STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

KRIS EDWARD SITERLET,

Defendant-Appellant.

______________________________/

Supreme Court No. 146713

Court of Appeals No. 308080

Circuit Court No. 10-4061 FH

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF QUESTIONS PRESENTED v

STATEMENT OF FACTS 1

I. THE TRIAL COURT PLAINLY ERRED IN SENTENCING MR. SITERLET AS A FOURTH HABITUAL OFFENDER, WHERE THE INFORMATION IN PLACE DURING PLEA NEGOTIATIONS AND AT TRIAL ALLEGED THAT HE WAS A THIRD HABITUAL OFFENDER, AND WHERE THE PROSECUTION WAITED UNTIL FOUR DAYS AFTER TRIAL TO AMEND THE HABITUAL NOTICE. THE REMEDY IS A NEW SENTENCING HEARING. 2

A. The Court of Appeals correctly found that the trial court committed error in sentencing Mr. Siterlet as a fourth habitual offender 4

1. Statutory Construction: General Principles 4

2. MCL 769.13: Importance of Notice of Potential Consequences 5

3. Application: The trial court erred in sentencing Mr. Siterlet as a fourth habitual offender 11

B. The Court of Appeals' opinion conflicts with the *Olano* Court's determination that a trial court necessarily commits "plain" error when it disregards the plain language of the controlling statute 12

C. The Court of Appeals correctly found that the trial court's committed error in sentencing Mr. Siterlet as a fourth habitual offender 14

D. The Court of Appeals' opinion conflicts with the *Kimble* Court's ruling that plain error which results in imprisonment in excess of what is permitted by the law necessarily has a serious affect upon the fairness, integrity or public reputation of a judicial proceeding 16

SUMMARY AND REQUEST FOR RELIEF 21

APPENDIX A (Order Directing Oral Argument on Application) .... A

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v United States, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998) 5

Apprendi v New Jersey, 530 US 466 ; 120 S Ct 2348; 147 L Ed 2d 435 (2000) 5

Dascola v YMCA of Lansing, 490 Mich 899 ; 804 NW2d 558 (2011) 4

Henderson v United States, __ US __; 133 S Ct 1121; 185 L Ed 2d 85 (2013) 13, 14

Lafler v Cooper, __ US __; 132 S Ct 1376; 182 L Ed 2d 398 (2012) 9, 15

Missouri v Frye, __ US __; 132 S Ct 1399; 182 L Ed 2d 379 (2012) 15

Oyler v Boles, 368 US 448 ; 82 S Ct 501; 7 L Ed 2d 446 (1962) 5

People v Bailey, 483 Mich 905; 762 NW2d 161 (2009) 11

People v Barber, 466 Mich 877; 661 NW2d 578 (2002) 20

People v Carines, 460 Mich 750 ; 597 NW2d 130 (1999) 2, 16, 18

People v Ellis, 224 Mich App 752 ; 569 NW2d 917 (1997) .... passim

People v Fountain, 407 Mich 96; 282 NW2d 168 (1979) 7, 8

People v Gardner, 482 Mich 41 ; 753 NW2d 78 (2008) 19, 20

People v Hatt, 384 Mich 302; 181 NW2d 912 (1970) 6

People v Hendrick, 398 Mich 410 ; 247 NW2d 840 (1976) 17

People v Hornsby, 251 Mich App 462 ; 650 NW2d 700 (2002) 2, 11, 12

People v Kimble, 470 Mich 305; 684 NW2d 669 (2004) 17, 18, 19, 20

People v Koonce, 466 Mich 515 ; 648 NW2d 153 (2002) 5

People v Manning, 163 Mich App 641; 415 NW2d 1 (1987) 10, 11

People v Marshall, 41 Mich App 66; 199 NW2d 521 (1972) 6

People v Morales, 240 Mich App 571 ; 618 NW2d 10 (2000) .... passim

People v Palm, 245 Mich 396 ; 223 NW 67 (1929) 5, 6

People v Shelton, 412 Mich 565; 315 NW2d 537 (1982) 7, 8, 9, 15

People v Siterlet, 299 Mich App 180 ; 829 NW2d 285 (2012) 3, 4, 11, 12

People v Stratton, 13 Mich App 350; 164 NW2d 555 (1968) 6

People v Sunday, 183 Mich App 504 ; 455 NW2d 321 (1990) 17

People v Webb, 458 Mich 265 ; 580 NW2d 884 (1998) 5

People v Weissert, 485 Mich 860; 771 NW2d 752 (2009) 4

Tapia v United States, __ US __; 131 S Ct 2382; 180 L Ed 2d 357 (2011) 13, 14

United States v Merlos, 8 F3d 48 (CA DC, 1993) 13

United States v Olano, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993) 12, 13, 18

United States v. Perry, 479 F3d 885 (CA DC, 2007) 12

US Fidelity Insurance & Guaranty Co. v Michigan Catastrophic Claims Ass'n, 482 Mich 414 ; 759 NW2d 154 (2008) 5

CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES

MCL 257.625(11)(c)(1) 15

MCL 257.625(11)(c)(i) 3, 15

MCL 767.76 .... 3, 9

MCL 769.10 et seq. 4

MCL 769.10(1)(a) 19

MCL 769.10(1)(b) 19

MCL 769.11(1)(a) 3, 15, 19

MCL 769.11(1)(b) 19

MCL 769.12 .... 3, 15

MCL 769.12(1)(b) 3, 15, 19

MCL 769.12(1)(c) 19

MCL 769.13 .... passim

MCL 769.13(1) .... passim

MCL 769.26 18

MCL 769.34(1) 20

MCL 769.34(10) 18

MCL 777.21(3) 20

MCL 777.21(3)(c) 15

MCL 777.66 .... 15, 20

F.R. Crim. P. 24(c) 12

STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT PLAINLY ERR IN SENTENCING MR. SITERLET AS A FOURTH HABITUAL OFFENDER, WHERE THE INFORMATION IN PLACE DURING PLEA NEGOTIATIONS AND AT TRIAL ALLEGED THAT HE WAS A THIRD HABITUAL OFFENDER, AND WHERE THE PROSECUTION WAITED UNTIL FOUR DAYS AFTER TRIAL TO AMEND THE HABITUAL NOTICE? IS THE REMEDY A NEW SENTENCING HEARING?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

SUPPLEMENTAL STATEMENT OF FACTS

Defendant-Appellant Kris Siterlet relies on the statement of facts found in his initial application for leave to appeal to this Court.

I. THE TRIAL COURT PLAINLY ERRED IN SENTENCING MR. SITERLET AS A FOURTH HABITUAL OFFENDER, WHERE THE INFORMATION IN PLACE DURING PLEA NEGOTIATIONS AND AT TRIAL ALLEGED THAT HE WAS A THIRD HABITUAL OFFENDER, AND WHERE THE PROSECUTION WAITED UNTIL FOUR DAYS AFTER TRIAL TO AMEND THE HABITUAL NOTICE. THE REMEDY IS A NEW SENTENCING HEARING.

Issue Preservation

Trial counsel failed to raise this issue at the original sentencing proceedings. This issue is therefore subject to review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Standard of Review

Questions regarding the correct interpretation of the Habitual Offender Act are subject to *de novo* review. *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002).

Analysis

The prosecution initially charged Mr. Siterlet as a fourth habitual offender. Two months before trial, on June 14, 2011, the prosecution filed an amended information designating Mr. Siterlet as a third habitual offender. *Id.* at A-2. This amended notice remained in place throughout trial, from jury selection through the final verdict. More importantly, the amended notice remained in place during plea negotiations. (Pre-Trial 8/16/2011, at 4-5). On August 16, 2011, the prosecution offered to reduce the third-offense enhancement to a second-offense enhancement in exchange for Mr. Siterlet's guilty plea. (Pre-Trial 8/16/2011, at 4-5). Mr. Siterlet rejected this offer. (Pre-Trial 8/16/2011, at 5).

Only after the jury reached its verdict (and after Mr. Siterlet rejected the plea offer) did the prosecutor amend the information to reinstate the fourth habitual notice. Despite the adverse effect this would have on Mr. Siterlet's sentence, the prosecution did not seek leave from the trial

court to make this amendment. MCL 767.76. The trial court nevertheless sentenced Mr. Siterlet as a fourth habitual offender. (ST 4). This increased the controlling guidelines range to 7-46 months. (ST 4). It also increased the potential maximum sentence from ten years to life. MCL 769.11(1)(a); MCL 769.12(1)(b); MCL 257.625(11)(c)(i). The trial court sentenced Mr. Siterlet at the very top of the range, imposing a prison term of 46 months to 25 years. (ST 16).

This constituted error, as the Court of Appeals correctly held in the proceedings below. *People v Siterlet*, 299 Mich App 180, 188; 829 NW2d 285 (2012). The plain language of the Habitual Offender Act requires the prosecution to give notice of its intent to pursue an enhanced sentence within 21 days of the arraignment or the filing of the information. MCL 769.13(1). Once the statutory period expires, the prosecution may not seek to "materially alter the 'potential consequences' to the accused of conviction or plea." *People v Ellis*, 224 Mich App 752, 757; 569 NW2d 917 (1997).

This leaves the question of remedy. This Court has asked the parties to address two questions. *Appendix A: Order Scheduling Oral Argument on Application*. The first question asks:

> [W]hether the defendant is entitled to any relief on his claim that the trial court lacked authority to sentence him as a fourth habitual offender, MCL 769.12, due to an invalid post-trial amendment of the notice of intent to seek sentence enhancement, MCL 769.13(1), and where the defendant failed to timely object to the amendment or to his sentencing as a fourth habitual offender. [*Id.*].

