IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

MAMERTO G. MALLO,
Defendant-Appellant.

OPINION

Cite as: 2008 Guam 23

Supreme Court Case No.: CRA07-008
Superior Court Case No.: CF0595-99

Appeal from the Superior Court of Guam
Argued and submitted on July 16, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Defendant-Appellant Mamerto G. Mallo appeals from a conviction, based on a plea agreement, of Murder (As a First Degree Felony) in violation of 9 GCA § 16.40(a)(1). The plea agreement required that Mallo pay restitution but left to the discretion of the sentencing judge whether Mallo would receive credit for time served. The sentencing judge denied Mallo credit for time served and ordered that restitution be paid to the decedent victim's brother. Mallo argues that the Superior Court improperly refused to grant him credit for time served and issued a restitution order in excess of the statutory limit, to be paid to someone other than the victim of his crime, and without a statutorily-mandated hearing on the victim's loss and defendant's ability to pay.

[2] The sentencing judge had no discretion to deny Mallo's request for time served because credit for time served is a statutory right, and the plea agreement was insufficient to serve as a knowing, intelligent, and voluntary waiver of that right. The language in the plea agreement concerning restitution, on the other hand, was clear and direct and Mallo thereby waived all of his arguments related to the restitution order. Thus, we reverse in part and affirm in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Mallo was indicted for the murder of his wife, Lourdes, in 1999. The Indictment charged Mallo with Aggravated Murder (As a First Degree Felony) in violation of 9 GCA § 16.30(a)(1) (2005) and a Special Allegation, possession and use of a deadly weapon in the commission of a felony, in violation of 9 GCA § 80.37 (2005). Due to changes of counsel, motions to suppress, motions for psychiatric examination, discovery motions, and motions *in limine*, it was over six

years later that Mallo and the Government entered into a plea agreement to the single charge of Murder (As a First Degree Felony) in violation of 9 GCA §16.40(a)(1) (2005).

[4] The Plea Agreement provided, *inter alia*:

> 4. The Attorney General and Defendant, in consideration for the Defendant's plea of guilty and cooperation, agree to the following:
>
> > a. That as to the charge of **MURDER (As a 1st Degree Felony)**, punishable by life imprisonment, the Defendant and the Government specifically agree that the determination as to whether the Defendant should receive credit for time served is **entirely within the discretion of the Sentencing Judge.**
> >
> > . . . .
> >
> > c. That the Defendant shall be held liable for restitution pursuant to 9 GCA § 80.50(e). Restitution shall include funeral expenses, all related funeral costs, and medical expenses of the victim. . . . In an amount to be determined by Court at a restitution hearing.
> >
> > . . . .
>
> 7. Defendant stipulates and agrees that if given a fair opportunity to pay any fines and restitution ordered by the Court, he will be able to do so. Defendant further understands and agrees that he has an obligation to pay any fine and restitution ordered by the Court and that this obligation survives the expiration of probation or parole and that expiration of probation or parole does not prevent collection of fines and restitution, pursuant to 9 GCA § 80.56.
>
> . . . .
>
> 9. Defendant understands that he has a right to appeal his conviction in the case pursuant to 8 GCA §§ 130.10 and 130.15, and agrees to **waive** that right for the purpose of this plea.

Appellant's Excerpts of Record ("ER"), tab 2 at 3 (Plea Agreement, Dec. 23, 2005) (emphasis in original).

[5] The trial court sentenced Mallo to life imprisonment without credit for any time served and ordered that a restitution hearing be scheduled. The Restitution Report submitted by the Probation Office called for $13,899.70 in restitution for costs associated with the victim's funeral, to be paid to the victim's brother who had incurred them. Mallo thereafter submitted his Objection to Restitution, which the People opposed. Mallo also submitted a Notice of Objection

to Judgment, objecting to not receiving credit for time served. Subsequently, Mallo filed a Motion to Reconsider Denial of Credit for Time Served.

[6] The Objection to Restitution and the Motion to Reconsider Denial of Credit for Time Served were heard before the trial court on the same day. A few months later, the trial court issued a decision and order denying both the Objection and the Motion. Mallo filed a Notice of Appeal and a Statement of Jurisdiction, prior to the entry of judgment, challenging the trial court's denial of his Objection and Motion.

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a final judgment of a criminal case pursuant to 7 GCA §§ 3107(a) and 3108(a) (2005), 8 GCA §§ 130.10 and 130.15 (2005), and 48 U.S.C. § 1424-1(a)(2) (West 2008). Rule 4 of the Guam Rules of Appellate Procedure provides that this court shall treat a notice of appeal filed after the announcement of decision, sentence or order, but before entry of the judgment or order, as being filed after such entry and on the date thereof. Guam R. App. P. 4(a)(2) (2007).

[8] The Plaintiff-Appellee People of Guam assert, however, that this court lacks jurisdiction due to Mallo's express waiver in the plea agreement of his right to appeal the conviction. Although the existence of a valid waiver could prevent Mallo from obtaining the relief he seeks, even a valid waiver of appellate rights in a plea agreement does not deprive an appellate court of jurisdiction to hear the appeal. In *United States v. Gwinnett,* a defendant entered into a plea agreement in which she waived her right to appeal. 483 F.3d 200, 201 (3d Cir. 2007). The Third Circuit concluded that, despite the plea, it retains subject matter jurisdiction over the appeal by a defendant who has signed an appellate waiver:

> It could not be otherwise. After all, a sentence based on constitutionally impermissible criteria, such as race, or a sentence in excess of the statutory maximum sentence for the defendant's crime, can be challenged on appeal even if the defendant executed a blanket waiver of his appeal rights. It follows that we have subject matter jurisdiction over [such a defendant's] appeal notwithstanding her waiver of appeal. Nonetheless, we will not exercise that jurisdiction to review the merits of [a defendant's] appeal if we conclude that she knowingly and voluntarily waived her right to appeal unless the result would work a miscarriage of justice.

