STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v KRIS SITERLET, Defendant-Appellant. _____/	Supreme Court No. 146713 Court of Appeals No. 308080 Clare Circuit Court No. 2010-004061-FH

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

146713
Pltf's Supp

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Cheri L. Bruinsma (P58673)
Assistant Attorney General
Attorneys for the People
Plaintiff–Appellee
Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875

Dated: October 10, 2013

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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?

   Appellant's answer: Yes.

   Appellee's answer: No, defendant waived this issue.

   Trial court's answer: Not raised below.

   Court of Appeals' answer: No.

Authority: *United States v Olano,* 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000).

2. Whether the Court of Appeals correctly analyzed the unpreserved error in this case under "plain error" standards?

   Appellant's answer: No.

   Appellee's answer: No, defendant waived this issue.

   Trial court's answer: Not raised below.

   Court of Appeals' answer: Yes.

Authority: *United States v Olano,* 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000).

STATUTES AND RULES INVOLVED

MCL 769.13:

(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.

(3) The prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense, upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1).

(4) A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence as provided under section 10, 11, or 12 of this chapter, may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court and by serving a copy of the motion upon the prosecuting attorney in accordance with rules of the supreme court.

(5) The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

(a) A copy of a judgment of conviction.

(b) A transcript of a prior trial or a plea-taking or sentencing proceeding.

(c) A copy of a court register of actions.

(d) Information contained in a presentence report.

(e) A statement of the defendant.

(6) The court shall resolve any challenges to the accuracy or constitutional validity of a prior conviction or convictions that have been raised in a motion filed under subsection (4) at sentencing or at a separate hearing scheduled for that purpose before sentencing. The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose. The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. If the defendant establishes a prima facie showing that information or evidence concerning an alleged prior conviction is inaccurate, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the information or evidence is accurate. If the defendant establishes a prima facie showing that an alleged prior conviction is constitutionally invalid, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the prior conviction is constitutionally valid.

MCL 767.76:

No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a

reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted.

MCR 6.112(F)-(H):

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. 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, within 21 days after the filing of the information charging the underlying offense.

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

(H) Amendment of Information. The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information.

INTRODUCTION

The habitual offender statute, MCL 769.10 *et seq.*, sets forth a legislative framework that punishes repeat felony offenders with harsher sentences. In 1994, the Legislature amended MCL 769.13 to include a notice provision that requires prosecutors to file a notice of intent to seek an enhanced sentence within 21 days of the defendant's arraignment of the underlying offense. As the clear intent of the statute is to give a defendant notice, amendment is permitted within the constraints of due process—that the defendant is not unfairly prejudiced by any amendment. Thus, when a defendant has notice of the penalty he faces and the prior convictions that will be used to enhance his sentence so that his right to challenge those convictions is not impeded, the requirements of MCL 769.13 and due process have been satisfied.

Defendant Kris Siterlet is a habitual drunk driver, who has driven drunk 9 times. He pleaded guilty to four felony drunk driving charges before his present conviction for the same offense. When prosecution charged Siterlet with his fifth felony drunk driving offense, the original complaint and felony information alleged that Siterlet was a fourth habitual offender. In the course of plea negotiations, the prosecution agreed to reduce Siterlet's habitual offender level to a third, but only *if* he pleaded guilty to the operating while intoxicated third offense charge. In anticipation of a plea agreement, the prosecution filed an amended felony information reducing the habitual offender notice to a third and even offered to let Siterlet pled guilty to being a second-felony offender. Siterlet ultimately rejected the prosecution's plea offers, choosing to take his chances at trial.

After a jury convicted Siterlet of operating while impaired third offense, but well before sentencing, the prosecution filed a second amended felony information reinstating the fourth habitual offender notice. This amendment simply updated the paperwork to comport with what all parties already knew—*if* Siterlet did not plead guilty, he faced sentence as a fourth habitual offender. Siterlet never objected to this amendment or to being sentenced as a fourth habitual offender. In fact, at sentencing, he said he had no objection to his presentence information report which showed he was charged as a fourth felony offender.

On appeal, Siterlet, for the first time, argued that plain error occurred when the prosecution amended its notice before sentencing. The Court of Appeals denied Siterlet's request for relief. Though incorrectly holding the second amendment of the notice was a late increase of Siterlet's habitual offender level and thus prohibited, the Court properly denied relief because Siterlet failed to demonstrate the error was plain or that error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

The Court of Appeals' conclusion—that Siterlet does not deserve relief—was a proper application of the plain error standard. Though the amended notice was proper because Siterlet had notice and an opportunity to challenge it, Siterlet cannot demonstrate that, even if error existed, it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The record demonstrates that Siterlet is in fact a fourth habitual offender, that he admitted being charged as one before trial, and that he had notice of the fact the prosecution would pursue

such a sentence throughout the case. Because of that, the fairness, integrity of the proceedings is only compromised if Siterlet is allowed to escape the punishment he deserves—sentence as a fourth habitual offender.

But, even if the Court of Appeals was incorrect in applying the plain error standard, Siterlet is not entitled to any relief. Siterlet waived any challenge to his fourth habitual offender status when his attorney told the sentencing court that she had no challenge to the accuracy of his presentence report after she reviewed it with him. Indeed, Siterlet was well aware his habitual fourth status never changed because he did not accept the People's offer to reduce it to either a third- or second-felony offense. As recognized by the Court of Appeals, Siterlet agreed that he was charged as a fourth-felony offender in the circuit court. Because Siterlet repeatedly waived any challenge to his habitual offender status, he is not entitled to any relief.

COUNTER-STATEMENT OF FACTS

A Clare County jury convicted Siterlet of operating while visibly impaired. MCL 257.625(3). The court sentenced him as a fourth habitual offender, MCL 769.12, to a prison term of 46 months to 25 years. (12/5/2011 Sentencing Transcript, p 16.)

