

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee**

v

**ALFONZO ANTWAN JOHNSON
Defendant-Appellant**

No. 145477

and

**PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee**

v

**KRIS EDWARD SITERLET
Defendant-Appellant**

No. 146713

**BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN
AS AMICUS CURIAE IN SUPPORT OF THE
PEOPLE OF THE STATE OF MICHIGAN**

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Statement of the Question

I.

MCL § 769.13 provides that the prosecuting attorney may seek to enhance the sentence of a defendant by filing a written notice of 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, and that the notice is to list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. Is this time limitation a nonjurisdictional inflexible claim-processing rule, and the notice subject both to equitable tolling and amendment, as well as forfeiture by failure to object and waiver?

Amicus answers: YES

Statement of Facts

Amicus refers this Court to the Statement of Facts by the People in both cases.

Argument

I.

MCL § 769.13 provides that the prosecuting attorney may seek to enhance the sentence of a defendant by filing a written notice of 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, and that the notice is to list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. This time limitation is a nonjurisdictional inflexible claim-processing rule, and the notice is subject both to equitable tolling and amendment, as well as forfeiture by failure to object, and waiver.

A. Introduction

This Court granted leave to appeal in *People v Johnson*,¹ and in *People v Siterlet*² directed supplemental briefing from the parties, and scheduled oral argument on the application. Each case concerns questions regarding MCL § 769.13. Amicus believes it useful to brief them together.

1. The Johnson case

The prosecution filed an information on September 28, 2006, and the same day filed an amended information that included a timely notice of intent to seek an enhanced sentence of the defendant as a fourth-offender. Almost five months later, the prosecution filed a motion to amend the notice because the dates and convictions listed were incorrect. A week later an information was filed containing the amended notice of intent to seek enhancement, with corrected conviction information. Though no order apparently appears in the trial court file, no claim appears to be made by the defendant that the motion was not actually granted by the trial court. Because the notice of

¹ *People v. Johnson*, 493 Mich 972, 973 (2013).

² *People v. Siterlet*, __Mich__, 836 NW2d 437 (2013).

intent to seek an enhanced sentence was filed timely, and the amendment of the notice did not elevate the range of penalty the defendant faced, the court found no error.³

2. The Siterlet case

The prosecution filed a notice that it would seek to have defendant sentenced as a fourth-offense habitual offender. During a time of plea negotiations, the notice was amended, in contemplation of a plea, to enhancement of the sentence of defendant as a third offender. Plea negotiations proved unfruitful, and the case went to trial, at which defendant was convicted. After the trial, but before sentencing, the prosecutor amended the enhancement notice back to fourth offender. No objection was raised, and defendant was so sentenced, to 46 months to 25 years in prison.

The Court of Appeals held that the amendment of the notice changing enhancement of the sentence from third offender back to fourth was improper, as the amendment occurred after the 21-day period provided in MCL § 769.13(1) for *filing* an enhancement notice. But the court nonetheless denied defendant relief because the issue was forfeited by lack of objection on a number of occasions when an objection would have been expected. The court found both that the error was not plain or obvious, and that even if it was, the defendant had proceeded with the understanding that, given the failure of plea negotiations, the prosecution was seeking that he be sentenced as a fourth-offender, and to allow the sentence to stand under these circumstances would not “seriously affect the fairness, integrity, or public reputation of the judicial proceedings.”⁴

³ As the Court of Appeals put it, no error occurred because the “amended supplemental information” did not increase the defendant’s “potential sentencing consequences.” *People v. Johnson*, 2012 WL 2362438, 7 (2012).

⁴ *People v. Siterlet*, 299 Mich App 180, 191-192 (2012).

3. The issues

This Court directed that the parties, and any amici, address two issues in each case that amicus believes are related, and all concern construction and/or proper application of MCL §769.13.

