

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

KARL THOMPSON, JR.,
Defendant.

No. CR-09-88-FVS

ORDER DENYING UNITED
STATES' REQUEST FOR
RESTITUTION

THIS MATTER came before the Court based upon the United States' request for an order requiring the defendant to pay restitution. The United States is represented by Timothy M. Durkin, Michael C. Ormsby, Aine Ahmed, Joseph H. Harrington, and Victor Boutros. The defendant is represented by Carl J. Oreskovich, Courtney A. Garcea, and Stephen M. Lamberson.

SUMMARY

A jury found the defendant guilty of two crimes. One of them consisted of willfully depriving Otto Zehm of his Fourth Amendment right to be free from unreasonable force. The defendant concedes the civil rights conviction constitutes a crime of violence within the meaning of the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A(c) (1) (A) (i), and, thus, his case is governed by the MVRA. 18 U.S.C. § 3663A(a) (1). The United States asks the Court to order the defendant to pay the following sums as restitution: \$37,410.88 for

1 medical expenses; \$612.00 for cremation expenses; \$1,751.00 for a
2 memorial plaque; \$208,000 for lost wages; and \$578,118.00 for
3 investigative costs and attorneys' fees. The defendant objects.

4 **BACKGROUND**

5 At all times relevant to this action, the defendant was a Spokane
6 Police Officer. On March 18, 2006, he followed Otto Zehm into a
7 convenience store in response to a report suggesting Mr. Zehm recently
8 had stolen money from an automated teller machine. (Although the
9 defendant did not know it, the report was inaccurate; Mr. Zehm had not
10 stolen anything.) The defendant drew his baton and rapidly approached
11 Mr. Zehm, who began backing away. The defendant repeatedly struck Mr.
12 Zehm with his baton, knocking him down. Mr. Zehm wriggled away along
13 the floor. As he did so, he attempted to shield himself from baton
14 blows. The defendant fired taser barbs into Mr. Zehm in an effort to
15 shock him into submission. The defendant was unsuccessful. Other
16 officers arrived. The defendant withdrew from the struggle. The
17 other officers subdued and restrained Mr. Zehm on the floor. Mr. Zehm
18 stopped breathing. He was transported by ambulance to a Spokane
19 hospital. Efforts at resuscitation were unsuccessful. Mr. Zehm was
20 pronounced dead a few days later. On March 13, 2009, his estate and
21 his mother brought an action in United States District Court against
22 the City of Spokane and ten police officers, including the defendant.¹
23 On June 19, 2009, an Indictment was filed charging the defendant with
24 two crimes. Count 1 charged him with willfully depriving Otto Zehm of
25 his Fourth Amendment right to be free from unreasonable force. 18

26 ¹CV-09-80-LRS.

1 U.S.C. § 242. Count 2 charged the defendant with knowingly making a
2 false entry in a record with the intent to obstruct an investigation
3 of a matter within the jurisdiction of the FBI. 18 U.S.C. § 1519. On
4 November 2, 2011, a jury convicted the defendant of both charges.
5 Sentencing was delayed in order to allow the defendant to investigate
6 credible information indicating the United States had withheld
7 exculpatory information. During 2012, the civil action settled. The
8 plaintiffs received one million six hundred seventy thousand
9 (\$1,670,000.00) dollars. Although the City did not explicitly admit
10 liability, its attorneys implicitly admitted the City had failed to
11 adequately train and supervise its police officers. (Transcript of:
12 Hearing re Settlement Agreement (ECF No. 136) at 5.) Sentencing in
13 the criminal case took place on November 15, 2012. The Court ordered
14 the defendant to serve concurrent terms of 51 months in prison, but
15 reserved ruling on the United States' request for restitution.

