No. 13-110318-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

JOHN DOE
Plaintiff - Appellee,

v.

KIRK THOMPSON, DIRECTOR OF THE KANSAS BUREAU OF INVESTIGATION AND FRANK DENNING, JOHNSON COUNTY KANSAS, SHERIFF
Defendants - Appellants

BRIEF OF APPELLANTS

Appeal from the District Court of Shawnee County, Kansas
Honorable Larry D. Hendricks, Judge,
District Court Case No. 12 C 168

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

This is a direct appeal of, *inter alia*, the district court's conclusion that application of the 2011 Amendments to the Kansas Offender Registration Act to Doe violates the *Ex Post Facto* Clause of the United States Constitution.

Under the pre-2011 version of the Kansas Offender Registration Act, Doe was required to register as a sex offender with the Kansas Bureau of Investigation ("KBI") through the Johnson County Sheriff ("Sheriff") for ten years from his February 2003 conviction, which was until February 2013. Amendments in 2011 extended Doe's registration requirements until February 2028. Doe filed this action claiming that the application of the extended registration period and other accompanying changes to KORA requirements amounts to *ex post facto* punishment. Doe requested declaratory relief against KBI Director Kirk Thompson and Johnson County Sheriff Frank Denning, in their official capacities, (collectively "the State"). Doe sought an order relieving him of the requirement to register and removing his registration information from public access.

ORDERS FROM WHICH THE APPEAL IS TAKEN

On April 30, 2012, the district court granted Doe leave to proceed pseudonymously (*Memorandum Decision and Order*, Vol. I, p. 40).

On February 27, 2013, the court overruled the State's motion to strike materials submitted in summary judgment proceedings (*Memorandum Decision and Order*, Vol. X, p. 1826).

The court then granted summary judgment to Doe on July 15, 2013, finding the additional requirements of the 2011 amendments amounted to an *ex post facto* violation when applied to Doe. (*Memorandum Decision and Order*, Vol. X, p. 1838).

The State directly appeals these decisions and the accompanying orders.

ISSUES TO BE DECIDED

B. Whether the District Court Erred by Denying the State's Motion to Strike Inadmissible Material from Doe's Summary Judgment Filings?

C. Whether, in its Summary Judgment Ruling, the District Court Erred by Taking Judicial Notice of Facts Contained in Journal Articles Where Those Facts are not Reasonably Beyond Dispute?

D. Whether the District Court Erred in Concluding KORA, as Amended, Violates the *Ex Post Facto* Clause of the United States Constitution?

E. Whether the District Court Erred in Granting Doe Leave to Proceed Pseudonymously?

STATEMENT OF FACTS

1. The Kansas Offender Registration Act ("KORA") was originally enacted by the Kansas Legislature in 1993. It was known as the Habitual Sex Offender Registration Act ("HSORA"), and applied to twice-convicted sex offenders. (Vol. III, p. 177, *Defendants' Joint Memorandum in Support of Summary Judgment* ("*Defendants' Summary Judgment Memo*"), *1993 Kan. Sess. Laws*, ch. 253, §17, *et seq.*).

2. The HSORA was changed in 1994 to require, *inter alia*, first-time sex offenders to register. It was renamed the Sex Offender Registration Act ("KSORA") and

became effective April 14, 1994. (Vol. III, p. 177, *Defendants' Summary Judgment Memo, 1994 Kan. Sess. Laws*, ch. 107, §1).

3. The Kansas Supreme Court decided *State v. Myers* on August 23, 2006. *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997) (KSORA registration requirements held remedial and not a violation of the federal *Ex Post Facto* Clause; notification requirements as applied to *Myers* – and offenders convicted of offenses with occurred prior to April 14, 1994 – violated *Ex Post Facto* Clause). (Vol. III, p. 177, *Defendants' Summary Judgment Memo*).

4. The Kansas Legislature amended KSORA in 1997, requiring registration for certain violent offenses. The act was then known as the Kansas Offender Registration Act ("KORA"). (Vol. III, p. 178, *Defendants' Summary Judgment Memo, 1997 Kan. Sess. Laws*, ch. 181, §7, *et seq.*, effective May 29, 1997; K.S.A. 22-4901).

5. The Tenth Circuit Court of Appeals issued its decision in *Femedeer v. Haun* on August 28, 2000. *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (Utah sex offender registration and Internet notification requirements and stated retroactivity did not violate *Ex Post Facto* Clause). (Vol. III, p. 178, *Defendants' Summary Judgment Memo*).

6. Plaintiff committed his offenses on December 24, 2001, and again on April 2, 2002. (Vol. III, pp. 177, 202, *Defendants' Summary Judgment Memo* and *Journal Entry of Judgment*).

7. On February 19, 2003, Plaintiff was convicted in the District Court of Johnson County, Kansas after pleading guilty to indecent liberties with a child 14 years of age or older, but less than 16, as set forth at K.S.A. §21-3503(a)(1), a Level 5 person felony. (Vol. III, pp. 178, 202, 210, *Defendants' Summary Judgment Memo, Journal Entry of Judgment and K.S.A. §21-3503 (1995)*; Vol. X, p. 1838, *Memorandum Decision and Order*).

8. On the date of his offenses Plaintiff was 38 years of age and his victim was 14 years of age. (Vol. III, p. 178, 216-17, *Summary Judgment Memo* and *Kansas Standard Offense Report*).

9. After having taken indecent liberties with his victim for the second time, Plaintiff reported to the investigating officer a prior incident in "1984 or 1985" where he fondled the breast of his 14 year old sister-in-law, and that "the incident was almost exactly like the fondling incident with [the victim in his crime of conviction]." (Vol. III, p. 178, 219, *Defendants' Summary Judgment Memo* and *Narrative Report*).

10. On March 5, 2003, the United States Supreme Court decided *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003) (Alaska Sex Offender Registration Act was nonpunitive; retroactive application did not violate *Ex Post Facto* Clause). (Vol. III, p. 178-79, *Defendants' Summary Judgment Memo*).

11. Plaintiff was sentenced on April 3, 2003, to 32 months in prison, granted 36 months standard probation to Community Corrections, and 24 months of post-release supervision. The court determined Plaintiff's crime was sexually motivated. (Vol. III, p. 179, 203, *Defendants' Summary Judgment Memo* and *Journal Entry of Judgment*).

12. Plaintiff's crime of conviction, K.S.A. §21-3503, was statutorily classified a "sexually violent crime" by K.S.A. §22-4902(c)(2). (Vol. III, p. 179, 223, *Defendants' Summary Judgment Memo*). As a result, Plaintiff was statutorily classified a sex offender, as the term was defined at K.S.A. §22-4902(b). (Vol. III, p. 179, *Defendants' Summary Judgment Memo*).

13. Pursuant to the terms of KORA, Plaintiff was required to register as an adult offender. Plaintiff registered through the office of the Sheriff of Johnson County, Kansas, on April 22, 2003. (Vol. III, p. 179, 228, *Defendants' Summary Judgment Memo* and *Offender Registration Form*).

14. Pursuant to K.S.A. §22-4907, Plaintiff was required to provide certain registration information to the Sheriff of Johnson County, Kansas. (Vol. III, p. 179, 231, *Defendants' Summary Judgment Memo* and *Offender Registration Form*). At the time of registration and as required by statute, Plaintiff was also photographed, provided fingerprints and provided a DNA sample. (Vol. III, p. 179, 231, *Defendants' Summary Judgment Memo*).

15. Pursuant to K.S.A. §22-4906(a), Plaintiff was required to register, and to provide this registration information, for a period of 10 years from the date of conviction, that is, until February 19, 2013. (Vol. III, p. 179, 234, *Defendants' Summary Judgment Memo*).

16. The Kansas Court of Appeals issued its decision in *State v. Reider* on April 24, 2003. *State v. Reider*, 31 Kan. App. 2d 509, 67 P.3d 161 (2003) (district court

has no discretion to lower 10 year registration period). (Vol. III, p. 179, *Defendants' Summary Judgment Memo*).

17. The Kansas Court of Appeals issued its decision in *State v. Evans* on November 12, 2010. *State v. Evans*, 44 Kan. App. 2d 945, 242 P.3d 220 (2010) (person convicted of KORA offense required to register for life regardless of whether crime occurred before effective date of amendment changing registration term). (Vol. III, p. 179-80, *Defendants' Summary Judgment Memo*).

18. The Kansas Legislature amended KORA in 2011, effective July 1, 2011. (Vol. III, p. 180, 237-79, *Defendants' Summary Judgment Memo* and *2011 Kan. Sess. Laws*, ch. 95, §2, *et seq.*; Vol. X, p. 1838, *Memorandum Decision and Order*).

19. Included in the 2011 amendments was a change in terms for which certain classes of offenses offenders are required to register. K.S.A. §22-4906 now requires Plaintiff to register for an additional 15 years, until February 19, 2028. (Vol. III, p. 180, 284, *Defendants' Summary Judgment Memo* and *K.S.A. §22-4906 (b)(1)(E) (Supp 2011)*; Vol. X, p. 1838, *Memorandum Decision and Order*).

20. In the personal experience of Johnson County Sheriff's Office Detective Rebecca Crabtree, at least 80% or more of the time, in cases involving more severe or offensive sex-related offenses, where there is substantial evidence of a criminal offense, there has been a prior arrest, charge or conviction for a sex-related crime. (Vol. III, p. 180, 288, *Defendants' Summary Judgment Memo* and *Crabtree Affidavit*).

21. On June 15, 2011, the KBI informed Plaintiff that the 2011 amendment to KORA applied retroactively. Under the amendments, Doe has the following statutory duties:

a. to register for 25 years from the date of his conviction (until 2028);

b. to report in person four times per year in each jurisdiction in which he resides, works, or attends school;

c. to report in person within three days of changing residences, jobs, or schools;

d. at each in-person reporting, to pay a $20 reporting fee and submit to an updated photograph;

e. to provide the following information on his registration form: address, phone numbers, vehicle and watercraft and aircraft information, professional licenses, palm prints, email address, online identities, membership in online social networks, and travel and immigration documents;

f. to provide law enforcement with notice of any international travel; and

g. to suffer a penalty of a severity level 6, person felony for a first conviction for violation of KORA.

(Vol. X, p. 1839, *Memorandum Decision and Order*).

22. If known, members of the public can access Plaintiff's registration information by searching for his name, city, or address on the Johnson County Sheriff's website. The website's "Share & Bookmark" feature allows users to share registry

information via email, Google, Delicious, Stumble Upon, Windows Live, Facebook, Twitter, MySpace, Digg, and Reddit. (Vol. X, p. 1839, *Memorandum Decision and Order*).

23. If known, members of the public can also access Plaintiff's registration information from the KBI website. The website allows users to locate offenders on an interactive map or sign up for email notification about registered offenders living in Kansas. (Vol. X, p. 1839, *Memorandum Decision and Order*).

ARGUMENT AND AUTHORITIES

A. The District Court Erred By Denying the State's Motion To Strike Inadmissible Material From Doe's Summary Judgment Filings.

1. Standard of Review

"[A]n appellate court may review a district court's evidentiary determination under an abuse of discretion or as a matter of law. When the issue involves the adequacy of the legal basis for the district court's decision, the issue is reviewed using a de novo standard." *City of Wichita v. Denton*, 296 Kan. 244, 257, 294 P.3d 207, 217 (2013). Furthermore, "a district court always abuses it discretion when its decision goes outside the legal framework or fails to properly consider statutory limitations. For this reason, [an appellate court] review[s] de novo whether a district court applied the correct legal standards when ruling on the admission or exclusion of evidence." *Boldridge v. State*, 289 Kan. 618, 633, 215 P.3d 585, 597 (2009) (citations and internal quotation marks omitted).

2. The District Court Erred by Failing to Strike Testimony Not Based on Personal Knowledge and Inadmissible Hearsay from the Affidavits of Doe and Doe's Wife.

Doe's central complaint in this lawsuit is that application of the 2011 version of KORA is punitive in effect. When Doe filed his motion for summary judgment, he included affidavits from himself and his wife that tried to directly link alleged difficulties experienced by Doe and his family to Doe's status as a registered offender. The State objected to that material by filing a motion to strike. (Vol. VII, pp. 1321-1414). The district court denied the motion to strike, concluding that the statements in the affidavits "satisf[ied] the personal knowledge requirement because there is circumstantial evidence supporting the Does' declarations," and also that affidavits contained no hearsay because the "declarations are not offered to prove the truth of the matter asserted." (Vol. X, pp. 1828-29). Neither of these conclusions is correct.

The State's memorandum in support of its motion to strike comprehensively laid out all of the objectionable testimony and citations in Doe's brief in three tables. (Vol. VII, pp. 1332-1382). Ultimately, several statements by Doe and his wife were recited by the district court as uncontroverted material facts. (Vol. X, p. 1840-42). In light of the district court's summary judgment decision recounting certain testimony from these affidavits, the admission of the objected-to testimony from the following paragraphs was unfairly prejudicial to the State: paragraphs 5, 6, 9, 10, 11, 16, 18, 29, 30, 31, 32, and 33 of Doe's affidavit, and paragraphs 7, 8, 9, 10, 13, and 14 of Jane Doe's affidavit.

The problem with nearly all of this testimony is that it is not based on personal knowledge or contains inadmissible hearsay, including inadmissible double and triple hearsay. It is here that the district court failed to apply the correct statutory standards.

K.S.A. §60-256(e)(1) requires that affidavits supporting summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence and show that the affiant or declarant is competent to testify on the matters stated." K.S.A. §60-419 requires, "[a]s a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he or she has personal knowledge thereof, or experience, training or education if such be required."

K.S.A. §60-460 defines hearsay as "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated." Pursuant to K.S.A. §60-459, "'[s]tatement' means not only an oral or written expression but also nonverbal conduct of a person intended by him or her as a substitute for words in expressing the matter stated." This type of evidence is inadmissible unless it falls under a recognized hearsay exception. "'The theory behind the hearsay rule is that when a statement is offered as evidence of the truth asserted in it, the credibility of the asserter is the basis for the inference, and therefore the asserter must be subject to cross-examination." *State v. Harris*, 259 Kan. 689, 698, 915 P.2d 758 (1996) (citing 6 *Wigmore on Evidence* § 1766 (Chadbourn rev. 1976)).

Regarding the requirement that fact and opinion testimony offered be based on personal knowledge and contain sufficient supporting facts (*see* K.S.A. §§60-256(e), 60-419, 60-456), these statutory requirements ensure that trustworthy evidence is offered to

the court. *See Pullen v. West*, 278 Kan. 183, 210-13, 92 P.3d 584, 603-04 (2004) (affirming trial court's exclusion of witness' opinion testimony about fireworks launcher because witness had not personally observed launcher in use and because witness was not designated as an expert and no expert report had been prepared and submitted); *RAMA Operating Co., Inc. v. Barker*, 47 Kan. App. 2d 1020, 1031, 286 P.3d 1138, 1146 (2012) ("conclusory affidavits are insufficient to establish contested facts for summary judgment purposes"); *ORI, Inc. v. Lanewala*, 147 F. Supp. 2d 1069 (D. Kan. 2001) (on motion for summary judgment, applying parallel federal rules of evidence 602 and 701 to exclude witnesses' "conclusory assertions, unsubstantiated with any specific facts" where "absolutely no evidence that the two [witnesses] had first-hand knowledge" of alleged events).

As Judge Lungstrum has explained, "[w]hile it is true that 'personal knowledge' includes inferences and opinions, those inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience." *PAS Communications, Inc. v. Sprint Corp.*, 139 F. Supp. 2d 1149, 1181 (D. Kan. 2001) (on cross-motions for summary judgment, applying parallel federal rules of evidence 602 and 701 to exclude witness' statements about other person's beliefs where no facts established witness' first-hand knowledge of the matter).

a. Lack of Personal Knowledge

The personal knowledge problem with Doe's affidavits testimony is simple. Doe and his wife testified that various people do not like him and shun his family because they look him up on the offender registry or otherwise obtain his registration status. Doe and his wife assert that particular people have Doe's registry information and are acting upon it in a way that he finds unpleasant. Yet all Doe offers is unsupported, self-serving allegations that other people only know about Doe through the registry and that those people have used that registry information to make his life less enjoyable or difficult by refusing to associate with him and doing and saying certain things. This is biased conjecture about specific individuals rather than an appropriate inference grounded in personal knowledge.

Paragraphs 5 and 6 of Doe's affidavit contain the testimony about what the parents of other children are telling their children and about what other children are doing at school despite having no personal knowledge about those alleged events:

> Because of my inclusion on the registry, my children have been teased by their schoolmates and prevented from forming lasting relationships with other children whose parents instruct them not to associate with my family. . . . My children have come home from school crying because children at school told them their father is a 'bad man,' 'pervert,' or 'pedophile.' My children's schoolmates are repeating what they hear from their own parents, people who know nothing about me except what they can view on the Offender Registry. (Vol. IV, p. 317)

To be sure, Doe is competent to testify to his observations that his children have come home crying, but the remainder of Doe's assertions go beyond his personal knowledge. Doe was not present at school to witness the teasing and does not know what

was said. (To the extent that he relies on his children's explanations of events that is inadmissible hearsay, as discussed more fully below.) In addition, Doe was not present at these other children's homes to know what their parents "told" or "instructed" those other children; and Doe also has no basis to say whether those other parents know about his status as a sex offender, whether they accessed the registry, or whether they relied on the registry to issue the supposed instructions to their children. For this testimony to be relevant to this case, Doe must show that the other parents "know nothing" more about him besides what the parents allegedly learned from the registry information. This is so because it is the only way for Doe to isolate his registration status as the sole cause for the other schoolchildren's parents' behavior and statements that he finds burdensome. Yet Doe offered no basis for the district court to find that Doe would have personal knowledge about the source or extent of parents' knowledge about him, about KORA, about the KBI's sex offender registry, or about the Johnson County Sheriff's sex offender registry. In these instances, Doe merely engages in speculation.

