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ATTORNEY GENERAL OPINION NO. 2019- 6

Kirk D. Thompson, Director
Kansas Bureau of Investigation
1620 S.W. Tyler
Topeka, KS 66612-1837

Re: Criminal Procedure—Offender Registration—Definitions; Time Period in which Required to Register

Minors—Revised Kansas Juvenile Justice Code—Extended Jurisdiction Juvenile Prosecution; Authorization; Violating Conditions of Stayed Juvenile Sentence; Juvenile Offenders in Custody of DOC; Placement; Notification to Court; Orders Appealable by Juvenile

Synopsis: A juvenile who is found guilty in an extended jurisdiction juvenile prosecution is convicted, not adjudicated, of the offense charged. Under the Kansas Offender Registration Act (KORA), the duty to register springs into existence by operation of law immediately upon the existence of statutorily prescribed conditions. Under the circumstances provided, the juvenile's duty to register pursuant to KORA arises once the offender's adult conviction is effective. Cited herein: K.S.A. 2018 Supp. 22-4901; 22-4902; 22-4906; 38-2347; 38-2364; 38-2366; 38-2380; Kan. Const., Bill of Rights, § 9.

* * *

Dear Director Thompson:

As Director of the Kansas Bureau of Investigation, you ask whether a juvenile who is found guilty in an extended jurisdiction juvenile prosecution (EJJP) and later ordered to serve an adult sentence must register pursuant to the Kansas Offender Registration Act (KORA)¹ when an adult conviction for the crime committed triggers registration but a juvenile adjudication for the same crime does not. We conclude that in an EJJP, the juvenile is convicted rather than adjudicated. If the court later imposes the offender's stayed adult sentence, the conviction necessarily becomes effective. As a result, the individuals in the scenarios you propose must register once their adult convictions are effective.

To answer your overall question, we must interpret two distinct statutory schemes. In doing so, we first review their text, giving words their ordinary, everyday meanings. Only when the statute's language is unclear or ambiguous is it appropriate to use tools of statutory interpretation, such as canons of construction and legislative history.² Recently, our Supreme Court has emphasized the importance of relying on the statute's text.³ "The plain language selected by the legislature, when it does not conflict with constitutional mandates, *trumps both judicial decisions and the policies advocated by the parties.*"⁴

Kansas Offender Registration Act

KORA is a comprehensive statutory scheme that, broadly stated, prescribes: the conditions under which certain individuals become offenders; the type of information offenders must report; and the frequency and length of time offenders must register. Our Supreme Court recently reiterated that KORA registration is civil in nature and not punishment under the Eighth Amendment to the United States Constitution or Section 9 of the Bill of Rights of the Kansas Constitution.⁵

KORA generally imposes registration on offenders at the time they are convicted, rather than when they are sentenced.⁶ Under KORA, a sex offender includes someone who

¹ K.S.A. 2018 Supp. 22-4901 *et seq.*

² *State v. Pulliam*, 308 Kan. 1354, 1364 (2018).

³ See, e.g., *State v. Spencer Gifts*, 304 Kan. 755, 761 (2016).

⁴ *Id.* (emphasis in original); see *State v. Sandoval*, 308 Kan. 960, 962 (2018) ("Our primary consideration in ascertaining the intent of the legislature is the language of a statute; we think 'the best and only safe rule for determining the intent of the creators of a written law is to abide by the language that they have chosen to use.'").

⁵ *State v. Petersen-Beard*, 304 Kan. 192, 210-11, *cert. denied*, 137 S. Ct. 226 (2016) (concerning sex offenders); see *State v. Meredith*, 306 Kan. 906, 913 (2017), *cert. denied*, 138 S. Ct. 2674 (2018) (holding defendant did not produce a sufficient record to show drug offenders are a class distinct from sex offenders); *State v. Huey*, 306 Kan. 1005, 1010 (2017), *cert. denied*, 138 S. Ct. 2673 (2018) (holding defendant did not produce a sufficient record to show violent offenders are a class distinct from sex offenders).

⁶ See K.S.A. 22-4902(b)(1), (e)(1), (f)(1).

