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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

Supreme Court
No. 156198

ALPHONSO L. STRAUGHTER, JR.,
Defendant-Appellee.

Court of Appeals No. 328956
Wayne Circuit Court No. 15-000755-02-FC
Hon. Alexis A. Glendening
(Defendant's MSC ALA: Docket No. 156157)

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF AFTER MOAA GRANT

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STATEMENT OF JURISDICTION, JUDGMENT APPEALED FROM, AND RELIEF SOUGHT

The People seek leave to appeal from the Court of Appeals opinion dated April 11, 2017.[1] The People challenge only that portion of the opinion in which the Court of Appeals vacated defendant's enhanced sentence and remanded for resentencing. This Court has jurisdiction over the People's application for leave to appeal pursuant to MCL 770.12(2)(c), MCR 7.303(B)(1), and MCR 7.305(B)(5)(a) and (b).

The Court of Appeals reached the wrong result on the habitual-offender notice issue, and misstated and misapplied Michigan law in doing so. The People seek relief to correct both errors, and respectfully request that this Court either (1) reverse the Court of Appeals' order vacating defendant's enhanced sentence, affirm defendant's sentence instead, and remand for a *Crosby* hearing, or (2) grant the People's application for leave to appeal.

[1] *People v Straughter*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2017 (Docket No. 328956). Plaintiff-Appellant's appendix, page 70a. The appendix will be referred to solely by its page number followed by the letter "a."

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STATEMENT OF QUESTIONS PRESENTED

I.

MCL 769.26, in the same chapter of the criminal code as the habitual-offender statute, provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." An alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure. Is a preserved claim that the notice was not properly served subject to harmless-error review?

The People answer: "YES"

Defendant presumably would answer: "NO"

Defendant did not raise this issue in circuit court.

The Court of Appeals presumably would answer: "NO"

II.

When a proof of service of a habitual-offender notice has not been filed, there are other ways to establish that a defendant or his counsel received the notice within the statutory time frame. For example, the prosecutor or defense counsel can acknowledge service or receipt of the habitual-offender notice on the record. Can a failure to file a proof of service, then, be deemed harmless when a defendant's due process right to that information was protected?

The People answer: "YES"

Defendant presumably would answer: "NO"

Defendant did not raise this issue in circuit court.

The Court of Appeals presumably would answer: "NO"

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III.

A habitual-offender notice must be served "within 21 days after the arraignment on the information" so that a defendant is promptly notified he faces an enhanced sentence. It is reasonable to construe the term "within" as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, that is, 21 days after the AOI. Does service of the notice in district court comply with the statute's language and intent?

The People answer: "YES"

Defendant presumably would answer: "NO"

Defendant did not raise this issue in circuit court.

Defendant did not raise this issue in the Court of Appeals.

IV.

An unpreserved claim that the People failed to comply with the habitual-offender notice provision is subject to plain-error review. Here, defendant never claimed he had not been served nor objected to the lack of a proof of service, and was not prejudiced by either alleged error since he had actual notice of the enhancement at least by the AOI. Did the Court of Appeals clearly err by not applying the plain-error standard, not following Michigan caselaw on this issue, and granting relief?

The People answer: "YES"

Defendant presumably would answer: "NO"

Defendant did not raise this issue in circuit court.

The Court of Appeals presumably would answer: "NO"

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STATEMENT OF FACTS AND PROCEEDINGS

On January 5, 2015, the Wayne County Prosecutor's Office ("this office") recommended charges against defendant for carjacking,[2] armed robbery,[3] conspiracy to commit carjacking,[4] conspiracy to commit armed robbery,[5] first-degree home invasion,[6] and unlawful imprisonment.[7] It is standard procedure in this office to put any notice of sentencing enhancement as a habitual offender on each of the three charging documents from the inception of the case (the felony warrant, complaint, and information).[8] Consistent with this practice, the charging documents in this case, dated January 5, 2015, *each* contained a habitual-offender second-offense notice ("notice") for this defendant, Defendant (02).[9] Defendant was arraigned on the warrant on January 6, 2015, and bound over on all charges at the preliminary examination on January 23, 2015. 14a.[10]

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[2]MCL 750.529a.

[3]MCL 750.529.

[4]MCL 750.529a and MCL 750.157a.

[5]MCL 750.529 and MCL 750.157a.

[6]MCL 750.110a(2).

[7]MCL 750.349b.

[8]This is the practice unless a defendant's habitual-offender status is not yet known (which was not the case here). In that event, an amended information is filed within 21 days of the AOI or its waiver.

[9]The charging documents are attached at 6a.

[10]At a hearing on March 27, 2015, the court reduced the first-degree home invasion charge to second degree and amended the information to reflect this. 20a-23a.

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At the arraignment on the information (AOI) on January 30, 2015, defendant waived the reading of the information—which already contained the habitual-second notice—and the court entered a plea of not guilty as to all charges. 18a. The People did not file a proof of service regarding the information or enhancement notice.

At trial, after the close of the People's proofs and outside the jury's presence, defense counsel told the court that defendant had a concern about "the Felony Information." 25a. Specifically, defendant wondered why his copy of the information was dated 1-5-2015, which pre-dated his bind-over date (1-23-2015). The court, referring to the information, noted that in the court file it had "something that's dated – I'm sure the People do as well." 25a. The court appeared to be stating that it had a copy of a correctly dated information.[11] 25a. Defense counsel then appeared to refer to the Felony Warrant in stating, "it's my understanding that he was arraigned [on the warrant] on 1-5-2015 so this document is accurate." 26a. Counsel stated he would give defendant a copy of the (presumably correctly dated) Felony Information. 26a. Neither defendant nor counsel raised any concerns about the habitual notice on the information. On June 25, 2015, the jury convicted defendant of carjacking, armed robbery, conspiracy to commit armed robbery, second-degree home invasion, and unlawful imprisonment.

