

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 SUPPLEMENTAL BRIEF

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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 at page 201a of **Appellant's Appendix**, hereinafter referred to by the Appendix page number] 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 arraiging 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. Does the Juvenile Code allow a family court judge to *sua sponte* unauthorize and dismiss two delinquency cases?

Appellant contends the answer is: “No.”

Appellee appears to contend the answer is: “Yes.”

II. Does the notification provision in section 36b of the Crime Victims Rights Act provide the family court with family court judge with the authority to *sua sponte* unauthorize and dismiss two delinquency cases?

Appellant contends the answer is: “No.”

Appellee’s trial counsel appears to contend the answer is: “Yes.”

III. Did the family court’s *sua sponte* dismissal of two formally authorized delinquency cases, when the prosecutor did not agree to the plea bargain the judge was attempting to negotiate on behalf of the Respondent, encroach upon the prosecutor’s executive branch authority in violation of the separation of powers doctrine?

Appellant contends the answer is: “Yes.”

Appellee contends the answer is: “No.”

IV. Was any error resulting from the family court’s *sua sponte* dismissal of two formally authorized delinquency cases harmless?

Appellant contends the answer is: “No.”

Appellee contends the answer is: “Yes.”

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 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," 10a) 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. (46a) 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. (46a) 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. (16a & 21a-22a)

After arguments, the Court found that the Petitioner sustained its burden of proof, and the petition was sent for authorization. (54a) 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. (54a-55a)

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. (59a-60a) 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. (61a, *also see* item 8 on Petition 1 at 10a, containing the court's 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. (61a)

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," 63a) 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. (69a) 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. (74a)

The Court found that the petition should be authorized, and Petition 2 was signed for formal authorization. (72a-73a, *also see* item 8 on Petition 2 at 63a, containing 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. (73a-74a, 90a)

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). (96a-104a) 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. (97a) The police report was used as the factual basis to support the plea. (103a-104a) 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. (96a) After the plea was taken, Respondent's mother, Ms. Diehl acknowledged that Respondent "went into a rage" and "in his rage, injuries were caused." (105a) Respondent remained in custody, pending a psychological evaluation. (113a)

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. (120a) Respondent was placed on standard probation, allowing Respondent to leave Children's Village and return home. (131a) 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." (132a) Judge Valentine concluded the hearing by stating to Respondent "Mr. Diehl hang in there, buddy." (135a)

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," 138a) 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. (142a) 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. (144a-145a)

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. (146a-150a) The police reports were used as the factual basis to sustain Respondent's plea to Petition 2 and Petition 3. (150a) 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." (150a-151a) 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] (151a)

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. (151a) The family court judge verified that Respondent's mother had also gone over, and signed, the plea form submitted to the Court. (151a-152a) 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. (152a) A disposition date for Petition 2 and Petition 3 was then discussed. (152a)

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." (152a) 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." (152a) Disposition (sentencing) for Petition 2 and Petition 3 was then set for April 24, 2018. (153a) 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. (153a) 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." (153a)

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. (159a) 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." (160a-161a)

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--.” (161a) At that point Respondent’s counsel finished the trial court’s statement with “held them in abeyance, I believe,” to which the court replied “Yep. *He wanted to give a plea, and I wouldn’t accept it.*”[Emphasis added] (161a) 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.” (163a) 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. (163a) The family court judge explained that this was the reason “I am holding everything in abeyance.” (163a) The family court judge continued by asking Respondent “are you 12, you’re 10?” to which Respondent answered that he was actually “thirteen.” (163a-164a) 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. (163a-164a)

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.

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.”

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.” (172a) 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. (172a-173a) 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.” (173a-174a)

The case worker acknowledged that Respondent had another contact with the White Lake Police Department since the last hearing. (175a) 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. (176a)

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. (181a) 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. (181a)

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?" (182a) 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. (182a) 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. (182a) 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." (183a) 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." (183a)

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 –" (184a) 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. (185a-186a) The Assistant Prosecutor then pointed out that since Respondent already had an adjudication that allowed for whatever probationary conditions were necessary, the court could issue a "warning

and dismiss” on Petition 2 and Petition 3. (187a-188a) The judge responded to this argument by correctly noting that under the ‘warn and dismiss’ option, the offenses would remain a part of Respondent’s family court record. (188a) 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.” (188a)

