

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Michigan Court of Appeals  
Bandstra, P.J., and Fort Hood and Davis, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 144979  
Plaintiff-Appellant, Court of Appeals No. 302293  
v Jackson Co Circuit No. 09-5862-FC  
DEVON DECARLOS GLENN, JR.,  
Defendant-Appellee.

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**BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE***

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## **INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE**

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of this role, the Court Rules provide that the Attorney General may file a brief as *amicus curiae* without seeking permission from this Court. MCR 7.306(D)(2).

## **COUNTER-STATEMENT OF QUESTION PRESENTED**

In an order dated June 8, 2012, this Court granted the People's application for leave to appeal and ordered the parties to address the following question:

Whether the trial court erroneously assessed 50 points for offense variable 7 (OV 7), MCL 777.37(1)(a), for committing assaultive acts beyond those necessary to commit the offense.

**STATUTORY PROVISION INVOLVED**

**MCL 777.37(1)(a)**

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense..... 50 points

(b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense..... 0 points

(2) Count each person who was placed in danger of injury or loss of life as a victim.

(3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

## INTRODUCTION

“The direct use of force is such a poor solution to any problem, it is generally employed only by small children and large nations.”

David Friedman, American political scientist

The Court of Appeals panel below held that smashing two men in the face with the butt of a rifle during the course of an armed robbery was not conduct “designed to substantially increase the fear and anxiety” of those victims beyond the fear and anxiety that occurs in most armed robberies. This ignores reality.

When victims are held at gunpoint during a robbery, they suffer from a certain level of fear and anxiety. But when a defendant escalates from a *show of force* to the actual *use of force*, the victims’ level of fear and anxiety necessarily increases substantially. That is why assailants conducting an armed robbery use force: to cause more fear and anxiety in the victims. The panel’s contrary holding cannot be reconciled with either the language of the statute or with common sense.

The panel’s decision is also inconsistent with the principles underlying Michigan’s sentencing guidelines. One of the guidelines’ purposes is to take into account the circumstances surrounding the commission of the crime. That is what the trial court did in scoring OV-7 in this case. It concluded that Glenn should serve a more severe sentence as a consequence of his decision to use force gratuitously. The panel has perversely rewarded Glenn for his use of unnecessary physical violence. This Court should reverse and reinstate Glenn’s sentence of 15 to 30 years’ imprisonment.

## COUNTER-STATEMENT OF FACTS

Attorney General Schuette adopts the People's recitation of facts as accurate and complete.

## ARGUMENT

- I. **The use of physical violence beyond that necessary to commit an armed robbery is conduct "designed to substantially increase the fear and anxiety of the victims" and, therefore, can properly be scored under OV-7.**

"The premise of our system of criminal justice is that, everything being equal, the more egregious the offense . . . the greater the punishment." *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003). The Legislative guidelines serve that premise by fashioning a defendant's sentence in a range determined by looking, in part, at his conduct while committing the offense. It cannot be argued that a defendant who commits an unnecessary physical assault during the course of an armed robbery has committed a more egregious offense than one who simply relies on the *show* of force. It follows, then, that such a defendant should serve a greater punishment. The Legislature has done just that, by requiring the trial court to score 50 points for Offense Variable 7 (OV-7) for conduct that was "designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). But the panel in this case has added a new requirement to the guidelines, holding that the defendant's conduct must be "particularly egregious." That holding conflicts with the purpose of the statute and is unsupported by the statutory text.

MCL 777.37(1)(a) states that a defendant must be assigned 50 points under OV-7 if the “victim was treated with sadism, torture, or excessive brutality, or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” According to the panel, the phrase “substantially increase the fear and anxiety a victim suffered” must be defined in light of the terms that precede it. *People v Glenn*, 295 Mich App 529, 533-534; 814 NW2d 686 (2012). “Sadism,” “torture,” and “excessive brutality” all describe particularly egregious behavior and, thus, the panel reasoned that the “substantial increase” provision must be similarly egregious. *Id.* That is, the “conduct” must be of the same egregious nature as “sadism,” “torture,” and “excessive brutality.” *Id.* But this reasoning is not consistent with the language of the statute.

The panel’s erroneous statutory interpretation derived from its failure to account for the Legislature’s use of the disjunctive word “or.” This Court has noted that “or” is a “disjunctive [term], used to indicate a disunion, a separation, an alternative.” *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011). In order for there to be alternatives, each phase must necessarily relate to different behavior. But the panel simply blended these concepts together. As the prosecutor noted, the panel failed to explain what remains of the “conduct” phrase under its new definition. Under the panel’s definition, it is impossible to conceive of a circumstance where a victim was treated with “conduct designed to substantially increase the fear and anxiety a victim suffered” without also meeting the definition of “sadism,” “torture,” or “excessive brutality.”