There were two sentencing hearings due to a mistake in stating the convictions and sentences on July 17, 2015. 59a. Defendant was sentenced on July 23, 2015 as a habitual-

[11]And this would align with a statement in the COA opinion that the court file contained an information dated January 23, 2015. 78a.

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second offender to prison for 16.5 to 25 years for each conviction.[12] 66a. Notably, at both sentencing hearings defense counsel acknowledged that defendant was being sentenced as a habitual-second offender. 41a, 53a, 67a. Referring to one of the sentences at the first hearing, counsel stated, "being that's a habitual second." 53a. At the second hearing, defense counsel corrected the court when it stated defendant was a habitual-third offender: "Second for Mr. Straughter, your Honor." 67a. There was no objection at either hearing—*or at any earlier proceeding*—that the habitual notice had not been timely received.

After defense counsel filed an appellant's brief in defendant's appeal of right, defendant filed a pro per Standard 4 brief, raising for the first time a claim that the People did not timely file and serve the habitual notice. The Court of Appeals ("COA") affirmed defendant's convictions on all counts, but vacated the enhanced sentence and remanded to the trial court for resentencing without habitual enhancement, finding "there is no written proof of service in the circuit court file as is required by MCL 769.13(2)."[13] The COA acknowledged the information in the court file dated January 23, 2015 contained the notice.[14]

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[12]Defendant's minimum guidelines range was 171-356 months as a habitual-second offender (cell IV-F on the A grid). 66a-67a.

(The Court of Appeals incorrectly stated the length of two of the prison terms. *Straughter*, unpub op at 1; 70a.)

[13]*Straughter*, unpub op, p 9; 78a.

[14]*Straughter*, unpub op, p 9; 78a.

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The People's COA motion for reconsideration on the habitual-offender ruling was denied.[15] This Court granted a MOAA on the People's application for leave to appeal, and asked the parties to address three issues:

> (1) whether the harmless error tests articulated in MCR 2.613 and MCL 769.26 apply to violations of the habitual offender notice requirements set forth in MCL 769.13, compare *People v Cobley*, 463 Mich 893 (2000), with *People v Johnson*, 495 Mich 919 (2013); (2) whether the prosecutor may establish that a defendant received a habitual offender notice at any time before the 21-day time limit in MCL 769.13 by any means other than a proof of service; and (3) whether providing a habitual offender notice in district court satisfies the requirement set forth in MCL 769.13 that the habitual offender notice be served within 21 days after the defendant's arraignment on the information.[16]

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[15] *People v Straughter*, COA order dated June 1, 2017.

[16] *People v Straughter*, __ Mich __ ; 904 NW2d 633 (2017) (Docket No. 156198, order of December 27, 2017). 80a.

Defendant also filed an application for leave to appeal which this Court denied (MSC Docket No. 156157).

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INTRODUCTION

In this case, defendant was informed well before the deadline that the prosecution had charged him as a habitual-second offender; he also acknowledges that he is, in fact, a two-time felon. Nevertheless, he maintains that he could not be sentenced as a repeat offender because the notice came too early, because it may not have been properly served, and because the prosecution never filed a proof of service.

But none of these objections holds water. There is no such thing as legal notice that arrives too early, and the statute in question does not support, much less require, that interpretation. That is, the notice here *was* clearly filed "within 21 days after" the arraignment on the information, as that phrase is properly understood. Defendant received actual notice that he faced enhanced sentencing as a habitual-second offender at least by the preliminary exam on January 23, 2015; the information in the court file was dated that day. Additionally, since the enhancement was included on the information—which defendant chose to waive the reading of—the record below supports the inference that he *did* have written notice. Third, although the People did not file a proof of service, the lack thereof does not foreclose the application of the habitual-offender statute. The notice was factually accurate from the inception of the case, never changed thereafter, was on all three charging documents, and defendant has never claimed otherwise.

An alleged defect in the service of a habitual-offender notice is an error by a party—the prosecution—in its pleading and procedure and is thus subject to harmless-error review. Specifically, MCL 769.26 provides for harmless-error review of any error in

"pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." Indeed, this Court has already applied a harmless-error standard in reviewing a habitual-offender notice claim. Even if there was error in service of the notice or filing a proof of service here, it was harmless.

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ARGUMENT

I.

MCL 769.26, in the same chapter of the criminal code as the habitual-offender statute, provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." An alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure. Thus, a preserved claim that the notice was not properly served is subject to harmless-error review.

Standard of Review

Issues involving the interpretation of statutes and court rules are questions of law which this Court reviews novo.[17]

Discussion

MCL 769.26, in the same chapter of the criminal code as the habitual-offender statute, provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." An alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure. Thus, a preserved claim that the notice was not properly served is subject to harmless-error review.

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[17] *People v Gardner*, 482 Mich 41, 46 (2008); *People v Williams*, 483 Mich 226, 231 (2008). The same legal principles which govern the interpretation of statutes also apply when interpreting court rules. *Williams*, 483 Mich at 232.

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A. The habitual-offender notice provision protects a defendant's due process right to know his possible sentencing penalties.

MCL 769.13, governing habitual-offender sentence enhancement notices, requires written notice of an enhanced sentence to be filed "within 21 days after" the defendant's arraignment on the information or, if the arraignment is waived, within 21 days after the filing of the information. Within this time period the People are also required to serve defendant with the notice and file a proof of service:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 121 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.[18]

[18]MCR 769.13(1) and (2). MCR 6.112(F) is the court-rule counterpart to MCL 769.13 and uses the same language at issue here. It states in pertinent part: "The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense."

