

# Retreating from Constitutional Protections: Requiring Registration on Offender Registries Without a Jury [State v. Huey, 399 P.3d 211 (Kan. 2017)]

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*In State v. Huey, the Kansas Supreme Court held requiring registration under the Kansas Offender Registration Act was not a punishment. In doing so the Kansas Supreme Court authorized judges to find facts necessary to force registration. Darnell Lee Huey was required to register for fifteen years as a violent offender after a judge decided he had used a dangerous weapon in the commission of a crime. While offender registration is a critically useful tool in our society, registration on such a public and pervasive list is something that should be decided by a jury.*

It is a truism to say juries are essential to the criminal justice system. They are so important, the Founding Fathers explicitly required them for all criminal prosecutions.<sup>1</sup> With few exceptions, the jury requirement has served our country well by putting an additional barrier between a person and prison. Without this constitutional command, it would be too easy for a government agent—a judge—to decide facts in favor of the government’s case. For this reason, the Kansas Supreme Court’s decision in *State v. Huey*<sup>2</sup> should be viewed as a clear and frightening retreat from constitutional safeguards.

## II. BACKGROUND

### A. Case Description

In 2011, Darnell Huey pled guilty to a single count of robbery and aggravated burglary.<sup>3</sup> Huey unlawfully entered another person’s apartment and stole money and prescription medication.<sup>4</sup> At the sentencing hearing, per the State’s request, the district court found Huey used a deadly weapon during the commission of the crime.<sup>5</sup> More precisely, the judge stated, “I’m going to make the finding that a firearm was used in the course of this event and order offender registration.”<sup>6</sup>

Consequently, the court convicted Huey of robbery and aggravated burglary, and sentenced him according to a plea agreement.<sup>7</sup> His punishment included concurrent sentences of “57 months imprisonment and 36 months’ postrelease supervision for the robbery and 32 months imprisonment and 36

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1. U.S. CONST. amend. VII.  
2. 399 P.3d 211 (Kan. 2017).  
3. *State v. Huey*, No. 109,690, 2014 WL 1707807, at \*1 (Kan. Ct. App. April 25, 2014), *aff’d* 399 P.3d 211 (Kan. 2017).  
4. *Id.*  
5. *Id.*  
6. *Huey*, 399 P.3d at 214. It is also important to note the State admitted there was doubt as to whether Huey used a firearm when he committed the crime. *Id.* (noting the conflicting statements of the defendant and the witnesses). Huey claimed he used a crowbar, not a firearm, but the State produced witnesses who disputed that claim. *Huey*, 2014 WL 1707807, at \*1. No firearm was ever found. *Id.*  
7. *Huey*, 2014 WL 1707807, at \*1.

months' postrelease supervision for the aggravated burglary," as well as a requirement to register as a violent offender for ten years under the Kansas Offender Registration Act ("KORA").<sup>8</sup>

Huey timely appealed, arguing, among other things, the district court violated his constitutional rights by finding a fact that should be determined by a jury.<sup>9</sup> Moreover, Huey argued the thirty-six month postrelease supervision clearly violated the controlling statute because it only allowed for a maximum of twenty-four months.<sup>10</sup> The State agreed.<sup>11</sup> The appellate court explained at the time Huey committed these crimes the statute at issue allowed for sentences to be increased only if the crime was sexually motivated.<sup>12</sup> Thus, the postrelease sentence was illegal because it did not conform to the clear language of the statute and had to be reversed and remanded for resentencing.<sup>13</sup> Huey then argued that, under *Apprendi v. New Jersey*,<sup>14</sup> a fact that triggered his requirement to register as a violent offender must be submitted to a jury.<sup>15</sup> The Kansas Court of Appeals disagreed, in part because the requirement to register with KORA is a punishment, not a sentence, and *Apprendi* applies only to sentences.<sup>16</sup> On appeal to the Kansas Supreme Court, Huey again argued the judge's factual finding constituted a violation of his constitutional rights under "*Apprendi's* general prohibition on sentencing-enhancing judicial fact finding."<sup>17</sup>

### B. Legal Background

In its initial form, the Kansas Offender Registration Act—then titled the Kansas Habitual Offenders Act—required only those individuals with two sexually violent criminal convictions to register with their local county sheriff.<sup>18</sup> Its stated purpose was "to provide the public with information regarding convicted offenders who could pose a threat to the safety of our

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8. *Id.*; KAN. STAT. ANN. §§ 22-4901 to -4910 (2010).

