NO. 99226-6

SUPREME COURT FOR THE STATE OF WASHINGTON

DONALD W. MORGAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Donald Morgan seeks discretionary review of a unanimous and unpublished Court of Appeals opinion affirming a restitution order. Review of the per curiam opinion[1] is unwarranted, because the opinion does not raise any significant question of law under the constitutions of the State of Washington or of the United States. RAP 13.4(b)(3). Nor does it present an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

The conclusion that criminal defendants do not have a due process right to cross-examine adverse witnesses as part of the court's restitution determination is consistent with well-settled law. This Court has also previously held that neither the Sixth Amendment, nor article 1, section 21 of the Washington Constitution requires a jury determination of the facts necessary to set restitution amounts, and as the Court of Appeals correctly recognized, Morgan's attempt to distinguish such binding precedent is unpersuasive. Because the Court of Appeals opinion is consistent with long-standing and well-settled law, Morgan's petition does not warrant Supreme Court review.

[1] The Court of Appeals opinion is attached as Appendix A.

II. ISSUES FOR REVIEW

1. Where Morgan did not risk imprisonment or its substantial equivalent at his restitution hearing, does he fail to show that due process required the State to present live witness testimony?

2. Where this Court has held that the criminal restitution statute, RCW 9.94A.753, does not violate the Sixth Amendment by allowing a court to award criminal restitution without a jury trial, does Morgan fail to show that he is entitled to a jury determination of restitution?

3. Where the right to a criminal restitution jury trial did not exist at the time the Washington Constitution was ratified, does Morgan fail to show that he is entitled to a jury trial under article I, section 21 regarding the amount of restitution the court may order?

III. STATEMENT OF THE CASE

The State charged Morgan, a Washington-licensed insurance broker, with four counts of theft for defrauding several insurance customers, an insurance wholesaler he used as an intermediary, and an insurance premium financing company. CP 132-36. Morgan pled guilty to the first count of Theft in the First Degree in exchange for the State dismissing counts two through four. CP 106-08, 110-22, 126. Pursuant to the plea agreement, Morgan agreed to pay restitution on all charged counts. CP 126

The parties reached an agreement on the restitution amounts for counts three and four; Morgan contested counts one and two. RP 5/23/19 at 4.[2] After a partially contested restitution hearing, the trial court found by a preponderance of the evidence that the State had proven specific restitution amounts for counts one and two, and accepted the parties' agreed restitution amounts for counts three and four. RP 5/23/19 at 17-18; CP 9-10.

Morgan appealed the entire restitution order, demanding a jury trial and live witness testimony to determine the disputed restitution amounts for the first time on appeal. The Court of Appeals rejected Morgan's requests in a two page per curiam opinion, and affirmed the restitution order.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Due Process Requires Live Witness Testimony Only in Hearings That Have the Potential To Result in a Loss of Liberty

The Court of Appeals determination that Morgan does not have a due process right to live testimony at his restitution hearing comports with well-settled law and does not warrant review. As the Court of Appeals correctly recognized, due process does not require the right to confront witnesses because "restitution hearings do not involve the potential loss of a liberty interest." Slip Opinion at 1.

[2] RP refers to the trial court's Report of Proceedings.

The Court of Appeals opinion is consistent with well-settled law. In 1992, the Court of Appeals decided *State v. Fambrough*, which explicitly rejects Morgan's claim that the Sixth Amendment right to confront witnesses extends to restitution hearings. 66 Wn. App. 223, 227, 831 P.2d 789 (1992). Like Morgan, the Appellant in *Fambrough* claimed he had the right to cross-examine and confront the preparer of a professional estimate at his restitution hearing. *Id.* The Court rejected the argument, reasoning that restitution orders do not implicate loss of liberty, and that due process is thus "substantially relaxed" at restitution hearings. *Id.* at 226. The court held that there was no right to confront the estimator at a restitution hearing. *Id.* at 227.