In *Johnson*, the issues to be addressed are:

- whether the amendment of the supplemental notice of intent to seek to enhance the defendant's sentence was contrary to MCL § 769.13, and, if so, to what remedy, if any, the defendant is entitled.
- whether, if the original notice was defective and no order was entered allowing the notice to be amended, the trial court had the authority to sentence the defendant as a fourth habitual offender.⁵

In *Siterlet*, the issues to be addressed are:

- 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.
- whether the Court of Appeals correctly analyzed the unpreserved error in this case under "plain error" standards.⁶

⁵ *People v Johnson*, 493 Mich 972 (2013).

⁶ *People v. Siterlet*, __Mich__, 2013 WL 4994804, 1 (2013).

- B. MCL § 769.13 is a nonjurisdictional inflexible claim-processing rule. The time period for filing is subject to equitable tolling, the notice may, under some circumstances, be amended, and issues concerning the notice may be forfeited by failure to object, or waived**

“The first step to wisdom is calling a thing by its right name”⁷

1. There is no such thing as a “habitual offender information”

Until 1994, enhancement of the sentence of an habitual offender was accomplished by 1) the filing of an information, in the same manner as an information charging a criminal offense, and 2) a full trial⁸ on the habitual offender information, the jury to decide whether in fact the defendant had committed the prior offenses.

If after conviction and either before or after sentence it appears⁹ that a person convicted of a felony has previously been convicted of crimes as set forth in section 10, 11, or 12, the prosecuting attorney of the county in which the conviction was had may file a separate or supplemental information in the cause accusing the person of the previous convictions. . . . a jury of 12 jurors shall be impaneled from the petit jurors serving at the then or a following term of court to determine the issues raised by the information and plea. . . . The usual

⁷ *Roulette v City of Seattle*, 97 F3d 300 (CA 9, 1996). Sometimes phrased as “The beginning of wisdom is calling things by their right names,” attributed to an “ancient Chinese proverb.” See e.g. *State v. Pugh*, 225 P.3d 892, 904 (Wash., 2009).

⁸ The defendant could also plead to the information.

⁹ In a series of cases this Court augmented the statute by way of a holding that the habitual offender information was required to be “promptly” filed *before* trial, unless there was a necessary delay to verify out-of-state convictions, see *People v. Hendrick*, 398 Mich. 410 (1976); *People v. Fountain*, 407 Mich. 96 (1979), and also added to the statute the requirement that the information be filed not more than 14 days after the defendant was arraigned (or waived arraignment) on the information charging the underlying felony, or before trial if the defendant was tried within that 14-day period. *People v. Shelton*, 412 Mich. 565, 566 (1982). With the amendment of MCL § 769.13, these additions to the statute are no longer operative.

practice in the trial of criminal actions shall be followed in the impaneling of a jury and the trial of the issue. . . .¹⁰

But in 1994 the manner of proceeding with regard to enhancement of sentences of repeat offenders was changed. No longer is an information—which is a *charging* document—filed, nor is there any trial at which a jury determines whether defendant is the individual responsible for the convictions detailed in an information. In pertinent part, the statute now provides:

In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant . . . by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

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

A notice of intent to seek sentence enhancement has replaced the information, then,¹¹ and if there is a challenge from the defendant regarding the listed convictions, which must be made by written motion, the challenge is resolved by the trial court in the manner provided by the statute.¹²

¹⁰ MCL §769.13, before amendment in 1994.

¹¹ MCR 6.112(F) mimics the statutory provision: “**(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.”

¹² MCL § 769.13(4)(5).

A convenient way for the prosecution to provide the notice, and to insure its timeliness, is to include it *on* the information, though nothing requires that notice be given in this manner. Despite this change in procedure, opinions often refer to the enhancement notice as a “habitual information.” For example, the *Siterlet* opinion repeatedly references the enhancement notice listed on the information as though it were a *part* of that charging document, which it is not. For example:

