APPENDIX

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APPENDIX A

No. 112,572

IN THE SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TAYLOR ARNETT,
Appellant.

Review of the judgment of the Court of Appeals in an unpublished opinion filed May 4, 2018. Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed October 15, 2021. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Samuel Schirer, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Ethan Zipf-Sigler, assistant district attorney, argued the cause, and *Alan T. Fogelman*, assistant district attorney, *Jerome A. Gorman*, district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for the appellee.

The opinion of the court was delivered by

WILSON, J.: Taylor Arnett petitions this court for review of the judgment of the Court of Appeals affirming the restitution ordered against her by the district court. She argues that the restitution violates her right to a jury under both the Sixth Amendment of the United States Constitution and section 5 of the Kansas Constitution Bill of Rights. We find that her right to a jury as guaranteed by the Sixth Amendment is unharmed. However, we agree the current structure of criminal restitution in Kansas violates section 5 of the Kansas Constitution Bill of Rights in part, but the offending part of that structure can be severed from the rest, which does not violate section 5. Specifically, insofar as the ordered restitution is given the effect of a civil judgment, it violates section 5. Otherwise, it does not.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Arnett with one count of conspiracy to commit burglary after she provided the car which her boyfriend used to burglarize two houses. The boyfriend paid Arnett $200 when he returned the car. Arnett pled guilty to that conspiracy charge. Arnett's plea did not include an agreement with the State to pay any amount of restitution.

The district court held a restitution hearing, during which the State explained that it was requesting $33,248.83 in restitution, payable to three individuals who incurred losses due to the burglaries. According to the State, Arnett took no issue with the amounts of restitution ordered for the victims' total losses, but argued she should only be responsible for the $200 she obtained for her part in the burglaries. The district

court disagreed and ordered the full amount of $33,248.83, jointly and severally with Arnett's codefendants.

In Arnett's first appeal, a Court of Appeals panel held that the State failed to show a sufficient causal connection for restitution between Arnett's plea to and conviction for conspiracy to commit burglary and the financial loss to the victims. As a result, the panel never reached Arnett's alternative arguments. See *State v. Arnett*, No. 112,572, 2015 WL 6835244 (Kan. App. 2015) (unpublished opinion). This court reversed the panel, holding that restitution may be ordered against a defendant in a criminal case if the loss to the victim was proximately caused by the crime of conviction. *State v. Arnett*, 307 Kan. 648, Syl. ¶ 7, 413 P.3d 787 (2018). This court remanded the case to the Court of Appeals to consider the constitutional arguments raised by Arnett. That panel found Arnett's arguments unavailing and affirmed the district court's restitution order. *State v. Arnett*, No. 112,572, 2018 WL 2072804 (Kan. App. 2018) (unpublished opinion). Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

Arnett did not raise her constitutional issues before the district court. Generally, a constitutional issue not raised before the district court is considered abandoned. But this court can review issues presented on appeal where: "(1) the newly asserted theory involves only a question of law arising on proved or admitted facts . . . ; (2) consideration of the theory is necessary to serve the ends of justice or to prevent [a] denial of fundamental rights"; or (3) the district

court's judgment is correct for the wrong reason. *State v. Perkins*, 310 Kan. 764, 768, 449 P.3d 756 (2019). But "'[t]he decision to review an unpreserved claim under an exception is a prudential one. Even if an exception would support a decision to review a new claim, [this court has] no obligation to do so.' [Citations omitted.]" *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020).

The right to a jury trial is a fundamental right under both section 5 of the Kansas Constitution Bill of Rights and under the Sixth Amendment to the United States Constitution. *State v. Rizo*, 304 Kan. 974, 979-80, 377 P.3d 419 (2016). We elect to reach both questions under the second exception.

ANALYSIS

Our analysis first looks at the statutes which make up the "restitution scheme" being challenged by Arnett. K.S.A. 2017 Supp. 21-6604(b)(1) grants a district court the authority to order the defendant to pay restitution as part of the sentence. The statute dictates that the restitution amount "shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances which would render a plan of restitution unworkable."

In the same way, K.S.A. 2017 Supp. 21-6607(c)(2) gives the district court the authority to order restitution payments as a condition of probation. Based on the clear language of the statutes, "'restitution for a victim's damages or loss depends on the establishment of a causal link between the defendant's unlawful conduct and the victim's damages.' [Citations omitted.]"

State v. Alcala, 301 Kan. 832, 837, 348 P.3d 570 (2015).

Criminal restitution does not violate the Sixth Amendment to the United States Constitution.

Standard of review

Determining a statute's constitutionality is a question of law subject to unlimited review. *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014).

Discussion

We begin with Arnett's argument that the restitution statutes in question offend her right to a jury trial under the Sixth Amendment to the United States Constitution.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The Supreme Court of the United States has established that this right to a jury covers any fact which increases the maximum penalty for a crime—other than a prior conviction—and such facts must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Supreme Court further established that any facts which increase a mandatory minimum penalty must also be decided by a jury. See *Alleyne v. United States*, 570 U.S. 99, 102, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The reasoning is that when "a judge inflicts punishment that the jury's verdict alone does not allow," the judge has exceeded his authority. *Blakely v.*

Washington, 542 U.S. 296, 304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Arnett is not the first defendant to make the argument that judicially ordered restitution violates *Apprendi* and its progeny, but most federal courts confronted with the question disagree. Largely, these courts have followed one of two analytical paths to conclude either that criminal restitution is not punishment or to find that restitution statutes do not specify a maximum award. See *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008) (restitution is not a criminal punishment); see also *United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016) (restitution is considered punishment but is not affected by *Apprendi* because statutes do not specify a statutory maximum). Sometimes the courts have taken a more hybrid approach. See *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (restitution is only punishment in some contexts but is "not clearly" punishment covered by *Apprendi*); *United States v. Leahy*, 438 F.3d 328, 338 (3d Cir. 2006) (Although restitution is criminal punishment, its essence is a restorative remedy that compensates victims and does not make a defendant's punishment more severe.).

As our own Court of Appeals has recently pointed out, at least 11 of 13 federal United States Circuit Courts of Appeal have refused to extend *Apprendi* and its progeny to orders of restitution, not to mention the many state courts which have followed suit. *State v. Robison*, 58 Kan. App. 2d 380, 389-90, 469 P.3d 83, *rev. granted* 312 Kan. 900 (2020). Following that lead, the Kansas Court of Appeals has also declared criminal restitution non-punishment for Sixth Amendment purposes. *Robison*, 58 Kan. App. 2d at 392; *State v. Huff*, 50 Kan. App. 2d 1094, 1100, 336 P.3d 897 (2014).

Outside the context of this question, this court has previously acknowledged that restitution serves many purposes separate from criminal punishment, including victim compensation, deterrence, and rehabilitation of the guilty. *State v. Applegate*, 266 Kan. 1072, 1075, 976 P.2d 936 (1999).

Despite the nonuniform approach taken by federal circuits, the Supreme Court has remained silent on whether criminal restitution triggers the right to a jury as contemplated in *Apprendi*, even when presented with opportunities to take up the question. See *United States v. Green*, 722 F.3d 1146 (9th Cir.), *cert. denied* 571 U.S. 1025 (2013); *United States v. Day*, 700 F.3d 713 (4th Cir. 2012), *cert. denied* 569 U.S. 959 (2013).

The Supreme Court once again denied a petition for a writ of certiorari in a case that would have answered that question in *Hester v. United States*, 139 S. Ct. 509, 202 L. Ed. 2d 627 (2019). But this time, Justice Gorsuch—joined by Justice Sotomayor—dissented from the denial of certiorari, arguing that under either analytical path, restitution is within reach of the Sixth Amendment's protections and should trigger the right to a jury trial. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting).

Although this two-justice dissent might signal that the Supreme Court will eventually take up the question, the majority has thus far been content to allow the lower courts to continue ruling that restitution does not implicate a defendant's Sixth Amendment right to a jury. We see no reason why we should take up that mantle in its place. While the dissent observes that the theoretical bases upon which the various circuit courts relied are not uniform, we need not resolve

these differences here. We are content to side with the majority of the circuit courts of appeal.

The current structure of criminal restitution violates section 5 of the Kansas Constitution Bill of Rights but is remedied by severance.

Next, we turn to the question of whether the Kansas criminal restitution statutes violate section 5 of the Kansas Constitution Bill of Rights.

Standard of review

As noted above, a statute's constitutionality is a question of law subject to unlimited review. *Soto*, 299 Kan. at 121.

Discussion

Section 5 of the Kansas Constitution Bill of Rights states that "[t]he right of trial by jury shall be inviolate." Citing *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012), a plurality of this court declared "'[s]ection 5 preserves the jury trial right as it historically existed at common law when our state's constitution came into existence'" in 1859. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1133, 442 P.3d 509 (2019). A majority of this court has ruled the "right as it historically existed" protects as inviolate *at least* the procedural right to have a jury decide the contested questions juries historically decided. *Hilburn*, 309 Kan. at 1133 (plurality holding that "[s]ection 5 preserves the jury trial right as it historically existed at common law"); *Hilburn*, 309 Kan. at 1151 (Stegall, J., concurring) (stating that the "section 5 'right of trial by jury' that 'shall be inviolate' is a procedural right").

Consequently, we begin our analysis of the section 5 challenge with whether territorial juries would have decided the issue of criminal restitution in 1859. If so, under *Hilburn*, section 5 would clearly apply, requiring juries also to decide it now. See *Hilburn*, 309 Kan. at 1134. On the other hand, if judges decided the issue of criminal restitution in 1859, section 5 would not apply.

Were it so easy. Unfortunately, the concept of criminal restitution as we know it today was not part of the common law at all in 1859. Since it did not exist, it follows that it could not have been decided by juries *or* judges.

So we explore further. At common law, a victim would have been able to recover damages caused by a criminal act through civil suit with a finding of causation and damages. Civil defendants in those actions had a right to demand a jury trial. There is no dispute that the amount of damages—and causation—was a question of fact to be determined by the jury in common-law tort actions. *Miller*, 295 Kan. at 647; see *St. Clair v. Denny*, 245 Kan. 414, 417, 781 P.2d 1043 (1989). Consequently, Arnett would have us find that because criminal restitution orders now allow those same crime victims to be compensated for losses just as if they were successful tort plaintiffs, criminal defendants should enjoy that same right to a jury trial.

This court has consistently noted that when the section 5 jury trial right is implicated, it applies no further than to give the right of such trial upon issues of fact so tried at common law. The right to have the jury determine issues of fact is contrasted with the determination of issues of law, which have always been left to the court. See *State v. Love*, 305 Kan. 716, 735,

387 P.3d 820 (2017) (citing General Laws of the Territory of Kansas, 1859, ch. 25, § 274 ["[I]ssues of law must be tried by the court. . . . Issues of fact arising in action, for the recovery of money, or of specific, real or personal property, shall be tried by a jury."]). Therefore, Arnett's argument hinges on analogizing modern criminal restitution to causation and damages in a civil suit.

The panel disagreed with Arnett, finding that orders of criminal restitution do not legally supplant civil actions, because a crime victim may still file a civil suit against a criminal defendant to recover money damages. *State v. Arnett*, No. 112,572, 2018 WL 2072804, at *1 (Kan. App. 2018) (unpublished opinion).

Likewise, the Court of Appeals panel in *Robison* was faced with the same argument—analogizing criminal restitution orders to causation and civil damages in tort—and came to the same conclusions as the *Arnett* panel: as distinct remedies, criminal restitution is not a civil judgment and is therefore not covered by section 5. *Robison*, 58 Kan. App. 2d at 386.

But the *Robison* panel was faced with another argument. The defendant in *Robison*, taking a deep dive into our state's history, argued that not only did Kansas juries decide the amount of civil damages in tort prior to statehood, but juries were also required to determine the value of stolen property for certain theft offenses in criminal cases. See Kan. Terr. Stat. 1859, ch. 25, § 274; Kan. Terr. Stat. 1859, ch. 27, § 219. The defendant in Robison argued that, by analogy, Kansas juries *would* have had to determine the amount of criminal restitution in 1859 because it is yet another

example of juries determining the amount of loss or damage caused to a victim.

The majority of the *Robison* panel was not persuaded, instead turning to the State's rebuttal that the reason juries had to make a factual finding regarding the value of stolen property was because that factual determination affected the severity level of the offense. See Kan. Terr. Stat. 1859, ch. 28, §§ 72-74, 82-88, 91. The *Robison* majority maintained that because criminal restitution is not a civil remedy—and criminal restitution was not listed in the Kansas territorial statutes as a permissible remedy for any crime in 1859—the defendant failed to establish that section 5 would require a jury to impose criminal restitution under K.S.A. 2017 Supp. 21-6604(b)(1) and K.S.A. 2017 Supp. 21-6607(c)(2). 58 Kan. App. 2d at 386. We agree with this assessment. Moreover, we note that the territorial statutes contained no mechanism by which an aggrieved victim could obtain recompense for the value of stolen goods, as determined by a jury in a criminal trial; that recovery, if any, would flow only through a civil proceeding—including, potentially, a trial by jury.

Both appellate panels ultimately disagreed with their respective defendants. The *Robison* panel relied on this court's precedent that made clear that criminal restitution and civil damages are separate and independent remedies under Kansas law. *Robison*, 58 Kan. App. 2d at 385-86; see *Applegate*, 266 Kan. at 1078. Because they are distinct remedies,

> "[t]he judge's order of restitution in a criminal action does not bar a victim from seeking damages in a separate civil action. Likewise, the judge, when sentencing a defendant in a

> criminal action, is not foreclosed from ordering restitution just because the victim has received compensation in a civil action." *Applegate*, 266 Kan. at 1079.

When framed as two unique avenues to recover—with separate standards and implications—it would follow that criminal restitution does not trigger the same protections afforded to defendants in civil actions.

Then what, one may ask, is the difference? While many legal scholars and editors have weighed in on the subject, the following is one explanation that can be used to understand this court's holding in Applegate.

> "Criminal restitution is not the equivalent of civil damages. The criminal sanction of restitution and the civil remedy of damages further distinct societal goals. . . . Unlike a civil claim for damages, the purpose of restitution in a criminal case is twofold: (1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. The restitution order has complications and effects which the ordinary civil money judgment lacks. It necessarily holds incarceration over the head of the defendant like a sword of Damocles to enforce payment in a way that civil judgments cannot.
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> . . . .
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> ". . . A final judgment in a civil case speaks instantly; it fixes the amount due and compensates a plaintiff for a delay in payment by including an award of post-judgment interest. . . . [T]he award of restitution can include installment payments enforceable as a

condition of probation—a remedy not available in a civil lawsuit.

"Another difference between restitution and civil damages is that the State is a party to the case and, consistent with the twofold purpose of restitution, while the victim's wishes concerning restitution are relevant, they are not dispositive—it is the judge, not the victim, who must weigh society's competing needs and make the determination of whether or not restitution will be imposed and, if so, to what extent. It is for this reason that a defendant cannot foreclose restitution in a criminal case through execution of a release of liability or satisfaction of payment by the victim.

"Criminal restitution is rehabilitative because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty affects the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. Restitution is also retributive, particularly in cases of theft or fraudulent conduct, in that it seeks to take ill-gotten gains from the defendant." Criminal restitution and civil damages, 16 Fla. Prac., Sentencing § 10:3 (2020-2021 ed.).

Thus, unlike the dissent, we cannot agree that criminal restitution and civil actions are merely

"separate procedures for obtaining the same remedy—making a party whole." But we also cannot ignore the development of the modern criminal restitution statutes which are confronting Arnett. These statutes include several relevant provisions that did not exist or that the court did not have cause to consider at the time of *Applegate*. K.S.A. 2017 Supp. 21-6604(b)(2) states that the order of restitution shall be a judgment against the defendant that may be collected by the court by garnishment or other execution as on judgments in civil cases. Likewise, K.S.A. 2017 Supp. 22-3424(d)(1) states that the order of restitution shall be enforced as a judgment, specifically pursuant to K.S.A. 60-4301 through K.S.A. 60-4304, all of which make criminal restitution virtually identical to a civil judgment. K.S.A. 60-4301 states in pertinent part,

> "The clerk of the district court shall record the judgment of restitution in the same manner as a judgment of the district court of this state pursuant to the code of civil procedure. A judgment so filed *has the same effect* and is subject to the same procedures, defenses and proceedings as a judgment of a district court of this state and *may be enforced or satisfied in like manner*, except a judgment of restitution shall not constitute an obligation or liability against any insurer or any third-party payor." (Emphases added.)

As shown from the plain text, the only difference enumerated in the statute between civil judgments and orders of restitution is that orders of restitution are not enforceable against insurers or any third-party payor. This is simply not enough to differentiate the two remedies. Regarding K.S.A. 60-4302 through

K.S.A. 60-4304, all presume an order of criminal restitution will be filed and enforced as a civil judgment.

Although K.S.A. 60-4301 was in effect at the time of *Applegate*, that court did not address it—or its section 5 implications—because it was not necessary to resolve the issues in that case. However, when the *Applegate* court stated "[r]estitution imposed as a condition of probation is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant to avoid serving an active sentence," it directly cited a Court of Appeals case which was decided *before* K.S.A. 60- 4301 was enacted. *Applegate*, 266 Kan. at 1075 (citing *Church Mut. Ins. Co. v. Rison*, 16 Kan. App. 2d 315, 318, 823 P.2d 209 [1991]).

In the days before these statutes, it was true that criminal restitution was not a legal obligation equivalent to a civil judgment, for all the reasons explained above. The *Rison* case cited by the *Applegate* court demonstrates that very well from a practical, as opposed to theoretical, point of view. There, the defendant was ordered to pay criminal restitution as a condition of his probation. After his discharge from probation—and after the statute of limitations for a civil action had run—he ceased making restitution payments. Because restitution and civil actions were truly separate remedies at the time, the insurance company was barred by the statutes of limitation from pursuing a civil action and the defendant's payment of restitution during his probation did nothing to toll that applicable statute of limitations. See *Rison*, 16 Kan. App. 2d at 320.

But in the framework of our *current* criminal restitution statutes, we cannot continue to say that

restitution is not equivalent to civil judgments, at least to the level that—if left untouched—it would implicate the right to a jury under section 5. The district court is now required to order the defendant to pay restitution which includes, but is not limited to, damage or loss caused by the defendant's crime, as determined by that judge. See K.S.A. 2020 Supp. 21-6604(b); K.S.A. 2020 Supp. 21-6607(c)(2). As established above, once the judge decides the amount of loss to the victim proximately caused by the defendant's crime, that award becomes a civil judgment, which may be enforced the same as any other civil judgment. K.S.A. 2017 Supp. 21-6604(b)(2); K.S.A. 60-4301. By allowing the judge to determine the legal damages proximately caused by the crime, rather than a jury, and then converting that determination into a civil judgment for the victim, the statutory scheme bypasses the traditional function of the jury to determine civil damages, thereby implicating section 5. See *Missouri, K. & T.R. Co. v. L.A. Watkins Merch. Co.*, 76 Kan. 813, 815, 92 P. 1102 (1907) (existence and extent of injury caused by defendant are questions of fact to be determined by a jury). More so, unlike most other civil judgments, a modern judgment for restitution never becomes dormant. See K.S.A. 2020 Supp. 60-2403(b).

So what is the remedy for judicially determined restitution under our current statutory scheme? Arnett suggests it must be to vacate her order of restitution because it was determined by a judge and not a jury. But her preferred remedy goes too far. Although the development of criminal restitution as a full-fledged and unhindered civil judgment is concerning to the validity of any order of restitution, we do not find that it necessitates invalidating every order of

restitution made by a district court outside the purview of a jury. To do so would be to blindly disregard every valid justification in those rulings for having a separate avenue to recovery for crime victims. It would also ignore an effective, but more focused, solution.

When confronting a constitutional flaw in a statute, we will resolve the problem, if possible, by severing the problematic portions and leaving the remainder intact.

> "Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that (1) the act would have been passed without the objectionable portion and (2) if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand. This court will assume severability if the unconstitutional part can be severed without doing violence to legislative intent." *Gannon v. State*, 304 Kan. 490, 491, 372 P.3d 1181 (2016).

We acknowledge that this solution is not always possible, and this court has, in the past, declared entire acts void after we were unable to sever the unconstitutional provision from its companions. See *Gannon*, 304 Kan. at 520 (citing *State ex rel. v. Hines*, 163 Kan. 300, 322, 182 P.2d 865 [1947]; *Sedlak v. Dick*, 256 Kan. 779, 803-04, 887 P.2d 1119 [1995]; *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023, 850 P.2d 773 [1993]; and *Boyer v. Ferguson*, 192 Kan. 607,

389 P.2d 775 [1964]). But we find no such hindrances here.

If we use precision to sever the problematic statutory language from the rest of the Kansas criminal restitution statutes and invalidate only those portions making orders of restitution civil judgments, it preserves the societal goals advanced by a judicial sanction of restitution within the context of a criminal case without infringing on a defendant's— or a victim's—right to a jury trial in a civil setting. Because these goals are still advanced without the offending portions of the statute, the remainder has satisfied the "*Gannon* test" and may stand.

