

Construing the Restitution Statutes

BY ADAM J. ESPINOSA AND ABIGAIL WALKER

This article discusses key provisions of the Colorado restitution statutes and includes practical tips for prosecutors, defendants, and trial courts based on recent court decisions dealing with restitution in Colorado.

Colorado restitution statutes have been a primary source of caselaw during the last two decades. In 2021, the Colorado Supreme Court further developed that caselaw with its decision in *People v. Weeks*. As Justice Carlos Samour notes in the opening line of *Weeks*: “Old habits die hard.”¹ *Weeks* clarifies two separate provisions of CRS § 18-1.3-603—a statute concerning the assessment of restitution—that deal with the 91-day deadline for courts to determine the final amount of restitution in a sentence.² The decision outlines a framework for how trial courts and parties should resolve cases in which the exact amount of restitution is deferred to a later time.³ This article reviews some of the important components of *Weeks*, as well as the best practices envisioned by the Court for litigants and trial courts going forward. It also highlights recent caselaw that refined the way Colorado interprets its restitution statutes in general.

The Issue: Confusion Caused by CRS § 18-1.3-603

Colorado law requires that all judgments of conviction determine whether and to what extent restitution should be ordered.⁴ As written, CRS 18-1.3-603 created a source of confusion for trial courts and parties alike because subsections (1)(b) and (2) seemed to give the same deadline for both supplying information to support a determination of restitution and the determination of restitution itself.⁵ In practice, how can the prosecution provide information supporting a motion for restitution and the trial court issue an order for restitution by the same deadline?⁶ Imposing the same deadline would preclude the defendant from having a reasonable and meaningful opportunity to contest the proposed amount and order.⁷ *Weeks* provided much-needed clarification on how

these provisions work together and outlined best practices to help Colorado courts and litigants comply with the restitution statute.⁸

The Law: CRS § 18-1.3-603

Subsection (1) of CRS § 18-1.3-603 details the four ways in which the trial court must determine restitution at the judgment of conviction.⁹ Trial courts can enter restitution orders that include:¹⁰

1. a specific, final amount that the defendant must pay, determined at the judgment of conviction;
2. a reservation of the restitution amount to be determined at a later date (within 91 days unless there is good cause to extend this deadline);
3. a determination that the defendant pay actual, future costs of the treatment a victim receives for injury sustained as a result of the convicted conduct; or
4. a determination that no restitution is required.

The statute requires one or more of these orders to be entered, which means it is possible to enter a restitution order that is a combination of the four options. It is not uncommon for courts to enter an order requiring the defendant to pay a specific amount of restitution and an order for actual costs of specific future treatment.

Subsection (2) of CRS § 18-1.3-603 requires the trial court to enter an amount of restitution based on information provided by the prosecuting attorney.¹¹ The prosecution must submit this information before the judgment of conviction. If the information supporting a motion for restitution is unavailable and restitution is reserved in the manner prescribed by subsection (1)(b), then the information must be submitted within 91 days after the judgment of conviction.¹² Like the deadline given to trial courts in subsection (1)(b), this deadline can

be extended, but only if the trial court finds extenuating circumstances have prevented the prosecution from obtaining the information.¹³

Clarification in *Weeks*

As the Court emphasized in *Weeks*, CRS § 18-1.3-603(2) envisions a requirement that any motion for restitution must be made before or during the sentencing hearing.¹⁴ This is because restitution is a component of a final judgment.¹⁵ This distinction is important because some trial courts, and their respective prosecutors and defendants, slipped into the habit of allowing the prosecution to file the *motion* for restitution, rather than the information supporting the motion, during the 91-day period.¹⁶ The Court further determined that subsection (1)(b) refers to the *trial court's* deadline in entering a final determination of the restitution amount,¹⁷ and subsection (2) refers to the *prosecution's* deadline for providing the information to support a motion for restitution.¹⁸ The Court reached this distinction by looking at the context of subsection (1)(b), which deals entirely with orders.¹⁹ Trial courts, not the prosecution, have the authority to enter orders.²⁰ Both subsections, however, require an express finding of good cause to extend the 91-day deadline,²¹ and the extension must be granted before the 91-day deadline expires.²² Extenuating circumstances affecting the prosecution's ability to meet the 91-day deadline is one of many reasons that a trial court could extend the deadline for good cause contemplated by subsection (1)(b).²³