The original felony complaint filed against Siterlet charged him with OWI, third offense, and listed six prior drunk driving convictions. (Appendix A, 10/16/10 Felony Complaint.) It contained notice that he was being charged as a fourth habitual offender, listing three separate OUIL/OWI 3rd Offense convictions as underlying offenses. (Appendix A, p 2.) The felony information filed against Siterlet on November 18, 2010 listed the same charges, namely, OWI third offense as a fourth habitual offender. (Appendix B, 11/18/10 Felony Information.) It also listed the same three prior OUIL/OWI 3rd Offense convictions as the underlying felonies supporting the habitual offender notice. (*Id.*)

The prosecutor's office and defense counsel had plea discussions on December 22, 2010. (6/13/2011 Motion Transcript, p 9.) Five days later, the prosecutor offered to reduce Siterlet's habitual offender status to a third offense, MCL 769.11, if Siterlet pled guilty to OWI third offense. (Appendix C, 12/27/10 Pretrial Summary; Temp Order dated 12/27/2010 ["ACTION: PTH ADJOURNED FROM 12-13-10 P.T. held by phone between pros + def aty."])

During subsequent motion hearings, Siterlet's attorney acknowledged the habitual offender, fourth offense notice. (6/13/11 Motion Transcript, p 31.) On June 14, 2011, the People amended the information to remove certain drunk driving

convictions from the OWI 3rd Offense and reduce the habitual offender notice to a third. (Appendix D, 06/14/11 Amended Information.) The following day, in a plea offer memorandum filed with the court, the prosecutor extended a plea offer and listed the guidelines Siterlet would face for habitual offender second, third, *and* fourth. (Appendix E, Plea Offer Memorandum, p 1.)

About two months later, the prosecutor offered a further sentence reduction that would have permitted Siterlet to plead guilty to OWI third offense, as a second habitual offender, MCL 769.10. (Appendix E, Plea Offer Memorandum; PT 08/16/11, p 4.) The prosecution noted Siterlet's proposed sentence would be within the guidelines, which were determined to be 7-to-28 months for habitual offender second. (PT 08/16/11, p 4.)

Siterlet rejected this plea offer. He agreed with his counsel that, if he went to trial, the "minimum ranges . . . could be substantially higher than 7-28 [months]." (PT 08/16/11, p 5.) Although the guidelines for a conviction as a habitual third offender were only six months higher than second (i.e. 7 to 34 months), the guidelines for a fourth-felony offender were eighteen months higher (7 to 46 months), MCL 777.21(3)(c) and MCL 777.66. (Appendix E, Plea Offer Memorandum.) The circuit court's order confirms that Siterlet was given that day to accept the prosecution's offer. (Temp Order dated 8/16/11 ["ACTION: PTH 2nd FINAL PRETRIAL Held in chambers, plea offer is placed on record, but is to be taken off the table if he doesn't accept it today. Mtns to be set for morning of trial Case proceeds to trial."].)

Thereafter, in a pretrial pleading, Siterlet acknowledged the fourth habitual offender notice was still in play. The day after Siterlet rejected the plea, the prosecutor filed a motion to suppress non-expert testimony. (Appendix F, 08/17/11 Motion.) In this motion, the prosecution's first paragraph read: "Defendant is currently charged with Operate while Intoxicated 3rd offense, Driving While License Suspended 2nd offense, and *Habitual Offender 4th offense.*" (Appendix F, 08/17/11 Motion, p 1 (emphasis added). In Siterlet's response, he admitted that those were the pending charges. (Appendix G, 09/14/11 Answer to Motion, p 1.)

At the close of trial, after the jury found Siterlet guilty, the parties discussed bond. The prosecutor noted that Siterlet been found guilty of a third offense felony OWI, but he was also a fourth habitual offender, making the penalty life. (Trial Transcript 09/23/11, p 190.) Defense counsel did not disagree or express shock over this fact.

Then the prosecutor filed a second amended information, reflecting the fourth habitual offender notice. (Appendix H, 09/27/11 Second Amended Information.) This amendment occurred more than two months before Siterlet was sentenced. Siterlet never objected this amendment.

Siterlet's presentence investigation report (PSIR) also stated his conviction was for operating while impaired third offense, and "HOA 4th Off." (PSIR, Appendix to Defendant's Court of Appeals' Brief). At sentencing, the prosecutor introduced certified copies of Siterlet's prior convictions. (12/5/11 Sentencing, p 3.) The prosecutor gave Siterlet's attorney copies of those records before Siterlet was

sentenced. (12/5/11 Sentencing, p 3.) This led the sentencing court to explain that Siterlet was "previously convicted of operating while under the influence or impaired offense to make you a third offense, that is a felony and it carries a maximum penalty of five years in prison and also to show that *you are a habitual offender fourth offense, which means the sentence can be enhanced further to life in prison...*" (12/5/11, p 4.) (emphasis added.)

Siterlet's attorney confirmed that she had reviewed the updated PSIR with Siterlet. (12/5/11 Sentencing, p 5.) When asked if she had factual challenges to the PSIR's content, Siterlet's attorney only challenged the number of jail-credit days. (12/5/11 Sentencing, p 4.) She did not challenge the PSIR's factual accuracy as to Siterlet's fourth habitual offender status. (12/5/11 Sentencing, pp 4-6.) Instead, when asked if she had "[a]nything else regarding the factual accuracy of the report[,]" she said: "No[.]" (12/5/11 Sentencing, pp 5-6.)

