

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

IN THE MATTER OF TYLER DIEHL, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellant,

-vs-

TYLER DIEHL,

Respondent-Appellee.

Supreme Court No.

Court of Appeals
No. 345672

Oakland Circuit Court
Family Division
No. 2017-855352-DL

PETITIONER-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| INDEX TO AUTHORITIES CITED..... | iv |
| STATEMENT REGARDING JURISDICTION OF THE COURT..... | viii |
| STATEMENT REGARDING MCR 7.305(B) GROUNDS FOR APPEAL..... | ix |
| STATEMENT OF QUESTIONS PRESENTED..... | xi |
| STATEMENT OF MATERIAL PROCEEDINGS AND FACTS | 1 |
| ARGUMENTS: | |
| I. The Court of Appeals clearly erred in affirming the trial court’s dismissal of the two authorized juvenile delinquency petition cases..... | 14 |
| Issue Preservation | 14 |
| Standard of Review..... | 14 |
| Discussion..... | 14 |
| A. Juvenile delinquency proceedings are quasi-criminal in nature | 14 |
| B. The Court of Appeals clearly erred in affirming the family court’s <i>sua sponte</i> dismissal of the two formally authorized petition cases | 17 |
| 1. The Court of Appeals also clearly erred when it misconstrued a section of the CVRA imposing notification obligations on the family courts as granting family courts the power to divert and dismiss those juvenile delinquency cases that involve crime victims, while conversely shielding delinquency cases that did not victimize individuals from this arbitrary dismissal power..... | 18 |
| 2. The Court of Appeals clearly erred when ruling that the <i>Lee</i> case recognized that the family court’s inherent authority empowered the family court to transfer an authorized juvenile delinquency case off of the formal family court docket and then dismiss it, over the prosecutor’s objection | 22 |

| | | |
|-----|---|----|
| a. | The <i>Lee</i> ruling was expressly limited to interpreting the notification obligations imposed upon the court through section 36b of the CVRA, and did not hold that family courts had the broad power to unilaterally dismiss any authorized juvenile delinquency case..... | 22 |
| b. | The Court of Appeals clearly erred when it misinterpreted <i>Lee</i> as expanding the family court’s inherent powers to the extent that it ruled that family courts can dismiss any formally authorized juvenile delinquency case so long as “there is also no authority prohibiting the trial court from taking such an action.” | 27 |
| 3. | The Court of Appeals clearly erred when it ruled that the separation of powers doctrine did not prevent the family court from dismissing two authorized juvenile delinquency cases over the prosecutor’s objection | 32 |
| a. | Courts are not permitted to share the executive branch prosecutor’s authority to make discretionary litigation decisions on cases | 35 |
| b. | The published Court of Appeals decision created binding precedent that eviscerated the separation of powers doctrine established by Const 1963, art 3, § 2, as it applies to discretionary litigation decisions made by the executive branch prosecutor and the Legislature’s excusive power to legislate | 39 |
| 4. | The Court of Appeals used the wrong standard of review when it affirmed the trial court’s erroneous ruling | 43 |
| II. | Relief Requested..... | 45 |

INDEX OF AUTHORITIES CITED

| <u>CASES</u> | <u>PAGE</u> |
|--|-------------|
| <i>Beadling v Governor</i> , 106 Mich App 530; 308 NW 2d 269 (1981)..... | 33 |
| <i>Bolt v City of Lansing</i> , 459 Mich 152; 587 NW 2d 264 (1998) | 32 |
| <i>Breed v Jones</i> , 421 US 519; 95 S Ct 1779; 44 L Ed 2d 346 (1975)..... | 16 |
| <i>Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass’n (On Remand)</i> , 317 Mich App 1; 894 NW2d 758 (2016)..... | 30 |
| <i>Coldwater v Consumers Energy Co</i> , 500 Mich 158; 895 NW2d 154 (2017)..... | 19, 21, 30 |
| <i>Dearborn Twp v Dearborn Twp Clerk</i> , 334 Mich 673;55 NW 2d 201 (1952)..... | 32, 33 |
| <i>Genesee Prosecutor v Genesee Circuit Judge (‘Genesee II’)</i> , 391 Mich 115; 215 NW 2d 145 (1974) | 35, 42 |
| <i>In re Gault</i> , 387 US 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967)..... | 15, 16 |
| <i>In re Tiemann</i> , 297 Mich App 250; 823 NW2d 440 (2012) | 14, 44 |
| <i>In re Winship</i> , 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970)..... | 16 |
| <i>Johnson v Recca</i> , 492 Mich 169; 821 NW2d 520 (2012)..... | 19 |
| <i>Judicial Attorneys Ass’n v Michigan</i> , 459 Mich 291; 586 NW 2d 894 (1998) | 33 |
| <i>Myers v. United States</i> , 272 US 52; 47 SCt 21; 71 Led 160 (1926)..... | 32 |
| <i>Okrie v State</i> , 306 Mich App 445; 857 NW 2d 254 (2014)..... | 31, 33 |
| <i>People v Alton (In re Alton)</i> , 203 Mich App 405; 513 NW 2d 162 (1994) | 17 |
| <i>People v Anderson</i> , 298 Mich App 178; 825 NW 2d 678 (2012)..... | 16 |
| <i>People v Barksdale</i> , 219 Mich App 484; 556 NW 2d 521 (1996)..... | 36, 42 |
| <i>People v Calloway</i> , 469 Mich 448; 671 NW2d 733 (2003) | 33, 39 |
| <i>People v Carey (In re Carey)</i> , 241 Mich App 222; 615 NW 2d 742 (2000)..... | 16, 17, 40 |
| <i>People v Chapel (In re Chapel)</i> , 134 Mich App 308; 350 NW2d 871 (1984) | 15 |
| <i>People v Conat</i> , 238 Mich App 134; 605 NW 2d 49 (1999)..... | passim |
| <i>People v Ford</i> , 417 Mich 66; 331 NW2d 878 (1982)..... | 33, 35, 38 |
| <i>People v Garrison</i> , 495 Mich 362; 852 NW 2d 45 (2014)..... | x, 19, 20 |
| <i>People v Grant</i> , 455 Mich 221; 565 NW2d 389 (1997) | 19 |
| <i>People v Harverson</i> , 291 Mich App 171; 804 NW2d 757 (2010)..... | 16 |
| <i>People v Heiler</i> , 79 Mich App 714; 262 NW 2d 890 (1977)..... | 37, 42 |
| <i>People v Jones</i> , 252 Mich App 1; 650 NW 2d 717 (2002)..... | 35 |
| <i>People v Kerr (In re Kerr)</i> , 323 Mich App 407; 917 NW 2d 408 (2018) | 16, 17 |

| | |
|--|----------------|
| <i>People v Killebrew</i> , 416 Mich 189; 330 NW2d 834 (1982)..... | 34 |
| <i>People v Lee (In re Lee)</i> , 282 Mich App 90; 761 NW 2d 432 (2009)..... | passim |
| <i>People v McCracken</i> , 124 Mich App 711; 335 NW2d 131 (1983)..... | 34, 35, 38 |
| <i>People v McDaniel (In re McDaniel)</i> , 186 Mich App 696; 465 NW 2d 51 (1991)..... | 16 |
| <i>People v Mitchell</i> , 428 Mich 364; 408 NW 2d 798 (1987)..... | 43 |
| <i>People v Morrow</i> , 214 Mich App 158; 542 NW2d 324 (1995)..... | 36, 37, 42 |
| <i>People v Muniz</i> , 259 Mich App 176; 675 NW2d 597 (2003)..... | 35, 36, 42 |
| <i>People v Nelson</i> , 66 Mich App 60; 238 NW 2d 201 (1975),..... | 38, 43 |
| <i>People v Palm</i> , 245 Mich 396; 223 NW 67 (1929)..... | 34 |
| <i>People v Pinkney</i> , _ Mich _; _NW3d_; MSC docket 154374 (May 1, 2018)..... | 14 |
| <i>People v Robinson (In re Robinson)</i> , 180 Mich App 454; 447 NW 2d 765 (1989) ... | 17, 36, 40, 42 |
| <i>People v Siebert</i> , 450 Mich 500; 537 NW2d 891 (1995)..... | 35, 37 |
| <i>People v Sierb</i> , 456 Mich 519; 581 NW 2d 219 (1998)..... | 37, 42 |
| <i>People v Smith</i> , 496 Mich 133; 852 NW2d 127 (2014)..... | passim |
| <i>People v Smith</i> , 502 Mich 624; 918 NW 2d 718 (2018)..... | 39 |
| <i>People v Trinity</i> , 189 Mich App 19; 471 NW 2d 626 (1991)..... | 34, 39 |
| <i>People v Venticinque</i> , 459 Mich 90; 586 NW 2d 732 (1998)..... | 35, 36, 42 |
| <i>People v Williams</i> , 147 Mich App 1; 382 NW 2d 191 (1985)..... | passim |
| <i>People v Wilson (In re Wilson)</i> , 113 Mich App 113; 317 NW 2d 309 (1982)..... | passim |
| <i>People v. Kimble</i> , 470 Mich 305, 684 NW2d 669 (2004)..... | 14 |
| <i>Sharp v Genesee Co Election Comm</i> , 145 Mich App 200; 377 NW2d 389 (1985)..... | 32 |
| <i>State Farm Fire & Cas Co v Old Republic Ins Co</i> , 466 Mich 142; 644 NW2d 715 (2002) .. | 19, 30 |
| <i>Sun Valley Foods Co v Ward</i> , 460 Mich 230; 596 NW2d 119 (1999)..... | 19 |
| <i>Taylor v Gate Pharm</i> , 468 Mich 1; 658 NW 2d 127 (2003)..... | 31, 33 |
| <i>Traverse City Sch Dist v Attorney General</i> , 384 Mich 390; 185 NW 2d 9 (1971)..... | 32 |
| <i>US v Batchelder</i> , 443 US 114; 99 SCt 2198; 60 Led 2d 755 (1979)..... | 36, 42 |

STATUTES

| | |
|------------------------|--------|
| MCL 712A.1..... | 38 |
| MCL 712A.1(2)..... | 6 |
| MCL 712A.18..... | 9 |
| MCL 712A.18(1)(a)..... | passim |

MCL 712A.2(a)(1)..... 17
MCL 712A.2f..... passim
MCL 712A.2f(1)..... 26, 29
MCL 712A.2f(2)..... x, 23, 26, 29
MCL 712A.f..... 23
MCL 722.821 18
MCL 750.360..... 14
MCL 750.81(2)..... 14
MCL 768.27a 17
MCL 780.621(11)..... 41
MCL 780.751 19
MCL 780.786b..... passim
MCL 780.786b(1)..... x, 23, 27
MCL 791.234(11)..... 41

MISCELLANEOUS AUTHORITIES

Const 1963, art 1, § 13 35
Const 1963, art 1, § 24..... x, 19, 20, 22
Const 1963, art 3, § 2..... ix, 32, 40, 43
Const 1963, art 7, § 4..... 35
House Fiscal Agency Analysis of Senate Bill 251 of 2015 23, 26
Public Act 185 of 2016 23, 26, 28, 29
Public Act 503 of 2000 19

RULES

MCR 2.613(A)..... 25
MCR 3.932..... 25
MCR 3.932(A) 4
MCR 3.932(B) 21
MCR 3.932(C) passim
MCR 3.932(C)(2)..... 26, 29
MCR 3.935..... 4

MCR 3.942(C) 17
MCR 3.943(E)(1)..... 9
MCR 3.943(E)(2)..... 9
MCR 7.215(C)(2)..... 43
MCR 7.303(B)(1)..... viii
MCR 7.305(A)(1)(a)..... viii
MCR 7.305(B) ix, x
MCR 7.305(C)(2)..... viii

STATEMENT REGARDING JURISDICTION OF THE COURT

MCR 7.305(A)(1)(a) Jurisdiction of the Court

On September 19, 2019, the Court of Appeals issued a published opinion affirming the trial court's dismissal of the two juvenile delinquency cases which are the subject of Appellant's appeal. [Attached as **Appendix A** and **Appendix B**, respectively] Jurisdiction is therefore proper for Appellant's application seeking leave to appeal this decision. MCR 7.303(B)(1) and MCR 7.305(C)(2).

