

Restitution¹

Presented by:
Meryl Carver-Allmond, KSBIDS Training Director
Douglas County Bar Association
October 2022

I. Why does this matter for clients?

- A. Duty to inform of “direct consequences” of their conviction. *State v. Moody*, 282 Kan. 181 (2006). (“Direct consequences” are “definite, immediate, and largely automatic”.)
- B. Duty to push back against the criminal legal system where it puts costs on our clients.
- C. Fines and fees will impact your client’s quality of life.
 1. On probation:
 - a. Generally, probation can’t exceed 60 months or the maximum prison sentence that could be imposed, whichever is longer. K.S.A. 21-6608(6). But when a client has been ordered to pay restitution, the probation period may be continued as long as the restitution has not been paid. K.S.A. 21-6608(7).
 - b. The indefinite extension of probation impacts your client’s rights because many are not restored until their sentence (including the term of probation) is complete.
 - i. Expungement Eligibility: A person is not eligible to have their conviction expunged until a number of years (varied by crime) have passed since the sentence was satisfied **or the person was discharged from probation**. K.S.A. 21-6614.
 - ii. Right to Possess a Firearm: Under Kansas law, it is illegal for a convicted felon to possess a firearm until a number of years (varied by crime) have passed since the sentence was satisfied **or the person was discharged from probation**. K.S.A. 21-6304.
 - iii. Right to Vote or Serve As a Juror: Convicted felons are ineligible to vote or serve as a juror in any criminal or civil case. K.S.A. 21-6613(a). These ineligibilities extend until the person has **completed the terms of the sentence**. K.S.A. 21-6613(b).
 - c. The indefinite extension of probation is also an indefinite extension of your client’s incarceration liability.
 - i. It is unlikely a probationer would be revoked solely for their failure to pay restitution. *State v. White*, 41 Kan.App.2d 943 (2009) (It is

¹ This presentation was originally compiled with substantial assistance from Kansas Appellate Defenders Corrine Gunning and Jacob Nowak.

unconstitutional for the district court to revoke solely for failure to pay **unless** the district court finds “the probationer willfully refuses to pay, although he has the means to pay, or he does not make a bona fide effort to acquire the resources to pay.”)

- ii. However, probation could be revoked if your client violates another condition of their probation, even if the original term of probation has long elapsed.
- iii. Also, if your client is on felony probation, any subsequent conviction must be imposed consecutively pursuant to statute. K.S.A. 21-6606(c).

2. In prison:

- a. Your client can be garnished in prison even if they don’t make any money.
 - i. Anything over \$5 can be garnished.
 - ii. If their family sends money to them, that can be garnished.
 - iii. The only things that are exempt are state or federal benefits (*e.g.*, KPERS or VA benefits).
- b. It is difficult to pay bills on time in prison.
 - i. Payments must generally be made about a month in advance in order to be processed in time to pay by the due date.
 - ii. Payments are even more difficult to make during your client’s first few months in prison when their banking is being set up.
 - iii. When payments are late, they can go to collections, which can add as much as 30% in fees.
- c. Privacy laws can make it difficult for families to help. For example, DOC can’t tell your client’s mother how much is in his inmate account.
- d. Prisons only supply bare necessities. If your client is going to want “extras” like shampoo or chips from the canteen, \$5 can be a lot.

II. Restitution

A. What is restitution?

- 1. Restitution is a criminal remedy that is primarily intended to **compensate the victim for the actual loss suffered**, and also serves **deterrent** and **rehabilitative** functions. *State v. Hunziker*, 274 Kan. 655, 663 (2002).
- 2. Restitution is generally limited to “**damage or loss caused by the defendant’s crime.**” K.S.A. 21-6604(b)(1) and K.S.A. 21-6607(c)(2).
 - a. Damage or Loss
 - i. Restitution is not intended to **bestow a windfall** on the victim, and it is not meant to be **punitive**. The victim should not be compensated in excess because of their loss.
 - ii. “Because the primary purpose of restitution is to make the victim whole, and the other aim of restitution is rehabilitative **rather than**

punitive, payment beyond that necessary to compensate does not serve the Legislature’s purposes.” *State v. Applegate*, 266 Kan. 1072, 1076–77 (1999).

- iii. If your client has co-defendants, the district court should order your client to be joint and severally liable for the restitution order. (But, that said, beware when advising your client. The co-defendants may be acquitted, have their convictions reversed on appeal, or have their restitution declared unworkable.)
- iv. Restitution does not include costs associated with preparing for trial, such as witness fees or the preparation of photographic exhibits, but those expenses can be assessed as separate court costs. *State v. Gentry*, 310 Kan. 715, 736-38 (2019).

b. Caused By (Includes **causation-in-fact** and **legal causation**. *State v. Arnett*, 307 Kan. 648, 654-55 (2018).)

