

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. \_\_\_\_\_  
(Leave blank.)

Plaintiff-Appellee,

Court of Appeals No. 267317  
(From Court of Appeals decision.)

v

CAPRESE D. GARDNER  
(Print the name you were convicted under on this line.)

Trial Court No. 01-3494-01  
(See Court of Appeals brief or Presentence Investigation Report.)

Defendant-Appellant. *OK*

*Wayne CRT P Edwards*

**INSTRUCTIONS:** Answer each question. Add more pages if you need more space. **NOTE:** If you are appealing a Court of Appeals decision involving an administrative agency or a civil action, you will have to replace this page with one containing the relevant information for that case.

*131942*

PRO PER APPLICATION FOR LEAVE TO APPEAL

1. I was found guilty on (Date of Plea or Verdict) August 3, 2001

2. I was convicted of (Name of offense) Second Degree Murder, Weapon, possession by Felon and Felony Firearm.

3. I had a  guilty plea;  no contest plea;  jury trial;  trial by judge. (Mark one that applies.)

4. I was sentenced by Judge PRENTIS EDWARDS on August 30, 2001  
(Print or type name of judge) (Print or type date you were sentenced)

in the WAYNE County Circuit Court to 25 years 300 months  
(Name of county where you were sentenced) (Put minimum sentence here)

to 50 years 600 months, and to 2 years 24 months to 10 years 120 months.  
(Print or type maximum sentence) (Minimum sentence) (Maximum sentence)

I am in prison at the MOUND CORRECTIONAL FACILITY in DETROIT, Michigan.  
(Print or type name of prison) (Print or type city where prison is located.)

5. The Court of Appeals affirmed my conviction on November 4, 2002  
(Print or type date stamped on Court of Appeals decision)

in case number 01-3494-01. A copy of that decision is attached.  
(Print or type number on Court of Appeals decision)

6.  This application is filed within 56 days of the Court of Appeals decision. (It MUST be received by the Court within 56 days of date on Court of Appeals decision in criminal cases and 42 days in civil cases. Delayed applications are NOT permitted, effective September 1, 2003.)

**FILED**

**AUG 28 2006**

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

**MOUND CORRECTIONAL  
LAW LIBRARY**

Continued from page one (1).

4. and to 5 years 60 months, to 5 years 60 months.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

GROUND - ISSUES RAISED IN COURT OF APPEALS

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

ISSUE I:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

~~DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL,  
AND TO DUE PROCESS OF COMPETENT ATTORNEY REQUIRED BY THE  
SIXTH AMENDMENT (A) TRIAL COUNSEL FAILED TO INVESTIGATE  
INFORMATION WHICH CHARGED DEFENDANT AS A THIRD HABITUAL OFFENDER.~~

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle which is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

~~Multiple convictions that arise out of the same transaction, sharing the same time, place and subject matter, under one indictment may only be counted as a single incident. See People v Newson, 173 Mich App 160; People v Stoudemire 429 Mich App 262 (1987); Glover v United States, 604 S Ct 696 (2001). The defendant only had one prior conviction which is provable in his exhibits. The Court never adjudicated this issue, never gave a decision on this issue. The court never addressed why the defendant is charged as a Third Habitual when the defendant had only one prior conviction. This charge can easily be negated by retroactive application Stoudemire, supra.~~

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8, on page 7.

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

TRIAL COUNSEL FAILED TO CHALLENGE THE SUGGESTIVENESS OF THE IDENTIFICATION  
MADE BY THE CHIEF WITNESS JAMES WRIGHT.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle which is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

People v Anderson, 389 Mich 155 (1973); Thigpen v Cory, 804 F3d 893 (C A 6  
1986); Neil v Biggers, 93 S Ct 375 (1972). Identification was key information  
used to convict the defendant, information which was never given by the only  
eye witness, James Wright. Wright made an immediate identification 5-months  
after the incident took place. Four months later at trial Wright in his own  
words admitted that his identification was predicated on the size of the  
the defendant. Trial counsel elicited testimony from officer Lance Newman,  
the officer that was in charge at the time, that polaroid pictures had been  
taken of the defendant while he was in custody. This was a major violation  
of defendant's constitutional rights.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

**INSTRUCTIONS:** In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

**ISSUE III:**

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

**(C) DEFENDANT WAS DENIED THE OPPORTUNITY TO REFUTE THE BOGUS "ELEVEN WORD" STATEMENT BY WAY OF WALKER HEARING.**

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle which is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

**See People v Walker, 374 Mich 331, (1965); Jackson v Denno, 84 S Ct 1774, (1964); Rogers v Richmond, 81 S Ct 735, (1961). These cases state that a defendant is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. Trial counsel never challenged the veracity of the verbal confession. The defendant suffered irreparable harm for defense counsel failure to have a Walker Hearing out of the presence of the jury.**

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

ISSUE IV:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

COUNSEL FAILED TO IMPEACH WITNESS WHO GAVE PERJURED TESTIMONY AT PRELIMINARY EXAMINATION AND AT CIRCUIT COURT.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle which is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

People v Glass, 464 Mich 266 (2001); People v Hall, 435 Mich 599 (1990); People v Yost, 468 Mich 122 (2003); United States v Dunnigan, 113 S Ct 1111

(1993); 18 U.S.C.A § 1621. Witnesses James Wright and Jermaine Baldwin testified under oath to matters of materiality at preliminary examination, which affected the defendant's bind-over for trial. Defendant shows proof in his exhibits

that both witnesses voluntarily with the willful intent to influence the Courts decision to bind defendant over for trial.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

ISSUE V:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

**DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.**

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle which is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

See Strickland v Washington, 104 S Ct 2052 (1984); Beasley v United States, 491 F2d 687 (C A 6 1974), state that a defendant has a sixth amendment constitutional right to the effective assistance of counsel on appeal. Appellate Counsel's sloe claim of error was pertaining to an evidentiary ruling made by the Trial Court. Appellate Counsel did not raise one issue that was in relation to the trial itself, not even the fact that the defendant was falsely charged as a third habitual offender.

RELIEF REQUESTED

9. For the above reasons I request that this Court *GRANT* leave to appeal, *APPOINT* a lawyer to represent me, and *GRANT* any other relief it decides I am entitled to receive.

August 21, 2006  
(Date)

Caprese Gardner #192486  
(Print your name and number here.)

Caprese Gardner  
(Sign your name here.)

17601 Mound Road  
(Print your address here.)

Detroit, Michigan 48212

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

ISSUE VI:

A. IMPROPER REFERENCE MADE BY A VETERAN POLICE OFFICER TO DEFENDANT'S PRIOR CRIMINAL RECORD.

B. X 1. This issue raises a serious question about the legality of a law passed by the legislature.

X 2. This issue raises a legal principle which is very important to Michigan law.

X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

X 4. The decision conflicts with the Supreme Court decision or another decision of the Court of Appeals.

C. See People v McCartney, 46 Mich App 691 (1973); People v Gardner, 37 Mich App 520 (1972); United States v Blanton, 520 F2d 907, (CA 6 1975). This was one of a long list of issues that were never addressed in defendant's denial for Relief From Judgment. Defense Counsel moved for a mistrial based on the improprieties of this police officers comments. According to the cases states above, it was improper for the 17-year veteran police officer to quote a bogus charge to the jury that the defendant was wanted for Federal Flight To Avoid Prosecution. That was not a charge that the defendant had, plus Officer Amos, told the jury that the defendant was charged with being a third habitual offender.

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

ISSUE VII:

A. PROSECUTOR MADE NUMEROUS IMPROPER COMMENTS DURING CLOSING ARGUMENT WHICH ACCUMULATED TO ERROR. (a) The prosecutor made improper comments about defendant's only alibi witness.

B. X 1. This issue raises a serious question about the legality of a law passed by the legislature.

X 2. This issue raises a legal principle which is very important to Michigan law.

X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

X 4. The decision conflicts with the Supreme Court decision or another decision of the Court of Appeals.

C. See People v Dalessandro, 165 Mich App 569 (1988); People v Ellison, 133 Mich App 814 (1984); Berger v United States, 55 S Ct 629 (1935); MRE 401, 403.

This comment was the beginning of many improprieties initiated by the prosecution. The prosecutor basically told the jury that the defendant's only alibi witness knew he was guilty and was in cahoots, helping the defendant hideout from the police knowing he was wanted for murder. Defense Counsel objected, stating that there wasn't any evidence established to use that type of argument. The Trial Court allowed this argument in as evidence stating, "I'm going to let the jury decide." This the same Trial Court who at the beginning of trial ruled that defense counsel couldn't produce evidence to argue his defense theory and suppressed his defense theory for "lack of evidence." See exhibits (G pp.42-47).

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

ISSUE VIII:

A. (b) The prosecutor argued in her closing rebuttal, information pertaining to defendant's arrest, including the bogus statement which was not in the scope of defense counsel's closing.

B. X 1. This issue raises a serious question about the legality of a law passed by the legislature.

X 2. This issue raises a legal principle which is very important to Michigan law.

X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

X 4. The decision conflicts with the Supreme Court decision or another decision of the Court of Appeals.

C. See People v Yost, 468 Mich 122 (2003); People v Jones, 252 Mich 1, (2002); United States v Bess, 593 F2d 749 (CA 6 1979). Counsel made a request at side bar for sur-rebuttal, to address the argument being made by the prosecutor in her closing rebuttal. Exhibits (F pp.170). The Court made this reply, "well, it appears to me that the arguments made by the prosecuting attorney was proper given the scope of the closing by defense," and for that reason no action is going to take place." (F pp.173). Trial Counsel never mentioned anything in his closing argument to defendant's arrest, including the verbal statement which the prosecutor kept emphasizing throughout her closing rebuttal. Exhibits (F pp.147, 170-171).

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

ISSUE IX:

- A. (c) The prosecutor argued in closing rebuttal, that the victim, Dawan Bibbs, told the chief witness James Wright, the defendant put a MAC-10 up to [h]is head. (F pp.142).
- B. X 1. This issue raises a serious question about the legality of a law passed by the legislature.
- X 2. This issue raises a legal principle which is very important to Michigan law.
- X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- X 4. The decision conflicts with the Supreme Court decision or another decision of the Court of Appeals.
- C. People v Dalessandro, 165 Mich 1, 15-16 NW2d 58 (1977); MRE 401,403. The prosecutor on direct examination questioned the witness James Wright, asking him if the victim, Dawan Bibbs, ever tell him what type of gun the victim said was put up to his head and Wright answered by saying, "no, he didn't." Exhibits (C pp.166). In Dalessandro, supra, a prosecutor may not argue facts material to the case which are not in evidence. (reversed). Plus, the prosecutor was in direct violation of MRE 403, by misleading the jury with this falsification of the witness sworn testimony. Being fully aware of what the witness testified to, the defendant should prevail on his prosecutorial misconduct and be remanded back to the lower Court.

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

ISSUE X:

- A. (d) The prosecutor attacks the credibility of defense counsel's methods for defending clients and insinuates how feebly they make arguments.
- B. X 1. This issue raises a serious question about the legality of a law passed by the legislature.
- X 2. This issue raises a legal principle which is very important to Michigan law.
- X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- X 4. The decision conflicts with the Supreme Court decision or another decision of the Court of Appeals.
- C. People v Wise, 134 Mich App 82, 101-102 (1984); lv den 422 Mich 852 (1985); People v Dalessandro, 165 Mich App 569, (1988). The prosecutor made these comments in her closing rebuttal: "The prosecutor presents evidence, the prosecutor presents evidence to the trier of fact, the juror's. You are the triers of fact. What's the defense attorney's role? Well, its certainly not to get up and say, guess what, my guy is guilty, convict him, its to look at the case and to point out pieces of the case and attempt to make arguments to show reasons why [h]e feels the defendant should be found not guilty. He would not come up here and say the defendant is guilty. A lot of times [W]e talk about defense attorney's picking issues...." [emphasis added] (F pp.144-145). This argument shifts the focus of evidence and undermines defense counsel's ability to be "truthful." It also insinuates that counsel doesn't believe his client is innocent.

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

ISSUE XI:

A. (e) The prosecutor argued in closing rebuttal, that the defendant was fleeing prosecution and that the jury would be instructed that, that was a conscience of guilt.

B. X 1. This issue raises a serious question about the legality of a law passed by the legislature.

X 2. This issue raises a legal principle which is very important to Michigan law.

X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

X 4. The decision conflicts with the Supreme Court decision or another decision of the Court of Appeals.

C. People v Jones, 252 Mich App 1, (2002); Koon v United States, 116 S Ct 2035 (1996); United States v Taylor, 286 F3d 303, 305 (CA 6 2002). Defense Counsel objected to the improper rebuttal argument and made the following statement: "Your Honor, I think I'm going to have to object. I believe this is rebuttal. I don't think there's anything mentioned about that in my closing." (F pp.146-147). The issue here isn't whether or not the prosecutor quoted the law correctly, but that the instructions to the jury were not balanced and the comments were not in refutation to anything defense counsel used in his closing argument.

