

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

IN RE TYLER JOSEPH DIEHL

Supreme Court: 160457  
Court of Appeals: 345672  
Lower Court: 17-855342-DL  
Oakland County Circuit Court  
Family Division

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RESPONDENT-APPELLEE'S SUPPLEMENTAL BRIEF

**\*\*\* ORAL ARGUMENT REQUESTED\*\*\***

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**TABLE OF CONTENTS**

	<b><u>PAGE NO</u></b>
INDEX OF AUTHORITIES	3
COUNTER-STATEMENT OF JURISDICTION OF THE COURT	4
COUNTER-STATEMENT REGARDING MCR 7.305(B) APPELLATE GROUNDS	5
COUNTER-STATEMENT OF QUESTIONS PRESENTED	7
COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS	8
COUNTER-ARGUMENTS:	8
<b>a. The Juvenile Code does permit a family court judge to revoke its previous authorization of a juvenile delinquency petition over the objection of the prosecution.</b>	<b>8</b>
<b>b. MCL 780.786b does provide family courts with the independent authority to remove an already authorized delinquency matter from the adjudicative process without the prosecution’s consent.</b>	<b>16</b>
<b>c. The family court’s decision to “unauthorize” two delinquency petitions did not encroach on the prosecution’s charging authority and did not violate the Separation of Power’s Clause, Const 1963, art 3, S 2.</b>	<b>22</b>
<b>d. To the extent that the family court may have erred such error was harmless, MCR 3.902(A); MCR 2.613</b>	<b>29</b>
CONCLUSION AND RELIEF SOUGHT	37

