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TO: House Committee on Corrections and Juvenile Justice
FROM: Kansas Judicial Council – Hon. Ben Sexton
DATE: February 22, 2021
RE: 2021 H.B. 2349 amending the Kansas Offender Registration Act

The Kansas Judicial Council and its Advisory Committee on Sex Offenses and Registration (Committee) recommend H.B. 2349. The bill would reform the Kansas Offender Registration Act by creating an exit mechanism for offenders, repealing juvenile sex offender registration, decreasing penalties for violators, and enacting numerous other changes to the current offender registration scheme.

The Committee's recommendation of H.B. 2349 arose out of a study originally requested in March 2018 by Reps. Russell Jennings and Blaine Finch asking the Judicial Council to undertake a comprehensive review of the Kansas criminal code's sex offense structure and related registration requirements for both juveniles and adults. The Committee's assignment was later expanded to include a review of registration requirements for drug offenders and violent offenders, in addition to sex offenders.

The Committee made some preliminary recommendations that were introduced in the 2020 session and heard in the House Corrections and Juvenile Justice Committee. Last year's bills included 2020 H.B. 2474 (reducing penalties for registration violations and creating a fee waiver mechanism); and 2020 H.B. 2475 (reducing registration requirements for some drug crimes). Because the 2020 session came to an abrupt halt, those bills were not considered by the full House.

The Committee has now completed its study, and H.B. 2349 contains all of the Committee's recommendations relating to offender registration. The bill includes the same

recommendations that were contained in 2020 H.B. 2474 and 2475 plus many new provisions. The Committee's full report is available on the Judicial Council's website, www.kansasjudicialcouncil.org, under the Studies and Reports tab. Much of this testimony is taken directly from that report.

The testimony is organized as follows:	page
Summary of Amendments Contained in H.B. 2349	2
Committee Membership and Study Process	4
Background on the Kansas Offender Registration Act (KORA)	5
Overarching Committee Goals/Concerns	6
Exit Mechanism	7
Repeal of Juvenile Offender Registration	8
Penalties for Registration Violations	10
Court Waiver of the Registration Fee	12
Other Miscellaneous KORA Changes	13
Registration Requirements for Specific Sex Offenses	14
Registration Requirements for Specific Drug Offenses	16
Registration Requirements for Specific Violent Offenses	17
Conclusion	18

SUMMARY OF AMENDMENTS CONTAINED IN H.B. 2349:

House Bill 2349 would amend the Kansas Offender Registration Act as follows:

Create an exit mechanism to give offenders the ability to petition the district court to be relieved of registration after a period of time in successful compliance. Victims would receive notice, and offenders currently registering for life would have a mandatory risk assessment. The burden would be on the offender to demonstrate rehabilitation.

Repeal registration requirements for juvenile sex offenders except those waived to adult court or serving an adult sentence under extended juvenile jurisdiction, or juveniles ordered to register in an out-of-state jurisdiction.

Reduce penalties for registration violations to a Class B misdemeanor for a first offense; a Class A misdemeanor for a second offense; and a severity level 8 felony for a third or subsequent or aggravated offense. All violations would be classified as nonperson. A violation based on a failure to pay the fee would be a Class C misdemeanor. Also, the bill would lower the penalty for aiding a KORA violator.

Redefine KORA violations so that a new offense is committed every 90 days an offender is out of compliance, and an aggravated violation is committed when an offender is out of compliance for one year.

Create a fee waiver process that allows an offender to ask the district court to find that requiring the offender to pay the registration fee would impose a manifest hardship on the offender or the offender's immediate family.

Amend other miscellaneous KORA provisions:

- Require single point registration in county of residence only.
- Eliminate provisions that give courts unfettered discretion to impose registration for any offense not listed in KORA. Instead, allow parties to agree to registration for non-KORA offenses.
- Clarify that municipal court convictions are not registrable offenses under KORA.

Amend Registration Requirements for Specific Sex Offenses –

- Repeal registration for some lower level offenses listed in K.S.A. 22-4902(b)(4), such as adultery and buying sexual relations.
- Change registration for lewd and lascivious behavior under K.S.A. 21-5513(a)(2) (public exposure) to require 15-year registration only when committed in the presence of someone under 16 (felony violation).
- Require registration for internet trading in child pornography, K.S.A. 21-5514 (same terms as sexual exploitation of a child); and for breach of privacy under K.S.A. 21-6101(a)(6) and (a)(7).
- For sexually motivated offenses, amend the exception for "non-forcible sexual conduct when the victim was at least 14 years of age and the offender was not more than four years older than the victim" to make clear that the victim must be a minor.

Amend Registration Requirements for Specific Drug Offenses –

- Reduce registration for possession of drug precursors and distribution offenses to 5 years private registration.
- Repeal lifetime registration for second time drug offenders. Registration terms for multiple drug offenses would run concurrently.

Amend Registration Requirements for Specific Violent Offenses –

- Repeal registration for criminal restraint, voluntary and involuntary manslaughter, and kidnapping and aggravated kidnapping of an adult.
- Increase registration to lifetime for capital murder and first-degree murder.
- Change registration to 15 years for kidnapping of a minor.
- Change registration for person felony with deadly weapon finding to 5 years. Also, deadly weapon finding must be made on the record, "in open court and with particularity."

COMMITTEE MEMBERSHIP AND STUDY PROCESS

The Judicial Council recruited people with diverse experience and points of view to serve on its Advisory Committee on Sex Offenses and Registration. The members of that Committee are:

Hon. Ben Sexton, Chair, Abilene; Dickinson County District Judge
Natalie Chalmers, Topeka; Assistant Solicitor General
Sheriff Jeff Cope, Emporia
Jason Covington, Olathe; Johnson County Assistant District Attorney – Sex Crimes Unit
Jeff Cowger, Topeka; Chief Legal Counsel, Kansas Department of Corrections
Dr. Mitchell Flesher, Lenexa; clinical psychologist and attorney
Sen. Randall Hardy, Salina; State Senator from the 24th District
Rep. Susan Humphries, Wichita; State Representative from the 99th District
Rep. Russell Jennings, Lakin; State Representative from the 122nd District
Donna Longworth, Wichita; Sedgwick County Assistant District Attorney – Juvenile Division
Jennifer Roth, Topeka; Appellate Defender
Dionne Scherff, Overland Park; criminal defense attorney
Phil Stein, Shawnee; criminal defense attorney
Seth Wescott, Lenexa; licensed master’s level psychologist and sex offender treatment provider
Prof. Corey Rayburn Yung, Lawrence; KU School of Law

The Committee began meeting in the fall of 2018. The Committee held 24 all-day meetings, and a separate drafting group also met on multiple occasions.