16 **STANDARD**

17 A federal court may not order a defendant to pay restitution
18 absent statutory authorization. *United States v. Andrews*, 600 F.3d
19 1167, 1172 (9th Cir.2010). Here, there is a statute. The Mandatory
20 Victims Restitution Act requires the Court to award restitution to any
21 victim of the defendant's crimes. 18 U.S.C. § 3663A(1). A "victim"
22 is "'a person directly and proximately harmed as a result of the
23 commission of an offense for which restitution may be ordered.'" *United States v. Yeung*, 672 F.3d 594, 600 (9th Cir.2012) (quoting §
24 3663A(a)(2)). The purpose of the MVRA is to make the victim whole.
25 *Id.* at 600-01 (citations omitted).
26

1 The defendant objects to the United States' request for
2 restitution. "Any dispute as to the proper amount or type of
3 restitution shall be resolved by the court by the preponderance of the
4 evidence. The burden of demonstrating the amount of the loss
5 sustained by a victim as a result of the offense shall be on the
6 attorney for the Government." 18 U.S.C. § 3664(e). The government
7 must show it is more likely than not that the defendant's offense
8 proximately caused the losses for which the government is seeking
9 restitution. *United States v. Tsosie*, 639 F.3d 1213, 1222 (9th
10 Cir.2011). In deciding whether the government has satisfied its
11 burden, a "district court may utilize only evidence that possesses
12 sufficient indicia of reliability to support its probable accuracy."
13 *United States v. Waknine*, 543 F.3d 546, 557 (9th Cir.2008) (internal
14 punctuation and citations omitted).

15 **ANALYSIS**

16 A. Procedural Errors

17 The MVRA requires a defendant in a criminal case to pay
18 restitution in certain circumstances. The duty to pay restitution is
19 set forth in § 3663A. The procedure for resolving disputes over the
20 existence or amount of restitution is set forth in § 3664. See
21 *Andrews*, 600 f.3d at 1175 (Clifton, J., and Fernandez, J.,
22 concurring). As the defendant points out, the procedure that is set
23 forth in § 3664 was not followed in this case. Failure to comply with
24 statutory requirements is a serious matter. Nevertheless, the errors
25 that have occurred do not deprive the Court of authority to order the
26 defendant to pay restitution if restitution is warranted. For one

1 thing, he was on notice at sentencing that the United States was
2 seeking restitution and the Court wanted briefing from the parties
3 before ruling. For another thing, he has not demonstrated he suffered
4 any prejudice as a result of the errors that have occurred.
5 Consequently, the procedural errors are not a bar to restitution. See
6 *Dolan v. United States*, 560 U.S. ----, ----, 130 S.Ct. 2533, 2537, 177
7 L.Ed.2d 108 (2010) ("a sentencing court that misses the 90-day
8 deadline nonetheless retains the power to order restitution -- at
9 least where, as here, the sentencing court made clear prior to the
10 deadline's expiration that it would order restitution, leaving open
11 (for more than 90 days) only the amount").

12 B. Medical Expenses

13 Mr. Zehm was treated at a Spokane hospital. Treatment cost
14 \$37,410.88. The United States requests restitution of \$37,410.88 for
15 medical expenses. The defendant objects for two reasons. First, he
16 notes the City has paid Mr. Zehm's medical expenses. Second, he
17 maintains some of Mr. Zehm's injuries were inflicted by other
18 officers. At this point in the analytic process, only the second
19 reason needs to be considered. The first reason will be addressed
20 later.

21 It is unlikely the defendant is solely responsible for Mr. Zehm's
22 injuries, hospitalization and death. In fact, they may have had
23 several causes. One cause may have been the City's tacitly-
24 acknowledged failure to adequately train and supervise its police
25 officers. A second cause may have been the defendant's use of
26 unconstitutional force. A third cause may have been the manner in

1 which the other police officers subdued and restrained Mr. Zehm.²
2 However, the possibility that Mr. Zehm's injuries, hospitalization,
3 and death had multiple causes does not relieve the defendant of
4 responsibility for making restitution for medical expenses as long as
5 his unconstitutional conduct was a proximate cause of Mr. Zehm's
6 injuries, hospitalization, and death. *Yeung*, 672 F.3d at 600.

