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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs **Michigan Supreme Court No. 158716**

GARY GILMORE,
Defendant-Appellant.

Court of Appeals No. 334205
Circuit Court No. 16-003006-01-FH

On Appeal from the Court of Appeals
M.J. Kelly, P.J., and Markey and Fort Hood, JJ.

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF
ORAL ARGUMENT REQUESTED

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II. A trial court judge necessarily abuses his discretion if he modifies the prosecutor's plea and sentence agreement; moreover, if an actual controversy does not exist, this Court will not decide it, because the issue is moot. Here, on May 18, 2016, the People offered defendant a plea and sentence agreement that required him to pay $18,000.80 in restitution and the court refused to order that the restitution amount be established at an evidentiary hearing; weeks later, that agreement was stricken and defendant entered into a different plea. Not only did the trial court not abuse its discretion when it refused to modify the People's plea agreement, this entire issue is moot because the May 18, 2016 plea and sentence agreement was stricken. 29

Standard of Review 29

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A. The trial court would have necessarily abused its discretion if it had inserted a term in the People's May 18, 2016 plea offer and sentencing agreement—which specifically stated that defendant would pay $18,000.80 in restitution—and required, instead, that the amount of restitution be determined at an evidentiary hearing. 30

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Defendant—through his affirmative conduct—may waive an error for appellate review. Here, defendant agreed that the restitution amount listed in the presentence investigation report was accurate and then did not object or ask for an evidentiary hearing when the court ordered him to pay that same amount of restitution to the victim. Has defendant waived appellate review of the restitution order?

The trial court did not answer this question.

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Defendant would answer, "No."

II

A trial court judge necessarily abuses his discretion if he modifies the prosecutor's plea and sentence agreement; moreover, if an actual controversy does not exist, this Court will not decide it, because the issue is moot. Here, on May 18, 2016, the People offered defendant a plea and sentence agreement that required him to pay $18,000.80 in restitution and the court refused to order that the restitution amount be established at an evidentiary hearing; weeks later, that agreement was stricken and defendant entered into a different plea. Did the trial court properly exercise its discretion and is this issue moot?

The trial court did not answer these questions.

The Court of Appeals did not answer these questions.

The People answer, "Yes."

Defendant would answer, "No."

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COUNTERSTATEMENT OF FACTS

On March 24, 2016, defendant Gary Gilmore stood mute at the arraignment on the warrant on the charges of count 1: organized retail crime;[1] count 2: using a computer to commit a crime;[2] count 3: possession of a financial transaction device;[3] count 4: uttering and publishing a financial transaction device;[4] and count 5: receiving and concealing stolen property $200.00 or more but less than $1,000.00.[5] The district court entered a not guilty plea on defendant's behalf. 8b-9b. On April 8, 2016, defendant waived his right to a preliminary examination and was bound over, as charged, for trial. 9b.

On April 15, 2016, defendant appeared with counsel before Third Circuit Court Judge James Callahan for the arraignment on the information and stood mute. 3b; 1a-2a. The court entered a not guilty plea on defendant's behalf and defense counsel addressed defendant's bond. 3b-4b. The People did not object to a reduction in defendant's bond as long as he was given a GPS tether, noting that defendant had "an extensive history" and that the crimes charged involved "fairly substantial restitution…owed to Home Depot, for approximately 52 transactions that…occurred at different locations, through the fraud and retail organized crime." 5b.

On April 29, 2016, defendant appeared with counsel for calendar conference and the People placed their initial offer on the record: plead guilty to counts 1 and 3, dismiss counts 2, 4, 5 and the habitual fourth offender notice, with a sentence agreement of three-and-a-half years of probation (first year in the Wayne County Jail), with defendant further ordered to pay restitution

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[1] MCL 752.1084; see also MCL 752.1083(c) (defining organized retail crime).
[2] MCL 752.796(1).
[3] MCL 750.157p.
[4] MCL 750.248a.
[5] MCL 750.535(4)(a). Defendant was also charged as a habitual fourth offender under MCL 769.12.

in the amount of $18,000.00. 7a-8a. Although defendant did not accept the offer on that day, defense counsel remarked that the offer was "very good" and that the "only point of contention" was with respect to the amount of restitution. 7a.

On May 18, 2016, defendant appeared with counsel for final conference and the People placed a new offer on the record: plead guilty to counts 1 and 2, dismissal of the remaining counts and the habitual offender notice, with a sentence agreement of three-and-a-half years of probation (first year in the Wayne County Jail), with defendant further ordered to pay restitution in the amount of $18,000.80. 13a. The following exchange then took place on the record:

> THE COURT: What was that restitution amount?
>
> MR. GLYNNE: $18, 000.80, your Honor.
>
> THE COURT: All right. Going once, going twice.
>
> MR. PARKER: Your Honor?
>
> THE COURT: Yes.
>
> MR. PARKER: I have a question for the Court as well as for the People.
>
> THE COURT: No, I wouldn't allow him any access to computers.
>
> MR. PARKER: That is not the question, sir.
>
> THE COURT: Oh, okay.
>
> MR. PARKER: But the question would be that if we were to avail ourselves of the People's offer, would we be entitled to a restitution hearing based on the fact that they're arguing that my client is part of a larger ring and that other people are involved in it and—
>
> THE COURT: So he wants to add further undue expense to the community and to—what's the name of the financial, not the financial but the retail—
>
> MR. PARKER: Home Depot.

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THE COURT: Home Depot. So he wants to add further expense to Home Depot and the community in establishing proofs that they would have to otherwise establish during the course of a trial. So, let's see, what would be the benefit to the community to allow such a thing? I guess nothing. And the only person who'd derive a benefit from that would be the defendant. What kind of negotiation is that? It's bullshit to me. How's that?

MR. PARKER: I would like to also state that—to request that on behalf of my client that we add some discussions about that and we'll put it on the record.

THE COURT: Well, I guess it's up to the prosecuting attorney in that regard.

MR. GLYNNE: I mean. Judge, in terms of restitution, we have something like 50 different receipts that all total up to $18,000—I mean, that's what the proofs would show, and that's what we would be arguing with the restitution. But, I mean, I'm also more than willing to go talk to my supervisor about that and we can set restitution. But I know Home Depot's position as well as this, you know, hundred page binder with their investigation too shows that restitution is around that number, if not that number.

THE COURT: If someone isn't guilty of a crime though they shouldn't plead guilty to it.

MR. GLYNNE: Agree.

THE COURT: I mean, if they aren't guilty of a crime they shouldn't plead guilty to it, they should go to trial and have a trial by their peers.

MR. GLYNNE: Well, I think though, your Honor, we could have a situation where a person feels that they have a certain level of guilt but not necessarily guilty for the whole thing. And I know we always like to make the argument is he in for a penny in for a whole pound and that type of analogy, but still, I mean, we are talking about, you know, a certain number of people, we are talking about exact, you know, figure.

THE COURT: Yes, but if someone's unjustly accused then they should just go to trial. If the complaining witness is lying about what was taken from them let them prove it, it's up to them, they've got to prove it. Baloney. I don't need to establish my innocence, they have to prove my guilt.

DEFENDANT GILMORE: May I speak, your Honor?

THE COURT: Why sure.

DEFENDANT GILMORE: I do have a certain amount of guilt, as you—

THE COURT: Oh, no, no, don't start telling me about your guilt. I don't want to hear that. Either you take advantage of this plea offer that's been extended to you or you go to trial, one or the other. I'm not going to hear a cockamamie bull story from you.

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DEFENDANT GILMORE: I wouldn't give you one, your Honor.

THE COURT: Okay. Well, then, you've got to fish or cut bait today, my man. My dad used to use another expression.

MR. PARKER: Your Honor, my client would like to avail himself of the People's offer.