Similarly, neither Siterlet nor his attorney contested the prior convictions that resulted in his fourth habitual offender status:

- 02/06/89: OWI plea, Oakland County
- 04/27/92: OWI plea, Oakland County
- 06/06/94: OUIL plea, Oakland County
- 06/17/94: OWI plea, Alcona County
- 01/22/96: OWI 3rd plea, Alcona County
- 04/22/98: OWI 3rd plea, Oakland County
- 09/16/98: OWI 3rd plea, Oakland County
- 06/24/02: OUIL 3rd plea, Iosco County

(PSIR, Appendix to Defendant's Court of Appeals Brief, pp 2-6.)

On appeal, however, Siterlet challenged the imposition of sentence as a fourth habitual offender for the first time. The Court of Appeals affirmed Siterlet's sentence, ruling that he had not shown plain error.

ARGUMENT

I. Siterlet waived this claim, and, even if he did not, MCL 769.13 is intended to give a defendant notice of the penalty he faces and the prior convictions that may be used to enhance his sentence. Because Siterlet's due process rights were not violated and because the statute provides no remedy, Siterlet is not entitled to relief even if the amended notice was untimely.

A. Issue Preservation

Siterlet says this issue was not preserved for appeal. But, this issue was waived. First, Siterlet waived it by recognizing that his fourth habitual offender status would be reduced only if he pled guilty – something he refused to do. Second, Siterlet waived it when his counsel affirmatively told the sentencing court that she had no challenge to his status as a fourth habitual offender after reviewing Siterlet's presentence report with him.

B. Standard of Review

Neither counsel nor a defendant may "harbor error as an appellate parachute." *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000). "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v Olano,* 507 US 725, 732-733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Waiver is the "intentional relinquishment of a known right." *People v Carines,* 460 Mich 750, 762-763 n 7; 597 NW2d 130 (1999). Express approval of the court's action extinguishes any error. *Carter,* 462 Mich at 216.

If not waived, unpreserved issues are reviewed for plain error affecting substantial rights. *Carines,* 460 Mich at 763-764. To demonstrate plain error,

Siterlet must prove: "(1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Vaughn*, 491 Mich 642, 663-64; 821 NW2d 288, 302 (2012).

Questions of statutory interpretation are reviewed de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). Whether a defendant has been deprived of his constitutional rights is also reviewed de novo. *Id.*

C. Analysis

Siterlet waived any error. But, even if he did not, Siterlet was properly sentenced as a fourth felony offender.

1. Siterlet waived any error.

"'A defendant may not waive objection to an issue before the trial court and then raise it as an error' on appeal." *Carter,* 462 Mich at 214, quoting *People v Fetterley,* 229 Mich App 511, 520; 583 NW2d 199 (1998). Here, Siterlet attempts to do just that.

After the People timely charged Siterlet as a fourth felony offender, he knew that any reduction was contingent on his acceptance of a plea. (Appendix C, 12/27/10 Pretrial Summary; Appendix E, Plea Offer Memorandum; PT 08/16/11, p 4.) Siterlet never pled guilty. (8/16/2011 PT, p 5.) Thereafter, Siterlet explicitly

admitted that he was charged as a fourth felony offender. (Appendix F 8/17/11 Motion, p 1; Appendix G, 09/14/11 Answer to Motion, p 1.) This is a waiver.

And, just days after trial, and two months before sentencing, the prosecution amended its notice to reflect Siterlet's status as a fourth felony offender. At sentencing, Siterlet continued to waive his right to challenge his habitual fourth status. The sentencing court told Siterlet he would be sentenced as a fourth felony offender – the status reflected in his PSIR. (12/5/11 Sentencing, pp 3-4.) Siterlet's attorney acknowledged receiving certified copies of his prior convictions and reviewing the presentence report reflecting Siterlet's habitual fourth status with Siterlet. (12/5/11 Sentencing, p 4.) Even so, Siterlet's attorney only objected to the jail credit given. (12/5/11 Sentencing, p 4.) When explicitly asked if she had "[a]nything else regarding the factual accuracy of the report[,]" defense counsel said: "No[.]" (12/5/11 Sentencing, pp 5-6.) This too is a waiver.

Because waiver extinguishes any error, Siterlet is not entitled to any relief.

2. Even if Siterlet did not waive any error, the sentencing court properly sentenced him as a fourth felony offender.

The habitual offender statute MCL 769.10 *et seq.* sets forth a legislative scheme whereby offenders repeatedly convicted of felonies are punished more severely. *Gardner*, 482 Mich at 44. By enacting the habitual offender statute, "the Legislature apparently and reasonably saw fit to punish an offender who has committed multiple prior felonies in a harsher manner than an offender who has committed only a single prior felony." *Id.* at 66.

a. The history of the habitual offender statute.

The habitual offender statute was amended in 1994. That amendment dramatically changed the procedures used to prosecute habitual offenders as well as a defendant's rights. Though the current version of the statute contains a provision requiring that notice to seek an enhanced sentenced be filed within 21 days after the arraignment or filing of the information charging the underlying offense, MCL 769.13, this was not always the case. Previous versions of the statute contained no notice provision. *People v Stratton*, 13 Mich App 350, 355; 164 NW2d 555 (1968), quoting MCL 769.13.

A complicated body of case law developed leading this Court to ultimately adopt a bright-line rule. In *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), this Court held that the prosecution was required to file the supplemental information "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." *Id.* The *Shelton* Court also created a single exception to its rule: "'when the delay is due to the need to verify out-of-state felony convictions based on the 'rap sheet'.'" *Shelton*, 412 Mich at 569, quoting *People v Fountain*, 407 Mich 96, 98-99; 282 NW2d 168 (1979). The purpose of the rule was to "allow[] 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." *Shelton*, 412 Mich at 569.

