

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

H. R. Gage, P.J.; W.B. Murphy and K. Jensen, J.J.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff, Appellee

v

S.C: 131942
COA: 267317
LCN: 01-003494-01

CAPRESE D. GARDNER,
Defendant, Appellant

BRIEF ON APPEAL—APPELLANT

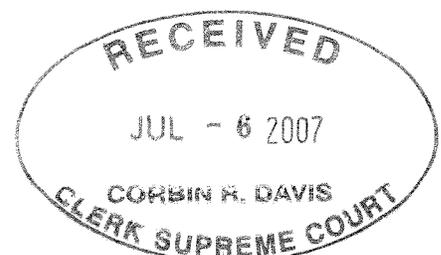
Oral Argument Requested

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STATEMENT OF JURISDICTION

Jurisdiction is based on the Order of the Supreme Court dated April 13, 2007.

STATEMENT OF QUESTIONS INVOLVED

Would reversal of the ruling in People v Preuss, 436 Mich 714 (1990) and People ve Stoudemire, 429 Mich 262 (1987) deprive Mr. Gardner of his rights of due process under Ams V and XIV of the US Constitution?

Did these cases correctly hold that multiple convictions arising out of a single criminal incident count as only a single prior conviction for habitual offender purposes?

The trial court answers these questions “No”.

Appellee answers these questions “No”.

Appellant answers these questions “Yes”.

FACTS

Caprese D. Gardner was found guilty, by a jury of second-degree murder, and possession of a firearm by a felon and felony firearm. (VI-4) The Court also found him guilty as an habitual third offender. He was sentenced to 25 to 50 years on the murder conviction, 2 to 10 years on the possession conviction, 5 to 5 years on the felony firearm conviction and 5 to 5 years as a third habitual offender. (Tr. of 8/30/01 p. 11) (Habitual Offender Statute, MCL 769.10 et seq.; annexed hereto.)

The third offender notice, contained in the Information, charged that Mr. Gardner was previously convicted of felonious assault on February 25, 1988 and felony firearm on the same date, for which he was liable to twice the maximum sentence on the primary offense. The Presentence Investigation Report indicates that the previous offenses occurred on a single offense date, September 21, 1987 (p. 2) as did the three current offenses, October 8, 2000. (Basic Information Report.)

The sentencing guideline range computed for the defendant was 180 to 300 months. (SIR) The habitual third enhancement made the range 180/450 months. Defendant was sentenced within the guidelines to 25 to 50 years imprisonment (Tr. of 8/30/01 p. 12) which was within the normal guideline range as well as the habitual third range.

A Motion for Relief from Judgment was denied by the trial court and Mr. Gardner's Application for Delayed Appeal was denied by the Court of Appeals.

By order of April 13, 2007 this Court directed the Wayne County Circuit Court to appoint counsel to represent defendant. Counsel was directed to submit a supplemental brief addressing whether People v Preuss, 436 Mich 714 (1990) and People v Stoudemire, 429 Mich 262 (1987) correctly held that multiple convictions arising out of a single criminal incident may count as only a single prior conviction for habitual offender purposes, and if so, whether the defendant is entitled to be resentenced.

ARGUMENT

Reversal of the ruling in People v Preuss, 436 Mich 714 (1990) and People v Stoudemire, 429 Mich 262 (1987) would deprive Mr. Gardner of his rights of due process under Ams V and XIV of the US Constitution. These cases correctly held that multiple convictions arising out of a single criminal incident count as only a single prior conviction for habitual offender purposes.

SUMMARY OF ARGUMENT

Mr. Gardner was previously convicted and sentenced on two convictions which occurred the same day. His present three offenses were also committed the same day. (PSIR) He was sentenced in the instant case as a third habitual offender. People v Preuss, 436 Mich 714 (1990) and People v Stoudemire, 429 Mich 262 (1987) correctly held that multiple convictions arising out of a single criminal incident may count as only a single prior conviction for habitual offender purposes. Accordingly, Mr. Gardner should be resentenced as a second habitual offender.

