

The PROSECUTOR



RECENT CASES

Utah Supreme Court

Reasonable debatable standard proper in reviewing municipality's zoning decision

The Petersens proposed a rezoning of over 20 acres of land to the Riverton City Council. All efforts to obtain approval were unsuccessful. Riverton City upheld the City Council's denial of the Petersens' application. When brought before the district court, summary judgment was entered in

favor of Riverton City. The Petersens appeal and argue that the district court erred when it applied the reasonably debatable standard in reviewing and upholding the City Council's decision. Rather, they assert that the substantial evidence standard should have been used.

The Utah Supreme Court affirmed its precedent establishing that to amend or enact a municipality's zoning ordinance is legislative and any review of that decision is subject to a reasonably debatable standard. In this case, the court found a reasonable basis for the City Council to deny the Petersens' application. Additionally, the district court's ruling on all other issues were upheld. Affirmed. *Petersen v. Riverton City*, 2010 UT 58.



Utah Court of Appeals

Credibility of conflicting evidence at a preliminary hearing to be left to the trier of fact.

Michael Droesbeke was charged with sodomy upon a child, aggravated sexual abuse of a child, and dealing in material harmful to a minor. During the preliminary hearing the child victim's testimony on cross examination became inconsistent with what she had initially told police and testified to on direct. Notably, Droesbeke was crying and emotionally distraught during the child's testimony. The magistrate took the matter under advisement and allowed the parties to brief the issue of bindover. Following briefing, the preliminary hearing reconvened and the magistrate heard

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oral arguments. In the court's ruling, the magistrate acknowledged both the inconsistency of the testimony and the emotional state of Droesbeke during the victim's testimony. The court then bound the matter over for trial, finding that there was sufficient evidence to believe the core allegations were committed by Droesbeke. Droesbeke, subsequently filed a motion to quash the bindover. The district court denied the motion and found that the preliminary hearing evidence supported a reasonable belief that Droesbeke committed the allegations. He now appeals the interlocutory decision and argues that the court erred when it applied an incorrect probable cause standard by failing to weigh the credibility of the

child's testimony when reviewing the bindover decision. He further argues that the child's statements were so 'inconsistent, contradictory, and incredible' that her testimony could not establish probable cause as determined by the court.

The appellate court held that the district court's review of the bindover determination was in accordance with the probable cause standard as outlined in *State v. Virgin*, 2006 UT 29. It further explained that although a magistrate must disregard or discredit evidence incapable of creating a reasonable inference regarding a prosecutor's claim, it must leave the weighing of credible but conflicting evidence to the trier of fact. Accordingly, it affirmed the district

court's decline of the motion to quash the bindover order. *State v. Droesbeke*, 2010 UT App 275.

Jurisdiction and venue not subject to rule 11 as elements of the offense

Johnny Lee Morgan appeals his conviction and sentence for unlawful sexual activity with a minor. He argues that his guilty plea was not entered into knowingly and voluntarily because he was not informed of the jurisdictional element of the offense.

The appellate court, in a Memorandum Decision, Per Curiam, held that the existence of jurisdiction and venue are not elements of the offense. It reasoned that because jurisdiction must be established

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by preponderance of evidence, rather than beyond reasonable doubt, rule 11 does not contemplate jurisdiction as an element of the offense that must be explained during the plea colloquy. Affirmed. *State v. Morgan*, 2010 UT App 262.

Tenth Circuit Court of Appeals

Waiver of appeal in plea bargain held valid and enforceable

Wilmer Leyva-Matos pleaded guilty to drug charges and, as part of his plea deal, waived his right to appeal. At sentencing, the district court rejected certain stipulations in the plea agreement and sentenced him to twenty-six months imprisonment, followed by two years of supervised release. Leyva-Matos appeals, arguing that the court improperly considered certain information he provided to the government with the understanding that it would not be used against him.

The Tenth Circuit applied the three prong test outlined in *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004). It went on to hold that Leyva-Matos failed to demonstrate that enforcing the waiver would result in a miscarriage of justice. Accordingly, the court concluded the waiver of his right to appeal is enforceable and dismissed the appeal without addressing the merits.



State v. Leyva-Matos, 618 F.3d 1213 (10th Cir. 2010).