Id. at 203 (citation and internal quotation marks omitted), *cited approvingly by United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007).

[9] The power of this body to sit as an appellate court is granted by the Organic Act and by the Guam Legislature, not the private arrangements of the parties. We exercise our jurisdiction to hear the instant appeal.

III. STANDARD OF REVIEW

[10] The issue of whether Mallo waived his right to appeal in the plea agreement is reviewed *de novo*. *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998). On review, this court must determine whether the waiver was knowing and voluntary. *Id.*

[11] Issues of statutory interpretation are reviewed *de novo*. *People v. Gutierrez*, 2005 Guam 19 ¶ 13. Mallo's appeal of the trial court's decision to deny him credit for time served in accordance with 9 GCA § 80.46 is a matter of statutory interpretation because he contends that the trial court does not have the authority to deny him credit for his prior detention even when the plea agreement leaves the issue entirely to the sentencing judge's discretion. Additionally, whether Mallo's waiver was knowing, intelligent, and voluntary is a mixed question of law and fact to be reviewed *de novo*. *United States v. Robinson*, 913 F.2d 712, 714 (9th Cir. 1990).

[12] Mallo's other arguments regarding the restitution order also involve an interpretation of a statute: whether 9 GCA § 80.50(a) controls 9 GCA § 80.50(e) and whether relatives of the victim

may be appropriate awardees of restitution. Finally, we review for abuse of discretion the trial court's failure to make findings to support the higher restitution award and failure to hold a hearing to determine Mallo's ability to pay the restitution award. Although there is currently no Guam authority directly dealing with the standard of review for restitution orders, "[w]e review evidentiary rulings for an abuse of discretion . . . ." *People v. Fisher*, 2001 Guam 2 ¶ 7 (quoting *J.J. Moving Servs., Inc. v. Sanko Bussan (GUAM) Co., Ltd.*, 1998 Guam 19 ¶ 31). Of the three states cited as sources for Guam's restitution statute, 9 GCA § 80.50—California, Massachusetts, and New Jersey—all share the same opinion that restitution awards are reviewed for abuse of discretion. *See People v. Crisler*, 81 Cal. Rptr. 3d 887, 890 (Ct. App. 2008); *State v. Martinez*, 307, 920 A.2d 715, 722 n.11 (N.J. Super. Ct. App. Div. 2007); *Com. v. McIntyre*, 767 N.E.2d 578, 584 (Mass. 2002). We agree with our fellow courts that restitution awards are reviewed for abuse of discretion.

III. DISCUSSION

A. Waiver of Right to Appeal

[13] Insofar as Mallo is arguing that the trial court violated Guam statutes in denying credit for time served and ordering excessive restitution to an improper party, he is appealing what he believes to be an illegal sentence. An illegal sentence is void and the right to appeal it cannot be waived, so even if Mallo had knowingly and voluntarily waived all of his appellate rights, we would still be able to correct an illegal sentence. An illegal sentence, as explained by the Eighth Circuit, is "[a] sentence . . . [that] is not authorized by the judgment of conviction or [that] is greater or less than the permissible statutory penalty for the crime." *United States v. Greatwalker*, 285 F.3d 727, 729 (8th Cir. 2002). Guam law allows an illegal sentence to be

appealed at any time, regardless of waiver. *See* 8 GCA § 120.46 (2005) ("The court may correct an illegal sentence at any time . . . .").

[14] To the extent Mallo's arguments on appeal are based on what he alleges to be a misinterpretation of the statute, he is challenging the sentence as illegal, not as illegally imposed. If sections 80.46 and 80.50 forbid the trial court from issuing the sentence that it did, then that sentence is illegal and can be appealed by Mallo regardless of any waiver of his right of appeal that he may have signed.

[15] However, waiver of one's right to appeal—even from a legal sentence—must meet certain requirements. In general, a plea agreement term waiving an important right "is constitutionally valid 'only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.'" *People v. Van Bui*, 2008 Guam 8 ¶ 11 (quoting *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005)). Although an agreement to waive appeal of a sentence within the statutory limits is generally enforceable, "[s]uch waivers may be avoided if they are not knowing and voluntary, or if the Government breaches the plea agreement." *United States v. Garcia*, 166 F.3d 519, 521 (2d Cir. 1999) (per curiam).

[16] In addition, federal courts have warned that, because of the power disparity, plea agreements are to be strictly construed in favor of the defendant and against the Government.

> In *United States v. Hernandez,* the Second Circuit stated that while waivers of appellate rights are generally valid, these waivers "are to be applied 'narrowly' and construed 'strictly against the Government.'" 242 F.3d 110, 113 (2001) (internal citation and quotations omitted) . . . . We agree with the position taken by the Second Circuit. Plea agreements will be strictly construed and any ambiguities in these agreements will be read against the Government and in favor of a defendant's appellate rights.

United States v. Andis, 333 F.3d 886, 890 (8th Cir. 2003). We adopt this rule as well, and hold that any ambiguities in Mallo's plea agreement should be construed against the People and in favor of Mallo's appellate rights.

[17] To determine whether Mallo knowingly and voluntarily waived his appellate rights, we first we look to the language of the plea agreement. The plain language of the plea agreement states: "Defendant understands that he has a right to appeal his *conviction* in this case pursuant to 8 GCA §§130.10 and §§130.15, and agrees to waive that right for purpose of this plea." (emphasis added.) ER, tab 2 at 6 (Plea Agreement) (emphasis added).

