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March 4, 2011

**Testimony in support of HB 2038
Senate Judiciary Committee**

Mr. Chairman and members of the Committee, thank you for the opportunity to speak in support of HB 2038 on behalf of the Kansas Sentencing Commission. This bill would amend current sentencing law to comply with a recent Kansas Supreme Court holding.

In August 2010, the Kansas Supreme Court in *State v. Horn*, Kansas Supreme Court No. 97,872 (8/20/2010), held that a portion of the current statutory procedure for upward durational departure sentence proceedings is unconstitutional. Under Kansas law, the sentencing guidelines grid in K.S.A. 21-4704 must be applied for crimes falling within the grid, unless the judge finds substantial and compelling reasons to impose a departure. Any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be proved to a jury beyond a reasonable doubt.

In *Horn*, the Supreme Court objected to current language in K.S.A. 21-4718(b)(4) requiring upward durational departure sentence proceedings for defendants who have waived a jury trial, i.e. by pleading guilty, to be heard by the court, not by a jury. The Court held that waiver of a jury trial does not equate to a waiver of a jury for an upward durational departure sentencing proceeding.

This bill would amend K.S.A. 21-4718(b)(4) by removing language requiring the court to conduct an upward durational departure sentence proceeding when the defendant has waived a jury trial. The effect of this bill would be to protect a defendant's constitutional right while allowing for effective administration of justice.

Thank you for your consideration of this bill. I am happy to stand for questions the Committee may have.

Sarah Fertig
Executive Director
Kansas Sentencing Commission

Senate Judiciary
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Attachment 1