**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**GARY GILMORE**

Defendant-Appellant.
_____/

**Supreme Court No.** 158716

**Court of Appeals No.** 334205

**Lower Court No.** 16-003006-01-FH

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee

_____

**STATE APPELLATE DEFENDER OFFICE**
Attorney for Defendant-Appellant

_____

# DEFENDANT-APPELLANT'S REPLY

**STATE APPELLATE DEFENDER OFFICE**

**BY: Steven D. Helton (P78141)**
**Michael L. Mittlestat (P68478)**
**Jacqueline J. McCann (P58774)**
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

# Table of Contents

# Index of Authorities

## Cases



## Statutes



## Rules



## Other Authorities

# Reply

## I. The trial court's errors in ordering Mr. Gilmore to pay $18,000 in restitution and in failing to conduct an evidentiary hearing on restitution were not waived.

The prosecution's supplemental brief argues that Gary Gilmore waived the question of his entitlement to an evidentiary hearing regarding restitution based on its position that *People v Gahan,* 456 Mich 264 (1997) and *People v Grant,* 455 Mich 221 (1997) continue to accurately define the result of a defendant's failure to object and affirmatively request a restitution hearing at sentencing as "waiver". This position is not legally sustainable in general and is less defensible in the context of this case.

The crux of the prosecutor's position is that *Gahan*, 456 Mich 264 and *Grant* 455 Mich 221 are wholly compatible with *People v Carter,* 462 Mich 206 (2000). *Gahan*, 456 Mich at 276 held: "at sentencing defendant did not request an evidentiary hearing regarding the amount of restitution that was properly due. This was a waiver of his opportunity for an evidentiary hearing." Conversely, *Carter* sought to differentiate waiver from forfeiture: "Waiver has been defined as the intentional relinquishment or abandonment of a known right. … It differs from forfeiture which has been explained as the failure to make the timely assertion of a right." *Carter*, 462 Mich at 215 (internal citations and quotations omitted).

The prosecution asserts that:

> 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 (which specifically sought restitution in the amount of $18,000, as well as provided an explanation justifying the amount), coupled with defendant's failure to specifically object to the court's restitution order and his failure to request an evidentiary hearing, constituted the intentional relinquishment of a known right, thereby extinguishing any error." [Pr. Br. 22-23]

The response also cites to *People v Kowalski,* 489 Mich 488 (2011) in support of its position that a defendant waives his right to challenge restitution by not objecting to the contents of the presentence report or the amount of restitution ordered at sentencing. *Kowalski* held that where the defendant affirmed he had no objections to the jury instructions he waived his right to challenge an erroneous instruction. *Id.* at 504-505. *Kowalski* held that if the instructional error was not considered waived it "would allow counsel to harbor error at trial and then use that error as an appellate parachute[.]" *Id.* at 504-505.

As a general legal matter, a defendant who fails to object to or who affirmatively expresses approval of the presentence report cannot be said to have intentionally relinquished or abandoned his right to an evidentiary hearing on restitution or to challenge the amount of restitution ordered. "[W]aiver must simply be explicit." *Sweebe v Sweebe,* 474 Mich 151, 157 (2006). "[W]aiver, must be clearly shown to exist. It should not be lightly inferred," *Saginaw Lumber Co v Wilkinson,* 266 Mich 661, 666 (1934). An "effective waiver requires ... knowledge of the consequences." 31 CJS Estoppel and Waiver § 95. It follows that a defendant who "explicitly and repeatedly approve[s] the instruction," waives the right to challenge the instruction on appeal. *Kowalski*, 489 Mich at 503. It does not follow that a defendant who explicitly and repeatedly approves of the accuracy of the presentence report waives his right to a restitution hearing or to challenge the amount of restitution on appeal. The intent to abandon those challenges is not evinced from his approval of the presentence report, and waiver must be explicit and should not be inferred. See, e.g., *People v Hershey,* 303 Mich App 330, 351-52 (2013) (defendant who said he had "no additions or corrections" to the presentence report did not waive challenge to the scoring of his sentencing guidelines because "the record as a whole does not show a clear expression of satisfaction with the trial court's decision to score" the incorrectly-scored offense variables).