9. *Huey*, 2014 WL 1707807 at \*1. Huey also argued the district court imposed an illegal sentence that did not conform with the controlling statute (and the State agreed), and that it violated his constitutional rights for his criminal history to be considered in sentencing because the State had not submitted it to a jury. *Id.* at \*1.

10. *Id.* at \*2 (citing KAN. STAT. ANN. § 22-3717(d)(1)(B) (2009)).

11. *Id.*

12. KAN. STAT. ANN. § 22-3717(d)(1)(D). When the crime is sexually motivated, the statute allows the judge to impose postrelease supervision for up to sixty months. *Id.*

13. *Huey*, 2014 WL 1707807, at \*2.

14. 530 U.S. 466 (2000).

15. *Huey*, 2014 WL 1707807, at \*2. The U.S. Supreme Court held in *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

16. *Huey*, 2014 WL 1707807, \*4. The theory that *Apprendi* applies only to sentences seems to be a critical misreading of the case, considering the Supreme Court's command that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater *punishment* than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494 (emphasis added).

17. *State v. Huey*, 399 P.3d 211, 214 (Kan. 2017).

18. Kirk D. Thompson & Derek Schmidt, *Kansas Offender Registration Act*, KAN. BUREAU OF INVESTIGATION (Sept. 23, 2011), [http://www.kansas.gov/kbi/info/docs/pdf/KORA\\_Brochure\\_September\\_2011.pdf](http://www.kansas.gov/kbi/info/docs/pdf/KORA_Brochure_September_2011.pdf) [<https://perma.cc/K2EX-JKRP>].

families.”<sup>19</sup> Certain non-sexually based violent crimes were added in 1997, and the title was changed to the Kansas Offender Registration Act.<sup>20</sup> At the time of Huey’s conviction, KORA stated any person convicted of a violent felony, in which a “finding [is made] on the record that a deadly weapon was used,” must register as a violent offender for ten years.<sup>21</sup>

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum *must* be submitted to a jury, and proved beyond a reasonable doubt.”<sup>22</sup> Cases claiming violations under *Apprendi* are afforded unlimited review.<sup>23</sup> Moreover, an *Apprendi* violation, by definition, alleges a defendant has received an illegal sentence, and under Kansas law, courts are allowed to vacate or “correct” an illegal sentence at any time.<sup>24</sup> Review is permissible even if the argument is first raised on appeal.<sup>25</sup>

In *Apprendi*, the white defendant fired multiple gunshots into the home of a black family living in his neighborhood.<sup>26</sup> The State charged, and the court convicted, the defendant of possessing a firearm for an unlawful purpose, and the judge enhanced his sentence after finding the crime was racially motivated.<sup>27</sup> In striking down the sentence, the Supreme Court stated an “element” of a crime is whether the findings required by a specific statute “expose the defendant to a greater *punishment* than that *authorized* by the jury’s guilty verdict.”<sup>28</sup> Because the New Jersey statute required a finding of racial motivation to impose the enhanced sentence, the question of whether such a motivation existed should have been submitted to a jury.<sup>29</sup>

In *Kennedy v. Mendoza-Martinez*,<sup>30</sup> the U.S. Supreme Court decided the constitutionality of a federal law that stripped U.S. citizens of their citizenship if they left the country to evade the draft.<sup>31</sup> The key issue in *Kennedy* was whether the sanction—deprivation of citizenship—was penal or regulatory in nature; if it was punitive, the punishment must be struck down because of a

