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February 10, 2022

ATTORNEY GENERAL OPINION NO. 2022- 3

Kirk D. Thompson, Director
Kansas Bureau of Investigation
1620 SW Tyler St.
Topeka, KS 66612

Re: Criminal Procedure—Offender Registration—Registration of Offender; Duties of Court, Correctional Facility, Treatment Facility, Registering Law Enforcement Agency, Kansas Bureau of Investigation, Attorney General Time Period in Which Required to Register; Termination of Registration Requirement; Effect of Statutory Amendments after Expiration of Registration Period

Synopsis: Persons who were convicted of crimes for which registration was required under the Kansas Offender Registration Act (KORA) and who completed their 10-year registration periods prior to the effective date of the 2011 amendments to K.S.A. 22-4906 are not required to re-register and complete the longer periods of registration prescribed by L. 2011, ch. 95, § 6. Cited herein: K.S.A. 2020 Supp. 22-4902, 22-4903, 22-4904, 22-4905, 22-4906, 22-4908, and 22-4909; L. 2011, ch. 95, § 6.

* * *

Dear Director Thompson:

As the Director of the Kansas Bureau of Investigation (KBI), you request our opinion regarding the retroactive application of an amendment to the Kansas Offender Registration Act (KORA).¹ Specifically, you ask whether persons who complied with the statutory registration requirements in effect at the time of their qualifying convictions and completed their registration periods prior to July 1, 2011, when L. 2011, ch. 95 took effect,

¹ K.S.A. 22-4901 *et seq.*

must again register and complete the longer periods of registration now prescribed by K.S.A. 22-4906.

Background

The KORA is a comprehensive statutory scheme that defines "offenders" as those persons convicted of specified crimes,² requires such persons to register,³ prescribes the registration requirements by which offenders must abide,⁴ fixes the durations of the registration periods for "qualifying" crimes,⁵ and sets the penalties for failure to register as directed.⁶ The KORA places responsibilities not only on offenders, but also on the district courts, correctional and treatment facilities, the KBI and other registering law enforcement agencies, the attorney general, the state department of education, and the secretary of health and environment.⁷

Offenders' names, addresses, photographs, convictions, and other information are posted on publicly-accessible websites.⁸ The KBI's Offender Registration Unit (ORU) receives registration forms and electronic data from registering entities, enters information into the registered offender database (from which data is drawn for the registered offender website), and maintains the central repository of offender registration records.⁹ To implement these duties, the KBI calculates an end-of-registration date (ERD) for each offender based on the qualifying crime of conviction and the corresponding duration assigned in the KORA.¹⁰ You explain the difficulties in calculating such a date if an individual is required to re-register, particularly, setting the start date of the additional 5- or 15-year period,¹¹ and the difficulty of locating all offenders whose original registration periods had ended prior to July 1, 2011, *i.e.*, those who were convicted and completed their criminal sentences prior to July 1, 2001 – more than 20 years ago.

You note that an answer to this question will enable jurisdictions across Kansas to take a consistent approach. It will also provide guidance to prosecutors in determining whether to charge an offender with violating the KORA, to defense attorneys in advising their clients about the registration obligations attached to a charge, and to courts and registering entities tasked with implementing the KORA. The implications of the question for offenders are significant – being required to re-register more than 20 years after completing their assigned registration periods could disrupt employment or family or

² K.S.A. 2021 Supp. 22-4902, as amended by L. 2021, ch. 103, § 8 (listing crimes). Offenders are classified as sex offenders, violent offenders, or drug offenders.

³ K.S.A. 2021 Supp. 22-4904.

⁴ K.S.A. 2021 Supp. 22-4905.

⁵ K.S.A. 2021 Supp. 22-4906.

⁶ K.S.A. 2021 Supp. 22-4903.

⁷ K.S.A. 2021 Supp. 22-4904.

⁸ See K.S.A. 2021 Supp. 22-4909.