Morgan's petition provides no argument or analysis challenging the Court of Appeals' reliance on *Fambrough*, which is directly on point. Instead, he asks this Court to simply sweep aside Washington trial courts' nearly 30 years of reliance on *Fambrough*, and replace it with the procedures used in parole revocation hearings as set forth in *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1992). But as the Court of Appeals properly concluded, reliance on *Morrissey* is misplaced because restitution hearings do not involve the same potential loss of liberty at issue in parole revocation hearings. Slip Opinion at 1.

In *Morrissey*, the United States Supreme Court examined the due process rights afforded a parolee facing a potential return to prison for violating the terms of parole. *Morrissey*, 408 U.S. at 481. *Morrissey* held that due process requires that the parolee be permitted to cross-examine adverse witnesses unless good cause is shown. *Id.* at 489. The Court emphasized that the parole returnee "may face a potential of substantial imprisonment." *Id.* at 480. This potential loss of liberty was central to the Court's analysis.

This Court has also emphasized the significance of these liberty interests when analyzing due process claims. For example, in *State v. Abd-Rahmaan*, this Court concluded that *Morrissey* applies to sentence modification hearings. 154 Wn.2d 280, 286, 111 P.3d 1157 (2005). In doing so, this Court recognized that the key component of *Morrissey* is the potential loss of conditional liberty. This Court stated, "[n]o meaningful difference exists between sentence modification hearings and parole revocation hearings for the purposes of this inquiry; both settings involve the potential deprivation of a conditional liberty." *Id.* at 288; *see also State v. Dang*, 178 Wn.2d 868, 883, 312 P.3d 30 (2013) ("When confronted with revocation of a qualified or conditional liberty, the United States Supreme Court has indicated that limited Fourteenth Amendment due process guaranties apply").

Morgan cites to several cases extending *Morrissey* in various settings beyond parole revocation, but ignores that each case involves a defendant facing potential incarceration or its functional equivalent. Petition at 5-6, *((*citing *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d. 656 (1973) (probation revocation hearings); *Dang*, 178 Wn.2d at 868 (revocation of the conditional release of insanity aquittee); *Abd-Rahmann*, 154 Wn.2d at 280 (sentence modification hearings); *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999) (revocation of a Special Sex Offender Sentencing Alternative (SOSA)); *State v. Nelson*, 103 Wn.2d 760, 697 P.2d 679 (1985) (revocation of a suspended sentence)). Morgan has not identified, and the State did not locate any case where a Washington court extended *Morrissey* to a hearing that did not implicate a risk of the loss of liberty.[3]

Morgan attempts to equate his loss of property and the various collateral consequences of a criminal sentence with an actual loss of liberty. Petition at 7-9. This argument has no merit. "While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to

[3] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities but instead may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

encompass freedom from bodily restraint and punishment." *Ingraham v. Wright*, 430 U.S. 651, 673–74, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (citing *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952)). Morgan was entitled to, and he received, due process at his restitution hearing. Morgan, however, faced only the possibility of the loss of property at his restitution hearings. Therefore, the due process owed Morgan is not the full *Morrissey* panoply of rights because Morgan did not face a potential loss of liberty. *See Fambrough*, 66 Wn. App. at 226.

Morgan urges this Court to extend *Morrissey*'s requirement of live witness testimony beyond its recognized bounds to RCW 9.94A.753 restitution hearings. To accept Morgan's argument, this Court would need to reject decades of established law and conclude that the risk faced at an RCW 9.94A.753 restitution hearing entitles Morgan to the same due process right of live witness testimony as a defendant facing the risk of incarceration. The Court of Appeals properly rejected Morgan's request to stretch due process beyond its previously recognized bounds. This Court should deny review, as Morgan's request is contrary to multiple Washington decisions.

B. This Court's Binding Precedent Holds That a Jury Trial Is Not Required To Determine Restitution Amounts

Morgan argues that the Sixth and Fourteenth Amendments of the United States Constitution require a jury determination of the facts underlying a restitution order. The Court of Appeals' rejection of this argument does not warrant review, because the decision was based on this Court's binding precedent explicitly rejecting an identical claim. Slip Opinion at 2, (citing *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005)).

