No. 19-120590-AS

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MAURICE BROWN
Defendant-Appellant

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
Honorable John Kisner, Judge
District Court Case No. 17 CR 446

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Notice to Attorney General Pursuant to K.S.A. 2016 Supp. 75-764

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NATURE OF THE CASE

Maurice Brown challenged the district court's sentence in this case, arguing that the judicial prior conviction findings which enhanced his KSGA sentence violated Section 5 of Kansas Constitution Bill of Rights and that the judicial restitution findings violated Section 5 of the Kansas Constitution Bill of Rights. He also challenged the State's preemptory juror strikes as unconstitutional. After the Court of Appeals affirmed, this Court granted Mr. Brown's petition for review on all issues. He now files a supplemental brief, as allowed by Supreme Court Rule 8.03(i)(3).

STATEMENT OF THE ISSUES

Issue I: **The judicial prior conviction findings which elevated Mr. Brown's presumptive KSGA sentence violated Section 5 of the Kansas Constitution Bill of Rights.**

Issue II: **The judicial fact-finding which informs a criminal restitution judgment violates a criminal defendant's constitutional right to a civil and/or criminal jury trial.**

STATEMENT OF THE FACTS

The Court of Appeals provided an accurate statement the facts. *State v. Brown*, No. 120,590, Slip Op. at 1-3 (Kan. App. 2020).

ARGUMENTS AND AUTHORITIES

Issue I: **The judicial prior conviction findings which elevated Mr. Brown's presumptive KSGA sentence violated Section 5 of the Kansas Constitution Bill of Rights.**

Introduction

Mr. Brown maintains the argument he pursued both in his original briefing and in his petition for review: that Section 5 of the Kansas Constitution Bill of Rights

requires sentence-enhancing prior convictions to be proven to a jury beyond a reasonable doubt. Brief of Appellant at 30-33; Appellant's Petition for Review at 8-11. In Kansas, "The right of trial by jury shall be inviolate." Kan. Const. Bill of Rights, § 5. And Section 5 "preserves the jury trial right as it historically existed at common law when our state's constitution came into existence." *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1133, 442 P.3d 509 (2019) (quoting *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098 [2012]); see *State v. Love*, 305 Kan. 716, Syl. ¶ 12, 387 P.3d 820 (2017) (in criminal cases, the jury trial right extends to "issues of fact so tried at common law"). But the KSGA relies on judicial prior conviction findings for sentence enhancement. See K.S.A. 21-6814(a). This practice violates Section 5 of the Kansas Constitution Bill of Rights, rendering Mr. Brown's sentence unconstitutional. See Brief of Appellant at 30-33; Appellant's Petition for Review at 8-11.

The Court of Appeals has provided one reason for denying Mr. Brown the sentencing relief he requests. See *State v. Brown*, No. 120,590, Slip Op. at 14-15. It asserted that Mr. Brown failed to provide authority establishing that section 5 of the Kansas Constitution Bill of Rights requires jury findings that the Sixth Amendment does not provide. See *Brown*, Slip Op. at 14. And, as Mr. Brown has conceded, both this Court and the United State Supreme Court have rejected challenges like this one raised under the Sixth Amendment. See *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (noting prior conviction exception to general rule that all sentence enhancing facts must be proven to a jury beyond a reasonable doubt); *State v. Ivory*, 273 Kan. 44, 44, 41 P.3d 781 (2002).

The Court of Appeals' analysis is flawed. The Kansas Constitution offers more robust protection of the jury trial right than the United States Constitution does. And American common law in 1859 included the right to have sentence-enhancing prior convictions proven to a jury. Accordingly, this Court should reverse the Court of Appeals and the district court, and vacate Mr. Brown's unconstitutional sentence.

The plain language of Section 5 offers greater protection than the Sixth Amendment.

Mr. Brown, in his earlier filings, has advanced the argument that Section 5 offers greater protection to the jury trial right than the Sixth Amendment does. Brief of Appellant at 30-33; Appellant's Petition for Review at 8-11. This Court has recognized that Section 5 makes the jury trial right in Kansas "inviolate" - while the Sixth Amendment contains no such language. See *Hilburn*, 309 Kan. at 1150; compare Kan. Const. Bill of Rights, § 5 with U.S. Const. amend. VI. This Court should continue the approach taken in cases like *State v. Becker*, 311 Kan. 176, 459 P.3d 173 (2020), by treating jury trial right challenges raised under Section 5 differently from similar challenges raised under the Sixth Amendment. See *Becker*, 311 Kan. at 185-87.

This approach is supported by the distinct language employed by Section 5 and by the Sixth Amendment to the United States Constitution - as well as the language used in Section 10 of the Kansas Constitution Bill of Rights. These differences are captured below:

Kan. Const. Bill of Rights, § 5.	U.S. Const. amend. VI.	Kan. Const. Bill of Rights, § 10.
"The right of trial by jury *shall be inviolate.*" (Emphasis added).	"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 ... 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."	"In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Most notably, Section 5 makes the Kansas right to a jury trial "inviolate." See *Hilburn*, 309 Kan. at 1150. Neither the Sixth Amendment nor Section 10 (which, unlike Section 5, loosely tracks the language of the Sixth Amendment) contains anything like the "inviolate" language of Section 5. See U.S. Const. amend. VI; Kan. Const. Bill of Rights, § 10. The brevity of Section 5 underscores the power of the People's choice to make the jury trial right "inviolate." This Court must not ignore the plainly expressed will of the People. See *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 622-23, 440 P.3d 461 (2019).

The jury trial rights of Section 10 of the Kansas Constitution Bill of Rights roughly mirror the jury trial rights of the Sixth Amendment, while Section 5 is something totally different. Compare Kan. Const. Bill of Rights, § 5 with U.S. Const. amend. VI and Kan. Const. Bill of Rights, § 10. Admittedly, this Court has analyzed

Section 10's jury trial rights the same way as the Sixth Amendment, although it did so partly because neither party asked it to analyze Section 10 differently. *State v. Carr*, 300 Kan. 1, 56, 331 P.3d 544 (2014). And this Court has also said that Sections 5 and 10 both protect the right to a jury trial. *State v. Redick*, 307 Kan. 797, 803, 414 P.3d 1207 (2018); *In re Clancy*, 112 Kan. 247, 249, 210 P. 487 (1922). But this does not mean that Sections 5 and 10 are the same. Just because both sections protect jury trial rights, it does not follow that they offer the exact same protections – especially when their language is so different.

In fact, if Section 5 means the same thing as Section 10, it is not clear why the drafters of our Constitution put Section 5 into the Kansas Constitution in the first place. Appellate courts avoid a reading of statutes that renders other portions of law redundant or meaningless. See *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004). It stands to reason that this same rule of interpretation would apply to the Kansas Constitution, since other rules of statutory interpretation do. See *Hodes*, 309 Kan. at 610, Syl. ¶ 4 (plain language of constitution governs). Applying this rule of statutory interpretation, this Court should find, at a minimum, that sections 5 and 10 are not the same.

Moreover, when interpreting our Kansas Constitution, appellate courts must "presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing." *Hodes*, 309 Kan. at 622-23. This Court must presume that Sections 5 and 10 offer unique jury trial rights because to find otherwise would be to find that there was no design behind the different words

employed for each section. In other words, this Court must presume that our Founders drafted two sections protecting jury trial rights in Kansas, and used different language in each, because it was their desire to grant different protections of the right to a jury trial in each section.

The *Brown* panel concluded without further analysis. A different panel's decision on the exact same issue, which was published and issued the same day as *Brown*, offered further analysis. See *State v. Albano*, 58 Kan.App.2d 117, 464 P.3d 332 (2020). To get around the plain language of Section 5, the *Albano* panel relied on a series of inferences. See *Albano*, 58 Kan.App.2d at 127-29. The *Albano* panel ultimately concluded that: "[S]ince section 10 encompasses section 5's jury trial right and section 10 provides the same protection as the Sixth Amendment, it is a reasonable inference that section 5's jury trial right is also interpreted the same as the Sixth Amendment." *Albano*, 58 Kan.App.2d at 129. Even assuming these inferences to be reasonable, this is not how our Constitution is to be interpreted. This Court has long held that: "[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing." *Hodes*, 309 Kan. at 622–23 (quoting *Wright v. Noell*, 16 Kan. 601, 607, 1876 WL 1081 [1876]). The *Albano* panel erred by making unwarranted inferences to avoid the People's plainly expressed desire to make the Kansas jury trial right "inviolate."

The plain language of Section 5 must control its interpretation, which makes the jury trial right in Kansas – unlike the federal jury trial right – "inviolate."

American common law in 1859 included the right to have prior convictions proven to a jury.

The United States Supreme Court has recognized the common law right to have sentence enhancing prior convictions proven to a jury.

