No. 22-125269-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff / Appellee

vs.

JASON W. PHIPPS
Defendant / Appellant

SECOND 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

Natalie Chalmers, #23196
Principal Assistant Solicitor General
Office of the Kansas Attorney General
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
Fax: (785) 296-3131
Natalie.chalmers@ag.ks.gov
Attorney for Appellee

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NATURE OF THE CASE

Based on this Court granting rehearing, this supplemental brief addresses whether this Court has jurisdiction to decide if Phipps's prior criminal threat conviction was properly scored as a person felony.

STATEMENT OF THE ISSUE

I. This Court has jurisdiction to reach Phipps' challenge to his criminal history.

STATEMENT OF THE FACTS

No additional facts are necessary.

ARGUMENTS AND AUTHORITIES

I. This Court has jurisdiction to reach Phipps' challenge to his criminal history.

Standard of Review

This Court has unlimited review over questions of jurisdiction. *State v. Clark*, 313 Kan. 556, 560, 486 P.3d 591 (2021).

Argument

The Kansas Constitution does not directly speak on the jurisdiction of this Court to decide moot issues. Despite this Court's caselaw using the term, Article III, Section 1, does not contain the words "rival litigants." Meanwhile, Article III, Section 3, instructs only that this Court has "such appellate jurisdiction as may be provided by law." Article III, Section 3. No known statute prohibits the review of moot claims.

Historically, the law has provided jurisdiction over arguably "moot" issues, in that, even before Kansas's Constitution was adopted and ratified, the State has been able to appeal a question reserved. E.g. Section 266 of the 1859 Code of Criminal Procedure. Then, after Kansas ratified its Constitution, a question reserved appeal remained authorized. E.g. Section 266 of 1862 Code of Criminal Procedure; K.S.A. 22-3602(b)(3); see also *State v. Carmichael*, 3 Kan. 102, 103 (1865) (noting that under Section 266 of the Code of Criminal Procedure in effect at the time, one of the grounds for appeal by the State is "[u]pon a question reserved by the territory (state).").

Review of a question reserved is permitted despite neither party benefitting from an answer to the question in the actual case. Rather, "[q]uestions reserved presuppose that the case at hand has concluded but that an answer to an issue of statewide importance is necessary for disposition of future cases." *State v. Berreth*, 294 Kan. 98, 124, 273 P.3d 752 (2012) (citations omitted). Appellate courts nevertheless rule on questions reserved when the issues are "matters of statewide interest important to the correct and uniform administration of the criminal law and interpretation of statutes…." *State v. Skolaut,* 286 Kan. 219, 225, 182 P.3d 1231 (2008). And, as early as 1920, a majority of this Court found such questions were constitutionally permitted under Section 3 of Article 3 of the Kansas Constitution even after a defendant was acquitted. *State v. Allen*, 107 Kan. 407, 191 P. 476, 477-78 (1920).

Thus, any conclusion that Kansas's Constitution unequivocally prohibits opinions on matters of statewide importance merely because the defendant's case would not be affected contradicts the Criminal Code of Procedure in effect before and after ratification of the Constitution, K.S.A. 22-3602(b)(3), and the caselaw on questions reserved.

The separation of powers doctrine may well limit when this Court chooses to exercise its authority. But the legislature has granted this Court the authority, at minimum, to give guidance in criminal cases on questions reserved. This Court should not lightly conclude its ability to do so is unconstitutional when that practice has existed throughout the history of this State.

The existence of the long-standing ability for the State to appeal on questions reserved should be sufficient to determine that stare decisis forecloses a jurisdictional rule barring this Court from having jurisdiction to reach issues that remain capable of repetition and are issues of statewide importance. Or, at the very least, this Court must have jurisdiction to reach questions reserved because they have been directly authorized by statute for appellate jurisdiction. Thus, such questions must be permitted within any mootness framework decided upon by this Court.

Nor would carving out an exception to a jurisdictional rule be unique in this Court's caselaw to the mootness doctrine, even if it is jurisdictional. While the timely filing of a notice of appeal or a petition for review are jurisdictional, review can still occur in limited circumstances. *State v. Patton*, 287 Kan. 200, 206, 195 P.3d 753 (2008) (setting forth the three *Ortiz* exceptions for the failure to file a timely notice of appeal); *Swenson v. State*, 284 Kan. 931, 937, 169 P.3d 298 (2007) (permitting untimely petition for review to proceed due to ineffective assistance of counsel). Thus, despite the majority's conclusion otherwise, the mere fact that something is jurisdictional does not inherently mean no exceptions can ever apply.