Accordingly, we hold the following statutes or portions of statutes to be unconstitutional and sever them:

K.S.A 60-4301, which establishes that an order of restitution shall be filed, recorded, and enforced as a civil judgment, in its entirety;

K.S.A. 60-4302, which sets forth notice requirements when an order of restitution is filed as a civil judgment, in its entirety;

K.S.A. 60-4303, which establishes the docket fee when filing an order of restitution as a civil judgment, in its entirety;

K.S.A. 2020 Supp. 21-6604(b)(2), which dictates that if the court orders restitution, the restitution shall be a judgment against the defendant that may be collected by the court by garnishment or other execution as on judgments in civil cases in accordance with K.S.A. 60-4301 et seq.; and

Finally, only the last sentence of K.S.A. 2020 Supp. 22-3424(d)(1) which reads, "If the court orders

restitution to be paid to the victim or the victim's family, the order shall be enforced as a judgment of restitution pursuant to K.S.A. 60-4301 through 60-4304, and amendments thereto."

Further explanation of our decision to sever the entirety of K.S.A. 2020 Supp. 21-6604(b)(2) is in order. This subsection refers to the court's ability to order collection of restitution by "garnishment or other execution." It, in part, demonstrates the court's flexibility when it comes to enforcing orders of criminal restitution. That alone would not offend section 5. The problem with the statute is that, as worded, it is too difficult to uncouple the acceptable provisions from those provisions that violate section 5. Thus, it is necessary to sever the entire subsection. We recognize that a court may still enforce its order of criminal restitution through lawful means if the court has cause to believe a defendant is not in compliance. Those means still include the potential for court-ordered garnishment. And the defendant still retains the ability to object to such garnishment and justify why garnishment is not appropriate, i.e., to show the court how he is taking reasonable steps to comply with the restitution order.

With today's holding, restitution may still be imposed by a judge either as part of the sentence—as contemplated by K.S.A. 2020 Supp. 21-6604(b)—or as a condition of probation—as contemplated by K.S.A. 2020 Supp. 21-6607(c)(2).

However, a criminal defendant will not be faced with a civil judgment for restitution unless it has been obtained separately through a civil cause of action. In this way, criminal restitution is—once again—not a

legal obligation equivalent to a civil judgment and does not violate section 5.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

* * *

STANDRIDGE, J., dissenting: I dissent from the majority's holding that Kansas' restitution statutes do not violate a criminal defendant's right to a jury trial under the Sixth Amendment to the United States Constitution. I also dissent from the majority's holding that portions of our restitution statutes may be severed to avoid offending a criminal defendant's right to a jury trial under section 5 of the Kansas Constitution Bill of Rights. For the reasons set forth below, I would hold that Taylor Arnett had a right under both the Sixth Amendment and section 5 to have a jury determine the amount of damage or loss caused by her crime.

A. *Sixth Amendment*

The Sixth Amendment provides a right to a jury trial in all criminal prosecutions. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court established a rule to enforce that right: "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Arnett claims that the Kansas restitution statutes violate the *Apprendi* rule because they allow

judges, not juries, to make the underlying findings of fact needed to award restitution. The State responds with two arguments: (1) the Sixth Amendment does not apply because restitution is not punishment, and (2) even if restitution is punishment, having the judge instead of the jury make findings of fact to support the court's restitution order does not violate *Apprendi* because restitution does not increase the statutory maximum penalty for Arnett's offense.

The majority does not engage in a substantive analysis of the Sixth Amendment issue. Instead, it summarily concludes that Kansas' restitution scheme does not violate the Sixth Amendment because the United States Supreme Court has been silent on the issue and the decisions of a majority of the federal circuits and many state courts find the Sixth Amendment inapplicable to restitution. Because a substantive analysis is critical to deciding the issue here, I will begin with that analysis, considering both of the State's arguments, and then address the majority's summary reliance on the cited caselaw.

1. *The Sixth Amendment applies*

The State first argues that restitution does not trigger an *Apprendi* analysis. It relies on an argument that restitution is not punishment. It asserts that, instead, restitution is like damages in a civil case because it is designed to compensate victims of the defendant's crime. The State's view that the Sixth Amendment is inapplicable conflicts with the text of the Sixth Amendment, the historical record, and *Apprendi*'s progeny.

To begin, the State's position is at odds with the language in the Sixth Amendment. The Sixth

Amendment right to a jury trial applies in "all criminal prosecutions." U.S. Const. amend VI. Restitution is part of the criminal prosecution because it is part of the defendant's sentence. *State v. Johnson*, 309 Kan. 992, 996, 441 P.3d 1036 (2019). The Sixth Amendment's text supports Arnett's position that *Apprendi* applies to restitution.

And so does the historical record, which is the touchstone of the *Apprendi* rule. Courts applying that rule must consider "whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" *Oregon v. Ice*, 555 U.S. 160, 168, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). Courts must do so because the scope of the jury-trial right is "informed by the historical role of the jury at common law." 555 U.S. at 170. The historical record on the jury's role in deciding restitution is clear.

In England, the facts needed to support the earliest examples of restitution had to be alleged in the complaint or found by the jury. In a victim-initiated prosecution called an "appeal of felony," a larceny victim could retake stolen property by identifying it in the complaint and having the jury determine who owned it. Note, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 472 (2014). Larceny victims also could recover stolen property in an "indictment of felony"—a prosecution brought by the Crown—by filing a writ of restitution that listed the property in the indictment. 51 Am. Crim. L. Rev. at 473-74; see *State v. Ragland*, 171 Kan. 530, 534-35, 233 P.2d 740 (1951). The American experience with restitution flows from this English tradition. Early American courts allowed

restitution for theft offenses if the property was described in the indictment and the jury made a special finding. Statutes provided for restitution, but they also required a description of the property in the indictment and a finding of ownership by the jury. 51 Am. Crim. L. Rev. at 474-75. The colonies, like their English counterparts, required a jury finding about the property described in the indictment before an award of restitution could be made. The State's position cannot be squared with the historical record.

Neither can the State's position be squared with the contemporary *Apprendi* line of cases. In *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), the Court applied *Apprendi* to criminal fines. In doing so, the Court saw no reason to treat criminal fines differently from other forms of punishment to which the Sixth Amendment applies:

> "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.' That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. . . . In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]'—terms that each undeniably embrace fines. [Citations omitted.]" 567 U.S. at 349-50.

Based on this analysis, the *Southern Union* Court held that criminal fines were subject to *Apprendi* because they were indistinguishable from other punishments covered by *Apprendi*.

The same can be said about restitution. Like a criminal fine, restitution is a penalty imposed by the State against a defendant for committing an offense. And punitive consequences attach to the failure to pay restitution, just like they do to the failure to pay criminal fines. Lollar, *What Is Criminal Restitution?* 100 Iowa L. Rev. 93, 123-30 (2014) (describing restitution's punitive characteristics). Granted, restitution and criminal fines are different in some ways. For example, a defendant pays a fine to the government but pays restitution to the victim. But those differences did not stop the United States Supreme Court from comparing the two under the Eighth Amendment's Excessive Fines Clause. *Paroline v. United States*, 572 U.S. 434, 456, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014). And they should not stop this court from finding that *Apprendi* applies to restitution for all the same reasons it applied to criminal fines in *Southern Union*.

My conclusion in this regard is unaffected by the fact that one of restitution's purposes is to compensate crime victims. There is no question that restitution serves a compensatory purpose, but that is not all it does—it also serves "functions of deterrence and rehabilitation of the guilty." *State v. Applegate*, 266 Kan. 1072, Syl. ¶ 2, 976 P.2d 936 (1999). Those are two "principal rationales" from which the government derives its power to punish. *Hall v. Florida*, 572 U.S. 701, 708, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) (discussing justifications for punishment under the Eighth Amendment). So, it is no surprise that the

United States Supreme Court has recognized that restitution awarded under federal statutes is a form of punishment. *Paroline*, 572 U.S. at 456 (while restitution "is paid to a victim, it is imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime. Thus, despite the differences between restitution and a traditional fine, restitution still implicates 'the prosecutorial powers of government.' [Citations omitted.]"); *Pasquantino v. United States*, 544 U.S. 349, 365, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) ("The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct.").

Having concluded that the text of the Sixth Amendment, the historical record, and the Supreme Court's decision in *Southern Union* all support a holding that the Sixth Amendment applies to restitution, I turn to the State's alternative argument.

2. *Applying* Apprendi: *restitution increases the maximum punishment*

The State's second claim is that even if the Sixth Amendment applies to restitution awards, there is no *Apprendi* violation in this case because the court's order of restitution did not increase the statutory maximum sentence for Arnett's crime. The State is arguing that because the Legislature has not set statutory maximums for the amount of restitution a judge can order, there can be no *Apprendi* violation.

The State twists the *Apprendi* holding. In *Apprendi*, the Court held that juries must decide any facts that are to be used to enhance the "statutory maximum" sentence of a crime. The "statutory

maximum" refers to "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In other words, the Sixth Amendment limits the sentencing judge to the maximum punishment the Legislature permits for a crime of which the jury has found the defendant guilty or to which the defendant has admitted. If anything is to be added to the sentence beyond that statutory maximum, the jury needs to make additional factual findings that will permit such an addition. The Court applied this same definition again in *Southern Union*. See 567 U.S. at 348.

Given this definition, the Kansas restitution scheme necessarily permits an increase to the statutory maximum of a defendant's sentence because K.S.A. 2017 Supp. 21-6604(b)(1) and 21-6607(c)(2) give judges discretion to impose restitution amounts if the *judge* determines the crime caused damage or loss—regardless of whether the jury made this finding. Because the jury in Arnett's case made no finding on the amount of damage that Arnett caused, the imposition of restitution based on the judge's finding violated the *Apprendi* prohibition.

In concluding restitution can never run afoul of *Apprendi*, the Court of Appeals panel reasoned that these statutes do not impose a specific maximum amount and will vary on a case-by-case basis depending on a victim's loss. *State v. Arnett*, No. 112,572, 2018 WL 2072804, at *2-3 (Kan. App. 2018) (unpublished opinion). In doing so, it attempted to distinguish restitution from the criminal fine issue discussed in *Southern Union* because fines have fixed statutory maximums.

The panel made the same mistake that the State does. The underlying premise employed by the panel—that there is no *Apprendi* violation if there is no statutory maximum on additional punishment—is wrong. Furthermore, the majority's attempt to paint restitution as significantly different from fines misses the mark. The Court in *Southern Union* was considering legislation that authorized indeterminate criminal fines. The relevant statute permitted a fine of up to $50,000 for each day a company violated a certain federal statute. To determine the appropriate fine to impose, the judge had to determine the number of days the company violated the federal statute. So, the judge had to make an additional factual finding: the length of the violation. The United States Supreme Court ruled that *any* fact used to calculate a fine—including the amount of the defendant's gain or the victim's loss—was therefore violative of the *Apprendi* rule. *Southern Union*, 567 U.S. at 349-50.

The same logic undoubtedly applies to indeterminate restitution statutes like the ones at issue here. Like criminal fines, the court orders a defendant to pay restitution, which includes, but is not limited to, damage or loss caused by the defendant's crime. See K.S.A. 2017 Supp. 21-6604(b)(1). In both situations, a judge must make a factual finding that increases the punishment beyond the amount a jury or plea agreement authorize.

Because restitution is punishment and because Kansas' restitution scheme increases the statutory maximum penalty a judge can impose, I would hold that the Sixth Amendment applies and that the scheme violates the rule announced in *Apprendi*.

3. *The majority's reasoning is flawed*

I now turn to the majority's reasoning that the Kansas restitution scheme does not violate the Sixth Amendment because (a) the United States Supreme Court remains silent on the issue and recently denied a petition for certiorari arguing the same; and (b) the majority of federal circuits and many state courts have refused to extend *Apprendi* to restitution orders.

a. The Supreme Court's silence tells us nothing

In finding that the Sixth Amendment and the rule in *Apprendi* do not apply to restitution, the majority cites to the United States Supreme Court's silence on the issue. Slip op. at 8. Specifically, the majority cites to two cases from eight years ago when the Court denied certiorari when the issue was presented. Slip op. at 7 (citing *United States v. Green*, 722 F.3d 1146 [9th Cir.], *cert. denied* 571 U.S. 1025 [2013]; *United States v. Day*, 700 F.3d 713 [4th Cir. 2012], *cert. denied* 569 U.S. 959 [2013]). The majority also cites to the Court's recent denial of a petition for certiorari on the issue in *Hester v. United States*, 139 S. Ct. 509, 202 L. Ed. 2d 627 (2019). The majority construes these denials to mean that the Court "has thus far been content to allow the lower courts to continue ruling that restitution does not implicate a defendant's Sixth Amendment right to a jury." Slip op. at 8. Because of this, the majority declines to address the issue further, opting instead to side with the majority of federal circuits on the matter.

However, as the United States Supreme Court has long held, "[Denial of a petition for certiorari] simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower

court as a matter 'of sound judicial discretion.'" *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917, 70 S. Ct. 252, 94 L. Ed. 562 (1950). There are myriad reasons why the Court may refuse to take up an issue, including, but not limited to: narrow technical reasons, various procedural bars, lack of finality, the judgment does not come from the state court of last resort, a decision may be supportable as a matter of state law but not be subject to review, or an insufficient record. 338 U.S. at 917-18. A denial of a petition for certiorari in no way implies approval or disapproval of a lower court's decision. 338 U.S. at 919. In my view, the majority reaches the wrong conclusion about what the denial in these cases means and accordingly circumvents the Sixth Amendment analysis necessary to resolve the issue presented.

b. Other caselaw is unreliable

This brings us to the majority's second justification for its decision: that 11 of 13 federal circuits and many state courts have held that *Apprendi* should not be extended to restitution orders. Specifically, the majority sees no reason to engage in a substantive analysis and remains "content to side with the majority of the circuit courts of appeal." Slip op. at 8. I disagree with this approach.

In looking to the federal circuits, six of these courts either (1) fail to analyze *Southern Union* and how it may affect the analysis, (2) only cursorily do so, or (3) incorrectly do so. Six other circuits conclude that *Apprendi* does not apply strictly because there is no statutory maximum provided in the restitution statutes—it is tied to the full amount of a victim's loss. *United States v. Vega-Martinez*, 949 F.3d 43, 54-55

(1st Cir. 2020); *United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016); *United States v. Bengis*, 783 F.3d 407, 411-13 (2d Cir. 2015); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014); Day, 700 F.3d at 732; *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006). Furthermore, at least two circuits definitively state that *Apprendi* should not apply because restitution is not punishment, rather it is a civil remedy. *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012); but cf. *United States v. Ross*, 279 F.3d 600, 609 (8th Cir. 2002) (Eighth Circuit previously concluded that restitution is punishment, but the restitution statutes do not set a statutory maximum to exceed). Yet two other circuits find that *Apprendi* does not apply because of a combination of the above theories: restitution may not be a punishment, and even if it were, the restitution statutes set no statutory maximum. *United States v. Burns*, 800 F.3d 1258, 1261-62 (10th Cir. 2015); *United States v. Green*, 722 F.3d 1146, 1149-50 (9th Cir.), *cert. denied* 571 U.S. 1025 (2013). The Ninth Circuit explicitly acknowledges in its opinion that its prior precedent is not "well-harmonized with *Southern Union*," and had that opinion come down before the court's previous cases, the court may have ruled differently. *Green*, 722 F.3d at 1151. And one other circuit explains its holding this way: *Apprendi* does not apply because there is no statutory maximum and while restitution is punishment, it does not act as a severe increase to a defendant's sentence. In other words, it is punishment, but it is not punishment enough for the Sixth Amendment to apply. *United States v. Leahy*, 438 F.3d 328, 335-38 (3d Cir. 2006).

When we look to the state cases the majority relies upon, a similar pattern emerges. To be clear, 16 other state courts conclude that *Apprendi* does not extend to restitution orders. However, only seven of these cases are state supreme court opinions, five of which were handed down before *Southern Union*. Almost all these cases provide no real analysis of the issue, instead basing their holdings on the various rationales of the federal circuit courts. And just like their federal counterparts, these state supreme courts rely on varying rationales in rejecting application of *Apprendi*. One state supreme court finds that *Apprendi* is inapplicable because there is no statutory maximum. *State v. Kinneman*, 155 Wash. 2d 272, 282, 119 P.3d 350 (2005). Two state supreme courts conclude that restitution simply is not punishment, precluding application of the Sixth Amendment jury-trial right. *Prickett v. State*, 856 N.E.2d 1203, 1210 (Ind. 2006); *State v. Field*, 328 Mont. 26, 32, 116 P.3d 813 (2005). One court rejects application because there is no statutory maximum and restitution is not analogous to the kind of sentencing enhancement factors conceived of in *Apprendi*. *People v. Horne*, 97 N.Y.2d 404, 414-15, 767 N.E.2d 132, 740 N.Y.S.2d 675 (2002). One court explains that while restitution is punishment, *Apprendi* cannot apply because there is no statutory maximum. *State v. Clapper*, 273 Neb. 750, 755-59, 732 N.W.2d 657 (2007). Yet another court holds that restitution is not punishment and that lack of a statutory maximum precludes application of *Apprendi*. *Commonwealth v. Denehy*, 466 Mass. 723, 736-38, 2 N.E.3d 161 (2014). The most interesting rationale comes from the California Supreme Court, which recognized that *Apprendi* may apply to the state's restitution scheme but only in situations where the trial court is trying to

determine whether "compelling and extraordinary reasons" exist to not impose restitution. *People v. Wall*, 3 Cal. 5th 1048, 1075-76, 404 P.3d 1209, 224 Cal. Rptr. 3d 861 (2017).

The remaining state cases are appellate court opinions, a handful of which are unpublished and have no precedential value and most of which simply rely on other courts' findings with little to no additional analysis. And like those other courts, these courts vary in their reasoning for rejecting the *Apprendi* argument. See *State v. Leon*, 240 Ariz. 492, 495-96, 381 P.3d 286 (Ct. App. 2016) (*Apprendi* does not apply to restitution because restitution is not punishment, and even if it was, there is no statutory maximum); *People v. Smith*, 181 P.3d 324, 327 (Colo. App. 2007) (*Apprendi* does not apply to restitution because there is no statutory maximum); *People v. Foster*, 319 Mich. App. 365, 389, 901 N.W.2d 127 (2017) (*Apprendi* does not apply to restitution because restitution is not punishment); *State v. Maxwell*, 802 N.W.2d 849, 851 (Minn. Ct. App. 2011) (*Apprendi* does not apply to restitution because there is no statutory maximum); *State v. Martinez*, 392 N.J. Super. 307, 315-18, 920 A.2d 715 (2007) (*Apprendi* does not apply because restitution is capped at victim's total loss, which trial court cannot exceed); *State v. Deslaurier*, 277 Or. App. 288, 295, 371 P.3d 505 (2016) (same); *State v. Foumai*, No. CAAP-17-0000093, 2018 WL 495679, at *4 (Haw. Ct. App. 2018) (unpublished opinion) (*Apprendi* does not apply to restitution because there is no statutory maximum); *Commonwealth v. Getz*, No. 2153 EDA 2011, 2013 WL 11254781, at *8 (Pa. Super. Ct. 2013) (unpublished opinion) (same).

When viewed collectively, these cases may appear to provide overwhelming support for finding that *Apprendi* does not apply to restitution orders. However, when read individually, these cases fail to provide a consistent or clear rationale for why *Apprendi* should not apply to restitution. Like the majority in this case, many of the courts blindly follow other decisions without any independent analysis of their own. Based on my own independent analysis, I would find the Sixth Amendment applies to restitution orders. Restitution is part of the "criminal prosecution" to which that Sixth Amendment jury trial right attaches. Courts award it in a criminal proceeding as part of a criminal sentence. Imposing it serves punitive aims and not paying it has punitive consequences. Juries, not judges, were historically required to find the amount of restitution based on facts alleged in the indictment. And under *Southern Union*, present-day juries must also decide restitution for the same reasons they must find the facts needed to award criminal fines. For these reasons, I would vacate Arnett's restitution order as violative of the Sixth Amendment.

B. *Section 5*

At the outset, I note that the panel's decision and Arnett's petition for review focused their section 5 analyses on whether the Legislature deprived Arnett of her right to a jury trial by allowing the district court to decide and order restitution without providing a "quid pro quo" or substitute remedy. See *Arnett*, 2018 WL 2072804, at *1-2. After Arnett's petition for review had been granted and while review was pending, however, we issued our decision in *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1135-44, 1150, 442 P.3d 509

(2019) (plurality opinion), in which a majority of this court abrogated the quid pro quo test for section 5 challenges. Because *Hilburn* was filed while review of Arnett's case was pending, we do not apply the quid pro quo test to her section 5 claim. See *State v. Mitchell*, 297 Kan. 118, 124-25, 298 P.3d 349 (2013) (change in the law acts prospectively, applying "'to all cases . . . pending on direct review or not yet final'").

Section 5 of the Kansas Constitution Bill of Rights provides that "[t]he right of trial by jury shall be inviolate." Section 5 preserves the jury trial right as it existed at common law in 1859 when the Kansas Constitution was ratified. *Hilburn*, 309 Kan. at 1133-34; 309 Kan. at 1151 (Stegall, J., concurring). Thus, section 5 only applies if it can be shown that territorial juries would have decided the issue of restitution in 1859. 309 Kan. at 1133-34.

The majority finds that the concept of criminal restitution was not part of the common law in 1859 and that section 5 is only implicated by our current restitution statutes that equate criminal restitution orders with civil judgments. The majority then finds this unconstitutional infringement on a defendant's right to a jury trial may be remedied by severing certain portions of the restitution statutes.

But I would never reach the severance issue because I disagree with the majority's premise that the concept of criminal restitution was not part of the common law in 1859. While the term "restitution" is not found in our common law, Kansas juries in 1859 made factual determinations analogous to the modern-day concept of restitution by deciding (1) damages in civil cases and (2) the value of stolen property in certain types of theft cases.