⁹ Opinion Request at 1.

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2. You note that the start date could be the date the individual's original registration period was completed, the effective date of the 2011 amendments, or the date when the individual was notified of a duty to re-register.

personal relationships and would make them again subject to felony prosecution for any violation of the Act.

An Illustration of the Issue

You provided a hypothetical in which an individual was convicted in 1995 of indecent solicitation of a child. The 10-year term of offender registration prescribed by K.S.A. 1994 Supp. 22-4906(b) began to run upon his release in 1997.¹² Thus, his registration period expired in 2007, before the 2011 amendments increased the duration of registration for the crime to 25 years. You ask whether he is required to re-register to complete another 15 years' registration.

Statutory Analysis

Resolving your question requires analysis of both the pre- and post-2011 versions of the K.S.A. 22-4906. The version in effect at the time of the hypothetical crime was K.S.A. 1994 Supp. 22-4906(b), which stated:

Upon the first conviction [of a sexually violent crime], liability for registration terminates, if [the offender is] not confined, at the expiration of 10 years from the date of conviction, or, if confined, at the expiration of 10 years from the date of parole, discharge or release, if the convicted sex offender does not again become liable to register as provided by this act during that period.

To interpret this statute, we apply the most fundamental rule of statutory interpretation, that the intent of the Legislature governs if that intent can be ascertained.¹³ That intent is ascertained in the first instance from the language used by the Legislature, giving common words their ordinary meanings.¹⁴ The word "terminate" means "to come to an end in time" and "bring to an end, close."¹⁵ The statute also uses the phrase "expiration of 10 years." The word "expiration" means "the fact of coming to an end or the point at which something ends."¹⁶ Thus, the plain language of the statute evinced the Legislature's intent that liability to register would end after 10 years.¹⁷

We now turn to the 2011 amendments that lengthened the duration of the duty to register by eliminating the 10-year term and replacing it with 15- and 25-year terms, depending

¹² For purposes of this illustration, it is assumed that the offender remained in compliance with his registration responsibilities and was not incarcerated again during the 10-year registration period.

¹³ *Ullery v. Othick*, 304 Kan. 405, 409 (2016) (citations omitted).

¹⁴ *Id.*

¹⁵ *Terminate*. Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/terminate> (last accessed July 12, 2021).

¹⁶ *Expire*. Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/expire> (last accessed July 12, 2021).

¹⁷ Amendments in 2005 added tolling provisions such that periods of incarceration or knowing, willful noncompliance with the KORA would not be counted toward the 10-year registration term. L. 2005, ch. 202, § 1. Thus, a registration period would not necessarily end at the expiration of 10 calendar years.

on the qualifying crime.¹⁸ K.S.A. 2012 Supp. 22-4906(a)(2) retained the words “terminates” and “expiration.” It stated in pertinent part:

(a)(2) Except as otherwise provided by the Kansas offender registration act, the duration of registration terminates, if not confined, at the expiration of 15 years from the date of conviction [unless tolled].¹⁹

The amendment is silent on whether the new 15- and 25-year terms were to be imposed on persons who had already completed their prescribed 10-year registration terms. Because we are unable to determine the Legislature’s intent from the language of the statute, we turn to the circumstances surrounding the bill’s passage and the purpose to be accomplished by the change.²⁰

The purpose of enacting the longer registration terms was to bring Kansas into “substantial implementation”²¹ of the federal Sex Offender Registration and Notification Act (SORNA).²² The amendments made Kansas eligible for federal grants.²³ Although the substantial implementation standards require, generally, that states register persons convicted of sex crimes prior to the state’s implementation of SORNA, the U.S. Attorney General published Guidelines in 2008 recognizing that it “may not be possible for jurisdictions to identify and register all sex offenders who fall within the SORNA registration categories, particularly where they have left the justice system and merged into the general population long ago.”²⁴ The Supplemental Guidelines issued in January

¹⁸ The amendments also imposed lifetime registration for more crimes. L. 2011, ch. 95, § 6.