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The purpose of requiring the prosecutor to promptly serve the enhancement notice is rooted in the Due Process Clause,[19] that is, "to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense."[20] The habitual-offender notice provision, then, protects a defendant's due process right to know what penalties he faces, by not allowing the late filing of either an original notice, or an amended notice which increases his offender level.[21]

MCL 769.13 does not specify on which document the enhancement notice must be placed. The Wayne County Prosecutor's Office has chosen to place the notice directly on the three charging documents (the felony warrant, the felony complaint, and the felony information) to ensure the notice is timely served, and to notify defendant as soon as possible of the possible enhancement. All three documents are prepared at the same time, when the warrant prosecutor has decided what charges to recommend, and their contents are "carbon copies" of one another.[22]

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[19]US Const, Am XIV, § 1; Const 1963, art 1, § 17.

[20]*People v Shelton*, 412 Mich 569 (1982) (assessing whether the prosecutor proceeded "promptly," and creating the 14-day notice rule since there was no time period stated in MCL 769.13 until 1994); *People v Morales*, 240 Mich App 571, 582 (2000).

[21]*People v Ellis*, 224 Mich App 752, 755 (1997); *People v Morales*, 240 Mich App 571, 575 (2000).

[22]While the information has the same date as the other charging documents, the document does not take effect until defendant is bound over at the preliminary examination. This would explain why the copy in the court file was dated January 23, 2015. 78a.

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Turning to the first issue, in response to this Court's question whether the harmless error tests in MCR 2.613 and MCL 769.26 apply to violations of the habitual-offender notice requirements, the People respond "yes."

B. The language in the harmless-error rules confirms that the rules apply to violations of the habitual-offender statute.

The harmless-error rule is codified in MCL 769.26 and MCR 2.613, which "present different articulations" of the same concept.[23] MCL 769.26 directs the court to assess an alleged error for a "miscarriage of justice":

> Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Thus, a miscarriage of justice must be found before a judgment (which a sentence is part of) may be set aside. A defect in the filing or service of a habitual-offender notice is an "error as to any matter of pleading or procedure." There is nothing in MCL 769.26 (or elsewhere) which excludes it from applying to the filing and service of habitual offender notices. Therefore, the "miscarriage of justice" standard in MCL 769.26 applies when reviewing alleged violations of MCL 769.13. Moreover, it would be reasonable to assume the Legislature intended MCL 769.26 to apply to the review of alleged errors in complying with

[23] *Williams*, 483 Mich at 232 (citation and internal quotation omitted).

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the habitual-offender statute, since they are both in Chapter 769 (or Chapter IX) of the Code of Criminal Procedure.

Similarly, MCR 2.613(A), the court-rule counterpart to MCL 769.26, instructs the court to assess an alleged error to determine if refusal to grant relief "appears to the court inconsistent with substantial justice":

> **Harmless Error.** An error in the admission or exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

A defect in the filing or service of a habitual-offender notice is "an error or defect in anything done or omitted" by "the parties." Thus, as it does in MCL 769.26, the harmless-error rule in MCR 2.613(A) encompasses alleged violations of the habitual-offender statute.[24]

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[24]Another court rule provision, MCR 6.112(G), previously excluded an untimely filing of an enhancement notice from that provision's harmless-error review:

> (G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. *This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.*

Michigan Court Order 16-0020 revised MCR 6.112 effective January 1, 2017, and one of the changes was deletion of the italized sentence above. The People submit that MCR 6.112(G) and its amendment have no bearing—good or bad—on the present issue. The last sentence was possibly deleted because it made no sense being there. If there is an error in the filing of a habitual-offender notice, the remedy is withdrawal of the notice and, if withdrawn after sentencing, resentencing. In no case does the trial court "dismiss an information or reverse

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C. A harmless-error analysis is harmonious with the "bright-line" rule.

The Court of Appeals has held the habitual-offender statute's 21-day rule is a "bright-line test" for determining whether the prosecutor promptly filed a habitual-offender notice.[25] In those cases, though, the enhancement level defendant faced was increased after the 21-day period, contrary to the due process concerns underlying the habitual-offender notice provision. For example, in *People v Morales*,[26] the trial court improperly allowed the prosecution to increase defendant's enhancement from a second to a third habitual offender two months after the first, timely, notice was filed.[27] Similarly, in *People v Ellis*,[28] after filing a timely supplemental information with a habitual-second notice on it, the prosecutor filed an untimely amended supplemental information to increase defendant's offender level to a habitual fourth.[29]

In contrast, a prosecutor *may* amend the enhancement notice to correct errors after the expiration of the 21-day period as long as the amendment does not increase the habitual-

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a conviction because of an untimely filing" of a habitual-offender notice. The removal of the last sentence could reflect this Court's agreement that it was out of place.

[25] *People v Ellis*, 224 Mich App 752, 755 (1997); *People v Morales*, 240 Mich App 571, 575 (2000).

[26] *People v Morales*, 240 Mich App 571 (2000).

[27] *Morales*, 240 Mich App at 573.

[28] *People v Ellis*, 224 Mich App 752 (1997).

[29] *Ellis*, 224 Mich App at 755.

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offender level, or otherwise "increase the potential sentencing consequences."[30] Thus, allowing harmless-error review when service of the notice is not in strict compliance with the statute is not inconsistent with the bright-line test. If a notice is untimely filed, and a defendant had no actual notice of the sentence enhancement, the bright-line rule would govern and prevent enhancement because the error was not harmless. Likewise, the bright-line rule would apply to prevent an amendment to a timely filed notice which seeks to increase a defendant's offender level after the 21-day period.

