

**STATE OF MICHIGAN  
MICHIGAN SUPREME COURT**

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**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellee,

v

**FATEEN MUHAMMAD,**

Defendant-Appellant.

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Supreme Court No. 150119  
Court of Appeals File No. 317054  
Circuit Court File No. 13-161-FH

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**ATTORNEY FOR PLAINTIFF-APPELLEE**

**Ingham County Prosecuting Attorney**

Stuart Dunnings, III (P31089)

303 W Kalamazoo Street

Lansing, Michigan 48933

(517) 483-6108

**ATTORNEY FOR DEFENDANT-  
APPELLANT**

**The Curi Law Office, P.L.L.C.**

Joseph D. Curi (P47811)

2875 Northwind Drive, Suite 137

East Lansing, Michigan 48823

(517) 333-9905

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**DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF  
ON APPLICATION FOR LEAVE TO APPEAL**

By: Joseph D. Curi (P47811)  
Attorney for Defendant-Appellant Fateen Muhammad

The Curi Law Office, PLLC  
2875 Northwind Drive  
Suite 137  
East Lansing, MI 48823  
(517) 333-9905



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**The Curi Law Office, PLLC**  
2875 Northwind Drive  
Suite 137  
East Lansing, MI 48823  
(517) 333-9905

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## STATEMENT OF QUESTIONS PRESENTED

- I. **WHETHER DEFENDANT'S ACKNOWLEDGEMENT THAT HE RECEIVED A FELONY COMPLAINT THAT CONTAINED AN HABITUAL OFFENDER NOTICE FILED IN DISTRICT COURT SATISFIES THE REQUIREMENTS SET FORTH IN MCL 769.13 THAT THE HABITUAL NOTICE BE SERVED WITHIN 21 DAYS AFTER THE DEFENDANT'S ARRAIGNMENT ON THE INFORMATION CHARGING THE UNDERLYING OFFENSE.**

Plaintiff-Appellee says, "Yes."

Defendant-Appellant says, "No."

Court of Appeals answers, "Yes,"

Trial Court answers, "No,"

- II **THE PROPER APPLICATION OF THE HARMLESS ERROR TEST ARTICULATED IN MCR 2.613 AND MCL 769.26 TO VIOLATIONS OF THE HABITUAL OFFENDER NOTICE REQUIREMENTS SET FORTH IN MCL 769.13 WHEN COMPLERD TO PEOPLE V COBLEY, 463 MICH 893 (2000), WITH PEOPLE V JOHNSON, 495 MICH 919 (2013).**

No response required. See argument section.

## STATEMENT OF FACTS

DATE	EVENT
02/06/13	Defendant-Appellant Fateen Muhammad was arraigned before 54-A District Court Judge Frank J. Deluca. Judge Deluca informed Defendant-Appellee that he faced a maximum of more than 20 years and 10 years respectively for the two felony charges that were filed against Defendant, but Judge Deluca never informed Defendant that he faced a maximum of life in prison as a result of the habitual notice for the two felony charges that he faced. Judge Deluca never asked Defendant-Appellant if Appellant understood the charges and maximum penalties that Appellant was facing (See pages 3-4 of Exhibit C attached to Appellant's Application for Interlocutory Leave to Appeal).
02/11/13	Defense counsel received a copy of the Felony Complaint on February 11, 2013 (See Felony Complaint attached as Exhibit D to Appellant's Application for Interlocutory Leave to Appeal). The Felony Complaint contained an Habitual Offender Fourth Offense Notice (See Exhibit D attached to Appellant's Application for Interlocutory Leave to Appeal).
02/15/13	Preliminary Examination held – Case was bound over to the 30 <sup>th</sup> Judicial Circuit Court (See Adult Bind Over Form attached as Exhibit E to Appellant's Application for Interlocutory Leave to Appeal). Following the Preliminary Examination, Defendant-Appellant signed a form that waived his Circuit Court Arraignment (See Waiver of Arraignment and Election to Stand Mute or Enter a Guilty Plea attached as Exhibit F attached to Appellant's Application for Interlocutory Leave to Appeal).
02/27/13	Plaintiff-Appellee filed the Felony Information on February 27, 2013 (See Exhibit K attached to Appellant's Application for Interlocutory Leave to Appeal).
03/27/13	Circuit Court Pre-Trial was held (See Criminal Pre-Trial Conference Order attached as Exhibit G attached to Appellant's Application for Interlocutory Leave to Appeal). Neither Defendant nor Defendant's counsel was provided with a copy of the Felony Information at the Pre-Trial.
04/24/13	The prosecuting attorney served defense counsel with a copy of the Felony Information (See e-mail attached as Exhibit C to Appellant's Application for Interlocutory Leave to Appeal).