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

CAPRESE GARDNER, Defendant-Appellant

CA No. 267317

ISSUE XII:

A. (f) The prosecutor vouched for the credibility of the police officer who arrested the defendant.

B. X 1. This issue raises a serious question about the legality of a law passed by the legislature.

X 2. This issue raises a legal principle which is very important to Michigan law.

X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

X 4. The decision conflicts with the Supreme Court decision or another decision of the Court of Appeals.

C. People v Noble, 238 Mich App 647,660 (1999); People v Bahonda, 202 Mich App 214 (1993); Chapman v California, 87 S Ct 824 (1967). The prosecutor stated to the jury in her closing rebuttal, "that if the officer was lying, and this is once again part of the conspiracy theory, and if the officer wanted to lie he could have said that Caprese Gardner said he shot somebody on Hamburg. This argument clearly vouched for the credibility of the police officer's sworn testimony. This was another improper argument that was not in refutation to anything defense counsel used in his closing argument.

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 267317

Lower Court No. 01-3494-01

Honorable PRENTIS EDWARDS  
Circuit Court Judge

CAPRESE D. GARDNER,

Defendant-Appellant.

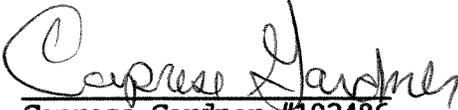
\_\_\_\_\_ /

NOTICE OF HEARING

To: Wayne County Prosecutor  
Frank Murphy Hall Of Justice  
1441 St. Antoine  
Detroit, Michigan 48226

PLEASE TAKE NOTICE that the attached APPLICATION FOR LEAVE TO APPEAL DENIAL OF DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT and MOTION FOR AN EVIDENTIARY HEARING, will be brought on for hearing by the Court on the 28 day of August, 2006, at 9:00 a.m., in the forenoon or as soon thereafter as defendant may be heard.

Respectfully Submitted

  
Caprese Gardner #192486  
Defendant In Pro Per

Dated: the 22 day of August, 2006.

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

-vs-

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 267317

Lower Court No. 01-3494-01

Honorable PRENTIS EDWARDS  
Circuit Court Judge

CAPRESE GARDNER

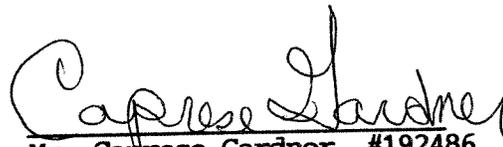
Defendant-Appellant.

Mr. CAPRESE D GARDNER #192486  
Defendant In Propria Persona  
17601 MOUND ROAD  
Detroit, Michigan 48212

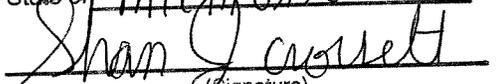
PROOF OF SERVICE

I, Caprese D. Gardner, declare that I served the Wayne County Prosecutor's office with a copy of the following documents: **APPLICATION FOR LEAVE TO APPEAL DENIAL OF DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT, MOTION FOR AN EVIDENTIARY HEARING, AND MEMORANDUM OF LAW SUPPORTING APPLICATION**, in the above cause, by depositing same in an envelope addressed to the Wayne County Prosecutor, 12th Floor, 1441 St. Antoine, Detroit, Michigan 48226, affixing appropriate first class postage and depositing same in the U.S. Mailed on the 22, day of August, 2006.

Dated: the 19, day of AUGUST, 2006.

  
Mr. Caprese Gardner, #192486  
Defendant In Propria Persona

Subscribed and sworn before me, this 19  
day of AUG, 06, a Notary Public  
in and for MACOMB County,  
State of MICHIGAN.

  
(Signature)  
NOTARY PUBLIC  
My Commission expires 3-29-08

SHARON J. GROSSETT  
Notary Public, Macomb County, MI  
My Commission Expires March 29, 2008  
Acting in  
Wayne County

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN  
(Print the name of the opposing party, e.g., "People of the State of Michigan.")

Supreme Court No. \_\_\_\_\_  
(Leave blank.)

Plaintiff-Appellee,

Court of Appeals No. 267317  
(From Court of Appeals decision.)

v  
CAPRESE GARDNER.  
(Print the name you were convicted under on this line.)

Trial Court No. 01-3494-01  
(See Court of Appeals brief or Presentence Investigation Report.)

Defendant-Appellant.

MOTION FOR WAIVER OF FEES AND COSTS

Appellant, pursuant to MCR 7.319(7)(h) and MCL 600.2963, for the reasons stated in the attached affidavit of indigency, requests that this Court: (Check the ones that apply to you.)

- GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring prisoners to pay filing fees do not apply to appeals from a decision involving a criminal conviction or appeals from a decision of an administrative agency. The statute applies *exclusively* to prisoners filing civil cases and appeals in civil cases.
- GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring only indigent prisoners to pay court filing fees violates the equal protection provision of the Michigan Constitution, Art I, Sec 2.
- Temporarily waive the initial partial payment of filing fees for the attached pleadings and order the Michigan Department of Correction to collect and pay the money to this Court at a later date in accordance with MCL 600.2963, when the money becomes available in appellant's prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.
- Allow an initial partial payment of \$ \_\_\_\_\_ of the fee for filing the attached pleadings and order the Michigan Department of Correction to collect the remaining money and pay it to this Court at a later date in accordance with MCL 600.2963, as additional money becomes available in my prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.

August 21, 2006.  
(Date)

Caprese Gardner  
(Sign your name here.)

Caprese Gardner #192486  
(Print your name and number here.)

17601 Mound Road  
(Print your address here.)

Detroit, Michigan 48212

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN  
(Print the name of the opposing party, e.g. "People of the State of Michigan.")

Supreme Court No. \_\_\_\_\_  
(Leave blank.)

Plaintiff-Appellee,

Court of Appeals No. 267317  
(From Court of Appeals decision.)

v

CAPRESE GARDNER  
(Print the name you were convicted under on this line.)

Trial Court No. 01-3494-01  
(See Court of Appeals brief or Presentence Investigation Report.)

Defendant-Appellant.

AFFIDAVIT OF INDIGENCY

1. My name is Caprese Gardner. I am in prison at Mound Corr. Facility in Detroit MI.  
(Type or print your name here.) (Name of prison) (city where prison is located)

My prison number is 192486. My income and assets are: (Check the ones that apply to you.)  
(Your prison number.)

- My only source of income is from my prison job and I make \$ \_\_\_\_\_ per day.
- I have no income.
- I have no assets that can be converted to cash.
- I can not pay the filing fees for the attached application.

I ask this Court to waive the filing fee in this matter.

I declare that the statements above are true to the best of my knowledge, information and belief.

August 21, 2006  
(Date)

Caprese Gardner  
(Sign your name here.)

Caprese Gardner  
(Print your name here.)

PROOF OF SERVICE

On August 21, 2006, I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

- Affidavit of Indigency and Proof of Service
- Motion to Waive Fees and Costs
- Statement of Prisoner Account (this is not necessary in criminal appeals)
- Pro Per Application for Leave to Appeal with a copy of Court of Appeals Decision
- Court of Appeals Brief
- Supplemental Court of Appeals Brief

TO: Wayne County Prosecutor, 1441 St. Antoine 12th Floor, at  
(Name of county where you were sentenced) (Address)  
Detroit, MI 48226  
(City) (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

August 21, 2006  
(Date)

Caprese Gardner  
(Sign your name here.)

Caprese Gardner  
(Print your name here.)

CAPRESE D. GARDNER  
#192486  
17601 Mound Road, Detroit, Michigan 48212

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Wayne County Circuit Court  
Clerk of the Court  
1441 St. Antoine, Room 901  
Detroit, Michigan 48226

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 267317  
Lower Court No. 01-3494-01

Re: People v Caprese Gardener  
Case No. 01-003494-01  
Honorable Prentis Edwards

**Dear Clerk:**

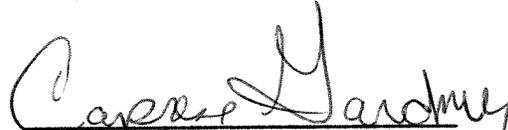
Under the cover of this letter, please find the original copy of the following documents for filling with the Court:

- APPLICATION FOR LEAVE TO APPEAL
- MEMORANDUM OF LAW SUPPORTING APPLICATION
- MOTION FOR AN EVIDENTIARY HEARING

Defendant-Appellant is acting in Propria Persona and swears that on the 22, day of August, 2006, defendant mailed a copy of the same documents to the Wayne County Prosecutors office.

If you have any questions, please contact me at the address above.

Respectfully Submitted,

  
Mr. Caprese D. Gardner #192486  
Defendant In Propria Persona

Dated: the 22, day of August, 2006.

cc: File Enclosures

COVER LETTER

MOUND CORRECTIONAL  
LAW LIBRARY

August 21, 2006

(Put Today's Date)

Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

RE: PEOPLE OF THE STATE OF MICHIGAN

(Print the name of the opposing party, e.g., "People of the State of Michigan.")

v CAPRESE GARDNER.

(Print the name you were convicted under here.)

Supreme Court No. \_\_\_\_\_

(Leave blank - the Clerk will assign a number for you.)

Court of Appeals No. 267317

(Get this number from the Court of Appeals decision.)

Trial Court No. 01-3494-01

(Get this number from Court of Appeals brief or  
Presentence Investigation Report.)

Dear Clerk:

Enclosed please find the original of the pleadings checked below. (Put a check mark by the items you are sending.) I am indigent and can not provide seven copies. Please file them.

- Affidavit of Indigency/Proof of Service
- Motion to Waive Fees and Costs
- Statement of Prisoner Account (this is not necessary in criminal appeals)
- Pro Per Application for Leave to Appeal
- Court of Appeals Decision (You **must** enclose a copy of the Court of Appeals decision.)
- Court of Appeals Brief (This is not necessary, but it is a good idea.)
- Supplemental Court of Appeals Brief (This is not necessary, but it is a good idea.)
- Other \_\_\_\_\_

Thank you.

Sincerely,

Caprese Gardner  
(Sign your name here.)

Caprese Gardner

(Print or type your name here.)

192486

(Print or type your prisoner number here.)

17601 Mound Road

(Print or type your address here.)

Detroit, Michigan 48212

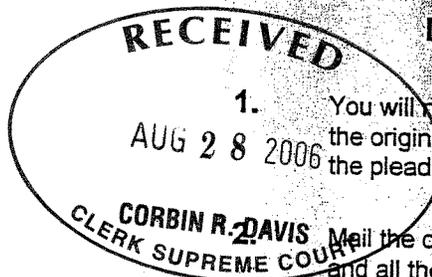
(Print or type your City, State, and Zip Code here.)

Copy sent to:

Wayne

County Prosecutor

(Fill in the county where you were convicted.)



INSTRUCTIONS

1. You will need 2 copies and the original of this letter and the pleadings listed above.

2. Mail the original of this letter and all the pleadings listed above to the Supreme Court Court Clerk.

3. Mail 1 copy of letter and pleadings to the prosecutor in the county where you were convicted.

4. Keep 1 copy of letter and pleadings for your file.

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**FILED**

AUG 28 2006

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

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APPENDIX D- Transcripts from July 31, 2001.

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APPENDIX G- Transcripts from (Voir Dire) out of the presence of the jury, held on July 26, 2001.

## STATEMENT OF JURISDICTION

On August 3, 2001, after a six-day jury trial before the Honorable Prentis Edwards in the Wayne County Circuit Court, Defendant-Appellant was convicted of three counts: second-degree murder, felon in possession of a firearm, and possession of a firearm in the commission of a felony (felony-firearm). On August 30, 2001, Defendant was sentenced as a Third Habitual Offender to terms of twenty-five to fifty years for the murder, two to ten for felon in possession, and five years for felony-firearm.

November 29, 2001, the trial court filed a Claim of Appeal on Defendant-Appellant's behalf pursuant to his timely request for appellate counsel received on September 5, 2001. On December 3, 2001, the State Appellate Defender Office was appointed as substitute appellate counsel.

On November 1, 2002, the Court of Appeals denied Defendant's motion to remand. On April 15, 2003, the Court of Appeals issued an unpublished pre curiam opinion affirming defendant's convictions.

Defendant-Appellant filed a application for Leave to Appeal on June 12, 2003, and the Supreme Court denied defendant's request in a court order on November 26, 2003. Defendant filed a 6500 Motion For Relief From Judgment on December 2, 2004. The Lower Court denied defendant's motion on December 17, 2004. The Court of Appeals denied defendant's motion July 10, 2006. (See Appendix A for all the decisions issued by the Courts).

This Court has jurisdiction pursuant to US Const, Ams V,VI,XIV Const 1963, art 1, §§17,20; MCR 7.201(B)(2), MCR 7.205, MCR 7.302(B)(5), MCR 6.509(A) and MCR 6.508(B).