## INDEX OF AUTHORITIES

<i>People v. Smith</i> , 496 Mich 133; 852 NW2d 127 (2010)	5
<i>People v Tanner</i> , 496 Mich 199, 256; 853 NW2d 653 (2014)	5
<b><i>People v Kirby</i>, 440 Mich 485, 492; 487 NW2d 404 (1992)</b>	<b>5</b>
<i>People v. T.J.D. (In re D.)</i> , 329 Mich. App. 671, 944 N.W.2d 180, 2019	5
<i>In re Webster</i> , 170 Mich. App. 100, 427 N.W.2d 596	9, 10
<i>People v Brown</i> , 205 Mich App 503; 517 NW2d 806 (1994)	9
<i>In re Scruggs</i> , 134 Mich App 617, 622-623; 350 N.W.2d 916 (1984)	9
<i>In re Kerr</i> , 323 Mich App 407, 411; 917 NW2d 408 (2018)	9
<i>Frost-Pack Distrib Co v Grand Rapids</i> , 399 Mich 664; 252 NW2d 747 (1977)	9
<i>People v. Diehl (In re Diehl)</i> , 2019 Mich. App. LEXIS 5682	9
<i>People v. Dunbar</i> , 423 Mich. 380, 377 N.W.2d 262.	10
<b><i>People v. Matson (In re Matson)</i></b> , 2017 Mich. App. LEXIS 1707, 2017 WL 4803572	10
<i>Coal. No-Fault v. Mich. Catastrophic Claims</i> 317 Mich. App. 1, 894 N.W.2d 758	13
<i>MidAmerican Energy Co v Dep't of Treasury</i> , 308 Mich App 362, 863 NW2d 387 (2014)	14
<b><i>People v. Krukowski</i></b> , 2019 Mich. App. LEXIS 4395, 2019 WL 3519251	14
<b><i>People v. Smith</i>, 496 Mich. 133, 852 N.W.2d 127, 2014</b>	15
<i>State ex rel. S.R.</i> , 08-785, pp. 4-5 (La.App. 4 Cir. 10/8/08), 995 So.2d 63, 66,	15, 23, 24
<i>In re Jagers</i> , 224 Mich. App. 359, 568 N.W.2d 837	16
<i>People v. Garrison</i> , 495 Mich. 362, 852 N.W.2d 45, 2014	16
<i>Sun Valley Foods Co. v. Ward</i> , 460 Mich. 23, 596 N.W.2d 119	19, 20
<i>Murphy v Michigan Bell Telephone Co</i> , 447 Mich. 93; 523 N.W.2d 310 (1994).	19
<i>Nation v W D E Electric Co</i> , 454 Mich. 489, 494; 563 N.W.2d 233 (1997).	19
<i>United States v Turkette</i> , 452 U.S. 576, 593; 101 S. Ct. 2524; 69 L. Ed. 2d 246 (1981)	19
<i>Tryc v Michigan Veterans' Facility</i> , 451 Mich. 129; 545 N.W.2d 642 (1996)	19
<b><i>Piccalo v. Nix</i>, 2002 Mich. LEXIS 733, 466 Mich. 861, 643 N.W.2d 233</b>	21
<b><i>McAuley v. GMC</i>, 457 Mich. 513, 578 N.W.2d 282, 1998 Mich. LEXIS 1292</b>	21
<i>People v. Sierb</i> , 456 Mich 519; 581 NW2d 219 (1998)	22
<i>In re Robinson</i> , 180 Mich. App. 454, 458, 447 N.W.2d 765 (1989)	22
<i>People v. Leonard</i> , 144 Mich App 492 at 495; 375 NW2d 745	23
<i>Lee v. Grandison</i> , 1996 U.S. Dist. LEXIS 13921 at 9	23
<i>People v. Williamson</i> , 138 Mich. App. 397; 360 NW2d 199, (1984)	23
<b><i>Commonwealth v. Turner</i>, 2000 Mass. Super. LEXIS 15, 8-9, 11 Mass. L. Rep. 193</b>	<b>25</b>
<i>Bolt v City of Lansing</i> , 459 Mich 152, 160; 587 NW2d 264 (1998)	25
<i>Dearborn Twp v. Dearborn Twp Clerk</i> , 334 Mich 673; 55 NW 2d 201 (1952)	27
<i>Sharp v. Genesee Co Election Comm</i> , 145 Mich App 200: 377 NW2d 389 (1985)	27
<i>Soap &amp; Detergent v Natural Resources Comm</i> , 415 Mich 728; 330 NW2d 346 (1982)	27
<i>People v. Trinity</i> , 189 Mich. App. 19, 471 N.W.2d 626, 1991	27
<i>People v. Ford</i> , 417 Mich. 66, 331 N.W.2d 878, 1982	27, 28
<i>Genesee Prosecutor v Genesee Circuit Judge</i> , 386 Mich 672; 194 NW2d 693 (1972)	27
<i>Bordenkircher v Hayes</i> , 434 U.S. 357; 98 S Ct 663; 54 L Ed 2d 604 (1978)	27
<i>People v. Muniz</i> , 259 Mich. App. 176, 675 N.W.2d 597, 2003	28
<i>In re Wilson</i> , 113 Mich App 113; 317 NW2d 309 (1982)	30
<i>In re Whittaker</i> , 239 Mich App 26, 28-30; 607 NW2d 387 (1999)	30

<i>People v. Lee (In re Lee)</i> , 282 Mich. App. 90, 761 N.W.2d 432, 2009	30
<i>People v. Mateo</i> , 453 Mich. 203, 551 N.W.2d 891, 1996	34
<i>United States v. Olano</i> , 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508, 1993	34
<i>Ariz. v. Fulminante</i> , 499 U.S. 279, 111 S. Ct. 1246	35
<i>People v. Anderson</i> , 446 Mich. 392, 521 N.W.2d 538, 1994 Mich. LEXIS 2038,	36

#### STATUTES

MCR 7.303(B)(1)	4
MCR 7.305(C)(2)	4
MCR 7.305(B)(5)	4, 5, 6
MCR 7.305(B)(5)(b)	4
MCR 7.305(B)(5)(a)	5
Crime Victims Rights Act (CVRA).MCL 780.786b	6, 12, 13
<a href="#">MCLS § 712A.1</a>	8, 10
<a href="#">MCLS § 712A.2</a>	11
MCL 780.781(1)(g)(i) and (ii)	12
MCR 3.932(B)	12
<a href="#">MCLS @ 712A.2f</a>	15, 18
Const 1963, art 9, § 31	26

#### **COUNTER-STATEMENT OF JURISDICTION OF THE COURT**

A published Opinion was entered by the Court of Appeals on September 19, 2019 affirming the trial court's dismissal of Petitions number two and three and affirming the trial court's application of the CVRA as rationale for its decision in doing so. Petitioner-Appellant filed an Application for Leave to Appeal to the Supreme Court and Respondent-Appellee filed a responsorial Brief. On July 1, 2020 the Supreme Court issued an order that the parties file Supplemental Briefs focusing on four specific identified issues and not to submit restatements of their respective applications. Petitioner-Appellant filed their Supplemental Brief on August 12, 2020. Respondent-Appellee now files his Supplemental Brief within the required 21-days.