[18] According to the People, paragraph 9 constituted Mallo's waiver of all his appellate rights because it incorporated by reference all appeals pursuant to sections 130.10 and 130.15. Section 130.10 provides: "An appeal may be taken in any criminal action in which the offense charged is not a violation." 8 GCA § 130.10 (2005). Section 130.15 provides:

> An appeal may be taken by the defendant:
>
> > (a) From a final judgment of conviction. The commitment of a defendant by reason of mental illness, disease or defect shall be deemed to be a final judgment of conviction within the meaning of this Section.
> >
> > (b) From an order denying a motion for a new trial.
> >
> > (c) From any order made after judgment, affecting the substantial rights of the defendant.
> >
> > (d) Pursuant to § 40.80 [governing appeal of conditions of release].
> >
> > (e) From a judgment of conviction upon a plea of guilty or nolo contendere, where the defendant has filed with the trial court a written statement, executed under oath of penalty of perjury showing reasonable constitutional, jurisdictional or other grounds going to the legality of any proceedings held in this case under § 65.15(c) [suppression motions] of this Code and the trial court has executed and filed a certificate of probable cause for such appeal with the District Court.

8 GCA § 130.15 (2005).

[19] The People argue that the reference to sections 130.10 and 130.15 means Mallo has waived all of his rights on appeal. But a close reading of paragraph 9 contradicts the People's contention: Mallo waived the right to appeal his *conviction*, not his sentence. By agreeing to paragraph 9, Mallo gave up the right to challenge his conviction pursuant to a plea of guilty, but not other rights. There is no express mention of the right to appeal his *sentence* being waived, and therefore this language does not clearly and unequivocally convey to Mallo that in agreeing to paragraph 9, he is waiving this right.

[20] One might argue that Mallo waived his right to appeal the denial of credit for time served because the plea agreement Mallo signed waived his right to appeal from a final judgment of conviction under section 130.15(a), and the final judgment of conviction *contains within it* the denial of credit for time served and the restitution order.[1] By this reasoning, an appeal of either the credit or restitution issues would be an appeal from the final judgment of conviction, and that appeal is waived. Although this is a potential interpretation of paragraph 9, a "clear" waiver does not require the parties to interpret ambiguous language. As a result, the fact that the language is ambiguous ultimately prevents Mallo from making a voluntary waiver based on it.

[21] The language of the plea agreement, without more, may not always be dispositive. We look also to the plea colloquy to determine whether the ambiguity in paragraph 9 was clarified when the judge advised Mallo of the rights he was waiving by entering a guilty plea. At the change of plea hearing, the court advised Mallo that in entering the plea, he was waiving the right "to appeal this case":

[1] Although the plea agreement neither contains the exact language nor references the exact sub-section, 8 GCA § 130.15(a) seems the closest fit to the intent of the plea agreement.

> THE COURT: You understand if this case had gone to trial, the burden is always on the Government to prove you guilty beyond a reasonable doubt, and if you would have had a jury trial, in order for that jury to find you guilty of all the charges against you, they must all vote guilty; if you plead guilty then, accept your plea, you (indiscernible) you trial, waive right to appeal this case (sic), and waive all you other rights I just told to you. Do you understand that?

ER, tab 3 at 12 (Transcripts of Proceedings on Appeal, Dec. 21, 2005).

[22] The colloquy only mentions Mallo's "right to appeal this case." *Id.* This advisement, without more, is insufficient to clearly and unequivocally convey that Mallo agreed to waive his right to appeal his sentence. This court has never reached the question of whether the right to appeal one's sentence may be waived through a plea agreement. Even assuming that the right to appeal a sentence is waivable, Mallo has failed to make an express waiver of his right to appeal his sentence. *See United States v. Rodriguez*, 360 F.3d 949, 959 (9th Cir. 2004) ("An express waiver of a right to appeal a sentencing determination is valid if made knowingly and voluntarily.") Our review of Mallo's plea agreement and change of plea transcript establishes that while Mallo did waive his right to appeal his conviction, he did not waive his right to appeal the sentence imposed.

[23] The plea agreement also did not contain an explicit waiver of his right to appeal the restitution award. The majority rule in the United States Courts of Appeals, including the Ninth Circuit, is that the right to appeal a restitution award must be waived explicitly. *United States v. Cooper*, 498 F.3d 1156, 1159 (10th Cir. 2007).[2] We adopt the same rule here. Because the Plea Agreement made no reference to Mallo waiving his right to appeal the restitution award, he

[2] *See United States v. Sistrunk*, 432 F.3d 917, 918 (8th Cir. 2006); *United States v. Smith*, 344 F.3d 479, 483 (6th Cir. 2003); *United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000); *United States v. Zink*, 107 F.3d 716, 717-18 (9th Cir. 1997); *United States v. Ready*, 82 F.3d 551, 560 (2d Cir. 1996); *but see United States v. Cohen*, 459 F.3d 490, 497 (4th Cir. 2006).

cannot be said to have done so voluntarily and knowingly. We therefore reach the merits of his appeal of both the sentence imposed and the restitution ordered.

B. Credit for Prior Detention

[24] Mallo first objects to the Superior Court's refusal to grant him credit for the time he served in custody prior to sentencing. As a result, Mallo's eligibility for parole will begin after he has served more than twenty-one years of his life sentence, rather than after the statutory term of fifteen years. The plea agreement between Mallo and the government states: "the Defendant and the Government specifically agree that the determination as to whether Defendant should receive credit for time served is **entirely within the discretion of the Sentencing Judge**." ER, tab 2 at 3 (Plea Agreement) (emphasis in original). Under Guam law, however, the sentencing judge has no discretion as to whether a defendant should receive credit for time served: "When an offender who is sentenced to imprisonment has previously been detained . . . such period of detention *shall* be deducted from the maximum and minimum term of such sentence." 9 GCA § 80.46 (2005) (emphasis added). The plain meaning of this statute is that the credit for time served is obligatory.

