, there are still only 18 states in "substantial implementation"—the latter standard is "more flexible," yet still 32 states have refused to substantially implement SORNA. *SORNA has nothing to do with the drug or violent categories in KORA*, yet the Legislature applied the sweeping changes in SB 37 to all three types of registrants (sex, drug, and violent).

In 2012, HB 2568 added juvenile adjudications to some provisions. At the request of a local businessman and the Department of Corrections, HB 2568 also restricted employment information from being on the offender registry website, but it is publicly available by contacting the registering law enforcement agency or by signing up for community notification through the KBI website.

In 2013, SB 20 made a few changes to KORA, including specifying that drug offenders affected by KORA were those convicted after July 1, 2007. For the six years prior to that, KORA was applied retroactively to drug offenders who were convicted before a drug offender registry even existed.

Amending penalties for noncompliance with KORA

Background of penalties for noncompliance

From 1993 to mid-1999, noncompliance with KORA's requirements was a Class A nonperson misdemeanor. In 1999, the Legislature increased the penalty to a severity level 10 nonperson felony. It remained that way until 2006, when a legislator offered an amendment to increase the penalty by five levels on the grid to severity level (SL) 5, elevate it to a person felony, and make every thirty days of noncompliance a separate offense. That provision eventually made it into a conference committee report and became law.

As of July 1, 2011, a violation of KORA requirements is a SL 6 person felony for a first offense, a SL 5 person felony for a second offense, a SL 3 person felony for a third or subsequent offense, and a SL 3 person felony for an aggravated violation (i.e. violation that lasts over 180 consecutive days).

To put this in context, here are two relatively mild examples (compared to what I will share later) of how noncompliance relates to the registrable offense: someone convicted of SL 4 possession with intent to distribute (which is the lowest level) is required to register. The sentencing range she faces for failing to comply with every KORA requirement (17-46 months) is almost the same as her underlying drug crime (14-51 months). A person convicted of aggravated assault (a SL 7 offense) faces a prison sentence of 11-34 months, but if he fails to comply with any KORA requirement, he faces a prison sentence of 17-46 months (and that's just if he is charged with SL 6 noncompliance, as opposed to 5 or 3).

As of July 1, 2013, it is a Class A misdemeanor to not pay, within 15 days, the \$20 registration fee that is owed when a registrant goes in for the quarterly registrations. It is a SL 9 person felony if, within 15 days of the recent registration, two or more \$20 payments have not been paid if the person registers for a person offense; it is a SL 9 nonperson felony if they register for a nonperson offense.

In 2016, HB 2463 made it a nonperson crime for failing to comply with KORA when the underlying crime is a nonperson offense (i.e. drug offenses). It remains a person felony for those who register for person offenses.

Recommendation from the Judicial Council

For noncompliance, we recommend a return of the penalties to severity levels more in line with their original classification. A first offense would be a class B nonperson misdemeanor, a second offense a class A nonperson misdemeanor, and a third or subsequent offense (or an aggravated offense) a severity level 8 nonperson felony. It would make it so that if someone registers because of a misdemeanor, then a KORA violation would also be a misdemeanor.

Reasons why this change is warranted

In addition to the reasons set out in the Judicial Council's report (see pages 19-23), another reason for this change is that current penalties are too severe in the context of what conduct it covers. Currently, periods of registration are 15 years, 25 years, and lifetime. KORA requires registrants to provide lots of detail on the form that they have to fill out (ex.: tattoos, e-mail and online accounts, cars/boats/planes/motorcycles makes and models, etc.). Registrants do not receive any sort of reminder when it is time to register (your dentist sends you a postcard or your doctor leaves you a voice mail message or text, but there are no reminders for KORA registrants). In addition to quarterly in-person visits, registrants must report in person whenever there is a change in their information, i.e. they get a new job, get a new e-mail address, buy a boat, get a new tattoo, want to take a trip out of the country, etc. And registrants must do these things in all counties where they live, work, or go to school.