MR. GLYNNE: Just give me a second. Judge, and I'll—

THE COURT: He's a lot smarter than what I thought. Put the man over there.[6]

After a brief recess, the court placed defendant under oath and proceeded with the plea colloquy, at which time defendant agreed to plead guilty to counts 1 and 2, with a sentence agreement of three-and-a-half years of probation (first year in the Wayne County Jail), plus pay restitution in the amount of $18,000.80 to Home Depot. In exchange for his plea, defendant acknowledged that the People would withdraw the habitual fourth offender notice, along with counts 3-5. Defendant also agreed that he had signed a written form evidencing the plea and sentence agreement. 10a, 17a-18a. While under oath, defendant waived all of his constitutional trial rights, his automatic right of appeal, any defects in the charges that had been filed against him, and affirmed that he was entering into the plea agreement "freely, voluntarily and understandingly[.]" 19a-25a. After defendant gave a full factual basis for these crimes, the court accepted the plea. 25a-29a. Both defense counsel and the prosecutor agreed that the court had complied with the plea-taking requirements found in MCR 6.302. 30a.

On June 13, 2016, defendant appeared before the court for sentencing. Defense counsel affirmed that he and defendant had had the opportunity to review the presentence investigation report (PSIR) and that they had no additions or corrections to the report. 34a. With respect to defendant's obligation to pay restitution, the PSIR included the following language:

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[6] 13a-17a.

- At page 1: Sentence Agreement: No charge reduction; 3 ½ years probation; 1st year WCJ; restitution $18,000.00; People agree to withdraw Notice to Enhance Sentence Habitual 4th Offense; dismiss counts 3-5
- At page 3, line 13: You must pay restitution in the amount of $18,000.00 payable to Home Depot as follows: You must execute a wage assignment to pay restitution if you are employed and miss two regularly scheduled payments.
- At page 1, under Evaluation and Plan: Per the Sentence Agreement, it is respectfully requested restitution be set in the amount of $18,000.00, payable to Home Depot in the instant offense.
- At pages 2-3, under Agent's Description of the Offense: In December, 2015 Home Depot located at 47725 Five Mile, Plymouth Twp., Michigan Loss Prevention department noticed a pattern of sales and returns and began an investigation dubbed, "Operation Barn Door". Defendant Gary Gilmore would purchase sliding doors valued between $169 and $199 at the U Scan. While at the U Scan, the defendant would affix a different UPC seal to the item for the amount of $13.99, to the higher price item. The defendant would return the item without a receipt and receive a store credit for the original higher price. The noted activity took place at least 52 times at various Wayne County Home Depot locations, with an estimated loss of approximately $18,000.[7]

The parties then discussed the prior record variables and offense variables and, after corrections were made to the sentencing information report, defendant's guidelines were determined to be 19 months to 38 months. 34a-36a. Judge Callahan noted that the sentence agreement was below the guidelines and, based upon defendant's 12 prior felonies, told the parties that he could not "in good conscience" follow the sentence agreement, because defendant needed "to have serious [prison] time." 37a-38a.

On June 15, 2016, the parties returned to court "for sentencing"[8] and Judge Callahan stated again that the original sentence agreement of three-and-a-half years of probation was "out of the question." 42a. The assistant prosecuting attorney asked that defendant be sentenced at "the bare minimum of the bottom of the guidelines for prison." 43a. The People further asked

[7] PSIR, filed by defendant with the Court of Appeals on November 7, 2017. References to the PSIR made here follow the page numbers utilized by the author of the report and, thus, reflect the repeated use of some page numbers.

[8] Both defense counsel and the trial court stated on the record that the June 15, 2016 hearing was "for [t]he sentencing of Mr. Gilmore." 42a.

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“that restitution be ordered as well.” *Id.* The court then told defendant “that the original agreement ha[d] been stricken,” which meant that it did “not apply[.]” *Id.* The court told defendant that if he wished to maintain his plea on counts 1 and 2, he would receive a sentence within the guidelines range. The court asked defendant what he wanted to do, because the court would “allow [defendant] to withdraw [his] plea and…go to trial.”[9] 44a. The court told defendant that it did not want defendant “making a snap decision[,]” so if he wanted more time, the court would “put the matter over until maybe Monday or something.” 45a. Defendant told the court that he wanted to “take [c]are of this today” and defense counsel told the court that defendant “would like to accept the offer.” 45a. To that, the court clarified that there was “no actual offer, the only thing that’s on the table right now are guidelines except for the fact that the People are desirous of withdrawing the habitual fourth and dismissing Counts 3, 4 and 5 at the time of sentencing, that’s it.” *Id.* Defendant accepted the new plea and both he and his attorney confirmed that they wanted to immediately proceed with sentencing. *Id.*

The trial court then asked if the People had anything to add to the record—the assistant prosecuting attorney answered in the negative. On behalf of defendant, defense counsel stated that defendant was accepting responsibility in this case and asked that he receive a sentence at the low-end of the guidelines. 46a. When offered the opportunity for allocution, defendant told the court that he would “just like to get on with [his] life[.]” *Id.* The court then sentenced defendant to serve five years of probation on count 1, concurrent with a sentence of 30 months to 7 years of imprisonment on count 2. The court also dismissed counts 3, 4, 5, and the fourth habitual offender notice, and ordered defendant to pay costs, fees, and $18.000.00 in restitution.

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[9] A few minutes later, the court clarified that, as part of the revised plea, the People would move to dismiss counts 3, 4, and 5, as well as withdraw the habitual fourth offender notice. 44a-45a.

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47a. At the end of the sentencing hearing, defendant stated on the record that he understood his appellate rights. 48a.

On August 2, 2016, defendant, through counsel, filed a delayed application for leave to appeal, claiming that he had objected to the restitution ordered in this case and that he was entitled to a restitution hearing.[10] The People did not file a response to defendant's application. On September 13, 2016, the Court of Appeals denied defendant's delayed application for lack of merit in the grounds presented, although Judge Cynthia Diane Stephens would have granted the application. 51a.

On October 7, 2016, defendant filed an *in pro per* application for leave to appeal to the Michigan Supreme Court. In the application, defendant once again asserted that he was entitled to a restitution hearing because he had made a timely objection to the restitution amount. On May 2, 2017, the Court directed the Wayne County Prosecuting Attorney to file an answer to defendant's application, which undersigned counsel did on May 18, 2017. On June 27, 2017, the Court issued an order remanding the case back to the Court of Appeals "for consideration, as on leave granted, of: (1) whether the defendant waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution; and, if not, (2) whether the Wayne Circuit Court erred in denying him such a hearing." 52a.

On July 6, 2017, the Court of Appeals remanded this case to the Wayne County Third Circuit Court for a determination as to defendant's indigency and, if necessary, to appoint counsel to represent defendant for this appeal. On July 26, 2017, attorney Mary Blaney was

[10] Prior to this, defendant never filed a motion contesting his sentence or the court's restitution order in the trial court. 11b-12b.

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appointed to represent defendant on appeal; she was substituted out for attorney Steven Helton on October 10, 2017.

On November 7, 2017, defendant filed his brief on appeal addressing the two issues described above. On December 6, 2017, the People filed their brief on appeal. On September 25, 2018, the Court of Appeals issued an unpublished per curiam opinion finding that defendant had waived his right to an evidentiary hearing regarding restitution. 53a-55a.

On November 19, 2018, defendant filed an application for leave to appeal in the Michigan Supreme Court. On November 27, 2018, the People filed an answer opposing the application. On May 24, 2019, this Court entered an order directing the Clerk to schedule oral argument on the application. The order further directed the parties to file supplemental briefs addressing:

> (1) whether the defendant waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution, compare *People v Gahan*, 456 Mich 264, 276 (1997), overruled in part by *People v McKinley*, 496 Mich 410, 413 (2014) (stating that the failure to affirmatively request an evidentiary hearing regarding restitution is a waiver of a defendant's due process claim on appeal) with *People v Carter*, 462 Mich 206, 215 (2006) [sic] (defining waiver as "the intentional relinquishment or abandonment of a known right" and distinguishing waiver from forfeiture, which has been defined as "the failure to make the timely assertion of a right.") and if not, (2) whether the Wayne Circuit Court erred in denying defendant such a hearing. See *McKinley*, 496 Mich 410.[11]

On August 15, 2019, defendant filed his supplemental brief in accordance with this Court's order. On August 27, 2019, the People filed a motion requesting an extension of time within which to file their supplemental brief, which this Court granted on September 3, 2019.