STATEMENT OF QUESTIONS PRESENTED

I. WAS DEFENDANT DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND TO DUE PROCESS OF COMPETENT ATTORNEY REQUIRED BY THE SIXTH AMENDMENT? (A). DID TRIAL COUNSEL FAIL TO INVESTIGATE INFORMATION WHICH CHARGED DEFENDANT AS A THIRD HABITUAL OFFENDER? (B). DID TRIAL COUNSEL FAIL TO CHALLENGE THE SUGGESTIVENESS OF THE IDENTIFICATION MADE BY THE CHIEF WITNESS JAMES WRIGHT? (C). WAS DEFENDANT DENIED THE OPPORTUNITY TO REFUTE THE BOGUS "ELEVEN WORD" STATEMENT BY WAY OF WALKER HEARING? (D). WAS COUNSEL INEFFECTIVE FOR FAILING TO IMPEACH WITNESS WHO GAVE PERJUROUS TESTIMONY AT PRELIMINARY EXAMINATION AND AT CIRCUIT COURT?

Defendant-Appellant answers, "Yes."

The Court of Appeals answered, "No."

The Circuit Judge answered, "NO."

II. WAS DEFENDANT DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL?

Defendant-Appellant answers, "Yes."

The Court of Appeals answered, "No."

The Circuit judge answered, "NO."

III. WAS THERE AN IMPROPER REFERENCE MADE BY A VETERAN POLICE OFFICER TO DEFENDANT'S PRIOR CRIMINAL RECORD?

Defendant-Appellant answers, "Yes."

The Court of Appeals answered, "NO."

The Circuit Judge answered, "NO."

IV. DID THE PROSECUTOR MAKE NUMEROUS COMMENTS DURING CLOSING ARGUMENT, WHICH ACCUMULATED TO ERROR?: (a). DID THE PROSECUTOR MAKE A IMPROPER COMMENT ABOUT DEFENDANT'S ONLY ALIBI WITNESS? (b). DID THE PROSECUTOR ARGUE IN HER CLOSING REBUTTAL, INFORMATION PERTAINING TO DEFENDANT'S ARREST, INCLUDING THE BOGUS STATEMENT WHICH WAS NOT IN THE SCOPE OF DEFENSE COUNSEL'S CLOSING? (c). DID THE PROSECUTOR ARGUE IN CLOSING REBUTTAL, THAT THE VICTIM DAWAN BIBBS, TOLD THE CHIEF WITNESS JAMES WRIGHT, THE DEFENDANT PUT A MAC-10 UP TO HIS HEAD? (d). DID THE PROSECUTOR ATTACK THE CREDIBILITY OF DEFENSE COUNSEL'S METHODS FOR DEFENDING CLIENTS AND INSINUATE HOW FEEBLY THEY MAKE ARGUMENTS? (e). DID THE PROSECUTOR ARGUE IN CLOSING REBUTTAL, THAT THE DEFENDANT WAS FLEEING PROSECUTION AND THE JURY WOULD BE INSTRUCTED THAT, THAT WAS A CONSCIENCE OF GUILT? (f). DID THE PROSECUTOR VOUCH FOR THE CREDIBILITY OF THE POLICE OFFICER WHO ARRESTED THE DEFENDANT?

Defendant-Appellant answers, "Yes."

The Court of Appeals answered, "NO."

The Circuit Judge answered, "NO."

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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. \_\_\_\_\_

Plaintiff-Appellee,

Court Of Appeals No. 267317

Lower Court No. 01-3494-01

-vs-

Honorable Prentis Edwards  
Circuit Court Judge

CAPRESE GARDNER,

Defendant-Appellant.

\_\_\_\_\_ /

MOTION FOR SUSPENSION OF FEES AND COST

NOW COMES Defendant, Caprese Gardner, and moves this Honorable Court pursuant to MCR 7.319(7)(h), for the suspension of all fees and cost required by law and court rule in the above for cost rule in the above matter for the reasons stated in the affidavit below.

VERIFICATION AND AFFIDAVIT OF INDIGENCY

Defendant-Appellant, declares he is indigent; he has no money, stocks, bonds or other tangible assets with which he may utilize to pay Court Cost, or filling fees in this matter.

Defendant-Appellant, further declares the foregoing statements are true to the best of his knowledge, information and belief.

Dated: AUG 19, the X, 2006

Respectfully Submitted,

Caprese Gardner

Mr. Caprese Gardner #192486  
Defendant In Propria Persona  
Mound Correctional Facility  
17601 Mound Road  
Detroit, Michigan 48212

Subscribed and sworn before me, this 19  
day of AUG, 06, a Notary Public  
in and for MACOMB County,  
State of MICHIGAN  
Sharon J. Grossett  
(Signature)  
NOTARY PUBLIC  
My Commission expires 3-29-08

SHARON J. GROSSETT  
Notary Public, Macomb County, MI  
My Commission Expires March 29, 2008

Acting in  
Wayne County

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

CAPRESE GARDNER,

Defendant-Appellant.

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 267317

Lower Court No. 01-3494-01

Honorable Prentis Edwards  
Circuit Court Judge

---

APPLICATION FOR LEAVE TO APPEAL DENIAL OF  
DEFENDANT-APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT  
PURSUANT TO MCR 7.205

AND

MOTION FOR AN EVIDENTIARY HEARING  
PURSUANT TO MCR 7.211 (C)(1)

NOW COMES Defendant-Appellant Caprese Gardner, in Propria Persona, and respectfully moves this Honorable Court to grant the within APPLICATION FOR LEAVE TO APPEAL and MOTION FOR AN EVIDENTIARY HEARING in this case and says in support as follows:

1. On August 3, 2001, after a six-day jury trial before the Honorable Prentis Edwards in the Wayne County Court, Defendant-Appellant Caprese Gardner was convicted of three counts: second-degree murder, felon in possession of a firearm, and possession of firearm in the commission of a felony (felony firearm). On August 30, 2001 Mr. Gardner was sentence as a Third Habitual Offender to terms of twenty-five years to fifty years for the murder, two to ten for felon in possession, and five years for felony-firearm, (See Appendix A).

2. Defendant-Appellant Caprese Gardner was sentenced to three counts:

one count of second degree murder pursuant to MCL 750.317; felon in possession of a firearm pursuant to MCL 750.224f; felony firearm pursuant to MCL 750.227B-A; and third habitual offender pursuant to MCL 769.11; MSA 28.1083.

3. Defendant-Appellant was represented at trial by counsel Richard Cunningham, who completed pretrial and trial. Defendant-Appellant request for appellate counsel was received by the Circuit Court Clerk on September 5, 2001, six days after sentencing. On November 29, 2001, Ralph Simpson was appointed to represent Mr. Gardner and the Claim of Appeal was mailed to the Court of Appeals. On December 3, 2001, the State Appellate Defender Office was appointed to replace Mr. Simpson.

4. Defendant-Appellant was represented by P.E. Bennett (p26351) on his appeal of right, whereby Mr. Bennett sole claim of error was in regards to an evidentiary ruling made by the trial court. The Michigan Court of Appeals affirmed Defendant's convictions and sentence in an unpublished opinion, Case No. 238186, decided April 15, 2003. (See Appendix A).

5. Defendant-Appellant thereafter raised the same issue in the Michigan Supreme Court, June 12, 2003, and on November 26, 2003, the Court issued its standard order denying defendant's leave to appeal. (See Appendix A).

6. On November 26, 2004, Defendant mailed his Motion For Relief From Judgment to the Third Circuit Court, Docket Management Motion Department room #770 2 Woodward Detroit, Michigan 48226. (See Appendix A). Defendant-Appellant received a letter on December 13, 2004, from the Third Circuit Court affiliated branch saying that Defendant's motion was received on December 2, 2004, and was scheduled to be forwarded to the Honorable Prentis Edwards for review. However, only the file was forwarded and if defendant was still interested in pursuing his Post Conviction Relief, that defendant needed to re-submit his Motion For Relief From Judgment so that it may be reviewed by the Honorable

Prentis Edwards. The letter stated "Please forward your motion to the address listed above, Please accept our apology for the inconvenience."

7. On December 17, 2004, Defendant received a letter from the Lower Court denying his Motion For Relief From Judgment. This was 4-days after Defendant-Appellant received the letter from the Courts affiliated branch, telling him to re-submit his motion for review. (See Appendix A for both conflicting letters from the Third Circuit Court). The letter Defendant received on December 13, 2004, was clear and unambiguous when it stated that the defendant's motion was never forwarded to the Honorable Prentis Edwards for review. It was Clearly Erroneous" for the Lower Court to deny defendant's motion without ever having possession of it.

8. Defendant-Appellant claims the Lower Court committed legal, moral and professional errors in his case, "Plain Error" and "Abuse of Discretion." Plain Error is defined as an egregious error, one that directly leads to a miscarriage of justice, or error that is obvious, affects "substantial rights," and seriously impairs the fairness or integrity of the judicial proceedings. US Const, Am V; Const 1963, art 1,§17; People v McGee 258 Mich App 683 (2003); Johnson v U.S 117 S Ct. 1544 (1997). People v Brown 196 Mich App 153 (1992), this court reviews a Trial Court decision to deny a Motion For Relief From Judgment under abuse of discretion. Abuse of Discretion occurred when the Trial Court denied defendant's Motion For Relief From Judgment without ever having possession of the motion. Defendant shows proof that it was virtually impossible for the Lower Court to make such a critical decision in denying his motion without ever having possession of the motion.

9. Defendant-Appellant filed a Delayed Motion For Relief From Judgment. The Court of Appeals denied Defendant's motion on July 10, 2006, the court didn't give an opinion on any of the issues defendant raised. The Court of

Appeals did not adjudicate any of the defendant's issues, even after the defendant claimed the Lower Court's decision was "Clearly Erroneous." Defendant raises issues which were never previously raised in Trial, The Court of Appeals or the Michigan Supreme Court. The issues were not raised or omitted because of ineffective assistance of Appellate Counsel, Evitts v Lucey, 469 US 387; 105 S Ct 830; (1985); People v Wolfe, 156 Mich App 225 (1986).

10. Defendant-Appellant seeks an evidentiary hearing pursuant to MCR 6.508(C) to develop a testimonial record to support his claim to the extent that the claim raised depends on the facts not on record, and this it is incumbent upon Defendant to make a testimonial record at this level to support his ineffective assistance of Trial and Appellate Counsel claims. See People v Ginther 390 Mich 436, 422-443 (1973). The United States Supreme Court has stated a preference for determining disputed factual issues by way of live hearing rather than by employing speculation or presumption. Smith v Phillips, 455 US 290, 215-216 (1982); Rushen v Spain, 464 US 114,119,120 (1983); Blackledge v Allison, 431 US 63, 72-73 (1977), the Court held where "allegations related primarily to purported occurrence outside the courtroom and upon which the record could, therefore, cast no real light." That is precisely the situation we have here and MCR 6.508(C) expressly provides for an evidentiary hearing on the Motion For Relief From Judgment, in the discretion of the judge. Here, counsel is automatically presumed to have rendered effective assistance, and the onus is on this Defendant-Appellant to demonstrate that counsel actions were not reasonable or strategic, and that this prejudice defendant to the extent that the trial was unreliable. Strickland v Washington, 446 US 668 (1984); People v Pickens, 446 Mich 298 (1984); Evitts v Lucey, supra. Defendant-Appellant argues that appellate counsel was ineffective on his appeal of right in failing to raise trial counsel's ineffectiveness, constitutes "good cause"

under People v Reed, 449 Mich 375 (1995), and absent an evidentiary hearing, would make it impossible for this Defendant-Appellant to overcome the "constitutionally defective" representation, and therefore, the "good cause" standard.

11. Specifically, Defendant-Appellant raises the following issues:

- I. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND TO DUE PROCESS OF COMPETENT ATTORNEY REQUIRED BY THE SIXTH AMENDMENT: (A) TRIAL COUNSEL FAILED TO INVESTIGATE INFORMATION WHICH CHARGED DEFENDANT AS A THIRD HABITUAL OFFENDER (B) TRIAL COUNSEL FAILED TO CHALLENGE THE SUGGESTIVENESS OF THE IDENTIFICATION MADE BY THE CHIEF WITNESS JAMES WRIGHT, (C) DEFENDANT WAS DENIED THE OPPORTUNITY TO REFUTE THE BOGUS "ELEVEN WORD" STATEMENT BY WAY OF WALKER HEARING (D) COUNSEL FAILED TO IMPEACH WITNESS WHO GAVE PERJUROUS TESTIMONY AT PRELIMINARY EXAMINATION AND AT CIRCUIT COURT.
- II. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.
- III. IMPROPER REFERENCE MADE BY A VETERAN POLICE OFFICER TO DEFENDANT'S PRIOR CRIMINAL RECORD.
- IV. PROSECUTOR MADE NUMEROUS IMPROPER COMMENTS DURING CLOSING ARGUMENT WHICH ACCUMULATED TO ERROR.