Failure to comply with any of these duties, even unintentionally, is currently prosecuted as a severity level 6, 5, or 3 felony for all categories of registrants (drug, violent, and sex). In 2006, the Legislature passed a special sentencing rule that resulted in all KORA noncompliance convictions being presumptive prison. In 2010, the Legislature put into statute that failing to comply is a strict liability offense. In other words, there is no criminal intent required. (The only other strict liability crimes specifically listed are DUI, commercial DUI, and smoking.) In other words, a person is cut off from raising a defense to failing to comply. Here are some real-life examples of people who were prosecuted in Kansas for KORA violations:

- You forgot to register on time and get there two weeks late, but none of your information has changed. The sheriff's registration unit tells you to come back another day because they don't take registration updates on Mondays.
- Your apartment burned down, which law enforcement knows, but you failed to go tell them within three business days that you had to move.
- You work in a county that is different from where you live and you failed to register in that other county, but you are compliant in your home county (and, therefore, all of your information is on a public website).
- You are homeless and do not report as frequently as law enforcement tells you to (which, if you are homeless, can be every 30 days or more), but you have lived in the same camp for years.
- You buy a jet ski and forget to list it on your registration form.
- You register while in jail and get out the next day. This happens during your registration month and you don't go in to register again during that month.
- You forget to report a new email address relating to your employment.
- You fail to timely report a change of address. The offense that requires you to register is for voluntary sexual contact with your girlfriend when she was 15 and you were 19. Years later, she is still your girlfriend (now 20+ years old).
- You move to another state (which would be any of the other 49) that does not require people to register for a conviction for possession with intent to distribute. You tell the sheriff's office but not the KBI.

As I mentioned, I represent people with KORA cases. In the last few months alone, just my caseload has included appeals in KORA noncompliance cases where my clients are currently *serving a prison sentence that is two to eleven times longer than the sentence for the offense they register for*:

- person registers for misdemeanor sexual battery (max. sentence is 12 months in jail) and is serving 122 months in prison for KORA noncompliance (the record shows his supposed noncompliance was telling some people he no longer lived at the address on his registration form but he really did)
- person registers for SL 7 aggravated assault (sentencing range of 11-34 months) and is serving 136 months for KORA noncompliance (the evidence in the record is he didn't register after he got out of a mental health facility)
- person registers for SL 7 aggravated battery (range of 11-34 months) and is serving a total of 102 months for KORA noncompliance
- person registers for SL 3 aggravated indecent liberties (got a sentence of five years) and is serving 120 months in prison for KORA noncompliance
- person registers for possession of precursors (evidence was he admitted to a detective who saw him in a pharmacy that he bought a couple boxes of cold medicine and was going to take them to another town to get turned into meth); he did 32+ months in prison for that offense but was never told by the court to register; was later told by a jailer to register, and when he failed to do so, got sentences totaling 114 months in prison for KORA noncompliance

Information provided last session on the fiscal impact of the Judicial Council's recommendations included two quantifiable costs: \$160,725 for overtime to KBI employees who would have to remove records from the registry, and a loss of \$180,000 in Byrne Grant funding, for a total of \$340,735. The average yearly cost to imprison just the five people in the examples above is \$150,500,¹ and there are over 400 people in prison for KORA noncompliance.² The cost of implementing the Judicial Council's recommendations are nothing compared to the cost of incarcerating hundreds of people for noncompliance.

The current penalties for noncompliance with KORA's requirements are too high. It is past time to restore the punishment for KORA violations to a misdemeanor and lower-level felony.

¹ The average per year cost of imprisoning someone in a Kansas prison was \$30,100 in FY 2020. See Kansas Department of Corrections FY 2020 Annual Report, p. 48, available at <https://www.doc.ks.gov/publications/Reports/fy-2020-annual-report>

² "As of 2019, there were 442 inmates in prison for KORA registration violations, and over the preceding five years, the number of convictions for registration violations had increased by almost 65 percent. In 2018 alone, 325 offenders were convicted of registration violations, and 116 of those were sent to prison." Report of the Judicial Council Advisory Committee on Sex Offenses and Registration, p. 8.

Changes to the drug registry

Background on the inclusion of drug offenses in KORA

In 2007, what started as SB 14 would have added the crimes of manufacture and possession of precursors to the list of registrable offenses. After a proponent conferee said that the odds were greater of living near a person selling drugs than a meth lab house, an amendment to add distribution offenses was offered on the Senate floor and passed. Once on the House side, this idea was supported by some who thought that what had been added was distribution of methamphetamine within 1,000 feet of a school. But that was not the case—it was drafted and offered as the entire sale/possession with intent to sell statute. This was concerning to the KBI, which suggested that the amendment be removed and a more thorough discussion held the following year:

It is certainly true that drug trafficking, in any form and any drug, can be a very dangerous profession. And it is true that innocent bystanders are shot or injured when deals go bad or retribution is attempted. However, our first concern is resources — we estimated 100-200 meth cooks who would need to register, a number we could absorb. But there may be 1000 to 2000 convictions each year for sale, attempted sale and possession with intent to sell under K.S.A. 65-4161. . . . Obviously, additional personnel and resources will be necessary. Our second concern would be the impact on the local sheriff offices. While the bill contemplates collecting a fee, that might be problematic with some offenders. Furthermore, even with a fee, the number of registrants might strain the support staff at many sheriff offices. Third, there is a question about dilution — we need to keep the registry workable so that the public can readily find the registrants that concern them. Too many people on the list will make it unwieldy and less useful. (Testimony from KBI to House Judiciary Committee, March 14, 2007.)