D. In *People v Johnson* this Court reviewed a habitual-offender notice claim for harmless error.

This Court has considered this issue before. In *People v Johnson*,[31] the prosecution filed a timely notice of habitual-fourth-offender enhancement and, then, months after the 21-day window had passed, the trial court allowed an amendment to correct "the dates and convictions listed" in the notice. Defendant was sentenced accordingly, and the Court of Appeals affirmed.[32] This Court granted leave; then, in a one-page order, it affirmed the Court of Appeals, finding defendant "was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement."[33] Citing MCL 769.26,

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[30]*People v Hornsby*, 251 Mich App 462, 472 (2002) (finding no prejudice when the convictions in the notice were corrected beyond the 21-day period because defendant's offender level was not increased). *Id*., 251 Mich App at 472-473.

[31]*People v Johnson*, 495 Mich 919 (2013), attached at 94a. The Court of Appeals in the present case did not cite *Johnson*.

[32]*People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2012 (Docket No. 304273), attached at 85a.

[33]*Johnson*, 495 Mich at 919; 94a.

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this Court ruled there was "no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct the convictions . . . "[34] Similarly, citing MCR 2.613(A), this Court also ruled that affirming defendant's enhanced sentence was "not inconsistent with substantial justice."[35] Thus, in a one-paragraph order, *this Court cited both harmless-error rules* in denying relief, indicating its intent that the harmless-error rules apply to alleged violations of the habitual-offender statute.

E. *People v Cobley* is distinguishable and does not preclude a harmless-error standard of review.

In *People v Cobley*,[36] the prosecutor timely filed a habitual-offender notice, and at the AOI stated that he would be filing a supplemental information increasing defendant's habitual-offender level. The prosecutor then timely filed the supplemental information containing an amended habitual-fourth notice, but did not serve it on defendant. The COA found harmless error because defendant admitted he received actual notice well before trial of the prosecutor's intent to file the supplemental information with the amended habitual notice, and that defendant's habitual-offender status was used in plea negotiations. 81a.

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[34] *Johnson*, 495 Mich at 919; 94a.

[35] *Johnson*, 495 Mich at 919; 94a.

[36] *People v Cobley*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 1999 (Docket No. 204155), aff'd in part, vacated in part, by *People v Cobley*, 463 Mich 893 (2000). 81a-83a, 84a.

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This Court, in lieu of granting leave, remanded to the trial court to vacate the habitual-fourth sentence because the prosecutor had not shown that the amended notice was served on defendant within 21 days after the AOI.[37]

Cobley should not be read as precluding harmless-error review for several reasons. First, the facts are distinguishable from *Johnson* because in *Cobley*, in contrast to *Johnson*, neither defendant nor his counsel received a copy of the final habitual-offender notice within the 21-day period.[38] The *Cobley* defendant's awareness of the People's *intent* to amend the habitual notice is not the same as having a hard copy of the final notice in hand. Second, in contrast to *Johnson*, *Cobley*'s order does not cite any standard of review, and thus cannot be read as rejecting a harmless-error standard. The MSC order could equally be read as simply finding the error was not harmless.

F. The COA has also applied a harmless-error analysis to alleged violations of the habitual-offender notice provision.

In *People v Walker*,[39] the Court of Appeals applied a harmless-error review to a failure to file a proof of service of the habitual-offender notice. The *Walker* Court denied defendant relief, noting that he never claimed he did not have notice that he faced enhanced sentencing.

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[37]*People v Cobley*, 463 Mich 893 (2000), at 84a.

[38]And defendant here had a copy of at least one of the charging documents no later than the preliminary examination, and on it was the final version of the habitual–offender notice.

[39]*People v Walker*, 234 Mich App 299 (1999).

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Thus, the COA found the failure to file the proof "in no way prejudiced defendant's ability to respond to the habitual offender charge:"[40]

> [A]ny error was harmless beyond a reasonable doubt. . . Defendant makes no claim that he did not receive the notice of intent to enhance . . . defense counsel admitted at the sentencing hearing that the notice of intent had been received . . . . [234 Mich App 315.]

Walker's application of a harmless-error standard of review to a failure to file a habitual-offender notice proof of service is consistent with the harmless-error statute and court rule, and its reasoning supports extending the harmless-error rule to alleged errors in filing or serving the notice.[41]

Many unpublished cases have also applied a harmless-error analysis to alleged violations of the notice provision when timely actual notice was established.[42]

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[40]*Walker*, 234 Mich App at 315.

[41]See also MCR 2.104(B): "Failure to file proof of service does not affect the validity of the service." While pertaining to civil filings, the rule supports the conclusion that a proof of service in criminal proceedings can be reviewed for harmless error.

[42]See, e.g., *People v Swift*, unpublished per curiam opinion of the Court of Appeals, issued February 19, 2015 (Docket No. 318680); 105a. There, defendant also challenged the People's compliance with the notice provision because there was actual notice only, and no proof of service. The COA cited *Walker* and found harmless error. 106a-107a. This Court granted a MOAA, and one of the questions it posed was whether the harmless-error rules apply to violations of the notice provision. *People v Swift*, 500 Mich 877 (2016); 110a. The People conceded there had been no service of the notice and no proof of service filed, but pointed to the actual notice defendant had received on all three charging documents and argued the harmless-error rules applied to preclude relief. This Court denied defendant's application after the MOAA. *People v Swift*, 500 Mich 950 (2017).