¹⁹ *Id.* The tolling provision from the 2005 amendments was also retained. K.S.A. 2006 Supp. 22-4906. Subsection (b)(2) is comparable, but imposes a 25-year term for other enumerated crimes. The quoted language remains unchanged in K.S.A. 2021 Supp. 22-4906.

²⁰ See *State v. Quested*, 302 Kan. 262, 268 (2015) (finding that legislative silence on a point created an ambiguity; thus, “canons of construction, legislative history, the circumstances attending the statute’s passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested” may be considered to interpret the statute).

²¹ Supplemental Note on House Sub. for SB 137 (2011 Session).

²² 34 U.S.C. § 20901 *et seq.* SORNA is Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248. SORNA set registration periods for offenders at 15 years, 25 years, and lifetime. States that “substantially implement” SORNA by enacting legislation, or amending existing statutes, to match those registration periods and other aspects of SORNA become eligible for federal grants.

²³ States that “substantially implement” SORNA by enacting legislation, or amending existing statutes, to match those registration periods and other aspects of SORNA become eligible for federal grants. Office of the U.S. Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030-01, 38036, 2008 WL 2594934 (July 2, 2008) (hereinafter, *Guidelines*). Kansas was deemed to have “substantially implemented” SORNA after the 2011 amendments. U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Jurisdictions that have Substantially Implemented SORNA*, <https://smart.ojp.gov/sorna/substantially-implemented> (last accessed July 28, 2021).

²⁴ *Guidelines*, 73 Fed. Reg. at 38046 (discussing how SORNA standards should be applied to persons who were convicted of sex offenses prior to its enactment). The Supplemental Guidelines extended this reasoning to sex offenders who had fully exited the criminal justice system but later reenter it through a misdemeanor prosecution for something other than a sex crime, recognizing that many jurisdictions would not have the resources to examine a misdemeanor defendant’s criminal history for a sex offense conviction that could be subject to the longer registration periods prescribed by SORNA. Office of the U.S. Attorney

2011 state that it is sufficient if jurisdictions register pre-SORNA-implementation sex offenders who are in the system as prisoners, supervisees, or registrants, or who reenter the system through a subsequent sex crime or felony conviction.²⁵ States are not required to locate and register persons who had "fully exited the criminal justice system" by the time of the state's implementation of SORNA.²⁶ Specifically, "jurisdictions are not required to register sex offenders in the retroactive classes whose SORNA registration periods have already run."²⁷

Both sets of Guidelines were published and available to the Legislature when it acted with the purpose of achieving substantial implementation with SORNA. It was not necessary, for the purpose of achieving substantial-implementation status, for the new, longer terms to be imposed on persons who had finished their registration terms. In light of the legislative silence and the identified practical challenges to finding prior registrants, we are reluctant to read into the statute a requirement to locate and re-register offenders who had completed their registrations prior to July 1, 2011, and instead conclude that the amendments did not impose a duty on registering agencies to identify, find, and re-register prior registrants – and did not impose a duty on formerly-registered offenders to re-register.

Further support for this conclusion comes from Attorney General Opinion No. 2003-20, which considered a 2001 amendment to K.S.A. 22-4908. Prior to July 1, 2001, that statute allowed an offender to seek a court order granting relief from registration requirements if the offender had completed 10 years of registration or if the offender's conviction had been set aside.²⁸ The 2001 amendment eliminated this opportunity for relief.²⁹ The Attorney General Opinion concluded that persons who had been granted relief from registration prior to July 1, 2001 were not required to register again after the amendment.³⁰ In other words, where the obligation to register was terminated in accordance with the law in effect prior to the amendment, no new obligation to register was imposed by the amendment. Likewise, here, we conclude the 2011 amendments did not impose a new obligation to register on persons whose obligation to register had already terminated by operation of law.