12. Denial of this motion would violate defendant's right to a hearing to establish his contentions, to due process, to a fair Post Appeal, and to the effective assistance of trial and appellate counsel's. US Const, Ams V,VI,XIV; Const 1963, art, §§17,20; Dobbs v Zant, 506 US 357; 113 S Ct 835; 122 L Ed2d 103 (1993); Evitts v Lucey, 469 US 387, 105 S Ct 830, 83 L Ed2d 821 (1985); People v Mitchell, 454 Mich 145; 560 NW2d 600 (1997); People v Ginther, 390 Mich 436; 212 NW2d 922 (1973).

Wherefore, for the above stated-reasons, Defendant-Appellant request this Court to remand his issues to the Lower Court for an evidentiary hearing and to move for a new trial on his claims.

RESPECTFULLY SUBMITTED,

*Caprese Gardner*

MR. CAPRESE GARDNER #192486  
DEFENDANT IN PROPRIA PERSONA  
MOUND CORRECTIONAL FACILITY  
17601 MOUND ROAD  
DETROIT, MICHIGAN 48212

Dated: the 22, day of August, 2006.

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

Supreme Court No. \_\_\_\_\_  
Court Of Appeals No. 267317  
Lower Court No. 01-3494-01

-vs-

Honorable Prentis Edwards  
Circuit Court Judge

CAPRESE GARDNER,  
Defendant-Appellant.  
\_\_\_\_\_ /

MEMORANDUM OF LAW IN SUPPORT OF  
APPLICATION FOR LEAVE TO APPEAL  
DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT.  
PURSUANT TO MCR 7.205

AND

MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR AN EVIDENTIARY HEARING  
PURSUANT TO MCR 7.211(C)(1)

By: Mr. Caprese Gardner #192486  
Defendant-Appellant In Propria Persona  
Mound Correctional Facility  
17601 Mound Rd.  
Detroit, Michigan 48212

## STATEMENT OF FACTS

Defendant-Appellant Caprese Gardner was charged with three counts: first-degree premeditated murder, MCL 750.316; felon in possession of a firearm, MCL 750.224f; and possession of a firearm in the commission of a felony (felony-forearm), MCL 750.227b, for allegedly shooting Dawan Bibbs. (See Appendix A). Mr. Bibbs was shot at the house where he was living with James Wright at 12450 Hamburg Street in Detroit, and the shooting occurred at about 7:00 in the morning on Sunday, October 8, 2000.

As the prosecutor argued to the jury, her theory was that Caprese Gardner came to James Wright's house because Gardner thought Dawan Bibbs had stolen a gun from him and he was angry at Bibbs. In the ensuing confrontation Mr. Gardner shot Mr. Bibbs. (C pp.34; F pp.80,105-106). The prosecutor also argued that although James Wright had gun shot residue on his hands after the killing Wright did not commit the murder. (C pp.42-43; F pp.94,139-141). She stated. "You have been presented no reason, no motivation for any of the witnesses to lie to pin it on Caprese Gardner." (F pp.146).

The defense theory was that Caprese Gardner was not guilty and that James Wright shot Dawan Bibbs, so Wright had to blame the shooting on someone else, i.e., Gardner. (C pp.47,52; F pp.119-120,137). Mr. Wright had gun shot residue on his hands after the shooting and he had delayed in calling 911 after the shooting in order to clean the house of incriminating evidence, including removing the shell casings that would normally be at the scene and of the gun that shot Bibbs. (C pp.48-49; F pp.119-124). The gun that shot Dawan Bibbs was consistent with the one that Bibbs had

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Appendix's will be represented by the letters A,B,C,D,E,F,ect.... Followed by pp., adjacent to the page numbers where information can be located, (Appendix Information).

stolen from Caprese Gardner and taken to Wright's house. Id., at 124. The testimony of James Wright "is not worthy of your belief, and the story given by James Wright just doesn't make sense." Id., at 114,123.

On August 3, 2001, after a six-day jury trial before the Honorable Prentis Edwards in Wayne County Circuit, Caprese Gardner was found not guilty of first-degree premeditated murder but convicted of the lesser offense of second-degree murder, MCL 750.317, and was convicted as charged of felon in possession of a firearm and of felony-firearm.

#### **PRELIMINARY EXAMINATION**

James Wright and Jermaine Baldwin testified that Dawan Bibbs told them that Caprese shot him. Mr. Baldwin also testified that Bibbs made these same statements to the police officers and while the EMS drivers were wheeling Bibbs into the back of the truck, Bibbs repeated the statement again to them. (B pp.42-43).

#### **TRIAL**

At the beginning of trial and over defense objection, the Circuit Court Judge granted the prosecutor's motion to prevent defense counsel from referring to Dawan Bibbs and James Wright selling drugs. (G pp.42-47). When counsel brought up the issue again before James Wright testified and renewed his motion in limine concerning Bibbs and Wright selling drugs, the judge again ruled to suppress the proposed evidence.

Tonia Pinson testified that she was Dawan Bibbs mother and Caprese Gardner's girlfriend. She and Mr. Gardner lived together with her five children and his two children. (C pp.54-57). At the time of his death Mr. Bibbs was fifteen years old, but Ms. Pinson had problems with his behavior, so Bibbs was living somewhere else. (Id., at 54,58-59).

Tonia Pinson further states that when Dawan Bibbs had come over and

stayed for a few days and when he left, Pinson and Gardner realized that the gun was missing from the house, Tech 9 (also called a TEC-9), Pinson and Gardner knew that Bibbs had taken it. (C pp.62-64). The same day, after Bibbs had denied taking the gun, Gardner told Pinson that he got another gun, a Mack 10 or 11 (also called a MAC). Pinson also stated that she never saw the other gun Id., at 67-68.

On Sunday morning, October 8, 2000, Ms. Pinson returned home at 4:00am in the morning. Caprese Gardner was in a different room in the house and while he approached the bedroom that he shared with Ms. Pinson, they had some words about her coming in so late and Mr. Gardner left. (C pp.70-73,90). At about 8:30am the police arrived, looking for Mr. Gardner. Id., at 74-75. Dawan Bibbs died in the hospital on the following Wednesday. Id., at 78-79.

James Wright testified that he only knew Dawan Bibbs stayed around the corner and never knew who he was living with. It came a time Dawan Bibbs had got kicked out of his house and moved in with Mr. Wright. (C pp.145-149). Even before Bibbs was shot, Wright's house already had some bullet holes in it. (D pp.7-8). At about 7:00 in the morning on Sunday, October 8, 2000, Wright was sleeping on the living room coach and Bibbs was in the bedroom when Wright heard knocking on the door. (C 149-150, 163-164). When Wright answered the door, a man asked him for Dawan Bibbs. Mr. Wright said that he had never seen the man before, but he identified the man as Defendant Caprese Gardner. Id., at 154.

James Wright stated that while he was walking back to his coach after using the bathroom he heard six shots fired in rapid succession as Bibbs was standing in the front doorway. (C pp.155-159; D pp.12-13,28,33). Mr. Bibbs backed into the living room and was still on his feet when Mr. Wright ran back into the bedroom and locked the door. He came out when he heard

Bibbs calling for him. Mr. Bibbs was lying on his back near the front door, and when Wright asked him who shot him, Bibbs "said Caprese did it." (C pp.158-160). James Wright ran over to the next block where his friends stayed, Jermaine Baldwin and Andre Sewell, Baldwin's brother, and told Sewell to call 911. Id., at 162-164. Andre Sewell came out about two minutes later and Sewell and Mr. Wright went back to the house where Bibbs was. Jermaine Baldwin arrived three to five minutes later and after a brief conversation with Mr. Bibbs Baldwin realized that he never called 911. Id., at 167. Jermaine Baldwin and brother Andre Sewell were both told by Bibbs that "Caprese" shot him. Id., at 165-167. The next March Mr. Wright viewed a police corporal lineup and made an "immediate identification" of Mr. Gardner. Id., at 170-171; (D pp.172-175).

Jermaine Baldwin and Andre Sewell testified that they are brothers, were friends with Dawan Bibbs, and lived near James Wright. (D pp.102-104,126-127). When they were wakened by James Wright on the morning of October 8, 2000, they went over to Wright's house and saw Dawan Bibbs lying in the vestibule Id., at 106-108; 129-130. When Mr. Baldwin asked him what happened, "[h]e said Caprese shot him." Id., at 108. Mr. Sewell said that he asked Mr. Bibbs what had happened, and "[h]e said his mama's boyfriend shot him." Id., at 131. James Wright admitted that he had prior convictions for CCW and UDAA. (B pp.24). Jermaine Baldwin, and Andre Sewell also admitted to priors involving breaking and entering, and receiving and concealing stolen property, respectively. (C pp.191; D pp.117-118,138-139).

The pathologist testified that Dawan Bibbs had been shot three times, with two of the bullets exiting his body and one remaining in his shoulder. One of the shots did major damage to his spinal cord. (D pp.203-207,222). No major blood vessels were hit by the shots, but the cause of death was

the multiple gun shot wounds. Id., at 219-222. she thought that Mr. Bibbs could have talked for up to about thirty minutes after being shot. Id., at 220-221,243-224. The routine toxicology test came back negative for alcohol and other drugs. Id., 210-211.

The police investigation showed that there were vacant lots on both sides of James Wright's house. (D pp.38). The front door was steel and had gouge marks and footprints on it. Id., at 41-42. There were old bullet holes in various spots in the house, including one of the bedroom doors and in the wall between the bedroom closet. Id., 61-64,78-79,163. James Wright told the police that Dawan Bibbs told him that a MAC-10, an automatic, was used. Id., at 185-186,191-192.

The police recovered three bullets, two from the scene and one from Dawan Bibb's shoulder, and all three were nine millimeter caliber and shot from the same gun, which possibly could have been a TEC-9. (D pp.159-162,203,206-207,223-224; F pp.10-13,17-21. However, no cartridge casings were found at the scene, and the fatal weapon was never recovered. (C pp.139; E pp.48). The police looked for casings because the shots were fired from a nine millimeter weapon and they expected that it would have been an automatic and would have ejected its casings as they were fired. The fact that there were no casings at the scene tended to indicate that someone had picked them up after the shooting. (D pp.85-87,100-101).

Police chemist William Steiner testified that he found gunshot-residue on James Wright's hands and inside both pants pockets, where someone would after firing a gun would put his hands in the pockets of his pants. (E pp.115-116,136,138; D pp.67-68,71). (See Appendix A for Trace Evidence Report II). However, Steiner had originally been told by Officer Lance Newman, who was in charge of the case that the analysis of the gunshot-residue kit taken

from Wright was unnecessary, so he did not do the analysis until April, 2001, more than six months after the shooting. (E pp.143-144); see Id., at 39 [The original officer in charge Lance Newman, testified, "my investigation led differently."].

Officer Mark Amos testified that he arrested Caprese Gardner on March 6, 2001, outside a store in Detroit where Gardner had been paying a bill. Officer Mark Amos asked Mr. Gardner what was his name, Gardner was reluctant and initially gave a false name. (E 161-166). He had no weapon or ammunition on him. Id., at 176. Even though Mr. Gardner refused to give his correct name when asked, Officer Amos told him what he was being charged with and where the offense occurred, "[h]e stated he was there when the shit went down but he had left." Id., at 167-168.

The prosecutor and the defense counsel stipulated that Caprese Gardner had previously been convicted for felonious assault and had not had his rights to possess a firearm restored. (F pp.5).

Kimberly Jones testified for the defense that she and Caprese Gardner had a daughter together. On Saturday, October 7, 2000, she told him on the telephone that their daughter was sick and she would probably need him to go to the hospital if her symptoms did not get any better. It was Jones decision to try some over the counter medication first and if that did not work she would call Mr. Gardner back and require his assistance. Ms. Jones stated that Mr. Gardner arrived at about 5:00am the next morning and stayed until about 10:00am that morning. (F pp.38-43). Defendant Caprese Gardner did not testify. (F pp.76)

The jury found Caprese Gardner not guilty of first-degree premeditated murder but convicted him on the lesser offense of second-degree murder and was convicted as charged of felon in possession of a firearm and

felony-firearm. (F pp.4). He was sentenced as a Third Habitual Offender, MCL 769.11 to terms of twenty-five to fifty years for the murder, two to ten years for felon in possession, and five years for felony-firearm. S 12; (Appendix A), Amended Judgment Of Sentence.

Defendant Caprese Gardner, now files Delayed Application For Leave To Appeal Denial Of Defendant's Motion For Relief From Judgment and to remand on the issues that follow. pursuant to MCR 7.205.