Mr. Brown, in his original brief and his petition for review, relied on Justice Thomas' concurring opinion in *Apprendi*, and Justice Scalia's dissenting opinion in *Almendarez-Torres* to detail the common law right to have sentencing-enhancing prior convictions proven to a jury. Brief of Appellant at 30-33; Appellant's Petition for Review at 9-11; *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring); *Almendarez-Torres v. United States*, 523 U.S. 224, 248-71, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (Scalia, J., dissenting). But the conclusion that sentence-enhancing prior convictions had to be proven to a jury at common law is hardly restricted to those two justices or those two opinions. A majority of the United States Supreme Court had endorsed this conclusion by the time *Apprendi* was decided, either by joining Justice Scalia's *Almendarez-Torres* dissent, or by joining Justice Thomas' *Apprendi* concurrence. *Almendarez-Torres*, 523 U.S. at 248-71 (Scalia, J., dissenting); *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring). But even beyond that, support for the common law right to have sentence-enhancing prior convictions proven to a jury on our nation's highest court has been robust.

For example, in 1967 the United States Supreme Court took up the question of whether a single-stage trial on a recidivist charge (where the jury was tasked with both adjudicating guilt and finding the existence of an alleged prior conviction at the same

time) violates the due process rights of the accused. *Spencer v. State of Tex.*, 385 U.S. 554, 554-59, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). In finding no constitutional bar to the challenged Texas procedure, the Supreme Court stated that: "The common-law procedure for applying recidivist statutes, used by Texas in the cases before us, *which requires allegations and proof of past convictions in the current trial*, is of course, the simplest and best known procedure." *Spencer*, 385 U.S. at 655. (Emphasis added).

More recently, in deciding *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), the Court noted that: "Consistent with common-law and early American practice, *Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne*, 570 U.S. at 111 (quoting *Apprendi*, 530 U.S. at 490). Writing for the majority, Justice Thomas further explained that: "We held that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt." *Alleyne*, 570 U.S. at 111.

Of course, the Sixth Amendment-based *Apprendi* rule is still subject to the prior conviction exception announced in *Apprendi* and *Almendarez-Torres*. See *Alleyne*, 570 U.S. at 111 n. 1; *Apprendi*, 530 U.S. at 487 (*Almendarez-Torres* "represents at best an exceptional departure from the historic practice that we have described"). But the *Apprendi* Court did not justify this exception by finding that the common law allowed judicial fact-finding of sentence-enhancing prior convictions, but rather by finding that "substantial procedural safeguards ... mitigated the due process and Sixth Amendment concerns" otherwise implicated by judicial fact finding. *Apprendi*, 530 U.S. at 488. But

the Kansas Constitution does not allow an exception where "substantial procedural safeguards" exist, because the jury trial right in Kansas is "inviolate." Kan. Const. Bill of Rights, § 5.

Legal scholars have also recognized the common law right to have sentence-enhancing prior convictions proven to a jury.

Abundant legal scholarship has also found that American common law required sentence-enhancing prior convictions to be proven to a jury beyond a reasonable doubt. See, e.g., Nancy J. King, Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to *Apprendi*, 97 Marq. L. Rev. 523, 530 (2014) ("At the end of the eighteenth century, every state followed the established common law rule: any prior conviction that would boost the sentence had to be alleged in the indictment and proven to a jury beyond a reasonable doubt."); Anthony M. Radice, Recidivist Procedure Prejudice and Due Process, 53 Cornell L. Rev. 337, 340-41 n. 19 (1968) ("This is the common law procedure once used by a majority of the states..."); *Almendarez-Torres*, 523 U.S. at 261 (Scalia, J., dissenting) (citing additional scholarship, and concluding that: "At common law, the fact of prior convictions *had* to be ... submitted to the jury for determination along with that crime.") (Emphasis in original). This legal scholarship reinforces the conclusion that the common law, and therefore the Kansas Constitution, protects the right to jury findings on sentence-enhancing prior convictions.

Neither *Woodman* nor *Levell* addresses the constitutional question presented by this challenge – both cases were decided on statutory grounds.

The Court of Appeals has relied on *State v. Woodman*, 127 Kan. 166, 272 P. 132 (1928) and *Levell v. Simpson*, 142 Kan. 892, 52 P.2d 372 (1935) to support the contention that American common law did not require that sentence-enhancing prior convictions be proven to a jury in 1859. *Albano*, 58 Kan.App.2d at 133-34. But neither of these cases actually looks back to the common law practice detailed at length above, and in Mr. Brown's earlier filings. Rather, these cases rely on a 1927 Kansas statute requiring that:

> "Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction; and if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty, *unless the court shall find ... the fact of former convictions...*" *Woodman*, 272 P. at 134 (citing Laws 1927, c. 191) (Emphasis added).

But pointing to a 1927 statute allowing judicial criminal history findings does not resolve the constitutional question. Certainly, the 1927 statute authorized the judicial recidivism findings, just as the KSGA presently allows for judicial criminal history findings. The question, however, is not what the statutes *say*, but rather what the Kansas Constitution *allows*. And because American common law guaranteed the right to have prior convictions found by a jury, Section 5 protects that right as well – even if our Legislature tried to make a different rule in 1927. See *Love*, 305 Kan. at 716, Syl. ¶ 12.

In fact, the *Woodman* Court did not directly consider the Section 5 jury trial right at all. The appellant's challenge was more of a due process issue - that "the information

on which defendant was prosecuted did not allege that defendant had formerly been convicted of a felony." *Woodman*, 272 P. at 134. *Woodman* cited extensively to a New York case, *People v. Gowasky*, 244 N.Y. 451, 155 N.E. 737 (1927), in resolving the challenge. The question in *Gowasky* was whether the prior conviction in a recidivist charge must be included in the indictment – not whether the accused was entitled to a jury trial on its factual existence. *Gowasky*, 244 N.Y. at 457-62; see King, supra., 97 Marq. L. Rev. at 586-87. *Woodman* simply does not address the Section 5 challenge Mr. Brown has raised.

In *Levell*, the appellant argued that "he was entitled to a jury trial on the question whether he had been convicted of other felonies" which enhanced his sentence under the previously cited 1927 statute. *Levell*, 52 P.2d at 374. Although the challenge was apparently raised "under the State and Federal Constitutions," there is no indication that Section 5 was the basis for the challenge. *Levell*, 52 P.2d at 373-74. The *Levell* Court made short work of the challenge by citing to *Woodman* and *Gowasky* – again without looking to the state of American common law in 1859. *Levell*, 52 P.2d at 373-74. And, as noted above, neither *Woodman* nor *Gowasky* considered a jury trial challenge – both dealt with whether a prior must be alleged in the pre-trial indictment. Thus, the *Levell* Court's conclusion lacks legal foundation.

Interestingly, the *Levell* Court went on to explain that a separate Kansas recidivist liquor law must be treated differently, requiring that the prior conviction element of that statute must be proven to a jury – consistent with the common law practice described above. *Levell*, 52 P.2d at 374. This distinction was justified on the ground that

recidivism created "quite a different and more serious crime" for the liquor law violation by elevating a second offense from a misdemeanor to a felony, rather than simply demanding a harsher sentence. *Levell*, 52 P.2d at 374. In such a case, the *Levell* Court held that "every material allegation ... would have to be proved to the satisfaction of a jury." *Levell*, 52 P.2d at 374; see King supra., 97 Marq. L. Rev. at 574-75. But this type of distinction has since been rejected by the United States Supreme Court: "*[A]ny* fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury." *Alleyne*, 570 U.S. at 103 (Emphasis added). Viewed this way, *Levell* actually supports a finding that Kansas continued to follow the American common law practice of requiring prior sentence-enhancing convictions to be proven to a jury, even as late as the 1930s.

In short, neither *Woodman* nor *Levell* offers a legally sound reason to deny Mr. Brown the relief he requests. The cases do not address the Section 5 challenge at bar. They instead rely on a 1927 statute to declare judicial prior conviction findings constitutional, without considering the common law practice at the time the Kansas Constitution was adopted. The cases do not control the outcome of this issue.

The 1862 General Statues of Kansas do not depart from the common law requirement that sentence-enhancing prior convictions must be proven to a jury.

If American common law had abandoned the traditional rule requiring that prior convictions be proven to a jury before our Constitution was adopted in 1859, the best place to look for evidence of that shift would be in our State's earliest criminal procedure statutes - not in a statute enacted almost seven decades later. But the Kansas

statutes controlling recidivist sentencing in 1862 show no evidence of abandoning the traditional rule. Appendix A.[1]

Recidivist sentencing statutes have been with us since our State's earliest history. As of 1862, the recidivist sentencing scheme in Kansas worked to enhance the sentences imposed on offenders previously convicted of: "any offence punishable by confinement and hard labor, or of petit larceny, or of any attempt to commit an offence which, if perpetrated, would be punishable by confinement and hard labor." General Laws of Kansas, 1862, Ch. 33, Sec. 278; Appendix A. The statute *required* a sentence of life imprisonment for a second offence, if life imprisonment *could* be imposed for a first offense. General Laws of Kansas, 1862, Ch. 33, Sec. 278; Appendix A. If a first offense called for a term-of-years sentence, the statute required the maximum term-of-years sentence allowed by law in the case of a second offense. General Laws of Kansas, 1862, Ch. 33, Sec. 278. And for petit larceny and attempts to commit offenses authorizing a prison sentence, the statute called for up to five years of imprisonment on a second offense. General Laws of Kansas, 1862, Ch. 33, Sec. 278; Appendix A.

