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Testimony Regarding HB 2401
Submitted by Marc Bennett, District Attorney
Eighteenth Judicial District

Honorable Chairwoman Humphries and members of the House Judiciary Committee, thank you for the opportunity to offer support for SB 2401.

There is an adage in the law, "*Courts must construe a statute to avoid unreasonable or absurd results*." *State v. Eckert*, 317, Kan. 21, Syl 8 (2023). Recently, a state statute has been interpreted in such a fashion that, I believe leads to an absurd result. Some context is necessary to explain the situation.

First, *State v. Boettger* was decided by the Kansas Supreme Court in 2019. In *Boettger*, our Supreme Court ruled that the reckless criminal threat provision of K.S.A. 2018 Supp. 21-5415(a)(1), allowing for a conviction if a threat of violence was made "in reckless disregard for causing fear," was unconstitutionally overbroad because it punishes conduct that may be constitutionally protected under some circumstances. The *Boettger* opinion was based upon the Kansas Supreme Court's interpretation of prior United States Supreme Court cases: *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969); *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).

This decision had a major effect on criminal history. We obviously could not count criminal threat convictions that were either based on reckless conduct, or were not explicitly based only on intentional conduct. That makes sense – a conviction for an unconstitutional crime should not count. That approach is codified in K.S.A. 21-6810 (9): "*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*."

Then the United States Supreme Court issued *Counterman v. Colorado*, No. 22-138, 2023 WL 4187751, 600 U.S. __ (2023). In *Counterman*, the US Supreme Court determined, "[t]rue threats of violence are outside the bounds of First Amendment protection and punishable as crimes . . . The question presented is whether the First Amendment still

requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communication would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another."

In other words – the U.S. Supreme Court conclusively ruled that reckless criminal threats **are** constitutional. So, it made sense that *Boettger* would be overturned by the Kansas Supreme Court since Kansas state courts are duty-bound to follow the decisions of the United States Supreme Court when interpreting the United States Constitution. See, e.g., *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P.2d 665, *cert. denied* 361 U.S. 846, 80 S.Ct. 101, 4 L.Ed.2d 85 (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."). We just needed to get a case in front of the Kansa Supreme Court to fix this.

It took roughly 18 months to get the *Boettger* issue back before the Kansas Supreme Court. On Friday February14, 2025, the Kansa Supreme Court issued *State v. Robert Smith*, No. 126,844 (2025). In that case, the Supreme Court determined that Counterman was not relevant and instead ruled:

> *"K.S.A. 21-6810(d)(9) provides that a prior conviction 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. Under the plain language of this subsection, it is irrelevant whether a subsequent appellate court reversed or repudiated an appellate court's holding that a statute is unconstitutional."*

Put another way, because *Boettger* found that "reckless" criminal threat was unconstitutional, the fact that the US Supreme Court later clarified that it was **not** unconstitutional was irrelevant because Kansas statute 21-6810(9) controlled the issue forever. That can't be the intent of the legislature – to NOT count crimes that were subsequently found to be Constitutional.

This is not simply an academic issue. For instance, a defendant in a rape case that occurs this week who has zero criminal history (CH "I") faces 147-159-165 months. A person with one prior criminal threat charged under the statute (reckless or intentional) should face 240-253-267 months because criminal threat is a "person felony." While a person with 2 prior criminal threats (CH "B") should face 554-586-618 months. But according to the recent *Smith* decision – those priors would not count due to 21-6810(9)

HB 2104 clarifies the intent of the legislature and eliminates the absurd result of *Smith* with the following change to K.S.A. 21-6810 (9):

> (9) 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 *unless the basis of the determination of unconstitutionality by the appellate court is later overruled or reversed by an order or opinion of the supreme court of the state of Kansas or the United States supreme court.*

This change would simply give effect to what the legislature clearly intended – that people who have prior convictions for crimes that were found to be unconstitutional would not have their criminal history enhanced by an unconstitutional prior. **HOWEVER,** if the appellate process later overturned that decision and the prior convictions were found to be constitutional, the person ***should*** face the impact of their prior *constitutionally valid* convictions.

The Kansas sentencing scheme is based on the severity of the crime and the *accurate* criminal history of the suspect. The only argument against this is that defendants will face greater sentences. My response to that argument is, only if the appellate process establishes that they have been convicted of constitutionally valid crimes.

I've testified before the legislature dozens of times over the last twenty years. This is the only time I have said this, but I cannot conceive of a valid counter argument to this request.

Thank you for your time and consideration.

Respectfully submitted,

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