1. *Civil damages*

Neither judges nor juries could impose restitution in criminal cases in 1859. But Kansas law did guarantee a jury trial on issues of fact arising in a civil action for the recovery of money or property. See Kan. Terr. Stat. 1859, ch. 25, § 274.

The majority maintains that criminal restitution and civil damages are not analogous concepts but are instead separate and independent remedies because a crime victim may recover both restitution and civil damages. See *Applegate*, 266 Kan. at 1078- 79. But the majority's argument ignores the fact that a crime victim in 1859 could not. At that time, the only avenue for an aggrieved party to seek compensation for loss due to a defendant's criminal act was to file a civil case against that defendant. In such an action, a civil jury would have decided issues of fact relating to whether the aggrieved party was entitled to a monetary award and the amount of the award, if any. See Kan. Terr. Stat. 1859, ch. 25, § 274. And before 1994, Kansas statutes only authorized criminal restitution as a condition of probation or parole; it was not allowed as part of a defendant's general sentence. Compare K.S.A. 1993 Supp. 21-4603d(a) with K.S.A. 1994 Supp. 21-4603d(a).

Moreover, the concepts of restitution and damages are not so independent as the majority suggests. While they each involve a different process for compensating an aggrieved party for monetary loss caused by a criminal defendant, a party generally cannot recover both restitution and damages for the same loss. See K.S.A. 60-4304(b) (restitution award will reduce a victim's recovery in a later civil case by "the

amount of the restitution paid"); K.S.A. 2020 Supp. 21-6604(b)(1) (measure of restitution includes "damage or loss caused by the defendant's crime"); *Applegate*, 266 Kan. at 1080 (civil damage award may be credited against restitution ordered in criminal proceeding). So rather than thinking of restitution and damages as separate remedies, it is more accurate to describe them as separate procedures for obtaining the same remedy—making a party whole. In this way, our criminal restitution statutes serve the same purpose as actions for civil damages did in 1859. Thus, I would find that our restitution statutes violate section 5 by allowing a judge in a criminal case to decide and order restitution based on questions of fact historically reserved for a civil jury.

2. *Stolen property valuation*

In addition to deciding the amount of civil damages, juries in 1859 also were tasked with determining the value of stolen property in criminal cases involving "robbery, theft, fraud, embezzlement, or the like." See Kan. Terr. Stat. 1859, ch. 27, § 219. The jury's property valuation affected the severity of the defendant's punishment. See Kan. Terr. Stat. 1859, ch. 28, §§ 72-74. The jury could specify a punishment in the verdict; if the jury failed to specify an authorized punishment, the judge was required to do so. See Kan. Terr. Stat. 1859, ch. 27, §§ 220-24.

Juries in criminal cases involving theft offenses were required to make a factual finding about the value of the stolen property. This is equivalent to the factual finding a judge makes in determining restitution—whether a defendant's crime caused damage or loss to a victim. And both findings affect the severity

of the defendant's sentence. See *State v. Hall*, 298 Kan. 978, 983, 319 P.3d 506 (2014) ("Restitution constitutes part of a criminal defendant's sentence."). Because a jury in 1859 would have determined what amount of damage or loss a criminal defendant caused, our criminal restitution statutes violate a defendant's right to a jury trial under section 5.

In sum, I would find that the Kansas criminal restitution statutes unconstitutionally deprived Arnett of her section 5 right to have a jury determine whether her crime caused damage or loss to a victim because this right existed in 1859.

ROSEN, J., joins the foregoing dissent.

APPENDIX B

No. 120,903

IN THE SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBERT JAMES ROBISON III,
Appellant.

Review of the judgment of the Court of Appeals in 58 Kan. App. 2d 380, 469 P.3d 83 (2020). Appeal from Lyon District Court; MERLIN G. WHEELER, judge. Opinion filed October 15, 2021. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Caroline Zuschek, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Amy L. Aranda, first assistant county attorney, argued the cause, and *Marc Goodman*, county attorney, and *Derek Schmidt*, attorney general, were with her on the brief for the appellee.

The opinion of the court was delivered by

WILSON, J.: Robert James Robison III petitions this court for review of two intertwined issues: Whether the order of restitution in his case violates either section 5 of the Kansas Constitution Bill of Rights or the Sixth Amendment of the United States Constitution, if not both. This court granted review on both issues. The issues raised are identical to those raised in *State v. Arnett*, 314 Kan. ___ (No. 112,572, this day decided). Our analysis in this case will take reference liberally from that opinion.

FACTS AND PROCEDURAL BACKGROUND

The relevant facts are brief and Robison's Court of Appeals decision covers them thoroughly. They are:

> "On January 3, 2018, the State charged Robison with two counts of battery of a law enforcement officer in violation of K.S.A. 2017 Supp. 21-54113(c)(3)(D). The charges stemmed from an incident at the Lyon County Jail in which Robison hit Officer Zachary Nance and Corporal Bobby Cutright several times. Corporal Cutright suffered an injury to his eye and a bite on his arm. Following the incident, he went on to Newman Regional Health where he received treatment. Lyon County's workers compensation insurance carrier subsequently paid Corporal Cutright's medical bills.
>
> "Prior to trial, the parties entered into a plea agreement in which Robison agreed to plead no contest to one count of battery of a law enforcement officer. In exchange, the

State agreed to dismiss the second count and further agreed not to request a fine. On March 20, 2018, the district court accepted Robison's no-contest plea and found him guilty of a single count of battery of a law enforcement officer arising out of the attack on Corporal Cutright. A few months later, the district court sentenced Robison to 32 months' imprisonment and 24 months' post-release supervision. Complying with the terms of the plea agreement, the district court did not impose a fine. However, the district court agreed to consider the State's request for restitution and continued the resolution of the request until a later date.

"At a restitution hearing held on August 21, 2018, the State requested that Robison pay $2,648.56 in restitution to reimburse the workers compensation insurance carrier that paid Corporal Cutright's medical bills arising out of the battery. A hospital employee testified about the medical bills and verified that they had been paid by the insurance carrier. Robison's counsel did not dispute the amount of the medical bills or that they arose out of the attack on Corporal Cutright. Instead, defense counsel argued that the workers compensation insurance carrier was not entitled to restitution and had not requested reimbursement.

"After considering the evidence and the arguments of counsel, the district court found that the medical bills incurred by Corporal Cutright were caused by Robison's crime and

> that Lyon County's insurance carrier had paid the medical expenses on the officer's behalf. Accordingly, the district court ordered Robison to pay restitution in the amount of $2,648.56 to reimburse the workers compensation insurance carrier for the medical expenses it had paid." *State v. Robison*, 58 Kan. App. 2d 380, 381-82, 469 P.3d 83 (2020).

On appeal, Robison argued three issues: (1) The Kansas restitution statutes violate section 5 of the Kansas Constitution Bill of Rights because they encroach upon a criminal defendant's common law right to a civil jury trial on damages caused by the defendant's crime. (2) His right to a jury trial on the issue of restitution under the Sixth Amendment of the United States Constitution was violated because the statutes allowed the court to make a finding of fact that increased the penalty for his crime beyond the prescribed statutory maximum. (3) The statutes governing restitution preclude district courts from awarding restitution to an insurance carrier that has paid the victim's medical expenses caused by a criminal defendant.

The panel found against Robison on each of these three issues and affirmed the district court's restitution order. 58 Kan. App. 2d at 381. Robison petitioned this court for review of only the first two issues, which this court granted. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review). After the court heard oral arguments, Robison filed a Motion to Supplement Oral Argument, to which the State did not file a

response. The motion is granted. The court has considered the arguments and authorities cited in the motion.

Preservation

Robison did not raise these issues before the district court. Generally, a constitutional issue not raised before the district court is considered abandoned. But this court can review issues presented on appeal where: "(1) the newly asserted theory involves only a question of law arising on proved or admitted facts . . . ; (2) consideration of the theory is necessary to serve the ends of justice or to prevent [a] denial of fundamental rights"; or (3) the district court's judgment is correct for the wrong reason. *State v. Perkins*, 310 Kan. 764, 768, 449 P.3d 756 (2019). But "'[t]he decision to review an unpreserved claim under an exception is a prudential one. Even if an exception would support a decision to review a new claim, [this court has] no obligation to do so.' [Citations omitted.]" *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020).

The right to a jury trial is a fundamental right under both section 5 of the Kansas Constitution Bill of Rights and under the Sixth Amendment to the United States Constitution. *State v. Rizo*, 304 Kan. 974, 979-80, 377 P.3d 419 (2016). We elect to reach both questions under the second exception.

Analysis

As in *Arnett*, our analysis first looks at the statutes which make up the "restitution scheme" being challenged by Robison. K.S.A. 2017 Supp. 21-6604(b)(1) grants a district court the authority to

order the defendant to pay restitution as part of the sentence. The statute dictates that the restitution amount "shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances which would render a plan of restitution unworkable."

In the same way, K.S.A. 2017 Supp. 21-6607(c)(2) gives the district court the authority to order restitution payments as a condition of probation. Based on the clear language of the statutes, "'restitution for a victim's damages or loss depends on the establishment of a causal link between the defendant's unlawful conduct and the victim's damages.' [Citations omitted.]" *State v. Alcala*, 301 Kan. 832, 837, 348 P.3d 570 (2015).

Criminal Restitution does not violate the Sixth Amendment to the United States Constitution.

Standard of Review

Determining a statute's constitutionality is a question of law subject to unlimited review. *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014).

Discussion

We begin with Robison's argument that the restitution statutes in question offend his right to a jury trial under the Sixth Amendment to the United States Constitution.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S.

Const. amend. VI. The Supreme Court of the United States has established that this right to a jury covers any fact which increases the maximum penalty for a crime—other than a prior conviction—and such facts must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Supreme Court further established that any facts which increase a mandatory *minimum* penalty must also be decided by a jury. See *Alleyne v. United States*, 570 U.S. 99, 102, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The reasoning is that when "a judge inflicts punishment that the jury's verdict alone does not allow," the judge has exceeded his authority. *Blakely v. Washington*, 542 U.S. 296, 304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Most federal courts confronted with the question have concluded restitution does not run afoul of the Sixth Amendment. Largely, these courts have followed one of two analytical paths to conclude either that criminal restitution is not punishment or to find that restitution statutes do not specify a maximum award. See *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008) (restitution is not a criminal punishment); see also *United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016) (restitution is considered punishment but is not affected by *Apprendi* because statutes do not specify a statutory maximum). Sometimes the courts have taken a more hybrid approach. See *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (restitution is only punishment in some contexts but is "not clearly" punishment covered by *Apprendi*); *United States v. Leahy*, 438 F.3d 328, 338 (3d Cir. 2006) (Although restitution is criminal punishment, its essence is a restorative remedy that compensates

victims and does not make a defendant's punishment more severe.).

As our own Court of Appeals observed below, at least 11 of 13 federal United States Circuit Courts of Appeal have refused to extend *Apprendi* and its progeny to orders of restitution, not to mention the many state courts which have followed suit. *State v. Robison*, 58 Kan. App. 2d 380, 389-90, 469 P.3d 83 (2020). Following that lead, the Kansas Court of Appeals has also declared criminal restitution non-punishment for Sixth Amendment purposes. *Robison*, 58 Kan. App. 2d at 392; *State v. Huff*, 50 Kan. App. 2d 1094, 1100, 336 P.3d 897 (2014).

Outside the context of this question, this court has previously acknowledged that restitution serves many purposes separate from criminal punishment, including victim compensation, deterrence, and rehabilitation of the guilty. *State v. Applegate*, 266 Kan. 1072, 1075, 976 P.2d 936 (1999).

Despite the nonuniform approach taken by federal circuits, the Supreme Court has remained silent on whether criminal restitution triggers the right to a jury as contemplated in Apprendi, even when presented with opportunities to take up the question. See *United States v. Green*, 722 F.3d 1146 (9th Cir.), *cert. denied* 571 U.S. 1025 (2013); *United States v. Day*, 700 F.3d 713 (4th Cir. 2012), *cert. denied* 569 U.S. 959 (2013).

The Supreme Court once again denied a petition for a writ of certiorari in a case that would have answered that question in *Hester v. United States*, 139 S. Ct. 509, 202 L. Ed. 2d 627 (2019). But this time, Justice Gorsuch—joined by Justice Sotomayor—dissented from the denial of certiorari, arguing that

under either analytical path, restitution is within reach of the Sixth Amendment's protections and should trigger the right to a jury trial. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting).

Although this two-justice dissent might signal that the Supreme Court will eventually take up the question, the majority has thus far been content to allow the lower courts to continue ruling that restitution does not implicate a defendant's Sixth Amendment right to a jury. We see no reason why we should take up that mantle in its place. While the theoretical bases upon which the various circuit courts relied are not uniform, we need not resolve these differences here. We are content to side with the majority of the circuit courts of appeal.

The current structure of criminal restitution violates section 5 of the Kansas Constitution Bill of Rights but is remedied by severance.

Next, we turn to the question of whether the Kansas criminal restitution statutes violate section 5 of the Kansas Constitution Bill of Rights.

Standard of Review

As noted above, a statute's constitutionality is a question of law subject to unlimited review. Soto, 299 Kan. at 121.

Discussion

Section 5 of the Kansas Constitution Bill of Rights states that "[t]he right of trial by jury shall be inviolate." Citing *Miller v. Johnson*, 295 Kan. 636, 289 P.3d

1098 (2012), a plurality of this court declared "'[s]ection 5 preserves the jury trial right as it historically existed at common law when our state's constitution came into existence'" in 1859. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1133, 442 P.3d 509 (2019). A majority of this court has ruled the "right as it historically existed" protects as inviolate at least the procedural right to have a jury decide the contested questions juries historically decided. *Hilburn*, 309 Kan. at 1133 (plurality holding that "[s]ection 5 preserves the jury trial right as it historically existed at common law"); *Hilburn*, 309 Kan. at 1151 (Stegall, J., concurring) (stating that the "section 5 'right of trial by jury' that 'shall be inviolate' is a procedural right").

Consequently, we begin our analysis of the section 5 challenge with whether territorial juries would have decided the issue of criminal restitution in 1859. If so, under *Hilburn*, section 5 of the Kansas Constitution would clearly apply, requiring juries also to decide it now. See *Hilburn*, 309 Kan. at 1134. On the other hand, if judges decided the issue of criminal restitution in 1859, section 5 would not apply.

It is not so simple. The concept of criminal restitution as we know it today was not part of the common law at all in 1859. Since it did not exist, it follows that it could not have been decided by juries *or* judges.

So we explore further. At common law, a victim would have been able to recover damages caused by a criminal act through civil suit with a finding of causation and damages. Civil defendants in those actions had a right to demand a jury trial. There is no dispute that the amount of damages—and causation—was a question of fact to be determined by the jury in common-law tort actions. *Miller*, 295 Kan. at 647; see *St.*

Clair v. Denny, 245 Kan. 414, 417, 781 P.2d 1043 (1989). Consequently, Robison would have us find that because criminal restitution orders now allow those same crime victims to be compensated for losses just as if they were successful tort plaintiffs, criminal defendants should enjoy that same right to a jury trial.

This court has consistently noted that when the section 5 jury trial right is implicated, it applies no further than to give the right of such trial upon issues of fact so tried at common law. The right to have the jury determine issues of fact is contrasted with the determination of issues of law, which have always been left to the court. See *State v. Love*, 305 Kan. 716, 735, 387 P.3d 820 (2017) (citing General Laws of the Territory of Kansas, 1859, ch. 25, § 274 ["[I]ssues of law must be tried by the court. . . . Issues of fact arising in action, for the recovery of money, or of specific, real or personal property, shall be tried by a jury."]). Therefore, Robison's argument hinges on analogizing modern criminal restitution to causation and damages in a civil suit.

As in *Arnett*, the Court of Appeals in the present case was faced with this argument—analogizing criminal restitution orders to causation and civil damages in tort—and concluded these remedies are distinct. Criminal restitution is not a civil judgment and is therefore not covered by section 5. *Robison*, 58 Kan. App. 2d at 386.

But the panel was also faced with another argument. Taking a deep dive into our state's history, Robison argued that not only did Kansas juries decide the amount of civil damages in tort prior to statehood, but juries were also required to determine the value

of stolen property for certain theft offenses in criminal cases. See Kan. Terr. Stat. 1859, ch. 25, § 274; Kan. Terr. Stat. 1859, ch. 27, § 219. Consequently, by analogy, Robison asserts that Kansas juries *would* have had to determine the amount of criminal restitution in 1859 because it is yet another example of juries determining the amount of loss or damage caused to a victim.

The majority of the *Robison* panel was not persuaded, instead turning to the State's rebuttal that the reason juries had to make a factual finding regarding the value of stolen property was because that factual determination affected the *severity level* of the offense. See Kan. Terr. Stat. 1859, ch. 28, §§72-74, 82-88, 91. The panel majority maintained that because criminal restitution is not a civil remedy—and criminal restitution was not listed in the Kansas territorial statutes as a permissible remedy for any crime in 1859—the defendant failed to establish that section 5 of the Kansas Constitution Bill of Rights would require a jury to impose criminal restitution under K.S.A. 2017 Supp. 21-6604(b)(1) and K.S.A. 2017 Supp. 21-6607(c)(2). 58 Kan. App. 2d at 386. We agree with this assessment. Moreover, we note that the territorial statutes contained no mechanism by which an aggrieved victim could obtain recompense for the value of stolen goods, as determined by a jury in a criminal trial; that recovery, if any, would flow only through a civil proceeding—including, potentially, a trial by jury.

This court's precedent has previously held that restitution ordered in criminal proceedings and civil damages are separate and independent remedies under Kansas law. *State v. Applegate*, 266 Kan. 1072,

1078, 976 P.2d 936 (1999). Because they are distinct remedies,

> "[t]he judge's order of restitution in a criminal action does not bar a victim from seeking damages in a separate civil action. Likewise, the judge, when sentencing a defendant in a criminal action, is not foreclosed from ordering restitution just because the victim has received compensation in a civil action." *Applegate*, 266 Kan. at 1079.

When framed as two unique avenues to recovery—with separate standards and implications—it would follow that criminal restitution does not trigger the same protections afforded to defendants in civil actions.

Then what, one may ask, is the difference? While many legal scholars and editors have weighed in on the subject, the following is one explanation that can be used to understand this court's holding in *Applegate*.

> "Criminal restitution is not the equivalent of civil damages. The criminal sanction of restitution and the civil remedy of damages further distinct societal goals. . . . Unlike a civil claim for damages, the purpose of restitution in a criminal case is twofold: (1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. The restitution order has complications and effects which the ordinary civil money judgment lacks. It necessarily holds incarceration over the head of the defendant like a sword of Damocles to enforce payment in a way that civil judgments cannot.

. . . .

". . . A final judgment in a civil case speaks instantly; it fixes the amount due and compensates a plaintiff for a delay in payment by including an award of post-judgment interest. . . . [T]he award of restitution can include installment payments enforceable as a condition of probation—a remedy not available in a civil lawsuit.

"Another difference between restitution and civil damages is that the State is a party to the case and, consistent with the twofold purpose of restitution, while the victim's wishes concerning restitution are relevant, they are not dispositive–it is the judge, not the victim, who must weigh society's competing needs and make the determination of whether or not restitution will be imposed and, if so, to what extent. It is for this reason that a defendant cannot foreclose restitution in a criminal case through execution of a release of liability or satisfaction of payment by the victim.

"Criminal restitution is rehabilitative because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty affects the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. Restitution is also retributive, particularly in cases

> of theft or fraudulent conduct, in that it seeks to take ill-gotten gains from the defendant." Criminal restitution and civil damages, 16 Fla. Prac., Sentencing § 10:3 (2020-2021 ed.).

Thus, criminal restitution and civil actions are *not* merely two ways for simply making a victim whole. But we cannot ignore the development of the modern criminal restitution statutes which are confronting Robison. These statutes include several relevant provisions that did not exist or that the court did not have cause to consider at the time of *Applegate*. K.S.A. 2017 Supp. 21-6604(b)(2) states that the order of restitution shall be a judgment against the defendant that may be collected by the court by garnishment or other execution as on judgments in civil cases. Likewise, K.S.A. 2017 Supp. 22-3424(d)(1) states that the order of restitution shall be enforced as a judgment, specifically pursuant to K.S.A. 60-4301 through K.S.A. 60-4304, all of which make criminal restitution virtually identical to a civil judgment. K.S.A. 2017 Supp. 60-4301 states in pertinent part,

> "The clerk of the district court shall record the judgment of restitution in the same manner as a judgment of the district court of this state pursuant to the code of civil procedure. A judgment so filed *has the same effect* and is subject to the same procedures, defenses and proceedings as a judgment of a district court of this state and *may be enforced or satisfied in like manner*, except a judgment of restitution shall not constitute an obligation or liability against any insurer or any third-party payor." (Emphases added.)

As shown from the plain text, the only difference enumerated in the statute between civil judgments and orders of restitution is that orders of restitution are not enforceable against insurers or any third-party payor. This is simply not enough to differentiate the two remedies. Regarding K.S.A. 60-4302 through K.S.A. 60-4304, all presume an order of criminal restitution will be filed and enforced as a civil judgment.

