STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

ALPHONSO L. STRAUGHTER

Defendant-Appellee.
_____/

Supreme Court No. 156198

Court of Appeals No. 328956

Lower Court No. 15-0755-02

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellee
_____

# DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

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## Statement Of Questions Presented

I. The Statute Requires That A Written Proof Of Service Of The Notice Be Filed. As There Is No Time Requirement For The Filing Of The Proof Of Service, So This Part Of The Statute Is Subject To Harmless Error Analysis. In This Case, However, There Is No Evidence That The Prosecution Complied With The Requirement That The Notice Be Served Within 21 Days Of The Arraignment On The Information.

Court of Appeals answers, "Yes".

Plaintiff-Appellant answers, “No”

Defendant-Appellee answers, "Yes".

II. The Statute Requires That A Written Proof Of Service Of The Notice Be Filed. As There Is No Time Requirement For The Filing Of The Proof Of Service, So This Part Of The Statute Is Subject To Harmless Error Analysis. In This Case, However, There Is No Evidence That The Prosecution Complied With The Requirement That The Notice Be Served Within 21 Days Of The Arraignment On The Information.

Court of Appeals answers, "Yes".

Plaintiff-Appellant answers “No”

Defendant-Appellee answers, "Yes".

## Statement Of Relevant Facts

This Court has asked counsel to address issues relating to service of a habitual offender notice in the district and circuit courts. The following is a summary of the relevant facts with respect to those issues.

As an initial matter, there is no proof of service of any document containing the habitual offender notice in the court file. The prosecution's appendix contains documents labelled Felony Warrant, Complaint and Information which each contain a notice of intent to seek habitual offender enhancement. 6a-11a. No proof of service of is attached to any of these documents. The documents all bear a date of January 5, 2015. The preliminary examination was not held until January 23, 2015, and the Information could not be operative before that date. 12a.

The Information in the prosecution's appendix is not the Information filed in the Circuit Court dated January 23, 2015, and noted in the Court of Appeals opinion. That Information, signed by Daniel Williams and hand-dated, has been included in the Appellee's Appendix at 1b-2b. Appellate counsel personally obtained that document directly from the file in this Court's possession. That January 23rd Information also is not in the copy of the court file that appellate defense counsel received from the Wayne County Circuit Court. Counsel did, however, receive as part of the circuit court file what appears to be the Amended Information because it is dated April 10, 2015 and contains a charge of Home Invasion – 2d degree, instead of the Home Invasion – 1st degree charge that had been quashed on March 27, 2015. 3b-4b. The document attached at Appendix pp 22a to 23a by the prosecutor and identified by the prosecutor as the Amended Information is not in the copy of the jumbled circuit court file provided to appellate defense

counsel.[1] As the prosecution observes, the document in its appendix is undated and is annotated with the verdict.

This January 23, 2015 Information appears to have never been served on defense counsel. On the last day of trial, defense counsel expressed Mr. Straughter's concern that the only Information he has is dated January 5, 2015, which everyone acknowledges is the document from the district court. 25a. Defense counsel further notes that even at this late date this is the only Information he has. (THE COURT: What was the date of yours? MR. JOHNSON: 1-5-2015.") There is a discussion of another Information, which could have been either the January 23, 2015 Information or the operative Amended Information dated April 10, 2015. *See* 25a-26a. A copy of the Amended Information was provided to the trial judge on the first day of trial so she could read the correct charges to the jury. (6/22/15 Tr, 4)

The Information dated January 5, 2015, was not, according to Mr. Straughter's affidavit, provided to him personally until March 13, 2015. 6b He averred that until he received this document he was unaware that a habitual offender enhancement was being sought by the prosecution. 6b This affidavit was filed with his pro per brief raising this issue in the Court of Appeals.

At sentencing, no issue regarding the habitual offender notice was raised.

[1] Counsel would note that it took three requests, over a period of months, to receive what was represented as the complete file.

