

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.
160457

Court of Appeals
No. 345672

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

**PETITIONER-APPELLANT'S REPLY TO APPELLEE'S ANSWER
TO APPLICATION FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

	<u>PAGE</u>
INDEX TO AUTHORITIES CITED	iii
ARGUMENTS:	
I. The Crime Victim Rights Act was enacted to enhance the rights of crime victims, not to grant family courts the executive branch power to <i>sua sponte</i> dismiss any juvenile case involving a crime victim so long as notification is given before the dismissal.....	1
A. The evolution and purpose of section 36b of the CVRA.....	1
B. “Shall not. . . unless” vs “may”; the difference between the Legislature conditionally prohibiting a broad category of actions and the Legislature conditionally permitting a specific action.....	4
C. Appellee’s answer does not address, much less attempt to legally defend, the portion of the Court of Appeals’ published opinion that distinguished <i>People v Smith</i> and decades of published caselaw addressing the separation of powers doctrine	7
D. Appellee’s Double Jeopardy argument lacks merit	8
E. The parties agree that appellate review is based upon the lower court record	9
F. Appellant’s appeal raises questions of law that are reviewed de novo	9
G. Harmless error does not apply to the dismissal of the two delinquency cases.....	9
Relief Requested..	10

INDEX OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<i>Band v Livonia Assocs</i> , 176 Mich App 96; 439 NW2d 285 (1989).....	9
<i>Genesee Prosecutor v Genesee Circuit Judge ('Genesee I')</i> , 386 Mich 672; 194 NW2d 693 (1972) ...	8
<i>Genesee Prosecutor v Genesee Circuit Judge ('Genesee II')</i> , 391 Mich 115; 215 NW2d 145 (1974).....	8, 9
<i>Hawkins v Department of Corrections</i> , 218 Mich App 523; 557 NW2d 138 (1996).....	10
<i>McAuley v GMC</i> , 457 Mich 513; 578 NW2d 282 (1998)	5, 7
<i>People v Garrison</i> , 495 Mich 362; 852 NW2d 45 (2014).....	1
<i>People v Johnson</i> , 396 Mich 424; 240 NW2d 729 (1976)	9
<i>People v Lee (In re Lee)</i> , 282 Mich App 90; 761 NW2d 432 (2009)	10
<i>People v Leonard</i> , 144 Mich App 492; 375 NW2d 745 (1985)	9
<i>People v Morey</i> , 461 Mich 325; 603 NW2d 250 (1999).....	4
<i>People v Nelson</i> , 66 Mich App 60; 238 NW 2d 201 (1975).....	10
<i>People v Robinson (In re Robinson)</i> , 180 Mich App 454; 447 NW2d 765 (1989).....	8
<i>People v Smith</i> , 496 Mich 133; 852 NW2d 127 (2014)	7, 10
<i>People v Kimble</i> , 470 Mich 305; 684 NW2d 669 (2004).....	4
<i>People v Wilson (In re Wilson)</i> , 113 Mich App 113, 122-123; 317 NW2d 309 (1982).....	9
<i>Piccalo v Nix</i> , 466 Mich 861; 643 NW2d 233 (2002).....	4, 7
<i>Rafferty v Markovitz</i> , 461 Mich 265; 602 NW2d 367 (1999).....	5
<i>Spectrum Health Hosps v Farm Bureau Mut Ins Co</i> , 492 Mich 50; 821 NW2d 117 (2012).....	4, 9
<i>Ypsilanti Fire Marshall v Kircher</i> , 273 Mich App 496; 730 NW2d 481 (2007).....	10
 <u>STATUTES</u>	
1988 PA 13	2
1988 PA 21	2
1988 PA 22	2
2000 PA 503.....	5, 7
MCL 712A.18(1)(a)	10
MCL 712A.2f.....	6
MCL 722.821	2

