

29 May '09

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals,
Whitbeck, P.J., and Saad and Schuette, JJ,
Affirming Defendant's sentence in the Saginaw County Circuit Court.
Leopold P. Borrello presiding.

PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN,
Amicus Curie,

Supreme Court
No.132876

Ex Rel

Court of Appeals
No. 264052

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Lower Court
No. 03-022840-FH

v

MATTHEW LLOYD MCGRAW,
Defendant-Appellant.

AMICUS CURIE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

PROOF OF SERVICE

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BASIS OF JURISDICTION

Amicus agrees with Plaintiff-Appellant's statement of the basis of this Court's jurisdiction in this matter.

STATEMENT OF QUESTIONS PRESENTED

- I SHOULD THE OFFENSE VARIABLES OF THE SENTENCING GUIDELINES BE SCORED BASED ON THE DEFENDANT'S ENTIRE COURSE OF CONDUCT CONSTITUTING THE OFFENSE BEING SCORED AND IS A COURSE OF CONDUCT NOT COMPLETED UNTIL THE ENTIRE CRIMINAL TRANSACTION HAS CONCLUDED? [Defendant-Appellant's Issues I and II.]**

Plaintiff-Appellee would answer this question "YES."

Defendant-Appellant would answer this question "no."

Amicus Curie answers this question "YES."

These questions were not presented to the Court of Appeals.

- II DOES THE PLAIN LANGUAGE OF MCL 777.39 REQUIRE THAT EVEN CO-DEFENDANT'S BE CONSIDERED WHEN SCORING OFFENSE VARIABLE 9 - NUMBER OF VICTIMS?**

Plaintiff-Appellee would answer this question "YES."

Defendant-Appellant would answer this question "no."

Amicus Curie answers this question "YES."

These questions were not presented to the Court of Appeals.

STATEMENT OF FACTS

Amicus adopts Plaintiff-Appellee's statement of facts except as may be otherwise noted in the following argument.

I THE OFFENSE VARIABLES OF THE SENTENCING GUIDELINES SHOULD BE SCORED BASED ON THE DEFENDANT'S ENTIRE COURSE OF CONDUCT CONSTITUTING THE OFFENSE BEING SCORED. A COURSE OF CONDUCT IS NOT COMPLETED UNTIL THE ENTIRE CRIMINAL TRANSACTION HAS CONCLUDED. [Defendant-Appellant's Issues I and II.]

STANDARD OF REVIEW:

Statutory interpretation is a question of law and is reviewed *de novo*.¹ Whether a statute has been properly applied is also reviewed *de novo*.²

ARGUMENT:

The core question in this case is what constitutes a criminal offense for purposes of scoring the sentencing guidelines. This seems to be a black letter law question: simple, direct, and easy to answer. Unfortunately, criminal acts are often complicated, subtle, and messy.

A STATUTORY ANALYSIS OF THE SENTENCING GUIDELINES STATUTES IS NOT PARTICULARLY HELPFUL IN THIS CASE.

Defendant spends a substantial amount of time and argument wrestling with the question of what events should be scored in a given offense and relies heavily on this Court's opinions in *People v Morson*³ and *People v Sargent*.⁴ This reliance is not exactly misplaced but more, in *Amicus*' view, beside the point.

In *Morson* the issue was directly related to how guidelines for co-defendants are to be scored. This Court made it fairly clear that when co-defendants are convicted of the same

¹*People v Phillips*, 469 Mich 390, 394 (2003).

²*People v Hegwood*, 465 Mich 432, 436 (2001).

³471 Mich 248 (2004).

⁴481 Mich 346 (2008).

offense, in *Morson* armed robbery, they are to receive the same scores for Offense Variable (OV) 1 and OV 3, in accordance with the plain language of the statutes.⁵ This is the rule even if the first co-defendant sentenced was incorrectly scored on these OVs.⁶ *Morson* also held that the plain language of OV 9's internal definition of "victim" included bystanders who become involved in the criminal offense.⁷

Defendant argues that this Court rejected a transactional approach to the sentencing guidelines when the majority opinion noted that it disagreed⁸ with Justice Young's proposed approach to the problem of multiple offender situations by comparing offense variable scores independent of the particular crimes being scored.⁹ *Amicus* suggests that Justice Young was not talking about a transactional approach to individual crimes but rather a transactional view of guidelines scoring of multiple offenders, an entirely different situation.

