

IN THE THIRD JUDICIAL DISTRICT OF KANSAS

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JOHN DOE,

*Plaintiff,*

v.

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

*Defendants.*

Civil Action No. 12 C \_\_\_\_\_

Division \_\_\_\_\_

Petition pursuant to K.S.A. Chapter 60

**PETITION FOR DECLARATORY JUDGMENT**

1. In late 2002, the Johnson County District Attorney filed a criminal complaint against John Doe, alleging that he committed the crime of indecent liberties with a minor, in violation of K.S.A. 21-3503(a)(1). Specifically, it alleged that between December 2001 and April 2002, he lewdly fondled or touched a child who was 14 or more years of age but less than 16 years of age.

2. Mr. Doe accepted responsibility for his conduct and, in February 2003, he pled guilty as charged in the complaint. In April 2003, Mr. Doe was sentenced to three years of probation. He successfully completed that probation in April 2006, and an order terminating probation was filed.

3. After his sentencing in April 2003, Mr. Doe registered as a sex offender with the Johnson County Sheriff.

### The evolution of Kansas offender registration law

4. Since the enactment of “Megan’s law” by the Kansas Legislature in 1993, the Kansas Sex Offender Registration Act (KSORA) has been amended by the Legislature in 11 of the last 18 legislative sessions. *See* 1994 Kan. Sess. Laws 107, 1997 Kan. Sess. Laws 181, 1999 Kan. Sess. Laws 164, 2001 Kan. Sess. Laws 208, 2002 Kan. Sess. Laws 55 (HB 2399), 2002 Kan. Sess. Laws 163 (SB 434), 2003 Kan. Sess. Laws 123, 2006 Kan. Sess. Laws 212, 2007 Kan. Sess. Laws 183, 2008 Kan. Sess. Laws 74, 2009 Kan. Sess. Laws 32, and 2011 Kan. Sess. Laws 95.

5. The original 1993 legislation created relatively modest registration requirements that were not subject to public disclosure. Today’s law looks nothing like the law passed in 1993. In fact, the name of the law has even changed to the Kansas Offender Registration Act (KORA).

#### *State v. Myers*

6. On August 23, 1996, the Kansas Supreme Court issued a decision in the case of *State v. Myers*, 260 Kan. 669. In *Myers*, the court considered the first Ex Post Facto Clause challenge to the new sex offender registration law. Mr. Myers argued it would violate the Ex Post Facto Clause of the United States Constitution to require him to comply with KSORA because Mr. Myers was convicted of a crime before KSORA became law in Kansas. The Kansas Supreme Court held that the majority of the registration requirements did not

amount to punishment and, thus, Mr. Myers was required to comply. The 1994 amendment to KSORA, allowing unrestricted public access to the information in the offender registry, was a different matter. The court found this provision to be unconstitutional:

For Myers, KSORA's disclosure provision must be considered punishment. We hold that the legislative aim in the disclosure provision was not to punish and that retribution was not an intended purpose. However, we reason that the repercussions, despite how they may be justified, are great enough under the facts of this case to be considered punishment. The unrestricted public access given to the sex offender registry is excessive and goes beyond that necessary to promote public safety.

7. At a hearing in district court, Myers described his life as a registered sex offender as follows:

Now, [registration] has caused me more problems than going to prison. I was evicted from my mother's apartment; left me virtually homeless. I had nowhere to go. I didn't have anyone to rent to me. I didn't know what to do. I had to go to a halfway house. I've been on television. I've been in--Overland Park publishes this every Friday.

I can't live like this and every morning I get up to look at the paper--I'm paranoid. I can't take this. I'm about ready to crack, okay? I live with 12 other guys. They are about ready to kick me out on the street. I have no money. I don't know what I'm going to do. At least in prison I knew I had a place to sleep. I would rather go back to prison. I can't do this.

8. After finding the public disclosure of offender information to be an ex post facto violation, the *Myers* court issued this directive to local sheriff's and the KBI:

To prevent an ex post facto violation, each sheriff's office shall adopt a record system that prevents public access or disclosure of the statements or any

other information required by KSORA of any sex offender required to register whose offense occurred before April 14, 1994. Any such statements or other information shall neither be open to the public nor subject to the provisions of the Kansas Open Records Act.