Jurisdiction is proper pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(2) as it pertains the original Application for Leave and Appellee's Responsive Brief.

The Order of the Court dated July 1, 2020, is a separate Order and the parties and compelled to comply therewith.

**COUNTER -STATEMENT REGARDING GROUNDS FOR APPEAL**

MCR 7.305(B)(5) states that in an appeal of a decision of the Court of Appeals, such appeal must establish the following:

- (a) the decision is clearly erroneous and will cause material injustice, or
- (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals;

It is submitted that the Petitioner-Appellant is unable to establish either ground in its Application for Leave to Appeal. However, this Honorable Court did issue an Order dated July 1, 2020 that the parties file supplemental briefs to address the four issues the court identified in its Order.

It may be argued that this is a case of first impression but this does not obviate the fact that the decision of the Court of Appeals does not conflict with any Supreme Court decision or another decision of the Court of Appeals. Thus, the grounds pursuant to MCR 7.305(B)(5)(b) have not been met.

The Prosecutor must also establish both that the decision is clearly erroneous – which has been argued in its Supplemental Brief but the Prosecutor must also establish that the decision will cause material injustice. The Petitioner-Appellant has failed to meet the second prong of MCR 7.305(B)(5)(a).

While stating the above, the Respondent-Appellee is fully cognizant of the Court's Order for the parties to file Supplemental Briefs.

As argued above the application, contrary to appellant's assertions, the Court of Appeals did not disregard clear and binding precedent – as none exists – and did not establish that the decision is clearly erroneous and will cause material injustice.

These are the two grounds for Appellant to prevail. It is an either/or ground and again Appellant has not established either ground.

Appellant goes on to argue that there was a breach of the separation of powers doctrine and states that the court of appeals decision disregarded precedent as set forth in Const 1963, art 3, S 2 and cites the case of *People v. Smith*, 496 Mich 133; 852 NW2d 127 (2010) in support thereof.

Appellee contends that this Honorable Court is not bound by such precedent and "[T]his Court need not interpret a provision of our Constitution in the same manner as a similar or

identical federal constitutional provision . . . ." *People v Tanner*, 496 Mich 199, 256; 853 NW2d 653 (2014).

Rather, when interpreting the Michigan Constitution, we must recognize the law as it existed in Michigan at the time the relevant constitutional provision was adopted, and "it must be presumed that a constitutional provision has been framed and adopted mindful of prior and existing law and with reference to them." *People v Kirby*, 440 Mich 485, 492; 487 NW2d 404 (1992)

*People v. Smith*, supra is distinguishable in that it dealt with an adult sentencing in a criminal matter. This is not the issue before this court - whether the trial court's decision to "unauthorize" two delinquency petitions violated the Separation of Powers clause. *Smith* states that: "the power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests exclusively in the prosecutor" at 141. However, this is not the issue before the court.

As pointed out in the Court of Appeals - *People v. T.J.D. (In re D.)*, 329 Mich. App. 671, 944 N.W.2d 180, 2019 Mich. App. LEXIS 5682 - the underlying decision being appealed;

The prosecution's reliance on *Smith* is unpersuasive. Whereas the defendant in *Smith* actually pleaded guilty to the criminal charge against him, the trial court here took respondent's plea to the charges in the second and third petitions under advisement and never accepted respondent's plea of no contest. *Id.* Thus, unlike *Smith*, no adjudication occurred in this case, and the trial court was permitted to remove the second and third petitions from the adjudicative process without respondent having tendered a plea. *Lee*, 282 Mich App at 94; MCL 780.786b; MCR 3.932(B).

It is submitted that the Court of Appeals was correct in distinguishing *Smith* and reliance thereupon does not establish grounds under MCR 7.305(B)(5).

Contrary to Appellant's assertion, the Court of Appeals did not improperly rely on the Crime Victims Rights Act (CVRA).MCL 780.786b. The Court of Appeals correctly stated that pursuant to the CVRA, the trial court was permitted to remove petitions from the adjudicative process.