Given that all the discussion of transactional views of armed robbery by the concurring and dissenting opinions, and the responses by the majority, were unnecessary to the determination of the case,¹⁰ that is, *obiter dicta*, *Morson* really has little if any relevance to the instant case.

Defendant does not fare much better with *Sargent*. In that case, the defendant had been convicted at trial of first and second degree criminal sexual conduct for acts committed against a single 13 year old complainant. At trial, the victim's older sister testified that the defendant

⁵MCL 777.31(2)(b), MCL 777.33(2)(a).

⁶*Morson*, 471 Mich at 258-259.

⁷*Morson*, 471 Mich at 262-262.

⁸*Morson*, 471 Mich at 260 n 13.

⁹*Morson*, 471 Mich at 279-281 (Young, J. concurring in part and dissenting in part.)

¹⁰*Morson*, 471 Mich at 259 n 10.

had also sexually abused her when she was 15 years old.¹¹ At the time of sentencing, the trial court assessed 10 points under OV 9 in the belief that there were two victims.¹² There is no indication in either this Court's opinion or the Court of Appeals' opinion¹³ as to how long a time separated the incidents involving the victim and her sister, but it seems safe to assume they were not closely related in time.

The Court of Appeals affirmed the defendant's convictions without addressing any sentencing guidelines issues.¹⁴

Finally, defendant contends that he was sentenced in violation of *Blakely v Washington*, [citation omitted.] Because this issue is unpreserved, we review the issue for plain error affecting substantial rights. In *People v Drohan*, [citation omitted], [. . .] our Supreme Court definitively held that "the Michigan [indeterminate sentencing] system is unaffected by the holding in *Blakely*" Therefore, defendant failed to demonstrate plain error affecting his substantial rights, *Carines, supra*, and is not entitled to relief on this issue. Further, the evidence in this case adequately supports that trial court's scoring of the challenged offense variables, and defendant's sentence was within the appropriate guidelines. Therefore, we must affirm the sentence. [Citation omitted.]

This Court granted leave to consider whether uncharged acts that *did not* occur during the same criminal transaction as the sentencing offence could be scored in OV 9.¹⁵ The Court, reasonably enough, held that offense means offense and that when the legislature wanted other offenses scored in a given offense variable they said so, clearly and unambiguously.¹⁶ In *Sargent* the defendant was convicted of sexually abusing the 13 year old victim, not her sister.

¹¹*Sargent*, 481 Mich at 347.

¹²*Id.*

¹³*People v Sargent*, Unpublished opinion per curium of the Court of Appeals issued January 25, 2007 (Court No 263392); 2007 Mich App Lexis 147.

¹⁴*Sargent*, 2007 Mich. App. LEXIS 147, *9-*10.

¹⁵*Sargent*, 481 Mich at 347.

¹⁶*Sargent*, 481 Mich at 349-350.

Nor did the abuse of the sister arise from the same transaction. The trial court was simply wrong when it scored OV 9 for two victims.¹⁷ Sometimes even a court of last resort functions as an error correcting court.¹⁸ This is, *Amicus* believes, the true extent of *Sargent*, substantially limiting its application to this case.

Defendant's sole issue on appeal has been the scoring of OV 9 on one of the three files for which he entered pleas of guilty of breaking and entering a building with intent. The scoring of OV 9 in this file was determined, by the Court of Appeals, to be appropriate because Defendant, while fleeing from a pursuing police officer, crashed the getaway car, creating a risk of injury to both his co-defendants, who were passengers in the vehicle.¹⁹ The record is not clear as to who was actually driving, although the Court of Appeals opinion assumes it was Defendant.

In this case, as far as *Amicus* is aware, no one has suggested that the offense variables for breaking and entering, a crime against property, should be modified or in any way take into account actions outside the circumstances of the offense to which Defendant pled. Most, if not all of Defendant's statutory analysis under his Issue I is, frankly, beside the point. His whole argument on this issue succeeds or fails on what is the duration of a criminal offense. Even were we to concede, which we do not, that Defendant's analysis of the various statutes involved in creating or defining the sentencing guidelines are absolutely correct, nothing pertaining to the scoring of OV 9 would change. The question is simply when was the breaking

¹⁷*Sargent*, 481 Mich at 351.

¹⁸MCR 7.302(B)(5).