The Committee received input from many sources. Leslie Moore, Information Services Division Director for the KBI, and Brooklynn Graves, Offender Registration Manager for the KBI, were regular attendees who provided helpful information about the offender registry and answered questions from the Committee. Ed Klumpp, representing the Kansas Sheriffs Association, also attended several meetings and was asked to comment on law enforcement’s perspective.

Scott Schultz, executive director of the Sentencing Commission, attended a meeting at the Committee’s request to provide background on drug and violent offenders. Finally, the Committee heard from a registered sex offender and from several crime victims about their experiences and their opinions about the offender registry.

The Committee reviewed Kansas statutes and case law, the federal Adam Walsh Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.*, and examples of registration provisions from other states. The Committee also considered many secondary sources as listed in the Committee’s report, which can be viewed on the Council’s website, www.kansasjudicialcouncil.org, under the Studies and Reports tab.

BACKGROUND ON THE KANSAS OFFENDER REGISTRATION ACT (KORA)

History

The first Kansas offender registry was created in 1993. It required an offender twice convicted of a sexually violent crime to register with the sheriff in the offender's county of residence, and the information was available only to law enforcement. Over the next few years, the registry was expanded to include violent offenses and additional sex crimes, and registration information was made available to the public.

In 2002, juvenile sex offenders were required to register. In 2006, offenders convicted of any person felony in which a deadly weapon was used were added to the registry. Certain drug offenses were added to the registry in 2007.

More dramatic changes were enacted in 2011 in an effort to bring Kansas into compliance with the federal Adam Walsh Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.* For example, all offenders were required to register four times per year in each county where they live, work, or attend school. These requirements were extended to sex, drug, and violent offenders although SORNA only applies to sex offenders.

Current KORA requirements

The attached sentencing journal entry addendum lists the sex, drug, and violent offenses that require registration and the registration terms. For adult offenders, registration terms may be 15 years, 25 years, or life. A second conviction of a qualifying offense of any type requires lifetime registration. Any early relief from registration requirements is prohibited.

Juvenile offenders register only for sex offenses, and their registration terms depend on their age and the type of offense. In most cases, the courts have some discretion in whether to order registration and whether to make the information public or available only to law enforcement. However, juveniles who are 14 years of age or older and who are adjudicated of a sexually violent crime that is an off-grid or severity level 1 felony must register for life.

All offenders, whether adult or juvenile, must register four times per year in person in any county where they live, work, or go to school. They must be photographed, fill out a detailed registration form, and pay a \$20 fee each time. Registered offenders must report in person within three days any change in residence, work status, or school attendance.

Any failure to comply with registration duties is a strict liability offense, and penalties are high: a first offense is a severity level 6 felony; a second offense is a severity level 5 felony; and a third or subsequent offense or aggravated offense is a severity level 3 felony. A KORA violation that consists merely of a failure to pay the fee is a class A misdemeanor or severity level 9 felony, depending on how many payments have been missed. KORA violations are classified as person or nonperson offenses depending upon the underlying registrable offense.

Number of registrants

There are over 22,000 offenders currently required to register in Kansas. Of those, roughly half are sex offenders, one quarter are violent offenders, and one quarter are drug offenders. Thousands of new offenders are being added to the registry each year, and when combined, new drug and violent offenders are significantly outpacing new sex offenders.

Over 900 offenders are registered because of a juvenile adjudication for a sexually violent crime. Fewer than half of those registrations are public; the majority are visible to law enforcement only.

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.

OVERARCHING COMMITTEE GOALS/CONCERNS

While all Committee members had concerns about some aspect of KORA, not all of those concerns were shared unanimously. The most commonly voiced concerns were:

- The rationale that an offender registry will enhance public safety and reduce recidivism is not supported by the data.
- The effectiveness of the registry is diluted by the large number of offenders who are required to register.
- Registration has an especially negative impact on juvenile offenders.
- Retroactive application of increased registration requirements is fundamentally unfair.
- A large number of offenders are being sent to prison for KORA violations that can be merely technical.
- The registry uses a “one size fits all” approach that does not assess current individual risk or the potential for change.

From its first meeting, the Committee agreed that any recommendation it made should be data-driven and evidence-based. The Committee reviewed several studies and articles indicating that the common perceptions about recidivism rates among sex offenders are misplaced. For example, the article *“Frightening and High”: The Supreme Court’s Crucial Mistake about Sex Crime Statistics*, 30 Const. Comment. 495 (Fall 2015), points out the lack of any factual basis for the assertion that the recidivism rate of sex offenders is “frightening and high,” as stated by the US. Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003), and repeated by many other courts since.

Committee members Dr. Mitchell Flesher and Seth Wescott, both of whom are experts in the area of sex offender evaluation and treatment, drew the Committee's attention to the most recent research on registration and recidivism. That research shows that a sex offender's risk of reoffending drops by half once the offender has returned to the community and lived offense-free for five years. After 10 years offense-free, a sex offender's risk of reoffending is not significantly greater than the general population. See *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender* (Hanson, et al., 2018).

As the Committee's study progressed, it focused on several major reforms to KORA. These include:

- 1) Creating an exit mechanism to give offenders the ability to petition the district court to be relieved of registration after a period of time in substantial compliance.
- 2) Repealing registration entirely for juvenile offenders.
- 3) Lowering the penalties for violations of KORA.
- 4) Decreasing the term of registration for some offenses, especially certain drug and violent offenses.

