

**No. 22-125269-A**

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**IN THE COURT OF APPEALS  
OF THE STATE OF KANSAS**

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**STATE OF KANSAS**  
**Plaintiff / Appellee**

vs.

**JASON W. PHIPPS**  
**Defendant / Appellant**

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**BRIEF OF APPELLEE**

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Appeal from the District Court of Sumner County, Kansas  
Honorable William R. Mott, Judge  
District Court Case No. 22-CR-02

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## TABLE OF CONTENTS

NATURE OF THE CASE.....	1
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE FACTS .....	2
ARGUMENTS AND AUTHORITIES.....	3
<b>I.    Phipps’s prior conviction for criminal threat was properly scored</b> .....	3
<b>Standard of Review</b> .....	3
<i>State v. Roberts</i> , 314 Kan. 316, 498 P.3d 725 (2021) .....	3
<b>Argument</b> .....	4
<i>The United States Supreme Court may overrule Boettger</i> .....	4
<i>State v. Boettger</i> , 310 Kan. 800, 450 P.3d 805 (2019) .....	4
<i>Counterman v. Colorado</i> , No. 22-128.....	4
<a href="https://www.scotusblog.com/case-files/cases/counterman-v-colorado/">https://www.scotusblog.com/case-files/cases/counterman-v-colorado/</a> (last visited April 13, 2023).....	4
<i>The criminal history challenge is moot</i> .....	4
<i>State v. Castle</i> , 59 Kan. App. 2d 39, 477 P.3d 266 (2020).....	5
<i>If reached, this panel should affirm</i> .....	5
<i>State v. Boettger</i> , 310 Kan. 800, 450 P.3d 805 (2019) .....	5
<i>State v. Fleming</i> , 308 Kan. 689, 423 P.3d 506 (2018) .....	5
K.S.A. 22-3210 .....	5
<i>State v. Edgar</i> , 281 Kan. 30, 127 P.3d 986 (2006).....	5
<i>State v. Shaw</i> , 259 Kan. 3, 910 P.2d 809 (1996) .....	5
K.S.A. 2011 Supp. 21-5202.....	6
<i>No statute requires the State to prove the conduct was only intentional.</i> .....	6
K.S.A. 2022 Supp. 21-6814.....	6
<i>Constitutional law does not permit the collateral attack, so it has no relevance here.</i> .....	7
<i>State v. Edwards</i> , 281 Kan. 1334, 135 P.3d 1251 (2006).....	7

<i>State v. Kleypas</i> , 305 Kan. 224, 382 P.3d 373 (2016) .....	7
K.S.A. 2022 Supp. 21-6810.....	7
<b>II. Phipps’s argument regarding the sentence for his misdemeanor convictions contradicts prior caselaw and is flawed.....</b>	<b>8</b>
<b>Standard of Review .....</b>	<b>8</b>
<i>State v. Roberts</i> , 314 Kan. 316, 498 P.3d 725 (2021) .....	8
<b>Argument .....</b>	<b>8</b>
K.S.A. 2021 Supp. 21-6604.....	8
K.S.A. 2021 Supp. 21-6605.....	8
K.S.A. 2021 Supp. 21-6608.....	8
K.S.A. 21-6819 .....	9
K.S.A. 21-6801 .....	9
K.S.A. 21-6802 .....	9
<i>State v. Huff</i> , 277 Kan. 195, 83 P.3d 206 (2004) .....	9
K.S.A. 21-4720 .....	9
<i>State v. Hambright</i> , 310 Kan. 408, 447 P.3d 972 (2019).....	9
<b>CONCLUSION .....</b>	<b>9</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>10</b>

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**STATE OF KANSAS  
Plaintiff-Appellee**

v.

**JASON W. PHIPPS  
Defendant-Appellant**

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**BRIEF OF APPELLEE**

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**NATURE OF THE CASE**

This is Jason W. Phipps's direct appeal from his convictions for burglary, theft of a firearm, misdemeanor theft, and criminal trespass. He argues his prior criminal threat conviction should not have been scored as a person felony and that his misdemeanor convictions must be served in the Department of Corrections and are subject to the double-double rule. Remand is not required.

**STATEMENT OF THE ISSUES**

- I. Phipps's prior conviction for criminal threat was properly scored.**
- II. Phipps's argument regarding the sentence for his misdemeanor convictions contradicts prior caselaw and is flawed.**

## STATEMENT OF THE FACTS

Jason Phipps pled no contest to criminal trespass, burglary of a vehicle, misdemeanor theft, and theft of a firearm. (R. IV, 10.)

At sentencing, the issue of whether Phipps's prior conviction for criminal threat should be scored as a person felony was discussed. The court found that it should because when the defendant entered a plea of no contest, he pled to both versions of the statute, and the court found him guilty of both versions of the statute. (R. V, 5-18.)

In doing so, the court noted the factual basis of the plea, which was that Phipps became upset in a dispute with the mother of his child. He went to her home and demanded she open a gun safe. When she refused to do so, he said, "You will if you have a gun to your head." (R. V, 8.) He also asked her if she wanted to die there and told her other people were going to die before leaving the scene. (R. V, 8.)