(1) . . . is convicted of any sexually violent crime; [or]

(2) . . . is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim[.]”⁷

For a number of years, the Court of Appeals almost uniformly held that KORA registration is "a nonpunitive collateral consequence of judgment that is distinct from, and not part of, a criminal sentence."⁸ But in *State v. Marinelli*,⁹ the Kansas Supreme Court overruled this blanket holding. While it agreed that "aspects of KORA appear self-executing," it held that other parts of KORA are triggered only when a district court exercises its discretion.¹⁰ Although *Marinelli*'s broader holding is difficult to discern, it suggests that most forms of KORA registration are not part of a defendant's sentence.¹¹

The Kansas Supreme Court clarified *Marinelli* in *State v. Thomas*.¹² In that case, a jury convicted Thomas of aggravated battery with a deadly weapon (a stiletto heel), but the district court failed to make a deadly weapon finding necessary to impose KORA registration.¹³ Recognizing the mistake, the Court of Appeals reversed and remanded the case to the district court so that it could make the requisite finding.¹⁴ Thomas petitioned the Kansas Supreme Court for review, agreeing that the district court erred but contending that remand was inappropriate because registration is not part of sentencing.¹⁵ Before considering the nature of KORA registration, the Court summarized the different categories of KORA registration listed in *Marinelli*.

⁷ K.S.A. 2018 Supp. 22-4902(b)(1)-(2); see K.S.A. 2018 Supp. 22-4902(c)(1)-(18) (listing sexually violent crimes); K.S.A. 2018 Supp. 22-4902(t)(1)(B) (excluding juveniles adjudicated for unlawful transmission of a visual depiction of a child).

⁸ *State v. Simmons*, 50 Kan. App. 2d 448, 457 (2014). The only case in which a panel held that KORA registration is part of a sentence was *State v. Dandridge*, No. 109,066, 2014 WL 702408, at *3 (Kan. App. 2014) (unpublished opinion). The vast majority of cases were in accord with *Simmons*. See, e.g., *State v. Kilpatrick*, No. 111,054, 2015 WL 1310723 (Kan. App. 2015) (unpublished opinion), *aff'd on other grounds*, 306 Kan. 883 (2017).

⁹ 307 Kan. 768 (2018).

¹⁰ *Id.* at 784.

¹¹ It is hard to tell whether *Marinelli* held anything broader than that a challenge to KORA registration from a defendant who has pled guilty or no contest may not invoke appellate jurisdiction for direct appeal under K.S.A. 2017 Supp. 22-3602.

¹² 307 Kan. 733, 747-48 (2018).

¹³ *Id.* at 733; see K.S.A. 2018 Supp. 22-4902(e)(2) (stating that a violent offender includes individuals convicted of "any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony").

¹⁴ 307 Kan. at 746.

¹⁵ *Id.* at 746-47. It is important to note that the State did not file a cross-petition, so the Court did not consider whether the jury's finding that Thomas used a deadly weapon is sufficient for a deadly weapon finding under KORA.

We held in *Marinelli* that there are actually distinct sources of the obligation to register in KORA. Sometimes no judicial intervention is necessary at all. For example, KORA describes circumstances in which a mere conviction is sufficient to render an individual an "offender." See *Marinelli*, 307 Kan. at 783, 415 P.3d 405; see also K.S.A. 2017 Supp. 22-4902(a) (defining an offender in part as a sex offender; violent offender; drug offender); K.S.A. 2017 Supp. 22-4902(b)(4), (c) (listing crimes that qualify an individual as a sex offender); K.S.A. 2017 Supp. 22-4902(e) (listing crimes that qualify an individual as a violent offender); K.S.A. 2017 Supp. 22-4902(f) (listing crimes that qualify an individual as a drug offender).

In other instances, a judge must make a finding of fact, and that finding, along with the conviction, triggers the duty to register. See K.S.A. 2017 Supp. 22-4902(e)(2) (defining "violent offender" as person convicted of person felony and court makes finding on the record that a deadly weapon was used in the commission of the person felony); K.S.A. 2017 Supp. 22-4902(c)(18) (defining "sexually violent crime" as any act determined beyond a reasonable doubt to have been sexually motivated unless the court, on the record, finds the act involved nonforcible sexual conduct, the victim was at least 14, and the offender was not more than 4 years older than victim); K.S.A. 2017 Supp. 22-4902(b)(3), (d) (providing an individual qualifies as a sex offender if he or she has been determined to be a sexually violent predator). And sometimes a judicial finding of fact may remove an otherwise automatic duty to register. See K.S.A. 2017 Supp. 22-4902(b)(2) (defining "sex offender" to include juveniles adjudicated of a registrable offense unless court finds on the record the act involved nonforcible conduct, victim was at least 14, and offender was not more than 4 years older than victim).