- i. Causation-in-fact requires proof that it is more likely than not that, **but for** the defendant’s conduct, the result would not have occurred.
- ii. Legal cause limits the defendant’s liability even when their conduct was the cause-in-fact, by requiring that the defendant is **only liable when it was foreseeable** that the defendant’s conduct might have created the risk of harm. (An intervening circumstance **may** absolve your client of liability **if** it was **not reasonably foreseeable**.)

c. The Defendant’s Crime

- i. A district court may only order restitution for losses or damages caused by the crime or crimes that the defendant was convicted of, unless the defendant agreed to pay restitution for crimes dismissed or never filed pursuant to a plea agreement. *State v. Dexter*, 276 Kan. 909, 919 (2003).
- ii. Tip: If your client must agree to pay restitution to plead, consider negotiating for qualifying language. For example, if you would like to retain the ability to argue workability, “**Subject to the imposition of a workable restitution plan**, the defendant agrees to pay restitution as a condition of sentence for the crimes pleaded to or dismissed herein.”

B. How is restitution proved?

1. The State has the burden of production.

- a. “It is the State’s burden to marshal the evidence necessary to justify the amount it seeks.” *State v. Hand*, 297 Kan. 734, 738 (2013).
- b. In other words, the State must produce evidence demonstrating the “**damage or loss caused by the defendant’s crime**.” K.S.A. 21-6604(b)(1) & K.S.A. 21-6607(c)(2).

2. The evidence must yield a defensible restitution figure.

- a. “Although the rigidity of proof of value the lies in a civil damage suit does

not apply in a criminal case, **the court’s determination of restitution must be based on reliable evidence which yields a defensible restitution figure.**” *State v. Hunziker*, 274 Kan. 655, 663 (2002).

- b. The court has broad discretion in selecting a method to determine probation—fair-market value, wholesale cost, or retail cost—but the method selected must fashion an award in the amount of actual damage or loss caused by the defendant’s crime. *State v. Hall*, 297 Kan. 70 (2013).
- C. Important restitution concepts and pointers.
- 1. Restitution is part of your client’s sentence. “Because restitution constitutes a part of the sentence, its amount can only be set by a sentencing judge **with the defendant present in open court.**” *State v. Hall*, 298 Kan. 978, 986 (2014).
 - 2. Restitution is generally mandatory.
 - a. “[T]he 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. Restitution shall be due immediately **unless...** the court finds compelling circumstances that would render restitution **unworkable**, either in whole or in part.” K.S.A. 2021 Supp. 21-6604(b)(1)
 - b. “In addition to any other conditions of probation... the court **shall** order the defendant to... make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant’s crime in accordance with K.S.A. 21-6604(b), and amendments thereto...”K.S.A. 2021 Supp. 21-6607(c)(2).
 - 3. Restitution is due immediately unless the court orders otherwise.
 - a. “Restitution shall be due immediately unless: (A) the court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments....” K.S.A. 2021 Supp. 21-6604(b)(1).
 - b. *State v. Roberts*, 57 Kan.App.2d 836 (2020) (judgment vacated and remanded for consideration of statutory amendments).
 - i. In *Roberts*, the Court of Appeals held that an order of an **amount of restitution** does not constitute a **plan established by the court for payment of restitution** and remanded the case for the district court to impose a restitution plan.
 - ii. On June 11, 2020, the legislature amended K.S.A. 21-6604 in response to *Roberts*.