The same problem exists for Doe's testimony about what happened at a former job. Doe provided no basis to testify to the truth about a former manager's thoughts about Doe's registration status – e.g., concern about "liabilities" for company (Vol. IV, p. 318) – or about whether a co-worker found Doe on the registry and told the former manager – e.g., "someone who saw my profile on the registry website informed my manager" (Vol. IV, p. 318). Likewise, Doe's testimony about the truth of whether a hospital barred his entry solely because of his registration status and not his crime is not founded on personal knowledge of the hospital's policies or instructions to its guards. (Vol. IV, p. 322 ("The

[hospital] guard said that, because I was a registered sex offender, the hospital could not accommodate my visit. . . . I was only barred from entering because I was listed on the Offender Registry, not because of my crime.")).

The district court cited *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 275 P.3d 869 (2012), to support the idea that "affidavits satisfy the personal knowledge requirement if the affiant used circumstantial evidence to deduce the facts to which the affiant attested." *Aeroflex* is not reasonably stretched so far as to cover what the district court allowed in this case. In *Aeroflex*, this Court reversed the district court's granting of a defendant's motion to dismiss on personal jurisdictional grounds. To begin, the procedural posture of the *Aeroflex* case affected the standard being applied to the review of the affidavits. Because this was a motion to dismiss for lack of personal jurisdiction being decided before trial without an evidentiary hearing, "any factual disputes must be resolved in the plaintiff's favor and the plaintiff need only make a prima facia showing of jurisdiction." *Id.* at 270, 878-79. The district court erred by failing to view the plaintiff's affidavits in the light most favorable to it, as the plaintiff was the non-movant. The issue at the heart of the dispute over the affidavits was whether the non-movant had established evidence that the movant had misappropriated proprietary information. First, this Court reaffirmed that an affiant's "own conclusions or opinions rather than facts . . . must be disregarded." *Id.* at 278, 883. Next, this Court concluded that other portions of the non-movant's affidavit in question were acceptable because they described "personal knowledge of the facts and circumstances." *Id.* While the plaintiff had no "direct evidence," it had supplied sufficient "circumstantial evidence" of a disputed element of

the plaintiff's claim, allowing the case to move forward. At bottom, *Aeroflex* does not stand for the proposition that personal knowledge is not required in an affidavit, but rather established that personal knowledge of events may be used as circumstantial evidence to survive a challenge to personal jurisdiction. By contrast, here, the district court discarded the personal knowledge standard completely by concluding that the objected-to portions of the Does' testimony were still admissible to show the truth of events they did not witness and the truth of other people's thoughts and motivations.

b. Inadmissible Hearsay

The hearsay problem with the Does' affidavits is also straightforward. Doe asserts that bad things happen to him because he is a registered offender. The Does' affidavits try to support that claim by stating they have been told by other people (e.g., his former manager or their children or a school principal) that there are yet other people (like co-workers or schoolchildren or schoolchildren's parents) who claim to only know about Doe from the offender registry and who then say that Doe is a bad person or call his children names or tell their children to avoid Doe because he's an offender. However, neither Doe nor his wife observed the events being described to them or to other people, and thus have no first-hand knowledge as required by 60-256(e). The only plausible basis for these claims is that someone has told Doe or his wife about them. That raises the hearsay rule, which is designed to place the declarant before the court to ensure that there is a credible basis for the facts and inferences being asserted in the testimony. *See Harris*, 259 Kan. at 698, 915 P.2d at 766.

Doe evaded that requirement where he and his wife testified to out-of-court statements by numerous declarants, most if not all being unidentified, while asking the district court to rely on those declarant's statements for the truth of the matter asserted. Specifically, Doe asserts that there are or have been negative effects on him as a result of his registration. To show certain of these asserted negative effects, Doe alleged that other people have communicated, out of court, what they actually believe or think about him and his family, or what they experienced outside of Doe's presence and the reasons for those experiences. (Vol IV, pp. 317-24). To connect the dots in support of Doe's theory of the case, these out-of-court communications must be evidence of the truth of the matter asserted. It was insufficient for Doe to offer the out-of-court statements made to him or his wife to show only what words were uttered regardless of whether the words represent the truth. Instead, Doe needs the unnamed declarants' statements as substantial credible evidence proving that the declarants' believe, think or feel certain things, or have done, witnessed or experienced certain things outside of Doe's presence. This is exactly what the hearsay rule prohibits. Yet this is what the district court allowed.

As an example, there are the allegations of Doe's children being teased at school. (Vol. IV, p. 317). Had Doe personally observed the teasing, these observations would not be hearsay. But he never saw the teasing. Instead, he relies on reports from his children. To be sure, Doe is competent to testify to his observations that his children are upset. But he goes further, and in doing so, goes too far. Both Doe and his wife assert that, outside of their presence, there is teasing going on at school and that the name-calling involves sex-related terms. What the district court and Doe ignored is that the testimony of both

Doe and his wife rely on his children's statements. His children's purported recitation of the events at school are the only basis that Doe has for asserting that the teasing occurred and that it occurred in the way that his children said it did. But Doe offers no testimony on summary judgment aside from that of himself and his wife. Doe deliberately chose not to offer testimony from the persons with personal knowledge of events that he never observed. There are legal consequences to that choice. Doe's recitation of other persons' out-of-court descriptions of events cannot be offered for the truth of the events and, at the same time, be admissible because Doe offers no applicable exception to the hearsay rule.

To summarize, if it does not matter whether the teasing happened or not, then the children's reports about the teasing are *not relevant* and thus inadmissible. If the reports of teasing are offered as true, then they are necessarily *hearsay* and must meet an exception to the hearsay rule. Doe offered no such exception, and thus the statements should have been stricken by the court below. If his children did not tell Doe and his wife about the teasing, then they are just guessing about why their children are upset and the testimony is mere *speculation* which should have been stricken for that reason instead.

The district court concluded that Doe "did not offer the statements to prove the truth of the matter stated." (Vol. X, p. 1829). That is incorrect. If Doe did not intend to rely on any of these descriptions as being true (Vol. IV, p. 317 (teasing at school), p. 318 (work incident), p. 321-22 (school parents' behavior); Vol. V, p. 689 (school parents' behavior and treatment at school)) – then it follows that these particular out-of-court statements can all be assumed to be false. If these descriptions of what other people did and thought are false, then they do not help show that Doe was singled out at work or in

the community based on the registry, that any name-calling ever occurred, or that anyone has instructed their family to avoid Doe and his family.

Instead, the district court relied on these objected-to statements as true in its summary judgment decision, and therefore Doe was obligated to submit evidence that could be put in an admissible form about each of these alleged events, all of which occurred outside of the presence of Doe and his wife. What is missing from Doe's materials are any affidavits from all of these out-of-court declarants, such as the unidentified school principals, unidentified parents, and the unidentified manager that fired Doe. These omissions mean that the objectionable material was inadmissible and should have been stricken from the record.

3. The District Court Erred By Concluding That Journal Articles Are Admissible As "Legislative Facts."

As an initial matter, Doe's request for judicial notice of journal articles was offered only after the State moved to strike Doe's use of that material in his summary judgment brief. (Vol. IX, pp. 1552, 1559, *Plaintiff's Response to Defendants' Motion to Strike*). Importantly, Doe never offered the "social science research" in his listing of uncontroverted facts, and never offered any expert testimony to support reliance on the articles as accurate and trustworthy. The State objected to Doe's maneuver on both of those bases. (Vol.VII, p. 1321, *Defendants' Joint Motion to Strike*); Vol. VII, pp. 1373-82, *Defendant's Memo in Support of Joint Motion to Strike – Table C, Column 3 "Basis for objection"*; Vol. X, pp. 1811-17, *Defendants' Joint Reply in Support of Motion to Strike*).

In denying the motion to strike the journal articles being relied upon by Doe as proof of the punitive effects of offender registration and public notification provisions, the district court concluded that Kansas courts are permitted to admit "social science research, which was sometimes under debate, to support the creation of new law." (Vol. X, p. 1832). Accepting the district court's premise essentially creates a whole new category of evidence that would operate outside the statutory rules of evidence. There is no basis in Kansas law to allow this. In this section, the State explains why the lower court's avoidance of the judicial notice standard was erroneous. Below, in Section B, the State explains why the district court's separate ruling on judicial notice inside its summary judgment ruling was mistaken as well.

In denying the motion to strike Doe's reliance on journal articles as a substitute for formal proof, the district court recited the judicial notice standard but then refused to apply it, stating that, "[b]ecause [Doe's] studies are legislative facts, the judicial notice statutes do not apply." (Vol. X, p. 1832). The district court further explained that "courts have commonly used social science research, which was sometimes under debate, to support the creation of new law." (Vol. X, p. 1832). The district court cited to several court decisions and two journal articles to support its conclusion that journal articles were appropriate sources to resolve questions about the effect of KORA on Doe.

As an initial matter, the district court proposes a distinction between "adjudicative facts" and "legislative facts," citing a federal court decision discussing the difference, but the Kansas rules of evidence make no such distinction. This distinction exists in the federal rules, and referring to it confuses the relevant standard. *Compare* K.S.A. §60-409

with Fed. R. Evid. 201; *see also* Barbara, Lawyer's Guide to Kansas Evidence, §10.4, pp. 307-08. The standard in Kansas is whether the proffered facts are reasonably beyond dispute, and Doe's articles fall well short. Yet even under the federal standard, there is no basis in this case to treat the social science research "under debate" as "legislative facts." The federal case cited and partially quoted by the district court makes this point clear. In federal court, a "legislative fact" is one relied on by a court "'to develop a particular law or policy.'" *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) (quoting 2 K. Davis, Administrative Law Treatise § 15.03, at 353 (1958)). But as the *Gould* court further explained: "Legislative facts are *established truths, facts or pronouncements that do not change from case to case but apply universally*, while adjudicative facts are those developed in a particular case" *Id.* (emphasis added). Even in federal court, "legislative facts" are not facts in controversy – in *Gould* for example, the court affirmed the district court's recognition as legislative facts the facts that "cocaine hydrochloride is derived from coca leaves and is a schedule II controlled substance within the meaning of [21 U.S.C. § 801]." *Id.* Applying the reasoning of the federal rules that creates this distinction, Doe's materials are not "legislative facts" because Doe asked the district court to conclude that what may have happened to other sex offenders in other jurisdictions under different statutes is also likely to happen to him under KORA. That goes directly to the Court's adjudicative function. It would be particularly perverse if Doe's inadmissible hearsay testimony speculating about the effects of KORA were properly excluded and then his assertions were accepted as true because he found similar descriptions in journal articles.

Although the district court cites several U.S. Supreme Court decisions to support the idea that journal articles can be used "to create new law," this mischaracterizes the holdings. The Court in two of these cases either referred to statistics as background on objectively verifiable information or criticized reliance on inconclusive research. *See Kennedy v. Lousiana*, 554 U.S. 407, 128 S. Ct. 2641, 2657 (2008) (referring to statistics about the number of executions of for the crime of child rape to document prevalence of this practice); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S. Ct. 2738, 2776-77 (2007) (criticizing dissent's reliance on social science research noting it was "inconclusive"). And while the Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686 (1954), referred to the research on the effects of segregation, that decision is grounded in the "intangible considerations" of racial segregation, and found that the research "amply supported" the conclusion rather than formed the foundation for it. *Id.* at 691, 692. The sole Kansas case cited involved determining parentage and furtherance of a "longstanding public policy" to avoid "bastardizing." *In re Marriage of Ross*, 245 Kan. 591, 601-02, 783 P.2d 331 (1989). This Court held that the district court had abused its discretion by failing to review independently the facts in the record. *See id.* at 602. To the extent that the research cited in that decision had any bearing on the holding, it addressed the unremarkable point that "[a] child's psychological tie to a parent is not a simple, uncomplicated relationship." *Id.* at 601.

The thrust of all of the cited authority is summed up by a statement from one of the journal articles cited by the district court: "Today, it is generally accepted that when

judges are formulating rules of general application they may act either from knowledge already possessed or upon investigation of pertinent social, economic, political or scientific general facts." Steve Leben & Megan Moriarty, A Kansas Approach to Custodial Parent Move-Away Cases, 37 Washburn L.J. 497, 526. But that is not what is at issue in this case. The district court was not charged with "creating new law" or "formulating rules of general application." Rather, the district court was charged with adjudicating the effect of KORA and applying binding federal constitutional precedent, and, as explained below, it failed to do so properly.

The social science research presented by Doe to the district court was offered to satisfy Doe's burden of proof to establish punitive effects resulting from KORA. Faced with no formal proof, and faced with facts reasonably in dispute, the district court classified these facts as "legislative," and therefore moved them beyond the reach of any applicable evidentiary standard. That result is at odds with the statutory standards for evidence in Kansas and with the principle of a fair adjudication on the merits.

At the summary judgment stage, the district court's admission and reliance on inadmissible testimony and journal articles as uncontroverted material fact unfairly prejudiced the State. For that reason, the ruling on the motion to strike should be reversed.

B. The District Court Erred by Taking Judicial Notice of Facts Contained in Journal Articles Where Those Facts are not "Reasonably Beyond Dispute."

1. Standard of Review

A district court's decision about taking judicial notice of evidence is reviewed under the same standards as other evidentiary rulings. K.S.A. 60-412(b). "[A]n appellate court may review a district court's evidentiary determination under an abuse of discretion or as a matter of law. When the issue involves the adequacy of the legal basis for the district court's decision, the issue is reviewed using a de novo standard." *Denton*, 296 Kan. at 257, 294 P.3d at 217.

2. The District Court Erred in Taking Judicial Notice of Journal Articles As a Substitute for Formal Proof of Whether KORA Has Punitive Effects.

In its summary judgment decision, the court below took judicial notice of several articles from research journals for two purposes. First, the court stated that "social science research confirms that the [offender] registry is the cause of significant employment and housing disadvantages. The Court takes judicial notice of these studies and finds that the public dissemination of registry information serves as an affirmative disability or restraint [on registered offenders]." (Vol. X, pp. 1851-52). The district court then cited several of the journal articles that Doe had included as appendices to his summary judgment memorandum. Second, the district court, *sua sponte,* took judicial notice of an article in the Journal of Law and Economics titled, "*Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*" which had not been cited or provided by Doe. (Vol. X, pp. 1859-60 (citing 54 J. L. & Econ. 161 (2011))). The

district court erred in taking judicial notice of all of these materials as a substitute for formal proof.

Regarding the first category of judicially noticed material, this was material that Doe labeled as "appendices" to his summary judgment memorandum, (Vol. VI, p. 887), and Doe never submitted any expert witnesses to authenticate, explain, or adopt the research in those journal articles. Doe's summary judgment memorandum contained a statement of uncontroverted facts (Vol. II, pp. 91-126), and that list did not include a single one of the supposed "facts" from the journal articles that Doe presented in his arguments as reliable evidence to support summary judgment on his behalf. The State objected to Doe's reliance on journal articles to establish facts in support of summary judgment. (Vol. VII, pp. 1321-23 (*Defendants' Joint Motion to Strike*); pp. 1328, 1376-79, 1380-81 (supporting memorandum)). The first time that Doe sought judicial notice of this material was in response to the State's motion to strike. (Vol. IX, pp. 1552-61). In response, the State objected to having the content of the journal articles being judicially noticed. (Vol. X, pp. 1811-1817).

The district court relied on some of Doe's articles as part of its analysis of Doe's *ex post facto* challenge to KORA's amendments, and the substance of those articles is discussed more fully below as it relates to the constitutional question. Here, on the issue of the appropriateness of taking judicial notice of these articles, it is sufficient to note that the subjects addressed by the articles fail Kansas' evidentiary standard for judicial notice.

Under the Kansas Rules of Evidence, judicial notice is permissible under certain circumstances. *See* K.S.A. §§60-409, 60-410, 60-411. Judicial notice may be taken by a

court of "such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and . . . specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." K.S.A. §60-409(b)(3) and (4). It is well-settled that judicial notice serves as "a substitute for formal proof when the fact sought to be proved is reasonably beyond dispute." Michael A. Barbara, *Lawyer's Guide to Kansas Evidence*, §10.1, p. 303 (4th Ed. 2005) (citing *Casey v. Phillips Pipeline Co.*, 199 Kan. 538, 431 P.2d 518 (1967)).

Here, the lower court substituted journal articles for formal proof of two reasonably disputable subjects regarding the effects of the public notification prong of offender registration programs: 1) problems that sex offenders might experience related to employment and housing; and 2) effects on sex offender recidivism. It was error to judicially notice these materials because a review of the articles shows that they do not support the definitive conclusions reached by the district court and because even assuming the articles lend support, Doe offered no expert witness to authenticate, explain, validate or adopt them.