Federal law – SORNA

The Committee reviewed the requirements of the federal Adam Walsh Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.* Kansas is one of 18 states that the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) has deemed in compliance with SORNA.

The Committee made its recommendations based on what it believes to be good policy, but it acknowledges that several of its recommendations do not meet SORNA's requirements. For example, the Committee's proposed exit mechanism is broader than SORNA allows; SORNA requires registration for certain juvenile sex offenders; and SORNA requires a higher penalty for registration violations than the Committee is recommending.

If Kansas were deemed to be no longer in compliance with SORNA, the state could lose 10% of its Byrne grant funds. In 2019, 10% of Byrne grant funding would have amounted to roughly \$240,000. The Committee believes any potential loss of Byrne grant funding would be more than offset by the savings in prison bed space.

EXIT MECHANISM

As originally enacted, KORA contained an exit mechanism. See L. 1993, ch. 253, § 24. But, since 2001, KORA has prohibited offenders from obtaining court-ordered relief from registration requirements. See K.S.A. 22-4908. Most other states have some mechanism for an offender to seek relief from registration, though the parameters vary widely. See Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 Wis. L. Rev. 219, 227 (2015).

The Committee believes that offering an exit mechanism to offenders is critically important for several reasons. First, the possibility of an early exit gives offenders an incentive to comply with registration requirements. Second, the hearing process allows the courts to make an individual determination based on an offender's behavior in the community over a period of years. And, finally, allowing an offender to petition for relief after a period of 5 or 10 years is evidence-based. It is consistent with the reduction in the recidivism rate that occurs after 5 and 10 years.

The Committee recommends that K.S.A. 22-4908 be amended to create an exit mechanism with the following elements:

- Allow offenders to petition the court for relief from registration requirements after a period of substantial compliance of 5, 10, or 25 years depending on the original registration term:
 - Offenders required to register for 15 years could petition after 5 years.
 - Offenders required to register for 25 years could petition after 10 years.
 - Offenders required to register for life could petition after 25 years.
 - Offenders who were required to register retroactively or whose registration term was increased retroactively as a result of changes to the law in 2011 could petition after 10 years.
- No relief for sexually violent predators or offenders who would still be required to register in another jurisdiction.
- Judicial Council to develop petition form.
- Victim notice.
- Mandatory risk assessment for offenders who have committed an offense requiring lifetime registration. Discretionary risk assessment for all others.
- Burden on offender to show by clear and convincing evidence that:
 - 1) Offender has not been convicted of a felony, other than a felony registration violation, within the past 5 years;
 - 2) Offender's circumstances, behavior and treatment history show that the offender is sufficiently rehabilitated to warrant relief; and
 - 3) Registration is no longer necessary to promote public safety.

REPEAL OF JUVENILE OFFENDER REGISTRATION

While KORA leaves little room for discretion in adult offender registration, it does give district courts some discretion in ordering registration for most juvenile sex offenders. For example, for juvenile sex offenders under 14 who are adjudicated for a sexually violent crime under K.S.A. 22-4902(c), a court may require public registration until age 18 or five years from the date of adjudication or release from incarceration, whichever is longer; private registration only; or no registration at all if based on substantial and compelling reasons. K.S.A. 22-4906(f). The same rules apply to juveniles 14 or older who are adjudicated for sexually violent offenses that are not offgrid or severity level 1 felonies. K.S.A. 22-4906(g). However, juvenile sex offenders who are 14 or older and are adjudicated for offgrid or severity level 1 sexually violent

offenses -- *e.g.* rape, aggravated criminal sodomy, aggravated human trafficking -- must register for life. K.S.A. 22-4906(h).

If a juvenile is required to register, all other provisions of KORA apply just as they would to an adult. Juveniles must register four times per year, in person, in any county where they live, work, or go to school, and must pay \$20 each time they register.

According to data provided by the KBI, there are over 900 registered offenders who were ordered to register because of a juvenile adjudication for a sexually violent crime. Over 600 are continuing to register *solely* because of a juvenile adjudication. Roughly a third of juvenile registrations are public, and two-thirds are private and available only to law enforcement. However, a county-by-county breakdown shows that there are disparities in public versus private registration, with at least two counties ordering public registration significantly more often.

The Kansas Court of Appeals recently held that KORA's requirement of lifetime registration for juvenile sex offenders is not punishment, and thus does not violate the *ex post facto* clause or cruel and unusual punishment clause of the constitution. *State v. N.R.*, 57 Kan. App. 2d 298, 451 P.3d 877 (2019). The Kansas Supreme Court granted a petition for review in *N.R.* on August 27, 2020.

The Committee reviewed a paper co-authored by Committee member Seth Wescott and other members of the Association for the Treatment of Sexual Abusers (ATSA), which recommends the elimination of registration for juvenile offenders. ATSA concluded that registration laws are not effective to deter either first-time sexual offending or reoffending by juveniles; they do not identify those juveniles most at risk of reoffending; and they do not promote public safety. Registration does, however, have long-term detrimental effects on the juveniles who are required to register. Registration of youth often means registration of the youth's family. This can lead to disruption and, at times, family separation. The unintended negative consequences of registration exist regardless of whether the registration is public or private. The stigma attached to a youth on the registry is damaging. Youth required to register are four times more likely to attempt suicide, five times more likely to report having been approached by an adult for sex, and twice as likely to report having been sexually victimized in the past year. Essentially, registration of adolescents may actually increase sexual abuse rather than prevent it.

Registration laws were implemented based on a series of assumptions: that informing people where a sex offender lives will keep them safe, that people who commit sexual crimes will commit more, and that children who commit sexual crimes are just like adults who commit sexual crimes. None of these myths have been supported through research. It is clearly established that only 2.5% of youth who commit sexual crimes offend against a stranger. Additionally, research has demonstrated that sexual re-offense rates for youth who commit sexual crimes is less than 5%. Adolescents are more responsive to treatment and community intervention than adults and typically do not require lengthy supervision terms. Thus, registration laws which are meant to protect the "public" from "repeat offenders" are, in fact,

inconsequential to public safety. Yet by their mere existence, these laws present youth with a multitude of societal, physical, and emotional barriers to success. It is now time to protect youth from the effects of these harmful policy decisions.