**I. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND TO DUE PROCESS OF COMPETENT ATTORNEY REQUIRED BY THE SIXTH AMENDMENT:**

**(A) TRIAL COUNSEL FAILED TO INVESTIGATE INFORMATION WHICH CHARGED DEFENDANT AS A THIRD HABITUAL OFFENDER.**

On August 30, 2001, defendant was sentenced to 25 to 50 years for second-degree murder, 2 to 10 years for felon in possession and five years for felony-firearm, plus Third Habitual Offender. Defense Counsel Knew well in advance of trial that defendant had only one prior conviction that occurred on February 25, 1988. (B pp.44). The 1988, convictions were for felonious assault and felon-firearm, both convictions arose out of the same transaction involving same time, place and subject matter. If Counsel was unaware of how the habitual statute was construed, then it would be adequate to say that counsel fell below reasonable, and competent required by the Sixth Amendment and prejudiced the defendant in the process.

Critically defense counsel made no objections in the District Court to the information charging defendant as a Third Habitual Offender.

Two standards of review apply to this issue: de novo and Plain Error. The interpretation of either a statute or a court rule is a question of law subject to review de novo. People v Chavis, 468 Mich 84, 91; 658 NW2d 469 (2002); In re Gosnell, 234 Mich App 326,333; 594 NW2d 90 (1999). Accordingly, this court reviews for "plain error." United States v Collins, 78 F3d 1021,

1033 (CA 6, 1996). "Plain Error" is defined as an egregious error, one that directly leads to a miscarriage of justice, or error that obvious, affects "substantial rights," and seriously impairs the fairness or integrity of the judicial proceedings. People v Stoudemire, 429 Mich App 262 (1987); United States v Frazier, 936 F2d 262,266 (CA 6, 1991); United States v Mendena, 302 F3d 626 (CA 6, 2002), stating multiple convictions that arise out of the same transaction may only be counted as a single incident (MCL 769.10); (MAS 28.1082).

In Stoudemire, supra, we learned about the legislative intent of the habitual offender statute. The Court held as a matter of legislative intent that because the defendant did not have an opportunity to reform between the prior convictions, this did not demonstrate the recidivism for which enhanced punishment was appropriate. The clear legislative intent that increased penalty was for "hardcore recidivist robbers and burglars, repeat offenders, and three time losers." Stoudemire, supra at 275. In Glover v United States, 531, US 198, 148 L Ed2d 604 Ct.696 (2001), this court states that there are no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute prejudice. "Indeed, it is not even clear if the relevant increase is to be measured in absolute terms or by some fraction of the total authorized sentence." Here the government no longer asserts that a 6 to 21 month prison increase is not prejudice under Strickland v Washington, 446 US 668; 104 S Ct.2052; 80 L Ed2d 674 (1984).

In the present case, counsels performance was deficient in that Counsel failed to argue that defendant's two prior convictions that were tried together were related. The Court should find that defendant's two prior convictions were related and shared the same "modus operandi," and was consolidated for trial under one indictment sharing the same time, place and subject. In the

event, counsel erred in failing to raise the "relatedness" question which severely prejudiced defendant and so constituted constitutionally ineffective assistance of counsel. Under these circumstances, defendant is entitled to resentencing within the appropriate guideline range.

The issue of the proceedings, under the habitual offender statute involves substantial rights and should be resolved by retroactive application. People v Newman, 173 Mich App 160 (1988). A third habitual offender may be sentenced to double for the substantive offense in contrast to a second habitual receiving one and a half times for the substantive offense. (MCL 769.10); (MSA 28.1082).

Defendant Gardner, deserves to be represented by trial Counsel at all stages of trial, especially when there's a sentencing determination. Without the adequate representation of counsel defendant goes through trial blind and oblivious to law, which leaves him susceptible to the exploitations of the prosecutor. Counsels failure to object to Mr. Gardners prior convictions did not constitute reasonable trial strategy and fell outside the wide range of professionally competent assistance. By counsel not informing defendant of how the habitual offender statute was construed, defendant was deprived of a meaningful opportunity to exercise his peremptory challenges. (MCL 769.13); (MSA 28.1085).

If trial Counsel would have objected to defendant's prior offenses and made "clear" the interpretation of the statute, Mr. Gardner, would have without a doubt received a lesser amount of time, under a different guideline range. It was not trial strategy for counsel to disinform the court of the legislative intent of the habitual offender statute. Defendant Gardner, seeks the mitigation of the Court for all the above reasons stated throughout this issue and resentencing should be granted as stated in Stoudemire, supra at 263.

**(B) TRIAL COUNSEL FAILED TO CHALLENGE THE SUGGESTIVENESS OF THE IDENTIFICATION MADE BY THE CHIEF WITNESS JAMES WRIGHT.**

James Wright, the eye witness for the prosecutor identified Defendant Caprese Gardner as the perpetrator who committed the shootings that took place on Hamburg Street in Detroit, on the morning of October 8, 2000. (B pp.11,12). The identification made by Mr. Wright were made under such suggestive circumstances, and of such questionable reliability that there introduction denied defendant of a fair trial. Defense Counsel's failure to take the obvious steps to prevent the introduction of this evidence constituted ineffective assistance of counsel. US Const, Ams VI,XIV; Const 1963, §§17,20.

Because this not a preserved error, Defendant must show a "Plain Error" affecting substantial rights. Under this standard, reversal is warranted where the Defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. People v Carines, 460 Mich 750, 774 (1999). On the alternative ground of ineffective assistance, Defendant must demonstrate errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, and that there is a reasonable probability that, but for counsel's errors, he would have been acquitted. Strickland v Washington, 446 US 668; 104 S Ct 2052; 80 L Ed2d 674 (1984); People v Pickens, 446 Mich 298 (1984).

In the present case, Defendant Caprese Gardner was picked up March 6, 2001, by Officer Mark Amos and partner Keith Norrod, who conveyed defendant downtown to the Homicide Section located at 1300 Beaubian. (E pp.168). Officer Amos testified that he was contacted by the Violent Crimes Task Force and was presented with a "picture" of defendant, plus a copy of the warrant. (E pp.160-162). Defendant was in custody March 6, 2001, at about 12:00pm and the show-up on defendant wasn't until the 13, of March, exactly one week later. (D

pp.172-173). Jame Wright, the only eyewitness for the prosecutor made an "immediate identification." (See Appendix for show-up and photo).

Trial Counsel was informed by defendant that Officer Lance Newman, had taken polaroid pictures of defendant while he was in custody and after refusing to make a statement. During trial on cross examination, defense counsel was questioning Officer Newman about whether he had taken any statements from Mr. Gardner and in the process, counsel abruptly changed the question and asked if he had ever taken "pictures" of defendant. Officer Newman said he did not take the pictures, but would not say who did. Officer Newman admitted to polaroid pictures being taken of Mr. Gardner, before the show-up was conducted and while defendant was custody. (E pp.49).

Officer Newman, already had pictures in his possession of defendant which he distributed to various officers in the area, 9th and 5th precincts. The pictures officer Newman had in his possession were pretty outdated. Mr. Gardner, at the time of the crime had been clean shaven "bald" head for the past eight years. (E pp.46-47).

On direct examination, James Wright was asked about how was he able to make his identification and Wright answered "his size", Wright also testified that he never saw the defendant before, but had a brief conversation with him on the morning of October 8, 2000, and looked defendant right in the "face". (C pp.173-174).

Defendant has a scar on his face that starts right below the left eye and runs down the cheek to the top of the mustache, that's a personal peculiarity that distinguishes defendant from the next individual. (See Appendix defendant's prison ID), which also includes other personal information. James Wright, made an "immediate identification," five months after the crime took place, but when trial started 4-months after the identification, Wright dosen't

have a clue of how the defendant looked. Mr. Wright based his identification on the defendant's "size" no other description was given at trial and defendant is not abnormal sized.

Defendant never had a photographic array, identification was made through corporal show-up only. Mr. Wright, never identified defendant by any "idiosyncratics" and admitted that his identification was predicated on defendant's size. Trial Counsel possessed information of refutation and knew the identification of Wright was highly suspect. After eliciting testimony from Officer Newman about the polaroid pictures taken of defendant while he was in custody, counsel chose not challenge the identification of the only eyewitness. Counsel's original defense theory was suppressed, but counsel chose not to request a "continuance" and proceeded to trial without an adequate defense theory to use. (G pp.42-47). Counsel has a duty to make reasonable investigations or to make a "reasonable decision" that makes particular investigations unnecessary, Strickland, supra.

The trial Court gave instructions to the jury on how important "accurate identification" is in a murder case (F pp.159-160). With the evidence the prosecutor was able to glean and with no real defense theory from trial counsel, defendant was still found "not guilty" of first degree murder. If defense counsel would have challenged James Wright identification through vigorous, adversarial testing, counsel would have been able to argue that Mr. Wright never saw defendant on the day of the crime and only made his identification by pictures taken of defendant while he was in custody.

Defense Counsel could have argued that James Wright had no clue of how defendant looked, but was still able to make an immediate identification 5-months after the crime took place. Counsel could have presented the question that how was it possible to positively identify someone based on their size?

Had Counsel performed the vigorous, adversarial testing to the identification of James Wright, there's no doubt that no reasonable juror would have found defendant guilty and defendant would have been acquitted of the charges.

Defense Counsel left the only identifying witness testimony "virtually unchallenged." Trial counsel could have exposed Officer Lance Newman, showing to the jury that the pictures taken of defendant Gardner while he was in custody were the "fruit" of police misconduct and in the process violated defendant's due process rights. (U.S.C.A Const. Amends V,VI,XIV; Const. 1963, art 1, §§17,20). This Court should grant leave to appeal, and schedule Caprese Gardner an evidentiary hearing on this issue.

**(C) DEFENDANT WAS DENIED THE OPPORTUNITY TO REFUTE THE BOGUS  
"ELEVEN WORD" STATEMENT BY WAY OF WALKER HEARING.**

On July 18, 2001, one week before trial started for Defendant-Caprese Gardner, a motion hearing was held which was requested by the prosecution. At this motion hearing, Defense Counsel was presented with a "new" P.C.R, submitted by Officer Mark Amos, one of the arresting officers, implying that defendant made a verbal statement. Trial Counsel asked defendant about the statement and defendant repudiated the verbal statement. At that point defense counsel stated that he would not request a "Walker Hearing." This was an improper procedure for the admission of a statement to be determined voluntary or involuntary. U.S.C.A. Const. Amend. XIV. (See Appendix A for motion hearing pp.14-15).

Two standards of review apply to this issue, Clear Error and de novo. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The Court must first find the facts and then decide whether those facts constituted a violation of the defendant's constitutional rights to effective assistance of counsel. The Trial Court's factual findings are reviewed de novo.

People v LeBlanc, 465 Mich 575 579; 640 NW2d 246 (2002). Jackson v Denno, 378 US 368, 84 S Ct 1774, 12 L Ed2d 908 (1964), stating that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v Richmond, 364 US 534, 81 S Ct 735, 5 L Ed2d 760 (1961), and even though there is ample evidence aside from the confession to support the confession. Equally clear is the defendant's constitutional right at the same stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession, Rogers, supra.

In the present case, defense counsel did not comport with constitutional standards and the defendant was deprived of a meaningful determination of the voluntariness of his confession. Defendant was denied effective assistance of counsel, for not requesting the evidentiary hearing to refute the statement that was said to have been made voluntarily. (E pp.168). Defendant-Gardner, was arrested on March 6, 2001, by officer Mark Amos and partner Keith Norrod. A report was originally made out by Keith Norrod, stating how they picked defendant up and conveyed him downtown. Four months later on July 18, 2001, a week before trial started, the prosecuting attorney produced a "new" P.C.R, with Mark Amos Name on it, saying that defendant made a verbal statement. (See Appendix A for both officers P.C.R's and the prosecutor's motion pp.14). Officer Amos P.C.R, was contrary to Mr. Norrods, in regards to the statement that was said to have been made by the defendant.

During cross examination, defense counsel asked Mr. Amos, when did he do his P.C.R, and Mr. Amos replied, that he filled out his P.C.R, the same day at about 12:15pm. (E pp.175). Keith Norrod's P.C.R, had defendant in custody

at 11:50am and transported downtown by 12:00pm, which was approximately determined. Mark Amos "new" P.C.R, had defendant in custody by 11:50am, but his time for filling out his P.C.R was 11:20am, and at that time defendant had no encounter with law officials. (Appendix A and check the times on both P.C.R's). Defense Counsel was equipped to challenge the "new" P.C.R, produced by Mark Amos, but refused to do so.

Defendant-Gardner, never had an opportunity to have the Walker Hearing" to support his allegations that the statement was never made. (A pp.14-15). Officer Mark Amos had no proof that the statement was ever made by the defendant and an evidentiary hearing should have been held. (E pp.174-175). Trial Counsel decided not to have a Walker Hearing without consulting or explaining why to the defendant, the validity to do so. At trial, defense counsel stated to the court that he wasn't going to request a Walker Hearing, because it wasn't a matter of challenging the veracity of the confession for being voluntary or involuntary, but that the statement was never made. This allowed officer Amos to inject prejudicial information into trial and defense counsel knowing that the statement was "bogus" did nothing to prevent the detrimental affect it would leave in the minds of the jurors.