Regarding the first issue, the district court asserted that it is undisputable fact that "employment difficulties associated with registration are pervasive," (Vol. X, p. 15), but the two articles cited by the district court do not support that statement. The first article documents survey results from sex offenders asked whether they "believe" something negative had happened as a result of being on a registry without verifying whether any of

the reported events had actually occurred. (Vol. VI, p. 886 (Tewksbury, 2009)). The second article likewise relies on self-reported information from sex offenders. (Vol. VI, p. 950-51). The district court also stated that a registered offender's "employment search is often 'fraught with rejections and dead-ends.'" (Vol. X, p. 1852 (quoting Tewksbury, 2006, Vol. VI, pp. 889-900)). That article does not state that this difficulty actually occurs or that it occurs "often." Instead, it states that registered sex offenders "perceive" that conviction or registration or both are the cause of difficulties, and that knowledge of registration status by itself only causes problems "at least occasionally." (Vol. VI, p. 899). Furthermore, a fuller quote from the article shows it does not state that reported rejections occur often but rather states that "finding a job *can be a major challenge and one* fraught with rejections and dead-ends when potential employers learn they are convicted, registered sex offenders." "Can be" is plainly not "often." Moreover, the same article reports that sometimes an offender's conviction alone rather than any information about a sex offense is a perceived cause of employment difficulties: "'The farthest most people get is "have you been convicted of a felony?" A lot of [employers], when they see that, it ends right there.'" (Vol. VI, p. 900). As for any conclusions regarding housing difficulties facing registered sex offenders generally, the district court once again cited the articles that rely on self-reported survey answers about beliefs. (Vol. X, p. 1852). The district court also added an assertion that "offenders often become 'nomadic lepers'" based on housing and employment difficulties, but the cited article instead limited its observation on this point to only certain offenders and did not document any level of

frequency: "For example, in states across the country community notification has made *some high-risk offenders* 'nomadic lepers' of sorts." (Vol. VI, p. 1170) (emphasis added).

The second subject treated by the district court as indisputable is whether public notification provisions increase sex offender recidivism. The district court relied on a single journal article, but that article does not establish anything conclusive on the hotly debated subject of recidivism. To begin with, the authors' conclusion is merely "that notification *may* actually increase recidivism," not that notification actually does so. 54 J. L. & Econ. at 161 (emphasis added). Furthermore, the authors acknowledge research showing "the decline [with age] for sex offenses may be more gradual." 54 J. L. & Econ. at 162. Also cited by the authors is a 2003 Department of Justice analysis of crime statistics, which reported that released sex offenders were four times more likely to be re-arrested for a sex offense than released non-sex offenders. *See* Langan, Schmitt, and Durose, 2003, at p. 1, available at http://www.bjs.gov/content/pub/pdf/rsorp94.pdf. While the 2011 article represents more recent scholarship on a debated subject, the authors concede that uncertainty is a significant issue regarding recidivism: "Like most studies of criminal behavior, we can only examine the frequency of reported crime, not actual crime, and so it is possible that our findings are affected or driven by changes in victim reporting behavior." 54 J. L. & Econ. at 190. The authors state that according to one study, "less than 50 percent of rape and sexual assault victimizations are reported to the police (Rennison 2002)." *Id.* In addition, the authors acknowledge that "researchers are still in the process of measuring the benefits of registration and notification laws." 54 J. L. & Econ. at 192. As the article judicially noticed by the district court itself shows, the

subject of recidivism – and of the benefits of public notification laws generally – is not a closed subject, and thus the district court erred in accepting the article as a substitute for formal proof.

Finally, even assuming that any of the journal articles judicially noticed by the district court supported firm conclusions about actual events occurring to Doe or any registered sex offender in Kansas pursuant to KORA, Doe provided no expert testimony to justify the district court's reliance upon the statements in the articles. This Court's decision in *Casey* (cited by Judge Barbara) is instructive. There, this Court applied K.S.A. §60-409(b) and held that judicial notice of the fact that gasoline-tainted water kills grass was proper because the court "could take [ ] cognizance without proof of fact of the general qualities of gasoline." *See Casey*, 199 Kan. at 552. Furthermore, *Casey* is helpful in another way: it exemplifies the correct approach to incorporating journal articles and statistical research. In *Casey*, an expert witness opined about the subject of business "value," relying in part on research journals. *See id.* at 547-48. The journals themselves were never admitted into evidence nor relied upon independent of the expert's opinion. *See id.* This Court held the expert witness' testimony could properly rest on his interpretation of information in the journals. *See id.* The trial court was never going to consider independently the journal articles, but rather was allowed to receive the expert witness' professional conclusions about those articles. The expert witness' testimony about the journals was the required link. That critical link is missing in this case because Doe never offered any expert testimony at all.

For all these reasons, the district court ruling on judicial notice should be reversed.

C. The District Court Erred in Concluding KORA, as Amended, Violates the *Ex Post Facto* Clause of the United States Constitution.

1. Standard of Review

Whether a law violates the *ex post facto* prohibition is reviewed de novo because the issue involves a constitutionality challenge to a statute. See *State v. Cheeks*, - - - Kan. - - - -, 310 P.3d 346, 350-51 (2013). During this review, courts presume the statute is constitutional and resolve all doubts in favor of upholding the legislation. *Id.* Doe, as the party challenging the constitutionality of a statute, bears a "weighty" burden. *Id.* at 351.

2. The U.S. Supreme Court's Decision in *Smith v. Doe* Sets out the Federal Constitutional Standard for Analyzing an E*x Post Facto* Claim.

In *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003), the United States Supreme Court considered for the first time a claim that a sex offender registration and notification law violated the *Ex Post Facto* Clause. *Smith*, 538 U.S. at 92. The Court explained the framework for analyzing this type of constitutional challenge. First, a court must determine whether the legislature meant to establish a civil regime. *See id.* If so, then a court must "further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* (internal quotation marks omitted, alteration in original). *Accord Myers*, 260 Kan. at 677-78, 681, 1030-31, 1033. (explaining *ex post facto* analysis requires examination of legislation's purpose and effect).

The burden of proof is high on a challenger raising an *ex post facto* claim: "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (internal quotation marks omitted). When examining the legislation's effects, the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), are "'useful guideposts.'" *Smith*, 538 U.S. at 97 (quoting *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)). However, the factors are "'neither exhaustive nor dispositive.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)). The five factors of particular relevance in analyzing the legislation's effects are whether an offender registration and public notification regime: "[1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Id.*

As in most states and consistent with federal statutory requirements, Kansas' offender registration has two branches: first, offenders meeting the statutory definition are required to provide information to law enforcement agencies so that law enforcement can identify and locate sex offenders; and second, certain registration information provided is made available to the public. These two branches are colloquially known as registration requirements and public notification requirements. Each of these branches withstands an *ex post facto* challenge.

The requirement for sex offenders to register with a law enforcement agency has been the law of the land in Kansas in some form since 1994. In 1996, this Court recognized the two branches as distinct and held that the registration requirements were non-punitive and therefore retroactive application to offenders convicted before passage of KORA presented no problem under the *Ex Post Facto* Clause of the United States Constitution. *See Myers*, 260 Kan. at 695, 925 P.2d at 1041 ("KSORA's registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends."). In 2010, the Kansas Court of Appeals held that extending the duration of registration is not an *ex post facto* violation. *See State v. Evans*, 44 Kan. App. 2d 945, 948, 242 P.3d 220, 223 (2010) ("Because the registration requirement is not punishment and does not violate the Ex Post Facto Clause of the Constitution, any person who has been convicted of any of the offenses listed in K.S.A. §22–4906(d) is now required to register for that person's lifetime regardless of whether the crime occurred before the legislature amended the KORA."). *See also State v. Shaylor*, no. 108,103 at 6 (collecting unpublished appellate opinions rejecting *Ex Post Facto* challenges to registration requirements) (unpublished, *see* Appendix).

Regarding the public notification provision, the *Myers* decision held that those were punitive in effect and thus could not be applied retroactively. *See* 260 Kan. at 698-99, 923 P.2d at 1043. However, that portion of the *Myers* decision has been superseded by the United States Supreme Court's decision in *Smith*. The *Smith* Court examined an Alaska offender registration statute that contained substantially similar registration and public notification provisions. Regarding public notification, the Alaska statute allowed

the public to access certain registration information. Applying the *Mendoza-Martinez* factors, the Court concluded that the effects of the legislation did not negate Alaska's intention to create a civil regulatory program.

First, the Court rejected the argument that registration and public notification resembled the historical shaming punishments of the colonial period. Whatever the stigma experienced by an offender, it results not from being physically displayed for ridicule, but from "the dissemination of accurate information about a criminal record, most of which is already public." *Id.* at 98. In the American criminal justice system, indictment, trial, and sentencing all occur publicly, and "[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Id.* at 99. While publicity may cause negative consequences for the convicted offender, this publicity is not the primary objective of this type of regulatory program. *See id.* The Court also concluded that the purpose and effect of Internet availability of registration information was "to inform the public for its own safety, not to humiliate the offender." Indeed, "[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id.* Internet access is akin to visiting a records archive and makes document searches "more efficient, cost effective, and convenient" for the public. *Id.*

Second, the Alaska act imposed no physical restraint on offenders, and any negative consequences regarding employment or residence flow from the fact of conviction, which is already a matter of public record. *See id.* at 100-101.

Third, regarding the traditional aims of punishment, the Alaska act was not punitive simply because its provisions may help deter future offenses or because it contains varying registration periods based on the type of offense committed. Effective regulation routinely assists in deterrence, and the mere presence of that purpose does not render a program criminal. *See id.* at 102. Further, categorizing reporting periods based on offense type is "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id.*

The Court found the fourth factor – a rational connection to a nonpunitive purpose – to be the most significant factor in determining the legislation's effects were not punitive. *Id.* The program alerts the public to the risk of sex offenders in their community, thereby advancing the legitimate nonpunitive purpose of public safety. *See id.* at 102-103. Importantly, there is no requirement for the program to have "a close or perfect fit with the nonpunitive aims" of the statute. *Id.* at *103.*

Finally, the Court examined whether the Alaska act was excessive in relation to its regulatory purpose and concluded that it was not. The statute was not required to assess a convicted sex offender's future dangerousness and did not need limits on the number of persons with access to the information. The Alaska legislature validly concluded that a sex offense conviction provides evidence of a substantial risk of recidivism. *See id.* at 103-104. The Court noted that it is well-established that:

> The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); see also *id.*, at 33, 122 S.Ct. 2017 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice,

> Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).

Id. at 103. On that basis, states are permitted to make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.*

Nor were the long duration of the reporting requirements and the wide dissemination of the information considered excessive. "Empirical research on child molesters, for instance, has shown that, '[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.'" *Id.* at 104 (quoting National Institute of Justice, R. Prentky, R. Knight, & A. Lee, *U.S. Dept. of Justice, Child Sexual Molestation: Research Issues* 14 (1997)). Furthermore, Alaska's system was a passive one that required individuals to seek access to the information, while ensuring that the information wasaccessible throughout the State. The mobility of our population justifies that approach. *See id.* (citing D. Schram & C. Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism* 13 (1995) ("38% of recidivist sex offenses in the State of Washington took place in jurisdictions other than where the previous offense was committed")).

Accordingly, the Supreme Court determined that Alaska's registration and public notification regime was not punishment and held that its retroactive application did not violate the *Ex Post Facto* Clause. *See id.* at 105-106.

To be sure, the Kansas Supreme Court in *Myers* concluded that the public notification provisions of KSORA amounted to punishment because of the unrestricted public access and the absence of an individualized determination of dangerousness:

> The disclosure provision allowing public access to sex offender registered information, K.S.A. §22-4909, when applied to Myers, is unconstitutional punishment under the Ex Post Facto Clause. The unlimited public accessibility to the registered information and the lack of any initial individualized determination of the appropriateness and scope of disclosure is excessive, giving the law a punitive effect–notwithstanding its purpose, shown in the legislative history, to protect the public.

Myers, 260 Kan. at 700-701, 923 P.2d at 1044. However, the United States Supreme Court in *Smith* subsequently rejected all of the reasoning that led to the *Myers* result.

As an interpretation by the United States Supreme Court of the *Ex Post Facto* Clause of the United States Constitution, *Smith* is controlling precedent. *See, e.g.*, *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P.2d 665 (1959) ("[T]he interpretation placed on the Constitution and laws of the United States by the decisions of the [S]upreme [C]ourt of the United States is controlling upon state courts and must be followed. This we may add is true regardless of views of state courts even though such decisions are inconsistent with their prior decisions.").

The *Myers* court stated that the unrestricted public access "leaves open the possibility that the registered offender will be subjected to public stigma and ostracism," "provides a deterrent or retributive effect that goes beyond [the nonpunitive] purpose," and "goes beyond that necessary to promote public safety." *Myers*, 260 Kan. at 695, 694, 923 P.2d at 1041. As noted, in *Smith*, the United States Supreme Court subsequently determined that unlimited public access does none of these things. Regarding stigma, the

Myers court relied predominantly on a comparison to colonial-era punishments like the badge of punishment in the novel *The Scarlet Letter*, as described in an opinion evaluating the New Jersey offender registration statute. *See Myers*, 260 Kan. at 696-97, 923 P.2d 1041-42 (citing *Artway v. Attorney General of State of New Jersey*, 81 F.3d 1235, 1265 (3rd Cir. 1996)). The United States Supreme Court concluded that "[a]ny initial resemblance to early punishments is, however, misleading," because, as explained above, humiliation is incidental to the dissemination of accurate information from public criminal records. *Smith*, 538 U.S. at 98, 99. Similarly, as explained above, the Court also concluded that unlimited public access was reasonably related to the nonpunitive objectives of the offender registration regime. *See id.* at 102.

Finally, the Court determined that neither the lack of individualized determinations on disclosure nor the provision of unlimited public access made Alaska's statute go excessively beyond its public safety purpose. Specifically with regard to the question of "excessiveness," the *Smith* Court said the excessiveness inquiry "[i]s not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard." *Id.* at 105. The Court concluded that a categorical approach to registration satisfied the constitutional requirements.

> The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.
>
> . . . .

> In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause. *Id.* at 104.

The "wide dissemination of the information" through the Internet was also not unreasonable. *Id.* at 104. "[F]or Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment." *Id.* at 105.

Indeed, the Kansas Court of Appeals has consistently recognized that "*Smith*, as controlling authority on interpretation of the United States Constitution, effectively undermines the holding in *Myers* that the disclosure requirements of KORA are punitive for Ex Post Facto purposes." *In the Matter of E.L.W.*, No. 106,241, 2012 WL 686861 at *4 (Kan. App. 2012) (unpublished, *see* Appendix). *See also State v. Wingo*, No. 108,275, 2013 WL 2936088 at *2 (Kan. App. 2013) (citing *E.L.W.*) (unpublished, *see* Appendix).

In the present case, applying the federal constitutional framework laid out in *Smith*, both the registration and public notification aspects of the current version of KORA continue to pass constitutional muster.

a. As the District Court Concluded Correctly, the Purpose of KORA Remains Non-punitive.

The district court correctly concluded that the 2011 amendments to KORA did not change the purpose of the statute, which remains a civil, regulatory regime aimed at public safety. It is well-settled that the original legislative purpose of KORA is remedial and non-punitive. *See Myers*, 260 Kan. at 678, 923 P.2d at 1031 ("The State counters the

intent of KSORA is regulatory. We agree with the State."); *id.* at 681, 1032 ("We conclude that the legislative history suggests a nonpunitive purpose – public safety."); *id.* at 695, 1041 ("We hold that KSORA's registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends."); *id.* at 698, 1043 ("We hold that the legislative aim in the disclosure provision was not to punish and that retribution was not an intended purpose."); *State v Scott*, 265 Kan. 1, 15, 961 P.2d 667, 676 (1998) (holding that due, in part, "Due to the nonpunitive intent and the concern for public safety in the KSORA" that the public access provisions were not cruel or unusual punishment); *State v. Wilkinson*, 269 Kan. 603, 609, 9 P.3d 1, 5-6 (2000) ("KSORA's legislative purpose is to protect public safety and, more specifically, to protect the public from sex offenders as a class of criminals who are likely to reoffend."); *id.* at 614, 8 ("[W]e hold that the registration and public access provisions of the Act do not violate procedural due process."); *State v Cook*, 286 Kan. 766, 774, 187 P.3d 1283, 1289 (2008) ("[T]his court [has] found that the registration act was intended to promote public safety and to protect the public from sex offenders, who constitute a class of criminals that is likely to reoffend.").

As noted by the district court, the 2011 amendments to KORA did not change that purpose. The amendments brought Kansas' offender registration and public notification provisions into line with the minimum federal standards established in the Title I of Adam Walsh Child Protection and Safety Act of 2006, known as the Sex Offender Registration and Notification Act ("SORNA"), which is a statute directed at public safety. (Vol. X, pp. 1846-47). *See also* 73 Fed. Reg. 38030 (SORNA Final Guidelines).

To the extent that the Kansas Legislature sought to meet those federal standards, in part, to secure federal funding, those funds assist with public safety, and thus the amendments' purpose remains non-punitive. *See* 42 U.S.C. §§3750 (name of grant program is "Edward Byrne Memorial Justice Assistance Grant Program"); §3751(a)(1) (grants authorized for "criminal justice" purposes).

b. The Registration Requirements of KORA Do Not Violate the *Ex Post Facto* Clause Because They Are Not Punitive in Effect.