MCL 722.823(1)..... 2
MCL 780.752(1)(a)(1989)..... 2
MCL 780.781 3
MCL 780.786b 1

MISCELLANEOUS AUTHORITIES

Const 1963, art 1, § 24..... 5, 7
House Legislative Analysis, SB 1180 (December 12, 2000)..... 4, 5, 7
House Legislative Analysis, SB 251 (May 27, 2016) 6
Senate Committee Summary, SB 1180 (April 5, 2000) 5, 7
Senate Fiscal Agency Analysis for 2000 PA 503 (April 17, 2002) 4, 5, 7
Van Regenmorter, *Crime Victims’ Rights—A Legislative Perspective*, 17 Pepperdine L R 59, 59
(1989)..... 1, 2, 5

ARGUMENT

I. The Crime Victim Rights Act was enacted to enhance the rights of crime victims, not to grant family courts the executive branch power to *sua sponte* dismiss any juvenile case involving a crime victim so long as notification is given before the dismissal.

As noted in Appellant's application, the trial court accepted Appellee's pleas to three separate and formally authorized juvenile delinquency petitions, only to later set aside and ultimately dismiss two of the cases, *sua sponte*, on the grounds that the notification provisions of section 36b of the Crime Victims Rights Act ("CVRA"), being MCL 780.786b, empowered the trial court to *sua sponte* dismiss any juvenile delinquency case that involves a crime victim, over the People's objection, so long as the notice requirements of this section are met by the court. (H 9-10-18, p 11) The Court of Appeals sustained this reasoning in the published opinion underlying this appeal.

Appellee's answer argues that the notification obligations imposed through section 36b of the CVRA affirmatively empower trial courts to *sua sponte* dismiss any delinquency case involving a crime victim for any reason, over the objection of the People, so long as the court fulfils the notification obligations set forth in the CVRA. In support of this position, Appellee argues that the People cited no specific legislative history that gives "insight into the intentions of the Legislature when enacting the CVRA." Appellee's answer at 8, 26. However, as will be discussed, the legislative history underlying section 36b of the CVRA demonstrates that the purpose of this law was to *enhance* the rights and protections afforded to crime victims in Michigan; *not* to render victim cases dismissible by the courts for any reason while conversely shielding non-victim cases from this arbitrary dismissal power.

A. The evolution and purpose of section 36b of the CVRA

The origins of the CVRA authored by then Michigan Representative William Van Regenmorter began in the early 1980's, in response to frequent complaints by crime victims that they were ignored by the criminal justice system. Van Regenmorter, *Crime Victims' Rights—A Legislative Perspective*, 17 Pepperdine L R 59, 59 (1989); *See People v Garrison*, 495 Mich 362, 368 fn 19; 852 NW2d 45 (2014). In response to this problem, a comprehensive new act was introduced that ultimately resulted in the CVRA being signed into law on July 10, 1985. *Crime Victims' Rights—A Legislative*

Perspective, at 60-62. Among the focuses of the CVRA were to provide protections to crime victims and to ensure that crime victims were provided notice when events occur on their case. *Id.*, at 62-66.

The CVRA initially only applied to victims of felony crimes committed by adults, but was amended to add chapters applying the act to victims of misdemeanor crimes and to victims of crimes committed by juvenile offenders. *See* MCL 780.752(1)(a)(1989); 1988 PA 21 & 22. As noted by the author of the CVRA, one of the challenges to adding a chapter applying the CVRA to victims of crimes committed by juvenile offenders was that the terminology used in juvenile proceedings was different than the terminology used for adult offenders. As a result, the sections of the CVRA addressing the rights granted to victims of crimes committed by juvenile offenders had to be translated from the unique terminology used in delinquency proceedings into more ordinary criminal justice definitions, so that these rights were consistent with the rights afforded to victims of crimes committed by adults. *Crime Victims' Rights—A Legislative Perspective*, at 71.

A second challenge to the application of the CVRA to victims of crimes committed by juveniles was illustrated by the Juvenile Diversion Act (“JDA”), which was passed in the same year as these amendments to the CVRA. *See* MCL 722.821 et seq. 1988 PA 13. Under section 3 of the JDA, the Legislature has allowed some juvenile delinquency cases to be informally diverted before a prosecutor becomes involved in the case, so long as the decision to informally divert the case is made *before* a petition has been formally authorized into the family court docket. MCL 722.823(1). As a result, the CVRA chapter addressing the rights of victims of crimes committed by juveniles imposes victim notification obligations upon the court, instead of the prosecutor’s office, because the prosecutor’s office is not typically involved in juvenile delinquency cases diverted before formal authorization. *Crime Victims' Rights—A Legislative Perspective*, at 71.