The Committee recommends that Kansas join the 16 other states that do not require juvenile offender registration and repeal registration for juvenile offenders entirely, except for those juveniles who have been waived to adult court or who are subject to an adult sentence under an extended juvenile jurisdiction prosecution. The repeal would apply retroactively to any offender on the registry solely because of a juvenile adjudication; however, it would not apply to juvenile offenders required to register by another jurisdiction. In other words, if a juvenile has an out-of-state adjudication, and the state where that adjudication occurred would require registration, Kansas would continue to honor the other state's registration requirement.

The Committee understands this recommendation represents a significant change for Kansas. However, the Committee believes this is a necessary step toward evidence-based practices.

PENALTIES FOR REGISTRATION VIOLATIONS

Under current law, a failure to comply with any provision of the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, is a strict liability offense, *i.e.*, no criminal intent is required. Any failure to comply that continues for more than 30 consecutive days becomes a new and separate offense. K.S.A. 22-4902(a). A violation of KORA is a severity level 6 felony for a first conviction, a severity level 5 felony for a second conviction, and a severity level 3 felony for a third or subsequent conviction. K.S.A. 22-4903(c)(1). An aggravated violation (failure to comply for more than 180 consecutive days) is also a severity level 3 felony. K.S.A. 22-4903(b) and (c)(2).

Violations are designated as person or nonperson felonies depending upon the underlying offense for which the offender is required to register. K.S.A. 22-4903(c)(1) and (c)(2). This means that, in general, sex offenders and violent offenders who fail to comply with registration requirements are charged with person felonies, while drug offenders are charged with nonperson felonies.

A violation of KORA that consists solely of the failure to pay the required \$20 registration fee to the sheriff's office is a class A misdemeanor if the full payment is not made within 15 days of registration. It is a severity level 9 felony if, within 15 days of the most recent registration, two or more full payments have not been made to the sheriff's office. Again, these violations are person or nonperson offenses depending upon the underlying registrable offense. K.S.A. 22-4903(c)(3).

Under the current scheme, an offender who is required to register for a misdemeanor offense such as sexual battery could be charged with a person felony for a registration violation. Once an offender has a person felony in his or her criminal history, it has a big impact on the sentence for any future offense.

The Committee learned that, as of 2019, there were 442 inmates in prison for KORA registration violations and that, over the last five years, the number of convictions for registration violations has increased by almost 65 percent. In 2018 alone, 325 offenders were convicted of registration violations, and 116 of those were sent to prison.

Under K.S.A. 21-6804(m), the sentence for a KORA registration violation is presumptive imprisonment. However, only about a third of violators are sentenced to prison while two-thirds are placed on probation. It's not clear whether the statute is being ignored or overlooked or whether courts are ordering downward departures in most cases, but if the statute were being routinely applied, the numbers of offenders being sent to prison would be even higher.

This trend is not sustainable. The Committee believes that the penalties for registration violations have ratcheted up too much since registration was first required in the early 90s. From 1993 to 1999, failure to register was a class A nonperson misdemeanor, and from 1999 to 2006, it was a severity level 10 nonperson felony. The Committee believes it is appropriate to return to similar severity levels, and recommends the following penalties:

- For a first offense, a class B nonperson misdemeanor
- For a second offense, a class A nonperson misdemeanor
- For a third or subsequent or aggravated offense, a severity level 8 nonperson felony

Classifying first and second registration violations as misdemeanors will give district judges more flexibility in dealing with violators. For example, a judge would have the option of ordering a violator to spend weekends in jail, which might allow the person to keep his or her job. For offenders who are out of compliance and afraid to update their registration for fear of facing arrest on a felony registration violation charge, reducing the penalties should give them an incentive to come forward and become compliant rather than going completely off the radar.

The Committee recommends classifying all registration violations as nonperson offenses, which is appropriate for an offense that consists of a failure to provide information and does not involve harm to another person. This change will impact not only future convictions and sentences for registration violations, it will also affect how past convictions are scored for criminal history purposes. See *State v. Keel*, 302 Kan. 560, 590, 357 P.3d 251 (2015) (classification of prior conviction as person or nonperson offense for criminal history purposes is determined based on classification in effect at the time the current crime of conviction was committed).

The Committee also recommends the following related changes:

- Amend the presumptive prison rule so that it applies only to aggravated violations.
- Redefine a registration violation so that a new offense is committed every 90 days, rather than every 30 days, an offender is out of compliance. (This corresponds to the requirement that an offender register every three months.)

- Redefine an aggravated violation to consist of an offender being out of compliance for one year, rather than 180 days.
- Make an aggravated violation a class A nonperson misdemeanor if the underlying registrable offense is a misdemeanor.
- Do not require a registration fee for any offender under 18 years of age.
- Classify violations for failure to pay as class C nonperson misdemeanors.
- Amend K.S.A. 21-5913(b) and K.S.A. 21-6804(m) to make the penalty for obstructing the apprehension or prosecution of a KORA violator the same as the penalty for obstructing the apprehension or prosecution of any other person.

COURT WAIVER OF THE REGISTRATION FEE

As part of its proposal to amend penalties for registration violations, the Committee also drafted a new mechanism for an offender to seek a court waiver of the registration fee based on a finding of manifest hardship. This is in response to a Court of Appeals decision, *State v. Owens*, 55 Kan. App. 2d 290, 411 P.3d 1247 (2018), which held that finding a sex offender criminally liable for failure to pay the \$20 registration fee violated the offender's procedural due process rights as applied because the statutes did not provide any procedure for the offender to obtain a court determination of indigency.