## Summary Of Argument

MCL 769.13 vests the prosecution with the authority to seek an enhanced sentence based on a defendant's prior convictions. The Legislature set conditions on the exercise of that authority, requiring the prosecution to file and serve the notice on the defendant "within 21 days after the defendant's arraignment on the information." Because the statute uses the mandatory word "shall," sets forth a time limit for acting, and affects the rights of the defendant, the prosecution must give notice in the manner the Legislature has required. If it fails to do so, the prosecution has no authority to seek the enhancement and may not act as if it did. As such, harmless error analysis does not apply to the failure to file and serve within the time period set forth in the statute. It is not a matter of pleading and procedure, but rather goes to the prosecution's very authority to seek an enhanced sentence. To hold otherwise would be to treat the timing provision as if it did not matter, which is contrary to long-standing authority of this Court requiring it to give effect to every word in a statute.

The prosecution asks this Court to rewrite the statute to permit the filing and serving of the notice on the defendant at any point before 21 days after the defendant's arraignment on the information, even before the defendant has been bound over to the circuit. At various points in its brief, it asks this Court to add either the phrase "or earlier" or "from the inception of the case in district court" to the statute. This argument is contrary to basic principles of statutory interpretation and strains the ordinary meaning of the word "within." Further, the prosecution's assertion that there is no such thing as a notice that comes too early is wrong. In *People v Henderson,* 497 Mich 988 (2015), this Court found that a notice sent by the MDOC to the prosecutor about a prisoner can come too early to trigger the 180-day rule. In *Henderson*, the MDOC sent a certified letter to the prosecution after the defendant was found to have violated his parole, but before charges had been filed by the prosecution against him for the act that led to the parole violation. This Court

held that the notice was, in fact, too early: "At the time that letter was sent, the Department did not have notice of any pending untried warrant, indictment, information, or complaint against the defendant, and the letter therefore did not meet the statutory requirements for applying the 180–day rule." Likewise, here if the notice is given before the arraignment on the information there are no circuit court charges to which the enhancement would attach. As the prosecution has control over when the notice is filed and served, they should be required to comply with the statute as the Legislature wrote it.

In contrast, the portion of the statute requiring that a proof of service of the notice be filed with the court does not include a time frame within which this act must be performed. As such, it is a matter of pleading and procedure and so subject to harmless error analysis. If the prosecution can show that the notice was filed and served within the prescribed statutory period, within twenty-one days *after* the arraignment on the information, then the failure to file the proof of service could be harmless. Service while the case is still pending in the district court is too early under the plain language of the statute, however.

In this case the prosecution cannot show that service of the notice was effectuated within the statutory period. In fact, because it failed to prepare or file a proof of service, the prosecution cannot say with any certainty when the notice was served. It therefore lacks the authority to seek an enhanced sentence, and Mr. Straughter is entitled to resentencing.

## I. The Plain Language Of MCL 769.13 Requires That Notice Must Be Filed And Served After The Case Has Been Bound Over To The Circuit Court. Failure To File And Serve It Within 21 Days Is Not Subject To The Harmless Error Statute. As There Is No Evidence Of Timely Service On Defendant, He Cannot Be Sentenced As A Habitual Offender.

### A. Timing Of The Filing And Service Of The Notice

The circuit courts have exclusive jurisdiction over all adult felonies in Michigan. Const 1963, Art VI, § 13; MCL 767.1 (circuit court jurisdiction); MCL 600.8311(district court jurisdiction). The district court charging documents are not controlling once the case is bound over to the circuit court. MCL 767.40; MCL 767.42. The prosecution in circuit court *must* be based on an information, and it may not be filed before the preliminary examination is held, or waived. MCR 6.112(B).

Within the context of this statutory (and constitutional) scheme, in MCL 769.13 the Legislature required that notice be given of the intent to seek an enhanced sentence *after* the case is bound over to the circuit court because those documents are the operative ones that give a defendant notice of the charges and penalties he will face at trial.