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. (187a) 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.” (188a)

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. (189a-191a)

Through a document dated July 26, 2018, (195a), yet received for filing by the Oakland County Clerk on August 9, 2018, the trial court 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. 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. (203a-207a) 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. (203a-205a) 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. (210a) 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. (210a-211a)

Through an Order dated September 10, 2018 (but stamped as having been received for filing with the Oakland County Clerk on October 3, 2018), (220a), the trial court 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. *In re Diehl*, at 9-12, (222a). 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. Through an Order dated July 1, 2020, this Court granted Appellant oral argument on its application, and further directed the parties to file supplemental briefs addressing four issues related to Appellant's appeal. Further facts may be included in the argument section, where relevant to the issues presented.

ARGUMENT

- I. The Juvenile Code does not allow a family court judge to “unauthorize” and revoke a previously ordered authorization of a delinquency petition into the formal family court docket, with or without a prosecutor’s objection**

ISSUE PRESERVATION:

The People objected to the court’s *sua sponte* dismissal of the two juvenile delinquency cases, 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:

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).

Respondent was brought before the family court on juvenile delinquency petitions alleging three separate violations of state law on three separate dates. 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 unauthorizing and then dismissing the cases addressing Petition 2 and Petition 3, *sua sponte*, when the prosecution did not agree to offer the plea bargain that was requested by the judge on behalf of Respondent.

The trial judge did not cite a provision of the Juvenile Code in support of its revocation of its previous order authorizing these cases onto the formal family court docket and dismissal of the two delinquency cases, but instead relied upon a notification provision of the Crime Victim's Rights Act (hereinafter "CVRA") as purported authority to unauthorize and dismiss the two cases. The Court of Appeals likewise cited no provision of the Juvenile Code empowering a trial judge to bypass the procedures set forth in the Juvenile Code and revoke previously ordered authorizations placing the delinquency cases onto the formal family court docket, and then dismiss the two cases. To the contrary, the Court of Appeals specifically 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 unauthorized and then dismissed the two delinquency cases subject to this appeal. *In re Diehl*, at 11.

A. Juvenile delinquency proceedings are quasi-criminal in nature

When evaluating juvenile delinquency cases, it is important to note that while they are 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 United States Supreme Court in *In re Gault*, 387 US 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967) 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 and accurately

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.

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 Juvenile Code and Michigan Court Rules set forth specific procedures by which juvenile delinquency cases are to be handled by family courts

When a juvenile is accused of violating Michigan’s criminal laws, an original delinquency petition may be drafted by the County Prosecutor’s Office, and submitted to the Family Court division of the Circuit Court. MCL 712A.11(2); MCR 3.914(b)(1) The Juvenile Code and Court Rules sets forth the manner in which juvenile delinquency petition cases are then handled by the family courts.

1. Preliminary Inquiries

When the juvenile delinquency petition is not accompanied by a request to detain the juvenile, the court holds a “preliminary inquiry,” which, except for specified cases, does not have to be held on the record. MCR 3.932(A); MCL 780.781(1)(g). When evaluating the juvenile delinquency petition in a preliminary inquiry, the options available to the family court are to:

- (1) deny authorization of the petition;

- (2) refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 et seq.;
 - (3) direct that the juvenile and the parent, guardian, or legal custodian be notified to appear for further informal inquiry on the petition;
 - (4) proceed on the consent calendar as provided in subrule (C); or
 - (5) place the matter on the formal calendar as provided in subrule (D).
- MCR 3.932(A)

2. Preliminary Hearings

If the juvenile delinquency petition is accompanied by a request to detain the juvenile, a “preliminary hearing” must be held, no later than 24 hours after the juvenile was taken into custody. MCR 3.925(A)(1) Unlike a preliminary inquiry, a preliminary hearing is held on the record, and evidence may be presented. MCR 3.925(B) The Rules of Evidence, except as to privilege, do not apply to preliminary hearings. MCR 3.901(A)(3) When a preliminary hearing is held, the options available to the family court are to decide:

- (1) whether the petition should be dismissed,
 - (2) whether the matter should be referred to alternate services pursuant to the Juvenile Diversion Act, MCL 722.821 et seq.,
 - (3) whether the matter should be heard on the consent calendar as provided by MCR 3.932(C), or
 - (4) whether to authorize the petition to be filed pursuant to MCR 3.932(D).
- MCR 3.935(B)(3)&(7)

