STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAPRESE D. GARDNER,

Defendant-Appellant,

/

Supreme Court No. 131942

Court of Appeals No. 267317

Circuit Court No. 01-003494-01

131942

THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN'S AMICUS CURIAE BRIEF

IN SUPPORT OF

DEFENDANT-APPELLANT GARDNER'S APPLICATION FOR LEAVE TO APPEAL

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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STATEMENT OF JURISDICTION

CDAM does not contest that this Honorable Court has jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

I. **THIS COURT SHOULD NOT OVERRULE *PEOPLE V PREUSS,* AND *PEOPLE V STOUDEMIRE,* AS MODIFIED BY *PREUSS*? WHEN THE LEGISLATURE ENACTED THE STATUTORY SENTENCING GUIDELINES IT INCORPORATED THIS COURT'S EXISTING INTERPRETATION OF THE HABITUAL OFFENDER ACT, MCL 769.10 – MCL 769.13, INTO THEM, THUS ADOPTING THIS COURT'S EXISTING INTERPRETATION? IF THIS COURT OVERTURNS *PREUSS* AND *STOUDEMIRE*, THIS COURT WILL ALTER A FUNDAMENTAL PART OF THE STATUTORY SENTENCING GUIDELINES AND THWART THE LEGISLATURE'S STATED INTENTIONS FOR ENACTING THE GUIDELINES?**

Court of Appeals made no answer.

CDAM answers, "Yes".

STATEMENT OF FACTS

This case comes to this Honorable Court in the context of a 6.500 appeal. The Circuit Court denied Defendant-Appellant Caprese Gardner's motion for relief from judgment, brought pursuant to MCR 6.500, *et seq*, and the Court of Appeals denied him leave to appeal. In this Court, the Prosecutor concedes that Mr. Gardner is entitled to resentencing under the existing law. (Plaintiff-Appellee's Supplemental Brief in Opposition to Application for Leave to Appeal, pp 4). So, the Prosecutor asks this Honorable Court to overrule the existing law. (*Id.*, pp 4-11.)

This Court invited the Criminal Defense Attorneys of Michigan (CDAM) to file a brief amicus curiae. *People v Gardner*, 477 Mich 1096 (2007).

I. THIS COURT SHOULD NOT OVERRULE *PEOPLE V PREUSS*, AND *PEOPLE V STOUDEMIRE*, AS MODIFIED BY *PREUSS*. WHEN THE LEGISLATURE ENACTED THE STATUTORY SENTENCING GUIDELINES IT INCORPORATED THIS COURT'S EXISTING INTERPRETATION OF THE HABITUAL OFFENDER ACT, MCL 769.10 – MCL 769.13, INTO THEM, THUS ADOPTING THIS COURT'S EXISTING INTERPRETATION. IF THIS COURT OVERTURNS *PREUSS* AND *STOUDEMIRE*, THIS COURT WILL ALTER A FUNDAMENTAL PART OF THE STATUTORY SENTENCING GUIDELINES AND THWART THE LEGISLATURE'S STATED INTENTIONS FOR ENACTING THE GUIDELINES.

Standard of Review

This Court reviews questions of statutory interpretation de novo. *People v Babcock*, 469 Mich 247, 253 (2003).

Discussion

In 1987, this Court held that multiple prior convictions arising from a single transaction may be counted only as a single conviction for purposes of the habitual offender statutes. *People v Stoudemire*, 429 Mich 262 (1987). In 1990, this Court reaffirmed that central holding,[1] but clarified that in order to be counted for habitual offender purposes it was not additionally required that the prior convictions be separated by an opportunity to reform, e.g. separated by completed sentences. *People v Pruess*, 436 Mich 714, 720 (1990).

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[1] The *Preuss* Court reasoned:

> The legislative history of the statute suggests that it was directed at the "persistent" or "repeat" offender. See parts III(B), (C), and (D). A common-sense interpretation of these phrases is that the Legislature did not have in mind the person who had only one criminal episode in which he managed to commit several different crimes. Instead, "repeat" suggests some time interval between crimes, and "persistent" suggests a criminal who continues in his criminal pursuits after these intervals. Neither of these concepts may easily be reconciled with an interpretation of the statute which would allow a court to impose fourth-offender penalties on a defendant whose three prior convictions arose out of the same criminal incident. *Preuss, supra* at 738.

