

Senate Judiciary Committee
February 15, 2018

Senate Bill 407
Testimony of the Kansas Association of Criminal Defense Lawyers
Presented by Jennifer Roth, Legislative Committee co-chair
Neutral

Dear Chairman Wilborn and Members of the Committee:

This organization has been raising concerns about the Kansas Offender Registration Act (hereinafter referred to as KORA) since at least 2006, when we opposed the addition of what turned out to be the biggest category of violent offenders (i.e. “any person felony committed with a deadly weapon”). We were one of the three conferees opposed to the addition of drug offenders in 2007, as well as an opponent to the broad expansion of KORA in 2011 (who it covers, for how long, and the requirements).

As proposed, SB 407 would allow a person meeting the definition of “violent offender” to file a petition with the court where the conviction requiring registration occurred, but would not be open to anyone who had juvenile adjudications or adult convictions of any kind *before or after* the conviction that requires them to register.

While we list ourselves as “neutral”, we are actually anything but neutral when it comes to KORA. **We are encouraged by SB 407, and bring this testimony to encourage this Committee to amend the bill to add drug offenders and make the registration period for both categories (drug and violent) be five years** (in other words, no petition required). Registering **all** violent and drug offenders for a minimum of 15 years is a drain on resources with no science, studies, or data to justify it. It dilutes the overall registry of any value it might have. Furthermore, to people under the registry, it is akin to having two sentences, with registration often times being harsher than the requirements of and/or the sentence for the underlying offense for which the person registers.

History of changes to the Kansas Offender Registration Act

1993: creation of the Habitual Sex Offender Registration Act. It required a person twice convicted of a sexually violent crime to register with the sheriff in the Kansas county where he/she lived. The information was open to law enforcement agencies only.

1994: renamed the Kansas Sex Offender Registration Act, it was expanded to include first-time sex offenses. It allowed public access to registrants’ information at the sheriff’s office.

1997: renamed the Kansas Offender Registration Act. Expanded to include people convicted of murder and manslaughter (defined as “violent offenders”) and certain crimes with victims under 18 (exs.: kidnapping, criminal restraint, adultery). Over time additional sex offenses have been added to KORA.

1993 to mid-1999: Failure to register was a Class A nonperson misdemeanor.

1999: failure to register became a severity level 10 nonperson felony.

2001: added people found to be sexually violent predators in a civil proceeding.

2002: added juvenile sex offenders.

2006: failure to register got caught up in HB 2576 (commonly referred to as Jessica’s Law), when the offense (for any type of offender) was doubled from a severity level 10 nonperson felony to a severity level 5 person felony, and provided that every thirty days of failure was a separate offense.

2006: added people “convicted of any person felony [where a finding was made that] a deadly weapon was used in the commission of such person felony.”

2007: added drug offenders convicted of manufacturing, possession of precursors, and drug distribution or possession with intent to distribute (regardless of amount) (marijuana is not included).

2011: attempts, conspiracies, and solicitations of the enumerated registerable offenses were added as registerable offenses themselves; also extended the minimum period of registration for any category from 10 to 15 years

2011: SB 37 dramatically changed KORA. The idea was to bring Kansas into “substantial compliance” with SORNA in order to avoid the loss of Byrne Grant money. At that time, there were four states in substantial compliance. Today, there are only 18. <https://www.smart.gov/pdfs/SORNA-progress-check.pdf>. SORNA has nothing to do with drug or violent offenders, yet the sweeping changes in SB 37 were applied to all three types of offenders (sex, drug, and violent). Registrants are now required to report four times a year. KORA requires people with qualifying drug or violent convictions from other states or federal courts to register, even though 1) there is no federal drug registry; 2) no other state appears to register distribution offenses by requiring a person to take affirmative, ongoing steps to comply; 3) it is unknown whether there are any other states that register “violent offenders” to the extent Kansas does.

2011: made failing to comply with the registry a severity level (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).