STATEMENT REGARDING MCR 7.305(B) GROUNDS FOR APPEAL

MCR 7.305(B) Grounds for Appeal

- A. The Court of Appeals' published opinion overturned this Court's decisions interpreting the separation of powers doctrine, and in doing eviscerated Const 1963, art 3, § 2, as it applies to discretionary litigation decisions made by the executive branch prosecutor.**

This application challenges the above cited published decision on the grounds that it disregarded clear and binding precedent and interpreted the separation of powers doctrine in such a way that it eviscerates the executive branch prosecutor's exclusive power to make discretionary litigation decisions on cases. This decision disregarded binding caselaw from the last half century interpreting the separation of powers doctrine set forth in Const 1963, art 3, § 2, including this Court's recent decision in *People v Smith*, 496 Mich 133; 852 NW2d 127 (2014), and erroneously inserted an improper conditional requirement into this doctrine, i.e. that this doctrine *only* bars a court from making its own unilateral litigation decisions on the prosecutor's case if the court's actions occur *after* a plea or verdict has been accepted by the court. This decision directly contradicts both caselaw and the purpose of the separation of powers doctrine.

Under this decision, if an arraigning judge does not like the prosecutor's choice of charges, the published decision in this case allows that judge to amend the charging document as it pleases, or if a trial court decides that an offender deserves a charge reduction (or even a charge enhancement), it can add or remove charges, allow the offender to plea to a lesser charge, and even dismiss the case entirely, all without the consent of the prosecutor, as long as the discretionary litigation decisions made by the court occur before a plea or verdict is entered in the case. *In re Diehl*, at 14-15. These results are entirely inconsistent with Const 1963, art 3, § 2.

- B. The Court of Appeals' published opinion improperly interpreted a notice provision of a CVRA law enacted for the purpose of enhancing the rights of crime victims in a way that victimizes crime victims by ruling that this notice provision granted courts the authority to dismiss any delinquency offense that involves a crime victim.**

The Court of Appeals' published decision interpreted the notice provision in section 36b of the

William Van Regenmorter Crime Victim’s Rights Act [“CVRA”], codified as MCL 780.786b, as giving family courts the power to unilaterally dismiss any delinquency offense that involves a crime victim, holding that “on the basis of the plain language of MCL 780.786b(1), the trial court was permitted to remove the second and third petitions from the adjudicative process....” *In re Diehl*, at 8, 11-12. However, this ruling conflicts with both the plain language of this statute, as well as its legislative purpose.

The purpose of the CVRA, and Const 1963, art 1, § 24, was to bring some balance to the criminal justice system by enhancing the protections given to Michigan’s crime victims. *People v Garrison*, 495 Mich 362, 368; 852 NW 2d 45 (2014). The language used by the Legislature when enacting MCL 780.786b clearly and unambiguously imposes four notice obligations on the family court, along with a requirement that restitution be provided, if a delinquency case is diverted by the family court. MCL 780.786b contains no language empowering a court to dismiss authorized juvenile delinquency cases that involve crime victims; and to read the conveyance of such a power into the CVRA gives this statute quite literally the *opposite effect* that was intended by the Michigan Legislature.

C. The grounds in MCR 7.305(B) have been met.

In addition, this published decision affirmed a dismissal that both bypassed the safeguards put in place by the Legislature to ensure that offenses committed by juveniles are only handled informally with the consent of the executive branch prosecutor and ignored the public policy decisions reflected in these legislative enactments. *See* MCL 712A.2f(2) & MCL 712A.18(1)(a). As such, this appeal involves substantial questions about the validity of legislative acts, involves significant (and constitutionally protected) public interests, involves legal principles of major significance to the state’s jurisprudence, was clearly erroneous and will cause material injustice, and conflicts with binding caselaw. MCR 7.305(B).

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals commit reversible error when it misconstrued a section of the CVRA imposing notification obligations on the family courts as affirmative authority empowering family courts to divert and dismiss juvenile delinquency cases that involve crime victims, while conversely shielding delinquency cases that did not victimize individuals from this arbitrary dismissal power?

Appellant contends the answer is: “Yes.”

Appellee contends the answer is: “No.”

II. Did the Court of Appeals commit reversible error when it ruled that the *Lee* case and the family court’s inherent authority empowered the family court to transfer an authorized juvenile delinquency case off of the formal family court docket and then dismiss it, over the prosecutor’s objection?

Appellant contends the answer is: “Yes.”

Appellee’s trial counsel appeared to answer this question: “Yes.”

III. Did the Court of Appeals commit reversible error when it ruled that the separation of powers doctrine did not prevent the family court from dismissing two authorized juvenile delinquency cases over the prosecutor’s objection?

Appellant contends the answer is: “Yes.”

Appellee contends the answer is: “No.”

IV. Did the Court of Appeals commit reversible error when it used the wrong standard of review when it affirmed the trial court’s erroneous ruling?

Appellant contends the answer is: “Yes.”

Appellee contends the answer is: “No.”

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Three separate original delinquency petitions were filed by the Prosecutor's Office against Respondent, alleging three separate violations of state law on three different dates. Each of these petitions was authorized by the Court, filed with the clerk of the court and placed on the Oakland County Family Court's docket, i.e. its formal calendar. Two of these original delinquency petition cases were later improperly dismissed by the trial court, *sua sponte*, after the Prosecutor's Office declined to dismiss these cases, reduce these charges, or approve the transfer of these two cases to the informal consent calendar; with the order dismissing the two delinquency petition cases being the subject of the present appeal.

Petition 1 – Domestic Violence

The first original delinquency petition filed against Respondent was issued by the Oakland County Prosecutor's Office on July 24, 2017. This petition, (hereinafter "Petition 1") arose as a result of a domestic violence incident on July 23, 2017, where Respondent was upset about being told to go to bed and then assaulted Respondent's adoptive mother, Ms. Diehl, by throwing various things at her, causing injury. (Tr 7-24-17, p 36) Fresh injuries were observed on Ms. Diehl that evening, including various cuts, scrapes and contusions to her arms, legs and head, and fresh blood running down her legs and arms when the police arrived on the scene. (Tr 7-24-17, p 36) Before police arrived on scene, Ms. Diehl had retreated outside the house with her twelve year old son Colin, periodically trying to talk to Respondent through the door in an attempt to calm him down. (Tr 7-24-17, pp 6 & 11-12)

After arguments, the Court found that the Petitioner sustained its burden of proof, and the petition was sent for authorization. (Tr 7-24-17, p 44) In light of the recency of this assault, along with Ms. Diehl's lack of recognition of the potential danger of the situation and the fact that this was not an isolated incident because the police had already been called to the family's residence

five times, Petitioner asked the court to detain Respondent. (Tr 7-24-17, p 44-45)

Respondent was not detained, but instead was released into the custody of his mother, Ms. Diehl, with the requirements of home detention and that she arrange for counseling for Respondent. (Tr 7-24-17, pp 49-50) The court concluded by finding that it was in the best interest of the Respondent and the public that the petition be authorized, and Petition 1 was signed for formal authorization. (Tr 7-24-17, p 51, *also see* item 8 on Petition 1, being the July 24, 2017 signature formally authorizing this petition). Petition 1 was filed and accepted by the clerk of the court on July 27, 2017. The matter was concluded at 2:39 pm on July 24, 2017. (Tr 7-24-17, p 51)

Petition 2 – Domestic Violence

The second original delinquency petition filed against Respondent was issued by the Oakland County Prosecutor's Office on July 26, 2017. This petition, (hereinafter "Petition 2") arose as a result of a domestic violence incident that occurred at 11:20 am on July 25, 2017, less than 24 hours after Respondent was released from custody into home detention supervised by his mother. Another preliminary hearing was held, and testimony was given that while Ms. Diehl was the victim of another assault by Respondent, she did not contact police, but instead they were called by Respondent's neighbor (Mr. Denoe), who heard a lot of yelling back and forth between Respondent and Ms. Diehl, and then observed Respondent punch Ms. Diehl in the stomach, knocking her to the ground, and then either stomp or kick Ms. Diehl's legs while she was on the ground, until she was able to say something to get Respondent to stop. (Tr 7-26-17, p 6) Injuries were observed on Ms. Diehl, but police were not able to tell whether the injuries were a result of the July 25th incident, or from Respondent's July 23rd assault on Ms. Diehl. (Tr 7-26-17, p 11)

The Court found that the petition should be authorized, and Petition 2 was signed for formal authorization. (Tr 7-26-17, pp 19-20 *also see* item 8 on Petition 2, being the July 26, 2017 signature formally authorizing this petition) Petition 2 was filed and accepted by the clerk of the court on

July 27, 2017. The Court ruled that it was contrary to Respondent's welfare to be placed back at home, and that reasonable efforts had been made to avoid the need for out of home placement. (Tr 7-26-17, pp 20-21 & 27)

Respondent's Plea to Petition 1

The two domestic violence petitions were set for pretrial on August 8, 2017, where Respondent tendered a no contest plea to Petition 1 (dated July 24, 2017, alleging domestic violence against his mother on July 23, 2017). (P 8-8-17, pp 3-11) A plea form was filled out by Respondent, with the assistance of his attorney, and was submitted to Judge Valentine at the start of the plea. (P 8-8-17, p 4) The police report was used as the factual basis to support the plea. (P 8-8-17, pp 10-11) Respondent's attorney indicated that Respondent was not prepared to enter a plea to Petition 2 (dated July 26, 2017, alleging domestic violence against his mother on July 25, 2017), noting that after he received discovery on Petition 2 his position might change. (P 8-8-17, p 3) After the plea was taken, Respondent's mother, Ms. Diehl acknowledged that Respondent "went into a rage" and "in his rage, injuries were caused." (P 8-8-17, p 12) Respondent remained in custody, pending a psychological evaluation. (P 8-8-17, p 20)

Disposition on Petition 1

Disposition (sentencing) was held on Petition 1 on September 1, 2017. The case worker noted that a psychological evaluation was done on Respondent, which recommended individual and family counseling, anger management and participation in a mentor program. (D 9-1-17, p 4) Respondent was placed on standard probation, allowing Respondent to leave Children's Village and return home. (D 9-1-17, p 15) The family court judge then stated to the Assistant Prosecutor "[w]ith regard to the additional charge, I'll allow you to determine how you're going to handle that, if you want that in a place for safeguarding any additional behavior." (D 9-1-17, p 16) Judge Valentine concluded the hearing by stating to Respondent "Mr. Diehl hang in there, buddy." (D 9-

1-17, p 19)

Petition 3 – Larceny in a Building

On November 28, 2017, Respondent was caught taking money at Clifford Smart Middle School, from the purse of a teacher at the school (a teacher who did not teach any of Respondent's classes). A complaint requesting a delinquency petition was completed by the Oakland County Sheriff's Office, and a juvenile delinquency petition alleging that Respondent committed Larceny in a Building (hereinafter "Petition 3") was issued by the Prosecutor's Office on January 11, 2018. Because Petitioner was not seeking the detention of Respondent at that time, a preliminary inquiry was held (as opposed to the preliminary hearings held on Petition 1 and Petition 2. *See* MCR 3.932(A); MCR 3.935) Petition 3 was formally authorized by the Court on January 18, 2018, and was filed and accepted by the clerk of the court on January 23, 2018.