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19. *Id.*

20. *Id.*

21. KAN. STAT. ANN. §§ 22-4902(a)(7) to -4906(a)(1) (2010). The legislature recently updated the statute to require offenders to register for fifteen years. § 22-4906(a)(1)(N). This change caused litigation because it covered those already serving their ten-year registration and extended their registration requirement for another five years, for a total of fifteen years. *See, e.g.*, *State v. Reed*, 399 P.3d 865, 866 (Kan. 2017) (deciding a case where the court sentenced the defendant to a ten-year registration under KORA, and then subsequently extended it to fifteen years after the KORA amendment passed); *State v. Simmons*, 405 P.3d 1190, 1191–92 (Kan. 2017) (allowing retroactive application of KORA for drug offenders); *State v. Peterson-Beard*, 377 P.3d 1127, 1129 (Kan. 2016) (allowing retroactive application of KORA’s lifetime registration requirements for sex offenders).

22. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added).

23. *State v. Huey*, 399 P.3d 211, 215 (Kan. 2017).

24. KAN. STAT. ANN. § 22-3504(1) (2017).

25. *State v. Dickey*, 350 P.3d 1054, 1060–61 (2015).

26. *Apprendi*, 530 U.S. at 466.

27. *Id.*

28. *Id.* at 494 (emphasis added).

29. *State v. Huey*, 399 P.3d 211, 215 (Kan. 2017).

30. 372 U.S. 144 (1963).

31. *Id.* at 146–47.

lack of Due Process, but if it was regulatory, it likely would be upheld.<sup>32</sup> The Supreme Court provided a list of factors to determine whether a sanction is punitive or regulatory in nature:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.<sup>33</sup>

### III. COURT’S DECISION

The Kansas Supreme Court provided two interrelated reasons for rejecting Huey’s arguments. First, it held KORA is exempt from *Apprendi*’s reasoning because the legislature intended “KORA to be civil and nonpunitive.”<sup>34</sup> The court reasoned “[o]nly the clearest proof that the scheme is so punitive either in purpose or effect as to negate the legislature’s intention will suffice to override the legislature’s nonpunitive intent and transform what has been denominated a civil remedy into a criminal penalty.”<sup>35</sup> Second, the court rejected Huey’s argument because he failed to raise the issue of KORA’s unconstitutionality in the lower court.<sup>36</sup> In doing so, the lower court did not build a factual record on which the court could rely in making a decision.<sup>37</sup> Because Huey did not show the registration requirements constituted an increase in punishment, the majority held it was not a violation for the district court judge to make the finding rather than submit the question to a jury.<sup>38</sup> Although short, the three-judge dissent strongly argued that KORA’s registration requirement is “maximally invasive, maximally pervasive, and infinitely more public than incarceration,” and therefore was effectively a punishment.<sup>39</sup> Because the dissent believed this was a punishment, the issue of whether a deadly weapon was used should have been

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32. *Id.* at 164.

33. *Id.* at 168. These factors normally are discussed in the context of *ex post facto* laws, i.e., laws that are retroactively punitive in nature, though they are still illustrative in other punitive contexts, such as the one in *Huey*. See, e.g., *Smith v. Doe*, 538 U.S. 84, 92–96 (2003) (discussing the process of inquiring whether a statute is punitive in nature); *State v. Meredith*, 399 P.3d 859, 864 (Kan. 2017) (rejecting the idea that KORA is punitive and therefore barred by the *ex post facto* clause of the U.S. constitution). Although these are merely factors, many Supreme Court cases have turned on whether a single or a limited number of factors existed. See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 613–18 (1960) (discussing how “the mere denial of a noncontractual government benefit” was not an affirmative disability or restraint, making it less likely to be a punishment); *United States v. Constantine*, 296 U.S. 287, 294–95, (1935) (deciding a fine was a punishment in this case because it was clearly meant to be retribution for a crime and to serve as a deterrent).

34. KAN. STAT. ANN. § 22-4901 (2017); *Huey*, 399 P.3d at 215.

35. *Huey*, 399 P.3d at 215 (internal quotation marks and brackets omitted).

