

## HOUSE BILL No. 2162

By Representative Ward

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9 AN ACT concerning criminal procedure; relating to upward departures  
10 in sentencing; amending K.S.A. 2004 Supp. 21-4718 and repealing the  
11 existing section.  
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13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 2004 Supp. 21-4718 is hereby amended to read as  
15 follows: 21-4718. (a) (1) Whenever a person is convicted of a felony, the  
16 court upon motion of either the defendant or the state, shall hold a hear-  
17 ing to consider imposition of a departure sentence other than an upward  
18 durational departure sentence. The motion shall state the type of depart-  
19 ure sought and the reasons and factors relied upon. The hearing shall be  
20 scheduled so that the parties have adequate time to prepare and present  
21 arguments regarding the issues of departure sentencing. The victim of a  
22 crime or the victim's family shall be notified of the right to be present at  
23 the hearing for the convicted person by the county or district attorney.  
24 The parties may submit written arguments to the court prior to the date  
25 of the hearing and may make oral arguments before the court at the  
26 hearing. The court shall review the victim impact statement. Prior to the  
27 hearing, the court shall transmit to the defendant or the defendant's at-  
28 torney and the prosecuting attorney copies of the presentence investi-  
29 gation report.

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

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

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

42 (b) (1) *If upon conviction of the defendant, the county or district*  
43 *attorney intends to request an upward durational departure sentence, the*

1 county or district attorney shall file written notice with the court and  
2 serve notice on the defendant or the defendant's attorney not later than  
3 five days after the time of arraignment. If notice is not filed and served  
4 as required by this subsection, the county or district attorney may not  
5 request an upward durational departure sentencing proceeding, the de-  
6 fendant shall be sentenced as otherwise provided by law and no upward  
7 durational departure sentence shall be imposed.

8 (2) Upon motion of the county or district attorney to seek an upward  
9 durational departure sentence, the court shall ~~consider~~ conduct a separate  
10 proceeding to determine whether the defendant may be subject to imposi-  
11 tion of ~~such an~~ upward durational departure sentence in the manner  
12 provided in ~~subsection (b)(2)~~ the following subsections. ~~The county or~~  
13 ~~district attorney shall file such motion to seek an upward durational de-~~  
14 ~~parture sentence not less than 30 days prior to the date of trial or if the~~  
15 ~~trial date is to take place in less than 30 days then within five days from~~  
16 ~~the date of the arraignment.~~

17 ~~—(2)—The court shall determine if the presentation of any evidence~~  
18 ~~regarding the alleged fact or factors that may increase the penalty for a~~  
19 ~~crime beyond the statutory maximum, other than a prior conviction, shall~~  
20 ~~be presented to a jury and proved beyond a reasonable doubt during the~~  
21 ~~trial of the matter or following the determination of the defendant's in-~~  
22 ~~nocence or guilt.~~

23 ~~—(3)—If the presentation of the evidence regarding the alleged fact or~~  
24 ~~factors is submitted to the jury during the trial of the matter as deter-~~  
25 ~~mined by the court, then the provisions of subsections (b)(5), (b)(6) and~~  
26 ~~(b)(7) shall be applicable.~~

27 ~~—(4)—If the court determines it is in the interest of justice, The court~~  
28 ~~shall conduct a separate departure sentence proceeding to determine~~  
29 ~~whether the defendant may be subject to an upward durational departure~~  
30 ~~sentence. Such~~

31 (3) *The upward durational departure sentence* proceeding shall be  
32 conducted by the court before the trial jury as soon as practicable. If any  
33 person who served on the trial jury is unable to serve on the jury for the  
34 upward durational departure sentence proceeding, the court shall sub-  
35 stitute an alternate juror who has been impaneled for the trial jury. If  
36 there are insufficient alternate jurors to replace trial jurors who are unable  
37 to serve at the upward durational departure sentence proceeding, the  
38 court may conduct ~~such the~~ upward durational departure sentence pro-  
39 ceeding before a jury ~~which may have~~ that has 12 or less jurors, but at  
40 no time less than six jurors. Any decision of an upward durational depar-  
41 ture sentence proceeding shall be decided by a unanimous decision of  
42 the jury. Jury selection procedures, qualifications of jurors and grounds  
43 for exemption or challenge of prospective jurors in criminal trials shall be

1 applicable to the selection of such jury. The jury at the upward durational  
2 departure sentence proceeding may be waived in the manner provided  
3 by K.S.A. 22-3403, and amendments thereto, for waiver of a trial jury. If  
4 the jury at the upward durational departure sentence proceeding has been  
5 waived or the trial jury has been waived, the upward durational departure  
6 sentence proceeding shall be conducted by the court.

7 ~~(5)~~ (4) In the upward durational departure sentence proceeding, ev-  
8 idence may be presented concerning any matter that the court deems  
9 relevant to the question of determining if any specific factors exist that  
10 may serve to enhance the maximum sentence as provided by K.S.A. 21-  
11 4716 or 21-4717, and amendments thereto. Only such evidence as the  
12 state has made known to the defendant prior to the upward durational  
13 departure sentence proceeding shall be admissible, and no evidence se-  
14 cured in violation of the constitution of the United States or of the state  
15 of Kansas shall be admissible. No testimony by the defendant at the up-  
16 ward durational departure sentence proceeding shall be admissible  
17 against the defendant at any subsequent criminal proceeding. At the con-  
18 clusion of the evidentiary presentation, the court shall allow the parties a  
19 reasonable period of time in which to present oral arguments.

20 ~~(6)~~ (5) The court shall provide oral and written instructions to the  
21 jury to guide its deliberations.

22 ~~(7)~~ (6) If, by unanimous vote, the jury finds beyond a reasonable  
23 doubt that one or more specific factors exist that may serve to enhance  
24 the maximum sentence, the defendant may be sentenced pursuant to  
25 K.S.A. 21-4716 through 21-4719, and amendments thereto; otherwise,  
26 the defendant shall be sentenced as provided by law. *If such jury finds*  
27 *that the aggravating circumstances and mitigating circumstances are*  
28 *equal, the defendant shall not be sentenced to death and shall be sentenced*  
29 *to life without the possibility of parole.* The jury, if its verdict is a unan-  
30 imous recommendation that one or more of the specific factors that may  
31 serve to enhance the maximum sentence exists, shall designate in writing,  
32 signed by the foreman of the jury, the specific factor or factors which the  
33 jury found beyond a reasonable doubt. If, after a reasonable time for  
34 deliberation, the jury is unable to reach a verdict of finding any of the  
35 specific factors, the court shall dismiss the jury and shall only impose a  
36 sentence as provided by law. In nonjury cases, the court shall follow the  
37 requirements of this subsection in determining if one or more of the  
38 specific factors exist that may serve to enhance the maximum sentence.

39 Sec. 2. K.S.A. 2004 Supp. 21-4718 is hereby repealed.

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