Nevertheless, the provisions ended up in SB 204, and required that people convicted of manufacturing, possession of precursors, and drug distribution or possession with intent to distribute (regardless of amount; marijuana is not included) must register for ten (now 15) years.

This includes people who give drugs to their friends, sell drugs to police informants (including their own spouse or former girlfriend/boyfriend who are working off charges with police) or undercover officers, and sell drugs to support their own addictions. It includes any amount of drugs. It also includes people with qualifying drug convictions from other states or federal courts, even though there is no registry requirement for federal drug crimes, and no other state (that I know of) registers distribution offenses by requiring a person to take affirmative steps to comply.

Recommendation from the Judicial Council

Our recommendation is to require registration for five years for possession with intent to distribute/distribution and possession of precursors, and make the information available only to law enforcement. For convictions for manufacturing, registration would remain 15 years and public. We also urge the elimination of lifetime registration for people with multiple qualifying drug convictions.

Reasons why these changes are warranted

Kansas is an outlier—there is no other state with a registry akin to ours.³ And what at least one proponent (i.e. KBI) and opponents said in 2007 would happen, has happened: 1) law enforcement resources have been strained to comply with KORA requirements; 2) the registry has been diluted; 3) having thousands of registrants who have been convicted of distribution-related offenses is expensive; and 4) registrants have a hard time getting jobs (employment being the main predictor of success/not recidivating, according to the DOC and others), housing, being with their families, participating in positive life activities, etc.

Despite its strain on its resources, law enforcement appears to want to maintain the drug offender registry—they say it is a tool for them. Our recommendation maintains this tool, making registration open to law enforcement only. This is how the registry was when it began in 1993. Making registration private would address some of the problems KORA creates.

Additionally, there is no research, study, data, or other evidence-based assessment on whether including thousands of people with convictions for distribution or possession with intent to distribute on a public registry does anything to reduce recidivism or increase public safety, at least that we have seen. There was none in 2007 and none today.

Changes to any person felony/any deadly weapon

Background on this category

In 2006, HB 2754 proposed to add media alerts and a new category of registrant, often referred to as any person felony where a deadly weapon was used. Three conferees (two in favor, and I was opposed) testified in House Federal and State Affairs on February 16, 2006. A review of the testimony shows *no proponents*

³ See, e.g., Report of the Judicial Council Advisory Committee on Sex Offenses and Registration, p. 30-31; <https://www.themarshallproject.org/2018/03/08/convicted-of-a-drug-crime-registered-with-sex-offenders>.

of the addition of a new category of offenders. (The proponents only wanted alerts that did not make it into law.) HB 2754 passed out of committee and the full House.

There was no hearing on this bill in any Senate committee. But in May 2006, the “any person felony/deadly weapon used” language from HB 2754 was folded into SB 506 during a conference committee, along with the doubling of severity level for KORA violations (that I addressed in the first part of this testimony). Throughout the life of this provision (in HB 2754 and SB 506), there was no testimony or other comment in the legislative record that explained why this addition of offenders was proposed or how it could enhance public safety, or why the severity level for violations was doubled.

“Any person felony” is just what it sounds like. “Deadly weapon” includes not just firearms or long knives, but also any object that a court determines to be a “deadly weapon.” This includes a BB gun, a table knife, a car, a bowling ball, and a Taser (all of these are taken from actual cases I have handled or read).

Recommendation from the Judicial Council

Currently this category carries a 15-year registration period. Our recommendation is to shorten it to five years and require the court to make a finding on the record “in open court and stated with particularity.”

Why these changes are warranted

The reason these changes should be made are basically the same as those that support the drug registry changes. First, Kansas is again an outlier; we know of no other such registry. Second, there is no research, study, data, or other evidence-based assessment on whether including thousands of people with convictions for “any person felony” with “any deadly weapon” does anything to reduce recidivism or increase public safety, at least that we have seen. Third, this category is the biggest driver of the “violent offender” category. It has overwhelmed the registry, and diverts law enforcement resources away from solving crimes or working on prevention, requiring instead that they be spent on registration.

Conclusion

For all of the reasons above, I wholeheartedly urge this Committee to support the Judicial Council’s recommendations.

Sincerely,
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