Eligibility for Pilot Program not inclusive of good time credits

Gaetano Izzo applied to the Bureau of Prisons for placement in the Pilot Program, a program established by the Second Chance Act, which would allow him to serve the remainder of his 360 month sentence in home detention. To be eligible, an offender must have served the greater of 10 years or 75 percent of his sentence. With good time credit, Izzo had served 75 percent of his sentence, however, his request was denied on the grounds that he had not served 75 percent of the initial term imposed at sentencing. Izzo appeals arguing the Second Chance Act is ambiguous and, as such, the district court should have applied the rule of lenity to interpret the phrase “term of imprisonment to which the offender was sentenced” in his favor.

The Court of Appeals for the Tenth Circuit found that the interpretation of “term of imprisonment” in the Second Chance Act did not conflict with the interpretation of the same wording, in a different statute, as held by the

United States Supreme Court in *Barber v. Thomas*, 130 S. Ct. 249 (2010). It further stated that even under a less deferential analysis, the court would agree with the Bureau of Prisons interpretation that eligibility for the Pilot Program refers to the term imposed by the sentencing court, without any consideration of good time credit. *Izzo v. Wiley*, 620 F.3d 1257 (10th Cir. 2010).

Failure to inform of presentence interview consequences held to be ineffective assistance of counsel

Patrick Washington was convicted, by a jury, of drug offenses in the United States District Court. Prior to sentencing, Washington attended a presentence interview with the probation officer assigned to his case. His attorney, Gary Long, did not accompany him to this meeting and did not inform Washington about the purpose or legal significance of the interview. Pursuant to information provided by a confidential informant and Washington admitting to additional drug activity, the amount of drugs estimated to have been distributed by Washington placed him at a base offense level of 40. In addition, Washington received sentencing enhancements for attempting to kill the informant before the trial and acting as a leader or organizer of a group with more than five participants; which resulted in an offense level of 44. The sentencing court imposed three forty-year terms of imprisonment to be served consecutively. After losing on appeal, and the disbarment of his attorney from practicing in federal court, Washington moved to vacate, set aside, or correct his sentence. The District Court denied his motion and the matter now comes before the Tenth Circuit.

The Court of Appeals for the Tenth Circuit held that Washington’s trial attorney’s failure to inform him of the consequences of his presentence admissions fell below the objective standard of reasonableness. It further held that the attorney’s deficient performance prejudiced Washington. Accordingly, the court reversed in part

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PROSECUTOR PROFILE



Robert Stott,

Assistant Criminal Division Director, SLCDA

Robert Stott is energetically engaged in an impressive career. His work ethic began when he was only ten years old and being paid to answer the telephone at a mortuary. His relative was the town mortician, so when the family would leave their home they needed someone to be there to answer the phone, in case a body needed to be picked up. This was, of course, back in the days before cell phones. If Robert received a call while the family was gone, he would track them down and call them at the number of the place they were visiting. He remembers it as a super easy job, but also a little spooky at times because they lived in the mortuary. His all-time favorite job was a soda jerk in an icecream shop. Unfortunately, after a few days of being hired, he was fired because his scoops were too large. With his soda jerk career dreams dashed and since he couldn't play center field for the Yankees, he decided to be a lawyer.

It all began in Lompoc, California where Robert was born. He was raised in Pleasant Grove, Utah and is the second oldest of three brothers and a sister. Robert states that his mother and father greatly influenced his life. His mother instilled in him a passion for reading and studying. His father taught him the value of work. As a young boy, his father told him that he could either work at home pulling weeds in the pasture for free, or find a paying job outside of the home. Robert made certain he always had a paying job! He attended BYU and graduated with a degree in Sociology. He then went on to graduate from law school at the University of Utah. Robert explains that as a child, his brother was bigger and stronger than he was. As such, he saw his only chance to out-argue him was to become a lawyer. His family wasn't surprised by this decision as they always knew he wanted to be a lawyer. In fact, as a child of the 60s, he wanted to be a defense attorney and save all the people who had been innocently arrested and convicted by the 'merciless and vile state'. However, after three years as a public defender in Las Vegas, he found that his romantic view of defense work had no connection to reality. It was during law school that he met his lovely wife, Deanie, through Robert's roommate. Initially the roommate had tried for her affection but failing miserably he decided to let Robert have an opportunity. It took three years, but he finally convinced her to marry him. They now have four beautiful daughters and two strapping sons.