In *Kinneman*, this Court analyzed Washington's restitution statute, RCW 9.94A.753, and held that jury fact-finding was not required to support a restitution order. *Kinneman*, 155 Wn.2d at 282. In *Kinneman*, Appellant argued that he was entitled to a jury determination of the facts essential to a restitution determination under two United States Supreme Court opinions: *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

In *Apprendi*, the Supreme Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Blakely*, the

Supreme Court defined the statutory maximum as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303.

This Court analyzed the restitution statute under both cases and determined that "[t]here is no right to a jury trial to determine facts on which restitution is based under RCW 9.94A.753." *Kinneman*, 155 Wn.2d at 282.

> While the restitution statute directs that restitution 'shall' be ordered, it does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution . . . Instead, RCW 9.94A.753 allows the judge considerable discretion in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss.
>
> Given the broad discretion accorded the trial judge by the statute, the lack of any set maximum, and the deferential abuse of discretion review standard, the restitution statute provides a scheme that is more like indeterminate sentencing not subject to Sixth Amendment jury determinations than the SRA's determinate sentencing scheme at issue in *Blakely* [*v. Washington*, 542 U.S. 296 (2004)].

Id.

Morgan claims that two United States Supreme Court cases, *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012) and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2152, 186 L .Ed. 2d 314 (2013), undermine Kinneman's reasoning. Petition at 11-16. Morgan's reliance on these post-*Kinneman* cases is unpersuasive,

however, because these cases involved the imposition of minimum and maximum fines, which is not at issue here.

In *Southern Union*, a jury found a natural gas distributor guilty of violating federal environmental laws by storing liquid mercury without a permit for approximately 762 days. *Southern Union Co.*, 567 U.S. at 346–47. The offense was punishable by a maximum fine of $50,000 a day. *Id.* at 347. After trial, the probation office imposed a fine of $38.1 million. The company objected to imposition of the fine because the jury did not decide the number of days the violation occurred, and could have found guilt based on a violation of just a single day. *Id.* The Court held that the judicial fact-finding in *Southern Union* thus "enlarge[d] the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow[ed]." *Id.* at 352. In such circumstances, *Apprendi* requires that a jury determine the facts to "set a fine's maximum amount." *Id.* at 356. In other words, the jury needed to determine the number of days that the defendant had violated the law so that the maximum fine could be calculated.

Southern Union does not apply to restitution under RCW 9.94A.753. Beside the fact that restitution is not merely punitive in nature, unlike the fine in *Southern Union*, there is no prescribed statutory maximum amount of restitution that can be awarded under RCW 9.94A.753. Moreover, the

broad discretion granted to the court in determining restitution under RCW 9.94A.753, as recognized in *Kinneman,* does not enlarge the maximum punishment faced by a defendant beyond what the jury's verdict or defendant's plea agreement allows.

The Ninth Circuit rejected a nearly identical argument to Morgan's in *United States v. Green*, 722 F.3d 1146, 1149-50 (9th Cir. 2013), which similarly recognized the material distinction between restitution and fines under *Apprendi*. In *Green*, the Court held that restitution is distinctly different than fines, like at issue in *Southern Union,* because: (1) fines merely punish and restitution can have several purposes including punishment and compensation to the victim; and (2) *Southern Union*'s mandatory fines dealt with a determinate punishment scheme whereas restitution is "pegged to the amount of the victim's loss. A judge can't exceed the non-existent statutory maximum for restitution no matter what facts he finds." *Green*, 722 F.3d at 1150; *see also United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012) (holding that there is no prescribed statutory maximum for restitution). *Southern Union* is thus inapposite.

Morgan's reliance on *Alleyne* is similarly misplaced. In *Alleyne,* the Supreme Court examined whether a firearms enhancement for brandishing a firearm, which increased the mandatory minimum penalty from five years to ten years, must be determined by a jury. *Alleyne*, 570 U.S. at 99. The

Court held, "Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id.* at 102.