In 1998, the Legislature enacted statutory sentencing guidelines, MCL 777.1 *et seq*. Unlike the judicial sentencing guidelines, the statutory sentencing guidelines address sentencing ranges for habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 322-323 (1997); MCL 777.21(3).

The Legislature had specific goals that it wanted to accomplish with the new statutory sentencing guidelines. It delegated the development of the guidelines to a sentencing commission. See former MCL 769.32, 769.33, 1994 PA No 445.[2] The Legislature intended for these guidelines to reduce unjustified disparities in sentencing,[3] and carried out that intent by requiring that the sentencing guidelines developed by the Sentencing Commission must:

* * *

> iii) **Be proportionate to** the seriousness of the offense and the offender's prior criminal record.
>
> iv) **Reduce sentencing disparities** based on factors other than offense characteristics and offender characteristics **and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences**.
>
> * * *
>
> vii) **Maintain separate ranges for convictions under the habitual offender provisions** in sections 10, 11, 12 and 13 of this chapter, **which may include as an aggravating factor**, among other relevant circumstances, **that the accused has engaged *in a pattern* of proven or admitted criminal behavior**.

[MCL 769.33(1)(e)(iii); see also 1994 PA 445 (Emphasis added.)]

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[2] Since repealed.
[3] *Babcock, supra* at 267 n 21.

Ultimately, habitual offender sentencing ranges were established in MCL 777.21(3). The statute provides for an increase in the upper limit of the normal (non-habitual) range by varying % levels: 25% for a habitual offender – 2nd, 50% for a habitual offender – 3rd, and 100% for a habitual offender – 4th or more.[4]

In enacting the sentencing guidelines, the Legislature introduced some new concepts into Michigan's sentencing scheme, such as intermediate sanction cells. *People v Stauffer*, 465 Mich 633, 634-636 (2002). But, as this Court explained in *Babcock*, the Legislature also incorporated a number of features from Michigan's existing law, like the standards for departure from *People v Fields*, 448 Mich 58 (1995), and the principle of proportionality from *People v Milbourn*, 435 Mich 630 (1990). *Babcock*, *supra* at 257-258, 263-264.

This Court should find that its construction of the habitual offender statutes in *Stoudemire*, as modified by *Preuss*, was one of the features from existing sentencing practice that was incorporated into the statutory sentencing guidelines. Habitual offender had become a legal term art by the time the Legislature enacted the statutory sentencing guidelines. A habitual offender, i.e. subsections (1) of MCL 769.10, 769.11, and 769.12, had acquired a particular and appropriate meaning in Michigan law by 1998. See *Babcock*, *supra* at 257-258. This Court should treat this aspect as it treated the departure concept in *Babcock*. In *Babcock*, this Court found that "substantial

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[4] MCL 777.21(3) provides:

> If the offender is being sentenced under section 10, 11, or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows:
>
> (a) If the offender is being sentenced for a second felony, 25%.
>
> (b) If the offender is being sentenced for a third felony, 50%.
>
> (c) If the offender is being sentenced for a fourth or subsequent felony, 100%.

and compelling" as defined by this Court in *Fields* had become a term of art and that the Legislature had thus incorporated this Court's definition of substantial and compelling and incorporated, with one exception, this Court's basic standards of review for departures into the statutory sentencing guidelines. *Babcock, supra* at 257-258, 265-266. In that exception, this Court modified its existing abuse of discretion standard of review. This Court abandoned the *Spalding v Spalding*, 355 Mich 382, 384-385 (1959), standard, in favor of a less deferential one. This Court made that adjustment out of deference to the Legislature in order to further the manifest purpose of the statutory sentencing guidelines to reduce sentencing disparities. *Babcock, supra* at 265-270, 267 n 21.