The district court held that the registration requirements of the 2011 version of KORA, taken together, led to punitive effects on sex offenders, and thus applying the new registration requirements to Doe amounted to a retroactive application of a punitive law in violation of the *Ex Post Facto* Clause. To reach this result, the district court singled out the following specific registration provisions of KORA: 1) having to register in-person four times per year (22-4905(a)); 2) having to pay a $20 fee each time an offender registers (22-4905(k)); 3) having to register for more years (22-4906(b)(1)); 4) being subject to a large penalty for failing to register (22-4903(c)(1)(A)); and 5) not having the opportunity to reduce the length of registration (the district court cited 22-4908, which prohibits court-ordered relief from registration). (Vol. X, pp. 1850, 1853, 1861-63). None of these attributes of the registration requirements of KORA warrant a conclusion that registration is punitive in effect. The State applies the *Mendoza-Martinez* factors to the registration requirements below.

i. Traditionally Considered Punishment

The requirement to provide registration information to law enforcement agencies is not a traditional form of punishment. As the *Smith v. Doe* Court observed, sex offender registration statutes "'are of fairly recent origin,' which suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." *Smith*, 538 U.S. at 97 (quoting *Doe I v. Otte*, 259 F.3d 979, 989 (9th Cir. 2001)). Thus, this factor does not indicate the registration requirements are punitive.

ii. Affirmative Disability or Restraint

The district court cited in-person registration and payment of a $20 fee at each registration as evidence that the registration requirements imposed an affirmative disability or restraint. Neither one rises to the level of a restraint or disability.

In-Person Reporting

The district court concluded that the requirement to register in-person four times per year was an affirmative disability or restraint. (Vol. X, pp. 1850-51). The district court noted that the Alaska statute under review in the *Smith* decision did not require in-person reporting, and cited to a Maine Supreme Court decision applying Maine's state constitutional *ex post facto* provision instead of the federal one. (Vol. X, p. 1851).

KORA has required in-person reporting since 2006, when it was required twice per year. *See* 2006 Kan. Sess. Laws Ch. 214, §7, p. 1846 (amending K.S.A. §4904(d)) Vol. VIII, p. 1477, *Defendant's Joint Response to Plaintiff's Motion for Summary Judgment*). The federal standards in SORNA require in-person reporting, which ensures the accuracy and currency of registration information. In-person reporting provides

"reasonably frequent opportunities to obtain a photograph of the sex offender and a physical description that reflects his or her current appearance," and opportunities to review registration requirements with the offender and obtain any new information. 73 Fed. Reg. 38067. This also promotes the protective and investigative functions of local law enforcement agencies by making agency personnel familiar with local offenders. *Id.*

In the words of the federal First Circuit Court of Appeals, upholding SORNA against an *ex post facto* challenge:

> To appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance. Further, the inconvenience is surely minor compared to the disadvantages of the underlying scheme in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld.

United States v. Parks, 698 F.3d 1, 6 (1st Cir. 2012). *See also United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011) ("Appearing in person may be more inconvenient, but requiring it is not punitive."). Indeed, the other federal Circuit Courts of Appeal that have analyzed the in-person reporting requirement in SORNA also have held that it does not represent an affirmative disability or restraint. *See United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013); *United States v. Shannon*, 511 Fed. Appx. 487, 491 (6th Cir. 2013) (unpublished, *see* Appendix); *United States v. Hinkley*, 550 F.3d 926, 937-38 (10th Cir. 2008), *abrogated on other grounds by Reynolds v. United States*, 132 S. Ct. 975 (2012). Likewise, the federal circuit courts of appeal reviewing *ex post facto* challenges

to state statutes that require in person reporting have held that the requirement does not rise to the level of punitive effect. *See American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1056-57 (9th Cir. 2012) (Nevada statute); *Hatton v. Bonner*, 356 F.3d 955, 964 (9th Cir. 2004) (California statute). Similarly, those state supreme courts applying federal law to state statutes requiring in-person reporting have also upheld the in-person reporting requirement as non-punitive. *See State v. Eighth Jud. Dist. Ct.*, 306 P.2d 369, 383-84 (Nev. 2013); *State v. Harris*, 817 N.W.2d 258, 270-73 (Neb. 2012).

Here, the in-person reporting requirement in KORA does not prohibit Doe from moving or traveling, and so it presents no limit on his choices. The burden of registration on Doe is not punitive, but rather a routine part of many regulatory programs. "Registration is frequently part of civil regulation, including car licensing, social security applications, and registering for selective service." *Parks*, 698 F.3d at 6.

Registration Fees

The district court concluded that payment of the $20 fee at each registration was a substantial cost that amounted to an affirmative disability. (Vol. X, p. 1853). This fee is neither substantial nor punitive. To begin with, Doe lives and works (self-employed) in only one county, Johnson County, and does not attend school, so he will not pay the "maximum of $240 per year" that the district court described. (Vol. X, p. 1853). Instead, Doe will pay $20 each quarter, for a total of $80 per year. In any event, these fees are a reasonable reimbursement to the registering law enforcement agencies to cover the costs of administering the offender registration program. *See, e.g., State v. Weis*, 47 Kan. App.

2d 703, 719, 280 P.2d 805, 816 (2012); *State v. Unrein*, 47 Kan. App. 2d 366, 372, 274 P.2d 691, 696 (2012). For those reasons, the fees are not punitive.

iii. Promotes Traditional Aims of Punishment

The district court correctly held, pursuant to *Smith*, that KORA (both the registration and public notification provisions) is not retributive and is not punitive just because it deters crime. (Vol. X, p. 1850). The *Smith* Court held that an offender registration program is not considered punitive or criminal because it assists in deterrence because effective regulation routinely assists in deterrence. *See Smith*, 538 U.S. at 102. Additionally, the Court held that categorizing reporting periods based on offense type is "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id.* Those conclusions apply as equally to KORA's registration requirements.

iv. Rational Connection to Non-punitive Purpose

The district court correctly concluded that the registration requirements are connected rationally to KORA's public safety purpose. (Vol. X, p. 1858-59). In doing so, the district court took judicial notice of a study that the State contends cannot be relied upon, as explained above. Even without relying on that journal article, KORA's registration requirements have a demonstrably rational connection to the statute's purpose. Among other things, the registration requirements ensure that local law enforcement personnel are familiar with sex offenders and that local and state law enforcement agencies are thorough and consistent in enforcing the statute. *See, e.g.*, 73 Fed. Reg. 38067 (SORNA Final Guidelines, Section XI).

v. Excessive for Non-punitive Purpose

The district court concluded that three aspects of KORA's registration requirements rendered registration punitive: 1) the extended duration of reporting; 2) the penalty for failing to register; and 3) no opportunity for relief from registration. (Vol. X, p. 1861-63). The district court erred in concluding these demonstrate a punitive effect from registration.

First, the extended duration by itself does not represent any new reporting requirement. The Kansas Court of Appeals has already rejected a challenge based on extended registration terms in *Evans*, explaining that because this Court held in *Myers* that registration is not punitive, there is no *ex post facto* violation when the duration of registration is extended. *See Evans*, 44 Kan. App. 2d at 948, 242 P.3d at 223. Assuming that the registration requirements are now considered punitive, it is not simply their duration that makes them so. In any event, while the district court concluded that Doe's recidivism risk is declining, and therefore an extended term was unwarranted (Vol. X, p. 1862), the Legislature was entitled to hedge on the side of safety when revising the reporting duration. Indeed, the danger of recidivism addressed by the statute is very real. Aside from Doe's fondling of his 14-year-old victim on December 24, 2001 and again April 2, 2002 (Vol. III, pp. 177, 202, *Defendants' Summary Judgment Memo* and *Journal Entry of Judgment*), Doe admitted to the investigating officer of an incident "almost exactly like" those incidents with another 14-year-old victim in "1984 or 1985." ((Vol. III, p. 178, 219, *Defendants' Summary Judgment Memo* and *Narrative Report*)). (*See also* Vol. III, p. 180, 288, *Defendants' Summary Judgment Memo* and *Crabtree Affidavit* (at

least 80% or more of the time in cases involving more severe or offensive sex-related offenses, where there is substantial evidence of a criminal offense, there has been a prior arrest, charge or conviction for a sex related crime).

Second, the district court erred by concluding that the severity of the penalty for failing to register transformed registration into punishment. To begin with, the wisdom of the legislature's decision to make failing to register a felony is simply not at issue in this case. *See State v. Mossman*, 294 Kan. 901, 916, 281 P.3d 153, 163 (2012) ("The classification of sex offender registration crimes and the proportionality of sentences for those crimes are not at issue" in a challenge to the constitutionality of lifetime postrelease supervision.). The purpose of a penalty for failing to register is to ensure compliance. The Legislature is entitled to make policy choices on penalties, and those choices reflect the priority assigned to KORA. Sex offenses are repugnant, and the risk of sex offense recidivism remains high – the Legislature chose to make sex offender registration a top priority. That choice does not represent a judgment that registration is punitive, only that compliance is a paramount goal. In any event, many civil regulatory programs have steep penalties for failure to comply, and that does not render regulation into punishment.

Finally, the district court wrongly concluded that because KORA lacks any "mechanism for challenging long registration terms, offenders who are compliant with the registration requirements and have a low risk of recidivism suffer consequences that outweigh the minimal increases in public safety created by registration." (Vol. X, p. 1863). The district court's holding essentially mandates that KORA contain a "mechanism" to tailor registration duration to specific recidivism risks. The *Smith* Court

rejected this reasoning, holding that the federal constitution allows broad categorical offender registration programs. States are permitted to make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences," and there is no requirement for the program to have "a close or perfect fit with the nonpunitive aims" of the statute. *Smith*, 538 U.S. at 103.

In sum, the registration provisions are not punitive in effect, there is no *ex post facto* violation in applying the 2011 version of KORA to Doe.

c. The Public Notification Requirements of the KORA Do Not Violate the *Ex Post Facto* Clause Because They Are Not Punitive in Effect.

The district court separately held that the public notification requirements of the 2011 version of KORA, taken together, led to punitive effects on sex offenders, and thus applying the new notification requirements to Doe amounted to a retroactive application of a punitive law in violation of the *Ex Post Facto* Clause. Applying the *Mendoza-Martinez* factors, the district court placed the most weight on two general conclusions regarding public access to registration information: 1) that it may result in sex offenders encountering difficulties with employment or housing; and 2) that it may lead to increased recidivism in sex offenders. (Vol. X, p. 1851-53, 1859-60). The district court also singled out the requirement that the notation "RO" be placed on an offender's driver's license (K.S.A. §8-243(d)). (Vol. X, p. 1857). But the district court also reached beyond KORA's provisions in concluding that the statute had a punitive effect. The district court attributed two website functions to KORA that are not part of the statutory program, namely the ability on the Sheriff's website to "share" links to offender

registration information via other, non-governmental social media websites, such as Facebook or Twitter, and the potential for people to use these non-governmental websites to make comments about offenders. (Vol. X, p. 1855). None of these attributes of the public notification requirements of KORA warrant a conclusion that public notification is punitive in effect. The State applies the *Mendoza-Martinez* factors below to the public notification requirements.

i. Traditionally Considered Punishment

The district court concluded that "KORA's web notification provisions and drivers' license notations resemble the traditional, colonial punishments." (Vol. X, p. 1855). The web provisions cited by the district court are not statutory provisions in KORA, and the driver's license provision is, at most, ambiguous to the public. Thus the district court erred in concluding that these items show that KORA is punitive.

Referring to the "web notification provisions," the district court concluded that the State's and Sheriff's websites "are distinguishable in two ways from [the website] in *Smith*," and the court specified that the Sheriff's website "includes tools for sharing registrant information that were not available in *Smith*," and "citizens can now use the county-sponsored notification website to comment on registration entries and shame offenders." (Vol. X, pp. 1855-56). To begin, the district court does not accurately describe the functionality of the Sheriff's website. There is no evidence in the record to support a finding that anyone can use the Sheriff's website "to comment on registration entries." The sum total of the relevant findings of fact made by the district court on this point are listed in paragraph 5 of the "Uncontroverted Facts" of the summary judgment

decision: "Members of the public can access Doe's registration information by searching for his name, city, or address on the Johnson County Sheriff's website. The website's 'Share & Bookmark' feature that "allows users to share registry information via email, Google, Delicious, Stumble Upon, Windows Live, Facebook, Twitter, MySpace, Digg, and Reddit." (Vol. X, p. 1839). Although the court's opinion later asserts that the Sheriff's website is "used" to comment on offenders, any commenting is done by "social media users" on "social media websites," not the Sheriff's website. Because the record shows that there is no opportunity on the Sheriff's website directly to make any comments or to "shame" offenders, and the district court's conclusion about the punitive effect of comments on the Sheriff's website can be disregarded.

What remains of the district court's attempt to distinguish KORA's website registry from the Alaska website at issue in *Smith* are the "tools for sharing" registry information. However, there are two reasons why those tools do not represent punitive effects attributable to KORA. First, KORA does not require any law enforcement agency's website to include these links to social media websites. Whether the Sheriff's website includes those tools is irrelevant for purposes of evaluating the constitutionality of the 2011 amendments to KORA. Second, those tools are mere links to third-party websites, and what occurs on those websites cannot be attributed to the government for purposes of this *ex post facto* challenge. Doe's conviction status is a matter of public record, and there is nothing stopping any private, third-party website from making that information available and allowing users to post comments. None of that potential activity is encouraged or authorized, let alone mandated, by KORA.

Turning to the notation "RO" that is required to be placed on the driver's license of a registered offender, the district court erroneously concluded that this was a "visible badge of criminality" because of the risk that "community members who view the driver's license . . . may ask questions about the 'RO' notation." (Vol. X, p. 1857). The district court's conclusion should be rejected for three reasons. First, Doe presented no evidence that anyone besides a law enforcement officer that Doe has shown his license to has ever asked about the notation or associated it with his status as a registered sex offender. Second, the letters "RO" do not, by themselves, provide any plain, unambiguous link to the offender registry. The purpose of the assigned identifier is to "readily indicate to law enforcement officers that such person is a registered offender." K.S.A. §8-243(d). Lacking any additional context, to the uninformed viewer of Doe's license, the letters "RO" are not a visible badge of anything. Second, even if someone other than a law enforcement officer were able to discern from the letter "RO" that Doe was a registered offender, that, by itself, does not reveal anything specific about the conviction that resulted in requiring Doe to register.

In any event, the only information revealed about Doe is his publicly available conviction record. In Kansas, an offender's conviction information is public. *See* K.S.A. §45-221(29)(A). For purposes of examining whether an offender registration regime has a punitive effect under the federal *Ex Post Facto* Clause, *Smith* definitively cut any possible tie between a registry that includes publicly available conviction information and a claim of punitive "stigma" or "shaming" resulting from public access to that conviction information. The respondents in *Smith* raised the exact argument made by Doe in this

case. *See id.* at 97 ("Respondents argue, however, that the Act – and, in particular, its notification provisions – resemble shaming punishments of the colonial period."). The *Smith* Court examined the shaming argument in detail, and rejected it in full. As the Court explained:

> Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.
>
> . . . .
>
> *By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.* On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

Id. at 98-99 (emphasis added). Doe cannot overcome this ruling – it has been conclusively determined that dissemination of accurate, public conviction information in furtherance of a public safety purpose is not public shaming.

ii. Affirmative Disability or Restraint

The district court determined that public notification of registry information pursuant to KORA subjects offenders to an affirmative disability or restraint "because it

often causes them occupational and housing problems." (Vol. X, p. 1851). As discussed above, on this subject, the district court erred in relying on inadmissible testimony from Doe and his wife as well as several journal articles for this conclusion. Those rulings should be reversed because the district court failed to apply the proper legal standard. In addition, as also discussed above, the journal articles cited by the district court are much less definitive than the district court described them to be.

In any event, even assuming that the self-reported difficulties described by the various offenders surveyed in these journal articles were accepted as true – without requiring any formal proof – the difficulties result from the offenders' conviction, which is a matter of public record. Just like the situation facing offenders subject to the Alaska statute upheld in *Smith*, whatever negative repercussions are experienced by Doe, they are a result of his conviction, which is undeniably a piece of publicly available information. For the purposes of *ex post facto* analysis, KORA is not the source of any employment or housing difficulties suffered by Doe.

iii. Promotes Traditional Aims of Punishment

As discussed above, the district court correctly concluded that both parts of KORA should not be considered punitive based on this factor (Vol. X, p. 1850), and, applying *Smith*, this factor does not indicate KORA's public notification requirements are punitive.

iv. Rational Connection to Non-punitive Purpose

The district court concluded that the public notification provisions "are not rationally related to public safety" because one journal article argues that these types of

provisions "may" increase sex offender recidivism. (Vol. X, p. 1860-61). As discussed above, the district court erred in taking judicial notice of this journal article, which in any event falls well short of presenting indisputable conclusions on sex offender recidivism.

