

No. 21-1126

In the
Supreme Court of the United States

TAYLOR ARNETT AND ROBERT JAMES ROBISON III,
Petitioners,

v.

STATE OF KANSAS,
Respondent.

**On Petition for Writ of Certiorari to the
Kansas Supreme Court**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Sixth Amendment require facts affecting the amount of restitution in criminal cases to be found by the jury beyond a reasonable doubt?

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INTRODUCTION

The petition should be denied. There is no split of authority on the question presented, which this Court has consistently declined to take up. Federal and state courts across the country agree with the Kansas Supreme Court that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not extend to criminal restitution. That position is fully consistent with the Sixth Amendment and this Court’s precedents. This Court’s review is not warranted.

STATEMENT OF THE CASE

1. Petitioner Taylor Arnett loaned a car to her boyfriend and another man who used the car to burglarize homes in suburban Kansas City, Kansas. Pet. App. 107a. In the late evening hours, the two men broke into two homes, stealing items worth more than \$50,000. Pet. App. 107a, 119a. Arnett later admitted to police that she knew the car would be used “to do ‘a lick,’” which she acknowledged meant “robbing houses.” Pet. App. 119a. In return for use of the car, Arnett received \$200. Pet. App. 107a.

The State charged Arnett with felony conspiracy to commit burglary. Pet. App. 119a. She later pleaded guilty as charged, and the State agreed not to file additional charges and to recommend a mitigated controlling sentence. Pet. App. 119a.

At a separate restitution proceeding, Arnett agreed that the victims suffered the following losses:

\$31,646.66 for items taken from one home; \$1,200 for property damage to the same home; and \$402.17 for out-of-pocket expenses incurred by the owner of the other home. Pet. App. 107a. Arnett also agreed that she was responsible for some amount of restitution and posed the issue for the court as whether she was responsible “for all, part, or some amount of restitution.” Pet. App. 109a, 120a. Arnett asked the court to limit restitution to an amount “commensurate with her level of involvement,” which she thought was the \$200 she had received. Pet. App. 107a, 109a. The district court found Arnett jointly and severally liable with her codefendants for the full amount—\$33,248.83. Pet. App. 107a.

2. Petitioner Robert James Robison III attacked Officer Zachary Nance and Corporal Bobby Cutright at a county jail, striking them several times. Pet. App. 39a. In the course of the struggle, Robison bit Corporal Cutright’s arm and injured his eye. Pet. App. 39a. Corporal Cutright received treatment at a local hospital, and his employer’s workers compensation insurance carrier paid the expenses for his treatment. Pet. App. 39a.

The State charged Robison with two counts of battery of a law enforcement officer. Pet. App. 39a. In exchange for Robison’s no-contest plea to one count, the State agreed to dismiss the second count and forego a request for a fine. Pet. App. 39a-40a. After it sentenced Robison, the district court held a separate restitution proceeding, during which a hospital employee testified that Corporal Cutright’s medical bills amounted to \$2,648.56. Pet. App. 40a.

Robison did not dispute the amount or that he had caused Corporal Cutright's injuries. Pet. App. 40a. The court ordered Robison to reimburse the insurance carrier in full. Pet. App. 41a.

3. Arnett and Robison appealed their restitution orders to the Kansas Court of Appeals. For the first time, Arnett and Robison argued that their Sixth Amendment right to a jury trial was violated when the district court determined the amount of restitution without convening a jury. Pet. App. 67a-68a, 119a, 122a. In addition, they both claimed that Kansas's restitution scheme violates the right to trial by jury protected by Section 5 of the Kansas Constitution Bill of Rights for the same reason. Pet. App. 67a-68a, 119a, 122a.

In Arnett's case, the Kansas Court of Appeals unanimously rejected the Sixth Amendment claim in a per curiam opinion.¹ The court reasoned that "restitution is not considered punishment in the same way incarceration or a fine paid to the State would be." Pet. App. 63a. It also held that because Kansas restitution statutes do not set a mandatory minimum or maximum amount of restitution, they do not implicate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. App. 63a-64a. The court explained that "[a] mandatory minimum would be a specified

¹ Arnett's initial appeal to the Kansas Court of Appeals resulted in a reversal when the panel held that there was insufficient evidence she caused the amount of restitution found by the district court. Pet. App. 118a-23a. The Kansas Supreme Court later reversed that decision and remanded the case to the Court of Appeals for resolution of her constitutional claims. Pet. App. 106a-17a.

amount a convicted defendant would have to pay a victim even if the victim had little or no financial loss. [Kansas] statutes require no such obligation.” Pet. App. 64a. It further held that court-imposed restitution does not violate Section 5 of the Kansas Constitution Bill of Rights. Pet. App. 61a-63a.

