

FILED BY CLERK  
KS. DISTRICT COURT  
THIRD JUDICIAL DIST.  
STOPEKA, KS

IN THE THIRD JUDICIAL DISTRICT OF KANSAS  
DIVISION 6

2012 DEC 14 A 11:12

JOHN DOE,

*Plaintiff,*

v.

Case No. 12-C-168

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

*Defendants.*

PLAINTIFF'S RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

The defendants' lead argument for summary judgment is that K.S.A. § 22-4908 somehow prohibits the plaintiff's constitutional challenge. The choice to lead their brief with this fallible argument speaks to how difficult it is to argue that the 2011 KORA requirements are not punitive. To make that argument, the defendants rely on case law evaluating offender registration laws enacted in the 1990's. Referring to the massive overhaul of Kansas offender registration legislation since that time as mere "updates," the defendants fail to acknowledge the KORA's dramatic transformation. The KORA no longer imposes minor inconveniences on registrants. Current requirements, such as frequent in-person reporting, payment of registration fees, and disclosure of incredible amounts of personal information for publication, resemble a combination of probation and

public shaming. The 2011 KORA exhibits all the hallmarks of retribution, not mere regulation. Because the KORA is punitive, its retroactive application violates the Ex Post Facto Clause, and the defendants' motion must be denied.

### UNCONTROVERTED FACTS

The plaintiff does not dispute the truth of defendants' uncontroverted facts. He questions the relevancy of paragraphs 8 and 9 as well as defendants' motives for including the paragraphs. Also, while the plaintiff has no basis to dispute the claims in paragraph 20, the relevance of one officer's unquantified personal experience seems marginal at best. The plaintiff agrees that there are no controverted material facts and that the case is appropriate to be decided on summary judgment.

### ARGUMENT & AUTHORITIES

#### I. A statutory provision cannot preclude a constitutional challenge.

Defendants' lead argument is that K.S.A. § 22-4908 acts to stop this Court from granting the plaintiff relief for constitutional violations. In support, defendants' point to three cases, none of which hold that a court is without power to provide relief for constitutional violations. Nor could they.

Article VI, Clause 2 of the United States Constitution establishes the United States Constitution, federal statutes, and United States treaties as "the supreme law of the land." Judges in every state are bound to follow the United States Constitution over any

conflicting state statutes, see U.S. Const. art VI, cl. 2, rendering conflicting state laws "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); see also *Hartford Accident & Indem., Co.*, 262 Kan. 570, 576 (1997).

The retroactive application of the 2011 Kansas Offender Registration Act amendments violates the Ex Post Facto Clause of the United States Constitution. No state statutory provision can obscure this Court's obligation to uphold the United States Constitution's proscription of ex post facto punishment. It is not within the province of the legislature to bar constitutional challenges to state laws. K.S.A. § 22-4908 does not preclude the plaintiff from obtaining judicial relief for constitutional violations.

II. The defendants' argument that the KORA's requirements are not punitive relies on decisions evaluating registration requirements enacted in 1994. They fail to acknowledge the dramatic transformation of registration laws in the last 17 years, calling the amendments mere "updates."

The defendants primarily rely on *State v. Myers*, 260 Kan. 669 (1996), and *Smith v. Doe*, 538 U.S. 84 (2003) to assert that the 2011 KORA is not punitive. Their arguments ignore that both of these cases considered sex offender registration legislation enacted in 1994. The defendants fail to address the dramatic transformation in offender registration requirements over the 17 years between the enactment of the statutes considered in those cases and the enactment of the amendments at issue in this case. The plaintiff's motion for summary judgment addresses the KORA's metamorphosis since *State v. Myers* and distinguishes the KORA from the 1994 Alaska statute considered in *Smith v. Doe*. The

plaintiff will not repeat argument on those cases here, but he incorporates it by reference. Suffice it to say, the 2011 KORA bears little resemblance to 1994 laws in Kansas or Alaska.

The defendants offer two more recent Kansas decisions, but those cases do nothing more than regurgitate the holdings of *State v. Myers* and *Smith v. Doe* and do not take note of the evolution of Kansas registration law. *State v. Evans*, 44 Kan. App. 2d 945 (2010) was offered by the defendants to demonstrate that the registration requirement "remains nonpunitive." Defendants' Joint Memorandum in Support of Summary Judgment, p. 10. The defendants reference *Evans's* blind application of *Myers*, one that was inserted in passing and relied on no independent examination of how registration obligations have evolved since 1994. *Evans* did not evaluate a constitutional challenge to the KORA; it examined the proper interpretation of K.S.A. § 22-4912. After reaching a holding on the statutory interpretation issue, the court noted, "At oral argument, Evans' counsel claimed for the first time that he believed Evans meant to argue his motion under K.S.A. 22-4906 [Time period in which required to register; termination of registration requirement]. This is not only a new issue on appeal, it was not briefed. Ordinarily this court will not entertain such an issue." *Id.* at 948. The court then summarily dismissed the argument with a citation to *Myers*. *Evans* adds no substance to the defendants' argument.