Going Forward When Reserving Restitution: Best Practices

A unique but helpful aspect of the *Weeks* decision is the Court's description of how it envisions subsections (1)(b) and (2) working in reality.²⁴ A key component for all parties to keep in mind, including the trial court, is

that subsection (1)(b) is triggered where the prosecution has not determined the amount of restitution due to a lack of information but has properly moved to reserve that determination.²⁵

Tips for Prosecutors

Prosecutors should make a motion for restitution before or at the sentencing hearing.²⁶ If the prosecution is unable to determine the exact amount at that point, it should communicate that to the trial court and provide an anticipated date at which that information will become available.²⁷ Any extenuating circumstances that will prevent the prosecution from determining the restitution amount by the 91-day deadline should be communicated as soon as possible, ideally at the sentencing hearing.²⁸

Important reminders. CRS § 18-1.3-603(2) allows the prosecution to submit *information in support* of a motion—not the motion itself—after the sentencing hearing.²⁹ Subsection (3)(a) of this statute, which allows the trial court to increase the preliminary amount where additional victims or losses are discovered, only applies in situations like the one described in subsection (1)(b) where a final restitution amount has not yet been determined.³⁰ Additionally, subsection (3)(a) does not create an exception to the deadlines in subsection (1)(b).³¹

Tips for Defendants

If a (1)(b) order is entered at the sentencing hearing, defendants can either: (1) enter an agreement with the prosecution concerning the preliminary restitution order, (2) convey an intent to oppose the future amount, or (3) take a wait-and-see approach and contest the amount once the prosecution has provided the supporting information.³² No matter what option they choose, defendants should communicate their intentions to the court at the sentencing hearing.³³

Important reminders. The defense can contest the existence of the prosecution’s purported extenuating circumstances to extend the 91-day deadline under subsection (2).³⁴ If the prosecution takes almost the entire 91-day period to submit the requisite information under a subsection (1)(b) preliminary restitution order, the court may find good cause to extend its

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The 91-day post-sentencing allotment is not guaranteed; rather, it is a mechanism to allow the prosecution to gather information needed, but not yet available, to determine restitution. The trial court must make an express finding of good cause when extending the determination past the 91 days allowed by the statute, and it must do so before that deadline expires.

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deadline to enter the order to allow the defense time to respond.³⁵

Tips for Trial Courts

Trial courts should always be prepared to enter one or more of the four restitution orders prescribed by CRS § 18-1.3-603(1) *at the sentencing hearing*.³⁶ Subsection (1)(b) only permits the trial court to put off determining the *amount* of restitution, and only when the prosecution has made a motion for restitution.³⁷ The 91-day post-sentencing allotment is not guaranteed; rather, it is a mechanism to allow the prosecution to gather information needed, but not yet available, to determine restitution.³⁸ The trial court must make an express finding of good cause when extending the determination past the 91 days allowed by the statute, and it must do so before that deadline expires.³⁹ This express finding requirement applies to the court’s own extensions or those granted at the request of the prosecution under subsection (2).⁴⁰ In addition to extenuating circumstances presented by a prosecutor under subsection (2), good cause for an extension could include scheduling issues in the trial court’s docket, complex issues within the case, or giving the defense an ample opportunity to respond.⁴¹ Importantly, if the trial court enters a subsection (1)(b) restitution order at the sentencing hearing, the mittimus should reflect this and then be updated once the amount has been determined.⁴²