7 "Proximate cause is causation substantial enough and close enough
8 to the harm to be recognized by law, but a given proximate cause need
9 not be, and frequently is not, the exclusive proximate cause of harm."
10 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718
11 (2004). As the Ninth Circuit explained in *Yeung*, "Although a
12 defendant's conduct need not be the sole cause of the loss, any
13 subsequent action that contributes to the loss, such as an intervening
14 cause, must be directly related to the defendant's conduct. The
15 causal chain may not extend so far, in terms of the facts or the time
16 span, as to become unreasonable." 672 F.3d at 600 (internal
17 punctuation and citations omitted). In view of these principles, was
18 the defendant's unlawful conduct a proximate cause of the injuries
19 that led to Mr. Zehm's hospitalization and death?

20 There is no reason to think Mr. Zehm would have been severely
21 restrained by police officers on March 18, 2006, but for the
22 defendant's unlawful conduct. Thus, the defendant's conduct was a
23 "but for cause" of the severe restraint to which Mr. Zehm was
24

25 ²The Court is not suggesting the other officers used
26 unconstitutional force. None of the other officers has made such
an admission, and no fact-finder has made such a determination.

1 subjected. Of course, that does not necessarily mean the defendant's
2 conduct was a proximate cause of Mr. Zehm's hospitalization and death.
3 "[A] person whose initial act is the 'but for' cause of some ultimate
4 harm (i.e., the harm would not have happened but for the initial act)
5 is not legally liable for the harm if an intervening act is a
6 'superseding cause' that breaks the legal chain of proximate cause."
7 *Higazy v. Templeton*, 505 F.3d 161, 181 (2d Cir.2007) (internal
8 punctuation and citations omitted). The issue is whether the conduct
9 of the defendant's fellow officers broke the legal chain between the
10 defendant's unlawful use of force and Mr. Zehm's death. See *United*
11 *States v. Kennedy*, 643 F.3d 1251, 1263 (9th Cir.2011).

12 It is unlikely Mr. Zehm died from the injuries he sustained at
13 the defendant's hands, though the injuries were serious. To the
14 contrary, it is likely, though by no means certain, Mr. Zehm died
15 because of the manner in which he was restrained by the defendant's
16 fellow officers. The defendant was not responsible for training his
17 fellow officers in the use of force. He did not direct them to
18 restrain Mr. Zehm in the manner in which they did, and he was not
19 involved in restraining Mr. Zehm. By that point, he had withdrawn
20 from the struggle. Nevertheless, the conduct of the defendant's
21 fellow officers does not constitute an intervening cause. The
22 defendant is the one who provoked Mr. Zehm's resistance. He is the
23 one who summoned his fellow officers to help subdue Mr. Zehm, and he
24 is the one who, for a time, directed their actions. The defendant
25 placed his fellow officers in a difficult situation. It was
26 foreseeable they would restrain Mr. Zehm, and given Mr. Zehm's

1 combative behavior, it was foreseeable they would employ substantial
2 force in doing so. Their collective decision to restrain Mr. Zehm
3 followed closely in time, and was directly related to, the defendant's
4 unlawful behavior. Thus, the behavior of the defendant's fellow
5 officers cannot be classified as an intervening cause. The defendant
6 is liable for Mr. Zehm's medical expenses subject to the provisions of
7 § 3664(j).