That the Legislature intended to incorporate this Court's existing interpretation of the habitual offender statutes is evidenced by the interaction of the PRV scoring, including the 10-year gap rule[5] (MCL 777.50), with the existing interpretation of the habitual offender statutes. This interaction serves the Legislature's stated intentions of providing guideline ranges that are proportionate, reduce unjustified disparities, and more seriously punish repeat offenders. Currently, while multiple prior convictions for offenses committed in a single transaction may only be counted as one conviction for habitual offender purposes, they will all be scored in PRVs 1 – 5, unless more than 10 years has passed since the offender discharged off those sentences. The 10-year gap rule evidences the Legislature's intent to give an offender who maintains a significant period of time crime free with some relief from his record. If the prior convictions cannot be scored because of the 10-year gap rule, the habitual offender ranges will still differentiate an offender with prior

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[5] The 10-year gap rule provides:

> In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or adjudication and the defendant's commission of the next offense resulting in a conviction or adjudication. MCL 777.50(1).

convictions from a true first-time offender.[6] At the same time, the 10-year gap rule will differentiate an offender with one or more prior convictions followed by many years of conviction-free law-abiding behavior from the true repeat persistent offender who has been continuously offending.

A hypothetical example will serve to illustrate the Legislature's intent. Compare Mr. X and Mr. Y:

Mr. X: Mr. X robs a lone gas station attendant by displaying a knife when he is 18-years-old. Mr. X is a first-time offender and he is convicted of armed robbery, felonious assault, and carrying a concealed weapon.[7] His guidelines are scored out at a range of C-I (42-70 months) and the trial court sentences him to prison for a minimum term of 42 months.[8] Mr. X is paroled at age 23 after serving 5 years. Mr. X is discharged from parole after 2 more years at age 25. Mr. X reforms his life and goes on in a crime-free manner, with one exception. He does not realize that he must have his firearm rights officially restored.[9] At age 35, nine years after being discharged from parole, Mr. X is arrested for felon in possession of a firearm and felony firearm when he goes hunting and convicted of the same. His guidelines are scored out at a range of D-I.[10] *Under the current system,* his prior convictions would make him a habitual offender – 2nd offense and the D-I, habitual offender – 2nd range would be 5 months to 28 months. In a worst case guidelines sentence, he could be sentenced to prison terms of a maximum-minimum term of 28 months to a maximum-

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[6] A person may be charged as a habitual offender no matter how many conviction-free years have passed between offenses. MCL 769.10 – 769.12.

[7] Convictions for armed robbery and felonious assault of the same person for the same conduct do not violate the constitutional prohibition against double jeopardy. *People v Chambers*, __ Mich App ___ (October 9, 2007).

[8] Armed robbery is a Class A offense, in the Crime Against a Person category. Though he is a first-time offender Mr. X's PRV level will be level C because PRV 7 would be scored at 20 points based on the two concurrent convictions.

[9] MCL 750.224f.

[10] Felon in possession of firearm is a Class E felony, in the Crime Against Public Safety category. Mr. X would be scored 25 points for PRV 1 for the prior armed robbery and 10 points for PRV 2 for the prior felonious assault and carrying a concealed weapon. PRV 7 cannot be scored for a felony firearm offense. His PRV total is 35, which is a D level. No OVs are scored, so the OV level is I.

maximum term of 7 ½ years consecutive to the mandatory 2-year term for felony firearm. *If this Court overturns Stoudemire and Preuss*, his prior convictions would make him a habitual offender – 4th offense and the D-I range would be 5 to 46 months. In a worst case guidelines sentence, he could be sentenced to prison terms of a maximum-minimum term of 46 months to an unlimited maximum-maximum term consecutive to the mandatory 2-year term for felony firearm. The appellate courts would be required to affirm the sentence as it is within the guidelines range. MCL 769.34(10).

Mr. Y: Mr. Y robs a lone gas station attendant by displaying a toy gun that looks real when he is 18-years-old. Mr. Y is a first-time offender and he is convicted of armed robbery. His guidelines are scored out at a range of A-I (21-35 months) and the trial court sentences him to prison for a minimum term of 24 months.[11] Mr. Y is paroled at age 20 after serving 2 years. Within 6 months, Mr. Y commits an unarmed robbery and is convicted later that year. His guidelines are scored out a range of D-I.[12] The D-I range for a habitual offender – 2nd is 12 to 30 months. At age 21, Mr. Y was sentenced to a minimum prison term of 30 months. Mr. Y was paroled at age 26 after serving 5 years (60 months). Within 6 months, the police spot Mr. Y casing a gas station. When they stop him, he has a gun in his hand. Mr. Y, still at age 26, is charged and convicted of felon in possession of a firearm and felony firearm. His guidelines score out at a range of E-I.[13] His

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[11] Armed robbery is a Class A offense, in the Crime Against a Person category. Because he has no concurrent convictions, the PRV total is 0 for a PRV level of A. Because he used a simulated weapon, OV 1 will be scored at 5 points, which is still an OV level of I.