Under current law, K.S.A. 22-4905(l)(3) waives the registration fee only "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." For an offender who has had a criminal case pending during that 3-year window, there is a recognized procedure for obtaining an indigency determination for purposes of determining whether to appoint counsel. But for an offender who no longer has a criminal case pending, there is no such procedure. See *Owens*, 55 Kan. App. 2d at 293-94.

The Committee is recommending a new statute to establish that procedure. Under the Committee's proposal, an offender could ask the district court of the county where he or she resides to find that requiring the offender to pay the \$20 registration fee would impose a manifest hardship on the offender or the offender's immediate family. The offender would be required to submit an affidavit in the form prescribed by the Judicial Council, and there would be no docket fee required. The court could rule on the basis of the affidavit alone, or it could hold a hearing and require evidence to be presented. If the court finds that requiring payment of the fee would impose a manifest hardship, the court could order that the fee be waived or deferred and specify how long the court's order will remain in effect, not to exceed three years.

The Committee recognized that there is a difference between finding that a defendant is indigent to the extent he or she is unable to pay for a defense attorney versus unable to pay a \$20 registration fee. A defendant who may have been unable to afford to pay a defense attorney might be able to pay \$20 four times a year. Thus, under the Committee's proposal, any indigency finding from the original criminal case would remain in effect for three years (as

under current law), but a finding of manifest hardship would only remain in effect for the period specified by the court in its order, not to exceed three years.

OTHER MISCELLANEOUS KORA CHANGES

Single point registration

The Committee also recommends eliminating the requirement that offenders register in person with the sheriff in each county where they live, work, and attend school. Instead, offenders would be required to register only in the county where they live. In the form that offenders must complete each time they register, they are already required to report the name and address of any employer or school they attend. Under the bill, if an offender reports an employer or school in a county other than the county where they live, the KBI would be required to notify the sheriff of the county where the employer or school is located. The Committee believes that this change would ease the burden on both offenders and sheriffs while still providing the necessary information to keep the public informed.

Registration for non-KORA offenses

Under current law, courts have unfettered discretion to order an offender to register for any offense not otherwise covered by KORA. See K.S.A. 22-4902(a)(5); and, *e.g.*, *State v. Juarez*, 312 Kan. 22, 470 P.3d 1271 (2020) (defendant pled guilty to aggravated battery for punching a prison guard; at sentencing, court ordered him to register under KORA). The registration term for such non-KORA offenses is set at 15 years, unless a diversion agreement, probation order, or juvenile sentencing order sets a different term. See K.S.A. 22-4906(a)(1)(M) and K.S.A. 22-4906(i).

The Committee believes that courts should not be able to sua sponte order registration for offenses not covered by KORA. However, there are situations where it may be appropriate for the parties to agree to such registration. For example, it is not uncommon for parties to enter a plea bargain in which the defendant pleads guilty to a non-registrable offense but agrees to register for the term of probation. Also, the parties may agree to registration as part of a diversion agreement.

The Committee recommends amending KORA so that the parties can agree to registration for a non-KORA offense, but courts cannot order such registration sua sponte. The Committee's recommendation would have no effect on a court's ability to order registration for any offense that is found to be sexually motivated under K.S.A. 22-4902(c)(18).

Clarify that municipal court convictions are not registrable offenses

In July 2020, the Kansas Court of Appeals held that a municipal court conviction for sexual battery is a registrable offense under KORA. See *City of Shawnee v. Adem*, 58 Kan. App. 2d 560, 472 P.3d 123 (2020), petition for review granted Nov. 20, 2020. Prior to the *Adem*

opinion, most Committee members believed that KORA did not apply to municipal court convictions. For some Committee members, this belief was based on the action of the legislature, which considered and rejected a proposed amendment to explicitly bring municipal court convictions under KORA in 2012. See 2012 H.B. 2568.

The Committee recommends that municipal court convictions be explicitly excluded from KORA because municipal courts lack many of the protections that are available in district courts, *e.g.* municipal courts are not courts of record, jury trials are not available, and appointed counsel is not available unless the defendant faces possible jail time.

REGISTRATION REQUIREMENTS FOR SPECIFIC SEX OFFENSES

K.S.A. 22-4902 sets out which sex offenses require registration under KORA. Most of the offenses that trigger registration are listed as “sexually violent crimes” under K.S.A. 22-4902(c). However, subsection (b)(4) also requires registration for a list of lower level crimes such as adultery and patronizing a prostitute “when one of the parties involved is less than 18 years of age.” Importantly, this subsection does not apply to juvenile offenders, who are only required to register for acts which would constitute sexually violent crimes if committed by an adult. See K.S.A. 22-4902(b)(2).

The Committee finds the language “when one of the parties involved is less than 18 years of age” to be unnecessarily confusing because it seems, on its face, to implicate juvenile offenders. While it would be much clearer and reflective of the true legislative intent to amend the statute so that it applies “when *the victim* is less than 18 years of age,” not all of the criminal offenses listed in (b)(2) reference a “victim.” Instead, the Committee recommends the statute be clarified by changing the phrase to “when one of the parties *other than the offender* is less than 18 years of age.”

The Committee also recommends repealing registration requirements for the following offenses listed in K.S.A. 22-4902(b)(4):

- Adultery
- Criminal sodomy under K.S.A. 21-5504(a)(1) (consensual sodomy between persons 16 years of age or older).
- Patronizing a prostitute
- Lewd and lascivious behavior under K.S.A. 21-5513(a)(1) (public intercourse or sodomy)

The Committee does not believe these offenses pose a serious risk of future reoffending to justify requiring registration as a sex offender.

As to lewd and lascivious behavior under K.S.A. 21-5513(a)(2) (public exposure), the Committee would continue to require 15-year registration but only when the offense is committed in the presence of someone less than 16 years old, which is a felony violation under the statute.

The Committee identified several offenses that do not currently require registration but should. The Committee recommends that internet trading in child pornography under K.S.A. 21-5514 be added to the list of sexually violent offenses in K.S.A. 22-4902(c), and that registration be required for the same terms as for sexual exploitation of a child, *i.e.*, 25 years if the victim is 14 years old or older but less than 18, and lifetime if the victim is less than 14 years old. See K.S.A. 22-4906(b)(1)(G) and (d)(7).