Original Statute	Amended Statute
------------------	-----------------

<p>[T]he court <u>shall order</u> 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... <u>If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefor.</u></p> <p>K.S.A. 2019 Supp. 21-6604(b)(1).</p>	<p>[T]he court <u>shall order</u> the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime. <u>Restitution shall be due immediately unless: (A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part... If the court finds restitution unworkable, either in whole or in part, the court shall state on the record in detail the reasons therefor.</u></p> <p>K.S.A. 2020 Supp. 21-6604(b)(1).</p>
<p>If the court orders restitution, the restitution shall be a judgment against the defendant, which <u>may be collected by the court by garnishment</u> or other execution as on judgments in civil cases. If, <u>after 60 days</u> from the date restitution is ordered by the court, <u>a defendant is found to be in noncompliance with the plan established by the court for payment of restitution</u>, and the victim to whom restitution is ordered paid has not initiated proceedings in accordance with K.S.A. 60-4301 et seq., and amendments thereto, <u>the court shall assign an agent</u> procured by the attorney general pursuant to K.S.A. 75-719, and amendments thereto, <u>to collect the restitution on behalf of the victim</u>. The chief judge of each judicial district may assign such cases to an appropriate division of the court for the conduct of civil collection proceedings.</p> <p>K.S.A. 2019 Supp. 21-6604(b)(2)</p>	<p>If the court orders restitution, the restitution shall be a judgment against the defendant that <u>may be collected by the court by garnishment</u> or other execution as on judgments in civil cases. If, <u>after 60 days</u> from the date restitution is ordered by the court, <u>a defendant is found to be in noncompliance with the restitution order</u>, and the victim to whom restitution is ordered paid has not initiated proceedings in accordance with K.S.A. 60-4301 et seq., and amendments thereto, <u>the court shall assign an agent</u> procured by the judicial administrator pursuant to K.S.A. 20-169, and amendments thereto, <u>to collect the restitution on behalf of the victim</u>. The chief judge of each judicial district may assign such cases to an appropriate division of the court for the conduct of civil collection proceedings.</p> <p>K.S.A. 2020 Supp. 21-6604(b)(2)</p>

	<p>If a restitution order entered prior to the effective date of this act does not give the defendant a specified time to pay or set payment in specified installments, the defendant may file a motion with the court prior to December 31, 2020, proposing payment of restitution in specified installments. The court may recall the restitution order from the agent assigned pursuant to K.S.A. 20-169, and amendments thereto, until the court rules on such motion. If the court does not order payment in specified installments or if the defendant does not file a motion prior to December 31, 2020, the restitution shall be due immediately. K.S.A. 2020 Supp. 21-6604(b)(3)</p>
--	---

4. Practical pointers for repayment post-*Roberts*.

a. If your client will be on probation:

- i. Request a payment plan based on your client’s disposable income.
 - Make sure your client is realistic, not aspirational.
 - Put on your client’s testimony to establish what their disposable income is.
- ii. If your client’s probation is revoked, request a modification of the restitution plan to have it become due when they get to postrelease. See K.S.A. 22-3716(b)(3)(B)(iii) and (c)(1)(C) (Upon revocation of probation the district court may require the defendant to “serve the sentence imposed, or any lesser sentence...”)
- iii. If the district court doesn’t already order it, advise your client to direct the clerk to apply their probation payments towards restitution first.
- iv. Consider whether your district court might be receptive to discharging probation on the condition that outstanding costs will be sent to collections and discuss that with your client. While your client will likely incur garnishment and collection fees, if they have several years in prison hanging over them they may reasonably decide that traditional debt is a better option.

b. If your client will be going to prison:

- i. Request the district court make restitution payable upon the start of postrelease.
- ii. Alternatively, request a nominal monthly amount and present evidence to establish why the defendant cannot make greater

payments.

- iii. Advise your client to make sure that any forced restitution payments (5% of your client's salary if they are working in private industry) go to their individual restitution obligation, **not** to the general Crime Victims' Compensation Fund.
- c. Either way, try to utilize plea negotiations when applicable.
 - i. Courts generally prefer to adopt joint recommendations.
 - ii. Attempt to negotiate an agreement to request to have restitution payable in installments **or** restitution due at the start of postrelease.
5. Be sure to make a clear record of what you're talking about. Make sure it's clear what the judge is ordering restitution for. Consider putting an itemized list in the record, particularly if you think restitution will be a likely issue on appeal.

D. Workability of Restitution

1. Under K.S.A. 21-6604(b)(1), restitution is the rule and a finding that restitution is unworkable is the exception. *State v. Shank*, 304 Kan. 89, 94 (2016).
2. Your client carries the burden to come forward with **evidence of compelling circumstances** that render the restitution plan unworkable. *State v. Alcala*, 301 Kan. 832, 840 (2015).
3. Workability is evaluated on a case-by-case-basis.
 - a. Relevant factors include, but aren't limited to (1) defendant's income; (2) present and future earning capacity; (3) living expenses, debts, and other financial obligations; (4) dependents; (5) the length of time it will take to pay off restitution. *State v. Meeks*, 307 Kan. 813, 820 (2018).
 - b. When restitution is ordered in conjunction with a prison sentence and the restitution is not immediately payable, proof of unworkability requires proof of **inability to pay upon release**. *State v. Holt*, 305 Kan. 839, 842 (2017).
 - c. The indefinite extension of probation, as the result of a high restitution amount coupled with the defendant's poverty, can result in unworkability. *State v. Herron*, 50 Kan.App.2d 1058 (2014) (holding a restitution amount that would result in payments extending over 57 years was not workable). The statutory authority to extend probation indefinitely pursuant to K.S.A. 21-6608(6), and the statutory requirement for a workable restitution order, pursuant to K.S.A. 21-6604(b)(1), must be read together to "balance the competing interests of the payment of restitution to victims of crime and the provision of reasonable requirements to a probation that is to be rehabilitative, not punitive."
 - d. Can independent probation conditions result in unworkable restitution? Probably.
 - i. In *State v. Jones*, No. 118,458, 430 P.3d. 488, 2018 WL 6005157 (Kan. App. 2018) (unpublished opinion), the Court of Appeals reviewed the interplay of three probation conditions: (1) a \$27,000 restitution order; (2) a condition prohibiting the defendant from access to

