

2015

## State of Utah, Plaintiff/Respondent v. Ryan Mooers and Darron Laven Becker, Defendants/Petitioners

Utah Supreme Court

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Case No. 20150996-SC

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IN THE  
UTAH SUPREME COURT

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STATE OF UTAH,  
*Plaintiff/Respondent,*

*v.*

RYAN MOOERS AND DARRON LAVEN BECKER,  
*Defendants/Petitioners.*

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Brief of Respondent

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*On Writ of Certiorari to the Utah Court of Appeals*

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- Utah R. App. P. 3 (appeal as of right)
- Utah R. App. P. 5 (discretionary appeals from interlocutory orders)
- Utah R. Civ. P. 54 (judgments)
- Utah Code Annotated § 77-2a-1 (West Supp. 2012) (plea in abeyance definitions)
- Utah Code Annotated § 77-2a-2 (West Supp. 2012) (plea in abeyance terms)
- Utah Code Annotated § 77-2a-3 (West Supp. 2012) (entry of plea in abeyance)
- Utah Code Annotated § 77-2a-4 (West Supp. 2012) (violation of plea in abeyance)
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*Defendants/Petitioners.*

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Brief of Respondent

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**STATEMENT OF JURISDICTION**

This case is before the Court on a writ of certiorari to the Utah Court of Appeals in *State v. Mooers*, 2015 UT App 266, 362 P.3d 282, and *State v. Becker*, 2015 UT App 304, 365 P.3d 173 (Addendum A). This Court consolidated the cases pursuant to rule 3(b), Utah Rules of Appellate Procedure. The Court has jurisdiction under Utah Code Ann. § 78A-3-102(5) (West Supp. 2015).

**INTRODUCTION**

After Mooers burglarized a home and Becker struck his neighbor with a shovel, they negotiated pleas in abeyance with the State to avoid convictions and sentences for felonies. In return, Mooers and Becker had only to attend a class, pay a fee, and pay restitution to their victims. Their



plea in abeyance agreements did not specify a sum certain for restitution, but left that determination to the trial court.

Mooers and Becker ultimately disagreed with the trial courts' restitution determinations and appealed to the court of appeals. The court of appeals dismissed Mooers's and Becker's appeals, holding that because their pleas in abeyance were not final orders, the court lacked jurisdiction to consider them.

### **STATEMENT OF THE ISSUE**

Did the court of appeals err in holding that it lacked jurisdiction to consider Mooers's and Becker's direct appeals from restitution entered as conditions of their non-final pleas in abeyance?

*Standard of Review.* Whether appellate jurisdiction exists is a question of law reviewed for correctness. *Gailey v. State*, 2016 UT 35, ¶8, \_\_ Utah Adv. Rep. \_\_.

### **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The following constitutional provisions, statutes, and rules are reproduced in Addendum B:

- Utah R. App. P. 3 (appeal as of right)
- Utah R. App. P. 5 (discretionary appeals from interlocutory orders)
- Utah R. Civ. P. 54 (judgments)

- Utah Code Annotated § 77-2a-1 (West Supp. 2012) (plea in abeyance definitions)
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- Utah Code Annotated § 77-38a-401 (West Supp. 2012) (entry of restitution judgment)

## STATEMENT OF THE CASE<sup>1</sup>

### A. *State v. Mooers*.

#### 1. Summary of facts.

One November, a family went on a week-long vacation. *See* mR.2. When they returned, they discovered that their home had been burglarized. *See* mR.2; mR.138:14. The burglars had entered the home through daughter Randi’s bedroom window, scattering “glass everywhere.” mR.138:5, 13-14.

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<sup>1</sup> Because this case has been consolidated by the Court’s order, there are two records on appeal: the record of *State v. Mooers* and the record of *State v. Becker*. To avoid confusion, the State cites to the record in *Mooers* as mR.\_\_\_ and the record in *Becker* as bR.\_\_\_.

Randi's carpet had been torn and ripped from the broken window glass and her belongings were strewn around. *See* mR.128:6; mR.138:8. Several of the family's items were missing from throughout the home. *See* mR.138:8, 13. The family estimated that the burglars had stolen \$3,200 in jewelry and coins. *See* mR.2.

After the break-in, Randi "was terrified" and "didn't feel safe anymore." mR.138:7, 16. She became withdrawn, would "shake," and experienced nightmares. mR.138:16. And if someone "walked into the room unexpectedly," she would "jump halfway out of her skin." mR.138:17.

Randi was also too afraid to sleep in her bedroom and she began sleeping on the couch. *See* mR.138:8, 15. Randi, in fact, would not go into her bedroom at all except to "grab [her] clothes in the morning" and only if her mother accompanied her. *Id.* at 11, 15.

Approximately one month after the break-in, Randi's parents decided that "the only thing [they] could do" to ease Randi's distress was to install security bars on her window. mR.138:16; mR.132 n.2. Indeed, after the security bars were installed, Randi "got much better." mR.138:17. She "felt safer" and returned to sleeping in her own bedroom. mR.138:9.

After an investigation, Mooers and a co-defendant were charged for their involvement in the break-in. *See* mR.1-2, mR.138:2. Mooers was charged with burglary, a second degree felony, and theft, a third degree felony. *See* mR.1-2.

Mooers negotiated a plea in abeyance agreement with the State. According to the agreement, Mooers agreed to plead guilty to third-degree-felony theft, and the State would dismiss the more serious burglary charge. *See* mR.15, 24; mR.137:1. The trial court would hold the plea in abeyance for 18 months. *See id.* If Mooers successfully fulfilled certain plea in abeyance conditions, the theft charge would also be dismissed and Mooers would not have any conviction. *See* mR.137:5-6; Utah Code Annotated §77-2a-3(2) (West Supp. 2012).

As conditions of his plea in abeyance, Mooers agreed to complete a theft class, pay a \$200 fee, and pay restitution jointly and severally with his co-defendant. *See* mR.15, 24; mR.137:5-6; mR.138:1-2. The plea in abeyance agreement did not provide how much restitution Mooers would be required to pay. Instead it stated that the State would “submit” its figure to the trial court within 90 days of Mooer’s plea. *See* mR.137:5; mR.15, 24.

At his plea hearing, Mooers admitted that he “aided others in entering a home and taking coin[s] and jewelry worth between \$1,500 and

\$5,000.” mR.22; mR.137:3. The trial court accepted Mooer’s plea, but did not enter it, instead holding it in abeyance for 18 months. See mR.15; mR.137:5. Following the terms of the plea in abeyance agreement, the trial court ordered Mooers to complete a theft class, pay a fee, and pay restitution jointly and severally with his co-defendant. mR.137:6; mR.15. The trial court “g[a]ve the State 90 days to determine the restitution” amount. mR.137:6. The trial court advised Mooers that if he failed to fulfill these conditions, it “would mean you would come back here and the guilty plea would be entered and you would be sentenced.” mR.137:5.

Following the plea hearing, the State requested \$5,760.50 in restitution—about \$260 more than Mooers had already admitted he owed. See mR.38, 110-127. Of this amount, \$4,660.50 was for the value of the stolen jewelry and coins, repairing Randi’s broken window, and replacing Randi’s damaged carpet. See mR.116-125, 131. The remaining \$1,100 was for installing security bars on Randi’s bedroom window. See *id.*

Mooers objected to restitution for the security bars, asserting that they were not “‘pecuniary damages’ resulting from Defendant’s ‘criminal activity’” as required by the Crime Victims Restitution Act. mR.71; mR.128:4-7, 11-12 (quoting Utah Code Ann. § 76-3-201).

The trial court disagreed. *See* mR.131-135. After an evidentiary hearing and considering both oral and written argument, it ordered Mooers to pay “for all of the pecuniary damages arising from the break-in,” “including the installation of security bars.” mR.135.

Mooers appealed the trial court’s restitution award for the security bars. *See* mR.101.

## **2. The court of appeals’ decision.**

In a unanimous opinion, the court of appeals held that it lacked jurisdiction to consider Mooers’s appeal. *See State v. Mooers*, 2015 UT App 266, ¶¶10, 19, 362 P.3d 282 (Addendum A). While the court agreed that defendants, “as a matter of right,” may appeal a final judgement of conviction, it recognized that under well-established precedent, “a plea in abeyance is neither a sentence nor a final judgment, and therefore does not give rise to a right to appeal.” *Id.* at ¶¶8, 10 (citing *Meza v. State*, 2015 UT 70, 359 P.3d 592; *State v. Moss*, 921 P.2d 1021 (Utah App. 1996); *State v. Millward*, 2014 UT App 174, 332 P.3d 400; *Salzl v. Department of Workforce Servs.*, 2005 UT App 399, 122 P.3d 691; *State v. Hunsaker*, 933 P.2d 415 (Utah App. 1997) (per curiam)).

The court of appeals further rejected Mooers’s contention that a restitution order—entered as a condition of a plea in abeyance—is

independently appealable. *Id.* at ¶¶11-17. To the extent that *State v. Gibson*, 2009 UT App 108, 208 P.3d 543, or *Meza v. State*, 2015 UT 70, 359 P.3d 592, suggested such a right, the court of appeals dismissed its language as non-binding dicta because neither case addressed whether a restitution order entered as a condition of a plea in abeyance was directly appealable. *See id.* at ¶¶12-14 (explaining that *Gibson* reviewed trial court's denial of motion to withdraw guilty plea and *Meza* addressed whether successfully completed plea in abeyance agreement is treated as conviction for purposes of Post-Conviction Remedies Act).

Recognizing that statutes which treat pleas in abeyance as convictions do so only "explicitly," the court of appeals also determined that the Crime Victims Restitution Act did not create a right to directly appeal a restitution order entered as a condition of a plea in abeyance agreement. *Id.* at ¶15. The Act's provision that a restitution order be "'considered a legal judgment, enforceable under the Utah Rules of Civil Procedure'" did not create such a right because it "does not refer to the right to appeal, nor does it indicate that a restitution order is considered a conviction for purposes of appeal." *Id.* at ¶¶16-17 (quoting Utah Code Annotated § 77-38a-401(2) (LexisNexis 2012)). Instead, this provision simply created a mechanism for victims to enforce the payment of restitution. *Id.* at ¶17.

The court of appeals finally noted that defendants who are ordered to pay restitution as a condition of a plea in abeyance are not without an avenue for seeking appellate review. *Id.* at ¶18. It observed that they can request interlocutory review pursuant to rule 5, Utah Rules of Appellate Procedure or they can request extraordinary relief under rule 65B of the Utah Rules of Civil Procedure. *Id.*

**B. *State v. Becker.***

**1. Summary of facts.**

Angry that his neighbor Mr. Turner's dogs were off-leash, Becker ran after Mr. Turner with a shovel, yelling obscenities and threatening to kill him. *See* bR.2, 73, 79. Becker hit Mr. Turner with the shovel twice – once in the throat and once in the head. *See* bR.2, 73, 82. Becker then pinned Mr. Turner against a fence. *See* bR.74, 76, 77. Mr. Turner escaped only after neighbors intervened. *See* bR.74, 82.