Although K.S.A. 60-4301 was in effect at the time of *Applegate*, that court did not address it—or its section 5 implications—because it was not necessary to resolve the issues in that case. However, when the *Applegate* court stated "[r]estitution imposed as a condition of probation is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant to avoid serving an active sentence," it directly cited a Court of Appeals case which was decided *before* K.S.A. 60-4301 was enacted. *Applegate*, 266 Kan. at 1075 (citing *Church Mut. Ins. Co. v. Rison*, 16 Kan. App. 2d 315, 318, 823 P.2d 209 [1991]).

In the days before these statutes, it was true that criminal restitution was not a legal obligation equivalent to a civil judgment, for all the reasons explained above. The *Rison* case cited by the *Applegate* court demonstrates that very well from a practical, as opposed to theoretical, point of view. There, the defendant was ordered to pay criminal restitution as a condition of his probation. After his discharge from probation—and after the statute of limitations for a civil action had run—he ceased making restitution payments. Because restitution and civil actions were truly separate remedies at the time, the insurance company was barred by the statutes of limitation from

pursuing a civil action and the defendant's payment of restitution during his probation did nothing to toll that applicable statute of limitations. See *Rison*, 16 Kan. App. 2d at 320.

But in the framework of our *current* criminal restitution statutes, we cannot continue to say that restitution is not equivalent to civil judgments, at least to the level that—if left untouched—it would implicate the right to a jury under section 5. Under current law, the district court is required to order the defendant to pay restitution which includes, but is not limited to, damage or loss caused by the defendant's crime, as determined by that judge. See K.S.A. 2020 Supp. 21-6604(b); K.S.A. 2020 Supp. 21- 6607(c)(2). As established above, once the judge decides the amount of loss to the victim proximately caused by the defendant's crime, that award becomes a civil judgment, which may be enforced the same as any other civil judgment. K.S.A. 2017 Supp. 21-6604(b)(2); K.S.A. 60-4301. By allowing the judge to determine the legal damages proximately caused by the crime, rather than a jury, and then converting that determination into a civil judgment for the victim, the statutory scheme bypasses the traditional function of the jury to determine civil damages, thereby implicating section 5. See *Missouri, K. & T.R. Co. v. L.A. Watkins Merch. Co.*, 76 Kan. 813, 815, 92 P. 1102 (1907) (existence and extent of injury caused by defendant are questions of fact to be determined by a jury). More so, unlike most other civil judgments, a modern judgment for restitution never becomes dormant. See K.S.A. 2020 Supp. 60-2403(b).

So what is the remedy for judicially determined restitution under our current statutory scheme?

Robison suggests it must be to vacate his order of restitution because it was determined by a judge and not a jury. But his preferred remedy goes too far. Although the development of criminal restitution as a full-fledged and unhindered civil judgment is concerning to the validity of any order of restitution, we do not find that it necessitates invalidating every order of restitution made by a district court outside the purview of a jury. To do so would be to blindly disregard every valid justification in those rulings for having a separate avenue to recovery for crime victims. It would also ignore an effective, but more focused, solution.

When confronting a constitutional flaw in a statute, we will resolve the problem, if possible, by severing the problematic portions and leaving the remainder intact.

> "Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that (1) the act would have been passed without the objectionable portion and (2) if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand. This court will assume severability if the unconstitutional part can be severed without doing violence to legislative intent." *Gannon v. State*, 304 Kan. 490, 491, 372 P.3d 1181 (2016).

We acknowledge that this solution is not always possible, and this court has, in the past, declared

entire acts void after we were unable to sever the unconstitutional provision from its companions. See *Gannon*, 304 Kan. at 520 (citing *State ex rel. v. Hines*, 163 Kan. 300, 322, 182 P.2d 865 [1947]; *Sedlak v. Dick,* 256 Kan. 779, 803-04, 887 P.2d 1119 [1995]; *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023, 850 P.2d 773 [1993]; and *Boyer v. Ferguson*, 192 Kan. 607, 389 P.2d 775 [1964]). But we find no such hindrances here.

If we use precision to sever the problematic statutory language from the rest of the Kansas criminal restitution statutes and invalidate only those portions making orders of restitution civil judgments, it preserves the societal goals advanced by a judicial sanction of restitution within the context of a criminal case without infringing on a defendant's—or a victim's—right to a jury trial in a civil setting. Because these goals are still advanced without the offending portions of the statute, the remainder has satisfied the "*Gannon* test" and may stand.

Accordingly, we hold the following statutes or portions of statutes to be unconstitutional and sever them: K.S.A 60-4301, which establishes that an order of restitution shall be filed, recorded, and enforced as a civil judgment, in its entirety;

K.S.A. 60-4302, which sets forth notice requirements when an order of restitution is filed as a civil judgment, in its entirety;

K.S.A. 60-4303, which establishes the docket fee when filing an order of restitution as a civil judgment, in its entirety;

K.S.A. 2020 Supp. 21-6604(b)(2), which dictates that if the court orders restitution, the restitution shall be a judgment against the defendant that may

be collected by the court by garnishment or other execution as on judgments in civil cases in accordance with K.S.A. 60-4301 et seq.; and

Finally, only the last sentence of K.S.A. 2020 Supp. 22-3424(d)(1) which reads, "If the court orders restitution to be paid to the victim or the victim's family, the order shall be enforced as a judgment of restitution pursuant to K.S.A. 60-4301 through 60-4304, and amendments thereto."

Further explanation of our decision to sever the entirety of K.S.A. 2020 Supp. 21- 6604(b)(2) is in order. This subsection refers to the court's ability to order collection of restitution by "garnishment or other execution." It, in part, demonstrates the court's flexibility when it comes to enforcing orders of criminal restitution. That alone would not offend section 5. The problem with the statute is that, as worded, it is too difficult to uncouple the acceptable provisions from those provisions that violate section 5. Thus, it is necessary to sever the entire subsection. We recognize that a court may still enforce its order of criminal restitution through lawful means if the court has cause to believe a defendant is not in compliance. Those means still include the potential for court-ordered garnishment. And the defendant still retains the ability to object to such garnishment and justify why garnishment is not appropriate, i.e., to show the court how he is taking reasonable steps to comply with the restitution order.

With today's holding, restitution may still be imposed by a judge either as part of the sentence—as contemplated by K.S.A. 2020 Supp. 21-6604(b)—or as a condition of probation—as contemplated by K.S.A. 2020 Supp. 21-6607(c)(2).

However, a criminal defendant will not be faced with a civil judgment for restitution unless it has been obtained separately through a civil cause of action. In this way, criminal restitution is—once again—not a legal obligation equivalent to a civil judgment and does not violate section 5.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

STANDRIDGE, J., not participating.

* * *

ROSEN, J., dissenting: Consistent with my position in *State v. Arnett*, 314 Kan. ___ (No. 112,572, this day decided), and *State v. Owens*, 314 Kan. ___ (No. 120,753, this day decided), I dissent from the majority's conclusions that the Kansas criminal restitution scheme does not violate the right to jury trial under the Sixth Amendment to the United States Constitution or section 5 of the Kansas Constitution Bill of Rights. I would adopt the reasoning set forth in Judge Leben's dissent in this case *State v. Robison*, 58 Kan. App. 2d 380, 395, 469 P.3d 83 (2020), and Justice Standridge's dissent that I joined in *Arnett*, slip op. at 19-36, to hold that our criminal restitution statutes are unconstitutional because they allow a judge—rather than a jury—to determine how much a criminal defendant must pay in restitution. I would vacate the restitution order entered in this case.

APPENDIX C

No. 112,572

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TAYLOR ARNETT,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion on remand filed May 4, 2018. Affirmed.

Samuel Schirer, of Kansas Appellate Defender Office, for appellant.

Alan T. Fogelman, assistant district attorney, *Jerome A. Gorman*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., SCHROEDER, J., and HEBERT, S.J.

PER CURIAM: After granting a petition for review in this case, the Kansas Supreme Court held that restitution may be ordered against a defendant in a criminal case if the loss to the victim was proximately caused by the crime of conviction. *State v. Arnett*, 307 Kan. 648, Syl. ¶ 7, 413 P.3d 787 (2018). The court reversed this panel's decision that the State failed to show a sufficient causal connection for restitution between Defendant Taylor Arnett's plea to and conviction for conspiracy to commit burglary and the financial loss to two victims whose homes were burglarized by her coconspirators, who stole a substantial amount of personal property. See *State v. Arnett*, No. 112,572, 2015 WL 6835244 (Kan. App. 2015) (unpublished opinion). The court found both that the panel applied too strict a causation standard and that the Wyandotte County District Court made sufficient factual determinations to establish proximate cause supporting its restitution order for $33,248.83. 307 Kan. at 654-56.

Because the panel reversed the restitution order on causation grounds, it did not address Arnett's alternative arguments against the order. 2015 WL 6835244, at *3. The Supreme Court has remanded the case for the panel to now consider those arguments: (1) The State failed to establish the amount of the property loss at the restitution hearing; (2) the statutory restitution scheme violates § 5 of the Kansas Constitution Bill of Rights; and (3) the scheme cannot be reconciled with a criminal defendant's right to have a jury find certain facts enhancing punishment as required by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Arnett*, 307 Kan. at 656.

We now take up those points and find them unavailing. We, therefore, affirm the district court's restitution order.

As to the first, Arnett did not dispute the amount of requested restitution at the district court hearing. She, therefore, cannot do so for the first time on appeal. See *State v. Thach*, 305 Kan. 72, 81, 378 P.3d 522 (2016).

As to the second, Arnett cites § 5 of the Kansas Constitution Bill of Rights recognizing "[t]he right of trial by jury shall be inviolate." She argues that at common law, crime victims could seek compensation from defendants only through civil actions for damages. Under the common law, as outlined by Arnett, the victims would be entitled to have juries hear those actions, and the defendants would have a correlative right to request a jury trial. Arnett contends restitution impermissibly compromises that right and provides no "quid pro quo" substitute, thereby violating § 5 of the Bill of Rights.

The argument fails. First, restitution does not legally supplant civil actions. A crime victim may still file a civil suit against a criminal defendant to recover money damages. Most don't simply because few criminal defendants have ready assets (or realistic prospects for acquiring assets) sufficient to make the effort worthwhile. Either party, however, could request a jury trial.

More generally, Arnett's argument fails because the substitute remedy or quid pro quo requirement applies when the Legislature extinguishes or substantially curtails a common-law cause of action for damages, thereby implicating both § 5 and § 18 of the Kansas Constitution Bill of Rights. Section 18

provides: "All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay." In tandem, those provisions require that the Legislature provide an adequate substitute remedy for the curtailment or elimination of a common-law claim. See *Miller v. Johnson*, 295 Kan. 636, 654-55, 289 P.3d 1098 (2012). The prototypical example has been the State's workers compensation system that replaced common-law tort actions for employment related injuries with an administrative process largely aimed at providing prompt, if more limited, recompense without regard to fault or negligence. See *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 852, 942 P.2d 591 (1997). Workers compensation was deemed a constitutionally adequate substitute remedy, despite the elimination of jury trials, because it afforded financial relief to a significantly greater number of injured workers than did fault-based negligence law.

Arnett has no grounds to assert a constitutional deprivation of any of her rights otherwise protected in §§ 5 and 18 as a result of the district court's restitution order. In short, restitution does not deprive Arnett of a remedy for any injury she has suffered. Here, Arnett inflicted the injury. The Legislature was not obligated to provide her or any other criminal defendant with some quid pro quo or substitute remedy when it required payment of restitution. If restitution had been enacted as the sole remedy for crime victims seeking compensation from convicted perpetrators, those victims might have an argument their rights under § 5 and particularly under § 18 had been impermissibly curtailed. But Arnett—as a convicted criminal

defendant—can make no corresponding argument that a restitution order violates her constitutional rights.

Finally, Arnett contends *Apprendi* and its application in *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), prohibit judicially imposed restitution as a violation of her right to jury trial under the Sixth Amendment to the United States Constitution and her right to due process under the Fourteenth Amendment. Those cases recognize that a fact used to impose a punishment greater than either a statutory mandatory minimum punishment or a statutory maximum punishment must be found by a jury beyond a reasonable doubt. *Alleyne*, 570 U.S. at 103; *Apprendi*, 530 U.S. at 476. Arnett's argument fails for two reasons.

First, restitution is not considered punishment in the same way incarceration or a fine paid to the State would be. Rather, it is a rehabilitative and compensatory tool designed to aid both convicted criminals and their victims. See *State v. Huff*, 50 Kan. App. 2d 1094, 1100, 336 P.3d 397 (2014); *State v. Heim*, No. 111,665, 2015 WL 1514060, at *2 (Kan. App. 2015) (unpublished opinion) ("Restitution is intended to fairly compensate crime victims and to further the rehabilitation of defendants by instilling in them some sense of the costs their wrongdoing has inflicted."). Although a district court typically enters a restitution order during a sentencing hearing, that doesn't make the order a form of punishment.

Even if restitution were considered punitive and, thus, punishment, Arnett's argument fails. The Kansas statutes governing restitution impose neither mandatory minimum amounts nor maximum

amounts. See K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2). A mandatory minimum would be a specified amount a convicted defendant would have to pay a victim even if the victim had little or no financial loss. The statutes require no such obligation. The statutes, likewise, impose no cap or upper limit on restitution that might be exceeded only in exceptional circumstances or upon proof of statutorily identified facts. So even if restitution were punitive, the scheme does not entail mandatory minimums or maximums triggering the protections set out in *Alleyne* and *Apprendi*.

Arnett has presented no arguments that undercut the district court's restitution order.

Affirmed.

APPENDIX D

No. 120,903

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBERT JAMES ROBISON III,
Appellant.

Appeal from Lyon District Court; MERLIN G. WHEELER, judge. Opinion filed June 26, 2020. Affirmed.

Caroline M. Zuschek, of Kansas Appellate Defender Office, for appellant.

Amy L. Aranda, first assistant county attorney, *Marc Goodman*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before STANDRIDGE, P.J., LEBEN and BRUNS, JJ.

BRUNS, J.: Robert James Robison, III pled no contest to one count of battery of a law enforcement officer. As part of his sentence, the district court required Robison to pay $2,468.56 in restitution to reimburse a workers compensation insurance carrier that had paid the medical expenses of the law

enforcement officer injured as a result of the battery. On appeal, Robison contends that the order of restitution violates both Section 5 of the Kansas Constitution Bill of Rights and the Sixth Amendment of the United States Constitution. In addition, Robison contends that the district court erred in awarding restitution to be paid to an insurance carrier. Finding no error, we affirm the district court's order of restitution.

FACTS

On January 3, 2018, the State charged Robison with two counts of battery of a law enforcement officer in violation of K.S.A. 2017 Supp. 21-5413(c)(3)(D). The charges stemmed from an incident at the Lyon County Jail in which Robison hit Officer Zachary Nance and Corporal Bobby Cutright several times. Corporal Cutright suffered an injury to his eye and a bite on his arm. Following the incident, he went to Newman Regional Health where he received treatment. Lyon County's workers compensation insurance carrier subsequently paid Corporal Cutright's medical bills.

Prior to trial, the parties entered into a plea agreement in which Robison agreed to plead no contest to one count of battery of a law enforcement officer. In exchange, the State agreed to dismiss the second count and further agreed not to request a fine. On March 20, 2018, the district court accepted Robison's no-contest plea and found him guilty of a single count of battery of a law enforcement officer arising out of the attack on Corporal Cutright. A few months later, the district court sentenced Robison to 32 months' imprisonment and 24 months' post-release supervision. Complying with the terms of the plea agreement, the

district court did not impose a fine. However, the district court agreed to consider the State's request for restitution and continued the resolution of the request until a later date.

At a restitution hearing held on August 21, 2018, the State requested that Robison pay $2,648.56 in restitution to reimburse the workers compensation insurance carrier that paid Corporal Cutright's medical bills arising out of the battery. A hospital employee testified about the medical bills and verified that they had been paid by the insurance carrier. Robison's counsel did not dispute the amount of the medical bills or that they arose out of the attack on Corporal Cutright. Instead, defense counsel argued that the workers compensation insurance carrier was not entitled to restitution and had not requested reimbursement.

After considering the evidence and the arguments of counsel, the district court found that the medical bills incurred by Corporal Cutright were caused by Robison's crime and that Lyon County's insurance carrier had paid the medical expenses on the officer's behalf. Accordingly, the district court ordered Robison to pay restitution in the amount of $2,648.56 to reimburse the workers compensation insurance carrier for the medical expenses it had paid.

On appeal, Robison raises three issues. First, Robison contends that the Kansas restitution statutes violate Section 5 of the Kansas Constitution Bill of Rights because they encroach upon a criminal defendant's common law right to a civil jury trial on damages caused by the defendant's crime. Second, Robison contends that his right to a jury trial on the issue of restitution under the Sixth Amendment of the United

States Constitution was violated because the statutes allowed the court to make a finding of fact that increased the penalty for his crime beyond the prescribed statutory maximum. Third, Robison contends that the statutes governing restitution preclude district courts from awarding restitution to an insurance carrier that has paid the victim's medical expenses caused by a criminal defendant. In response, the State denies each of these contentions. Specifically, the State maintains that the Kansas restitution statutes are constitutional—both under the Kansas Constitution and United States Constitution—and requests that we affirm the district court's restitution order.

PRESERVATION

At the outset, we must determine whether Robison's constitutional claims are properly before this court. The State argues that these issues were not properly preserved at the district court level and we should not consider them. It is undisputed that Robison asserts violations of the Kansas Constitution and the United States Constitution for the first time on appeal. Whether an issue has been properly preserved for appeal is a question of law that we review de novo. *State v. Haberlein*, 296 Kan. 195, 203, 290 P.3d 640 (2012).

Generally, a constitutional issue not raised before the district court is considered to be waived or abandoned. Nevertheless, we can review issues presented on appeal in cases where: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts; (2) consideration of the theory is

necessary to serve the ends of justice or to prevent a denial of fundamental rights; or (3) the district court is right for the wrong reason. *State v. Perkins*, 310 Kan. 764, 768, 449 P.3d 756 (2019). "The decision to review an unpreserved claim under an exception is a prudential one. Even if an exception would support a decision to review a new claim, this court has no obligation to do so." *State v. Gray*, 311 Kan. 164, Syl. ¶ 1, 459 P.3d 165 (2020).

The right to a jury trial is a fundamental right under both Section 5 of the Kansas Constitution Bill of Rights and under the Sixth Amendment to the United States Constitution. *State v. Rizo*, 304 Kan. 974, 979-80, 377 P.3d 419 (2016). Robison argues that his fundamental constitutional right to a jury trial was violated when the district court decided the issue of restitution. Although Robison did not raise these issues before the district court, we may consider them because they potentially implicate a claim to the fundamental right to a trial by a jury under the Kansas Constitution and the United States Constitution. See *State v. Beaman*, 295 Kan. 853, 858, 286 P.3d 876 (2012). Accordingly, we find that a decision on the merits would serve the ends of justice.

ANALYSIS

Section 5 of the Kansas Constitution Bill of Rights

The district court's authority to order restitution in a criminal case is established by statute. Robison contends that these statutes violate Section 5 of the Kansas Constitution Bill of Rights, which provides that "[t]he right of trial by jury shall be inviolate." So

we begin our analysis by looking at the statutes challenged by Robison.

K.S.A. 2017 Supp. 21-6604(b)(1)—which was applied in this case—grants a district court the authority to order the defendant to pay restitution as part of the sentence. The statute provides that the restitution amount "shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances which would render a plan of restitution unworkable." Similarly, K.S.A. 2017 Supp. 21-6607(c)(2) grants a district court the authority to order restitution payments as a condition of probation. Based on the clear and unambiguous language of the statutes, "'restitution for a victim's damages or loss depends on the establishment of a causal link between the defendant's unlawful conduct and the victim's damages.' [Citations omitted.]" *State v. Alcala*, 301 Kan. 832, 837, 348 P.3d 570 (2015).

Robison claims K.S.A. 2017 Supp. 21-6604(b)(1) and K.S.A. 2017 Supp. 21-6607(c)(2) violate Section 5 of the Kansas Constitution Bill of Rights because they deprive him of his right to have a civil jury determine the amount of damages or loss caused by his crimes. Whether the criminal restitution statutes violate Section 5 of the Kansas Constitution is a legal question. Although we usually must presume that a statute is constitutional and must look for any reasonable way to interpret the statute to avoid a violation, this presumption does not apply to claims involving fundamental rights. See *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132-33, 442 P.3d 509 (2019) (plurality opinion). Even so, we do not find Robison's arguments to be persuasive.

The parties agree that Section 5 of the Kansas Constitution Bill of Rights preserves the common law right to a jury trial as it existed at the time of its adoption. The Kansas Constitution was approved by the delegates to the Wyandotte Constitutional Convention on July 29, 1859. A few months later, on October 4, 1859, the Kansas Constitution—also known as the Wyandotte Constitution—was overwhelmingly approved by popular vote. Consequently, Section 5 of the Kansas Constitution only applies if it can be shown that territorial juries would have decided the issue of restitution in 1859. See *Hilburn*, 309 Kan. at 1134.

Robison offers several arguments in an attempt to show that the criminal restitution statutes implicate the right to a jury trial under Section 5 of the Kansas Constitution. He first analogizes criminal restitution to causation and civil damages in a tort action. Robison accurately points out that Kansas juries decided the amount of civil damages in tort prior to statehood. See Kan. Terr. Stat. 1859, ch. 25, § 274. From there, he springs to the conclusion that criminal restitution should be treated like a civil remedy because such orders can be enforced like civil judgments under K.S.A. 60-4301.