The Kansas Court of Appeals also rejected Robison’s Sixth Amendment claim. Writing for the majority, Judge Bruns explained, “[r]estitution is a form of restorative justice . . . intended to restore the victims of a crime to the position they found themselves in prior to a defendant’s commission of the offense that caused the injury or damage.” Pet. App. 75a. The court further reasoned that even if restitution were considered punishment, *Apprendi* would not apply because Kansas statutes do not impose a mandatory maximum amount of restitution that a court may impose. Pet. App. 76a. Rather, the court explained, the amount is set by the “damage or loss caused by the defendant’s crime.” Pet. App. 76a (quoting Kan. Stat. Ann. §§ 21-6604(b), 21-6607(c)(2)). The court also recognized that numerous other state and federal courts have refused to extend *Apprendi*’s holding to restitution orders. Pet. App. 77a-78a. And the court held that Section 5 of the Kansas Constitution Bill of Rights does not require a jury to determine criminal restitution. Pet. App. 69a-73a. Judge Leben dissented. Pet. App. 86a.

4. Arnett and Robison petitioned for review in the Kansas Supreme Court. That court granted review and affirmed the lower courts’ Sixth Amendment holdings. Pet. App. 7a-8a, 46a. At the same time, the

court held that Section 5 of the Kansas Constitution Bill of Rights could not countenance restitution provisions that permit a restitution order to be enforced as a civil judgment but otherwise does not prevent judges from determining the amount of restitution. Pet. App. 13a-16a, 53a-54a. The court decided Arnett's and Robison's cases in tandem using identical reasoning.

The Kansas Supreme Court noted that “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.” Pet. App. 6a. Noting the Kansas Court of Appeals’ opinion in Robison’s case, the court cited the many federal courts of appeals and state courts that have refused to extend *Apprendi* to this context. Pet. App. 6a. The Kansas Supreme Court then pointed to one of its prior decisions “acknowledg[ing] that restitution serves many purposes separate from criminal punishment.” Pet. App. 7a (citing *State v. Applegate*, 976 P.2d 936, 938 (Kan. 1999)). Ultimately, the court found no reason to disagree with the numerous courts that have rejected such claims. Pet. App. 7a. The court’s analysis in Robison’s case was the same. Pet. App. 43a-46a.

Justices Standridge and Rosen dissented in Arnett’s case, contending that the Sixth Amendment provides criminal defendants a right to have a jury determine the amount of restitution. Pet. App. 20a-

36a. In Robison's case, only Justice Rosen dissented. Pet. App. 58a.²

REASONS FOR DENYING THE WRIT

This Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), 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.” *Id.* at 490. Petitioners think that holding applies to the calculation of criminal restitution. But every federal court of appeals to consider the question has disagreed. So too have numerous state courts.

This Court has consistently denied certiorari in cases presenting this issue. *See Flynn v. United States*, 141 S. Ct. 2853 (2021) (No. 20-1129); *Gilbertson v. United States*, 141 S. Ct. 2793 (2021) (No. 20-860); *George v. United States*, 141 S. Ct. 605 (2020) (No. 20-5669); *Budagova v. United States*, 140 S. Ct. 161 (2019) (No. 18-8938); *Hester v. United States*, 139 S. Ct. 509 (2019) (No. 17-9082); *Petras v. United States*, 139 S. Ct. 373 (2018) (No. 17-8462); *Fontana v. United States*, 138 S. Ct. 1022 (2018) (No. 17-7300); *Alvarez v. United States*, 137 S. Ct. 1389 (2017) (No. 16-8060); *Patel v. United States*, 137 S. Ct. 184 (2016) (No. 16-5129); *Santos v. United States*, 136 S. Ct. 1689 (2016) (No. 15-8471); *Roemmele v.*

² Because then-Judge Standridge was on the Court of Appeals panel in Robison's case (in the majority), she did not participate in the case after joining the Kansas Supreme Court. Pet. App. 58a, 65a.

United States, 136 S. Ct. 255 (2015) (No. 15-5507); *Gomes v. United States*, 136 S. Ct. 115 (2015) (No. 14-10204); *Printz v. United States*, 136 S. Ct. 91 (2015) (No. 14-10068); *Johnson v. United States*, 135 S. Ct. 2857 (2015) (No. 14-1006); *Basile v. United States*, 135 S. Ct. 1529 (2015) (No. 14-6980); *Ligon v. United States*, 135 S. Ct. 1468 (2015) (No. 14-7989); *Holmich v. United States*, 135 S. Ct. 1155 (2015) (No. 14-337); *Roscoe v. United States*, 134 S. Ct. 2717 (2014) (No. 13-1334); *Green v. United States*, 571 U.S. 1025 (2013) (No. 13-472); *Wolfe v. United States*, 569 U.S. 1029 (2013) (No. 12-1065); *Read v. United States*, 569 U.S. 1031 (2013) (No. 12-8572).