- The prosecution originally *charged defendant* as a fourth-offense habitual offender. However, the prosecution amended the felony information during plea negotiations to *charge defendant* as a third-offense habitual offender After defendant rejected the prosecution's plea offers, the prosecution pursued the case as if defendant was *charged* as a fourth-offense habitual offender, to which defendant did not object.¹³
- Defendant argues on appeal that the trial court erred by sentencing him as a fourth-offense habitual offender because the information in place during the plea negotiations and at trial alleged that he was a third-offense habitual offender. We hold that the trial court erred by sentencing defendant as a fourth-offense habitual offender *because the prosecution improperly amended the felony information.*¹⁴

And this mislabeling has been regular since the 1994 amendment.¹⁵

It might be said that calling a notice of intent to seek an enhanced sentence a “habitual information,” and the notice a “charge,” is a mere matter of semantics, but it can lead to a mistaken analysis. In fact, the *Siterlet* opinion veers down a wrong path, noting other cases that have taken

¹³ *People v. Siterlet*, 299 Mich.App.at 182(emphasis supplied)

¹⁴ *People v. Siterlet*, 299 Mich.App. at 183 (emphasis supplied).

¹⁵ There are many examples in the unpublished Court of Appeals cases, and published cases also often refer to the notice of intent to seek enhancement as a “habitual offender information.” See e.g. *People v. Ellis*, 224 Mich.App. 752, 755 (1997) to which amicus will return: “it is without question that the prosecutor promptly filed a supplemental information charging defendant with being an habitual offender, second offense.” In all fairness, prosecutors also often refer to “habitual offender informations.” Old habits are hard to break.

the same detour. The opinion analyzes the amendment of the notice of seek sentence enhancement by applying both the statute and court rule that address amendment of the *information*. Because MCL § 767.76 allows the amendment of an information at any time, before, during, or after trial, to cure any defect, so long as the accused is not prejudiced, and MCR 6.112(H) does the same, if one considers the enhancement notice as a “habitual information,” then it becomes necessary to conclude either 1) that the enhancement notice may be amended at any time, before, during, or after trial, to cure any defect, so long as the accused is not prejudiced, or 2) explain why not. The opinion takes the latter course, aligning itself with previous opinions that have, as the opinion puts it, “harmonized” MCL § 769.13, the enhancement-notice statute, and MCL § 767.76, the amendment of the information statute:

This Court has harmonized MCL 769.13 and MCL 767.76 to determine that the prosecution may not *amend an information* after the 21-day period provided in MCL 769.13(1) to include *additional* prior convictions and, therefore, increase potential sentence consequences.¹⁶

The court distinguished what it saw as an amendment of the “habitual information” that *increases* the defendant’s sentencing exposure, as from a habitual third to a habitual fourth, which it found impermissible, and an amendment of the “habitual information” that corrects the convictions charged—rather than adding a conviction—as by *substituting* one conviction for another listed in the “information,” so long as defendant remains subject to the same level of sentencing enhancement as originally “charged” in the “supplemental information.”¹⁷

¹⁶ *People v. Siterlet*, 299 Mich.App. at 186 (emphasis added).

¹⁷ *People v. Siterlet*, 299 Mich.App. at 187. To the same effect see *People v. Hornsby*, 251 Mich.App. 462, 472-473 (2002): “the amended information did not increase defendant’s potential sentence because the amendment did not change defendant’s habitual offender level. . . . Because the

This distinction began with a case that borrowed a similar distinction from a case decided under the statute when it required the filing of a habitual-offender information and either a plea or trial, augmented by this Court's requirement that this information be filed not more than 14 days after the defendant was arraigned, or waived arraignment, on the information charging the underlying felony, or before trial if the defendant was tried within that 14-day period.¹⁸ In the 1987 case of *People v Manning*,¹⁹ the court observed that the purpose of this Court's creation in *Shelton* of the 14-day rule for filing a habitual information was to provide the defendant "notice, at an early stage of the proceedings, of the potential consequences should the defendant be convicted of the underlying offense." Given this purpose, the court found no error when an amended habitual information was filed two months after the initial filing, replacing prior convictions which were listed in error because another offender had used Manning's name as an alias, causing his convictions to appear on Manning's record, because the amendment did not increase the sentencing exposure to which Manning was given notice, and so the notice purpose of the *Shelton* requirement had been met.²⁰ And so in the *Ellis* case the Court of Appeals cited *Manning*, and applied principles governing MCL § 769.13 before its amendment though it was the amended MCL § 769.13 which governed the case. The court said that:

amendment did not change in any way the potential consequences of a conviction, of which defendant had received proper notice, we conclude that the trial court properly denied defendant's motion challenging the amendment of the notice to seek sentence enhancement and properly sentenced defendant as a third-offense habitual offender."