The statement that was said to have been made by the defendant stated, "I was there when the shit went down but I left.". What that statement does is put the defendant at the murder scene and involves him in whatever took place at that residence. That's all the jury needed to hear to associate the defendant with the crime. When officer Amos was asked about whether he had the statement written down he replied, "I don't hold on to that stuff." (E pp.168,174-175). Defense Counsel was left with no other alternative but to utilize defendant's Fourteenth Amendment constitutional rights and allow the proper procedures to be administered and have an evidentiary hearing. See People

v Walker, 374 Mich 331; 132 NW2d 87 (1965); People v Ginther, 390 Mich 436; 212 NW2d 922 (1973).

If Defense counsel would have challenged the statement and had an evidentiary hearing, the Court would not have allowed such incriminating evidence in without first establishing its proof. Counsel could have argued that right after officer Amos asked defendant his name, defendant gave a different name and claim to have no identification. Officer Amos, then retrieves a bill from the defendant's pocket showing his correct name. According to officer Amos, that's when the defendant admitted to being at the murder scene. (E pp.165-166,168). The Trial Court would not have believed that defendant-Gardner, goes from not telling the officer his name and having no identification on him, to admitting being at a murder scene, it just doesn't seem logical.

The Court, being the fact finder would have been able to discern and reach the logical conclusion that the statement was never made and discarded the incriminating evidence. Defense Counsel, was not functioning as competent counsel guaranteed by the Sixth Amendment and allowed prejudicial information to be admitted against defendant. Defendant could have possibly been acquitted of the charges, if the jury would have never been allowed to hear that bogus statement from the police officer. No matter how the jury weighed the evidence adduced at trial to defendant's guilt or innocence, it was virtually impossible to vindicate the defendant after hearing that incriminating statement which went unchallenged.

Defendant-Gardner, is relying on this Court to review this issue and determine that it was not trial strategy for counsel not to take the proper procedures and have an evidentiary hearing in accordance with the U.S.C.A Const. Amend. XIV, and grant defendant's relief requested.

**(D) COUNSEL FAILED TO IMPEACH WITNESS WHO GAVE PERJURED TESTIMONY AT PRELIMINARY EXAMINATION AND AT CIRCUIT COURT.**

Jermaine Baldwin, and James Wright, testified at preliminary examination that the victim Dawan Bibbs, made statements that Defendant-Gardner, shot him. Mr. Baldwin, also testified to the same statements at trial, that Mr. Bibbs made those same statements to police officers and E.M.S drivers, that Defendant Gardner shot him. (B pp.16,21,42); (D pp.118-120).

These statements were intentionally made to influence the investigation, and had a direct affect on the District Court decision to bind the defendant over for trial. Trial Counsel had the P.C.R's of the first two police officers on the scene and could have impeached Jermaine Baldwin with tangible evidence, but failed to do so. Defense Counsel was ineffective for failing to impeach a witness who gave perjured statements under oath, which related to matters of materiality, according to the Federal Criminal Statute, 18 U.S.C.A § 1621.

Two standards of review apply to this issue, Clear Error, and de novo. First, the District Courts factual determination that the witness testified falsely about a material matters and that he did it so intentionally and not because of confusion, mistake, or memory lapse, is reviewed for Clear Error. United States, v McDonald, 165 F3d 1032, 1033-34 (CA 6, 1999). Second, the determination that the specific conduct constitutes obstruction of justice is a mixed question of law and fact, which is reviewed de novo.

Although, a preliminary examination may assist in fulfilling the constitutional requirement that the accused be informed of the nature of the charge, People v Johnson, 427 Mich 98, 103-104; 398 NW2d 219 (1986), the primary function of a preliminary examination "is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed." People v Glass, (after remand), 464 Mich 266, 278n 8, 279; 627

NW2d 261 (2001). Thus, a preliminary examination "primarily serves the public policy of casing judicial proceedings where there is lack of evidence that a crime was committed or that the defendant committed." Johnson, supra at 104-105. Thus under People v Hall, 435 Mich 599, 602-603, 613; 460 NW2d 520 (1990), an error in the preliminary examination procedure must have "affected the bind-over," and have adversely affected the fairness or reliability of the trial itself to warrant reversal.

In the instant case, Defendant-Gardner, was bond-over for trial on first-degree premeditated murder, based on testimony given by James Wright and Jermaine Baldwin. (B pp.46-47). The District Court, allowed hearsay testimony to be admitted under "Dying Declaration," predicated on testimony given by Wright and Baldwin. (B pp.21). On cross examination, Jermaine Baldwin, specifically stated to the court that the victim Dawan Bibbs, told him, the police officers and the E.M.S drivers that, "Caprese shot him." These answers given by Mr. Baldwin to the veracity of the "Dying Declaration" is what makes this a matter of materiality. There no question, that the voluntary answers given by Mr. Baldwin was of material matter and a phenomenal affect on the Districts Courts decision to bind defendant over for trial (B pp.42-43). At the end of preliminary examination the District Court made this statement:

"All right, based on the testimony that I have heard in the matter I find there is enough to find there is probable cause to believe the defendant charged committed the crime." (B pp.46-47).

James Wright, was the only person with the victim, Dawan Bibbs, the day the shooting took place. (C pp.149). In Wright's original report to officer Roy Coleman, Wright stated that Dawan told him the defendant pointed a "MAC 10" at his head. (Appendix A for Roy Coleman's P.C.R). On cross examination, officer Coleman, testified that Mr. Wright told him that Dawan said defendant pointed a "MAC 10" at his head. (D pp.185-186). Mr. Wright, on direct

examination denied that Dawan told him that a "MAC 10" was used. (C pp.166). The prosecutor used Mr. Wright's original report in her closing argument stating: "Remember when James Wright, when the police first arrived at the scene James said Dawan, the victim, told him that his mothers boyfriend had pointed a "MAC 10" at his head and he slapped it away." (F pp.142).

According to the Federal Statute Of Perjury 18 U.S.C.A § 1621, "A witness testifying under oath or affirmation violates this statute if he gives testimony concerning a material matter with the willful intent to provide false testimony, rather as a result of confusion, mistake, or faulty memory." United States v Dunnigan, 507 US 87, 113 S Ct 1111, 122 L Ed2d 445 (1993). James Wright, was in violation the moment he produced written testimony to officer Roy Coleman, relating to a "declaration" made by the victim, Dawan Bibbs. James Wright, specifically stated what type of gun was used, according to what the victim, Dawan told him, but later at trial Mr. Wright woun'dn't acknowledge it. (C pp.166; D pp.185-186).

The obvious conflict between Jermaine Baldwin's testimonial statement's and the first police officer on the scene, Roy Coleman's statement, clearly established "probable cause" to believe that the witness had knowingly testified falsely. The same with James Wright, making a report to the officer at the scene of the crime saying the victims last words were the defendant put a "MAC 10" up to his head and later at trial denied it. Furthermore, the testimonies in question went to a matter of materiality. The evidence presented at preliminary examination thus supported the Districts Court's decision to bind defendant over for trial. Defense Counsel can not satisfy its burden with respect to proving a willfully false statement or testimony simply by "contradicting" the witness sworn statement, but must present evidence of circumstances bringing strong corroboration of the contradiction. See People

v Kozyra, 219 Mich App 422, 428-429; 556 NW2d 512 (1996).

If defense counsel would have impeached the prosecutor's key witness's by presenting evidence of circumstances bringing strong corroboration, Defendant Gardner, would have been acquitted. Showing with tangible evidence and not by verbal contradictions, that the testimonies in question was less than veracious. Defense Counsel would have been successful arguing the fact that Wright only knew the victim Dawan Bibbs, from living in the neighborhood. (C pp.59,144-145). That after Bibbs was shot, Wright went over on the next block and got his friends to help corroborate a story against defendant. That Wright, admitted the crime happened at 7:00am, but did not report it until 7:35am and told police that it occurred at 7:20am. (C pp.163-164; D pp.183). Defense Counsel, could have placed emphasis on why it took 30-minutes to report the offense. Counsel would have been successful arguing why there wasn't any casing found at the scene, or the "TEC 9" that the victim, Dawan took to Wright's house. (C pp.139). Why the victim, Dawan wanted to go see his friends instead of having someone call his mother, the police or the E.M.S to get medical attention. (D pp.15).

The only overwhelming evidence against defendant, was the "Dying Declaration" made by the perjurious witnesses "word of mouth." If Defense Counsel had impeached the prosecutor's key witnesses who perjured themselves, defendant would have been acquitted of the lesser included charge as well. Counsel's failure to impeached the key witnesses, without having a genuine defense theory to use did not fall under trial strategy and the actions of counsel constituted prejudice under Strickland v Washington, 446 US 668, 104 S Ct 2052, 80 L Ed2d 647 (1984).

Defendant-Caprese Gardner, implores this Court to review the testimonial statement's according to the perjury criminal statute 18 U.S.C.A § 1621, and

if the statement's are found to be to matters of materiality, reverse defendant's conviction or grant defendant's motion and schedule an evidentiary hearing on this issue.

## II. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A criminal defendant is entitled to the effective assistance of counsel. Strickland v Washington, 466 US 668; 104 S Ct.2052; 80 L Ed2d 674 (1984); Beasley v United States, 491 F2d 687 (CA 6 1974); U.S.C.A Const. Amend. VI. This right includes the right to the effective assistance of counsel on appeal. Evitts V Lucey, 469 US 378; 105 S Ct. 830; 83 L Ed2d 821 (1985); Penson v Ohio, 488 US 75; 109 S Ct.346; 102 L Ed2d 300 (1988).

In Beasley v United States, supra, the Court stated that, to be constitutionally adequate:

"Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a timely manner."

Under Strickland v Washington, supra, the following standard applies to the performance of counsel:

"[t]he proper standard for attorney performance is that of reasonably effective assistance.... When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate.... In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."

Under Strickland v Washington, supra, the following standard applies to prejudice from the attorney's poor performance, stating:

"We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.... The result of a proceeding can be rendered unreliable, and hence

the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome....

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

In the present case, appellate counsel only raised one issue for defendant on his appeal of right, which was a reiteration of trial counsel's argument to admit evidence that the Trial Judge thought was irrelevant. (G pp.42-47). Appellate counsel's sole claim of error was in regards to evidentiary rulings made by the Trial Judge. (1) suppressed evidence relating to motive and bias, suppressed evidence that the shooting was drug related, and suppressed evidence that another individual was the shooter. (See Appendix A Court of Appeals decision April 15, 2003). The exclusion of evidence is within the sound discretion of the Trial Court. People v Golochwicz, 413 Mich 298 (1982).

According to appellate counsel's actions and his professional judgment, there were no error's that occurred during the trial itself. In the United States v Cronin, 466 US 648,--n.19, 104 S Ct.2039, 2045-46n.19,80 L Ed2d 657,666 n.19 (1984), the court stated, "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."

In the present case, as Defendant argues in issue I. (A), that the defendant was sentenced under invalid information which charged him as a Third Habitual Offender, while the defendant had only one prior conviction. This was a perspicuous error that was easily detectable for any competent attorney making a reasonable inquiry.

If Appellate-Counsel was functioning as attorney guaranteed by the Sixth Amendment, and raised the habitual issue alone, Defendant-Gardner would have received a lesser amount of time. The actions taken by Appellate-Counsel

deprived the defendant of a meaningful opportunity to succeed on his Appeal of Right, all due to appellate counsel's failure to raise any trial errors. The greatest deficiency of all was not raising ineffective assistance of trial counsel for making the decision to go to trial without having a defense theory and not holding the prosecution to its heavy burden of proof. It's a great possibility that Defendant-Gardner, would have been successful on his appeal of right had appellate counsel raised any errors that occurred throughout the process of trial.

Under Evitts v Lucey, 469 US 396, the following standard applies to ineffective assistance on appeal:

"nominal representation on appeal as of right--like nominal representation at trial--does not suffice to render the proceedings constitutionally adequate."

The critical failure of an attorney to object or raise an issue can be ineffective assistance of counsel if it deprived the defendant of an opportunity for dismissal of the case or for success on appeal. Gravly v Mills, 87, F3d 779 (CA 6 1996); Kowlak v United States, 645 F2d 534, 537-538 (CA 6 1981); Corsa v Anderson, 443 F. Supp. 176 (ED Mich 1977).

We submit there was ineffective assistance of Appellate-Counsel.

We should look both at what was raised, and what was not raised.

