STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

Supreme Court
No. _____

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 APPLICATION FOR LEAVE TO APPEAL

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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 remanding 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[1] *People v Straughter*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2017 (Docket No. 328956). Appendix A.

STATEMENT OF QUESTION PRESENTED

An unpreserved claim that the People failed to comply with the habitual-offender notice provision is subject to plain-error review. Here, defendant never objected to the lack of a proof of service, and was not prejudiced by it 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 the notice issue in circuit court.

The Court of Appeals presumably would answer: "NO"

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,

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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 does not appear to be the case here). In that event, an amended information is filed within 21 days of the AOI or its waiver.

dated January 5, 2015, *each* contained a habitual-offender second-offense notice ("notice") for this defendant, Defendant (02).[9] It appears the People did not file a proof of service of the notice. Defendant was arraigned on the warrant on January 6, 2015.

At the arraignment on the information (AOI) on January 30, 2015, defendant waived the reading of the felony information, and the court entered a plea of not guilty "as to all charges . . . ." 1/30, 3. At a motion hearing on March 27, 2015, the information was amended to reflect the Court's reduction of the first-degree home invasion charge to second-degree home invasion.[10] 3/27, 12-13.

On June 25, 2015, a jury convicted defendant of carjacking, armed robbery, conspiracy to commit armed robbery, second-degree home invasion, and unlawful imprisonment. There were sentencing hearings on July 17 and 23, 2015 (due to a mistake at the first hearing). 7/23, 3. Defendant was ultimately sentenced as a habitual-second offender[11] to prison for 16.5 to 25 years for each conviction.[12] 7/23, 10. At each of the sentencing hearings, defense counsel acknowledged that defendant

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[9]The charging documents are attached as Appendix G.

[10]MCL 750.110a(3).

[11]Defendant's minimum guidelines range was 171-356 months as a habitual-second offender (cell IV-F on the A grid). 7/23, 10-11.

[12]The Court of Appeals incorrectly stated the length of the prison terms.

was being sentenced as a habitual-second offender, and there was no objection at either hearing—or at any earlier proceeding—that the notice had not been timely received. 7/17, 14; 7/23, 11.

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] In so ruling, the Court acknowledged the information dated January 23, 2015 (the preliminary examination date) contained the notice.[14]

The People filed a motion for reconsideration in the Court of Appeals regarding its ruling on the habitual-offender notice claim, and the motion was denied in an order dated June 1, 2017. The People now file this timely application for leave to appeal.[15]

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[13]*Straughter*, unpub op, p 9 (Appendix A).

[14]*Straughter*, unpub op, p 9

[15]Defendant has also filed an application for leave to appeal with this Court (MSC Docket No. 156157).

ARGUMENT

An unpreserved claim that the People failed to comply with the habitual-offender notice provision is subject to plain-error review. Here, defendant never objected to the lack of a proof of service, and was not prejudiced by it 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."[16] 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.[17] Questions of statutory interpretation are generally reviewed de novo,[18] but since defendant did not preserve this issue it was forfeited.[19] If an

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

[17]Defendant's pro per COA brief, p 22.

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

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

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. 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, 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.[20]

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 defendant never objected to the lack of a proof of service, was not prejudiced by it since he had actual notice of the enhancement at least by the AOI (and most likely before that), and the notice never changed thereafter.

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

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

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.[21]

[21]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."

The purpose of requiring the prosecutor to promptly file the enhancement notice "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."[22]

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 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 of the charging documents are prepared at the same time, that is, when the warrant prosecutor has decided what charges to recommend, and their contents are "carbon copies" of one another.[23] The charging documents in this case were filed on January 5, 2015, as reflected on the Circuit Register of Actions.[24] 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.

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[22]*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).

[23]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.

[24]Attached as Appendix B.

The so-called "bright-line" 21-day requirement for filing the notice protects a defendant's due process right to know what penalties he faces, by not allowing the late filing of an original notice (or an amended notice which increases his offender level).[25] But the filing of the proof of service does not implicate a defendant's due process right to notice. Thus, in *People v Walker*,[26] 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. The Court thus found the failure to file the proof "in no way prejudiced defendant's ability to respond to the habitual offender charge:"[27]

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

Walker's application of a harmless-error standard of review to a habitual-offender notice violation is supported by statute and court rule. MCL 769.26 provides

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[25]*People v Ellis*, 224 Mich App 752, 755 (1997); *People v Morales*, 240 Mich App 571, 575 (2000). In each of those cases, the enhancement level defendant faced was increased after the 21-day period, contrary to the due process concerns in the habitual-offender notice provision. *Ellis*, 224 Mich App at 755; *Morales*, 240 Mich App at 573.

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

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

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 and is thus subject to harmless-error review if preserved. Moreover, since the claim is unpreserved here, the more burdensome plain-error standard of review applies.

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).[28] The Court of Appeals did not cite *Walker*, *supra*, which is directly on point and controls to preclude relief. To the extent the Court of Appeals read *People v Cobley*[29] as overruling *Walker*, this

[28] *Straughter*, unpub op at 9.

[29] *People v Cobley*, 463 Mich 893 (2000). See Appendix C.

conclusion was not justified. *Walker* has not been overruled, including by this Court in *Cobley*.[30]

B. The Court of Appeals also overlooked the more recent case of *People v Johnson*, where this Court applied a harmless-error standard in reviewing a habitual-offender notice claim.