Robert's favorite sports team is any team his grandchildren are playing on. He loves the music of the 60s, loves to read, play tennis and take a daily three mile walk around downtown Salt Lake City. His favorite food is his own homemade lasagna and he loves a Hersey chocolate bar with almonds for a treat. His favorite movie is 'It's a Wonderful Life', his favorite TV series is the World Series. As a kid, Robert liked Captain Marvel but as an adult he likes Wonder Woman, and jokes that after all, what red-blooded male wouldn't like Wonder Woman?! He claims extensive traveling experience including: Cache County, Thistle, Grantsville and even as far away as Cedar City. If he could travel anywhere, regardless of money, Robert would like to go to Italy.

As a funny in-court experience, Robert shares that during a murder prosecution, a colleague was examining a witness, on the stand, whom Robert had not met before. Although the witness said she could not identify the perpetrator, the colleague asked her to look around the courtroom to see if anyone looked like the man. Her eyes shot around the courtroom and then stopped at Robert. She then said, while pointing her finger at him, "He looks like the man!"

Ethical behavior leads to trust which leads to successful prosecution, says Robert. He finds the most satisfying aspect of his job is the interaction with so many dedicated, intelligent, and enjoyable people. Robert believes that honing your skills is very important, but the most sure way to become a successful prosecutor is to be ethical, honest, and a person of constant integrity. Robert is certainly successful in those aspects as well as many others. Thank you for your many years of service!!

PREFERRED NAME - Robert Stott

NICKNAME: Stottskyinski

BIRTHPLACE - Lomoc, CA

FAMILY - Second oldest of five children; Father of six children

PETS - None

FIRST JOB - Answering phones at a mortuary

FAVORITE BOOK - *American Spinks* by Joseph Ellis

LAST BOOK READ - *Adams and Jefferson* by John Ferling

FOREIGN LANGUAGE - "Only when I pound a hammer onto my thumb"

FAVORITE QUOTE OR WORDS OF WISDOM: "You don't know what you know until you know what you don't know."



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and remanded. *United States v. Washington*, 619 F.3d 1252 (10th Cir. 2010).

Other Circuits

Examination of electronic data restricted from access under plain view doctrine

Government obtained evidence from drug testing administrators across the country as part of an ongoing investigation into illegal steroid use by professional athletes. Although there was sufficient probable cause for the warrant involving about a dozen athletes, the execution of the warrant involved hundreds of athletes and others connected to the drug-testing company. Subsequently, testing administrators and athletes sought return of the property seized. On rehearing en banc, the Ninth Circuit amended its prior opinion. However, it upheld the prior ruling that the government exceeded the warrant's scope and callously disregarded constitutional rights. It reasoned that the although over-seizing is an inherent part of the electronic search process, such risks call for a greater vigilance on the part of judicial officers to strike a balance between government's interest and the rights of individuals to be free from unreasonable searches and seizures. Examining electronic data to determine if it falls under the scope of the warrant, does not then provide law enforcement access to that data under the plain view doctrine. As such, it held that records and property seized,

outside the scope of the warrant, must be returned. *United States v. Comprehensive Drug Testing, Inc.* 621 F.3d 1162 (9th Cir. 2010).

Federal statute conditioning bail upon providing DNA sample upheld

Jerry A. Pool was charged with possessing and receiving child pornography. With no prior criminal history, the judge ordered Pool's release, on bond, on the condition that he comply with all pretrial conditions. Pool agreed to all conditions, except the requirement to provide a DNA sample as allowable under the Bail Reform Act. Pool challenges the constitutionality of the requirement.

The Ninth Circuit applied the totality of the circumstances balancing test and concluded that the government's interest in confirming Pool's identity outweighed his privacy interest. It reasoned that the government's use of the DNA is limited to identification purposes and that there is no basis to believe it would be used for any other purpose. Additionally, the court rejected Pool's claims that the mandatory DNA collection provision is unconstitutional because Pool failed to show that requiring him to provide a DNA sample violated his rights under established precedent. Affirmed. *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010).

Pension funds may be garnished to satisfy criminal restitution order

Kerry DeCay and Stanford Barre pleaded guilty to mail fraud, conspiracy to commit mail fraud and obstruction of justice charges resulting

from a scheme to defraud the City of New Orleans. As part of sentencing, DeCay and Barre were ordered to pay restitution, under the Mandatory Victims Restitution Act (MVRA). After judgment against them was entered, the government sought to seize their interests in their pension funds to satisfy the restitution order. The court issued the writs of garnishment as requested. The garnished agency, as well as the defendants, objected to the garnishment writs and filed motions for a new trial or to alter or amend the judgment. The motions were denied and the parties appeal.