But the critical point for this challenge is that these statutes *do not* depart from the traditional common law rule, by allowing a *judge* to find the existence of a prior conviction. In fact, in 1862 the jury actually played a major role in sentencing:

> "In all cases of a verdict of conviction for any offence, where by law there is any alternative or discretion in regard to the kind or extent of

[1] The title page and referenced statutes from a publication compiling the General Laws of the State of Kansas in effect on March 6, 1862 have been attached to the end of this brief as Exhibit A. A digital copy of the complete publication is available through Google Books at: https://www.google.com/books/edition/General_Laws_of_the_State_of_Kansas/mPBBAAAAYAAJ?hl=en&gbpv=0

> punishment to be inflicted, *the jury may assess and declare the punishment in their verdict*, and the court shall render a judgment according to such verdict..." General Laws of Kansas, 1862, Ch. 32, Sec. 220 (Emphasis added); Appendix A.

The statutory scheme goes on to provide for several exceptional situations in which the court must decide on a sentence: when the jury cannot agree on a sentence or does not announce a sentence, when the case resolves by plea, or when the jury imposes an illegally high or low sentence. General Laws of Kansas, 1862, Ch. 32, Sec. 221-23; Appendix A. The court also retained the power to reduce an offender's jury-imposed sentence when "in its opinion, ... the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted." General Laws of Kansas, 1862, Ch. 32, Sec. 224; Appendix A.

Again, nothing in this sentencing procedure takes the job of finding the existence of prior convictions away from the jury. If anything, the jury's prominent role in sentencing makes it *more* important that the jury, not the judge, make any prior conviction findings. Without making such findings, it is not clear how the jury could impose a legally appropriate sentence, as juries were empowered to do in 1862. See General Laws of Kansas, 1862, Ch. 32, Sec. 220; Appendix A.

Had the common law eliminated the traditional requirement that prior sentence-enhancing convictions be proven to a jury before 1859, one would expect to see evidence of a shift from jury findings to judicial findings in our State's earliest statutes. But there is no evidence of such a shift as of 1862. Accordingly, this Court should conclude that the common law rule was alive and well in 1859, and that Section 5

continues to protect the right to have sentence-enhancing prior convictions proven to a jury. See *Love*, 305 Kan. at 716, Syl. ¶ 12.

Conclusion

Section 5 of the Kansas Constitution Bill of Right protects the right of the accused to have a jury find all issues of fact tried to a jury at common law in 1859. Unlike the Sixth Amendment jury trial right, the Kansas right is inviolate. And since the common law in 1859 required sentence-enhancing prior convictions to be proven to a jury, Section 5 – without exception - continues to protect that right today. The KSGA, by allowing a judge to make criminal history findings which increase an offender's sentence, violates Section 5. And since Mr. Brown's sentence was imposed under this unconstitutional scheme, this Court must reverse his illegally enhanced sentence.

Issue II: The judicial fact-finding which informs a criminal restitution judgment violates a criminal defendant's constitutional right to a civil and/or criminal jury trial.

Introduction

Mr. Brown maintains the argument he pursued both in his original briefing and in his petition for review: that the judicial fact-finding which informs a criminal restitution judgment violates a criminal defendant's constitutional right to a civil and/or criminal jury trial. Appellant's Brief at 35-45; Appellant's Petition for Review at 13-15.

The Court of Appeals concluded that the determination of the amount of restitution in a criminal case is not subject to the right to a jury trial under section 5 of the Kansas Constitution Bill of Rights by dismissing the analogies to juries historically

deciding damages in civil tort cases as misplaced. *Brown*, Slip Op. at 16. It also concluded that restitution is not punishment, and even if it were, the imposition of restitution does not increase a defendant's maximum or minimum sentence, and as such the restitution statutes do not violate the Sixth Amendment right to a jury trial. *Brown*, Slip Op. at 17-18. But, this makes restitution, "something of a Goldilocks remedy—not too punitive to trigger the Sixth Amendment, not too compensatory to trigger Section 5." *State v. Robison*, __Kan. App. 2d __, __ P.3d __, (June 26, 2020), No. 120,903, 2020 WL 3487475, at *17 (Leben, J., *dissenting*.) As Judge Leben explains, such a remedy is a fairy tale. Restitution is either punishment, in which case Mr. Brown had a jury-trial right under *Apprendi*; or else it is a civil remedy streamlined into the criminal context, in which case he had a jury trial right to its determination under section 5 of the Kansas Constitution Bill of Rights.

Analysis

Section 5 of the Kansas Constitution Bill of Rights states that "[t]he right of trial by jury shall be inviolate," and this right applies in both civil and criminal cases, and protects the common-law right to a jury trial as it existed in 1859, when the Kansas Constitution was adopted. *Hilburn v. Enerpipe, Ltd.*, 309 Kan. 1127, 1132-33, 442 P.3d 509 (2019) (plurality opinion). Because of the "inviolate" and fundamental nature of the section 5 right, this Court does not presume the constitutionality of statutes that are alleged to infringe on it. *Id.* As such, if Mr. Brown had a right to a jury trial on the issue in 1859, but that right has since been statutorily abrogated, the statutes are unconstitutional.

The criminal restitution statutes—K.S.A. 2017 Supp. 21-6604(b)(1) and K.S.A. 2017 Supp. 21-6607(c)(2)—authorize a judge to impose restitution in criminal cases of an amount which "shall include, but not be limited to, damage or loss caused by the defendant's crime." Mr. Brown contends that Kansas criminal restitution statutes unconstitutionally abrogate his section 5 right to have a jury determine the issue of loss or damages caused by his crime, which existed in 1859.

Mr. Brown contends these statutes violate his section 5 jury trial right because: (1) in 1859, criminal judges did not award restitution, civil juries did; and (2) in the cases where restitution-like orders were entered in criminal actions, the jury determined the damages caused by the accused's crime.

On the first point, Mr. Brown noted that "restitution for harm done is a classic civil remedy" and that, in Kansas, restitution orders are treated like civil judgments—if an accused does not pay a restitution order, state agents may collect restitution on behalf of the party allegedly harmed by the defendant's crime. *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000); K.S.A. 21-6604 (b)(1); K.S.A. 22-3424(d); K.S.A. 60-4301. As Judge Posner noted, criminal restitution orders permit aggrieved parties "to be compensated for definite losses just as if the persons were successful tort plaintiffs." *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999). Because, in 1859, in Kansas, no statute broadly authorized judges to impose restitution in criminal cases, Kansas defendants had a right to a civil jury trial on the issue of whether damages were caused by their crimes. See the Statutes of the Territory of Kansas, 1855, 47-54 (authorizing imprisonment, hard labor, fines, and castration as punishments, but not criminal

restitution). Instead, Kansas laws guaranteed a jury-trial on issues of fact arising in an action for the recovery of money or property: "Issues of fact arising in an action for the recovery of money, or specific real or personal property, shall be tried by a jury, unless a jury is waived or a reference be ordered." Territory of Kansas, General Laws, 1859, Ch. 25, Title IX, Ch.2, Art. I, §274.

As such, when Kansas enacted the criminal-restitution scheme, and permitted a judge to find the issue of damages in all criminal cases without a right to a jury-trial or the proper waiver thereof, it unconstitutionally abrogated the right to a civil jury trial on the issue of damages a criminal defendant in 1859 would have enjoyed under the same circumstances. Kansas' criminal restitution statutes therefore unconstitutionally abrogate a criminal defendant's section 5 jury trial right to a determination of damages.

But the Court of Appeals disagreed. It noted that, "[r]estitution ordered in criminal proceedings and civil damages are separate and independent remedies under Kansas law." *Brown*, Slip Op. at 16. It then concluded that because restitution is not a civil judgment, section 5 does not protect a criminal defendant's right to a jury determination of restitution. *Id.*

But this misses the point. While restitution and civil damages may be separate remedies *now*, this is only because of the very statutes Mr. Brown claims are unconstitutional. Prior to the enactment of the criminal restitution statute, crime victims or parties aggrieved by an accused's crime, had to pursue damage actions in civil court where the right of a jury attached. As such, in 1859, a jury would have determined whether an aggrieved party was entitled to recover money from an accused, and if so,

how much. That restitution is a "separate remedy" now doesn't change that fact; instead, it is the very thing about which Mr. Brown complains.