financial/checking accounts—effectively limiting her to cash-only employment; and (3) the condition requiring valid “W-2” type employment—which is not generally associated with cash-only employment.

- ii. The Court of Appeals found the conditions collectively worked against each other and remanded for the district court to either prohibit the defendant from accessing financial accounts and declare restitution unworkable **or** craft a workable restitution plan without an absolute bar on accessing financial accounts.

E. Challenging Workability

1. Keep in mind, that the defendant carries the burden to come forward with **evidence of compelling circumstances** that render the restitution plan unworkable.
 - a. You’ll need to present actual evidence to meet your burden – testimony, exhibits, and/or a stipulation of facts.
 - b. **“Neither counsel’s arguments** before the trial court **nor assertions in the appellate briefs constitute evidence** or remedy the inadequacy of a record on appeal.” *City of Overland Park v. Barnett*, 10 Kan.App.2d 586, 595 (1985).
2. Establish your client’s disposable income by having them testify about their basic income and expenses.
 - a. Income.
 - b. Living expenses (rent, utilities, food, gas, phone/internet).
 - c. Active debt/necessity payments (car payments, insurance, current costs from prior cases, outstanding medical or child support payments).
3. Have your client testify about the volatility of their income.
 - a. The purpose here is to demonstrate that a reasonable plan should be set a fair amount below disposable income because it is subject to change.
 - b. Factors could include things like:
 - i. Dependents
 - ii. Disabilities/illness
 - iii. Excessive work hours
 - Present and future earning capacity is one of the workability factors. *State v. Meeks*, 307 Kan. at 820.
 - Your client may not be able to retain their same work schedule **and** comply with the conditions of probation.
 - If your client’s current income is predicated on them working 65+ hours per week, then argue the reasonable inference that it will decrease while on probation.
4. Consider bringing in others to testify about the costs of probation or prison.
 - a. What can your client expect to pay for UAs monthly? What is the cost of the programs recommended by the PSI?

- b. What kind of wages can your client anticipate being paid in prison?
 5. Make this easy on yourself **and your judge**. Math isn't fun and even a slightly disorderly direct examination can make it difficult to keep the figures presented straight.
 - a. Your client is already going to testify under oath, so consider having them fill out an affidavit with these figures beforehand to establish their monthly disposable income.
 - b. At the outset of your client's testimony, have them lay foundation, admit the affidavit, and provide copies so the court and prosecutor can follow along.
 6. Once you have established your client's disposable income, use it to arrive at your proposed monthly restitution payment. Divide the restitution amount by the restitution payment, if it will take your client an excessive number of years to pay off restitution, argue it is unworkable.
 7. Clarify your objection.
 - a. K.S.A. 21-6604(b)(1) authorizes the district court to find restitution unworkable "either in whole or in part."
 - b. You can object to:
 - i. The entire amount.
 - ii. A portion of the requested amount. If you're requesting the court limit the total restitution imposed, use your proposed monthly restitution plan and multiply by the number of months in the original term of probation: 12, 18, 24, or 36.
 - iii. The court's payment plan.
 - You can argue that the court set the installment payment too high given your client's financial limitations, or
 - You can argue that the court's payment plan is overly burdensome because it will extend probation for years.
- F. Constitutionality of Kansas's Restitution Statutes.
1. The constitutionality of Kansas's restitution statutes under the Sixth Amendment and under Section 5 of the Kansas Bill of Rights was recently addressed in *State v. Arnett*, 314 Kan. 183 (2021). Broadly, the Court was asked to determine whether Kansas's restitution statutes were unconstitutional because they don't require that questions of fact be submitted to a jury before restitution is imposed.
 - a. Sixth Amendment ruling: The Court held that criminal restitution does not implicate a defendant's right to a jury trial as contemplated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). But the ruling is not final. A cert petition was filed February 11th, and the State has been ordered to respond by May 25th.
 - b. Section 5 ruling: The Court held that the current structure of restitution violates Section 5 because it made restitution equivalent to civil judgements,

which are covered by Section 5. To remedy the problem, the Court held that several statutes that allow restitution to be enforced as a civil judgment are unconstitutional. The Court severed those statutes from our primary restitution scheme. The Court reasoned as follows:

