# Legislative Analysis

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**REVISE ELEMENTS OF OFFENSE VARIABLE 7**

**House Bill 4463 as reported without amendment**
**Sponsor: Rep. Kurt Heise**
**Committee: Criminal Justice**
**Complete to (4-28-15)**

***BRIEF SUMMARY:*** The bill would revise the elements constituting Offense Variable 7 (*aggravated physical abuse)* within the sentencing guidelines to allow 50 points to be scored if a victim was treated with sadism, torture, excessive brutality, or *similarly egregious* conduct designed to substantially increase the fear and anxiety of a victim.

***FISCAL IMPACT:*** The bill could increase costs for state and local correctional systems. Information is not available on the number of persons that might be convicted under the new terms. Felony convictions could result in increased costs related to state prisons, county jails, and/or state probation supervision. The average cost of prison incarceration in a state facility is roughly $34,800 per prisoner per year, a figure that includes various fixed administrative and operational costs. The costs of local incarceration in a county jail vary by jurisdiction. State costs for parole and felony probation supervision average about $3,800 per supervised offender per year. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

***THE APPARENT PROBLEM:***

A recent decision in a consolidated case by the Michigan Supreme Court revealed a lack of clarity in language contained in one of the offense variables. Offense variables require certain points to be scored depending on elements of the crime and are used by a court to determine an appropriate sentence range when the statute only establishes a maximum term of imprisonment. A higher score generally increases the likelihood an offender will serve a term of incarceration in a county jail or a state prison, and also increases the minimum sentence that must be served before parole eligibility.

The recent case, *People* v *Hardy* and *People* v *Glenn*, concerned the interpretation of the phrase "*conduct designed to substantially increase the fear and anxiety a victim suffered during the offense"* contained in Offense Variable 7 (aggravated physical abuse), which requires the addition of 50 points to an offender's total score if the victim of the crime was treated with sadism, torture, excessive brutality, <u>or</u> conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. The issue addressed by the bill centers on the meaning that should be implied by the placement of the word "or."

The state supreme court interpreted the phrase in question as applying to "conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." One of the justices, though agreeing with the court's decision, separately encouraged the Legislature to amend OV 7 to more clearly define or articulate the intent of including the phrase.

Without such clarification, a potential exists for subjectivity by the courts in applying the "conduct designed" language that could result in "disparate outcomes for criminal defendants . . . even with the guiding principles today's decision provides."

However, another of the justices dissented from the majority's interpretation, instead writing that because of the placement of the word "*or*," "the 'conduct designed' category of OV 7 should be interpreted in light of the other three categories within the statute, and thus must be of the same class as sadism, torture, and excessive brutality."

Legislation has been offered to clarify the Legislature's intent regarding the application of scoring OV 7 to crimes involving physical abuse.

***THE CONTENT OF THE BILL:***

The bill would amend the Code of Criminal Procedure to revise the conduct for which Offense Variable 7 can be "scored" when determining an appropriate sentence for aggravated physical abuse. Where the code now refers to cases where a victim was treated with sadism, torture, or excessive brutality, or conduct designed to substantially increase the fear and anxiety of a victim during the offense, the amendment would specify "similarly egregious" conduct to sadism, torture, or excessive brutality.

The penalty prescribed for most felony crimes in Michigan are indeterminate, meaning that the statute sets the maximum term of imprisonment. The sentencing range appropriate for a specific offender convicted of a felony is determined by "scoring" the offense and then plotting the score on a grid relating to the crime class. Points are scored for such things as an offender's prior record and elements specific to the crime (offense variables) and the crime class (property crime, crime against a person, etc.). Depending on the score and the grid used, a sentencing range is determined that either requires a judge to send a person to prison, grants the judge discretion to send the person to prison or to jail, or grants discretion to send the person to jail and/or probation. There are 20 offense variables.

Offense Variable 7 – aggravated physical abuse – is scored when a crime is committed against a person. If 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 must be added to the offender's score. If no victim received such treatment, then 0 points are scored for this variable.

**House Bill 4463** would amend the Code of Criminal Procedure to revise Offense Variable 7 so that it would apply if the victim were treated with sadism, torture, excessive brutality, or *similarly egregious* conduct designed to substantially increase the fear and anxiety a victim suffered during the offense (the new language is underlined). If so, 50 points would still be scored (and 0 points if the crime did not include such conduct).

MCL 777.37

***BACKGROUND INFORMATION:***

The bill is a reintroduction of House Bill 5157 of the 2013-2014 legislative session; the bill passed the House but failed to see Senate action.

***ARGUMENTS:***

***For:***

The bill would clarify that a court should score 50 points under OV 7 for conduct *designed to substantially increase the fear and anxiety a victim suffered* only when the conduct is at the same level as sadism, torture, or excessive brutality. This clarification should mitigate the possibility of disparate sentences being issued by different courts around the state – which, after all, is the main purpose for creating the sentencing guidelines. Without such clarification, the recent state supreme court interpretation could be interpreted as creating a fourth, and potentially lesser, category of conduct for which the 50 points would still have to be scored. It is this separate category that invites broad discretion among courts that could indeed result in a wide range of applications for which it was never intended.

***Response:***

According to the legislative history of OV 7, the problematic "conduct designed" phrase was originally included as a definition for "terrorism," which, prior to September 11, 2001, and the subsequent enactment of a stand-alone anti-terrorism statute, had been part of OV 7. Thus, at one time, OV 7 was scored for sadism, torture, excessive brutality, or *terrorism*. When the anti-terrorism statute was enacted, Offense Variable 20 was created to score terrorism offenses under that act. At the same time, the word "terrorism" was eliminated from OV 7, but for some reason, the definition of the term was not eliminated and so became a new element for which 50 points could be scored under OV 7.

Since the "conduct designed" language was the definition for the term "terrorism," and since there is a separate offense variable to score offenses of terrorism, some feel it makes more sense just to strike the "conduct designed" language altogether. Doing so would apply scoring OV 7 to cases where a victim was treated with sadism, torture, or excessive brutality, a fix which appears to embody the original intent of OV 7.

***POSITIONS:***

The Criminal Defense Attorneys of Michigan indicated support for the bill. (4-28-15)

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