Standard of Review: A lower court's interpretation of appellate decisions is a question of law that is reviewed de novo. People v Sexton, 458 Mich 43;580 NW2d 404 (1998).

Stoudemire

In People v Stoudemire, 429 Mich 262; 414 NW2d 693 (1987) reh den 429 Mich 1213, app den 437 Mich 869, cert den 113 ___ US ___, 111 S Ct 1596, 113 L Ed 2d 658, Justice Levin summarized the holding as follows:

"The habitual offender statute provides escalating penalties for persons repeatedly convicted of felonies. A life sentence may be imposed on a fourth-felony offender where the fourth felony is punishable by a term of five years or more. The question presented is whether Stoudemire was promptly charged as a habitual offender where the three prior convictions arose out of a single transaction. We hold that he could only be charged as a second offender, reverse the decision of the Court of Appeals, and remand for trial on the principal charge and supplemental information charging that he was convicted but one previous time." 429 Mich 264

In other words, "in order for a conviction to count as a prior conviction under the statute, each conviction must be for an offense committed after conviction and sentence for the prior offense". Preuss, 719.

A more succinct summary was Justice Levin's concurrence in Preuss: "multiple convictions arising out of a single incident may count as only a single prior conviction for purposes of the [habitual offender] statute" People v Preuss, 436 Mich 714; 461 NW2d 703 (1990) at 740.

In Stoudemire the Court first decided that the statute must be construed "in order to implement the purpose and intent of those who enact it". People v Gilbert, 414 Mich 191; 324 NW2d 834

(1982). Judge Levin founded his opinion on the New York statute (1926 NYU Law is 457), upon which the Michigan statute was originally modeled, together with New York case law and the case law of other jurisdictions, and found that the fourth habitual offender statute was aimed at:

"... incorrigible criminals who had failed three separate times to reform." Preuss, p. 266 [The Court also discussed whether sequential felony sentencing must occur before the ultimate habitual statute is impacted. That issue is beyond the scope of this Court's April 13th, Order.]

The critical phrase of the original statute requiring construction is "after having been three times convicted." (1927 PA 175) [The statute now phrases as follows: "If a person has been convicted of three or more felonies" which Justice Levin said was stylistic, not substantive; only to improve the statute's grammar. Stoudemire, 278].

"Once legislative intent is discerned, it must be given effect, even if doing so might appear to conflict with the letter of the statute. '(A) thing which is within the spirit of a statute is within the statute, although not within the letter; and a thing within the letter is not within the statute, unless within the intention. '" Metropolitan Council #23 v Oakland County Prosecutor, 409 Mich 299; 294 NW2d 578 (1980).

"In this case, the legislative history of the statute indicates that the legislature, by using the phrase "after having been three times convicted," intended that the fourth-offender penalties reach incorrigible criminals who had failed three separate times to reform - who had been convicted three separate times where the last two convictions were for crimes committed after the prior conviction. The Legislature used the phrase "after having been three times convicted" as shorthand."

"When the Legislature uses a shorthand expression, legislative intent controls over an arguably literal reading of the statute inconsistent with that intent..." Stoudemire, 266 (Footnote omitted).

The Court held that multiple simultaneous convictions arising out of a single incident should count as only a single prior conviction, since the defendant under such circumstances could be said to have only one opportunity to reform. The Court reversed defendant's conviction as a fourth offender. Stoudemire, 278.

The overarching theme of the opinion, is "opportunities to reform" following a conviction. Stoudemire, 271, et seq. In support of this proposition Justice Levin cited Wymer v Holmes, 429 Mich 66; 294 NW2d 578 (1987) directing construction in light of the general purpose to be accomplished. In accord is Metropolitan Council #23 and Elba Twp v Gratiot Co., 287 Mich 372; 283 NW2d 615 (1939). Justice Levin primarily relied on the legislative history commencing with the New York statute known as Baumes laws (1926 NY Laws 457) which operated upon the principle that a felon must have had an opportunity to reform in order to trigger the increased offender status. Stoudemire, 268.