The second question asks "whether the Court of Appeals correctly analyzed the unpreserved error in this case under plain error standards."

Here, as set forth below, the Court of Appeals misapplied this Court's plain error precedent when it refused to remand the case for resentencing. The Court correctly found that the trial court erred by sentencing Mr. Siterlet as a fourth habitual offender in the wake of the

prosecution's improper post-trial amendment of the habitual enhancement notice. *See* Part A, *infra.* The Court also correctly held that this error was outcome determinative insofar as it allowed the trial court to impose a sentence that it otherwise could not have imposed. *See* Part C, *infra.* But the Court of Appeals incorrectly found that the error was not "plain," despite the plain language of the Habitual Offender Act, MCL 769.10 *et seq.*, particularly in light of its history and the clarity of the cases construing it. *See* Part B, *infra.* Lastly, the Court of Appeals erred when it concluded that the trial court's error did not "seriously affect the fairness, integrity, or public reputation of the judicial proceedings" even though it allowed the trial court to impose a sentence beyond what the law actually permitted. For all of these reasons, this Court should reverse the Court of Appeals and remand to the trial court so that Mr. Siterlet may be resentenced as a third habitual offender.

A. **The Court of Appeals correctly found that the trial court committed error in sentencing Mr. Siterlet as a fourth habitual offender.**

The prosecution has not cross-appealed the appellate court's ruling that "the trial court erred by sentencing defendant as a fourth-offense habitual offender." *People v Siterlet*, 299 Mich App 180, 188; 829 NW2d 285 (2012). This Court typically confines its analysis to only those questions it has been asked to review. *See, e.g., Dascola v YMCA of Lansing*, 490 Mich 899, 901, fn 8; 804 NW2d 558 (2011) (Young, C.J., concurring in denial of leave to appeal); *People v Weissert*, 485 Mich 860; 771 NW2d 752 (2009) (Corrigan, J, concurring in denial of leave to appeal). But because the nature of the error is relevant to whether reversal is required, the analysis of the Court of Appeals is discussed here.

1. Statutory Construction: General Principles

Whether the Court of Appeals correctly construed the Habitual Offender Act is a question of statutory interpretation. When interpreting statutes, this Court must give effect to the intent of

the Legislature by applying its plain language. *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002). This Court considers both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *US Fidelity Insurance & Guaranty Co. v Michigan Catastrophic Claims Ass'n*, 482 Mich 414, 423; 759 NW2d 154 (2008). Whenever possible, the Court should give effect to every phrase, clause and word in a statute. *Id.* Statutes that relate to the same subject or share a common purpose are said to be *in pari materia* ("upon the same matter or subject"). *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Such provisions must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Id.* at 274.

2. *MCL 769.13: Importance of Notice of Potential Consequences*

Under the federal constitution, facts of prior conviction—even those which elevate the maximum available penalty—need not be charged in the indictment, submitted to a jury, or proven beyond a reasonable doubt. *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (citing *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998). Nevertheless, criminal defendants are entitled at least some notice of the prosecution's intent to pursue a recidivist enhancement. *Oyler v Boles*, 368 US 448, 452; 82 S Ct 501; 7 L Ed 2d 446 (1962). "[A] defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense." *Id.*

Michigan has a long tradition of providing greater protections than constitutionally required. Public Act No. 175 of 1927 provided for a life sentence for defendants with three prior felony convictions. *See People v Palm*, 245 Mich 396, 398; 223 NW 67 (1929). This statute did permit prosecutors to wait until after the trial on the underlying offense before giving notice of

its intent to pursue this enhancement. *Id.* But it also gave certain defendants the right to what was effectively a second trial, where they could challenge the validity of the alleged prior convictions before a jury of twelve. *Id.* at 399.

These procedures remained in place until 1994. *See People v Morales*, 240 Mich App 571, 576; 618 NW2d 10 (2000). Because the pre-1994 statutory scheme required at least some notice, "a rather complex body of case law developed addressing the question of when a prosecutor could proceed to charge a defendant as an habitual offender under the Code of Criminal Procedure." *Id.* at 577. In *People v Hatt*, 384 Mich 302; 181 NW2d 912 (1970), this Court adopted then-Judge Levin's distinction between pre-trial notice and post-trial notice, which he had articulated in *People v Stratton*, 13 Mich App 350; 164 NW2d 555 (1968). If the prosecution provided notice of its intent to pursue the habitual enhancement before trial on the underlying charge, there was no need for a supplemental information or jury consideration of the enhancement. *Stratton*, 13 Mich App at 356. But if the prosecution waited until after trial, the defendant would be entitled to those procedural protections. *Id.* (citing 1927 PA 175, § 13).