- i. Section 5 preserves the jury trial right as it historically existed at common law when the Kansas Constitution came into existence. This includes the procedural right to have a jury decide the contested questions juries historically decided. Civil damages & causation were a question for fact for the jury in common-law tort actions.
- ii. The Court held that criminal restitution (at least in theory) is not the equivalent of civil damages.
 - Relied on prior holding in *State v. Applegate*, 266 Kan. 1072 (1999).
 - Unlike civil damages the purpose of criminal restitution is two-fold: (1) to compensate the victim, and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.
 - An order of restitution holds incarceration over a defendant's head to enforce payment in a way that civil judgment cannot.
 - Civil damages fixes an amount due and compensates plaintiffs for the delay in payment by including an award of post-judgment interest. But restitution can include installment payments and is enforceable as a condition of probation.
- iii. Prior to the enactment of K.S.A. 60-4301, in 1995, "restitution imposed as a condition of probation [was] not a legal obligation equivalent to a civil judgment, but rather a distinct option which [could] be voluntarily exercised by the defendant to avoid serving an active sentence."
 - Once discharged from probation, a defendant would stop making restitution payments, and
 - The restitution order did nothing to stay the civil statute of limitations. *Church Mut. Ins. Co. v. Rison*, 16 Kan.App.2d 315, 318 (1991).
- iv. However, the Court acknowledged that, due to developments since *Applegate*, it could not find the **current** criminal restitution statutes were not the equivalent of civil judgments at least to the level that – if left untouched – it would implicate the right to jury trial under Section 5.
 - Under the statutes reviewed, once the district court orders restitution, that award becomes a civil judgement and may be enforced like one. The only distinction between the two is that restitution is not enforceable against the defendant's insurers or

third-party payors, but this was not enough to differentiate the two remedies.

- In other words, absent severance, the Kansas restitution statutes were equivalent to a civil judgment, which would require that the questions of damages and causation be put to a jury under Section 5.
- c. Based on its Section 5 rationale, the Court held the following statutes and provisions unconstitutional.
- i. In its entirety, K.S.A. 60-4301, which establishes that an order of restitution shall be filed, recorded, and enforced as a civil judgment.
 - ii. In its entirety, K.S.A. 60-4302, which sets forth notice requirements when an order of restitution is filed as a civil judgment.
 - iii. In its entirety, K.S.A. 60-4303, which establishes the docket fee when filing an order of restitution as a civil judgment.
 - iv. The last sentence of K.S.A. 2020 Supp. 22-3424(d)(1) which reads, “If the court orders restitution to be paid to the victim or the victim’s family, the order shall be enforced as a judgment of restitution pursuant to K.S.A. 60-4301 through 60-4304, and amendments thereto.”
 - v. Subsection, K.S.A. 2020 Supp. 21-6604(b)(2), which established that if the court orders restitution, the restitution shall be a judgment against the defendant that may be collected by the court by garnishment or other execution as on judgments in civil cases.
 - Here the Court clarified that a district court has flexibility when enforcing an order of criminal restitution which can include garnishment where (1) the court has cause to believe a defendant is not in compliance with the restitution order, and (2) the defendant has the ability to object to the proposed order of garnishment and demonstrate they are taking reasonable steps to comply with the court’s restitution order.
 - “The problem with the statute is that, as worded, it is too difficult to uncouple the acceptable provisions from those provisions that violate section 5. Thus, it is necessary to sever the entire subsection” *Arnett*, 314 Kan. at 196. (Note: This language is problematic because it does not identify precisely which is which. This makes it difficult to determine if subsequent legislation will offend Section 5.)
2. What is the impact of *Arnett*?
- a. Three points of clarification:
 - i. The Court’s holding is fairly open-ended regarding its impact, which makes analysis speculative.
 - ii. The legislature has already passed a set of statutory amendments

which will go into effect July 1, 2022. This makes any analysis short-lived.