Ultimately, KORA is directed at notifying the public about sex offenders in their vicinity, and the public notification provisions unquestionably accomplish that purpose. As the *Smith* Court explained, a notification program that alerts the public to the risk of sex offenders in their community advances the legitimate non-punitive purpose of public safety. *See Smith,* 538 U.S. at 102-103. The public notification provisions do not require "a close or perfect fit with the nonpunitive aims" of the statute. *Id.* at *103.*

And even assuming that estimates of sex offender recidivism rates reveal questions about how effective public notification provisions are, efficacy is not the constitutional standard being applied here. The Legislature is the proper forum for debating the tradeoffs associated with different policy choices, and for evaluating the merits of competing approaches. As this Court explained in *Myers*, "[p]ublic access to sex offender registration is a matter of legislative public policy." 260 Kan. at 699. The district court erred in substituting its judgment on this issue.

v. Excessive for Non-punitive Purpose

The district court concluded that "the duration of registration, consequences for failing to register, denial of relief from registration requirements, and stigma associated with registration are not reasonable in light of KORA's public safety goals." (Vol. X, p. 1864). As discussed above regarding the registration provisions, the duration, potential penalties for failing to register, and lack of provisions to end registration early are

insufficient to show that KORA has punitive effects. This leaves only the potential for stigma, which also falls short for the same reasons explained above regarding the lack of shaming or affirmative restraint. Whatever stigma Doe perceives, his publicly available conviction record is the source of those difficulties, not KORA. After *Smith*, there is no longer any basis to link shaming or stigma or social difficulties to an offender's registration status.

In sum, the public notification provisions are not punitive in effect, there is no *ex post facto* violation in applying the 2011 version of KORA to Doe.

D. The District Court Erred in Granting Doe Leave to Proceed Pseudonymously.

The district court committed legal error and misapplied the evidence to the nine factors from *Unwitting Victim v. C.S.*, 273 Kan. 937, 47 P.3d 392 (2002). Therefore, it abused its discretion in granting Plaintiff leave to file pseudonymously.

1. Standard of Review

The determination of whether a plaintiff's privacy interest is sufficient to warrant pseudonymous proceedings is left to the district court's sound discretion. *Unwitting Victim*, 273 Kan. at 942 (citing *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118 (10th Cir.), *cert. denied* 444 U.S. 856 (1979)).

Although a "trial court's discretion is broad, it is not unlimited." *Fouts v. Armstrong Commercial Laundry Distributing Co.*, 209 Kan. 59, 65, 495 P.2d 1390 (1972). A district court's discretion is abused if it deviates from legal standards or statutory limitations. *State v. Edgar*, 281 Kan. 30, 38, 127 P.3d 986 (2006). This

deviation includes "fail[ing] to properly consider the factors" provided to guide the analysis. *Dragon v. Vanguard Industries, Inc.*, 282 Kan. 349, 354, 144 P.3d 1279 (2006). Discretion is also abused when a decision is arbitrary or where "no reasonable person would take the view adopted by the trial court." *Citifinancial Mortgage Co., Inc. v. Clark*, 39 Kan. App. 2d 149, 151, 177 P.3d 986 (2008). Finally, discretion can be abused "based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *Coulter v. Anadarko Petroleum Corp.* 296 Kan. 336, 357, 292 P.3d 289 (2013).

2. The District Court Erred in Applying the *Unwitting Victim* Factors.

In this case, the district court identified the correct legal standard but misapplied that standard. Furthermore, it ignored relevant case law and made findings that were not supported by substantial competent evidence. Accordingly, the district court's determination that Plaintiff could proceed pseudonymously should be reversed as an abuse of discretion and the case remanded with orders for Plaintiff to amend his petition to include his legal name.

"Lawsuits are public events." *Day v. Sebelius*, 227 F.R.D. 668, 678 (D. Kan. 2005). "Only in the rarest of cases should the trial judge allow the use of pseudonyms." *Unwitting Victim v. C.S.,* 273 Kan. at 948. *Unwitting Victim* provided the first Kansas analysis evaluating whether a plaintiff may proceed pseudonymously under the modern Kansas rules of civil procedure, specifically K.S.A. §60-210(a). 273 Kan. at 940. This Court adopted several factors used by federal courts to guide its analysis:

The factors favoring anonymity are:

> (1) the extent to which the identity of the litigant has been kept confidential;
>
> (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases;
>
> (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity;
>
> (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities;
>
> (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and
>
> (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives.

Unwitting Victim, 273 Kan. at 948, 47 P.3d 392 (internal citations omitted).

> Conversely, the factors militating against the use of a pseudonym are as follows:
>
> [(7)] the universal level of public interest in access to the identities of litigants;
>
> [(8)] whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and
>
> [(9)] whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

Id. No subsequent Kansas cases have addressed these issues in more meaningful detail.

The U.S. Supreme Court has stated "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to

preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 510 (1984). No reasonable person would agree with the district court that Doe demonstrated such an overriding interest in this civil case.

a. The First *Unwitting Victim* Factor: Identity Already Known

The district court concluded that the first factor "strongly support[ed] Plaintiff's request." (Vol. I, p. 42, *April 30, 2012 Memorandum Decision and Order*). The district court committed legal error by assigning the State the burden of proof for the first factor and failing to properly apply the facts to the standard.

The first and most significant factor is the extent to which the litigant's identity had been kept confidential. There is no need to litigate in secret if one's identity is already known. In this case, Doe filed suit and sought leave to proceed pseudonymously on February 15, 2013. (Vol. I, p. 9–25). His name appeared in the very brief submitted for use of a pseudonym, and remained a matter of public record for over two months, until Doe's motion for leave to proceed under pseudonym was heard. Both the State and Doe pointed out that the Doe's legal name appeared in his original Motion for Leave. (Vol. XIII, p. 7, *Defendant's Response in Opposition for Motion to Leave*; Vol. XI, p. 27).

Despite this ongoing and continuous public disclosure, the district court stated in its decision that "it is believed" that Doe's identity is not "known to the public, in this case at this time." (Vol. I, p. 41, *April 30, 2012 Memorandum Decision and Order*). The district court minimized this seventy-one day public disclosure as a "clerical error" and

then rested only on the "belief" that Doe's name was unknown to the public, without any evidence at all from Doe to support that position. (*See* Vol. I, pp. 41–42, *April 30, 2012 Memorandum Decision and Order*). This effectively shifted the burden of proof to the State to establish that the Doe's identity was in fact known to the public, rather than maintaining the movant's burden to prove his identity had been kept confidential. Based on this evidence alone, no reasonable person could conclude that Doe's identity had been kept confidential. In addition, the district court committed legal error by failing to recognize that "the social interest in allowing a party to proceed anonymously is limited" when the party's name has already been in the public domain. *Raiser v. Church of Jesus Christ of Latter-Day Saints*, 182 Fed. Appx. 810, 811 (10th Cir. 2006). Applying the facts, the first *Unwitting Victim* factor did not favor Doe.

b. The Second *Unwitting Victim* Factor: The Basis on Which Disclosure is Feared, and the Substantiality Thereof

The district court also erroneously determined that the second factor, the substantiality of the bases for Doe's fear of publicity, weighed in Doe's favor. The district court determined that because he suffered one isolated, non-confrontational event of trespass and vandalism—over a period of ten years—and had difficulty finding work, Doe was likely to suffer similar harassment if his name was now made public in association with this civil case. (Vol. I, p. 42, *April 30, 2012 Memorandum Decision and Order*). Additionally, the district court cited testimony that Doe's children had complained of being teased at school because of their father's crime. *Id.* Based only on

these points, the district court concluded that Doe had substantial bases to anonymously sue governmental entities and attack the constitutionality of state statutes.

The main problem with the district court's reasoning is that any harassment Doe suffered prior to filing this action or is likely to suffer during or afterwards is a result of his criminal conduct, as explained by the *Smith* decision. Furthermore, Doe's name was in the public domain associated with this case for over two months yet Doe presented no evidence whatsoever that any publicity—much less harassment—came from it. Based on this lack of evidence demonstrating that this civil suit would cause additional or distinct harm, it was unreasonable to conclude that the events surrounding his criminal conviction would resurface because of this case. As a result, Doe failed to demonstrate that "he will face criminal sanctions, actual physical harm, or economic hardship as a result of his name appearing on the caption of his lawsuit." *Unwitting Victim*, 273 Kan. at 949. Accordingly, the second factor should not have favored Doe either.

c. The Third, Fourth, and Fifth *Unwitting Victim* Factors

The district court lumped the next three factors together. It determined that the public's interest in preserving Doe's anonymity (factor three) was strong because the public has a strong interest in resolving constitutional claims, and Doe may elect not to pursue his claim without anonymity (factor five). (Vol. I, p. 43, *April 30, 2012 Memorandum Decision and Order*); *see also Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) ("the public has an important interest in access to legal proceedings ... attacking the constitutionality of popularly enacted legislation"). The district court also determined that this constitutional claim was brought by what is essentially a fungible

plaintiff, making the public's interest in his identity atypically weak (factor four). (Vol. I, p. 43, *April 30, 2012 Memorandum Decision and Order*). All of these conclusions are erroneous.

The only evidence that the district court relied on to determine that Doe may not bring his suit if denied anonymity was a single statement from the Doe's wife in which she said she would consider asking her husband not to file the suit if he could not proceed anonymously. (*See* vol. I, p. 43, *April 30, 2012 Memorandum Decision and Order*). This is not substantial competent evidence showing that Doe would not proceed without anonymity. *See Munck v. Kansas Pub. Employees Ret. Sys.*, 35 Kan. App. 2d 311, 315, 130 P.3d 117 (2006) (describing substantial competent evidence as "evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved"). The showing of Doe's reluctance to proceed publicly was weak, making factor five favor the State. Because that showing was weak, the district court also erred in evaluating the third factor because there was a very low risk that the constitutional question would not be resolved. Furthermore, as at least one federal court has explained, the identity of a litigant is important to ensure there are not repetitive invalid constitutional challenges to the same law. *Femedeer*, 227 F.3d at 1246.

Finally, although the public may have less of an interest in knowing the Doe's identity because he is functionally a class representative, the public certainly does not have an "atypically weak" interest in the identity of those challenging a validly enacted (and presumably constitutional) law that requires them register as sex offenders. These

laws, after all, have been enacted to ensure the public's safety from those who have been convicted of crimes the legislature has determined are particularly threatening. *State v. Evans*, 44 Kan. App. 2d 945, 948, 242 P.3d 220, 223 (2010). Taken together, these factors did not weigh in favor of Doe.

d. The Sixth and Ninth *Unwitting Victim* Factors

These two factors both have to do with the respective parties having improper motives for either pursuing or resisting proceeding pseudonymously. Neither party contended that the other had any improper or illegitimate motive for its position. Yet, the district court seemed to hold that both factors favored the Doe. (*See* vol. I, p. 44, *April 30, 2012 Memorandum Decision and Order*) (stating "Thus, factor number six (6) favors the Plaintiff"; "Finally, factor nine (9) has been previously addressed"). Perhaps the district court disagreed with the State's resisting of Doe's request for anonymity, but there was no showing of any improper motive by any party. In any event, Doe had the burden of proof on this issue, and there was no basis to conclude these factors favored him.

e. The Seventh *Unwitting Victim* Factor

The district court stated that this was the strongest factor in favor of the State. That said, the district court undervalued this factor in its determination, as it determined that issues of res judicata and collateral estoppel were "highly unlikely" to arise (Vol I, p. 44), again without any support from Doe, despite several courts citing it as a concern, and one such case specifically addressing challenges to sex offender registries. *Femedeer*, 227 F.3d at 1246 (mentioning this issue in connection with a challenge to offender

registration laws); *see also Vorhees v. Baltazar*, 283 Kan. 389, 415-16, 153 P.3d 1227 (2007) (dissent stating "[i]t is important for purposes of res judicata, judgment enforcement, and public records that there be a clear record of who are the parties to a lawsuit"). This factor supported the State and deserved to be accorded proper weight.

f. Balancing the Factors

The State does not challenge the district court's analysis of the eighth factor because Doe is not a public figure. Based on the legal standard and the facts, the majority of the factors favored the State or favored no particular party. No factor favored the Doe: he failed to keep his name confidential; he failed to demonstrate that any legitimate threat would be caused by this civil suit (not his criminal past); he failed to show that the public has an overwhelming interest in keeping his identity confidential; he failed to show that the public's interest in knowing who is challenging validly enacted laws is atypically weak; he failed to demonstrate any significant likelihood that he would not file the suit without anonymity; and he failed to rebut the general proposition that "[l]awsuits are public events." *Day*, 227 F.R.D. at 678. The district court's conclusions to the contrary constitute a reversible abuse of discretion, and the ruling should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's granting of Doe's motion to proceed pseudonymously, reverse the district court's denial of the State's motion to strike, reverse the district court's ruling on judicial notice, and reverse

entry of summary judgment in favor of Doe, and direct the district court to enter summary judgment in favor of the State.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and sixteen (16) copies of the above and foregoing were hand delivered this 22nd day of January, 2014 addressed to:

The Clerk of the Appellate Court
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and two (2) copies via U.S. mail, first class, postage prepaid, this 22nd day of January, 2014, addressed to:

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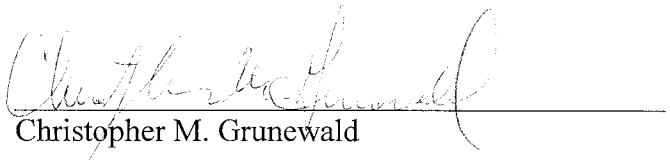

Christopher M. Grunewald

APPENDIX

State v. Shaylor, no. 108,103 at 6
In the Matter of E.L.W., No. 106,241, 2012 WL 686861 at *4 (Kan. App. 2012)
State v. Wingo, No. 108,275, 2013 WL 2936088 at *2
United States v. Shannon, 511 Fed. Appx. 487, 491 (6th Cir. 2013)

NOT DESIGNATED FOR PUBLICATION

No. 108,103

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

PHOEBE E. SHAYLOR,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed December 13, 2013. Reversed and remanded with instructions.

Christina M. Kerls, of Kansas Appellate Defender Office, for appellant.

Thomas R. Stanton, deputy district attorney, *Keith E. Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., PIERRON, J., and KNUDSON, S.J.

Per Curiam: Phoebe Shaylor appeals from her conviction for failure to register as a drug offender. Shaylor was convicted and sentenced in 2006 of unlawful manufacture of methamphetamine. When Shaylor committed that crime—and even when she was sentenced—the Kansas Offender Registration Act (KORA) did not require drug offenders to register. In 2007, KORA was amended to add certain drug offenders to the registration list. Shaylor failed to register, and the State charged her in June 2010 with failing to do so.

Shaylor sought to dismiss the charge arguing that the KORA did not apply to her because it did not apply to drug offenders when she was convicted. Specifically, Shaylor contended that applying the registration statute to her in this after-the-fact manner would violate the Ex Post Facto Clause of the United States Constitution. Shaylor also argued that KORA violated her right to procedural due process and equal protection. Under her procedural due process claim, Shaylor contended that she was not given the opportunity to be heard on whether her conduct of manufacturing methamphetamine fell under the personal use exception. If so, she argued that she would not have been required to register. For the reasons explained later, we reverse and remand this case to the trial court to hold an evidentiary hearing as expeditiously as feasible to determine if Shaylor's conduct comes within the statutory personal use exemption from offender registration. If the trial court finds that Shaylor did manufacture methamphetamine or possessed methamphetamine precursors with intent to manufacture methamphetamine or both for personal use after applying our Supreme Court holding in *State v. Mishmash*, 295 Kan. 1140, 1144-45, 290 P.3d 243 (2012), the court shall vacate Shaylor's conviction and sentence for failure to register as a drug offender.

On January 12, 2004, Shaylor was convicted of two counts of conspiracy to manufacture methamphetamine, two counts of possession of methamphetamine, two counts of possession of drug paraphernalia with the intent to manufacture a controlled substance, two counts of possession of ephedrine with the intent to use it to manufacture a controlled substance, one count of possession of lithium metal with the intent to use it to manufacture a controlled substance, and three counts of child endangerment.

When Shaylor was sentenced on February 13, 2006, the Kansas Offender Registration Act (KORA) did not require any registration for drug offenses. As a result, the trial court did not make any findings on the record for the purpose of determining whether Shaylor manufactured methamphetamine for personal use or for sale.

In 2007, the legislature amended KORA to require registration for certain drug offenses. When Shaylor was released from prison in September 2009, she was told that she was required to register as a drug offender. Shaylor properly registered as a drug offender in September, but she failed to update her registration in February 2010.

On June 24, 2010, Shaylor was arrested and charged with an offender registration violation. Shaylor moved to dismiss the charge on the grounds that it violated the Ex Post Facto Clause of the United States Constitution because there was no registration requirement when she committed the crimes, when she was convicted of the crimes, and when she was sentenced for the crimes.

Shaylor also moved to dismiss the charge because it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Shaylor based this argument on the fact that a person convicted of certain drug crimes is required to register as an offender unless the trial court makes a finding that the crime was committed for personal use. Shaylor contends that, unlike offenders who were sentenced after July 2007, she never had an opportunity to be heard on whether her crimes were committed for personal use.

The trial court denied both motions to dismiss. The trial court denied the ex post facto claim on the grounds that the registration requirement is remedial and not punishment; therefore, it is constitutional. The trial court denied the due process and equal protection claims on the grounds that Shaylor was allowed to present "extensive testimony" at her sentencing hearing on February 13, 2006, regarding her convictions involving the manufacture of methamphetamine. The trial court found that Shaylor testified at her sentencing hearing that she had a severe methamphetamine addiction and that she had been involved in selling the methamphetamine that was manufactured. Although the trial court found that her current argument was "interesting," the court

determined that it was a moot point because Shaylor testified, during her sentence hearing on February 13, 2006, that she had sold the manufactured methamphetamine.

After the trial court denied her motions to dismiss, Shaylor waived her right to a jury trial and the trial court convicted her, after a bench trial on stipulated facts, for failure to register as a drug offender. The trial court sentenced Shaylor to 36 months' probation with an underlying prison term of 53 months.