See also, two recent cases: *People v Carter*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2017 (Docket No. 304273), excerpt attached at 111a,

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G. *In re Forfeiture of Bail Bond (People v Gaston)* is distinguishable on numerous grounds, and thus the COA erred by applying *Gaston*'s strict-compliance holding to the habitual-offender statute.

In granting relief, the Court of Appeals cited *In re Forfeiture of Bail Bond (People v Gaston)*,[43] where this Court applied a strict-compliance reading to the notice provision of the bail-bond statute, MCL 765.28.[44] 78a-79a. *Gaston* is distinguishable on numerous grounds, though, including that this Court was interpreting a different statute in a different chapter of the Code of Criminal Procedure which protected different rights of removed third parties, rather than a criminal defendant's.[45]

The bail-bond statute requires the trial court to provide notice to a surety within seven days of a defendant's failure to appear, so the surety may appear in court to contest the forfeiture of whatever sum it posted on behalf of defendant.[46] The trial court in *Gaston* sent notice to the surety *three years* after defendant failed to appear for trial, and then denied the

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and *People v Howell*, unpublished per curiam opinion of the Court of Appeals, issued December 14, 2017 (Docket No. 331901), excerpt attached at 114a.

[43]*In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320 (2014).

[44]*Gaston*, 496 Mich at 330.

[45]This Court in *People v Swift*, 500 Mich 877 (2016) asked the parties to address whether the harmless-error rules apply to violations of the notice 110a. In posing that question, the Court asked the parties to consider *Gaston*. In denying defendant's application after the MOAA, the Court did not address any of the substantive issues, including whether *Gaston*'s strict-compliance approach applied to habitual-offender notice violations. *People v Swift*, 500 Mich 950 (2017). Tellingly, perhaps, in the present MOAA order *Gaston* is not mentioned.

[46]MCL 765.28(1).

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surety's motion to set aside the forfeiture due to the lack of timely notice. The COA rejected the surety's claim that the trial court's failure to provide timely notice barred forfeiture of the surety's bond.

The Supreme Court reversed, holding that when a statute requires a public officer to undertake certain action within a specified time period to safeguard another's rights, it is mandatory (as opposed to "directory") that the action be taken within that time period, "and noncompliant public officers are prohibited from proceeding as if they had complied with the statute."[47] It found the notice provision of the bail-bond statute was such a provision, because it protected the surety's right to immediately begin searching for an absconding defendant to have him returned to custody so it does not forfeit the amount it posted on his behalf.

In contrast, a defendant's rights under the habitual-offender statute are still safeguarded under a harmless-error standard of review because a defendant has other opportunities to obtain actual notice of a sentence enhancement. While the People acknowledge the mandatory language of the notice provision, procedural violations of it do not violate the due process clause unless actual notice was not given by the 21-day window.[48]

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[47] *Gaston*, 496 Mich at 323.

[48] The COA in the present case also erred by finding *People v Muhammad*, 498 Mich 909 (2015) supported granting relief. The *Muhammad* defendant acknowledged that the felony complaint he received in district court contained a habitual-offender notice, but contended the People did not comply with MCL 769.13 because they did not timely serve him with the felony information which also contained the (unchanged) enhancement notice. The COA held that any error was harmless and reversed the trial court's dismissal of the habitual-offender notice. *People v Muhammad*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2014 (Docket No. 317054), attached at 95a.

This Court granted a MOAA and asked the parties to brief whether "defendant's

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In sum, as long as a defendant's due process right to know what potential sentencing penalties he faces is protected, a violation of the habitual-offender notice provision should be subject to a harmless-error standard of review.

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acknowledgment that he received a felony complaint" in district court which contained the notice satisfied MCL 769.13, and, if not, "the proper application of the harmless error tests" in MCR 2.613 and MCL 769.26 to violations of the notice requirements in MCL 769.13. *People v Muhammad*, 497 Mich 988 (2015); 101a.

At the MOAA the People (according to this Court's subsequent order) conceded they did not timely serve defendant with the habitual-offender notice. *People v Muhammad*, 498 Mich 909 (2015); 102a. This Court, *without ruling on the harmless-error issue*, vacated the Court of Appeals' holding that any error was harmless, ruling that the Court of Appeals first needed to determine whether the trial court's dismissal of the habitual-offender notice was erroneous before applying a harmless-error analysis. 102a. (On remand, the Court of Appeals found the trial court's dismissal was not erroneous.) Thus, this Court never answered the question it originally posed, that is, whether the harmless-error rules apply to alleged violations of MCL 769.13. This Court's *Muhammad* ruling was specific to that case and prompted by the premature harmless-error analysis; the case does not support the relief granted by the COA here.

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II.

When a proof of service of a habitual-offender notice has not been filed, there are other ways to establish that a defendant or his counsel received the notice within the statutory time frame. For example, the prosecutor or defense counsel can acknowledge service or receipt of the habitual-offender notice on the record. A failure to file a proof of service, then, can be deemed harmless when a defendant's due process right to that information was protected.

Standard of Review

Issues involving the interpretation of statutes and court rules are questions of law which this Court reviews novo.[49]

Discussion

When a proof of service of a habitual-offender notice has not been filed, there are other ways to establish that a defendant or his counsel received the notice within the statutory time frame. For example, the prosecutor or defense counsel can acknowledge service or receipt of the habitual-offender notice on the record. A failure to file a proof of service, then, can be deemed harmless when a defendant's due process right to that information was protected.

The habitual-offender statute requires the prosecutor to file a written proof of service after providing the defendant or his counsel with a habitual-offender notice.[50] The People acknowledge that this office has overlooked this statutory requirement in the past; we are striving to comply with it. The proof-of-service requirement, though, is not a constitutional

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[49] *People v Gardner*, 482 Mich 41, 46 (2008); *People v Williams*, 483 Mich 226, 231 (2008). The same legal principles which govern the interpretation of statutes also apply when interpreting court rules. *Williams*, 483 Mich at 232.