he Curi Law Office, PLLC  
 2875 Northwind Drive  
 Suite 137  
 East Lansing, MI 48823  
 (517) 333-9905

## LEGAL ARGUMENT

- I. **DEFENDANT'S ACKNOWLEDGEMENT THAT HE RECEIVED A FELONY COMPLAINT THAT CONTAINED AN HABITUAL OFFENDER NOTICE FILED IN DISTRICT COURT DOES NOT SATISFY THE REQUIREMENTS SET FORTH IN MCL 769.13 THAT THE HABITUAL NOTICE BE SERVED WITHIN 21 DAYS AFTER THE DEFENDANT'S ARRAIGNMENT ON THE INFORMATION CHARGING THE UNDERLYING OFFENSE.**

In a criminal proceeding in Michigan a defendant starts out in District Court. In the case at bar the prosecuting attorney filed a "Felony Complaint" in the 54-A District Court that included an Habitual Offender Fourth Offense Notice (See Felony Complaint attached as Exhibit D to Appellant's Application for Interlocutory Leave to Appeal). Thereafter, the case was bound over to the 30<sup>th</sup> Judicial Circuit Court (See Adult Bind Over Form attached as Exhibit E to Appellant's Application for Interlocutory Leave to Appeal).

As it relates to district court procedure, MCL 764.1(1) and (3)(a)-(c) states:

- 1) For the apprehension of persons charged with a felony, misdemeanor, or ordinance violation, **a judge or district court magistrate** may issue processes to implement this chapter, except that a judge or district court magistrate shall not issue a warrant for other than a minor offense unless an authorization in writing allowing the issuance of the warrant is filed with the judge or district court magistrate and, except as otherwise provided in this act, the authorization is signed by the prosecuting attorney, or unless security for costs is filed with the judge or district court magistrate.

\* \* \*

- 3) A complaint for an arrest warrant may be made and an arrest warrant may be issued by any electronic or electromagnetic means of communication from any location in this state, if all of the following occur:
  - (a) The prosecuting attorney authorizes the issuance of the warrant. Authorization may consist of an electronically or electromagnetically transmitted facsimile of the signed authorization.
  - (b) The judge or district court magistrate orally administers the oath or affirmation, in person or by any electronic or electromagnetic means of

communication, to an applicant for an arrest warrant who submits a complaint under this subsection.

(c) The applicant signs the complaint. Proof that the applicant has signed the complaint may consist of an electronically or electromagnetically transmitted facsimile of the signed complaint.

(Emphasis added)..

\* \* \*

In the case at bar the prosecution combined the criminal charges together with the Habitual Offense Fourth Offense Notice in a Felony Complaint (See Exhibit D attached to Appellant's Application for Interlocutory Leave to Appeal). The district court is authorized to proceed under a "complaint." However, once a case is bound over to Circuit Court then the charging document is no longer the "complaint." Instead, pursuant to MCL 767.1, the charging document is identified as an "information." A defense attorney will prepare its case based on the content that is contained in the charging document, i.e., the "information."