The Fifth Circuit held that the MVRA authorizes the garnishment of pension benefits to pay restitution. It further held that the garnishment did not violate the Tenth Amendment. However, it reversed part of the lower court's ruling, in that the Consumer Credit Protection Act prohibited the garnishment of any amount greater than 25 percent of the participant's monthly benefits. Affirmed in part, reversed in part, and remanded. *United States v. DeCay*, 620 F.3d 534 (5th Cir. 2010).



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JOHN R. JUSTICE STUDENT LOAN RELIEF PROGRAM UPDATE

In late June, Governor Herbert designated Utah Prosecution Council (UPC) as the state agency to administer the JRJ Act here in Utah. The Utah application was filed and a couple of weeks ago UPC received notification from DOJ that the application had been approved. The required acceptance documents have now been signed and returned.

During the summer an application to be used in applying for JRJ assistance was also prepared. DOJ has, however, in very specific terms, directed that no JRJ funds may be committed until after congress passes a budget for the fiscal year that began on October 1, 2010. As you are probably aware, Congress just adjourned until after the elections – without passing a budget. Depending upon election results, it could very well be sometime after the new congress convenes in January before an FY11 federal budget is passed.



Some things about JRJ awards, however, are certain:

- Only \$100,000 will be available for Utah in FY11.
- The act mandates that JRJ funds be divided 50/50 between prosecutors and public defenders, regardless of the relative number of eligible persons in each category. Up to 15% of the state's share may be used to cover administrative expenses.
- To be eligible for JRJ assistance a person must be either:
 - a full time prosecutor who works for state government, for a local governmental entity or for a tribal government;
 - a full time public defender who is employed by the state, by a local governmental entity or by a non-profit agency which contracts to supply public defender services for the state or for a local governmental entity; or
 - a full time public defender who works for a federal defender office.
- The act mandates that funding priority be given to those applicants who are “least able to pay” their student loan obligation.
- The act requires that a procedure be used to assure relatively equal geographic distribution of JRJ assistance awards throughout the state.
- The Utah JRJ committee has determined that, at least during this first year, no individual award of JRJ funds will exceed \$4,000. Individual award amounts will be based upon a formula that takes income and number of dependants into consideration. Longevity in JRJ eligible employment may also be considered.
- In order to receive a JRJ award, an applicant must sign a written commitment to continue in eligible JRJ employment for at least three years from the date of the award. Those who receive awards the first year of the program will, if still eligible, receive priority for subsequent year awards. Any subsequent year awards are, of course, dependant upon continued congressional funding of the program.
- There will not be nearly enough money to meet the needs of eligible prosecutors and public defenders in Utah.

Once the go-ahead from DOJ is received, word will be spread that UPC is ready to accept applications. Notification to prosecutors will be through e-mails from UPC, written notification to employers and information in *The Utah Prosecutor* newsletter. Notification to public defenders will be through e-mail and written notification to eligible employers, all of whom have agreed to spread the word internally. Information will also be posted in a JRJ section of the UPC website: www.upc.utah.gov.

All applications will be reviewed and award amounts will be determined by a five member committee consisting of two experienced public defenders, two experienced prosecutors and a representative from the Utah Higher Education Assistance Authority. The Director of UPC will chair the review committee but will have a vote only in case of a tie among other members of the committee.



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Other States

Texas court rejects free speech challenge to ban on 'gang signs'

Mario Rico Martinez was a member of the Varrío Carnales street gang. He and other gang members were enjoined from engaging in various activities within a geographically delineated area. Subsequently, Martinez was convicted of a misdemeanor offense for violating the injunction by making gang hand signs and wearing clothes identifying him as a gang member. The Fort Worth Court of Appeals affirmed and Martinez petitioned for discretionary review.

The Texas Court of Criminal Appeals affirmed the Fortworth Court of Appeals ruling. It held that the statute enjoining the conduct was content-based, was not unconstitutionally vague and did not violate separation of powers doctrine. It further held that the injunction was narrowly tailored to serve a compelling state interest and as such, the injunction did not violate Martinez' right to free speech. *Martinez v. State*, 2010 WL 3894633 (Tex. Crim App., 2010).