[50] MCL 769.13(2).

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right rooted in the Due Process Clause. Rather, it is a procedural mechanism to ensure that the due process right to receive prompt notice of sentencing penalties is protected. The function of the proof of service is to memorialize that the prosecutor gave a copy of the habitual-offender notice to either defendant or his attorney.

A failure to file a proof of service violates the habitual-offender statute but, if receipt of the habitual-offender notice is established on the record (within 21 days after the AOI or earlier), this satisfies the due process concerns underlying the statute and renders the error harmless.[51] In other words, the absence of a written proof of service creates a question of fact: Whether the prosecutor protected defendant's due process right by giving him timely notice that he faced enhanced sentencing. If timely notice is provided, defendant has received the information he was entitled to under the Due Process Clause and any error was harmless.

For example, receipt of the habitual-offender notice may be shown by (1) a statement on the record by the prosecutor that he or she has provided a copy of the information to defense counsel either at that hearing or earlier, or is simultaneously handing defense counsel a copy at that moment, and indicate that it contains a habitual-offender notice, or (2) a statement on the record by defense counsel acknowledging either that the prosecutor has provided him or her with a copy of the information with a habitual-offender notice on it, or

[51]If the enhancement notice is on the charging documents (as opposed to being added later to an amended information), then acknowledging receipt of any of the charging documents (complaint, warrant, or information) should also suffice as de facto proof of service. Therefore, defense counsel's waiver of the reading of the information at the AOI should be deemed an acknowledgment that he has received it, and any habitual-offender notice on it.

that counsel had already obtained a copy independently. Further, reasonable inferences may be drawn that counsel has a copy of the habitual-offender notice if counsel has discussed on the record any of the counts of the information or sentencing penalties that defendant faces, since they are all on the same document.

In sum, as was the case here, timely receipt of the habitual-offender notice may be established if the record shows either defendant, his counsel, or both received a copy of one of the charging documents with the notice on it no later than 21 days after the AOI.

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III.

A habitual-offender notice must be served "within 21 days after the arraignment on the information" so that a defendant is promptly notified he faces an enhanced sentence. It is reasonable to construe the term "within" as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, that is, 21 days after the AOI. Thus, service of the notice in district court complies with the statute's language and intent.

Standard of Review

An issue involving the interpretation of a statute is a question of law which this Court reviews novo.[52]

Discussion

Since MCL 769.13 identifies only the end of the period "within" which a habitual-offender notice must be served, it is reasonable to construe the language as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, i.e., 21 days after the AOI. Service of the notice in district court complies with the statute's language and intent.

This Court's goal in construing a statute is "to ascertain and give effect to the intent of the Legislature."[53] The "touchstone of legislative intent is the statute's language."[54] This Court interprets the statute's words "in light of their ordinary meaning and their context within

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[52] *People v Gardner*, 482 Mich 41, 46 (2008).

[53] *People v Gardner*, 482 Mich 41, 50 (2008) (citation and internal quotation omitted), interpreting the statute at issue here, MCL 769.13.

[54] *Gardner*, 482 Mich at 50.

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the statute and read[s] them harmoniously to give effect to the statute as a whole."[55] Every word should be given meaning.[56] If the statute's language "is clear and unambiguous," this Court assumes "that the Legislature intended its plain meaning" and it enforces the statute as written.[57] When statutory language is unambiguous, judicial construction is not required or permitted because this Court presumes the legislature intended "the meaning that it plainly expressed."[58] Nonetheless, statutory language should be construed reasonably, keeping in mind the statute's purpose, "to avoid absurd results."[59]

A. It is reasonable to conclude the Legislature intended to allow service of the notice from the start of the case until 21 days after the AOI.

This Court has asked whether serving the habitual-offender notice before the AOI complies with MCL 769.13. The habitual-offender statute's 21-day time limit is the *end* of the time period "within" which the notice must be served. This countdown is triggered by the AOI date or, if the AOI is waived, by the filing of the information.[60] An information can be filed as soon as the preliminary examination is held (or waived) and defendant is bound

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[55]*People v Peltola*, 489 Mich 174, 181 (2011).

[56]*Peltola*, 489 Mich at 181.

[57]*Gardner*, 482 Mich at 50 (citation and internal quotation omitted).

[58]*Peltola*, 489 Mich at 181; *Gardner*, 482 Mich at 50.

[59]*People v Hutcheson*, 308 Mich App 10, 13 (2014) (internal quotation and citation omitted), interpreting the sentencing guidelines.

[60]MCL 769.13(1). For ease of reference going forward, a reference to "AOI" in the context of the habitual-offender notice also includes the alternate scenario where a defendant waives the AOI and the information filing date triggers the 21-day end of the filing period.

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over.[61] Since a defendant can waive the AOI at the preliminary examination,[62] giving a defendant the required enhancement notice by the preliminary exam date certainly is not prohibited by the habitual-offender statute. And since a defendant can also seek permission to waive a preliminary exam,[63] it is conceivable a defendant could waive both the preliminary exam and the AOI.[64]

In describing a time period, the term "within" usually denotes a discrete beginning and ending. The term is not defined in the habitual-offender statute. Applying "common sense,"[65] the People suggest the Legislature intended that this time period could *begin* at the inception of the case, as long as the enhancement notice was served by the *end* of the time period, that is, "21 days after" the AOI. The statute puts no limitation on how *early* the notice can be

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[61]MCL 767.42(1) states, in pertinent part: "An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination." And MCR 6.112(C) provides: "The prosecutor must file the information or indictment on *or before* the date set for the arraignment [emphasis added]."