¹⁸ *People v Shelton, supra*.

¹⁹ *People v. Manning* 163 Mich.App. 641, 644-645 (1987).

²⁰ *People v Manning*, 163 Mich App at 645.

- If a prosecutor wishes to file a supplemental information alleging that a defendant is an habitual offender, he must do so “promptly.” *People v. Fountain*, 407 Mich. 96, 98, 282 N.W.2d 168 (1979).²¹
- [I]t is without question that the prosecutor promptly filed a *supplemental information charging defendant with being an habitual offender*, second offense. . . . the prosecutor filed an amended supplemental information alleging two additional prior convictions, thus *changing the supplemental information to habitual offender, fourth offense*.²²
- MCL § 769.13 . . . does not provide for amendment of a supplemental information. However, MCL § 767.76 . . . generally allows amendment of an indictment as a matter of the court's discretion, as long as the defendant does not suffer prejudice.²³
- Both statutes *relate to criminal informations* and thus are in pari materia and must be read together as one law. . . . Reading [MCL § 769.13] in harmony with MCL § 767.76, we hold that the supplemental information may be amended outside the statutory period only to the extent that the proposed amendment does not relate to the specific requirements of MCL. § 769.13 . . . 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 *Shelton, supra* . . .

²⁴

But neither *Shelton*, *Fountain*, nor any other caselaw concerning habitual-offender informations construing and applying MCL § 769.13 before amendment, nor MCL § 767.73 concerning amendment of informations, are relevant to the inquiry here, which concerns not informations, but

²¹ *People v. Ellis*, 224 Mich.App.at 754.

²² *People v Ellis*, 224 Mich App at 755.

²³ *People v Ellis*, 224 Mich App at 756.

²⁴ *People v Ellis*, 224 Mich App at 756-757.

notices of intent to seek enhancement of a sentence based on prior felony convictions. There is no such thing as a habitual-offender information. MCL § 769.13 as amended must be considered apart from the law concerning informations.

2. MCR 6.112(H) is not relevant to the issues raised here

Though MCR 6.112 is headed “The Information or Indictment,” paragraph (F) is titled “Notice of Intent to Seek Enhanced Sentence,” and incorporates the notice requirements of MCL § 769.13 into the rule. Paragraph (G) and (H) together essentially incorporate MCL § 767.76. Paragraph (G) is titled “Harmless Error,” and provides, with regard to an information, that “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.” There follows the second and final sentence, which is a *disclaimer*: “This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.” It is entirely unremarkable that the rule would make clear that a provision that by its very terms applies to *informations*—the rule expressly noting circumstances where an information cannot be dismissed or a conviction reversed because of defects regarding the information, absent a timely objection and showing of prejudice—has no application to something that is *not* an information, that is, the notice of intent to seek an enhanced sentence, but whose requirements are also stated in a paragraph of the rule. It would, on the other hand, be remarkable to read the disclaimer as *resolving* questions that might arise regarding amending timely filed notices of intent to seek an enhanced sentence, equitable tolling of the time for filing the notice, or

application of a plain-error standard of review where there is some error regarding the notice but there is no objection. The sentence disclaims; it does not *proclaim*.²⁵

Again, there is no such thing as a habitual-offender information, and cases, statutes, and court rules concerning informations are not relevant to the inquiry here. The questions that this Court has directed be briefed must, then, be answered apart from these rules concerning informations.

