

House Judiciary Committee
February 15, 2022

House Bill 2608

Testimony of the Kansas Association of Criminal Defense Lawyers (KACDL)
Presented by Bryan Cox
Opponent

Dear Chairman Patton and Members of the Committee:

HB 2608 is the wrong approach to resolving restitution in criminal cases in the wake of the Kansas Supreme Court’s ruling in *State v. Arnett*. Rather than patching a flawed process, the legislature should instead fix the root issue—which the Kansas Supreme Court refused to do—and provide for a jury to determine restitution in contested criminal cases. In this testimony, I provide some background to help explain why the Committee is seeing the current bill (section I), and provide an alternative solution to the issue (section II).

I. Background.

This bill is a response to the Kansas Supreme Court’s ruling in *State v. Arnett*, 496 P.3d 928 (2021). In *Arnett*, the defendant was charged with conspiracy to commit burglary because she loaned her car to her boyfriend in exchange for \$200. The boyfriend used her vehicle to commit multiple burglaries. Pursuant to a plea agreement that was silent regarding restitution, Arnett pleaded guilty to that conspiracy charge. At sentencing, the court—without any findings made by a jury—ordered Ms. Arnett to pay over \$30,000 in restitution, making its own findings on both issues of causation and the amount of damages that were actually incurred.

On appeal, Arnett argued that a judge determining a contested restitution amount violated her Sixth Amendment right to a jury trial under the United States Constitution, as well as her right to a jury determination of the issue under the Kansas Bill of Rights.

The court rejected Arnett’s argument based on the U.S. Constitution, but agreed that under Section 5 of the Kansas Bill of Rights there was more of a problem. Section 5 states that “[t]he right of trial by jury shall be inviolate.” Through originalist interpretation, this has been interpreted to refer to anything that was determined by a jury at the time of the adoption of the Kansas Bill of Rights; issues that were not determined by a jury can be determined by courts.

The difficult part of this analysis is that criminal restitution did not exist under the common law at the time of the adoption of the Kansas Bill of Rights. Restitution was available, but it would be done through a civil suit, rather than as part of the criminal proceedings. In that context, there would have been a jury trial right. So, the court reasoned, to the extent that restitution judgments were effectively identical to civil judgments, a jury trial right exists. The

court found that these two—civil judgments and criminal restitution awards—were too identical, therefore the jury right should exist.

The *Arnett* court then turned to how to fix the problem. The court could have reversed and remanded Arnett’s case for her to have a jury trial on these issues. Instead, the court opted to declare several statutes unconstitutional in order to remove the similarity of civil judgments and criminal restitution orders, thereby hoping to resolve the issue.

The Arnett case is not yet over, as the appellant is petitioning the United States Supreme Court for certiorari in order to address the 6th Amendment issue.

II. The better resolution: just have a jury!

Rather than attempt patch the statutory holes created by the *Arnett* court’s decision, it would be far better for the legislature to address the root of the problem by providing for a jury trial to determine restitution when it is a contested.

Patching the statute is dangerous.

If the legislature merely attempts a patch, restitution orders could still be in danger. As noted above, the *Arnett* case is still pending certiorari before the United States Supreme Court. Justice Gorsuch has previously joined Justice Sotomayor in indicating support for the argument that jury-less restitution violates *Apprendi* and the Sixth Amendment. *See Arnett*, 496 P.3d at 933 (citing *Hester v. United States*, --- U.S. ---, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., dissenting)). What happens if the United States Supreme Court decides differently from the Kansas Supreme Court, and invalidates numerous restitution orders? Restitution orders do not toll the statute of limitations on civil actions; these might run, without any action taken by a victim, and when the restitution order is invalidated they may have no recourse for recovery.

Providing for a jury would do more to fulfill the promise of the Kansas Bill of Rights.

Implementing a jury trial right would also do more to uphold individual rights. Just because someone has pleaded guilty does not mean that they are guilty of everything under the sun. I have seen a defendant, unable to bond out, plead to a theft charge, thinking that restitution would be at most several hundred dollars for the expenses in retrieving certain property. Instead, the prosecution sought over \$10,000 for the full value of the property, despite having nothing but a single-line e-mail from the victim; no receipts or other proofs.

The Supreme Court should have done this.

A court is supposed to interpret statutes in a manner that renders them constitutional. This doctrine arises from the principle of separation of powers: the legislature, with the executive, has the power to make law; the courts are supposed to interpret it. As such, whenever possible, the courts should refrain from concluding that a law is unconstitutional.

The Kansas Supreme Court should have applied this doctrine to interpret Kansas law—both its statutes and its constitution—harmoniously. There is nothing in the statutes that would *prohibit* a court from summoning a jury for the purpose of determining restitution. Indeed, one of the most concerning implications of the court’s ruling in *Arnett* is that it implies that Kansas Constitutional provisions must be enacted in Kansas statute as well, rather than being self-executing. Instead of doffing the robes of a judge and donning the suit of the legislator, the court should have remanded Arnett’s case to the district court for a jury determination on restitution. Nothing more than Section 5 (as well as funding to enable it, which the courts have) is necessary to require a court to do so. If a jury had decided restitution, then no judicial legislating would have been necessary.

Providing for a jury would be a minimal burden.

Providing for a jury would not be difficult. The legislature could merely insert an appropriate provision into the restitution statutes. I do not believe that this would create too substantial of a burden, for a number of reasons.

First, of course, most cases resolve in a plea. When entering a plea, a defendant waives many rights, most importantly the right to a jury trial on the question of guilt or innocence. Nothing would prevent the prosecution and defense from including restitution issues—and waiver of a jury trial about them—in a plea agreement, exactly the same as they already do for the question of guilt. In fact, negotiations regarding fixing an amount often happen already, since in the absence of agreement the state would still bear some burden of producing evidence to a judge as trier of fact. Parties could also agree to waive the jury trial and submit the issue of restitution to the judge, either in a plea agreement or just voluntarily.

Second, if a case goes to trial, a jury will already be summoned. Restitution may be addressed in a single phase, or it may be a separate phase of trial, but in any event a jury would already be summoned and capable of deciding this issue as well.

In a limited number of cases, a jury may need to be called when it otherwise would not have been. But these situations should be very few.

In exchange, however, providing for a jury would create efficiencies that would arise from every type of case. As it stands under *Arnett*—and would still stand under the current bill—restitution just is not the same as a civil judgment. The victim cannot take charge and initiate their own enforcement proceedings. If they want such control, they would have to re-file their own, largely duplicative lawsuit and would have to have a jury trial anyway. By providing for a jury, these provisions could be re-implemented for *all* cases, reducing overall litigation burdens in the courts.

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I thank the Chairman and all members of this Committee for the opportunity to testify today, and am happy to participate further in the consideration of this bill, or in the development of a substitution bill that would enact the recommendations in section II and fulfill the promise of Section 5 of the Kansas Bill of Rights.

Sincerely,

Bryan Cox
KACDL