A responding officer noted that Mr. Turner had injuries on the top of his head as well as scratches and marks on his neck and a bleeding cut on his hand. *See* bR.2, 81. As the officer placed Becker under arrest, he continued to yell about Mr. Turner and his dogs. *See* bR.2, 82.

Becker was charged with aggravated assault, a third degree felony. *See* bR.1. Like Mooers, Becker negotiated a plea in abeyance with the State.



Becker agreed to plead guilty to attempted aggravated assault, a class A misdemeanor, with the understanding that the trial court would hold the plea in abeyance for 24 months. *See* bR. 26, 28; bR.99:6. In return, Becker agreed to complete an anger management class and to pay the victim restitution. bR.28; bR.99:2. If Becker successfully complied with these conditions, the charge against him would be dismissed. bR.99:5.

While Becker and the State did not agree to a final sum for restitution, the State gave Becker a copy of a letter Mr. Turner had written requesting restitution for \$1,143: \$39 for a vision exam, \$624 for pair of replacement eyeglasses, and \$480 for lost wages. *See* bR.68; bR.99:2, 10; bR.95:5, 8-9.

At the plea hearing, Becker admitted that he had “attempted to hit his neighbor with the handle of a shovel during an argument regarding some loose dogs.” bR.99:7-8. He confirmed that the plea in abeyance agreement required him to complete an anger management course and to pay the victim restitution. *See* bR.99:2.

When the trial court expressed concern about accepting a plea in abeyance agreement that did not include a restitution amount, Becker affirmed that the plea in abeyance agreement required him to pay full restitution. *See* bR.99:2. He further agreed that the trial court would determine the final restitution amount and he would be required to pay it,

even if he ultimately disagreed with the trial court's determination. *See* bR.99:2-3, 9 (Becker affirming trial court's statement that "everyone understands the payment of restitution as ordered by this court . . . will be one of the conditions . . . [e]ven if Mr. Becker ultimately disagrees with what that is").

The trial court accepted Becker's plea, held it in abeyance for 24 months, and ordered him to complete an anger management course and to "pay full restitution." bR.21; bR.99:8-10.

Following the plea hearing, the State submitted a motion for restitution, requesting \$663.01—a little over half the original estimate because it did not seek restitution for Mr. Turner's lost wages. *See* bR.32; bR.95:5-6. The State included a "Subrogation Notice" for the Utah Office for Victims of Crime (UOVC). *See* bR.34-37. The documents itemized the \$663.01 to show that the UOVC had paid the victim \$39.00 and \$624.01 for "Medically Necessary Device[s]." bR.36. The documents also included Becker's name, the date and address of the assault, the police report number, the responding officer's name, the victim's name, the third district court's case number, and the UOVC claim number. *See* bR.35-37.

Becker objected to the State's restitution request. *See* bR.38, 42. At a subsequent hearing, Becker argued that the UOVC's documents were

insufficient because they did not state what the “medically necessary device” was or “who provided the services.” bR.95:4-5. Although subpoenaed, Mr. Turner did not appear at the hearing. *See* bR.95:6.

The State explained that the “medically necessary device[s]” were for Mr. Turner’s \$39 vision exam and \$624 pair of replacement eyeglasses. bR.95:5-6; bR.68. The State presented Mr. Turner’s letter to the trial court. *See id.*

Becker, however, insisted that the UOVC must have had “additional information.” R.95:8. He asked for another hearing so that he could “try to obtain that information.” R.95:11. While the trial court believed that “on its face this appears to be a proper restitution claim,” it ordered another hearing to give Becker “some time to see if in fact this is not what it claims to be.” R.95:17. But the trial court cautioned that “I am not going to have a hearing where I second-guess whether or not [the UOVC] should have paid that . . . .” bR.95:12. Instead, the hearing would address only whether there was “sufficient documentation to connect it to this criminal conduct.” *Id.* The court explained that unless Becker came up with something that undercut the UOVC’s decision to reimburse Mr. Turner, it planned to order restitution in the amount of \$663.01. *See id.*

Before the second restitution hearing, Becker served the UOVC with a subpoena duces tecum. *See* bR.45-46. The UOVC responded with documents showing that it had reimbursed the victim for an eye exam and eyeglasses, but the documents were “no more in detail than what” it had already provided. bR.96:4.

At the second restitution hearing, Becker argued once again that the State’s request for restitution lacked evidentiary foundation because “the only thing that’s formal” was the UOVC’s notice that it had paid the victim \$663.01 for unspecified “medically necessary device[s].” bR.96:5. Becker further argued that the State had not shown a causal nexus between his criminal conduct and Mr. Turner’s economic loss because Becker “did not admit to any conduct that would result in damages to Mr. Turner’s eye or his eyeglasses . . . .” bR.96:5.

The trial court rejected Becker’s arguments and granted the State’s motion for restitution in the amount of \$663.01. *See* bR.84; bR.96:14. Becker appealed. *See* bR.91.<sup>2</sup>

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<sup>2</sup> On May 6, 2016, the trial court ordered Becker to appear and show cause why his plea in abeyance should not be terminated, judgment of conviction be entered, and his sentence be imposed. A hearing is scheduled for August 8, 2016. *See* Third Judicial District court docket, case number 131902981.

## **2. The court of appeals' decision.**

The court of appeals also dismissed Becker's appeal for lack of jurisdiction. *See State v. Becker*, 2015 UT App 304, 365 P.3d 173 (Addendum A). Following *Mooers*, it concluded that because "Becker has not been sentenced and a conviction has not yet been entered against him, there is no final order from which Becker may appeal." *Id.* at ¶9.

## **SUMMARY OF ARGUMENT**

The court of appeals correctly dismissed Mooers's and Becker's appeals because it did not have jurisdiction to consider them. For direct appeals, Utah appellate courts have jurisdiction to review only final judgments or orders. The restitution orders here were not final. Rather, they were conditions of pleas in abeyance—which by design and for defendants' benefits are not final judgments because neither judgments of conviction nor sentences are entered.

While in a typical case, a restitution order may be appealed independently of conviction and sentence, this is not true in the plea in abeyance context. This is because restitution orders become part of a convicted defendant's sentence—the final judgment—but in the plea in abeyance context, a defendant has been neither convicted nor sentenced. And the reasoning for allowing convicted defendants to independently

appeal restitution orders does not apply in the plea in abeyance context—there is no appeal that would otherwise be delayed by awaiting a final restitution order.

But defendants like Mooers and Becker are not without an avenue of appellate review. Indeed, defendants may seek interlocutory review of restitution orders imposed as conditions of pleas in abeyance. And if interlocutory review is foreclosed by law, they may seek extraordinary relief under rule 65B, Utah Rules of Civil Procedure. Moreover, they may always appeal as a matter of right if their pleas in abeyance are terminated and their convictions become final.

This is fair. Mooers and Becker negotiated the terms of their plea in abeyance agreements. And in doing so, they were guaranteed the opportunity to avoid criminal penalties to which they would have otherwise been subject.

## **ARGUMENT**

### **I.**

#### **THE COURT OF APPEALS CORRECTLY DISMISSED MOOERS’S AND BECKER’S APPEALS BECAUSE UTAH’S APPELLATE COURTS DO NOT HAVE JURISDICTION TO CONSIDER NON-FINAL ORDERS ON DIRECT APPEAL**

Mooers and Becker argue that “the court of appeals erred in concluding that it lacked jurisdiction over [the] direct appeals of their

restitution orders.” Br.Pet. 9 (capitalization removed). They contend that a restitution order is always final—and thus appealable as a matter of right—even when it is entered as a condition of a non-final plea in abeyance agreement. *See* Br.Pet. 9-19. And while Mooers and Becker concede that defendants can seek discretionary review of non-final orders, they contend that such review is inadequate because it “would either come too late or not at all.” Br.Pet. 19-20.

The court of appeals correctly held that it lacked jurisdiction to consider Mooers’s and Becker’s appeals because their restitution orders are not final judgments. Rather, they are conditions of Mooers’s and Becker’s plea in abeyance agreements—which by their very nature are not final. Appellate courts cannot act without a grant of jurisdiction. And there is none granting an appeal as of right here. But discretionary review is eminently reasonable for pleas in abeyance; Mooers and Becker negotiated the terms of their agreements and received the benefit of the possibility of having no conviction or sentence if they successfully fulfill the terms of those agreements.

**A. A restitution order imposed as a condition of a plea in abeyance is not appealable as a matter of right because it is not a final order.**

Under the Utah Constitution, criminal defendants have “the right to appeal in all cases.” *State v. Clark*, 2011 UT 23, ¶6, 251 P.3d 829 (quoting Utah Const. art. I, § 12). But this right is not absolute. Rather, the right to appeal “must be positively recognized by statute or a constitutional provision.” *Id.* See also *State v. Harrison*, 2011 UT 74, ¶8, 269 P.3d 133, 136 (same); *State v. Taylor*, 664 P.2d 439, 441 (Utah 1983) (“Appellate jurisdiction . . . may exist by virtue of a constitutional grant or by statute.”); *State v. Olsen*, 115 P. 968, 969 (Utah 1911) (“[T]he right of appeal is purely statutory and exists only when given by some constitutional or statutory provision.”). As relevant here, a criminal defendant’s right to a direct appeal lies only in final judgments. See Utah Code Ann. § 77-18a-1(1) (West 2012) (providing that “defendant may, as a matter of right, appeal from . . . a final judgment of conviction, whether by verdict or plea”); Utah R. App. P. 3 (“An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments”). For



everything else, the defendant may appeal only by permission. §77-18a-1(2).<sup>3</sup>

Likewise, appellate court jurisdiction is conferred by statute or constitutional provision. *See Chen v. Stewart*, 2004 UT 82, ¶35 n.6, 100 P.3d 1177 (“[S]ubject matter jurisdiction . . . is the authority granted through constitution or statute to adjudicate a class of cases or controversies.”). *See also Clark*, 2011 UT 23, ¶6 (same); *Harrison*, 2011 UT 74, ¶8 (same); *Taylor*, 664 P.2d at 441 (same). Indeed, appellate courts “cannot conjure jurisdiction.” *State v. Collins*, 2014 UT 61, ¶21, 342 P.3d 789 (quoting *State v. Lara*, 2005 UT 70, ¶10, 124 P.3d 234).

For direct appeals, appellate courts have jurisdiction to hear it only if it is taken from a final judgment or order. *See Loffredo v. Holt*, 2001 UT 97, ¶¶10, 15, 37 P.3d 1070. An order is final only if it disposes of the case as to all parties and “finally dispose[s] of the subject-matter of the litigation on the merits of the case.” *Bradbury v. Valencia*, 2000 UT 50, ¶9, 5 P.3d

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<sup>3</sup> There is a statutory right to appeal other orders that this appeal does not implicate. *See Utah Code Annotated* § 77-18a-1(b) through (d). There is also an exception to the final judgment rule for direct appeals that does not apply here. Utah’s appellate courts may have jurisdiction to consider a direct appeal from a nonfinal order if there are multiple parties and multiple claims and the appellant satisfies the criteria of rule 54(b), Utah Rules of Civil Procedure. *See Loffredo v. Holt*, 2001 UT 97, ¶15, 37 P.3d 1070.