In construing similar statutes, a substantial majority of the courts who have considered this question have recognized that the enacting legislature intended that prior "convictions" reflect previous opportunities to reform. Multiple convictions arising out of one incident count as only one "conviction" for purposes of applying habitual offenders statutes. Stoudemire, 272.

The opinion also cited Petty v US, 481 US 1034; 107 S Ct 1968; 95 L Ed 2d 810 (1987) where the Solicitor General confessed

error and asked the U.S. Supreme Court to overrule a decision of the US Court of Appeals for the Eighth Circuit that counted an offender's six convictions arising out of the same incident as six separate convictions for the purposes of the federal habitual criminal act. Stoudemire, n. 24 The Solicitor General asked that such convictions should be counted as only one previous conviction, urging that "Congress had intended its sentencing enhancement provision to apply only to recidivists and repeat offenders, and not to persons who commit several crimes at one time." Quoted in Towne, 890.* The Supreme Court remanded the cause to the Court of Appeals for the Eighth Circuit "for further consideration in light of the position presently asserted by the Solicitor General in his brief." Petty, 1034 The Court of Appeals accepted the Solicitor General's position and vacated the habitual offender sentence. Stoudemire, 275.

Justice Levin also cited cases from Nevada, New Mexico, Hawaii and Federal courts, in support of the theme of "opportunity to reform" Stoudemire, 273 (Many of these cases are collected at Stoudemire, n. 23.)

In a contemporary comment on the New York statute, N.Y. State Senator B. Roger Wales, in an address to the League of Women Voters after relating the successive penalties of the statute, said:

"...Should it then be necessary to arraign him in courts a fourth time on a felony charge, it is inconceivable to me that anyone can urge seriously in his behalf an opportunity to go on committing crimes and be a menace to society. He has had his opportunity to learn his lesson and failed. (Italics supplied.) Johnsen, The Baumes Law (6 The

Reference Shelf, #3, 1929, pp. 58-59)

Another contemporary comment said:

"Life imprisonment for the incorrigible is justifiable, but only after a serious and scientific effort at reformation has been made ..." id. P. 160 [From article by W.A. Shumaker, Law Notes, 31:106-8. Sept. 1927]

Those cases holding to the contrary, including Justice Archer's dissent in Stoudemire, 278, base their decisions on the doctrine that "When the language used in a statute is plain and unambiguous, a common-sense reading of the provision will suffice." Stoudemire, 280. Justice Archer, quoted Salas v Clemens, 399 Michigan 103; 247 NW2 889 (1976) at 109:

"(D)eparture from the literal construction of the statute is justified "when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question". Stoudemire, 281

Justice Archer cited Justice Cooley to support literal construction of the statute, Stoudemire, 280, but Justice Cooley recognized that the purpose and intent of a statute is of overriding concern. Stewart v Kalamazoo School District, 30 Mich 69 (1874) and People v Detroit Bd. Of Education, 18 Mich 400 (1869).¹

It is noteworthy that Senator Baumes was not the first to suggest the "opportunity to reform" rationale: In People v Bergman, 176 AD 318, 162 NYS 443 (1916) the court said:

"The theory of section 1941 of the Penal Law and like statute that prescribe heavier punishment for a second offender, is that he has not reformed since his first offense, but has persisted in breaking the law." Bergman, 162 NYS 443.

Habitual offender statutes have passed muster by the U.S. Supreme Court. ²

Preuss

In People v Preuss, 436 Mich 714; 461 NW2d (1990) this Court reversed the Court of Appeals decision that defendant's two convictions, for which he was sentenced on the same date resulted in only one opportunity to reform Preuss, 718 and rejected the statement of Stoudemire that the fourth offender's three prior offenses must be separated by intervening convictions and sentences. The Court did not, however overrule Stoudemire's precise holding that defendant's prior convictions must arise from separate criminal incidents. In Preuss, defendant's three prior felony convictions preceded his commission of the underlying burglary offenses. He had been sentenced for two of the prior felonies on the same date by the same judge but those two felonies flowed from separate incidents committed on separate dates.