In a third set of circumstances, the obligation to register arises out of a district court's "exercise of discretion" to order registration. See *Marinelli*, 307 Kan. at 783-85, 415 P.3d 405. See K.S.A. 2017 Supp. 22-4906(f), (g); K.S.A. 2017 Supp. 22-4902(a)(5); K.S.A. 2017 Supp. 22-4906(a)(1)(M).¹⁶

The Court then turned to Thomas' circumstances, stating her obligation to register as a violent offender "springs into existence by operation of law" only when (1) she is convicted of a person felony; and (2) the district court makes a factual finding on the record that a deadly weapon was used in the commission of the crime. Since the second condition was never satisfied, Thomas' duty to register never came into being, and the district court's failure to make the necessary finding was not a "sentencing error."¹⁷

Rather, the registration obligation that the State alleges simply never materialized in this case. Once the case is appealed and the appeal is docketed, the district court loses jurisdiction. [Citation omitted.] And once

¹⁶ *Id.* at 747-48.

¹⁷ *Id.* at 749.

the conviction and sentence are affirmed on appeal, the opportunity to generate the necessary conditions precedent to trigger a springing duty to register is extinguished. A remand in these circumstances amounts to giving the State a judicially created second bite at the registration apple—something that is wholly inconsistent with the springing character of the registration requirement at issue in this case.¹⁸

Since the duty to register under KORA springs into existence by operation of law immediately upon the existence of statutorily prescribed conditions, it is not within or part of a criminal sentence. Given this, the absence of a court-made finding on the record that Thomas used a deadly weapon cannot be a sentencing error amenable to the remedy of a remand. Such an absence is not error at all—K.S.A. 2011 Supp. 22-4902(e)(2) does not affirmatively require the district court to consider and determine whether Thomas used a deadly weapon in the commission of her offense. The error here—an error of law—was the district court's declaration that Thomas is required to register. The absence of statutorily defined conditions precedent which would give rise to a duty to register is merely proof of that error.¹⁹

Thomas offers several insights. For at least the second category of registration (a qualifying conviction plus a finding by the district court), we definitively know registration is not part of a sentence.²⁰ *Thomas'* characterization of the first category ("no judicial intervention") shows it is also not part of a sentence.²¹ Whether registration pursuant to the third category (founded exclusively on judicial discretion) is part of a criminal sentence, however, remains unclear, though the Court has suggested it is not.²²

Extended Juvenile Jurisdiction Prosecution

With *Thomas* in mind, the operative question becomes whether a juvenile who is found guilty in an EJJJ is "convicted" or "adjudicated." Answering this question tells us at which point the duty to register arises.

Under the Revised Kansas Juvenile Justice Code, a county or district attorney may move to designate the proceedings as an EJJJ when the offense, if committed by an adult, would be an off-grid felony or a nondrug level 1 through 4 person felony.²³ When deciding whether to designate the proceedings as an EJJJ, the district court considers the same

¹⁸ *Id.* at 749.

¹⁹ *Id.* at 750 (emphasis added).

²⁰ *Id.*

²¹ *See Id.* at 747, 750.

²² *See State v. Rocheleau*, 307 Kan. 761, 765 (2018) ("Ultimately, while we concluded a KORA challenge is not an appeal from the judgment of conviction, we also concluded KORA was not a part of a criminal sentence.").

²³ K.S.A. 2018 Supp. 38-2347(a)(1), (2); *see* K.S.A. 2018 Supp. 38-2347(d) (listing factors for court to consider when ruling on the motion).

factors as if the prosecution were seeking to try the juvenile as an adult.²⁴ If the court designates the proceedings as an EJJP, the juvenile receives the same statutory and constitutional rights as a defendant under the criminal code.²⁵ Indeed, "extended-jurisdiction juvenile proceedings have always been recognized as serious cases, and K.S.A. 2008 Supp. 38-2347(f)(4) . . . provide[s] the right to a jury trial to juveniles in those proceedings."²⁶

Another statute provides that if guilt is found in an EJJP, the district court enters both a juvenile and adult sentence, "the execution of which shall be stayed on the condition that the juvenile offender substantially comply with the provisions of the juvenile sentence and not commit a new offense."²⁷ And if the offender violates one or more conditions of the juvenile sentence or commits a new offense, the court must revoke the juvenile sentence and impose the adult sentence.²⁸ Once this occurs, the "juvenile court jurisdiction is terminated."²⁹

This office has previously stated that "[a] juvenile who is found guilty in an [EJJP] is convicted, not 'adjudicated,' of the offense charged."³⁰ While we maintain that this is true, it deserves greater explanation.