Further, the information in the presentence report that circuit courts generally rely upon when determining the amount of restitution is the probation agent's recommendation regarding restitution.[1] MCR 6.425(A)(1)(k) requires that the probation agent include "a specific recommendation for disposition" in the presentence report. The defendant has no grounds to object to the agent's recommendation. MCR 6.425(E)(1)(b). Finding waiver of the right to challenge the amount of restitution ordered based on a defendant's failure to object to the agent's recommendation would be akin to finding a defendant waives the right to challenge his above-guidelines sentence when he fails to object to the agent's recommendation that the court impose an above-guidelines sentence. This Court has never found waiver in this context. See, e.g., *People v Kimble,* 470 Mich 305, 312 (2004) (defendant's "sentence is appealable under [MCL 769]§ 34(10), even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand."). Again, waiver should be explicit and unambiguous. Waiver of the right to challenge restitution based on the failure to object to the presentence report would be quite a leap.

Finally, unlike an erroneous jury instruction, defendants gain no tactical advantage by failing to object to the amount of restitution ordered at sentencing. If defendants were permitted to expressly approve of erroneous jury instructions and then raise the erroneous instruction on appeal in the event the jury returned a guilty verdict, defendants would be encouraged to harbor error because the erroneously instructed jury would provide a free shot at an acquittal. Conversely, defendants gain no advantage or "appellate parachute" whatsoever by failing to the object to the

[1] See *Gahan*, 456 Mich at 268 ("On the basis of this accounting of known victims, the probation officer recommended the court immediately order defendant to pay $28,260 in restitution."); *Grant*, 455 Mich at 223 ("the presentence report recommended restitution in the amount of $175,000."); *People v McKinley*, 496 Mich 410, 426 (2014) ("the probation officer recommended that the defendant be ordered to pay restitution in an amount of more than $28,000.").

amount of restitution ordered or by failing to request a restitution hearing at sentencing. If the defendant fails to object and request a restitution hearing at sentencing, the circuit court will order the amount it says that it is ordering at the sentencing hearing. If the amount the trial court orders is less than the victim is entitled to under law, the prosecuting attorney and the victim will be entitled to move to have the amount of restitution corrected. MCL 780.766(22); MCR 6.430. If the amount the court orders at sentencing is erroneously high, there is no conceivable tactical reason for the defendant not to object and there is no practical reason that the crime victim should be entitled to a windfall. See *Hershey*, 303 Mich App at 353 ("there is no basis to think that he was harboring an appellate parachute at sentencing, given there would be no advantage in doing so.").

Even if the prosecution's legal positions were valid, waiver could not be found in this case. The prosecution argues Mr. Gilmore waived any challenge relating to restitution due to his counsel's "affirmative acceptance as to the accuracy of the restitution information contained in the PSIR (which specifically sought restitution in the amount of $18,000, as well as provided an explanation justifying the amount), coupled with defendant's failure to specifically object to the court's order and his failure to request an evidentiary hearing, [which] constituted the intentional relinquishment of a known right." (Pl. Br. 22-23)

Mr. Gilmore's counsel specifically declined to affirmatively accept the accuracy of any portion of the presentence report. When the circuit court asked counsel if the presentence report was "factually accurate," counsel responded: "We wish to make no additions or corrections to the report." 34a. Counsel's response appeared to be precisely worded to avoid waiving any challenge regarding restitution on appeal, and made in light of his previous "request that on behalf of my client we add some discussion about [the court's ruling denying his request for a restitution hearing] and we'll put it on the record." 15a. Counsel had already brought the parties' dispute

regarding restitution and his request for a hearing on restitution to the court's attention. The court had definitively ruled. Mr. Gilmore was not required to raise the issue again to avoid waiving or forfeiting the issue. See *People v Taylor,* 387 Mich 209 (1972).