The People's supplemental brief is timely-submitted in accordance with this Court's order of September 3, 2019. The People stipulate to the use of the appendix filed by defendant-appellant on August 15, 2019, although the People have also submitted, as an appendix,

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[11] 56a.

additional portions of the record that were not covered by defendant's appendix. See MCR 7.312(D)(3)-(4). Additional facts are presented *infra*.

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ARGUMENT

I.

Defendant—through his affirmative conduct—may waive an error for appellate review. Here, defendant agreed that the restitution amount listed in the presentence investigation report was accurate and then did not object or ask for an evidentiary hearing when the court ordered him to pay that same amount of restitution to the victim. Defendant has waived appellate review of the restitution order.

Standard of Review

Defendant's supplemental brief does not include the required statement of the applicable standard of review. See MCR 7.312(A), MCR 7.212(C)(7). When preserved, interpretation of the statutes authorizing the assessment of restitution at sentencing is a matter of statutory interpretation which this Court reviews de novo. *McKinley*, 496 Mich at 414-415. Unpreserved errors, however, are reviewed under the plain error rule. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "This Court disfavors consideration of unpreserved claims of error." *Id.* at 762. The full standard of review for plain error is given *infra* at pages 16-17. Waiver—the intentional relinquishment or abandonment of a known right—extinguishes an alleged error and forecloses appellate review. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Discussion

This Court first asks whether "defendant waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution, compare" *Gahan*, 456 Mich at 276 with *Carter*, 462 Mich at 215. 56a. In order to answer this question, the People will first engage in a review of the statutory scheme underpinning the payment of restitution by criminal defendants in

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Michigan, then address the legal concepts of waiver and forfeiture, before applying the law to the facts of this case.

A. Crime victims in Michigan are constitutionally and statutorily entitled to receive full and complete restitution from defendants.

Michigan's "Crime Victim's Rights Act [CVRA, MCL 780.751 *et seq*,] was enacted in 1985 in response to growing recognition of the concerns of crime victims."[12] *People v Peters*, 449 Mich 515, 523; 537 NW2d 160 (1995). In 1988, the Michigan Constitution "was amended to further enumerate the rights of crime victims." *Id.*; see Const. 1963, art. 1, § 24(1) ("Crime victims, as defined by law, shall have the following rights, as provided by law: […] The right to restitution."). "One aim of these laws was 'to enable victims to be compensated fairly for their suffering at the hands of convicted offenders.'" *Garrison*, 495 Mich at 365, quoting *Peters*, 449 Mich at 526.

The CVRA is divided into three articles, only the first of which is pertinent to the issues presented in this appeal. See *id.* at 367 n 11 (observing that "Article 1, MCL 780.751 through MCL 780.775, [of the CVRA] addresses felony convictions[.]"). Originally, MCL 780.766 codified a victim's right to restitution, but left the granting of restitution to the discretion of the sentencing judge. See *Peters*, 449 Mich at 523. In 1994, the statue was amended to make restitution mandatory. See *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2011) ("A

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[12] Michigan also has a general restitution statute, MCL 769.1a, which is not mentioned in either defendant's August 15, 2019 supplemental brief or in the September 25, 2018 unpublished opinion of the Court of Appeals. When the trial court ordered defendant, on June 15, 2016, to pay restitution in this case, the court did not specify the applicable statute. 47a. Both MCL 769.1a and MCL 780.766 "impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete." *People v Garrison*, 495 Mich 362, 368; 852 NW2d 45 (2014). MCL 769.1a, however, does not include a provision regarding the settlement of disputes if the parties cannot agree to the proper amount or type of restitution. Compare MCL 769.1a with MCL 780.767(4). The People therefore have focused their discussion on the language contained in MCL 780.766 and MCL 780.767.

trial court does not have discretion to order a convicted defendant to pay restitution; it must order the defendant to pay restitution and the amount must fully compensate the defendant's victims."), citing *Gahan*, 456 Mich at 270 n 6; see also MCR 6.425(E)(1)(f) (requiring a trial court, at sentencing, to "order that the defendant make full restitution as required by law[.]"). An additional amendment in 1997 stripped out the requirement that a trial court evaluate a defendant's ability to pay before ordering him to make full, complete, and maximal restitution. See *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001). The statute now provides, in pertinent part:

> Except as provided in subsection (8),[13] when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. [....][14]

From the language contained in MCL 780.766(2), this Court has said that"[t]he Legislature's statutory direction to order defendants to pay complete, entire, and maximum restitution effectuates this goal of fair compensation." *Garrison*, 495 Mich at 368. A trial court's restitution order may not, however, be based "solely on uncharged conduct[,]" that is, conduct "that the defendant allegedly engaged in that was not relied on as a basis for any criminal charge and therefore was not proved beyond a reasonable doubt to a trier of fact." *McKinley*, 496 Mich at 413 n 1.

[13] MCL 780.766(8) directs the sentencing court to, in part, "order restitution to the crime victim services commission or to any individuals, partnerships, corporations…or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss."

[14] MCL 780.766(2). As set forth in MCL 780.766(1), "victim" includes, for purposes of MCL 780.766(2), a corporation "that suffers direct…financial harm as a result of a crime." Accordingly, the complainant in this case, Home Depot, is a victim under the CVRA for purposes of restitution. See, e.g., *People v Fawaz*, 299 Mich App 55, 64; 829 NW2d 259 (2012).

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At sentencing, when it comes to setting the amount of restitution that is required under MCL 780.766(2), the trial court is directed to "consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). "The court may order the probation officer to obtain information pertaining to the amounts of loss described in [MCL 780.767(1)]. The probation officer shall include the information collected in the presentence investigation report or in a separate report, as the court directs." MCL 780.767(2). This information "shall" be disclosed to counsel for both parties. MCL 780.767(3). If there is any "dispute as to the proper amount or type of restitution[,]" the court shall resolve it "by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." MCL 780.767(4).

When reading the foregoing statutory provisions in context,[15] this Court has held that the proper time for a defendant to raise a dispute as to the amount of restitution is at the sentencing hearing. See *People v Grant*, 455 Mich 221, 234; 565 NW2d 389 (1997) ("Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence.") (citing reference omitted); *McKinley*, 496 Mich at 414-415 (addressing "MCL 780.766(2) and other statutes authorizing the assessment of restitution *at sentencing*") (emphasis added); *Gahan*, 456 Mich at

[15] See *Garrison*, 495 Mich at 379 (emphasizing that "all statutory language must be read within its particular context. *G.C. Timmis & Co. v Guardian Alarm Co.*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. 'In seeking meaning, words and clauses will not be divorced from those which precede and those which follow.'") (citations omitted)); see also *McKinley*, 496 Mich at 420 (reading MCL 780.766 "*in pari materia* with other provisions in the Crime Victim's Rights Act, MCL 780.751 *et seq*."); *Id.* at 420 n 11 (quoting *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953) as follows: "[S]tatutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and…courts will regard all statutes upon the same general subject matter as part of 1 system.").

276 n 16. If defendant does not "make a proper objection and request an evidentiary hearing" at sentencing, the trial court "is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due." *Id.* at 276 n 17, citing *Grant*, 455 Mich at 231-232 and *People v Hart*, 211 Mich App 703, 705; 536 NW2d 605 (1995). "Instead, the court is entitled to rely on the amount recommended in the presentence investigation report 'which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.'" *Gahan*, 456 Mich at 276 n 17, quoting *Grant*, 455 Mich at 233-234; see also MCR 6.425(E)(1)(b) (requiring trial courts to, at sentencing, "give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (E)(2)."); MCL 771.14(6) (allowing the parties to challenge the contents of the PSIR at sentencing).

B. Appellate Courts have long recognized the importance of preserving, for appeal, an alleged error by objecting in the trial court.