8 C. Cremation Expenses and Memorial Plaque

9 Mr. Zehm was cremated. The United States seeks restitution from
10 the defendant in the amount \$612.00 for cremation expenses. The
11 defendant objects on the ground he did not cause Mr. Zehm's death.
12 For the reasons set forth in the preceding section, the defendant's
13 objection is overruled. He must make restitution for cremation
14 expenses subject to the provisions of § 3664(j). The memorial plaque
15 is a different matter. The City agreed to install a memorial plaque
16 in a city park as part of its settlement with the plaintiffs in the
17 civil action. Apparently, the City's decision to install a plaque was
18 prompted by a desire to accept responsibility for its omissions.
19 While the City's decision may be commendable, the installation of a
20 plaque was not necessary to make the victims whole; that is to say, it
21 was not necessary to restore them to "their original state of well-
22 being." *See United States v. Gordon*, 393 F.3d 1044, 1053 (9th
23 Cir.2004) (internal punctuation and citation omitted).

24 D. Future Lost Income

25 Mr. Zehm was 36 years old when he died. The United States
26 estimates his death deprived him of \$208,635.00 in future lost income.

1 The United States arrived at that figure by a two-step process.
2 First, the United States assumed Mr. Zehm would have earned \$16,859 in
3 wages each year until age 65. Second, the United States assumed a
4 discount rate of four percent. Based upon these assumptions, the
5 United States argues the defendant must pay restitution for Mr. Zehm's
6 future lost income in the amount of \$208,635. The defendant objects
7 for three reasons. First, he denies he caused Mr. Zehm's death.
8 Second, he questions whether Mr. Zehm would have worked to age 65
9 given his mental illness. Finally, he challenges the method the
10 United States used to arrive at the figure it is requesting.

11 The defendant's first reason for objecting to restitution for
12 future lost income is that he did not cause Mr. Zehm's death. This
13 reason is unpersuasive. As explained above, the defendant's unlawful
14 use of force was a proximate cause of Mr. Zehm's death even though
15 other acts or omissions may have contributed to the tragedy. The
16 defendant's second reason for objecting to restitution for future lost
17 income is that Mr. Zehm's mental illness may have prevented him from
18 working until age 65. Undoubtedly, at times, Mr. Zehm's mental
19 illness was disruptive. However, the United States has provided
20 credible evidence Mr. Zehm's colleagues expected him to continue
21 working despite his mental illness. Thus, it is reasonable to assume
22 he would have worked until age 65. The defendant's third reason for
23 objecting to restitution for future lost income is methodological in
24 nature. He says the United States should have subtracted Mr. Zehm's
25 probable expenditures between ages 36 and 65 from its computation of
26 the value of his lost future wages. This argument is based upon the

1 law of the State of Washington. Federal law appears to be contrary.
2 *See, e.g., United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir.2006).
3 In *Cienfuegos*, the Ninth Circuit authorized district courts to award
4 restitution for future lost income. 462 F.3d at 1168. However, the
5 Ninth Circuit did not adopt a specific methodology for calculating
6 future lost income. Instead, the circuit court encouraged district
7 courts to review *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S.
8 523, 533-53, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Sutton v.*
9 *Earles*, 26 F.3d 903, 918-19 (9th Cir.1994). It is appropriate to
10 begin with *Jones & Laughlin Steel Corp., supra*. There, the Supreme
11 Court said:

12 [A]lthough the notion of a damage award representing the
13 present value of a lost stream of earnings in an inflation-
14 free economy rests on some fairly sophisticated economic
15 concepts, the two elements that determine its calculation
16 can be stated fairly easily. They are: (1) the amount that
17 the employee would have earned during each year that he
18 could have been expected to work after the injury; and (2)
19 the appropriate discount rate, reflecting the safest
20 available investment. The trier of fact should apply the
discount rate to each of the estimated installments in the
lost stream of income, and then add up the discounted
installments to determine the total award.

21 462 U.S. at 537-38, 103 S.Ct. 2541. The method the United States used
22 in this case to calculate future lost income is consistent with the
23 method set forth in *Jones & Laughlin Steel Corp.* Admittedly, the
24 figure that the United States is proposing does not establish Mr.
25 Zehm's future lost income with mathematical certainty; but, as the
26 Ninth Circuit noted in *Sutton*, mathematical certainty is not required.