649 (internal quotation marks and citation omitted). *See also State ex rel. J.M.S.*, 2010 UT App 326, ¶12, 246 P.3d 1188 (holding that order removing children from father’s custody was not final, appealable order because “further judicial proceedings are required to determine [children’s] ultimate placement” and father still had chance to regain custody). “In a criminal case, it is ‘*the sentence itself*’ which constitutes a final judgment from which the appellant has the right to appeal.” *State v. Bowers*, 2002 UT 100, ¶4, 57 P.3d 1065 (quoting *State v. Gerrard*, 584 P.2d 885, 886 (Utah 1978)) (emphasis in original).<sup>4</sup>

By design and for the defendant’s benefit, a trial court’s order accepting a plea in abeyance is not a final judgment because neither a judgment of conviction nor a sentence is entered. *See Utah Code Ann. § 77-2a-2(1)* (West Supp. 2012) (providing that court will “hold the plea in abeyance and not enter judgment of conviction against the defendant nor impose sentence upon the defendant”). Instead, the trial court holds a guilty or no contest plea in “abeyance” “on condition that the defendant comply with specific conditions as set forth in a plea in abeyance agreement.” *Utah Code Ann. § 77-2a-1* (West Supp. 2012). One condition a

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<sup>4</sup> As discussed in subpoint I.B below, appellate courts also have jurisdiction to hear appeals of non-final orders, but only when they grant defendants permission to appeal.

plea in abeyance may require is that the defendant pay restitution. *See* Utah Code Ann. § 77-2a-3(5) (providing that “terms of a plea in abeyance agreement may include: . . . (b) an order that the defendant pay restitution to the victims of the defendant’s actions”).

If the defendant successfully fulfills his plea in abeyance conditions—including paying restitution—the trial court may either “reduce the degree of offense and enter judgment of conviction and impose sentence” or “allow withdrawal of defendant’s plea and order the dismissal of the case.” Utah Code Ann. § 77-2a-3(2) (West. Supp. 2012). If the defendant does not successfully fulfill the plea in abeyance conditions, the trial court “may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered.” Utah Code Ann. § 77-2a-4 (West Supp. 2012).

As the court of appeals has explained, a plea in abeyance does not result in a final judgment unless and until a conviction is entered or the case is dismissed:

a plea in abeyance anticipates further action by the trial court, and accordingly is not final. In other words, the case remains open until the trial court takes further action to either enter a conviction for the pleaded-to crime or a lesser crime, or dismisses the case. Until that time, the case is in limbo and the defendant’s status is unresolved.

*State v. Turnbow*, 2001 UT App 59, ¶17, 21 P.3d 249.

Consequently, the “law is well-settled that, because there has been no final judgment, a direct appeal cannot be taken from a plea in abeyance agreement.” *State v. Millward*, 2014 UT App 174, ¶2, 332 P.3d 400 (quoting *State v. Comer*, 2002 UT App 219, ¶14, 51 P.3d 55, *cert. denied* 59 P.3d 603). *See also Meza v. State*, 2015 UT 70, ¶18, 359 P.3d 592 (“Had the Legislature intended a plea in abeyance to constitute a conviction . . . it would have so provided in the statute authorizing such pleas. But it did not. Rather, the statute provides to the contrary.”); *State v. Moss*, 921 P.2d 1021, 1025 n.7 (Utah App. 1996) (“The plain language of these statutes reveals that a plea in abeyance is not a final adjudication.”), *cert. denied* 929 P.2d 350. As a result, defendants cannot take a direct appeal to contest the conditions of their pleas in abeyance.

Here, there are no final judgments because neither Mooers nor Becker have been convicted or sentenced. *See* Utah Code Ann. § 77-2a-2(1). Instead, the trial courts have entered orders accepting their plea in abeyance agreements. *See* mR.15; bR.21; Utah Code Ann. § 77-2a-1. And if Mooers and Becker fulfill the conditions of their plea in abeyance agreements—including paying restitution—the trial courts may withdraw their pleas and dismiss their cases. *See* bR.99:5 (“If you do what is ordered as the conditions of this plea in abeyance, ultimately that [charge] will be

dismissed.”); Utah Code Ann. § 77-2a-3(2). If they do not fulfill the conditions, the trial court will enter judgments of conviction and sentence them. *See* mR.137:5 (advising Mooer that if he failed to fulfill the conditions, it “would mean you would come back here and the guilty plea would be entered and you would be sentenced”). And in that case, they will have an appeal of right.

One of the conditions in both Mooers’s and Becker’s plea in abeyance agreements is that they pay restitution. *See* mR.15; mR.137:5-6; bR.21; bR.99:2-3, 9. *See* Utah Code Ann. § 77-2a-3(5) (providing that “an order that the defendant pay restitution” is a “*term* [] of a plea in abeyance agreement”) (emphasis added). But that is merely a condition for them to *avoid* a final judgment or order. The court of appeals thus correctly held that it lacked jurisdiction to consider Mooers’s and Becker’s direct appeals.

**1. A restitution order entered as a condition of a plea in abeyance is not a separate, final order.**

Although pleas in abeyance are not final, Mooers and Becker contend that a restitution order is always final and directly appealable, even when it is imposed as a condition of a non-final plea in abeyance agreement. *See* Br.Pet. 9-19. In support, they rely on *State v. Gibson*, 2009 UT App 108, 208 P.3d 543, and *Meza v. State*, 2015 UT 70, 359 P.3d 592. Neither case,

however, supports the proposition that a restitution order imposed as a condition of a plea in abeyance is directly appealable.

It is true that in a typical case, a restitution order is final and separately appealable. *See Salt Lake City v. Ausbeck*, 2011 UT App 269, ¶4 n.2, 274 P.3d 991; *Dolan v. United States*, 560 U.S. 605, 618 (2010) (observing that “it is not surprising to find instances where a defendant has appealed from the entry of a judgment containing an initial sentence [and also] . . . from a later order setting forth the final amount of restitution”). But this is because when a defendant is *convicted* (either by verdict or by pleading guilty or no contest), restitution becomes part of his *sentence*—the final judgment against him. *See* Utah Code Ann. § 77-38a-302(1) (providing that “in addition to any other *sentence* it may impose, the court shall order that the defendant make restitution”) (emphasis added); *State v. Garner*, 2005 UT 6, ¶17, 106 P.3d 729 (explaining that restitution order is part of sentence).

In a plea in abeyance, however, the restitution order cannot be part of the defendant’s sentence because he has not been—and may never be—sentenced. *See* Utah Code Ann. § 77-2a-2 (providing that court will “hold the plea in abeyance and not enter judgment of conviction against the defendant nor impose sentence upon the defendant”). Instead, the restitution order is simply a non-final condition of his plea in abeyance

agreement, the successful completion of which will usually mean there will be no judgment against the defendant at all. *See* Utah Code Ann. § 77-2a-3(5) (providing that “an order that the defendant pay restitution” is a “*term* [] of a plea in abeyance agreement”) (emphasis added).

A *convicted* defendant may separately appeal a restitution order that is part of his sentence because restitution may not be determined for up to one year after sentencing—outside the time usually allotted to file an appeal from a final judgment. *See* Utah Code Annotated § 77-38a-302(2)(b) (West Supp. 2012) (providing that trial court shall determine restitution “as part of the criminal sentence at the time of sentencing or within one year after sentencing”).<sup>5</sup> It thus “makes sense” to permit a convicted defendant to immediately proceed to direct appeal on his claims about his conviction and sentence and separately appeal any complaints about his restitution order. *Dolan*, 560 U.S. at 618. “[O]therwise,” his appeal would be delayed and he “would be forced to wait . . . before seeking review of [his] conviction” — indeed, up to one year. *Id.* *See also Garner*, 2005 UT 6, ¶¶15-16 (explaining

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<sup>5</sup> The current version of the Crime Victims Restitution Act has removed this language, instead requiring the State to submit restitution requests within one year after sentencing. *See* Utah Code Annotated § 77-38a-302(5)(d)(i) (West 2016).

that convicted defendants may separately appeal restitution order so as not to “significantly delay[]” right to appeal).

But this concern does not apply in the plea in abeyance context. In fact, because a recipient of a plea in abeyance has not been convicted, there is no conviction for him to appeal. *See* Utah Code Annotated § 77-2a-2(1) (West Supp. 2012) (providing that court will “hold the plea in abeyance and not enter judgment of conviction against the defendant nor impose sentence upon the defendant”). Only if he fails to successfully fulfill his plea in abeyance conditions will the trial court enter judgment and conviction and impose sentence. *See* Utah Code Annotated § 77-2a-3(2) (West Supp. 2012). But this would be after his restitution condition has already been ordered, not the other way around. *See* Utah Code Annotated § 77-2a-1 (West Supp. 2012) (providing that plea in abeyance conditions must be set forth in plea in abeyance agreement). Thus, the conundrum that justifies treating a restitution order entered as part of a sentence—delaying the remainder of the appeal—does not exist in a plea in abeyance because there is no appeal that would otherwise be delayed by awaiting a final restitution order.

Mooers and Becker argue, however, that it “defies . . . logic” that a defendant who has received a plea in abeyance must wait until after he has been convicted and sentenced to receive direct review of this restitution



condition. Br.Pet. 15. But this is true for any other condition of his plea in abeyance agreement. Because the plea had not been entered and no sentence imposed, the plea itself is interlocutory. And if the whole is interlocutory, so are its parts. Indeed, Mooers and Becker have not shown—even argued—why restitution orders should be treated differently than any other condition of a plea in abeyance agreement. While there is much “at stake” in complying with a restitution condition, this is true for every condition of a plea in abeyance agreement. Br.Pet. 14 (quotation marks and citation omitted). Each equally and independently puts the defendant at risk of a criminal conviction and sentence if he does not comply.<sup>6</sup> Br.Pet. 14 (quotation marks and citation omitted). *See e.g., State v. Martin*, 2012 UT App 208, ¶3, 283 P.3d 1066 (explaining that Martin failed to fulfill plea in abeyance condition that he replace chain link fence and replant elm tree and shrubs by “licensed third party”) (emphasis removed).

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<sup>6</sup> Many possible common conditions of a plea in abeyance—like restitution—require the defendant to pay substantial monthly sums, such as paying child support, paying for a “remedial or rehabilitative program,” or maintaining a residence. Utah Code Annotated § 77-2a-3(5)(c) (West Supp. 2012). *See also* Utah Code Annotated § 77-2a-3(5)(d) (providing that plea in abeyance may contain any condition that could be imposed as a condition of probation).

The court of appeals thus correctly concluded that Mooers's and Becker's appeals were not final and the court accordingly had no jurisdiction to consider them.