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. 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."[32]

In that order, this Court cited MCL 769.26 and ruled there was "no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct

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[30]Westlaw indicates that *Walker* has "Negative Treatment (0)," and has been cited in 98 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 102 cases has disagreed with its holding.

[31]*People v Johnson*, 495 Mich 919 (2013): *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2012 (Docket No. 304273). See Appendix D for both.

[32]*Johnson*, 495 Mich at 919.

the convictions[.]"[33] Similarly, citing MCR 2.613(A), the Court also ruled that affirming defendant's enhanced sentence was "not inconsistent with substantial justice."[34] Thus, in a one-paragraph order, this Court cited both harmless-error rules in denying relief, and they should apply here as well, since this case also involves an alleged violation of the habitual-offender statute.[35]

C. *People v Muhammad* did not hold what the Court of Appeals said it did.

The Court of Appeals also erred by concluding *People v Muhammad*[36] supported granting relief in the present case. 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 he was not timely served with the felony information which also contained

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[33] *Johnson*, 495 Mich at 919.

[34] *Johnson*, 495 Mich at 919.

[35] See also, *People v Swift*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket No. 318680), attached as Appendix E, and the MSC orders included. There, defendant also challenged the People's compliance with the notice provision because there was actual notice only, and no proof of service. This Court granted a MOAA, and expressly asked the parties to address whether the harmless-error rules apply to violations of the notice provision, and to answer this question in light of *Gaston*. At the MOAA, the People, in conceding there had been no service of the notice and no proof of service filed, pointed to the actual notice defendant had received on all three charging documents. This Court denied defendant's application.

[36] *People v Muhammad*, 498 Mich 909 (2015). See Appendix F.

the unchanged enhancement notice. The Court of Appeals in *Muhammad* held that any error was harmless and reversed the trial court's dismissal of the habitual-offender notice.[37] This Court granted oral argument on whether to grant defendant's application for leave to appeal (a "MOAA"), and asked the parties to brief whether (1) "defendant's acknowledgment that he received a felony complaint" in district court which contained the notice satisfied MCL 769.13, and, if not, (2) "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.[38]

Following the MOAA in *Muhammad*, this Court, *without ruling on the harmless-error issue*, vacated the Court of Appeals' holding, ruling that the Court of Appeals first needed to determine whether the trial court's dismissal of the notice was erroneous before applying a harmless-error analysis.[39] On remand, the Court of Appeals found the trial court's dismissal was not erroneous.[40] Thus, in *Muhammad*, this Court never answered the question it originally posed, that is, whether the harmless-error rules in fact apply to alleged violations of MCL 769.13. Its holding

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[37]*People v Muhammad*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2014 (Docket No. 317054) (Appendix F).

[38]*People v Muhammad*, 497 Mich 988 (2015). See Appendix F.

[39]*People v Muhammad*, 498 Mich 909 (2015).

[40]*People v Muhammad (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2015 (Docket No. 317054).

was specific to that case and prompted by the Court of Appeals' premature harmless-error analysis; the case does not support the relief granted here.

D. In granting relief the Court of Appeals erred in finding *In re Forfeiture of Bail Bond (People v Gaston)* analogous.

In granting relief, the Court of Appeals also cited *In re Forfeiture of Bail Bond (People v Gaston)*,[41] where this Court applied a strict-compliance reading to the notice provision of the bail-bond statute, MCL 765.28. *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**.** 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.[42] In *Gaston*, the trial court sent notice to the surety *three years* after defendant failed to appear for trial, and then denied the surety's motion to set aside the forfeiture due to the lack of timely notice. The Court of Appeals rejected the surety's claim that the trial court's failure to provide timely notice barred forfeiture of the surety's bond.

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[41] *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 330 (2014).

[42] MCL 765.28(1).

This 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."[43] 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 (or here, plain error) standard of review, unlike in *Gaston*, 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[44] unless actual notice was not given by the 21-day window.[45] Thus, the *Gaston* concerns are not present with habitual notices; the 21-day rule protects against a due

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

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

[45] *Ellis*, 224 Mich App at 755; *Morales*, 240 Mich App at 573.

process violation and renders a strict-compliance approach to MCL 769.13 unnecessary.

E. 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.[46] Even if there was error in *service* of the notice or *filing a proof* of service, it was harmless because there was *actual notice*, thus satisfying due process constitutional concerns. 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.[47]

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 defense counsel had a copy of the information containing the enhancement notice at

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[46]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).

[47]See charging documents in Appendix G, which show the People actually gave *early* notice, that is, even before the AOI.

least by the arraignment on the information, where he waived its reading. 1/30, 4. 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.[48] There is simply no indication defense counsel did not have a copy of the information containing the enhancement notice at 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. 1/30, 3.

Indeed, in Wayne County the People notify most defendants *at the inception of the case* that they face habitual-offender sentencing enhancement; the People do not wait until "21 days after the" AOI. The COA noted the information in the court file was dated 1/23/15, the date of the preliminary exam, and hence it is likely defense counsel had a copy of it by then.

Additionally, defense counsel, who advocated vigorously on behalf of his client throughout trial, did not once claim he had not received the enhancement notice.

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[48]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.

Then, 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." 7/17, 26. 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 for Mr. Straughter, your Honor." 7/23, 11.

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*.

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.[49] For all these reasons, the Court of Appeals clearly erred.

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

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.

Respectfully submitted,

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Dated: July 27, 2017