[25] Although there are no cases in Guam on this point, similar language has been held elsewhere to be mandatory. The source for section 80.46 cites two jurisdictions, Massachusetts and New Jersey. Both states interpret similar provisions in their statutes as creating a right to credit for time served.

[26] In Massachusetts, state law requires that "[t]he court . . . shall order that the prisoner be deemed to have served . . . the number of days spent by the prisoner in confinement prior to such

sentence awaiting and during trial." Mass. Gen. Laws ch. 279, § 33A (1998).[3] Interpreting this statute, the Court of Appeals believed it should be read liberally for the benefit of prisoners.

> We reject "an overly legalistic approach" toward jail credit matters . . . and rely on the "rule that would remedy the injustice of a prisoner serving time for which he receives no credit. Liberty is of immeasurable value; it will not do to read statutes and opinions blind to the possible injustice of denying credit."

Com. v. Maldonado, 832 N.E.2d 690, 691-92 (Mass. App. Ct. 2005) (internal citations omitted).

[27] New Jersey agrees in its Rules of Court: "The defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence." N.J. R. 3:21-8 (1994).[4] As explained by the Appellate Division, "When the rule applies, the credit is mandatory." *State v. Hemphill*, 917 A.2d 247, 250 (N.J. Super. Ct. App. Div. 2007), *cert. denied*, 926 A.2d 853 (N.J. 2007). Mandatory jail credit is allocable to any imposed period of parole eligibility. *State v. Mastapeter*, 674 A.2d 1016, 1019 (N.J. Super. Ct. App. Div., 1996). In light of the imperative "shall" in section 80.46, this court concurs with Massachusetts and New Jersey that defendants like Mallo have a right to that credit.

[28] The People contend, and the sentencing court agreed, that Mallo waived his right to credit for time served in the plea agreement. The argument appears to be that by leaving the matter to the trial court's discretion, the plea agreement authorized the court to ignore the statute. The People argue that the grant of discretion served as a waiver of that credit by the defendant, and that Mallo gave up the right to the credit when he signed the plea agreement. Mallo argues that

[3] Massachusetts has since changed the location of this statute from the citation given in the Guam Code but the language and interpretation remain identical.

[4] Like Massachusetts, New Jersey's rule no longer has the same citation as given in the Guam Code Annotated, but the language remains identical.

he did not intend that the plea agreement waive his right to credit for time served. Mallo's preferred interpretation of the clause appears to be that he left the issue to the trial court's discretion and the trial court's discretion must be to follow the statutory mandate and grant him credit.

[29] Some jurisdictions do allow defendants to waive their statutory right to credit for the time served in jail prior to sentencing. States that allow a defendant to waive this right have demanded that the waiver be clear, knowing, intelligent, and voluntary. "[A] waiver of jail credit will not be presumed and the state has the burden to clearly establish a waiver occurred." *Briggs v. State*, 929 So. 2d 1151, 1153 (Fla. Dist. Ct. App. 2006). "As with the waiver of any significant right by a criminal defendant, a defendant's waiver of entitlement to . . . custody credits must, of course, be knowing and intelligent." *People v. Johnson*, 51 P.3d 913, 916 (Cal. 2002); *see also Van Bui*, 2008 Guam 8 ¶ 29.

[30] In Pennsylvania, a court upheld a "defendant's express **acquiescence** and **agreement** . . . [that] knowingly, voluntarily, and intelligently waived his right to credit for time served." *Com. v. Byrne*, 833 A.2d 729, 734 (Pa. Super. Ct. 2003) (emphasis in original). *Byrne* is of particular interest because it is the case the trial court used to analyze whether Mallo's waiver of his right to credit for time served was knowing, intelligent, and voluntary. In *Byrne*, the defendant expressly gave up his right to credit for time served in exchange for a plea agreement. *Id.* at 731. Unlike Mallo's agreement, which left the issue of credit for time served to the discretion of the sentencing judge, Byrne initialed each of the following lines:

> 14. Pursuant to this plea agreement I understand that I am only receiving credit for one year I have served in prison: February 8, 2000 to February 8, 2001.
>
> 15. Pursuant to this plea agreement, I understand that I am waiving my credit for all the other time I served in prison: August 8, 1991 to August 16, 1991; March 29, 1992 to June 5, 1997; and October 29, 1997 to February 7, 2001.

> 16. I am waiving my right to credit for time I served excluding the year knowingly, voluntarily, and intelligently.
>
> 17. No one has used any force or threats against me in order for me to waive my credit for time served.
>
> 18. No promises have been made to me in order to get me to enter this plea, other than what is set forth in the plea agreement, if any, on pages 3 and 4 of this guilty plea form.
>
> 19. I have had sufficient time to discuss the issue of credit for time served with my attorney.
>
> 20. My attorney has answered all of my questions concerning the issue of credit for time served.
>
> 21. I am waiving my right to receive credit for time served because I realize that it is in my best interest to accept the terms of the plea bargain rather than subject myself to a possible conviction on first degree murder and the penalty of a life sentence.

Id. Obviously, the terms of the plea agreement in *Byrne* are different. The waiver of credit for time served in *Byrne* was made knowingly, voluntarily, and intelligently. *Id.* at 737.

[31] The trial court also relied on *United States v. Kramer*, a case with a plea agreement similar to Mallo's. 12 F.3d 130 (8th Cir. 1993). Although Kramer's plea agreement was silent on the issue of credit for time served, the court stated that "[t]he record indicates that the parties specifically left the issue of credit for the sentencing court to resolve. Indeed, Kramer's attorney himself stated that the parties left the issue 'up to the discretion of [the judge].'" *Id.* at 131.