Although neither *Hatt* nor *Stratton* required pre-trial notice, the Court of Appeals soon "introduced the concept of 'promptness' into the ever complicating body of case law." *Morales*, 240 Mich App at 580 (citing *People v Marshall*, 41 Mich App 66; 199 NW2d 521 (1972)). In *Marshall*, the prosecutor did not pursue a habitual enhancement until one month before the defendant was to be discharged from his prison term of 14½ to 15 years. *Marshall*, 41 Mich App at 67-68. The *Marshall* Court held that the prosecutor "should have acted ***promptly*** to file his supplemental information." *Id.* at 73 (emphasis added). The Court found that a due process violation would result whenever delayed notice: (1) lacked good cause, and (2) prejudiced the defendant. *Id.* at 74.

This Court adopted a similar formulation in *People v Fountain*, 407 Mich 96; 282 NW2d 168 (1979). This Court held that "[a] prosecutor who knows a person has a prior felony record must ***promptly*** proceed, if at all, against the person as a habitual offender." *Id.* at 98 (emphasis added). But it further found that good cause for the delay would exist if "[the prosecution] is unaware of a prior felony record until after the conviction." *Id.* Good cause would also exist "when the delay is due to the need to verify out-of-state felony convictions based on the 'rap sheet.'" *Id.* at 99.

This Court went on to define "promptly" in *People v Shelton*, 412 Mich 565; 315 NW2d 537 (1982). In that case, the prosecution waited until the first day of trial before filing notice of its intent to pursue a habitual enhancement. *Id.* at 567. This Court rejected this practice, finding that it defeated the purpose of requiring notice in the first place:

> The purpose of requiring a prosecutor to proceed "promptly" to file the supplemental information 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. We conclude that a standard which would find a filing on the day of trial to suffice is an inadequate one. [*Id.* at 569].

This Court also expressed frustration with "the *ad hoc* decision-making which has been the practice heretofore." *Id.* It therefore announced a bright-line rule that would govern whether the prosecution's notice was sufficiently prompt:

> Accordingly, we hold that a supplemental information is filed "promptly" if it is filed not more than 14 days after the defendant is arraigned in circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period. We believe that such a rule allows the prosecutor sufficient time to make a decision concerning supplementation while at the same time providing notice at an early stage of the proceedings to the defendant of the potential consequences of conviction of the underlying felony. [*Id.*].

But the *Shelton* Court retained the *Fountain* exceptions for cases where the prosecutor is either unaware of the defendant's prior record or needs time to verify out-of-state convictions. *Id.* (citing *Fountain*, 407 Mich at 98-99).

The Legislature responded by amending the Habitual Offender Act in 1994. *See* 1994 PA 445. MCL 769.13 now reads in relevant part:

> (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.

With this enactment, the Legislature removed the enhancement question from jury consideration. *Morales*, 240 Mich App at 583. But the Legislature also eliminated the prosecution's option of providing post-trial notice of its intent to pursue the enhancement. *Id.* Instead, the Legislature created "a bright-line test for determining whether a prosecutor has filed a supplemental information 'promptly.'" *Id.* at 575 (quoting *People v Ellis*, 224 Mich App 752, 755; 569 NW2d 917 (1997)).

By statute, the prosecution must file written notice either: (1) within 21 days of the defendant's arraignment on the information, or (2) if the arraignment was waived, within 21 days

of the filing of the information. MCL 769.13(1); MCR 6.112(F). This 21-day period "signifies a desire to balance the credible concern of prosecutors that their ability to charge a defendant as an habitual offender not be undercut by too short a period, with the equally credible concern of defendants that they be given adequate notice to meet the charges against them." *Morales*, 240 Mich App at 584. Thus, the 21-day rule must be strictly applied; after all, "[i]n altering the statutory scheme, the Legislature had to balance the desire to 'make habitual offender procedures more efficient' with the need to make sure that the law 'provide adequate procedural safeguards' to protect a defendant's due process rights." *Id.* at 586 (quoting House Legislative Analysis, HB 5306, February 22, 1994, p. 2).

It is particularly important to "provid[e] notice at an early stage of the proceedings to the defendant of the potential consequences of conviction of the underlying felony." *Shelton*, 412 Mich at 569. As the United States Supreme Court has observed, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v Cooper*, __ US __; 132 S Ct 1376, 1388; 182 L Ed 2d 398 (2012). Early notice of a habitual enhancement affords defendants the opportunity to intelligently assess the value of a plea offer.