Unlike the minimum sentence in *Alleyne*, however, restitution does not increase a statutory mandatory minimum. Washington's restitution statute does not impose a minimum restitution amount due a victim. Rather, in cases where the victim suffers no monetary loss, the sentencing court would not order any restitution. *Kinneman*, 155 Wn.2d at 282 (holding that RCW 9.94A.753 does not set a minimum or a maximum restitution amount).

The Court of Appeals correctly found that *Alleyne* does not affect the reasoning of *Kinneman,* because *Alleyne* held only that a fact that increases the mandatory minimum penalty of a crime is an element that must be submitted the jury. *Alleyne*, 570 U.S. at 99. Since restitution does not involve a mandatory maximum or minimum penalty *Alleyne* is not implicated. Slip Opinion at 2.

Because the United States Supreme Court's holdings in *Alleyne* and *Southern Union* implicate only minimum and maximum punishments, the Court of Appeals properly held that it was bound by Kinneman's controlling precedent that Morgan was not entitled to a jury determination of his owed

restitution. Morgan presents no persuasive argument to overturn this Court's decision in *Kinneman* so review should be denied.

C. The Washington Constitution Does Not Require a Jury Determination of a Criminal Victim's Losses at a Restitution Hearing

This Court should also deny Morgan's request to review the Court of Appeals' conclusion that the Washington Constitution does not require a jury determination of his owed restitution. As noted by the Court of Appeals, this Court already rejected this same argument in *Kinneman*, Slip Opinion at 2, (citing *Kinneman*, 155 Wn. 2d. 272).

Morgan's claim is based solely on *Sofie v. Fibreboard Corp.*, in which this Court found that a statute that limited the noneconomic damages obtainable in a civil case was unconstitutional because it interfered with the jury's traditional function to determine damages. 112 Wn.2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989). In *Sofie*, this Court invalidated a controversial part of the 1986 tort reform act that limited the amount of noneconomic damages plaintiffs could recover in personal injury and wrongful death actions. This Court held that the statutory provision capping noneconomic damages violated article I, section 21 by interfering with the jury's traditional function of determining factual issues like damages. *Id.* at 638. This Court explained, "[a] review of the decisions cited by respondents . . . show that the Legislature cannot intrude into the jury's fact-finding

function in *civil actions*, including the determination of the amount of damages." *Id.* at 651. (emphasis added).

Morgan seeks to equate the civil damages at issue in *Sofie* with criminal restitution to argue that article I, section 21's right to a jury trial attaches to his restitution hearing. Morgan's argument fails, because the holding in *Sofie* turned on the Court's determination that the measure of damages in a civil suit was traditionally within the jury's province at the time the Washington State Constitution was enacted. The same is not true for criminal restitution. *See infra* at 14-18.

The Court of Appeals noted Morgan's failure to provide any analysis as to why *Sofie,* a civil damages case, applies to criminal restitution. Slip Opinion at 2. Morgan again fails to provide any analysis to support his wholly conclusory claim that *Sofie* compels overturning long-standing on-point precedent from this Court that limits the right to a jury trial under the Washington Constitution. In any event, Morgan's claim fails because the Washington Constitution does not require a jury determination of a criminal victim's losses at a restitution hearing.

Morgan argues that Washington Constitution Article 1, Section 21's "[inviolate] right of trial by jury" entitles him to a jury determination of criminal damages owed to his victims. Petition at 17. Morgan's argument is without merit, because article I, section 21 only applies to causes of action

that were tried by a jury at the time the Constitution was adopted, and does not apply to criminal sentencing. Because restitution is an integral part of sentencing, there is no right to a jury trial to determine facts underlying a restitution order.