In three instances, K.S.A. 2018 Supp. 38-2366 refers to juvenile offenders who have been "prosecuted and *convicted* as an adult or under the extended jurisdiction juvenile prosecution[.]"³¹ "[t]he [Kansas Supreme] [C]ourt and the Court of Appeals have repeatedly held that the legislature not only knows how to distinguish between juvenile adjudications and adult convictions, but it has done so in several statutes."³²

In addition, K.S.A. 2018 Supp. 38-2364(a)(2) commands the court to enter an "adult criminal sentence" that is "stayed" to see if the juvenile substantially complies with his or

²⁴ K.S.A. 2018 Supp. 38-2347(d); see generally *In re D.D.M.*, 291 Kan. 883 (2011) (explaining how the court may grant prosecution as an adult or designate the proceedings as an EJJP).

²⁵ K.S.A. 2018 Supp. 38-2347(e)(4); see *In re D.E.R.*, 290 Kan. 306, 310 (2010) (holding that absent a finding that a juvenile should be tried as an adult or that the proceedings should be designated as an EJJP, the juvenile has neither a statutory nor a constitutional right to a preliminary examination).

²⁶ *In re E.F.*, 41 Kan. App. 2d 860, 864 (2009).

²⁷ K.S.A. 2018 Supp. 38-2364(a).

²⁸ K.S.A. 2018 Supp. 38-2364(b). The court may modify the adult sentence only if the county or district attorney agree. K.S.A. 2018 Supp. 38-2364(b).

²⁹ K.S.A. 2018 Supp. 38-2364(b). While this statute permits juvenile courts to retain jurisdiction over EJJP's until this point, most district court rules in this state direct EJJP proceedings to be transferred to a district judge once the proceedings have been designated as an EJJP. See, e.g., Kan. R. 6 Dist. R. 27 ("Upon designation as an extended jurisdiction juvenile prosecution pursuant to K.S.A. 38-2347, proceedings shall be transferred forthwith to a district judge [if not already so assigned] for scheduling in due course with the adult criminal process.").

³⁰ Attorney General Opinion 97-101.

³¹ K.S.A. 2018 Supp. 38-2366(a)(1), (a)(2), (b) (emphasis added).

³² *State v. Boyer*, 289 Kan. 108, 116 (2009) ("[T]he legislature has specifically included juvenile adjudications in K.S.A. 22-4902[b], proving yet again that when it wants to include juvenile adjudications as a consideration, it is perfectly capable of doing so explicitly.").

her juvenile sentence. As stated above, this occurs after the juvenile has been afforded the same statutory and constitutional rights as a defendant under the criminal code.³³

Case law offers further insight. In a constitutional challenge to the EJJJ statutes, the Court of Appeals characterized "the essential nature" of the EJJJ's mandatory sentencing provision as the "sentencing of *convicted* criminals[.]"³⁴ What is more, another panel noted the "legislature's careful attention to the use of other statutory cites in outlining how the extended juvenile jurisdiction process is supposed to work."³⁵

You point out that K.S.A. 38-16,126(b) (currently K.S.A. 2018 Supp. 38-2364(b)) previously referred to "a person *convicted* as an extended jurisdiction juvenile[.]" When the Legislature recodified the Juvenile Justice Code in 2006, it replaced "convicted" with "sentenced."³⁶ The statute currently reads: "When it appears that a person *sentenced* as an extended jurisdiction juvenile has violated the conditions of the juvenile sentence or is alleged to have committed a new offense, the court, . . ."³⁷ You believe this amendment "suggests that guilty pleas or findings of guilt in an [EJJJ] are not considered convictions."