¹⁹*People v McGraw*, Unpublished opinion per curium of the Court of Appeals issued November 16, 2006 (Court No 264052); 2006 Mich App LEXIS 3384, *6.

and entering over so that Defendant's actions, and the events that followed from them, are no longer relevant to scoring the guidelines for breaking and entering?

B ENOUGH IS ENOUGH. WHEN IS A CRIME COMPLETE FOR SENTENCING GUIDELINES PURPOSES?

In the instant case, Defendant and his two co-defendants broke into a store and stole property of the store. In the process of making their getaway they were intercepted by a police officer who gave chase. The chase ended with the trio crashing their car and attempting to flee on foot. While we do not know the time frame involved, it seems clear that from the entry into the store to the point where the getaway car crashed was an unbroken sequence of events occurring over a short time.

Breaking and entering is a crime that is complete, for charging purposes, within seconds of the criminal's initial action. The black letter elements of the crime are satisfied the instant the criminal uses some force, no matter how slight, to cross into the building with the intent to commit any degree of larceny or a felony therein.²⁰ But merely satisfying the black letter law elements does not mean the criminal activity has ended. A criminal act may occur in complete isolation. A determined criminal may enter a building in complete secrecy, complete his larcenous or felonious activity, exit the building, and make his way to the safety of his lair without being detected or even suspected. No one beyond the victim is affected by his actions. Manifestly this is not the case here.

Defendant and his co-defendant's broke into the store, committed larceny of the store's property, and were detected almost at once whereupon the driver of the getaway car led the

²⁰MCL 750.110.

police on a chase until he crashed his car into a fence and they were forced to flee on foot. The record appears to be silent on the nature of the chase and the traffic conditions at the time, so we do not know how many people were put in jeopardy by these actions. Defendant metaphorically shrugs his shoulders and asks “so what?” His crime was over the instant he crossed the threshold of the store with larceny in his heart. How can anything that happened after that matter in evaluating the sentencing offense?

In support of this view, Defendant offers a bright line test in Issue II of his brief. Unless a crime is one that is, by its very nature, a continuing crime that does not have a clear cut end point, discernable by simply referring to the elements, then the crime is completed when the elements are satisfied such that it could be charged. In the case of the instant breaking and entering that would be the moment the criminal, i.e. Defendant, entered the building, by the application of some force, with the intent of commit larceny.

Bright line tests are simple and, in most cases, easy to apply. The problem with bright line tests is that the Law, like Life, is not defined by a neat set of rules and circumstances that are clear and unambiguous at all times. An elemental approach to determining when an offense ends, given the messy reality of criminal activity, may artificially limit consideration of all the circumstances surrounding a course of criminal conduct. That is to say, the *res gestae* of the crime.

The *res gestae* of a crime is a well settled concept in criminal law. As Justice Markman noted in his dissent in *People v Randolph*,²¹

²¹ 466 Mich 532, 579 (2002) (Markman, J. Dissenting).

However, “res gestae” in terms of the law, and in the context in which Perkins^[22] used it, simply means “the whole of the transaction under investigation and every part of it.” It means “things or things happened.” Indeed, a res gestae witness is defined as “an eyewitness to some event in the continuum of the criminal transaction and one whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense.” Black's Law Dictionary (6th ed).

Res gestae is used in determining the course of a criminal offense for purposes of applying the felony murder statute,²³ for admitting other acts evidence outside the parameters of MRE 404(b) when those acts are an integral part of the crime,²⁴ or, prior to the 1986 amendments to MCL 767.40a, when a witness must be endorsed on the information and produced at trial by the prosecution.²⁵ It seems to *Amicus* that it is an equally useful concept in determining the course of conduct that should be considered when scoring the sentencing offense.

If we follow Defendant’s reasoning to its logical conclusion, nothing that would not support a separate criminal charge could be used to score the guidelines except in the limited context of OV 14 - Offender’s Role; and OV 16 - Degree of Property Damage, and, in some cases whether the defendant has engaged in predatory conduct under OV 10 - Exploitation of a Victim’s Vulnerability. Defendant offers a list of the offense variables that he claims show specific legislative intent to use facts beyond the elements of the sentencing offense.²⁶ Defendant argues that these variables expressly allow the sentencing court to consider circumstances underlying the entire criminal transaction, and sometimes circumstances

²²Perkins, Criminal Law (2d ed).

²³*People v Gillis*, 474 Mich 105, 121 (2006).

²⁴*People v Sholl*, 453 Mich 730, 742 (1996).