3. MCL § 769.13 is a statutory inflexible claim-processing rule, and so the time for filing the notice is subject to equitable tolling, the notice may be amended under certain circumstances, forfeited error is reviewed for plain error, and waiver may occur

*“Terminology is destiny”*²⁶

A great many statutory—and court rule—time limitations for the filing of some document or pleading are not jurisdictional. But some are. The sometimes difficult thing is to tell the difference. And telling the difference may be outcome-determinative, for jurisdictional rules are not subject to forfeiture, but nonjurisdictional rules are, even rules that, when proper objection is made, must be enforced. The latter are known as inflexible claim-processing rules.

MCL § 769.13 provides that the prosecution “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

²⁵ For this reason, amicus thus sees no conflict between the final sentence of MCR 6.112(G) and MCL § 769.26, providing that “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, . . . 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.” MCR 6.112(G) determines nothing with regard to notices of intent to seek an enhanced sentence.

²⁶ *Gonzalez v Thaler*, __US__, 132 S Ct, 631, 664, 181 L Ed 2d 619 (2012), Scalia, J., dissenting.

waived, within 21 days after the filing of the information charging the underlying offense.” That the statute uses “may” rather than shall has nothing to do with the required filing time; it indicates only that there is no mandatory duty on the part of the prosecution to *seek* enhancement, even if, given the defendant’s criminal record, it is possible to do so. Amicus would certainly agree with the proposition that the prosecution’s ability to seek enhancement under the statute is limited by the notice filing requirement. This notice rule is a statutory claim-processing rule, of the sort known as inflexible claim-processing rules, denoted as inflexible because where proper objection is made to an improper notice the objecting party is entitled to relief.²⁶ Why so? Why is the requirement not jurisdictional?

(a) Avoiding “drive-by” jurisdictional rulings

Because “the consequences that attach to the jurisdictional label may be so drastic,” the United States Supreme Court has, in recent years, “tried to bring some discipline” to the use of this term.²⁷ The task is not always easy. The Court has observed that while “perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice.” The result may be a mischaracterization of the rule at issue, “particularly when that characterization was not central to the case, and thus did not require close analysis.” Thus the Court’s effort, given the consequences of identification of a rule as jurisdictional, to “curtail such

²⁶ Inflexible claim-processing rules are subject to equitable tolling. Though neither *Johnson* nor *Siterlet* involve equitable tolling, that issue *is* involved in a case held in abeyance by this Court pending resolution of the instant cases. See *People v. Glover*, __ Mich __, 2013 WL 5287977, 1 (2013). Amicus will return to the question of equitable tolling.

²⁷ *Henderson ex rel. Henderson v. Shinseki*, __ US __, 131 S.Ct. 1197, 1202, 179 L Ed 2d 159 (2011).

‘drive-by jurisdictional rulings.’”²⁸ In this effort, the Court “has repeatedly stated that filing deadlines are the ‘quintessential claim-processing rules,’ . . . , and that this is true irrespective of how ‘important’ the rule is and irrespective of whether the rule is phrased in ‘mandatory’ language.”²⁹ Thus “time prescriptions, however emphatic, are not properly typed ‘jurisdictional’”³⁰

(b) Identifying jurisdictional rules

In grappling with the problem of separating inflexible claim-processing rules from jurisdictional rules so as to provide some guidance to lower courts, the Supreme Court has “adopted a ‘readily administrable bright line’ for determining whether to classify a statutory limitation as jurisdictional”:

We inquire whether [the legislature] has ‘clearly state[d]’ that the rule is jurisdictional; absent such a clear statement . . . courts should treat the restriction as nonjurisdictional in character.’ . . . This is not to say that [the legislature] must incant magic words in order to speak clearly. We consider “context, including this Court’s interpretations of similar provisions in many years past,” as probative of whether [the legislature] intended a particular provision to rank as jurisdictional.³¹

Clarity would be facilitated if courts and litigants used the label “jurisdictional” not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter

²⁸ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161, 130 S.Ct. 1237, 1244, 176 L Ed 2d 18 (2010).