[32] In *Kramer*, the reason the Eighth Circuit upheld the trial court's decision not to grant credit was that the federal statute *forbids* credit when the presentence custody has already been applied as credit against a state sentence:

> [T]he Bureau of Prisons properly decided not to award Kramer credit for the time served, as it would have contravened the proscription in 18 U.S.C. § 3585(b) (1988) against double crediting. . . . The record shows that Kramer received credit for that six-month period against his state sentence for his state probation violation.

Id. at 132. Kramer had contended that the government violated his plea agreement by seeking to deny Kramer his credit for time served. *Id.* In light of the federal statute and the plea agreement's silence on the issue of credit for time served, the Eighth Circuit found no violation of the plea agreement in denying the credit. *Id.* Thus the *Kramer* court applied the mandatory federal statute, rather than merely enforcing a purported grant of discretion to the trial court where the trial court would normally have none.

[33] *Kramer* is inapplicable to an analysis of section 80.46, which requires the credit of time served without any statutory exceptions. 9 GCA § 80.46. Indeed, no court that has cited *Kramer* has done so for anything other than the proposition that a federal defendant cannot obtain "double credit." *See, e.g., Baker v. Tippy*, No. 99-2841, 2000 WL 1128285, at *1 (8th Cir. 2000). The other cases the trial court considered involved either excessive awards of credit, such as those that effected an immediate release,[5] or jurisdictions that do not require that credit be granted for time served, leaving it to the discretion of the sentencing judge instead.[6] Neither situation is on point.

[34] After the trial court's decision to deny Mallo credit for time served, this court handed down its opinion in *People v. Van Bui*, 2008 Guam 8. *Van Bui* involved the determination of whether a particular guilty plea was knowing, intelligent, and voluntary. *Id.* ¶ 1. The original plea agreement signed by the defendant and the People had the defendant pleading guilty to one crime, but due to a last-minute, hurried conference between the prosecutor and the defense attorney, it was changed to another. *Id.* ¶¶ 4-7. The two crimes had different elements, and no

[5] *See, e.g., Rivera v. State*, 954 So. 2d 1216, 1218 (Fla. Dist. Ct. App. 2007), *review granted by Rivera v. State*, 968 So. 2d 557 (Fla. 2007); *Fulcher v. State*, 875 So. 2d 647, 648-49 (Fla. Dist. Ct. App. 2004), *case dismissed by Fulcher v. State*, 890 So. 2d 1114 (Fla. 2004).

[6] *See Sweets v. State*, 36 P.3d 1130, 1131 (Wyo. 2001).

one explained to the defendant what the difference was or what he was now stipulating to in his guilty plea. *Id.* ¶¶ 6-7. The defendant then challenged the plea, arguing that it was not voluntary because he had not been advised of the differences between the elements of the two crimes. *Id.* ¶ 8. This court agreed that he did not understand and held that:

> [w]hen a court has failed to adequately determine that a defendant understands the nature of the charges to which he is pleading guilty, however, the error affects the defendant's substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings. . . . Such a plea cannot be deemed constitutionally voluntary and constitutes plain error.

Id. ¶ 29 (internal citations omitted). Thus, *Van Bui* holds that for a decision giving up important rights by a defendant to be voluntary under Guam law, the defendant must understand the meaning of the waiver and its consequences. *Id.* ¶ 11.

[35] Given the vague language in the plea agreement, it is hard to say that Mallo was aware that he was giving up his right to credit for time served. The record has no discussion during the entry of the plea of the fate of Mallo's credits, and there was no mention of the credit in the plea colloquy. Mallo never explicitly agreed to give up his credit for time served and, although the plea agreement might be read to imply that by granting the judge discretion he waived his right to credit for time served, we agree with the Second and Eighth Circuit that the ambiguity will be resolved in the defendant's favor and hold that here, the plea agreement Mallo signed was not a knowing waiver of his right to credit for time served. *See Andis*, 333 F.3d at 890.

[36] We do not reach the issue of whether, under Guam law, a defendant may waive his right to credit for time served or whether the waiver of sentencing rights could ever be knowing and voluntary. Instead, we find that even if the right is waivable, Mallo's plea agreement did not constitute a knowing, intelligent, and voluntary waiver of this right.

C. Vacating the Plea Agreement

[37] Because Mallo is entitled to his credit for time served and has not waived it, the remedy is to credit the time to his sentence. The People challenge this, arguing that Mallo is attempting to subvert the plea agreement by defeating one of its benefits, and thus the appropriate remedy would be to vacate the plea agreement and restore the parties to their prior positions.

[38] The People rely on *State v. Deilke*, wherein the Supreme Court of Wisconsin, considering the interplay between contract law and plea bargaining, held that while "[n]ot all conduct that deviates from the precise terms of a plea agreement constitutes a breach that warrants a remedy," courts will vacate a plea agreement if "the party arguing a breach . . . show[s], by clear and convincing evidence, that a breach occurred and that the breach is material and substantial." 682 N.W.2d 945, 951 (Wis. 2004) (internal citations omitted). Deilke had agreed to plead guilty in exchange for the prosecution's agreement to drop a more serious charge; he then brought a collateral attack on the conviction in which he successfully demonstrated his right to counsel had been violated. *Id.* at 949. The court concluded that Deilke could not have it both ways, and that the result of his successful collateral attack on the conviction that was issued pursuant to the plea was to invalidate both the conviction and the plea agreement. *Id.* at 953.