Increasing severity of charges after a mistrial constituted prosecutorial misconduct

Frank J. Knowles was charged with assault on a minor. After a mistrial, the prosecutor offered Knowles an open plea offer for the assault on a minor charge. Knowles was advised that if he chose to proceed to trial a second time the prosecutor intended to amend the charge to assault with a weapon. Knowles rejected the plea offer and as promised, the prosecutor amended the charge to felony assault with a weapon. Knowles was convicted at the second trial and appeals, arguing, among other issues, that the increased charge was imposed merely for exercising his right to go to trial.

The Supreme Court of Montana concluded that "because no new factual information was uncovered after the first trial which would justify a decision to increase the charges, the threat of a four- fold increase in punishment has the appearance of prosecutorial vindictiveness, and raises the reasonable likelihood that the State was simply utilizing the increased charges in an effort to deter Knowles from exercising his right to a second jury trial." Accordingly, the court held

that the appearance and reasonable likelihood of prosecutorial vindictiveness required retrial. Reversed and remanded. *State v. Knowles*, 2010 MT 186, 239 P.3d 129 (Mont. 2010).

No entitlement to jury instruction regarding cultural differences in child discipline

Loui Mahmoud Assad, a Syrian immigrant, was convicted by jury of torturing, committing aggravated mayhem and inflicting corporal injury on his children. On appeal, Assad argues, among other issues, that his trial counsel was ineffective for failing to request the court to instruct the jurors to consider whether the cultural differences in disciplining children created reasonable doubt as to Assad's requisite intent to inflict the harm.

The California appellate court held that trial counsel was not ineffective for failing to request a jury instruction regarding Assad's cultural background. It reasoned that the proposed instruction would have constituted an improper comment on the evidence, rather than a statement of law. Conviction affirmed. *People v. Assad*, 116 Cal.Rptr.3d 699 (Cal. Ct. App. 2010).

End of Briefs

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Seeking Restitution for Crime Victims: Statutes and Suggestions

by Brandon Simmons and Paul Fuller, Utah Crime Victims Legal Clinic¹

The purpose of restitution is, to the extent possible, to restore the victim to where he or she was before the crime was committed. In *State v. Corbitt*, 2003 UT App 417, ¶14, 82 P.3d 211, the Utah Court of Appeals stated that “the well-settled remedial purpose of our restitution statute is to compensate victims for the harm caused by a defendant and ... to spare victims the time, expense, and emotional difficulties of separate civil litigation to recover their damages from the defendant.” (quoting *Monson V. Carver*, 928 P.2d 1017, 1027 (Utah 1996)).

Prosecuting attorneys have several statutory duties regarding restitution. See UTAH CODE § 77-38a-202. In addition to fulfilling their restitution-related duties, prosecutors are often the best-situated criminal justice professionals to assist crime victims in seeking and enforcing restitution orders in criminal cases. This article reviews some of the restitution-related prosecutorial duties, reviews relevant cases and statutes, and makes several suggestions for effectively seeking restitution for crime victims.

Duties of Prosecutors

While determining restitution is only one of many issues a prosecutor has to think about when preparing to try or resolve a criminal case, prosecutors need to compile and prepare restitution information early in the case because they are required to present that information when a plea is entered or upon conviction. Specifically, the Crime Victims Restitution Act requires that “[a]t the time of entry of a conviction or entry of any plea disposition of a felony or class A misdemeanor [the prosecuting attorney] shall provide to the district court” the names of all victims, the “actual or estimated” amount of restitution, and “whether or not the defendant has agreed to pay the restitution specified as part of the plea disposition.” UTAH CODE § 77-38a-202(1). Many Utah courts continue to address restitution for the first time at sentencing; however, the purpose and intent of the restitution act is for prosecutors to demonstrate that restitution was factored into the plea bargaining process and, at the minimum, for the defendant to be put on notice that the victim may be seeking restitution.

The responsibility to calculate the amount of that restitution also falls to prosecutors. UTAH CODE § 77-38a-202(2)(a). While prosecutors are not statutorily required to provide restitution information to the court for class B and C misdemeanors, the best practice would be to have the same information ready at the time of conviction.²

In cases resulting in a plea agreement, where some charges are dismissed, prosecutors are required to inform the court about potential restitution claims arising from victims of the dismissed charges. UTAH CODE § 77-38a-202(3). Prosecutors are also required to “incorporate into any ... plea disposition all claims for restitution arising out of the investigation” where there are multiple victims, even if the charges related to some of those victims are dismissed. UTAH CODE § 77-38a-202(2)(b).