Does drug offender registration under KORA violate the Ex Post Facto Clause?

Shaylor was convicted and sentenced in 2006 of unlawful manufacture of methamphetamine. When Shaylor committed that crime—and even when she was sentenced—the KORA did not require drug offenders to register. But in 2007, the Kansas Legislature amended the statute to add those convicted of some drug offenses, including the manufacture of methamphetamine, to the list of those required to register. Shaylor failed to register, and the State charged her in June 2010 with failing to do so.

Before sentencing, Shaylor moved to dismiss the failure to register charge based on the claim that the KORA did not apply to drug offenders when she was convicted. Specifically, Shaylor contended that applying the registration statute to her in this after-the-fact manner would violate the Ex Post Facto Clause of the United States Constitution.

After a hearing, the trial court denied the ex post facto claim on the grounds that the registration requirement is remedial and not punishment; therefore, it is constitutional. The trial court relied on *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), to find that KORA did not violate the constitutional prohibition against ex post facto laws.

K.S.A. 2010 Supp. 22-4902(a)(11)(A), in effect when Shaylor was charged with offender registration violation, defined an offender for registration purposes:

"As used in this act, unless the context otherwise requires:

"(a) 'Offender' means:

. . . .

(11) any person who has been convicted of:

(A) Unlawful manufacture or attempting such of any controlled substance or controlled substance analog as defined by K.S.A. 65-4159, prior to its repeal or K.S.A. 2010 Supp. 21-36a03, and amendments thereto, *unless the court makes a finding on the record that the manufacturing or attempting to manufacture such controlled substance was for such person's personal use*;

(B) 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 as defined by subsection (a) of K.S.A. 65-7006, prior to its repeal or subsection (a) of K. S.A. 2010 Supp. 21-36a09, and amendments thereto, *unless the court makes a finding on the record that the possession of such product was intended to be used to manufacture a controlled substance for such person's personal use* . . . ." (Emphasis added.)

K.S.A. 2010 Supp. 22-4904 required registration of "offenders," as defined in K.S.A. 2010 Supp. 22-4902(a).

Based on K.S.A. 22-4902(a)(11)(A) and (B), it is clear that Shaylor was statutorily defined as an "offender" subject to registration duties after the 2007 amendments. Nevertheless, Shaylor contends that charging her with failure to register imposes a new punishment for her previous manufacture of methamphetamine charge, and this violates the Ex Post Facto Clause of the United States Constitution.

Thus, the question is whether the retroactive application of the 2007 amendment violated the Ex Post Facto Clause of the United States Constitution. Under this clause, "[a]ny statute . . . which makes more burdensome the punishment for a crime, after its

commission . . . is prohibited as ex post facto." *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925). A law is ex post facto when two critical elements are present: (1) the law is retrospective; and (2) the law disadvantages the offender affected by it. *State v. Jaben*, 294 Kan. 607, 612, 277 P.3d 417 (2012).

We note that neither the United States Supreme Court nor our Supreme Court considers offender registration requirements to be punishment. See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997). An act that is remedial cannot violate the Ex Post Facto Clause if it does not affect the penalty imposed upon a felon.

In *State v. Armbrust*, 274 Kan. 1089, 1093-94, 59 P.3d 1000 (2002), our Supreme Court concluded that the registration laws could be amended to require registration by people who had already been convicted of some crime; and in *State v. Cook*, 286 Kan. 766, 775-76, 187 P.3d 1283 (2008), our Supreme Court concluded that the punishment for failing to register could be increased after the date of the original offense that triggered the registration requirement. Although Shaylor's registration-triggering offense was a drug offense and both *Cook* and *Armbrust* involved sex offenses, there is no reason that the analysis of the Ex Post Facto Clause should differ in this case.

Moreover, numerous unpublished opinions from our court have agreed with the conclusion that adding drug offenders to the registration list did not violate the Ex Post Facto Clause. See *State v. Richardson*, No. 107,786, 2013 WL 3867329, at *2-3 (Kan. App. 2013) (unpublished opinion) (finding that inclusion of drug offenders in Kansas offender registration did not violate Ex Post Facto Clause), *petition for rev. filed* August 26, 2013; *State v. Scuderi*, No. 107,114, 2013 WL 3791614, at *5-6 (Kan. App. 2013) (unpublished opinion), *petition for rev. filed* August 19, 2013; *State v. Brown*, No. 107,512, 2013 WL 2395319, at *1-4 (Kan. App. 2013) (unpublished opinion), *petition for*

rev. filed June 24, 2013; *State v. Hall*, No. 106,903, 2013 WL 646482, at *3-4 (Kan. App. 2013) (unpublished opinion), *rev. denied* ___ Kan. ___ (August 19, 2013).

Shaylor's criminal offense for failing to register took place in 2010, several years after the statutory amendment requiring that certain drug offenders register. The State is not punishing Shaylor further for her manufacturing of methamphetamine offense; it is punishing Shaylor for her failure to register as required by law in 2010. Thus, there is no violation of the Ex Post Facto Clause here.

Was Shaylor denied equal protection of the law when she was charged with failure to register?

Next, Shaylor argues that she was denied due process and equal protection of the law when she was forced to register as a drug offender without the opportunity to have a hearing on the issue of whether she manufactured methamphetamine for personal use. Shaylor contends that K.S.A. 22-4902(a)(11)(B) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it permits individuals convicted of manufacturing methamphetamine after July 1, 2007, to be provided an opportunity to present evidence on whether the methamphetamine was manufactured for personal use but denies that opportunity to similarly situated individuals like herself who were convicted of manufacturing methamphetamine before July 1, 2007. Shaylor maintains that because she never had an opportunity to be heard on the issue of whether her possession of ephedrine and lithium metal was intended to be used to manufacture methamphetamine for personal use, her conviction should be reversed.

In response, the State contends that this issue is moot because the legislature amended the statute and removed the personal use exception. The State correctly notes that in 2011 the legislature amended K.S.A. 22-4902 and removed the personal use

exception. The State argues that because Shaylor was not sentenced until March 2012, the 2011 amendment applies to Shaylor's case and, therefore, we need not address whether the personal use exception even applies to her. Nevertheless, the sentencing law in effect when the offense occurred is controlling. Generally, it is a "'fundamental rule for sentencing . . . that the person convicted of a crime is sentenced in accordance with the sentencing provisions in effect at the time the crime was committed.'" *State v. Williams*, 291 Kan. 554, 559, 244 P.3d 667 (2010) (quoting *State v. Overton*, 279 Kan. 547, 561, 112 P.3d 244 [2005]).

In this case, Shaylor's offense was committed in February 2010 when she failed to update her registration. She was charged in June 2010 with failure to register in February 2010. Thus, Shaylor's sentence should conform to sentencings provisions in effect in February 2010, which predated the 2011 legislature amendment to K.S.A. 2010 Supp. 22-4902(a)(11)(A) and (B). Such a rule "is fair, logical, and easy to apply," and prevents either the State or the defendant from "maneuver[ing] a sentencing date to take advantage of or avoid a change in a statute." *Williams*, 291 Kan. 554, Syl. ¶ 3.

Before we address Shaylor's equal protection argument, we need to determine whether the trial court made a finding on the record about whether Shaylor manufactured methamphetamine for personal use. If the court did, Shaylor's equal protection argument necessarily fails because it is premised upon her not receiving the opportunity to present evidence of her personal use of the methamphetamine. If the court did not, we must remand for further proceedings in line with that requirement.

To the extent we must interpret KORA, our review is unlimited. See *State v. Wilson,* 295 Kan. 605, 627, 289 P.3d 1082 (2012).

As stated earlier, K.S.A. 2010 Supp. 22-4902(a) defines the meaning of the word "offender" for KORA's purposes. K.S.A. 2010 Supp. 22-4902(a)(11)(B) states that an

offender means any person who has been convicted of "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 . . . *unless the court makes a finding on the record that the possession of such product was intended to be used to manufacture a controlled substance for such person's personal use* . . . ." (Emphasis added.)

When Shaylor was sentenced for her manufacturing methamphetamine charge, KORA did not require drug offenders to register. Thus, the trial court did not (nor did it have reason to) make this finding on the record at sentencing.

But in 2007, the Kansas Legislature amended the statute to add those convicted of some drug offenses, including the manufacture of methamphetamine, to the list of those required to register. Shaylor failed to register, and the State charged her in June 2010 with failing to do so.

When Shaylor was released from prison she was told that she was required to register as a drug offender. Shaylor properly registered in September 2009, but she failed to register in February 2010 which led to her arrest and later conviction. Shaylor maintains that the trial court erred in charging her with failure to register because she was never given an opportunity to have a hearing to determine whether she qualified for the personal use exception.

Under K.S.A. 2010 Supp. 22-4902(a)(11)(A) and (B), registration is mandatory *unless* the individual qualifies for the personal use exception. To qualify for the personal use exception, the trial court must "make" a finding on the record that the manufacturing or attempting to manufacture such controlled substance was for such person's personal use." See K.S.A. 2010 Supp. 22-4902(a)(11)(A) or make "a finding on the record that the

possession of such product was intended to be used to manufacture a controlled substance for such person's personal use." See K.S.A. 2010 Supp. 22-4902(a)(11)(B). Without such a finding, the individual is required to register.

Thus, a conviction for manufacturing methamphetamine or possession of methamphetamine precursors creates the presumption that registration is required. The hearing at issue in this case is intended to determine whether an individual should be excluded from the registration requirement.

In denying Shaylor's claims for equal protection and due process, the trial court held that Shaylor was allowed to present "extensive testimony" at her sentencing hearing on February 13, 2006, regarding her convictions involving the manufacture of methamphetamine. The trial court found that Shaylor testified that she had a severe methamphetamine addiction and that she was involved in selling the methamphetamine that was manufactured. The trial court further found that this argument was "interesting" but determined that it was a moot point because Shaylor testified during her sentencing hearing on February 13, 2006, that she had sold the manufactured methamphetamine.

Moreover, the State contends there is no evidence in the record that Shaylor would have testified that she had committed the manufacture of methamphetamine crimes for personal use rather than for sale of the illegal substance. Thus, the State argues that the trial court has already made the factual determination that the statutory personal use exemption is inapplicable to Shaylor's case. As a result, the State contends that a remand is unnecessary.

Here, the trial court made the factual finding that Shaylor's conduct did not come within the statutory personal use exemption from offender registration. Ultimately, we must determine whether the trial court's factual finding comports with the statutory language of K.S.A. 2010 Supp. 22-4902(a)(11)(A) or (B) or both (A) and (B). As stated

earlier, interpretation of a statute is a question of law over which appellate courts have unlimited review. *State v. Dale*, 293 Kan. 660, 662, 267 P.3d 732 (2011). When reviewing a mixed question of fact and law, an appellate court applies a bifurcated review standard. The court's factual findings are generally reviewed under the substantial competent evidence standard. Its conclusions of law based on those facts are subject to unlimited review. *State v. Miller*, 293 Kan. 535, 547, 264 P.3d 461 (2011).

Based on the court's denial of Shaylor's motion to dismiss the failure to register charge, it is apparent that the trial court concluded that Shaylor did not qualify for the personal use exception because she had testified at her sentencing hearing that she was involved in selling the manufactured methamphetamine. Nevertheless, in arriving at this conclusion, the trial court relied on Shaylor's testimony she gave at her February 2006 sentencing hearing. This testimony was before the statutory personal use exemption was enacted by the Kansas Legislature in 2007 and before our Supreme Court's decision in *State v. Mishmash*, 295 Kan. 1140, 290 P.3d 243 (2012).

In *Mishmash*, our Supreme Court held that to qualify for the personal use exception, the trial court need not find that the individual manufactured methamphetamine *solely* for personal use. At Mishmash's sentencing hearing, the State presented evidence that Mishmash manufactured methamphetamine for his own individual use and for sale to others. Based on this evidence, the trial court held that because the methamphetamine was not manufactured solely for Mishmash's personal use, he was subject to the registration requirement. 295 Kan. at 1141-42. Our Supreme Court disagreed. The court vacated the registration portion of Mishmash's sentence finding that the personal use exception does not require proof that the manufacture of methamphetamine was solely for personal use. 295 Kan. at 1140. In other words, under *Mishmash*, Shaylor would not be excluded from the statutory personal use exemption just because she sold some of the methamphetamine that was produced.

Here, the trial court stated that there was evidence that Shaylor had a severe addiction to methamphetamine; thus, it is not a stretch to assume that Shaylor likely manufactured some of the methamphetamine for personal use. Because the trial court did not have the benefit of the *Mishmash* holding when it concluded that the statutory personal use exemption was inapplicable to this case and because Shaylor was not allowed an opportunity to present evidence on whether she manufactured methamphetamine or possessed methamphetamine precursors with the intent to manufacture methamphetamine or both for personal use, we determine that trial court's factual finding that Shaylor did not come within the statutory personal use exemption is not legally supportable.

Because we conclude that this case should be remanded to the trial court to determine whether Shaylor manufactured methamphetamine or possessed methamphetamine precursors with intent to manufacture methamphetamine or both for personal use, we decline to address Shaylor's Equal Protection Clause challenge and her Due Process challenge. See *Wilson v. Sebelius*, 276 Kan. 87, 91, 72 P.3d 553 (2003) (stating "[a]ppellate courts generally avoid making unnecessary constitutional decisions"); *State v. Schad*, 41 Kan. App. 2d 805, 807, 206 P.3d 22 (2009) ("[W]hen a valid alternative ground for relief exists, an appellate court need not reach the constitutional contentions of the parties.").

Was a jury required to determine whether Shaylor possessed the methamphetamine precursors for personal use?

Next, Shaylor contends that requiring her to register as a drug offender under K.S.A. 22-4902(a)(11) violates her constitutional rights in the manner prohibited by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Although Shaylor acknowledges this issue was decided adversely to her position in *State*

v. Chambers, 36 Kan. App. 2d 228, 238-39, 138 P.3d 405, *rev. denied* 282 Kan. 792 (2006), Shaylor argues that *Chambers* was wrongly decided.

Whether an individual's constitutional rights have been violated is a question of law over which an appellate court has unlimited review. *McComb v. State*, 32 Kan. App. 2d 1037, 1041, 94 P.3d 715, *rev. denied* 278 Kan. 846 (2004).

Apprendi established that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. We find that *Apprendi* is inapplicable to the facts presented here. This is because offender registration under KORA does not constitute a sentence enhancement within the meaning of *Apprendi*. *Chambers*, 36 Kan. App. 2d at 238-39 (*Apprendi* does not apply to sentencing judge's finding beyond reasonable doubt that burglary offense was sexually motivated for purposes of KORA).

In *Chambers*, we held that although KORA contained some punitive qualities, KORA did not impact the *sentences* of those defendants who were required to register. 36 Kan. App. 2d at 238-39. In concluding that KORA registration did not trigger *Apprendi*, the *Chambers* court found that the "punitive aspects inherent in the KORA do not implicate *Apprendi*'s essential focus—prohibiting a sentencing judge from imposing 'a more severe sentence than the maximum sentence authorized by the facts found by the jury.' [Citation omitted.]" 36 Kan. App. 2d at 239.

We agree with the reasoning set forth in *Chambers*. Therefore, even though Shaylor tries to distinguish *Chambers* by arguing that the registration fee is an increase in her penalty, the *Chambers* court held that the punitive aspects of KORA did not implicate *Apprendi*. Thus, as stated earlier, *Apprendi* is inapplicable to the facts presented here.

Thus, we conclude that requiring Shaylor to register under KORA did not increase her sentence beyond the statutory maximum sentence for purposes of *Apprendi*.

Moreover, we further note that KORA specifically requires that drug offenders must register unless the court makes a finding on the record that the drugs were manufactured for personal use. Under a plain reading of the statute, it is clear that the court is required to make this finding, not a jury. The personal use exception is not an element of the crime that needs to be proven to a jury.

Did the trial court violate Shaylor's constitutional rights under Apprendi when it used her prior convictions to enhance her sentence without proving them to a jury?

Finally, Shaylor argues that her constitutional rights under *Apprendi* were violated when the court used her prior convictions to enhance her sentence without proving them to a jury beyond a reasonable doubt. This argument involves a question of law over which this court exercises de novo review. *State v. Pennington*, 276 Kan. 841, 851, 80 P.3d 44 (2003).

As Shaylor acknowledges, this issue was previously decided and rejected by our Supreme Court in *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002), and *State v. Johnson*, 286 Kan. 824, 840-52, 190 P.3d 207 (2008). In *Ivory*, the court held that the use of a defendant's criminal history to calculate the presumptive KSGA sentence does not violate due process as interpreted by *Apprendi*. 273 Kan. at 46-48.

We are duty bound to follow Supreme Court precedent absent some indication that the court is departing from its previous position. See *State v. Ottinger*, 46 Kan. App. 2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. ___ (2012). There is no evidence to suggest that our Supreme Court is considering a departure from its holding in *Ivory*.

State v. McCaslin, 291 Kan. 697, 731-32, 245 P.3d 1030 (2011) (affirming *Ivory*). Thus, this claim must fail.

We reverse and remand for further proceedings.

Unpublished Disposition
270 P.3d 1229 (Table)
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

In the Matter of E.L.W., Appellant.

No. 106,241. | Feb. 17, 2012.

Appeal from Sedgwick District Court; Bruce C. Brown, Judge.

Attorneys and Law Firms

Karen R. Palmer, of Kansas Legal Services, of Wichita, for appellant.