Preuss acknowledged the rationale in Stoudemire "...that multiple convictions arising out of a single incident may count as only a single prior conviction under the statute...". Preuss, 720. It held Stoudemire to be in error, however, when Stoudemire decided "that a fourth offender's second and third offense must each follow conviction and sentence on the earlier offense" Preuss, 727 in order to be punished under the statute. Preuss, 729.

"We agree with the prosecutor that our statutory analysis of

the habitual offender statute in Stoudemire was flawed. Although we need not disturb the precise holding of that case - that multiple convictions arising out of a single incident may count as only a single prior conviction under this statute - we conclude that a more accurate interpretation of the statute precludes many of the statements made there concerning the intent and purpose of the legislature. "Preuss, 719

The Preuss court agreed that the literal reading of the statute may be modified if construction is required. Preuss, 721

Preuss departs from Stoudemire when Stoudemire concluded legislative intent:

"The commission's³ report reflects the goal of punishing repeat offenders harshly but does not particularly support an objective of punishing them only after they have three separate times disregarded this sobering message of a conviction and sentence." Preuss, 724(Italics in opinion).

The court stated that Stoudemire relied erroneously on the New York history (Preuss, 727) noting the ambiguity of Senator Baumes' views on sequentiality of a fourth offender's three prior convictions. Preuss, 730. Justice Cavanagh, writing for the majority, pointed out that contrary to New York history Michigan has never adopted any provision barring separate counting of multiple convictions despite repeated statutory revisions (Preuss, 731) and held that Stoudemire's reliance on Michigan precedent was misplaced. Preuss, 731.

Preuss found authority in a change in the statutory language:

"Most pertinent for our inquiry in this case, the new provisions did not require that the defendant had previously been twice sentenced to prison... The 1927 act required only that the person had been 'three times convicted' prior to committing the fourth offense. Thus the new provisions literally applied to defendants who had previously been

convicted three times before they committed their fourth offense even if they had not yet been sentenced in any or all of these prior convictions." Preuss, 723.

Preuss summarized its holding:

"In sum, a requirement that a fourth offender's three prior offenses be separated by intervening convictions and sentences need not be read into the language of our statute in order to accommodate any legislative purpose gleaned from New York law..." Preuss, 731.

In other words, it makes no difference if an offender is convicted and sentenced, convicted and sentenced, convicted and sentenced or just sentenced once for all three offenses. Preuss, 731.

This court rejected the statements of other jurisdictions to support the conclusion that a fourth offender's prior offenses be separated by intervening convictions (Preuss, 733) because there was no suggestion that the Michigan legislature considered the statutes or decisions interpreting them when it enacted the fourth offender provision. Preuss, 734. The Court said that while almost every jurisdiction requires that predicate offenses arise from separate transactions they do not support the Stoudemire reasoning that the statute applies only to defendants of predicate offenses which are separated by intervening convictions and sentences. Preuss, 734.

Preuss upholds Stoudemire that the prior offenses must arise from separate incidents (Preuss, 737) and held that the fourth offender statute contains no requirement that the three prior convictions must be for three offenses separated by intervening convictions or sentences. Because the defendant in that case had

previously been convicted of three felonies when he committed the fourth offense, each of those prior felonies having arisen from separate criminal incidents, he was properly convicted and sentenced to the fourth offender. The Court of Appeals was reversed and defendants sentenced reinstated. Preuss, 739.

Justice Levin concurred in the references to Stoudemire but dissented, adhering to the opportunity-to-reform rationale set forth in Stoudemire. Justice Archer reaffirmed his position in Stoudemire.

Stoudemire and Preuss

As noted, the point of departure between Preuss and Stoudemire is the statement at Stoudemire, 727 "that a fourth offender's second and third offense must each follow conviction and sentence on the earlier offense." Each "set" must follow the other. Stoudemire, 729.