1 26 F.3d at 918. Given the inherent difficulty in calculating future
2 lost income, the sum of \$208,635 is a reasonable estimate. The
3 defendant is liable for that sum subject to the provisions of §
4 3664(j).

5 E. Attorneys' Fees and Costs

6 Mr. Zehm's mother and his estate retained counsel pursuant to a
7 contingency fee agreement. In essence, they agreed to pay their
8 attorneys one-third of any money their attorneys recovered. During
9 2012, their attorneys negotiated a \$1.67 million dollar settlement
10 with the City of Spokane. Mr. Zehm's mother and his estate paid their
11 attorneys the sum of \$578,118.00 for the work they had performed. The
12 United States urges the Court to order the defendant to reimburse Mr.
13 Zehm's mother and his estate for the attorneys' fees and costs they
14 incurred in obtaining relief from the City.

15 "Generally, investigation costs -- including attorneys' fees --
16 incurred by private parties as a 'direct and foreseeable result' of
17 the defendant's wrongful conduct 'may be recoverable.'" *United States*
18 *v. Gordon*, 393 F.3d 1044, 1057 (9th Cir.2004) (quoting *United States*
19 *v. Phillips*, 367 F.3d 846, 863 (9th Cir.2004)). The Ninth Circuit's
20 decision in *United States v. DeGeorge*, 380 F.3d 1203 (9th Cir.2004), is
21 illustrative. The record in that case reflects Mr. DeGeorge purchased
22 an expensive yacht which he wanted to insure. *Id.* at 1208. However,
23 because of his checkered past, insurance companies would have been
24 unwilling to issue a policy to him. *Id.* Consequently, he and his
25 associates created corporations to hide his involvement in the yacht's
26 ownership. *Id.* One of the corporations ultimately purchased an

1 insurance policy. The yacht sank under suspicious circumstances while
2 Mr. DeGeorge and one of his associates were on board. *Id.* at 1209.
3 The corporation filed a claim with the insurance company, but the
4 insurance company refused to pay. *Id.* at 1210. Instead, the
5 insurance company brought an action to rescind its contract with the
6 corporation. Besides naming the insured as a defendant, the insurance
7 company also named Mr. DeGeorge and one of his associates. Mr.
8 DeGeorge testified, but the fact-finder did not credit his testimony.
9 Judgment was entered in favor of the insurance company. Afterward,
10 the judge who presided over the civil case referred the matter to the
11 local United States Attorney's Office for investigation. *Id.* Mr.
12 DeGeorge was indicted. A jury convicted him of conspiracy, mail
13 fraud, wire fraud, and perjury. *Id.* at 1210. The judge who presided
14 over the criminal case ordered him to reimburse the insurance company
15 for the attorneys' fees and costs it incurred in bringing the civil
16 action to rescind the insurance contract. *Id.* The Ninth Circuit
17 affirmed, "DeGeorge was convicted of conspiracy that included his
18 perjury and other conduct during the civil trial as overt acts. Thus,
19 the insurance company's expenses in the civil trial were directly, not
20 tangentially, related to DeGeorge's offenses." *Id.* at 1221 (emphasis
21 omitted). The existence of a conspiracy was critical to the outcome.
22 As the Ninth Circuit observed, "[W]hen someone is convicted of a
23 crime that includes a scheme, conspiracy, or pattern of criminal
24 activity as an element of the offense, the court can order restitution
25 for losses resulting from any conduct that was part of the scheme,
26 conspiracy, or pattern of criminal activity.'" *Id.* (quoting *United*

1 *States v. Reed*, 80 F.3d 1419, 1423 (9th Cir.1996)).