36. *Id.*

37. *Id.*

38. *Id.* The Kansas Supreme Court did not foreclose the issue of whether the legislature intended KORA to be a punishment, and a case with sufficient factual allegations could force the court to answer this. See *id.* at 215 (refusing to answer whether KORA’s registration requirement is a punishment because a factual record is lacking).

39. *Id.* at 215 (Beier, J., dissenting).

submitted to a jury for determination as required under *Apprendi*.<sup>40</sup>

#### IV. COMMENTARY

The Kansas Supreme Court’s reasoning is flawed and unpersuasive. First, it defies common sense and case law to suggest Huey’s forced registration on a list denoting him as a violent person is not punitive.<sup>41</sup> This effectively rejects the U.S. Supreme Court’s command to look at function over form when deciding whether a statute is punitive.<sup>42</sup> Applying the *Kennedy* factors, the registration requirement in *Huey* should have been found punitive.<sup>43</sup> A number of facts concerning KORA’s registration requirement show KORA imposes an affirmative duty on the offender.<sup>44</sup> At a minimum, offenders (1) *must* register anytime they change residence to a different county, or intend to do so, (2) *must* register at least four times a year, (3) if considered “transient”, *must* register at least every thirty days, and (4) *must* update their “registration information within three days” if any changes occur.<sup>45</sup> Additionally, these registration updates must be done in person, which the U.S. Supreme Court has indicated is an affirmative disability or restraint.<sup>46</sup> Moreover, KORA certainly operates as a deterrence to future crimes by making offenders’ past history of violence public with an updated location, and this deterrence is reinforced by the threat of additional jail time if offenders violate the conditions of KORA.<sup>47</sup> This threat of additional jail time should be considered a significant factor, if not dispositive, because it is the traditional hallmark of a punishment.<sup>48</sup> Taken together, this evidence strongly indicates KORA must be considered a punishment.<sup>49</sup>

Although the Kansas Supreme Court side-stepped Huey’s argument on the issue, case law allows Kansas courts to hear a constitutional sentencing claim for the first time on appeal.<sup>50</sup> The record in *Huey* contained enough

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40. *Id.* at 215–16 (discussing why KORA registration is a punishment).

41. *See Huey*, 399 P.3d at 215.

42. *See Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

43. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

44. *See* Kansas Bureau of Investigation & Kansas Attorney General, *Kansas Offender Registration Act* (Sept. 23, 2011), [http://www.kansas.gov/kbi/info/docs/pdf/KORA\\_Brochure\\_September\\_2011.pdf](http://www.kansas.gov/kbi/info/docs/pdf/KORA_Brochure_September_2011.pdf) [<https://perma.cc/K2EX-JKRP>].

45. *Id.* If the offender does not inform the local sheriff in person within three days, the offender faces penalties for violating the registration requirements. *Id.*

46. *See Smith v. Doe*, 538 U.S. 84, 86–87 (2003) (noting that the “lack” of an in-person registration requirement provision in a substantially similar statute in Alaska indicated it was non-punitive).

47. Kansas Bureau of Investigation & Kansas Attorney General, *supra* note 44. The first violation of KORA—“any portion” of it—is a level six person felony. *Id.* The punishment for a level six person felony is a statutory presumption of imprisonment for thirty-four to thirty-eight months. KANSAS SENTENCING GUIDELINES, DESK REFERENCE (2013), <https://www.sentencing.ks.gov/docs/default-source/2013-forms/sentencing-range—nondrug-offenses.pdf?sfvrsn=0> [<https://perma.cc/Q6N7-NEUE>]. A second violation is a level five person felony, which carries the presumption of imprisonment for fifty to fifty-five months. *Id.*; Kansas Bureau of Investigation & Kansas Attorney General, *supra* note 44.

48. *See, e.g., Smith*, 538 U.S. at 86–87 (stating imprisonment is “the paradigmatic affirmative disability or restraint”).

49. *See, e.g., id.*; *see also* Kansas Bureau of Investigation & Kansas Attorney General, *supra* note 44.