Because notice of potential consequences is so critical, the prosecution may not seek to enhance those consequences outside of the Legislature's strict 21-day rule. *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997). In *Ellis*, the prosecutor gave notice of its intent to seek a second-offense habitual enhancement within the statutory period. *Id.* at 755. After the expiration of the 21-day period, the prosecution amended its notice to charge the defendant as a fourth-offense habitual offender. *Id.*

The *Ellis* Court held that such a practice undermined what the Legislature had intended. It began by reading MCL 769.13 in harmony with MCL 767.76, which gives the trial court the

discretion to allow an amendment of the information only if the defendant does not suffer prejudice. *Id.* at 756. It then held:

> [T]he supplemental information may be amended outside the statutory [twenty-one day] period only to the extent that the proposed amendment does not relate to the specific requirements of M.C.L. § 769.13; MSA 28.1085, i.e. the amendment may not relate to additional prior convictions not included in the timely filed supplemental information. To hold otherwise would be to permit prosecutors to avoid making the necessary "prompt" decision regarding the level of supplementation, if any, they wish to pursue and would materially alter the "potential consequences" to the accused of conviction or plea. [Id. at 756-757 (citation and footnote omitted)].

In a footnote, the *Ellis* Court distinguished its decision barring a prosecutor from alleging additional prior convictions in an amended information from its previous decision in *People v Manning*, 163 Mich App 641; 415 NW2d 1 (1987). In *Manning*, a case which pre-dated the 1994 amendment to the Habitual Offender Act, the Court of Appeals found no error where the trial court permitted the information to be amended outside the fourteen-day rule of *Shelton. Ellis,* 224 Mich App 757, fn 2 (citing *Manning*, 163 Mich App at 644-645). The prosecutor in *Manning* initially filed timely notice of its intent to pursue a fourth-offense enhancement. *Manning*, 163 Mich App at 644. After the expiration of the 14-day period, the prosecution corrected an error in one of the listed convictions. *Id.* The *Manning* Court upheld the amendment because it did nothing to deprive the defendant of notice of the potential consequences he faced. *Id.* at 644-645.

In contrast, the belated amendment in *Ellis* heightened the defendant's sentencing exposure. *Ellis,* 224 Mich App 757, fn 2. The timely notice subjected the defendant to a seven-year enhancement, but the late-amended information subjected him to a potential life sentence.

Id. The *Ellis* Court concluded that the Legislature's statutory scheme did not allow the prosecution to elevate the level of the supplemental charge outside of the 21-day period. *Id.*

The Court of Appeals echoed this conclusion in *People v Hornsby*, 251 Mich App 462, 471; 650 NW2d 700 (2002). In that case, the prosecution filed timely notice of its intent to pursue a third-offense habitual enhancement. *Id.* at 469. One month later, after the expiration of the statutory 21-day period, the prosecution amended its notice by replacing one of the listed prior convictions with a different conviction. *Id.* at 470. Because this amendment did not expose the defendant to a more severe penalty, the *Hornsby* Court affirmed. *Id.* at 472. It reiterated, however, that MCL 769.13 forbids "attempts to impose more severe adverse consequences" outside of the prescribed 21-day period. *Id.*

3. Application: The trial court erred in sentencing Mr. Siterlet as a fourth habitual offender.

The Court of Appeals correctly applied these principles when it concluded that the trial court lacked the statutory authority to sentence Mr. Siterlet as a fourth habitual offender. *Siterlet*, 299 Mich App at 188. Again, under MCL 769.13(1), "the prosecutor may not amend a notice to seek enhancement to include additional prior convictions after the twenty-one-day period." *Hornsby*, 251 Mich App at 470 (citing *Ellis*, 224 Mich App at 755). This rule prevents the prosecution from changing the defendant's habitual offender level beyond the statutory timeframe, thereby increasing the potential sentence without "'the required notice that if he was convicted of the underlying felony he risked conviction for felony offender, fourth offense.'" *Id.* at 472 (quoting *People v Manning,* 163 Mich App 641, 644; 415 NW2d 1 (1987), overruled in part on other grounds *People v Bailey,* 483 Mich 905; 762 NW2d 161 (2009)). As discussed below, Mr. Siterlet suffered prejudice as a result of this error.

B. <u>The Court of Appeals' opinion conflicts with the *Olano* Court's determination that a trial court necessarily commits "plain" error when it disregards the plain language of the controlling statute.</u>

As discussed above, the plain language of MCL 769.13(1) set forth a "bright-line test that must be strictly applied." *Siterlet*, 299 Mich App at 186 (citing *Morales*, 240 Mich App at 575-576). The rigidity of this rule is apparent not just from the text of the statute, but also from the "complicating body of case law" that the Legislature sought to address. *Morales*, 240 Mich App at 580. Thus, it was already clear that "the prosecution may not amend an information after the 21-day period provided for in MCL 769.13(1) to include additional prior convictions and, therefore, increase potential sentence consequences." *Siterlet*, 299 Mich App at 186 (citing *Ellis*, 224 Mich App at 756-757, and *Hornsby*, 251 Mich App at 472-473). Yet the Court concluded that the trial court's failure to adhere to these rules was not "plain" because no existing precedent had ever addressed the precise facts present in this case. *Id.* at A-5.