²⁹ *United States ex rel. Air Control Technologies, Inc. v. Pre Con Industries, Inc.*, 720 F.3d 1174, 1176 -1177 (CA 9, 2013), quoting *Henderson*, 131 S.Ct. at 1203.

³⁰ *Arbaugh v. Y&H Corp.* 546 US 500, 510, 126 S Ct 1235, 1242, 163 L Ed 2d 1097 (2006). See also *Scarborough v. Principi*, 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004).

³¹ *Sebelius v. Auburn Regional Medical Center*, __US__, 133 S.Ct. 817, 824, 184 L Ed 2d 627 (2013).

jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.³²

Kontrick v. Ryan is an example of application of these principles. The creditor in a bankruptcy proceeding has 60 days after the first date set for the meeting of creditors to file a complaint objecting to the debtor's discharge.³³ An extension is allowed for good cause so long as the motion for an extension is filed before the time expires. The creditor objected to a particular debtor's discharge, but the filing was untimely, as the creditor did not raise this issue until the matter was resolved on the merits, by filing a motion for reconsideration. His claim on reconsideration was that the time rule was jurisdictional. The Court disagreed. The rule was, instead, an inflexible claim-processing rule, and thus subject to forfeiture. The creditor had forfeited any claim that the debtor's objection was time-barred by failing to raise that objection in a timely fashion.

(c) Justice Scalia's "buyer's remorse"

In his solo dissent in *Gonzalez v. Thaler*, Justice Scalia took issue with the division of the universe of rules requiring certain procedures into 1) claims-processing rules and 2) jurisdictional or "jurisdiction-removing rules," repudiating in part his former agreement.³⁴ This dichotomy, Justice Scalia said, is a false one; *all* of the sorts of rules the Court was discussing are claim-processing

³² *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 915, 157 L Ed 2d 867 (2004).

³³ Fed. Rule Bkrcty. Proc. 4004(a).

³⁴ "I confess error in joining the quoted portion of *Kontrick*." *Gonzalez v. Thaler*, 132 S.Ct. at 664, Scalia, J., dissenting.

rules, and so the proper dichotomy is between “claims processing rules that are jurisdictional, and those that are not.”³⁵

There is force to this argument. While the “readily administrable bright line” the Supreme Court has established has the virtue of conciseness, as the federalist “Mark Antony” said in reply to the criticism by the antifederalist “Brutus” of Article 1, § 3, clause 3, of the proposed constitution, that criticism putting forth a shorter version, “It frequently happens that precision is lost in conciseness.”³⁶ It cannot be gainsaid that rules that are jurisdictional are also claim-processing rules, and one may become confused looking at all rules through this lens. But if viewed only as a shorthand expression, the Court’s dichotomy makes sense. The Court’s shorthand *encompasses* its distinctions between claim-processing rules and [jurisdictional] claim-processing rules.. That is, claim-processing rules, and particularly filing-deadline rules, should be presumed to be nonjurisdictional.³⁷ That presumption is overcome if the rule “governs a court's adjudicatory

³⁵ *Gonzalez v. Thaler*, 132 S.Ct. at 664-665, Scalia, J., dissenting: “The requirement that the unsuccessful litigant file a timely notice of appeal, for example, is . . . a claims-processing rule, ordering the process by which claims are adjudicated. Yet . . . that, and all procedures that must be followed to proceed from one court to another, have always been deemed jurisdictional.”

³⁶ Mark Antony letter to the Boston Independent Chronicle, January 10, 1788, in 1 Bailyn, *The Debate on the Constitution*, p. 739. And Bryan Garner, a champion of conciseness, has said that sometimes conciseness can “produce brevity but not clarity.” Garner, *The Elements of Legal Style*, p. 54.

³⁷ “[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” *Arbaugh v. Y & H Corp.*, 126 S.Ct. at 1245.