The defendants attempt to bolster their reliance on *Smith v. Doe* with an unpublished Kansas Court of Appeals decision, *In the Matter of E.L.W.*, 270 P.3d 1229, 2012 Kan. App.

Unpub. LEXIS 114 (Kan. App. February 17, 2012). *In the Matter of E.L.W.* is not binding precedent and, thus, commands no ruling in this case. See Kansas Supreme Court Rule 7.04. Nor should *In the Matter of E.L.W.* persuade the Court's ruling. Consider the opinion's explanation of the *Smith v. Doe* holding: "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.'" *Id.* at \*10-\*11 (quoting *Smith v. Doe*, 538 U.S. at 105-06). *Smith v. Doe*'s holding was specific to the 1994 Alaska statute and the distinguishable facts of the case (Alaskan registrants failed to provide facts sufficient to show punitive effects). *Smith v. Doe* simply does not dictate the ruling in this or any other case considering punitive implications of a qualitatively distinct registration and notification statute. The opinion in *In the Matter of E.L.W.*, relies on outdated and distinguishable law and, like the defendants' motion, does not address the extraordinary changes to offender registration legislation since the early 1990's.

The defendants also offer the distinguishable case of *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). In *Femedeer*, the United States Court of Appeals for the Tenth Circuit considered a constitutional challenge to a 1998 amendment to Utah's offender registration law. *Id.* at 1247. The amendment expanded the scope of Utah's public notification to allow dissemination of registry information via the Internet. *Id.* The Tenth Circuit panel held that

the amendment did not violate the Ex Post Facto Clause. *Id.* at 1253. As explained further below, substantive distinctions between the 2011 KORA and the 1998 Utah statute, and the divergent analytical method employed by the Tenth Circuit, lead to the conclusion that the Kansas Supreme Court would not find *Femedeer* persuasive.

A comparison of the 1998 Utah notification provision with the notification provision contained in the 2011 KORA demonstrates the inapplicability of *Femedeer*'s holding to this case. Compared to the 1998 Utah statute, the 2011 KORA mandates disclosure of the following additional information: offenders' temporary lodging information, addresses of employment, addresses of places of education, license plate numbers (in addition to vehicle descriptions, which, in Kansas, specifically includes watercrafts and aircrafts), and professional licenses, certifications, and designations. Compare Utah Code Ann. § 77-27-21.5(10) (1998) with K.S.A. § 22-4909(b). The *Femedeer* decision focused exclusively on the public notification aspect of the Utah law. The Tenth Circuit did not have before it the punitive registration requirements of the 2011 KORA, namely the multi-jurisdictional in-person reporting and fee requirements, that are tied to the collection and dissemination of information under the 2011 KORA.

In addition, the analytical approach employed by the Tenth Circuit in *Femedeer* varies from the Ex Post Facto framework employed by the Kansas Supreme Court in *State v. Myers* and the United States Supreme Court in *Smith v. Doe*. The Tenth Circuit panel

reversed the district court because it had ascribed particular weight to excessiveness over the other *Mendoza-Martinez* factors. *Id.* at 1249. On appeal, the panel conducted its own examination of the *Mendoza-Martinez* factors, in an attempt to more evenly distribute the weight of each factor. *Id.* at 1249-53. This divide-and-conquer approach was rejected by the United States Supreme Court in *Smith v. Doe*, 538 U.S. at 97 (recognizing that some *Mendoza-Martinez* factors, including excessiveness, are more relevant than others). Moreover, this approach contradicts the Kansas Supreme Court's express direction that some factors "should be emphasized" over others in determining whether offender registration legislation is punitive in effect. *Myers*, 260 Kan. at 695 (emphasis added). It particularly contradicts the Kansas Supreme Court's designation of excessiveness as "the key factor" to be considered when evaluating whether sex offender registration laws violate the Ex Post Facto Clause. *Myers*, 260 Kan. at 696.

## CONCLUSION

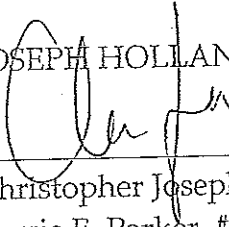
Kansas offender registration law has changed drastically since 1994. The 2011 KORA bears little resemblance to the laws considered in *State v. Myers* or *Smith v. Doe*. It is time for Kansas to take a fresh look at the harsh realities of the new law. When it does, the Kansas Supreme Court will no doubt join its sister states in recognizing that the "significant changes" adopted pursuant to the Adam Walsh Act are punitive and, thus,

cannot be applied retroactively. *Ohio v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011). The defendants' motion should be denied.

Respectfully submitted,

JOSEPH HOLLANDER & CRAFT, LLC

by:

  
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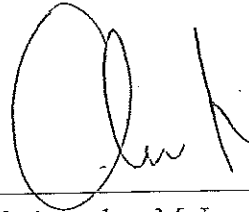
Certificate of Service

I certify that on December 14, 2012, true and correct copy of this response was hand-delivered to:

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