Other jurisdictions have come to the same conclusion. See *In re T.C.*, 210 Cal. App. 4th 1430, 1432-1433 (Cal. App. 2012) (dismissing direct appeal of restitution order where juvenile court "deferred entry of judgment" and observing juvenile could appeal if judgment is subsequently entered); *State v. Cameron*, 81 P.3d 442, 444 (Kan. App. 2003) (dismissing appeal of diversion agreement because it was not final judgment, which "requires both a conviction and a sentence"); *State v. Brown*, 2012 WL 1521544U, \*1-2 (La. App. 2012) (dismissing State's appeal for lack of jurisdiction because Brown had not been convicted where trial court deferred judgment); *State v. Castaldo*, 638 A.2d 845, 848 (N.J. 1994) (holding that Castaldo had no "appeal as of right" from restitution condition imposed in diversionary program because defendants "may appeal from an adverse determination only after judgment of conviction"); *State v. Collins*, 2008 WL 2579170U, \*1-2 (Tenn. App. 2008) (dismissing direct appeal of restitution order imposed as condition of "judicial diversion" because there was no final judgment and explaining proper avenue for appellate review was interlocutory review); *State v. Norris*, 47 S.W. 3d 457, 461-463 (Tenn. App. 2000) (holding that

appellant had no appeal of right when granted judicial diversion because there was no final judgment); *State v. Moore*, 2009 WL 2342905U, \*1 (Tenn. App. 2009) (dismissing appeal for lack of jurisdiction from judicial diversion where Moore contested whether interest could be awarded as part of restitution); *Quaglia v. State*, 906 S.W.2d 112, 113 (Tex. App. 1995) (holding that modification of terms of deferred adjudication are not directly appealable); *McLean v. State*, 2011 WL 192719U (Tex. App. 2011) (per curiam) (dismissing appeal for lack of jurisdiction from appeal of condition of deferred adjudication).

The cases upon which Mooers and Becker rely—*State v. Gibson* and *Meza v. State*—do not change this conclusion. In fact, neither supports the proposition that a restitution order imposed as a condition of a plea in abeyance agreement is directly appealable.

Gibson entered into a plea in abeyance agreement. *See Gibson*, 2009 UT App 108, ¶3. As here, one condition required her to pay restitution. *See id.* Because “there was a dispute over the amounts” of restitution, the trial court set the restitution amount after a hearing. *See id.* Gibson moved to amend the court’s restitution order, but the trial court denied it. *See id.* at ¶4. The State later filed a motion for order to show cause why Gibson’s plea in abeyance should not be terminated and judgment of conviction be

entered because Gibson had failed to pay restitution as required. *See id.* at ¶5. Before hearing the State’s motion, Gibson filed a motion to withdraw her guilty plea, arguing that her plea was not knowing or voluntary when the restitution figure was uncertain at the time she pleaded guilty. *See id.* at ¶6. The trial court denied her motion. *See id.* The court then heard the State’s motion for order to show cause and terminated Gibson’s plea in abeyance agreement, entered her guilty plea, and sentenced her. *See id.* at ¶7. Gibson timely appealed the trial court’s denial of her motion to withdraw her guilty plea. *See id.*

The court of appeals affirmed, holding that Gibson’s plea had been knowing and voluntary. *See id.* at ¶¶11-15. In its discussion, the court noted that Gibson had the right to a restitution hearing “and also ha[d] the right to appeal the resulting determination,” and “ultimately chose not to exercise her right to appeal the district court’s denial of her motion to amend.” *Id.* at ¶15. In a footnote, it stated that the “Crime Victims Restitution Act specifies that a judgment under that act has the same effect as an ordinary judgment.” ¶15 n.5 (citing Utah Code Annotated § 77-38a-401(4)).

These statements do not support the proposition that Gibson could have directly appealed the trial court’s restitution determination *before* her

plea in abeyance was terminated and her conviction was entered. Gibson *could* directly appeal the trial court's restitution determination because she was convicted and sentenced. Indeed, all interlocutory orders become final once a defendant has been sentenced. *See Bowers*, 2002 UT 100, ¶14 (explaining that sentence in criminal case "constitutes a final judgment from which the appellant has the right to appeal"). And once there is a final judgment, a defendant may appeal any error in the criminal process, as long as it is procedurally proper. The *Gibson* court thus correctly noted that Gibson could have claimed error in the trial court's restitution determination *in her present appeal*. *Cf. Comer*, 2002 UT App 219, ¶14 (dismissing defendant's appeal from plea in abeyance without prejudice and recognizing that he could raise same claims of error should judgment become final).

Neither does *Gibson's* observation that restitution orders have the same effect as an ordinary civil judgment turn an interlocutory restitution condition into a final judgment that is appealable as a matter of right. As stated, Gibson's plea in abeyance had been terminated, her conviction had been entered, and she had been sentenced. *Gibson*, 2009 UT App, ¶7. The restitution award was thus at that time a final judgment. Rule 54(b), Utah Rules of Civil Procedure, and rule 3, Utah Rules of Appellate Procedure

require all judgments—including civil ones—to be final before they can be directly appealed. The Crime Victims Restitution Act’s provision allowing crime victims to collect restitution awards as civil judgments thus does not change this final judgment rule. And as the *Mooers* court noted, the purpose of this provision is to give victims an avenue to collect restitution owed to them, not to invoke appellate jurisdiction. *See Mooers*, 2015 UT App 266, ¶¶16-17.

Likewise, *Meza* does not support the proposition that restitution orders imposed as a condition of a plea in abeyance agreement can be directly appealed. *Meza* addressed whether a defendant who successfully completed a plea in abeyance and had his plea withdrawn may proceed under the Post Conviction Remedies Act (PCRA). *Meza* held that he could not because he had no conviction. 2015 UT 70, ¶¶8, 16. *Meza* explained that the PRCA did not explicitly make an exception to the “general rule that a successfully completed plea in abeyance is not a conviction.” *Id.* at ¶17. The *Meza* court noted three “explicit exceptions” where a plea in abeyance was treated as a conviction. *Id.* One of these exceptions was the Crime Victims Restitution Act, which defines a “conviction” as a judgment of guilt,

plea of guilty, or plea of no contest. *Id.* (citing Utah Code Annotated § 77-38a-102(1)).<sup>7</sup>

But whether *Meza* correctly observed that the Crime Victims Restitution Act treats a plea in abeyance as a conviction for restitution purposes does not matter. Simply because the Act may treat a plea in abeyance as a conviction for one purpose—ensuring crime victims receive restitution—does not mean that it must be treated as a conviction for all purposes. Indeed, *Meza* made clear that “except in those cases where a statute specifically provides otherwise, a successfully completed plea in abeyance is not a conviction and cannot be treated as such.” *Id.* at ¶14. The Crime Victims Restitution Act does not purport to confer jurisdiction on appellate courts.

But even if *Gibson* and *Meza* could be construed as supporting Mooers’s and Becker’s position, the court of appeals correctly concluded

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<sup>7</sup> The two other exceptions *Meza* recognized were Utah Code Annotated § 17-16-10.5(2)(c) (“Entry of a plea in abeyance is the equivalent of a conviction for purposes of [removing public officer from office] even if the charge is later dismissed pursuant to a plea in abeyance agreement”) and Utah Code Annotated § 76-9-301.7(1) (“As used in this section, ‘conviction’ means a conviction by plea or by verdict, including a plea of guilty or no contest that is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, regardless of whether the charge was, or is, subsequently reduced or dismissed in accordance with the plea in abeyance agreement.”). See *Meza*, 2015 UT 70, ¶17 n.3.

that the language Mooers and Becker rely on was nonbinding dicta. *See Mooers*, 2015 UT App 266, ¶14. Dicta are “judicial statements that are unnecessary to the resolution of the case.” *Ortega v. Ridgewood Estates*, 2016 UT App 131, ¶14 n.4, \_\_Utah Adv. Rep. \_\_. Nonbinding, or obiter dicta, “‘refers to a remark or expression of opinion that a court uttered as an aside,’ such as a ‘statement made by a court for use in argument, illustration, analogy or suggestion.’” *Id.* (quoting *Exelon Corp. v. Department of Revenue*, 917 N.E.2d 899, 907 (Ill. 2009)). In contrast, binding, or judicial dicta is “an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court,” *Exelon*, 917 N.E.2d at 907; for example, a statement “‘deliberately made for the guidance of the bench and bar upon a point of statutory construction not theretofore considered by the Supreme Court,” *ex parte Harrison*, 741 S.W.2d 607, 609 (Tex. Ct. App. 1987).

While the court of appeals must follow judicial dicta, it is not required to follow orbiter dicta. *Ortega*, 2016 UT App 131, ¶14 n.4 *See also State v. Menzies*, 889 P.2d 393, 399 n.3 (Utah 1994) (providing that “lower courts are obliged to follow . . . any ‘judicial dicta’ that may be pronounced by the higher court”).

*Gibson’s* and *Meza’s* statements were nonbinding orbiter dicta. They did not address the question posed here: whether a defendant can appeal



as a matter of right a restitution order imposed as a condition of a plea in abeyance agreement. They were merely “statement[s] made by a court for use in argument, illustration, analogy or suggestion” on another point. *Ortega*, 2016 Utah App 131, ¶14 n.4 (quoting *Exelon Corp.*, 917 N.E.2d at 907). They thus do not control and the court of appeals correctly concluded it did not have jurisdiction to consider Mooers’s and Becker’s appeals.

**B. Alternative methods of review are both the only avenues of review and fair.**

Defendants finally argue that the alternative methods of review are a “poor fit” because they are discretionary. Br.Pet. 19-20 (capitalization removed). But appellate courts “cannot conjure jurisdiction.” *Collins*, 2014 UT 61, ¶21 (quoting *State v. Lara*, 2005 UT 70, ¶10). Their power to review an appeal exists only by a statutory or constitutional grant. *Clark*, 2011 UT 23, ¶6. There is none here that gives the court of appeals power to review non-final restitution conditions on direct appeal.

But defendants like Mooers and Becker are not wholly foreclosed from appellate review. They can timely move to withdraw their pleas and appeal the denial of that motion. See Utah Code Annotated § 77-13-6 (West Supp. 2012) (allowing defendants to move to withdraw their plea in plea in abeyance context 30 days after pleading). They can seek interlocutory review of the trial court’s restitution order under rule 5, Utah Rules of

Appellate Procedure. See Utah R. App. P. 5 (providing mechanism for appellate review of non-final orders). And if interlocutory review is foreclosed by law, they can seek extraordinary relief under rule 65B, Utah Rules of Civil Procedure. And while both are discretionary, Mooers and Becker cite no reason the appellate courts would be ungenerous with granting discretionary review, especially where appellate review is unlikely without it.

Further, they can always appeal the restitution award as a matter of right if their convictions are entered and become final. Or, they could have assured an appeal of right by declining a plea in abeyance in the first place.

This is eminently reasonable. A plea in abeyance “offers a defendant the opportunity to avoid criminal penalties to which the defendant would have otherwise been subject.” *Layton City v. Stevenson*, 2014 UT 37, ¶42. “While the choice to accept judicial diversion may jeopardize a defendant’s right to raise a legal issue, the *quid pro quo* is that the defendant who accepts diversion can emerge from the process without a conviction.” *Collins*, 2008 WL 2579170U, \*2. Indeed, a plea in abeyance is negotiated and “a trial court may not impose [a plea in abeyance] except with the defendant’s consent.” *Norris*, 47 S.W.3d at 461-463.