Respondent's Plea to Petitions 2 and 3

On January 30, 2018, a pretrial was held on Petition 2 and Petition 3. Respondent's attorney indicated that his client was tendering no contest pleas to Petition 2 and Petition 3; submitting a plea form filled out by his client, with his assistance, at the start of this plea. (P 1-30-18, p 3) Before taking the plea, the family court judge asked the case worker what the likely recommendation would be for the disposition on the two new Petitions, the case worker responded that they would likely recommend intensive probation for Respondent. (P 1-30-18, pp 5-6)

The family court judge indicated that she was going to take the plea, and elicited the testimony necessary to establish that Respondent's plea was knowingly, intelligently and voluntarily tendered. (P 1-30-18, pp 7-11) The police reports were used as the factual basis to sustain Respondent's plea to Petition 2 and Petition 3. (P 1-30-18, p 11) Respondent's attorney then stated that he was satisfied with the factual basis of the plea, and further stated that "the Court has complied with the court rule regarding the taking of the plea." (P 1-30-18, pp11-12) The family

court judge reviewed the police reports for the two incidents, and held:

And based upon the police reports, I am satisfied with regard to your plea. And I believe that your plea is given knowingly, voluntarily and willingly made. *And I will accept your plea of no contest.* [Emphasis added] (P 1-30-18, p 12)

The family court judge continued by verifying that Respondent had gone over with his attorney, and signed, the plea form that was submitted to the Court. (P 1-30-18, p 12) The family court judge verified that Respondent's mother had also gone over, and signed, the plea form submitted to the Court. (P 1-30-18, pp 12-13) When asked, Respondent's mother confirmed for the family court judge that she could see no reason why she shouldn't accept the plea tendered by Respondent. (P 1-30-18, p 13) A disposition date for Petition 2 and Petition 3 was then discussed. (P 1-30-18, p 13)

The family court then *sua sponte* stated "Mr. Diehl, after having a sidebar and after considering this police report a little bit more [without identifying which of the two police reports she was referring to], I am going to – I'm going to strike your plea." (P 1-30-18, p 13) The family court judge then continued by stating that she was "going to take your plea under advisement, okay? And I'm going to have you guys come back in three months." (P 1-30-18, p 13) Disposition (sentencing) for Petition 2 and Petition 3 was then set for April 24, 2018. (P 1-30-18, p 14) The family court judge then stated that while she was going to "hold everything under advisement," she was still going to seek a dispositional recommendation from the out of home screening committee. (P 1-30-18, p 14) The family court judge clarified her reason for taking the pleas under advisement, stating that "I can't give more probation or more services to you than you have right now even if I sentence you in a disposition." (P 1-30-18, p 14)

On the April 24, 2018 disposition date for disposition for Petition 2 and Petition 3, the hearing started out with the family court judge telling Respondent "you look very nice," followed by the question "did you dress up for me," to which Respondent answered affirmatively. (D 4-24-18, p

3) The case worker then stated that her recommended level of supervision for Respondent would not change, as a result of Petition 2 and Petition 3, noting that they had imposed a program on Respondent already as a consequence for both the offenses in Petition 2 and Petition 3, as well as for “the continued police contact at the family home between the months of February and March.” (D 4-24-18, p 4-5)

The family court judge then stated “Okay. And then with regard to – I thought we addressed larceny in a building before,” followed by “I think both of those, and I – he would like to – he want--.” (D 4-24-18, p 5) At that point Respondent’s counsel finished Judge Valentines statement with “held them in abeyance, I believe,” to which Judge Valentine stated “Yep. *He wanted to give a plea, and I wouldn’t accept it.*”[Emphasis added] (D 4-24-18, p 5) The Assistant Prosecutor asked the family court judge to accept the plea, to which the family court judge responded only “Denied,” responding to additional inquires with “I’m not accepting the plea. I’m not going to accept the plea.” (D 4-24-18, p 7) The family court judge stated that she disagreed with the Prosecutor’s Office’s decision to continue proceeding on the two cases because she felt that it was “giving him two additional charges,” and “just stacking a child’s juvenile record” in light of the fact that no additional consequences would be imposed through the disposition for these two cases. (D 4-24-18, p 7) The family court judge explained that this was the reason “I am holding everything in abeyance.” (D 4-24-18, p 7) The family court judge continued by asking Respondent “are you 12, you’re 10?” to which Respondent answered that he was actually “thirteen.” (D 4-24-18, pp 7-8) The family court judge stated that she did not feel that giving Respondent a “huge criminal record”¹ was in the best interest of justice or Respondent’s future. (D 4-24-18, pp 7-8)

¹ See MCL 712A.1(2), which provides that except where specifically provided, juvenile delinquency proceedings do not create criminal records because they “are not criminal proceedings.”

On May 30, 2018 the People filed a two page document entitled “The People’s Notice of Objection to Consent Calendar,” indicating the prosecutor’s objection to placing the two delinquency cases on the informal consent calendar and further requesting that the family court either re-accept the pleas tendered by Respondent and proceed to disposition, or reject the pleas and allow the two petitions to be set for jury trial in a timely manner.

At the next ‘review’ hearing, the family court judge reiterated her position that, because no additional consequences would be imposed from the two delinquency cases, she did not want to proceed to disposition on them because she felt that it would “just make a record of offenses without benefit to a juvenile.” (R 7-16-18, p 4) The Assistant Prosecutor noted that the prosecutor’s office was the governmental entity tasked with making litigation decisions when charges were issued in juvenile cases, not the Court, and that Michigan law required the court to either proceed to disposition on Petition 2 and Petition 3, or in the alternative, to reject the pleas so that the petitions could be set for jury trial and be resolved in a timely manner, and that the consent statute was not available in these cases. (R 7-16-18, p 4-5) Respondent’s trial attorney agreed and stated “I will, as an officer of the court, indicate that I don’t have an argument against Mr. Nael’s statements based upon the law and the statute governing consent. But I will leave it to your discretion and Miss Strehl’s [the case worker] discretion.” (R 7-16-18, pp-5-6)

The case worker acknowledged that Respondent had another contact with the White Lake Police Department since the last hearing. (R 7-16-18, p 7) The case worker also indicated that Respondent’s mother said that she paid the teacher back by sending money to the school, and concluded by recommending that the terms of probation continue. (R 7-16-18, p 8)

The family court then addressed the request to accept Respondent’s pleas and proceed to disposition on Petition 2 and Petition 3 by stating that her job “is to make sure if we’re going to be charging juveniles, that we have some procedures that we’re putting in place,” again reiterating

her position she believed that litigation on the two cases should be discontinued because no additional consequences would be imposed from the two charges. (R 7-16-18, p 13) In response, the Assistant Prosecutor noted that separation of powers doctrine prevented the court from participating in discretionary decision making about how the cases should be litigated, as that function was solely assigned to the prosecutor. (R 7-16-18, p 13)

The judge then began engaging in unsolicited advocacy on Respondent's behalf, seeking a plea deal for Respondent on Petition 2 and Petition 3 by responding to the Assistant Prosecutor's argument with the question "So, would you be offering a consent on these at all?" (R 7-16-18, p 14) The Assistant Prosecutor responded that he was continuing to look into potential resolutions for the cases, again reasserting that the law required the court to either accept the plea or set the matters for trial. (R 7-16-18, p 14) The Assistant Prosecutor then renewed his request for Judge Valentine to either accept the pleas and set a disposition on Petition 2 and Petition 3, or in the alternative, to reject the pleas and set the two matters for jury trial. (R 7-16-18, p 14) Respondent's counsel again agreed with the Assistant Prosecutor's argument that the law required the trial court to either sentence Respondent or set aside the pleas and set the matters for trial by stating "well, I think, like I indicated, I cannot disagree with – I'm not sure that I know that I'm saying this – but I can't disagree with Mr. Nael's dissertation of the procedural issues and where we're at." (R 7-16-18, p 15) When the trial court asked Respondent's counsel "If I don't accept the plea, are you intending on going to trial?" Respondent's counsel responded "no." (R 7-16-18, p 15)

The trial court then ordered Respondent's attorney to submit a request for permission from the prosecutor to place the cases onto the informal consent calendar, further stating "I'm going to let you guys come to me and tell me if you have an agreement before I do an opinion then. So I'm not going to accept the plea because I want to understand – " (R 7-16-18, p 16) The Assistant Prosecutor stated that he would consider with an open mind whatever mitigating information is

provided to him by Respondent's counsel, but that the Prosecutor's Office was not going to engage in any 'consent for disposition' negotiations, because the only two legal options available to the Court for Petition 2 and Petition 3 were to either accept the pleas or reject the pleas and set the matter for trial. (R 7-16-18, pp 17-19) The Assistant Prosecutor then pointed out that since Respondent already had an adjudication that allowed for whatever probationary conditions were necessary, Judge Valentine could issue a "warning and dismiss" on Petition 2 and Petition 3.² The warn and dismiss option was established in MCL 712A.18(1)(a) by the Legislature to address the circumstance where a juvenile offender is factually responsible for a charged offense, but no additional services were needed from the court. In that situation, pursuant to MCL 712A.18(1)(a), the court simply enters the adjudication into the family court file and terminates jurisdiction over the juvenile, as to the charged offense that was warned and dismissed. (R 7-16-18, pp 19-20) The judge responded to this argument by correctly noting that under the 'warn and dismiss' option, the

² Unlike adult criminal law, which assigns a specified punishment to the sentencing for each criminal offense, punishment is not the goal in juvenile delinquency cases. For this reason, no set punishment is attached to delinquency petition charges. Instead, the needs of the juvenile drive the terms of the disposition (sentence) for each delinquency petition. This means that a charge that would have been a felony mandating significant punishment in adult court might result in minimal consequences for a juvenile, and conversely, a charge that would have carried minimal punishment as an adult could result in significant consequences to a juvenile; all dependent upon the specific needs of the specific juvenile. *See* MCL 712A.18 (which sets forth the 'sentencing' options available to the family court when holding a disposition on a juvenile delinquency case); *Also see* MCR 3.943(E)(1). As a result, when a juvenile is already under the jurisdiction of the family court for an earlier delinquency petition, and a new delinquency petition is brought against the juvenile, the family court often engages in what is termed a 'warning and dismissal' of the new delinquency petitions. MCL 712A.18(1)(a) What is done with a 'warning and dismissal' is that a plea is taken and accepted (or a trial is conducted) on the new delinquency petition, and at disposition (sentencing) for the new petition, the family court enters the adjudication and then immediately ends the court's jurisdiction of the minor as to the new petition (because the earlier petition already gave the court jurisdiction over the juvenile, including the power to impose whatever supervision terms are appropriate for the juvenile). MCL 712A.18(1)(a); MCR 3.943(E)(2). As Judge Valentine correctly noted, when delinquency petitions are warned and dismissed, the adjudication remains a part of the juvenile's family court record.

offenses would remain a part of Respondent's family court record. (R 7-16-18, p 20) The Assistant Prosecutor agreed with this statement, and noted that "that's an effect that neither you nor I are in a position to control at this point," to which the judge responded "Okay. I'm going to just make sure I can control it." (R 7-16-18, p 20)

The family court judge continued advocating for a plea deal for Respondent, asking the Prosecutor's Office to either reduce or eliminate the charges in the two cases by stating "[s]o, I'm not suggesting it has to be consent. I'm suggesting that there needs to be" before reiterating that no additional services would be provided to Respondent from the dispositions on the cases. (R 7-16-18, p 19) When later asked by Respondent's counsel if the court was still ordering him to submit a mitigation memorandum to the Prosecutor's Office, the court responded with:

I would love for Mr. Nael to come forward and tell me he has a plan in place and that the prosecutor's office have looked at everything and they want to reduce it, or they want to do something differently, that would be great. In the meantime, I will look at everything and determine whether or not I can proceed and in what direction." (R 7-16-18, p 20)

The Assistant Prosecutor was then asked how much time he would need to investigate the trial court's request to offer a plea deal to Respondent "have some other conversation with the prosecutor's office with regard to the charges." The Assistant Prosecutor responded that any discussion about the court's request to reduce the charges would only occur after the pleas were accepted for Petition 2 and Petition 3, and disposition was scheduled. (R 7-16-18, pp 21-22)

Through a document dated July 26, 2018, yet received for filing by the Oakland County Clerk on August 9, 2018, Judge Valentine issued a "notice to the prosecutor of removal of the case from the adjudicative process." This "notice" began by quoting the legal summary contained in section 1.3(A)(2) 'Criminal Penalties' section of the Juvenile Justice Benchbook authored by the Michigan Judicial Institute, wherein the court reiterated its observation that Respondent was already receiving all necessary services through the jurisdiction arising from the domestic violence offense

in Petition 1.