9. Despite the very clear holding in *Myers* that public disclosure of offender registration information is punitive and, thus, triggers a violation of the Ex Post Facto Clause, the defendants have applied recent legislative amendments to the Kansas registration law to Mr. Doe. The effect of applying the amendments to Mr. Doe is to extend the duration of his registration, and thus public disclosure of information about Mr. Doe, from 10 to 25 years. It also dramatically expands the scope of the information collected and disclosed.

**After *Myers*: The dramatically increased burden of registration**

10. In 1996, when the *Myers* court concluded that the registration requirement of KSORA was regulatory and not punitive, KSORA required only the following of registered offenders:

1. Where and when to register: Offenders were required to register within 15 days of coming into any county in which the offender resides or is temporarily domiciled for more than 15 days.
2. Length of registration: Ten years from date of conviction for first conviction, lifetime for second or subsequent conviction.

3. Periodic reporting: Offenders were required to send back verification forms confirming their address and information to the sheriff every 90 days.
4. Information disclosed to sheriff: Offenders were required to provide the following information to the sheriff: (1) Name; (2) date of birth; (3) offense or offenses committed, date of conviction or convictions obtained; (4) city or county of conviction or convictions obtained; (5) a photograph; (6) fingerprints; and (7) social security number.
5. Early termination of registration: Any registered offender could apply to the court in the county where he resides for an order relieving him of the duty of further registration. The court would hold a hearing, hear evidence of any interested persons preponderance of evidence if rehabilitated, then enter an order.
6. Public disclosure: The offender's registration information was open for public inspection "in the sheriff's office" but was not subject to the Kansas Open Records Act.
7. Number of offenses that trigger registration requirement: Registration was required for persons convicted of any of nine "sexually violent crimes": Rape, indecent liberties with a child, aggravated indecent liberties with a child, criminal sodomy, aggravated criminal sodomy, indecent solicitation of a

child, aggravated indecent solicitation of a child, sexual exploitation of a child, and aggravated sexual battery.

8. Potential criminal consequences: Offenders convicted of violating provisions of the act were guilty of a class A nonperson misdemeanor.

*See* 1993 Kan. Sess. Laws 253; 1994 Kan. Sess. Laws 107.

11. Today KORA requires vastly more of an offender, and subjects them to severe penalties for failing to comply:

1. Where and when to register: Offenders are required to register in person within three business days of coming into any county or location of jurisdiction in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school.

2. Length of registration: Offenders are required to register for 15 years, 25 years, or life, depending on the offense of conviction. Convictions for the following crimes are examples of what now requires 15 years of offender registration: Attempted misdemeanor sexual battery, misdemeanor solicitation of adultery from a 17 year old girl, misdemeanor patronizing of a prostitute or solicitation of the same, criminal restraint of a minor,

possession of iodine with the intent to use it to manufacture a controlled substance.

3. Periodic in-person reporting: Offenders are now required to report to sheriff's offices at up to three locations four times a year. Offenders must report in-person in the county where they reside, where they work, and where they go to school, every four months. They sign forms, confirm their information, and have their photos taken at every reporting.

4. Information disclosed to sheriff: Offenders were required to provide the following information to the sheriff: (1) Name and all alias names, (2) date and city, state and country of birth, and any alias dates or places of birth, (3) title and statute number of each offense or offenses committed, date of each conviction or adjudication and court case numbers for each conviction or adjudication, (4) city, county, state or country of conviction or adjudication, (5) sex and date of birth or purported age of each victim of all offenses requiring registration, (6) current residential address, any anticipated future residence and any temporary lodging information including, but not limited to, address, telephone number and dates of travel for any place in which the offender is staying for seven or more days; and, if transient, the locations where the offender has stayed and frequented since last reporting for

registration (7) all telephone numbers at which the offender may be contacted including, but not limited to, all mobile telephone numbers; (8) social security number, and all alias social security numbers; (9) identifying characteristics such as race, ethnicity, skin tone, sex, age, height, weight, hair and eye color, scars, tattoos and blood type; (10) occupation and name, address or addresses and telephone number of employer or employers, and name of any anticipated employer and place of employment; (11) all current driver's licenses or identification cards, including a photocopy of all such driver's licenses or identification cards and their numbers, states of issuance and expiration dates; (12) all vehicle information, including the license plate number, registration number and any other identifier and description of any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept; (13) license plate number, registration number or other identifier and description of any aircraft or watercraft owned or operated by the offender, and information concerning the location or locations such aircraft or watercraft are habitually parked, docked or otherwise kept; (14) all professional licenses, designations and certifications;



(15) documentation of any treatment received for a mental abnormality or personality disorder of the offender; for purposes of documenting the treatment received, registering law enforcement agencies, correctional facility officials, treatment facility officials and courts may rely on information that is readily available to them from existing records and the offender; (16) a photograph or photographs; (17) fingerprints and palm prints; (18) any and all schools and satellite schools attended or expected to be attended and the locations of attendance and telephone number; (19) any and all e-mail addresses, any and all online identities used by the offender on the internet and any information relating to membership in any online social networks; (20) all travel and immigration documents; and (21) name and telephone number of the offender's probation, parole or community corrections officer.