- iii. Kansas has 105 counties and 31 judicial districts; absent a more specific holding from the Kansas Supreme Court or an advisory from the Kansas Sentencing Commission, it is unlikely that *Arnett* or the impending amendments will be uniformly applied.
 - b. Orders of restitution are not civil judgments and cannot be enforced as if they were.
 - i. This is the entire basis of the Court's holding, and the Court extensively severed provisions authorizing restitution to be enforced as a civil judgment.
 - ii. As a result, it seems restitution should once again be a **distinct criminal remedy**, which should mean that once a defendant is discharged from probation or satisfies their sentence, they should be under no obligation to continue to make payments.
 - c. Restitution cannot be garnished for the time being.
 - i. The Court recognized, in theory, that district courts have the flexibility to order restitution be garnished if the defendant is in noncompliance.
 - ii. But the Court also held that the statute authorizing that remedy was unconstitutional, so, for the time being, courts have no authority to order garnishment of restitution.
3. The *Arnett* "Fix" Statutory Amendments

a. Arnett Fix Part One: Repeal Article 43 of Chapter 60, “Enforcement of Judgment of Restitution” entirely.

Statute	Repealed
<p>K.S.A 60-4301, which established that an order of restitution shall be filed, recorded, and enforced as a civil judgment.</p> <p>Held unconstitutional in its entirety.</p>	<p>Repealed in its entirety.</p>
<p>K.S.A. 60-4302, which set forth notice requirements when an order of restitution is filed as a civil judgment.</p> <p>Held unconstitutional in its entirety.</p>	<p>Repealed in its entirety.</p>
<p>K.S.A. 60-4303, which established the docket fee when filing an order of restitution as a civil judgement.</p> <p>Held unconstitutional in its entirety.</p>	<p>Repealed in its entirety</p>
<p>K.S.A. 60-4304, which established a judgment of restitution will not bar subsequent civil remedy, but amount paid in restitution shall offset civil recovery.</p> <p>Not held unconstitutional by <i>Arnett</i>.</p>	<p>Repealed in its entirety</p>
<p>K.S.A. 60-4305, which established records regarding financial assets/income in the possession of the court, community corrections, or KDOC were subject to disclosure to victim of the restitution order.</p> <p>Not held unconstitutional by <i>Arnett</i>.</p>	<p>Repealed in its entirety</p>

b. Arnett Fix Part Two: Make the following amendments.

Statute	Amendment
<p>K.S.A. 20-169(e)</p> <p>Authorizes judicial districts to enter into contracts with collection agencies for the collection of debts owed to the court or restitution owed under an order of restitution.</p>	<p><i>Judicial districts of the state of Kansas are authorized to utilize the collection services of contracting agents pursuant to this section for the purpose of collecting restitution owed under an order of restitution. Any beneficiary under an order of restitution entered by a court after this section takes effect is authorized to utilize the collection services of contracting agents pursuant to this section for the purpose of collecting all outstanding amounts owed under such order of restitution</i></p>
<p>K.S.A. 21-6604(b)(2)</p> <p>Replaced the general language authorizing restitution may be collected by the court by <u>“garnishment as on judgement in civil cases”</u></p> <p>with:</p> <p>may be collected by collected by the court by garnishment <u>“as provided in article 7 of chapter 60”</u> of the K.S.A.</p> <p>Article 7 of Chapter 60 of the K.S.A. is The Code of Civil Procedure Attachment and Garnishment.</p>	<p>If the court orders restitution, the restitution shall be a judgment against the defendant that may be collected by the court by garnishment <i>as provided in article 7 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, or other execution as on judgments in civil cases.</i> If, after 60 days from the date restitution is ordered by the court, a defendant is found to be in noncompliance with the restitution order, and the victim to whom restitution is ordered paid has not initiated proceedings in accordance with K.S.A. 60-4301 et seq., and amendments thereto, the court shall assign an agent procured by the judicial administrator pursuant to K.S.A. 20-169, and amendments thereto, to collect the restitution on behalf of the victim. The chief judge of each judicial district may assign such cases to an appropriate division of the court for the conduct of civil collection proceedings.</p>
<p>K.S.A. 22-3424 (d)(1)</p>	<p>K.S.A. 22-3424 (d)(1): If the court orders restitution to be paid to the victim or the victim's family, the order shall be enforced as a judgment of restitution pursuant to K.S.A. 60-4301 through 60-4304 20-169, and amendments thereto, and K.S.A. 2021 Supp. 21-6604(b)(2), and amendments thereto.</p>