This ‘notice’ then block quoted section 36b of the CVRA, being MCL 780.786b, which imposes an obligation upon the courts to ensure that crime victims are notified before any juvenile case is “diverted, placed on the consent calendar, or made subject to any other pre-petition or pre-adjudication procedure that removes the case from the adjudicative process.” This notice indicated that Respondent’s mother claimed that she paid \$57.98 in restitution, although there was no indication that the court took any steps to verify this claim. This notice then stated that because no additional consequences would be imposed from the dispositions of the offenses in Petition 2 and Petition 3, the court believed that continuing to litigate the two petitions to disposition would ‘punish’ Respondent, by placing the two delinquency adjudications onto his family court record, further stating that it was the court’s opinion that “[a]dding these charges” without providing additional services was not in the best interests of Respondent or the public. *Id.*, at page 5. The notice ended with a statement that the court intended on “*unauthorizing* and, thereby, removing the petitions from the adjudicative process.” [Emphasis added] *Id.* No caselaw, statute or Court Rule was cited in this notice supporting the court’s *sua sponte* contention that it had the authority to “unauthorize” and then dismiss the two authorized delinquency petitions, other than the notice provision of section 36b of the CVRA. A hearing on this ‘notice’ was set for the already existing pretrial date of September 10, 2018.

On September 10, 2018, a hearing was held regarding the court’s notice of intent to unauthorize the two juvenile delinquency cases arising from Petition 2 and Petition 3. The Assistant Prosecutor reiterated its position that, because the delinquency cases were authorized and currently on the Court’s formal docket, the *only* procedural options available to the Court (that were consistent with Michigan law) were to either accept the pleas on the petitions and set the matters for disposition, or to reject the pleas and set the matters for trial. (H 9-10-18, pp 4-8) The Assistant Prosecutor

noted that MCL 780.786b did not empower the Court to remove the formally authorized cases from the adjudicative process, and that the court's proposed actions constituted a violation of the separation of powers doctrine and would sidestep the legal procedures in place that govern juvenile delinquency petitions. (H 9-10-18, pp 4-6) At the end of the hearing, the court ruled that a notification provision of the CVRA, being 780.786b, gave the court the authority to unauthorize and dismiss Petition 2 and Petition 3. (H 9-10-18, p 11) The court concluded by finding that because no additional consequences would be imposed at the dispositional stage for the charges in Petition 2 and Petition 3, the two juvenile delinquency cases were being unauthorized and dismissed because the court was "not willing" to allow the charges to be entered into Respondent's family court file. (H 9-10-18, pp 11-12)

Through an Order dated September 10, 2018 (but stamped as having been received for filing with the Oakland County Clerk on October 3, 2018), Judge Valentine effectuated the ruling detailed in the September 10, 2018 hearing, and unauthorized Petition 2 and Petition 3; dismissing these cases and removing both of the petitions from the formal adjudicative process. It is from this final order of dismissal of Petition 2 (alleging that on July 25, 2017, Respondent committed domestic violence by punching his mother in the stomach, knocking her down, and then kicking her legs until she was able to talk him into stopping) and Petition 3 (alleging that Respondent committed a larceny in a building on November 28, 2017, by stealing money from a teacher's purse in his school), that the People appealed to the Michigan Court of Appeals.

In the published opinion underlying the present application seeking leave to appeal, the Court of Appeals affirmed the family court's dismissal of the two authorized juvenile delinquency petitions on two grounds, being (1) that section 36b of the CVRA, which imposes notification obligations on the family court, gave the family court the power to dismiss those juvenile delinquency petitions that involve crime victims, and (2) that the absence of caselaw specifically

prohibiting a family court from “unauthorizing” and then dismissing juvenile delinquency cases on the formal family court docket meant that the family court had the inherent authority to take these actions.³ *In re Diehl*, at 9-12. The Court of Appeals then rejected Appellant’s challenge to the dismissals on the grounds that they constituted a violation of the separation of powers doctrine, ruling that the separation of powers doctrine, as discussed recently by this Court in *Smith*, 496 Mich at 140-141, did not apply to the dismissal of the cases challenged in this appeal because the charges were dismissed before a plea or verdict had been accepted by the court, i.e. before an adjudication had occurred on these charges.

It is from the Court of Appeals’ published decision that Petitioner now seeks leave to appeal. Further facts may be included in the argument section, where relevant to the issues presented.

³ Of note in the factual recitation of the Court of Appeals’ decision was a statement about Respondent’s post-dismissal behavior that was not part of the underlying record in this case and paints Respondent in a bit of an inaccurate light. Specifically, the Court of Appeals stated that his completion of the terms of probation imposed through the first juvenile delinquency petition demonstrated that the trial court’s actions on the case were correct. *In re Diehl*, at 8 & 13. What the Court of Appeals failed to note, in its follow-up into Respondent’s family court interactions, is that as recently as the date of oral argument on the Court of Appeals appeal, Respondent was housed in Oakland County’s Children’s Village due to yet another domestic violence charge where Respondent assaulted his mother. Respondent has since been released from that detention program, only to be rearrested on his fifth charge of assaulting his mother. At a pretrial on this new charge the caseworker indicated that Respondent was also being investigated by police for another recent incident where he exposed himself to his therapist.

ARGUMENT

I. The Court of Appeals clearly erred in affirming the trial court's dismissal of the two authorized juvenile delinquency petition cases

ISSUE PRESERVATION:

The People objected to the court's *sua sponte* dismissal of Petition 2 and Petition 3, therefore, this issue was preserved for appeal.

STANDARD OF REVIEW:

The People's appeal raises questions of law that are reviewed de novo on appeal. *In re Tiemann*, 297 Mich App 250, 257; 823 NW2d 440 (2012); *People v. Kimble*, 470 Mich 305; 684 NW2d 669 (2004); *People v Pinkney*, _ Mich _; _NW3d_; MSC docket 154374 (May 1, 2018).

DISCUSSION:

Respondent was brought before the family court on juvenile delinquency petitions alleging three separate violations of state law. Petition 1 alleged that Respondent committed domestic violence by assaulting his mother on July 23, 2017, in violation of MCL 750.81(2). Petition 2 alleged that Respondent committed domestic violence by assaulting his mother on July 25, 2017, in violation of MCL 750.81(2). Petition 3 alleged that Respondent committed larceny in a building on November 18, 2017, in violation of MCL 750.360. Respondent offered pleas to all three delinquency cases, but the family court only formally accepted his plea on Petition 1, ultimately dismissing Petition 2 and Petition 3, *sua sponte*, when the prosecution did not agree to offer the plea bargain that was requested by the family court on behalf of Respondent. The People's appeal challenges the Court of Appeals' affirmance of the trial court's *sua sponte* dismissal of two factually separate and legally authorized juvenile delinquency petition cases, identified in the facts as Petition 2 and Petition 3.

A. Juvenile delinquency proceedings are quasi-criminal in nature

While juvenile delinquency proceedings have been labeled civil proceedings by the

Legislature, courts have long recognized that they are actually “quasi-criminal” in nature. *People v Williams*, 147 Mich App 1, 6; 382 NW 2d 191 (1985), citing *People v Chapel (In re Chapel)*, 134 Mich App 308; 350 NW2d 871 (1984). The recognition that courts must look past its civil label, when evaluating delinquency cases, dates back over half a century, when the United States Supreme Court in *In re Gault*, 387 US 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967) discussed both the laudable purpose of the juvenile justice laws, as well as the unintended negative impact that these proceedings had upon the rights of the juvenile and the fair and efficient administration of justice. The *Gault* Court noted that the early reformers in the juvenile court movement had the goal of discarding the notion of punishment in favor of rehabilitation, adopting the Latin term *parens patriae* to describe the state’s involvement with the juvenile. *Gault*, 387 US at 15-16. However the *Gault* Court also recognized that the broad discretion accompanying the juvenile court’s rehabilitative model created significant procedural problems:

Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is -- to say the least -- debatable. And in practice, as we remarked in the *Kent* case, supra, the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts" The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. The Chairman of the Pennsylvania Council of Juvenile Court Judges has recently observed: "Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process." *Gault*, 387 US at 18-19.

As a result, the *Gault* Court recognized that it was necessary to look beyond the “civil label-of-convenience which has been attached to juvenile proceedings” so that the juvenile delinquency

proceedings could be candidly appraised. *Breed v Jones*, 421 US 519, 529; 95 S Ct 1779; 44 L Ed 2d 346 (1975), citing *Gault*, 387 US at 21 & 49-50.

The *Gault* Court held that despite the civil label given to juvenile delinquency proceedings, the right to receive notice of the charges, the right to counsel, the constitutional privilege against self-incrimination and the right to confrontation and cross-examination are all applicable to juvenile delinquency cases in much the same manner that they were in adult criminal cases. *Gault*, 387 US at 34, 41, 55 & 57. In *In re Winship*, 397 US 358, 368; 90 S Ct 1068; 25 L Ed 2d 368 (1970), the Supreme Court later ruled that respondents in juvenile delinquency cases had the right to have the allegations in a delinquency petition proven beyond a reasonable doubt. A juvenile offender's right not to be placed in jeopardy twice was recognized in *Breed v Jones*, 421 US 519, 529-531; 95 S Ct 1779; 44 L Ed 2d 346 (1975).

Michigan Courts have similarly ruled that juvenile proceedings are "closely analogous to the adversary criminal process." *People v Kerr (In re Kerr)*, 323 Mich App 407, 414; 917 NW 2d 408 (2018) citing *People v Carey (In re Carey)*, 241 Mich App 222, 226-227; 615 NW 2d 742 (2000), citing *People v Wilson (In re Wilson)*, 113 Mich App 113, 121; 317 NW 2d 309 (1982). A juvenile delinquency adjudication in Michigan "clearly constitutes criminal activity because it amounts to a violation of a criminal statute, even though that violation is not resolved in a "criminal proceeding."” *People v Anderson*, 298 Mich App 178, 182; 825 NW 2d 678 (2012), quoting *People v Harverson*, 291 Mich App 171, 180; 804 NW2d 757 (2010). As such, despite the non-criminal nature of the delinquency proceeding, an offense charged in a juvenile delinquency petition remains a "crime," and the process by which consequences are implemented in juvenile delinquency cases remains part of the "criminal justice system." *People v McDaniel (In re McDaniel)*, 186 Mich App 696, 699; 465 NW 2d 51 (1991); *Anderson*, 298 Mich App at 182.

While juvenile delinquency cases are labeled civil proceedings, "[n]evertheless, the

substantive criminal law applies because the critical issue is whether the juvenile violated the law.” *People v Alton (In re Alton)*, 203 Mich App 405, 407; 513 NW 2d 162 (1994), citing MCL 712A.2(a)(1). Despite the statutory labels given to juvenile delinquency proceedings, “they have many of the trappings of criminal proceedings; the petition is filed by the prosecutor, notice is required, there must be a preliminary hearing, which resembles an arraignment in criminal proceedings, and the functions of the prosecutor and court are the equivalent to their functions in a criminal proceeding.” *Carey*, 241 Mich App at 230; *See People v Robinson (In re Robinson)*, 180 Mich App 454, 458; 447 NW 2d 765 (1989). The separation of powers doctrine applies to cases alleging that a crime was committed by a juvenile offender in the same manner that it applies to cases alleging that a crime was committed by an adult offender. *Robinson*, 180 Mich App at 458; *Wilson*, 113 Mich App at 122-123.

“The purpose of the trial phase of a juvenile proceeding is to determine whether the juvenile comes within the jurisdiction of the court,” because a “court may take jurisdiction only if the juvenile has violated a law.” *Carey*, 241 Mich App at 230. As such, the trial phase of a juvenile delinquency proceeding “is nothing more than a fact-finding mission to determine whether the juvenile has in fact violated any law, thus authorizing the court to exercise jurisdiction over the juvenile.” *Id.* The trial procedure for a juvenile delinquency case is governed by the court rules applicable to proceedings in the juvenile division of the probate court. *Alton*, 203 Mich App at 407. Pursuant to MCR 3.942(C), the Michigan Rules of Evidence, including statutory rules of evidence applicable to adult criminal trials such as MCL 768.27a, apply to juvenile delinquency trials. *Kerr*, 323 Mich App at 413-414.