The Committee also recommends that 15-year registration be required for certain breach of privacy offenses under K.S.A. 21-6101(a)(6) and (a)(7). Subsection (a)(6) prohibits installing or using a concealed camcorder or camera to secretly videotape, film, photograph or record another identifiable person under or through their clothing or who is nude or in a state of undress for the purpose of viewing the body or undergarments of that other person, with the intent to invade that other person's privacy, and under circumstances in which the other person has a reasonable expectation of privacy. Subsection (a)(7) prohibits disseminating or permitting dissemination of any videotape, photography, film or image obtained in violation of (a)(6).

The Committee agreed to make this recommendation after hearing from two women who spoke about their experiences as victims of the crime of breach of privacy. In one case, a man was using his cellphone to video young women under the doors of their dressing rooms. In another, a man was using his cellphone to video up women's skirts in a grocery store. The Committee believes these kinds of offenses should require registration because they are sexually motivated and may represent compulsive behavior, which presents an increased risk of reoffending.

Senator Julia Lynn, who also spoke to the Committee about making breach of privacy a registrable offense, introduced a bill on this topic in 2020: S.B. 420. That bill contained more extensive amendments relating to breach of privacy and registration, and the Committee takes no position on those additional amendments.

Finally, the Committee recommends a change to the provision requiring registration for an offense that has been found beyond a reasonable doubt to have been sexually motivated. K.S.A. 22-4902(c)(18) lists such sexually motivated acts as sexually violent crimes "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." K.S.A. 22-4906(a)(1)(L) contains similar language and sets the registration term at 15 years.

The Committee was concerned that this language might be interpreted to apply even when the victim and offender are older; for example, when a victim is 25 and the offender is 28. The Committee believes the legislature intended this exception to apply only when the victim was less than 18 years old and recommends the language be amended to read, "unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was a *child* at least 14 years of age and the offender was not more than four years older than the victim."

REGISTRATION REQUIREMENTS FOR SPECIFIC DRUG OFFENSES

Since 2007, Kansas has required registration of offenders convicted of drug manufacturing, possession of precursors, and distribution or possession with intent to distribute certain drugs (not including marijuana). Kansas law also requires registration for similar drug offenses from other jurisdictions and for attempts, conspiracies and solicitations to commit these offenses. K.S.A. 22-4902(f). Drug offenders are required to register for 15 years; report in person four times per year to the registering law enforcement agency of any county where the offender lives, works, or attends school; and pay a \$20 fee each time. K.S.A. 22-4906(a)(1); K.S.A. 22-4905(b)(2) and (l). (While the registering agency may, in its discretion, allow one of the four reports to be done by certified letter, the Committee is not aware of any agency using this option.)

There are more than 5,600 registered drug offenders in Kansas, representing roughly one quarter of all registered offenders. Over the last few years, more than 500 new drug offenders were added to the registry each year.

Kansas is one of only a small handful of states that register drug offenders. Some of those states focus only on methamphetamine-related offenses, and some maintain a database or list of offenders but do not impose an ongoing duty on offenders to report to a registering agency.

Importantly, Kansas appears to be the only state that makes public the addresses of offenders convicted of possession and distribution offenses. For example, California's drug registration is available only to law enforcement, and Oklahoma makes the information available only to law enforcement and those who sell pseudoephedrine. In Illinois, Minnesota, and Tennessee, the public can search for a list of offender names by county, but specific addresses are not available. While Montana makes the addresses of some drug offenders public, Montana only registers drug offenders convicted of operating an unlawful clandestine drug lab.

Kansas also appears to be the only state to require drug offenders to register for 15 years. Most of the states mentioned above maintain an offender's information on their registry for ten years, and California requires registration for five years.

The Committee heard from Scott Schultz, Executive Director of the Sentencing Commission, who explained that the Sentencing Commission had voted to recommend repealing registration requirements for all drug offenders. The Commission is concerned about registered offenders being approached at their homes by persons seeking to buy drugs, although evidence of this happening is only anecdotal to date. The Commission is also concerned that requiring drug offenders to register publicly can put them at risk from former associates and can negatively impact their reintegration by impeding their ability to find housing and employment.

The Committee shares the Sentencing Commission's concerns. Accordingly, the Committee recommends that registration requirements for drug offenders convicted of manufacturing offenses remain as under current law (15 years of public registration), but that requirements for drug offenders convicted of possession of precursors and distribution offenses be amended to five years of private registration, with the information being available only to law enforcement.

The Committee's recommendation regarding drug offender registration was introduced as 2020 H.B. 2475. That bill was amended by the House Corrections and Juvenile Justice Committee to change the five-year registration term from private to public. However, the Committee stands by its original recommendation that registration for these offenses be private.

Lifetime Registration for Second Time Drug Offenders

The Committee recommends one further change regarding drug offenders that was not included in 2020 H.B. 2475. That change is to eliminate lifetime registration for second time drug offenders.

Under K.S.A. 22-4906(c), an offender convicted of a second or subsequent registrable offense of any kind (sex, drug or violent) must register for life. According to data from the KBI, 975 offenders are currently being required to register for life because they have two or more drug convictions.

The Committee recommends that offenders with multiple drug convictions be required to register for the longest term currently in effect. In other words, registration terms for drug offenses would run concurrently, not consecutively. And, a drug offense should never be used to create a lifetime registration requirement, *i.e.*, one drug offense and one sex or violent offense would no longer require lifetime registration. These changes would apply retroactively.

REGISTRATION REQUIREMENTS FOR SPECIFIC VIOLENT OFFENSES

KORA requires registration for a wide array of violent offenses, ranging from criminal restraint of a minor, a misdemeanor, to capital murder. See K.S.A. 22-4902(e). Kidnapping and aggravated kidnapping require lifetime registration, but all murder and manslaughter convictions require 15-year registration. See K.S.A. 22-4906(a) and (d). KORA also requires 15-year registration for any person felony if the court finds that a deadly weapon was used. K.S.A. 22-4902(e)(2) and K.S.A. 22-4906(a)(1)(N).

