



House Judiciary Committee
March 12, 2025
House Bill 2401
Testimony of the BIDS Legislative Committee
Presented by Emily Brandt and Clayton Perkins
Opponent

Dear Chairperson Humphries and Members of the Committee:

On February 14, 2025 the Kansas Supreme Court issued its opinion in *State v. Robert Smith*, holding that K.S.A. 21-6810(d)(9) means exactly what it says: "Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes."¹ That decision, based on the plain and literal language of the statute, clarified a sentencing issue that has been causing confusion and uncertainty in Kansas sentencing courts. HB 2401 is a hurried attempt to add language to the statute in order to undo the holding of *State v. Smith*. Because the bill will re-inject the same uncertainty back into Kansas sentencing, and produce a slew of unnecessary appeals, the BIDS Legislative Committee opposes HB 2401.

How We Got Here

Fully explaining the impact of HB 2401 requires some background into a complex area of Kansas appellate history. On October 25, 2019, the Kansas Supreme Court held in *State v. Boettger* that the offense of reckless criminal threat as defined in K.S.A. 21-5415(a)(1) was unconstitutional in violation of the protections of free speech under the First Amendment.² That decision became final in June 2020 when the United States Supreme Court denied the request from the State of Kansas to review the case.³ Following that, it was clear for several years that under K.S.A. 21-6810(d)(9), prior convictions of reckless criminal threat "a statute that has since been determined unconstitutional by an appellate court" could not be counted in a criminal history score.

Thereafter, however, the United States Supreme Court, which had already passed over reviewing *Boettger*, concluded in *Counterman v. Colorado* that Colorado's statutes did not violate the First Amendment by using a reckless mental state in defining a threat.⁴ That decision has raised several complicated questions including whether:

1. *Counterman* undermines the holding of *Boettger* based upon First Amendment concerns;

¹ *State v. Smith*, No. 126,844, 2025 WL 496601 (Kan. Feb. 14, 2025)

² *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019)

³ *Kansas v. Boettger*, 140 S. Ct. 1956, 207 L. Ed. 2d 1089 (2020)

⁴ *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023)

2. Kansas' criminal threat statute is so distinct from the Colorado statute analyzed in *Counterman* that *Counterman* does not even apply; and
3. Kansas' criminal threat statute found unconstitutional under the United States Constitution in *Boettger* separately violates the protections of speech afforded by the Kansas Bill of Rights.

Suffice to say, the questions are complicated, and most of them remain pending before the Kansas Supreme Court, awaiting resolution in recently argued cases.⁵

Where We Are Now

After *Counterman*, the question of whether a prior conviction for reckless criminal threat could be used for criminal history scoring purposes became even more complicated. Questions arose not only over whether *Counterman* would implicitly overrule *Boettger*, but, if it did, when would prior convictions go from unconstitutional and unscorable to constitutional and scorable for criminal history purposes? As one opinion acknowledged it could be any number of dates including:

1. The date *Counterman* was decided;
2. The date the Kansas Supreme Court might find *Counterman* overrules *Boettger*; or, even,
3. As the "literal reading" of K.S.A. 21-6810(d)(9) indicates, the prior conviction remains unusable because the crime "has since been determined unconstitutional by an appellate court" regardless to the subsequent impact of *Counterman*.⁶

In *Smith* the Kansas Supreme Court adopted option 3, the "literal reading" based upon the plain language of the statute to clarify these outstanding sentencing questions. Rather than being bogged down by complicated timing questions, or the uncertainty of other pending cases addressing *Counterman*, we have the clarity that prior convictions for reckless criminal threat should not be scored because they remain convictions under a statute that "has since been determined unconstitutional[.]" That clarity is important because we want Kansas district courts to consistently and fairly sentence criminal defendants using the same basic sentencing laws that should be readily understood and applied.

Where HB 2401 Will Take Us

HB 2401 seeks to specifically undo that clarity provided by the *Smith* opinion. While the language the bill adds to K.S.A. 21-6810(d)(9) may appear innocuous at first glance, its function is just to revert the questions resolved in *Smith* back to being unresolved. And, in doing so, it will create several more years of unnecessary appellate litigation over when a prior conviction of a reckless criminal threat can be scored in a criminal defendant's criminal history.

First, we will need to await the aforementioned opinions addressing whether *Counterman* even impacts the holding of *Boettger*. If it does, then appellants will litigate whether *Counterman* even qualified as the "basis of the determination of unconstitutionality" being overruled or reversed, which is something this bill does not make clear. Then, all of the timing questions addressed above will return as parties litigate the dates that control when the statute was unconstitutional and when the basis for subsequently finding it was constitutional occurred. And even more timing questions

⁵ See, e.g., *State v. Phipps*, 63 Kan. App. 2d 698 (Kan. App. 2023), review granted (Jan. 29, 2024).

⁶ *Phipps*, 63 Kan. App. 2d at 711.

will be litigated as the parties debate at what point this proposed statute controls as opposed to the current version of the statute, whether it has retroactive effect, and whether any retroactive effect would violate the constitutional restriction on Ex Post Facto laws. Appellate attorneys for the prosecution and defense will spend the next several years litigating the impact of this amendment, all while district courts will be left without clear guidance on how to score prior reckless criminal threat convictions.

To put this in most simple terms, all HB 2401 really does is give prosecutors another chance to litigate the use of prior convictions for a crime that was found unconstitutional in 2019. It may be possible that crime could be deemed constitutional someday, but the Kansas Supreme Court has not even ruled on that issue yet. But, in exchange for this renewed chance to argue about these prior convictions, HB 2401 will create years of unnecessary appellate litigation, and inconsistent results. The *Smith* opinion provided necessary clarity that sentencing courts can fairly and evenly apply. We would urge this Committee to not move forward with HB 2401's attempts to undo that clarity.

Thank you for your time and consideration,

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