General, *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 Fed. Reg. 1630-01, 1639, 2011 WL 65547 (Jan. 11, 2011) (hereinafter, *Supplemental Guidelines*).

²⁵ *Supplemental Guidelines*, 76 Fed. Reg. at 1639.

²⁶ *Id.*

²⁷ *Id.* at 1636.

²⁸ K.S.A. 2000 Supp. 22-4906(a), (c).

²⁹ L. 2001, ch. 163, § 2 ("No person required to register as an offender pursuant to the [KORA] shall be granted an order relieving the offender of further registration under the act.") K.S.A. 2021 Supp. 22-4908 contains the same language. Amendments to the statute were proposed in 2021 HB 2349 to, *inter alia*, allow courts to grant relief from the extended periods of registration imposed by the 2011 KORA amendments.

³⁰ Kansas Att'y Gen. Op. 2003-20 at 3.

Caselaw

You posed your question because there are no cases on point. We do find instructive, though, cases concerning retroactive application³¹ of the 2005 and 2011 amendments to offenders who were still under a duty to register at the time of the amendments. We also discuss statute-of-limitations cases that explicitly evaluate an analogous situation.

In *State v. Meredith*,³² the Kansas Supreme Court rejected a drug offender's challenge to the retroactive application of the 2011 amendments that increased the registration period from 10 years to 15 years for his crime.³³ The offender was two years into his original registration period when the amendments became effective. In *State v. Reed*,³⁴ the Kansas Supreme Court held that applying the 2005 tolling provision amendment to the defendant was appropriate, twice noting that the tolling provision was enacted "shortly before" the offender's original registration period terminated.³⁵ In the most recent challenge to the retroactive application of lifetime registration requirements, our Supreme Court noted that the 2011 amendments were put in place "just before [the offender's] registration period was about to expire."³⁶ In each of these cases, the Court was careful to note that the offender was under a duty to register at the time of the amendments—in other words, the offender's original duty to register had not expired. The offender was subject to prosecution for failure to register at the time of the amendment, and the amendment lengthened the time that such prosecution could occur.

³¹ The Kansas Supreme Court has repeatedly held that offender registration is a civil regulatory scheme, not a punishment, and therefore is not subject to challenge on constitutional grounds. See, e.g., *State v. Petersen-Beard*, 304 Kan. 192, 208-09 (2016) (holding that lifetime registration is not punishment for ex post facto, double jeopardy, or Eighth Amendment purposes or § 9 of the Kansas Constitution Bill of Rights); *State v. Reed*, 306 Kan. 899, 904 (2017) (holding that retroactive application of a tolling provision added by a 2005 amendment to K.S.A. 22-4906 did not violate the Ex Post Facto Clause); *State v. N.R.*, No. 119,796, 495 P.3d 16, 2021 WL 4217146 (Kan. Sept. 17, 2021) (holding that the imposition of lifetime registration requirements on a person who was 14 at the time of the offense was not punishment; rejecting offender's as-applied challenge to K.S.A. 2011 Supp. 22-4906). See also *Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (construing Alaska's sex offender registration act that is similar to that of Kansas and holding that the act was nonpunitive and therefore its retroactive application did not violate the Ex Post Facto Clause). Thus, the prohibition on *ex post facto* application of later-enacted punishments does not prohibit application of the later-enacted increase in registration duration. See *Petersen-Beard*, 304 Kan. at 208-09.

³² 306 Kan. 906 (2017).

³³ *Id.* at 906-07.

³⁴ 306 Kan. 899 (2017).

³⁵ *Id.* at 900 (applying *Petersen-Beard*, 304 Kan.192).

³⁶ *State v. N.R.*, 495 P.3d 16, 19, 2021 WL 4217146 at *21 (Kan. 2021). See also *State v. Davidson*, 495 P.3d 9, 2021 WL 4217942 (Kan. 2021) (rejecting constitutional challenge by offender whose original 10-year registration period began in 2002 and was still in effect at the time of the 2011 amendments).