Just as the information cannot be filed until after there is a preliminary examination (or the examination is waived), MCL 769.13 specifically provides that the habitual offender notice must be filed and served "within 21 days after the arraignment on the information" or "within 21 days after" the filing of the information if the arraignment is waived. MCL 769.13 provides in relevant part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant . . . 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.

A holding that notice is effective only if given after the case has proceeded to the circuit court is consistent with basic principles of statutory construction. "We interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *People v. Peltola,* 489 Mich 174, 181 (2011). Statutory interpretation requires courts to "give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co. v. Old Republic Ins Co.,* 466 Mich 142, 146 (2002). Permitting notice to be given *before* the defendant has been arraigned on the information, or has waived the arraignment, renders the word "within" nugatory.

Moreover, permitting service before the case commences in circuit court is inconsistent with the ordinary meaning of the word "within." Within means "in or into the interior." "Within." Merriam-Webster.com. Merriam-Webster, n.d. Web. 8 Mar. 2018. So, a date is "within" two dates – here the arraignment on the information and 21 days after the arraignment – if it is filed *between* those two dates. The prosecution urges, however, that the statute be rewritten so that the notice be permitted as long as it is given at any point *no later than* 21 days after the arraignment. This argument rewrites the statute to replace the word "within" with the phrase "no later than," or to add the phrase "or earlier" as the prosecution does at page 24 of their brief. The prosecution also argues that the statute is unclear as to the period "within" begins, but the statute is clear: it is the arraignment on the information or the filing of the information if the arraignment is waived.

There is no need to add additional terms or do grammatical gymnastics if this Court simply interprets the statute as written: the prosecution must file and serve the habitual offender notice within 21 days after the arraignment on the information, not earlier or later than that time period.

Reading subsection (1) to permit effective notice of intent to enhance only on or after the date of the arraignment on the information is also consistent with subsection (2), which specifically provides that the notice be served either at the arraignment on the information or in the manner provided by the court rule for service of written pleadings. Subsection 2 does not state that notice may be given during any appearance in court, but rather specifically identifies the arraignment on the information as the time when the notice may be served. The Legislature indicated its intent that the arraignment on the information be the earliest point by which notice may be given by specifically identifying that proceeding as the primary way in which notice may be served.

Finally, although the prosecution asserts that there is no such thing as a notice that comes too early, that assertion is inconsistent with this Court's jurisprudence regarding MCL 780.131 to 780.133, the 180-day rule. In *People v Henderson,* unpublished per curiam opinion of the Court of Appeals issued November 6, 2014 (attached in Appellee's Appendix at 8b-12b) *reversed* 497 Mich 988 (2015), a search warrant was executed at the defendant's mother's home on March 12, 2012. 9b. The defendant was questioned, admitted possession of the guns found during the search and at "some point" after March 19, 2012, returned to prison on a parole violation. *Id.* On May 3, 2012, the MDOC sent a certified letter to the prosecutor giving notice of "possible firearm charges." *Id.* The letter specifically stated that it is giving notice under MCL 780.131. *Id.* The firearm charges, however, were not brought by this same prosecutor's office until over two months later (and four months after the search itself), until July 12, 2012. *Id.* Ultimately, the defendant sought dismissal of the case against him based on the 180-day rule, and the Court of Appeals held

that the May 3, 2012 letter was the notice that triggered the beginning of the 180-day rule. This Court reversed, holding that the notice in this letter was ineffective because it was sent too soon.

> we REVERSE that part of the Court of Appeals judgment holding that the May 3, 2012 letter from the Michigan Department of Corrections to the prosecutor was sufficient to trigger start of the 180–day period set forth in MCL 780.131. At the time that letter was sent, the Department did not have notice of any pending untried warrant, indictment, information, or complaint against the defendant, and the letter therefore did not meet the statutory requirements for applying the 180–day rule.