In 1994, the habitual offender law was completely revamped. Among other changes, there was no longer a right to trial by jury on the habitual offender charge; notice of intent to seek the enhanced sentence, rather than a supplemental information was allowed; and the time for filing the notice was increased from the judicially-created 14-day rule to 21 days after the defendant's arraignment on the information for the underlying offense, or within 21 days of the filing of the information of the defendant waives arraignment. MCL 769.13; See also, Summary of House Bill 5306, February 2, 1994, p 1, which is attached as Appendix I.)

According to the legislative history, the procedures before the proposed amendment were criticized for the burdens and expense placed on the criminal justice system. Analysis of House Bill 5306, February 22, 1994, p 1, which is attached as Appendix J. "The habitual offender law has been said to be underutilized because of the cumbersomeness of the procedures, which many believe exceed the demands of due process of law." *Id.* As noted by the courts, the main purpose of the habitual offender law—deterrence of repeat offenders through sentence enhancement—remained. *People v Martin*, 209 Mich App 362, 363-364; 531 NW2d 755 (1995), overruled in part on another grd *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996).

b. The plain language of MCL 769.13 allows for amendment of the notice of intent to seek an enhanced sentence.

i. Principles of statutory construction

"The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). A court best discerns that intent by reviewing the words of a statute as they have been used by the Legislature. When a statute's language is clear and unambiguous, this Court must enforce the statute as written. *People v Kowalski*, 489 Mich 488, 498; 803 NW2d 200 (2011). A paramount principle in statutory construction is that this Court reads the statute "as a whole" rather than reading each provision alone. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). While individual words and phrases are important, they must be read in context so that the legislative intent is given effect. *Id.* at 790-791. Finally, MCL 760.2 instructs: "This act is hereby declared to be remedial in character and as such shall be liberally construed to effectuate the intents and purposes thereof."

ii. The intent of the habitual offender statute, punishing repeat offenders more harshly, is served by allowing amendments to a timely filed notice.

As earlier noted, the primary objective of the habitual offender statutes, MCL 769.10 *et seq.*, is to punish repeat offenders with harsher sentences. When read in that context, and as a whole, the intent of MCL 769.13 is to put a defendant on

notice that he faces an enhanced sentence. Allowing amendment of that initial notice effectuates both the notice aspect of MCL 769.13 and its overarching intent.

MCL 769.13(1) states that the prosecuting attorney "may seek to enhance the sentence of the defendant ... by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense, or if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." MCL 769.13(2) states that the notice "shall list the prior conviction or convictions that will *or may* be relied upon for purposes of sentence enhancement." MCL 769.13(2) (emphasis added).

The remainder of the statute addresses the fact that the defendant may challenge the accuracy or constitutional validity of his prior convictions by filing a written motion, and that the existence of the defendant's prior convictions is determined by the court, not a jury. MCL 769.13(4)-(5). The existence of the convictions "shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing." MCL 769.13(5). The methods of proving the prior convictions consist of a copy of the judgment of conviction; transcript of a prior trial, plea or sentencing proceeding; copy of a court register of actions; information contained in a presentence report; or a statement of the defendant. MCL 769.13(5)(a)-(e).

MCL 769.13(6) mandates that a defendant who has challenged his prior convictions by filing a motion under Section 4 be given an opportunity to "deny, explain, or refute any evidence or information pertaining to the defendant's prior

conviction or convictions before sentence is imposed." Section 6 reiterates that once a motion is filed under Section 4, it is the court's duty to resolve any challenges to the prior convictions "at sentencing or at a separate hearing scheduled for that purpose before sentencing." *Id.*

The plain language of the statute allows for amendment. The language in Section 2 requires that the notice list the prior conviction or convictions that will or *may* be relied upon. This Court has held that the word "may" is permissive, not mandatory. *People v Watkins,* 491 Mich 450, 484; 818 NW2d 296 (2012). In the context of Section 2, the word "may" means that the prior convictions listed in the notice might be the ones relied upon, but might not. The permissive word chosen by the Legislature evidences its intent that prosecutors be allowed to change the information relied upon in seeking sentence enhancement.

When Section 2 is read in the context of the remainder of MCL 769.13, the Legislature's intent is even clearer. A defendant that is facing an enhanced sentence is given notice of the prior criminal history that may be relied upon so that he can challenge the accuracy or constitutionality of those convictions at a hearing *before or at sentencing.* Allowing amendment of the notice of intent to seek an enhanced sentence up until that time effectuates the intent of the statute—to punish repeat offenders more harshly, while giving notice. To hold otherwise would allow the most serious criminals to escape punishment that the Legislature intended prosecutors be allowed to pursue.

Allowing amendment of the notice of intent to seek an enhanced sentence is also consistent with the aims of due process. In *Oyler v Boles*, 368 US 448, 452; 82 S Ct 501; 7 L Ed 2d 446 (1962), the United States Supreme Court ruled that due process does not require "advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding." Rather, due process simply requires that "a defendant receive reasonable notice and an opportunity to be heard relative to the recidivist charge...." *Id.* at 452.

The question becomes, whether the defendant was prejudiced by the amendment. "[P]roof of prejudice is a generally necessary but not sufficient element of a due process claim, and that [ ] due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *United States v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752 (1977).

iii. As MCL 769.13 contains no remedy for a technical violation of the statute, a defendant is not entitled to relief absent a demonstration that he was unfairly prejudiced.

Cases construing the 1994 amendments to MCL 769.13 have read into the statute a remedy not provided by the Legislature—dismissal of the notice of intent to seek enhanced sentence. Though the 21-day filing requirement is a clear technical rule, the failure to provide a remedy for violation suggests that the Legislature did not intend one. Compare MCL 780.133 (explicitly providing for dismissal when the 180-day rule is violated). Accordingly, the notice of intent to

seek an enhanced sentence can be amended at any time so long as a defendant's due process rights are not violated.