The agent's recommendation regarding restitution was made in connection with the parties' original sentence agreement, which had required that Mr. Gilmore be sentenced to one year in jail and pay $18,000 in restitution. After defense counsel said that he did not wish to make any corrections or additions to the presentence report on June 13, 2016, the circuit court informed the parties that, "the original agreement has been stricken," "does not apply," and "there is no actual offer." 43a, 45a. The response acknowledges that "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, and the court did not ask the parties at the June 15, 2016 sentencing if they wished to challenge the PSIR." (Pl. Br. 23) Despite this, the prosecution asserts that Mr. Gilmore is bound by the restitution recommendation and factual assertions contained in the report based on waiver because he did not affirmatively request that the report be updated on June 15. Mr. Gilmore's (as well as the prosecutor's and circuit court's) complete silence regarding the presentence investigation report during the June 15 hearing cannot be reasonably construed as an agreement to be bound by the restitution recommendation contained in the outdated report that had been prepared pursuant to a voided sentencing agreement. See *Chippewa Lumber Co v Phenix Ins Co,* 80 Mich 116, 123 (1890) ("The mere silence of the defendant did not constitute a waiver.").

The description of the offense in the presentence report asserts:

> 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 $13.98, 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 times

> at various Wayne County Home Depot locations, with an estimated loss of approximately $18,000.

Mr. Gilmore personally disputed that he engaged in this activity more than two times at the plea hearing. 28a. However, even if he had not, he was only convicted of one count of organized retail crime and one count of using a computer to commit a crime. Both convictions arise from the same felonious activity that occurred on March 22, 2016, in Plymouth. 25a-29a. "Only crimes for which a defendant is charged "cause" or "give rise to" the conviction. … [A]ny course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant." *People v McKinley,* 496 Mich 410, 419-20 (2014). Restitution is only authorized based on the losses caused by Mr. Gilmore's criminal activity in Plymouth on March 22, 2016. 25a.

The prosecution appears to implicitly acknowledge that Mr. Gilmore did not personally engage in the "noted activity" 52 times by vaguely claiming that there is "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." (Pl. Br. 38) Organized retail crime, MCL 752.1084(1)(a)-(h), may be committed in eight different ways. One may engage in organized retail fraud alone, with another, or by engaging in a conspiracy. MCL 752.1084(1)(d). Presumably, a defendant who is engaged in such a conspiracy is responsible for all damages to the victim that result from the conspiracy. But Mr. Gilmore did not provide a factual basis to support a conspiracy to commit organized retail fraud conviction. The circuit court asked Mr. Gilmore: "On March 22nd, 2016 … did you use some trickery or artifice, false instrument or container, device or other article to facilitate the commission of an organized retail crime using a, what, a false or misleading UPC label?" Mr. Gilmore responded in the affirmative. 25a. MCL 752.1084(1)(f) provides: "A person is guilty of organized retail crime when that person, alone or in association with another … Uses any artifice, instrument … or other article to facilitate the commission of an organized retail

crime act." Mr. Gilmore did not admit to engaging in a conspiracy or to causing any damage beyond what his own, personal actions, caused.

Regarding the prosecution's 'appellate parachute' argument, the response refers to non-record "extensive and detailed police reports," "the 42-page report (with supporting documentation) generated by a Home Depot corporate investigator," and "defendant's criminal activity being captured on CCTV." (Pl. Br. 27, 37-38). Because the Prosecutor's Office apparently still possesses this evidence, it does not appear that the prosecuting attorney or Home Depot will be prejudiced or "sandbagg[ed]" should the Court grant Mr. Gilmore the relief he is requesting: a hearing so that the proper amount of restitution can be resolved by the circuit court by a preponderance of the evidence, under the limitations of *McKinley*, 496 Mich at 419-20; MCL 780.767(1), (4).

## II. The Court should hold that plea and sentence agreements that specify a clearly invalid amount of restitution are invalid.