3. The Juvenile Diversion Act

During the preliminary handling of a delinquency case, i.e. during either a preliminary inquiry or a preliminary hearing *before* the case is authorized into the formal family court docket, the court may consider providing the juvenile with alternate services, pursuant to the Juvenile Diversion Act, being MCL 722.821 *et seq.* When considering whether to divert a delinquency case under this act, the court must consider all of the factors set forth in MCL 722.824, including:

- (a) The nature of the alleged offense.
- (b) The minor's age.
- (c) The nature of the problem that led to the alleged offense.
- (d) The minor's character and conduct.
- (e) The minor's behavior in school, family, and group settings.
- (f) Any prior diversion decisions made concerning the minor and the nature of the

minor's compliance with the diversion agreement.
MCL 722.824

A petition may only be diverted through the Juvenile Diversion Act *before* the delinquency petition has been formally authorized for filing pursuant to MCR 3.932(D). MCL 722.823(1)

4. Consent Calendar

A court may consider placing a juvenile subject to a delinquency petition on the informal consent calendar, “[i]f the court determines that formal jurisdiction should not be acquired over the juvenile.” MCR 3.932(C)(1); MCL 712A.2f(1). Placing the juvenile on the consent calendar would allow the court to informally supervise the juvenile under what is termed a “consent calendar case plan,” which is not considered a court order. MCL 712A.2f(7); MCR 3.932(C)(6). If a juvenile successfully completes the terms imposed by the court while on the consent calendar case plan, the court closes the case and destroys all records of the proceedings on the petition, in accordance with the record management policies of the State Court Administrator’s Office. MCR 3.932(C)(10)&(11); MCL 712A.2f(9).

A juvenile may be placed on the consent calendar before or after the delinquency petition has been authorized into the formal family court docket, so long as disposition on the delinquency petition has not yet occurred. MCR 3.932(C)(1); MCL 712A.2f(3). However, a juvenile delinquency petition case may **not** be placed on the consent calendar if the prosecutor does not agree to have the case placed on the consent calendar. MCR 3.932(C)(2); MCL 712A.2f(2)

5. The authorization of a delinquency petition onto the formal family court docket

“If the court determines that formal jurisdiction should be acquired, the court shall authorize a petition to be filed.” MCL 712A.11(1); MCR 3.932(D) MCR 3.903(A)(21) explains that the term “Petition authorized to be filed” refers to written permission given by the court to file the petition containing the formal allegations against the juvenile or respondent with the clerk of the court. MCR 3.903(A)(9) provides that “[a]n authorized petition is deemed ‘filed’ when it is delivered to,

and accepted by, the clerk of the court.”

6. The post-authorization adjudicative stage

After a juvenile delinquency petition case has been authorized, accepted for filing by the clerk of the court, and placed on the family court’s formal docket (as occurred with all three of Respondent’s juvenile delinquency cases), the juvenile is no longer eligible to participate in the diversionary services available before a petition is authorized. MCL 722.823(1) As such, and much in the same the manner as adult criminal cases are handled after a complaint and warrant have been authorized by a judge, the *only* procedural options available to a court under either the Juvenile Code or the Michigan Court Rules to resolve an authorized juvenile delinquency petition are to accept a plea to the petition, MCR 3.941, set the case for trial, MCR 3.942, or transfer the cases to the consent calendar if, *and only if*, the prosecutor agrees to have the cases transferred to the consent calendar. MCR 3.932(C)(1)&(2); MCL 712A.2f(3).

7. Disposition (sentencing) options after adjudication

After an adjudication has been entered on an authorized juvenile delinquency petition, the court must proceed to disposition (sentencing) on the case, unless the matter has been transferred to the consent calendar. When a disposition addresses a juvenile’s first offense conveying jurisdiction to the court, the court may enter an order of disposition as provided in MCL 712a.18. MCR 3.943(E)(1). MCL 712A.18(1) provides for a number of different options that can be exercised by the court, ranging from warning and dismissing the petition (where the adjudication is entered into the family court records but no further services are required from the disposition), to making the juvenile a ward of the state through Public Act 150 of 1974. MCL 712A.18(1)(a)-(n) When a juvenile is subject to a second or subsequent disposition while already under a court’s supervision, additional requirements are imposed on the court, with MCR 3.943(E)(2) providing that “the court must consider imposing increasingly severe sanctions, which may include imposing additional

conditions of probation; extending the term of probation; imposing additional costs; ordering a juvenile who has been residing at home into an out-of-home placement; ordering a more restrictive placement; ordering state wardship for a child who has not previously been a state ward; or any other conditions deemed appropriate by the court.”