5. Early termination of registration: There is no longer any means for early termination of the requirement to register. In fact, the law goes so far as to assert: "No person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act."

6. DNA: An offender is required to provide to the registering law enforcement agency DNA exemplars, unless already on file at the Kansas bureau of investigation.

7. Public disclosure: The offender's information shall be open to inspection by the public at the registering law enforcement agency, at the headquarters of the Kansas bureau of investigation and on any internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation. Websites shall include: (1) Name of the offender, including any aliases; (2) address of each residence at which the offender resides or will reside and, if the offender does not have any present or expected residence address, other information about where the offender has their home or habitually lives. If current information of this type is not available because the offender is in violation of the requirement to register or cannot be located, the website must so note; (3) temporary lodging information; (4) address of any place where the offender is an employee or will be an employee and, if the offender is employed but does not have a definite employment address, other information about where the offender works; (5) address of any place where the offender is a student or will be a student; (6) license plate number and a description of any vehicle owned or operated by the offender,

including any aircraft or watercraft; (7) physical description of the offender; (8) the offense or offenses for which the offender is registered and any other offense for which the offender has been convicted or adjudicated; (9) a current photograph of the offender; and (10) all professional licenses, designations and certifications.

8. Potential criminal consequences: Offenders convicted of violating provisions of the act are guilty of a severity level 6, person felony for a first conviction, a level 5 person felony for a second conviction, a severity level 5, person felony; and a severity level 3, person felony, for a third conviction.

Offenders convicted of an aggravated violation, meaning a violation which continues for more than 180 consecutive days, are guilty of a severity level 3, person felony. Any violation of the act lasting more than 30 consecutive days "constitutes a new and separate offense." Any aggravated violation of the act which continues for more than 180 consecutive days constitutes "a new and separate offense" and "shall continue to constitute a new and separate offense every 30 days thereafter for as long as the violation continues."

9. Number of offenses that trigger registration requirement: registration is now required for persons convicted of (1) any of thirteen "sexually violent

crimes", (2) an "attempt, conspiracy or criminal solicitation" of those crimes, (3) any crime that is determined beyond a reasonable doubt to be sexually motivated, (4) a juvenile convicted of any "sexually violent crimes" unless the act involved non-forcible sexual conduct and the victim was at least 14 years of age and the offender was not more than four years older than the victim, (5) a person convicted of any one of five crimes if "one of the parties involved is less than 18 years of age," including promoting prostitution, patronizing a prostitute, lewd and lascivious behavior, criminal sodomy, and adultery, (6) is convicted of any of nine violent crimes or an attempt, conspiracy or criminal solicitation of those nine crimes, (7) is convicted of any person felony and the court finds that a deadly weapon was used in the commission of the felony, or (8) is convicted of one of four classes of drug crimes (each class encompassing multiple crimes), or attempt, conspiracy or criminal solicitation of those crimes.

10. Registration is now part of sentencing: KORA now requires that a sentencing judge (1) inform an offender "on the record, of the procedure to register," (2) if the defendant is not sent to prison, complete a registration form, require the offender to read and sign the form, order the offender to report and register within three business days where the offender resides,

maintains employment or attends school, (3) if the defendant is in custody, direct the correctional facility to complete the initial registration form within three business days for submission to the Kansas bureau of investigation, and (4) document the age of the victim in the journal entry of conviction.

*See* 2011 Kan. Sess. Laws 95. There are additional requirements, but they are too voluminous to list.

12. The dramatically expanded requirements under KORA amount to punishment. No longer can the requirements reasonably be described as a mere regulatory, non-punitive regime aimed at promoting public safety. The requirements are so vast and demanding and compliance so burdensome that they cannot be characterized as anything other than punitive.

#### **The parties**

13. John Doe is a resident of Johnson County, Kansas.

14. Kirk Thompson is the Director of the Kansas Bureau of Investigations, headquartered at 1620 SW Tyler, Topeka, KS 66612.