In effect, by accepting a plea in abeyance agreement, Mooers and Becker agreed to waive their right to a direct appeal of their restitution conditions. *Cf. State v. Taufui*, 2015 UT App 118, ¶15 (explaining that Taufui’s guilty plea operated “as a waiver of the right to a direct appeal of the conviction on the crime charged”); *Gailey*, 2016 UT 35, ¶2 (same); Utah Code Ann. § 77-13-6(c) (providing that “any challenge to guilty plea not made within” thirty days of pleading guilty cannot be directly appealed but “shall” be pursued through the PCRA); *State v. Nicholls I*, 2006 UT 76, ¶6 (holding that because Nicholls’ challenge to guilty plea was outside the statutory time period, any challenge “can only be pursued under” the PCRA.). That waiver purchased for them a guarantee of no conviction for their admitted criminal acts so long as they fulfill their obligations under the plea agreements. They cannot be now heard to complain.

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted on August 4, 2016.

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### **CERTIFICATE OF COMPLIANCE**

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 7,437 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

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TERA J. PETERSON  
Assistant Solicitor General

## CERTIFICATE OF SERVICE

I certify that on August 4, 2016, two copies of the Brief of Respondent were ☐ mailed ☒ hand-delivered to:

Nathalie S. Skibine  
Debra M. Nelson  
Salt Lake Legal Defender Assoc.  
424 East 500 South, Suite 300  
Salt Lake City, UT 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

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Addenda

# Addendum A

### **Utah R. App. P. 3. Appeal as of right: how taken**

**(a) Filing appeal from final orders and judgments.** An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

**(b) Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

**(c) Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

**(d) Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

**(e) Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving each party to the judgment or order in accordance with the requirements of the court from which the appeal is taken. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

**(f) Filing fee in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall accept a notice of appeal regardless of whether the filing fee has been paid. Failure to pay the filing fee within a reasonable time may result in dismissal.

**(g) Docketing of appeal.** Upon the filing of the notice of appeal, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a statement by the clerk indicating whether the filing fee was paid and whether the cost bond required by Rule 6 was filed. Upon receipt of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket.



An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

## Utah R. App. P. 5, Discretionary appeals from interlocutory orders

### Currentness

**(a) Petition for permission to appeal.** An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order. The appellate court may direct the appellant to file a petition that conforms to the requirements of paragraph (c) of this rule.

**(b) Fees and copies of petition.** For a petition presented to the Supreme Court, the petitioner shall file with the Clerk of the Supreme Court an original and five copies of the petition, together with the fee required by statute. For a petition presented to the Court of Appeals, the petitioner shall file with the Clerk of the Court of Appeals an original and four copies of the petition, together with the fee required by statute. The petitioner shall serve the petition on the opposing party and notice of the filing of the petition on the trial court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition, to the trial court where the petition and order shall be filed in lieu of a notice of appeal.

**(c) Content of petition.**

(c)(1) The petition shall contain:

(c)(1)(A) A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed;

(c)(1)(B) The issue presented expressed in the terms and circumstances of the case but without unnecessary detail, and a demonstration that the issue was preserved in the trial court. Petitioner must state the applicable standard of appellate review and cite supporting authority;

(c)(1)(C) A statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issue stated; and

(c)(1)(D) A statement of the reason why the appeal may materially advance the termination of the litigation.

(c)(2) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" shall appear immediately under the title of the document, i.e. Petition for Permission to Appeal.

Appellant may then set forth in the petition a concise statement why the Supreme Court should decide the case.

(c)(3) The petitioner shall attach a copy of the order of the trial court from which an appeal is sought and any related findings of fact and conclusions of law and opinion. Other documents that may be relevant to determining whether to grant permission to appeal may be referenced by identifying trial court docket entries of the documents.

**(d) Page limitation.** A petition for permission to appeal shall not exceed 20 pages, excluding table of contents, if any, and the addenda.

**(e) Service in criminal and juvenile delinquency cases.** Any petition filed by a defendant in a criminal case originally charged as a felony or by a juvenile in a delinquency proceeding shall be served on the Criminal Appeals Division of the Office of the Utah Attorney General.

**(f) Response; no reply.** No petition will be granted in the absence of a request by the court for a response. No response to a petition for permission to appeal will be received unless requested by the court. Within 10 days after an order requesting a response, any other party may oppose or concur with the petition. Any response to a petition for permission to appeal shall be subject to the same page limitation set out in subsection (d). An original and five copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The respondent shall serve the response on the petitioner. The petition and any response shall be submitted without oral argument unless otherwise ordered. No reply in support of a petition for permission to appeal shall be permitted unless requested by the court.

**(g) Grant of permission.** An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. The clerk of the appellate court shall immediately give the parties and trial court notice by mail or by electronic order of any order granting or denying the petition. If the petition is granted, the appeal shall be deemed to have been filed and docketed by the granting of the petition. All proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments except that no docketing statement shall be filed under Rule 9 unless the court otherwise orders, and no cross-appeal may be filed under rule 4(d).

**(h) Stays pending interlocutory review.** The appellate court will not consider an application for a stay pending disposition of an interlocutory appeal until the petitioner has filed a petition for interlocutory appeal.

**(i) Cross-petitions not permitted.** A cross-petition for permission to appeal a non-final order is not permitted by this rule. All parties seeking to appeal from an interlocutory order must comply with subsection (a) of this rule.

## Utah R. Civ. P. 54. Judgments; costs

**(a) Definition; form.** “Judgment” as used in these rules includes a decree or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

**(b) Judgment upon multiple claims and/or involving multiple parties.** When an action presents more than one claim for relief--whether as a claim, counterclaim, cross claim, or third party claim--and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

**(c) Demand for judgment.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

### **(d) Costs.**

(d)(1) *To whom awarded.* Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies may be imposed only to the extent permitted by law.

(d)(2) *How assessed.* The party who claims costs must within 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(d)(3) *Memorandum filed before judgment.* A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, is deemed served and filed on the date judgment is entered.

## § 77-2a-1. Definitions

For the purposes of this chapter:

(1) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(2) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

§ 77-2a-2. Plea in abeyance agreement--Negotiation--Contents--Terms of agreement--Waiver of time for sentencing

- (1) At any time after acceptance of a plea of guilty or no contest but prior to entry of judgment of conviction and imposition of sentence, the court may, upon motion of both the prosecuting attorney and the defendant, hold the plea in abeyance and not enter judgment of conviction against the defendant nor impose sentence upon the defendant within the time periods contained in Rule 22(a), Utah Rules of Criminal Procedure.
- (2) The defendant shall be represented by counsel during negotiations for a plea in abeyance and at the time of acknowledgment and affirmation of any plea in abeyance agreement unless the defendant shall have knowingly and intelligently waived his right to counsel.
- (3) The defendant has the right to be represented by counsel at any court hearing relating to a plea in abeyance agreement.
- (4)(a) Any plea in abeyance agreement entered into between the prosecution and the defendant and approved by the court shall include a full, detailed recitation of the requirements and conditions agreed to by the defendant and the reason for requesting the court to hold the plea in abeyance.
- (b) If the plea is to a felony or any combination of misdemeanors and felonies, the agreement shall be in writing and shall, prior to acceptance by the court, be executed by the prosecuting attorney, the defendant, and the defendant's counsel in the presence of the court.
- (5) A plea shall not be held in abeyance for a period longer than 18 months if the plea was to any class of misdemeanor or longer than three years if the plea was to any degree of felony or to any combination of misdemeanors and felonies.
- (6) A plea in abeyance agreement shall not be approved unless the defendant, before the court, and any written agreement, knowingly and intelligently waives time for sentencing as designated in Rule 22(a), Utah Rules of Criminal Procedure.

### § 77-2a-3. Manner of entry of plea--Powers of court

(1)(a) Acceptance of any plea in anticipation of a plea in abeyance agreement shall be done in full compliance with the provisions of Rule 11, Utah Rules of Criminal Procedure.

(b) In cases charging offenses for which bail may be forfeited, a plea in abeyance agreement may be entered into without a personal appearance before a magistrate.

(2) A plea in abeyance agreement may provide that the court may, upon finding that the defendant has successfully completed the terms of the agreement:

(a) reduce the degree of the offense and enter judgment of conviction and impose sentence for a lower degree of offense; or

(b) allow withdrawal of defendant's plea and order the dismissal of the case.

(3) Upon finding that a defendant has successfully completed the terms of a plea in abeyance agreement, the court may reduce the degree of the offense or dismiss the case only as provided in the plea in abeyance agreement or as agreed to by all parties. Upon sentencing a defendant for any lesser offense pursuant to a plea in abeyance agreement, the court may not invoke Section 76-3-402 to further reduce the degree of the offense.

(4) The court may require the Department of Corrections to assist in the administration of the plea in abeyance agreement as if the defendant were on probation to the court under Section 77-18-1.

(5) The terms of a plea in abeyance agreement may include:

(a) an order that the defendant pay a nonrefundable plea in abeyance fee, with a surcharge based on the amount of the plea in abeyance fee, both of which shall be allocated in the same manner as if paid as a fine for a criminal conviction under Section 78A-5-110 and a surcharge under Title 51, Chapter 9, Part 4, Criminal Conviction Surcharge Allocation, and which may not exceed in amount the maximum fine and surcharge which could have been imposed upon conviction and sentencing for the same offense;

(b) an order that the defendant pay restitution to the victims of the defendant's actions as provided in Title 77, Chapter 38a, Crime Victims Restitution Act;

(c) an order that the defendant pay the costs of any remedial or rehabilitative program required by the terms of the agreement; and

(d) an order that the defendant comply with any other conditions which could have been imposed as conditions of probation upon conviction and sentencing for the same offense.

(6) A court may not hold a plea in abeyance without the consent of both the prosecuting attorney and the defendant. A decision by a prosecuting attorney not to agree to a plea in abeyance is final.

(7) No plea may be held in abeyance in any case involving a sexual offense against a victim who is under the age of 14.

(8) Beginning on July 1, 2008, no plea may be held in abeyance in any case involving a driving under the influence violation under Section 41-6a-502.



**Utah Code Ann. § 77-2a-4. Violation of plea in abeyance agreement--Hearing--  
Entry of judgment and imposition of sentence--Subsequent prosecutions**

(1) If, at any time during the term of the plea in abeyance agreement, information comes to the attention of the prosecuting attorney or the court that the defendant has violated any condition of the agreement, the court, at the request of the prosecuting attorney, made by appropriate motion and affidavit, or upon its own motion, may issue an order requiring the defendant to appear before the court at a designated time and place to show cause why the court should not find the terms of the agreement to have been violated and why the agreement should not be terminated. If, following an evidentiary hearing, the court finds that the defendant has failed to substantially comply with any term or condition of the plea in abeyance agreement, it may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered. Upon entry of judgment of conviction and imposition of sentence, any amounts paid by the defendant as a plea in abeyance fee prior to termination of the agreement shall be credited against any fine imposed by the court.

(2) The termination of a plea in abeyance agreement and subsequent entry of judgment of conviction and imposition of sentence shall not bar any independent prosecution arising from any offense that constituted a violation of any term or condition of an agreement whereby the original plea was placed in abeyance.