We find Robison's comparison of criminal restitution to causation and civil damages in tort to be unavailing. In fact, the Kansas Supreme Court has found that "[r]estitution ordered in criminal proceedings and civil damages are separate and independent remedies under Kansas Law." *State v. Applegate*, 266 Kan. 1072, 1078, 976 P.2d 936 (1999). Our Supreme Court recognized that "[t]he judge's order of restitution in a criminal action does not bar a victim from seeking damages in a separate civil action. Likewise,

the judge . . . is not foreclosed from ordering restitution just because the victim has received compensation in a civil action." 266 Kan. at 1079. Because criminal restitution is not a civil judgment, we do not find that Section 5 of the Kansas Constitution Bill of Rights requires that criminal restitution be imposed by a jury.

Robison also argues that he has a right to a jury trial under Section 5 of the Kansas Constitution because Kansas juries would have had to determine the amount of criminal restitution in 1859. In support of his argument, Robison cites a Kansas territorial statute that required juries in criminal cases to determine the value of stolen property for certain theft offenses. See Kan. Terr. Stat. 1859, ch. 27, § 219. But as the State points out, the reason juries had to make a finding regarding the value of stolen property was because that factual determination affected the severity level of the offense. See Kan. Terr. Stat. 1859, ch. 28, §§ 72-74, 82-88, 91. As a result, factual findings by juries under the territorial statutes about the value of stolen property affected the appropriate sentence to be imposed on the defendant. But this does not mean that juries were used—either at common law or under territorial statutes—to determine whether an order of restitution could be awarded.

Because criminal restitution is not a civil remedy and Robison has not even shown that restitution was available at common law, we find his arguments to be unpersuasive. Notably, Robison cites no provision in the Kansas territorial statutes that mention criminal restitution. Likewise, he does not cite any Kansas territorial cases referencing criminal restitution. As Robison candidly acknowledges, criminal restitution

was not listed in the Kansas territorial statutes as a permissible remedy for any crime in 1859. Therefore, we conclude that Robison has failed to establish that Section 5 of the Kansas Constitution Bill of Rights requires that a jury impose criminal restitution under K.S.A. 2017 Supp. 21-6604(b)(1) and K.S.A. 2017 Supp. 21-6607(c)(2).

Sixth Amendment of the United States Constitution

Next, Robison contends that the Kansas restitution statutes violate his right to a jury trial under the Sixth Amendment to the United States Constitution. Robison argues that the Kansas criminal restitution statutes violate the Sixth Amendment because they allow a judge to determine the amount of restitution to be awarded to a victim. In support of this argument, Robison cites *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), in which the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. He also cites *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), in which the United States Supreme Court held that facts that increase a mandatory minimum penalty must also be decided by a jury.

In response, the State contends that the Sixth Amendment does not apply because criminal restitution is not punishment. The State argues that even if criminal restitution is punishment, it does not violate either *Apprendi* or *Alleyne* because a district court's imposition of restitution does not increase the

statutory maximum or minimum penalty for an offense. The State relies on this court's opinion in *State v. Huff*, 50 Kan. App. 2d 1094, 336 P.3d 897 (2014), *rev. denied* 302 Kan. 1015 (2015), which held the statutes do not violate the Sixth Amendment because restitution does not increase the statutory maximum or minimum penalty for an offense. In addition, the State cites several federal cases that reject similar challenges to criminal restitution statutes. See *United States v. Day*, 700 F.3d 713, 716, 732 (4th Cir. 2012), and *United States v. Burns*, 800 F.3d 1258, 1261-62 (10th Cir. 2015).

Both parties acknowledge that this court has previously addressed this issue in *Huff*. Likewise, we note that the Kansas Supreme Court has granted a petition for review in one of the cases from our court from this court addressing this issue. *State v. Arnett*, No. 112,572, 2018 WL 2072804 (Kan. App.) (unpublished opinion), *rev. granted* 308 Kan. 1596 (2018). We also note that in another case in which our court addressed this issue, the Kansas Supreme Court initially granted a petition for review but subsequently withdrew its order. *State v. Patterson*, No. 114,861, 2017 WL 3207149 (Kan. App. 2017) (unpublished opinion), mandate issued November 14, 2019.

As discussed above, there are two Kansas statutes that require district courts to order a defendant to pay restitution absent a finding of unworkability. K.S.A. 2017 Supp. 21-6604(b)(1)—which was applied in this case—provides that a district court must "order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances which would render a plan of

restitution unworkable." Likewise, K.S.A. 2017 Supp. 21- 6607(c)(2)—which applies restitution to the terms of probation—provides that a district court must order the defendant to "make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable." Despite minor differences in the wording, this court has interpreted the two statutes similarly because they were enacted together and cover the same subject matter. See *State v. Miller*, 51 Kan. App. 2d 869, 872, 355 P.3d 716 (2015).

Restitution is a form of restorative justice. It is intended to restore the victims of crime to the position they found themselves in prior to a defendant's commission of the offense that caused the injury or damage. See Black's Law Dictionary 1571 (11th ed. 2019) (Restitution is the "[r]eturn or restoration of some specific thing to its rightful owner or status; Compensation for loss, esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."). Although part of the criminal sentence, restitution benefits the criminal victims who actually suffered an injury or damage rather than the government. See *State v. Heim*, No. 111,665, 2015 WL 1514060, at *2 (Kan. App. 2015) (unpublished opinion) ("Restitution is intended to fairly compensate crime victims and to further the rehabilitation of defendants by instilling in them some sense of the costs their wrongdoing has inflicted.").

"While it is undeniable that restitution is part of a defendant's sentence, it does not mean restitution is punishment." *Huff*, 50 Kan. App. 2d at 1099; see also *State v. Hall*, 45 Kan. App. 2d 290, 298, 247 P.3d 1050 (2011) (restitution is not part of a defendant's punishment), *aff'd* 297 Kan. 709, 304 P.3d 677 (2013). Nevertheless, even if it is assumed that restitution constitutes punishment, we find that Robison's Sixth Amendment argument fails. This is because neither K.S.A. 2017 Supp. 21-6604(b)(1) nor K.S.A. 2017 Supp. 21-6607(c)(2) impose a mandatory minimum amount or a mandatory maximum amount that a convicted defendant must pay to reimburse a victim of crime.

It is important to recognize that both statutes grant a district court the authority to order a lesser amount than the actual amount suffered if it "finds compelling circumstances which would render a plan of restitution unworkable." K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2). Moreover, the restitution statutes impose no mandatory maximum amount that a district court may award. Rather, both statutes grant a district court the authority to order restitution in an amount equal to the "damage or loss caused by the defendant's crime . . . ." See K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2). In other words, as our Supreme Court found in *Applegate*, unless a restitution plan is shown to be unworkable, the amount to be awarded is that which "reimburses the victim for the actual loss suffered." 266 Kan. at 1079.

Accordingly, because the Kansas statutes do not include mandatory minimums or maximums, we find that neither *Alleyne* nor *Apprendi* applies to the

award of criminal restitution. As a result, we conclude that Robison's Sixth Amendment right to a jury trial was not violated by the district court's imposition of restitution. Moreover, we note that our holding is consistent with the numerous federal and state courts that have considered the issue.

At least 11 of the 13 United States Circuit Courts of Appeal have refused to extend *Apprendi* and its progeny to orders of restitution. See *United States v. George*, 949 F.3d 1181, 1188 (9th Cir. 2020); *United States v. Vega-Martinez*, 949 F.3d 43, 54 (1st Cir. 2020); *United States v. Churn*, 800 F.3d 768, 780-83 (6th Cir. 2015); *Burns*, 800 F.3d at 1261-62; *United States v. Bengis*, 783 F.3d 407, 411-13 (2d Cir. 2015); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014); *Day*, 700 F.3d at 732 (4th Cir. 2012); *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 335-38 (3d Cir. 2006); *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005). In fact, we can find no federal court that has held judicially ordered restitution violates *Apprendi* and its progeny.

Similarly, several state courts have joined this court in concluding that *Apprendi* and its progeny do not apply to restitution orders. See *State v. Leon*, 240 Ariz. 492, 495- 96, 381 P.3d 286 (Ct. App. 2016); *People v. Wall*, 3 Cal. 5th 1048, 1075-76, 224 Cal. Rptr. 3d 861, 404 P.3d 1209 (2017); *People v. Smith*, 181 P.3d 324, 327 (Colo. App. 2007); *Smith v. State*, 990 N.E.2d 517, 520-22 (Ind. App. 2013); *State v. Foumai*, No. CAAP-17-0000093, 2018 WL 495679, at *4 (Haw. Ct. App. 2018) (unpublished opinion); *Commonwealth v. Denehy*, 466 Mass. 723, 736-38, 2 N.E.3d 161 (2014);

People v. Corbin, 312 Mich. App. 352, 371-73, 880 N.W.2d 2 (2015); *State v. Rey*, 905 N.W.2d 490, 496-97 (Minn. 2018); *State v. Clapper*, 273 Neb. 750, 755-59, 732 N.W.2d 657 (2007); *State v. Martinez*, 392 N.J. Super. 307, 315-18, 920 A.2d 715 (2007); *People v. Horne*, 97 N.Y.2d 404, 414-15, 740 N.Y.S.2d 675, 767 N.E.2d 132 (2002); *State v. Deslaurier*, 277 Or. App. 288, 295, 371 P.3d 505 (2016); *State v. Kinneman*, 155 Wash. 2d 272, 282, 119 P.3d 350 (2005).

We recognize that some legal scholars believe the United States Supreme Court intimated in its opinion in *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), that it might extend the Sixth Amendment right to a jury trial on the issue of criminal restitution. We do not hold that belief. In *Southern Union*, the United States Supreme Court reviewed a state statute that imposed a maximum criminal fine for each day that the defendant was in violation. Under those circumstances, the Supreme Court found that a jury was needed to determine how many days the violation had occurred. 567 U.S. at 347-50. Of note, *Southern Union* explains that *Apprendi* prohibits "judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." 567 U.S. at 352. Of course, as explained above, there is a substantial difference between criminal fines paid to the government and restitution paid to reimburse victims.

Furthermore, several United States Circuit Courts have concluded that *Southern Union* does not extend *Apprendi* and its progeny to restitution. Recently, in *Vega-Martinez*, which was decided earlier this year, the First Circuit held that because

restitution under the federal Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, has no statutory maximum amount and instead tasks district courts with determining the factual amount of loss, *Apprendi* does not apply. *Vega-Martinez*, 949 F.3d at 54-55; see also *Bengis*, 783 F.3d at 412 (Under the MVRA, "a judge cannot find facts that would cause the amount to exceed a prescribed statutory maximum."). In reaching this conclusion, the First Circuit agreed with several other Circuit Courts that had found that *Southern Union* "does not overrule their previous holdings that *Apprendi* does not apply to restitution calculations." *Vega-Martinez*, 949 F.3d at 55 (citing *United States v. Sawyer*, 825 F.3d 287, 297 [6th Cir. 2016]); *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *Bengis*, 783 F.3d at 412-13; *Rosbottom*, 763 F.3d at 420; *United States v. Green*, 722 F.3d 1146, 1149-50 (9th Cir. 2013); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012); *Day*, 700 F.3d at 732.

In *Green*, the United States Court of Appeals for the Ninth Circuit found:

> "[I]t's not even clear that restitution's a form of punishment. We've held in some contexts that 'restitution under the MVRA is punishment.'" *United States v. Dubose*, 146 F.3d 1141, 1145 (9th Cir. 1998); see *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir. 1999). But in other contexts, we've held it's not. See *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) ('[F]orfeiture and restitution serve entirely distinct purposes: "Congress conceived of forfeiture as *punishment* . . . . The purpose of restitution . . . ,

> however, is not to punish the defendant, but to *make the victim whole again*.'" (quoting *United States v. Newman*, 659 F.3d 1235, 1241 [9th Cir. 2011]); *Gordon*, 393 F.3d at 1052 n.6 ('[T]he MVRA's purpose is to make the victims whole; conversely, the Sentencing Guidelines serve a punitive purpose.'). Sometimes we've held it's a hybrid, with 'both compensatory and penal purposes.' *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010). Even if *Apprendi* covers all forms of punishment, restitution's not 'clearly' punishment, so we can't rely on *Southern Union* to overrule our restitution precedents." 722 F.3d at 1150.

The Ninth Circuit also found it significant in *Green* that the MVRA does not have a statutory maximum. Rather, restitution is "pegged to the amount of the victim's loss. A judge cannot exceed the non-existent statutory maximum for restitution no matter what facts he finds, so *Apprendi*'s not implicated." 722 F.3d at 1150. Likewise, as discussed above, the Kansas restitution scheme does not have either a statutory maximum or minimum. So, like their federal counterparts, a Kansas district judge cannot exceed a statutory maximum—or statutory minimum—that does not exist.

In *Day*, the United States Court of Appeals for the Fourth Circuit also rejected the defendant's claim that *Southern Union* compelled a finding that the *Apprendi* rule should be extended to orders of restitution. 700 F.3d at 731. In *Day*, the Fourth Circuit found:

> "Prior to *Southern Union*, every circuit to consider whether *Apprendi* applies to

restitution held that it did not. See *United States v. Milkiewicz*, 470 F.3d 390, 403 (1st Cir. 2006) ('[L]ike all of the other circuits to consider this question, we conclude that [*Apprendi* does] not bar judges from finding the facts necessary to impose a restitution order.'). Day argues that we should break ranks with these prior decisions in light of Southern Union and apply *Apprendi* to restitution because it is 'similar' to a criminal fine.

"We decline to take Day's suggested course. As an initial matter, we note that *Southern Union* does not discuss restitution, let alone hold that *Apprendi* should apply to it. Instead, far from demanding a change in tack, the logic of *Southern Union* actually reinforces the correctness of the uniform rule adopted in the federal courts to date. That is, *Southern Union* makes clear that *Apprendi* requires a jury determination regarding any fact that 'increases the penalty for a crime beyond the prescribed statutory maximum.' [Citations omitted.] Thus, in *Southern Union* itself, the *Apprendi* issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case. [Citation omitted.]

"Critically, however, there is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense. [Citation omitted.] As a consequence, the rule of *Apprendi* is simply

not implicated to begin with by a trial court's entry of restitution." *Day*, 700 F.3d at 732.

We find that the holding in *Huff* is consistent with federal and state court decisions from across the United States. Furthermore, for nearly six years, district courts and panels of this court have followed the holding in *Huff*. See *Arnett*, 2018 WL 2072804, at *2; *Patterson*, 2017 WL 3207149, at *8 (since restitution does not implicate *Apprendi*, the court found no reason to review the issue for the first time on appeal); *State v. Bradwell*, No. 115,153, 2016 WL 7178771, at *4 (Kan. App. 2016) (restitution is not punishment but is restorative in nature); *State v. Pister*, No. 113,752, 2016 WL 4736619, at *7 (Kan. App. 2016), *rev. denied* 306 Kan. 1328 (2017); and *State v. Jones*, No. 113,044, 2016 WL 852865, at *9 (Kan. App. 2016), *rev. granted* 307 Kan. 991 (2017). *Huff* has also been cited with approval by other jurisdictions. See *Deslaurier*, 277 Or. App. at 295 n.2 (Oregon Court of Appeals citing *Huff* in support of conclusion that the imposition of restitution is unlike the circumstances in *Apprendi* and *Southern Union*); *Foumai*, 2018 WL 495679, at *4 (Hawaii Court of Appeals citing *Huff* in concluding that *Apprendi* does not apply to an order of restitution).

Despite Robison's claim that K.S.A. 2017 Supp. 21-6604(b)(1) increases the statutory minimum penalty, we find that it does not require a district judge to award the full amount of damage or loss. See *State v. Meeks*, 307 Kan. 813, 821, 415 P.3d 400 (2018) (affirming restitution order that was less than the loss sustained by the victims as a result of the theft of the vehicle). In fact, under the plain language of K.S.A. 2017 Supp. 21-6604(b)(1), a district judge has the

authority to impose no restitution if it "finds compelling circumstances which would render a plan of restitution unworkable." We note that this is also true under K.S.A. 2017 Supp. 21-6607(c)(2). We thus conclude that *Alleyne* is not applicable because the Kansas restitution statutes do not include statutory minimums and, as such, they cannot be increased.

In summary, we find that the statutes governing restitution in Kansas impose neither mandatory minimum amounts nor mandatory maximum amounts. See K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2). So they do not trigger the concerns expressed by the United States Supreme Court in *Apprendi* or *Alleyne*. Thus, we conclude that the district court's imposition of restitution in this case did not violate Robison's Sixth Amendment right to a trial by jury.

Award of Restitution to Insurance Carrier

Robison also contends that the district court erred in awarding restitution to an insurance company. He divides this argument into two parts. Initially, he argues that under K.S.A. 2017 Supp. 21-6604, an insurance company cannot receive restitution for damages caused by a defendant's crime. Next, he argues that even if an insurance company can receive restitution under the Kansas restitution statutes, the damage or loss to the insurance carrier in this case has not been established. We find neither argument to be persuasive.

We exercise unlimited review over that legal question because it requires interpreting the restitution statutes. *State v. Dexter*, 276 Kan. 909, Syl. ¶ 2, 80 P.3d 1125 (2003). Robison acknowledges that the

Kansas Supreme Court has held that a district court may award restitution to an insurance carrier. *State v. Beechum*, 251 Kan. 194, Syl. ¶ 3, 833 P.2d 988 (1992). Similarly, panels of this court have found that an "aggrieved party" under the restitution statutes includes an insurance company paying claims under a crime victim's policy. See *State v. Hand*, 45 Kan. App. 2d 898, Syl. ¶ 3, 257 P.3d 780 (2011), *rev'd on other grounds* 297 Kan. 734, 304 P.3d 1234 (2013); *State v. Jones*, No. 119,470, 2019 WL 2554115, at * 2 (Kan. App. 2019) (unpublished opinion); *State v. Blaylock*, No. 114,789, 2017 WL 839522, at *1-2 (Kan. App. 2017) (unpublished opinion). Furthermore, our Supreme Court found that the language in K.S.A. 1991 Supp. 21-6607(c)(2) regarding the payment of restitution to an "aggrieved party" for damage caused by the criminal act includes insurance companies. *Beechum*, 251 Kan. 194, Syl. ¶ 3.

Despite Robison's arguments to the contrary, we find that the rationale in *Beechum* and the other cases cited above applies equally to restitution ordered under K.S.A. 2017 Supp. 21-6604. Again, this court has interpreted the two restitution provisions to have the same meaning. *Miller*, 51 Kan. App. 2d at 872. Also, Robison offers no reason why the Kansas Legislature would have wanted to limit insurance carriers from receiving compensation for their losses as a condition of probation. Because we find that both statutes allow insurance companies to receive restitution, Robison's argument fails.

Nevertheless, Robison argues that even if insurance companies can receive restitution under K.S.A. 2017 Supp. 21-6604(b)(1), the State did not establish that the insurance carrier in this case suffered any

damage or loss as a result of his crime. We review the amount of restitution awarded for abuse of discretion. A district court abuses its discretion if its decision is based on legal or factual error, or if no reasonable person would agree with its decision. So, the district court's finding of a causal link between the defendant's crime and the victim's loss must be supported by substantial evidence. *State v. Shank*, 304 Kan. 89, 92-93, 369 P.3d 322 (2016).

In addition, Robison argues that "while the State put on evidence of value—$2,648.56—it failed to put on any evidence that a loss of that value occurred." Yet Robison does not suggest the insurance carrier's losses were less than the $2,648.56 the district court ordered. We also find nothing in the record to suggest that the insurance carrier received a windfall when the district court ordered that it be reimbursed for the amount it had paid to cover the officer's medical bills, and it is undisputed that these bills resulted from the treatment the officer received after being injured by Robison. Thus, we find that the district court did not abuse its discretion in ordering Robison to pay $2,648.56 in restitution to the workers compensation insurance carrier.

Finally, Robison briefly argues that the insurance company had to make the claim before the district court could order it to be reimbursed for the amount of medical expenses paid on behalf of Corporal Cutright. Again, we exercise unlimited review over this legal question because it involves the interpretation of the restitution statutes. *Dexter*, 276 Kan. 909, Syl. ¶ 2. Moreover, we note that two panels of this court have rejected similar arguments because the restitution statutes do not require the person or entity incurring

the damage or loss to request restitution. Instead, the State can make the request for the aggrieved party. See *Jones*, 2019 WL 2554115, at *2; *State v. Jones*, No. 106,750, 2012 WL 4121119, at *4 (Kan. App. 2012) (unpublished opinion). We are persuaded by the analysis in those opinions. Consequently, we conclude that Robison's argument fails for the same reason, and we find that the district court's restitution judgment should be affirmed.

Affirmed.

* * *

LEBEN, J., dissenting: We treasure and zealously protect our right to a jury trial. It's enshrined for both civil and criminal cases in our state and federal constitutions. Yet there's a big loophole in the protection of those rights—and that loophole is the restitution order in a criminal case.

These orders are often made in an almost perfunctory hearing after the defendant has, in all other respects, been fully sentenced. Prosecutors and defendants alike often focus on the big-picture issues: Should the defendant plead guilty? Can some charges be dismissed or reduced? How much time will the defendant have to serve in jail? In many cases, restitution is addressed only after those questions have been answered. And for an indigent defendant, it may not seem like an important issue at the time—the defendant who's going to prison won't be making any payments any time soon, anyway.

But constitutional rights don't go away just because we're not paying attention to them. Courts and judges still have a duty to protect them; if a defendant

is to waive a constitutional right, we must first tell the defendant about it.