In this case, defendant did not, at the June 15, 2016 sentencing hearing, object to the court's restitution order. 47a-48a. "[T]he United States Supreme Court has recognized the importance of an incentive for criminal defendants to raise objections at a time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights." *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994); see also *Carines*, 460 Mich at 764-765. Not only does voicing an objection allow for the trial court to take immediate steps to address and possibly correct the alleged error, this practice prevents attorneys from harboring "error as an appellate parachute." *Carter*, 462 Mich at 214 (citing references omitted); see also *People v Hardin*, 421 Mich 296, 322; 365 NW2d 101 (1984) (explaining that the Court did "not approve a procedure whereby counsel may 'sit back and

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harbor error to be used as an appellate parachute in the event of jury failure.'"), quoting *People v Brocato*, 17 Mich App 277, 305; 169 NW2d 483 (1969) (additional citing reference omitted). In *Freytag v C.I.R.*, 501 US 868, 895; 111 SCt 2631; 115 LEd2d 764 (1991), Justice Scalia explained that this understanding "reflect[s] the principle that a trial on the merits, whether in a civil or criminal case, is the 'main event,' and not simply a 'tryout on the road' to appellate review." *Id.* (Scalia, J., concurring in part and concurring in the judgment). Indeed, Justice Scalia observed that "[t]he very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." *Id.* Defendants are therefore encouraged to preserve issues for appeal "by notation of objection" in the trial court. *Carter*, 462 Mich at 214.

It often happens, however, that a defendant will either expressly agree or fail to object to a course of action undertaken by the trial court. In either case, the defendant will attempt to raise the court's action on appeal and claim that it constituted reversible error. An appellate court must then determine whether defendant waived or merely forfeited the alleged error. But see *Freytag*, 501 US at 895 (Scalia, J. recognizing that the case law in this area has often used these terms interchangeably and that "it may be too late to introduce precision."). In this circumstance, a reviewing court's "authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed[,]" as set forth *infra*. *Puckett v United States*, 556 US 129, 134; 129 SCt 1423; 173 LEd2d 266 (2009).

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C. Depending on the particular facts and circumstances of the case, an appellate court may find that a defendant either waived or forfeited an error in the trial court.

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v Olano*, 507 US 725, 732-733; 133 SCt 1770; 123 LEd2d 508 (1993). Waiver is defined as the "intentional relinquishment or abandonment of a known right." *Id.* at 733 (internal quotation and citing references omitted); *Johnson v Zerbst*, 304 US 458, 464; 58 SCt 1019; 82 LEd2d 1461 (1938) (stating that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."). "What suffices for waiver depends on the nature of the right at issue. Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *New York v Hill*, 528 US 110, 114; 120 SCt 659; 145 LEd2d 560 (2000) (internal quotation and citing reference omitted). But for a very narrow class of certain fundamental rights (i.e. the right to counsel and the right to plead not guilty), "decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Id.* at 115 (internal citations omitted). Whether a waiver exists depends on the particular facts and circumstances of the case. See *Johnson*, 304 US at 464. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Carter*, 462 Mich at 215 (internal quotation and citation omitted).

Unlike waiver, forfeiture does not extinguish an error on appeal. See *Carter*, 462 Mich at 215. Forfeiture "is the failure to make the timely assertion of a right[.]" *Olano*, 507 US at 733; *Puckett*, 556 US at 134 (explaining that if a defendant believes that an error has occurred, to his detriment, "he must object in order to preserve the issue. If he fails to do so in a timely manner,

his claim for relief from the error is forfeited."); see also *Carines*, 460 Mich at 763. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v United States*, 321 US 414, 444; 64 SCt 660; 88 LEd2d 834 (1944) (citing references omitted). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights." *Id.* (citing reference omitted). "The third requirement generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings." *Id.* (citing reference omitted). "[O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (internal quotation and citing reference omitted).

D. *For more than 20 years, this Court has held that a defendant, through his actions, can waive his opportunity for an evidentiary hearing regarding a trial court's restitution order, and this Court's opinions in* **Carines** *and* **Carter** *do not undercut this holding.*

The above-described case law on waiver has been applied with equal force to restitution orders. In *Gahan*, 456 Mich 264, this Court examined whether MCL 780.766 of the CVRA allowed sentencing courts to "order a defendant to pay restitution to compensate all victims who were defrauded by" a defendant's criminal course of conduct, "even though the specific criminal acts committed against some of these victims were not the basis of the defendant's conviction." *Id.* at 265. The Court first held "that the Legislature authorized restitution to any victim of the

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defendant's criminal course of conduct,"[16] and then turned to "defendant's argument that this statutory scheme violate[d] the 5th and 14th Amendments of the United States Constitution." *Gahan*, 456 Mich at 273. After reviewing MCL 780.767 of the CVRA, the Court determined that the statute afforded criminal defendants adequate process and therefore passed "constitutional muster." *Id.* at 275. Specifically, the Court noted that MCL 780.767(4) provided that "'[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence.'" *Id.* at 276, quoting MCL 780.767(4). The Court further observed that the subsection afforded defendants an evidentiary hearing when the amount of restitution was contested and that, at the hearing, the burden of demonstrating the amount of the loss sustained by the victim as a result of the offense was on the prosecuting attorney. See *id.*; see also MCL 780.767(4).

The *Gahan* Court ultimately determined that, while the defendant had not received an evidentiary hearing, he had not requested one in the trial court. See *Gahan*, 456 Mich at 276. Instead, at sentencing, the attorney representing the defendant told the trial court that, upon review of the PSIR, "the restitution amount should be reduced to reflect the amount truly owed to that person. In response, the trial court reduced the restitution amount recommended in the presentence report to reflect this correction." *Id.* at 276 n 16. "Other than this, [the] defendant did not offer any evidence or specific argument to demonstrate that the amount of restitution recommended in the presentence report was inaccurate." *Id.* The Court therefore found that,

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[16] *Gahan*, 456 Mich at 273. In *McKinley*, 496 Mich 410, this Court overruled *Gahan*, but only "to the extent that it held that MCL 780.766(2) 'authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction.'" *Id.* at 424, quoting *Gahan*, 456 Mich at 270.

because "[t]his was a waiver of [the defendant's] opportunity for an evidentiary hearing[,]" he could not claim that he was denied due process. *Id.* at 276.

In his supplemental brief of August 15, 2019, defendant claims that this Court used "imprecise language" when it wrote in *Gahan* that the defendant waived his opportunity for an evidentiary hearing, because the defendant in that case only *failed to object* to the restitution order.[17] Defendant asserts that, due to confusion and misapplication of *Gahan* in the Court of Appeals, it is now necessary for this Court to "clarify that a defendant does not waive entitlement to a restitution hearing or to a due process claim related to restitution by failing to object and request such a hearing at sentencing."[18] Defendant's argument is misplaced.

As set forth *supra*, the defendant in *Gahan* did not merely fail to object to the trial court's restitution order. Instead, the defendant's attorney—when presented with the restitution amount set forth in the PSIR—specifically requested that the trial court reduce the amount, which the court did. See *Gahan*, 456 Mich at 276 n 16. The defendant made no other objection to the restitution amount, nor did he raise any other factual inaccuracy with respect to the restitution listed in the PSIR. The trial court was therefore entitled to rely upon the accuracy of the restitution amount listed in the PSIR. See *Gahan*, 456 Mich at 276 n 17; *Grant*, 455 Mich at 233-234. The defendant's affirmative conduct—specifically requesting an adjustment to the restitution amount, which resulted in the defendant receiving the relief he requested—coupled with the defendant's failure to request a restitution hearing, thereby intentionally relinquishing or abandoning a known right or privilege available to him under MCL 780.767(4), constituted a waiver foreclosing further review of the trial court's restitution order. See *Carines*, 460 Mich at

[17] Defendant's brief, 11.
[18] *Id.*

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762 n 7; *Carter*, 462 Mich at 215; see also *LaFave & Israel*, *7 Criminal Procedure*, §27.5(d) (4th ed. 2018) (explaining that, "[a]lthough not doing or saying anything to object or bring the trial court's attention to an issue will generally be forfeiture subject to plain error review, actions 'inviting' error should amount to 'waiver' when those actions clearly indicate a conscious choice on the part of the defense to forego an objection.") (citing reference omitted). Because this Court's use of the term "waiver" to describe the defendant's conduct in *Gahan* was accurate, the Court should decline defendant's invitation to "clarify" this language.