Moreover, as Judge Leben pointed out in his dissent in *Robison*, "although restitution 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 restitution paid.'" 2020 WL 3487475 at *17 (Leben, J., *dissenting*) (citing *State v. Applegate*, 266 Kan. 1072, 1078-79, 976 P.2d 936 [1999], and K.S.A. 60-4304(b)). Indeed, while "restitution" and "civil damages" are two separate remedies insofar as they provide alternative mechanisms for parties aggrieved by crimes to recover their losses; they both get at the same thing—the amount of loss caused by a crime. As such, regardless of which "remedy" or mechanism the aggrieved party pursues, the total amount compensable does not change. Indeed, a party cannot recover restitution and civil damages covering the same amount. Rather, the aggrieved party may only be paid once for its loss. As such, restitution and civil damages aren't so much separate remedies, as a single remedy split into two procedures for obtaining it. The procedure by which a criminal judge decides and orders restitution on a question of fact historically within the civil jury's province is therefore unconstitutional.

As a second point, Mr. Brown noted that in criminal cases where restitution-like orders were entered, the jury determined the damages caused by the accused's crime. To a limited extent, common law did authorize criminal courts to impose restitution-like orders. But courts could only do this when a defendant had been convicted of a larceny-type offense. And those orders merely authorized the victim to retake his or her goods, or , in the alternative, take "the value of them out of the offender's goods."

Blackstone, Commentaries on the Laws of England, 362 (1769); see also *State v. Ragland*, 171 Kan. 530, 534-35 (1951) (summarizing common law). However, in Kansas in 1859, the jury had a right to determine the amo9unt of damages caused by a larceny-type offense. Territorial criminal procedure required:

> Where the indictment charges an offense against the property of another by robbery, theft, fraud, embezzlement or the like, the jury, on conviction, shall ascertain and declare in their verdict the value of the property taken, embezzled or received and the amount restored, if any, and the value thereof. Territory of Kansas, General Laws, 1859, Chapter 27, Title IX, § 219.

As such, even in situations where the damages caused by an accused's crime *were* a part of a criminal case, the accused still had a right to have the jury determine the value of the loss caused. As Judge Leben explained, "whether a defendant's crime caused damage or loss to a victim is an issue of fact," and in 1859, "juries in criminal cases involving theft offenses had to make a factual finding about the value of the stolen property." *Robison*, 2020 WL 3487475, at *18 (Leben, J., *dissenting*).

Criminal restitution statutes were enacted in the United States in the 1980s when the United States Congress enacted the Victim and Witness Protection Act. See Matthew Dickman, *Should Crime Pay: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1687-88 (2009). Prior to 1995, Kansas statutes only authorized criminal restitution as a condition of probation, or parole; restitution was not permitted as part of a defendant's general sentence. Compare K.S.A. 1994 Supp. 21-4603d(a) with K.S.A. 1995 Supp. 21-4603d(a); see also, *State v. DeHerrera*, 251 Kan. 143, Syl. ¶5, 153-55 (1992) (interpreting Kansas' early-1990's restitution statutes). The

purpose was to "streamlin[e] the cumbersome processes of our law" and to enable an aggrieved party to recover losses at the same time as the prosecution of the underlying crime. See *Bach*, 172 F.3d at 523. Thus, criminal restitution statutes were enacted over 100 years after Kansas' founding—to do exactly what civil damages actions in 1859 already did: to compensate an aggrieved party for damages caused by a crime. This time, without the cumbersome process of separate litigation. See *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000) (criminal restitution "avoid[s] the need for the victims of crime to file separate civil-suits litigation.")

Kansas' criminal restitution statutes streamlined the civil damages remedy into a criminal case. This, in and of itself, would likely be permissible. The statutes are not unconstitutional in violation of section 5 because they allow recovery in a criminal case, they are unconstitutional because they abrogate the accused's right to have a jury determine the amount of losses caused. Mr. Brown merely points to the theft case statute to indicate that even when matters of loss were subsumed into the criminal case, the jury retained decision making power over the value of the alleged loss.

Moreover, as Judge Leben explained, the fact-finding function of juries to determine loss in theft-like cases "is equivalent to the damage-or-loss finding function for restitution." *Robison*, 2020 WL 6487475, at *18 (Leben, J., *dissenting*.) And, as he pointed out, "[t]he 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 judgment." *Id.* Because a jury would have determined what amount of loss or damage—if any—a defendant's crime caused in 1859, the Kansas criminal restitution

statutes adopted over 100 years later violate the section 5 right of defendants to have a jury make that determination today.

Kansas' criminal restitution statutes violate Apprendi and the Sixth Amendment

Mr. Brown argued—in addition to, and in the alternative to his section 5 argument—that restitution is a "penalty" or "punishment" for a crime, and therefore he had a right to jury determination of the amount of loss, if any, caused by his crimes. This Court has held that criminal restitution is a part of the defendant's criminal sentence. *State v. Hall*, 298 Kan. 978, 319 P.3d 56 (2014). And, according to this Court, restitution is imposed for the punitively-tinged purposes of deterring and rehabilitating criminal offenders. *State v. Applegate*, 266 Kan. 1072, 1075, 976 P.2d 936 (1999). Because restitution is a penalty and/or punishment, Mr. Brown contends he had a Sixth Amendment right to have a jury determine what restitution—if any—he owed, or else the right to knowingly waive a jury determination on that issue.

But the Court of Appeals rejected Mr. Brown's argument on the grounds that even if it were to agree that restitution is punishment (which it did not), that the imposition of restitution does not increase the maximum or minimum sentence. *Brown*, Slip Op. at 18. Because the amount of restitution a defendant must pay has no set mandatory minimum or maximum, the Court of Appeals reasoned, there is no right to a jury trial on the amount owed. *Id.*

But as Judge Leben pointed out, the United States Supreme Court has explained what "statutory maximum" in the context of *Apprendi* means, and its meaning is not so narrow as the Court of Appeals would have us believe. *Robison*, 2020 WL 3487475, at *14

(Leben, J., *dissenting*.) In *Blakely v. Washington*, the United States Supreme Court explained that the statutory maximum is the greatest sentence the judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the accused.* 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). Because a judge cannot order restitution without making findings of fact that go beyond the jury's verdict or the admissions of the accused, any order of restitution is an increase beyond the statutory maximum as the United States Supreme Court defined it in *Blakely*, and applied that definition in *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L.Ed.2d 318 (2012). For instance, in Mr. Brown's case, the jury did not make a finding that he'd casued a particular amount of harm to the victims, nor did the complaint that charged him allege any particular amount of harm. Notwithstanding this, Kansas statutes required the district judge to impose criminal restitution based upon his factual findings regarding: (1) whether Mr. Brown's crime caused damage to another person; and (2) the amount of those damages. K.S.A. 21-6604(b); K.S.A. 21-6607(c)(2); *State v. Hall*, 297 Kan. 709, 712, 304 P.3d 677 (2013). Because the statutes required fact finding that increased the sentence from the statutory maximum in the absence of those findings—which would be a restitution value of zero—the statutes unconstitutionally abrogated Mr. Brown's Sixth Amendment right to have a jury determine sentence-enhancing facts other than the existence of a prior conviction.

Restitution is a criminal penalty imposed for partially punitive purposes. Moreover, because it cannot be imposed in a criminal case without judicial fact finding that goes beyond the jury's verdict or the factual basis for an accused's plea, it increases

an accused's penalty beyond the "statutory maximum" as that term-of-art is defined in *Blakely*. As such, Kansas' criminal restitution statutes, which permit a judge to make penalty-enhancing factual findings that increase the statutory maximum, violate the Sixth Amendment to the United States Constitution, *Apprendi*, *Alleyne*, and *Southern Union*.

Conclusion

For the aforementioned reasons, Mr. Brown asks this Court to reverse the decision of the Court of Appeals and hold that Kansas' criminal restitution statutes are unconstitutional in violation of section 5 of the Kansas Constitution Bill of Rights, and the Sixth Amendment to the United States Constitution.

CONCLUSION

For all of these reasons, Mr. Brown respectfully asks this Court to reverse his convictions and sentence, and to remand for further proceedings.

Respectfully submitted,

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Court of Appeals Opinion

State v. Brown, No. 120,590 (Kan. App. 2020)

NOT DESIGNATED FOR PUBLICATION

No. 120,590

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MAURICE A. BROWN,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JOHN J. KISNER, JR., judge. Opinion filed April 17, 2020. Affirmed in part, vacated in part, and remanded with directions.

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

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BRUNS, P.J., MALONE and GARDNER, JJ.

