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TO: Joint Committee on Corrections and Juvenile Justice Oversight
FROM: Kansas Judicial Council – Hon. Ben Sexton and Seth Wescott
DATE: November 29, 2022
RE: Select Judicial Council recommendations to reform the Kansas Offender Registration Act

In 2020, the Judicial Council’s Advisory Committee on Sex Offenses and Registration (Committee) completed a two-year comprehensive review of the Kansas criminal code’s sex offense structure and related registration requirements for both juveniles and adults. The majority of the Committee’s study and recommendations focused on reforming the Kansas Offender Registration Act (KORA). Today, we have been asked to discuss a few of those recommendations in more depth. Those recommendations include:

- Repealing sex offender registration requirements for juvenile offenders
- Expanding the exit mechanism created in 2022 for drug offenders so that it also applies to sex and violent offenders
- Reducing penalties for registration violations
- Requiring single point registration rather than multiple counties where offender lives, works, and attends school
- Creating a process for an offender to seek waiver of the \$20 registration fee

The Committee's full report, which contains more information about the Committee's study process and research sources plus additional recommendations about offender registration, sex offenses, and sex offender sentencing, is available on the Judicial Council's website, www.kansasjudicialcouncil.org, under the Studies and Reports tab. The Committee's recommendations relating to offender registration were introduced in 2022 as H.B. 2349.

REPEALING SEX OFFENDER REGISTRATION REQUIREMENTS FOR JUVENILE OFFENDERS

One of the Committee's biggest concerns was the especially negative impact that offender registration has on juvenile offenders. The Committee recommends a full repeal of offender registration requirements for those adjudicated as juvenile sex offenders. In reaching this conclusion, the Committee relied heavily on a paper co-authored by Committee member Seth Wescott and other members of the Association for the Treatment and Prevention of Sexual Abuse (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 should apply retroactively to any offender on the registry solely because of a juvenile adjudication; however, it should 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 should 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.

Additional background information about juvenile registration

Juvenile offenders were first required to register as sex offenders in 2002. Registration terms for juveniles can vary depending on their age and the type of offense. In many cases, the sentencing judge has 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 -- *e.g.* rape, aggravated criminal sodomy, aggravated human trafficking -- must register for life. K.S.A. 22-4906(h).

Just like adult offenders, juvenile offenders 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. They 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.

According to data provided by the KBI, as of October 2022, there were just over 700 registered offenders who were ordered to register because of a juvenile adjudication for a sexually violent crime. Over 500 are continuing to register *solely* because of a juvenile adjudication. A majority of juvenile registrations are public, though some are private and available only to law enforcement. A county-by-county breakdown indicates there are disparities in public versus private registration, with a few counties ordering public registration significantly more often than others.

EXPANDING THE EXIT MECHANISM IN K.S.A. 22-4908 TO SEX AND VIOLENT OFFENDERS

As part of its 2020 report, the Committee also recommended the creation of 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. Earlier this year, Rep. Stephen Owens requested the introduction of a bill to create just such an exit mechanism, but only for drug offenders and not sex or violent offenders. See 2022 H.B. 2515. This exit mechanism for drug offenders was eventually enacted as part of 2022 S.B. 366, and it went into effect on May 12, 2022. 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 the exit mechanism for drug offenders found in K.S.A. 22-4908 be expanded to apply to sex and violent offenders as well. As originally proposed by the Committee, that expanded exit mechanism should contain 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.

REDUCING PENALTIES FOR REGISTRATION VIOLATIONS

Next, the Committee recommends that penalties for registration violations be reduced to nonperson misdemeanors for first and second offenses. 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 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.

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.
- Classify violations for failure to pay as class C nonperson misdemeanors.

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 recommends that a new statute be enacted 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.

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 should be required to register only in the county where they live, while continuing to report the name and address of any employer or school they attend. The KBI could then 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.

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.

CONCLUSION

The proposed reforms to KORA listed in this testimony would reduce some of KORA's 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 recommend that legislation be introduced to accomplish these reforms.

COMMITTEE MEMBERSHIP

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 were:

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