The Court should deny certiorari again here. Not only is there no split of authority on this question, but the Kansas Supreme Court's decision is consistent with this Court's Sixth Amendment jurisprudence. Restitution is not punishment; its predominant purpose is to make whole the victims of crimes. And Kansas law does not mandate a maximum or minimum amount of restitution that must be ordered. In any event, this case would be a poor vehicle for addressing the question presented because Petitioners did not raise their Sixth Amendment claim in district court or contest the amount of the victims' loss and because there is no opportunity to consider the influence of the Seventh Amendment as this case arises from state rather than federal court.

I. Lower Courts Are Not Divided.

Petitioners have identified no conflict among either federal or state courts on the question presented. Every federal court of appeals to consider this question has held that *Apprendi* does not extend to restitution, and nearly all of them have reaffirmed that holding following this Court’s decision in *Southern Union Co. v. United States*, 567 U.S. 343 (2012). *See, e.g., United States v. Vega-Martínez*, 949 F.3d 43, 54-55 (1st Cir. 2020); *United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016); *United States v. Burns*, 800 F.3d 1258, 1261 (10th Cir. 2015); *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States v. Bengis*, 783 F.3d 407, 412 (2d Cir. 2015); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014); *United States v. Green*, 722 F.3d 1146, 1148-51 (9th Cir. 2013); *United States v. Wolfe*, 701 F.3d 1206, 1218 (7th Cir. 2012); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2006) (en banc).³

³ These courts’ reaffirmance of this holding after *Southern Union* undermines Petitioners’ assertion that this Court’s intervention is critical because “courts often follow existing holdings that *Apprendi* doesn’t apply to criminal restitution because those holdings are already on the books—in most cases, in precedents decided before *Southern Union*.” Pet. 20. As an example, Petitioners cite *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006). But the First Circuit recently reaffirmed that *Southern Union* has not altered its holding in *Milkiewicz*. *Vega-Martínez*, 949 F.3d at 55. Lower courts are not carelessly following their pre-*Southern Union* holdings. *See, e.g., Day*, 700 F.3d at 732 (explaining that the “logic of *Southern Union* actually reinforces the correctness of the

State appellate courts have also overwhelmingly rejected the same challenge to state restitution schemes, many since this Court’s decision in *Southern Union*. See, e.g. *People v. Chhoun*, 480 P.3d 550, 590 (Cal. 2021); *Commonwealth v. Denehy*, 2 N.E.3d 161, 175 (Mass. 2014); *State v. Clapper*, 732 N.W.2d 657, 663 (Neb. 2007); *State v. Kinneman*, 119 P.3d 350, 353-55 (Wash. 2005); *People v. Horne*, 767 N.E.2d 132, 138-39 (N.Y. 2002); *People v. Knapp*, 487 P.3d 1243, 1260 (Colo. App. 2021); *People v. Foster*, 901 N.W.2d 127, 140-41 (Mich. App. 2017); *State v. Deslaurier*, 371 P.3d 505, 509 (Or. App. 2016); *State v. Leon*, 381 P.3d 286, 287-90 (Ariz. App. 2016); *Smith v. State*, 990 N.E.2d 517, 520-22 (Ind. App. 2013); *State v. Martinez*, 920 A.2d 715, 722 (N.J. Super. App. Div. 2007).

Although these courts employ somewhat different reasoning, they all agree that *Apprendi* does not apply to restitution. Given that lower courts are not divided on the question presented, this Court’s review is not warranted.

II. The Kansas Supreme Court’s Decisions Do Not Conflict with Decisions of This Court.

Petitioners are wrong in arguing that *Apprendi* applies to restitution. This Court in *Apprendi* held that any fact other than a prior conviction that increases the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt. 530 U.S. at 490. “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum

uniform rule adopted in the federal courts”).

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 (2004) (emphasis omitted).