As it pertains to an "information" MCL 767.1 states as follow:

"The several circuit courts of this state, the recorders' courts and any court of record having jurisdiction of criminal causes, shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon *informations* for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments."

(Emphasis added).

\* \* \*

Once a case gets bound over to the Circuit Court, the prosecution proceeds on the "information" and not the "complaint." For example, during a circuit court jury trial, the trial court judge would instruct the jury that the charging document is the "information" and not the "complaint." See M Crim JI 1.8.

Therefore, once a case is in the Circuit Court it does not matter what was or was not contained in the "complaint." Furthermore, there is no requirement that the prosecution place the habitual offender notice in the "information." The defense is proceeding in a criminal case based on what the government has filed and served defendant. The government is duty bound to move its case against an accused in a speedy manner, as every criminal defendant is presumed innocent.

Once a defendant's case reaches the Circuit Court, the prosecuting attorney must make a prompt decision whether or not to file and serve defendant with a notice of an enhanced sentence. See People v Ellis, 224 Mich App 752, 569 NW2d 917 (1997) and People v Morales, 240 Mich App 571, 618 NW2d 10 (2000). The controlling statute regarding the filing and serving of an Habitual Offender Notices is MCL 769.13. As it pertains to filing and serving a notice of enhanced sentence, MCL 769.13(1) and (2) state as follows:

**"(1)** In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 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."

(Emphasis added).

\* \* \*

As can be seen by the above-referenced statute, there is no reference to a "complaint." Instead, MCL 769.13 kicks in once the "information is filed." The statute makes it crystal clear that once an "information" is filed a prosecutor has 21 days to serve the defense with a copy of a sentence enhancement notice.

**II. THE PROPER APPLICATION OF THE HARMLESS ERROR TEST ARTICULATED IN MCR 2.613 AND MCL 769.26 TO VIOLATIONS OF THE HABITUAL OFFENDER NOTICE REQUIREMENTS SET FORTH IN MCL 769.13 WHEN COMPARED TO PEOPLE V COBLEY, 463 MICH 893 (2000), WITH PEOPLE V JOHNSON, 495 MICH 919 (2013) IS TO DISMISS THE HABITUAL OFFENDER NOTICE IF THE PROSECUTION FAILS TO SERVE THE NOTICE WITHIN 21 DAYS AFTER FILING OF THE INFORMATION CHARGING THE UNDERLYING OFFENSE.**

As it relates to the harmless error test, MCR 2.613 states as follows:

**(A) Harmless Error.** An error in the admission or the 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.**

**(B) Correction of Error by Other Judges.** A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

**(C) Review of Findings by Trial Court.** Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."

\* \* \*

As it relates to the harmless error test, MCL 769.26 states as follows:

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**.

\* \* \*

The proper application of the harmless error test is already included in MCL

769.13, as follows:

**“(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 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)*.**”

(Emphasis added).

It is clear that the Legislature has determine that it is harmless error to serve a defendant, who has waived arraignment, with a notice of sentence enhancement within 21 days after the filing of the information charging the underlying offense. See MCL 769.13. The prejudice is obvious starting on the 22<sup>nd</sup> day, the 23<sup>rd</sup> day, etc. As such, the Legislature did not need to place a remedy for violation of the 21-day service rule since the prejudice to a defendant is obvious and dismissal of the notice is the only appropriate remedy. The prejudice is heightened in this case since the sentence enhancement was contained within the Felony Information. Therefore, the defense was not served with a copy of either document in circuit court until 56 days after the

Felony Information was filed in the circuit court. As noted above, the information is the charging document in the circuit court that the defense relies on to prepare its case for trial. In the case at bar the difference in the maximum potential prison time without the notice is 20 years and with the notice it is life in prison.

In essence, the Legislature has allowed the government a period of 21 days to file and serve the defense with a sentence enhancement. After that date, service is no longer considered as being prompt and the result is obvious prejudice to a defendant. This result is clear based on the holdings in People v Cobley, 463 Mich 893, 618 NW2d 768 (2000) and People v Johnson, 495 Mich 919, 840 NW2d 373 (2013).