8. What is *not* in the Juvenile Code or the Michigan Court Rules

Just as important as what is codified in Michigan’s Juvenile Code and Michigan’s Court Rules is what is *not* contained in these laws and rules. Nowhere in the Juvenile Code or the Michigan Court Rules is there any reference to a court being empowered to “unauthorize” a previously authorized juvenile delinquency petition, as was done by the judge, *sua sponte*, in this case. Nor is there any provision within the Juvenile Code or the Michigan Court Rules empowering a judge to bypass and disregard their delinquency case procedures and revoke a previously ordered authorization placing a delinquency case onto the formal family court docket.²

C. Because the two delinquency cases both were properly authorized for filing, filed with the clerk of the court, placed on the family court’s formal docket, and then litigated on the formal family court, the family court judge lacked authority under the Juvenile Code and the Michigan Court Rules to *sua sponte* “unauthorize” and dismiss the cases when the prosecutor would not agree to the plea bargain request made by the judge acting as an advocate for the Respondent

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

² 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 exclusio 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.

result of a domestic violence incident on July 23, 2017, where Respondent was upset about being told to go to bed and then assaulted his foster mother. Because the Prosecutor was seeking the detention of Respondent, a preliminary hearing was held on July 25, 2017 to determine whether the petition should be authorized and whether the Respondent should be detained.

At this hearing, the court had the option of dismissing the petition because it was not factually supported, referring Respondent to alternate services pursuant to the Juvenile Diversion Act, placing Respondent on the consent calendar (if the People agreed to this placement), or authorizing the delinquency petition to be filed with the clerk of the court so that it would proceed as a case on the family court's formal docket. In light of the severity of Respondent's assault on his mother, the court chose to authorize the filing of Petition 1 with the clerk of the court so that it would proceed as a case on the family court's formal docket. The signature and time stamp on Petition 1 shows that it was signed for formal authorization by the court on July 24, 2017, and accepted for filing by the clerk of the court on July 27, 2017.

When the preliminary hearing was held on Petition 2 (brought because Respondent assaulted his mother a second time less than 24 hours after being released from custody after his detention on Petition 1), the court faced the same choice as with Petition 1, and again chose to forgo any diversion options and instead authorize the filing of Petition 2 with the clerk of the court so that it would proceed as a case on the family court's formal docket. The signature and time stamp on Petition 2 shows that it was signed for formal authorization by the court on July 26, 2017, and accepted for filing by the clerk of the court on July 27, 2017.

When Respondent was charged for yet another violation of state law for stealing money from a teacher's purse at school (while under the court's jurisdiction from Petition 1), Respondent's detention was not sought, and a preliminary inquiry was held, instead of a preliminary hearing. Again, the court chose to forgo the diversion options available before a petition is authorized, and

instead authorize the filing of Petition 3 with the clerk of the court so that it would proceed as a case on the family court's formal docket. The signature and time stamp on Petition 3 shows that it was signed for formal authorization by the court on January 18, 2018, and accepted for filing by the clerk of the court on January 23, 2018.

Once the three petitions were authorized by the court, and accepted for filing by the clerk of the court so that they would proceed as cases on the family court's formal docket, Respondent was no longer eligible to participate in the diversionary services available before a petition is authorized. MCL 722.823(1) As such, the only procedural options available for Respondent's cases were to accept a plea to the petitions, MCR 3.941, set the matters for trial, MCR 3.942, or transfer the cases to the consent calendar if, *and only if*, the prosecutor agreed to have the cases transferred to the consent calendar. MCR 3.932(C)(1)&(2) There were no other options available under the Juvenile Code or the Michigan Court Rules to divert or otherwise dismiss Respondent's petitions, and the trial court's "un-authorization" and dismissal of these cases was legally unsupported and should be reversed.