B. The Court of Appeals clearly erred in affirming the family court’s *sua sponte* dismissal of the two formally authorized petition cases

In the present appeal, Petition 2 was formally authorized in the family court docket through an

order entered on July 26, 2017. Petition 3 was formally authorized into the family court docket on January 18, 2018. Neither of these petitions were subject to pre-authorization diversion pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.* As such, the only other statutorily authorized option to divert these two petitions from the formal family court docket was the consent calendar, set forth in MCL 712A.2f. However, the two authorized petition cases were not eligible for informal treatment through the consent calendar because the statute requires the agreement of the prosecutor and at the point when the cases were dismissed *sua sponte* by the family court, the prosecutor did not agree to the transfer of these cases from the formal docket onto the consent calendar. As such, all parties agree that the consent calendar was not used by the trial court to dismiss the two petitions underlying this appeal. *In re Diehl*, at 12.

Instead of following one of the legislatively authorized diversion procedures, the trial court bypassed these statutes and removed the two authorized delinquency cases from the formal family court docket and dismissed them under the purported authority of section 36b of the CVRA, codified as MCL 780.786b. The Court of Appeals affirmed the dismissal of these cases on that ground, and added a further rationale for the dismissal by holding that the decision in *People v Lee (In re Lee)*, 282 Mich App 90, 96; 761 NW 2d 432 (2009), empowered the family court to dismiss the two petitions. As will be discussed, the dismissal of the two cases was legally improper, as neither the *Lee* decision nor the CVRA empowers a family court to dismiss formally authorized petitions over the prosecutor's objection.

- 1. The Court of Appeals also clearly erred when it misconstrued a section of the CVRA imposing notification obligations on the family courts as granting family courts the power to divert and dismiss those juvenile delinquency cases that involve crime victims, while conversely shielding delinquency cases that did not victimize individuals from this arbitrary dismissal power**

When engaging in statutory interpretation, the language of the statute itself provides the most reliable evidence of the Legislature's intent. *Coldwater v Consumers Energy Co*, 500 Mich 158,

167; 895 NW2d 154 (2017). When the language of the statute is unambiguous, “the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written,” and “[n]o further judicial construction is required or permitted.” *Id.*, quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Language used in a statute should be given its ordinary meaning, within the context that the language is used, and must be read harmoniously so as to give effect to the statute as a whole. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). “Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.” *Coldwater*, 500 Mich at 167-168, quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

The William Van Regenmorter Crime Victim’s Rights Act (“CVRA”) was enacted in 1985 to respond to the growing recognition of the concerns regarding the treatment of crime victims, including a perceived insensitivity to their plight. MCL 780.751 *et seq.*; *People v Grant*, 455 Mich 221, 239-240; 565 NW2d 389 (1997). The CVRA was later supplemented by Article 1, § 24 of Michigan’s Constitution, which was ratified by election on November 8, 1988; enshrining into the Michigan Constitution specific rights for crime victims in Michigan. Included among the rights set forth in Const 1963, art 1, § 24 is the “right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process” and the right to “notification of court proceedings.” As noted in *People v Garrison*, 495 Mich 362, 368; 852 NW2d 45 (2014), “[t]he CVRA and Article 1, § 24 of Michigan’s Constitution were enacted as part of a movement intended to balance the rights of crime victims and the rights of criminal defendants.”

Effective June 1, 2001, the CVRA was amended to give protections to crime victims who were victimized by juvenile offenders. *See* Public Act 503 of 2000. Section 36b of this Act, codified as MCL 780.786b, recognizes the crime victim’s now constitutionally enshrined right to receive

notification of proceedings, and implements this right by imposing specific notification obligations on the family courts, when juvenile delinquency cases involving crime victims are diverted or dismissed. To satisfy the crime victim's constitutional right to receive notification of the proceedings, section 36b of the CVRA provides that:

Except for a dismissal based upon a judicial finding on the record that the petition and the facts supporting it are insufficient to support a claim of jurisdiction under section 2(a)(1) of chapter XIA of the probate code of 1939, 1939 PA 288, MCL 712A.2, a case involving the alleged commission of an offense, as defined in section 31, by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process. Before any formal or informal action is taken, the prosecutor shall give the victim notice of the time and place of the hearing on the proposed removal of the case from the adjudicative process. The victim has the right to attend the hearing and to address the court at the hearing. As part of any other order removing any case from the adjudicative process, the court shall order the juvenile or the juvenile's parents to provide full restitution as provided in section 44. MCL 780.786b.

The purpose of the CVRA, and Const 1963, art 1, § 24, is to bring some balance to the criminal justice system by enhancing the protections given to crime victims forced, through no fault of their own, to participate in a criminal justice system previously focused almost exclusively upon the protection of the rights of the individuals accused of violating Michigan's criminal laws. *Garrison*, 495 Mich at 368. The purpose of section 36b of the CVRA is *to impose notification obligations* upon the family court, in the event that the family court decides that it may divert a delinquency case involving a crime victim from the formal family court docket, so that the affected crime victim receives their constitutionally required notice of the proceedings, as well as be afforded an opportunity to be heard by the court, before the final decision is made regarding whether the juvenile case should be diverted by the court. *Lee*, 282 Mich App at 96.

The language used in section 36b of the CVRA is clear and unambiguous, so no judicial

construction or interpretation is needed or allowed. *Coldwater*, 500 Mich at 167. Section 36b of the CVRA imposes nothing more and nothing less than the four obligations that the *Lee* court recognized were “[c]learly and unambiguously” stated in this statute, along with a requirement that restitution be provided if a case is diverted by the family court (which was not at issue in the *Lee* appeal). *Lee*, 282 Mich App at 96. Section 36b of the CVRA contains no language empowering the family court to dismiss authorized juvenile delinquency petitions that involve crime victims. To read the conveyance of such a power into the CVRA would give this statute quite literally the opposite effect than was intended by the Michigan Legislature.

In the Court of Appeal’s published opinion in this case, it cited MCL 780.786b and MCR 3.932(B)(the Court Rule referencing the requirement that the family courts must comply with the obligations imposed in MCL 780.786b), as the only legal authority underlying its conclusion that the “governing statutes and court rules” authorized the family court in this case to remove the two authorized juvenile delinquency petitions from the formal family court docket and dismiss them. *In re Diehl*, at 14. Under the Court of Appeals erroneous interpretation of section 36b of the CVRA, juvenile offenses that victimized Michigan residents can now be dismissed at the whim of the family court, on the authority of a statute enacted for the purpose of *enhancing* the protections given to the crime victims of juvenile offenders; while those juvenile offenses that did not impact crime victims would be exempt from this arbitrary power by the family court. This is not an exaggeration of the impact of this published decision, as the Court of Appeals itself was careful to point out that the purported authority given by section 36b of the CVRA to dismiss Petition 2 and Petition 3 was allegedly proper because “[b]oth domestic violence and larceny in a building are ‘offenses’ under the CVRA.” *In re Diehl*, at 9. Such an interpretation of section 36b of the CVRA is unsupported by the clear and plain language of this statute, would run contrary to the purpose of this law and the constitutional protections given to crime victims through Const 1963, art 1, §

24, and cannot be allowed to stand.

2. The Court of Appeals clearly erred when ruling that the *Lee* case recognized that the family court's inherent authority empowered the family court to transfer an authorized juvenile delinquency case off of the formal family court docket and then dismiss it, over the prosecutor's objection

After holding that section 36b of the CVRA gave family courts the authority to dismiss prosecutor cases that involve crime victims, the Court of Appeals then cited the decision in *Lee* as further support for its claim that the trial court had the authority to dismiss the two delinquency cases. Like its reliance upon the notice provision of the CVRA, the Court of Appeals' conclusion that the *Lee* decision supported the trial court's *sua sponte* dismissal of these cases is erroneous.

a. The *Lee* ruling was expressly limited to interpreting the notification obligations imposed upon the court through section 36b of the CVRA, and did not hold that family courts had the broad power to unilaterally dismiss any authorized juvenile delinquency case

In *Lee*, a prosecutor challenged a family court's decision to remove two delinquency petitions from the formal court docket, and place them on the informal consent calendar docket. Both of the delinquency cases in *Lee* had been formally authorized into the family court's docket prior to their removal to the informal consent calendar docket. *In re Lee*, 282 Mich at 96, 100. After the respondents offered pleas to the charges, the family court in *Lee* held a hearing and ultimately removed the two delinquency cases from the formal family court docket, placing them both on the informal consent calendar docket. The trial court's transfer of the two delinquency cases in *Lee* was authorized by, and done in compliance with, the then-existing version of MCR 3.932(C), which provided that "[t]he court may transfer a case from the formal calendar to the consent calendar at any time before disposition."

Critically, it must be noted that when the *Lee* case was decided, MCR 3.932(C) had not yet been amended to include the existing requirement that a prosecutor *must* agree to allow a delinquency case to be transferred to the informal consent calendar, i.e. a delinquency case may

not be transferred to the informal consent calendar without the agreement of the prosecutor. Moreover, MCL 712A.f had not yet been enacted by the Michigan Legislature, setting forth the process and parameters by which a family court may place a delinquency case on the informal consent calendar, including both expanding the crime class eligibility for placement on the consent calendar and adding a requirement, as one of the check and balances of the consent calendar process, that the prosecutor is required to agree to the placement of any delinquency case onto the consent calendar. MCL 712A.2f(2), *See* the House Fiscal Agency Analysis of Senate Bill 251 of 2015, enacted at Public Act 185 of 2016.

In the *Lee* appeal, the prosecutor's appeal focused *solely* upon the family court's failure to strictly comply with the notification obligations set forth in section 36b of the CVRA, being MCL 780.786b, and did not raise any other challenge to the procedure or substance of the family court's decisions. The *Lee* court stated "that the appeals in these cases pertain solely to the procedural requirements of MCL 780.786b(1) and the court rules," and then noted that no other challenge to the family court's decision to divert the cases from the formal family court docket was raised in the appeal. *Lee*, 282 Mich App at 95.

The court in *Lee* reviewed the plain language in MCL 780.786b that stated that an offense "by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process," and concluded that effect of this section of the CVRA was to impose notification obligations on the family courts which must be fulfilled whenever a juvenile offense is dismissed or diverted. *Lee*, 282 Mich App at 94-95, citing MCL 780.786b The *Lee* court noted that while the Court Rules did not define the term "adjudicative process" used in this section of the CVRA, it clearly referenced the fact-finding process by which a juvenile delinquency petition was determined to be true or untrue, leading to an adjudication of the petition. *Lee*, 282 Mich App at 94. The *Lee* Court

continued by detailing the four specific requirements imposed upon family courts through section 36b of the CVRA, noting:

Clearly and unambiguously, MCL 780.786b(1) requires that before the family court formally or informally acts to remove from the adjudicative process a juvenile case involving a CVRA offense, the court must give the prosecuting attorney written notice of the court's intent to do so. Second, the court's notice to the prosecutor must specify the time and place at which the court will conduct a hearing on its proposed intent to remove the case from the adjudicative process. Third, the court's written notice to the prosecutor must be furnished sufficiently in advance so that the prosecutor can fulfill its responsibilities to both notify the victim or victims of the time and place of the court's hearing on the proposed removal of the case from the adjudicative process and also afford the victim or victims an opportunity to consult with the prosecuting attorney regarding the disposition of the case. *See* MCL 780.786b(2). Finally, at the removal hearing, the court must afford both the prosecuting attorney and the victim of the alleged offense the opportunity to address the court regarding the court's intent to remove the case from the adjudicative process. *Lee*, 282 Mich App at 96.