Meanwhile, K.S.A. 22-3602(a) only authorizes courts to review "any decision of the district court or intermediate order made in the progress of the case…." Yet, despite what is arguably a statutory jurisdictional limit on appellate court review, in a number of instances, including for allegations of prosecutorial error, defendants are permitted to raise claims for the first time on appeal without any decision by

the district court based on court-crafted exceptions to preservation. While no statute directly authorizes such exceptions, nor does one bar it. Cf. K.S.A. 22-3414(3) (limiting the review of jury instruction issues); K.S.A. 60-404 (requiring objections for evidentiary issues to be reviewed). The same is true of the mootness doctrine.

Further, a review of other jurisdictions establishes that no other state or federal court has gone as far as the majority opinion did in limiting issues courts can decide. This Court should now reverse course and find the mootness doctrine does not bar issues that are matters of statewide importance and capable of repetition.

1. *Among other states that permit questions reserved, each permit "moot" appeals if the issue is of public interest or capable or repetition yet evading review.*

At least two other states have laws similar to K.S.A. 22-3602(b)(3), and permit question reserved appeals. Each also have exceptions to the mootness doctrine.

Indiana permits a question reserved if the defendant is acquitted. Ind. Code Ann. § 35-38-4-2(a)(4). Indiana's Constitution authorizes its Supreme Court to have "in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed." Article 7, § 2. While it is unclear if Indiana views mootness as truly jurisdictional, the Indiana Supreme Court has concluded that its jurisdictional limits are not the same as the federal courts, since Indiana's Constitution contains no language regarding actual cases and controversies. *In re Custody of M.B.*, 51 N.E.3d 230, 233 (Ind. 2016). And it

specifically permits courts to decide moot cases "when the case involves questions of 'great public interest.'" 51 N.E.3d at 233.

Indiana has not fully adopted the federal doctrine's version of "capable of repetition yet evading review" but seems to have something very similar factor into whether mootness exists. *J.F. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 256 N.E.3d 1260, 1269-70 (Ind. 2025). And even the Indiana Supreme Court Justice that holds a more limited view of Indiana's judicial power to review moot cases explicitly advocates for a "capable of repetition yet evading review" exception. 256 N.E.3d at 1273 (Slaughter, J., concurring in part).

Oklahoma also permits question reserved appeals in criminal case. Okla. Stat. Ann. tit. 22, § 1053(3). Oklahoma's Constitution is comparable to Kansas's in that appellate jurisdiction is authorized by statute. Art. VII, § 4. It also contains no case or controversy requirement. While Oklahoma does not appear to have squarely addressed whether mootness is a jurisdictional doctrine, it does recognize two exceptions to the mootness doctrine: "(1) when the appeal presents a question of broad public interest, and (2) when the challenged event is capable of repetition, yet evading review." *Oklahoma Elec. Coop. v. State ex rel. Oklahoma Corp. Comm'n,* 2025 OK 60, ¶ 20.

2. *Even among jurisdictions that consider mootness jurisdictional, cases are not moot if they are capable of repetition or a matter of public importance.*

Other states are divided on whether mootness is prudential or jurisdictional. The courts in Alaska, Arizona, California, Florida, Maryland, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Wyoming each have direct

language stating mootness is prudential or not jurisdictional. *Regul. Comm'n of Alaska v. Matanuska Elec. Ass'n*, 436 P.3d 1015, 1027 (Alaska 2019); *Arizona Republican Party v. Richer*, 257 Ariz. 237, 247, 547 P.3d 356, 366 (2024); *People ex rel. Becerra v. Superior Ct.*, 29 Cal. App. 5th 486, 496, 240 Cal. Rptr. 3d 250, 261 (2018), as modified (Nov. 28, 2018); *Merkle v. Guardianship of Jacoby*, 912 So. 2d 593, 594 (Fla. Dist. Ct. App. 2005); *Thana v. Bd. of License Comm'rs for Charles Cnty.*, 226 Md. App. 555, 568, 130 A.3d 1103, 1111 (2016); *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 48, 539 P.3d 272, 288; *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890 (1978); *Matter of Y. S. D.*, 368 Or. 627, 632, 496 P.3d 1029, 1032 (2021); *Shirley v. Pennsylvania Legislative Reference Bureau*, 318 A.3d 832, 849-50 (Pa. 2024); *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 470 (R.I. 2008); *Operation Save Am. v. City of Jackson*, 2012 WY 51, ¶ 24, 275 P.3d 438, 449 (Wyo. 2012). New Hampshire also appears to be a jurisdiction in which mootness is not jurisdictional since it considers mootness a "matter of convenience and discretion." *State v. Luwal*, 175 N.H. 467, 470, 293 A.3d 482 (2022).

