STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC NO. 144979
COA NO 302293
LC NO 09-5862-FC

DEVON DECARLOS GLENN, JR.

Defendant-Appellee.

/

AMICUS CURIAE BRIEF OF DAVID SCOTT FARNEN

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Amicus Curiae Farnen is a state prisoner serving a sentence under similar OV 7 socring. He has an interest in seeing that the law is decided fairly to all defendants and further interest in the outcome of Glenn and his appeal. He seeks leave to file an Amicus Curiae brief in this matter under MCR 7.306(D)(1), MCR 7.316(B).

STATEMENT OF QUESTION PRESENTED

Whether a reasoned analysis of Michigan's statutory Sentencing Guidelines and appellate decisions will clearly demonstrate that the Legislature never intended that a one time use of non-aggravated physical violence used as a means to incapacitate, and not designed to substantially increase the fear and anxiety of the two victims, be used to score 50 points under the offense variable 7 in MCL 777.37(1)(a)?

Amicus Curiae Appellee says "Yes"

Defendant-Appellee says "Yes"

Plaintiff-Appellant says "No"

Amicus Curiae Appellant says "No"

STATUTORY PROVISIONS INVOLVED

Amicus Curiae Farnen incorporates by reference that provided by Amicus Curiae Assistant Attorney General Marks G. Sands

STATEMENT OF FACTS

Amicus Curiae Farnen accepts the statement of material proceedings and facts submitted by Defendant-Appellee Glenn

I. A REASONED HISTORICAL ANALYSIS OF MICHIGAN'S STATUTORY SENTENCING GUIDELINES AND APPELLATE DECISIONS WILL CLEARLY DEMONSTRATE THAT THE LEGISLATURE NEVER INTENDED THAT A ONE TIME USE OF NON-AGGRAVATED PHYSICAL VIOLENCE USED AS A MEANS TO MINIMALLY INCAPACITATE, AND NOT DESIGNED TO SUBSTANTIALLY INCREASE THE FEAR AND ANXIETY OF THE TWO VICTIMS, BE USED TO SCORE 50 POINTS UNDER OFFENSE VARIABLE 7 IN MCL 777.37(1)(a)

The Peoples' argument is both without merit and inconsistent with the Legislative scheme in fashioning mandatory statutory sentencing guidelines Michigan Sentencing Guidelines were first enacted by P.A. 127, No. 175, and amended by P.A. 1998, No. 307, eff Dec 15, 1998, and P.A. 2002, No. 137, eff 4/22/02

In light of judicial overreaching and to bring uniformity in sentences, the Legislature made guidelines mandatory to satisfy the criminal justice system and victims rights while being mindful of a defendant's potential for rehalitation Consideration of prior record variable (PRV's) and offense variables (OV's) are used to achieve this goal However, important to this argument for Glenn and other similar defendants' scored under OV 7 is a discussion of the changes over the past twenty years with various offense variables which identify "Terrorism"

Two years after Michigan enacted "judicial sentencing guidelines" in 1988, the Supreme Court granted leave in People v Milbourn, 435 Mich 630 (1990), where the Court was receiving cases with excessive sentences. Troubled with a sentencing court's subjective reason for guideline departure. the Supreme

Court did a thorough review of its previous decision in People v Coles, 417 Mich 523 (1983), and other case law under the principle of proportionality. The Court held 27 cases in abeyance ranging from assault w/i murder, criminal sexual conduct, robbery, breaking and entering, larceny and drugs.

The Court referenced eleven (11) of those cases with robbery. Milbourn, at 461 NW2d 40-46. In overruling Coles the court recognized the importance of placing substantive limitations on judges with objective and verifiable information in the sentencing process Although Milbourn still remains good law and a guide by which the Courts follow, much of it has been incorporated in the 1998 and 2002 amendment of the Sentencing Guidelines.

However, as evidence from the illustrative cases referenced with regard to robbery, Milbourn continues to be instructive on the appropriate model by which the judiciary have struggled in fashioning sentencing See People v Smith, 482 Mich 292; 784 NW2d 284, at 292, 295 fn 41 (2008), citing People v Babcock, 469 Mich 247, 257-258 (2003).

Prior to the 1998 change in the Sentencing Guidelines, terrorism was scored under OV 2, along with sadism. Between 1988 and 1998 each offense was designated under 10 categories: Assault, Burglary, Criminal Sexual Conduct, Drugs, Fraud, Homicide, Larceny, Property Destruction, Robbery, and Weapons Possession The amendment broke the offenses down to five (5) categories: crimes against a person, crimes against property, crimes involving controlled substances, crimes against public

order, crimes against public safety and crimes against public trust P A. 1998, No. 317, eff Dec 15, 1998 MCL 777.31-34.