This ruling is at odds with the United States Supreme Court's decision in *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). The *Olano* Court determined that a trial court necessarily commits "plain" error when it disregards the plain language of the controlling statute. The unpreserved error in that case related to the presence of alternate jurors during jury deliberations. *Olano*, 507 US at 727. The federal rules, specifically F.R. Crim. P. 24(c), explicitly provided: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." *Id.* at 737. The trial court, however, allowed the alternates to remain present. *Id.* Although no reviewing court had addressed the issue, the *Olano* Court accepted the Government's concession that the error was plain because the text of the rule was so clear. *Id. See also United States v. Perry*, 479 F3d 885, 893, fn 8 (CA DC, 2007) ("Some legal norms are absolutely clear (for example, because of the clarity of a

statutory provision or court rule); in such cases, a trial court's failure to follow a clear legal norm may constitute plain error, without regard to whether the applicable statute or rule previously had been the subject of judicial construction.") (quoting *United States v Merlos*, 8 F3d 48, 51 (CA DC, 1993)).

Here, the plain language of MCL 769.13(1) is just as clear. The 21-day rule set forth in that statute establishes a clear legal norm that prevents prosecutors from changing Mr. Siterlet's habitual level after trial. Further, unlike the trial court in *Olano*, the sentencing judge had the benefit of *Ellis*, *Hornsby*, *Morales*, and other appellate decisions construing the "bright-line test" of MCL 769.13(1). Accordingly, the sentencing judge's error was "plain."

At the very least, the trial court's error became plain during the pendency of Mr. Siterlet's direct appeal. Consider the United States Supreme Court's recent decision in *Henderson v United States*, __ US __; 133 S Ct 1121; 185 L Ed 2d 85 (2013). In that case, the federal district court went above the sentencing guidelines as a way to help the defendant qualify for an in-prison drug rehabilitation program. *Id.* at 1125. The defendant did not object at sentencing, but he did raise the issue on direct appeal. *Id.* While his appeal was pending, the Supreme Court issued an opinion in *Tapia v United States*, __ US __; 131 S Ct 2382; 180 L Ed 2d 357 (2011), in which it held that it is error to impose a sentence in excess of the guidelines to enable an offender to participate in rehabilitation. *Id.* The district court's sentencing error may not have been plain before *Tapia*, but it became plain afterward. *Id.*

The Supreme Court held that the obviousness of the error is to be assessed at the time of review, not at the time of error. *Id.* at 1127. The Court reasoned that this would help ensure that similarly situated defendants are not treated differently:

> But if the Rule's words "plain error" cover both (1) trial court decisions that were plainly correct at the time when the judge made

> the decision and (2) trial court decisions that were plainly incorrect at the time when the judge made the decision, then why should they not also cover (3) cases in the middle—i.e., where the law at the time of the trial judge's decision was neither clearly correct nor incorrect, but unsettled?
>
> To hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals. [*Id.*].

But as Justice Scalia observed in dissent, the *Henderson* rule does create the possibility of disparate treatment between similarly situated defendants:

> Consider two defendants in the same circuit who fail to object to an identical error committed by the trial court under unsettled law. By happenstance, Defendant A's appeal is considered first. The court of appeals recognizes that there was error, but denies relief because the law was unclear up to the time of the court of appeals' opinion. Defendant B's appeal is heard later, and he reaps the benefit of the opinion in Defendant A's case settling the law in his favor. What possible purpose is served by distinguishing between these two appellants? [*Henderson*, 133 S Ct at 1132 (Scalia, J., dissenting)].

If the Court of Appeals is correct in its assertion that the error here was not plain, then this is situation Mr. Siterlet finds himself in. He will not benefit from the Court of Appeals' clarification of supposedly unsettled law, but the next identically-situated appellant will reap the benefits of the decision. This disparate treatment is just as problematic as that identified by the *Henderson* majority. But such a result can be avoided by concluding that the Court of Appeals did not articulate a new rule, but instead applied the precedent construing the plain language of MCL 769.13. Simply put, the error here was plain.

C. **<u>The Court of Appeals correctly found that the trial court's committed error in sentencing Mr. Siterlet as a fourth habitual offender.</u>**

As the Court of Appeals correctly noted, the prosecution's post-trial amendment of the information prejudiced Mr. Siterlet by erroneously increasing the potential penalties. *Appendix A*, at A-4. The error increased Mr. Siterlet's potential minimum sentence by one year—from 34

months as a third habitual offender to 46 months as a fourth habitual offender. *Id. See also* MCL 777.21(3)(c); MCL 777.66. It also increased his potential maximum sentence from 10 years to life. *Id.* (citing MCL 769.11(1)(a); MCL 769.12(1)(b); MCL 257.625(11)(c)(i)). The sentence that Mr. Siterlet ultimately received—a prison term of 46 months to 25 years—could not have been imposed had he been sentenced as a third habitual offender. (ST 16).