Section 36b was added to the CVRA through 2000 SB 1180, introduced by then Senator Van Regenmorter on March 28, 2000. As introduced, section 36b of Senate Bill 1180 established a conditional prohibition upon the diversion of every delinquency case that required that the prosecutor consent to each diversion. The language used to describe the diversions and dismissals subject to section 36b was broad, using the terminology unique to delinquency proceedings to encompass

diversions under the JDA, formally authorized cases that are removed from the formal docket and placed on the consent calendar, as well as any other process that removes a delinquency case from the adjudicative process, regardless of the language used to describe the diversion or dismissal. To that end, this section provided in pertinent part that “[a] juvenile’s case 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 without the consent of the prosecuting attorney.” 2000 SB 1180, section 36b (introduced March 28, 2000).

In the substitute for Senate Bill 1180 of 2000 passed by the Senate on October 5, 2000, the language in section 36b conditionally prohibiting the diversion or dismissal of any delinquency case unless the prosecutor consented to the diversion was replaced with language prohibiting the diversion or dismissal of delinquency cases unless the court provided the prosecutor with notice of its intent to divert the delinquency case, along with a right to be heard on the issue. Senate substitute for 2000 SB 1180, section 36b (passed by the Senate on October 5, 2000). While the conditional prohibition against diverting delinquency cases was changed from requiring prosecutor consent to requiring that notice and an opportunity to be heard be given to the prosecutor, the section retained the broad juvenile-specific terminology used to be clear that *all* diversions, regardless of the terminology used to describe them, were subject to this conditional prohibition, i.e. that a delinquency case “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.” *Id.* The revised version of section 36b also included a caveat that the conditional prohibition against diverting delinquency cases (unless notice and an opportunity to be heard is provided to the prosecutor) only applied to delinquency cases involving offenses subject to CVRA, i.e. offenses involving crime victims as defined in section 31 of the CVRA, being MCL 780.781.

The revised version of section 36b included in the Senate substitute for 2000 SB 1180 passed by the Senate on October 5, 2000, was included without change in the House substitute for 2000 SB 1180, and was passed by the House on December 14, 2000. The House Legislative Analysis for the House substitute for 2000 SB 1180 noted that this bill was introduced because, even 15 years after the CVRA

was passed, “there are further protections that should be provided to crime victims,” including “expansion of the notification provisions” of the CVRA. House Legislative Analysis for 2000 SB 1180, at 1 (December 12, 2000). This report further noted that, with regard to section 36b, “[t]he bill would also *prohibit* a juvenile’s case from being diverted or otherwise removed from the adjudicative process unless the court notifies the prosecutor in writing and allows the prosecutor to address the court before the case is removed.” [Emphasis added] *Id.*, at 3.

The revised version of section 36b was signed into law on January 11, 2001. 2000 PA 503. The Senate Fiscal Agency Analysis of the final version of section 36b similarly noted that this law would operate to “*Prohibit* a juvenile’s case from being diverted or otherwise removed from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court’s intent to remove the case and allows the prosecutor to address the court before the case is removed.” [Emphasis added] Senate Fiscal Agency Analysis for 2000 PA 503, at 1 (April 17, 2002). This analysis further noted that the law provided that “a juvenile’s case *may not be* diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure removing 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 adjudication process and allows him or her the opportunity to address the court on that issue before the case is removed from the adjudicative process.” [Emphasis added]. *Id.*, at 8.

B. “Shall not. . . unless” vs “may”; the difference between the Legislature conditionally prohibiting a broad category of actions and the Legislature conditionally permitting a specific action

Questions regarding the interpretation and application of laws and constitutional provisions constitute questions of law, reviewable de novo by the appellate courts. *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004); *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503, 515; 821 NW2d 117 (2012). The goal of interpreting a statute is to give effect to the intent of the Legislature, as expressed in the statute’s language. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). When interpreting statutes, they should be construed in a manner that prevents absurd results or prejudice to the public interest, with any ambiguity in the language of a statute resolved to avoid absurdity. *Piccalo v Nix*, 466 Mich 861, 861; 643 NW2d 233 (2002); *Rafferty v Markovitz*, 461 Mich

265, 270; 602 NW2d 367 (1999); *McAuley v GMC*, 457 Mich 513, 519; 578 NW2d 282 (1998).