In the case before us today, Robert James Robison III pleaded no contest to battery of a law enforcement officer. At sentencing, with no jury proceedings, a judge found that Robison's crime had caused $2,548.56 in damages to an insurance company and ordered that Robison pay restitution in that amount. Neither the document initially filed to charge Robison with the crime nor the plea agreement he and the prosecutor entered into mentioned those damages.

One could argue that there's not much at stake here, only a little over $2,500. But that's not relevant when a restitution award is entered as part of a criminal sentence (and many restitution awards are much larger). Robison says that the Sixth Amendment to the United States Constitution, which requires juries in criminal cases, provides him a right to have a jury decide restitution. Text, history, and precedent convince me that it does. And if not, then Section 5 of the Kansas Constitution Bill of Rights does. Because Robison had a right to have a jury decide restitution, I would vacate the restitution award against him.

The Sixth Amendment Claim

The Sixth Amendment provides a right to a jury trial in all criminal prosecutions. The rule from *Apprendi v. New Jersey* enforces that right: "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Robison contends that the Kansas restitution statutes, K.S.A. 2017 Supp. 21-6604(b)(1) and K.S.A. 2017

Supp. 21-6607(c)(2), violate that rule. As I'll explain, there are several steps involved in the analysis, but my colleagues disagree with Robison for two reasons: (1) that restitution isn't punishment and (2) that the statutes don't increase the statutory maximum or statutory minimum sentence for Robison's crime. I will address those reasons in order, covering the applicable Sixth Amendment principles along the way.

The Sixth Amendment applies to restitution orders, so we must apply Apprendi.

The claim that restitution is nonpunitive—and thus not covered by the Sixth Amendment—is undercut by text, history, and precedent. The text of the Sixth Amendment provides a right to a jury trial "[i]n all criminal prosecutions." So we must determine whether restitution is part of the "criminal prosecution."

Restitution is imposed after a criminal conviction and is part of the defendant's sentence. *State v. McDaniel*, 292 Kan. 443, 446, 254 P.3d 534 (2011). Its purposes include deterring future crime and rehabilitating the defendant. *State v. Applegate*, 266 Kan. 1072, Syl. ¶ 2, 976 P.2d 936 (1999). Those are punitive objectives; they are two of the rationales the government may use to justify a form of punishment under the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution. *Hall v. Florida*, 572 U.S. 701, 708, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014). And the United States Supreme Court often describes restitution awarded under federal statutes as a form of punishment. *Paroline v. United States*, 572 U.S. 434, 456, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014) (collecting cases). Those statutes

"implicate[] 'the prosecutorial powers of government.'" 572 U.S. at 456. Nothing about restitution under our Kansas statutes justifies treating it any differently. Restitution implicates the Sixth Amendment because it is part of the defendant's "criminal prosecution."

That conclusion is unaffected by the observation that restitution also provides compensation for crime victims. It's true that one purpose restitution serves is to compensate victims for damage caused by the crime. But it also serves punitive purposes of deterrence and rehabilitation. *Applegate*, 266 Kan. 1072, Syl. ¶ 2. And it is part of the defendant's sentence after a criminal conviction. Restitution's compensatory purpose doesn't erase these punitive attributes.

They exist no matter how creatively courts like ours describe restitution. The majority prefers to call restitution "a form of restorative justice," slip op. at 11, a name used in only one other Kansas case to describe restitution. *State v. Brown*, No. 120,590, 2020 WL 1897361, at *9 (Kan. App. 2020) (unpublished opinion). Yet in the very same paragraph, the majority cites a dictionary definition and a case that acknowledge restitution's criminal characteristics. However labelled, restitution's criminal characteristics make it a part of the defendant's criminal prosecution.

The nonpunishment view is even harder to defend when you consider the size of restitution awards and the consequences of not paying them. A search of federal cases returns decisions from every circuit upholding multi-million-dollar restitution awards. E.g., *United States v. Bikundi*, 926 F.3d 761, 790-92 (D.C. Cir. 2019) ($80.6 million); *United States v.*

Moreland, 622 F.3d 1147, 1170-73 (9th Cir. 2010) ($36 million); *United States v. Lewis*, 557 F.3d 601, 615 (8th Cir. 2009) ($39 million). A similar search of Kansas cases produces awards in the hundreds of thousands of dollars. *State v. McAnally*, No. 119,133, 2019 WL 3367902 (Kan. App. 2019) (unpublished opinion) ($789,282); *State v. Crowell*, No. 116,841, 2018 WL 1352534 (Kan. App.) (unpublished opinion) ($202,552), *rev. denied* 308 Kan. 1597 (2018); *State v. Huff*, 50 Kan. App. 2d 1094, 1096, 1104, 336 P.3d 897 (2014) ($105,000).

Keep in mind that if any of the victims who received restitution in those cases had sued for civil damages, a jury-trial right would have kicked in. The defendants in that civil case could invoke their right to have a jury decide whether their actions caused damages, and if so, how much. Kan. Const. Bill of Rights § 5; K.S.A. 2017 Supp. 60- 238; *State v. Love*, 305 Kan. 716, 735-36, 387 P.3d 820 (2017). Not so in a criminal case, where the State can obtain a jury-free damages award for the victim—and that restitution award is enforceable as a civil judgment too. K.S.A. 2017 Supp. 21-6604(b)(2); K.S.A. 2017 Supp. 60-2401.

The lack of a jury-trial right in a criminal case is even more anomalous when you realize that the consequences of not paying criminal restitution are more severe than not paying a civil judgment. For many felonies, the district court can indefinitely extend probation until restitution is fully paid. K.S.A. 2017 Supp. 21-6608(c)(7). The court can even do so without holding a hearing. *State v. Gordon*, 275 Kan. 393, 406-07, 66 P.3d 903 (2003). So the defendant could end up on probation for years, subject to having the underlying prison sentence imposed for all manner of

potential violations. And with the felony sentence still in place through continued probation, the felony defendant also would be denied the right to vote, hold public office, and serve on a jury. K.S.A. 2017 Supp. 21-6613(a)-(b). These consequences, with plenty of punitive attributes, show that restitution is part of the "criminal prosecution" to which the Sixth Amendment jury-trial right attaches.

So does history, the touchstone of any *Apprendi* analysis. That analysis is "informed by the historical role of the jury at common law." *Oregon v. Ice*, 555 U.S. 160, 170, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). So we must consider "whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" 555 U.S. at 168.

Most judges and lawyers are not historians by training; I'm in that group. So there's always a risk that we'll misread history in some way. Here, though, the historical role of juries in finding restitution seems pretty well established. The earliest examples of restitution in England required jury findings. In a victim-initiated prosecution called an appeal of felony, a larceny victim could retake stolen property by identifying it in the complaint and having the jury determine who owned it. Note, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 472 (2014). Larceny victims could likewise recover stolen property in an indictment of felony, a prosecution brought by the Crown, by filing a writ of restitution that listed the property in the indictment. 51 Am. Crim. L. Rev. at 473-74; *State v. Ragland*, 171 Kan. 530, 233 P.2d 740 (1951).

American courts and colonial statutes followed the English tradition, allowing restitution for theft offenses only if the stolen property was described in the indictment and the jury made a special finding. 51 Am. Crim. L. Rev. at 474-75. The claim that the Sixth Amendment doesn't apply to restitution conflicts with this historical evidence.

It also conflicts with precedent. In *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), the United States Supreme Court applied *Apprendi* to criminal fines. It did so because criminal fines are no different from other punishments subject to the Sixth Amendment:

> "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.' That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. . . . In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]'—terms that each undeniably embrace fines. [Citations omitted.]" 567 U.S. at 349-50.

In short, the Apprendi rule applied to criminal fines because they were indistinguishable from other punishments subject to the rule.

So too with restitution. Like a criminal fine, restitution is a penalty inflicted by the government for

committing an offense. There is no meaningful difference between fines and restitution that would justify the Sixth Amendment applying to one and not the other. To be sure, you pay them to different actors—restitution to a victim, fines to the government. But that's a distinction without a constitutional difference, as the United States Supreme Court recognized in *Paroline*.

The *Paroline* Court rejected an interpretation of a federal restitution statute that, among other things, potentially violated the Eighth Amendment's Excessive Fines Clause. 572 U.S. at 455-56. That was the case, the Court explained, because although restitution is paid to a victim, the government may impose it only after a criminal conviction. So despite the difference in who receives payment, the Excessive Fines Clause still potentially applied to restitution because, like a fine, it "implicates 'the prosecutorial powers of government." 572 U.S. at 456. Thus, who receives payment is an insufficient basis for treating restitution and fines differently under the Sixth Amendment.

To recap, the text of the Sixth Amendment, history, and precedent support a holding that the Sixth Amendment—and thus the *Apprendi* rule—applies to restitution. I must concede, though, that the majority cites a slew of federal and state cases rejecting the claim that *Apprendi* applies to restitution. Three things stand out about these cases, and they lead me to conclude that the cases have limited precedential value.

First, the cases reject *Apprendi*-based restitution claims for different reasons, and those reasons aren't very consistent. Some do so because restitution isn't punishment at all. Others do so because it doesn't

increase the statutory maximum or minimum. Still others rely on both rationales. And while courts uniformly hold that restitution statutes don't violate *Apprendi*, they are split on whether restitution is punishment—a pretty important matter in deciding whether the Sixth Amendment (and, with it, *Apprendi*) applies.

Take the Third and Sixth Circuits. Both agree that restitution is a form of punishment. *United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006) (en banc); *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005). So do three states the majority mentions. *People v. Wall*, 3 Cal. 5th 1048, 1075-76, 224 Cal. Rptr. 3d 861, 404 P.3d 1209 (2017); *State v. Clapper*, 273 Neb. 750, 757, 732 N.W.2d 657 (2007); *State v. Kinneman*, 155 Wash. 2d 272, 277-81, 119 P.3d 350 (2005). In three others, the courts made no comment on whether restitution is punishment. *State v. Deslaurier*, 277 Or. App. 288, 295, 371 P.3d 505 (2016); *People v. Smith*, 181 P.3d 324, 327 (Colo. App. 2007); *State v. Foumai*, No. CAAP-17-0000093, 2018 WL 495679, at *4 (Haw. Ct. App. 2018) (unpublished opinion).

Then there are the courts that treat restitution as punishment in non-*Apprendi* contexts. Three federal circuits do that, describing restitution as "part of a criminal penalty," *United States v. Tull-Abreu*, 921 F.3d 294, 305 (1st Cir.), *cert. denied* 140 S. Ct. 424 (2019); having "compensatory and penal" goals, *United States v. Ritchie*, 858 F.3d 201, 214 (4th Cir. 2017); and "'penal, rather than compensatory,'" *United States v. Puentes*, 803 F.3d 597, 609 (11th Cir. 2015). At least two states, in cases not cited by the majority, similarly subscribe to the punitive

view of restitution when no *Apprendi* issues are being argued. *State v. Kealoha*, 142 Haw. 46, 50, 414 P.3d 98 (2018); *In re Cody H.*, 452 Md. 169, 183, 156 A.3d 823 (2017).

Second, many of the cases are outdated in light of later caselaw developments. Nine of them were decided six or more years before the Court's *Southern Union* opinion. *Dohrmann v. United States*, 442 F.3d 1279 (11th Cir. 2006); *Leahy*, 438 F.3d 328; *United States v. Carruth*, 418 F.3d 900 (8th Cir. 2005); *United States v. George*, 403 F.3d 470 (7th Cir. 2005); *Smith*, 181 P.3d at 327; *Clapper*, 273 Neb. at 757; *State v. Martinez*, 392 N.J. Super. 307, 315-18, 920 A.2d 715 (2007); *People v. Horne*, 97 N.Y.2d 404, 414-15, 740 N.Y.S.2d 675, 767 N.E.2d 132 (2002); *Kinneman*, 155 Wash. 2d at 277-81. So they don't account for the closely analogous application of the *Apprendi* rule to criminal fines in *Southern Union*.

Third, even the newer cases that do address *Southern Union* make little effort to distinguish it—or to explain *why* restitution isn't punishment. Like the rest, they mostly cite to other cases in which their court or another had already classified restitution as nonpunitive.

Rather than follow their lead, we should analyze the issue anew and recognize that restitution is part of the "criminal prosecution." Courts award it in a criminal proceeding as part of a criminal sentence. Imposing it serves punitive aims and not paying it has punitive consequences. For those reasons, the Sixth Amendment applies to restitution awards. So we must apply *Apprendi*.

The Kansas restitution scheme violates the Apprendi *rule.*

Now we must figure out whether the Kansas restitution statutes violate the *Apprendi* rule. The majority says they don't because these statutes increase neither the statutory maximum nor statutory minimum sentence. Although I agree that the statutes don't increase the statutory minimum, I would hold that they increase the statutory maximum.

The meaning of that phrase is clear from the United States Supreme Court's *Apprendi* cases. In *Blakely v. Washington*, the Court provided a simple definition of the term that's worth repeating here:

> "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum [a judge] may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment[.] . . .' [Citations omitted.]" *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

So the statutory maximum is the most punishment that a judge could impose *without more findings*. The Court continues to apply that definition in its *Apprendi* cases. *Southern Union*, 567 U.S. at 348.

Under *Blakely*, then, the Kansas restitution scheme increases the statutory maximum. Unless the

jury found that the defendant's crime caused the specific damages or the defendant stipulated to them in the plea deal, the most restitution that a judge could award is zero. Yet K.S.A. 2017 Supp. 21-6604(b)(1) and 21-6607(c)(2) allow judges to award amounts way more than zero in restitution if the judge finds that the crime caused "damage or loss."

Consider Robison's case. The indictment didn't allege that his crime caused any damage or loss to the insurance company. Nor did the plea agreement. So when the judge made a damages finding at sentencing, he ordered more restitution than was authorized by the plea agreement alone.

The majority counters that there is no statutory maximum for restitution (so our statutes couldn't impermissibly increase the maximum). Slip op. at 14-15. The argument goes like this: the maximum value of awardable restitution is indeterminate because it will vary from case to case based on the damage or loss caused by a crime; so unlike criminal fines with fixed dollar amounts, there is no statutory maximum for restitution. But *Southern Union* forecloses this argument.

Recall that *Southern Union* extended *Apprendi* to criminal fines. The statutorily authorized fine in that case was up to $50,000 for each day a company had violated a federal environmental statute. The judge-found fact that impermissibly increased the statutory maximum in *Southern Union* was the length of the violation. Yet the Court made clear that its holding would apply to any fact used to calculate a fine, including "the amount of the defendant's gain or the victim's loss." 567 U.S. at 349-50. Whatever fact is used, juries must "[i]n all such cases, . . . find beyond

a reasonable doubt facts that determine the fine's maximum amount." 567 U.S. at 350.

By the majority's logic, *Southern Union* was wrongly decided. The maximum fine in that case was not a fixed number. The fine was up to $50,000 for *each day* that the company had violated the environmental statute. The $50,000 number is not the statutory maximum; it's a variable the court multiplies by the length of the violation. Just as two crimes may not cause the same amount of damage or loss, two companies may not violate an environmental statute for the same number of days. So the statutory maximum for the fine is indeterminate. If there is no statutory maximum for indeterminate penalties, as the majority suggests, then *Southern Union* should have come out the other way. It didn't, of course, because no part of the Court's decision imposed the fixed-amount requirement read into the decision by the majority here.

The majority's reasoning would also mean that fines calculated using the amount of the defendant's gain or the victim's loss would be exempt from the *Apprendi* rule. Remember that *Southern Union* said that the rule applies to those fines. 567 U.S. at 349-50. But like a damage-or-loss figure for restitution, those fines have no constant maximum because the amount gained by the defendant or lost by the victim from the crime is variable. And if variable penalties have no statutory maximum, then under the majority's reasoning, the *Apprendi* rule shouldn't apply to those fines. Yet we know that's not right because *Southern Union* specifically identified those fines as an example of the kind of penalty to which the Court's holding applied. 567 U.S. at 349-50.

And if *Apprendi* applies to a fine that's calculated based on the victim's loss, it should apply to restitution calculated on that same basis. In both cases, a judge-found fact increases the punishment the judge could impose beyond the amount authorized by the jury verdict or the plea agreement alone. It doesn't matter that the specific dollar amount of restitution will differ from case to case because the fact that's used to calculate that amount will always be the same: the amount of damage or loss found to have been caused by the defendant's crime.

The majority recognizes that "some legal scholars believe," based on *Southern Union*, that the Sixth Amendment jury-trial right must also apply to restitution. Slip op. at 13. But that view goes well beyond the legal academy. Two United States Supreme Court justices, including the author of *Southern Union*'s majority opinion, have expressed support for the view that there's a right to a jury trial on restitution. *Hester v. United States*, 586 U.S. __, 139 S. Ct. 509, 510, 202 L. Ed. 2d 627 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from cert. denial). And years before *Southern Union*, several federal circuit judges—and one state supreme court justice—would have held that restitution statutes violate *Apprendi*. *Leahy*, 438 F.3d at 343-44 (McKee, J., concurring in part and dissenting in part) (joined by four judges); *Carruth*, 418 F.3d at 905-06 (Bye, J., dissenting); *Clapper*, 273 Neb. at 750 (Connolly, J., dissenting). Academics also support this position, including the leading treatise on criminal procedure. 6 LaFave, Israel, King & Kerr, Criminal Procedure, § 26.6(c) (4th ed. 2019).

Before moving to Robison's Section 5 claim, one last point is worth mentioning. The majority notes that under our state's restitution statutes, a judge may award less than the amount of "damage or loss" caused by the defendant's crime. Slip op. at 11-12, 16. That's because a judge can reduce the restitution award from the total loss if "the court finds compelling circumstances which would render a plan of restitution unworkable." K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2).

I agree with that interpretation, but it in no way affects my conclusion about the statutory maximum. If the judge awards any restitution, the statutory maximum has still increased from zero to more than zero. The only way the compelling-circumstances language could cure the *Apprendi* violation would be if the judge found that compelling circumstances justified awarding *no* restitution. Only then would the statutory maximum stay at zero. And the maximum didn't stay at zero in Robison's case; the court didn't apply that exception and instead ordered Robison to pay the full damage-or-loss value.

In sum, the two Kansas statutory provisions dealing with restitution—K.S.A. 2017 Supp. 21-6604(b)(1) and K.S.A. 2017 Supp. 21-6607(c)(2)—violate the *Apprendi* rule by allowing judges to increase the statutory maximum punishment for an offense beyond that authorized by the jury's verdict or the plea agreement. The district court, relying on those provisions, found that Robison's crime caused damages to an insurance company and ordered him to pay restitution in that amount. Because that violated Robison's Sixth Amendment jury-trial right, I would vacate the restitution portion of Robison's sentence.

I would not apply the harmless-error rule because the State doesn't raise it. And even if it had, the error could not have been harmless here because no Kansas law currently provides a procedure for empaneling a jury to decide restitution. See *Washington v. Recuenco*, 548 U.S. 212, 217-18, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. Horn*, 291 Kan. 1, 10, 238 P.3d 238 (2010); *State v. Kessler*, 276 Kan. 202, Syl. ¶ 8, 73 P.3d 761 (2003).

The Section 5 Claim

Robison's jury-trial right can come either from the federal constitution or its Kansas counterpart. Even if Robison had no jury-trial right under the Sixth Amendment, I would hold that he had one under Section 5 of the Kansas Constitution Bill of Rights. As the majority notes, Section 5 protects the jury-trial right as it existed in 1859 when Kansas ratified its Constitution. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019) (plurality opinion); *Wheeler v. Caldwell*, 68 Kan. 776, 780, 75 P. 1031 (1904); *Ross v. Crawford County Comm'rs*, 16 Kan. 411, 418 (1876). If juries decided a factual issue in 1859, then a statute that allows judges to decide the issue violates Section 5. *Hillburn*, 309 Kan. at 1133-34.

No one disputes that if Robison had a jury-trial right under Section 5, the restitution statutes deprived him of that right by allowing a judge to decide the facts needed to support his restitution award. The issue is whether juries would have decided those facts in 1859. Robison argues they would have for two reasons. First, he analogizes restitution to causation and damages in a civil case, issues decided by Kansas juries at statehood. Second, he cites Kansas Territorial

Statutes that purportedly show that juries also decided restitution in 1859.

The majority rejects Robison's civil-claim analogy by emphasizing restitution's criminal attributes. Criminal restitution and civil damages, the majority explains, are separate remedies under Kansas law. After all, a victim can still recover civil damages after a judge awards restitution, and a judge can still award restitution after the victim has recovered civil damages. These differences convince the majority that restitution should not be treated as civil damages under Section 5.

For the majority, restitution is something of a Goldilocks remedy—not too punitive to trigger the Sixth Amendment, not too compensatory to trigger Section 5. No, the majority says, it's just right.

On the Sixth Amendment claim, the majority says restitution is victim compensation, not punishment. It describes restitution with language that courts use to describe damages in a civil case. Compare slip op. at 11 ("[Restitution] is intended to restore the victims . . . to the position they found themselves in prior to a defendant's commission of the offense that caused the injury or damage."), with *Burnette v. Eubanks*, 308 Kan. 838, Syl. ¶ 4, 425 P.3d 343 (2018) ("The purpose in awarding damages is to make a party whole by restoring that party to the position the party was in prior to the injury."). Now on the Section 5 claim, the majority plays up restitution's criminal characteristics.