"The statute does not make imposition of sentence upon the previous convictions a prerequisite to the enhancement of punishment upon the fourth conviction." (Italics in original.) Preuss, 733. But the question here is "whether multiple convictions arising out of a single criminal incident may count as only a single prior conviction for habitual offender purposes".

It is not the fact of sentencing as long as the felonies involved separate criminal events. Preuss, 739.

Post Preuss

Other cases to a certain extent reaffirmed the opportunity-to-reform rationale of Stoudemire but were primarily influenced by the occurrence of separate transactions:

People v Jones 171 Mich App 720; 431 NW2d 204 (1988) [Agreed with opportunity to reform principle but distinguished Stoudemire because of separate events.]

People v Ellis, 174 Mich App 139; 436 NW2d 383 (1988) [Controlled by Stoudemire because of conviction date; were separate incidents.]

People v Holguin, 180 Mich App 429; 447 NW2d 753 (1989) (Followed Ellis; separate events.)

People v Hampton, 439 Mich 857; 475 NW2 822

People v Stewart, 441 Mich 89, 490 NW2 327 (1992) neatly summarized the two cases:

"...We held in People v Stoudemire, 429 Mich 262; 414 NW2d 693 (1987), that a person may be convicted only as a second felony offender, not as a fourth offender, when a person has three prior convictions arising out of a single criminal transaction. ...We termed (the intent of the Legislature) 'the lodestar of statutory construction.' 429 Mich 265.

"The habitual offender statute was again considered in People v Preuss, 436 Mich 714; 461 NW2d 703 (1990). The issue was whether, as the defendant contends in the present case, two prior convictions must be counted as only one when the second offense precedes the first conviction. We held that "the statute does not require that a fourth offender's three prior convictions, the sentences [Page 94] for those convictions, or the offenses upon which those convictions and sentences are based, occur in any particular sequence. The statute requires only that the fourth offense be preceded by three convictions of felony offenses, and that each of those three predicate felonies arise from separate criminal incidents. 436 Mich 717.

"As in Sawyer, [410 Mich 531; 302 NW2d 534 (1981)] and Preuss, we hold that a defendant may be convicted of felony-firearm (third offense) if the third offense is preceded by two convictions of felony-firearm, and both prior felony-firearm convictions have arisen from separate criminal incidents. For these reasons, we reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court..." Stewart, 95

In People v Hampton, 439 Mich 860; 474 NW2d 822 (1991) the Court of Appeals held that because defendant had been sentenced on the same day for two convictions, only one could be used to

enhance his sentence. This Court reinstated the habitual third, holding that each prior conviction stemmed from a separate criminal transaction so both could form the basis for the habitual third.

"In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the judgment of the Bay Circuit Court is reinstated. MCR 7.302(F)(1). The two prior felonies which formed the basis for the charge of third-felony offender were two separate criminal transactions. Consequently, there was no error in employing them to convict the defendant of being a third-felony offender. See People v Stoudemire, 429 Mich 262 (1987), and People v Preuss, 436 Mich 714 (1990). Reported below: (On Remand) 188 Mich App 675."xx

The single transaction language has been adopted by the Federal courts in later cases which dealt with the Armed Career Criminal Act (18 USCS, Sec. 924): US v Brady 988 F. 2d 664 (CA6 1993) certiorari denied 114 S Ct 166, 510 US 857, 126 L. Ed 2d 126 - "separate and distinct criminal episodes"; US v Hughes 924 F 2d 1354 (CA6 1991) - "episodes that occur at distinct times". Also US v Wallace (2006, CA2 Conn) 447 F3d 184 holding that the same conduct amounts to a single unit of prosecution and U. S. v Johnson (1994, CA6 Mich) 205 F3d 1335, simultaneous possession of different controlled substance substances constitutes only one offense. Convictions and sentences occurring in the same proceeding did not make three violations. U.S. v Long (2003, CA8 Ark) 320 F3d795.