Considering that 91 days is 13 weeks, some trial courts have developed standard practices that follow a week-to-week pattern to keep parties on track with the requirements of subsections (1)(b) and (2) within their regular docket schedules. Courts often require the prosecution to file information 42, 49, or 56 days (6 to 8 weeks) from the date of the judgment of conviction and require the defense to respond within 14 days of that filing. This method provides the prosecution ample time to determine the amount of restitution and creates a timeline within the 91 days for parties to communicate their intentions to the trial court well before the deadline precludes the option of an extension.⁴³

Important reminders. If the prosecution does not submit information to support an order for restitution in time, or if the trial court

decides not to order restitution, the mittimus should be updated to show that no restitution is required.⁴⁴ CRS § 18-1.3-603(3)(a) only allows for an increase in the amount of restitution where a final amount has not been determined. This could apply when a preliminary amount is determined under a subsection (1)(b) order.⁴⁵

Other Restitution Reminders

As Justice Samour alluded to in *Weeks*, subsections (1)(b) and (2) of CRS § 18-1.3-603 are not the only sources of recent confusion when it comes to restitution.⁴⁶ Below is a quick summary of law flowing from other decisions in the last two decades that has affected the way Colorado courts interpret the restitution statutes. Prosecutors, defendants, and trial courts alike need to consider these cases when navigating restitution.

Final Judgment and Appeals

Until a trial court enters a restitution order, sentencing is not complete and the judgment is not final.⁴⁷ Therefore, a trial court retains jurisdiction until it enters an order of restitution, and a direct appeal before such an order would be premature.⁴⁸ A sentence that does not fix restitution is illegal;⁴⁹ however, where a defendant has received a final conviction, an illegal sentence for purposes of restitution does not renew the opportunity for a direct appeal.⁵⁰ The restitution amount cannot be increased where a sentencing court has entered a restitution order with a determination of the final amount.⁵¹

Waivers of Appearance and the Restitution Hearing

A defendant has the right to be present at a restitution hearing.⁵² A defendant's failure to appear at the restitution hearing does not necessarily constitute a waiver of appearance, and a waiver of appearance does not necessarily permit a default judgment against the defendant.⁵³ A defendant may appear through defense counsel to contest the amount of restitution proposed by the prosecution.⁵⁴ Because restitution hearings are a component of sentencing, and sentencing is a critical stage in the trial process,⁵⁵ defense counsel cannot unilaterally waive a defendant's


presence.⁵⁶ A defendant waives any objections to an amount of restitution proposed by the prosecution if the defendant does not contest evidence at the opportunity to do so.⁵⁷

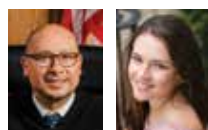
Restitution Requires a Valid Conviction

Withholding a refund of restitution upon a vacated conviction violates a defendant's Fourteenth Amendment right to due process.⁵⁸ Acquitted and dismissed charges cannot support an order of restitution.⁵⁹ Deceased defendants who have

not received a final conviction are entitled to the same abatement privileges in restitution as in all other criminal proceedings.⁶⁰

Conclusion

Weeks clarified important deadlines outlined in CRS § 18-1.3-603. Prosecutors, defendants, and trial courts should follow the Court's practical guidance in *Weeks*, along with other recent caselaw, when handling cases involving restitution. 