In theory, perhaps some monetary award could be just right, neither fish nor fowl, and avoid scrutiny under both the Sixth Amendment and Section 5. But that can't be the case here. If we focus on restitution

as compensation for loss, not punishment, we know that a victim can enforce a restitution award just like a civil judgment. K.S.A. 2017 Supp. 21-6604(b)(2); K.S.A. 60-2401. And although a restitution award will not bar the victim from later seeking civil damages, it will reduce the victim's recovery in the civil case by "the amount of any restitution paid." K.S.A. 60-4304(b); *Applegate*, 266 Kan. at 1078-79. So even if restitution is somehow treated as nonpunitive, it still works just like causation and damages in a civil case. Because juries decided those issues in Kansas in 1859, the restitution statutes necessarily infringe on Section 5's right to jury trial by allowing judges to decide those issues.

Similarly, if we focus on the punishment side instead of compensation for loss, there's more to Section 5 than its application to the recovery of civil damages or their equivalent: the Kansas Supreme Court has made clear that Section 5 applies in criminal cases too. *Love*, 305 Kan. at 736. For example, it's well-established that juries must decide guilt in a criminal case, though they need not decide legal issues like whether to instruct a jury on a lesser-included offense or whether one offense is a lesser-included offense of another. 305 Kan. at 736. Here, whether a defendant's crime caused damage or loss to a victim is an issue of fact. *Hall*, 297 Kan. at 712. The question, then, is whether juries would have had to find that fact in 1859.

In 1859, juries in criminal cases involving theft offenses had to make a factual finding about the value of the stolen property. Kan. Terr. Stat. 1859, ch. 27, §219; ch. 28, §§ 72-74, 82-88, 91. The jury's property valuation affected the severity of the defendant's

punishment—the punishments were more severe for property worth $20 or more (grand larceny) than for property worth less than $20 (petty larceny). Kan. Terr. Stat. 1859, ch. 28, §§ 72-74. Once the jury had valued the property, the judge could impose a punishment authorized for that type of larceny (unless the jury had specified a punishment in the verdict). Kan. Terr. Stat. 1859, ch. 27, §§ 219-221.

The property-valuation finding for theft offenses is equivalent to the damage-or-loss finding for restitution. As the majority puts it, the valuation "affected the severity level of the offense." Slip op. at 8. Juries had to determine how much the property was worth because that finding "affected the appropriate sentence to be imposed on the defendant." Slip op. at 9. So too with a damage-or-loss finding for restitution. That finding affects the severity of the defendant's sentence. If the crime caused no damage or loss, the judge cannot award any restitution; otherwise, the judge can award up to the full damage-or-loss amount. Because juries would have made the damage-or-loss finding in 1859, I would hold that Section 5 requires that they still make that finding today.

The majority concludes otherwise because Robison has not shown that juries decided restitution in 1859. That asks the wrong question. The key question isn't whether judges awarded restitution in Kansas in 1859, but whether juries would have found the facts needed to support a restitution award at that time. Juries, not judges, in 1859 would have decided whether the defendant's crime caused damage or loss to a victim. On that basis, I would hold that Robison had a right to a jury trial under Section 5.

In sum, Robison had a right to have a jury determine the amount of the damage or loss he caused to any victim of his crime. That right was not honored. I would vacate the restitution award.

APPENDIX E

No. 112,572

IN THE SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TAYLOR ARNETT,
Appellant.

Review of the judgment of the Court of Appeals in an unpublished opinion filed November 6, 2015. Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, Judge.

Samuel Schirer, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Ethan Zipf-Sigler, assistant district attorney, argued the cause, and *Alan T. Fogelman*, assistant district attorney, *Jerome A. Gorman*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by
ROSEN, J.:

The State appeals the Court of Appeals' decision vacating the district court's order of restitution. We reverse the Court of Appeals and remand the case to the Court of Appeals for further review consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On January 8, 2013, Taylor Arnett lent her mother's car to Joseph Stroble and Brandon Bryant so the two could break into houses. Allegedly, Stroble and Bryant then burglarized two different houses, damaging one in the process, and stole over $50,000 worth of property. Stroble returned the car to Arnett later that evening and gave her $200.

Arnett pleaded guilty to conspiracy to commit burglary, and the State agreed not to charge her with any other offenses. The district court sentenced Arnett to 5 months' imprisonment, suspended the imposition of her prison sentence, and placed her on 12 months of supervised probation.

The district court held a separate hearing on restitution. The State sought $33,248.83 in restitution—$31,646.66 for property loss from the thefts, $402.17 for "out-of-pocket expense[s]" of one of the homeowners, and $1,200 for damage to one of the homes as a result of the burglary. Arnett argued that she should only be ordered to pay $200—the amount she received from Stroble. The district court disagreed with Arnett and ordered the restitution requested by the State, holding Arnett jointly and severally liable with Stroble and Bryant for the full amount.

Arnett appealed the restitution order to the Court of Appeals, arguing that restitution violates Section 5 of the Kansas Constitution Bill of Rights, that restitution violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 435 (2000), and that the State failed to submit evidence to support the amount of restitution ordered. The Court of Appeals considered Arnett's original argument to the district court—that she was not liable for the entire restitution amount—and decided the case on that issue. *State v. Arnett*, No. 112,572, 2015 WL 6835244 (Kan. App. 2015) (unpublished opinion). The panel held that the district court erred in ordering Arnett to pay restitution because her crime of conspiracy to commit burglary did not cause the damages. The panel reversed and vacated the order of restitution. 2015 WL 6835244, at *2.

We granted the State's petition for review.

ANALYSIS

The State contends that Arnett failed to preserve this issue for review because she did not present it in the district court or in her appellate brief. The State asserts that Arnett addressed this issue for the first time in a letter to the Court of Appeals filed under Supreme Court Rule 6.09(b) (2018 Kan. S. Ct. R. 39). Alternatively, the State argues that the Court of Appeals misinterpreted the restitution statute when it concluded that the crime of conspiracy to commit burglary does not cause any damages that result from the corresponding crimes of burglary, theft, or criminal damage to property. We address the State's preservation argument first.

Preservation

"An issue not briefed by an appellant is deemed waived and abandoned." *State v. Boleyn*, 297 Kan. 610, 633, 303 P.3d 680 (2013). We do not consider issues that a party raises for the first time in a Rule 6.09(b) letter. *State v. Tague*, 296 Kan. 993, 1010, 298 P.3d 273 (2013).

At the restitution hearing, the State asserted that the parties agreed upon the amounts the State was seeking for restitution. Arnett did not disagree with this. Instead, she argued that she should only be ordered to pay restitution "commensurate with her level of involvement." Because she was unaware of the specific details surrounding the burglaries, like how many would occur and where, Arnett argued that she should be held responsible for only the $200 that she received.

The district court ruled that Arnett was liable for the entire amount of restitution because the applicable statute authorized the court to order restitution for the damages caused by Arnett's crimes, and Arnett had aided and abetted the crimes that resulted in the damages when she provided the vehicle.

On appeal, Arnett abandoned this argument. While she still challenged the restitution order, she argued that the Court of Appeals should vacate the order for three reasons: (1) the imposition of restitution violates Section 5 of the Kansas Constitution; (2) the imposition of restitution violates the *Apprendi* rule; and (3) the State failed to present evidence that the crimes associated with the conspiracy caused $33,248.83 in damages.

After both parties submitted their appellate briefs, but before oral argument, Arnett submitted

a Rule 6.09(b) letter to the Court of Appeals citing *State v. Miller*, 51 Kan.App.2d 869, 355 P.3d 716 (2015). In that letter, Arnett asserted that *Miller* supplemented and supported her third issue regarding the amount of restitution because the *Miller* panel held: "When a defendant is convicted for burglary, restitution cannot be awarded for the loss of items stolen during the burglary when the defendant was not convicted for the theft of those items, unless the defendant agrees to the restitution." 51 Kan.App.2d 869, Syl. ¶ 2, 355 P.3d 716.

The argument Arnett presented in her Rule 6.09(b) letter is different from the third argument presented in the appellate brief. In her brief, Arnett takes issue with the lack of evidence supporting the valuation of damages. In her Rule 6.09(b) letter, Arnett insinuates a legal argument that a person convicted of conspiracy to commit burglary cannot be held liable for losses or damages resulting from any burglaries or thefts that occur.

Nonetheless, the Court of Appeals addressed the argument raised in the Rule 6.09(b) letter and ultimately decided the case on that issue without considering the issues Arnett presented in her brief. *Arnett*, 2015 WL 6835244.

We conclude that Arnett abandoned any argument regarding whether her crime of conspiracy caused the alleged damages, and, therefore, the panel's consideration of this issue was more generous than strictly necessary when it decided the determinative merit of the issue. Even if Arnett's arguments in the district court adequately preserved the issue, her failure to brief the issue in the Court of Appeals would have precluded appellate review. See *City of*

Roeland Park v. Jasan Trust, 281 Kan. 668, 673, 132 P.3d 943 (2006); *McGinley v. Bank of America, N.A.*, 279 Kan. 426, 444, 109 P.3d 1146 (2005). To the extent that Arnett addressed the issue in her Rule 6.09(b) letter, that did not resurrect the issue for appeal because, as we explained in *Tague*, "Rule 6.09(b) letters are reserved for citing significant relevant authorities not previously cited which come to a party's attention after briefing. ... [A]n appellate court will not consider new issues raised for the first time in a party's Rule 6.09(b) letter." 296 Kan. at 1010-11, 298 P.3d 273.

Despite the abandonment of the issue, we will consider this issue's merits. In *State v. Bell*, 258 Kan. 123, 899 P.2d 1000 (1995), we faced an analogous scenario when the Court of Appeals considered an issue that the parties had not argued. There, we reiterated the general rule that an appellate court will not consider an issue not raised in the trial court. 258 Kan. at 126, 899 P.2d 1000. We explained that the rule prevents an appellate court from considering an issue sua sponte because the parties will not have had the opportunity to brief the issue or present their arguments to the appellate court. 258 Kan. at 126-27, 899 P.2d 1000. However, we concluded that we had the authority in that case to review an issue the Court of Appeals considered sua sponte because we granted the petition for review and the parties had submitted supplemental briefs to this court. 258 Kan. at 127, 899 P.2d 1000.

As in *Bell*, the parties have had an opportunity to present their arguments to this court. The State briefed the issue in its Petition for Review, which we granted, and both parties addressed the issue at oral argument. Therefore, we move forward to the merits.

Does K.S.A. 2016 Supp. 21-6607(c) support the restitution order?

The State argues that the Court of Appeals misinterpreted the restitution statute when it concluded that K.S.A. 2014 Supp. 21-6607(c) did not support the restitution order because there was no causal connection between Arnett's crime and the damages.

Generally, "'[a] district court's factual findings relating to the causal link between the crime committed and the victim's loss'" are reviewed for substantial competent evidence. *State v. Holt*, 305 Kan. 839, 842, 390 P.3d 1 (2017) (quoting *State v. Shank*, 304 Kan. 89, 93, 369 P.3d 322 [2016]). Our review of the panel's legal conclusion regarding the interpretation of the restitution statute is de novo. See *Gannon v. State*, 303 Kan. 682, 700, 368 P.3d 1024 (2016).

When interpreting a statute, we must give effect to its plain and unambiguous language. We will not read into the statute words not readily found there. If the language of the statute is unclear or ambiguous, we turn to canons of statutory construction, consult legislative history, or consider other background information to ascertain the statute's meaning. *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362, 361 P.3d 504 (2015).

K.S.A. 2016 Supp. 21-6607(c)(2) addresses restitution orders that are imposed as a term of probation. It provides that "the court shall order the defendant to ... make reparation or restitution to the aggrieved party for the damage or loss *caused by the defendant's crime* ...." (Emphasis added.)

The Court of Appeals panel concluded that Arnett could not be held liable for the damages alleged in this

case because they were a result of burglary, theft, and criminal damage to property, and Arnett was not convicted of those crimes. In its analysis, the panel reasoned that Arnett's crime of conspiracy "did not *directly* cause the actual burglaries, thefts, or damage to property." (Emphasis added.) *Arnett*, 2015 WL 6835244, at *2.

We conclude the panel misinterpreted the restitution statute when it read into its meaning a requirement that the crime of conviction have a *direct* causal link to any damages. As we said in *State v. Hand*, 297 Kan. 734, 739, 304 P.3d 1234 (2013), the restitution "statute's reference to damage or loss 'caused by' a defendant's crime is not modified by the adverb 'directly.'" We reiterated this observation in *State v. Hall*, 298 Kan. 978, 990, 319 P.3d 506 (2014), when we explained that, "[a]lthough not all tangential costs incurred as a result of a crime should be the subject of restitution, ... there is no requirement that the damage or loss be 'directly' caused by the defendant's crime."

Although we disagree with the panel's narrow interpretation, we agree that there must be some limit to the defendant's liability. If there is none, a defendant may be held financially liable for remote and minimally related damages. Because we must construe a statute to avoid unreasonable or absurd results, we will not read this meaning into the Legislature's words. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013).

The extent to which a defendant's responsibility for restitution should be limited is a more elusive notion; there is no legislative history that assists us in

knowing how far down a chain of causation a defendant's liability should extend. However, this court has considered liability based on a theory of causation in other contexts many times. Because our lawmakers adopted the restitution statute against this backdrop, we find the caselaw informative. See *Paroline v. United States*, 572 U.S. 464, 134 S.Ct. 1710, 1721, 188 L. Ed. 2d 714 (2014) (considering the legal tradition against which Congress legislated when interpreting a statute).

In both the criminal and civil context, we routinely require a showing of causation to demonstrate that one thing was the proximate cause of another. See, e.g., *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 420, 228 P.3d 1048 (2010) (plaintiff must show health care provider proximately caused injury in medical malpractice claim); *State v. Scott*, 285 Kan. 366, 372, 171 P.3d 639 (2007) (under involuntary manslaughter statute, State must prove defendant's behavior proximately caused victim's death). To establish that one thing proximately caused another, a party must prove two elements: cause-in-fact and legal causation. Together, these elements limit a defendant's liability to "'those consequences that are *probable* according to ordinary and usual experience.'" *Puckett*, 290 Kan. at 420, 228 P.3d 1048.

Generally, causation-in-fact requires proof that it is more likely than not that, but for the defendant's conduct, the result would not have occurred. *Puckett*, 290 Kan. at 420, 228 P.3d 1048.

Legal cause limits the defendant's liability even when his or her conduct was the cause-in-fact of a result by requiring that the defendant is only liable

when it was foreseeable that the defendant's conduct might have created a risk of harm and the result of that conduct and any contributing causes were foreseeable. When causation is based on a chain of events, an intervening cause may absolve the defendant of liability. However, "[i]f the intervening cause is foreseen or might reasonably have been foreseen" by the defendant, his or her conduct may still be considered to have proximately caused the result. *Puckett*, 290 Kan. at 421, 228 P.3d 1048.

While we have not explicitly embraced proximate cause when considering restitution, we have implicitly done so. As we noted earlier, in *Hall* and *Hand*, we held that the restitution statute does not require that loss be " 'directly' " caused by the defendant's crime. *Hall*, 298 Kan. at 990, 319 P.3d 506; *Hand*, 297 Kan. at 739, 304 P.3d 1234. And in *State v. Alcala*, 301 Kan. 832, 839, 348 P.3d 570 (2015), we concluded that substantial competent evidence supported the district court's restitution order when the defendant's actions "set in motion a foreseeable chain reaction" that led to the damages.

Today, we explicitly conclude that the causal link between a defendant's crime and the restitution damages for which the defendant is held liable must satisfy the traditional elements of proximate cause: cause-in-fact and legal causation. We reverse the Court of Appeals decision holding that the restitution statute requires a direct causal connection between the crime and the damages.

We would be inclined to remand this case to the district court for reconsideration under the proper legal standard. However, it is clear from the record that the district court utilized this standard in its analysis.

The district court did not explicitly declare Arnett's crime to have been the cause-in-fact and the legal cause of the alleged damages. But, when ruling from the bench, the district court judge said:

> "I understand from the proffer and from the affidavit that the allegations were that the defendant allowed a Defendant Stroble to use her car to commit the crimes; that she knew what they were going to do; and that by providing them a vehicle, she aided and abetted them in the commission of that crime. She entered into a conspiracy, and that's the crime that she pled to. Without that vehicle, they would not have been able to commit the crimes."

From this language, it is apparent to us that the district court concluded that, but for Arnett's crime, the subsequent crimes which resulted in the damages would not have occurred and that the resulting damages were a foreseeable result of Arnett's criminal actions.

Arnett did not challenge this factual determination on appeal. And because the Court of Appeals concluded, as a matter of law, that conspiracy to commit burglary does not cause damages that result from a corresponding burglary, theft, or criminal damage to property, it did not consider whether the facts showed a causal connection in this case. As a result, we do not reconsider the district court's factual conclusions.

Because the Court of Appeals decided that the statute did not support the restitution order, it did not address the arguments presented in Arnett's brief: that restitution violates Section 5 of the Kansas Constitution and is contrary to *Apprendi,* 530 U.S. 466,

120 S. Ct. 2348, and that the State failed to submit evidence to support the valuation of the damages. Our decision to reverse the Court of Appeals leaves the resolution of these issues and Arnett's appeal undecided. Therefore, we remand the case to the Court of Appeals to consider these issues.

The Court of Appeals decision holding that conspiracy to commit burglary does not legally cause damages that result from a corresponding burglary, theft, or criminal damage to property and vacating the order of restitution is reversed. The case is remanded to the Court of Appeals for consideration of the issues that Arnett presented in her brief to the Court of Appeals.

APPENDIX F

No. 112,572

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TAYLOR ARNETT,
Appellant.

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, Judge.

Samuel Schirer, of Kansas Appellate Defender Office, for appellant.

Alan T. Fogelman, assistant district attorney, argued the cause, *Jerome A. Gorman*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., SCHROEDER, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM. Taylor Arnett was convicted on her plea of guilty to the felony of conspiracy to commit burglary. She appeals from the order of the district

court imposing restitution. She argues that the imposition of criminal restitution violates *Apprendi v. New Jersey*, 530 U.S. 466, 147 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and also violates Section 5 of the Kansas Constitution Bill of Rights by allowing a judge rather than a jury to determine the amount of restitution. Alternatively, Arnett argues that the restitution order should be set aside for lack of substantial competent supporting evidence.

We find that restitution should not have been imposed upon Arnett, reverse the judgment of the district court, and vacate the order of restitution. Having so determined, we need not address the constitutional issues raised.

FACTUAL AND PROCEDURAL BACKGROUND

In the late evening hours of January 8, 2013, two men burglarized homes in Edwardsville. During their investigation, the police learned that the car used in the burglaries belonged to Arnett's mother. Arnett admitted to the police that she loaned her mother's car to her boyfriend that night "to do 'a lick,'" "which she said meant "robbing houses." Arnett further admitted her boyfriend gave her $200 when he returned the car.

The State charged Arnett with felony conspiracy to commit burglary. She eventually pled guilty as charged after reaching a plea agreement in which the State agreed not to file additional charges and to recommend a mitigated controlling sentence. Payment of restitution was not part of the plea agreement. The district court imposed an underlying mitigated 5-month prison sentence and granted Arnett 12 months' probation.

The district court conducted a separate hearing regarding restitution. The prosecutor advised the district court that the parties agreed upon the amounts that the State attributed to the losses suffered by the victims as being $31,646.66 for items taken from a tenant of one of the two burglarized homes; $1,200 for property damage to the tenant's home; and $402.17 for undisclosed "out-of-pocket" expenses for the other victim. The sole argument presented to the district court whether Arnett was responsible "for all, part, or some amount of restitution."

The district court held Arnett jointly and severally liable with her codefendants for the entire amount of restitution—$33,248.83—and imposed that obligation as a term of her probation. Arnett timely appealed.

The Order of Restitution Is Not Supported By Statute

We turn first to Arnett's argument that the order of restitution is not supported by substantial competent evidence. In raising her objection to the district court, Arnett has preserved the issue of whether she can legally be held liable for restitution, and we approach the question from that direction.

Standard of Review

Generally, "[t]he restitution amount and the manner in which restitution is to be made are reviewed for abuse of discretion." *State v. Alcala*, 301 Kan. 832, 836, 348 P.3d 570 (2015). Absent an error of fact or law, our appellate courts will find a district court abused its discretion only if its decision is arbitrary, fanciful, or unreasonable. *State v. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014).

However, the issue presented here also implicates interpretation and application of K.S.A.2014 Supp. 21-6607 (c)(2), a statute which specifically addresses the imposition of criminal restitution as a term of probation. A question regarding the interpretation or application of a statute is subject to unlimited review on appeal. *State v. Vrabel*, 301 Kan. 797, 802, 347 P.3d 201 (2015).

The Statute

K.S.A.2014 Supp. 21-6607(c)(2) provides in part that as a condition of probation, a defendant shall be ordered to "make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime."

The Crime

Arnett pled to the crime of conspiracy, as defined in K.S.A.2014 Supp. 215302(a): "A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime." K.S.A.2014 Supp. 21-5107(f) provides that "[a]n offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing offense plainly appears, at the time when the course of conduct or the defendant's complicity is terminated. Time starts to run on the day after the offense is committed." Thus, by definition, conspiracy is a completed crime upon the agreement and commission of any overt act in furtherance of the conspiracy; it does not require the actual commission of the object crime. That conspiracy is a separate offense apart from the object offense is made clear by the sentencing guidelines set forth in

K.S.A.2014 Supp. 21-5302(d)(1), which rank conspiracy at two severity levels below the appropriate level for the underlying or completed crime. Arnett was not charge with, nor did she plead guilty to, burglary, theft, or criminal damage to property in either an active or aiding and abetting role, charges which arguably could have been filed pursuant to K.S.A.2014 Supp. 21-5210 relating to responsibility for crimes of another.