2012: added juvenile adjudications to some provisions. It also provided that even if a person gets his/her conviction expunged, he/she must continue to register for the now-non-existent conviction. That information would not be publicly available, but the person could be punished all the same for noncompliance. (However, the expungement statutes still say that a person cannot expunge their conviction – or any others, for that matter – as long as they are registering for it, so there is conflicting law.)

2013: amended KORA to cover relevant drug offenders convicted only after July 1, 2007. For the six years prior to that, KORA was applied to drug offenders who were convicted before a drug offender registry even existed.

2013: made it a Class A misdemeanor to not pay within 15 days the \$20 registration fee that is owed when an offender goes in for the quarterly registrations, and a SL 9 person felony if, within 15 days of the recent registration, two or more \$20 payments have not been paid.

2016: made it a nonperson crime for failing to register when the underlying crime was a nonperson (ex.: it's a nonperson felony if the person registers for a nonperson drug felony). It remained a person felony for those who register for person crimes, and the severity levels of the punishment (SL 6, 5, or 3) remained the same.

Problems with the inclusion of “any person felony, a deadly weapon used” in the definition of violent offender in KORA

Under current law, there are four ways to meet the definition of a “violent offender”: 1) be convicted of one of nine enumerated offenses; 2) be convicted on or after July 1, 2006, “of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony”; 3) be convicted of a comparable crime or out-of-state comparable offense covered by (e); or 4) be convicted of an attempt, conspiracy, or criminal solicitation of an offense covered by (e). K.S.A. 22-4902(e)(1)-(4).

Although the Legislature used the word “deadly” in its 2006 amendment, the Kansas appellate courts have decided registration cases by saying “deadly weapon” and “dangerous weapon” are the same. See, e.g., *State v. Franklin*, 44 Kan. App. 2d 156, 234 P.3d 860 (2010) (Franklin pled to aggravated robbery and attempted aggravated robbery, and appealed the district court’s finding requiring him to register for the BB

gun he had during the robbery; the Court of Appeals approved of the use of “dangerous weapon” and “deadly weapon” as interchangeable).

On that note, there are crimes that have as an element of them the use of a deadly weapon, three examples being aggravated assault (severity level 7 person felony), aggravated battery/deadly weapon (severity level 7), and aggravated robbery (severity level 3). My quick poll shows cases where the “deadly” weapons charged included not only guns and knives, but a hammer, an air soft gun, baseball bat, car, Taser, broom handle, small pocket knives, bow and arrow, shovel, and more.

Furthermore, because the Court of Appeals has approved the use of the standard applied in cases where a deadly weapon is an element of the offense as the same standard to make the KORA finding, there are people on the registry for committing offenses with nonexistent weapons (ex.: aggravated robbery includes when an offender makes the victim think they have a gun in their pocket, etc.).

Registrants’ duties under KORA

Attachment A is from the KBI’s website and lists out a registrant’s duties. All of this includes drug and violent offenders. This text is basically what is in the quarterly reports that registrants have to initial. It does not illustrate the amount of detail that exists in the form the registrants have to fill out (ex.: tattoos, e-mail and online accounts, cars/boats/planes/motorcycles makes and models, etc.). Offenders do not receive any sort of reminder when it is time to register (put another way, your dentist sends you a postcard or your doctor leaves you a voice message, 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. They must renew their driver’s licenses yearly.

If a person gets a second qualifying conviction, the registration period is for life. (Example: two qualifying drug convictions in a short period of time means lifetime registration.) There is no way to be removed earlier than 15 years (or life, depending on the relevant period).

