

No. 22-125269-A

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

STATE OF KANSAS
Plaintiff / Appellee

vs.

JASON W. PHIPPS
Defendant / Appellant

SUPPLEMENTAL BRIEF OF APPELLEE

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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STATE OF KANSAS
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JASON W. PHIPPS
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SUPPLEMENTAL BRIEF OF APPELLEE

NATURE OF THE CASE

At issue in this supplemental brief is whether Phipps's prior criminal threat conviction can be scored as a person felony in light of *Counterman v. Colorado*, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), being decided during Phipps's direct appeal.

STATEMENT OF THE ISSUE

- I. ***Counterman* directly overrules *Boettger* and applies in this appeal because it is Phipps's direct appeal.**

STATEMENT OF THE FACTS

No additional facts are necessary. But it is important to note that this is Phipps's direct appeal.

ARGUMENTS AND AUTHORITIES

I. *Counterman* directly overrules *Boettger* and applies in this appeal because it is Phipps's direct appeal.

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

As an initial matter, the State no longer contends this case is moot. While Phipps has completed his felony prison sentence and postrelease, he is still serving his misdemeanor jail sentence. Although his prior conviction is not directly factored into the length of his jail sentence, that does not make this case moot. The question of whether criminal threat convictions can be scored as person felony is a question of statewide public importance. And no appellate court has yet to decide how *Counterman* applies to those cases on direct appeal and those cases pending on or after *Counterman* was decided.

It is unknown when the Kansas Supreme Court will have an appropriate vehicle to reach a decision on the merits, but since *Boettger* has been decided, this Court has ruled on a number of cases involving challenges to whether a criminal threat conviction can be scored. The sheer number of prior criminal threat convictions and prior conviction scoring challenges establish that the issue is likely to continue to vex both district and appellate courts as they attempt to ensure that prior criminal threat convictions are scored according to the legislature's intent.

Thus, the case is not moot because it is capable of repetition and presents concerns of public importance. *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020).

A. *Counterman* overrules *Boettger*.

In *Boettger*, the Kansas Supreme Court answered a question that it admitted had not yet been directly decided by the United States Supreme Court: “whether a conviction for recklessly making a threat can be a true threat or instead violates the First Amendment.” 310 Kan. 800, 808-09, 450 P.3d 805, 810 (2019). In doing so, it interpreted United States Supreme Court caselaw, including *Virginia v. Black*, 583 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), and *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). 310 Kan. at 809-22. The Kansas Supreme Court then relied on its interpretation of *Black* to conclude that criminalizing “a threat of violence [] made in reckless disregard for causing fear causes the statute to be unconstitutionally overbroad because it can apply to statements made without the intent to cause fear of violence.” 310 Kan. at 822-23. Thus, the Kansas Supreme Court’s holding rests *explicitly* on its view of the United States Supreme Court’s interpretation of the First Amendment.

And the United States Supreme Court has now directly answered the question it left open in its prior opinions. In doing so, the Court unequivocally held that “a mental state of recklessness is sufficient” to establish a true threat, unprotected by the First Amendment. 143 S. Ct. at 2111-12, 17-18. “The State need not prove any more demanding form of subjective intent to threaten

another.” 143 S. Ct. at 1112. Thus, *Counterman* establishes that the Kansas Supreme Court’s contention that reckless threats violated the First Amendment is wrong. In finding recklessness sufficient, *Counterman* directly conflicts with, and necessarily overrules, *Boettger*. Both this Court and the Kansas Supreme Court are bound by *Counterman*. See, e.g., *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P.2d 665 (1959) (Under Article VI of the United States Constitution, “the interpretation placed on the Constitution and laws of the United States by the decisions of the supreme court of the United States is controlling upon state courts and must be followed.”).

Further, Kansas follows the common definition of recklessness, so the Court’s holding unquestionably applies. K.S.A. 21-5202(j); 143 S. Ct. at 2117-18 (defining recklessness). Thus, because it conflicts with United States Supreme Court precedent, *Boettger* is no longer good law and no longer binding on this Court.

B. *Counterman* applies on direct appeal.

In light of a number of evolving criminal history rules, the Kansas Supreme Court has directly answered whether a change in law effecting criminal history applies during a direct appeal. In *State v. Murdock*, 309 Kan. 585, 591-92, 439 P.3d 307 (2019), the Kansas Supreme explained that a change in law during the pendency of a direct appeal is to be applied: “Put simply, a party may seek and obtain the benefit of a change in the law during the pendency of a direct appeal....”

In sum, the typical rule that changes in law apply prospectively and to cases on direct review applies here. E.g. *Murdock*, 309 Kan. at 591; *State v. Ewing*, 310

Kan. 348, 352, 446 P.3d 463 (2019) (relying on *Murdock*); *State v. Ford*, 302 Kan. 455, 471, 353 P.3d 1143 (2015) (“[I]t is generally true that changes in the law apply prospectively and only to cases on direct review.”). Thus, *Counterman v. Colorado*, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), must apply.

CONCLUSION

The State respectfully requests that this Court affirm Phipps’s sentence.

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 11th day of September, 2023, and the original was electronically filed with the Clerk of the Appellate Court.

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