When the family court's compliance with MCL 780.786b was reviewed, the court in *Lee* concluded that the notification requirements of this section of the CVRA had not been strictly complied with by the family court. However, the court also noted that in docket 283562 the crime victim was present at the hearing where the decision was made to transfer the petition to the informal consent calendar. The court noted that in docket 282848 the crime victim had received notice of the dispositional hearing, but had chosen not to appear at this hearing. The court further noted that the victim in docket 282848 had also previously discussed the possibility of diverting the case with the prosecutor, so they had been informed about this process. Moreover, the prosecutor advocated on behalf of the victim to oppose the transfer of the delinquency petition case to the informal consent calendar at the hearing. Because the crime victims in the two delinquency cases had either been present at the hearing, or had been given notice of the dispositional hearing and had their interest advocated at the hearing by the prosecutor, the *Lee* court concluded that the family court's failure to comply with the strict requirements of the

notification obligations contained in section 36b of the CVRA was harmless error, and did not justify the reversal of the family court's decision to utilize the provisions of MCR 3.932(C) to transfer the two cases from the formal family court docket to the informal consent calendar docket. *In re Lee*, 282 Mich App at 99-100 & 101-102, *citing* MCR 2.613(A).

Like *Lee*, the present appeal addresses two separate delinquency cases that were formally authorized into the family court docket. Also like the *Lee* case, both of the charges underlying the present appeal involve crime victims, such that the notice provisions of section 36b of the CVRA apply to the dismissal or diversion of these two cases. Further, in the present case the family court removed the two delinquency cases subject to this appeal from the formal family court docket and "dismissed the charges" in a similar manner as would have occurred in the *Lee* case, once the term of consent calendar probation was successfully completed by the *Lee* respondents. *See In re Diehl*, at 12. That is where the similarities end.

As noted, in the *Lee* case the family court's decision was done in compliance with an established Michigan Court Rule, that being MCR 3.932(C). The version of this Court Rule in effect at the time of the *Lee* decision stated that "[t]he court may transfer a case from the formal calendar to the consent calendar at any time before disposition." MCR 3.932(C). No challenge was made by the prosecutor in *Lee* to the family court's authority to transfer the two formally authorized delinquency cases onto the informal consent calendar docket, or to the substance of this decision, likely because the version of MCR 3.932(C) in effect at that time did not require prosecutor approval before a family court removed a case from the formal family court docket and placed it on the informal consent calendar docket.

However, since *Lee* was decided, this Court has completely rewritten the Court Rule governing the family court's authority to transfer juvenile delinquency cases to the informal consent calendar docket. The current version of MCR 3.932, which was in effect when the family court dismissed

the two delinquency petitions subject to this appeal, now only allows family courts to transfer delinquency cases onto the informal consent calendar docket *when the prosecutor agrees to this transfer*. See MCR 3.932(C)(2). Additionally, after the *Lee* decision the Michigan Legislature enacted Public Act 185 of 2016, codified as MCL 712A.2f. Public Act 185 of 2016 legislatively codified the family court's authority in circumstances where "the court determines that formal jurisdiction should not be acquired over a juvenile;" allowing the court to transfer such cases to the informal consent calendar as long as the conditions set forth in this statute are met. MCL 712A.2f(1). This Act expanded the crime classifications eligible for informal consent calendar diversion, but it also included a specific check and balance on the court's power to divert juvenile delinquency cases by requiring the prosecutor's agreement before any delinquency case is removed from the formal family court docket and handled informally through the consent calendar docket. MCL 712A.2f(2) See the House Fiscal Agency Analysis of Senate Bill 251 of 2015, enacted at Public Act 185 of 2016.

While the transfer of the two formally authorized juvenile delinquency cases off of the family court docket and onto the informal consent calendar in *Lee* was done under the authority of the then-existing version of MCR 3.932(C), allowing family courts to take such action, the family court in the present appeal unequivocally did not rely on the provisions of this Court Rule to remove the two delinquency cases from the family court's formal docket. Rather, as the Court of Appeals specifically noted, "[a]t no point did the trial court indicate that it would place respondent's cases on the consent calendar; therefore, MCR 3.932(C)(2) is inapplicable." *In re Diehl*, at 12. Because the prosecutor specifically objected to the placement of the two cases onto the consent calendar, the family court lacked the authority granted through MCR 3.932(C) and MCL 712A.2f to remove these two delinquency cases from the formal family court docket and place them on the informal consent calendar. See MCR 3.932(C)(2) & MCL 712A.2f(2).

Without the authority granted to the family court through MCR 3.932(C), and now MCL 712A.2f, the Court of Appeals' reliance upon the *Lee* case as purported authority for the family court's removal of the two petition cases from the family court's formal docket and dismissal of these cases fails because the published *Lee* decision never addressed the family court's power to remove formally authorized delinquency cases from the family court's docket. Instead, the *Lee* decision clearly stated that the *only* issue raised by the prosecutor in the appeal was a challenge to the family court's compliance with the *notification obligations* imposed through section 36b of the CVRA, with the *Lee* court noting "that the appeals in these cases pertain solely to the procedural requirements of MCL 780.786b(1) and the court rules," and as well as that no other challenge was raised to the family court's decision to divert the cases from the formal family court docket. *Lee*, 282 Mich App at 95. As such, the Court of Appeals erred when holding that the *Lee* case supported their conclusion that the trial court's dismissal of the two delinquency cases was proper.

- b. The Court of Appeals clearly erred when it misinterpreted *Lee* as expanding the family court's inherent powers to the extent that it ruled that family courts can dismiss any formally authorized juvenile delinquency case so long as "there is also no authority prohibiting the trial court from taking such an action."**

While initially relying upon section 36b of the CVRA and then the *Lee* decision as purported authority for family courts to unilaterally dismiss juvenile delinquency cases, the Court of Appeals decision later vacillates between that position and acknowledging that no legal authority actually exists empowering the family court to dismiss formally authorized juvenile delinquency cases in the manner done by the family court in this appeal. Specifically, after relying upon MCL 780.786b and the *Lee* decision as purported authority for the family court's actions in this case, the Court of Appeals then acknowledged that "there does not appear to be any explicit statute, court rule, or published caselaw" empowering the family court to 'unauthorize' petitions, as the family court did in this case when it transferred the two authorized delinquency petitions off of the family court's formal docket and then dismissed them. *In re Diehl*, at 11. The Court of Appeals then inexplicably

ruled that the family court had the inherent authority to take such actions on juvenile cases by following up its observation that *no legal authority exists to empower family courts to 'unauthorize' cases* with a statement that the family court's actions in this case were permitted nevertheless because "there is also no authority prohibiting the trial court from taking such an action." *Id.*

The *Lee* decision never stated, or even suggested, that absent a law specifically precluding it, the family court had the inherent power to *sua sponte* remove any authorized juvenile delinquency case from the formal family court docket at any time before adjudication,⁴ as was held by the Court of Appeals in this case. To the contrary, the *Lee* court was very clear when it stated that the only issue before it was whether the family court complied with the notification obligations imposed on it through section 36b of the CVRA. *Lee*, 282 Mich App at 95. Further, the Court of Appeals conclusion conflicts with the statutes enacted by the Michigan Legislature which govern the handling of criminal offenses committed by juveniles.

MCR 3.932(C) and Public Act 185 of 2016, codified as MCL 712A.2f

The conclusion reached in the Court of Appeals' published decision in this case, that family courts have the inherent power to remove formalized delinquency cases from the family court docket over the prosecutor's objection, runs contrary to the laws and procedures governing juvenile offenders. Specifically, this Court has established the Court Rules governing the

⁴ The Court of Appeals in this case inexplicably added a caveat to its conclusion that the family court possesses the inherent power to remove formalized delinquency petitions from the family court docket over the prosecutor's objection, even absent specific legal authority empowering a family court to take such action. To that end the Court of Appeals held that the *Lee* court's definition of the term "adjudicative process" used in the notification obligations contained in section 36b of the CVRA and the Court Rule citing this statute somehow limited the family court's inherent power to remove any formalized petition from the family court docket, such that this removal may only occur before a petition has been formally adjudicated, i.e. a plea has been accepted or a fact finder has adjudicated the juvenile responsible for the crimes alleged in the petition. *In re Diehl*, at 10, citing *Lee*, 282 Mich App at 94.

procedure by which juvenile delinquency proceedings are litigated. Among the Court Rules established by this Court is MCR 3.932(C)(2), which allows family courts to divert and ultimately dismiss formally authorized delinquency cases, so long as this informal diversion is approved by the prosecutor. This entire section of that Court Rule, including the requirement that the transfer of cases from the formal family court docket to the informal consent calendar docket only occur when it is approved by the prosecutor, was rendered meaningless by the Court of Appeals' decision in this case because now, even if the prosecutor objects to the consent diversion of a delinquency case, the family court can simply ignore the prosecutor's objections and remove the formally authorized case from the formal family court docket and dismiss it, as the family court did in this case.

Further, the Michigan Legislature passed Public Act 185 of 2016, codified as MCL 712A.2f, to give legislative authorization to family courts to divert certain cases involving criminal offenses committed by juveniles from the formal family court docket when "the court determines that formal jurisdiction should not be acquired over a juvenile." MCL 712A.2f(1). The Michigan Legislature labeled the handling of juvenile delinquency cases in an informal manner as the "consent calendar," which was consistent with the label given by MCR 3.932(C) to the informal handling of delinquency petitions. MCL 712A.2f(1) As noted in its legislative history, while this Act expanded the category of crimes eligible for informal handling by the family court, the Legislature also built checks and balances into the Act, to ensure that serious offenses are not improperly diverted by the family court. To that end, the Legislature included a requirement that the prosecutor be in agreement whenever a delinquency case is handled informally under this Act. MCL 712A.2f(2).

When interpreting statutes, "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."

Coldwater, 500 Mich at 167-168, citing *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Further, when legislation is passed regarding a subject, the express mention of one thing implies the exclusion of all similar things not mentioned in the statute, under the doctrine of *expressio unius est exclusion alterius*. *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 15 n 6; 894 NW2d 758 (2016).

The family court's use of a manufactured label, claiming that the dismissed cases were 'unauthorized' before being dismissed, does not change the fact that the family court's actions constituted a diversion of these formally authorized delinquency cases from the family court docket, and there is only one procedure set forth in Michigan statutes and Court Rules which empowers a family court to divert formally authorized juvenile delinquency cases, that being MCL 712A.2f and MCR 3.932(C). *In re Diehl*, at 11 (with even the Court of Appeals agreeing that "the choice of label" used by the family court when it dismissed the two cases was irrelevant). The family court's actions underlying this appeal, regardless of the label used by the family court, constituted a violation of MCL 712A.2f and MCR 3.932(C), which comprise the *only* authorized diversion option allowing family courts to remove formally authorized juvenile delinquency cases from the formal family court docket, as its actions improperly bypassed the safeguards put in place by the Michigan Legislature and this Court to ensure that the diversion of juvenile delinquency offenses are handled safely.

Finally, to the extent that the family court's removal of these authorized petitions from the formal family court docket did somehow constitute a new diversion option, beyond the diversion option authorized by the Legislature through MCL 712A.2f (and this Court through MCR 3.932(C)), this unlegislated diversion option would be precluded under the doctrine of *expressio unius est exclusion alterius*. *Coalition Protecting Auto No-Fault*, 317 Mich App at 15. That is

because when the Legislature chose to enact a statute to address the ability of a family court to treat an authorized juvenile delinquency case informally after authorization, the Legislature's failure to include any similar informal diversion options, including the court-created "unauthorize" diversion option used by the family court in this case, operates to preclude similar but unincluded diversion options under the doctrine of statutory interpretation *expressio unius est exclusio alterius*. *Coalition Protecting Auto No-Fault*, 317 Mich App at 15.

The warn and dismiss option set forth in MCL 712A.18(1)(a)

Further, it should be noted that the justification used by the family court to dismiss the two charges, i.e. they should be dismissed because no additional consequences would be imposed from the two additional delinquency cases, also ignores specific legislation enacted to address the very circumstance where a juvenile offender has been found to have committed a charged offense, but is not in need of further services from the family court. MCL 712A.18(1)(a). This statute both establishes the public policy of the state, i.e. that in this situation the adjudication of the delinquency case should still be entered and therefore included in the juvenile's family court file, and provides the family court with the mechanism to carry out this public policy at disposition by 'warning and dismissing' the delinquency case, which has the result of entering the adjudication into the family court file but then ending the family court's supervision of the juvenile, with regard to the charge that was warned and dismissed. The family court's *sua sponte* dismissal of the two authorized delinquency cases in this appeal intentionally bypassed this statute, and in doing so disregarded the public policy established by the Legislature,⁵ in the same manner that it bypassed the safeguard established in MCL 712A.2f.