The court then found:

So let's get back to basics here. The Defendant waived his right to a jury trial. All agree to that. Entered no contest plea. All agree to that. I think, if you really thought about it, you would agree that KSA 22-3210(a)(4) applies. That's that statute for taking pleas. So, in stark contrast to what happens when case goes to jury trial, the statute for taking pleas actually requires – to establish that all of the elements of the crimes charged are present were accepted in Defendant's plea. See, that's what happened here. That's *State v. Edgar*, 281 Kan. 30, 243, 2006. That's an Alford plea case. *State v. Shaw*, 59 Kan. 387, Page 387. 1996 case. That's a no contest plea. That's what happened here. I mean, it's a requirement to find that all the facts exist in a no contest plea. That's why we have the plea colloquy. I asked the Defendant what he's pleading to. He is found guilty, as alleged by the

State, which included both. That is a very clear case to me. It's not really that complicated, I don't think.

So what happened here was, he pled no contest, criminal threat without reservation, was found guilty as charged – excuse me – as alleged or as charged of criminal threat. And pursuant to the statute, I found him guilty of all the elements of the crime, both versions. So I accepted the plea.

(R. V, 13-14.)

With the scoring of the criminal threat conviction as a person felony, Phipps's criminal history score was a B. (R. V, 20.) He was then sentenced to a total of 20 months in prison on the felony counts with twelve months of postrelease supervision. (R. V, 23-24.) For the misdemeanor counts, he was sentenced to a total of 18 months in jail. (R. V, 24.) All of the counts were run consecutive. (R. V, 24.)

He now appeals.

Additional facts will be discussed in the analysis as necessary.

### **ARGUMENTS AND AUTHORITIES**

#### **I. Phipps's prior conviction for criminal threat was properly scored.**

##### **Standard of Review**

This Court has unlimited review over Phipps's challenge to the scoring of his prior criminal threat conviction. *State v. Roberts*, 314 Kan. 316, 319-20, 498 P.3d 725 (2021).

## Argument

Phipps argues his prior criminal threat conviction cannot be scored as a person felony because the State cannot prove that his conviction was only for intentional conduct. But the State should not have to bear that burden. No statute requires it. Nor does the United States Constitution.

### *The United States Supreme Court may overrule Boettger*

First, as a preliminary matter, a case pending in the United States Supreme Court has the potential to call *State v. Boettger*, 310 Kan. 800, 822, 450 P.3d 805 (2019), into question. *Counterman v. Colorado*, No. 22-128, is set to be argued on April 19, 2023. The issue in the case is whether “to establish that a statement is a ‘true threat’ unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective ‘reasonable person’ would regard the statement as a threat of violence.” <https://www.scotusblog.com/case-files/cases/counterman-v-colorado/> (last visited April 13, 2023). Due to that pending case, the State seeks to preserve the argument that reckless criminal threats do not violate the First Amendment. But the State also accepts that this Court is currently duty-bound to follow *Boettger*.

### *The criminal history challenge is moot*

The State filed a notice of change in custodial status on April 13, 2023. That notice establishes that Phipps has completed the prison portion of his sentence. Phipps’s criminal history has no effect on his postrelease term or his misdemeanor

sentences. This issue should not be reached because it is moot. *State v. Castle*, 59 Kan. App. 2d 39, 47-48, 477 P.3d 266 (2020).

*If reached, this panel should affirm*

Phipps relies on *Boettger* to assert that the State must prove that Phipps *only* acted intentionally when threatening to hold a gun to his child’s mother’s head and asking if she wanted to die before telling her others would die. (R. V, 8.) But as noted by the district court in this case, *Boettger* involves a jury trial and unanimity issues that simply do not exist in cases where a defendant waives a jury trial right (and the corresponding right to jury unanimity) by entering a plea. (R. V, 13-14.)

The State acknowledges that Phipps correctly establishes that opinions by this Court have refused to permit the State to score prior criminal threat cases as person felonies when the defendant pleads to both the reckless and intentional versions of criminal threat. The State continues to respectfully maintain that those opinions are wrongly decided. And this panel is not required to follow the other panels’ opinions. *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018).

As noted by the district court, in order to accept the plea, the district court was required to find a factual basis supported the charged crime. K.S.A. 22-3210(a)(4). And it was required to “establish that *all elements* of the crime charged are present.” *State v. Edgar*, 281 Kan. 30, 42, 127 P.3d 986 (2006) (emphasis added); *State v. Shaw*, 259 Kan. 3, 7, 910 P.2d 809 (1996) (same). Thus, when the district court accepted the plea, it necessarily found intentional conduct was present since it was an element of the charged offense. When Phipps accepted a plea to

both alternatives, he agreed that there was sufficient evidence for a conviction on both alternatives. As such, the crime was properly scored as a person felony.