The prosecution asks the Court to avoid reaching the merits of Mr. Gilmore's argument that the circuit court erred in refusing to conduct a hearing on restitution despite the fact that the basis for Mr. Gilmore's plea did not support an $18,000 restitution order. Should the Court accommodate this request it will enable prosecutors and criminal defendants to continue to agree to invalid restitution awards in exchange for reduced charges and sentences. The prosecution claims this issue is moot "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," (Pl. Br. 34) and because Mr. Gilmore "waive[d] appellate review of a sentence 'by understandingly and voluntarily entering into a plea agreement to accept that specific sentence.' " (Pr. Br. 34) (quoting *People v Wiley,* 472 Mich 153, 154 (2005)).

The prosecution's first argument falls flat because it repeatedly argues that Mr. Gilmore waived review of restitution, in part by pleading guilty pursuant to a plea and sentence agreement that provided "restitution: $18,000.80," and by failing to object to a presentence report that recommended that Mr. Gilmore be ordered to pay $18,000 in restitution in light of the vacated sentence agreement. (Pr. Br. 21, 22-23, 24, 27)

The prosecution's dual claims that (i) Mr. Gilmore waived review of the issue by pleading guilty pursuant to a sentence agreement that specified an invalid amount of restitution, but that (ii) "the issue presented here by defendant is not one that is likely to evade judicial review," cannot both be true. This case presents a unique opportunity for the Court to pass on the validity of such agreements. Defendants who benefit from such agreements are unlikely to complain about them on appeal since they generally receive the benefit for which they have paid. This case is different because Mr. Gilmore did not receive the benefit of the sentence agreement that specified an invalid amount of restitution, but was still ordered to pay the invalid amount of restitution. The prosecution cites to *People v Foster,* 501 Mich 985 (2018) as another case where the Court has had the opportunity to pass on this issue, but does not explain why Mr. Gilmore waived review of the validity of such agreements but the defendant in *Foster*, who agreed to pay restitution for uncharged conduct as part of his plea agreement, did not.

In arguing that the issue is moot, the prosecution takes issue with undersigned counsel's assertion that: "Common sense would indicate prosecutors mainly extend plea offers that include an inflated restitution term to defendants whom they believe have the ability to pay the amount specified." (Pl. Br. 36-38) This point was not meant to disparage prosecutors' ethics or efforts to ensure the crime victims receive full compensation for their losses. It was a request that the Court consider how allowing plea and sentence agreements that set forth an amount of restitution

unauthorized by law are likely to benefit a certain class of defendants: those with the likely ability to pay. This case demonstrates the level of pressure the government can apply to compel a defendant to agree to pay any amount of restitution it seeks. The prosecution's response accurately describes the amount of restitution as being the only issue that prevented the parties from reaching a plea agreement earlier in the proceedings. (Pl. Br. 1-4, 20-21) Yet in the end, Mr. Gilmore was required to pay a restitution figure that fully compensated Home Depot for every dollar it claimed it suffered as a result of the "noted activity," even though he clearly did not agree he was responsible for all of those damages. The prosecution's claim that "[n]o co-defendant was ever charged in this case," (Pl. Br. 33), should raise additional concerns about the danger of sanctioning plea and sentence agreements that allow defendants to agree to pay restitution for crimes they did not commit in exchange for reduced charges or a favorable sentence agreement. That no one other than Mr. Gilmore was charged with engaging in the "noted activity" would tend to indicate that the motivation to investigate and prosecute all of the criminals who are responsible for a victim's losses is reduced once the victim is awarded full restitution for its losses.

## Request for Relief

**WHEREFORE**, Gary Gilmore respectfully requests that this Honorable Court remand for an evidentiary hearing on restitution, grant leave to appeal, or order any other relief it deems just and appropriate.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/ Steven D. Helton

**Steven D. Helton (P78141)**
**Michael L. Mittlestat (P68478)**
**Jacqueline J. McCann (P58774)**
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: October 17, 2019