As noted in Appellee's answer to Appellant's application, the trial court and Court of Appeals ruled that section 36b of the CVRA empowered the trial court to *sua sponte* dismiss any delinquency case, as long as the case involved a crime victim and notice and an opportunity to be heard was provided to the prosecutor before the dismissal. The fallacy of this conclusion can best be described as a failure to differentiate between a law that conditionally prohibits an action (in this case by the court) and a law that conditionally permits an action.

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 crime victims. *Garrison*, 495 Mich at 368; *Crime Victims' Rights—A Legislative Perspective*, at 59-68. The purpose of 2000 PA 503, which added section 36b to the CVRA, was to provide further protections to crime victims, including expanding the notification obligations imposed through the CVRA. House Legislative Analysis for 2000 SB 1180, at 1, 3 (December 12, 2000); Senate Fiscal Agency Analysis for 2000 PA 503, at 1, 8 (April 17, 2002).

The evolution of section 36b from its initial version in SB 1180 of 2000 to its final version in 2000 PA 503 shows that the purpose of this law was to impose *restrictions* upon a court's ability to dismiss or divert delinquency cases. In the version of section 36b initially introduced, courts were *prohibited* from diverting or dismissing delinquency cases unless the court obtained the consent of the prosecutor. 2000 SB 1180, section 36b (introduced March 28, 2000); Senate Committee Summary, SB 1180, at 1 (April 5, 2000). The language used in the conditional prohibition contained in section 36b was as expansive as possible, to cover the known diversion options available to the court as well as any other action, regardless of the juvenile-specific terminology used to describe the action, that would result in the diversion or dismissal of juvenile delinquency cases for reasons other than legal insufficiency.¹ The final version of this section ultimately modified this conditional prohibition by replacing the requirement that a prosecutor consent to each diversion with a requirement that the court provide notice

¹ As noted by the original sponsor of the CVRA, the Legislature faced challenges translating the juvenile-specific terminology in delinquency cases into definitions that more closely aligned with ordinary criminal justice definitions. *Crime Victims' Rights—A Legislative Perspective*, at 71.

to the prosecutor and an opportunity to be heard before any delinquency case is diverted. The broad description in the enacted, version of section 36b clarifying that its conditional prohibition applied to all diversions of juvenile cases, regardless of their label, was not changed, except for the addition of a caveat that the prohibition in section 36b of the CVRA only applied to delinquency cases involving crime victims.

The intent of the Legislature to prohibit any type of diversion of delinquency cases, regardless of the juvenile terminology used to describe the action, unless notice is given to the prosecutor, can be further demonstrated by comparing and contrasting the language in section 36b of the CVRA with the language in MCL 712A.2f, which was conversely enacted by the Legislature to grant courts the conditional power to divert delinquency cases and place them on the informal consent calendar. While section 36b of the CVRA, which was enacted to enhance the rights of crime victims, MCL 712A.2f was enacted by the Michigan Legislature to set forth the process and parameters by which a family court may divert a delinquency case onto the informal consent calendar. *See* the House Legislative Analysis, SB 251 (May 27, 2016). Section 36b of the CVRA uses the language “*shall not*” and “*unless*” to establish a conditional prohibition against diverting or dismissing delinquency cases, while MCL 712A.2f(1), which was enacted to affirmatively grant courts the conditional power to divert delinquency cases onto the informal consent calendar, uses the language that a court “*may*” place a delinquency case on the informal consent calendar, subject to the limitations set forth in MCL 712A.2f(2). Additionally, section 36b of the CVRA uses a broad description of the diversion actions conditionally prohibited, which is consistent with a legislative intent to ensure that the conditional prohibition applied to all diversions of delinquency cases, regardless of the label used to describe the action. In contrast, MCL 712A.2f addressed only a single diversion method, i.e. the consent calendar, which is consistent with a legislative intent to grant courts the power to use a specific option to informally divert delinquency cases, subject to the limitations in the empowering legislation of this law. When the two statutes are compared and contrasted, it is clear that section 36b of the CVRA was enacted to create a conditional *prohibition* on all diversions of delinquency cases, regardless of the juvenile terminology used to identify the diversion method, unless notice and an opportunity to be