[62]MCR 6.110(A). Also, MCR 6.113(C) states a defendant may waive the AOI in writing "at or before the time set for the arraignment [on the information] . . . ."

[63]MCR 6.110(A).

[64]Effective January 1, 2015, MCR 6.108 established a probable-cause conference ("PCC") held after the arraignment on the warrant ("AOW"). The PCC rule permits a defendant to waive either the PCC, the preliminary exam, or both. MCR 6.108(A).

[65]*In re Forfeiture of Bail Bond (People v Stanford)*, 318 Mich App 330, 335 (2016): "In interpreting a statute, we apply the rule of ordinary usage and common sense."

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served. To read the statute as penalizing the prosecution for complying with the notice requirement immediately—especially if nothing in the notice changes thereafter—would elevate form over substance and ignore common sense.[66]

B. There is no sound reason to read the habitual-offender statute as precluding service of the enhancement notice before the AOI.

It would defy logic for a defendant to complain, under any circumstances, that he or she received a valuable piece of legal information too soon. Keeping in mind the purpose of the habitual-offender notice requirement—to put defendant on notice as soon as possible that he faces enhanced sentencing—such a claim loses even more ground, and makes it highly unlikely the Legislature intended such a limiting interpretation of the service period. There is no reason why a defendant can only receive notice of a sentence enhancement in circuit court, as if the exact same notice does not convey the same information if provided in district court.

Just as a defendant learns what charges he faces by the filing of felony charges in district court, it is consistent to allow the filing and service of the habitual-offender notice there too. It would make no sense to turn early notice of valuable information into a "negative" instead of the "positive" it clearly is. Early notice of enhanced sentencing could help a defendant decide whether to plea, and possibly whether to waive either the probable

[66]To clarify, if the People in *Muhammad* conceded (and it is not clear they did) that defendant's receipt of the habitual notice in district court did not comply with MCL 769.13, the People here do not agree with that position. See fn 48, *supra*, and 101a, 102a.

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cause conference, the preliminary exam, the AOI, or all three.[67] Further, it gives him additional time to challenge any prior convictions in the enhancement notice he may be contesting, as provided for in MCL 769.13(4) and (6).[68]

To the extent this Court is concerned that a habitual-offender notice served before the AOI would be premature because it could later change, this concern is addressed by the very language at issue, that is, the so-called "bright-line" 21-day statutory requirement that prevents any changes to the notice after that date which increase the penalties a defendant faces (as discussed *supra*).[69] This is when the 21-day limit comes into play meaningfully, by protecting a defendant from late service of an amended notice which increases his potential punishment.

In sum, there is no downside to early notice of possible sentence enhancement. And even if the statute requires the notice to be given after the AOI, any failure to comply is harmless if the defendant receives the same notice beforehand.

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[67]MCR 6.108(A); MCR 6.110(A); MCR 6.113(C).

[68]MCL 769.13(4) provides in pertinent part: "A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence . . . may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court . . . ."

MCL 769.13(6) provides in pertinent part: "The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose."

[69]*Ellis*, 224 Mich App at 755; *Morales*, 240 Mich App at 575.

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IV.

An unpreserved claim that the People failed to comply with the habitual-offender notice provision is subject to plain-error review. Here, defendant never claimed he had not been served nor objected to the lack of a proof of service, and was not prejudiced by either alleged error since he had actual notice of the enhancement at least by the AOI. The Court of Appeals clearly erred by not applying the plain-error standard, not following Michigan caselaw on this issue, and granting relief.

Standard of Review

Among the grounds for applying for leave to appeal in this Court are that a COA decision either "is clearly erroneous and will cause material injustice," or it "conflicts with a Supreme Court decision or another decision of the Court of Appeals."[70] The People will show that under either ground the COA erred. The Court of Appeals denied the People's motion for reconsideration on this issue.

Defendant admitted in his pro per COA brief that his habitual-offender notice claim was unpreserved.[71] The issue was thus forfeited.[72] If an appellate court nonetheless chooses to consider it, as the Court of Appeals did, the issue is reviewed for plain error affecting a defendant's substantial rights.[73] To merit relief a defendant must show: (1) there an error, (2) the error was plain, i.e., clear or obvious, (3) the plain error affected substantial rights, and,

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[70]MCR 7.305(B)(5)(a) and (b).

[71]Defendant's pro per COA brief filed on October 19, 2016, p 22.

[72]*People v Carines*, 460 Mich 750, 763-764 (1999)*; People v Vaughn*, 491 Mich 642, 654 (2012).

[73]*Carines*, 460 Mich at 763-764; *Vaughn*, 491 Mich at 654.

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once a defendant satisfies these three requirements, the reviewing court must still exercise its discretion and reverse only when (4) the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[74] Questions of statutory interpretation are reviewed de novo.[75]

Discussion

The Court of Appeals clearly erred by not applying the plain-error standard to the notice issue, not following Michigan caselaw, and granting relief, since he never claimed he had not been served nor objected to the lack of a proof of service, and was not prejudiced by either alleged error since he had actual notice of the enhancement at least by the AOI (and most likely before that), and the notice never changed thereafter.

A. The Court of Appeals did not acknowledge any standard of review, much less apply the applicable one, plain error, which precludes relief here.