\* \* \*

Provided below is a synopsis of the case that led to the holding in People v Cobley, 463 Mich 893, 618 NW2d 768 (2000).

- Defendant appealed a jury trial criminal conviction.
- Prosecution **failed to serve** defendant in the **circuit court** with a sentence notice enhancement as required by MCL 769.13.
- At the time of arraignment the prosecuting attorney informed the court, defendant and defense counsel **that he would be filing** a supplemental information alleging him as a fourth habitual offender.

#### Court of Appeals

Held: Affirmed. Harmless error applied because 1) defendant was aware of the prosecuting attorney's intent to file an habitual information well before trial and 2) the defendant was not prejudiced by the prosecutor's noncompliance with the statute.

#### Supreme Court

Held: Reversed. Prosecution failed to prove the notice of sentence enhancement was served on defendant within 21 days after the defendant was arraigned.

#### Discussion

The Court in Cobley followed the clear intent of the 21-day cut-off period in MCL 769.13 and determined that it was not harmless error to allow the prosecution to serve

a notice enhancement 21 days after the circuit court arraignment. The statute does not provide for oral notice of a potential future filing of a sentence notice enhancement. Furthermore, as in the case at bar, the statute does not provide for the prosecution to wait 56 days after the information is filed to finally serve the defense with a notice of sentence enhancement. The 21-day cut off date provides plenty of time for the government to prepare and serve a sentence notice enhancement on the defense.

Provided below is a synopsis of the case that led to the holding in People v Johnson, 495 Mich 919, 840 NW2d 373 (2013).

- Defendant appealed following a jury trial conviction.
- 09/28/06 Information filed in circuit court.
- 09/28/06 Supplemental Information filed in circuit court – Included Habitual Offender Notice – Fourth offense.
- 10/13/06 Circuit court arraigned defendant.
- 02/23/07 Prosecuting attorney filed motion to amend supplemental information to correct conviction dates.
- 03/01/07 Amended supplemental information filed.
- **Defendant was timely served in circuit court with the supplemental information** that contained an Habitual Offender Notice – Fourth offense.

#### Court of Appeals

Held: Affirmed. Defendant was given sufficient notice of the prosecutor's intent to seek sentencing enhancement, satisfying the primary purpose of MCL 769.13(2).

#### Supreme Court

Held: Affirmed. Defendant was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement.

#### Discussion

The holding in Johnson is consistent with the holding in Cobley, supra. In Johnson, the court did not look back to the events that occurred in the district court. Instead, the Johnson Court recognized that the defense was timely served with a sentence notice enhancement in the circuit court. Therefore, the defense was not prejudiced by a delay in serving the notice – pursuant to MCL 769.13. The issue at

hand was an error in the dates of conviction in the notice. Since the notice was timely served it was harmless error when the trial court allowed the prosecution to correct the errors that were contained in a timely served notice.

### **DISCUSSION**

Since the prosecution has a duty to move a criminal case promptly without unreasonable delay it is inconsistent with substantial justice and a miscarriage of justice in this case to allow the government to wait 56 days after it files an information to serve the defense with a notice enhancement. After the 21-day cut off period the prejudice to the defense is obvious. The prejudicial effect on the defense is heightened when the prosecution is essentially placing the burden on the defense by looking back to events that occurred in the district court complaint and imputing a notice requirement on the defense in the circuit court that is not provided for in MCL 769.13. Keep in mind that in this case the prosecution has no excuse for the lengthy delay in serving the defense with the notice of sentence enhancement.

Criminal defendants have a right to be presumed innocent and have their cases move promptly through the court system without any unreasonable delay. The defense has a right to thoroughly prepare its case for trial based on timely information provided to the defense by the government. Any time that is taken from the defendant's trial preparation by the fault of the governments unreasonable delay is prejudicial per se.