2 In *DeGeorge*, the Ninth Circuit upheld the district judge's
3 decision to require the defendant to pay restitution for attorneys'
4 fees the insurance company incurred in a separate civil case. What
5 was the key fact? Some of the acts Mr. DeGeorge engaged in during the
6 course of the civil case -- perjury, for example -- were part of the
7 conspiracy of which he was convicted. Thus, acts that occurred during
8 the civil case were organically related to the conspiracy conviction.
9 This case is distinguishable from *DeGeorge*. Here, Karl Thompson
10 completed his assault on March 18, 2006. Mr. Zehm's mother and his
11 estate did not file their civil action until March 13, 2009. During
12 2011, Mr. Thompson was convicted of wilfully depriving Mr. Zehm of a
13 constitutional right. However, Mr. Thompson was not convicted of
14 conspiracy. Consequently, unlike *DeGeorge*, there is no organic
15 connection between the civil action and the assault.

16 Another case that illustrates the Ninth Circuit's approach to
17 restitution is *United States v. Gordon, supra*. The record of that
18 case reflects Mr. Gordon worked for Cisco Systems. 393 F.3d at 1049.
19 He embezzled stock certificates, sold them, and used the proceeds from
20 the sales to "make stock trades using information gained from his
21 insider position." *Id.* Eventually, "Cisco discovered that shares
22 were missing from one of the accounts from which Gordon had embezzled
23 stock." *Id.* Cisco began an intensive internal investigation. *Id.*
24 The investigation uncovered additional embezzlements. *Id.* Mr. Gordon
25 was indicted. He pleaded guilty to wire fraud and insider trading.
26 The sentencing judge ordered him to serve 66 months in prison and pay

1 restitution in the amount of \$27,397,206.84. *Id.* at 1049-50. The
2 latter figure included costs that Cisco incurred investigating Mr.
3 Gordon's wrongdoing. *Id.* at 1050. The Ninth Circuit upheld the
4 sentencing judge's decision to award restitution for investigative
5 costs and attorneys' fees:

6 The record demonstrates that Cisco's investigation costs
7 were incurred in response to five grand jury subpoenas and a
8 number of government requests requiring Cisco to analyze
9 vast amounts of documentation and electronic information.
10 Cisco was required to retrieve every item regarding its
11 investments in 20 companies that were the subject of
12 possible insider trading by Gordon, and over 40 companies
13 that were identified as candidates for Gordon's possible
14 embezzlement of Cisco-owned shares or proceeds. Cisco was
15 forced to identify and reconstruct hundreds of sales and
16 acquisitions from which Gordon might have been able to
17 embezzle proceeds. Gordon purposefully covered his tracks
18 as he concealed his numerous acts of wrongdoing from Cisco
19 over a period of years. As the victim, Cisco cannot be
20 faulted for making a concerted effort to pick up his trail
21 and identify all the assets he took amid everything he
22 worked on.

19 *Id.* at 1057.

20 In *Gordon*, the victim needed to conduct an intensive internal
21 investigation in order to determine the extent of the economic damage
22 that Mr. Gordon had inflicted. This case arose in a very different
23 context, *viz.*, a confrontation between a police officer and a suspect;
24 a confrontation that set in motion a chain of events that led to the
25 suspect's death. Nevertheless, there is at least one material
26 similarity between this case and *Gordon*. For an extended period of

1 time after Otto Zehm's death, it was unclear what had happened. There
2 were conflicting descriptions of his behavior and of the defendant's
3 behavior. Mr. Zehm's mother and his estate reasonably hired counsel
4 in order to determine whether the official account of the incident was
5 accurate. They cannot be faulted for making a concerted effort to
6 determine whether Mr. Zehm's constitutional rights had been violated.

7 However, this case is dissimilar from *Gordon* in material
8 respects. In *Gordon*, there was only one wrongdoer. Here, by
9 contrast, Mr. Zehm's mother alleged wrongdoing on the part of numerous
10 persons. Karl Thompson was one of the alleged wrongdoers, but he was
11 only one. When Mr. Zehm's mother filed suit in 2009, she also named
12 as defendants the City of Spokane and ten of Mr. Thompson's fellow
13 police officers. The civil action settled during the summer of 2012.
14 The 2012 settlement agreement is the foundation of the United States'
15 request for attorneys' fees and costs; and yet, Mr. Thompson was not a
16 party to the agreement. This circumstance deserves careful
17 consideration. Is it reasonable to require Mr. Thompson to reimburse
18 Mr. Zehm's mother for the attorneys' fees and costs she incurred on
19 her way to obtaining the 2012 agreement with the City?