[39] Here, vacating Mallo's plea agreement and restoring the parties to their original positions is not the appropriate remedy. Mallo, unlike Deilke, has not challenged his guilty plea. The People retain the material and substantial benefit of his guilty conviction and the resulting life sentence. The People also retain the benefit of avoiding the time-consuming and resource-intensive preparation for trial. Mallo still faces a sentence of life imprisonment—the only change is that the Parole Board may *consider* his eligibility for parole after he has served a cumulative total of fifteen years in prison. The People, as the party arguing the breach, have

failed to demonstrate that such breach is material and substantial. Accordingly, we will not vacate the plea, but instead will remand the case to the trial court with instructions to credit Mallo for the time he served prior to sentencing.

D. Restitution

[40] Mallo originally argued that this court should strike the restitution award as excessive, since section 80.50(a) limits the amount of restitution to $10,000 "when the conviction is of a felony of the first . . . degree." 9 GCA § 80.50(a) (2005). However, when the statute is read in its entirety, one discovers that subsection (e) allows for a higher amount to be assessed:

> A person who has been convicted of an offense may be sentenced to pay a fine or to make restitution not exceeding:
>
> > (a) Ten Thousand Dollars ($10,000.00), when the conviction is of a felony of the first or second degree;
> >
> > . . . .
> >
> > (e) Any *higher* amount equal to double the pecuniary gain to the offender or loss to the victim caused by the conduct constituting the offense by the offender. In such case the court shall make a finding as to the amount of the gain or loss, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue.

9 GCA § 80.50 (emphasis added).

[41] The use of the word "higher" in 80.50(e) is comparative. The "amount" modified by the word "higher" must be greater than something else, and the only intelligible reading of the statue is that this amount is to be higher than the $10,000 limit in section 80.50(a).[7] If the first sub-section controlled and a first or second degree felony offender's restitution was capped at $10,000, then section 80.50(e) would be useless, irrelevant, and vitiated. This suggests that

[7] Curiously and we will presume, inadvertently, defense counsel in their brief present an excerpt of 9 GCA § 80.50(e) that omits the adjective "higher." Appellant's Br. at 19 (Apr. 14, 2008). Regardless, we remind defense counsel that every attorney has an ethical duty of candor to the court. Guam R. Prof'l Conduct 3.3(a).

restitution awards in excess of $10,000 are allowed under 9 GCA § 80.50(e). *See* 20 GCA § 15133 (2005) ("An interpretation which gives effect is preferred to one which makes void.").

[42] The District Court of Guam, Appellate Division had occasion to consider this exact issue in *People v. Guiang*, 1986 WL 68514 (D. Guam App. Div. 1986). Defendant, Guiang, was convicted of Theft by Unlawful Taking in excess of $500, a felony of the Third Degree. *Id.* at *1. She was ordered to pay restitution of $70,000 to her victim, well above the limit of section 80.50(b), which had a cap of $5,000. *Id.* She appealed, arguing that the statute "sets absolute limits on the amount of restitution a court may order and in her case, a third degree felony, that amount is $5,000." *Id.* at *2. Evaluating the interplay between sub-sections 80.50(b) and (e), the court rejected her appeal and upheld the restitution order:

> The plain meaning of these words is that a criminal can be ordered to pay restitution in the amount of gain received or loss suffered by the victim. In fact, § 80.50 authorizes the court, in its discretion, to order restitution equal to twice that amount. Guiang would have this court consider only subsection (b) and ignore subsection (e). But this analysis would fly in the face of the presumption against idle or useless language in a statute; additionally, it would violate the principle of giving effect to all words in a statute; and finally, it ignores the plain meaning of the language of § 80.50 which authorizes restitution equal to the gain to the offender or the loss to the victim. The restitution order of the Superior Court was well within the constraints of the law and the facts of this case and it will not be disturbed.

Id.

[43] We find *Guiang* to be well established in law and well reasoned, and we will not deviate from its holding. *See Limtiaco v. Guam Fire Dept.*, 2007 Guam 10 ¶ 46 n.9. We agree that section 80.50 allows a judge to order up to $10,000 in restitution without any findings, and to order a higher amount equal to the loss to the victim or gain to offender if the judge makes a finding as to that amount. Therefore, the restitution award of funeral expenses in the amount of $13,899.70 did not exceed the amount authorized by § 80.50(e).

[44] Mallo next objects to the award of restitution based on its recipients, the family of the victim, not the victim (who is deceased) or her estate. All of the $13,899.70 was awarded to the victim's brother for reimbursement for funeral-related expenses. In Mallo's plea agreement, signed more than six years after the murder, he agreed to the following provision:

> That Defendant shall be held liable for restitution pursuant to 9 [GCA] § 80.50(e). Restitution shall include funeral expenses, all related funeral costs, and medical expenses of the victim, Lourdes Constantino Mallo, in an amount to be determined at a restitution hearing.

ER, tab 2 at 3 (Plea Agreement). Despite the fact he expressly agreed to be held liable for "funeral expenses, all related funeral costs, and medical expenses of the victim," Mallo says that in the plea agreement he only accepted liability for "restitution pursuant to 9 [GCA] § 80.50(e)." *Id.* Although Mallo is liable for any funeral expenses pursuant to that statute, he argues he is not liable for any expenses incurred by people who are not covered by section 80.50(e). Because the victim's brother is not the victim, Mallo believes, the trial court cannot award as restitution any funeral expenses the brother paid, even if for the victim's funeral, because Mallo never agreed to cover the brother's expenses.

[45] In his plea agreement, Mallo clearly acquiesced to paying for all of the burial costs, including related expenses, in exchange for the negotiated sentence and other considerations. Contract analysis supports the idea that Mallo should be bound to his promise to pay restitution and deemed to have waived his complaint about who is a victim.[8] This court has likened, though not completely, plea agreements to contracts:

> Clearly, similarities do exist between one area of law and another such that in certain instances principles from one body may aid in the analysis of the another. [sic] For instance, in *Ex parte Johnson,* 669 So. 2d 205 (Ala.1995), the court

[8] The trial court did not consider contract arguments in its decision, but this court has the authority to uphold a decision based on any ground supported by the record. *Hart v. Hart*, 2008 Guam 11 ¶ 15.