Further, the more logical conclusion when a plea to both reckless and intentional conduct is entered is that the conduct is, in fact, intentional. After all, since the 2010 recodification, the law has been that when intentional conduct is proven, then reckless conduct is necessarily proven. K.S.A. 2011 Supp. 21-5202(c). This would allow for a plea to both alternatives based only on intentional conduct. But admittedly, the recodification was not in effect when Phipps committed his criminal threat.

Regardless, the factual basis here supports intentional conduct. Threatening to put a gun to someone's head and asking if they wanted to die while also telling them other people would die are intentional threats. (R. V, 8.) And because Phipps pled to both versions of the statute he was convicted under, that makes any reference to reckless intent mere surplusage.

*No statute requires the State to prove the conduct was only intentional*

Phipps argues that the State was required to prove the conduct was only intentional. He is wrong. He does not point to any statute that requires that rule. And *Boettger* and its progeny cannot be read to require such a thing as they dealt with jury unanimity, which is not required when a defendant waives his or her right to a jury trial and enters a plea.

The law provides that the State is required to prove the prior criminal history by a preponderance of the evidence. K.S.A. 2022 Supp. 21-6814(c). That is the only

statutory burden involved. The State merely has to prove that the defendant was convicted of an intentional version of criminal threat by a preponderance of the evidence. Because the plea involved the intentional version, it did so.

If Phipps believed his criminal threat conviction was unconstitutional because he only pled to the reckless version of the statute, he was free to file a motion to withdraw his plea. But, since his plea remains valid, there is no reason not to score it.

*Constitutional law does not permit the collateral attack, so it has no relevance here*

Because the convictions are final, they are entitled to a presumption of validity. See *State v. Edwards*, 281 Kan. 1334, 1341, 135 P.3d 1251 (2006) (a plea waives all nonjurisdictional defects, including most constitutional rights challenges). Collateral attacks on convictions are not permitted. *State v. Kleypas*, 305 Kan. 224, 327-28, 382 P.3d 373 (2016) (upholding the district court's decision not to permit a collateral attack on a conviction used to support an aggravating factor in Kleypas's death sentence). The only exception is an attack on whether a prior misdemeanor conviction occurred with the benefit of counsel. *Id.* So, as a matter of constitutional law, there is no reason Phipps' conviction cannot be scored as a person crime since Phipps cannot constitutionally raise a claim that he was only convicted of reckless conduct.

Here, his challenge is permitted due to K.S.A. 2022 Supp. 21-6810(e)(9). But the State met its statutory burden. Thus, the conviction was properly scored.

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This issue should not be reached because it is moot. But if reached, this panel should break from the other panels and find that a plea to both intentional and reckless conduct permits a prior criminal threat conviction to be scored as a person felony.

**II. Phipps’s argument regarding the sentence for his misdemeanor convictions contradicts prior caselaw and is flawed.**

**Standard of Review**

This Court has unlimited review over Phipps’s illegal sentence challenge. *State v. Roberts*, 314 Kan. 316, 319-20, 498 P.3d 725 (2021).

**Argument**

Phipps argues that misdemeanors sentences are required to be served in the Department of Corrections when they are consecutive to felony prison sentences. Expanding on this claim, Phipps argues that such misdemeanors sentences are also subject to the felony sentence double-double rule. His claims are flawed.

K.S.A. 2021 Supp. 21-6604(a) requires misdemeanor sentences to be served in jail. K.S.A. 2021 Supp. 21-6605 only permits the secretary of corrections to take custody of a person convicted of a felony.

Further, K.S.A. 2021 Supp. 21-6608 permits a district court to parole “a misdemeanant sentenced to confinement in the county jail.” Phipps’s unusual reading of the statutes would effectively end the ability of defendants convicted of a misdemeanor to shorten or terminate their purportedly illegal jail sentences if they were also convicted of a felony.

Most importantly, K.S.A. 21-6819 is part of the Revised Sentencing Guidelines. They only apply to felonies. E.g. K.S.A. 21-6801; K.S.A. 21-6802. Misdemeanors are not subject to the sentencing grid. Thus, they are not subject to K.S.A. 21-6819. Phipps claims to the contrary lack merit. The cases he notes that contradict his position are sound.

Further, this Court is duty-bound to follow *State v. Huff*, 277 Kan. 195, 197, 83 P.3d 206 (2004), which noted that K.S.A. 21-4720, which is now K.S.A. 21-6819, “applies only to felony sentences under the Kansas Sentencing Guidelines Act.” *State v. Hambright*, 310 Kan. 408, 416, 447 P.3d 972 (2019). This this Court cannot find in Phipps’s favor.

### CONCLUSION

The State respectfully requests that this Court affirm Phipps’s sentence or dismiss his criminal history challenge as moot.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of Appellee's Brief was sent by e-mailing a copy to Kai Tate Mann at adoservice@sbids.org on this 13th day of April, 2023, and the original was electronically filed with the Clerk of the Appellate Court.

*/s/ Natalie Chalmers* \_\_\_\_\_  
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