PER CURIAM: Following a four-day jury trial, Maurice A. Brown was convicted of two counts of aggravated robbery and eight counts of kidnapping. On appeal, Brown contends that the district court erred by denying his *Batson* challenge to the striking of five minority jurors. In addition, he contends the district court erred by characterizing a prior juvenile adjudication in Michigan for armed robbery as a person felony at sentencing. Brown also attempts to raise two additional constitutional issues for the first time on appeal. For the reasons set forth in this opinion, we affirm Brown's convictions

and the order of restitution. However, we vacate Brown's prison sentence and remand this case to the district court for resentencing consistent with this opinion.

FACTS

On January 30, 2015, two armed men robbed a Red Sky Wireless phone store in Wichita. In so doing, the men bound the arms and legs of two store employees with zip ties and duct tape. The robbers escaped with cash and cell phones. Two months later, on March 29, 2015, two armed men robbed another Red Sky Wireless store in Wichita. Similar to the previous robbery, the men bound the arms and legs of six people in the store. Again, the robbers escaped with cash and cell phones.

The State charged Maurice A. Brown—an African-American male—with 5 counts of aggravated robbery and 14 counts of kidnapping. Subsequently, following a preliminary hearing, the complaint was amended to two counts of aggravated robbery and eight counts of kidnapping. After several delays, the district court commenced a four-day jury trial on October 23, 2018.

During voir dire, Brown raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In doing so, Brown noted that the State had used five of its eight peremptory challenges to strike four African-American jurors and one multi-ethnic juror from the panel. In response, the State offered several race-neutral explanations for the strikes. In addition, the State noted that three Hispanic jurors remained on the panel and that the alternate juror was African-American. The district court accepted the State's explanations as supported by the statements and actions of the potential jurors and denied the *Batson* challenge.

After deliberation, the jury found Brown guilty of all the charges. Later, the State presented the district court with a presentencing report that showed Brown's criminal

history score to be a "D" and classifying a prior juvenile adjudication in Michigan for armed robbery as a person felony. Prior to sentencing, the district court overruled Brown's objection to this classification. The district court then imposed a presumptive 200-month prison sentence. In addition, the district court additionally ordered—without objection—that Brown pay restitution. Thereafter, Brown timely filed a notice of appeal.

ANALYSIS

On appeal, Brown raises four issues. First, whether the district court erred in denying his *Batson* challenge. Second, whether the district court erred by classifying his prior juvenile adjudication in Michigan for armed robbery as a person felony. Third, whether the district court violated section 5 of the Kansas Constitution Bill of Rights at sentencing. Fourth, whether the district court violated his constitutional rights by ordering restitution. In response, the State contends that the district court did not err and that Brown's convictions as well as his sentence should be affirmed.

Batson *Challenge*

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution applies to the State's privilege to strike prospective jurors through peremptory challenges. *State v. Kettler*, 299 Kan. 448, 461, 325 P.3d 1075 (2014). Under *Batson v. Kentucky*, we use a three-step analysis in considering whether the State exercised its peremptory strikes based on purposeful racial discrimination. *Batson*, 476 U.S. at 93-98; *Kettler*, 299 Kan. at 461-62. Ultimately, we must determine if the State exercised the peremptory strike, whether it did so for legitimate or discriminatory ends. *State v. Dupree*, 304 Kan. 43, 60, 371 P.3d 862 (2016).

The first step of the analysis requires the defendant to make a prima facie showing that the prosecutor's challenge was made on the basis of race; this step raises a question

of law, and appellate review of this issue is unlimited. *State v. Gonzalez-Sandoval*, 309 Kan. 113, 121, 413 P.3d 850 (2018); *Dupree*, 304 Kan. at 57. Here, the parties do not contest that Brown made a prima facie showing that the State exercised peremptory challenges based on race. The district court allotted each party eight peremptory strikes to use on a pool of 28 jurors. In addition, the parties selected an alternate juror. The prosecution used five of its eight peremptory challenges on four African-American jurors and one multi-ethnic juror. Thus, we agree with the district court that Brown met his initial burden of establishing a prima facie case. See *State v. Pham*, 281 Kan. 1227, 1237-38, 136 P.3d 919 (2006) (finding a prima facie case when a minority defendant demonstrated that the State struck multiple minority jurors).

Once a prima facie showing is made, the second step of the analysis shifts the burden to the State to articulate a legitimate—race-neutral—reason for using peremptory challenges to strike the minority jurors. The reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. *Gonzalez-Sandoval*, 309 Kan. at 122; *Dupree*, 304 Kan. at 58. As the United States Supreme Court has held, what is meant "by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. 765, 769, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). Indeed, the Kansas Supreme Court has held that the State "carries a relatively low burden to provide a race-neutral reason for a strike—the justification must be facially valid, but it need not necessarily be plausible or persuasive." *Dupree*, 304 Kan. at 59.

A review of the record reveals that the State articulated race-neutral reasons for striking the African-American and multi-ethnic jurors. In fact, Brown does not contend that the State failed to articulate race-neutral reasons for striking four of the five jurors. Instead, Brown argues that the State articulated a discriminatory reason for striking J.N.—who was the multi-ethnic member of the jury panel. Thus, we will focus our attention on those portions of the trial transcript that set out the statements made by J.N.

during voir dire as well as on the reasons given by the State in striking her from the jury panel.

On the second day of voir dire, Brown's attorney asked whether any prospective jurors had concerns about the possibility of finding an innocent person to be guilty of a crime. In response, J.N. stated:

> "With the way we are in America right now, I have a great fear of that. You hear about people . . . being in prison and then it is was a case of mistaken identity. It was a coincidence, the wrong place at the wrong time, maybe not following up with all of the evidence or whatever it was. At this time it is so important to do follow up and look at all of the evidence. And we as our responsibility to look at everything. That's why I am in fear of putting an innocent person away for . . . no offense or whatever . . . people of color especially right now. And my mom is—I am of mixed race and so that is so important to me that we get everything right.
>
> "Do it right because we want to follow the steps and do everything by the book as we should. And if that is what it takes, then that's how we should do it because putting an innocent person away is the worst thing that can happen to that person. Think of the time they spend in jail, the years they have. It is like it will make them seek revenge if they want to and it will be a vicious cycle. So, in doing the right thing and doing it like we should, look at all of the evidence and . . . there is nothing else involved other than the evidence, that's how we should do it."

After Brown asserted his *Batson* challenge, the State provided multiple reasons for striking J.N. In particular, the State noted J.N.'s concerns about "locking up" people and her "microscopic view" of the criminal justice system. In addition, the State noted that J.N. had failed to fully disclose her employment status on her juror information card; had smiled when Brown's attorney talked; and had expressed an interest in legal drama television shows. Further, the State noted that J.N. had self-identified as "mixed race" and suggested that she had indicated "biases" or a "preference" toward African-Americans.

Brown objects to the State's last reason, arguing that it is sufficient to show the prosecutor's discriminatory intent in striking J.N. from the jury panel. Specifically, Brown argues that the prosecutor *assumed* that Brown had a bias towards a specific minority group. However, in response, the State notes that J.N. brought up her own ethnic or racial identity when articulating her views on wrongful incarceration.

Equal protection principles preclude the State from striking jurors who share the racial identity of the defendant based on *assumptions* that those jurors will be biased towards their own race. *Flowers v. Mississippi*, 588 U.S._, 139 S. Ct. 2228, 2241-42, 204 L. Ed. 2d 638 (2019); see also *Batson*, 476 U.S. at 97-98. In *Flowers*, the United States Supreme Court found:

> "In some of the most critical sentences in the *Batson* opinion, the Court emphasized that a prosecutor may not rebut a claim of discrimination 'by stating *merely* that he challenged jurors of the defendant's race *on the assumption—or his intuitive judgment*—that they would be partial to the defendant because of their shared race.' . . .'The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors *on the basis of such assumptions, which arise solely from the jurors' race*.'" (Emphases added.) *Flowers*, 130 S. Ct. at 2241 (quoting *Batson*, 476 U.S. at 97-98).

Although it appears that the State may have misinterpreted J.N.'s heartfelt statement regarding the wrongful incarceration of African-Americans, we do not find that the State relied on assumptions based purely on her ethnicity. Instead, the State offered an explanation grounded upon J.N.'s own statements. Although we do not necessarily find the State's explanation for striking J.N. to be persuasive, we find that the reasons given for exercising a peremptory challenge provide a facially valid and race-neutral reason to justify the strike.

Finally, the third step in the analysis is whether the objecting party carried his burden of proving purposeful discrimination. This decision often hinges on credibility determinations and weighing the evidence—matters that the district court is in a better position to decide than an appellate court looking at a cold record. Accordingly, we review the district court's decisions regarding whether Brown has shown purposeful discrimination on the part of the State under an abuse of discretion standard. *Gonzalez-Sandoval*, 309 Kan. at 126; *Dupree*, 304 Kan. at 58.