The foregoing is consistent with United States v Towne (1989) CA2 Vt) 870 F2d 880, cert den 490 US 1101; 104 L Ed 2d 1010; 109 S Ct 2456 which held that it was improper for the District Court to sentence defendant as a career criminal on the

basis of four convictions, two of which were entered in 1976 and two entered on 1983. The court adopted the view that multiple convictions must be treated as one conviction if they arose out of a single criminal episode. Here, the critical inquiry was a the number of "occasions" not the number of convictions. Towne noted that "it has been fairly well established in other circuits that (sec.) 924(e)(1)'s reference to 'convictions' pertains to single episodes of felonious criminal activity that are distinct in time, rather than literal convictions." (Citing cases.) It quoted the brief of the solicitor General, in Wicks v U.S., 488 U.S. 831 (1988): "stating that every federal Court of Appeals that has considered the issue has adopted the multiple episodes approach, that there is no conflict among the Circuit Courts of Appeals with respect to this issue, and that these Courts have "simply required that the criminal episodes be distinct in time.'" Towne, 890

Towne made the further point that:

"We believe that the Armed Career Criminal Act indeed was aimed at career criminals, rather than those who merely commit three punishable acts." (Emphasis supplied)

"(I)t seems quite clear that this section of the Act was intended to target recidivists, i.e., those who have engaged in violent criminal activity on at least three separate occasions, and not individuals who happen to acquire three convictions as a result of a single criminal episode (or, as here, two such criminal events)." Towne, 890

Finally, uniting several incidents into a single offense serves multiple purposes:

(1) For the reasons expressed by Justice Levin in Stoudemire it provides an enhanced opportunity for the statutory purpose of

reformation:

"The increased penalty is held in terrorem over the criminal for the purpose of effecting his reformation and preventing further and subsequent offenses by him". Quoting State v Montoya, 92 NM 734, 737, 594 P32d 1190 (1979). Stoudemire, 273

(2) Disregarding the separate incident rationale would invite prosecuting attorneys (who really need no invitation) to slice a single incident into numerous offenses and thereby exponentially increase a sentence for the last offense. While it is undoubted that a prosecutor's discretion in charging under the habitual statute is virtually untrammled. (People v Birmingham, 13 Mich App 402; 164 NW2d 561(1968) at 410) Such excesses have been criticized. E.g., the Oakland County practice of charging as an habitual all cases involving repeat offenders. People v Sunday, 183 Mich App; 455 NW2d 321 (1990). [See concurring opinion of Judge T.M. Burns in People v Davis, 89 Mich App 588; 270 NW2d 604 (1979) who suggested that the prosecutor's time could be put to better use than pursuing habitual Informations in each case without a significant decrease in the protection afforded the Public.] Overzealous prosecutorial charging often results in excessive sentences. ["One which far exceeds what all reasonable persons would perceive to be an appropriate social response to the crime committed and the criminal who committed it." People v Coles, 417 Mich 523, 543; 339 NW2d 440(1983).]

(3) Ignoring the history of the separate incident rationale, would make bad law and bad social justice, since the sentencing

scheme of Michigan jurisprudence emphasizes reformation over warehousing, echoing the question asked in Williams v N.Y., 337 U.S. 241 (1949) Footnote 13:

"Is the criminal a man so constituted and so habituated to war upon society that there is little or no real hope that he ever can be anything other than a menace to society or is he obviously amenable to reformation?"

"The concept of discretionary indeterminate sentencing includes tailoring each sentence to the circumstances of each case in an effort to balance society's need for protection against its interest in rehabilitating the offender." People v Coles, 417 Mich 523; 339 NW2d 440 (1983)

In accord is People v Milbourn, 435 Mich 630; 461 NW2 1 (1990) which stands for the notion that a proportionate sentence should not merely focus on the protection of society, but also the reformation of the offender.