## **Utah Code Ann. § 77-18a-1. Appeals--When proper**

- (1) A defendant may, as a matter of right, appeal from:
  - (a) a final judgment of conviction, whether by verdict or plea;
  - (b) an order made after judgment that affects the substantial rights of the defendant;
  - (c) an order adjudicating the defendant's competency to proceed further in a pending prosecution; or
  - (d) an order denying bail, as provided in Subsection 77-20-1(7).
- (2) In addition to any appeal permitted by Subsection (1), a defendant may seek discretionary appellate review of any interlocutory order.
- (3) The prosecution may, as a matter of right, appeal from:
  - (a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;
  - (b) a pretrial order dismissing a charge on the ground that the court's suppression of evidence has substantially impaired the prosecution's case;
  - (c) an order granting a motion to withdraw a plea of guilty or no contest;
  - (d) an order arresting judgment or granting a motion for merger;
  - (e) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
  - (f) an order granting a new trial;
  - (g) an order holding a statute or any part of it invalid;
  - (h) an order adjudicating the defendant's competency to proceed further in a pending prosecution;
  - (i) an order finding, pursuant to Title 77, Chapter 19, Part 2, Competency for Execution, that an inmate sentenced to death is incompetent to be executed;
  - (j) an order reducing the degree of offense pursuant to Section 76-3-402; or
  - (k) an illegal sentence.
- (4) In addition to any appeal permitted by Subsection (3), the prosecution may seek discretionary appellate review of any interlocutory order entered before jeopardy attaches.

## Utah Code Ann. § 77-38a-102. Definitions

As used in this chapter:

(1) "Conviction" includes a:

- (a) judgment of guilt;
- (b) a plea of guilty; or
- (c) a plea of no contest.

(2) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(3) "Department" means the Department of Corrections.

(4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.

(5) "Party" means the prosecutor, defendant, or department involved in a prosecution.

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.

(7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.

(8) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(9) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(10) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment

for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12)(a) "Reward" means a sum of money:

(i) offered to the public for information leading to the arrest and conviction of an offender; and

(ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14)(a) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

§ 77-38a-302. Restitution criteria

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5)(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines may make restitution inappropriate.

(d)(i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.

(e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

**Utah Code Ann. § 77-38a-401. Entry of judgment--Interest--Civil actions--Lien**

(1) Upon the court determining that a defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Section 77-38a-302 on the civil judgment docket and provide notice of the order to the parties.

(2) The order shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure. In addition, the department may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.

(3) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover collection and reasonable attorney fees.

(4) Notwithstanding Subsection 77-18-6(1)(b)(v) and Sections 78B-2-311 and 78B-5-202, a judgment ordering restitution when entered on the civil judgment docket shall have the same affect and is subject to the same rules as a judgment in a civil action and expires only upon payment in full, which includes applicable interest, collection fees, and attorney fees. Interest shall accrue on the amount ordered from the time of sentencing, including prejudgment interest. This Subsection (4) applies to all restitution judgments not paid in full on or before May 12, 2009.

(5) The department shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

## Addendum B



KeyCite Yellow Flag - Negative Treatment

Certiorari Granted by State v. Mooers, Utah, December 2, 2015

362 P.3d 282

Court of Appeals of Utah.

STATE of Utah, Appellee,

v.

Ryan MOOERS, Appellant.

No. 20140170—CA.

|

Nov. 5, 2015.

### Synopsis

**Background:** Defendant was ordered by the Third District Court, West Jordan Department, Charlene Barlow, J., to pay restitution as condition of plea in abeyance agreement. He appealed.

**Holdings:** The Court of Appeals, Toomey, J., held that:

[1] plea in abeyance was neither a sentence nor a final judgment of conviction from which defendant could appeal, and

[2] restitution order imposed as condition to plea in abeyance agreement was not an exception to rule that plea in abeyance was not final judgment from which defendant had right of appeal.

Appeal dismissed.

West Headnotes (8)

### [1] Criminal Law

Appellate Jurisdiction

Whether the appellate court has jurisdiction to consider an appeal from a restitution order is a question of law requiring the court to examine the plain meaning of the relevant statute.

1 Cases that cite this headnote

### [2] Statutes

Intent

### Statutes

Statute as a Whole; Relation of Parts to Whole and to One Another

### Statutes

Similar or Related Statutes

When engaging in statutory construction, the court's primary goal is to effectuate the intent of the legislature; the court reads the statute as a whole, and interprets its provisions in harmony with other statutes in the same chapter and related chapters.

Cases that cite this headnote

### [3] Criminal Law

Necessity of sentence

Plea in abeyance was neither a sentence nor a final judgment of conviction from which defendant could appeal. West's U.C.A. §§ 77–2a–1(1), 77–18a–1(1); Rules App.Proc., Rule 3(a).

1 Cases that cite this headnote

### [4] Criminal Law

Requisites and Sufficiency of Judgment

### Criminal Law

Necessity of sentence

In the technical legal sense, sentence is ordinarily synonymous with judgment, such that, in criminal cases, it is the sentence itself which constitutes a final judgment from which appellant has the right to appeal. West's U.C.A. § 77–18a–1(1); Rules App.Proc., Rule 3(a).

Cases that cite this headnote

### [5] Criminal Law

Necessity of sentence

Restitution order imposed as condition to plea in abeyance agreement was not an exception to rule that plea in abeyance was not final judgment from which defendant had right of

appeal. West's U.C.A. §§ 77-2a-1(1), 77-18a-1(1), 77-38a-401(2); Rules App.Proc., Rule 3(a).

1 Cases that cite this headnote

[6] **Courts**

Dicta

Statements made in dicta may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Cases that cite this headnote

[7] **Sentencing and Punishment**

Alternative Dispositions

A “plea in abeyance” is a plea of guilty or of no contest.

Cases that cite this headnote

[8] **Criminal Law**

Necessity of sentence

Relief may still be attainable for a defendant who enters into a plea in abeyance agreement even if there is no appeal as of right from that plea agreement.

Cases that cite this headnote

**Attorneys and Law Firms**

\*282 Nathalie S. Skibine and Heather J. Chesnut, for Appellant.

Sean D. Reyes, Salt Lake City, and Tera J. Peterson, for Appellee.

Judge KATE A. TOOMEY authored this Opinion, in which Judges GREGORY K. ORME and JAMES Z. DAVIS concurred.

TOOMEY, Judge:

¶ 1 Ryan Mooers appeals from an order to pay restitution. The primary issue on appeal is whether a restitution order imposed as a condition of a plea in abeyance agreement, where the defendant's plea has not been \*283 entered and the defendant has not been sentenced, is a final and appealable order. We conclude that it is not. We therefore dismiss Mooers's appeal for lack of jurisdiction.

**BACKGROUND**

¶ 2 In November 2012, a family returned from vacation and discovered that someone had broken into their house through a basement window and had taken jewelry and coins. For his role in the crime, Mooers was charged with burglary, a second degree felony, and theft, a third degree felony.

¶ 3 Mooers ultimately pled guilty to theft and admitted to aiding “others in entering a home” and to taking items worth between \$1,500 and \$5,000. As part of the plea deal, Mooers agreed to attend a theft class, to pay “costs as ordered by the court,” and to pay restitution. The court signed Mooers's plea form but did not enter his plea. Instead, it held the plea in abeyance for eighteen months and ordered Mooers to “pay restitution jointly and severally with the other co-defendants.” It gave the State ninety days to determine the amount of restitution.

¶ 4 Later, as requested by the State, the court ordered Mooers to pay \$5,760.50 in restitution. This sum included \$1,100 for installing security bars on the basement window through which the thieves entered the family's house. Mooers agreed to pay everything except for this cost and requested an evidentiary hearing to establish the grounds for making him responsible for this expense.

¶ 5 At the evidentiary hearing, Mooers argued that he was not responsible for the cost of installing bars on the broken window and, in any event, those costs were not pecuniary damages as defined by Utah Code section 76-3-201. The court disagreed and again ordered Mooers to pay \$5,760.50.<sup>1</sup> Mooers now appeals the restitution order.

Opinion

## ISSUES AND STANDARD OF REVIEW

¶6 Mooers's primary contention on appeal is that the trial court erred in concluding that the cost of installing the security bars constitutes "pecuniary damages" under the Crime Victims Restitution Act. *See* Utah Code Ann. § 77-38a-102(6) (LexisNexis 2012). But before we reach this issue, we must address the State's preliminary argument that this court "lacks jurisdiction to consider [Mooers's] appeal because the restitution order is not a final judgment or sentence."

[1] [2] ¶ 7 Whether we have jurisdiction is a question of law requiring us to examine the "plain meaning of the [relevant] statute." *Housing Auth. of County of Salt Lake v. Snyder*, 2002 UT 28, ¶ 10, 44 P.3d 724. "[O]ur primary goal is to effectuate the intent of the Legislature.... [W]e read ... the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Meza v. State*, 2015 UT 70, ¶ 10, 359 P.3d 592 (second alteration in original) (citations and internal quotation marks omitted).

## ANALYSIS

### I. A Plea in Abeyance Is Not a Final Judgment of Conviction.

[3] [4] ¶ 8 "A defendant may, as a matter of right, appeal from ... a final judgment of conviction, whether by verdict or plea...." Utah Code Ann. § 77-18a-1(1) (LexisNexis 2012); *see also* Utah R. App. P. 3(a). "In the technical legal sense, sentence is ordinarily synonymous with judgment...." *State v. Fedder*, 1 Utah 2d 117, 262 P.2d 753, 755 (1953). Accordingly, in criminal cases, "[i]t is the sentence itself which constitutes a final judgment from which appellant has the right to appeal." *State v. Gerrard*, 584 P.2d 885, 886 (Utah 1978).

\*284 ¶ 9 A plea in abeyance, as the word "abeyance" itself suggests, is not a sentence or a final judgment of conviction. Rather, it is

an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not,

at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

Utah Code Ann. § 77-2a-1(1) (LexisNexis 2012). If a defendant successfully completes the conditions specified in the plea in abeyance agreement, a court may "reduce the degree of the offense and enter judgment of conviction," *id.* § 77-2a-3(2)(a), or "allow withdrawal of defendant's plea and order the dismissal of the case," *id.* § 77-2a-3(2)(b). If, during the term of the agreement,

the court finds that the defendant has failed to substantially comply with any term or condition of the plea in abeyance agreement, it may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered.

*Id.* § 77-2a-4(1).