497 Mich 988. Strict adherence to the very letter of the statute was required.

Strict adherence to the statutory language should similarly be required with respect to the notice requirements of the habitual offender statute. Notice served before charges have been bound over to the circuit court is not effective because there are no felony charges pending in the circuit court to which those enhanced penalties might attach. Moreover, unlike the 180-day rule, the prosecutor is entirely in control of whether the habitual offender notice is correctly given. The prosecution alone prepares the information. The prosecution alone causes the information to be filed and served. The prosecution, charged with enforcing citizens' compliance with the laws of this state, should be required to comply with those same laws. Proving service of the notice before the case has proceeded to the circuit court is irrelevant: the question is whether notice was filed and served within 21 days *after* the arraignment on the information (or its waiver).

**B. It has long been a rule of statutory construction that when a public entity does not perform its statutory obligations in a timely fashion, it lacks authority to proceed as if it has done so. Accordingly, the harmless error statute does not apply to the portion of MCL 769.13 that requires filing and service of the habitual offender notice within 21 days of the arraignment on the information, or the waiver of that arraignment.**

MCL 769.13 sets forth a time frame within which the habitual offender notice "shall" be filed and served on the defendant. "Shall" is a mandatory, not a permissive, term. *People v Francisco*, 474 Mich 82, 87 (2006). This Court has long held that "whenever the act to be done under a statute is to be done by a public officer, and concerns the public interest or the rights of third persons, which require the performance of the act, then it becomes the duty of the officer to do it." *Agent of State Prison v. Lathrop,* 1 Mich 438, 444 (1850). Since the Legislature is presumed to be familiar with the rules of statutory construction, this Court must presume that the Legislature "intended 'shall' to mean what this Court has held that 'shall' means since at least 1850." *In re Forfeiture of Bail Bond*, 496 Mich 320, 329 (2014).

As this Court explained in *In re Forfeiture of Bail Bond*, *supra*, "'if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.'" *Id* at 330, *quoting* 3 Sutherland §57:19. The time period at issue here was clearly provided to safeguard someone's rights. As the prosecution concedes (Appellant's Supplemental Brief, p 12), the time period in MCL 769.13 is safeguarding the defendant's due process rights. US Const, Amend XIV, Const 1963, art 1, § 17. In fact, while filing is important, the notice to the defendant comes through *service* of that notice, not its filing. Therefore, the statutory provision by requiring filing and service within a specified period gives the defendant an effective opportunity to determine whether the contents of the habitual offer notice are accurate and to make decisions about the risk of going to trial.

*In re Forfeiture of Bail Bonds* cited two Court of Appeals decisions that dismissed (albeit without prejudice) drunk driving charges for failure to comply with the mandatory statutory

provision requiring that a defendant be arraigned on charges within 14 days. *Id.* at 337. The Court further looked to *People v Weston*, 413 Mich 371 (1982), which held that because the statute in question contained an "unqualified statutory command," the failure to hold a preliminary examination within the required time compelled dismissal. *Id.*

Nor is the public interest harmed in some way by upholding the Court of Appeals' holding here. The prosecution has the discretion whether to seek the enhancement. The Legislature vested the prosecution with that authority, rather than making the enhancement mandatory. The Legislature also set a mandatory time limit for the exercise of that authority, requiring that the notice be prepared, filed and served within 21 days of the arraignment on the information. Thus, the issue here is not one of pleading or procedure, but rather goes to the very authority of the prosecution to seek a habitual offender enhancement. As such, neither MCL 769.26 nor MCR 2.613 would apply. *See generally McDougall v Schanz*, 461 Mich 15 (1999)("this Court's constitutional rule-making authority extends *only* to matters of practice and procedure.")

This interpretation of the statute is consistent with both *People v Cobley,* 463 Mich 893 (2000) and *People v Johnson*, 495 Mich 919 (2013). In *Cobley*, the prosecution failed to serve the notice within twenty-one days of the arraignment on the information. 81a-84a. This Court ordered the habitual enhancement vacated because of the failure to serve the notice timely. In *Johnson*, the notice was timely filed and service of the notice was not at issue, rather the question was whether that notice could be amended after the twenty-one days to correct the convictions identified in the notice as the basis for the enhancement. The corrected notice did not seek to further increase the defendant's sentence.