This Court has repeatedly recognized limits on the right to a jury trial. In *Bird v. Best Plumbing Grp., LLC*, this Court addressed whether article I, section 21's right to trial by jury applied to the reasonableness of a civil covenant judgment. 175 Wn.2d 756, 287 P.3d 551 (2012). This Court observed that Article 1, Section 21 has long been limited to "guaranteeing those rights to trial by jury that existed at the time of the constitution's adoption in 1889." *Id.* at 768. This Court also reaffirmed the factors that Washington courts should consider in determining if a party has the right to a jury trial for a particular controversy pursuant to article I, section 21. *Id.* at 768-69. The examining court should begin by giving "[l]egislative acts . . . a 'heavy presumption of constitutionality.'" *Id.* at 768 (quoting *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 528, 520 P.2d 162 (1974)). The examining court must be convinced beyond a reasonable doubt that the statute is unconstitutional. *Id.* Next, the court determines "whether the cause of action is one to which the right to a jury trial applied in 1889." *Id.* Lastly, the court examines "the scope of the right to a jury trial." *Id.*

In *Matter of Detention of C.B.* the Court analyzed the "scope of the right to a jury trial" and explained that the "type of action at issue [must be] similar to the one that would include the right to a jury trial at that time [of ratification of the Washington Constitution]." 9 Wn. App. 2d 179, 184, 443 P.3d 811 (2019). The Court found that in 1889 the right to a jury trial attached to indefinite detention proceedings, "[b]ut no statute provided for a defined period of temporary confinement . . . [s]o in 1889 the right to a jury trial did not extend . . ." to ninety-day commitment proceedings. *Id.*

This Court has also held that the right to a jury trial does not apply to post-conviction sentencing proceedings. In *State v. Smith*, the defendant argued that Article I, Section 21 requires that a jury determine a defendant's persistent offender status under RCW 9.94A.570, which subjects the offender to a sentence of life without the possibility of parole. 150 Wn.2d 135, 75 P.3d 934 (2003). Like RCW 9.94A.753 restitution, RCW 9.94A.570 persistent offender status is determined by a judge at the sentencing phase of a criminal proceeding. This Court rejected the argument that a defendant has the right to a jury trial to determine his persistent offender status under article I, section 21. *Id.* at 150. This Court held that the right to a jury trial is not absolute. In the criminal context, article I, section 21 must be read in conjunction with article I, section 22's specific criminal jury trial rights. *Id.* Article I, section 22 states, "[i]n criminal prosecutions the accused shall

have the right to . . . a speedy public trial by an impartial jury of the county in which the *offense* is charged to have been committed . . .” (Emphasis added).

This Court explained, “[a]lthough the use of the word “inviolate” in article I, section 21 indicates a strong protection of the jury trial right, by the plain language of article I, section 22, that right only applies to trials for *offenses,* not to sentencing proceedings.” *Smith*, 150 Wn.2d at 150 (emphasis in the original). This Court went on to state that the right to a jury trial “is only so for trials on ‘offenses’ as stated in article I, section 22” and that its purpose was “to preserve inviolate the right to a trial by jury as it existed at the time of the adoption of the constitution rather than to make jury determinations mandatory in all phases of all criminal cases.” *Id.* at 150–51. This Court concluded that the right to a criminal jury trial is thus limited to the determination of whether or not an offense was proven. It does not apply to all potential factual determinations in a criminal proceeding. *Id.*; *see also State v. Price*, 59 Wn.2d 788, 791, 370 P.2d 979 (1962) (“In a criminal proceeding, the constitution guarantees to the defendant a jury trial only on the issues of fact which determine his guilt or innocence”).

Smith examined the jury’s role at sentencing in 1889 and determined that there was no right to a jury determination for sentencing at the time of

ratification of the Washington Constitution. *Smith*, 150 Wn.2d at 153-54. *Smith* pointed to territorial criminal procedure and observed:

> Washington specifically abolished the jury's role in sentencing by statute before the state constitution was adopted in 1889. Section 239 of the Laws of 1866 provided: "When the defendant is found guilty, *the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted."* Laws of 1866, § 239, in Statutes of the Territory of Washington 102 (1866).

Id. at 154. (emphasis added). Thus, since 1866, Washington law has provided for sentencing by a judge after criminal conviction.

An RCW 9.94A.753 restitution hearing "is an integral part of sentencing." *State v. Pollard*, 66 Wn. App. 779, 784, 834 P.2d 51 (1992); *see also State v. Barbee*, 193 Wn.2d 581, 587, 444 P.3d 10 (2019). As an "integral part of sentencing," restitution amounts are properly set by the sentencing judge, not the jury, because the right to be sentenced by a jury did not exist at ratification and had been "specifically abolished" by the territorial legislature in 1866. Thus, there is no right for a criminal sentence to be determined by a jury pursuant to article I, section 21.