¶ 10 As Utah appellate courts have consistently explained, the plain language of these statutes provides that "[a]cceptance of a plea in abeyance and the entry of judgment of conviction and the imposition of sentence are not simultaneous events." *State v. Moss*, 921 P.2d 1021, 1025 n. 7 (Utah Ct.App.1996). "Had the Legislature intended a plea in abeyance to constitute a conviction ..., it would have so provided in the statute authorizing such pleas. But it did not. Rather, the statute provides to the contrary." *Meza*, 2015 UT 70, ¶ 18, 359 P.3d 592; *see also id.* ¶¶ 7-8 (holding that "no judgment of conviction is entered pending completion of a plea-in-abeyance agreement," and that a successfully completed plea in abeyance, where the court allows the defendant to withdraw his plea and dismisses the case, is not a conviction); *State v. Millward*, 2014 UT App 174, ¶ 4, 332 P.3d 400 (explaining that the Utah Code plainly provides that a plea in abeyance is not a final adjudication); *Salz/v. Department of Workforce Servs.*, 2005 UT App 399, ¶ 14, 122 P.3d 691 (providing that a plea in abeyance for a crime "constitutes an admission, ... not a conviction, to that crime" for the purpose of making an individual ineligible for unemployment benefits); *State v. Hunsaker*, 933 P.2d

415, 416 (Utah Ct.App.1997) (per curiam) (dismissing an appeal from a trial court's order regarding a plea in abeyance agreement for lack of jurisdiction for not being a final judgment); *Moss*, 921 P.2d at 1025 n. 7 (providing that the plain language of the plea in abeyance statutes “reveals that a plea in abeyance is not a final adjudication”). Consistent with these cases, we conclude that a plea in abeyance is neither a sentence nor a final judgment, and therefore does not give rise to a right to appeal.

## II. A Restitution Order Entered as a Condition of a Plea in Abeyance Agreement Is Not an Exception to the Final Judgment Rule.

¶ 11 Mooers argues that restitution orders under the Crime Victims Restitution Act are exceptions to the final-judgment rule and are “appealable orders independent of conviction.” This issue has not been directly addressed by any Utah appellate court.

¶ 12 Mooers's argument relies heavily on *State v. Gibson*, 2009 UT App 108, 208 P.3d 543, in which we reviewed a trial court's denial of a defendant's motion to withdraw her guilty plea. *Id.* ¶¶ 7–8, 10. As part of a plea in abeyance agreement, the defendant was ordered to pay restitution. *Id.* ¶¶ 3–4. She disputed the amount and requested a hearing, after which the court set restitution at nearly \$240,000. *Id.* The defendant later moved to amend the order, arguing that the total figure was incorrect. *Id.* ¶ 4. Although the court denied her motion, the defendant did not appeal and instead sought to withdraw her plea. *Id.* ¶¶ 4–6. The trial court denied her request and imposed a sentence for failing to pay restitution as required by the conditions of the plea in abeyance agreement. *Id.* ¶¶ 6–7. We upheld the trial court's decision, noting that the defendant could have appealed the restitution order after the restitution hearing, *id.* ¶¶ 15–16, \*285 and in a footnote, stated, “The Crime Victims Restitution Act specifies that a judgment under that act has the same effect as an ordinary judgment,” *id.* ¶ 15 n. 5 (citing Utah Code Ann. § 77–38a–401(4) (2008)).

[5] [6] ¶ 13 Mooers argues that *Gibson's* “parallel holding that the restitution order was independently appealable” is precedent that affords him the right to appeal the restitution order in this case. We disagree. The opinion's brief statement on this point was “not within

the issue of that case, and is therefore not authoritative here.” *See Lagoon Jockey Club v. Davis County*, 72 Utah 405, 270 P. 543, 549 (1928). The *Gibson* court was asked to consider whether the trial court “misapplied the law when determining that [the defendant's] guilty plea was knowing and voluntary.” *Gibson*, 2009 UT App 108, ¶ 8, 208 P.3d 543. In seven paragraphs, we thoroughly discussed this question. *See id.* ¶¶ 9–15. Only in passing—supported by a single footnote—did we address whether the defendant could have appealed the restitution order. *See id.* ¶ 15 & n. 5. We therefore conclude that *Gibson's* statement about the right to appeal a restitution order is dicta, in which case, it

may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

*See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400, 5 L.Ed. 257 (1821).

[7] ¶ 14 Similarly, the Utah Supreme Court's decision in *Meza* includes dicta that might suggest that a plea in abeyance is an exception to the final-judgment rule under the Crime Victims Restitution Act. *See Meza v. State*, 2015 UT 70, ¶ 17, 359 P.3d 592. There, the court was asked to consider whether a successfully completed plea in abeyance agreement, where the case was dismissed after the defendant met the conditions of the agreement, is a conviction for the purposes of the Post-Conviction Remedies Act. *Id.* ¶¶ 7–8. It concluded that a case dismissed under these circumstances is not a conviction. *Id.* ¶ 18. In reaching this conclusion, the court identified examples in which the legislature designated pleas in abeyance in certain contexts as the same as convictions, which included pleas in abeyance under the Crime Victims Restitution Act. *See id.* ¶ 17. This discussion of the Act begins and ends in two sentences and does not go to the matter decided. *See id.* Thus, the *Meza* court's statement on this hypothetical situation is also dicta and is not binding.<sup>2</sup>

¶ 15 Statutes that treat a plea in abeyance agreement as an exception to the usual rule that a plea in abeyance is not the equivalent of a conviction do so explicitly.<sup>3</sup> This feature of other statutes bolsters our conclusion that if the Utah Legislature intended to create an exception to the final-judgment rule for restitution \*286 orders imposed as a condition in a plea in abeyance agreement, it would have done so explicitly, but it did not.

¶ 16 The only language in the Crime Victims Restitution Act that suggests a restitution order is a final judgment lies in section 77–38a–401, which states that a restitution order “shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure,” Utah Code Ann. § 77–38a–401(2) (LexisNexis 2012), and “shall have the same [e]ffect ... as a judgment in a civil action,” *id.* § 77–38a–401(4). But we are not convinced the legislature intended to make a restitution order in this context an order appealable by the defendant. Rather, this section refers to whether the order may be enforced by the victim, the court, or creditors. *Id.* § 77–38a–401. In relevant part, it states,

The order shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure. In addition, the [Department of Corrections] may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.... If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover collection and reasonable attorney fees.... [A] judgment ordering restitution when entered on the civil judgment docket shall have the same [e]ffect and is subject to the same rules as a judgment in a civil action and expires only upon payment in full, which includes applicable interest, collection fees, and attorney fees.

*Id.* § 77–38a–401(2) to (4).

¶ 17 This section of the Act does not refer to the right to appeal, nor does it indicate that a restitution order is considered a conviction or sentence for purposes of appeal. Instead, the finality in the Act invokes a victim's, court's, or creditor's ability to enforce the payment of restitution. This enforcement provision helps fulfill the purposes of restitution—to “compensate the victim for pecuniary damages” and “rehabilitate and deter the defendant, and others, from future illegal behavior.” *See State v. Laycock*, 2009 UT 53, ¶ 18, 214 P.3d 104. Without this provision, which requires the court to enter the restitution order on a civil docket, there is no judgment entered by which a victim can hold the defendant accountable for restitution.

[8] ¶ 18 Mooers is concerned that not being able to directly appeal the restitution order puts him in the untenable situation of either paying an “improper restitution amount” or facing the consequences of not fulfilling the conditions of the agreement. But as our court has explained, “relief may still be attainable for a defendant who enters into a plea in abeyance agreement even if there is no appeal as of right from that plea agreement.” *State v. Millward*, 2014 UT App 174, ¶ 6, 332 P.3d 400. Indeed, we recognize that, without the legislature's express consent, there are available at least two of the “[t]hree avenues ... for securing review of a nonfinal order.” *Tyler v. Department of Human Servs.*, 874 P.2d 119, 120 (Utah 1994) (per curiam). The first is a petition requesting interlocutory review pursuant to rule 5 of the Utah Rules of Appellate Procedure. The second is to request extraordinary relief under rule 65B of the Utah Rules of Civil Procedure. Although “[t]he bases for proceeding under these [rationales] differ from each other, ... each provides a method for seeking review of a lower tribunal's order at a time prior to entry of a final appealable judgment.”<sup>4</sup> *Id.* “Our rules allowing discretionary review provide parties an opportunity to convince an appellate court that the issue raised is so important that review prior to full adjudication of the case is justified or that the order will escape review altogether if an appeal is not allowed.” *Id.*

\*287 CONCLUSION

¶ 19 Because we conclude that a plea in abeyance is not a final judgment, and that the restitution order imposed as a condition to the plea in abeyance agreement is not an exception to the final-judgment rule, we do not reach the merits of Mooers's appeal and dismiss his appeal.

#### All Citations

362 P.3d 282, 799 Utah Adv. Rep. 16, 2015 UT App 266

#### Footnotes

- 1 Although the court indicated that “[t]his is the final order of the Court and no other order needs to be prepared,” such language is not dispositive. In context, the order is properly viewed as the last order with regard to restitution, apparently intended to comply with the Utah Supreme Court's direction in *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966. See *id.* ¶ 32 (indicating that “whenever” a court intended for any document to constitute a final action, “the court must explicitly direct that no additional order is necessary” (citation and internal quotation marks omitted)). But the order's language does not control whether this court has appellate jurisdiction over an appeal from a restitution order issued while the district court is holding a plea in abeyance.
- 2 Although a plea in abeyance is “a ‘plea of guilty or of no contest,’ ” as *Meza v. State* suggests, it is explicitly *not* a conviction under the Crime Victims Restitution Act. See 2015 UT 70, ¶ 17, 359 P.3d 592 (quoting Utah Code Ann. § 77–38a–102(9)). The Act defines a “plea in abeyance” as “an order by a court ... accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him.” Utah Code Ann. § 77–38a–102(8) (LexisNexis 2012). When a court accepts a plea in abeyance and orders restitution under the Act, it does not enter judgment of conviction or impose sentence at that time. See *id.* Thus, *Meza's* brief statement on this issue is not controlling.
- 3 Several statutes explicitly treat a plea in abeyance as a conviction. See, e.g., Utah Code Ann. § 77–36–1.1(3) (LexisNexis 2012) (providing that “a plea of guilty or no contest to any qualifying domestic violence offense in Utah which plea is held in abeyance ... is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed”); *id.* § 17–16–10.5(2)(c) (2013) (providing that “[e]ntry of a plea in abeyance [in malfeasance in office cases] is the equivalent of a conviction ... even if the charge is later dismissed pursuant to a plea in abeyance agreement”); *id.* § 76–9–301.7 (2012) (providing that a conviction in cruelty to animal cases “means a conviction by plea or by verdict, including a plea of guilty or no contest that is held in abeyance ... regardless of whether the charge was, or is, subsequently reduced or dismissed in accordance with the plea in abeyance agreement”).
- 4 The third avenue mentioned in *Tyler v. Department of Human Services*, 874 P.2d 119, 120 (Utah 1994) (per curiam)—seeking certification of an order under rule 54(b) of the Utah Rules of Civil Procedure—may not be available in a criminal case. But even if it is, it is not clear that an order of restitution is one that would qualify for certification.

KeyCite Yellow Flag - Negative Treatment  
Certiorari Granted by State v. Becker, Utah, March 14, 2016

365 P.3d 173  
Court of Appeals of Utah.

STATE of Utah, Appellee,  
v.  
Darron Laven BECKER, Appellant.

No. 20131151-CA.  
|  
Dec. 24, 2015.

### Synopsis

**Background:** After defendant, who was charged with third degree felony aggravated assault, entered into plea-in-abeyance agreement on reduced charge of Class A misdemeanor attempted aggravated assault, State filed motion for restitution. The Third District Court, Salt Lake Department, Ann Boyden, J., ordered defendant to pay restitution. Defendant appealed.