Those cases stand for the proposition that if the notice is timely filed and served the prosecution has the authority to seek the enhancement sought. Errors in the content of the notice that do not change the punishment go not to the authority of the prosecution to act, but rather

would be a matter of pleading or procedure, subject to the harmless error statute. Thus, *Johnson*'s application of the harmless error standard to the amendment of the notice outside of the twenty-one day period is consistent with the plain language of the statute and principles of statutory construction.

Applying a harmless error provision to the failure to timely file *and* serve a habitual offender notice would render the twenty-one day notice requirement nugatory. Doing so would likewise run contrary to long-established caselaw and principles of statutory construction. This Court must give effect to unambiguous statutes, and not treat a statutory notice provision "as so far unimportant that it is a matter of indifference whether it is complied with or not." *Id.*, citing *Hoyt v East Saginaw*, 19 Mich 39, 46 (1869). The Legislature determined, explicitly and clearly, habitual offender notices be filed and served within twenty-one days after the arraignment on the information (or waiver). This Court must enforce that time limit.

## Conclusion

There is no evidence that the prosecution filed and served notice of its intent to seek a habitual offender enhancement within 21 days after the arraignment on the information. The prosecution's reading of the statute reads out two words: "within" and "service." Requiring that the prosecution both file and serve notice of the intent to seek habitual offender sentencing is consistent with the plain meaning of the statute and well-established principles of statutory construction. The Court of Appeals correctly granted Mr. Straughter a resentencing without the habitual offender enhancement.

## II. The Statute Requires That A Written Proof Of Service Of The Notice Be Filed. As There Is No Time Requirement For The Filing Of The Proof Of Service, So This Part Of The Statute Is Subject To Harmless Error Analysis. In This Case, However, There Is No Evidence That The Prosecution Complied With The Requirement That The Notice Be Served Within 21 Days Of The Arraignment On The Information.

MCL 769.13 mandates that the prosecution file a written proof of service with the court. Unlike the requirement for notice and service, the statute does not set forth a time limit for doing so. The purpose of a proof of service is just that: proof of service. The filing requirement allows the court, and the defendant, to know at a glance whether the prosecution has fulfilled the requirements set by the Legislature for the exercise of the authority to seek enhanced sentencing under the habitual offender statute. It is, therefore, a matter of pleading or procedure, and so within the harmless error mandate of MCL 769.26.

The file here is lacking a written proof of service. The People concede that they cannot prove that the written notice was *ever* served. (Appellant's Supplemental Brief, p 34) There is no indication on the record at any proceeding that service of the habitual offender notice contained in the information was being effectuated within 21 days after the arraignment on the information. The record shows only that Mr. Straughter's counsel had an information dated January 5, 2015, and even by the end of trial did not have *any* subsequent information. (25a) While the court had a January 23, 2015 information, that is of no moment: the statute requires not just that the notice be filed, but also that it be served on the defendant within 21 days after the arraignment on the information. To date, that information has not been served on defense counsel, who obtained a copy only by personally inspecting the court file. The prosecution cannot show timely service of the notice in this case. Absent such proof, they lack authority to act as if they served it.

Mr. Straughter personally raised the lack of timely notice and service at the first moment he was allowed to do so, in his Standard IV brief. This is not an error that the prosecution could have

corrected had it been raised earlier: either the notice was filed and served within twenty-one days after the arraignment on the information or it was not. The prosecution made a decision not to prepare a proof of service, perhaps because the Information that was filed with the Court was not served on the defendant. It is not too much of a burden to require the prosecution to serve the Information that they file with the court: litigants manage that hurdle every day. Mr. Straughter is entitled to resentencing without the habitual offender enhancement.

## Conclusion

Defendant-Appellee asks this Honorable Court to deny the prosecution's application.

Respectfully submitted,

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