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NOTES

1. *People v. Weeks*, 498 P.3d 142, 147 ¶ 1 (Colo. 2021).
2. *Id.*
3. *Id.* at 155–56 ¶ 44.
4. CRS § 18-1.3-603(1). This subsection describes one very specific exception in which restitution does not have to be considered in a final judgment, which is not relevant for purposes of this article. *See also Weeks*, 498 P.3d at 147–48 ¶ 3.
5. *Weeks*, 498 P.3d at 154 ¶ 37.
6. *Id.* at 154 ¶¶ 37–38.
7. *Id.*
8. *Id.* at 155–56 ¶ 44.
9. CRS § 18-1.3-603(1). *Weeks*, 498 P.3d at 148 ¶ 3.
10. CRS § 18-1.3-603(1)(a)–(d).
11. CRS § 18-1.3-603(2)(a).
12. *Id.*
13. *Id.*
14. *Weeks*, 498 P.3d at 152–53 ¶ 30.
15. *See People v. Rosales*, 134 P.3d 429, 432 (Colo.App. 2005).
16. *Weeks*, 498 P.3d at 147 ¶ 1.
17. *Id.* at 148 ¶ 5, 153 ¶ 31.
18. *Id.* at ¶¶ 6, 31.
19. *Id.* at 152–53 ¶ 30.
20. *Id.*
21. *Id.* at 155 ¶ 40.
22. *Id.* at 148 ¶¶ 5, 6.
23. *Id.* at 156 ¶ 44.
24. *Id.*
25. *Id.* at 152–53 ¶ 30.
26. *Id.* at 156 ¶ 44.

27. *Id.*
 28. *Id.* at 148 ¶ 8, 156 ¶ 44.
 29. *Id.* at 152–53 ¶ 30.
 30. *Id.* at 154 ¶ 36.
 31. *Id.* (The Court reiterates that the “subsection merely permits a court to increase an order of restitution ‘if additional victims or additional losses,’ not known when the order of restitution was entered, ‘are later discovered and the final amount of restitution due has not been set by the court.’”).
 32. *Id.* at 155–56 ¶ 44.
 33. *Id.*
 34. *Id.*
 35. *Id.*
 36. *Id.* at 149 ¶ 8.
 37. *Id.* at 152–53 ¶ 30.
 38. *Meza v. People*, 415 P.3d 303, 309 ¶ 17 (Colo. 2018) (prosecution could not increase the amount of restitution when the trial court had entered a final determination of the amount and nothing in the record reflected that the amount would be determined at a later date).
 39. *Weeks*, 498 P.3d at 148 ¶ 5.
 40. *Id.* at ¶ 6.
 41. *Id.* at 156 ¶ 44.
 42. *Id.* at 149 ¶ 9, 156–57 ¶ 44.
 43. An overarching tone throughout the *Weeks* opinion reflects a desire from the Colorado Supreme Court that parties communicate openly and effectively with the trial court when it comes to reserving restitution past the judgment of conviction. See *generally Weeks*, 498 P.3d 142.
 44. *Id.* at 149 ¶ 9.
 45. *Id.* at 154 ¶ 36.
 46. *Id.* at 147 ¶ 1.
 47. *Rosales*, 134 P.3d at 432.
 48. *Id.*
 49. *People v. Dunlap*, 222 P.3d 364, 368 (Colo. App. 2009) (citing *People v. Smith*, 121 P.3d 243, 251 (Colo.App. 2005)).
 50. *Dunlap*, 222 P.3d at 369 (reasoning that “failure to consider or fix restitution does not affect the finality of [a] judgment of conviction”).
 51. *Meza v. People*, 415 P.3d 303; *People v. Belibi*, 415 P.3d 301 (Colo. 2018) (once a final judgment is entered, the trial court loses the authority to increase restitution, even in the