David Lowden, chief attorney, Nola Tedesco Foulston, district attorney, and Derek Schmidt, attorney general, for appellee.

Before McANANY, P.J., LEBEN and ATCHESON, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

*1 Having entered a no-contest plea in juvenile court to an offense of lewd and lascivious conduct, E.L.W. contends the Sedgwick County District Court could not have relied on the recitation the State made supporting the factual basis for the plea to find the conduct to be motivated by his sexual gratification, thereby requiring him to register as a sex offender. We reject E.L.W.'s argument and affirm the district court.

Because of the way the issue is framed on appeal, the circumstances underlying the charge and the adjudication have no bearing on the outcome. We, therefore, dispense with that recitation. We briefly outlined the procedural posture. That does shape the appellate dispute.

E.L.W. entered a no-contest plea on March 11, 2011, to a charge that would constitute lewd and lascivious conduct in violation of K.S.A. 21–3508(a)(2) if committed by an adult. In pertinent part, the offense entails: "exposing a sex organ in the presence of a person ... who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another." K.S.A. 21–3508(a)(2). If a person to whom the exposure is made is less than 16 years of age, as was the case here, the offense is a severity level 9 person felony, K.S.A. 21–3508(b)(2). Otherwise, it is a misdemeanor. K.S.A. 21–3508(b)(1).

The district court may require an adjudicated juvenile to register under the Kansas Offender Registration Act (KORA), K.S.A. 22–4901 *et seq.* See K.S.A. 22–4906(h)(2)(A). Lewd and lascivious conduct is not an offense automatically requiring an offender to register under KORA. But an offender may be required to register if, at sentencing, the district court finds beyond a reasonable doubt he or she committed a "sexually motivated" offense, meaning the perpetrator committed the criminal act for his or her "sexual gratification." K.S.A.2009 Supp. 22–4902(c)(15). The district court made that finding regarding E.L.W. and ordered that he register under KORA and that his registration information be publicly available. K.S.A. 22–4906(h)(2)(A)(i). The district court relied on the factual basis the prosecution offered at the time of the no-contest plea in making that finding.

A person adjudicated in juvenile court may enter a no-contest plea. K.S.A.2009 Supp. 38–2345. The plea entails "a formal declaration that the juvenile does not contest the charge" and results in an adjudication—the same outcome as a guilty plea. K.S.A.2009 Supp. 38–2345. But the no-contest plea "cannot be used against the juvenile as an admission in any other action based on the same act." K.S.A.2009 Supp. 38–2345. A no-contest plea in juvenile court functionally operates the same way as the plea does in the adult criminal justice system. See K.S.A. 22–3209(2). Before accepting a no-contest plea from either a juvenile offender or an adult defendant, the district court must determine that there is a factual basis for the plea. K.S.A.2009 Supp. 22–3210(a)(4); K.S.A.2009 Supp. 38–2344(c)(2). The district court does so by establishing facts supporting each element of the offense. *State v. Bey,* 270 Kan. 544, 546, 17 P.3d 322 (2001). When an offender pleads guilty, he or she ordinarily will describe and admit to sufficient factual circumstances demonstrating the elements during the plea hearing. On a no-contest plea, because the offender does not admit to having committed the offense, the prosecutor makes a factual statement or proffer of what evidence the

State would present at trial to prove the crime. Assuming the recitation supports each element of the offense, the district court then accepts the no-contest plea.

*2 E.L.W. has not included a transcript of his plea hearing in the record on appeal, so we do not know what the prosecutor stated in the proffer supporting the factual basis for the plea. An appellant has the obligation to furnish a record sufficient to demonstrate any claimed error. See *State v. Paul,* 285 Kan. 658, 670, 175 P.3d 840 (2008). We, therefore, must presume the prosecutor presented a factual basis supporting the conclusion that E.L.W. acted for his own sexual gratification, although he could have been adjudicated if he had acted to gratify the sexual desires of another person.

But E.L.W. argues that regardless of the content of the proffer in support of the no-contest plea, the district court could not rely on that information to find the offense sexually motivated for purposes of requiring registration under KORA. And he really expands the argument to suggest the *only* purpose for which the district court could consider the proffer would be the sufficiency of the plea. As E.L.W. presents the issue, it depends on no disputed, material facts and requires only that we construe the statutory language in light of how a district court may use the prosecution's proffer in support of a no-contest plea. That presents a question of law over which we exercise unlimited review.

E.L.W. presents no authority directly supporting his argument, although, in fairness, we note the State has provided no squarely applicable caselaw going the other way either. E.L.W. relies on *State v. Case,* 289 Kan. 457, 468–69, 213 P.3d 429 (2009), to support his argument for the limited use of the proffer. In *Case,* the court held that the prosecution's factual proffer in support of an *Alford* plea could not be used to enhance the defendant's sentence beyond the statutorily prescribed term because the proffer did not amount to a stipulation or an admission by the defendant. Absent the defendant's explicit adoption of the proffer, the facts would have to be proven beyond a reasonable doubt to a jury to allow the district court to rely on them to increase the defendant's punishment. 289 Kan. at 468–69. To do otherwise would violate a defendant's constitutional right to jury trial as outlined in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). See 289 Kan. at 468–69. Although the *Case* decision concerned an *Alford* plea, the Kansas Supreme Court strongly indicated the same issue arises with a no-contest plea, since it also depends upon the State's proffer rather than the defendant's admissions to establish the requisite factual basis. 289 Kan. at 468–69. In short, *Case* teaches that a district court cannot impose a sentencing enhancement beyond the statutorily provided range based on the State's factual proffer in support of an *Alford* plea or in support of a no-contest plea, although it may do so based on a defendant's admission of the necessary facts or a jury's determination of them. 289 Kan. at 468–69.

*3 But that line of authority really does not advance the argument E .L.W. makes here because KORA registration does not amount to an enhanced sentence or punishment. This court has held that KORA registration does not implicate *Apprendi* or the right to jury trial. *State v. Chambers,* 36 Kan.App.2d 228, Syl. ¶ 4, 138 P.3d 405 (2006) (*Apprendi* does not apply to a district court's finding that an offense was sexually motivated for purposes of KORA registration). More broadly, the Kansas Supreme Court has held that registration under KORA does not entail punishment and is, therefore, not subject to challenge under the Eighth Amendment to the United States Constitution or Sec. 9 of the Kansas Bill of Rights as cruel or unusual punishment. *State v. Scott,* 265 Kan. 1, 5–6, 961 P.2d 667 (1998) (citing *State v. Myers,* 260 Kan 669, Syl. ¶ 1, 699, 923 P.2d 1024 [1996]). In *Myers,* the court held that the registration provisions were not punitive and, therefore, did not trigger a defendant's rights under the Ex Post Facto Clause of the United States Constitution, Art. 1, § 10. *Myers,* 260 Kan. at Syl. ¶ 1. Because the registration requirements of KORA do not impose punishment, we believe *Case* to be inapposite. The decision decided only that a prosecutor's factual proffer supporting a defendant's *Alford* plea or no-contest plea could not be used to enhance the statutorily fixed punishment for an offense. The court did not confine the use of the proffer to the district court's acceptance of the plea. The *Case* decision did not suggest, as is essential to E.L.W.'s position here, that a district court could rely on the proffer for no other, nonpunitive purposes in the same case.

We think such use would be appropriate. For example, if a defendant pled no-contest to a series of felony thefts and the State's proffer showed the crimes to be motivated to secure money to feed a drug habit, the district court could rely on that information at sentencing to impose a drug abuse evaluation and recommended treatment as a condition of probation. The district court would not have to hear testimony or receive affidavits at sentencing to establish those circumstances before imposing nonpunitive conditions on the defendant. It could rely on the plea proffer. Registration under KORA is legally comparable. And we see no reason the district court could not similarly rely on the proffer. A defendant, of course, could present information or evidence to dissuade the district court from imposing the nonpunitive condition, be

it substance abuse counseling or KORA registration.

The Kansas Supreme Court has treated KORA registration, on the one hand, as nonpunitive and public disclosure of that information under KORA, on the other, as punitive. We now address that divide and its implications for E.L.W. The *Myers* court held that the public disclosure requirements of KORA amounted to punishment. 260 Kan. 669, Syl. ¶ 1. The *Scott* court accepted that distinction, presumed the disclosure requirements to be punitive, and found they impose a constitutionally permissible form of punishment. *Scott,* 265 Kan. at 4–5, 15. In reaching that conclusion, the *Scott* court noted authority from other jurisdictions finding similar disclosure requirements to be nonpunitive. 265 Kan. at 5.

***4** After *Myers* and *Scott* were decided, the United States Supreme Court weighed in on the constitutionality of requiring public registration of sex offenders in *Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), and held that an Alaska statutory scheme similar to KORA did not impose punishment. The Alaska regimen required convicted criminals deemed to be sex offenders to register with the department of corrections or designated local law enforcement agencies. In turn, those agencies forwarded the registration information to the state's department of public safety. By statute, the department made some of the registration information available for public review, including the offenders' names, photographs, vehicle information, addresses, places of employment, dates of birth, and details about the criminal convictions. The department posted the information on an internet site. 538 U.S. at 89–91. The public disclosures are comparable to those mandated under KORA. See K.S.A.2009 Supp. 22–4907 (information the offender must provide in registering); K.S.A. 22–4909 (public access to information including dissemination on internet sites sponsored or created by law enforcement agencies).

The United States Supreme Court found that the Alaska Legislature did not intend the registration and disclosure requirement to operate as a form of punishment but as "a civil, nonpunitive regime ." *Smith,* 538 U.S. at 96. The Kansas Supreme Court has ascribed the same legislative purpose to KORA, noting "the legislative aim in the disclosure provision was not to punish and that retribution was not an intended purpose." *Myers,* 260 Kan. at 699. The United States Supreme Court found the registrants challenging the Alaska scheme "cannot show ... the effects of the law negate Alaska's intention to establish a civil regulatory scheme" and, thus, held the registration and disclosure requirements to be "nonpunitive." *Smith,* 538 U.S. at 105–06. Accordingly, the United States Supreme Court held the registration and disclosure requirements of the Alaska enactment did not violate the Ex Post Facto Clause. 538 U.S. at 105–06. As we have noted, the *Myers* court held the public disclosure provisions of KORA were punitive and did violate the Clause. And the *Scott* court accepted that conclusion in considering whether public disclosure amounts to cruel and unusual punishment.

We believe *Smith,* as controlling authority on interpretation of the United States Constitution, effectively undermines the holding in *Myers* that the disclosure requirements of KORA are punitive for Ex Post Facto purposes. In turn, the premise underlying *Scott*—that the disclosure provisions of KORA amount to punishment-has been undone. See *Scott,* 265 Kan. at 5 (acknowledging that the Kansas Supreme Court has interpreted the state constitutional bar on cruel and unusual punishment to be coterminous with the Eighth Amendment prohibition). Combined with the holding in *Chambers* that KORA does not implicate *Apprendi* issues regarding sentencing, the legal effect of *Smith* prompts us to conclude the district court could properly rely on the prosecution's proffer as a basis to apply the public disclosure provisions of KORA to E.L.W. Neither additional information nor presentation of sworn testimony was required at the sentencing hearing.

***5** Affirmed.

Parallel Citations

2012 WL 686861 (Kan.App.)

End of Document

302 P.3d 44 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Rebecca WINGO, Appellant.

No. 108,275. | June 7, 2013.

Appeal from Crawford District Court; Donald R. Noland, Judge.

Attorneys and Law Firms

Rachel L. Pickering, of Kansas Appellate Defender Office, for appellant.

Michael Gayoso, Jr., county attorney, and Derek Schmidt, attorney general, for appellee.

Before HILL, P.J., PIERRON and SCHROEDER, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

*1 Rebecca Wingo plead no contest to one count of second-degree intentional murder, and the State dismissed charges of aggravated robbery and conspiracy to commit aggravated robbery. On November 28, 2011, the district court sentenced Wingo to 155 months' incarceration and ordered her to register as an offender for 15 years. On January 19, 2012, the district court denied Wingo's request to modify her sentence. We affirm.

On May 17, 2012, Wingo filed a pro se appeal challenging all the decisions in her case. We retained Wingo's appeal under *State v. Ortiz,* 230 Kan. 733, 640 P.2d 1255 (1982). Now, for the first time on appeal, Wingo argues the district court erred in ordering her to register as an offender for a 15–year period when the law at the time she committed the crime (May 20, 2010) called for a 10–year period. Wingo claims a violation of the Ex Post Facto Clause of the United States Constitution.

The Kansas Offender Registration Act (KORA), K.S.A. 22–4901 *et seq.,* was amended in 2011, after Wingo's conviction but prior to her sentencing, to increase the registration period applicable to Wingo from 10 to 15 years. See K.S.A.2011 Supp. 22–4906(a)(1)(G). The law as it existed at the time Wingo committed her crimes called for a 10–year registration period. See K.S.A.2009 Supp. 4902(d)(3); Kansas 22–4906(a). Wingo argues the increased registration period cannot be applied against her retroactively without violating the Ex Post Facto Clause.

The constitutionality of a statute is a question of law over which we have unlimited review. *State v. Myers,* 260 Kan. 669, 676, 923 P.2d 1024 (1996), *cert denied* 521 U.S. 1118 (1997). The issue is controlled by our Supreme Court's decision in *Myers* as applied in *State v. Evans,* 44 Kan.App.2d 945, 242 P.3d 220 (2010).

Myers was convicted of sexual battery and rape prior to the enactment of the Kansas Sex Offender Registration Act (KSORA), which later became KORA. Myers argued that because KSORA was not in place at the time of his offense, it violated the Ex Post Facto Clause as applied to him. The *Myers* court disagreed and concluded the registration requirements were remedial and constitutional, 260 Kan. at 671, and the purpose of the imposed registration requirement was not punitive but for public safety. 260 Kan. at 681.

The United States Supreme Court also has upheld the constitutionality of offender registration laws. In *Smith v. Doe,* 538 U.S. 84, 105–06, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), the Court held that Alaska's sex offender registration act was not punitive and did not violate the Ex Post Facto Clause. The *Smith* Court held that the registration requirement served to make a valid regulatory program effective and do not impose punitive restraints in violation of the Ex Post Facto Clause. 538 U.S. at 102.

The *Evans* court was asked to decide whether an amendment to KORA could be retroactively applied without violating the Ex Post Facto Clause. In deciding that it could, the court cited to *Myers* where it was said the offender registration provisions are not part of the punishment for the crime. Thus, the *Evans* court held that the retroactive application of changes in the registration requirements did not violate the Ex Post Facto Clause. 44 Kan.App.2d at 948.

*2 Wingo points out that in *Myers* the Kansas Supreme Court held that the public notice provisions of KORA are punishment. As a result, Wingo contends she can only be required to publically register for 10 years and thereafter her registration must be converted to a nonpublic registration. See *Myers,* 260 Kan. 669, Syl. ¶ 1 (treating KORA registration, on the one hand, as nonpunitive, and public disclosure of that information under KORA, on the other, as punitive); accord *State v. Scott,* 265 Kan. 1, 5–6, 961 P.2d 667 (1998) (accepting this distinction in *Myers* in presuming public disclosure requirements to be punitive and finding they impose constitutionally permissible form of punishment).

A recent unpublished decision by a panel of this court undermines Wingo's argument. Specifically, in *In re E.L. W.,* No. 106,241, 2012 WL 686861, at *4 (Kan.App.2012) (unpublished opinion), *petition for review filed* March 19, 2012, the court found the United States Supreme Court's more recent interpretation of the Eighth Amendment in *Smith,* 538 U.S. at 105–06, regarding the nonpunitive nature of Alaska's similar offender registration requirements, effectively undermines the holding in *Myers* that the disclosure requirements of KORA are punitive for Ex Post Facto purposes. The *E.L. W.* court then reasoned: "In turn, the premise underlying *Scott*—that the disclosure provisions of KORA amount to punishment—has been undone. See *Scott,* 265 Kan. at 5 (acknowledging that the Kansas Supreme Court has interpreted the state constitutional bar on cruel and unusual punishment to be coterminous with the Eighth Amendment prohibition)." *In re E.L.W .,* 2012 WL 686861, at *4.

We agree with the *E.L.W.* court's reasoning and accordingly Wingo's argument concerning the limit on public disclosure for a maximum duration of 10 years to avoid a violation of the Ex Post Facto Clause necessarily fails.

Turning to Wingo's primary challenge to the State's position that she should have to register under KORA for 15 years, Wingo contends she is subject only to the 10–year registration period in effect at the time she committed the crime because to hold otherwise would violate the Ex Post Facto Clause. Wingo acknowledges the holdings in *Smith* and *Myers.* She suggests, however, that both the United States Supreme Court and the Kansas Supreme Court might now reach a different result in analyzing the 2011 version of the KORA.

In support, Wingo argues there are stark differences between the following categorical provisions of the current version of the KORA versus the version of the KORA analyzed in *Myers* and the Alaskan statutory scheme analyzed in *Smith:* (1) the class of offenders; (2) the penalties for failing to register; (3) the registration procedures; (4) the duration of registration periods for first-time offenders; (5) the information required for registration; and (6) the ability (or lack thereof) to apply for relief from registration. Based on these differences, Wingo asks us to revisit the issue of whether registration under KORA is now punishment under the factors applied by the United States Supreme Court in the punitive/nonpunitive effect analysis in *Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 168–69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (affirmative disability or restraint; historical view of registration; lack of scienter; punishment, retribution, and deterrence; behavior already a crime; alternative purposes for registration; and registration is excessive). We are bound by precedent.