The remedy for violating a statute is also "a question of statutory interpretation and thus one of legislative intent." *People v Stevens (After Remand)*, 460 Mich 626, 643; 597 NW2d 53 (1999). In the absence of a legislative remedy, this Court has repeatedly declined to impose the harshest possible remedy for a technical violation of a statute. In *People v Hawkins*, 468 Mich 488, 507; 668 NW2d 602 (2003), this Court held "that "application of the exclusionary rule is inappropriate unless the plain language of the statute indicates that the rule be applied." In *People v Hamilton*, 465 Mich 526; 638 NW2d 92 (2002), this Court examined the statute governing the jurisdiction of a police officer and held that, as a matter of statutory interpretation, the statute did not authorize the exclusion of evidence as a remedy.

"'[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied.'" *People v Anstey*, 476 Mich 436, 448; 419 Nw2d 579 (2006), quoting *Hawkins*, 468 Mich at 507. "Where there is nothing in the statutory language indicating that the exclusionary rule applies to a violation of a statute, this Court should decline to infer such legislative intent, because '[t]o do otherwise would be an exercise of *will* rather than *judgment*.'" *Anstey*, 476 Mich at 448, quoting *Stevens (After Remand)*, 460 Mich at 645.

The fact that the Legislature did not provide a remedy does not mean that this Court is completely unable to fashion one, but it does mean that the most drastic remedy, such as dismissal or suppression is unavailable. See *Anstey*, 476 Mich at 449-450.

When drafting MCL 769.13, the Legislature did not include dismissal of the habitual offender notice as a remedy for a technical violation of the statue—which is what resentencing without the habitual offender notice amounts to. Such a remedy is also at odds with the Legislature's intent of punishing habitual offenders with harsher sentences.

Unless a defendant can demonstrate a deprivation of his constitutional right to due process, he is not entitled a remedy. As earlier noted, in order to make such a showing, a defendant would need to demonstrate that he was unfairly prejudiced. Unfair prejudice in this context is not that the defendant faces a harsher sentence—as prejudice would be had in every case. Rather, unfair prejudice in the context of the habitual offender notice is whether the defendant was unfairly surprised by the amendment and left without a fair opportunity to respond.

The proper remedy is one consistent with the intent of the statute to more harshly punish and that gives the defendant adequate notice and an opportunity to challenge his prior convictions. Thus, whether a defendant is unfairly surprised by a tardy notice (i.e., one filed or amended after the 21-day period), would depend on the timing of the late filing or amendment. So long as the defendant is given adequate time to meet the tardy notice, there would be no surprise that is

unfair. Even surprise by a proposed amendment might be remedied by an adjournment of either the pre-sentencing hearing sought by the defendant to challenge his prior convictions or an adjournment of sentencing where the defendant moved to challenge the convictions. This allows the defendant an opportunity to obtain any necessary information to challenge the information contained in the amendment while maintaining the Legislature's intent.

iv. Amendments are permitted.

MCL 767.76 specifically allows for amendment of an indictment[1] so long as the defendant is not prejudiced. As noted by the Court of Appeals, MCL 769.13 and MCL 767.67 have been harmonized to allow the prosecution to amend a habitual offender notice so long as the amendment does not include *additional* prior convictions and therefore increase potential sentence consequences. *People v Siterlet*, 299 Mich App 180, 186 829 NW2d 285 (2012), citing *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997); *People v Hornsby*, 251 Mich App 462, 472-473; 650 NW2d 700 (2002).

Allowing amendment of the habitual-offender notice is consistent with MCL 769.13(1), which states that the prosecuting attorney "may seek to enhance the sentence of the defendant ... by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense, or if arraignment is waived, within 21 days after the filing of the

[1] Pursuant to MCR 6.112(A) rules applicable to informations apply to indictments unless otherwise provided.

information charging the underlying offense." MCL 769.13(2) states that the notice "shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." MCL 769.13(2). Nothing in the statutory language prohibits amendment of the habitual-offender notice, even if it is beyond the 21 days.

As noted by the court in *Ellis,* MCL 767.76 specifically allows for amendment of an indictment. The statute states that "the court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." In addition, MCR 6.112(H) states that "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." *Ellis* acknowledged that amendments could be made, but could not increase the defendant's habitual offender level.

This Court has held that a trial court may amend a felony information at any time, subject only to the limitation that amendment cannot cause a defendant prejudice "because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt,* 442 Mich 359, 364; 501 NW2d 151 (1993). This is based upon a defendant's due process right to "'reasonable notice of a charge against him, and an opportunity to be heard in his defense.'" *People v McGee,* 258 Mich App 683, 699; 672 NW2d 191 (2003), quoting *In Re Oliver,* 333 US 257, 273; 68 S Ct 499; 92 L Ed 682, 694 (1948). The constitutional notice requirement "'is a practical requirement that gives effect to a defendant's right to know and respond to the

charges against him.'" *McGee*, 258 Mich App at 699-700, quoting *People v Darden*, 230 Mich App 597, 601; 585 NW2d 27 (1998). Thus, in the context of amendment of the underlying charge, to establish a due process violation, a defendant must show his defense was prejudiced. *McGee*, 258 Mich App at 700.

The same due process rationale should be applied to the notice of intent to seek an enhanced sentence. It would make little sense that an amendment to the underlying crime, the one the defendant is typically the most interested in disputing, could be made at any time, but that the habitual offender notice could never be amended—even in the absence of prejudice.

When it comes to a due process claim—which is what MCL 769.13 addresses—prejudice is not whether the defendant faces a harsher penalty. Rather, as when amendments are made to the underlying crime, the question is whether the defendant had sufficient notice that he was facing an enhanced sentence to allow him to challenge the prior convictions. This analysis must also keep in mind that it is the defendant who is in the best position to know the details of his prior criminal history.

v. Siterlet was on notice that he faced sentencing as a fourth habitual offender if he did not plead guilty.