This is also consistent with this Court’s holdings, discussed in the briefs of the People in *Johnson* and *Siterlet*, that sanctions or remedies are generally not to be imposed for a statutory violation where the legislature has not so provided. See *People v Antsey*, 476 Mich 436 (2006); *People v Hawkins*, 468 Mich 488 (2003); *People v Sobczak-Obetts*, 463 Mich 689 (2001); *People v Hamilton*, 465 Mich 526 (2002).

capacity, that is, its subject-matter or personal jurisdiction.”³⁸ Other rules, “even if important *and mandatory* . . . should not be given the jurisdictional brand.”³⁹ The presumption can also be overcome if the legislature so provides in clear fashion, for the legislature is “free to attach the conditions that go with the jurisdictional label to a rule that [the courts] would prefer to call a claim-processing rule.”⁴⁰ It must be clear that the legislature has so provided, and the legislature, “of course, need not use magic words in order to speak clearly on this point. ‘[C]ontext, including this Court’s interpretation of similar provisions in many years past, is relevant.’”⁴¹ The reviewing court looks to “the legal character of the requirement,” which is to be discerned “by looking to the condition’s text, context, and relevant historical treatment.”⁴² And so the short-hand distinction between claim-processing rules and jurisdictional rules is workable, and Justice Scalia has joined in cases decided after his dissent in *Gonzalez v Thaler* that employ that distinction.⁴³

³⁸ *Henderson v. Shinseki*, 131 S.Ct. at 1202 -1203. See *Union Pacific RR Co v Locomotive Engineers*, 558 US 67, 130 S.Ct. 584, 596, 175 L Ed 2d 428 (2009). And personal jurisdiction differs from subject-matter jurisdiction. The latter is not forfeitable or waivable. The former is. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14, 105 S.Ct. 2174, 2182 n. 14, 85 L.Ed.2d 528 (1985). And see *People v Lown*, 488 Mich 242, 268, concerning Michigan’s “180-day rule,” MCL § 780.133: “the court’s jurisdiction over a particular person is another matter; a party may stipulate to, waive, or implicitly consent to *personal* jurisdiction.”

³⁹ *Henderson v. Shinseki*, 131 S.Ct. at 1202 -1203.

⁴⁰ *Henderson v. Shinseki*, 131 S.Ct. at 1203.

⁴¹ *Henderson v. Shinseki*, 131 S.Ct. at 1203.

⁴² *Reed v Elsevier*, 130 S.Ct. at 1246.

⁴³ See e.g. *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. at 825: “we have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as ‘quintessential claim-processing rules.’”

(d) Application to MCL § 769.13

When the principles for distinguishing claim-processing rules from jurisdictional rules discussed above are applied to MCL § 769.13, it becomes apparent that the time limit for filing the notice of intent to seek an enhanced sentence is an inflexible claim-processing rule. The time period, then, is subject to equitable tolling,⁴⁴ and there is no reason a timely-filed notice cannot be amended,⁴⁵ so long as the amendment is not so delayed as to cause prejudice to the defendant.⁴⁶ And, as has been demonstrated, deficiencies in notice, or the filing of a late notice, under a claim-processing rule are subject to forfeiture by failure to file a timely objection, as well as to waiver.⁴⁷ Applying a presumption that time rules are claim-processing rules rather than jurisdictional rules, nothing in the “the legal character of the requirement,” discerned “by looking to the condition's text, context, and

⁴⁴ See e.g. *Kwai Fun Wong v. Beebe*, __F3d__, 2013 WL 5539621, 3 (CA 9, 2013): “while courts ‘[have] no authority to create equitable exceptions to jurisdictional requirements,’ *Bowles*, 551 U.S. at 214, nonjurisdictional claim-processing requirements remain ‘subject to [*Irwin's*] rebuttable presumption in favor of equitable tolling.’ *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 2560, 177 L.Ed.2d 130 (2010).”

In the *Glover* case that this Court is holding in abeyance, defendant waived arraignment on the information in writing rather than in person, and did not serve the prosecuting attorney, causing the notice of intent to seek enhancement to be filed several days after the 21-day period had expired. Equitable tolling should apply in such a circumstance.

⁴⁵ Compare MCR 2.118(A).