“Victim” is more broadly defined in the restitution statute than elsewhere in the criminal code. For restitution purposes, “victim” means “any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities” (except for co-defendants and accomplices). UTAH CODE § 77-38a-102(14). In addition to helping restore more victims to their pre-crime status, this expanded definition also has the rehabilitative benefit of holding the defendant responsible for more of the true impact of his or her crime. It can therefore be very helpful to seek information early on from victims about restitution. Victims can also be asked whether they are aware of other people who suffered financial losses as a result of the defendant's crime. The Utah Office of Crime Victim Reparations can be another helpful source of part or all of the restitution information in a particular case.

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Seeking Restitution for Crime Victims: Statutes and Suggestions *(continued)*

Calculating Restitution

UTAH CODE § 77-38a-302(5) contains the statutory framework for determining the amount of restitution. The court is to consider “all relevant facts, including” property damage, medical and counseling costs, physical therapy and rehabilitation, lost income (in cases involving bodily injury or in cases involving theft or damage of work tools), and funeral costs (in cases resulting in death). UTAH CODE § 77-38a-302(5) (b). Notably, restitution is not limited to the enumerated categories of loss, but instead the court is to consider “all relevant facts.” *See id.* The list provided in the statute is an inclusive, not exclusive, list of categories of restitution. *See id.* Complete restitution is the “restitution necessary to compensate a victim for all losses caused by the defendant.” UTAH CODE § 77-38a-302(2).

The standard for determining whether or not an expense is eligible for restitution is set by Utah case law. “[A] modified ‘but for’ test is appropriate in the context of a restitution hearing.” *State v. McBride*, 940 P.2d 539 (Utah Ct. App. 1997). This requires a showing that a loss would not have occurred “but for” the conduct underlying the offense and also that the causation between the conduct and the loss is not “unforeseeable.” *Id.* *See also State v. Hight*, 2008 UT App 188, 182 P.3d 922; *State v. Harvell*, 2009 UT App 271, 220 P.3d 174 (applying the “but for” and “reasonably foreseeable” tests in determining restitution).

Overly narrow calculations of restitution can allow defendants to escape responsibility for much of the impact of their crimes. While financial restitution is only one aspect of the process of determining criminal penalties, victims and the public can find much more satisfaction with a process that seeks to compensate victims for their reasonable crime-related expenses. Asking victims thorough questions about the impact the crime has had on them can help victims to feel heard, while allowing the prosecutor to more fully calculate restitution. Victims who feel that a prosecutor is more thoroughly investigating their crime-related financial losses are often also more likely to listen when the prosecutor explains the legal limitations on criminal restitution.

Complete and Court-Ordered Restitution

The Supreme Court has recently clarified the courts’ duties regarding restitution. “[D]istrict courts are to make two separate restitution determinations, one for complete restitution and a second for court-ordered restitution.” *State v. Laycock*, 2009 UT 53, ¶20, 214 P.3d 104. Complete restitution is a measure of “all losses caused by the defendant” and court-ordered restitution is “the restitution the court ... orders the defendant to pay as a part of the criminal sentence.” UTAH CODE § 77-38a-302(2). Court-ordered restitution is usually ordered by the court as a condition of probation, and may be part or all of the complete restitution. At the time of sentencing, a determination of complete restitution *must* be made “based on the best information possible” regardless of how limited that information is. *Laycock* at ¶23. “Although the court must determine complete restitution, it is not required to order a defendant to pay complete restitution as part of the criminal sentence.” *Id.* The courts must explain on the record their reasons for ordering, or not ordering, restitution. UTAH CODE § 77-38a-302(3).

Because the courts are required to determine complete restitution regardless of whether sufficient information has been provided, prosecutors should provide as thorough information as possible to the courts. Victims are usually the best source of that information. Additionally, since the courts are not required to order court-ordered restitution, the amount of restitution that defendants will be held criminally accountable for will likely be increased when prosecutors provide more thorough information to the courts.