Even assuming each of the remaining states deem mootness jurisdictional (although several do not take clear positions), none go so far as the majority opinion in this case. Every remaining state permits the review of issues that are either capable of repetition or matters of public importance. *Plunk v. Reed*, No. SC-2024-0021, 2025 WL 225197, at *2 (Ala. Jan. 17, 2025) (capable of repetition but evading review or public interest); *Boling v. McCastlain*, 2025 Ark. 78, 2 (2025) (capable of repetition but evading review or issues of substantial public interest); *Bonde v.*

People, 2025 CO 24, ¶ 12, 569 P.3d 109, 113 (important issues that are capable of repetition yet potentially evading review); *State v. Guild*, 353 Conn. 76, 92, 340 A.3d 451, 461 (2025) (capable of repetition yet evading review); *Burroughs v. State*, 304 A.3d 530, 539 (Del. 2023) (capable of repetition yet evading review or matters of public importance); *Int. of D. B.*, 376 Ga. App. 403, 411, 917 S.E.2d 884, 891 (2025), reconsideration denied (July 17, 2025) (capable of repetition yet evading review); *Kia'i Wai O Wai'ale'ale v. Bd. of Land & Nat. Res.*, 157 Haw. 303, 316-17, 576 P.3d 816, 829-30 (2025) (capable of repetition yet evading review or public interest); *Mitchell v. Ramlow*, 174 Idaho 723, 727, 559 P.3d 1210, 1214 (2024), *cert. denied*, No. 25-116, 2025 WL 2906514 (U.S. Oct. 14, 2025) (capable of repetition yet evading review or substantial public interest); *People v. Brownlee*, 2025 IL App (2d) 250198, ¶¶ 12-13 (public interest or capable of repetition); *G.W. v. State*, 231 N.E.3d 184, 188 (Ind. 2024) (public interest); *Iowa Dep't of Health & Hum. Servs. v. Iowa Dist. Ct. for Polk Cnty.*, No. 24-0834, 2025 WL 3038256, at *4 (Iowa Oct. 31, 2025) (public issue that is likely to recur yet evade review); *Jones v. Commonwealth*, No. 2024-SC-0399-DG, 2025 WL 2998581, at *2 (Ky. Oct. 23, 2025) (public interest, which includes a factor of being capable of repetition); *Texas Brine Co., LLC v. Naquin*, 2019-1503 (La. 1/31/20), 340 So. 3d 720, 730 (capable of repetition yet evading review); *McCallion v. Town of Bar Harbor*, 2025 ME 58, ¶ 13, 340 A.3d 37, 41 (capable or repetition but evade review); *Care & Prot. of Jaylen*, 493 Mass. 798, 800, 231 N.E.3d 302, 306, Fn. 5 (2024) (public importance and capable of repetition yet evading review); *T & V Assocs., Inc. v. Dir. of Dep't of Health & Hum. Servs.*, 12