⁴⁶ The current rule from the Court of Appeals cases, that a notice may be amended to cure defects but not to increase the enhancement sought, makes sense to amicus. The former is an amendment of the notice, which should be permitted, but the latter appears more to be not an amendment of the notice, but a new notice. For example, a notice seeking enhancement as a third offender is simply not the same notice as one seeking enhancement as a second offender.

⁴⁷ See *Kontrick v Ryan*, supra. See also e.g. *Baker v. United States*, 670 F3d 448, 455 (CA 3, 2012): the Supreme Court has clarified “the difference between jurisdictional rules—those which are strictly enforced because they control a court's subject-matter jurisdiction over a case—and claims-processing rules—those which are subject to waiver, forfeiture, and equitable exceptions because they do not set mandatory rules regarding a court's subject-matter jurisdiction.”

relevant historical treatment” overcomes that presumption here. Filing deadlines are “quintessential claim-processing rules,” and this is true irrespective of how ‘important’ the rule is and irrespective of whether the rule is phrased in ‘mandatory’ language.” MCL § 769.13 is a typical filing-deadline claim-processing rule, albeit an inflexible one, so that the notice must be stricken if filed untimely and with no justification for the delay that would constitute equitable tolling. The evident purposes of the filing deadline—to allow a defendant to assess a plea-offer in an intelligent fashion, assuming there is such an offer, and to have sufficient time to prepare to contest the convictions listed in the notice at sentencing—are served by this rule viewed as an inflexible claim-processing rule.

C. Answers To The Courts Questions

Johnson:

Amicus thus answers the Court’s questions as follows:

- whether the amendment of the supplemental notice of intent to seek to enhance the defendant’s sentence was contrary to MCL § 769.13, and, if so, to what remedy, if any, the defendant is entitled.

An amendment to a timely-filed notice that does not change the degree of enhancement sought under this inflexible claim-processing rule is permissible, so long as not so delayed as to prejudice the defendant.

- whether, if the original notice was defective and no order was entered allowing the notice to be amended, the trial court had the authority to sentence the defendant as a fourth habitual offender.

Though courts “speak through their orders and not their words,” there is no contest here that the motion to amend the timely-filed notice was not granted by the trial court. Granting relief on this basis would be contrary to the requirement in MCL § 769.26 that “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, . . . 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.”

Siterlet:

- 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.

Under the circumstances of this case, where two notices were filed, and it was understood that should there be no plea agreement the habitual 4th notice was operative, and there was no objection to application of the habitual 4th notice at any time, both issue forfeiture and MCL 769.26 bar relief to the defendant, as issue forfeiture applies to the failure to complain of error with regard to a filing under an inflexible claim-processing rule, as do principles of waiver, which are applicable here.

- whether the Court of Appeals correctly analyzed the unpreserved error in this case under “plain error” standards.

Though issue-forfeiture does apply to failure to complain of error with regard to a filing under an inflexible claim-processing rule, and so under appropriate circumstances the plain-error standard of review is applicable, here, where the defense participated fully in sentencing under the habitual 4th notice, the issue was waived rather than forfeited, and there thus is no error to review.⁴⁸

⁴⁸ *Baker v. United States*, 670 F3d 448, 455 (CA 3, 2012): “claims-processing rules . . . are subject to waiver . . .” (emphasis added).

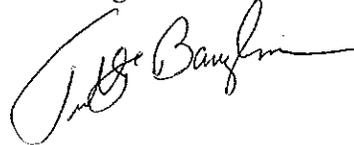
And see *People v. Carter*, 462 Mich. 206, 216 (2000): “Defense counsel in the present case did not *fail to object*. Rather, counsel *expressly approved* the trial court's response and subsequent instruction. This constitutes a waiver that *extinguishes* any error” (emphasis in the original).

Relief

WHEREFORE, the amicus requests that the Court of Appeals be affirmed in both *Johnson* and *Siterlet*.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Timothy A. Baughman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

TIMOTHY A. BAUGHMAN
Chief, Research, Training,
and Appeals