Additionally, the prosecution's post-trial amendment of the information deprived Mr. Siterlet of the opportunity to intelligently evaluate whether to accept the plea bargain. As the United States Supreme Court recently observed, plea bargaining "is not some adjunct to the criminal justice system; it ***is*** the criminal justice system." *Missouri v Frye,* __ US __; 132 S Ct 1399, 1407; 182 L Ed 2d 379 (2012) (quoting Scott & Stuntz, *Plea Bargaining as Contract,* 101 Yale L J 1909, 1912 (1992)) (emphasis in original). For that reason, the Court has made clear that defense lawyers have a duty to provide reasonable advice as to whether to accept or reject a plea offer. *Lafler v Cooper,* __ US __; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). But counsel cannot fulfill this duty without knowing what sentence the prosecution intends to seek. That is why it is so important to "provid[e] notice at an ***early*** stage of the proceedings to the defendant of the potential consequences of conviction of the underlying felony." *Morales,* 240 Mich App at 582 (quoting *People v Shelton,* 412 Mich 565, 569; 315 NW2d 537 (1982)) (emphasis added).

Here, the plea negotiations in this case were premised on the assumption that if the jury convicted Mr. Siterlet, he would be sentenced as a third habitual offender. *Appendix B*, at B-2. If that happened, his worst-case scenario would be a maximum sentence of ten years in prison and a minimum sentencing range of 7-34 months. (Pre-Trial 8/16/2011, at 4); MCL 257.625(11)(c)(1); MCL 769.12; MCL 777.66. So when he rejected the plea offer, he did so

believing that the prosecution was only offering a two-and-a-half-year reduction of the maximum potential sentence and a one-year reduction of the top end of the guidelines.

Only after the jury's verdict did Mr. Siterlet learn that the prosecution would be pursuing a fourth-habitual enhancement after all. *Appendix B*, at B-3. So it was not until after trial that Mr. Siterlet learned the true value of the prosecution's offer. In fact, the prosecution was offering a substantial reduction of the potential life sentence he faced as a fourth habitual offender. And the proposed maximum-minimum was a year and a half shorter than what he ended up facing at sentencing. *Compare* (ST 4), *with* (Pre-Trial 8/16/2011, at 4). For all of these reasons, the Court of Appeals correctly concluded that Mr. Siterlet established the first and third plain-error requirements: an error that affected the outcome of the lower-court proceedings.

D. **The Court of Appeals' opinion conflicts with the *Kimble* Court's ruling that plain error which results in imprisonment in excess of what is permitted by the law necessarily has a serious affect upon the fairness, integrity or public reputation of a judicial proceeding.**

For the final part of its plain-error analysis, the Court of Appeals examined whether "the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person." *Id.* at A-2 (citing *Carines*, 460 Mich at 763-764). It declared that "even if the error was plain," resentencing was not required "[g]iven defendant's qualification as a fourth habitual offender and his knowledge that the prosecution was pursuing the fourth-offense enhancement[.]" *Id.* at A-5-A-6. This analysis misses the mark on two key points.

First, the Court of Appeals failed to distinguish between the mistake made by the prosecutor (the failure to perfect its fourth-habitual enhancement) and the trial court's error (the decision to sentence Mr. Siterlet as a fourth-habitual offender despite the prosecutor's mistake and despite the plain language of MCL 769.13(1)). The former implicates Mr. Siterlet's right to

notice of the potential penalties he faced. *Morales*, 240 Mich App at 582. But the latter implicates his right to be sentenced consistently with what is permitted by law. *People v Kimble*, 470 Mich 305, 312-313; 684 NW2d 669 (2004) Only the trial court's error is subject to plain error review.

To start, the decision to pursue a habitual enhancement rests within the discretion of the prosecution. *People v Hendrick*, 398 Mich 410, 416; 247 NW2d 840 (1976). This discretion is, of course, subject to the requirement of written notice within 21 days. MCL 769.13(1). If the prosecution elects not to pursue a habitual enhancement, or fails to perfect the enhancement, then the sentencing court must proceed without it. *Morales*, 240 Mich.App at 574-575. The trial court does not have the discretion to impose a habitual enhancement that the prosecution failed to perfect. *Id.*; *see also People v Sunday*, 183 Mich App 504, 506; 455 NW2d 321 (1990) (noting that the constitutional doctrine of separation of powers prevented the trial court from second-guessing the prosecutor's exercise of discretion under the Habitual Offender Act).

The Court of Appeals limited its analysis to the deprivation of notice, reasoning that Mr. Siterlet could infer his sentencing exposure from the prosecution's pleadings and from knowledge of his own drunk driving record. *Siterlet,* 299 Mich App at 190-191. However, the fact that the prosecution could have pursued a fourth-habitual enhancement is irrelevant. The fact that the prosecution wanted to seek a fourth-habitual enhancement is also irrelevant. Rather, what matters here is the fact that the prosecution failed to perfect its right to do so. When Mr. Siterlet rejected the plea offer, he did so rightfully believing that the trial court lacked the authority to impose anything more severe than a maximum sentence of ten years in prison and a minimum sentence of 34 months. *Id.*

Second, the Court of Appeals wholly ignored the distinctions between plain error review of trial errors and plain error review of sentencing errors. When the *Carines* Court adopted the plain error test, it was addressing a trial error—namely, a faulty jury instruction. *Carines*, 460 Mich at 761. The *Carines* Court began by noting that MCL 769.26 prevented it from creating a rule of automatic reversal. *Id.* at 762. While that statute did not address the vacating of a sentence or resentencings, it did impose limits on a reviewing court's ability to reverse and/or remand for a new trial:

> 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. [MCL 769.26].