15. Frank Denning is the Johnson County Sheriff, located at 125 North Cherry Street Olathe, KS 66061-3443.

## Jurisdiction

16. The Court has jurisdiction to issue a declaratory judgment pursuant to K.S.A. § 60-1701.

## Venue

17. Venue is proper in Shawnee County, Kansas pursuant to K.S.A. § 60-602 because: (i) both Kirk Thompson, Director of the KBI, and Frank Denning, Johnson County Sheriff, by virtue of or under the color of their offices, have directed that their agencies apply the current requirements of KORA to offenders without regard to the date of their criminal conduct, including requiring Mr. Doe to comply with current KORA requirements, or, in the alternative, have neglected their official duties by failing to stop Ex Post Facto Clause violations, and (ii) all of the relevant conduct by the KBI occurred in Shawnee County, and (iii) the Johnson County Sheriff, pursuant to the requirements of KORA, collected and then transmitted Mr. Doe's offender registration information to the KBI in Shawnee County.

18. In the alternative, venue is proper in Shawnee County, Kansas pursuant to K.S.A. § 60-603 because: (i) the cause of action against the Director of the KBI arose exclusively in Shawnee County, Kansas, (ii) the cause of action against Mr. Denning arose, in part, in Shawnee County, Kansas by virtue of the Johnson County Sheriff, pursuant to

the requirements of KORA, collecting and transmitting Mr. Doe's offender registration information to the KBI in Shawnee County.

19. Venue is also proper in Shawnee County pursuant to K.S.A. § 60-608 because venue for the claim against Director Thompson is exclusively in Shawnee County, the defendants are properly joined in one action, and because two defendants are properly joined, venue of the action may be determined at the election of the plaintiff.

#### Request for declaratory judgment

20. Paragraphs 1 through 19 are incorporated by reference.

21. At the times of his offense and conviction, KORA required registration for Mr. Doe for only 10 years. He will have completed ten years of registration on April 22, 2013.

22. Applying current law, Mr. Doe is required to register for 25 years. He would complete that registration period on April 22, 2028.

23. Following the precedent in *Myers*, the dramatic increase in the duration of publication of information about Mr. Doe's inclusion on the offender registry, as well as the expansion of the scope of information about Mr. Doe made available to the public, violates the Ex Post Facto Clause.

24. Demand for Declaratory Judgment Number 1: Pursuant to K.S.A. § 60-1701, Mr. Doe seeks a judgment declaring that imposing a 25-year registration period and making

his registration information available to the public for 25 years is contrary to established Kansas law, specifically *State v. Myers*, 260 Kan. 669 (1996).

25. Also, the dramatically expanded KORA requirements, described in paragraph 11, imposed on Mr. Doe and others offenders under the 2011 amendments to KORA amounts to punishment. The requirements can no longer be accurately described as a regulatory, non-punitive regime aimed at promoting public safety. Because of this, subjecting Mr. Doe to the requirements of current law is a violation of Kansas precedent and the Ex Post Facto Clause.

26. Demand for Declaratory Judgment Number 2: Mr. Doe seeks judgment declaring that, pursuant to the principles of law in *Myers*, the current requirements of KORA are punitive and application of them to Mr. Doe is contrary to established Kansas law and the Ex Post Facto Clause. The defendants must apply the version of KORA in effect at the time of Mr. Doe's offense and conviction.

27. Demand for Declaratory Judgment Number 3: In the alternative, plaintiff seeks declaratory judgment that the amendments to KORA are not to be applied retroactively because: (a) Statutory amendments operate prospectively unless the language of the statute clearly shows that it is the intention of the legislature that it operate retroactively and the KORA amendments do not; and (b) Even if the amendments were intended to operate retroactively, they cannot be so applied because the amendments are substantive,



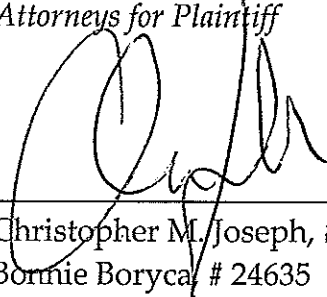
not merely procedural, and would interfere with the vested, substantive rights of Mr. Doe and others.

28. Demand for jury trial on all claims so triable: Mr. Doe demands a trial to a jury of all claims for which he has a right to jury trial.

Respectfully Submitted,

Joseph & Hollander LLC  
*Attorneys for Plaintiff*

By:



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