II. The section of the CVRA imposing notification *obligations* on the family courts if they dismiss or divert a delinquency cases involving crime victims does not grant 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

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:

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).

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).

A. The legislative history of the CVRA section imposing notification obligations upon family courts if they divert or dismiss a delinquency case involving a crime victim

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.*; Van Regenmorter, *Crime Victims' Rights—A Legislative Perspective*, 17 Pepperdine L R 59, 59 (1989); *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."

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 unless the prosecutor (who again was usually not involved in cases that were not formally authorized) consented 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, providing 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. *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 revised version of section 36b was signed into law on January 11, 2001. 2000 PA 503.

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 Senate Fiscal Agency Analysis of the final version of section 36b similarly noted that this law would operate to “[*p*]rohibit 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.

In whole, the enacted version of 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 XIIA 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.

B. “Shall not. . . unless” vs “may”; the difference between the Legislature conditionally prohibiting specified court actions on delinquency cases and the Legislature conditionally permitting court actions on delinquency cases

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. 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. 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* 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 in the enacted version, except for the addition of a caveat that the notification obligations imposed upon courts by 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 the statute governing the consent calendar. While section 36b of the CVRA was enacted to enhance the rights of crime victims, MCL 712a.2f, which codified the consent calendar procedure, was enacted by the Legislature to set forth the process and parameters by which a family court is empowered to 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 unless the section’s requirements are met. In contrast, 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 family 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 involving victims, 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 involving crime victims 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.

- III. The trial court’s decision to “unauthorize” and dismiss the two delinquency cases, after the prosecutor did not agree to the plea bargain suggested by the trial court on behalf of the Respondent, encroached upon the prosecutor’s executive branch authority to make discretionary litigation decisions on the cases, and therefore violated the separation of powers doctrine**

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:

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,³ 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 Mich App 711, 717; 335 NW2d 131 (1983). Finally, the judiciary has the power to hear and determine controversies,⁴ 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

³ 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.

⁴ 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. (182a-185a, 187a-190a), *People v Killebrew*, 416 Mich 189, 213; 330 NW2d 834 (1982).

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 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 Prosecutor v Genesee Circuit Judge* (*‘Genesee I’*), 386 Mich 672, 683-684; 194 NW 2d 693 (1972); *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 applies to both adult criminal and juvenile delinquency cases. *Robinson*, 180 Mich App at 458; *Wilson*, 113 Mich App at 122-123; *Carey*, 241 Mich App at 230.

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. (182a, 185a-188a) Only when the prosecutor refused to exercise its discretion on the cases in the manner advocated 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. (162a, 207a)

However, neither the fact that no additional sentencing 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.⁵ 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

⁵ 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, the court only looked at one of the two interests protected by this statute. MCL 712A.1(3) 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, as this argument could be applied 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, i.e. entering an adjudication without adding additional sentencing consequences.

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 executive branch responsibility of the prosecutor to make 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 “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 was a clear violation of the separation of powers doctrine, and the Court of Appeals erred when it affirmed these dismissals in its published opinion.

Further, it is the legislative branch of government 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 circumvented the limitations contained in 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 exclusive 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 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 all⁶ lower courts in Michigan to step into the role of the prosecutor and exercise the discretion vested exclusively with the executive branch prosecutor at any point in the proceedings 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

⁶ As noted, the separation of powers doctrine applies equally 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.

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.⁷

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 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 note that the timing of the dismissal after the plea was accepted made the court's dismissal more egregious, not that a dismissal before a plea was entered would have been proper. To that end, the *Smith* Court stated "[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

⁷ See MCL 791.234(11) and MCL 780.621(11), respectively.

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 that 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 previously 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 the action 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.

IV. The trial court’s *sua sponte* dismissal of the two formally authorized delinquency cases, when the prosecutor did not agree to the plea bargain suggested and advocated by the trial judge on behalf of the Respondent, constituted reversible error

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:

The fourth issue this Court directed the parties to address was whether any error made when the trial court *sua sponte* dismissed the two delinquency cases constituted harmless error under MCR 3.902(A) and MCR 2.613(A). MCR 3.902(A) provides:

In General. The rules are to be construed to secure fairness, flexibility, and simplicity. The court shall proceed in a manner that safeguards the rights and proper interests of the parties. Limitations on corrections of error are governed by MCR 2.613.