E. The record in this case supports a finding that defendant's affirmative conduct waived any error with respect to the trial court's June 15, 2016 restitution order.

Review of the record shows that defendant never, at any point, demanded a restitution hearing in the lower court. Indeed, the record shows that the only time that restitution was discussed, at any length, was at the May 18, 2016 plea hearing.[19] At that time, after the People placed their offer on the record—which included a specific provision that restitution would be set at $18,000.80—defense counsel asked the court the following question: if defendant were to avail himself of the People's offer, would he be entitled to a restitution hearing? 14a. The court answered in the negative, telling defendant that he either had to accept the People's plea offer or forfeit the offer and go to trial, which would require the People to establish defendant's guilt

[19] Prior to this date, there were only two restitution-related comments made at two separate hearings. The first was at the April 15, 2016 arraignment on the information, at which time the assistant prosecuting attorney noted for the record that this case involved "fairly substantial restitution" that was owed to Home Depot "for approximately 52 transactions that…occurred at different locations, through the fraud and retail organized crime." 5b. At the April 29, 2016 calendar conference, defense counsel—in response to the People's plea offer, which included a provision that defendant pay $18,000 in restitution to Home Depot—replied that the offer was "very good" and clarified that the "only point of contention" was with respect to the amount of restitution. 7a.

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beyond a reasonable doubt. 14a-16a. Instead of refusing to accept the deal, defendant chose to "avail himself of the People's offer." 17a.

Defendant was then placed under oath and affirmed that he wished to plead guilty to count 1: organized retail crime and count 2: using a computer to commit a crime with a sentence agreement of three-and-a-half years of probation, with the first year in the Wayne County Jail. Defendant further agreed to pay restitution in the amount of $18,000.80. In exchange for the plea and sentence agreement, the People agreed to dismiss three pending charges, along with the habitual fourth offense notice (which would have exposed defendant to up to life imprisonment). 10a, 18a. Defendant affirmed on the record that he was entering into the plea agreement freely, voluntarily, and understandingly and that he had not been threatened into pleading guilty. 25a. That defendant did not actually contest the restitution amount and, instead, expressly agreed to pay $18,000.80 is also reflected in the signed settlement offer and notice of acceptance which includes this requirement.[20]

The May 18, 2016 plea and sentence agreement, however, was later rejected by the trial court. On June 13, 2016, when the parties appeared for sentencing and reviewed the PSIR (the accuracy of which defense counsel confirmed)[21] and sentencing guidelines on the record, the

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[20] See 10a (defendant's signature appearing at the bottom of the plea form which includes, under the section titled "Sentence Agreement", the following: "Restitution: $18,000.80."); see also 18a-19a (defendant affirming on the record that the signature appearing on the plea form belonged to him).

[21] See *supra* at page 5; 34a (defense counsel replying, when asked if the PSIR was factually accurate, "We wish to make no additions or corrections to the report."). In *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011), this Court held that the distinction between an attorney stating that he approved the jury instructions versus counsel stating that he had no objections to the instructions, was unavailing, as either statement was an "express and unequivocal indication[] that he approved of the instructions. To hold otherwise would allow counsel to harbor error at trial and then use that error as an appellate parachute[.]" (internal quotation and citing reference omitted).

court stated that it would not accept the plea and sentence agreement, because the agreed-upon sentence was below the guidelines. 34a-38a. When defendant returned to court on June 15, 2016, he affirmed on the record his understanding that the May 18, 2016 plea and sentence agreement no longer applied. 43a. At that same hearing, defendant told the trial court that he wanted to accept the new plea, which was to counts 1 and 2 with a sentence in the guidelines range—unlike the plea agreement of May 18, 2016, this plea did not include the express requirement that defendant pay a specified amount of restitution. 43a-45a. Defendant accepted the plea and both he and his attorney requested that the court immediately proceed to sentencing. 45a. After hearing argument from both attorneys, as well as allocution from defendant, the court sentenced defendant to serve five years of probation for count 1: organized retail crime concurrently with a sentence of 30 months to 7 years of imprisonment on count 2: use of a computer in committing a crime. 46a-47a. The People moved to dismiss counts 3-5, along with the habitual fourth offender notice. 47a. The court further ordered defendant to pay various costs and fees, as well as $18,000 in restitution. *Id.* Defendant did not object to the court's restitution order. 48a. Following the sentencing hearing, defendant did not file a motion challenging the accuracy of the information relied upon by the trial court, nor did he file a motion to remand in the Court of Appeals. See MCL 769.34(10) (stating that "[a] party shall not raise on appeal an issue….challenging the accuracy of the information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.").

Under *Gahan*, 456 Mich at 276, and *Grant*, 455 Mich at 242, this Court should find that defendant's affirmative acceptance as to the accuracy of the restitution information in the PSIR

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(which specifically sought restitution in the amount of $18,000, as well as provided an explanation justifying the amount),[22] coupled with defendant's failure to specifically object to the court's restitution order and his failure request an evidentiary hearing, constituted the intentional relinquishment of a known right, thereby extinguishing any error. See *Carines*, 460 Mich at 762 n 7; *Carter*, 462 Mich at 215; see also *Kowalski*, 489 Mich at 504-505.

F. Defendant's contention—that he did not waive review of the restitution order and, instead, adequately preserved his objection to the order—is not supported in the record or in our case law.

Defendant's argument—that his attorney's question on May 18, 2016 about whether the trial court would conduct a restitution hearing if defendant accepted the People's plea offer somehow acted to preserve, for future appellate review, the issue of whether he was entitled to such a hearing—is meritless for several reasons. First, in order for defendant to succeed in this argument, this Court would have to find that defense counsel's initial *question* on May 18, 2016 about the possibility of a future restitution hearing (should defendant accept the People's offer)

[22] On page 15 of defendant's supplemental brief, he argues (for the first time in this case) that the general rule—that trial courts are entitled to rely upon the accuracy of the PSIR when the parties do not dispute its contents—is inapplicable here, because defendant's PSIR was not updated after the June 13, 2016 hearing, the court did not refer to the PSIR at the June 15, 2016 sentencing hearing, and the court did not ask the parties at the June 15, 2016 sentencing hearing if they wished to challenge the PSIR. Defendant, however, does not fully acknowledge the fact that the PSIR was generated for the June 13, 2016 sentencing hearing, that defense counsel stated on the record on that day that he had reviewed the report with defendant and had no changes, and that the trial court proceeded to sentencing on June 15, 2016 (a mere two days later) at *defendant and his attorney's express request*. 45a. There is no suggestion on the record that the trial court failed to utilize the PSIR at defendant's June 15, 2016 sentencing hearing and neither defendant nor his attorney requested an updated report at that time. See *People v Hemphill*, 439 Mich 576, 579; 487 NW2d 152 (1992) (explaining that "[a] sentencing judge must use a presentence report" and that a defendant may waive the production of an updated report) (citing references omitted). Moreover, defendant states in his brief that while he does not contest the fact that Home Depot lost $18,000 over 52 fraudulent transactions, he now disputes "his responsibility for all of it." Defendant's brief, 15. Defense counsel, however, accepted the accuracy of this information on the record on June 13, 2016. See *supra* at page 5 (detailing the relevant portions of the PSIR, including an excerpt from the police report which explains that *defendant's* actions, which took place 52 times, caused the loss to Home Depot).

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trumps his own client's written and oral sworn statements—made less than 15 minutes later—that defendant was freely, voluntarily, and accurately entering into an unconditional plea and sentence agreement, which carried with it a set amount of restitution and no requirement that the amount be established at a restitution hearing. See *People v New*, 427 Mich 482, 489; 398 NW2d 358 (1986) (explaining that, "as a general rule…a plea of guilty waives all nonjurisdictional defects in the proceedings.") (internal quotation and citing reference omitted). These actions *by defendant*, not his attorney, constituted a waiver cancelling out any prior "objection" his attorney may have made. See *Hill*, 528 US at 114-115.