Here, the Court of Appeals incorrectly applied previous precedent when it held that the trial court erred when sentencing Siterlet as a fourth habitual offender. Its rationale—that there was no error or defect in the habitual offender notice and that the "post-trial, pre-sentencing amendment ... sought to 'impose

more severe adverse consequences' on defendant by increasing his habitual-offender level and, therefore, his potential sentence", *Siterlet*, 299 Mich App at 188, disregards the true concern—notice.

The Court of Appeals holding ignores the fact that the original timely filed habitual offender notice contained the exact same crimes and penalty level as the second amended information. (Compare Appendix B 11/18/10 Felony Information with Appendix H, 09/27/11 Second Amended Information.) It also disregards the fact that Siterlet knew the third habitual offender level only applied if he pleaded guilty. The first amended habitual offender notice that decreased the penalty to a third habitual was only filed in anticipation of Siterlet's guilty plea. While the better course of action would have been to wait until after the plea was actually entered, Siterlet should not be allowed to benefit from this when he remained on notice that the prosecution sought to sentence him as a fourth offender if he did not plead guilty. Documents filed by the parties a*fter* Siterlet rejected the plea offers, but before his trial, established he was being charged as a fourth habitual offender. (Appendices F and G.)

Because Siterlet had notice, the Court of Appeals erred when it held that the trial court improperly sentenced Siterlet as a fourth habitual offender. As there was no error, subsequent analysis under the plain error standard is unnecessary.

II. Siterlet waived any error. But, even if he did not, the Court of Appeals did not err when it held he failed to demonstrate plain error.

A. Issue Preservation

Siterlet admits this issue was not preserved for appeal. But, this issue was waived. First, Siterlet waived it by recognizing that his fourth habitual offender status would be reduced only if he pled guilty – something he refused to do. Second, Siterlet waived it when his counsel affirmatively told the sentencing court that she had no challenge to his status as a fourth habitual offender after reviewing Siterlet's presentence report with him.

B. Standard of Review

Neither counsel nor a defendant may "harbor error as an appellate parachute." *Carter,* 462 Mich at 214. "Deviation from a legal rule is 'error' unless the rule has been waived." *Olano,* 507 US at 732-733 (1993). Waiver is the "intentional relinquishment of a known right." *Carines,* 460 Mich at 762-763 n 7. Express approval of the court's action extinguishes any error. *Carter,* 462 Mich at 216.

When not waived, unpreserved issues are reviewed for plain error affecting substantial rights. *Carines,* 460 Mich at 763-764. To demonstrate plain error, Siterlet must prove: "(1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Vaughn,* 491 Mich at 663-64.

C. Analysis

Siterlet waived any error. But, even if he did not, his failure to object requires him to show the sentencing court committed plain error. Siterlet's plain error claim fails on all grounds. There was no error because the prosecution timely filed the original habitual offender notice. Moreover, any subsequent amendment was proper to allow the record to comport with the understanding everyone had—Siterlet would be sentenced as a fourth habitual offender if he did not plead guilty. But, even if this Court decides the amendment was improper, Siterlet cannot demonstrate the error was plain—the law regarding amendment of the habitual notice was not clear. Lastly, Siterlet cannot meet his burden of establishing the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Siterlet is a fourth habitual offender – a fact he never contested. And, he had notice such a sentence would be pursued. To allow Siterlet to escape the sentence allowed by law for at a technical violation of a statutory notice provision is contrary to the premise of plain-error doctrine.

1. Siterlet waived any error.

"'A defendant may not waive objection to an issue before the trial court and then raise it as an error' on appeal." *Carter,* 462 Mich at 214, quoting *Fetterley,* 229 Mich App at 520. Here, Siterlet attempts to do just that.

After the People timely charged Siterlet as a fourth felony offender, he knew that any reduction was contingent on his acceptance of a plea. (Appendix C, 12/27/10 Pretrial Summary; Appendix E, Plea Offer Memorandum; PT 08/16/11, p

4.) Siterlet never pled guilty. (8/16/2011 PT, p 5.) Thereafter, Siterlet explicitly admitted that he was charged as a fourth felony offender. (Appendix F 8/17/11 Motion, p 1; Appendix G, 09/14/11 Answer to Motion, p 1.) This is a waiver.

Just days after trial, and two months before sentencing, the prosecution again amended its notice to reflect Siterlet's status as a fourth felony offender. And, at sentencing, Siterlet continued to waive his right to challenge his habitual fourth status. The sentencing court told Siterlet he would be sentenced as a fourth felony offender – the status reflected in his PSIR. (12/5/11 Sentencing, pp 3-4.) Siterlet's attorney acknowledged receiving certified copies of his prior convictions and reviewing the presentence report reflecting Siterlet's habitual fourth status with Siterlet. (12/5/11 Sentencing, p 4.) Even so, Siterlet's attorney only objected to the jail credit Siterlet received. (12/5/11 Sentencing, p 4.) When explicitly asked if she had "[a]nything else regarding the factual accuracy of the report[,]" defense counsel said: "No[.]" (12/5/11 Sentencing, pp 5-6.) This too is a waiver.

Because Siterlet's repeated waivers extinguish any error, Siterlet is not entitled to any relief. Stated otherwise, even if the Court of Appeals erroneously applied the plain-error standard of review, this Court should affirm the Court of Appeals' decision upholding Siterlet's sentence as a fourth felony offender. *People v Garcia-Hernandez,* 477 Mich 1039, 1040; 728 NW2d 406 (2007); *People v Nutt,* 469 Mich 565, 568; 677 NW2d 1 (2004).

2. But, even if the trial court erred in sentencing Siterlet as a fourth habitual offender, the Court of Appeals correctly applied the plain error standard to deny Siterlet relief.