K.S.A. 60-2310	<p>Amended a cross-reference:</p> <p>(d) Assignment of account. If any person, firm or corporation sells or assigns an account to any person or collecting agency, that person, firm or corporation or their assignees shall not have or be entitled to the benefits of wage garnishment. The provision of this subsection shall not apply to the following:</p> <p>(4) collections pursuant to contracts entered into in accordance with K.S.A. 75-719 20-169, and amendments thereto, involving the collection of restitution or debts to district courts.</p>
K.S.A. 60-2403	<p>Amended to provide that undisputed payments made prior to a request for a release of judgment are voluntary and not subject to refund or recoupment.</p>

4. Will these amendments fix the issue? Probably not.
- a. Because the Court did not specify which portions of K.S.A. 21-6604(b)(2) ran afoul of Section 5, it's difficult to say with certainty.
 - b. But, let's take a look at what we know:
 - i. The Court held that, in theory (and as severed) restitution – particularly the version that existed prior to 1995 – is not the functional equivalent of a civil judgment because:
 - Unlike civil damages, the purpose of criminal restitution is **both** to compensate the victim **and** to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.
 - Prior to the enactment of K.S.A. 60-4301, restitution was not the equivalent of a civil judgment because (1) once sentence was discharged, the defendant was allowed to stop making payments, and (2) the sentence did not toll the statute of limitations.
 - ii. Further, the ability of the district court to issue an order of garnishment does not inherently cause restitution to become the equivalent to a civil judgment, but it can be if it is enforced similarly to a civil judgment.
 - iii. However, the Court **could not find** that the **current** criminal restitution statutes were not the equivalent of a civil judgment, at

least to the level that – if left untouched – it would implicate the right to jury trial under Section 5. (And the portion of the decision that found this was 7-0, even the 2 dissenting Justices agreed with this point.)

- c. Practically, the *Arnett* “fix” amendments to K.S.A. 21-6604(b)(2) did the following:
 - i. Replaced the general language authorizing restitution may be collected by the court by “**garnishment as on judgement in civil cases**” with “If the court orders restitution, **the restitution shall be a judgment against the defendant** that may be collected by the court by garnishment **as provided in article 7 of chapter 60 of the Kansas Statutes Annotated**”.
 - Article 7 of Chapter 60 is the portion of the code of civil procedure which established attachment and garnishment procedures. Which means, practically, nothing has changed.
 - ii. Further, under K.S.A. 60-734(c) an order of garnishment remains in effect until either the judgment is paid or the garnishment is released by the party for whom the judgment is issued (which would be the victim, not the court).
 - iii. Further, the legislature continues to refer to an order of restitution as a “judgment” which is a civil term defined as “the final determination of the parties’ rights in an action.” K.S.A. 60-254.
- d. In conclusion, the legislative amendments likely do not resolve the issue by clearly distinguishing an order for restitution from a civil judgment. Under the proposed legislation, an order of restitution is still a judgment which may be garnished in the same manner as any other civil judgment. Under the proposed language an order of restitution remains the equivalent to a civil judgment which necessitates a jury finding on damages and causation under Section 5.

III. Fines in Criminal Cases

- A. Discretionary: Fines can be discretionary in 3 ways.
 1. In imposition
 - a. Fines are an authorized disposition in all cases. K.S.A. 21-6604(a)(1)
 - b. K.S.A. 21-6612 sets forth criteria for imposing fines.
 - i. Fines cannot be the sole punishment unless the court makes findings that a fine suffices for the protection of the public.
 - ii. Fines cannot be imposed in addition to other sentences unless the person has derived a pecuniary gain or the court finds the fine is adapted to deterrence or correction.
 2. In amount or method of payment
 - a. A court must consider the financial resources of the defendant and the

nature of the burden the fine will impose in determining the amount and method of payment. The court must make those findings on the record. K.S.A. 21-6612(c). See also *State v. Tafoya*, 304 Kan. 663 (2016); *State v. Copes*, 290 Kan. 209 (2010); *State v. McGlothlin*, 242 Kan. 437 (1988).

- b. This commonly comes up in traffic related felonies (driving while suspended, no insurance, habitual violator), but also in some infractions.
- B. Mandatory: There are mandatory fines for certain crimes.
1. A crime may set a specific amount for a fine, or give a range.
 - a. If the court imposes a range, it must make findings as to the defendant's financial resources and the nature of the burden payment will impose **for any amount above the minimum fine**.
 2. Even if the **amount** of a fine is mandatory, the method of payment may not be.
 3. Common crimes with mandatory fines include:
 - a. DUI, K.S.A. 8-1567
 - b. Domestic Battery, K.S.A. 21-5414
 - c. Human Trafficking, K.S.A. 21-5426
 - d. Forgery, K.S.A. 21-5823
 - e. Animal Cruelty, K.S.A. 21-6412
 - f. "Morality" Sex Offenses (Promoting Sale, K.S.A. 21-6420; Buying, K.S.A. 21-6421; Commercial exploitation of child, K.S.A. 21-6422)