N.W.3d 594, 595-96 (Mich. 2024) (public significance and likely to recur but may evade review); *In re State*, No. A22-1490, 2023 WL 9053670, at *2 (Minn. July 31, 2023) (capable of repetition yet likely to evade review or "functionally justifiable" and presents an important question of statewide significance); *Matter of Est. of Johnson v. Johnson*, 237 So. 3d 698, 715 (Miss. 2017) (capable of repetition but evading review or a matter of public interest); *A.J.B. v. Montana Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶ 14, 411 Mont. 201, 207, 523 P.3d 519, 523 (capable of repetition yet evading review or public interest); *Jones v. Colgrove*, 319 Neb. 461, 477, 24 N.W.3d 1, 15 (2025) (public interest); *Washoe Cnty. Hum. Servs. Agency v. Second Jud. Dist. Ct. in & for Cnty. of Washoe*, 138 Nev. 874, 877, 521 P.3d 1199, 1204 (2022) (widespread importance capable of repetition, yet evading review); *Delaware River Joint Toll Bridge Comm'n v. George Harms Constr. Co.*, 258 N.J. 286, 305, 318 A.3d 643, 654 (2024) (public importance that is capable of repetition yet evading review); *People ex rel. Welch v. Maginley-Liddie*, No. 53, 2025 WL 1687712, at *2 (N.Y. June 17, 2025) (novel issue that is likely to recur and will typically evade review); *Onstad v. Jaeger*, 2020 ND 203, ¶ 10, 949 N.W.2d 214, 217 (great public interest or capable of repetition yet evading review); *Highland Tavern, L.L.C. v. DeWine*, 2023-Ohio-2577, 173 Ohio St. 3d 59, 67, 227 N.E.3d 1148, 1156 (2023) (capable of repetition yet evading review); *Oklahoma Elec. Coop. v. State ex rel. Oklahoma Corp. Comm'n,* 2025 OK 60, ¶ 20 (question of broad public interest or capable of repetition yet evading review); *Croft as Tr. of James A. Croft Tr. v. Town of Summerville*, 433 S.C. 473, 480–81, 860 S.E.2d 352, 356-57 (2021) (capable of

repetition yet evading review or important public interest); *SD Citizens for Liberty, Inc. v. Rapid City Area Sch. Dist. 51-4*, 2023 S.D. 57, ¶ 39, 997 N.W.2d 635, 643 (capable of repetition yet evading review or public interest); *Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 208 (Tenn. 2009) (public interest); *Texas Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, 717 S.W.3d 854, 884 (Tex. 2025) (capable of repetition yet evading review); *State v. Seat*, 2022 UT App 143, ¶ 33, 523 P.3d 724, 732 (public interest and capable of repetition while likely to evade review); *In re Fredrick*, 2025 VT 37, ¶ 12, 342 A.3d 981, 985 (Vt. 2025) (capable of repetition yet evading review); *Commonwealth v. Browne*, 303 Va. 90, 95, 899 S.E.2d 616, 620 (2024) (capable of repetition yet evading review); *In re Marriage of Horner*, 151 Wash. 2d 884, 892–93, 93 P.3d 124, 128 (2004) (continuing and substantial public interest or likely to evade review); *State v. Foye*, 251 W. Va. 669, 916 S.E.2d 88, 94 (2025) (great public interest or capable of repetition yet evading review); *Cnty. of Dane v. Pub. Serv. Comm'n of Wisconsin*, 2022 WI 61, ¶¶ 24-25, 403 Wis. 2d 306, 325, 976 N.W.2d 790, 800 (great importance or frequently arise or capable of repetition yet evading review).

Federal caselaw, which also deems mootness jurisdictional, likewise does not have an absolute bar on deciding moot cases. *Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 606 U.S. 656, 672, 145 S. Ct. 2482, 2491, FN. 1, 222 L. Ed. 2d 800 (2025) (agreeing that the case was not moot because it was capable of repetition yet evading review); *United States v. Sanchez-Gomez*, 584 U.S. 381, 391, 138 S. Ct.

1532, 1540, 200 L. Ed. 2d 792 (2018) (discussing the capable of repetition yet evading review exception's requirements).

If other State and federal jurisdictions do not have a blanket prohibition on deciding such cases, there is no reason for this Court to adopt one. Nothing in Kansas's Constitution makes it so unique that this Court cannot consider issues with sufficient factual grounding to establish that they remain viable controversies and amount to matters of statewide importance.

To be clear, the State is not championing having this Court decide every single case that arguably becomes moot as it works its way through the appellate court system. If the issue itself lacks statewide interest or will have no effect on any future cases, then it is unquestionably moot. See Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 619 (2009) (arguing that only issue mootness, rather than personal stake mootness, is constitutionally barred and stating that "a moot case is, by definition, one that raises an issue with no reasonable likelihood of recurrence as to anyone."). This Court can place limits on other claims when the complaining party will not obtain any relief. But the idea that all 49 states and the federal government, each of which have some kind of "exception" to mootness, are all violating the tenants of their separation of powers doctrines is highly suspect.