When the 1998 was amended, the OV component, terrorism, was assigned a different category, OV 7 and eliminated scoring of 25 points from its previous 1988 OV 2 element of bodily injury and/or subjected to terrorism This clearly reflected the Legislatures intent to punish more severely only "excessive" criminal conduct beyond the inclusive conduct by scoring 50 points

When the guidelines were amended again by P.A 137, 2002, eff April 22, 2002, the OV component, terrorism was pulled from OV 7 and reassigned its own category, OV 20. See MCL 750 543b, and MCL 777.49a(2)(a). Obviously, these major changes were prompted by the act of terrorism by foreign terrorist on the World Trade Center on 9/11 Prior to the change in the 1998 and 2002 Sentencing Guidelines, **for a criminal defendant's conduct to equate to terrorism**, it needed to go beyond boundaries of reprehensible conduct; it needed to escalate beyond dreadful conduct; it needed to go beyond conspicuously bad and offensive conduct

No where are these propositions more true than in People v Dilling, 222 Mich App 44, 55; 564 NW2d 56 (1997). Dilling was a criminal sexual conduct case where young men forcefully took a toddler from her mother and forced the toddler to perform oral sex on another infant. The Dilling panel reasoned the conduct was such that it did not indicate conduct designed to increase substantially fear and anxiety in the toddler Dilling further

noted the defendants did not care one way or another about the toddler's feelings. In conclusion, Dilling ruled that the criminal conduct by the defendants did not equate with the definition of terrorism.

Two years after Dilling was decided, the 1999 Sentencing Guidelines came into effect. With that change the Michigan Court of Appeals began affirming the application of 50 points for the OV component, terrorism, in a way that certainly seemed, in contrast with Dilling, arbitrary. This is apparent in People v Leversee, 243 Mich App 337; 622 NW2d 325 (2000), People v Hornsby, 251 Mich App 462; 650 NW2d 700 (2000), and People v Wilson, 252 Mich App 390; 652 NW2d 488 (2002).

As the Defendant-Appellee's appellate counsel Linda D. Ashford pointed out in her brief, page 7 to 12, both published and unpublished cases cited by the People are distinguishable on the facts However, in another similar case in People v David Scott Farnen, COA NO. 233395, 5/31/01, SC NO 119414, 10/29/01, and on post-appeal relief, COA NO. 306121, 11/21/2011, and SC NO. 144227, 7/24/2012 and on reconsideration 10/22/2012, the Court of Appeals and this Court would not grant leave

However, the facts in Farnen is particularly useful to a proper resolution of Glenn and the proper interpretation and/or clarification of under what facts and circumstances should 50 points be scored under OV 7.

In particular, while it is this party's belief that neither Glenn nor Farnen engaged in the type of conduct that warranted

scoring of 50 points under OV 7 because there was no display of sadism, torture, or excessive brutality under any of the specific scenario's set forth on page 7 to 12 of Defendant-Appellee's brief, both were nevertheless scored 50 points. Although Farnen never struck any of the victims, he nevertheless pointed a weapon Glenn on the other hand, struck each attendant one time but never pointed a weapon at them. In both cases 50 points were assessed.

Contrary to the Peoples argument that it is difficult to reconcile the Court of Appeals decision with two of its earlier unpublished opinions in People v King, Docket No 279809, 12/11/2008, and People v Hereford, Docket No. 227296, 1/28/2003, the cases can be reconciled because they both clearly demonstrate "extreme brutality and/or heinous conduct".

But in the same vein, the Prosecutor cannot reconcile the disparity in rationality between Glenn and Farnen which are very similar in several ways. Under the Prosecutors argument virtually every defendant who commits a robbery with a weapon and strikes a victim or simply points a weapon, constitutes terrorism within the meaning of the statute. The Prosecutor is asking this Court to reverse the Court of Appeals decision so that sentencing Courts can continue to use their own subjective reasoning in scoring OV 7 and ultimately second-guess legislative intent by ignoring the plain language "excessive brutality" by somehow converting a one time strike to the head with a non-lethal toy weapon to sadism or torture.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals did not error in remanding Glenn for resentencing. The county prosecutor essentially had no standing to object to the OV 7 scoring or for that matter, any scoring because as an officer of the court, he was bound by the integrity of the plea with Glenn's full cooperation, but instead reneged by objecting to OV 7 so that Glenn would receive the maximum sentence. This conduct itself reeks of arbitrary justice and serves to dishonor the fairness and integrity of the criminal justice system not to mention the waste of scarce judicial resources.

As such, Amicus Curiae Farnen respectfully urges this Court to clarify Glenn, affirm the Court of Appeals remand for resentencing of Glenn and remand for resentencing without scoring of 50 points under OV 7.

Respectfully submitted,

David Scott Farnen
Amicus Curiae Appellee

Dated: 12/27, 2012