Arnett's alleged overt act of providing a car for the others to use may have furthered and completed the conspiracy but did not directly cause the actual burglaries, thefts, or damage to property. The record is undisputed that Arnett did not actually participate in those crimes.

Thus, we are constrained to conclude that there is no causal connection between Arnett's crime of conviction—conspiracy—and the amounts for which she was ordered to make restitution—the fruits of burglary, theft, and criminal damage to property. The order of restitution is unsupported by K.S.A.2014 Supp. 2-6607(c) and must be reversed and vacated.

The Constitutional Issues Need Not Be Addressed

"As a general rule, courts will not decide a constitutional question if there is some other ground upon which to decide or dispose of the case." *State v. Childs*, 275 Kan. 338, Syl. ¶2, 64 P.3d 389 (2003). First of all, there is a threshold question of whether the constitutional issues raised by Arnett, having not first been raised in the district court, are even appropriate for appellate consideration. *See e.g.*, *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014); *State v. Bowen*, 299 Kan. 339, 354, 323 P.3d 853 (2014).

In any event, having concluded as set forth above that Arnett is not liable for restitution based on her crime of conviction, addressing the constitutional issues would run afoul of the general rule that an appellate court does not decide moot questions or render advisory opinions. *See State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866 (2012).

Order of restitution reversed and vacated.

APPENDIX G

AMENDMENT VI TO THE
UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX H

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion to which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX I

Article 66 - SENTENCING

21-6604. Authorized dispositions; crimes committed on or after July 1, 1993

(a) Whenever any person has been found guilty of a crime, the court may adjudge any of the following:

(1) Commit the defendant to the custody of the secretary of corrections if the current crime of conviction is a felony and the sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment; or, if confinement is for a misdemeanor, to jail for the term provided by law;

(2) impose the fine applicable to the offense and may impose the provisions of subsection (q);

(3) release the defendant on probation if the current crime of conviction and criminal history fall within a presumptive nonprison category or through a departure for substantial and compelling reasons subject to such conditions as the court may deem appropriate. In felony cases except for violations of K.S.A. 8–1567, and amendments thereto, the court may include confinement in a county jail not to exceed 60 days, which need not be served consecutively, as a condition of an original probation sentence and up to 60 days in a county jail upon each revocation of the probation sentence, or community corrections placement;

(4) assign the defendant to a community correctional services program as provided in K.S.A. 75–5291, and amendments thereto, or through a departure for substantial and compelling reasons subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution;

(5) assign the defendant to a conservation camp for a period not to exceed six months as a condition of probation followed by a six-month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program;

(6) assign the defendant to a house arrest program pursuant to K.S.A. 2011 Supp. 21–6609, and amendments thereto;

(7) order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (c) of K.S.A. 2011 Supp. 21–6602, and amendments thereto;

(8) order the defendant to repay the amount of any reward paid by any crime stoppers chapter, individual, corporation or public entity which materially aided in the apprehension or conviction of the defendant; repay the amount of any costs and expenses incurred by any law enforcement agency in the apprehension of the defendant, if one of the current crimes of conviction of the defendant includes escape from custody or aggravated escape from custody, as defined in K.S.A. 2011 Supp. 21–5911, and amendments thereto; repay expenses incurred by a fire district, fire department or fire company responding to a fire which has been

determined to be arson or aggravated arson as defined in K.S.A. 2011 Supp. 21–5812, and amendments thereto, if the defendant is convicted of such crime; repay the amount of any public funds utilized by a law enforcement agency to purchase controlled substances from the defendant during the investigation which leads to the defendant's conviction; or repay the amount of any medical costs and expenses incurred by any law enforcement agency or county. Such repayment of the amount of any such costs and expenses incurred by a county, law enforcement agency, fire district, fire department or fire company or any public funds utilized by a law enforcement agency shall be deposited and credited to the same fund from which the public funds were credited to prior to use by the county, law enforcement agency, fire district, fire department or fire company;

(9) order the defendant to pay the administrative fee authorized by K.S.A. 22–4529, and amendments thereto, unless waived by the court;

(10) order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20–369, and amendments thereto;

(11) if the defendant is convicted of a misdemeanor or convicted of a felony specified in subsection (i) of K.S.A. 2011 Supp. 21–6804, and amendments thereto, assign the defendant to work release program, other than a program at a correctional institution under the control of the secretary of corrections as defined in K.S.A. 75–5202, and amendments thereto, provided such work release program requires such defendant to return to confinement at the end of each day in the work release

program. On a second conviction of K.S.A. 8–1567, and amendments thereto, an offender placed into a work release program must serve a total of 120 hours of confinement. Such 120 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. On a third or subsequent conviction of K.S.A. 8–1567, and amendments thereto, an offender placed into a work release program must serve a total of 240 hours of confinement. Such 240 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day;

(12) order the defendant to pay the full amount of unpaid costs associated with the conditions of release of the appearance bond under K.S.A. 22–2802, and amendments thereto;

(13) impose any appropriate combination of (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11) and (12); or

(14) suspend imposition of sentence in misdemeanor cases.

(b)(1) In addition to or in lieu of any of the above, the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances which would render a plan of restitution unworkable. In regard to a violation of K.S.A. 2011 Supp. 21–6107, and amendments thereto, such damage or loss shall include, but not be limited to, attorney fees and costs incurred to repair the credit history or rating of the person whose

personal identification documents were obtained and used in violation of such section, and to satisfy a debt, lien or other obligation incurred by the person whose personal identification documents were obtained and used in violation of such section. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefor.

(2) If the court orders restitution, the restitution shall be a judgment against the defendant which may be collected by the court by garnishment or other execution as on judgments in civil cases. If, after 60 days from the date restitution is ordered by the court, a defendant is found to be in noncompliance with the plan established by the court for payment of restitution, and the victim to whom restitution is ordered paid has not initiated proceedings in accordance with K.S.A. 60–4301 et seq., and amendments thereto, the court shall assign an agent procured by the attorney general pursuant to K.S.A. 75–719, and amendments thereto, to collect the restitution on behalf of the victim. The chief judge of each judicial district may assign such cases to an appropriate division of the court for the conduct of civil collection proceedings.

(c) In addition to or in lieu of any of the above, the court shall order the defendant to submit to and complete an alcohol and drug evaluation, and pay a fee therefor, when required by subsection (d) of K.S.A. 2011 Supp. 21–6602, and amendments thereto.

(d) In addition to any of the above, the court shall order the defendant to reimburse the county general fund for all or a part of the expenditures by the county to provide counsel and other defense services to the defendant. Any such reimbursement to the county

shall be paid only after any order for restitution has been paid in full. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment.

(e) In releasing a defendant on probation, the court shall direct that the defendant be under the supervision of a court services officer. If the court commits the defendant to the custody of the secretary of corrections or to jail, the court may specify in its order the amount of restitution to be paid and the person to whom it shall be paid if restitution is later ordered as a condition of parole, conditional release or postrelease supervision.

(f)(1) When a new felony is committed while the offender is incarcerated and serving a sentence for a felony, or while the offender is on probation, assignment to a community correctional services program, parole, conditional release or postrelease supervision for a felony, a new sentence shall be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2011 Supp. 21–6606, and amendments thereto, and the court may sentence the offender to imprisonment for the new conviction, even when the new crime of

conviction otherwise presumes a nonprison sentence. In this event, imposition of a prison sentence for the new crime does not constitute a departure.

(2) When a new felony is committed while the offender is incarcerated in a juvenile correctional facility pursuant to K.S.A. 38–1671, prior to its repeal, or K.S.A. 2011 Supp. 38–2373, and amendments thereto, for an offense, which if committed by an adult would constitute the commission of a felony, upon conviction, the court shall sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. In this event, imposition of a prison sentence for the new crime does not constitute a departure. The conviction shall operate as a full and complete discharge from any obligations, except for an order of restitution, imposed on the offender arising from the offense for which the offender was committed to a juvenile correctional facility.

(3) When a new felony is committed while the offender is on release for a felony pursuant to the provisions of article 28 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto, or similar provisions of the laws of another jurisdiction, a new sentence may be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2011 Supp. 21–6606, and amendments thereto, and the court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. In this event, imposition of a prison sentence for the new crime does not constitute a departure.

(g) Prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid, prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 5–H, 5–I or 6–G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3–E, 3–F, 3–G, 3–H or 3–I of the sentencing guidelines grid for drug crimes, prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 4–E or 4–F of the sentencing guideline grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2011 Supp. 21–6824, and amendments thereto, prior to revocation of a nonprison sanction of a defendant whose offense is classified in grid blocks 4–E or 4–F of the sentencing guideline grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2011 Supp. 21–6824, and amendments thereto, or prior to revocation of a nonprison sanction of a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5–H, 5–I or 6–G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3–E, 3–F, 3–G, 3–H or 3–I of the sentencing guidelines grid for drug crimes, the court shall consider placement of the defendant in the Labette correctional conservation camp, conservation camps established by the secretary of corrections pursuant to K.S.A. 75–52,127, and amendment thereto, or a community intermediate sanction center. Pursuant to this paragraph the defendant shall not be sentenced to imprisonment if space is available in a conservation camp or a community intermediate sanction center and the defendant meets all of the conservation camp's or a community intermediate sanction center's

placement criteria unless the court states on the record the reasons for not placing the defendant in a conservation camp or a community intermediate sanction center.

(h) The court in committing a defendant to the custody of the secretary of corrections shall fix a term of confinement within the limits provided by law. In those cases where the law does not fix a term of confinement for the crime for which the defendant was convicted, the court shall fix the term of such confinement.

(i) In addition to any of the above, the court shall order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment. The amount of attorney fees to be included in the court order for reimbursement shall be the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services

reimbursement tables as provided in K.S.A. 22–4522, and amendments thereto, whichever is less.

(j) This section shall not deprive the court of any authority conferred by any other Kansas statute to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose any other civil penalty as a result of conviction of crime.

(k) An application for or acceptance of probation or assignment to a community correctional services program shall not constitute an acquiescence in the judgment for purpose of appeal, and any convicted person may appeal from such conviction, as provided by law, without regard to whether such person has applied for probation, suspended sentence or assignment to a community correctional services program.

(l) The secretary of corrections is authorized to make direct placement to the Labette correctional conservation camp or a conservation camp established by the secretary pursuant to K.S.A. 75–52,127, and amendments thereto, of an inmate sentenced to the secretary's custody if the inmate:

(1) Has been sentenced to the secretary for a probation revocation, as a departure from the presumptive nonimprisonment grid block of either sentencing grid, for an offense which is classified in grid blocks 5–H, 5–I, or 6–G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3–E, 3–F, 3–G, 3–H or 3–I of the sentencing guidelines grid for drug crimes, or for an offense which is classified in grid blocks 4–E or 4–F of the sentencing guidelines grid for drug crimes and such offense does not meet the requirements of K.S.A. 2011 Supp. 21–6824, and amendments thereto; and

(2) otherwise meets admission criteria of the camp. If the inmate successfully completes a conservation camp program, the secretary of corrections shall report such completion to the sentencing court and the county or district attorney. The inmate shall then be assigned by the court to six months of follow-up supervision conducted by the appropriate community corrections services program. The court may also order that supervision continue thereafter for the length of time authorized by K.S.A. 2011 Supp. 21–6608, and amendments thereto.

(m) When it is provided by law that a person shall be sentenced pursuant to K.S.A. 1993 Supp. 21–4628, prior to its repeal, the provisions of this section shall not apply.

(n) Except as provided by subsection (f) of K.S.A. 2011 Supp. 21–6805, and amendments thereto, in addition to any of the above, for felony violations of K.S.A. 2011 Supp. 21–5706, and amendments thereto, the court shall require the defendant who meets the requirements established in K.S.A. 2011 Supp. 21–6824, and amendments thereto, to participate in a certified drug abuse treatment program, as provided in K.S.A. 2011 Supp. 75–52,144, and amendments thereto, including, but not limited to, an approved after-care plan. If the defendant fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding, the defendant shall be subject to revocation of probation and the defendant shall serve the underlying prison sentence as established in K.S.A. 2011 Supp. 21–6805, and amendments thereto. For those offenders who are convicted on or after July 1, 2003, upon completion of

the underlying prison sentence, the defendant shall not be subject to a period of postrelease supervision. The amount of time spent participating in such program shall not be credited as service on the underlying prison sentence.

(o)(1) Except as provided in paragraph (3), in addition to any other penalty or disposition imposed by law, upon a conviction for unlawful possession of a controlled substance or controlled substance analog in violation of K.S.A. 2011 Supp. 21–5706, and amendments thereto, in which the trier of fact makes a finding that the unlawful possession occurred while transporting the controlled substance or controlled substance analog in any vehicle upon a highway or street, the offender's driver's license or privilege to operate a motor vehicle on the streets and highways of this state shall be suspended for one year.

(2) Upon suspension of a license pursuant to this subsection, the court shall require the person to surrender the license to the court, which shall transmit the license to the division of motor vehicles of the department of revenue, to be retained until the period of suspension expires. At that time, the licensee may apply to the division for return of the license. If the license has expired, the person may apply for a new license, which shall be issued promptly upon payment of the proper fee and satisfaction of other conditions established by law for obtaining a license unless another suspension or revocation of the person's privilege to operate a motor vehicle is in effect.

(3)(A) In lieu of suspending the driver's license or privilege to operate a motor vehicle on the highways of this state of any person as provided in paragraph (1), the judge of the court in which such person was

convicted may enter an order which places conditions on such person's privilege of operating a motor vehicle on the highways of this state, a certified copy of which such person shall be required to carry any time such person is operating a motor vehicle on the highways of this state. Any such order shall prescribe the duration of the conditions imposed, which in no event shall be for a period of more than one year.

(B) Upon entering an order restricting a person's license hereunder, the judge shall require such person to surrender such person's driver's license to the judge who shall cause it to be transmitted to the division of vehicles, together with a copy of the order. Upon receipt thereof, the division of vehicles shall issue without charge a driver's license which shall indicate on its face that conditions have been imposed on such person's privilege of operating a motor vehicle and that a certified copy of the order imposing such conditions is required to be carried by the person for whom the license was issued any time such person is operating a motor vehicle on the highways of this state. If the person convicted is a nonresident, the judge shall cause a copy of the order to be transmitted to the division and the division shall forward a copy of it to the motor vehicle administrator, of such person's state of residence. Such judge shall furnish to any person whose driver's license has had conditions imposed on it under this paragraph a copy of the order, which shall be recognized as a valid Kansas driver's license until such time as the division shall issue the restricted license provided for in this paragraph.

(C) Upon expiration of the period of time for which conditions are imposed pursuant to this subsection, the licensee may apply to the division for the return of the license previously surrendered by such licensee. In the event such license has expired, such person may apply to the division for a new license, which shall be issued immediately by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless such person's privilege to operate a motor vehicle on the highways of this state has been suspended or revoked prior thereto. If any person shall violate any of the conditions imposed under this paragraph, such person's driver's license or privilege to operate a motor vehicle on the highways of this state shall be revoked for a period of not less than 60 days nor more than one year by the judge of the court in which such person is convicted of violating such conditions.

(4) As used in this subsection, "highway" and "street" means the same as in K.S.A. 8–1424 and 8–1473, and amendments thereto.

(p) In addition to any of the above, for any criminal offense that includes the domestic violence designation pursuant to K.S.A. 2011 Supp. 22–4616, and amendments thereto, the court shall require the defendant to undergo a domestic violence offender assessment and follow all recommendations unless otherwise ordered by the court or the department of corrections. The court may order a domestic violence offender assessment and any other evaluation prior to sentencing if the assessment or evaluation would assist the court in determining an appropriate sentence. The entity completing the assessment or evaluation

shall provide the assessment or evaluation and recommendations to the court and the court shall provide the domestic violence assessment and any other evaluation to any entity responsible for supervising such defendant. A defendant ordered to undergo a domestic violence offender assessment shall be required to pay for the assessment and, unless otherwise ordered by the court or the department of corrections, for completion of all recommendations.

(q) In imposing a fine, the court may authorize the payment thereof in installments. In lieu of payment of any fine imposed, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to $5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed by the later of one year after the fine is imposed or one year after release from imprisonment or jail, or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance shall become due on that date. If conditional reduction of any fine is rescinded by the court for any reason, then pursuant to the court's order the person may be ordered to perform community service by one year after the date of such recission or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date. All credits for community service shall be subject to review and approval by the court.

(r) In addition to any other penalty or disposition imposed by law, for any defendant sentenced to imprisonment pursuant to K.S.A. 21-4643, prior to its repeal, or K.S.A. 2011 Supp. 21-6627, and amendments thereto, for crimes committed on or after July 1, 2006, the court shall order that the defendant's be electronically monitored upon release from imprisonment for the duration of the defendant's natural life and that the defendant shall reimburse the state for all or part of the cost of such monitoring as determined by the prisoner review board.

APPENDIX J

Article 66 - SENTENCING

21-6607. Conditions of probation or suspended sentence; correctional supervision fee; correctional supervision fund; searches; drug testing; written reports

(a) Except as required by subsection (c), nothing in this section shall be construed to limit the authority of the court to impose or modify any general or specific conditions of probation, suspension of sentence or assignment to a community correctional services program. The court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation, suspension of sentence or assignment to a community correctional services program. For crimes committed on or after July 1, 1993, in presumptive nonprison cases, the court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation or assignment to a community correctional services program. The court may at any time order the modification of such conditions, after notice to the court services officer or community correctional services officer and an opportunity for such officer to be heard thereon. The court shall cause a copy of any such order to be delivered to the court services officer and the probationer or to the community correctional services officer and the community corrections participant, as the case may be. The provisions of K.S.A. 75-

5291, and amendments thereto, shall be applicable to any assignment to a community correctional services program pursuant to this section.

(b) The court may impose any conditions of probation, suspension of sentence or assignment to a community correctional services program that the court deems proper, including, but not limited to, requiring that the defendant:

(1) Avoid such injurious or vicious habits, as directed by the court, court services officer or community correctional services officer;

(2) avoid such persons or places of disreputable or harmful character, as directed by the court, court services officer or community correctional services officer;

(3) report to the court services officer or community correctional services officer as directed;

(4) permit the court services officer or community correctional services officer to visit the defendant at home or elsewhere;

(5) work faithfully at suitable employment insofar as possible;

(6) remain within the state unless the court grants permission to leave;

(7) pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court;

(8) support the defendant's dependents;

(9) reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs;

(10) perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;

(11) perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days, determined by the court on the basis of ability to pay, standard of living, support obligations and other factors;

(12) participate in a house arrest program pursuant to K.S.A. 2011 Supp. 21-6609, and amendments thereto;

(13) order the defendant to pay the administrative fee authorized by K.S.A. 22-4529, and amendments thereto, unless waived by the court; or

(14) in felony cases, except for violations of K.S.A. 8-1567, and amendments thereto, be confined in a county jail not to exceed 60 days, which need not be served consecutively.

(c) In addition to any other conditions of probation, suspension of sentence or assignment to a community correctional services program, the court shall order the defendant to comply with each of the following conditions:

(1) The defendant shall obey all laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject;

(2) make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined

by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefore;

(3)(A) pay a correctional supervision fee of $60 if the person was convicted of a misdemeanor or a fee of $120 if the person was convicted of a felony. In any case the amount of the correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount;

(B) the correctional supervision fee imposed by this paragraph shall be charged and collected by the district court. The clerk of the district court shall remit all revenues received under this paragraph from correctional supervision fees to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state general fund, a sum equal to 41.67% of such remittance, and to the correctional supervision fund, a sum equal to 58.33% of such remittance;

(C) this paragraph shall apply to persons placed on felony or misdemeanor probation or released on misdemeanor parole to reside in Kansas and supervised by Kansas court services officers under the interstate compact for offender supervision; and

(D) this paragraph shall not apply to persons placed on probation or released on parole to reside

in Kansas under the uniform act for out-of-state parolee supervision;

(4) reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid potion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment. The amount of attorney fees to be included in the court order for reimbursement shall be the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services reimbursement tables as provided K.S.A. 22-4522, and amendments thereto, whichever is less;

(5) be subject to searches of the defendants' person, effects, vehicle, residence and property by a court services officer, a community correctional services officer and any other law enforcement officer based on reasonable suspicion of the defendant violating conditions of probation or criminal activity; and

(6) be subject to random, but reasonable, tests for drug and alcohol consumption as ordered by a court services officer or community correctional services officer.

(d) Any law enforcement officer conducting a search pursuant to subsection (c)(5) shall submit a written report to the appropriate court services officer or community correctional services officer no later than the close of the next business day after such search. The written report shall include the facts leading to such search, the scope of such search and any findings resulting from search.

(e) There is hereby established in the state treasury the correctional supervision fund. All moneys credited to the correctional supervision fund shall be used for the implementation of and training for use of a statewide, mandatory, standardized risk assessment tool or instrument as specified by the Kansas sentencing commission, pursuant to K.S.A. 75-5291, and amendments thereto, and for evidence-based offender supervision programs by judicial branch personnel. If all expenditures for the program have been paid and moneys remain in the correctional supervision fund for a fiscal year, remaining moneys may be expended from the correctional supervision found to support offender supervision by court services officers. All expenditures from the correctional supervision fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the chief justice of the Kansas supreme court or by a person or persons designated by the chief justice.