In fact, perhaps it is a misnomer to deem issues that are capable of repetition yet evading review or matters of statewide importance exceptions to mootness. E.g. *Texas Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, 717 S.W.3d

854, 884 (Tex. 2025) (Discussing the Texas's constitutional mootness doctrine: "We are not alone in recognizing that the term 'exception' might be a bit of a misnomer…. Whatever we call them, therefore, it is important to correctly view the 'exceptions' as in no way purporting to be exemptions from the constitutional mandate that we have described."). Instead, they may well simply be excluded from the definition of mootness. Or perhaps they are more akin to elements that must not exist in order for a case to be deemed moot.

For example, in Georgia, there is a statute specifically barring the consideration of moot claims on appeal. OCGA § 5-6-48 (b)(3). Georgia has also concluded that moot claims are jurisdictionally barred, and likewise concluded no exceptions can exist, but found that issues that are capable of repetition yet evading review are not moot:

> The problem with denominating cases which present an issue capable of repetition yet evading review as moot, but subject to an exception to the mootness doctrine, is that the exception is inconsistent with the holding in *Chastain* that dismissal of moot cases is mandatory. A sound analytical approach to the doctrine of mootness, one which avoids the contradiction and which we now hold to be correct, was enunciated in *In the Interest of I.B.*, 219 Ga. App. 268, 464 S.E.2d 865 (1995). There, after a careful analysis of the doctrine of mootness as an element of jurisdiction, Judge Beasley (then Chief Judge Beasley) explained that the term "moot" must be narrowly construed to exclude from mootness those matters in which there is "[i]ntrinsically insufficient time to obtain judicial relief for a claim common to an existing class of sufferers...." *Id.* at 273, 464 S.E.2d 865. Since there would always be, in such cases, a live controversy, albeit no longer between the named parties, jurisdiction would not be foreclosed by the prohibition against advisory opinions. Thus, *Chastain*'s holding that a case is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights remains a correct statement of the doctrine of mootness so long as it is understood that a case which contains an issue that is capable

> of repetition yet evades review is not moot because a decision in such a case would be based on existing facts or rights which affect, if not the immediate parties, "an existing class of sufferers."

Collins v. Lombard Corp., 270 Ga. 120, 121, 508 S.E.2d 653 (1998).

But regardless of whether they are deemed exceptions or fit within the definition of mootness, an issue should not be moot if it is an issue of statewide importance and capable of repetition. This rule also dovetails with this Court's long-standing ability to rule on questions reserved.

Further, the Second Edition of American Jurisprudence, which acknowledges a need for an actual controversy for an appeal to proceed in most jurisdictions, concludes that cases that will resolve important and well-litigated controversies in situations capable of repetition must be decided:

> Although courts generally avoid issuing advisory opinions on abstract propositions of law, they should not avoid the resolution of important and well litigated controversies arising from situations which are capable of repetition, yet evading review. Moreover, the rule that courts will not decide moot questions is subject to an exception where the question, though moot, is of public importance and is likely to recur and evade review or judicial resolution in the future. Indeed, courts do not hesitate to reach the merits of cases that no longer involve a live dispute so as to further the public interest. Some courts subdivide the rule into two exceptions to the mootness doctrine; first, a court may resolve a moot case if it concerns a matter that is capable of repetition yet evading review, and second, a court may hear a moot case that involves issues of great public importance or a recurring constitutional violation.

1 Am. Jur. 2d Actions § 43.

3. *Permitting resolution of issues that are matters of statewide importance and capable of repetition would prevent the problems identified by the dissenting Justices.*

In his dissent joined by Justice Rosen, Justice Biles carefully laid out a number of concerns with modifying the mootness doctrine to end any exceptions. Especially in regards to the likely upheaval of prior decisions in criminal cases, the State shares those concerns. Numerous constitutional issues could be left unanswered without the ability of courts to intervene. E.g. *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S. Ct. 854, 861, FN. 11, 43 L. Ed. 2d 54 (1975) (finding that "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review."). Further, the State would likely lose its ability to ensure sentences are uniformly applied when issues of statewide importance arise that need this Court's resolution. E.g. *State v. Terrell*, 315 Kan. 68, 70, 504 P.3d 405, 407 (2022) (reaching a criminal history challenge even though the defendant had finished the prison portion of his sentence).

Since the federal courts and state courts can decide cases that are matters of statewide importance and capable of repetition without violating the separation of powers doctrine, it is unknown why Kansas cannot do so regardless of whether mootness is jurisdictional or prudential.