*3 Until the Kansas Supreme Court signals an intent to depart from its holding in *Myers,* we are duty bound to follow its conclusion that the KORA registration requirement challenged by Wingo does not violate the Ex Post Facto Clause. See *State v. Jones,* 44 Kan.App.2d 139, 142, 234 P.3d 31 (2010), *rev. denied* 292 Kan. 967 (2011). Likewise, we are bound by the United States Supreme Court's interpretation of Alaska's similar offender registration scheme under the Ex Post Facto Clause in *Smith.* See *Trinkle v. Hand,* 184 Kan. 577, 579, 337 P.2d 665, *cert. denied* 361 U.S. 846 (1959) (noting that under Article VI of the United States Constitution, the interpretation placed on the Constitution and laws of the United States by the decisions of the supreme court of the United States is controlling upon state courts and must be followed. This we may add is true regardless of views of state courts even though such decisions are inconsistent with their prior decisions.).

Wingo cites to no authority suggesting any such intention on the part of the Kansas Supreme Court, and none has been independently found. Accordingly, we decline Wingo's invitation to revisit the holding in *Myers.*

Affirmed.

Parallel Citations

2013 WL 2936088 (Kan.App.)

End of Document

511 Fed.Appx. 487
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28.
(Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Terrence SHANNON, Defendant–Appellant.

No. 11–3582. | Jan. 14, 2013.

Synopsis
Background: Defendant was convicted on guilty plea in the United States District Court for the Southern District of Ohio, of possession of firearm by a felon, and was ordered to register as sex offender under Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals, Siler, Circuit Judge, held that:

[1] evidence supported finding that defendant used or possessed firearm in connection with another felony offense, as grounds for four-level enhancement;

[2] registration as sex offender was mandatory condition of supervised release for defendant who had been adjudicated delinquent as juvenile for gross sexual imposition; and

[3] mandatory condition of supervised release that defendant register as sex offender under SORNA did not violate prohibition against ex post facto laws.

Affirmed.

West Headnotes (3)

[1] **Sentencing and Punishment**
⚖Facilitation of other offense
Sentencing and Punishment
⚖Sufficiency

Evidence supported finding that defendant used or possessed firearm in connection with another felony offense, as grounds for four-level enhancement to sentence for possession of firearm by a felon, even if district court did not explicitly state what specific drug offense constituted independent felony, where district court noted that defendant had no visible means of support, which suggested that he was involved in drug trafficking, rather than mere personal use, and such inference was further supported by defendant's statement to probation officer that he did not enjoy his one-time use of crack cocaine. U.S.S.G. § 2K2.1(b)(6), 18 U.S.C.A.

[2] **Sentencing and Punishment**
⚖Reporting to and Cooperation with Law Enforcement

Registration as sex offender was mandatory condition of supervised release for possession of firearm by a felon for defendant who had previously been adjudicated delinquent as juvenile for gross sexual imposition under Ohio law, under Sex Offender Registration and Notification Act, which imposed registration requirement for juveniles adjudicated delinquent for offense comparable to or more severe than aggravated sexual abuse, where gross sexual imposition was defined as purposeful compulsion of another person to submit to sexual contact by force or threat of force, which was comparable to definition of aggravated sexual abuse as knowingly causing, or attempting to cause, another person to engage in sexual act by using for or threatening death, serious bodily harm, or kidnapping. Sex Offender Registration and Notification Act, § 111(1, 8), 42 U.S.C.A. § 16911(1, 8); 18 U.S.C.A. § 2241(a); Ohio R.C. § 2907.05(A)(1).

1 Cases that cite this headnote

[3] **Constitutional Law**
Registration
Sentencing and Punishment
Validity

Mandatory condition of supervised release for possession of firearm by a felon that defendant register as sex offender under Sex Offender Registration and Notification Act (SORNA), based on prior Ohio adjudication of delinquency for gross sexual imposition, was not punitive in nature, and thus, did not violate prohibition against ex post facto laws; SORNA was regulatory statute, it did not impose affirmative disability or restraint on defendant, SORNA was reasonably related to danger of recidivism posed by sex offenders, and therefore, did not promote traditional aims of punishment, and registration requirement was not excessive with respect to its nonpunitive purpose. U.S.C.A. Const. Art. 1, § 9, cl. 3; Sex Offender Registration and Notification Act, § 111(1, 8), 42 U.S.C.A. § 16911(1, 8).

1 Cases that cite this headnote

*488 On Appeal from the United States District Court for the Southern District of Ohio.
Before: SILER and KETHLEDGE, Circuit Judges; MURPHY, District Court Judge.*

Opinion

SILER, Circuit Judge.

Defendant Terrence Shannon pled guilty to one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). The district court sentenced Shannon to 52 months of imprisonment and ordered that he register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901, for his earlier juvenile offender adjudication for gross sexual imposition, in violation of Ohio Rev.Code § 2907.05.

On appeal, Shannon raises three issues regarding his sentencing. First, whether the district court erred in applying a four-level enhancement for possession of a firearm in connection with another felony offense pursuant to U.S.S.G. § 2K2.1(b)(6). Second, whether the district court properly ordered Shannon to register as a sex offender under SORNA as a condition of supervised release. Third, whether the SORNA registration requirement violates the Ex Post Facto Clause of the U.S. Constitution. *See* U.S. Const. art. I, § 9, cl. 3. We **AFFIRM.**

I.

Shannon was arrested in 2010, after officers found him in possession of a loaded handgun and 2.2 grams of crack cocaine. He pled guilty to the firearm charge. His presentence investigation report ("PSR") assigned Shannon a total offense level of twenty-one and a criminal history category of IV, and recommended an imprisonment range of 57 to 71 months. Shannon objected to a four-level enhancement to his base level offense for possession of a firearm in connection with another felony, arguing that he carried the firearm for protection and not for criminal activity. He also objected to the probation officer's recommendation that he register as a sex offender under SORNA, arguing that he should not be required to comply because as a juvenile delinquent he was not convicted of a crime.

At sentencing, the district court imposed a four-level enhancement for use of a firearm in connection with another felony offense under U.S.S.G. § 2K2.1(b)(6). The district court found that the United States met its burden of showing that the enhancement should apply. The district court granted Shannon's objection with respect to state law sex offender registration but denied the objection as it applies to federal registration, requiring that he register in Ohio pursuant to Section 113 of the *489 Adam Walsh Child Protection and Safety Act of 2006.

The district court sentenced Shannon to concurrent terms of 52 months, departing downward from the guidelines range, and required him to register as a sex offender.

II.

[1] A four-level enhancement to the defendant's base offense level applies if the defendant "used or possessed any firearm or ammunition in connection with another

felony offense." U.S.S.G. § 2K2.1. "Possession of firearms that is merely coincidental to the underlying felony offense is insufficient" to warrant an application of the enhancement. *United States v. Taylor,* 648 F.3d 417, 432 (6th Cir.2011). We review the sentencing court's factual findings for clear error and accord "due deference" to the sentencing court's determination that the firearm was used or possessed "in connection with" the other felony. *Id.* at 430–31.

Shannon argues that the government failed to satisfy its burden and offered no proof that the firearm was possessed in connection with the drugs or another felony. When considering whether there is a connection between a gun and a drug offense, we consider the proximity of the gun to the drugs and whether the defendant has an innocent explanation for the firearm. *Id.* at 432. However, an "alternative explanation for the presence of a gun does not preclude that gun from *also* being used to facilitate a drug offense." *United States v. Oglesby,* 210 Fed.Appx. 503, 507 (6th Cir.2007). The close proximity of the firearm and the drugs, while not dispositive, is itself evidence of a nexus between the two. *See United States v. Davis,* 372 Fed.Appx. 628, 629 (6th Cir.2010) (noting that "we have stopped short of finding close proximity dispositive" and instead have held proximity is "certainly indicative of a connection between the guns and the drugs").

The district court never explicitly stated what specific drug offense constituted the independent felony connected to the firearm, but it noted that Shannon had no visible means of support, which suggests that Shannon was involved in drug trafficking as opposed to merely carrying the drugs for personal use. This inference is further supported by Shannon's statement to the probation officer that he did not use crack cocaine—with the exception of one occasion without his prior knowledge—and that he did not enjoy the experience. This evidence distinguishes *United States v. Shields,* a case on which Shannon relies, where this court held that the § 2K2.1(b)(6) enhancement did not apply to a defendant who was caught carrying a gun with a small amount of marijuana, in part because the government presented no evidence that the defendant was engaged in drug trafficking. 664 F.3d 1040, 1045 (6th Cir.2011). The district court properly applied the four-level enhancement.

III.

[2] Shannon argues that the district court abused its discretion when it ordered, as a special condition of supervised release, that he comply with SORNA's registration requirement. Specifically, he contends that the district court must give a rationale in open court for mandating special conditions of supervised release, which the court did not do here. But Shannon is mistaken about the nature of the condition at issue. A requirement to register under SORNA is a mandatory (or so-called "explicit") condition of supervised release, rather than a special condition of it. *See* 18 U.S.C. § 3583(d); *accord United States v. Ossa–Gallegos,* 491 F.3d 537, 540 (6th Cir.2007) (en banc). Thus, if Shannon met SORNA's registration requirements, the ***490** district court was statutorily required to impose registration as a condition of supervised release.

Additionally, Shannon challenges the procedure by which the district court imposed the condition of supervised release, arguing that the district court did not clearly determine at the sentencing hearing whether his previous conduct was "comparable to or more severe than aggravated sexual abuse or an attempt or conspiracy to commit such an offense" as defined by the SORNA provision which requires registration by juveniles age 14 or older who are adjudicated delinquent. 42 U.S.C. § 16911(1), (8). Aggravated sexual abuse is defined, in part, as knowingly causing, or attempting to cause, another person to engage in a sexual act by using force against that person or threatening death, serious bodily harm, or kidnapping. 18 U.S.C. § 2241(a). Shannon was adjudicated delinquent for gross sexual imposition, which is defined under Ohio law as the purposeful compulsion of another person to submit to sexual contact by force or threat of force. Ohio Rev.Code § 2907.05(A)(1).

We review de novo a district court's imposition of a mandatory condition of supervised release. *United States v. Marlow,* 278 F.3d 581, 583 (6th Cir.2002). Shannon was at least fourteen years of age at the time of the juvenile offense. The district court stated that the incident "could have turned into a rape situation," that it "could have been much uglier than the ultimate disposition of the case," and that the GSI "sounds like it could have turned pretty violent." Thus, even though the district court did not expressly state that this offense was comparable to aggravated sexual abuse, its comments amounted to such a finding. Although the court could have stated more clearly that the comparability requirement was met, the record here shows that it was. The district court, therefore, correctly decided that Shannon must comply with SORNA.

IV.

[3] Shannon argues that the district court's imposition of the SORNA registration requirement violates the Ex Post Facto Clause of the U.S. Constitution. However, the Ex Post Facto Clause does not forbid adoption of civil, regulatory measures with retroactive operation. *See Smith v. Doe,* 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (finding Alaska's sex-offender registration statute not punitive, but civil in nature, and not in violation of the Ex Post Facto Clause). A statute civil in nature cannot impose punishment. *Kan. v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *see Doe v. Bredesen,* 507 F.3d 998, 1003 (6th Cir.2007).

In *United States v. Felts,* 674 F.3d 599, 606 (6th Cir.2012), we held that SORNA's registration requirements do not violate the Ex Post Facto Clause, as the statute does not increase the punishment for the past conviction; rather, it provides for a conviction for failing to register.

At issue in this case is whether SORNA's juvenile registration provision is nevertheless punitive because, as Shannon argues, its effect is punitive. *See Doe,* 538 U.S. at 92–93, 123 S.Ct. 1140. The juvenile registration provision states:

> The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code [***491** 18 U.S.C.S. § 2241]), or was an attempt or conspiracy to commit such an offense.

42 U.S.C. § 16911(8). In evaluating the punitive effect of SORNA's juvenile registration provision, we consider only the "clearest proof," *Doe,* 538 U.S. at 92, 123 S.Ct. 1140, and the factors spelled out in *Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), in relation to the statute on its face. *Seling v. Young,* 531 U.S. 250, 262, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001). In *Doe,* the Supreme Court applied the *Mendoza–Martinez* factors and set forth the standard for evaluating whether a sex offender registration program violates the Ex Post Facto Clause. *Doe,* 538 U.S. at 97–105, 123 S.Ct. 1140. Other circuits have applied the *Doe* analysis in deciding whether SORNA registration for a juvenile sex offense violates the Ex Post Facto Clause.[2] Likewise, we consider "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Doe,* 538 U.S. at 92, 97, 123 S.Ct. 1140.

The *Doe* Court stated that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.* at 98, 123 S.Ct. 1140. Additionally, there is "no remaining requirement under SORNA that jurisdictions publicly disclose information about sex offenders whose predicate sex offense 'convictions' are juvenile delinquency adjudications." *See* Office of the Attorney Gen., U.S. Dep't of Justice, Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed.Reg. 1630, 1632 (2011). Thus, the first *Doe* guidepost leads us to conclude that SORNA is not "so punitive either in purpose or effect as to negate" Congress's intention to make it a civil regulatory statute, and it should not be equated with our nation's historical and traditional punishments. *Doe,* 538 U.S. at 92, 123 S.Ct. 1140.

Next, we consider whether SORNA imposes an "affirmative disability or restraint" on those it regulates. *Id.* at 100, 123 S.Ct. 1140. Shannon is not physically restrained by the SORNA registration requirement, nor is he likely to be more than inconvenienced by its conditions. Thus, SORNA does not rise to the level of imposition of affirmative disability or restraint upon Shannon.

Third, we consider whether SORNA promotes the traditional aims of punishment, retribution and deterrence. *Id.* at 102, 123 S.Ct. 1140. Like the Alaska statute in *Doe,* SORNA's regulatory regime is reasonably related to the danger of recidivism posed by sex offenders. SORNA allows the public and law enforcement to ***492** determine the whereabouts of convicted sex offenders, but it does not directly restrict their mobility, employment, or how they spend their time. We have determined that SORNA in not punitive in nature. *Felts,* 674 F.3d at 606. Therefore, we find that SORNA does not promote the traditional aims of punishment.

The question of whether SORNA has a rational relationship to a nonpunitive purpose is the "most significant" factor in determining whether a sex offender registration system is nonpunitive. *Doe,* 538 U.S. at 102, 123 S.Ct. 1140. The Court in *Doe* recognized that the Alaska sex offender registry had the legitimate

nonpunitive purpose of promoting public safety "by alerting the public to the risk of sex offenders in their communit[y]." *Id.* at 103, 123 S.Ct. 1140 (quotation marks omitted). The same is true of SORNA.

Finally, we determine whether SORNA is excessive with respect to its nonpunitive purpose. The excessiveness question is not to determine "whether the legislature made the best choice possible to address the problem it seeks to remedy," but rather "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* at 105, 123 S.Ct. 1140. With respect to the Tennessee state sex offender registry, we found the regulatory scheme and its reporting requirements not to be excessive in *Doe v. Bredesen,* 507 F.3d at 1006. SORNA's regulatory purpose and the means used to achieve it is not materially different from that of the Alaska statute in *Doe* or the Tennessee state registry. Unacknowledged by Shannon, the Guidelines issued by the Attorney General allow for possible exemption from the dissemination of Shannon's information. Thus, the degree to which his information may be publicized is not at the level of "punishment" that Shannon would have this court believe SORNA requires. Further, as acknowledged by the Eleventh Circuit in *W.B.H.,* a lower rate of recidivism among juveniles does not equate to no recidivism, and even if adults have a higher recidivism rate, that does not mean that registration requirements are excessive. *W.B.H.,* 664 F.3d at 860. When considered with the intended safety benefits, the SORNA regulatory scheme is not excessive.

In creating SORNA, Congress intended not to impose an additional punishment for past sex offenses but instead to establish a civil regulatory scheme. *Doe* requires the "clearest proof" that SORNA is so punitive in effect, as applied to juvenile delinquents, as to negate that intention. Because Shannon has not offered the clearest proof to contradict Congress's intention, we reject Shannon's ex post facto challenge of SORNA's application to him.

AFFIRMED.

Parallel Citations

2013 WL 141779 (C.A.6 (Ohio))

Footnotes

* The Honorable Stephen J. Murphy, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

2 *See United States v. Elkins,* 683 F.3d 1039 (9th Cir.2012) (concluded that applying SORNA to Elkins based on his state conviction as a juvenile sex offender is not punitive); *United States v. Juvenile Male,* 670 F.3d 999, 1008 (9th Cir.2012) ("*Juvenile Male II*") (finding that because SORNA was the later-enacted, more specific provision, and because Congress was aware of the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5031 *et seq.,* "the district court properly applied SORNA's registration requirements to the juvenile defendants in these cases" and not all applications of SORNA to individuals based on juvenile sex offender determinations are sufficiently punitive to violate the Ex Post Facto Clause); *United States v. W.B.H.,* 664 F.3d 848, 860 (11th Cir.2011) (holding that the SORNA registration requirement is not punitive in effect such that it violates the Ex Post Facto Clause when the defendant, convicted of a post-SORNA crime that is not a sex offense, is required to register as a condition of supervised release because of a "pre-SORNA, Alabama Youthful Offender conviction that is a sex offense.").

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