> recognized that "plea agreements resemble formal contracts and that contract law theories provide a 'useful analytical framework,' for dealing with plea agreements . . . ." *Id.* at 206 [internal citation omitted]. Qualifying this statement, however, the court further stated that, "contract law cannot be rigidly applied to plea agreements." *Id.*

Naron v. Bitanga, 1999 Guam 21 ¶ 8.

[46] Under contract law, Mallo would be held to the obvious meaning of the agreement—to pay for all of the funeral costs, without qualification as to whom he would pay. According to the Restatement (Second) of Contracts:

> (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
>
> > (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
> >
> > (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

Restatement (Second) of Contracts § 20 (1970).

[47] There is no reason for the People to have assumed that Mallo was only limiting his liability to funeral costs that the victim herself bore since there is no qualifying language in the agreement. Mallo would certainly have had reason to believe the People intended the plea agreement to cover the funeral expenses of the victim, which had already become definite, fixed, and paid for by the victim's brother at the time Mallo entered into the plea agreement.

[48] Under this analysis, the only complaint Mallo could have with his restitution is what he pays, not to whom he is forced to pay. If the total restitution does not exceed the statutory maximum,[9] then Mallo is not actually harmed if he is ordered to pay that amount. Mallo's

[9] In Mallo's case, the statutory maximum would be $10,000 or twice the victim's loss, whichever is greater. 9 GCA §§ 80.50 (a) and (e).

counsel hinted at this when he admitted that payment to the victim's estate would not be in violation of section 80.50. Since the victim's brother has a claim against the estate for the funeral expenses, if the estate were to be awarded restitution against Mallo for those expenses, the amount would simply go to the brother anyway. The only difference is the path, which in this case is of no legally significant consequence.[10] In addition, by entering into the plea agreement, Mallo waived any complaint he may have had with the payee of the restitution order. Because we find that Mallo has waived this alleged error, we do not decide whether section 80.50 would authorize a payment to the family of a victim absent the defendant's agreement to do so.[11]

[49] Finally, Mallo argues that the trial court failed to properly follow the statutory restitution scheme by sentencing him to pay restitution without an appropriate evidentiary basis for its amount and without a hearing on his ability to pay. Section 80.50(e) requires that when the restitution is based on the loss to the victim "the court shall make a finding as to the amount of the . . . loss, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue." 9 GCA 80.50(e) (2005). Another statute, 9 GCA § 80.52, requires that:

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[10] *See* 20 GCA § 15120 (2005) ("The law respects form less than substance."); 20 GCA § 15121 (2005) ("That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."); 20 GCA § 15125 (2005) ("The law disregards trifles.").

[11] The statute is ambiguous in that it does not define "victim," and almost every jurisdiction that allows families of victims to be included in restitution orders has much clearer statutory language allowing or demanding that they be included than does Guam, including all of those states cited by the trial court as reasons to consider the victim's brother to be a "victim" under section 80.50. Other Guam statutes are much more express in defining who may be considered a victim; see Crime Victim's Rights Act of 2004, "'Victim' means a person against whom a crime has been committed . . . ." 8 GCA § 160.30(d) (2005); Compensation for Damages from Criminal Activities, "'*Victim*' means a person who is injured or killed by any act or omission of any other person . . . ." 8 GCA § 161.10(h) (2005); Victims Immunity Act of 2004, "'Victim' is a person who was the object of another's criminal conduct . . . ." 8 GCA 162.10(e) (2005); Family Violence, "*Victim* means any natural person against whom a crime, as defined under the laws of Guam, has been committed or attempted to be committed." 9 GCA 30.10(f) (2005) (all emphasis in original). The Guam Legislature should consider amending section 80.50 to clarify its intent.

> (b) The court shall not sentence an offender to pay a fine or make restitution in addition to a sentence of imprisonment or probation unless:
>
> (1) the offender has derived a pecuniary gain from the offense; or
>
> (2) the court believes that a fine or restitution is specially adapted to deterrence of the type of offense involved or to the correction of the offender.
>
> (c) The court shall not sentence an offender to pay a fine or make restitution unless the offender is or, given a fair opportunity to do so, will be able to pay the fine or restitution. The court shall not sentence an offender to pay a fine unless the fine will not prevent the offender from making restitution to the victim of the offense.
>
> (d) In determining the amount and method of payment of a fine or restitution, the court shall take into account the financial resources of the offender and the nature of the burden that its payment will impose.

9 GCA § 80.52 (2005).

[50] Mallo contends that the trial court did not hold a hearing on his ability to pay, in violation of section 80.52. Given that Mallo has been in custody since 1999, is sentenced to life imprisonment, and the trial court did not grant him credit for his time served, Mallo argues there is no evidence that he can pay restitution. He also asserts that the court did not make any findings of the victim's loss, as required by section 80.50(e), and that the prosecution proffered no evidence of loss. Instead, the court simply relied on the Restitution Report prepared by the probation officer.