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Seeking Restitution for Crime Victims: Statutes and Suggestions *(continued)*

Victim Empowerment

On occasion, a victim's view about the appropriate amount of restitution, or the appropriate level of enforcement, will deviate from the prosecutor's view. While there is not yet Utah case law exploring the following strategies, prosecutors may propose them to victims in lieu of either pursuing restitution the prosecutor does not consider reasonable, or discouraging victims from pursuing that restitution.³

While prosecutors have a duty to provide restitution information to the court, Utah law does not prohibit victims from being another source of restitution information. Victims may submit additional restitution information to the court in addition to that provided by the prosecutor. Prosecutors presenting this option to victims should inform victims of service requirements to avoid delays and to ensure that the defendant has appropriate notice of the victims' restitution requests.

When restitution has been ordered, victims are able to file a motion for an order to show cause to enforce the payment of past-due court-ordered restitution. See UTAH CODE § 77-38a-501(1); UTAH CODE § 76-3-201.1(3). When the victim files a motion for order to show cause, it is unclear whether the responsibility to show whether the defendant should be held in contempt falls to the victim or to the prosecutor.

Conclusion

Ultimately, restitution for crime victims is an important criminal law objective. The act of ordering restitution serves as an acknowledgment by the criminal justice system that the victim sustained harm, and can help to return a victim to his or her pre-crime financial state. Victim loss information should be promptly gathered in an environment supportive to victims. Increased attention should be paid to quantifying a victim's losses before the court determines restitution. This will help improve the quality and workability of such orders. Prosecutors should continue to follow developments regarding this issue and should be willing and equipped to assist crime victims who seek restitution.

¹ Brandon Simmons is a Staff Attorney with the Utah Crime Victims Legal Clinic. Paul Fuller is a third-year law student at the S.J. Quinney College of Law at the University of Utah, and is currently a student intern at the Utah Crime Victims Legal Clinic. The Utah Crime Victims Legal Clinic is funded in part by Grant No. 2008-DD-BX-K001 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this article are those of the authors and do not necessarily reflect those of the U.S. Department of Justice.

² This would be especially important in class A and B misdemeanor cases where victims have a special interest in the case, such as domestic violence simple assault, sexual crimes such as misdemeanor unlawful sexual activity with a minor, and traffic cases charged as traffic offenses but which resulted in serious injury or death.

³ Prosecutors proposing these options can also refer victims to the Utah Crime Victims Legal Clinic for possible further assistance in seeking restitution in criminal cases.



On the Lighter Side

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50% off
or half price,
whichever is less.

Army vehicle disappears

AN Australian Army vehicle worth \$74,000 has gone missing after being painted with camouflage. Police are seeking public help to find the four-wheel drive, which was

correction

Due to incorrect information received from the Clerk of Courts Office, Diane K. Merchant, 38, [REDACTED] SW, was incorrectly listed as being fined for prostitution in Wednesday's paper. The charge should have been failure to stop at a railroad crossing. The Public Opinion apologizes for the error.

fire call

ON TEENAGERS, ADULTS:

Statistics show that teen pregnancy drops off significantly after age 25.

Mary Anne Tebedo, Republican state senator from Colorado Springs (contributed by Harry F. Pincer)

MONDAY DECEMBER 1999

Police checked the area and found an open door in the back of the building. An officer went inside and called out, "Marco."

The man's name was not Marco, detective Tim Dohr said. Instead, "the officer was trying to inject some humor into the situation."

Police found the suspect after he responded, "Polo."

The restaurant manager

WANTED: Somebody to go back in time with me.

This is not a joke. P.O. Box 322, Oakview, CA 93022. You'll get paid after we get back. Must bring your own weapons. Safety not guaranteed. I have only done this once before.

about the new store locating on Lower Third Street.

Debra Jackson said she likes shopping at the Dollar Palace because it is convenient and casual.

"I don't have to get all dressed up like I'm going to Wal-Mart or something," she said, adding she shops at Williams' store "to

Miscellaneous

■ **Dog attack** — Lower Duck Pond, Lithia Park, Ashland. Police responded to a report of two dogs running loose and attacking ducks at about 11:20 a.m. Sunday.

The officer cited a resident for the loose dogs. **The duck refused medical treatment and left the area, according to police records.**

■ **Jail releases** — Jackson

Utah Poison Control Center reminds everyone not to take poison

"Children Act Fast, So Do Poisons" is the theme for National Poison Prevention Week, arch 29 - 26. The Utah Poison Control Center (UPCC) would like to take the opportunity to remind parents and caregivers that poisonings can be prevented. In 2004, the Utah Poison Control Center responded to over 60,000 calls, the majority of which were about potential poisonings.