Likewise, defendants' argument—that the trial court was on "notice" that he disputed the restitution amount and was therefore required to conduct an evidentiary hearing—erroneously clings to the initial record made on May 18, 2016 (i.e. his attorney's question to the trial court) and ignores everything that came after (defendant's personal acceptance of the People's plea and sentence agreement with payment of $18,000.80 in restitution an enumerated term; counsel's acceptance as to the accuracy of the PSIR with this same amount; and, later, the trial court's rejection of this plea and sentence agreement; defendant's entry into a plea with a different sentence; and defendant's failure to object to the restitution order at sentencing). Thus, while the record shows that defendant initially struggled with accepting the idea that he would be required to pay substantial restitution to the victim in this case, the record also shows that *defendant changed his mind* and agreed, on May 18, 2016, to pay $18,000.80 in restitution to the victim. Compare 16a with 17a-19a. That defendant ceased disputing his obligation to pay this amount of restitution to the victim and accepted responsibility is further evidenced by the fact that counsel agreed to the accuracy of the PSIR, which detailed this requirement, and the fact that

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defendant did not object when the trial court ordered him, on June 15, 2016, to pay $18,000 in restitution as a part of his sentence.[23]

Moreover, for the reasons set forth *infra* at issue II, the trial court had no legal authority to interject a term into the People's May 18, 2016 plea and sentence agreement and, thus, was prohibited from answering defense counsel's question (about *both* accepting the People's offer *and* obtaining an evidentiary hearing) in the affirmative. The People also flatly disagree with defendant's interpretation of MCL 780.767(4). According to defendant, a party can raise a dispute regarding restitution *at any time* the case is proceeding through the trial court and, if he does, the court is required by law to conduct a restitution hearing.[24] Defendant argues that this is so because MCL 780.767(4) does not specifically state that the dispute as to the amount of restitution must be raised at sentencing. Defendant is wrong for the reasons set forth *supra* at pages 13-14, as MCL 780.767(4) must be read in light of the statutory provisions which precede it, all of which expressly discuss the fact that the court's determination as to the amount of restitution to order in a particular case occurs *at sentencing*. To read the statute in the manner suggested by defendant would lead to absurd results. For example, a defendant could state on the record at the arraignment on the information that he disputes restitution then, months later, sit silently through sentencing, only to appeal based on a "preserved" claim that the trial court abused its discretion when it failed to hold an evidentiary hearing regarding restitution.[25] This "sandbagging" of the prosecutor and the trial court cannot be said to be sanctioned by MCL

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[23] 34a; 47a-48a.
[24] See defendant's brief, 14.
[25] This is functionally what occurred in this case, as defendant maintained through his initial application for leave to appeal that his "objection" in the trial court on May 18, 2016 preserved his claim of error with regard to the court's restitution order, which was not entered until defendant was sentenced 28 days later.

780.767. See *Freytag*, 501 US at 895. Instead, review of MCL 780.766 and MCL 780.767 show an intention by the Legislature to have restitution-related discussions occur at the sentencing hearing, the time and place the trial court is most equipped to address such concerns. See *Grant*, 445 Mich at 551; see also MCL 780.766(2) and MCL 780.767(1).

G. If defendant did not waive the question of his entitlement to an evidentiary hearing regarding restitution, the error was forfeited because defendant cannot establish plain error affecting his substantial rights.

If this Court determines that defendant did not waive his evidentiary challenge to the trial court's restitution order, this issue may only be reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. In order to succeed here, defendant must show the existence of a *plain* error, as well as prejudice. *Id.*; see also *supra* at pages 16-17. In order to be 'plain,' an error must be worse than simply wrong; it must be clearly or obviously wrong. *LaFave & Israel*, *7 Criminal Procedure*, §27.5(d) (4th ed. 2018).

Defendant claims that the trial court plainly erred when it ordered him to pay restitution without first holding an evidentiary hearing. But, as discussed *supra*, the trial court's duty to order this hearing was not triggered, because defendant, at the sentencing hearing, did not object to the court's restitution order, nor did he request an evidentiary hearing at that time. See MCL 780.767(4); *Grant*, 455 Mich at 234 ("Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence.") (citing reference omitted); *Gahan*, 456 Mich at 276 n 16. Because defendant did not "make a proper objection and request an evidentiary hearing" at sentencing, the trial court was "not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due." *Id.* at 276 n 17, citing *Grant*, 455 Mich at 231-232 and *Hart*, 211 Mich App at 705. Instead, the trial court was entitled to rely upon the amount recommended in the PSIR, which defendant had, just two days earlier, confirmed was accurate.

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See *Gahan*, 456 Mich at 276 n 17; quoting *Grant*, 455 Mich at 233-234. Moreover, the court's restitution order of June 15, 2016 ($18,000.00) was functionally identical to the restitution amount that defendant, on May 18, 2016, agreed under oath that he would pay in exchange for the People's plea and sentence agreement ($18,000.80). For these reasons, defendant cannot show that the trial court's restitution order of June 15, 2016 was clearly or obviously wrong, nor can he show that defendant was prejudiced by the order. Defendant's "failure to establish a plain error that affected a substantial right precludes a reviewing court from acting on such an error." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

Finally, the People refute the argument made at page 19 of defendant's brief, in which he assumes that he has met his burden of demonstrating plain error affecting substantial rights, leaving this Court to decide whether to exercise its discretion and grant relief. See *Carines*, 460 Mich at 763-764 ("Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.") (internal quotation and citing reference omitted). The People are somewhat constrained in their ability to refute defendant's first allegation—that he is "actually innocent of causing $18,000 in damages to Home Depot, and is currently being required to pay for damages caused to Home Depot caused by others who engaged in the same general crime scheme that he pled guilty to engaging in"[26]—because the extensive and detailed police reports that were utilized by the charging prosecutor in this case (which contain receipts, transaction history, a 42-page report by the Home Depot loss prevention department, along with numerous references to defendant's criminal activity being captured on CCTV) are not part of the lower court record. See MCR

[26] Defendant's brief, 19.

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7.310(A); see also *Dora v Lesinski*, 351 Mich 579, 581; 88 NW2d 592 (1958) (explaining that the Court is "bound to review the trial court's actions on the record as certified to us."). Nonetheless, defendant's assertion here is contradicted by the uncontested content of the PSIR.[27]

Moreover, there is no support in the record for defendant's assertion that the trial court judge "indicated to him that [the court] had predetermined his guilt before he had submitted his plea and repeatedly threatened him with a harsh prison sentence."[28] In making this argument, defendant cites to 6a-9a and 38a, neither of which support defendant's allegations. First, when the People stated their offer on the record on May 18, 2016 and defendant expressed reluctance in accepting the deal, the court firmly told him that if he was not guilty, he should not plead guilty. 15a; 16a ("Yes, but if someone's unjustly accused then they should just go to trial. If the complaining witness is lying about what was taken from them let them prove it, it's up to them, they've got to prove it. Baloney. I don't need to establish my innocence, they have to prove my guilt."). Second, at the initial sentencing hearing, June 13, 2016, the court said only that, due to defendant's extensive criminal history, it could not accept the parties' below-the-guidelines plea and sentence agreement. 36a-37a. The court stated on the record that it would accept a plea and sentence agreement if the term was for a minimum of 19 months, which was at the very bottom of defendant's sentencing guidelines. 37a. Defendant went on to later accept a plea and sentence agreement that required him to serve a sentence within the guidelines. 43a-45a. For all of these reasons, even if this Court reached this portion of plain error review, the Court should exercise its discretion and decline to reverse.

[27] See *supra* at page 5; see also PSIR, page 2 (defendant stating, in part about the instant case, "There is no excuse. I did it. I made some bad decisions.").

[28] Defendant's brief, 19.

