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Kansas Judicial Center  
301 S.W. Tenth Street, Suite 140  
Topeka, Kansas 66612-1507

Telephone (785) 296-2498  
Facsimile (785) 296-1035

judicial.council@ks.gov  
www.kansasjudicialcouncil.org

EXECUTIVE DIRECTOR  
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**TO: House Committee on Corrections and Juvenile Justice**  
**FROM: Kansas Judicial Council – Hon. Ben Sexton**  
**DATE: February 4, 2020**  
**RE: 2020 HB 2474 re penalties for offender registration violations and registration fees**

The Kansas Judicial Council and its Advisory Committee on Sex Offenses and Registration (Committee) recommend HB 2474. The bill would decrease penalties for violations of the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*; redefine what constitutes a violation of KORA; and create a mechanism for an offender to seek court waiver of the registration fee.

The Committee's recommendation of HB 2474 arose out of a study originally requested in March 2018 by Reps. Russell Jennings and Blaine Finch asking the Judicial Council to undertake a comprehensive review of the Kansas criminal code's sex offense structure and related registration requirements for both juveniles and adults. While the Committee's study is ongoing, the Committee believes the amendments proposed in HB 2474 represent a good first step toward reforming the current offender registration scheme.

### Current law

Under current law, a failure to comply with any provision of the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, is a strict liability offense, *i.e.*, no criminal intent is required. Any failure to comply that continues for more than 30 consecutive days becomes a new and separate offense. K.S.A. 22-4902(a). A violation of KORA is a severity level 6 felony for a first conviction, a severity level 5 felony for a second conviction, and a severity level 3 felony for a third or subsequent conviction. K.S.A. 22-4903(c)(1). An aggravated violation (failure to

comply for more than 180 consecutive days) is also a severity level 3 felony. K.S.A. 22-4903(b) and (c)(2).

Violations are designated as person or nonperson felonies depending upon the underlying offense for which the offender is required to register. K.S.A. 22-4903(c)(1) and (c)(2). This means that, in general, sex offenders and violent offenders who fail to comply with registration requirements are charged with person felonies, while drug offenders are charged with nonperson felonies.

A violation of KORA that consists solely of the failure to pay the required \$20 registration fee to the sheriff's office is a class A misdemeanor if the full payment is not made within 15 days of registration. It is a severity level 9 felony if, within 15 days of the most recent registration, two or more full payments have not been made to the sheriff's office. Again, these violations are person or nonperson offenses depending upon the underlying registrable offense. K.S.A. 22-4903(c)(3).

Under the current scheme, an offender who is required to register for a misdemeanor offense such as sexual battery could be charged with a person felony for a registration violation. Once an offender has a person felony in his or her criminal history, it has a big impact on the sentence for any future offense.

The Committee learned that there are currently 442 inmates in prison for KORA registration violations and that, over the last five years, the number of convictions for registration violations has increased by almost 65 percent. In 2018 alone, 325 offenders were convicted of registration violations, and 116 of those were sent to prison.

Under K.S.A. 21-6804(m), the sentence for a KORA registration violation is presumptive imprisonment. However, only about a third of violators are sentenced to prison while two-thirds are placed on probation. It's not clear whether the statute is being ignored or overlooked or whether courts are ordering downward departures in most cases, but if the statute were being routinely applied, the numbers of offenders being sent to prison would be even higher.

This trend is not sustainable. The Committee believes that the penalties for registration violations have ratcheted up too much since registration was first required in the early 90s. From 1993 to 1999, failure to register was a class A nonperson misdemeanor, and from 1999 to 2006, it was a severity level 10 nonperson felony. The Committee believes it is appropriate to return to similar severity levels.

## Amendments proposed in HB 2474

HB 2474 would lower penalties for registration violations as follows:

- For a first offense, a class B nonperson misdemeanor
- For a second offense, a class A nonperson misdemeanor
- For a third or subsequent or aggravated offense, a severity level 8 nonperson felony

Classifying first and second registration violations as misdemeanors will give district judges more flexibility in dealing with violators. For example, a judge would have the option of ordering a violator to spend weekends in jail, which might allow the person to keep his or her job. For offenders who are out of compliance and afraid to update their registration for fear of facing arrest on a felony registration violation charge, reducing the penalties should give them an incentive to come forward and become compliant rather than going completely off the radar.

HB 2474 would also classify all registration violations as nonperson offenses. The Committee believes this is appropriate for an offense that consists of a failure to provide information and does not involve harm to another person. This change will impact not only future convictions and sentences for registration violations, it will also affect how past convictions are scored for criminal history purposes. See *State v. Keel*, 302 Kan. 560, 590, 357 P.3d 251 (2015) (classification of prior conviction as person or nonperson offense for criminal history purposes is determined based on classification in effect at the time the current crime of conviction was committed).