MCR 2.613(A) provides:

Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

A. The trial court’s outright dismissal of the two delinquency cases constituted reversible error under each of the harmless error inquires

As noted in *People v Mateo*, 453 Mich 203, 214; 551 NW2d 891 (1996), there are “different articulations of what constitutes a harmful error— “miscarriage of justice,” “inconsistent with substantial justice,” “affecting substantial rights.” Each conveys, however, a need for a

determination of prejudice.” An error is prejudicial when it is outcome-determinative, i.e. when it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *In re Tiemann*, 297 Mich App 250, 257; 823 NW2d 440 (2012), see *People v Houthoofd*, 487 Mich 568, 587; 790 NW2d 315 (2010), *Hurt v Michael's Food Ctr, Inc*, 220 Mich App 169, 177-178; 559 NW2d 660 (1996).

Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Tiemann*, 297 Mich App at 257, citing *Carines*, 460 Mich at 763, *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). An error is deemed to have affected substantive rights “if it caused prejudice, i.e., it affected the outcome of the proceedings.” *Id* at 9, citing *Carines*, 460 Mich at 763. A preserved non-constitutional error does not require reversal unless it is more probable than not that the error affected the outcome of the case. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); *In re VanDalen*, 293 Mich App 120, 131-132; 809 NW2d 412 (2011) see also MCR 3.902(A) and MCR 2.613(A). Preserved constitutional errors that are not structural defects require reversal unless the reviewing court determines that the beneficiary of the error has established, beyond a reasonable doubt, that it the error did not affect the outcome of the case. *Houthoofd*, 487 Mich at 587, citing *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

In the present case, Appellant preserved the issues raised on appeal. Appellant’s challenge to the trial court’s dismissal of the two cases based upon the trial court’s misinterpretation of the Juvenile Code raises an issue of non-constitutional law, which require reversal when it is more probable than not that the error affected the outcome of the cases. Appellant’s challenge to the trial court’s *sua sponte* dismissal of the two delinquency cases on the grounds that the trial court’s action encroached upon the executive branch duties of the prosecutor and was therefore a violation of the separation of powers doctrine raises a preserved constitutional issue, and therefore *requires* reversal unless this Court finds that Respondent has met his burden of showing, beyond a

reasonable doubt, that the trial court's violation of the separation of powers doctrine did not affect the outcome of the two cases. Finally, Appellant's challenge to the trial court's dismissal of the two cases based upon the trial court's misinterpretation of the CVRA raises both an issue of law, as to the interpretation of the statutory sections of the CVRA, and a constitutional issue, in that the CVRA was enacted in furtherance of Const 1963, art 1, § 24.

While the standards for establishing that the trial court's erroneous dismissal of the two cases varies depending upon which legal argument is being addressed, this differentiation is rendered meaningless because the errors challenged through Appellant's appeal were the trial court's erroneous outright dismissal of the two formally authorized delinquency cases. The absence of adjudications on these two cases, even without additional sentencing sanctions given as a result of the adjudications, not only violates the prosecutor's executive branch authority, but has a broader impact because delinquency adjudications, even if they were warned and dismissed pursuant MCL 712A.18(1)(a), are factored in to future dispositions (sentencings) for the respondent, MCR 3.943(E)(2), may impact the respondent's ability to attempt to set aside the juvenile adjudications, 712A.18e, and would be factored into any sentencing decisions if the respondent later commits adult felony offenses. *See* PRV 5. Because the errors raised and established by Appellant clearly affected the outcome of these two cases, as they resulted in the dismissal of the two cases, Appellant should prevail under both of the harmless error inquiries, and this Court should reverse the trial court's dismissal of these cases.

B. Appellant argues that the trial court's errors rise to the level of a structural defect errors that mandate reversal because they seriously affects the fundamental fairness, integrity, or public reputation of the judicial proceeding.

In *Arizona v Fulminante*, 499 US 279, 308-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991), the United States Supreme Court noted the distinction between a constitutional "trial error" and a "structural defect" error that seriously affects the fundamental fairness, integrity, or public reputation of the judicial proceeding. While a "trial error" affecting constitutional rights may only result in the reversal

of the trial court when the error was not harmless, i.e. it affected the outcome of the case, a “structural defect” error mandates the reversal of the trial court without weighing the resulting potential prejudice under a harmless error analysis. *People v Anderson (After Remand)*, 446 Mich 392, 404-405; 521 NW2d 538 (1994).