Here, the district courts ordered Petitioners to pay restitution under Kan. Stat. Ann. § 21-6604(b)(1), which does not establish a statutory maximum and therefore does not implicate *Apprendi*. Rather, that statute directs courts to order restitution determined by the “damage or loss caused by the defendant’s crime.” Kan. Stat. Ann. § 21-6604(b)(1); *see also id.* § 21-6607(c)(2) (stating 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”). By requiring defendants to pay restitution in the amount of “the damage or loss caused by the defendant’s crime,” instead of establishing a minimum or maximum amount of restitution that district courts may order, Kansas restitution statutes establish an indeterminate framework. *See, e.g., Day*, 700 F.3d at 732 (“Critically, . . . 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.” (emphasis omitted)). In determining the amount of a victim’s loss, a sentencing court “is merely giving definite shape to the restitution penalty born out of the conviction,” not “imposing a punishment beyond that authorized by jury-found or admitted facts.” *Leahy*, 438 F.3d at 337.

Petitioners' reliance on this Court's holding in *Southern Union* is misplaced. The fact that *Apprendi* applies to criminal fines does not call into question the numerous authorities holding that *Apprendi* does not apply to restitution. *Southern Union* only addressed criminal fines, which are "undeniably" imposed as criminal penalties. 567 U.S. at 350. But "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." *Leahy*, 438 F.3d at 338; *see State v. Applegate*, 976 P.2d 936, 938 (Kan. 1999) (explaining that restitution serves the function of victim compensation).

Southern Union also reiterated that there cannot "be an *Apprendi* violation where no maximum is prescribed." 567 U.S. at 353. This further confirms that *Apprendi* does not apply to restitution schemes—like Kansas's—that do not set a maximum amount. Unlike the statute in *Southern Union*, which prescribed a maximum fine amount, Kansas law requires that restitution be ordered in the total amount of the victims' losses. *See* Kan. Stat. Ann. §§ 21-6604(b)(1), 21-6607(c)(2); *see also Day*, 700 F.3d at 732 (distinguishing *Southern Union* on this basis).

Petitioners incorrectly argue that history supports extending *Apprendi* to restitution. Pet. 24-29. They claim that restitution was available in theft cases at common law only if the indictment listed the stolen property. The problem with this argument is that if the stolen property was not listed in the

indictment, the omission did not entitle the offender to keep the property. Instead, the property was “forfeit[ed], and confiscate[d] to the king” rather than to the victim. 1 Matthew Hale, *The History of the Pleas of the Crown* 538 (1736); *see id.* at 545; James Barta, 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, 473 (2014) (“Any goods omitted from the indictment were forfeited to the crown.”). And in any event, the return of stolen property is a far cry from modern restitution. As the Kansas Supreme Court explained below, “the concept of criminal restitution as we know it today was not part of the common law at all” Pet. App. 9a. Petitioners have not identified any historical basis for a right to have a jury determine the amount of restitution.

The Kansas Supreme Court’s decisions are consistent with the historical jury trial right as well as this Court’s precedents. Review is not warranted.

III. This Case Is a Bad Vehicle to Consider the Question Presented.

Even if this Court’s review of the question presented were warranted, this case is not a good vehicle to address that question for at least three reasons.

First, neither Petitioner contested the amount of the victims’ loss. Arnett “argued she should only be responsible for the \$200 she obtained for her part in

the burglaries” rather than being jointly and severally liable for the full amount of the victims’ loss. Pet. App. 2a. But that is a question of law. The factual question of the amount of the victims’ loss was not disputed, as the Kansas Court of Appeals noted. Pet. App. 61a. (“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.”) Likewise, Robison “did not dispute the amount of the medical bills or that they arose out of the attack on Corporal Cutright,” only whether the workers compensation insurance carrier was entitled to restitution. Pet. App. 40a. Because there were no disputed factual issues concerning the amount of restitution, any error was harmless.

Second, neither Petitioner raised a Sixth Amendment argument in the district court. Pet. App. 68a-69a, 122a. In fact, Arnett acquiesced to the district court’s authority to determine the amount of restitution she owed. Rather than argue that the court could not impose restitution without a jury, she expressly asked the district court to determine the amount of restitution “commensurate with her level of involvement” in the crimes. Pet. App. 107a, 109a.

Third, this case does not present this Court with the opportunity to consider the influence of the Seventh Amendment. In his dissent from the denial of certiorari in *Hester v. United States*, 139 S. Ct. 509 (2019), Justice Gorsuch reasoned that “if restitution really fell beyond the reach of the Sixth Amendment’s protections in *criminal* prosecutions,

we would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in *civil* cases.” *Id.* at 511 (Gorsuch, J., dissenting from denial of certiorari). But this Court cannot address those Seventh Amendment concerns here because that amendment has not been incorporated against the States. *See McDonald v. Chicago*, 561 U.S. 742, 784 n.30 (2010). Should the Court wish to consider this issue, it should do so in one of the many federal cases that routinely come before it.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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