Given Siterlet's concession that his allegation of error was unpreserved, the Court of Appeals reviewed the issue for plain error, and correctly ruled that the error was not plain because there was no case law directly addressing the facts of this case.

In *Olano*, 507 US at 732, the Supreme Court ruled that the first step in satisfying the plain error standard is demonstrating there was error and that it was plain. *Id.* at 732. Error occurs if there is a deviation from a legal rule that has not been waived. *Id.* at 732-733. But, there is an additional limitation. It is not sufficient that error occurred, the error must have been *plain*. The Court explains that "'[p]lain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* at 734. The error must be clear under current law. *Id.*

In *Olano*, the Court accepted the government's concession that the error at issue was plain, and therefore "assume[d] without deciding that this premise is correct." *Id.* at 737.

Here, the Court of Appeals did not misapply *Olano*. The law regarding whether an amendment back to the original habitual offender notice is allowed when plea negotiations break down was not clear. MCL 769.13 contains no prohibition against amendment, it simply requires that a defendant be given notice

within 21 days—a requirement no one disputes was met in this case.[2] (Appendix B, 11/18/10 Felony Information.) The statute contains no language prohibiting an after trial amendment, as Siterlet suggests.

Because the law in existence at the time was not plain, clear or obvious, the Court of Appeals correctly held that the error alleged here was not plain. Given the United States Supreme Court's conclusion in *Olano* that an appellate court cannot correct an error that is not clear under the current law, the Court of Appeals correctly denied Siterlet any relief. As the alleged error was not plain, no further inquiry is necessary.

3. If error and existed and was plain, the Court of Appeals properly denied relief, because any error did not result in the conviction of an innocent man, or seriously affect the fairness, integrity and public reputation of the proceedings.

While the People do not concede that there was error, or that it was plain, if this Court concludes otherwise, the Court of Appeals nevertheless correctly denied Siterlet relief. Here, Siterlet knew that the reduction in the habitual offender level applied only if he pleaded guilty. (Appendix C, 12/27/10 Pretrial Summary; Appendix E, Plea Offer Memorandum; PT 08/16/11, p 4.) Through counsel, he admitted in pleadings, after rejecting the plea offer, that he faced sentence as a fourth habitual offender. (Appendix G, 09/14/11 Answer to Motion, p 1.) At

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[2] It appears that Siterlet was scheduled to be arraigned on November 22, 2010. (Response To Motion To Compel Discovery, ¶ 2. D. ["11/22/10: Circuit Court Arraignment. *Defense counsel of record did not appear* and no waiver of that arraignment had been filed. Court states it will request that a waiver be filed."]; Temp Order dated 11/22/2010 ["ACTION: ARR waiver to be filed").

sentencing, he did not object when told he was subject to enhancement. And, he did not object when he was sentenced as a fourth-habitual offender. (12/5/11 Sentencing, pp 3-7.) Furthermore, Siterlet pleaded guilty to every one of the prior convictions used to enhance his sentence. Combined with the evidence presented at Siterlet's jury trial, an innocent man was not convicted. And, the fairness, integrity and public reputation of the proceedings was not compromised.

a. Outcome determinative error

The People agree that if this Court decides that there was error, Siterlet could show it affected his substantial rights. This phrase "normally means that the error must be prejudicial, affecting the outcome of ... court proceedings." *Olano*, 507 US at 725. Accord *People v Fackelman*, 489 Mich 515, 538; 802 NW2d 552 (2011); *Vaughn*, 491 Mich at 665-666; *Carines*, 460 Mich at 763. While it is questionable whether Siterlet was prejudiced because he had notice and an opportunity to be heard regarding the filing of the habitual offender notice, which satisfied due process,[3] the outcome of the proceedings was affected. This is so because, if the trial court was prohibited from sentencing Siterlet as a fourth habitual offender, and did so, he received a harsher sentence than he would have as a third felony offender.

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[3] Even if filing the amended notice was improper because it was filed after the 21-day period provided by statute, that technical statutory violation does not require sentencing as a third offender. The statute itself provides no such remedy. See MCL 769.13. And, due process only requires that a defendant be given notice and an opportunity to be heard. See *Oyler*, 368 US at 452.

Siterlet's contention that amendment of the habitual offender notice after trial deprived him the opportunity to evaluate the plea bargain is refuted by the record. The first plea offer form in December clearly stated that, if Siterlet entered a plea of guilty to "OWI 3rd as habitual 3rd felon for dismissal of Ct-2, DWLS 2nd Offense and dismissal of habitual 4th felony enhancement," the prosecution would recommend a sentence within the guidelines. (Appendix C, 12/27/10 Pretrial Summary.) After Siterlet's motions to dismiss, to suppress, and for a toxicologist were denied in June of the following year, and in anticipation of a plea offer, the notice was amended to OWI third offense, and habitual offender, third offense.[4] (Appendix D, 06/14/11 Amended Information.)

The prosecution then offered a further reduction which would have required Siterlet to plead guilty to OWI third offense, in exchange for a reduction to habitual offender, second offense. (PT 08/16/11, p 4.) The prosecution noted that the sentence would be within the guidelines, which were determined to be 7-to-28 months for habitual-offender second. (PT 08/16/11, p 4.) Siterlet rejected this plea offer, and agreed with his counsel that if he went to trial, the "minimum ranges . . . could be substantially higher than 7-28 (months)." (PT 08/16/11, p 5.) Although the guidelines for a conviction as a habitual third offender were only six months higher than second (i.e. 7 to 34 months), the guidelines for a fourth-felony offender were eighteen months higher (7 to 46 months), MCL 777.21(3)(c) and MCL 777.66. This

[4] The prosecution also filed a confirmatory plea offer memorandum (Appendix E, Plea Offer Memorandum, p 1) listing the guidelines Siterlet would face as a habitual-offender second, third, *and* fourth.

record confirms that any reduction to Siterlet's habitual offender level was premised on a guilty plea. He suffered no prejudice on this ground.

b. The Court of Appeals correctly ruled that Siterlet is not entitled to relief because the fairness, integrity, or public reputation of the judicial proceedings was not seriously affected.