There are more than 5,600 violent offenders currently registered in Kansas, and more than 500 new violent offenders are being added each year. A significant number of those are registering because of the deadly weapon finding.

As with registration of drug offenders, Kansas is in a minority of states that register violent offenders, and some of those states limit registration in ways Kansas does not. For example, some states only require registration for career violent offenders or for violent crimes against minors or law enforcement.

The Committee recommends the following changes to violent offender registration under KORA:

- Repeal registration for criminal restraint, voluntary and involuntary manslaughter, and kidnapping and aggravated kidnapping of an adult.
- Increase registration to lifetime for capital murder and first degree murder.
- Change registration to 15 years for kidnapping of a minor.
- Change registration for person felony with deadly weapon finding to 5 years.

The Committee also recommends amending the deadly weapon finding to require that it be made on the record “in open court and stated with particularity.” This amendment is intended to counter the holding of *State v. Marinelli*, 307 Kan. 768, 788-89, 415 P.3d 405 (2018), that merely checking a box on a sentencing journal entry is sufficient to establish a court finding “on the record.”

CONCLUSION

The reforms to KORA proposed by H.B. 2349 would reduce some of its most severe negative impacts while preserving its role as a tool to enhance public safety. The Kansas Judicial Council and its Advisory Committee on Sex Offenses and Registration urges this Committee to recommend H.B. 2349 favorably for passage.

Case No. _____

OFFENDER REGISTRATION SUPPLEMENT – K.S.A. 22-4901 et seq.
(If applicable, complete both pages and attach to the Journal Entry.)

(PAGE 1 of 2)

SECTION A. REGISTRATION REQUIREMENT - Check appropriate boxes to indicate the REASON for registration.
See K.S.A. 22-4902(a)

Offender required by court order to register for an offense not otherwise required as provided by the Kansas Offender Registration Act

____ Enter age of victim (K.S.A. 22-4904(a)(2))

Offender required to register due to **SEX OFFENDER** status as indicated by any of the following:

Conviction of any of the following crimes:

- Sexual Battery – K.S.A. 21-5505(a)
- Any conviction for any comparable offense
- Any attempt, conspiracy or criminal solicitation of a comparable crime

Conviction of any of the following crimes when one of the parties involved is under 18 years of age:

- | | |
|---|---|
| <input type="checkbox"/> Adultery – K.S.A. 21-5511 | <input type="checkbox"/> Criminal Sodomy - K.S.A. 21-5504(a) |
| <input type="checkbox"/> Promoting Prostitution – K.S.A. 21-6420 | <input type="checkbox"/> Buying Sexual Relations – K.S.A. 21-6421 |
| <input type="checkbox"/> Lewd and Lascivious Behavior – K.S.A. 21-5513 | <input type="checkbox"/> Conviction for any comparable offense |
| <input type="checkbox"/> Any attempt, conspiracy or criminal solicitation of an offense defined in this section | |

Conviction of any of the following sexually violent crimes or adjudication as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime, UNLESS the court finds on the record that the act involved non-forcible sexual conduct, the victim was at least 14 and the offender not more than 4 years older than victim:

- | | |
|--|---|
| <input type="checkbox"/> Indecent Liberties With a Child – K.S.A. 21-5506(a) | <input type="checkbox"/> Criminal Sodomy – K.S.A. 21-5504(a)(3),(a)(4) |
| <input type="checkbox"/> Rape – K.S.A. 21-5503 | <input type="checkbox"/> Indecent Solicitation of a Child – K.S.A. 21-5508 |
| <input type="checkbox"/> Agg. Indecent Liberties With a Child – K.S.A. 21-5506(b) | <input type="checkbox"/> Sexual Exploitation of a Child – K.S.A. 21-5510 |
| <input type="checkbox"/> Agg. Criminal Sodomy – K.S.A. 21-5504(b) | <input type="checkbox"/> Commercial Sexual Exploitation of a Child – K.S.A. 21-6422 |
| <input type="checkbox"/> Agg. Indecent Solicitation of a Child – K.S.A. 21-5508(b) | <input type="checkbox"/> Agg. Incest – K.S.A. 21-5604(b)(1) |
| <input type="checkbox"/> Agg. Sexual Battery – K.S.A. 21-5505(b) | <input type="checkbox"/> Unlawful Sexual Relations - K.S.A. 21-5512 |
| <input type="checkbox"/> Electronic Solicitation – K.S.A. 21-5509 | <input type="checkbox"/> Promoting the Sale of Sexual Relations - K.S.A. 21-6420 |
| <input type="checkbox"/> Agg. Human Trafficking, if committed in whole or in part for the purpose of sexual gratification of the defendant or another - K.S.A. 21-5426(b) | |
| <input type="checkbox"/> Any conviction for any comparable offense | |
| <input type="checkbox"/> Any attempt, conspiracy or criminal solicitation of a sexually violent crime | |
| <input type="checkbox"/> Any act determined beyond a reasonable doubt to have been sexually motivated AND the act did <u>not</u> involve non-forcible sexual conduct between a victim at least 14 and offender no more than 4 years older than victim – K.S.A. 22-4902 (c)(15) | |

Offender required to register due to **VIOLENT OFFENDER** status (Indicated by conviction of any of the following crimes):