⁵ See *Okrie v State*, 306 Mich App 445, 458; 857 NW 2d 254 (2014) citing *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW 2d 127 (2003)(The courts should not second guess the wisdom of a statute effectuating public policy).

3. The Court of Appeals clearly erred when it ruled that the separation of powers doctrine did not prevent the family court from dismissing two authorized juvenile delinquency cases over the prosecutor's objection

The separation of powers doctrine is set forth in Const 1963, art 3, § 2 as follows:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

The rules governing this Court's interpretation of constitutional provisions differs from the rules governing statutory construction, as the "rule of common understanding" should be used by this Court to evaluate the constitutional provisions language. *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW 2d 264 (1998). The rule of common understanding was explained by the Court in *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW 2d 9 (1971), which held:

A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. *Id.*

With regard to Const 1963, art 3, § 2, in *Dearborn Twp v Dearborn Twp Clerk*, 334 Mich 673, 692; 55 NW 2d 201 (1952) this Court held that "while it is not possible wholly to avoid conflicts between the several departments of government, the Constitution should be expounded to blend the departments of government no more than it affirmatively requires." *Id.*, citing *Myers v. United States*, 272 US 52; 47 SCt 21; 71 Led 160 (1926). Subsequent cases have similarly held that "[s]ome overlapping is permissible provided the area of one branch's exercise of another branch's power is very limited and specific." *Sharp v Genesee Co Election Comm*, 145 Mich App 200, 209; 377 NW2d 389 (1985).

Examples of permissible and impermissible overlap between branches of government include this Court's ruling that no separation of powers violation occurred when a single judge sat on a

three member county board that was part of the executive branch of government, because “alone, he cannot constitute a quorum or in any way exercise any power of the county election commission;” while four judicial magistrates serving on the seven member Dearborn township board gave the judicial magistrates the power to “exercise the whole legislative and administrative powers given to townships by law” and therefore violated the separation of powers doctrine. *Sharp*, 145 Mich App at 209, citing *Dearborn Twp*, 334 Mich at 692. In both *Judicial Attorneys Ass’n v Michigan*, 459 Mich 291, 296; 586 NW 2d 894 (1998) and *Beadling v Governor*, 106 Mich App 530, 536; 308 NW 2d 269 (1981), courts have ruled that a violation of the separation of powers doctrine would occur if employees working for one branch of government were made employees of, or were subject to oversight by, a different branch of government, though this Court was careful to note that this did not preclude a voluntary sharing of some employer-related duties to best serve the public as a whole. *Judicial Attys*, 459 Mich at 303.

In the criminal justice system, which necessarily involves all three branches of government, the Legislature has the authority to determine the interests of the public and formulate legislative policy,⁶ including establishing what conduct constitutes a criminal offense, and what consequences can be imposed if the criminal offense is committed. *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003); *People v Conat*, 238 Mich App 134, 147; 605 NW 2d 49 (1999). The prosecutor, an official of the executive branch of government, exercises its discretionary authority to enforce the laws by determining which criminal charges should be brought against an individual in a particular situation and how the cases should be litigated, so that the public interest is best served. *People v Ford*, 417 Mich 66, 91-92; 331 NW2d 878 (1982), See *People v McCracken*, 124

⁶ When evaluating a statute enacted by the Legislature in light of a separation of powers challenge, the court may not inquire into, or second guess, the wisdom of the statute. *Okrie*, 306 Mich App at 458; citing *Taylor*, 468 Mich at 6.

Mich App 711, 717; 335 NW2d 131 (1983). Finally, the judiciary has the power to hear and determine controversies,⁷ including the power to exercise discretion in imposing consequences for violations of criminal laws, within the limitations set by the Legislature. *Conat*, 238 Mich App at 147.

The interaction of the three branches of government in the criminal justice system creates some permissible overlap between the roles of the three branches, as the fulfilment of the responsibilities of one branch necessarily impacts the other branches of government. While courts typically have the power to exercise discretion when fashioning sentences, it is not a violation of the separation of powers doctrine for the Legislature to establish a mandatory sentence for an offense, even though the impact of the mandatory sentence would be to remove all sentencing discretion from the court. *Conat*, 238 Mich App at 147; citing *People v Palm*, 245 Mich 396, 404; 223 NW 67 (1929). Similarly the Holmes Youthful Trainee Act, which allows a youthful offender who is guilty of certain offenses to avoid receiving a criminal conviction when certain conditions are met, does not violate the separation of powers doctrine because the power to enact legislation, including establishing the parameters in which offenses result in convictions, is vested exclusively with the Legislature. *People v Trinity*, 189 Mich App 19, 22-23; 471 NW 2d 626 (1991).

The prosecutor's exercise of its executive branch power to enforce the laws likewise can impact a sentencing court's discretion, without violating the separation of powers doctrine. When conduct falls within the definition of more than one criminal law, the prosecutor has the sole discretion to determine the charge, which is not a violation of the separation of powers doctrine even though

⁷ This includes a longstanding prohibition against judges initiating or participating in plea bargain negotiations, which appears to have been violated when the family court in this case repeatedly (and *sua sponte*) attempted to initiate and negotiate plea deals for Respondent, before ultimately dismissing the two cases when the prosecutor would not agree to the resolution sought by the trial court. (R 7-16-18, pp 13-16, 19-22), *People v Killebrew*, 416 Mich 189, 213; 330 NW2d 834 (1982).

the impact of this decision may alter the discretion available to the court at sentencing. *People v Venticinque*, 459 Mich 90, 100-101; 586 NW 2d 732 (1998), citing *People v Ford*, 417 Mich 66, 91-93; 331 NW 2d 878 (1982). Likewise, a prosecutor's decision to charge an offender as an adult instead of as a juvenile is not a violation of the separation of powers doctrine, even though it has the impact of requiring the court to sentence the offender as an adult, instead of under the juvenile system. *Conat*, 238 Mich App at 148-152.

a. Courts are not permitted to share the executive branch prosecutor's authority to make discretionary litigation decisions on cases

The prosecutor is a constitutional officer whose duties are as provided by law. Const 1963, art 7, § 4. This Court has recognized that “[t]he prosecution has an equal, though different [from the charged offender], constitutional interest at stake insofar as it is constitutionally entrusted with authority to charge defendants.” *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995), citing *Genesee I*, 386 Mich at 683-684; Also See *Genesee Prosecutor v Genesee Circuit Judge* (*Genesee II*), 391 Mich 115; 215 NW 2d 145 (1974). This includes a constitutionally protected right of access to the court system to resolve the cases it has charged. *People v Williams*, 186 Mich App 606; 465 NW2d 376 (1990)(where the court found that the separation of powers doctrine required the reversal of a trial court's dismissal of a violation of probation hearing because the prosecutor would not commit to not bringing new criminal charges based upon the criminal activity underlying the violation of probation), citing Const 1963, art 1, § 13.

As noted, the prosecutor has the exclusive authority to determine which criminal charges should be brought against an individual in a particular situation, so that the public interest is best served. *Ford*, 417 Mich at 91-92; *McCracken*, 124 Mich App at 717. In *People v Muniz*, 259 Mich App 176. 178-179; 675 NW2d 597 (2003), the court held that “[a]ccording to separation-of-powers principles, the constitutional responsibility to determine the grounds for prosecution rests with the prosecutor alone.” *Id.*, citing *People v Jones*, 252 Mich App 1, 6-7; 650 NW 2d 717 (2002). This

includes the discretion to decide between charging offenses that carry different levels of punishment, as well as different types of consequences, such as when a prosecutor charges a juvenile as an adult. *Venticinque*, 459 Mich at 100-101; *Conat*, 238 Mich App at 148-152.

A “court’s authority over the discharge of the prosecutor’s duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires,” and “a trial court does not have authority to review the prosecuting attorney’s decisions outside this narrow scope of judicial function.” *People v Morrow*, 214 Mich App 158, 160; 542 NW2d 324 (1995). When performing this limited review of a prosecutor’s discretionary litigation decisions, the court does not “second-guess whether a prosecutor has a ‘rational basis’ or ‘good reason’” for the prosecutorial decision, but instead such a decision is reviewed by the court under an “abuse of power” standard, where the court limits the inquiry to “whether a prosecutor has acted in contravention of the constitution or the law.” *People v Barksdale*, 219 Mich App 484, 488; 556 NW 2d 521 (1996), *citing Morrow*, 214 Mich App at 161.

The limitations imposed by the separation of powers doctrine on interactions between the courts, as members of the judicial branch of government, and the prosecutor, as a member of the executive branch of government, have been addressed in numerous decisions by Michigan’s appellate courts. As examples: the separation of powers doctrine is violated when a court overrules a prosecutor’s litigation decisions and decisions regarding deciding between two chargeable offenses. *Venticinque*, 459 Mich at 100-101; *US v Batchelder*, 443 US 114, 124; 99 SCt 2198; 60 Led 2d 755 (1979); *Barksdale*, 219 Mich App at 487-488; *Muniz*, 259 Mich App at 178-179; *Robinson*, 180 Mich App at 458; *People v Wilson (In re Wilson)*, 113 Mich App 113, 122-123; 317 NW2d 309 (1982). The separation of powers doctrine is also violated when a court overrules a prosecutor’s discretionary litigation decision and dismisses the case because: the court did not think the prosecutor should have decided to retry the case after mistrials, *People v Sierb*, 456 Mich

519, 531-533; 581 NW 2d 219 (1998); or because the court did not think the prosecutor should have decided to continue prosecuting the case after a victim recanted, *People v Williams*, 244 Mich App 249, 251-252; 625 NW 2d 132 (2001); *Morrow*, 214 Mich App at 160-161; or because the court did not think the prosecutor should have brought felony charges where the offender was caught in possession of a small amount of heroin, *Stewart*, 52 Mich App 477, 484; 217 NW 2d 894 (1974). It also violates the separation of powers doctrine for a court to overrule a prosecutor's decision and allow a plea reduction deal to stand when the court rejected the sentencing agreement included as part of the plea deal offered by the prosecutor. *Siebert*, 450 Mich at 895-896. The separation of powers doctrine is similarly violated when a court requires a prosecutor to offer a plea deal that it chose to withdraw. *People v Heiler*, 79 Mich App 714, 718-719; 262 NW 2d 890 (1977).