heard is provided to the prosecutor. Conversely MCL 712A.2f was clearly enacted to conditionally *empower* courts to divert (and ultimately dismiss) delinquency cases through the specific informal diversion method referred to as the consent calendar.

The language and purpose of the CVRA, Const 1963, art 1, § 24, and 2000 PA 503 all support the undeniable conclusion that they were enacted for the purpose of enhancing the rights of crime victims in Michigan. The evolution of section 36b of the CVRA likewise supports only one conclusion, that its purpose is to impose a conditional prohibition on courts handling delinquency cases involving crime victims, such that courts are *prohibited* from diverting (regardless of the label used to describe the diversion method) such cases unless notice and an opportunity to be heard is provided to the prosecutor. *See* Senate Committee Summary, SB 1180, at 1 (April 5, 2000); House Legislative Analysis for 2000 SB 1180, at 3 (December 12, 2000); Senate Fiscal Agency Analysis for 2000 PA 503, at 1 (April 17, 2002). This section, which is designed to enhance victim rights, should not and can not be interpreted as legally empowering trial courts to *sua sponte* divert and then dismiss any delinquency case over the objection of the prosecutor. Such an interpretation would render an absurd result by achieving the opposite of the goal intended by the Legislature, because instead of enhancing victim rights it would victimize these victims by subjecting cases involving crime victims to *sua sponte* dismissal by the courts for any reason, while shielding delinquency cases that did not involve crime victims from this arbitrary power. *Piccalo*, 466 Mich at 861; *McAuley*, 457 Mich at 519.

C. Appellee's answer does not address, much less attempt to legally defend, the portion of the Court of Appeals' published opinion that distinguished *People v Smith* and decades of published caselaw addressing the separation of powers doctrine

In Appellant's application, it was noted that the published Court of Appeals decision in this case affirmed the longstanding principle that the separation of powers doctrine prevents a court from overruling a prosecutor's discretionary litigation decisions on a case, as recently addressed by this Court in *People v Smith*, 496 Mich 133; 852 NW2d 127 (2014). This published opinion then took the unprecedented step of distinguishing the *Smith* case and holding that the separation of powers doctrine *only* bars a court from making 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, ruling:

The prosecution's reliance on *Smith* is unpersuasive. Whereas the defendant in *Smith* actually pleaded guilty to the criminal charge against him, the trial court 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.* Thus, unlike *Smith*, no adjudication occurred in this case, and the trial court was permitted to remove the second and third petitions from the adjudicative process without respondent having tendered a plea. *People v Diehl (In re Diehl)*, at 15.

Appellee's answer completely failed to substantively address this finding by the Court of Appeals. As noted in Appellant's application, as far back as the two 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*, pre-adjudicative actions by a trial court are subject to the separation of powers doctrine in the same manner as post-adjudicative trial court actions. *Genesee Prosecutor v Genesee Circuit Judge ('Genesee I')*, 386 Mich 672, 683-684; 194 NW 2d 693 (1972); *Genesee Prosecutor v Genesee Circuit Judge ('Genesee II')*, 391 Mich 115, 119-122; 215 NW 2d 145 (1974). The Court of Appeals' published decision in this case improperly overruled four decades of binding caselaw cited in Appellant's application, and creates new binding precedent that allows all courts in Michigan to step into the role of prosecutor and make unilateral discretionary litigation decisions on cases at any pre-adjudicative stage of the proceedings, i.e. before a plea or verdict has been accepted by the court, in direct violation of Const 1963, art 3, § 2.