Failure to comply with any of these duties, even unintentionally, is prosecuted as a SL 6, 5, or 3 felony for all types of offenders (drug, violent, and sex). 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 in our statutes are DUI, commercial DUI, and chemical test refusal. See K.S.A. 21-5203. In other words, a person is cut off from raising a defense to failing to comply. Here are some real-life examples:

- You forgot to register on time, get there two weeks (or less) late, but none of your information has changed since your previous registration. No defense - you are prosecuted for a SL 6 felony.
- Your apartment burned down, which law enforcement knows, but you failed to go tell them within three business days that you had to move. No defense - you are prosecuted for a SL 6 felony.
- You work in a county that is different from where you live and you failed to register in that other county (but are compliant - and therefore all of your information is on a public website - in your home county). No defense - you are prosecuted for a SL 6 felony.
- You are homeless and do not report as frequently as law enforcement tells you to (which can be more than quarterly if you are homeless). No defense - you are prosecuted for a SL 6 felony.
- You buy a new jet ski and forget to include it on your registration form. No defense - you are prosecuted for a SL 6 felony.
- You register while in jail and get out the next day. This happens during your registration month (of which you have four a year). You don't go in to register again during that month. No defense - you are prosecuted for a SL 6 felony.

**Reasons for modifying length of registration
in the drug and violent offender categories**

To our knowledge, there is no research, study, data, or other evidence-based assessment that suggests keeping tabs on thousands of people convicted of "any person felony where a deadly weapon" was used does anything to reduce recidivism or increase public safety. There was none we know of in 2006 and none we know of today. Similarly, we know of 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 registry does anything to reduce recidivism or increase public safety. What we do know is that it takes massive amounts of resources to register these people, investigate allegations that they are not up-to-date, prosecute, and incarcerate them.

What at least one proponent (KBI) and the opponents said in 2007 in the context of drug offenders 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 not only because you have to register them, but because they are prosecuted, supervised on probation, and/or incarcerated when they fail to comply; 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, participating in positive life activities, etc.

Modifying the registration period for drug and violent offenders would free up law enforcement resources across the state, as well as resources at the KBI, to be put to use on things that have been shown to improve public safety and reduce crime. It will free up prison beds and other criminal justice system resources. It will make success more likely for the nearly 10,000 offenders who are essentially serving an additional sentence by being subject to excessive expectations and, if they don't meet them, excessive penalties for failing to comply in even the smallest of ways.

We would confidently estimate that the bulk of the almost 5,000 people who register as "violent offenders" include people convicted of "any person felony/a deadly weapon" – and the bulk of them is registering for offenses with a lower penalty than the penalty for failing to comply with the registry (i.e. they register for a severity level 7 or lower crime, but failing to comply is a level 6).

Similarly, based on a look at the recent conviction data for distribution/possession with intent to distribute offenses, we would also confidently estimate that the bulk of people who are required to register as a drug offender do so because of possession with intent to distribute/distribution of drugs valued at \$250 or less. In other words, it cannot be said that KORA includes only the "worst of the worst."

For all of these reasons, we urge this Committee to amend SB 407 and modify the registration time for offenders in the drug and violent categories.

Thank you for your consideration,

Jennifer Roth
co-chair, Legislative Committee of the Kansas Association of Criminal Defense Lawyers
jrothlegislative@gmail.com
785.550.5365

**Attachment A: from the KBI's FAQ found here:
<https://www.kbi.ks.gov/registeredoffender/FAQ.aspx#duties>**

What are the duties of a registered offender?

- I have been convicted or adjudicated of a crime that requires registration under the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., hereafter referred to as "the Act", and must honor all duties specified by the Act.
- At the time of conviction or adjudication, the court will complete a notice of duty to register if I am released prior to sentencing. Within three (3) business days, I will report to the registering law enforcement agency in the county or tribal land of conviction or adjudication and to the registering law enforcement agency in any place where I reside, maintain employment or attend school, to complete the registration form.
- If in the custody of a correctional facility , I will register with the correctional facility within three business days of initial custody and shall not be required to update such registration until discharged, paroled, furloughed or released on work or school release from a correctional facility.
- Within three (3) days of coming into any county or location of jurisdiction where I reside or intend to reside, maintain employment or intend to maintain employment, attend school or intend to attend school, I must register with each registering law enforcement agency in the county or location of jurisdiction. Each time I register, I must be photographed, pay a registration fee of \$20, and complete the registration form with all information and updated information required for registration as provided in K.S.A. 22-4907. In addition to the Kansas Offender Registration Act, sex offenders who reside, work or attend school on tribal land shall register pursuant to tribal law. Tribes in the state of Kansas that require registration include the Prairie Band Potawatomi Nation, Iowa Tribe of Kansas and Nebraska and the Kickapoo Tribe in Kansas. Sac and Fox Nation has delegated the registration responsibility to the state of Kansas through the local sheriff's offices, therefore compliance with the Kansas law is sufficient..
- I am required to report four times a year in person to the registering law enforcement agency in the county or location of jurisdiction where I reside, maintain employment, or attend school. After initial registration, I must report in the month of my birthday and every third, sixth, and ninth month occurring before and after my birth month.