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II.

A trial court judge necessarily abuses his discretion if he modifies the prosecutor's plea and sentence agreement; moreover, if an actual controversy does not exist, this Court will not decide it, because the issue is moot. Here, on May 18, 2016, the People offered defendant a plea and sentence agreement that required him to pay $18,000.80 in restitution and the court refused to order that the restitution amount be established at an evidentiary hearing; weeks later, that agreement was stricken and defendant entered into a different plea. Not only did the trial court not abuse its discretion when it refused to modify the People's plea agreement, this entire issue is moot because the May 18, 2016 plea and sentence agreement was stricken.

Standard of Review

Defendant's supplemental brief does not include the required statement of the applicable standard of review. See MCR 7.312(A), MCR 7.212(C)(7). Questions of law are reviewed de novo. *People v Smith*, 502 Mich 624, 647; 918 NW2d 718 (2018). "A trial court's decision to hold an evidentiary hearing is generally reviewed for an abuse of discretion." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (internal quotation and citing reference omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013) (citing references omitted).

Discussion

In its order of May 24, 2019, this Court directed the parties to brief the following question: if defendant did not waive the question of his entitlement to an evidentiary hearing regarding the amount of restitution, did "the Wayne County Circuit Court err[] in denying the defendant such a hearing. See *McKinley*, 496 Mich 410." 56a. For the reasons set forth *infra*, because the trial court had no legal authority to modify the terms of the People's plea offer and sentence agreement by adding a term requiring that restitution be proven at an evidentiary

hearing, the court did not abuse its discretion when it told defense counsel that it would not order such a hearing.

A. The trial court would have necessarily abused its discretion if it had inserted a term in the People's May 18, 2016 plea offer and sentencing agreement—which specifically stated that defendant would pay $18,000.80 in restitution—and required, instead, that the amount of restitution be determined at an evidentiary hearing.

As discussed *supra* at pages 20-21, the only time defendant expressed any reservations regarding the amount of restitution he would be required to pay came at the initial plea hearing on May 18, 2016. At that hearing, defense counsel asked a *question*: if defendant were to avail himself of the People's plea and sentence agreement, would he be entitled to a restitution hearing? 14a. The trial court answered in the negative and, later in the hearing, defendant went on to sign a written plea agreement, which stated that he would pay $18,000.80 in restitution. 10a; 14a-16a. Defendant also affirmed his obligation to pay restitution in this amount while under oath and further affirmed that the plea was not the product of any undisclosed promises or threats. 17a-29a. Because the May 18, June 13, and June 15, 2016 records are all completely silent regarding defendant making a declarative statement demanding a restitution hearing, the People read the Court's order as asking the parties to answer the following question: did the trial court err when it, on May 18, 2016, answered defendant's question—whether he was entitled to a restitution hearing challenging the restitution contained in the People's plea offer—in the negative. The answer to this question is no.[29]

The People's initial plea offer and sentence agreement required, in part, that defendant pay $18,000.80 in restitution. 10a. The record of May 18, 2016 is silent regarding the People's agreement to change this express term and, instead, determine the amount of restitution owed at

[29] Although the People have briefed the question posed here by the Court, the People submit that, for the reasons set forth *infra* in subsection B, that the issue discussed here is moot.

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an evidentiary hearing.[30] When it comes to plea and sentence bargains, the trial court's role is limited. The court must either accept or reject the *entire* agreement or defer action until it has had the opportunity to consider the PSIR. See *People v Killebrew*, 416 Mich 189, 207; 330 NW2d 834 (1982). This is because "the trial court's exclusive authority to impose sentence does not allow it to enforce only parts of a bargain." *People v Siebert*, 450 Mich 500, 510-511; 537 NW2d 891 (1995). Thus, had the trial court accepted the May 18, 2016 plea and sentence agreement, and then inserted the requirement that the restitution amount be subject to a later evidentiary hearing, the court would have imposed a different plea bargain on the prosecutor than what he had agreed to. See *Smith*, 502 Mich at 647. "In such circumstances, the trial court infringes on the prosecutor's charging discretion." *Id.* Accordingly, had the trial court informed the assistant prosecuting attorney that it would require the amount of restitution payable by defendant to be established at a restitution hearing, the People would have been entitled to withdraw from the agreement. See *id.* (explaining that the defendant had cited no "authority for the proposition that a trial court may unilaterally modify the terms of a plea bargain in order to serve the court's notions of justice.") (citing references omitted). If the trial court had refused to allow the People to withdraw from the agreement, the court would have necessarily abused its discretion. See *id.*; *Duncan*, 494 Mich at 723. For these reasons, the trial court did not err when it told defendant that, if he accepted the People's plea offer, the court would not conduct a

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[30] The People therefore vigorously contest defendant's assertion—made for the first time in this case—that the People "assented" to defendant's request to set restitution after an evidentiary hearing. See defendant's brief, 20-21. The record of May 18, 2016 shows only that the People justified the amount of restitution by making an offer of proof on the record. 15a. While the assistant prosecuting attorney told the court that he would be willing to talk to a supervisor about defendant's hearing request, the record does not show that the People actually agreed to change their offer to make restitution payable after a determination by the trial court, nor is that language included in the written plea offer signed by defendant, his attorney, and the assistant prosecuting attorney. 10a; 15a-30a.

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restitution hearing. The court, instead, correctly told defendant that he could either accept the offer as it was or reject the offer entirely and go to trial. 16a.

The People must also briefly address *McKinley*, as it was specifically cited by the Court in its order of May 24, 2019.[31] In *McKinley*, the defendant was convicted by jury of several felonies. "Following a hearing, and over defense counsel's objection to the amount of the restitution assessed, the trial court entered an amended judgment of sentence to reflect the imposition of" over $150,000 in restitution against defendant. *Id.* at 413-414. Of that total, defendant was ordered to pay over $60,000 "to the four victims of the offenses of which he was convicted" and over $90,000 "to the victims of uncharged thefts attributed to the defendant by his accomplice." *Id.* at 414. On appeal, the question for this Court was whether "an order of restitution is equivalent to a criminal penalty" and "whether Michigan's statutory restitution scheme is unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct[.]" *Id.* The Court—without deciding the constitutional question—held that MCL 780.766(2) "does not authorize trial courts to impose restitution based solely on uncharged conduct[,]" and, therefore, overruled *Gahan* "to the extent that it held to the contrary." *Id.* at 424. The Court vacated the restitution order and remanded the case so that the trial court could enter an order requiring defendant to pay restitution only to the four victims of the offenses to which he was convicted. See *id.*

With respect to the narrow question posed here by this Court in its order of May 24, 2019—whether the trial court erred when it stated that it would not hold an evidentiary hearing if defendant accepted the People's May 18, 2016 plea and sentence agreement—*McKinley* is

[31] 56a. Although the Court's order clearly asks the parties to address *McKinley* in the context of this second question, the pertinent portion of defendant's brief does not discuss *McKinley* at all. See defendant's brief, 20-26.

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factually and legally inapposite. Unlike the defendant in *McKinley*, defendant in this case was convicted by way of a guilty plea, the trial court did not preside over an evidentiary hearing on restitution, and defendant never objected at sentencing to the court's restitution order, which was based on the undisputed contents of the PSIR. Further, defendant was charged with, pleaded guilty to, and was sentenced for committing the felony offenses of organized retail crime and using a computer to commit a crime and the victim for all of defendant's crimes was Home Depot. No co-defendant was ever charged in this case.[32]

B. *Because the trial court ultimately rejected the May 18, 2016 negotiated plea offer and sentence agreement, defendant's request—that this Court rule on the legality of such agreements—is moot and should not be decided.*

Defendant also asks the Court to make a series of rulings regarding the propriety of plea offers and sentence agreements that include restitution set at a fixed amount.[33] Defendant claims, for various reasons, that these agreements may be void and asserts that a defendant should not be able to "waive review of an invalid restitution award by pleading guilty pursuant to a sentence agreement that specifies a clearly invalid amount of restitution."[34] The People first note that defendant's argument—that the restitution award in this case was "clearly" invalid—is not supported by the record in this case. The restitution amount contained in defendant's original plea and sentence agreement was supported by an offer of proof by the People and defendant affirmed the accuracy of the information justifying this amount in the PSIR. Because the restitution requested by the People was not "clearly invalid," defendant's argument is in conflict

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[32] See defendant's brief, 25 (defendant complaining that the trial court did not order him to pay restitution joint and severally with any co-defendants).
[33] See Issue II, subsection B of defendant's supplemental brief.
[34] Defendant's brief, 22; see also defendant's brief, 23 (claiming that a sentence agreement that contains a restitution award that is "clearly greater than what the defendant could be required to pay if he were to be convicted at trial are unconscionable, and should be deemed unenforceable as a matter of public policy and Due Process.").

