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Testimony In Support of Section 2 of HB 2385
Amending K.S.A. 60-416

Presented to the House Committee on Corrections and Juvenile Justice
By Assistant Solicitor General Natalie Chalmers

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Chairman Owen and Members of the Committee:

In the last few years, the Kansas Supreme Court decided a number of cases that called into question any criminal statute using a presumption in favor of the State. *State v. Strong*, 317 Kan. 197, 218, 527 P.3d 548 (2023) (J. Stegall concurring). Essentially, the court held that any instruction that deviates from a statute containing a mandatory presumption is not legally appropriate. 317 Kan. at 208. The problem is that following the statutory language could run afoul of the defendant's constitutional right to due process. *Francis v. Franklin*, 471 U.S. 307, 314-15(1985).

Likely anticipating this constitutional issue, the PIK committee has treated all presumptions as inferences. But based on the Kansas Supreme Court's decisions, they can no longer do so. The concurrence in *Strong* accurately explained the problem facing the parties and district court judges in trying to instruct juries: it is now impossible to give an instruction in cases dealing with statutory presumptions that favor the State because the instruction will be declared legally flawed despite it being constitutionally sound.

This problem potentially affects multiple statutes including stalking, theft, and unlawful transmission of a visual depiction of a child. K.S.A. 21-5611(d); K.S.A. 21-5427(c), and K.S.A. 21-5804. In order to allow instructions on rationale inferences, which are considered "a staple of our adversary system of factfinding," a statutory change is necessary. *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 156 (1979).

The Kansas Judicial Council approved the Criminal Law Advisory Committee's recommendation to fix K.S.A. 60-416 rather than fixing each individual statute that references a presumption of any kind. This solution is sound.

The fix follows what several states do and essentially converts any mandatory presumption into a legally permissible presumption or inference. It does so by 1) requiring the presumption to be supported by the facts before the instruction can be given, 2) telling the jury to consider all the evidence in deciding whether to accept or reject the presumption, and 3) reminding the jury the burden of proof never shifts to the defendant. Each of these factors amount to treating a presumption as a permissible inference.

That being said, it would likely be advisable to expressly permit presumptions to be called inferences in jury instructions. While the proposed language treats presumptions as inferences, the minor variances between the common understanding of the two terms may make it advisable to use the term inference. C.f. *State v. Slusser*, 317 Kan. 174, 188-89, 196, 527 P.3d 565 (2023) (noting the common definitions of presume and infer and reversing a conviction based on the prosecutor's improper use of a presumption), and *Strong*, 317 Kan. 205-10 (finding no reversible error when the instruction was treated as a permissible presumption).

Thus, the following addition should be considered at the end of subsection (b)(1): *The jury instruction may refer to any presumption as an inference.*

For the above reasons, the Office of the Attorney General supports this Committee adopting Section 2 of this bill. Thank you for your time.