Examples of court recognized structural defect errors include the total deprivation of the right to counsel at trial litigated in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), a case where the trial judge was found to not be impartial as addressed in *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927), the unlawful race-based exclusion of grand jury members litigated in *Vasquez v Hillery*, 474 US 254; 106 S Ct 617; 88 L. Ed. 2d 598 (1986), the right to self-representation at trial litigated in *McKaskle v Wiggins*, 465 US 168, 177-178, n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984), and the defendant's right to public trial litigated in *Waller v Georgia*, 467 US 39, 49, n 9; 104 S Ct 2210; 81 L. Ed. 2d 31 (1984). The common thread linking all of these cases is that the constitutional error affected the very framework in which the case proceeds, rather than being simply an error in the trial process itself. *People v Stevens*, 498 Mich 162, 178-179; 869 NW2d 233 (2015), citing *Rose v Clark*, 478 US 570, 577-578, 106 S Ct 3101; 92 L Ed 2d 460 (1986).

This Court recognized in *Stevens* that “[w]hen the issue is preserved and a reviewing court determines that a judge has pierced the veil of judicial impartiality, a structural error has been established that requires reversing the judgment.” *Stevens*, 498 Mich at 178, citing *Fulminante*, 499 US at 309-310. In the present appeal, the two delinquency cases had been issued by the prosecutor's office, authorized into the formal family court docket, and pleas were even tendered by the Respondent when the trial court, *sua sponte*, began to act as an advocate for Respondent. After accepting the pleas tendered by Respondent through a plea proceeding that both parties acknowledged complied with the appropriate Court Rules, the trial court *sua sponte* reversed its decision and held the pleas under

advisement. The lower court record shows that the trial court then began repeatedly attempting to pressure the prosecutor's office into either reducing Respondent's charges or agreeing to the consent calendar so the cases would eventually be dismissed. Further, the trial court's ultimate decision to unauthorize and dismiss the two delinquency cases was not done as a result of a motion by Respondent or his counsel, it was done *sua sponte*, by a trial court that appears to have stopped serving as a neutral and unbiased arbitrator of the cases, and instead had taken on the role of advocate⁸ for Respondent.

In light of the facts surrounding the trial court's *sua sponte* erroneous dismissal of the two delinquency cases in violation of the separation of powers doctrine, Appellant submits that the error subject to review by this Court rises to the level of a structural defect, which mandates a reversal of the trial court's rulings without consideration of the prejudice necessary to overcome a harmless error inquiry. *Stevens*, 498 Mich at 178. This position appears consistent with Michigan's appellate decisions reversing trial courts that encroach upon the executive branch authority of the prosecutor. The only case Appellant could find where harmless error was even addressed by a Michigan appellate court that found separation of powers violation of this nature is *People v Davis*, 310 Mich App 276, 302; 871 NW2d 392 (2015), where the court summarily *rejected* a defendant's argument that because the erroneous dismissal of his case was done without prejudice, harmless error doctrine would prevent the appellate court from reversing the trial court's actions. Every other Michigan appellate case that ruled that a trial court encroached upon a prosecutor's executive branch duties in violation of the separation of powers doctrine reversed the trial court's actions

⁸ The record shows that the trial court's hostility to the prosecution in these cases escalated to the point that the judge even aggressively argued with the Assistant Prosecutor over such things as the prosecutor's statement that two jury trials would be needed (to protect Respondent's right to a fair trial), if the trial court continued to refuse to accept Respondent's pleas and the factually and legally separate incidents in the two delinquency cases proceeded to trial. (190a-191a)

without engaging in a harmless error inquiry, including the appellate cases finding a separation of powers violation from a trial court's dismissal of a juvenile delinquency case.⁹ *Robinson*, 180 Mich App at 458; *Wilson*, 113 Mich App at 122-123.

V. 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 to either grant this application seeking leave to appeal, or to 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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⁹ Admittedly the trial court's dismissal or other actions on those cases, by their very nature, like the present case, met the showing of prejudice required to overcome the harmless error inquiry.