- | | |
|---|---|
| <input type="checkbox"/> Capital Murder – K.S.A. 21-5401 | <input type="checkbox"/> Murder in the First Degree – K.S.A. 21-5402 |
| <input type="checkbox"/> Murder in the Second Degree - K.S.A. 21-5403 | <input type="checkbox"/> Voluntary Manslaughter - K.S.A. 21-5404 |
| <input type="checkbox"/> Involuntary Manslaughter - K.S.A. 21-5405(a)(1), (a)(2) or (a)(4) | <input type="checkbox"/> Kidnapping - K.S.A. 21-5408(a) |
| <input type="checkbox"/> Agg. Kidnapping - K.S.A. 21-5408(b) | <input type="checkbox"/> Criminal Restraint - K.S.A. 21-5411 |
| <input type="checkbox"/> Agg. Human Trafficking, if not committed in whole or in part for the purpose of sexual gratification of the defendant or another – K.S.A. 21-5426(b) | (except by parent, and only when victim is less than 18 years of age) |
| <input type="checkbox"/> Any conviction for any comparable offense | |
| <input type="checkbox"/> Any out of state conviction for an offense that under the laws of Kansas would be an offense listed in this section | |
| <input type="checkbox"/> Any attempt, conspiracy or criminal solicitation of an offense defined in this section | |
| <input type="checkbox"/> Any person felony with court finding on the record that such felony was committed with a DEADLY WEAPON (On or after July 1, 2006) | |
| <input type="checkbox"/> Any conviction for any comparable person felony, committed with a DEADLY WEAPON | |
| <input type="checkbox"/> Any attempt, conspiracy or criminal solicitation of a person felony committed with a DEADLY WEAPON | |

Offender required to register due to **DRUG OFFENDER** status (Indicated by conviction of any of the following crimes):

- Manufacture** or attempted manufacture of any controlled substance – K.S.A. 21-5703
- Possession of precursors** with intent to manufacture any controlled substance – K.S.A. 21-5709(a)
- Cultivation, Distribution, Possession** with intent to distribute opiates, opium or narcotic drugs or any stimulant in K.S.A. 65-4107(d)(1), (d)(3), or (f)(1) – K.S.A. 21-5705(a)(1), **ONLY**
- Any conviction for any comparable offense
- Any attempt, conspiracy or criminal solicitation of an offense defined in this section

Case No. _____

OFFENDER REGISTRATION SUPPLEMENT CONT. – K.S.A. 22-4901 et seq.

(PAGE 2 of 2)

SECTION B. REGISTRATION TERMS - check appropriate boxes indicating REQUIRED TERM of registration
See K.S.A. 22-4906

Offender must register for 15 YEARS after the date of parole, discharge or release, whichever date is most recent, or, if offender is not confined, 15 YEARS from the date of conviction due to conviction of any of the following crimes:

- Capital Murder - K.S.A. 21-5401
- Murder in the Second Degree – K.S.A. 21-5403
- Involuntary Manslaughter – K.S.A. 21-5405(a)(1), (a)(2) or (a)(4)
- Promoting the Sale of Sexual Relations - K.S.A. 21-6420
- Criminal Restraint – K.S.A. 21-5411 (except by parent, and only when victim is less than 18 years of age)
- Any act determined beyond a reasonable doubt to have been sexually motivated AND the act did not involve non-forcible sexual conduct between a victim at least 14 and offender no more than 4 years older than victim – K.S.A. 22-4902(a)(15)
- Any conviction of a person felony w/ court finding on the record that such felony was committed with a **DEADLY WEAPON**- K.S.A. 22-4902(e)(2)
- An offense not otherwise required, as provided by the Kansas Offender Registration Act, K.S.A. 22-4902(a)(5)
- Manufacture** or attempted manufacture of any controlled substance – K.S.A. 21-5703
- Possession of precursors** with intent to manufacture any controlled substance – K.S.A. 21-5709(a)
- Cultivation, Distribution, Possession** with intent to distribute opiates, opium or narcotic drugs or any stimulant in K.S.A. 65-4107(d)(1), (d)(3), or (f)(1) K.S.A. 21-5705(a)(1) **ONLY**
- Any of the following crimes when one of the parties is less than 18 years of age:
 - Adultery - K.S.A. 21-5511
 - Lewd and Lascivious Behavior – K.S.A. 21-5513
 - Buying Sexual Relations – K.S.A. 21-6421
- Any attempt, conspiracy or criminal solicitation of an offense defined in this section

Offender must register for 25 YEARS after the date of parole, discharge or release, whichever date is most recent, or, if offender is not confined, 25 YEARS from the date of conviction due to conviction of any of the following crimes:

- Indecent Solicitation of a Child – K.S.A. 21-5508
- Agg. Incest – K.S.A. 21-5604(b)(1)
- Unlawful Sexual Relations – K.S.A. 21-5512
- Sexual Exploitation of a Child – K.S.A. 21-5510, if the victim is at least 14 years of age but less than 18 years of age
- Promoting Prostitution – K.S.A. 21-6420, if the victim is at least 14 years of age but less than 18 years of age
- Criminal Sodomy - K.S.A. 21-5504(a) when one of the parties involved is less than 18 years of age
- Any attempt, conspiracy or criminal solicitation of an offense defined in this section
- Electronic Solicitation – K.S.A. 21-5509
- Indecent Liberties With a Child – K.S.A. 21-5506(a)
- Agg. Sexual Battery – K.S.A. 21-5505(b)

Offender is subject to LIFETIME registration due to any of the following:

- 2nd or Subsequent conviction of an offense requiring registration
- Conviction of any of the following crimes:
 - Rape – K.S.A. 21-5503
 - Agg. Kidnapping – K.S.A. 21-5408(b)
 - Kidnapping – K.S.A. 21-5408(a)
 - Agg. Criminal Sodomy – K.S.A. 21-5504(b)
 - Criminal Sodomy – K.S.A. 21-5504(a)(3) or (a)(4)
 - Agg. Indecent Liberties With a Child – K.S.A. 21-5506(b)
 - Agg. Indecent Solicitation of a Child – K.S.A. 21-5508(b)
 - Agg. Human Trafficking – K.S.A. 21-5426(b)
 - Sexual Exploitation of a Child – K.S.A. 21-5510, if the victim is less than 14 years of age
 - Commercial Sexual Exploitation of a Child – K.S.A. 21-6422
 - Promoting Prostitution – K.S.A. 21-6420, if the victim is less than 14 years of age
 - Any attempt, conspiracy or criminal solicitation of an offense defined in this section

Duration determined by diversionary agreement, probation order or juvenile sentencing order: _____ years _____ months (K.S.A. 22-4906(i))