Judicial discretion is only abused when the district court's action was arbitrary, fanciful, or unreasonable. In other words, when no reasonable person would agree with the district court's decision or it made an error of law or fact. *State v. Schaal*, 305 Kan. 445, 449, 383 P.3d 1284 (2016); see *State v. Brown*, 51 Kan. App. 2d 876, 879-80, 357 P.3d 296 (2015). The party asserting an abuse of discretion—in this case Brown—bears the burden of establishing such abuse. *Schaal*, 305 Kan. at 449.

Brown points to the fact that five of the eight peremptory challenges exercised by the State were used to strike African-American and multi-ethnic jurors. Specifically, Brown suggests that "the sheer number of the prosecution's minority strikes, itself, served as evidence of its discriminatory intent." Although statistical evidence is one factor to consider, our Supreme Court has warned against placing determining emphasis on any one factor. Rather, when evaluating for purposeful discriminatory intent, district courts must look at the circumstances and subjectively evaluate the credibility of the prosecutor's reasons for each challenged strike. *State v. Trotter*, 280 Kan. 800, 812-13, 127 P.3d 972 (2006).

In this case, the record reveals that the State offered several race-neutral explanations for striking each of the African-American and multi-ethnic jurors. The district court found these explanations to be supported by the prospective jurors' statements and actions. As a result, the district court concluded that there was no

purposeful discrimination for any of the State's strikes. Giving deference to the district court's findings—which it was uniquely positioned to make—we find no abuse of discretion. Rather, we conclude that the district court's determination that there had not been purposeful discrimination was reasonable and was not based on either a mistake of law or fact.

Classification of Prior Juvenile Adjudication

Next, Brown contends that his sentence was illegal because the district court classified his prior juvenile adjudication in Michigan for armed robbery as a person felony. Brown argues that, because the elements of Michigan armed robbery are broader than the Kansas robbery or aggravated robbery statutes, the Michigan adjudication must be scored as a nonperson felony for sentencing purposes. As a result, he suggests that his criminal history score should be "G" instead of "D" as used by the district court at sentencing.

Whether the district court properly classified Brown's prior convictions as person or nonperson crimes for criminal history purposes involves interpretation of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2019 Supp. 21-6801, et seq. Because statutory interpretation presents a question of law, our review is unlimited. *State v. Wetrich*, 307 Kan. 552, 555, 412 P.3d 984 (2018). To classify an out-of-state conviction or juvenile adjudication for criminal history purposes, Kansas courts have been instructed to follow two steps. First, we must categorize the prior conviction or juvenile adjudication as a misdemeanor or a felony by deferring to the convicting jurisdiction's classification of the crime. Second, we must determine whether the prior conviction or juvenile adjudication is a person or nonperson offense. K.S.A. 2019 Supp. 21-6811(e); see *Wetrich*, 307 Kan. at 556.

Here, Brown only challenges the second step of the classification process so we will move to that step in our analysis. To determine whether a prior conviction or juvenile adjudication is a person or nonperson offense, we must look to a comparable offense or offenses in Kansas in effect at the time the defendant committed the current crime of conviction. K.S.A. 2019 Supp. 21-6811(e)(3). If Kansas has no comparable offenses, the out-of-state conviction or juvenile adjudication must be classified as a nonperson crime—even when such crime is inherently a person crime. *Wetrich*, 307 Kan. at 561-62.

In *Wetrich*, 307 Kan. at 561-62, the Kansas Supreme Court explained:

> "[I]interpreting 'comparable offenses' in K.S.A. 2017 Supp. 21-6811(e)(3) to mean that the out-of-state crime cannot have broader elements than the Kansas reference offense—that is, using the identical-or-narrower rule—furthers the KSGA's goal of an even-handed, predictable, and consistent application of the law across jurisdictional lines. Cf. *Johnson*, 135 S. Ct. at 2562-63 (discussing goal of doctrine of stare decisis to effect even-handed, predictable, and consistent application of the law). Accordingly, we hereby adopt that interpretation. For an out-of-state conviction to be comparable to an offense under the Kansas criminal code, the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced."

In making the comparison between an out-of-state offense and a comparable Kansas crime, we are to consider not only the plain language of the statute, but we are also to consider relevant statutory definitions and the interpretation of the statutory elements. See *State v. Gensler*, 308 Kan. 674, 680-81, 423 P.3d 488 (2018). If Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state crime must be classified as a nonperson crime. Likewise, if the elements of the out-of-state crime are broader than the comparable Kansas offense, it must be classified as a nonperson crime regardless of the plain statutory language. *Wetrich*, 307 Kan. 552, Syl. ¶¶ 2-3.

Because there is no dispute that Brown's prior offense in Michigan was a felony, we turn to the question of whether it should be classified as a person or nonperson felony for the purposes of determining his criminal history score. Here, Brown contends that his prior Michigan juvenile adjudication for armed robbery is not comparable to a Kansas offense because Michigan's armed robbery statute is broader than Kansas' robbery and aggravated robbery statutes. The parties agree that Mich. Comp. Laws § 750.529, § 750.530, and § 750.357 define the crime committed by Brown in Michigan. These statutes provide:

> "Sec. 529. A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years." Mich. Comp. Laws § 750.529.

> "Sec. 530. (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

> "(2) As used in this section, 'in the course of committing a larceny' includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." Mich. Comp. Laws § 750.530.

> "Sec. 357. LARCENY FROM THE PERSON—Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years." Mich. Comp. Laws § 750.357.

In contrast, at the time Brown committed his current crimes of conviction, the Kansas robbery statutes stated:

> "(a) Robbery is knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person.
>
> "(b) Aggravated robbery is robbery, as defined in subsection (a), when committed by a person who:
>
> (1) Is armed with a dangerous weapon; or
>
> (2) inflicts bodily harm upon any person in the course of such robbery.
>
> "(c) (1) Robbery is a severity level 5, person felony.
>
> (2) Aggravated robbery is a severity level 3, person felony." K.S.A. 2014 Supp. 21-5420.

First, Brown contends that the Michigan statutes are broader because placing another in fear is sufficient to commit the crime of robbery. See *People v. Hearn*, 159 Mich. App. 275, 281, 406 N.W.2d 211 (1987). Although Brown contends that the same is not true of the Kansas robbery statutes, our Supreme Court has found that robbery can be committed merely by placing another person in fear. See *State v. Moore*, 269 Kan. 27, 33, 4 P.3d 1141 (2000) (finding that the charge of aggravated robbery was properly submitted to the jury when the "defendant orchestrated a situation intended to intimidate the young woman into surrendering her car keys"). Hence, we do not find the Michigan statutes to be broader than the Kansas statutes for this reason.

Second, Brown contends that the Michigan robbery statutes are broader than the Kansas robbery statutes because a person can be convicted of robbery based on using force to accomplish an escape. See *People v. Letham*, No. 269789, 2007 WL 1687468, at *1 (Mich. App. 2007) (unpublished opinion) (Mich. Comp. Laws § 750.530[2] defines the crime of robbery to include "'in flight or attempted flight after the commission of the larceny.'"). In contrast, the Kansas robbery statutes do not permit a conviction based on acts which occur after the taking of property. See *State v. Plummer*, 295 Kan. 156, Syl.

¶ 3, 165, 283 P.3d 202 (2012) (When violence is used to retain property to effectuate an escape, such an act is a theft rather than robbery.).

As the State candidly recognizes, a panel of this court has previously decided a similar issue in *State v. Heard*, No. 118,569, 2018 WL 6580497 (Kan. App. 2018) (unpublished opinion), *rev. denied* September 11, 2019. In *Heard*, the panel found that the Arkansas robbery statute was broader than the Kansas robbery statute because the Arkansas statute allows a person to be convicted of robbery based on acts occurring after the taking of property to support a robbery conviction. 2018 WL 6580497, at *3. Because the panel concluded that because the Arkansas robbery statute was broader than the Kansas robbery statute, it found that they were not comparable for the purposes of determining the defendant's criminal history score. 2018 WL 6580497, at *4, 6. Although we recognize that *Heard* is not binding authority, we do find it to be persuasive regarding the current status of Kansas law.

We agree with the State that there are incidences where it is appropriate to compare an out-of-state criminal conviction or juvenile adjudication to more than one Kansas offense. See *State v. Williams*, No. 114,778, 2019 WL 406296 (Kan. App. 2019) (unpublished opinion). Moreover, it seems logical to conclude that certain offenses—like homicide, rape, and robbery—are inherently person crimes. However, we must follow the precedent of our Supreme Court unless there is some indication that the court is departing from its previous position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). Although we are hopeful that our Supreme Court might recognize that some offenses are inherently person crimes, we do not have any indication that it is departing from *Wetrich* at this point in time. Thus, because this is a direct appeal, we must follow *Wetrich*.