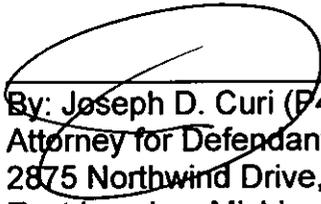
### **RELIEF SOUGHT**

Defendant-Appellant seeks reversal of the Michigan Court of Appeals July 29, 2014 decision and an affirmance of the trial court's order dismissing the habitual notice enhancement.

Date: May 15, 2015

Respectfully submitted,

**The Curi Law Office, P.L.L.C.**



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By: Joseph D. Curi (P47811)  
Attorney for Defendant-Appellant  
2875 Northwind Drive, Suite 137  
East Lansing, Michigan 48823  
(517) 333-9905

**The Curi Law Office, PLLC**  
2875 Northwind Drive  
Suite 137  
East Lansing, MI 48823  
(517) 333-9905

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**Ingham County Prosecuting Attorney**  
Stuart Dunnings, III (P31089)  
303 W Kalamazoo Street  
Lansing, Michigan 48933  
(517) 483-6108

**ATTORNEY FOR APPELLANT**

**The Curi Law Office, P.L.L.C.**  
Joseph D. Curi (P47811)  
2875 Northwind Drive, Suite 137  
East Lansing, Michigan 48823  
(517) 333-9905

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**Proof of Service**

The undersigned hereby certifies that on May 15, 2015, he served a copy of the following:

- Defendant-Appellant's Supplemental Brief on Application for Leave to Appeal on the following offices:

**By Personal Delivery:**

**Lawyer for Appellee**

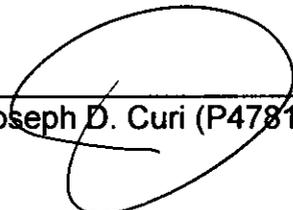
**Ingham County Prosecuting Attorney**  
Stuart Dunnings, III (P31089)  
303 W Kalamazoo Street  
Lansing, Michigan 48933

Ingham County Circuit Court Clerk  
313 W. Kalamazoo Street

**The Curi Law Office, PLLC**  
2875 Northwind Drive  
Suite 137  
East Lansing, MI 48823  
(517) 333-9905

Lansing Charter Township, MI 48933

Michigan Court of Appeals Court Clerk  
925 W Ottawa St  
Lansing Charter Township, MI 48915

  
\_\_\_\_\_  
Joseph D. Curi (P47811)

**The Curi Law Office, PLLC**  
2875 Northwind Drive  
Suite 137  
East Lansing, MI 48823  
(517) 333-9905



# THE CURI LAW OFFICE, P.L.L.C.

2875 Northwind Drive, Suite 137  
East Lansing, Michigan 48823  
TELE: (517) 333-9905 • FAX: (517) 333-9907  
[curilawoffice@tds.net](mailto:curilawoffice@tds.net)

May 15, 2015

Michigan Supreme Court  
C/o Court Clerk  
925 Ottawa Street  
Lansing, Michigan 48909-7522

Re: People v Fateen Muhammad  
Supreme Court File No. 150119  
Court of Appeals File No. 317054  
Circuit Court File No. 13-161-FH

Dear Clerk of Court:

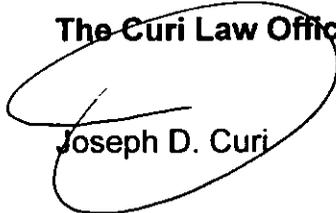
The following are enclosed:

- Original and seven copies of Appellant Fateen Muhammad's Supplemental Brief and
- Proof of Service.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

**The Curi Law Office, P.L.L.C.**

  
Joseph D. Curi

Enclosures

cc: Mr. Fateen Muhammad  
Ingham County Prosecuting Attorney  
Michigan Court of Appeals Clerk  
30<sup>th</sup> Judicial Circuit Clerk