Plain, forfeited error affecting substantial rights should only be corrected if the error, "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 US at 736, quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936). See also *Vaughn*, 491 Mich at 666-667. That the error had *an* effect on the proceedings is not sufficient. *Id.* at 667. To merit relief, the error must have *seriously* affected those factors. *Id.* Thus, plain error affecting substantial rights, that does not affect the fairness, integrity or public reputation of the judicial proceedings, or result in the conviction of an innocent person, does not warrant relief. *Id.*

This Court recently recognized as much. In *Vaughn*, though the defendant had demonstrated outcome-determinative plain error when the trial court improperly closed the courtroom during his trial, relief was not warranted because the closure did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 668. The closure was "limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties...." *Id.*

As the Court of Appeals correctly determined, sentencing Siterlet as a fourth habitual offender also did not seriously affect the fairness, integrity, or public

reputation of the proceedings. Siterlet does not argue he is innocent. *Siterlet*, 299 Mich App at 190. And, as noted by the Court of Appeals, he had notice that the prosecution intended to seek sentencing as a fourth habitual offender:

> Significantly, the record illustrates that defendant knew that the prosecution would pursue a fourth-offense enhancement after he rejected the prosecution's plea offer. The prosecution alleged in two motions filed on August 18, 2011, that defendant was charged at that time as a fourth-offense habitual offender. Although this was not true in light of the June 15, 2011, felony information, defendant not only failed to challenge the prosecution's allegation in the lower court but admitted this allegation in his answer to the prosecution's motion to suppress nonexpert testimony. *Defendant cannot make this admission in the trial court and now argue on appeal that the prosecution abandoned its intent to charge him as a fourth-offense habitual offender.*

Siterlet, 299 Mich App at 191 (emphasis added.) Because Siterlet knew *and acknowledged* without objection that the prosecution planned to proceed against him as a fourth offender if he did not plead guilty, the Court of Appeals correctly declined to grant him relief. It would seriously affect the fairness, integrity, or public reputation of the proceedings *to allow a party to admit a fact in the trial court and argue to the contrary on appeal.* Indeed, that is a waiver. *Carter,* 462 Mich at 214, quoting *Fetterley,* 229 Mich App at 520. And, here, it would give Siterlet an undeserved windfall – a much decreased sentence despite the fact he *actually is* a fourth habitual offender.

Because Siterlet is factually a fourth habitual offender—a fact that he has never contested—his reliance on *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); is misplaced. In *Kimble* this Court granted relief because the defendant was sentenced outside the sentencing guidelines, and thus subjected to a harsher

sentence. *Id.* at 312-313. OV 16 was incorrectly scored because the defendant was convicted of second-degree murder, and OV 16 is only properly scored when a defendant is sentenced for home invasion. *Id.* at 308. Consequently, the defendant factually and legally did not satisfy the requirements to be scored under OV 16.

The same is not true here. There is no doubt that Siterlet *is* a fourth habitual offender. As the Court of Appeals noted, "[t]he factual basis supporting defendant's status as a fourth-offense habitual offender was beyond dispute. Indeed, defendant has an extensive criminal history illustrating that he is a[] habitual drunk driver." *Siterlet*, 299 Mich App at 190]. The law authorizes a harsher sentence for Siterlet because he is a habitual offender. The question is whether there was a technical violation of the notice provision of the habitual-offender statute, and, if so, whether Siterlet was prejudiced in the sense that he did not have notice or an opportunity to be heard.

Here, there was compliance with the statute because the original habitual offender notice was filed within 21 days, and the subsequent amendment to the notice was proper. But, even if the amendment is viewed as a late filing of the habitual offender notice, the statute does not give Siterlet a remedy. See Issue I.C.2.a.iii.

The habitual offender statute itself allows for amendment. It is silent with respect late filings and whether a remedy exists. Because the statute provides no remedy even if the habitual-offender notice was filed late, as Siterlet acquiesced to the amendment and in fact admitted he was charged as a fourth offender in a

pleading, the integrity of the proceedings was not compromised. It would make little sense that deprivation of a constitutional right, like the one at issue in *Vaughn*, could be deemed not to seriously affect the fairness, integrity, or public reputation of the judicial proceedings, and yet, a technical violation of a statute like one alleged here, would. Given Siterlet's concessions in the trial court, the Court of Appeals did not err in holding that any error did not *seriously* affect the fairness, integrity, or public reputation of the proceedings. Thus, the Court of Appeals correctly denied Siterlet's request for relief.

CONCLUSION AND RELIEF REQUESTED

Siterlet waived any error. But, even if he did not, he has failed to sustain his burden of demonstrating plain error. There was no error because the original habitual offender notice was timely filed and any subsequent amendment reinstating that level was expected by the parties. Any error that may have occurred was not plain as there was no case law dictating that an amendment was improper under the circumstances of this case. Lastly, Siterlet knew throughout the proceedings that any reduction in his habitual offender level was conditioned upon his pleading guilty. When he failed to do so, he knew that he would be sentenced as the fourth habitual offender. Siterlet admitted this in his pleadings and at sentencing.

In light of Siterlet's repeated waivers, the People respectfully ask this Court to affirm Siterlet's sentence as a fourth-felony offender.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

(P38255)
Anica Letica for
Cheri L. Bruinsma

Cheri L. Bruinsma (P58673)
Assistant Attorney General
Attorneys for the People
Plaintiff–Appellee
Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875

Dated: October 10, 2013

AG# 20120003180B/Siterlet, Kris/Supp Brief