We turn now to another setting in which a person's exposure to prosecution terminates upon the expiration of a set period of years: statute of limitations cases. In *State v. Nunn*,³⁷ our Supreme Court considered the retroactive application of an amendment that increased the statute of limitations for certain sex offenses from two years to five years. The Court held that such an amendment "may be applied to crimes committed prior to the effective date of the amendment *so long as the statute of limitations had not expired prior to the effective date of the amendment*."³⁸ The Court continued, "[o]f course, if the statute being amended has run on the specific crime charged, then the amendment cannot be applied to resurrect a prosecution which has already been time-barred."³⁹ Once the statute of limitations runs, a "complete defense" arises.⁴⁰

The situation presented here is analogous because the expiration of a registration period is akin to the expiration of a statute of limitations – both define the end of a person's exposure to potential prosecution for a specific offense. During the time an offender is under a duty to register, he is subject to felony prosecution for noncompliance.⁴¹ When an offender has successfully completed the registration period, he is no longer subject to prosecution for failure to register. Applying the construct of *Nunn*, and in accord with Attorney General Opinion 2003-20, we conclude that an offender's duty to register, once terminated in accordance with law, is not "resurrected" by a change in the law.

Conclusion

Nothing in the language of L. 2011, ch. 95, § 6 amending K.S.A. 22-4906 indicates that it was intended to apply to persons who had completed their registration terms prior to the amendment, and it was not necessary to apply it to those persons to achieve the stated purpose of the legislation: substantial implementation of SORNA. The federal Guidelines issued in 2008 and 2011 made clear that it would be sufficient, for SORNA implementation purposes, for jurisdictions to register sex offenders who were in the criminal justice

³⁷ 244 Kan. 207 (1989).

³⁸ *Id.* at 218 (emphasis added).

³⁹ *Id.*; see also *State v. Noah*, 246 Kan. 291, 295 (1990) (explaining that the State "reserves the right to change the prescription or period of limitation of criminal offenses until it has accrued to the benefit of the accused").

⁴⁰ *Noah*, 246 Kan. at 295. Further, "where a complete defense has arisen under such a statute, it cannot be taken away by a subsequent repeal thereof." *Id.*; see also *Tonge v. Werholtz*, 279 Kan. 481 (2005) (considering retroactive application of a regulatory amendment regarding collection of disciplinary restitution from an inmate; stressing that the restitution was not part of a criminal sentence and therefore not subject to an *ex post facto* challenge).

⁴¹ K.S.A. 2020 Supp. 22-4903. Although a district court concluded that the existence of criminal penalties for noncompliance turns the KORA into a punitive scheme subject to *ex post facto* challenges, the Court of Appeals rejected this conclusion, citing *Petersen-Beard. State v. Klima*, 2016 WL 17178274 at *4 (Kan. App. 2016) (unpublished opinion). The defendant in *Klima* was under a 10-year registration period at the time the 2011 amendments became effective; the amendments imposed lifetime registration for his crime.

system at the time of SORNA implementation – a class that does not include offenders who had completed their registration terms. The Legislature used the terms "terminate" and "expiration," which mean "to end," and the statute of limitations cases teach that upon the expiration of the limitations period, a person's exposure to prosecution ends and is not resurrected by later legislation. We opine, consistent with Attorney General Opinion 2003-20, that once a person's obligation to register ends in accordance with law, no new obligation arises upon an amendment to the law.⁴²

For these reasons, we opine that persons who successfully completed their offender registration requirements prior to the 2011 amendments to K.S.A. 22-4906 are not required to re-register and complete additional years of registration for those crimes.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Sarah L. Shipman

Sarah L. Shipman
Deputy Attorney General

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⁴² We express no opinion on the ability of the Legislature to explicitly impose a re-registration requirement.