- If my birthday is in January, April, July, or October, I am required to report to the registering law enforcement agency in January, April, July, and October.
 - If my birthday is in February, May, August, or November, I am required to report to the registering law enforcement agency in February, May, August, and November.
 - If my birthday is in March, June, September, or December, I am required to report to the registering law enforcement agency in March, June, September, and December.
- If I am transient, I must report in person to the registering law enforcement agency of such county or location of jurisdiction in which I am physically present within three business days of arrival in the county or location of jurisdiction. I am required to register in person with the registering law enforcement agency every 30 days, or more often at the discretion of the registering law enforcement agency and provide a list of places where I have slept and otherwise frequented during the period of time since the last date of registration and provide a list of places where I may be contacted and where I intend to sleep and otherwise frequent during the period of time prior to the next required date of registration.
- I must register in person upon any commencement, change or termination of residence location, employment status, school attendance or other information within three days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered and provide written notice to the Kansas Bureau of Investigation.
- If required by out of state law, I will register in any out of state jurisdiction where I reside, maintain employment or attend school.
- I am required to immediately renew any Kansas driver's license or state identification card issued to me, and I must annually renew such license or identification card on or before my birthday. The driver's license and identification card shall indicate that I am a registered offender. If maintaining primary residence in Kansas, I must surrender all other driver's licenses and identification cards from other states, territories, and the District of Columbia, except if I am or an immediate family member is maintaining active duty in any branch of the United States military.
- If this is my first adult conviction, I must register for fifteen (15) years unless a longer term is specified or present term limits are amended by statute for any of the following:

Sexual battery, Adultery if one party is less than 18 years of age, Patronizing a prostitute if one party is less than 18 years of age, Lewd and lascivious behavior if one party is less than 18 years of age, Capital murder, Murder in the first degree, Murder in the second degree, Voluntary manslaughter, Involuntary manslaughter, Criminal restraint if the victim is less than 18 years of age, Any act which has been determined beyond a reasonable doubt to have been sexually motivated, Conviction of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony, Unlawful manufacture or attempting such of any controlled substance or controlled substance analog, Possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to manufacture a controlled substance, Unlawful sale of or distribution of a controlled substance. This time period does not include any time incarcerated in any jail or correctional facility or any period of non-compliance with the requirements of the Act. If I am convicted as an adult of a second or subsequent offense(s) covered by the Act, I will be required to register for life. Any conviction for an attempt, conspiracy or solicitation requires registration for the same term as the underlying offense.

If this is my first adult conviction, I must register for twenty-five (25) years unless a longer term is specified or present term limits are amended by statute for any of the following: Criminal sodomy if victim is 16 or more years of age but less than 18 years of age and a member of the same sex or an animal, Indecent solicitation of a child, Electronic solicitation, Aggravated incest, Indecent liberties with a child, Unlawful sexual relations, Sexual exploitation of a child if the victim is 14 or more years of age but less than 18 years of age, Aggravated sexual battery, Promoting prostitution if the prostitute is 14 or more years of age but less than 18 years of age. This time period does not include any time incarcerated in any jail or correctional facility or any period of non-compliance with the requirements of the Act. If I am convicted as an adult of a second or subsequent offense(s) covered by the Act, I will be required to register for life. Any conviction for an attempt, conspiracy or solicitation requires registration for the same term as the underlying offense.