20 A useful place to begin is the civil action. Federal
21 jurisdiction was predicated upon 42 U.S.C. § 1983. Mr. Zehm's mother
22 and his estate sought damages under § 1983 and state law. Their
23 reliance upon § 1983 is significant. The City of Spokane could not be
24 held liable for damages under that statute based upon the doctrine of
25 *respondeat superior*. See, e.g., *Monell v. Department of Social*
26 *Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611

1 (1978). Insofar as § 1983 is concerned, the City could be held liable
2 for those acts, and only those acts, which were its acts; that is to
3 say, acts the City ordered or sanctioned. See *Pembaur v. City of*
4 *Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452
5 (1986). One of the issues was whether the City had adequately trained
6 and supervised its police officers with respect to the use of force.
7 In limited circumstances, a city may be held liable under § 1983 for
8 failing to do so. Cf. *Connick v. Thompson*, --- U.S. ----, ----, 131
9 S.Ct. 1350, 1359, 179 L.Ed.2d 417 (2011) ("a local government's
10 decision not to train certain employees about their legal duty to
11 avoid violating citizens' rights may rise to the level of an official
12 government policy for purposes of § 1983"). Although the City of
13 Spokane did not formally admit liability, the transcript of the
14 hearing that occurred on May 15, 2012, indicates the City's attorneys
15 tacitly acknowledged the City had failed to adequately train its
16 police officers with respect to the use of force. The terms of the
17 settlement agreement reflect that tacit admission. (Transcript of:
18 Hearing re Settlement Agreement (ECF No. 136) at 5.)

19 It appears, then, that the United States wants the defendant to
20 pay restitution to Mr. Zehm's mother and his estate for fees and costs
21 they incurred obtaining relief from the City based upon the City's
22 failure to adequately train its police officers. This helps clarify
23 the nature of the request the United States is making. Still, the
24 question remains: Is it reasonable to require the defendant to
25 reimburse Mr. Zehm's mother and his estate for fees and costs they
26 incurred obtaining relief from the City? The answer to that question

1 is not obvious. At least two circumstances warrant consideration.

2 One relevant circumstance is the relationship between the City's
3 failure to train its officers and the defendant's conduct. To what
4 extent did the City's omission contribute to the assault? The City's
5 failure to adequately train its officers, including its failure to
6 adequately train the defendant, occurred prior to the defendant's
7 assault of Mr. Zehm. Consequently, this particular omission was not a
8 foreseeable result of the assault. To the contrary, the assault
9 arguably was a foreseeable result of the City's failure to adequately
10 train the defendant.

11 Another circumstance that warrants consideration is the
12 relationship between the defendant's unlawful conduct and the City's
13 liability. Undoubtedly, the jury's verdicts in the criminal case
14 played an important part in the City's decision to settle.
15 Nevertheless, the criminal convictions were not essential to success
16 in the civil rights action. As noted above, the defendant's conduct
17 probably was not the only proximate cause of Otto Zehm's death.
18 Another proximate cause may have been the manner in which he was
19 restrained by the defendant's fellow officers after the defendant
20 withdrew from the struggle.³ Mrs. Zehm arguably could have prevailed
21 in the civil rights action by proving that the City failed to train
22 its officers to use constitutionally adequate methods to restrain
23 combative suspects, that the City's failure to provide adequate
24 training reflected deliberate indifference to Otto Zehm's

25
26 ³This observation does not represent a finding of fact or a
conclusion of law concerning causation.