²⁵*People v Perez*, 469 Mich 415, 418 (2003).

²⁶Defendant’s Brief on Appeal p 11 n 10.

beyond the immediate crimes, in order to claim that other offense variables should be severely limited to the elements of the exact sentencing offense. *Amicus* disagrees with this interpretation as to most of the offense variables listed.

In order, these are the reasons for *Amicus*' disagreement on the nature of these offense variables. Offense Variable 3 simply classifies the offense being scored depending on whether it involves a homicide or not. This is hardly a direction to look to the entire course of conduct. Nor does *Amicus* agree that OV 8 - Victim Asportation or Captivity, falls into the same group as the other variables Defendant lists. The factors to be considered in scoring OV 8 are actually focused on the elements of the sentencing offense to the exclusion everything else.

Amicus must also disagree with Defendant's assessment that OV 11 - Sexual Penetrations, falls into this category of offense variables. Offense Variable 11 is too narrowly focused on events that are arguably part of the sentencing offense (penetrations that arise out of the sentencing offense) but uncharged as separate crimes. As to OV 12 and OV 13, *Amicus* suggests that these variables, by their very nature, deal with acts that could support separate criminal charges and have no requirement that they be based on conduct directly related to the sentencing offense. Indeed, OV 13 affirmatively allows charged and uncharged crimes far removed in time and place from the sentencing offense. As, to a somewhat more limited extent, does OV 12. Both OV 12 and OV 13 contemplate a broader review of a defendant's conduct. While OV 12 may, in many if not most cases, involve reviewing a criminal transaction that includes more offenses than the sentencing offense, it is not limited to that view. Indeed, OV 12 clearly looks to hold a defendant accountable for felonious acts that may have no

relation to the sentencing offense other than proximity in time. A crime spree variable, as it were. Note, however, that criminal behavior not rising to the level of a felony is not included. Note also the requirements that the other felonious acts not result in conviction and not be sexual penetrations scored under OV 11.²⁷ Offense Variable 13 is even less focused on the immediate criminal transaction, except as it requires the sentencing offense be included in the eventual tally. Again, only felony level offenses may be counted and there are a number of other limitations. There must be at least three felonies that were not scored in OV 11 or OV 12, except when the other offense involved relates to a pattern of felonious activity directly tied to membership in an organized criminal gang. There are also limitations on the use of controlled substance offenses in various situations. *Amicus* would characterize this offense variable as a catch all provision to enable the sentencing court to hold a defendant accountable for being a career criminal even when he has managed to avoid being convicted for some of his felonious acts.²⁸

Finally, OV 16 - Degree of Property Damage, is somewhat of a special case. The offense variable more or less tracks the change in the property damage statutes that allowed the prosecutor to aggregate the value of damaged property. The offense variable is somewhat more expansive than the charging statute in that it allows consideration of uncharged or dismissed (pursuant to plea bargain) incidents. These other incidents may or may not be part of the criminal transaction that the sentencing offense is based on. To the extent that they are

²⁷This dovetails nicely with Prior Record Variable (PRV) 7 - Subsequent or Concurrent Felony Convictions.

²⁸The level of proof required for sentencing guidelines factors is a preponderance of the evidence. *People v Ratkov*, 201 Mich App 123, 125 (1993).

not part of a single transaction OV 16, like OV 12 and OV 13, considers the defendant's general conduct in fashioning a individualized sentence. To the extent that they are part of the same incident, the legislature has recognized the injustice of allowing an offender to escape the consequences of his total course of conduct.

Considering these offense variables, point by point, we are left with Offense Variables 14 (and occasionally OV 16) as the variable that supposedly is the exception that proves the rule that only specific offense variables can consider events within the overall *res gestae* of the sentencing offense. Of all the possibilities Defendant cites, OV 14 is the only one that explicitly requires the sentencing court consider the entire criminal transaction. And that consideration is, again, narrowly focused on a single question. In the case of OV 14 the question is whether the defendant was a leader in a multiple offender situation. Of all the offense variables that supposedly tell us to look to the whole criminal transaction, or to look outside the sentencing offense, only OV 14 (and occasionally OV 16) actually directs an analysis of a defendant's course of conduct. The rest are specialized scoring devices (as in OV 16, generally) that seem to be designed to take into account the less precise facts of a defendant's criminal history and overall conduct.