The Court of Appeals failed to cite the harmless-error standard of review which applies to preserved claims of error in complying with the notice provision and, because of this oversight, granted relief which was not warranted (a remand for resentencing without habitual-offender enhancement). The Court of Appeals did not cite *Walker* or *Johnson, supra*, which are directly on point and control to preclude relief. To the extent the Court of Appeals

[74]*Carines*, 460 Mich at 763-764; *Vaughn*, 491 Mich at 654.

[75]*People v Hardy*, 494 Mich 430, 438 (2013).

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read *People v Cobley*[76] as overruling *Walker*, this conclusion was not justified. *Walker* has not been overruled, including by this Court in *Cobley*.[77]

B. There was no plain error here, since defendant received actual notice.

Had the Court of Appeals applied a standard of review, and the correct one—plain error—no relief would have been warranted. Even under the more lenient standard of harmless error, defendant's claim would still fail. The prosecution complied with the statute's purpose to give prompt notice, by including the notice on each charging document and never changing defendant's offender level thereafter.[78]

The charging documents in this case were filed on January 5, 2015, as reflected on the Circuit Register of Actions. 3a. Defendant does not dispute that each of the documents contained the enhancement notice, that the information in the notice was accurate, *and* that the notice never changed after that to increase his offender level. The COA acknowledged, as did the trial court, that the information in the court file dated January 23, 2015 (the preliminary examination date) contained the notice.[79] There is a presumption of regularity

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[76]*People v Cobley*, 463 Mich 893 (2000), at 84a.

[77]Westlaw indicates that *Walker* has "Negative Treatment (0)," and has been cited in 100 Michigan appellate cases and 4 federal district court cases in Michigan. Notably, Westlaw, which often characterizes a distinction made between one case and another as a "disagreed with" has no such notations for *Walker*. Not one of the 104 cases has disagreed with its holding.

[78]See charging documents at 6a-11a, which show the People gave *early* notice, even before the AOI.

[79]*Straughter*, unpub op, p 9; 78a.

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concerning the "proper performance of their official duties by the judge and the State's attorney…."[80] Therefore, it should be presumed that the information dated January 23, 2015 was actually filed in court on that date.

The People cannot represent when defendant was served with a written copy of the habitual-offender notice enhancement, or if he in fact was, because the prosecution did not file a proof of service. The record supports a strong inference, though, that based on the information's date (1-23-2015), defense counsel had a copy of the information containing the enhancement notice at least by the preliminary exam. Further, this seems likely since counsel was arguing for dismissal of count V. 13a. Further, at the arraignment on the information counsel waived its reading. 18a. If defense counsel had not yet been served with a copy of the information, it would seem logical he would have said so at the AOI instead of waiving the reading of a document he had not seen. And if counsel's waiver was based on a knowledge of the charges rather than on having seen the felony information, whatever charging document he had seen also contained the enhancement notice.[81] There is simply no indication defense counsel did not have a copy of the information containing the enhancement notice by the AOI. Further, the court entered a plea of not guilty at the AOI "as to all charges," and also did not state it did not have a copy of the information containing the charges—and the habitual-second notice. 18a.

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[80] *People v Iacopelli*, 141 Mich App 566, 568 (1985).

[81] And if counsel had not seen any charging document and still waived the reading of the information, then this calls into question counsel's performance, not the prosecutor's.

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Additionally, on the first day of sentencing, counsel expressly mentioned defendant's habitual-offender status, and never stated he had not received proper notice of the enhancement: "[Defense Counsel:] We have to redo the guidelines for unlawful imprisonment because that has a 15 year tail and the Court's sentence would be outside the two-thirds rule of unlawful imprisonment, being that's a habitual second." 53a. Then, at the second sentencing hearing, defense counsel agreed with the prosecutor's statement to the court that defendant was being sentenced as a habitual second: "[Defense Counsel:] Second [habitual] for Mr. Straughter, your Honor." 67a. Hence, the due process concern behind the notice provision is not implicated in this case because defendant or his counsel had actual notice by the preliminary exam or the AOI.[82]

In sum, defendant gave the COA no evidence from which to conclude he did not have actual notice of the enhancement. He has never contested its accuracy nor identified any harm he suffered because a proof of service was not filed. The COA clearly erred by granting relief without finding plain error—even ignoring the harmless-error standard espoused in *Walker* and *Johnson*.

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[82]See *People v Siterlet*, 495 Mich 919 (2013), where this Court granted a MOAA (495 Mich 856 (2013), then affirmed the COA in an order "because the defendant waived any error in the untimely amendment of the habitual offender enhancement notice by repeatedly admitting his status as a fourth habitual offender. This waiver extinguished any error.…We thus VACATE that part of the Court of Appeals judgment addressing plain error, because it was unnecssary to decide the case." *Id*., 495 Mich at 919, referring to *People v Siterlet*, 299 Mich App 180 (2012). In the present case, defendant and his counsel also tacitly and expressly admitted defendant's habitual-offender second status.

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Finally, the COA ruling will cause material injustice if defendant—a repeat violent offender—receives an unwarranted lighter sentence which does not punish him appropriately or protect the public adequately.[83] For all these reasons, the Court of Appeals clearly erred and its order vacating defendant's enhanced sentence should be reversed.[84]

[83]MCR 7.305(B)(5)(a).

[84]Defendant is still entitled to a remand for a *Crosby* inquiry to see if the sentencing court would have imposed a materially different sentence knowing the guidelines are advisory only. *People v Lockridge*, 498 Mich 358, 397 (2015); *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

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RELIEF

WHEREFORE, the People respectfully request that this Court either (1) reverse the Court of Appeals' order vacating defendant's enhanced sentence, affirm defendant's sentence instead, and remand for a *Crosby* hearing, or (2) grant the People's application for leave to appeal and grant the above relief after plenary review.

Respectfully submitted,

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