Rather, this change seems to simply bring the first sentence of K.S.A. 2018 Supp. 38-1364(b) in accord with the subject matter of subsections (a) and (b). Subsection (a) directs the district court to enter at least one juvenile sentence and a stayed adult criminal sentence. Subsection (b) then tells the district court what to do if the juvenile violates his or her sentence or commits a new offense. In other words, these subsections deal with a juvenile's *sentence*, not a finding of guilt, so it makes sense that the Legislature would replace "convicted" with "sentenced."

A brief review of legislative history confirms this reading. When enacting the Revised Juvenile Justice Code, the Legislature incorporated the recommendations of the Kansas Judicial Council's Juvenile Offender/Child in Need of Care Advisory Committee, which the Legislature had formed to study the Kansas Juvenile Offenders Code.³⁸ The committee recommended the amendment you note.³⁹ Its report states that the proposed version of the statute was "nearly identical to current K.S.A. 38-16,126" and "the changes are [only] technical."⁴⁰ Therefore, neither the statute's language nor the legislative history suggests the Legislature intended a substantive change when it replaced "convicted" with "sentenced."

In the end, we believe that the Legislature carefully selected the word "convicted" rather than "adjudicated" when it drafted K.S.A. 2018 Supp. 38-2366. Accordingly, we glean that

³³ K.S.A. 2018 Supp. 38-2347(e)(4).

³⁴ *State v. J.D.H.*, 48 Kan. App. 2d 454, 465 (2013) (emphasis added).

³⁵ *State v. I.A.*, Nos. 104,481, 104,482, 2011 WL 3250584, at *4 (Kan. App. 2011) (unpublished opinion).

³⁶ L. 2006, Ch. 169, Sec. 64.

³⁷ K.S.A. 2018 Supp. 38-2364(b) (emphasis added).

³⁸ 2006 S.B. 261, Conference Committee Report Brief, p. 7.

³⁹ Juvenile Offender/Child in Need of Care Advisory Committee, Revised Kansas Juvenile Justice Code (with comments), 154-55, October 21, 2004.

⁴⁰ *Id.* at 154-55.

a juvenile is "convicted" upon a finding of guilt, but the conviction is stayed alongside the adult sentence while the juvenile attempts to successfully complete the juvenile sentence.

Questions presented

We now turn to the scenarios you pose. In the first, a juvenile was found guilty of aggravated robbery in an EJJP. Under KORA, a person who has been convicted of aggravated robbery has a duty to register as a violent offender only if the district court finds on the record that a deadly weapon was used in the commission of the aggravated battery, which is a person felony.⁴¹ In other words, this is the second category of KORA registration, and the duty to register "springs into existence by operation of law immediately upon the existence of statutorily prescribed conditions."⁴² Thus, assuming the district court made the requisite deadly weapon finding, once the adult sentence is imposed, the juvenile's conviction is effective, so the juvenile must register for fifteen years.⁴³

Under the second scenario you presented, a juvenile pled guilty to attempted rape in an EJJP. The juvenile did not successfully complete his juvenile sentence, so the court imposed his stayed adult sentence. At this point, the juvenile's conviction was effective. By KORA's plain language, therefore, K.S.A. 2018 Supp. 22-4902(b)(2), which imposes registration for certain adjudications, is inapplicable.⁴⁴ Like before, once the adult conviction is effective, the offender's duty to register immediately springs into existence, meaning this offender must register for life.⁴⁵

In sum, our Supreme Court has clarified that most forms of KORA registration are not part of a defendant's sentence and once the statutory prerequisites for registration exist, the duty to register springs into existence. In an EJJP, the juvenile's conviction is effective once the adult sentence is imposed. Under the scenarios you have provided, we conclude that the juveniles must register pursuant to KORA once the adult sentence is imposed.

⁴¹ See K.S.A. 2018 Supp. 22-4902(e)(1)-(2).

⁴² *Thomas*, 307 Kan. at 750.

⁴³ See K.S.A. 2018 Supp. 22-4906(a)(1)(N).

⁴⁴ *State v. Reese*, 42 Kan. App. 2d 388, Syl. ¶ 1 (2009) ("Because the legislature knows the distinction between juvenile adjudications and adult convictions and has set up a separate registration protocol for juvenile offenders, a juvenile adjudication does not qualify as a conviction for purposes of K.S.A. 22-4906[a].").

⁴⁵ K.S.A. 2018 Supp. 22-4902(c)(1), (17); K.S.A. 2018 Supp. 22-4906(d)(1), (12).

Sincerely,

/s/Derek Schmidt

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