**III. IMPROPER REFERENCE MADE BY A VETERAN POLICE OFFICER  
TO DEFENDANT'S PRIOR CRIMINAL RECORD.**

Defendant has filed a motion to remand for a new trial on the grounds that a veteran police officer injected prejudicial information into trial.

**ISSUE PRESERVATION AND STANDARD OF REVIEW.**

This issue was preserved by Defense-Counsel's attempt to have a mistrial based on the improper reference made by a police officer, and the Trial Judges rejection of the proposed motion. (E pp.180-182).

The standard of review for a decision not to grant a mistrial is reviewed as "Abuse of Discretion."

People v Yost, 486 Mich 122, 127; 659 NW2d 640 (2003); United States v Chambers, 944 F2d 1253,1263 (CA 6 1991), cert, denied, 112 S Ct 1217, 117 L Ed2d 455 (1992). An abuse of discretion occurs when we are left with the "definite and firm conviction that the [district] court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors" or where it improperly applies the law or uses an erroneous legal standard. Huey v Stine, 230 F3d 226,228 (CA 6 2000).

In the United States v Blanton, 520 F2d 907,909-10, (CA 6 1975); (holding that the deliberate injection of testimony concerning another wholly unrelated offense in which the defendant was allegedly involved was reversible error because the evidence of the defendant's guilt was not "so overwhelming that the error could not possibly had influenced the jury's decision or affected the substantial rights of the defendant." A non-responsive and volunteered answer referring to a defendant's prior criminal activity is prejudicial error where the witness is a "police officer and a fingerprint expert", a prosecutor has a high degree of duty to ensure that "police officers" do not venture into forbidden areas in their testimony and the Court Of Appeals will not let a prosecutor sit back and ask open-ended questions of police officers and then,

thereafter, deny culpability when the officer makes an inadmissible statement; See People v McCartney, 46 Mich App 691 (1973).

In the present case, Defendant-Caprese Gardner, never took the stand in his defense. On August 1, 2001, officer Mark Amos, was questioned on direct examination about whether or not, he had informed defendant of the charges. After answering the question yes, the officer was asked what did he tell the defendant about why he was being detained and the officer answer went as followed: "I said, I showed him the warrant I had in my hand, which charged him with murder, felon-firearm, federal flight to avoid prosecution, and habitual third." (E pp.167). Officer Amos, was still being questioned by the prosecutor, when defense counsel summoned the court's attention, pertaining to the comments made by the officer. Defense Counsel, (quoting) "your Honor, just for the purpose of the record, I wont do it now, but out of the presence of the jury there is a matter that I would like to raise based on some of the responses by this officer." (E pp.167-168).

Defense-Counsel, moved for a mistrial, specifically on the comments made by Officer Amos about the defendant being a third habitual offender. Under the same motion, the officer intentionally misquoted the defendant's charge from felon in possession of a firearm, to federal flight to avoid prosecution. Defense Counsel told the court that it was unnecessary for an experienced officer to relate a bogus charge for federal flight to avoid prosecution. Officer Amos, intentionally stated the charge incorrectly. (E pp.180-182).

Officer Mark Amos, is a seventeen year veteran police officer who went out of his way to prejudice the defendant by fabricating the charge of federal flight to avoid prosecution. The officer used this bogus charge to influence the jury to defendant's guilt by implicating that the defendant was avoiding prosecution, for being a repeated offender.

This prejudicial injection of information fell in line with the prosecutor's closing argument, that the defendant wouldn't turn himself in and the defendant was ducking the police, "defendant is on the run." (F pp.99). The prosecutor agreed that the officer should not have said what he said, but didn't agree to the comments causing a mistrial. (E pp.181). The Trial Judge, ruled with the prosecutor and said he didn't think no harm had been done. The Court stated: "I don't even think the juror's know what that means just given that statement." The statement the court was referring to is about the defendant being a third habitual. (E pp.180-182).

On July 18, 2001, at a motion hearing requested by the prosecutor, the trial Judge made this statement while addressing other issues, "That's the whole basis to make a reasonable inference based on evidence that is submitted and if evidence -- if there's a basis for the Court determining that the evidence is trust-worthy, then it should be allowed, as much evidence as possible should be given to the jury so they can make their decision regarding the verdict in this case." (See Appendix A motion hearing pp.13).

Given that statement by the Court, how do we determine the true capability of a reasonable juror? On one hand, the Court states that he doesn't think the jury understood that defendant was charged as a "third habitual." (E pp.181). At the motion hearing held on July 18, 2001, the Court stated that juror's should be able to make reasonable inferences based on evidence submitted and make reasonable determinations.

Just given the word habitual along, with no numbers added for emphasis, would alert the average person to believe that something or someone continuously or repeatedly does something over and over again. To say "none of the jurors" understood that the warrant charged the defendant as a third habitual offender and federal flight to avoid prosecution, would say that the jury itself was

incompetent. That the jury was feebly intelligent, and could not weigh essential evidence and make reasonable decisions as fact-finders to try a person accused of any type of crime.

Officer Mark Amos, is the same officer argued in issue I.(C), and had he not been allowed to speak improprieties to the jury, defendant may have been acquitted of the charges. The jury would not have been allowed to consider prejudicial information, which became evidence against defendant, used to be determined to defendant's guilt or innocence. Officer Amos was never admonished for making the improper comments, neither was there a curative instruction given. Even if a curative instruction was given, the damage was so severe, that no instruction would have been adequate enough to erase from the jurors mind, that Defendant-Gardner, was trying to flee the states for being a "three time loser."

Absent the erroneous charge that officer Amos used against defendant, along with the intentional injection of prejudicial information, Defendant-Gardner, would have been acquitted. The jury used this spurious charge, alone with the third habitual as evidence to determine defendant's guilt or innocence. The Court, should address this issue to protect defendant's due process and grant the motion for mistrial, to prevent a miscarriage of justice.

#### IV. PROSECUTOR MADE NUMEROUS IMPROPER COMMENTS DURING CLOSING ARGUMENT WHICH ACCUMULATED TO ERROR.

Here, there are a number of comments which were improper. (a) The prosecutor made improper comments about defendant's only alibi witness.

##### ISSUE PRESERVATION AND STANDARD OF REVIEW

This issue was preserved by trial counsel objecting to the improper comments made by the prosecutor, who argued information that wasn't part of evidence. (F pp.102).

The standard of review for prosecutorial misconduct should be reviewed de novo. People v Bahoda, 448 Mich 261 (1985).

To prevail on a prosecutorial misconduct claim, the petitioner must demonstrate that the prosecutors remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v DeChristoforo, 416 US 637, 643, 93 S CT 1868, 40 L ED2d 432 (1974). A prosecutor may not make a statement of fact unsupported by trial evidence, People v Ellison, 133 Mich App 814 (1984). See Berger v United States, 295 US 78, 84 55 S Ct 629, 631, 79 L Ed 1314 (1935).

In the present case, the prosecutor implied to the jury, that the defendant's alibi witness knew [h]e was guilty and was helping the defendant hideout from the police, knowing he was wanted for murder. That argument alone shifts the burden to the defendant to prove the alibi witness beyond a reasonable doubt. Defense Counsel immediately objected to the improper argument reasoning, that there was nothing in evidence to support that type of argument. The Trial Court allowed this argument to continue stating, "I'm going to let the jury decide. Let's continue." (F pp.102). See also MRE 401,403.

This was clearly an improper argument which could have been negated by a curative instruction. A Trial Judge, may comment on the evidence as justice requires, MCL 768.29; MSA 28.1052; GCR 1963, 516.1, but such comments must

be limited to remarks regarding evidence presented at trial. People v Viaene, 119 Mich App 690, 696-697; 326 NW2d 607 (1982).

Both the prosecutor's comments in closing argument and the trial Court's failure to sustain defense counsel's objection and give cautionary instruction, went beyond the scope of permissible comment on the evidence presented. Instead, the comment amounted to "new evidence" presented against the defendant. As such it was testimony presented by the prosecutor and trial court against defendant. Berger v United States, supra. The prosecutor may not assume prejudicial facts not in evidence, nor may he insinuate the possession of personal knowledge of facts not offered in evidence, Berger, supra.

It was an abuse of discretion for the trial Judge to allow the prosecution to inflame the jury with this type of argument, without having any supportive evidence. The fact finders were allowed to consider this argument to determine defendant's guilt or innocence. Since there was never a curative instruction given, the fact finders was left with the thought of defendant's only alibi witness knowing the defendant was guilty and was trying to get him exonerated by all means necessary. Any weight that was carried by the veracity of the alibi witness up until this point was denigrated and the burden of proof shifted.

According to People v Dalessandro, 165 Mich App 569 (1988), the attorney's task is to persuade the jury based solely on "proof" at trial and make reasonable inferences drawn from that evidence. The Sixth Amendment guarantee of a fair trial, means the one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as "proof" at trial.

In the present case, if the prosecutor had not been allowed to inflame

the jury with this improper argument, or a curative instruction was promptly given, the jury would not have had any reason to second quest defendant's alibi witness. The alibi witness was the only evidence to prove that the defendant was never at the scene of the crime. Its possible that the defendant would not have been convicted if the prosecutor had not been allowed to use improper arguments. (F pp.38).

It was prosecutorial misconduct in its rarest form, for the prosecutor to argue that the alibi witness was in cahoots and helping the defendant elude police. Even if a curative instruction was given, the damage had already been done, that even a curative instruction couldn't placate, or mend the defendant's presumption of innocence. Without the improper argument induced as evidence against defendant, defense Counsel could have prevailed on the fact that James Wright reported the crime 30-minutes later to clean up the scene and get rid of the shell casings that were never found. The prosecutor had to use these improprieties because her theory wasn't adding up.

At the beginning of trial, the Trial Judge ruled that defense counsel couldn't produce evidence to argue his defense theory and suppressed his defense theory for "lack of evidence." (G pp. 42-47). Now, the trial Court allows the prosecutor to infect the jury with this improper argument without having any evidence established, shows partiality. For the Trial Court not to admonish the prosecutor or sustain the objection of defense counsel was an abuse of discretion and violated defendant's due process rights to have a fair and "impartial trial" guaranteed by the U.S.C.A Const. Amendments VI,XIV.

(b) The prosecutor argued in her closing rebuttal, information pertaining to defendant's arrest, including the bogus statement which was not in the scope of defense counsel's closing.

This issue was preserved by defense counsel request to make a record at the end of closing arguments. (F pp.170). Counsel made a request at side-bar for sur-rebuttal, to address the argument being made by the prosecutor in her closing rebuttal. This request was denied and the prosecutor's argument was deemed proper by the trial judge. The Court made this reply, "well, it appears to me that the arguments made by the prosecuting attorney was proper given the scope of the closing by the defense." and for that reason no action is going to take place." (F pp.173). Trial Counsel never mentioned anything in his closing argument to defendant's arrest, including the verbal statement which the prosecutor kept emphasizing. (F pp.147,170-171). This was an improper argument allowed in by the trial Court, which violated defendant's due process.

United States v Bess, 593 F2d 749 (CA 6 1979), this Court explains that the attorney's task is to persuade the jury based solely on the proof at trial and the reasonable inferences drawn from that evidence. This court reiterated the Supreme Court's warning with respect to the prosecutor's action at trial:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer, he may prosecute with earnestness and vigor-in-deed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

After reviewing Trial Counsel's closing argument, it would be adequate

to say that the Court improperly assessed the scope of trial counsel's closing and made an improper ruling. (F pp.110-137). The Judge in his own words said no action would be taken because the prosecutor's argument was in the scope of defense counsel's closing. (F pp.173).

The Trial Court abuses its discretion if the results are so contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias, People v Yost, 468 Mich 122, 127; 659 NW2d 604 (2003), or when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling, People v Jones, 252 Mich 1, 4; 650 NW2d 717 (2002).

In the present case, the prosecutor was basically allowed to say and argue in her rebuttal, whatever she felt without any admonishing from the Court as if there were no rules or guidelines to follow. The improprieties of the prosecutor and the erroneous rulings by the Trial Court deprived the defendant of a fair and impartial trial govern by the U.S.C.A VI and XIV Amendments. Const 1963, art §§ 1,17,20.

Absent the error's that took place, defendant would have been acquitted of the charges. If the Trial Court would have admonished the prosecutor for the use of illegal tactics, the fact-finders would have saw that the prosecutor was willing to go any extent to convict a man whose presumably innocent. This insight from the juror's perspective would have changed the outlook on the prosecutor's entire argument. The jury never knew about the error's that took place, because the court never reprimanded the prosecutor nor gave any instructions to negate the improper argument initiated by the prosecutor. This display, shows the charter of the prosecutor's personal agenda, to convict a man that could be innocent.

(c) The prosecutor argued in closing rebuttal, that the victim Dawan Bibbs, told the chief witness James Wright, the defendant put a MAC-10 up to [h]is head. (F pp.142).

