

(Corrected)

Session of 2011

## HOUSE BILL No. 2038

By Committee on Corrections and Juvenile Justice

1-19

1 AN ACT concerning crimes, criminal procedure and punishment;  
2 amending section 298 of chapter 136 of the 2010 Session Laws of  
3 Kansas and repealing the existing section.

4  
5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. Section 298 of chapter 136 of the 2010 Session Laws of  
7 Kansas is hereby amended to read as: Sec. 298. (a) (1) Whenever a  
8 person is convicted of a felony, the court upon motion of either the  
9 defendant or the state, shall hold a hearing to consider imposition of a  
10 departure sentence other than an upward durational departure sentence.  
11 The motion shall state the type of departure sought and the reasons and  
12 factors relied upon. The hearing shall be scheduled so that the parties  
13 have adequate time to prepare and present arguments regarding the issues  
14 of departure sentencing. The county or district attorney shall notify the  
15 victim of a crime or the victim's family of the right to be present at the  
16 hearing. The parties may submit written arguments to the court prior to  
17 the date of the hearing and may make oral arguments before the court at  
18 the hearing. The court shall review the victim impact statement. Prior to  
19 the hearing, the court shall transmit to the defendant or the defendant's  
20 attorney and the prosecutor copies of the presentence investigation report.

21 (2) At the conclusion of the hearing or within 20 days thereafter, the  
22 court shall issue findings of fact and conclusions of law regarding the  
23 issues submitted by the parties, and shall enter an appropriate order.

24 (3) If the court decides to depart on its own volition, without a  
25 motion from the state or the defendant, the court must notify all parties of  
26 its intent and allow reasonable time for either party to respond if  
27 requested. The notice shall state the type of departure intended by the  
28 court and the reasons and factors relied upon.

29 (4) In each case in which the court imposes a sentence that deviates  
30 from the presumptive sentence, the court shall make findings of fact as to  
31 the reasons for departure as provided in this subsection regardless of  
32 whether a hearing is requested.

33 (b) (1) Upon motion of the county or district attorney to seek an  
34 upward durational departure sentence, the court shall consider imposition  
35 of such upward durational departure sentence in the manner provided in  
36 subsection (b)(2). The county or district attorney shall file such motion to

1 seek an upward durational departure sentence not less than 30 days prior  
2 to the date of trial or if the trial date is to take place in less than 30 days  
3 then within five days from the date of the arraignment.

4 (2) The court shall determine if the presentation of any evidence  
5 regarding the alleged fact or factors that may increase the penalty for a  
6 crime beyond the statutory maximum, other than a prior conviction, shall  
7 be presented to a jury and proved beyond a reasonable doubt during the  
8 trial of the matter or whether such evidence should be submitted to the  
9 jury in a separate departure sentencing hearing following the  
10 determination of the defendant's innocence or guilt.

11 (3) If the presentation of the evidence regarding the alleged fact or  
12 factors is submitted to the jury during the trial of the matter as determined  
13 by the court, then the provisions of subsections (b)(5), (b)(6) and (b)(7)  
14 shall be applicable.

15 (4) If the court determines it is in the interest of justice, the court  
16 shall conduct a separate departure sentence proceeding to determine  
17 whether the defendant may be subject to an upward durational departure  
18 sentence. Such proceeding shall be conducted by the court before ~~the trial~~  
19 a jury as soon as practicable. If any person who served on the trial jury is  
20 unable to serve on the jury for the upward durational departure sentence  
21 proceeding, the court shall substitute an alternate juror who has been  
22 impaneled for the trial jury. If there are insufficient alternate jurors to  
23 replace trial jurors who are unable to serve at the upward durational  
24 departure sentence proceeding, the court may conduct such upward  
25 durational departure sentence proceeding before a jury which may have  
26 12 or less jurors, but at no time less than six jurors. Any decision of an  
27 upward durational departure sentence proceeding shall be decided by a  
28 unanimous decision of the jury. Jury selection procedures, qualifications  
29 of jurors and grounds for exemption or challenge of prospective jurors in  
30 criminal trials shall be applicable to the selection of such jury. The jury at  
31 the upward durational departure sentence proceeding may be waived in  
32 the manner provided by K.S.A. 22-3403, and amendments thereto, for  
33 waiver of a trial jury. If the jury at the upward durational departure  
34 sentence proceeding has been waived ~~or the trial jury has been waived,~~  
35 the upward durational departure sentence proceeding shall be conducted  
36 by the court.

37 (5) In the upward durational departure sentence proceeding,  
38 evidence may be presented concerning any matter that the court deems  
39 relevant to the question of determining if any specific factors exist that  
40 may serve to enhance the maximum sentence as provided by section 296  
41 or 297 of chapter 136 of the 2010 Session Laws of Kansas, and  
42 amendments thereto. Only such evidence as the state has made known to  
43 the defendant prior to the upward durational departure sentence

1 proceeding shall be admissible, and no evidence secured in violation of  
2 the constitution of the United States or of the state of Kansas shall be  
3 admissible. No testimony by the defendant at the upward durational  
4 departure sentence proceeding shall be admissible against the defendant  
5 at any subsequent criminal proceeding. At the conclusion of the  
6 evidentiary presentation, the court shall allow the parties a reasonable  
7 period of time in which to present oral arguments.

8 (6) The court shall provide oral and written instructions to the jury to  
9 guide its deliberations.

10 (7) If, by unanimous vote, the jury finds beyond a reasonable doubt  
11 that one or more specific factors exist that may serve to enhance the  
12 maximum sentence, the defendant may be sentenced pursuant to sections  
13 *296 through 299 of chapter 136 of the 2010 Session Laws of Kansas*, and  
14 amendments thereto; otherwise, the defendant shall be sentenced as  
15 provided by law. The jury, if its verdict is a unanimous recommendation  
16 that one or more of the specific factors that may serve to enhance the  
17 maximum sentence exists, shall designate in writing, signed by the  
18 foreman of the jury, the specific factor or factors which the jury found  
19 beyond a reasonable doubt. If, after a reasonable time for deliberation, the  
20 jury is unable to reach a verdict of finding any of the specific factors, the  
21 court shall dismiss the jury and shall only impose a sentence as provided  
22 by law. In nonjury cases, the court shall follow the requirements of this  
23 subsection in determining if one or more of the specific factors exist that  
24 may serve to enhance the maximum sentence.

25 Sec. 2. Section 298 of chapter 136 of the Session Laws of Kansas is  
26 hereby repealed.

27 Sec. 3. This act shall take effect and be in force from and after its  
28 publication in the statute book.