The panel erred. Courts “must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.” *People v Couzens*, 480 Mich 240, 249, 747 NW2d 849 (2008). Here, the phrase “substantially increase” modifies the term “conduct.” “Increase” is defined as “to become greater or larger.” American Heritage Dictionary (2d College Ed 1985), p 653. “Substantially” is defined in pertinent part as “considerable in importance, value, or degree.” *Id.*, p 1213. Thus, the statute’s plain language says that OV-7 relates to conduct which causes a victim’s fear or anxiety to become significantly greater.

The statutory language also demonstrates that the relevant “conduct” can go beyond the acts necessary to commit the sentencing offense. The panel correctly noted that any armed robbery necessarily entails fear and anxiety on the victim’s part. Had the Legislature intended that all fear and anxiety be scored under OV-7, it would have done so plainly by using a term such as “cause.” Instead, the Legislature assumed that a victim suffers “fear and anxiety . . . during the offense” and only required 50 points to be scored when the defendant “substantially increases” a victim’s fear or anxiety. Thus, the defendant must take some action during the robbery that substantially increases a victim’s fear and anxiety beyond what a victim would ordinarily feel. One way to accomplish this is to escalate a threat of force into a use of force. That is, the relevant “conduct” for purposes of OV-7 includes conduct other than what is necessary to accomplish the crime itself.

Holding defendant accountable at sentencing for assaultive acts beyond those necessary to commit the offense is consistent with “[t]he premise of our system of criminal justice . . . that, everything being equal, the more egregious the offense . . . the greater the punishment.” *Babcock*, 469 Mich at 263. Outside of this case, the Court of Appeals has routinely held that unnecessary assaultive acts constitute conduct intended to substantially increase a victim’s fear or anxiety. For instance, in *People v Clark-Willis*, No. 302388, 2012 WL 933818 (Mich App Mar 30, 2012), the defendant and others approached the victim from behind and struck him in the head with a rock. While the victim was on the ground, the defendant held him down and threatened to shoot him. The Court of Appeals noted that “the restraint and continual threat to shoot and kill [the victim] was designed to substantially increase his fear during the robbery.” OV-7 was properly scored. *Id.* at \*2.

The Court of Appeals similarly considered a defendant’s unnecessary assaultive acts in *People v Hereford (On Rehearing)*, No. 227296, 2003 WL 193523 (Mich App Jan 28, 2003). In *Hereford*, the defendant and his co-defendant robbed a restaurant. During the robbery, the defendant struck one of the victims on the back of his head. *Id.* at \*3. In addition, the defendant fired his weapon into the air. Because the defendant’s conduct “substantially increased”<sup>1</sup> the victims’ fear and anxiety, OV-7 was properly scored.

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<sup>1</sup> At the time of the offense, OV-7 applied to victims “treated with terrorism, sadism, torture, or excessive brutality.” *Hereford*, 2003 WL 193523 at \*3. “Terrorism,” in turn, was defined as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.” *Id.* The statute was amended in 2002. 137 PA 2002.

The panel's decision below cannot be reconciled with the statutory language. Moreover, its conclusion—that the assault in this case was insufficient to substantially increase the victims' fear and anxiety—defies logic. As the prosecutor noted in his brief, the act of being struck in the head with the butt of what appears to be a shotgun is something that would place any reasonable person in substantial fear of further harm or death. (People's Brief, p 4.) And the panel simply ignored the fact that defendant forced the victims behind the counter—a place where it would be difficult to escape but would allow for the defendants to shoot them in a convenient manner. Those are circumstances that would cause any victim to experience significantly greater fear and anxiety.

This Court has recognized that a reasonable person in the victims' position would be right to be significantly fearful and anxious once the defendant assaulted them. In *People v Robinson*, 475 Mich 1; 715 NW2d 44 (2006), this Court recognized that assaultive behavior of this nature can quickly get out of control. In *Robinson*, the defendant and another man went to the victim's house to assault him. *Id.* at 4. The defendant knew that his co-defendant was in an agitated state before the assault. After the two men beat on the victim, the defendant stated "that's enough" and left. The co-defendant ultimately shot and murdered the victim. This Court affirmed the defendant's conviction of second-degree murder on an aider and abettor theory. This Court reasoned that a "natural and probable consequence" of a plan to assault someone is that one of the actors may well escalate the assault into a murder. *Id.* at 11.

The same reasoning applies here. A reasonable person facing an armed robbery that turned violent would have to be superhuman not to be in substantial fear or anxiety that the robbers would further escalate the use of force.

### **CONCLUSION AND RELIEF REQUESTED**

OV-7 must be scored 50 points when a defendant engages in assaultive acts beyond those necessary to commit the offense. A defendant's escalation from a *show* of force to the actual (but unnecessary) *use* of force fits squarely within the statute.

Accordingly, *Amicus Curiae* Attorney General Bill Schuette respectfully urges this Court to reverse and reinstate Glenn's sentence.

Respectfully submitted,

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