Over 60 percent of the potential poisoning exposures involved children under age 6. The top five substances that children ingest

giving or taking medicine. Check the dosage each use.

Avoid taking medicine in front of children.

Never refer to medicine as candy.

Clean your medicine cabinet periodically, safely disposing of unneeded and outdated medicines.

The UPCC, part of the College of Pharmacy, has an active community outreach program. In 2004, representatives of the Utah Poison Control Center provided 126 community presentations and distributed more than 49,000 poison prevention education materials.

DO YOU HAVE A JOKE, HUMOROUS QUIP OR COURT EXPERIENCE?

We'd like to hear it! Please forward any jokes, stories or experiences to jstott@utah.gov.

The Utah Prosecution Council

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Visit the UPC online at
www.upc.utah.gov



UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

February 8-11	TRAIN THE TRAINERS <i>Training experienced prosecutors to be excellent trainers and instructors</i>	Hampton Inn & Suites West Jordan, UT
April 27-29	SPRING CONFERENCE <i>Case law and 2011 legislative update, ethics, civility and more.</i>	South Towne Expo Sandy, UT
May	REGIONAL LEGISLATIVE UPDATE SESSIONS <i>24 legislative update sessions for cops and prosecutors</i>	24 locations in all areas of the state
May 17-19	ANNUAL CJC / DOMESTIC VIOLENCE CONFERENCE <i>Workers against all types of interpersonal violence get to mingle and learn</i>	Zermatt Resort Midway, UT
June 23-24	UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE <i>Substantive training for non-legal staff in prosecution offices</i>	Location pending
August 4-5	UTAH MUNICIPAL PROSECUTORS ASSOCIATION SUMMER CONF. <i>The annual opportunity for municipal prosecutors to gather for mutual training</i>	Moab Valley Inn Moab, UT
August 15-19	BASIC PROSECUTOR COURSE <i>Substantive and trial advocacy training for new and newly hired prosecutors</i>	University Inn Logan, UT
September 14-16	FALL PROSECUTOR TRAINING CONFERENCE <i>The annual training and interaction event for all the state's prosecutors</i>	Facility pending Park City, UT
October 19-21	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training and interaction for civil side public attorneys</i>	Zion Park Inn Springdale, UT
November 9-11	ADVANCED TRIAL SKILLS TRAINING <i>Substantive and trial advocacy training for experienced prosecutors</i>	Location pending
November 17-18	COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR <i>Elected and appointed county/district attorneys meet in conjunction with UAC</i>	Dixie Center St. George, UT

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES*
AND OTHER NATIONAL CLE CONFERENCES

December 5-8	THE EXECUTIVE PROGRAM	Register	San Francisco, CA	
December 5-9	FORENSIC EVIDENCE	Agenda	Register	San Antonio, TX

* For a course description, click on the course title (if the course title is not hyperlinked, the sponsor has yet to put a course description on line). If an agenda has been posted there will be a "Agenda" link next to the course title. Registration for all NDAA sponsored courses is now on-line. To register for a course, click either on the course name or on the "Register" link next to the course name.

A description of and application form for NAC courses can be accessed by clicking on the course title.

Effective February 1, 2010, The National District Attorneys Association will provide the following for NAC courses: course training materials; lodging [which includes breakfast, lunch and two refreshment breaks]; and airfare up to \$550. Evening dinner and any other incidentals are NOT covered.

See the table

[PROSECUTOR BOOTCAMP](#)

[Register](#)

NAC
Columbia, SC

Specifically designed for newly hired prosecutors

Course Dates	Registration Deadlines
February 7-11, 2011	December 3, 2010
March 21-25, 2011	January 21, 2011

Feb. 28—March 4

[TRIAL ADVOCACY I](#)

[Register](#)

NAC
Columbia, SC

*A practical, “hands-on” training course for trial prosecutors
The registration deadline is January 3, 2011.*

March 14-17

[CROSS EXAMINATION](#)

[Summary](#)

NAC
Columbia, SC

A complete review of cross examination theory and practice

April 3-8

[childProof](#)

[Summary](#)

NAC
Columbia, SC

Intensive course for experienced child abuse prosecutors

April 11-15

[TRIAL ADVOCACY I](#)

[Summary](#)

NAC
Columbia, SC

A practical, “hands-on” training course for trial prosecutors

April 18-21

[UNSAFE HAVENS II](#)

[Summary](#)

NAC
Columbia, SC

Prosecuting on-line crimes against children