This argument was never objected to, although appellate review of improper remarks made by a prosecutor in closing argument is foreclosed absent a timely objection, unless failure to address the issue would result in a miscarriage of justice. People v Dalessandro, 165 Mich 1, 15-16; NW2d 58 (1977); People v Watson, 245 Mich App 572 (2001); Whiting v Burt, 395 F3d 602 (CA 6 2005).

The prosecutor questioned the chief witness James Wright on direct examination, asking him if the victim, Dawan Bibbs, ever told him what type of gun the victim said was put up to his head, and Mr. Wright answered by saying "no, he didn't." (C pp.166). That answer given by Mr. Wright, was clear and unambiguous. Now, the prosecutor is making this argument up in her closing rebuttal, telling the jury that the witness, Mr. Wright, was told by the victim, that a MAC-10 was put up to his head. The prosecutor knew that wasn't the testimony given by Mr. Wright and this argument served no other purpose but to inject prejudicial information into trial. The defendant's constitutional right was violated when the prosecutor knowingly and voluntarily mislead the fact-finders by falsifying the witness true testimony. Not only was this a falsification of inflammatory injection of information, but this argument wasn't in the scope of defense counsel's closing. It was inaccurate information intended to mislead the jury. The witness Mr. Wright, denied ever being told by the victim what type of gun was used and these comments by the prosecutor went outside of the wide scope of permissible comments.

Evidence, may be determined to be properly admitted where the evidence is relevant and is found not to be more prejudicial than probative, (MRE 401, 403). Also see Dalessandro, supra, a prosecutor may not argue facts material to the case which are not in evidence. (reversed).

In the present case, not only did the argument adduced in the prosecutor's rebuttal amount to evidence against defendant, but it was also a falsification of the witness sworn testimony meant to mislead the jury. It would be impossible for the jury to make reasonable assessments to the information presented at trial, while the prosecutor fabricates the evidence to influence the jury. The prosecutor knew she was presenting a false argument, because she was the one who elicited the testimony from the witness Mr. Wright, about whether or not he was ever told by the victim Dawan Bibbs, that the defendant put a MAC-10 up to [h]is head. (F pp.142).

Reading the argument as a whole, the prosecutor stated:

"Remember when James, when the police first arrived at the scene James said that Dawan, the victim, told him that his mother's boyfriend had pointed a Mack 10 at his head and he slapped it away."

This was an improper rebuttal argument which had nothing to do with the scope of defense counsel's closing. No one ever saw the MAC-10, that defendant supposedly had, not even Tonia Penson, the defendant's girlfriend who stayed with him at the time of the incident. (C pp.68; F pp.81). The prosecutor was determined to put the MAC-10 in defendant's possession and it didn't matter what procedures had to be taken to do it. The prosecutor knew the juror's wouldn't remember everything the witnesses testified to and took advantage of the opportunity to "confuse" the fact-finders.

This improper argument left an impression in the juror's mind that the defendant harbored all kinds of notorious guns. Without the prosecution fabricating the witness testimony, [she] would have had to, prove that the TEC9, that was in the victims possession wasn't involved in the crime. (C pp.62-63). There was no way counsel could have challenged this argument, because it was done in the prosecutor's closing rebuttal. Defense Counsel could have challenged this argument with the fact that nothing throughout trial, ever

proved the defendant actually possessed this type of gun. Defense counsel, could have also argued that the MAC-10, was an imaginary gun that the prosecutor was trying to put in defendant's possession, having no proof that this gun ever existed. (C pp.68).

Without this argument admitted in the prosecutor's rebuttal, the juror's would not have found defendant guilty. The jury was never satisfied with the thought of defendant having a MAC-10, until the prosecutor's faulty recollection surfaced. The prosecutor violated defendant's due process the moment she fabricated the witness sworn testimony. (C pp.166; F pp.142). The right to a fair trial is a fundamental liberty secured by the U.S.C.A Fourteenth Amendment.

**(d) The prosecutor attacks the credibility of defense counsel's methods for defending clients and insinuates how feebly they make arguments.**

This issue was not preserved for review, but failure to consider this issue would result in a miscarriage of justice, People v Dalessandro, 165 Mich App 569, (1988), this case states, "it is improper for a prosecutor to argue in a matter which attacks defense counsel and suggest to the jury that counsel is intentionally trying to mislead the jury."

In Peopel v Wise, 134 Mich App 82, 101-102; NW2d 255 (1984) lv den 422 Mich 852 (1985), this court articulates the improprieties of the prosecutor when attacking the defense counsel's strategy methods. The Court stated:

The prosecutor may not question defense counsel's veracity.... When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality.

In the present case, the prosecutor's closing rebuttal attacked defense counsel and suggested that defense counsel was intentionally trying to mislead

the jury. The prosecutor made these comments in her closing rebuttal:

"The prosecutor presents evidence, the prosecutor presents evidence to the trier of fact, the juror's. You are the triers of fact. What is the defense attorney's role? Well, its certainly not to get up and say, guess What, my guy is guilty, convict him, its to look at the case and to point out pieces of the case and attempt to make arguments to show reasons why [h]e feels the defendant should be found not guilty. He would not come up here and say the defendant is guilty. A lot of times [W]e talk about defense attorney's picking issues...." [emphasis added] (F pp.144-145).

This argument clearly shifts the focus of the evidence and undermines the role of defense counsel's ability to be "truthful." This argument also insinuates, that counsel doesn't believe his client is innocent and defense counsel's jobs are to "defend the guilty." The jury could view this argument as defense counsel picking any frivolous issue out of the blue to defend his guilty client. This argument shifts the focus of the evidence to defense counsel's personality.

Defendant may have been acquitted if it wasn't for the prosecutor shifting the focus of the evidence to defense counsel's veracity. Counsel could have prevailed on his argument that the defendant was never at the scene of the crime and the gun-powder found on the hands of the onlt eyewitness James Wright, proved that he had just recently fired a gun. (F pp.42,128-129). That out of three witnesses, two were brothers and both friends of James Wright. That Dawan Bibbs lived with James Wright and Wright, knew about the gun that was taken from defendant, but Wright denied knowing anything about the TEC-9. (C pp.145,209-210). This argument by defense counsel could have been successful if it wasn't for the prosecutor shifting the focus of attention to defense counsel's methods of defending.

Without the underhanded tactics used by the prosecutor, the jury would not had any reason no to believe the argument administered by defense counsel.

We'll probably never know how many other different ways the jury comprehended this argument by the prosecution. One thing we do know is that, this argument defamed defense counsel's ability to be "truthful" and the argument wasn't in the scope of defense counsel's closing. The prosecutor basically told the jury that [she] was the only attorney present in court, capable of presenting "truthful evidence." (F pp.144-145). This argument subtracted anything the defendant had left for acquittal and deprived the defendant of a fair trial. Although, defense counsel did not object to this argument, failure to consider would result in a miscarriage of justice.

This issue is similar to the one in Dalessandro, supra. If the Court finds that the argument by the prosecutor was a improper rebuttal and deprived the defendant of a fair trial, defendant's conviction should be remanded and a new trial should be granted.

(e) The prosecutor argued in closing rebuttal, that the defendant was fleeing prosecution and that the jury would be instructed that, that was a conscience of guilt.

This issue was preserved by defense counsel objecting to the improper argument given by the prosecutor in closing rebuttal. Defense Counsel made the following statement: "Your Honor, I think I'm going to have to object. I believe this is rebuttal. I Don't think there's anything mentioned about that in my closing." (F pp.146-147). The Court allowed this rebuttal argument to continue, which was not in the scope of defense counsel's closing.

The abuse of discretion standard includes review to determine whether a court guided by an erroneous legal conclusion and [a] district court by definition abuses its discretion when it makes an error of law. People v Jones, 252 Mich App 1, 4; 650 NW2d 717 (2002); Koon v United States, 518 US 81, 99-1--, 116 S Ct 2035, 135 L Ed2d 392 (1996); See also United States v Taylor, 286 F3d 303, 305 (CA 6 2002).

The prosecutor was continuously allowed to argue issues out of the scope of defense counsel's closing, which made it impossible to challenge, due to the fact that it was done in the prosecutor's rebuttal. While the prosecutor was instructing the jury on law, she made the following comments:

"The issue in this case is whether beyond a reasonable doubt the defendant is guilty. You heard the fact that the defendant was fleeing from the police for five months, never went back to the address on Pelkey, left all his things there, left his car there. The judge is going to instruct you that, that is evidence of guilt." (F pp.146)

Not only did the prosecutor give denigrated instruction to the jury, but she failed to balance the instructions of law. The defendant is not arguing whether or not the prosecutor quoted the law correctly, but that the instructions to the jury were not balanced and the comments were not in refutation to anything defense counsel used in his closing argument. This action

taken by the trial court violated defendant's due process and the deprivation of a balanced litigation. How could the defendant receive a fair trial when the prosecutor is constantly allowed to work outside the rules and regulations established by the judicial system and later when the defendant raises prosecutorial misconduct its discarded as "harmless error?"

Defense Counsel had evidence to contradict the allegations asserted by the prosecution. Defense Counsel could have argued that the defendant had two working automobiles and he could only drive one at a time. Plus, the defendant kept in touch with the victims mother, Tonia Penson, weeks after the incident took place. (C pp.57-58,101). This evidence could have been construed as a man innocent of a crime, but the only one implicated as the culprit. The jury may have acquitted the defendant and had a reasonable doubt not to believe that the defendant committed the crime. The jury would have been presented with evidence to make a reasonable determination, of whether the defendant was fleeing from guilt or fear of being wrongfully convicted.

No action was taken and no rulings were made to prevent this improper rebuttal argument. Once again the defendant was exploited by the craftiness of the prosecution and denied a fair trial in the process.

**(f) The prosecutor vouched for the credibility of the police officer who arrested the defendant.**

This issue wasn't preserved for review, but failure to consider this issue would result in a miscarriage of justice. People v Noble, 238 Mich App 647, 660; 608 NW2d 123 (1999). See also People v Bahoda, 202 Mich App 214, (1993), a prosecutor may not express personal belief in a defendant's guilt or attempt to place the prestige of the prosecutor's office, or that of a police, hind a contention that the defendant is guilty.

During the prosecutor's closing rebuttal, the prosecutor made the following comments:

"Think about this. When the officers arrested the defendant and he said, "I was there, when the shit went down and I left." That's important. The officer was very clear on informing him of the charges, and that being said. Now, there's been no reason not to believe what the officers submitted. If the officer was lying, and this is once again part of the conspiracy theory, why wouldn't the officer say Caprese Gardner said he shot somebody over on Hamburg. The officer didn't say that. He said that Caprese said he was there when the shit went down and he left." (F pp.147).

This was another rebuttal argument that had nothing to do with defense counsel's closing. For the prosecutor to say there's been no reason not to believe what the officers submitted would be an embellishment of the actual testimony. The word officers insinuates that both partners agree in testimony, or in their reports, that the defendant made a verbal statement. The only officer who said the defendant made a verbal statement was officer Mark Amos. (E pp.166-168). The second part of this improper argument was when the prosecutor said that if the officer was lying, that this would have to be part of the conspiracy theory. This argument clearly vouches for the veracity of the officers credibility not to lie, or submit false allegations in court. Third, this argument had nothing to do with defense counsel's closing and there was no way to challenge this argument, because it was done in the prosecutor's

rebuttal.

The average juror already believes that police officers jobs are to protect, serve and be honest. For the prosecutor to exploit this well known recognition would deprive the defendant of a fair and impartial trial. Absent the improper vouching of the police officer testimony, its a possibility that the defendant would have been acquitted. Defense Counsel could have argued that officer Mark Amos, never had any proof that the defendant actually made the statement. (E pp.174-175). This argument along with the fact that the defendant never told the police his correct name, this argument could have given the jury a different outlook on the truthfulness of police officers testimony. Absent all the irregularities that occurred during the prosecutor's improper rebuttal arguments, the defendant may have been acquitted of the charges. All issues raised under prosecutorial misconduct, although some not preserved for review, should be given the proper attention to prevent the violation of the defendant's constitutional rights to have a fair and impartial trial.

These errors can in no way be deemed harmless as they caused the unconstitutional conviction, the absence of which would have resulted in a different outcome, Chapman v California, 386 US 18; 87 S Ct 824; 17 L Ed2d 353 (1993); Scott v Bock, 241 F. Supp 2d 780 (Ed Mich 2003). Because of this Six and Fourteenth Amendment violations, this conviction should be reversed, and the defendant should be granted a new trial, or whatever the Court deems necessary to eradicate this injustice.

**SUMMARY AND RELIEF SOUGHT**

WHEREFORE, the Defendant respectfully request that this Honorable Court order an evidentiary hearing on the ineffective assistance of trial and appellate counsel claims in order to overcome the Reed, procedural bar as articulated under MCR 6.508(D), and remand defendant's case, grant a new trial or whatever the Court deems justice requires.

Respectfully Submitted,



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Dated: the 22, day of August, 2006.