Applying *Wetrich* to this case, we find that the Michigan robbery statutes are broader than the Kansas robbery statutes. As a result, we conclude that the district court was compelled under *Wetrich* to classify Brown's prior juvenile adjudication for armed

robbery in Michigan as a nonperson crime. 307 Kan. at 561-62. Accordingly, we vacate Brown's sentence and remand this matter for resentencing after recalculating his criminal score in a manner consistent with this opinion.

Judicial Findings of Prior Criminal History

Next, Brown contends that the district court's determination of his criminal history score and the resulting sentence violated his constitutional right to a jury trial under section 5 of the Kansas Constitution Bill of Rights. It is undisputed that Brown did not present this issue to the district court. Instead, he presents it for the first time on appeal. So, we must first determine whether this issue is properly before us.

Whether an issue has been properly preserved for appeal is a question of law that this court reviews de novo. *State v. Haberlein*, 296 Kan. 195, 203, 290 P.3d 640 (2012). As a general rule, unless an issue is first presented to the district court, it is not preserved for appeal. *State v. Cheffen*, 297 Kan. 689, 696, 303 P.3d 1261 (2013). There are three exceptions to the general rule that a party cannot raise a constitutional claim for the first time on appeal. An appellate court may consider the new claim if: (1) it involves a pure legal question arising on proved or admitted facts that's finally determinative of the case, (2) considering it is necessary to serve the ends of justice or prevent the denial of fundamental rights, or (3) the district court was right for the wrong reason. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015).

The right to a jury trial is a fundamental right under section 5 of the Kansas Constitution Bill of Rights. *State v. Rizo*, 304 Kan. 974, 979-80, 377 P.3d 419 (2016). This constitutional right is codified in K.S.A. 22-3403(1), which requires that all felony cases be tried to a jury unless the defendant and prosecuting attorney—with the consent of the district court—submit the matter to a bench trial. Here, although Brown did not raise this issue before the district court, we may consider it nonetheless because it

implicates a claim to the fundamental right to a trial by a jury. See *State v. Beaman*, 295 Kan. 853, 856-58, 286 P.3d 876 (2012). Therefore, we find that a decision on the merits would serve the ends of justice.

Turning to the merits, Brown suggests that "prior to Kansas' statehood, American common law required any fact which increased the permissive penalty for a crime—inclusive of an offender's prior criminal convictions—to be proven to a jury beyond a reasonable doubt." As such, he argues that "the sentencing scheme set out by the KSGA—in which judicial findings of criminal history elevate a defendant's presumptive prison sentence—is unconstitutional." Nevertheless, as the parties recognize, an identical argument was raised and rejected by a panel of this court in *State v. Valentine*, No. 119,164, 2019 WL 2306626, at *6 (Kan. App. 2019) (unpublished opinion), *rev. denied* December 17, 2019.

We do not agree with Brown that *Valentine* was wrongly decided. Moreover, we note that our Supreme Court had the opportunity to review the issue in *Valentine* but chose to deny the petition for review filed in that case. Further, a similar argument has been rejected by the United States Supreme Court with respect to the United States Constitution in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Likewise, the Kansas Supreme Court has rejected the argument that the KSGA violates the Sixth and Fourteenth Amendments to the United States Constitution. See *State v. Ivory*, 273 Kan 44, 45-48, 41 P.3d 781 (2002).

Similar to *Valentine*, Brown has failed to provide authority establishing that section 5 of the Kansas Constitution Bill of Rights requires jury findings regarding prior criminal convictions that the Sixth Amendment does not provide. Instead, "[t]his court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous position." *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). Thus, we find Brown's argument that section 5 of the Kansas

Constitution Bill of Rights should be interpreted to provide a greater right than set forth in the Sixth Amendment to the United States Constitution to be unpersuasive.

Judicial Order of Restitution

Finally, Brown contends that the district court violated his constitutional right to a jury trial by imposing restitution under K.S.A. 2019 Supp. 21-6604(b)(1). Specifically, Brown argues that the statute allowing judicially determined restitution in criminal cases violates a criminal defendant's common-law right to a jury trial under section 5 of the Kansas Constitution. In the alternative, he argues that the determination of the amount ordered by a judge violates the Sixth Amendment to the United States Constitution.

Again, Brown failed to raise this issue with the district court. As such, we could refuse to consider this issue for lack of preservation. See *Godfrey*, 301 Kan. at 1043. Nevertheless, as we did with the previous issue, we find that a decision on the merits would serve the ends of justice because Brown is asserting a violation of his fundamental right to a jury. See *Beaman*, 295 Kan. at 856-58. Therefore, we find that a decision on the merits would serve the ends of justice.

Like any constitutional claim, the question of whether K.S.A. 2019 Supp. 21-6604(b)(1) violates "[t]he right of trial by jury" as provided in section 5 of the Kansas Constitution Bill of Rights is a legal question subject to unlimited review. See *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132-33, 442 P.3d 509 (2019). It is undisputed that section 5 preserves the common-law right to a jury trial as it existed in 1859 when the Kansas Constitution was ratified. So, section 5 applies only if a jury would have decided the issue in Kansas in 1859.

For some issues, it is clear that section 5 applies. For example, it applies to fact questions involving "liability and actual damages in civil cases and guilt in criminal

cases," because a jury in Kansas would have decided those issues in 1859. *State v. Love*, 305 Kan. 716, 735-36, 387 P.3d 820 (2017). But it is less clear that section 5 applies to restitution. Brown offers two alternative reasons why he believes restitution implicates the right to a jury trial under section 5 of the Kansas Constitution Bill of Rights. However, we find neither of these reasons to be persuasive.

As our Supreme Court has held, "[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). Consequently, because restitution is not a civil remedy, Brown's analogies to juries historically deciding damages in civil tort cases are misplaced. Thus, we conclude that the determination of the amount of restitution in a criminal case is not subject to the right to a jury trial under section 5 of the Kansas Constitution Bill of Rights.

In addition, we find Brown's alternative argument that the Sixth Amendment to the United States Constitution requires that a jury determine the amount of restitution in a criminal case to be similarly unconvincing. In support of his argument, Brown cites *Apprendi*, which holds that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476. In addition, he cites *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), which holds that facts that increase a mandatory minimum penalty must be submitted to the jury.

A similar argument was made by the defendant in the case of *State v. Huff*, 50 Kan. App. 2d 1094, 336 P.3d 897 (2014), *rev. denied* 302 Kan. 1015 (2015). In *Huff*, a panel of our court held:

> "Restitution, although part of a defendant's sentence, is not punishment; even if restitution were considered punishment, it does not exceed the statutory maximum of a defendant's sentence." 50 Kan. App. 2d at 1099 (collecting additional cases).

Similarly, in *State v. Arnett*, another panel of our court reached the same conclusion, holding:

> "[R]estitution is not considered a punishment in the same way incarceration or a find paid to the State would be. Rather, it is a rehabilitative and compensatory tool designed to aid both convicted criminals and their victims ..... Even if restitution were considered punitive and, thus, punishment [t]he Kansas statutes governing restitution impose neither mandatory minimum amounts nor maximum amounts So even if restitution were punitive, the scheme does not entail mandatory minimums or maximums triggering the protections set out in . . . *Apprendi*." No. 112,572, 2018 WL 2072804, at *2 (Kan. App. 2018) (unpublished opinion), *rev. granted* 308 Kan. 1596 (2018).

We agree with our court's prior rulings regarding this issue. While it is undisputed that restitution is part of a defendant's sentence, this does not mean that restitution is punishment. See *State v. McDaniel*, 292 Kan. 443, 446, 254 P.3d 534 (2011); *State v. Hall*, 45 Kan. App. 2d 290, 298, 247 P.3d 1050 (2011), *aff'd* 297 Kan. 709, 304 P.3d 677 (2013). Instead, by definition, restitution is a form of restorative justice intended to return the victim of a crime—to the extent possible to do so—back in the position that he or she was in prior to the commission of the criminal act. See Black's Law Dictionary 1571 (11th ed. 2019) (defining restitution, in part, as: "Return or restoration of some specific thing to its rightful owner or status. 4. 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."). Unlike a criminal fine, restitution benefits—and flows to—the victim of the crime who suffered the injury and not to the government. See *Applegate*, 266 Kan. at 1076 (noting that, while restitution may serve a rehabilitative or deterrence function, it is distinguishable from

criminal fines—which are punitive in nature.) (citing *State v. Iniguez*, 169 Ariz. 533, 537, 821 P.2d 194 [1991]).

Although district courts have some discretion in imposing restitution, it may only be awarded up to "the amount that reimburses the victim for the actual loss suffered." 266 Kan. at 1079. Moreover, a district court has the discretion to award less than the actual amount of loss if the plan of restitution is found to be unworkable. Specifically, K.S.A. 2019 Supp. 21-6604(b)(1) provides that a district 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 that would render a plan of restitution unworkable."