Defendant may argue that if this analysis is correct then OV 14 really *is* the exception that proves the rule. If only OV 14 specifically directs the scoring court to consider the entire criminal transaction, is that not proof that the other offense variables only apply to the narrow definition of the sentencing offense as encompassed by the elements of the crime? No, it does not.

The instruction to consider the entire criminal transaction should be viewed as nothing more than a reminder that leadership in a multiple offender enterprise may not be readily discernable based on the circumstances surrounding one offense, even when viewing the entire *res gestae* of the offense. In some cases leadership will only be evident when viewing the entire transaction, which may include several distinct parts, some criminal, some not, over a considerable period of time.

We are left with the conclusion that there are no exceptions to prove the rule because the rule would make it impossible to accurately evaluate a defendant's conduct over the *res gestae* of the sentencing offense. *Amicus* believes the *res gestae* doctrine provides a workable theory for what circumstances should be considered in scoring the offense variables for the sentencing offense and proposes an alternative to Defendant's rule.

As previously noted, the *res gestae* doctrine is well settled law. Seventy-five years ago this Court set out the working rules for determining the *res gestae* of a crime.²⁹

“*Res gestae* are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.” *Stirling v Buckingham*, 46 Conn. 461 [1878].

“No inflexible rule has ever been and probably never can be adopted as to what is a part of the *res gestae*. It must be determined largely in each case by the peculiar facts and circumstances incident thereto; but it may be stated as a fixed rule that, included in the *res gestae* are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.” *Chicago & Erie Ry. Co. v. Cummings*, 24 Ind. App. 192, 209 (53 N.E. 1026, 1031) [1899].

²⁹*People v Kayne*, 268 Mich 186, 191-192 (1934).

“And as long as the transaction continues, so long do acts and deeds emanating from it become part of it, so that, describing it in a court of justice, they can be detailed. * * * Nor are there any limits of time within which the *res gestae* can be arbitrarily confined (citing Wharton on Criminal Evidence (9th Ed.), § 262).” *Territory v. Clayton*, 8 Mont. 1 (19 Pac. 293, 297) [1888].

There is nothing in this that is out of the ordinary. Trial courts decide these sorts of issues on a regular basis. There is no reason to think they are not capable of doing the same in the context of scoring the sentencing guidelines. Indeed, *Amicus* suspects this is the way most sentencing offenses are typically scored by most trial courts.

Applied to the facts of this case, the breaking and entering in the sentencing offense, we can see the logic of using the *res gestae* doctrine. The larceny, the flight, the police pursuit, and the eventual crash of the getaway car all “grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.” The flight and the attempt to escape from the attentions of the police would, at trial, serve as evidence of the defendants’ knowledge of their guilt and proof of their intent to permanently deprive the shop owner of property they took. Evidence to that effect would surely be allowed for those purposes, even if the act of fleeing the police was uncharged and would be considered an other act under MRE 404(b). Why, then, should it not be considered as part of the criminal conduct surrounding the breaking and entering?

This Court should adopt a *res gestae* rule for determining the course of conduct to be scored as part of the sentencing offense under the statutory guidelines. Defendant’s sentence should be affirmed.

II THE PLAIN LANGUAGE OF MCL 777.39 REQUIRES THAT EVEN CO-DEFENDANT'S BE CONSIDERED WHEN SCORING OFFENSE VARIABLE 9 - NUMBER OF VICTIMS.

STANDARD OF REVIEW:

Questions of law are reviewed de novo.³⁰

ARGUMENT:

Defendant raises several cases construing the former judicial sentencing guidelines to argue that his co-defendants can not possibly be considered victims for purposes of scoring OV 9, no matter what the plain language of the statute says. Those cases seem to *Amicus* to be irrelevant to the instant question. This Court, interpreting its own rules, has fewer constraints, if any, than it does when interpreting a legislative enactment.

Two of the cases Defendant cites are *People v Love*,³¹ and *People v Latzman*.³² In *Love*, the Court of Appeals, citing absolutely no authority for the proposition, determined that “common sense” dictated that injuries suffered by a defendant could not form the basis for scoring former OV 18 - Injury or Threat to Life. Interestingly enough, even though the panel observed that the defendant’s objection at sentencing did not specifically state the reasons for the objection, which would generally preclude meaningful appellate review, the court apparently gave the whole issue a pass because the change in the points assessed did not change the resulting sentence.³³ In *Latzman*, the defendant had been scored points under former OV 6 - Multiple Victims, for three or more victims. The case involved a plea to manslaughter based

³⁰*People v Maynor*, 470 Mich 289, 294 (2004).