IV. Court Costs and Fees

- A. Non-discretionary fees: These three things are not waivable (**but almost everything else is**).
1. Docket Fees
 2. Extradition Fees
 3. Child Advocacy Center Assessment Fee (\$400 if your client is convicted of a crime where a minor was a victim)
- B. Discretionary costs "reasonably related to the prosecution". *State v. Alvarez*, 309 Kan. 203 (2019).
1. Trial costs
 - a. Costs the State incurs to prepare exhibits
 - b. Witness fees for both sides
 - c. Sex assault examination and evidence kit
 - d. Out-of-state process service
 - e. Transcripts
 - f. Doctor and evaluation fees
 - g. Reward reimbursement
 2. Cost enumerated by K.S.A. 21-6604(a)(8)
 - a. Costs incurred by law enforcement to re-catch your client in escape from

custody cases.

- b. Costs incurred by the fire department in responding to a fire in an arson case.
- c. Repayment of public money used to purchase drugs in a controlled buy.
- d. Any medical costs and expenses “incurred by any law enforcement agency or county.”

C. Discretionary/waivable fees

1. DNA database fee, K.S.A. 75-724
 - a. Waived if a person can prove (1) they have already paid the fee in connection with a prior conviction or (2) they did not submit a sample for the current crime of conviction. *State v. Simmons*, 307 Kan. 38 (2017).
 - b. Can be lessened or waived if the court makes an indigency finding on the record.
2. Domestic violence program fee, K.S.A. 20-369; K.S.A. 21-6604(a)(10)
 - a. Created by judicial districts.
 - b. Only in cases involving a family or household member **and** a domestic violence finding.
 - c. Capped at \$100.
3. Domestic violence assessment fee, K.S.A. 21-6604(p)
 - a. Statute says it “shall” be assessed.
 - b. But only if a “DV” designation is applied.
4. Drug and alcohol evaluation fee, K.S.A. 8-1008
 - a. Mandatory for 1st or 2nd DUI, at least \$150
 - b. Waivable for alcohol offenses for people under 21
 - c. Not applicable to drug offenses.
5. KBI lab fees, K.S.A. 28-176
 - a. \$400 for “every individual offense”. So it applies to each **count** for which services were rendered, but **it is limited to crimes of conviction**. *State v. Goeller*, 276 Kan. 578 (2003).
 - b. But testing must **actually** be performed.
 - c. And the fee is waivable upon an indigency finding made on the record.
6. Supervision fees, K.S.A. 21-6607(c)(3)
 - a. Can only be assessed for people who are placed on probation.
 - b. May be waived or reduced upon an indigency finding.
7. BIDS attorney fee, K.S.A. 21-6604(i), K.S.A. 22-4513
 - a. In determining the initial amount and method of payment, the court must take into consideration the defendant’s financial resources and the nature of the burden the payment of attorney fees will impose. *State v. Robinson*, 281 Kan. 538 (2006).
 - b. May be waived or lessened upon petition if the person (1) is not willfully in default and (2) the court finds payment of the remaining amount will impose

- “manifest hardship” on client or client’s family.
8. BIDS application fee, K.S.A. 22-4529
 - a. The fee is charged for every case.
 - b. It is waivable if the court finds that payment of the fee will impose “manifest hardship”.
 - i. Determination is made at the time of the application.
 - ii. Part of the court’s initial inquiry into the client’s financial condition is based on the information provided in the application. *State v. Hawkins*, 285 Kan. 842 (2008).
 - c. The fee can also be waived later.
 - i. But the burden shifts to the client at that point to prove manifest hardship.
 - ii. If not paid by sentencing, it can be imposed as costs without further inquiry.
 9. Booking/fingerprint fee, K.S.A. 12-16,119
 - a. Fee adopted by city and/or county.
 - b. Capped at \$45.
 10. SB 123 assessment fee, offender reimbursement, K.S.A. 75-52,144
 - a. Costs of assessment and treatment paid by the Kansas Sentencing Commission.
 - b. At sentencing, the court must determine “the extent, if any, that such person is able to pay for such assessment and treatment.”
 - c. The Sentencing Commission sets cost caps.
 - i. \$175 for the assessment (currently).
 - ii. Treatment cost cap varies based on modality.
- D. Unlike restitution, all costs and feeds can be collected as if they were a civil judgment. K.S.A. 20-169.