1 constitutional rights, and that the lack of adequate training caused
2 his death. See *Board of County Commissioners of Bryan County,*
3 *Oklahoma v. Brown*, 520 U.S. 397, 404-10, 117 S.Ct. 1382, 137 L.Ed.2d
4 626 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388-92, 109 S.Ct.
5 1197, 103 L.Ed.2d 412 (1989). Under this theory, Mrs. Zehm would not
6 have had to prove the defendant violated her son's constitutional
7 rights. She arguably could have obtained damages from the City under
8 this theory even if the defendant's use of force had been
9 constitutional.

10 Given the record as a whole, the Court is not satisfied the 2012
11 settlement was a direct result of the defendant's unlawful conduct,
12 even though the City may have been influenced by the verdicts in the
13 criminal case. Rather, the record suggests the settlement was
14 achieved by the City's tacit admission that it had violated Mr. Zehm's
15 constitutional rights by failing to adequately train its police
16 officers. To require the defendant to pay the sum requested by the
17 United States would effectively compel him to pay restitution for the
18 City's independent omissions. Not only that, but it would compel him
19 to pay for omissions that occurred prior to his assault; omissions
20 that arguably left him inadequately prepared to respond properly to
21 Mr. Zehm on March 18, 2006. Consequently, the Court will not order
22 the defendant to reimburse Mr. Zehm's mother and his estate for the
23 fees and costs they incurred in obtaining relief from the City.

24 F. Double Recovery

25 As part of the settlement of the civil action, Mr. Zehm's mother
26 and his estate were compensated for his medical expenses, burial

1 expenses, and future lost income. Mr. Zehm's mother and his estate
2 are not entitled to recover twice for the same losses. 18 U.S.C. §
3 3664(j). Thus, the defendant is under no obligation to pay
4 restitution to them. But must he reimburse the City? The United
5 States says "Yes." The Court would be inclined to agree if the City
6 had paid for injuries that had been inflicted solely by the defendant.
7 However, that does not appear to be the case. The City implicitly
8 conceded that it harmed Mr. Zehm by failing to adequately train and
9 supervise its officers. The defendant is not obligated to reimburse
10 the City for the harm the City caused by its omissions, especially
11 omissions that occurred prior to March 18, 2006.

12 **RULING**

13 The United States' request for restitution is denied. The
14 defendant is not obligated, pursuant to the terms of the Mandatory
15 Victims Restitution Act, to pay for the memorial plaque that the City
16 installed. By contrast, he is obligated to pay for Otto Zehm's
17 medical expenses, burial expenses, and future lost income subject to
18 the provisions of § 3664(j). Section 3664(j) prohibits double
19 recoveries. As the United States acknowledges, Mr. Zehm's mother and
20 his estate have been compensated by the City of Spokane for Mr. Zehm's
21 medical expenses, burial expenses, and future lost income. Mr. Zehm's
22 mother and his estate are not entitled to compensation from the
23 defendant for the same expenses. The United States recognizes as
24 much, but asks the Court to order the defendant to reimburse the City.
25 The Court declines to do so. It would be unreasonable to order the
26 defendant to reimburse the City for damages the City paid to Mr.

1 Zehm's mother and his estate as a result of the City's own omissions.
2 Similarly, it would be unreasonable to order the defendant to pay
3 restitution to Mr. Zehm's estate and his mother for the fees and
4 expenses they incurred obtaining relief from the City for the City's
5 own omissions.

6 **IT IS HEREBY ORDERED:**

7 1. The United States' request for restitution (**ECF Nos. 1100,**
8 **1117, 1171) is denied.**

9 2. The "Defendant's Objection to United States' Untimely Filings"
10 (**ECF No. 1192) is moot.**

11 **IT IS SO ORDERED.** The District Court Executive is hereby
12 directed to enter this order and furnish copies to counsel.

13 **DATED** this 11th day of March, 2013.

14 s/ Fred Van Sickle
15 Fred Van Sickle
16 Senior United States District Judge