³¹144 Mich App 374 (1985).

³²153 Mich App 270 (1985) vacated on other grounds 429 Mich 866 (1987).

³³*Love*, 144 Mich App at 377.

on a vehicular homicide. There was evidence that the deceased victim was the only passenger in his vehicle. Defendant argued that there were only two possible victims, the decedent and a passenger in his vehicle. The evidence indicated that there were no passengers in decedent's vehicle, but there were two or three passengers in the defendant's vehicle.³⁴ The panel noted, in passing, that the defendant could not be considered a victim under former OV 6, citing to *Love, supra*, but that the passengers in his vehicle could.³⁵ *Latzman* points to *Love*, which points to – no authority at all.

Defendant returns to *People v Sargent, supra*, and makes the same argument. As this Court noted in *Sargent*, the question was if OV 9 could “be scored using uncharged acts that did not occur during *the same criminal transaction* as the sentencing offenses.”³⁶ The question of when the sentencing offense ended was not really in dispute in *Sargent* because it was clear the acts involving the victim's sister occurred at a considerable remove from the acts that formed the basis for the sentencing offense. *Sargent* adds nothing to our analysis of the instant case.

Defendant's final case is *People v Cannon*³⁷ a case involving the interpretation of OV 10 - Exploitation of a Victim's Vulnerability. In *Cannon* this Court, rather than find a limitation to the plain meaning rule of statutory construction³⁸ rigorously applying the rule to the language of MCL 777.40. It is clear the Court had the doctrine that a statute must be read

³⁴*Latzman*, 153 Mich App at 274.

³⁵*Id.*

³⁶*Sargent*, 481 Mich at 347 (emphasis added).

³⁷481 Mich 152 (2008).

³⁸*Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 539 (1997) (.The words in a statute must be given their ordinary meaning according to common usage.)

in its entirety, giving due consideration to all its provisions³⁹ firmly in mind while interpreting MCL 777.40.⁴⁰ Defendant's claim that the Court read the requirement that the victim be a "vulnerable victim" into the statute "despite the plain language in the various subsections" is simply not on point. The plain language of the very first sentence of the statute says "Offense Variable 10 is exploitation of a vulnerable victim."⁴¹ The Court's interpretation of the remaining clauses of the statute properly applied this modifier to all the subsequent references to a victim. If anything, *Cannon* is a unanimous affirmation⁴² of this Court's consistent championing of the plain meaning rule of statutory construction. As with the other cases Defendant cites, *Cannon* adds nothing to the analysis of the instant matter.

This Court is not required to "broadly interpret the term 'victim' under Offense Variable 9" as Defendant would have it.⁴³ All this Court has to do is apply the same rules of statutory construction it has long advocated. "If the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written."⁴⁴ In this case the legislature specifically defined victim as "each person who was placed in danger of physical injury or loss of life. . . ."⁴⁵ and this Court should so hold.

Defendant's sentence should be affirmed.

³⁹*Auto-Owners Ins. Co. v. State Farm Mutual Automobile Ins. Co.*, 187 Mich App 617, 619 (1991).

⁴⁰*Cannon*, 481 Mich 157-158.

⁴¹MCL 777.40(1).

⁴²All seven Justices agreed that point should only be assessed under OV 10 when the offender has exploited a vulnerable victim. *Cannon*, 481 Mich at 162 (Cavanagh, J. concurring in part and dissenting in part.)

⁴³Defendant's Brief on Appeal p 43.

⁴⁴*People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998).

⁴⁵MCL 777.39(2)(a).

***AMICUS* TAKES NO POSITION ON DEFENDANT-APPELLANT'S ISSUE IV, but leaves the matter in the capable hands of Plaintiff-Appellee.**

CONCLUSION AND RELIEF REQUESTED

Defendant has failed, in the issues considered by *Amicus*, to demonstrate any error in his sentence requiring reversal or resentencing. This Court should adopt a rule for determining which circumstances may be considered in scoring the sentencing guidelines' offense variables based on the well established *res gestae* rule. Finally, this Court should affirm the plain language of MCL 777.39 which provides a specific definition for victim that would encompass the co-defendants in this case.

Respectfully submitted,

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By:


Timothy K. Morris
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St. Clair County Prosecuting Attorney's Office

Dated: May 4, 2009