To give this statute effect, the *Carines* Court adopted the plain error test of *Olano*, *supra*, for unpreserved trial court errors implicating constitutional or nonconstitutional rights. *Id.*

This Court subsequently applied the *Carines* test to an unpreserved sentencing error in *Kimble*, 470 Mich at 312-314. The *Kimble* Court noted that an entirely different statute applied to sentencing error. Specifically, MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. [MCL 769.34(10); *see also* MCR 6.429(C)].

Interpreting this provision, the *Kimble* Court held that "a sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *Kimble*, 470 Mich at 310. Further, such an error would be reversible under the plain error standard because "[i]t is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law." *Kimble*, 470 Mich at 313.

The same analysis applies to errors in the habitual enhancement. Habitual enhancements affect the defendant's maximum sentence. *People v Gardner*, 482 Mich 41, 47; 753 NW2d 78 (2008). Under the Habitual Offender Act, the sentencing court may increase a second offender's maximum sentence by 50%. MCL 769.10(1)(a). For third offenders, the court may double the maximum sentence. MCL 769.11(1)(a). For fourth offenders, if the sentencing offense carries a statutory maximum of less than five years, the trial court may impose a maximum sentence as high as 15 years. MCL 769.12(1)(b). If the sentencing offense carries a statutory maximum of five years or more, the trial court may increase a fourth offender's maximum to life or any term of years. MCL 769.12(1)(c).[1]

Habitual enhancements also affect the defendant's minimum sentence. *Gardner*, 482 Mich at 47. The legislative sentencing guidelines account for habitual enhancements as follows:

> If the offender is being sentenced under [the Habitual Offender Act], determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows:

[1] Of course, if the sentencing offense already carries a statutory maximum of life, the sentencing court may "sentence the person to imprisonment for life or for a lesser term." MCL 769.10(1)(b); MCL 769.11(1)(b); MCL 769.12(1)(b).

> (a) If the offender is being sentenced for a second felony, 25%.
>
> (b) If the offender is being sentenced for a third felony, 50%.
>
> (c) If the offender is being sentenced for a fourth or subsequent felony, 100%. [MCL 777.21(3)].

Thus, "[t]he high end of the statutory recommended minimum sentence range under the sentencing guidelines (the maximum minimum) also increases on the basis of the number of prior convictions." *Gardner*, 482 Mich at 47-48.

MCL 769.34(1) therefore requires resentencing whenever an unpreserved error in the habitual enhancement results in "a sentence that is outside the appropriate guidelines sentence range[.]" *Kimble*, 470 Mich at 310. *See also People v Barber*, 466 Mich 877; 661 NW2d 578 (2002) (noting that the remedy for an untimely habitual notice is "resentencing without enhanced sentencing"). Here, but for the trial court's error, Mr. Siterlet would have faced a guidelines range of 7 to 34 months. *See* MCL 777.66. His 46-month minimum sentence is therefore "outside the appropriate guidelines sentence range[.]" *Kimble*, 470 Mich at 310. Moreover, his 25-year maximum sentence exceeds the 10-year maximum that would have accompanied a sentence as a third habitual offender. Because the trial court's plain error deprived Mr. Siterlet "of his liberty for a period longer than authorized by the law[,]" he is entitled to resentencing at a third habitual offender. *Id.* at 313.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court either grant leave to appeal or remand for resentencing as a third habitual offender.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:

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Dated: October 10, 2013

Order

Michigan Supreme Court
Lansing, Michigan

September 12, 2013

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

146713

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 146713
COA: 308080
Clare CC: 10-004061-FH

KRIS EDWARD SITERLET,
Defendant-Appellant.

_____________________________________/

On order of the Court, the application for leave to appeal the December 27, 2012 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 28 days of the date of this order addressing: (1) whether the defendant is entitled to any relief on his claim that the trial court lacked authority to sentence him as a fourth habitual offender, MCL 769.12, due to an invalid post-trial amendment of the notice of intent to seek sentence enhancement, MCL 769.13(1), and where the defendant failed to timely object to the amendment or to his sentencing as a fourth habitual offender; and (2) whether the Court of Appeals correctly analyzed the unpreserved error in this case under "plain error" standards. The parties should not submit mere restatements of their application papers.

s0911

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 12, 2013

Clerk

APPENDIX A