It should be further noted that while Appellee's answer continues to assert that the trial court's dismissals of the two delinquency cases should be allowed because there is no law expressly prohibiting the court from dismissing these cases, there is in fact a law expressly prohibiting trial courts from engaging in *sua sponte* dismissals of such cases, with that law being the separation of powers doctrine, and the decades of caselaw interpreting this constitutional section's prohibitions upon court involvement in the discretionary litigation decisions of prosecutors. *Genesee I*, 386 Mich at 683-684; *Genesee II*, 391 Mich at 119-122; *People v Robinson (In re Robinson)*, 180 Mich App 454, 458; 447 NW 2d 765 (1989).

D. Appellee's Double Jeopardy argument lacks merit

Appellee's answer appears to argue that double jeopardy bars the reversal of the trial court's dismissal of the two delinquency cases, but this claim lacks merit. Michigan law has long been settled

that jeopardy does not attach in plea-based convictions until a sentence (in this case disposition) is imposed, which never occurred in the two cases subject to the present appeal. *People v Leonard*, 144 Mich App 492, 494-495; 375 NW2d 745 (1985); *People v Johnson*, 396 Mich 424, 431 fn3; 240 NW2d 729 (1976). Further, in circumstances where a court violates the separation of powers doctrine in a prosecutor's case, double jeopardy does not bar the reversal of the trial court's actions and reinstatement of the original charge(s) even after an accused has been sentenced. *Genesee II*, 391 Mich at 123; *People v Wilson (In re Wilson)*, 113 Mich App 113, 122-123; 317 NW2d 309 (1982).

E. The parties agree that appellate review is based upon the lower court record

Appellee's answer makes reference to the fact that a bench conference with the trial court was not included in the court reporter's transcription of the hearings, in conjunction with a citation to the case *Band v Livonia Assocs*, 176 Mich App 96, 103-104; 439 NW2d 285 (1989), all in support of the conclusion that appellate review is limited to the lower court record presented to the appellate courts. The record shows that Appellant requested and received what have been certified as complete transcriptions of the hearings in this case, and that the issues subject to this appeal were all placed on the record by the parties and included in the transcripts provided to the appellate courts. As such, Appellant agrees with Appellee that the appellate review in this case is limited to the transcripts, the pleadings, and the orders of the court.

F. Appellant's appeal raises questions of law that are reviewed *de novo*

Appellee's answer also agrees that the Court of Appeals applied the abuse of discretion standard to Appellant's appeal, which Appellee attempts to support through a claim that this standard of review was purportedly proper because Appellant's appeal "does not raise questions of law that are reviewable *de novo*." Appellee's answer, at 30. However, because Appellant's appeal raised challenges to the trial court's dismissal of the two delinquency cases involving the interpretation of multiple statutes, multiple court decisions, and multiple constitutional provisions, there should be no genuine dispute that the trial court's dismissals should have been reviewed under the *de novo* standard of review. . *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503, 515; 821 NW2d 117 (2012).

G. Harmless error does not apply to the dismissal of the two delinquency cases

Appellee's final argument in his answer to the application is a claim that any error in dismissing the two delinquency cases was harmless. A harmless error finding is applied when a court comes to the right result for the wrong reason, or when the error is not decisive to the outcome of the case. *Ypsilanti Fire Marshall v Kircher*, 273 Mich App 496, 529; 730 NW2d 481 (2007); *Hawkins v Department of Corrections*, 218 Mich App 523, 528; 557 NW2d 138 (1996). A good example of harmless error is the *Lee* case, where the trial court's failure to strictly comply with the CVRA notice requirements was ruled harmless error because the victims were either present at the hearing or chose not to attend after being notified of the hearing. *People v Lee (In re Lee)*, 282 Mich App 90, 99-100 & 101-102; 761 NW 2d 432 (2009) Harmless error does not apply to the present appeal because the two delinquency cases were dismissed in their entirety, with no adjudication entered for either case as required by the legislative branch through MCL 712A.18(1)(a), and as requested by the executive branch. The absence of additional sentencing consequences attached to the two judicially dismissed cases does not render the improper dismissals harmless. *People v Nelson*, 66 Mich App 60, 66; 238 NW 2d 201 (1975); *People v Smith*, 496 Mich 133, 136 & 140-141, 144; 852 NW2d 127 (2014).

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 the relief requested in Appellant's application.

Respectfully submitted,

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