**[Holding:]** The Court of Appeals, Roth, J., held that restitution order entered as condition of plea in abeyance was not a final order from which defendant could appeal.

Appeal dismissed.

West Headnotes (3)

### [1] Criminal Law

☞ Finality of determination in general

Generally, an appeal is improper if it is taken from an order or judgment that is not final.

Cases that cite this headnote

### [2] Criminal Law

☞ Appellate Jurisdiction

Where an appeal is not properly taken, an appellate court lacks jurisdiction and must dismiss.

Cases that cite this headnote

### [3] Criminal Law

☞ Necessity of entering judgment

Restitution order entered as condition of plea in abeyance on reduced charge of class A misdemeanor attempted aggravated assault was not a final order from which defendant could appeal, and thus appeal would be dismissed; plea in abeyance did not operate as final adjudication, and language of the Crime Victims Restitution Act, which provided that restitution orders were to be considered "legal judgments" and that they had "same [e]ffect...as a judgment in a civil action," referred to enforceability of the order "by the victim, the court, or creditors," not the order's appealability by a defendant. West's U.C.A. § 77-38a-401(2, 4).

Cases that cite this headnote

### Attorneys and Law Firms

\*173 Debra M. Nelson and Lacey C. Singleton, for Appellant.

Sean D. Reyes, Salt Lake City, and Tera J. Peterson, for Appellee.

Judge STEPHEN L. ROTH authored this Memorandum Decision, in which Judges MICHELE M. CHRISTIANSEN and JOHN A. PEARCE concurred.

### Memorandum Decision

ROTH, Judge:

¶ 1 Darron Laven Becker appeals an order of restitution. We dismiss the appeal for lack of jurisdiction.

¶ 2 Becker was charged with third degree felony aggravated assault based on allegations that he had attacked and struck his neighbor. Becker entered into a plea-in-abeyance agreement on a reduced charge of class A misdemeanor attempted aggravated assault. The

agreement described the factual basis for the assault to be that “on or about March 2, 2013, ... Becker attempted to hit his neighbor with the handle of a shovel during an argument regarding loose dogs.” Among other things, the plea agreement required Becker to pay restitution for damages suffered by the neighbor. The parties \*174 agreed to reserve the amount of restitution for a later hearing. The district court accepted the plea and held it in abeyance for twenty-four months. It also ordered the State to submit documentation supporting an order of restitution within ninety days.

¶ 3 Two months later, the State filed a motion for restitution, to which it attached a “Restitution/Subrogation Notice” from the Utah Office for Victims of Crime (OVC). The notice listed Becker as the defendant and identified the date, location, and type of crime. It then stated that OVC had paid the neighbor \$663.01 to replace a “Medically Necessary Device” and that OVC requested reimbursement for that pay-out. Attached to the notice was a list of payments indicating that OVC had paid the neighbor \$39 for a “Medically Necessary Device” received on March 4, 2013, and \$624.01 for a “Medically Necessary Device” received on March 6, 2013. No other documentation or description of the damages was included with the motion for restitution. Becker objected to the motion, arguing that the documentation was insufficient to support the requested restitution. The court set the matter for a restitution hearing.

¶ 4 At the hearing, the State explained to the court that the medically necessary devices listed in OVC's notice appeared to be for an eye exam and eyeglasses, respectively. In support, the State presented a handwritten document submitted by the neighbor. The document, which was addressed to the prosecutor, identified Becker's case number and then listed two categories of “Monetary Damages”: \$39 for an eye exam and \$624 for eyeglasses.<sup>1</sup> After the State represented that OVC had paid the claim “just based on [the handwritten documentation before the court] in conjunction with the police report,” Becker “strenuously object[ed],” arguing that restitution, whether paid by OVC or not, could not be “based on a handwritten piece of notebook paper.” Accordingly, Becker argued that there was not “enough information right now ... [to] know what exactly this claim was” and how it related to his attempted aggravated assault charge.

¶ 5 Although the district court expressed doubt that the State would be able to produce more restitution information, it agreed to set another restitution hearing six weeks later “to give [the parties] some time to see if in fact [the OVC payment] is not what it claims to be.” The court explained that unless Becker came up with something that undercut OVC's decision to reimburse the neighbor, it planned to order restitution in the amount of \$663.01.

¶ 6 By the time of the second restitution hearing, the State had not received any further documentation. Over Becker's objection that there was insufficient evidence to find that the “damage was directly caused by Mr. Becker's criminal conduct,” the court determined that the documentation included “sufficient foundation and nexus” between the requested damages and the criminal conduct. Accordingly, the court ordered Becker to pay restitution in the amount of \$663.01 plus interest. Becker appeals.

[1] [2] ¶ 7 As a threshold matter, we must determine whether we have jurisdiction to consider Becker's appeal. *See Robinson v. Baggett*, 2011 UT App 250, ¶ 12, 263 P.3d 411. The State contends that this court does not have jurisdiction to consider Becker's appeal because “a plea in abeyance does not result in a final judgment unless and until a conviction is entered or a case is dismissed.” Generally, “[a]n appeal is improper if it is taken from an order or judgment that is not final....” *Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649 (citation omitted). “Where an appeal is not properly taken, [an appellate] court lacks jurisdiction and ... must dismiss.” *Id.* ¶ 8.

¶ 8 While this case was under advisement, another panel of this court decided *State v. Mooers*, 2015 UT App 266, 362 P.3d 282, *petition for cert. filed*, Dec. 2, 2015 (No. 20150996). *Mooers* held that we lack jurisdiction to consider appeals regarding restitution orders under the Crime Victims Restitution \*175 Act (the Act) when a defendant appeals that restitution order during the plea-in-abeyance period. *Id.* ¶ 19; *see also* Utah Code Ann. §§ 77–38a–101 to –601 (LexisNexis 2012). In *Mooers*, the defendant appealed a trial court's determination that all of the ordered restitution fell within the scope of amounts recoverable, contending that over \$1,000 of the ordered restitution monies did not constitute “pecuniary damages” under the Act. *Mooers*, 2015 UT App 266, ¶¶ 5–6, 362 P.3d 282; *see also* Utah Code Ann. § 77–38a–102(6). The defendant in *Mooers* filed his appeal while his



plea-in-abeyance probationary period was still in effect. *Mooers*, 2015 UT App 266, ¶¶ 3–6, 362 P.3d 282. A panel of this court determined that we lacked jurisdiction to consider the appeal because there was no final judgment, particularly holding that a restitution order under the Act, as a condition of the plea-in-abeyance agreement, was not an exception to the final order rule. *Id.* ¶ 19. The court reasoned first, that the plain language of the Utah Code, corroborated by our cases, precludes a plea in abeyance from generally operating as or being considered a final adjudication, *id.* ¶¶ 8–10, and, second, that the plain language of the Act prevented a restitution order entered as a condition of a plea-in-abeyance agreement from being an exception to the final judgment rule, *id.* ¶¶ 11–17. In particular, *Mooers* concluded that the language in the Act that might have suggested that a restitution order is final—a restitution order “ ‘shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure’ ” with “ ‘the same [e]ffect ... as a judgment in a civil action’ ”—referred to the enforceability of a restitution order “by the victim, the court, or creditors,” not the order’s appealability by a defendant. *Id.* ¶¶ 16–17 (alteration and omission in original) (quoting Utah Code Ann. § 77–38a–401(2), (4)). Additionally, *Mooers* determined that statements from *State v. Gibson*, 2009 UT App 108, 208 P.3d 543, and *Meza v. State*, 2015 UT 70, 359 P.3d 592, which suggest that a restitution order entered as a condition of a plea in abeyance under the Act is final and appealable are dicta and therefore not binding. *Mooers*, 2015 UT App 266, ¶¶ 12–14, 362 P.3d 282.

[3] ¶ 9 The circumstances in this case are indistinguishable from *Mooers*. Becker has appealed a restitution order entered by the district court under the Act as a condition of his plea in abeyance, and he has appealed during his plea-in-abeyance period. Thus, *Mooers* controls the outcome here: Because Becker has not been sentenced and a conviction has not yet been entered against him, there is no final order from which Becker may appeal.

¶ 10 Though Becker contends that *Mooers* is inconsistent with prior case law, *Mooers* analyzed the plea-in-abeyance

statute and the Act in light of relevant precedent, and we are bound to follow *Mooers* as a matter of stare decisis. See *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993) (“[S]tare decisis has equal application when one panel of a multi-panel appellate court is faced with a prior decision of a different panel.”); *id.* (stating that horizontal stare decisis requires that “the first decision by a court on a particular question of law governs later decisions by the same court”); *State v. Tenorio*, 2007 UT App 92, ¶ 9, 156 P.3d 854 (explaining that the Utah Court of Appeals is “bound by [its] previous decisions as well as the decisions of the Utah Supreme Court.”); see also *State v. Shoulderblade*, 905 P.2d 289, 292 (Utah 1995) (per curiam) (“Stare decisis forges certainty, stability, and predictability in the law. It also reinforces confidence in judicial integrity and lays a foundation of order upon which individuals and organizations in our society can conduct themselves.” (citations omitted)). Accordingly, we have no choice but to dismiss for lack of jurisdiction.

¶ 11 We note, as did *Mooers*, that a defendant desiring to challenge a restitution order in the context of a plea in abeyance is not left entirely without options. He or she may seek interlocutory review pursuant to rule 5 of the Utah Rules of Appellate Procedure or file a petition for extraordinary relief under rule 65B of the Utah Rules of Civil Procedure.<sup>2</sup> We recognize that both these avenues of relief are discretionary and may not be \*176 had as a matter of right. However, as *Mooers* points out, in the absence of a final, appealable order, these avenues place the burden on the defendant to show that “ ‘review prior to the full adjudication of the case is justified or that the order will escape review altogether if an appeal is not allowed.’ ” *Mooers*, 2015 UT App 266, ¶ 18, 362 P.3d 282 (quoting *Tyler v. Department of Human Servs.*, 874 P.2d 119, 120 (Utah 1994) (per curiam)).

¶ 12 The appeal is dismissed for lack of jurisdiction.

#### All Citations

365 P.3d 173, 802 Utah Adv. Rep. 13, 2015 UT App 304

#### Footnotes

- 1 These figures total \$663, and the breakdown very nearly aligns with OVC’s itemization of the medically necessary devices. It is not apparent why OVC paid an additional \$0.01 on the eyeglasses.
- 2 *Mooers* also noted that rule 54(b) of the Utah Rules of Civil Procedure may provide another possible avenue of relief but that rule 54(b) did not appear to apply to the circumstances in that case. See *State v. Mooers*, 2015 UT App 266,

State v. Becker, 365 P.3d 173 (2015)

802 Utah Adv. Rep. 13, 2015 UT App 304

¶ 18 n. 4, 362 P.3d 282, *petition for cert. filed*, Dec. 2, 2015 (No. 20150996); *cf. Tyler v. Department of Human Servs.*, 874 P.2d 119, 120 (Utah 1994) (*per curiam*).

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