50. *State v. Huey*, 399 P.3d 211, 215 (Kan. 2017); *State v. Dickey*, 301 Kan. 1018, 1036 (2015). The court in *Huey* recognized this case law by quoting *State v. Dickey*. *Huey*, 399 P.3d at 215. In *Dickey*, the

evidence to establish that an *Apprendi* violation occurred because the district court judge *explicitly* stated she was making a finding that a dangerous weapon was used, triggering the application of a punishment separate from the jury's deliberations.<sup>51</sup> Because appellate courts have unlimited power to review *Apprendi* challenges, the judge's finding could have easily been reviewed and vacated.<sup>52</sup> Huey pled guilty to robbery and aggravated burglary, but no jury heard the issue of whether Huey used a deadly weapon, nor did Huey admit to using one.<sup>53</sup> The finding of a weapon was an element of the crime that should have been litigated in front of a jury.<sup>54</sup>

In conclusion, the Kansas Supreme Court's decision is chilling. But for Huey's criminal violation, he would not be forced to register as a violent offender.<sup>55</sup> No reasonable person would register on such a list *without* being forced to register under threat of law. But, the outcome does not have to be set in stone for future cases.<sup>56</sup> The Kansas Supreme Court at one time did believe forced registrations like Huey's were punishments, and (perhaps soon) it can return to that precedent again.<sup>57</sup>

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Kansas Supreme Court explicitly restated its ability to review *Apprendi* challenges without restraint. 301 Kan. at 1036 (2015). "As a general rule, a reviewing court will consider only those issues on which the parties have relied in trying their case."

*Pierce v. Bd. of Cty. Comm'rs of Leavenworth Cty.*, 434 P.2d 858, 859 (Kan. 1967). However, the Kansas Supreme Court has recognized *Apprendi* challenges to postrelease issues are exceptions to the general rule. *State v. Anthony*, 45 P.3d 852, 854 (Kan. 2002). The court of appeals recognized Huey's case fit the exception of needing consideration "to serve the ends of justice to prevent the denial of fundamental rights." *State v. Huey*, No. 109,690, 2014 WL 1707807, at \*2 (Kan. Ct. App. April 25, 2014), *aff'd*, 399 P.3d 211 (Kan. 2017).

51. *See Huey*, 399 P.3d at 214; *Dickey*, 301 Kan. at 1036 (restating the unlimited power reviewing courts have over *Apprendi* challenges).

52. *Dickey*, 301 Kan. at 1036.

53. *Huey*, 2014 WL 1707807 at \*1.

54. *Compare Apprendi*, 530 U.S. at 494 (stating that every element that constitutes the offense must be pleaded and proved in front of a jury) *with Huey*, 399 P.3d at 211 (admitting the lower court judge made a factual finding). There are practical considerations at work here, i.e., the prosecution could have simply added Huey's alleged use of a dangerous weapon to the plea agreement. *See Huey*, 2014 WL 1707807 at \*1 (noting that Huey's plea agreement lacked the admission of the use of a dangerous weapon).

55. *Huey*, 399 P.3d 211, 214.

56. *See generally id.*; *State v. Charles*, 372 P.3d 1109, 1123 (Kan. 2016), *abrogated by State v. Huey*, 399 P.3d 211 (Kan. 2017) (holding that KORA's registration requirement was in fact a punishment under Kansas law). *State v. Charles* was a unique case in Kansas precedent because it was the first time the Kansas Supreme Court ruled on whether KORA was in fact a punishment; it was overturned the next year by *State v. Huey*. *See Charles*, 372 P.3d 1109, 1122; *see also Doe v. Thompson*, 373 P.3d 750, 771 (Kan. 2016) (Kansas Supreme Court "finding that . . . KORA's statutory scheme is so punitive in effect as to negate the implied legislative intent to deem it civil"), *overruled by State v. Petersen-Beard*, 377 P.3d 1127, 1128 (2016).

57. *Huey*, 399 P.3d 214–15 (failing to reverse the defendant's punishment despite possessing sufficient evidence on the record).