Even if we were to agree that restitution constitutes punishment or a criminal penalty, we find that the imposition of restitution does not increase a defendant's maximum or minimum sentence. As indicated above, a district court's discretion in awarding restitution to a victim is limited to the actual amount of loss or a lower amount if the plan of restitution is unworkable. Thus, we do not find that the Kansas restitution statutes violate a defendant's Sixth Amendment right to a jury trial and we conclude that the district court did not err in imposing restitution in this case.

We, therefore, affirm Brown's convictions as well as the restitution order entered by the district court, and we vacate Brown's prison sentence and remand this case for resentencing consistent with this opinion.

Affirmed in part, vacated in part, and remanded with directions.

Appendix A: Selections from General Laws of Kansas, 1862
Pages 268-69 and 341-342
Ch. 32, Sec. 220-224; Ch. 33, Sec. 278
(Full document available at:
https://www.google.com/books/edition/General_Laws_of_the_State_of_Kansas/mPBBAAAAYAAJ?hl=en&gbpv=0)

GENERAL LAWS

OF THE

STATE OF KANSAS,

IN FORCE AT THE CLOSE OF THE

SESSION OF THE LEGISLATURE

Ending March 6th, 1862,

TO WHICH IS APPENDED

THE CONSTITUTION OF THE UNITED STATES, TREATY OF CESSION, ORGANIC ACT, CONSTITUTION OF THE STATE OF KANSAS, AND THE ACT OF ADMISSION.

PUBLISHED BY AUTHORITY.

TOPEKA, KANSAS:
J. H. BENNET, STATE PRINTER.
Printed at the Gazette Co's Steam Printing House, Cincinnati, O.
1862.

among themselves, nor suffer others to converse with them, on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them.

Manner of charging jury by the judge.

SEC. 215. The judge must charge the jury in writing, when either party request it, and the charge shall be filed among the papers of the cause. In charging the jury, he must state to them all matters of law which are necessary for their information in giving their verdict. If he presents the facts of the case, he must inform the jury that they are exclusive judges of all questions of fact.

Jury may decide in court or retire.

Duty of officer in charge of jury.

SEC. 216. After hearing the charge, the jury may either decide in court or retire for deliberation. They may retire under the charge of an officer, sworn to keep them together in some private and convenient place, without food, except such as the court shall order, and not permit any person to speak or communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed upon their verdict, and return them into court or when ordered by the court. The officer shall not communicate to any person the state of their deliberations.

Of the Verdict and Judgment, and Proceedings thereon.

When verdict is agreed upon. Proceeding.

SEC. 217. When the jury have agreed upon their verdict, they must be conducted into court, by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court. If all do not appear the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term.

Jury to specify the degree of offence when defendant is found guilty.

SEC. 218. Upon the trial of any indictment for any offence, where by law there may be conviction of different degrees of such offence, the jury, if they convict the defendant, shall specify in their verdict of what degree of the offence they find the defendant guilty.

Jury to ascertain the value of the property stolen, &c.

SEC. 219. Where the indictment charges an offence against the property of another by robbery, theft, fraud, embezzlement, or the like, the jury, on conviction, shall ascertain and declare in their verdict the value of the property taken, embezzled or received, and the amount restored, if any, and the value thereof; but their failure to do so shall in no wise affect the validity of their verdict.

Jury to assess the punishment.

SEC. 220. In all cases of a verdict of conviction for any of-

fence, where by law there is any alternative or discretion in regard to the kind or extent of punishment to be inflicted, the jury may assess and declare the punishment in their verdict, and the court shall render a judgment according to such verdict, except as hereinafter provided.

When court shall assess the same.

SEC. 221. Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, or assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment, and render judgment accordingly.

When it may be increased by the court.

SEC. 222. If the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law for the offence of which the defendant is convicted, the court shall pronounce sentence and render judgment according to the lowest limit prescribed by law in such case.

When diminished.

SEC. 223. If the jury assess a punishment, whether of imprisonment or fine, greater than the highest limit declared by law for the offence of which they convict the defendant, the court shall disregard the excess, and pronounce sentence and render judgment according to the highest limit prescribed by law in the particular case.

Power of court to reduce punishment.

SEC. 224. The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in its opinion, the conviction is proper, but the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted.

Power of court to require security of the peace, &c., from convicts.

SEC. 225. The court before which any person shall be convicted of any criminal offence, shall have power, in addition to the sentence prescribed or authorized by law, to require such person to give security to keep the peace or be of good behavior, or both, for a term not exceeding two years, or to stand committed until such security be given.

Limitations of the preceding section.

SEC. 226. The last section shall not extend to convictions for writing or publishing any libel, nor shall such security be hereafter required by any court, upon any complaint, prosecution or conviction for any such writing or publishing.

When recognizance deemed to be broken.

SEC. 227. No recognizance given under the provisions of the second preceding section shall be deemed to be broken, unless the principal therein be convicted of some offence, amounting, in judgment of law, to a breach of such recognizance.

SEC. 228. After verdict of guilty or finding of the court

this Territory; and in any such cases, the larceny may be charged to have been committed, and may be indicted and punished in any county into or through which such stolen property shall have been brought.

What defendant may plead in his defense.

SEC. 275. Every person, prosecuted under the last section may plead a former conviction or acquittal for the same offence in another Territory, State or country; and if such plea be admitted or established, it shall be a bar to any other or further proceedings against such person.

Punishment of principals in the second degree, and accessories before the fact.

SEC. 276. Every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory to any murder or other felony before the fact, shall, upon conviction, be adjudged guilty of the offence in the same degree, and be punished in the same manner, as herein prescribed with respect to the principal in the first degree.

Who deemed accessories after the fact, and how punished.

SEC. 277. Every person who shall be convicted of having concealed any offender after the commission of any felony, or of having given to such offender any other aid, knowing that he has committed a felony, with the intent and in order that he may escape or avoid arrest, trial, conviction or punishment, and no other, shall be deemed an accessory after the fact, and, upon conviction, shall be punished by confinement and hard labor, not exceeding five years, or in the county jail, not exceeding one year nor less than six months, or by fine, not less than four hundred dollars, or by both a fine, not less than one hundred dollars, and imprisonment in a county jail, not less than three months.

Punishment for second offences.

SEC. 278. If any person convicted of any offence punishable by confinement and hard labor, or of petit larceny, or of any attempt to commit an offence which, if perpetrated, would be punishable by confinement and hard labor, shall be discharged either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished as follows: First, If such subsequent offence be such that, upon a first conviction, the offender would be punishable by confinement and hard labor for life, or for a term which under this act might extend to confinement for life, then such person shall be punished by confinement and hard labor for life: Second, If such subsequent offence be such that, upon a first conviction, the offender would be punishable by impris-

onment, for a limited term of years, then such person shall be punished by confinement and hard labor for the longest term prescribed upon a conviction for such first offence: Third, If such subsequent conviction be for petit larceny, or for an attempt to commit an offence which, if perpetrated, would be punishable by confinement and hard labor, the person convicted of such subsequent offence shall be punished by confinement and hard labor for a term not exceeding five years.

Convicts in other States liable to punishment for second conviction.

SEC. 279. Every person who shall have been convicted in any of the United States, or in any district or Territory thereof, or in a foreign country, of an offence which, if committed in this Territory, would be punishable by the laws of this Territory, by confinement and hard labor, shall, upon conviction for any subsequent offence within this Territory, be subject to the punishment herein prescribed upon subsequent convictions, in the same manner and to the same extent as if such first conviction had taken place in a court of this Territory.

Sentences of persons convicted of two or more offences.

SEC. 280. When any person shall be convicted of two or more offences, before sentence shall have been pronounced upon him for either offence, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior convictions.

When imprisonment may extend to lifetime; never to be less than one year.

SEC. 281. Whenever any offender is declared by law punishable, upon conviction, by confinement and hard labor for a term not less than any specified number of years, and no limit to the duration of such imprisonment or confinement is declared, the offender may be sentenced to imprisonment during his natural life, or for any number of years not less than such as are prescribed; but no person shall, in any case be sentenced to confinement and hard labor for any term less than one year.

No fine imposed when prisoner is sent to confinement.

SEC. 282. Whenever any offender is declared by law punishable, upon conviction, by confinement and hard labor, or by imprisonment in a county jail, or by fine, or by both such fine and imprisonment, it shall not be construed to authorize the imposition of a fine where the offender is sentenced to confinement and hard labor.

Punishment limited in certain cases. New provision.

SEC. 283. Whenever any offender is declared by law punishable, upon conviction, by confinement and hard labor, or

CERTIFICATE OF SERVICE

Counsel served this Supplemental Brief on the Sedgwick County District Attorney by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b), and by email at appeals@sedgwick.gov and on Derek Schmidt, Attorney General, by email at ksagappealsoffice@ag.ks.gov on the 30 day of November, 2020.

/s/ Jennifer C. Bates
Jennifer C. Bates #21269