Take, for example, an offender who has a single prior conviction for a registration violation that occurred in 2015. Assuming the offender is a sex or violent offender, that conviction would currently be classified as a person felony. So, if the offender were charged with a new crime in 2019, his prior conviction of a registration violation would count as a person felony for criminal history purposes. But, if that same offender were charged with a new crime after July 1, 2020 (the effective date of the proposed legislation), under *Keel*, his prior conviction of a registration violation would now count as a nonperson misdemeanor for criminal history purposes.

HB 2474 also makes the following additional changes:

- The presumptive prison rule applies only to severity level 8 offenses.
- A registration violation is redefined so that a new offense is committed every 90 days, rather than every 30 days, an offender is out of compliance. (This corresponds to the requirement that an offender register every three months.)

- An aggravated violation is redefined to consist of an offender being out of compliance for one year, rather than 180 days.
- An aggravated violation is a class A nonperson misdemeanor if the underlying registrable offense is a misdemeanor.
- No registration fee is required for any offender under 18 years of age.
- Violations for failure to pay are classified as class C nonperson misdemeanors.
- K.S.A. 21-5913(b) is amended to make the penalty for obstructing the apprehension or prosecution of a KORA violator the same as the penalty for obstructing the apprehension or prosecution of any other person.

The Committee is aware that its recommendation to reduce penalties for registration violations does not technically meet the requirements of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.*, which requires that the penalty for a registration violation must provide for a maximum term of imprisonment greater than one year. The Committee has been informed by the SMART Office, which monitors SORNA compliance, that its proposal is likely to result in Kansas being determined to be no longer in substantial compliance with SORNA. If that were to occur, the state could lose 10% of its Byrne grant funds. In 2019, 10% of Byrne grant funding would have amounted to roughly \$240,000. However, the Committee believes any potential loss of Byrne grant funding would be more than offset by the savings in prison bed space.

### Court Waiver of the Registration Fee

New Section 1 of HB 2474 creates a mechanism for an offender to seek a court waiver of the registration fee based on a finding of manifest hardship. This is in response to a Court of Appeals decision, *State v. Owens*, 55 Kan. App. 2d 290, 411 P.3d 1247 (2018), which held that finding a sex offender criminally liable for failure to pay the \$20 registration fee violated the offender's procedural due process rights as applied because the statutes did not provide any procedure for the offender to obtain a court determination of indigency.

Under current law, K.S.A. 22-4905(l)(3) waives the registration fee only "if an offender has, prior to the required reporting and within the last three years, been determined to be indigent by a court of law, and the basis for that finding is recorded by the court." For an offender who has had a criminal case pending during that 3-year window, there is a recognized procedure for obtaining an indigency determination for purposes of determining whether to appoint counsel. But for an offender who no longer has a criminal case pending, there is no such procedure. See *Owens*, 55 Kan. App. 2d at 293-94.

New Section 1 of the bill establishes that procedure. Under Section 1, an offender could ask the district court of the county where he or she resides to find that requiring the offender to pay the \$20 registration fee would impose a manifest hardship on the offender or the offender's immediate family. The offender would be required to submit an affidavit in the form prescribed by the Judicial Council, and there would be no docket fee required. The court could rule based on the affidavit alone or could hold a hearing and require evidence to be presented. If the court finds that requiring payment of the fee would impose a manifest hardship, the court could order that the fee be waived or deferred and specify how long the court's order will remain in effect, not to exceed three years.

The Committee recognized that there is a difference between finding that a defendant is indigent to the extent he or she is unable to pay for a defense attorney versus unable to pay a \$20 registration fee. A defendant who may have been unable to afford to pay a defense attorney might be able to pay \$20 four times a year. Thus, under the bill, any indigency finding from the original criminal case would remain in effect for three years (as under current law), but a finding of manifest hardship would only remain in effect for the period specified by the court in its order, not to exceed three years.

The members of the Judicial Council Advisory Committee on Sex Offenses and Registration are:

- Hon. Ben Sexton**, Chair, Abilene; Dickinson County District Judge
- Natalie Chalmers**, Topeka; Assistant Solicitor General
- Sheriff Jeff Cope**, Emporia
- Jason Covington**, Olathe; Johnson County Assistant District Attorney – Sex Crimes Unit
- Jeff Cowger**, Topeka; Chief Legal Counsel, Kansas Department of Corrections
- Dr. Mitchell Flesher**, Lenexa; clinical psychologist and attorney
- Sen. Randall Hardy**, Salina; State Senator from the 24<sup>th</sup> District
- Rep. Susan Humphries**, Wichita; State Representative from the 99<sup>th</sup> District
- Rep. Russell Jennings**, Lakin; State Representative from the 122<sup>nd</sup> District
- Donna Longworth**, Wichita; Sedgwick County Assistant District Attorney – Juvenile Division
- Jennifer Roth**, Topeka; Appellate Defender
- Dionne Scherff**, Overland Park; criminal defense attorney
- Phil Stein**, Shawnee; criminal defense attorney
- Seth Wescott**, Lenexa; licensed master's level psychologist and sex offender treatment provider
- Prof. Corey Rayburn Yung**, Lawrence; KU School of Law