4. *This case is not moot because the State is a party to this litigation and a ruling would inform how criminal threat cases are charged and how criminal history scores are calculated in multiple pending cases. Thus, the issue is one of statewide importance and is capable of repetition.*

In its initial opinion, this Court found that the issue was not moot because the resolution would not affect Phipps. But Phipps is not the only party to this case. The State is also a party to the case, and it will continue to be affected by the uncertainty in whether a plea to both the intentional and reckless versions of the criminal threat can be scored in a defendant's criminal history. It also needs clarity on whether the crime of reckless criminal threat is now constitutional. These issues are issues of statewide importance and capable of repetition.

And the State's assertion that the issue is not moot for its own purposes remains a valid reason to find the case is not moot. See e.g. 13C Wright & Miller, § 3533.8 *Capable of Repetition, Yet Evading Review*, 13C Fed. Prac. & Proc. Juris. § 3533.8 (3d ed.) (noting that there is no "apparent reason" why the government cannot defeat a claim of mootness if the conditions of the capable repetition yet evading review doctrine are satisfied). Here, this Court has yet to resolve the issues that the State is repeatedly facing despite the sentencing issue having arisen in several cases.

Nor does this Court's opinion in *State v. Smith*, 320 Kan. 62, 90-91, 563 P.3d 697 (2025), answer these questions. In fact, since *Smith* was decided, the Appellate Defender's Office is now asserting that no criminal threat convictions can ever be used in a defendant's criminal history because the criminal threat statute is not divisible. E.g. Brief of the Appellant in 21-128172. Further, defendants are

continuing to assert that *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), does not mean reckless criminal threat is constitutional in Kansas.

Due to the evolving issues that this Court has yet to address, the State has begun arguing that *Smith* was wrongly decided in part because *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019) (called into question by *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023)), did not find the statute itself was unconstitutional, but only found the reckless version was. Thus, because no court has declared the crime of criminal threat unconstitutional, no "crime defined by a statute that has since been declared unconstitutional" exists, and K.S.A. 21-6810(d)(9) has no application. In other words, applying the literal reading under the "plain and unambiguous" wording of K.S.A. 21-6810(d)(9), *Boettger* does not implicate the statute's exclusionary rule because *Boettger* did not determine "the crime" to be unconstitutional, only part of the statute, and criminal threat convictions should be scored as person felonies. The State has also argued that the conclusion that subsequent caselaw by a higher court cannot be factored into considering whether the statute is unconstitutional is absurd. And that absurdity should have led to a different outcome. *State v. Arnett*, 307 Kan. 648, 654, 413 P.3d 787 (2018) (courts must construe states to avoid unreasonable or absurd results).

Regardless of whether this Court is inclined to reconsider *Smith*, prosecutors have obtained numerous pleas to criminal threat without specifying if the crime was committed recklessly or intentionally. It is a matter of statewide importance to

ensure sentencing uniformity and fairness to know how such crimes can treated in applying a defendant's criminal history score. It is also a matter of statewide importance to answer whether *Counterman*, in fact, overruled *Boettger*. These are unquestionably issues that will continue to arise and should be addressed by this Court.

Although the State is not advocating that the case must be capable of evading review in order for the issue to be reached *in criminal cases*, any such requirement would also be met here. It should not be the rule in criminal cases because it is not the standard for questions reserved. Instead, in criminal cases, if the issue is one of statewide importance and capable of repetition, appellate courts should have jurisdiction to reach the issue. But even if capable of evading review becomes part of the mootness doctrine, because of the time involved in pursuing a criminal appeal, these issues are likely to continue to evade this Court's review. Thus, this case is not moot.

CONCLUSION

The State respectfully requests that this Court find it has jurisdiction to reach this issue and to affirm Phipps' sentence. In the alternative, the State requests that this Court clarify that its opinion has no impact on the appellate courts' statutory ability to decide questions reserved.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
KRIS W. KOBACH

/s/ Natalie Chalmers
NATALIE CHALMERS, # 23196
Principal Assistant Solicitor General
Office of the Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
Fax: (785) 296-3131
natalie.chalmers@ag.ks.gov
Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that on November 17, 2025, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was emailed to Kai Tate Mann at adoservice@sbids.org.

/s/ Natalie Chalmers
Natalie Chalmers, #23196
Assistant Solicitor General