Under *Bird* and *Smith*, RCW 9.94A.753 is presumed constitutional. Morgan cannot meet his high burden of showing that RCW 9.94A.753 is unconstitutional beyond a reasonable doubt. Morgan is thus not entitled to a jury determination of his owed criminal restitution.

V. CONCLUSION

The State asks this Court to deny the petition for review.

RESPECTFULLY SUBMITTED this 14th day of January, 2021.

MELANIE TRATNIK, WSBA #25576
Assistant Attorney General

Appendix A

FILED
10/12/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. DONALD W. MORGAN, Appellant.	No. 80030-2-I UNPUBLISHED OPINION

PER CURIAM — The State charged Donald Morgan with two counts of first degree theft and two counts of second degree theft relating to his commission of insurance fraud. As part of a plea agreement, the State agreed to dismiss all but one count of first degree theft, and Morgan agreed to pay restitution on the dismissed charges.

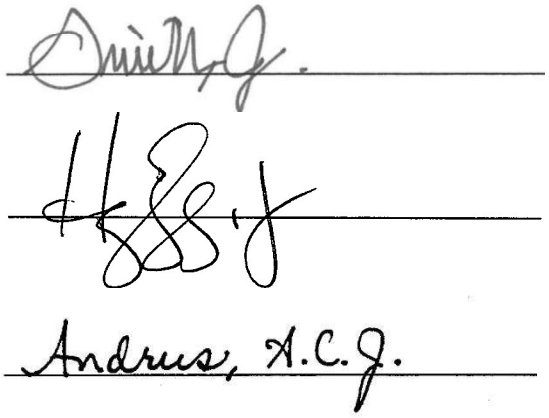
The State and Morgan agreed to the sum of restitution for the second degree thefts, but disputed the sum of restitution for the first degree thefts. Both the State and Morgan presented physical evidence, including bank statements, at a restitution hearing.

Morgan first contends he was denied due process because the trial court did not allow him to confront and cross-examine adverse witnesses. But we have already rejected the argument that the Sixth Amendment right to confront witnesses applies to restitution hearings. State v. Fambrough, 66 Wn. App. 223, 226-27, 831 P.2d 789 (1992). And Morgan's reliance on Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), which involved due process at parole revocation hearings, is misplaced because restitution hearings do not involve the potential loss of a liberty interest.

Morgan furthermore argues that both the Sixth Amendment and article I, section 21 of the Washington State Constitution require a jury determination of the facts necessary to set a restitution amount. But this claim has been rejected by the Washington Supreme Court in State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Though Morgan contends that Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), has eroded the reasoning of Kinneman, Alleyne held only that a fact that increases the mandatory minimum penalty for a crime is an element that must be submitted to the jury. Restitution does not involve a mandatory maximum or minimum penalty and Alleyne is not implicated here. Morgan's citation to Sofie v. Fibreboard Corp., 112 Wn.2d 636, 648, 771 P.2d 711, 780 P.2d 260 (1989) is similarly uncompelling because Sofie was a civil case in which the court concluded that a statute placing a limit on noneconomic damages was unconstitutional, because it interfered with the jury's traditional function to determine damages. Morgan provides no analysis of why Sofie applies in a criminal setting to the determination of restitution.

Affirmed.

FOR THE COURT:



NO. 99226-6

SUPREME COURT FOR THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DONALD W. MORGAN, Appellant.	DECLARATION OF SERVICE

I, Mira Feskova, declare as follows:

On January 14, 2021, I sent via the Washington State Appellate Courts' Secure Portal, a true and correct copy of Respondent's Brief and this Declaration of Service, addressed as follows:

SARA SOFIA TABOADA
SARA@WASHAPP.ORG

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of January, 2021, at Seattle, Washington.

MIRA FESKOVA

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

January 14, 2021 - 3:10 PM

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