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with *People v Wiley*, 472 Mich 153; 693 NW2d 800 (2005), in which this Court held that a defendant waives appellate review of a sentence "by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *Id.* at 154. In support of this holding, *Wiley* cited to *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993), which held "that a defendant who pleads guilty with knowledge of the sentence will not be entitled to appellate relief on the basis that his sentence is disproportionate" and *Carter*, 462, Mich at 215-216 (stating that waiver is "the intentional relinquishment or abandonment of a known right.") (internal quotation and citing references omitted).

More importantly, the issue defendant attempts to raise here—the legality of plea bargains in Michigan that contain a set amount of restitution as an express term—is moot, as it "presents 'nothing but abstract questions of law which do not rest upon existing facts or rights.'" *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010), quoting *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW2d 633 (1920); see also *id.* at 34 ("It is universally understood…that a moot case is one which seeks to get a judgment on a pretend controversy, when in reality there is none, …or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.") (internal quotation and citing references omitted). This is because the May 18, 2016 plea and sentence agreement that contained this term was rejected on the record by the trial court on June 13, 2016. 37a. On June 15, 2016, defendant affirmed that he understood that the May 18, 2016 agreement had "been stricken[.]" 43a. Defendant then went on to accept a new plea and sentencing recommendation that did not include a set amount of restitution as an enumerated term. 44a-47a.

"It is well established that a court will not decide moot issues…because it is the 'principal duty of this Court…to decide actual cases and controversies.'" *Richmond*, 486 Mich

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at 34, quoting *Federated Publications, Inc. v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002) (additional citing reference omitted).[35] "That is, '[t]he judicial power…is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.'" *Id.*, quoting *Anway v Grand Rapids R. Co.*, 211 Mich 592, 610; 179 NW2d 350 (1920). "As a result, 'this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before" it. *Id.*, quoting *Federated Publications*, 467 Mich at 112; see also *Anway*, 211 Mich at 606 ("'Any attempt by a mere colorable dispute to obtain the opinion of a court upon a question of law, when there is no real controversy, is an abuse which courts have always reprehended and treated as a punishable contempt of court.'"), quoting 2 Bouvier's Law Dict. 2245. The Court can, however, reach a moot question "if 'the issue is one of public significance that is likely to recur, yet evade judicial review.'" *Richmond*, 486 Mich at 34, quoting *Federated Publications*, 649 Mich at 390.

Here, because the People's May 18, 2016 plea offer—which contained a specific amount of restitution as an express term of the agreement—was stricken, any declaration by this Court regarding the propriety of such agreements would have no practical effect on defendant. See *Smith*, 502 Mich at 632 (finding that the resignation provision in a plea deal was moot because the defendant had already resigned from office, so Court's decision on the issue would lack practical legal effect in that case). This issue is therefore moot. See *Richmond*, 486 Mich at 34. Further, there is no evidence that the issues raised in Issue II, subsection B of defendant's supplemental brief are likely to evade judicial review. For example, the question of the legality and propriety of a plea and sentence agreement that contains a provision requiring a defendant to

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[35] The Court's decision in *Federated Publications* was later modified, on other grounds, by *Herald Co. Inc v Eastern Michigan University Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006).

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pay a specific, enumerated amount of restitution as part of the plea bargain was addressed just two years ago in *Foster*, 319 Mich App 365. The Court of Appeals in that case distinguished *McKinley* and found that a defendant's due process rights are not "implicated when the defendant expressly agrees to pay restitution to receive the benefit of a bargain struck with the prosecution." *Id.* at 382. Describing these plea bargains as an "act of self-conviction by the defendant in exchange for various official concessions,'" the Court of Appeals explained that "[w]hen a conviction is exchanged for restitution, a defendant intentionally relinquishes his right to have the prosecution prove every element of the charge beyond a reasonable doubt." *Id.*, quoting *Killebrew*, 416 Mich at 199 and citing *Olano*, 507 US at 733 and *Johnson*, 304 US at 464. Although the defendant in *Foster* applied for leave, his application to this Court was denied on March 7, 2018. See *People v Foster*, 501 Mich 985; 907 NW2d 577 (2018). Thus, the issue presented here by defendant is not one that is likely to evade judicial review. For all of these reasons, the Court should not decide this moot issue. See *Smith*, 502 Mich at 632.

Finally, although the issue discussed in pages 21-26 of defendant's supplemental brief is moot, the People are compelled to refute the specious allegation made at page 26 of defendant's brief, in which he claims that resolution of this legal question is necessary because "[c]ommon sense would indicate [that] prosecutors mainly extend plea offers that include an inflated restitution term to defendants whom they believe have the ability to pay the amount specified." Defendant offers zero factual or legal support for this assertion[36] and undersigned counsel will not sit back idly and allow defense counsel to broadly and falsely attribute malfeasance upon her fellow prosecutors in this state.

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[36] See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (finding that the failure to properly brief a question on appeal is tantamount to abandoning it).

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Prosecutors in Michigan, along with all other licensed attorneys in this state, must comply with the ethical rules set forth in the Michigan Rules of Professional Conduct (MRPC).[37] Among other professional obligations, prosecutors have a duty of candor toward the tribunal[38] and any action undertaken by the prosecutor must not rest upon a frivolous basis.[39] The MRPC also impose special responsibilities upon prosecutors[40] because "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[41] See also *Hurd v People*, 25 Mich 405, 412 (1872), superseded by statute on other grounds as recognized in *People v Koonce*, 466 Mich 515, 518-521; 648 NW2d 153 (2002) (explaining that "[t]he prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success.").

In light of these ethical duties and special responsibilities required of prosecutors, not only is the notion that prosecutors in Michigan are willfully requiring defendants to pay "inflated" amounts of restitution to crime victims baseless, it is antithetical to the prosecutor's function in our legal system. And, to the extent that anything argued here by defendant may be read as alleging that the $18,000.80 restitution amount originally requested by the assistant prosecuting attorney at the May 18, 2016 plea hearing was impermissibly "inflated," the record

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[37] See MRPC 1.0; Preamble: A Lawyer's Responsibilities.
[38] See MRPC 3.3: Candor Toward the Tribunal.
[39] MRPC 3.1, Meritorious Claims and Contentions, provides, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous."
[40] See MRPC 3.8: Special Responsibilities of a Prosecutor.
[41] MRPC 3.8, Comment.

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does not support this claim. The People, by way of an offer of proof, maintained that they had evidence supporting defendant's direct participation in an organized retail crime scheme that resulted, over the course of at least 52 transactions, in $18,000 in losses to Home Depot.[42] 15a. Some of the details of this scheme—including defendant's role and the total losses suffered by Home Depot—were included in the PSIR, the accuracy of which defendant did not dispute when presented with the opportunity to do so on June 13, 2016. 34a. Defendant's arguments are baseless and must be rejected by the Court.

[42] As an officer of the court, undersigned counsel avers that she has reviewed the file utilized by the trial prosecutor in 2016 and has read and reviewed the police reports contained in that file, along with the 42-page report (with supporting documentation) generated by a Home Depot corporate investigator, which was referred to by the assistant prosecuting attorney on the record at the May 18, 2016 hearing. 15a.

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RELIEF

THEREFORE, the People request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

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Dated: October 3, 2019