- event of a surprise cost or victim associated with the conviction).
 52. *People v. Hernandez*, 487 P.3d 1095 (Colo. App. 2019).
 53. *People v. Martinez*, 166 P.3d 223, 225 (Colo. App. 2007) (a court cannot enter an order of restitution without a hearing where the prosecution must prove the victim’s losses in conjunction with the conviction and defense counsel is prepared to contest the proposed amount).
 54. *Id.* (restitution is a final *civil* judgment and civil courts do not enter default judgments where attorneys appear without their clients).
 55. *Hernandez*, 487 P.3d at 1100 ¶ 22.
 56. *Id.* at 1101 ¶ 27.
 57. *Martinez*, 166 P.3d at 224.
 58. *Nelson v. Colorado*, 581 U.S. 128, 134–35 (2017). The Court ultimately ruled that Colorado’s Exoneration Act did not sufficiently mitigate the due process issues caused by its restitution statutes that prohibited trial courts from issuing refunds of restitution to defendants with overturned convictions because (1) someone cannot be presumed “guilty enough” for monetary exactions; (2) restitution is tied to a criminal proceeding, and the defendant cannot be required to have any burden of proof where they have been deemed innocent; and (3) the civil proceeding outlined by the Act for the defendant to seek a refund of restitution is cost-prohibitive. *Id.* This case overturned *People v. Nelson*, 362 P.3d 1070 (Colo. 2015).
 59. *Cowen v. People*, 431 P.3d 215 (Colo. 2018) (a person acquitted of a charge cannot be ordered to pay restitution based off that charge because that person is not an “offender”); *People v. Roddy*, 498 P.3d 136 (Colo. 2021) (the trial court could not order restitution based on conduct exclusively related to charges that had been dismissed).
 60. *People v. Johnson*, 499 P.3d 1045 (Colo. 2021). As a reminder, “final conviction” refers to defendants who have exhausted all rights to direct appeal.

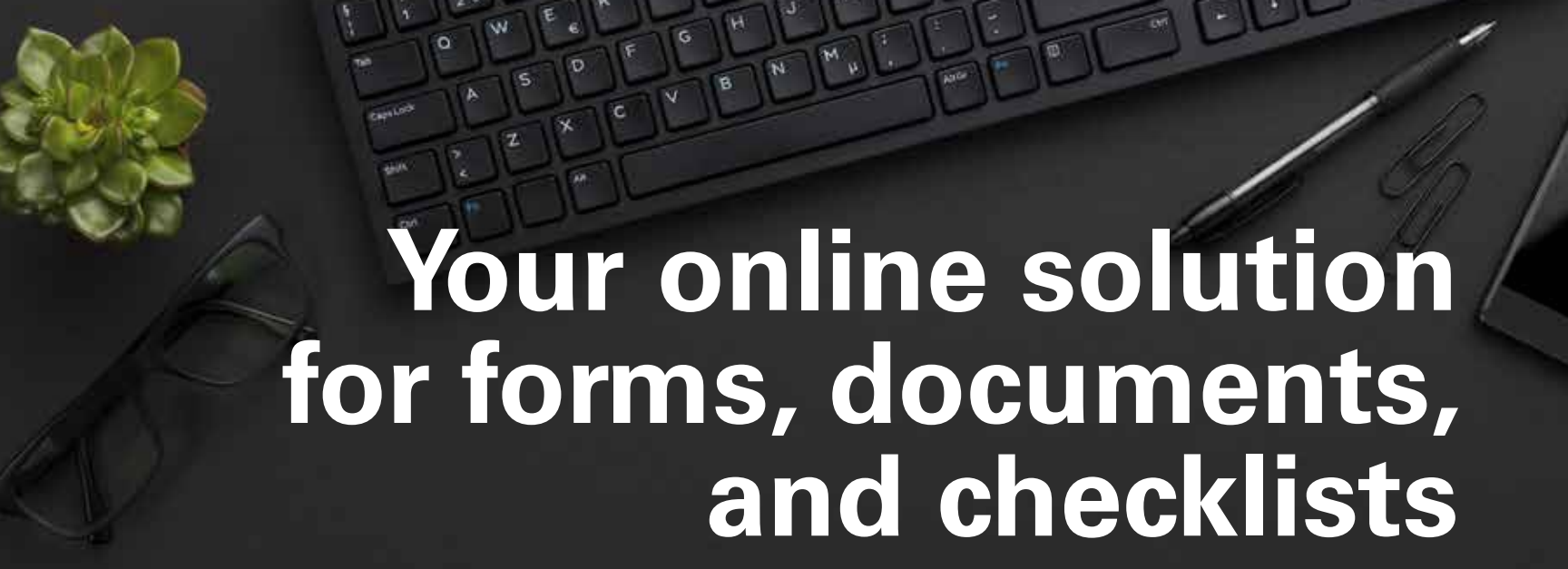


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