[12] Unarmed robbery is a Class C offense, in the Crime Against a Person category. Mr. Y would be scored 25 points for PRV 1 and 10 points for PRV 6, totaling 35 points, for a PRV level of D. In our hypothetical, Mr. Y's victim received only minor injuries. He was given 5 points for OV 3, resulting in an OV level of I.

[13] Felon in possession of firearm is a Class E felony, in the Crime Against Public Safety category. Mr. Y would be scored 50 points for PRV 1 for the prior armed robbery and unarmed robbery convictions and 10 points for PRV 6 for being on parole from a felony conviction. Felony firearm cannot be scored under PRV 7. His PRV total is 60, which is an E level. No OVs are scored, so the OV level is I.

prior convictions would make him a habitual offender – 3rd offense and the E-I, habitual offender – 3rd range would be 7 months to 34 months. In a worst case guidelines sentence, he could be sentenced to a prison term with a maximum-minimum of 34 months to a maximum-maximum of 10 years consecutive to the mandatory 2-year term for felony firearm. The appellate courts would be required to affirm the sentences as they are within the guidelines range. MCL 769.34(10).

Under the current system, Mr. Y who is a worse offender than Mr. X would have a higher guideline range and potential maximum sentence for the last episodes which consist of the same charges and same OV levels. The repeat pattern offender, Mr. Y, as a habitual offender – 3rd would have a maximum-minimum of 34 months and a maximum-maximum of 10 years. While Mr. X, as a habitual - 2nd, would have a maximum-minimum of 28 months and a maximum-maximum of 7 ½ years.

If this Court overturns Stoudemire and Preuss, the statutory sentencing guidelines are thrown into disarray. The worse offender, Mr. Y, would have a lower guideline range and lower potential maximum sentence than Mr. X. Mr. Y would still be a habitual - 3rd and still have a maximum-minimum of 34 months and a maximum-maximum of 10 years. But, Mr. X would now be considered a habitual - 4th and have a maximum-minimum term of 46 months and an unlimited maximum-maximum term. The appellate courts would have to affirm the injustice because the sentences are within the guidelines ranges. MCL 769.34(10). (Both would serve the consecutive 2 year felony firearm sentences, under either scenario.)

Thus, it is evident that the Legislature intended to incorporate the central holding of *Stoudemire* as modified by *Preuss* within the statutory sentencing guidelines. To hold otherwise, one would have to find that the Legislature actually enacted a guidelines system that would subvert its manifest purposes for enacting them in the first place.

Even if this Court holds that the Legislature did not intentionally incorporate the central holding of *Stoudemire* as modified by *Preuss* within the statutory sentencing guidelines and holds that those cases were wrongly decided, this Court should still not overrule those cases. *Stare decisis* is generally the preferred course. *Robinson v City of Detroit*, 462 Mich 439, 463, 613 NW2d 307 (2000). The fact that an earlier case was wrongly decided does not invariably mean that it should be overruled. *Id.* at 465. "[T]he Court must ask whether the previous decisions have become so embedded, so accepted, so fundamental, to everyone's expectations that to change them would produce not just readjustments, but practical real-world dislocations." *Id.* at 466. In overruling those cases, this Court would alter a fundamental part of the statutory sentencing guidelines and in doing so would thwart the Legislature's purposes for enacting them. As discussed above and demonstrated through the hypotheticals, to produce the results that the Legislature wanted the guidelines to produce, e.g. proportionality, reducing unjustified sentencing disparities, and providing harsher punishment for offenders who engage in a pattern of offenses, this Court must leave the central holding of *Stoudemire* as modified by *Preuss* intact.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, **CDAM** asks this Honorable Court not to overrule *Preuss* and *Stoudemire*, as modified by *Preuss*. **CDAM** asks this Court to grant Defendant-Appellant Gardner resentencing.

Respectfully submitted,

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