[51] When Mallo signed the plea agreement, he agreed in paragraph 7 to the restitution requirement and to pay the entire cost of the funeral and related expenses. ER, tab 2 at 6 (Plea Agreement). In the plea agreement, he also stipulated and agreed "that if given a fair opportunity to pay any fines and restitution ordered by the Court, he will be able to do so." *Id.* Nowhere in his briefs does Mallo argue that he did not understand the significance of paragraph 7. When the plea was entered, Mallo was asked about the plea agreement: "[D]id you read it, understand it,

voluntarily agree to all the terms in this agreement that you signed it?" ER, tab 3 at 10 (Transcript of Proceedings on Appeal). He said, "I have, sir." *Id.*

[52] Unlike the issue of whether Mallo would get credit for time served, which had not yet been decided and was reserved to the discretion of the court in the plea agreement, the funeral expenses had already been incurred when they were negotiated and inserted into the plea agreement. Further, although Mallo objects to the decision of the trial court, nowhere in the record did he take issue with the amounts listed on the restitution report. Mallo offered to pay the restitution amount to obtain valuable concessions from the prosecution. He accepted responsibility for the restitution in court under direction and questioning by the judge and this acceptance was "knowing, intelligent, and voluntary." *Van Bui*, 2008 Guam 8 ¶ 29.

[53] Even if not proffered by the People, the judge could make a judicial finding based on the restitution report and the trial court did just that in its decision: "the Court entered the recommended sentence, including the full amount of $13,899.70 . . . . This amount is consistent with the March 21, 2006 Restitution Report filed by the Probation Office . . . ." ER, tab 9 at 1 (Dec. & Order, Dec. 5, 2007). Indeed, at least to the finding by the judge as to the amount of the restitution, Mallo cannot even explain how he is being harmed by the alleged procedural impropriety. Mallo makes no objection at all as to the amount of the funeral costs.

[54] Mallo clearly stipulated in the plea agreement that if given a fair chance, he would be able to pay the restitution award. While the District Court Appellate Division has held that section 80.52 requires "an evidentiary hearing conducted by the court to determine whether the offender has the financial means to make the payment of restitution," *In re Interest of Cruz*, 1983 WL 29938, at *2 (D. Guam App. Div. 1983), we do not believe *Cruz* can be construed to apply

when the defendant stipulates that he or she has the ability to pay. A stipulation, by its very nature, indicates that no factual dispute exists, and therefore no evidentiary hearing is required.

[55] While it may be true that Mallo cannot now pay the restitution order, it does not mean that the trial court abused its discretion in ordering him to pay restitution under section 80.52. The comments to the Model Penal Code, upon which section 80.52 was based, explain that restitution can be ordered if the "defendant is adjudged capable of paying it, either at once or in the future." Model Penal Code § 7.02 cmt. The trial court in Mallo's case did just that, noting that Mallo has the opportunity for parole within fifteen years and that he has the ability to work while in prison to support its decision to impose a restitution that Mallo had already agreed to pay.[12]

[56] The trial court determined, pursuant to section 80.52, that Mallo had the ability to pay the restitution in the future. That determination is subject to review only for abuse of discretion. This court has announced that, "[a] court abuses its discretion by basing its decision on an erroneous legal standard or clearly erroneous factual findings, or if, in applying the appropriate legal standards, the court misapprehended the law with respect to the underlying issues in the litigation." *San Miguel v. Dep't of Pub. Works*, 2008 Guam 3 ¶ 18. Under this standard, "before reversing a lower court's decision, we must first have a definite and firm conviction the trial court committed clear error of judgment in its conclusion." *J.J. Moving Servs., Inc. v. Sanko Bussan (Guam) Co.*, 1998 Guam 19 ¶ 14.

[57] No such error exists here. The restitution report, especially without any challenge to its veracity by Mallo, serves as a sufficient finding of the victim's loss and the court was within its

[12] The trial court cited to several cases which all hold the same: *Nixon v. State*, 4 P.3d 864, 871-72 (Wyo. 2000); *People v. Frye*, 27 Cal. Rptr. 2d 52, 54-55 (Cal. Ct. App. 1994); and *State v. Van Hoff*, 415 N.W.2d 647, 649 (Iowa 1987). ER, tab 9 at 5-7 (Decision, Dec. 5, 2007).

discretion in not requiring any more evidence. As to the ability to pay, the trial court could consider Mallo's ability to earn money in prison and his eventual release, and could infer from the fact that he promised to pay the funeral costs that he had the ability to pay those costs. Moreover, Mallo voluntarily and knowingly stipulated that if given a fair chance, he has the ability to pay the restitution award.

IV. CONCLUSION

[58] Because Mallo did not waive his right to credit for time served, the trial court erred in denying him that credit. Mallo did, however, waive his right to contest the amount or payee of the restitution award, and that order is upheld. We **REVERSE** in part, **AFFIRM** in part, and **REMAND** to the Superior Court for further proceedings consistent with this opinion.

F. PHILIP CARBULLIDO

F. PHILIP CARBULLIDO
Associate Justice

ROBERT J. TORRES

ROBERT J. TORRES
Chief Justice

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MARAMAN, J., concurring:

[59] I concur with the result reached by the majority. However, I do not believe it is necessary to reach the question of whether or not Mallo may waive his right to appeal the imposition of his sentence.

[60] During the change of plea colloquy, the court asked Mallo the following:

> THE COURT: Do you understand that you are pleading guilty to Murder (As a First Degree Felony) and the maximum sentence I can impose upon you is life imprisonment with the possibility of parole after 15 years and a fine of $10,000.00. [sic] Do you understand that?
>
> MALLO: I do.

ER, tab 3 at 11 (Transcripts of Proceedings on Appeal, Dec. 21, 2005).

[61] Mallo did not knowingly waive credit for time served because it was not explained in the colloquy. In *People v. Van Bui*, 2008 Guam 8 ¶ 11, standards were established for entry of a plea agreement. Those standards were not met in that Mallo clearly did not waive credit for time served because the trial court did not advise him of the consequences of waiver during the colloquy.

[62] I join with the majority in their analysis that the plea agreement should stand and the setting of restitution was proper.

KATHERINE A. MARMAN

KATHERINE A. MARAMAN
Associate Justice