I must register for life if I am convicted of any of the following crimes: Rape, Aggravated indecent solicitation of a child, Aggravated indecent liberties with a child, Criminal

sodomy if the victim is 14 or more years of age but less than 16 years of age or animal, Aggravated criminal sodomy, Aggravated human trafficking, Sexual exploitation of a child if the victim is less than 14 years of age, Promoting prostitution if the prostitute is less than 14 years of age, Kidnapping, Aggravated kidnapping, Any person who has been declared a sexually violent predator pursuant to K.S.A. 59-29a01 et seq. Any conviction for an attempt, conspiracy or solicitation requires registration for the same term as the underlying offense.

- If adjudicated as a juvenile and required to register by law for an act which if committed by an adult would constitute a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902, and amendments thereto, and such crime is not an off-grid felony or a felony ranked in severity level 1 of the nondrug grid or by court order, I must register until eighteen (18) years of age, or for five (5) years from the date of adjudication or release from confinement, whichever date occurs later. This time period does not include time incarcerated in any jail, juvenile facility or correctional facility or any period of non-compliance with the requirements of the Act. As a juvenile, the court may order that my registration not be an open record displayed on the public website. In such cases, it is my duty to provide a copy of the court order to the sheriff at the time of registration. If I am 14 years of age or more and adjudicated as a juvenile of an offense that if committed by an adult would constitute a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902, and amendments thereto, and such crime is an off-grid felony or a felony ranked in severity level 1 of the non drug grid , I shall be required to register for life.
- If I reside, maintain employment, or attend school in the state of Kansas on a full-time, part-time, or temporary basis and I have been convicted or adjudicated in an out of state court, or where I was required to register by an out of state law, or if I have been convicted or adjudicated of an offense comparable to a Kansas law that requires registration, I shall register for the same length of time required either by that out of state jurisdiction or by Kansas Offender Registration Act, whichever term is longer. I must register in person with the registering law enforcement agency in the county or location of jurisdiction where I am residing, maintaining employment, or attending school within three (3) days to complete a registration form.
- If receiving inpatient treatment at any treatment facility, inform the treatment facility of my status as an offender and inform the registering law enforcement agency of the

county or location of jurisdiction in which the treatment facility is located of my presence at the treatment facility and the expected duration of the treatment.

- If I travel outside of the United States, I will report in person to the registering law enforcement agency and provide written notice to the Kansas bureau of investigation 21 days prior to any such travel. I will provide an itinerary including, but not limited to, destination, means of transport and duration of travel.
- If I use the internet, I am required to report to the registering law enforcement agency any and all: email addresses; online identities; information relating to membership in any and all personal web pages or online social networks; and internet screen names.
- If I fail to register, fail to update my registration, provide any false information or otherwise violate any requirement of the Act, I have committed a violation of the Kansas offender registration Act. A first conviction of a violation of the Kansas offender registration act is a severity level 6, person felony; upon a second conviction, a severity level 5, person felony; and upon a third or subsequent conviction, a severity level 3, person felony. A new and separate offense of non-compliance will occur every 30 days that have elapsed until such time as I comply with the law. Aggravated violation of the Kansas offender registration Act is failing to register for more than 180 consecutive days and is a severity level 3, person felony. If I fail to remit payment to the sheriff's office as required in subsection (k) of K.S.A. 22-4905, I have committed a violation of the Kansas offender registration act. A first conviction of a violation of not remitting payment within 15 days of registration is a class A misdemeanor. If I do not remit payment within 15 days of the most recent registration and two or more full payments have not been remitted to the sheriff's office, I have committed a violation of the Kansas offender registration act which is a severity level 9, person felony.
- Pursuant to Title 18, United States Code, Section 2250, if a sex offender fails to register or fails to report a change in residence, employment, or student status, and travels in or moves across state lines, the offender can be charged with a federal crime and punished by up to ten (10) years imprisonment.
- I understand that if I receive an expungement for the crime that required registration, my registration obligation does not terminate.