In the present case, there is no question that the decision to reduce or dismiss the two authorized juvenile delinquency cases fell squarely within the prosecutorial discretion of the Appellant, as evidenced by the family court's repeated requests that Appellant agree to offer a plea deal that would reduce or dismiss one or both of the cases, or allow them to be removed from the formal family court docket and be handled informally through the consent calendar. (R 7-16-19, pp 14, 17-20) Only when the prosecutor refused to exercise its discretion on the cases in the manner requested by the family court were the two juvenile delinquency cases *sua sponte* dismissed by the family court. Among the reasons cited by the family court for the dismissal of the cases were that the new adjudications would not add any consequences to the juvenile's probation and that the family court did not want to add to the juvenile's family court delinquency record. (D 4-24-18, p 7 & H 9-10-18, p 8)

However, neither the fact that no additional consequences would be imposed as a result of a charged offense, nor a trial court's desire to help the offender avoid an adjudication for an offense,

empower a court to step into the prosecutor's executive branch role and overrule a discretionary decision made on a case by a prosecutor.⁸ In *People v Nelson*, 66 Mich App 60, 66; 238 NW 2d 201 (1975), a violation of the separation of powers doctrine was found when a trial court dismissed a case while the defendant was attempting to tender a plea because the court was not going to impose any additional consequences on the offender for the offense, due to the consequences already imposed upon the offender from an earlier case. Likewise, it is a violation of the separation of powers doctrine when a court dismisses a case because it does not want an offender to "end up with a felony" conviction. *People v Smith*, 496 Mich 133, 136 & 140-141, 144; 852 NW2d 127 (2014)

It is the prosecutor, alone, who is tasked with the responsibility of making the determination about whether the public's interests are best served by bringing or maintaining a charge, and a court impermissibly steps into the role of the executive branch and violates the separation of powers doctrine when it substitutes its judgment about what it believes would be the better outcome in a case, or compels a plea deal over the prosecutor's objection because it furthered

⁸ While the family court also claimed that it had determined that discontinuing the prosecution of the two juvenile cases was in the best interest of the child, in furtherance of MCL 712A.1, this was based upon its conclusion that the court did not want Respondent to have additional adjudications in his family court file. However, MCL 712A.1 actually provides that the purpose of the juvenile process is for the juvenile to receive rehabilitation conducive to *both* the "juvenile's welfare and the best interest of the state." No case has held that entering a juvenile adjudication has any effect on a juvenile's welfare. Additionally, the complaint raised by the family court in this case, i.e. that the juvenile did not benefit from additional delinquency case adjudications, could be applied equally to every juvenile offender who is charged with multiple offenses because in every such circumstance the family court would need only adjudicate a single offense to obtain jurisdiction over the juvenile. Further, it is the prosecutor's executive branch role to determine whether the public's best interest is served by proceeding on a charge. *Ford*, 417 Mich at 91-92; *McCracken*, 124 Mich App at 717. It is likewise the Michigan Legislature's exclusive role to enact laws reflecting public policy, and in doing so created the warn and dismiss option in MCL 712A.18(1)(a) to address the specific situation complained about by the family court. As such, the family court's stated concerns do not alter the conclusion that the court's dismissal of the cases constituted a violation of the separation of powers doctrine.

“what the court may think is the goal of the criminal justice system.” *People v Smith*, 502 Mich 624, 646 fn75; 918 NW 2d 718 (2018); *Williams*, 186 Mich App at 612. When the prosecutor refused to exercise its discretion on the juvenile cases in the manner desired by the family court in this appeal, the family court stepped into the role of the prosecutor and exercised the prosecutor’s discretion for it; dismissing the two juvenile cases over the objection of the prosecutor. This action was a clear violation of the separation of powers doctrine, and the Court of Appeals clearly erred when it affirmed these dismissals in its published opinion.

Additionally, it is the legislative branch of government, alone, that is tasked with passing laws establishing public policy for the state. *Calloway*, 469 Mich at 450-451. Because the Michigan Legislature enacted a law specifically addressing the manner in which a family court may remove an authorized juvenile delinquency case from the formal family court docket and handle it informally, the family court further violated the separation of powers doctrine by ignoring this statute and creating its own version of MCL 712A.2f which bypassed the safeguards and limitations imposed by the Legislature. Moreover, by enacting the warn and dismiss option in MCL 712A.18(1)(a), to provide a disposition option for family courts faced with the situation where a juvenile offender committed a charged offense but did not need further consequences imposed from the charge, the family court violated the separation of powers doctrine when it bypassed this law and created its own disposition option that bypassed the statute created by the Legislature to respond to this specific situation. MCL 712A.18(1)(a); *See Conat*, 238 Mich App at 147 (the Legislature can limit the discretion of a court when imposing consequences from an offense); *Trinity*, 189 Mich App at 22-23.

- b. The published Court of Appeals decision created binding precedent that eviscerated the separation of powers doctrine established by Const 1963, art 3, § 2, as it applies to discretionary litigation decisions made by the executive branch prosecutor and the Legislature’s excusive power to legislate**

By distinguishing existing caselaw, the Court of Appeals redefined the separation of powers

doctrine in a way that eviscerated Const 1963, art 3, § 2, as it applies to discretionary litigation decisions made by the executive branch prosecutor. In rejecting Appellant's separation of powers challenge, the Court of Appeals acknowledged that in *Smith*, 496 Mich at 140-141, this Court affirmed the longstanding principle that the separation of powers doctrine prevents a court from overruling a prosecutor's discretionary litigation decisions on a case. However, the Court of Appeals then took the unprecedented step of ruling that the separation of powers prohibition addressed in this Court's *Smith* decision did not apply to the present appeal because the court's dismissal of the charges in this case *occurred before a plea was formally accepted by the court*. *In re Diehl*, at 14-15. To that end, the Court of Appeals held that the separation of powers doctrine recently addressed in *Smith* did not bar the court's dismissal of charges in the present appeal because "[w]hereas the defendant in *Smith* actually pleaded guilty to the criminal charge against him, the trial court [in this case] took respondent's plea to the charges in the second and third petitions under advisement, and never accepted respondent's plea of no contest." *Id*, citing *Smith*, 496 Mich at 140-141.

In so ruling, the published Court of Appeals' decision, which is currently binding on all lower courts throughout Michigan, inserted a condition into the separation of powers doctrine (i.e. that this doctrine only bars actions by a court on a case *after* a plea or verdict has been accepted by the court) that has never been recognized by any appellate court in Michigan, and which directly contradicts both existing caselaw on this issue as well as the very purpose of the separation of powers doctrine. This published decision now allows all⁹ lower courts in Michigan to step into the

⁹ As noted, the separation of powers doctrine applies to both adult and juvenile cases. *Robinson*, 180 Mich App at 458; *Wilson*, 113 Mich App at 122-123; *See Carey*, 241 Mich App at 230. While the Court of Appeals' published decision specifically distinguished this Court's decision in *Smith*, which addressed a separation of powers argument involving an adult offender, the published decision in this case applies to both juvenile delinquency cases like the present appeal, and cases involving adult offenders like the *Smith* case.

role of the prosecutor and exercise the discretion vested exclusively with the executive branch prosecutor at all stages of the proceeding before a plea or a verdict has been entered on the case, i.e. before an adjudication on the case has occurred. Under this decision, if an arraigning judge does not like the prosecutor's choice of charges, the published decision in this case would allow that judge to amend the charging document as it pleases, because the court's modification of the charging document would occur before an adjudication of the case had happened. *In re Diehl*, at 14-15. Likewise, if a trial court decides that an offender deserves a charge reduction (or even a charge enhancement), it can add or remove charges, allow the offender to plea to a lesser charge, and even dismiss the case entirely, all without the consent of the prosecutor, so long as the discretionary litigation decisions made by the trial court occurs before a plea or verdict is entered in the case. *Id.*

The conclusion reached by the Court of Appeals in this case is unsupported by the very nature of the constitutionally established separation of powers doctrine. The prosecutor's executive branch discretion to make litigation decisions on a case is not impacted by when, in the proceedings, the decision is made. Just as a court can not step into the role of the Legislature and enact its own substantive laws, the separation of powers doctrine prohibits a court's intrusion into the litigation discretion vested solely with the executive branch prosecutor, regardless of whether the intrusion occurs at the very important (yet necessarily pre-adjudication) charging stage, or at the end of its involvement at equally important post-appeal stages like parole review or motions seeking to set aside convictions.¹⁰

In addition to conflicting with the very nature of the separation of powers doctrine, the Court of Appeals decision overrules caselaw issued by Michigan's appellate courts for the last half

¹⁰ See MCL 791.234(11) and MCL 780.621(11), respectively.

century addressing the separation of powers doctrine's application to the criminal justice system. While the *Smith* case involved a court's dismissal of a case that occurred after a plea was accepted, the point made by this Court when referencing this procedural fact in combination with the phrase "much less" was to point out that the timing of the dismissal made the court's action more egregious, not that a dismissal before a plea was entered would have been proper, with this Court stating "[i]t is axiomatic that the power to determine whether to charge a defendant and what to charge should be brought is an executive power, which vests *exclusively* in the prosecutor. The trial court had no legal basis to trump the prosecutor's charging decision, much less dismiss the case *after* the defendant had pleaded to the charge and had never sought to withdraw his plea." [emphasis in the original] *Smith*, 496 Mich at 140-141.

Not only did the Court of Appeals' published decision misinterpret this Court's ruling in *Smith*, but its conclusion that the separation of powers doctrine only precludes a court's involvement in the executive branch discretionary decision making on a case if the court action occurs *after* a plea or verdict has been entered overrules numerous past appellate decisions from both this Court and the Court of Appeals. As examples, in both of the cases that form the foundation of Michigan appellate courts' application of the separation of powers doctrine to court involvement in prosecutor cases, being *Genesee I* and *Genesee II*, the trial courts' actions which were ruled a violation of the separation of powers doctrine occurred at the pre-adjudicative stage, i.e. before pleas were entered on the charges. *Genesee I*, 386 Mich at 683-684 and *Genesee II*, 391 Mich at 119-122. Likewise, trial court actions at the *pre-adjudication* stage, which constitute a violation of the separation of powers doctrine, were identified in *Batchelder*, 443 US at 124; *Sierb*, 456 Mich at 531-533; *Venticinque*, 459 Mich at 100-101; *Muniz*, 259 Mich App at 178-179; *Williams*, 244 Mich App at 251-252; *Conat* 238 Mich App at 147; *Barksdale*, 219 Mich App at 487-488; *Morrow*, 214 Mich App at 161; *Robinson*, 180 Mich App at 458; *Wilson* 113 Mich App at 122-123; *Heiler*,

79 Mich App 714 at 719; and *Nelson*, 66 Mich App at 66. Conversely no Michigan appellate court has ruled that the ability of a trial court to step into the role of the executive branch prosecutor and make discretionary litigation decisions in a case only constitutes a violation of the separation of powers doctrine if it occurs after a plea or verdict is accepted by the court, as the Court of Appeals ruled in this case.

The published Court of Appeals decision in this case improperly overturned over four decades of published caselaw, including decisions from this Court that constitute binding precedent on the Court of Appeals. *People v Mitchell*, 428 Mich 364, 369; 408 NW 2d 798 (1987). This decision misinterpreted the separation of powers doctrine set forth in Const 1963, art 3, § 2 in such a way that not only was the family court allowed to improperly step into the role of the executive branch prosecutor and dismiss the two juvenile delinquency offenses in this appeal, but under MCR 7.215(C)(2), all courts in Michigan have now been given the power to replicate this constitutional violation in any case where a plea or verdict has not yet been accepted by the court. This decision should not be allowed to stand.

4. The Court of Appeals used the wrong standard of review when it affirmed the trial court's erroneous ruling

The People's appeal of the family court's dismissal of the two authorized petitions raised several issues of law, including the interpretation of statutes such as section 36b of the CVRA, MCL 712A.2f and MCL 712A.18(1)(a), as well as a constitutionally based challenge to the decision on the grounds that it violated the separation of powers doctrine set forth in Const 1963, art 3, § 2. However, when addressing the standard of review applicable to Appellant's appeal, it appears that the Court of Appeals held that caselaw required it to apply the "abuse of discretion" standard to "[t]he trial court's entry of an order of disposition." *In re Diehl*, at 8. Later in this opinion the court applied this incorrect standard and ruled that the removal of these delinquency

cases from the family court docket and dismissal of them did not violate the abuse of discretion standard of review, concluding that “it cannot be said that the trial court abused its discretion by unauthorizing respondent’s second and third petitions and removing them from the adjudicative process.” *In re Diehl*, at 8 & 11.

As noted, Appellant’s challenge to the dismissal of the two juvenile delinquency cases addressed questions of law and constitutional interpretation, so this appeal should have been reviewed by the Court of Appeals under the less deferential de novo standard. *In re Tiemann*, 297 Mich App at 257. The use by the Court of Appeals of the more deferential abuse of discretion standard, when evaluating Appellant’s appeal challenging the family court’s dismissal of the two authorized juvenile delinquency petitions, constituted another example of reversible error by the Court of Appeals.

II. Relief Requested

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Jeffrey M. Kaelin, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court grant this application seeking leave to appeal, reverse portions of the Court of Appeals decision that affirmed the family court's dismissal of Petition 2 and Petition 3, hold that the trial court's *sua sponte* dismissal of the two authorized juvenile delinquency cases subject to this appeal was unlawful and a violation of the separation of powers doctrine, and remand this matter to the Oakland County Family Court judge for acceptance and entry of Respondent's pleas to these two juvenile delinquency petitions.

Respectfully submitted,

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