(4) Not the least important, is that the Courts are the only bastion holding at bay the warehousing philosophy of the Department of Corrections: In a case involving the sentencing of a minor, the representative of the Department of Corrections, David Venema, testified:

"The Department does not try on a regular basis to reform offenders. It's more of a warehousing type of situation. Therefore, you know, given the fact that there's not a lot of strong programs to make sure this individual can be reformed and released back into society in a short-term basis, the conclusion and the policy is that we look at a longer term of incarceration with the hope that once they're of age, that the desire and the reasons why they committed a violent offense will be gone or lessened." (DHT 11)."
(Extract of testimony contained in brief on appeal #8809 filed with Court of Appeals 3/31/00 by Debra A. Gutierrez, SADO.

CONCLUSION AND RELIEF

Where a sentence is imposed based upon mistaken

understanding of the law, resentencing will be required. People v Whalen, 412 Mich 166, 169-170; 312 NW2d 638(1981); People v Coffee, 151 Mich App 364, 375; 390 NW2d 721(1986). It was error for the trial court to sentence Mr. Gardner as a third habitual offender, where the convictions relied upon for enhancement arose from the same incident. Stoudemire and Preuss mandate that multiple prior convictions arising from a single transaction may be counted only as a single conviction for purposes of the habitual offender act. The Information clearly indicates that the offense date for all of the prior convictions is September 21, 1987. Accordingly, under Stoudemire and Preuss, Mr. Gardner should have been enhanced only as a second habitual offender.

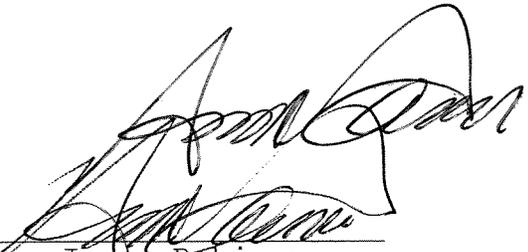
For the foregoing, it is evident that Preuss at 737 and Stoudemire at 278 correctly held that multiple convictions arising out of a single criminal incident count as only a single prior conviction for habitual offender purposes. As demonstrated, this comports with the weight of authority. Reversal of these holdings, besides doing damage to stare decisis, would deprive Mr. Gardner of his rights of due process under Amendments V and XIV of the U.S. Constitution.

Mr. Gardner's two prior convictions should not be treated as separate convictions for the purpose of habitual offender sentencing, since the convictions were entered on the same day but, more important, the prior offenses arose from the same criminal transaction on September 21, 1987. (PSIR P. 2)

Mr. Gardner asks this court to reverse the decision of the

Court of Appeals and remand this case for resentencing by the trial court as a second, rather than third, offender. Both the separate incident/opportunity to reform rationale of Stoudemire and the separate incident rationale of Preuss are applicable to the facts of this case, where the defendant had two convictions arising out of a single incident. Mr. Gardner prays that this Honorable Court remand this cause for resentencing in accord with the foregoing authority.

Dated: July 5, 2007



Arthur James Rubiner,
Attorney for Defendant/Appellant

1. That "plain meaning" can be an inadequate principle of interpretation has had a long history in Michigan. In Stewart v Kalamazoo School District, 30 Mich 69 (1874) Justice Cooley approved legislative authority to collect taxes to support a high school teaching non-elementary subjects, such as Latin. Holding that while the Constitution requires the Legislature to support a public university it would have been irrational not to support secondary education. In People v Detroit Board of Education, 18 Mich 400 (1869), the Cooley court struck down segregation in Detroit public schools.

2.

On March 5, 2003, the U.S. Supreme Court held by a 5-4 majority that such sentences do not violate the Eighth Amendment of the U.S. Constitution, which prohibits "cruel and unusual punishment." In two separate opinions handed down on the same day, the court upheld California's three-strikes law against an attack on direct appeal from conviction, Ewing v California, 538 U.S. 11 (2003) and a collateral attack through a petition for habeas corpus, Lockyer v Andrade, 538 U.S. 63 (2003).

3. 1927 Commission of Inquiry Into Criminal Procedure. Preuss, 721