A reviewing court reviews de novo questions of statutory interpretation. *Smith* supra at 138.

The Court's primary responsibility in statutory interpretation is to determine and give effect to the Legislature's intent. The words of a statute are the most reliable indicator of the Legislature's intent and should be interpreted according to their ordinary meaning and the context within which they are used in the statute. Once the Legislature's intent has been discerned, no further judicial construction is required or permitted, as the Legislature is presumed to have intended the meaning it plainly expressed.

As Appellant points out, the CVRA contains no specific language empowering a court to dismiss authorized delinquency petitions but neither does it contain language specifically prohibiting it. Appellant has provided no authority that the intention of the Michigan Legislature was to prohibit such actions nor that the trial court's utilization of the CVRA is in direct contradiction or as counsel states in his brief that it has the "opposite effect that was intended by the Legislature.

Once again it is asserted that Appellant has failed to establish sufficient grounds under MCR 7.305(B)(5).

#### **COUNTER-STATEMENT OF QUESTIONS PRESENTED**

- a. The Juvenile Code does permit a family court judge to revoke its previous authorization of a juvenile delinquency petition over the objection of the prosecution.**

Petitioner - Appellant contends the answer is: "NO"  
Respondent-Appellee answers: "YES"

- b. MCL 780.786b does provide family courts with the independent authority to remove an already authorized delinquency matter from the adjudicative process without the prosecution's consent.**

Petitioner - Appellant contends the answer is: "NO"  
Respondent-Appellee answers: "YES"

- c. The family court's decision to "unauthorize" two delinquency petitions did not encroach on the prosecution's charging authority and did not violate the Separation of Power's Clause, Const 1963, art 3, S 2.**

Petitioner - Appellant contends the answer is: "NO"  
Respondent-Appellee answers: "YES"

**d. To the extent that the family court may have erred such error was harmless, MCR 3.902(A); MCR 2.613**

Petitioner - Appellant contends the answer is: "NO"  
Respondent-Appellee answers: "YES"

**CONCISE COUNTER-STATEMENT OF FACTS**

Respondent-Appellee relies on his Concise Counter-Statement of Facts as laid out in his Original Brief on Appeal in the Court of Appeals and his Answer to Petitioner-Appellant's Application for Leave to Appeal before this Honorable Court. Respondent-Appellee also stipulates to the use of the appendix filed by Appellant in this matter.

**ARGUMENT**

**I. The Juvenile Code, MCL 712A.1 et seq., does allow a family court to revoke its previous authorization of a juvenile delinquency petition over the objection of the prosecution?**

The Juvenile Code deals with matters involving Juveniles and the jurisdictional "Court" means the family division of circuit court. [MCLS § 712A.1](#) "Juvenile" means a person who is less than 17 years of age who is the subject of a delinquency petition. [MCLS § 712A.1](#)

(3) This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents.  
[MCLS § 712A.1\(3\)](#)

This matter was properly brought before the trial court as the family division of the circuit court has jurisdiction pursuant to the Juvenile Code and that the Juvenile involved was less than

17 years of age when the offense was allegedly committed. The Juvenile Code is not punitive by nature in its drafting nor in its execution. It is to be “liberally construed”

The juvenile code is to be liberally construed in order to effectuate the child’s welfare and the state’s best interest. *In re Webster*, 170 Mich. App. 100, 427 N.W.2d 596, 1988 Mich. App. LEXIS 416 (Mich. Ct. App. 1988), app. denied, 432 Mich. 894, 1989 Mich. LEXIS 497 (Mich. 1989).

The trial court's entry of an order of disposition in a juvenile-delinquency proceeding is reviewed for an abuse of discretion, while its factual findings are reviewed for clear error. *People v Brown*, 205 Mich App 503, 504-505; 517 NW2d 806 (1994); *In re Scruggs*, 134 Mich App 617, 622-623; 350 N.W.2d 916 (1984). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *In re Kerr*, 323 Mich App 407, 411; 917 NW2d 408 (2018) (quotation marks and citation omitted). This Court will reverse a trial court's finding of fact only if "this Court is left with a definite and firm conviction that a mistake has been made." *Brown*, 205 Mich App at 505. In addition, this Court reviews de novo the interpretation of statutes and court rules. *Kerr*, 323 Mich App at 411.

As stated in the underlying published decision of the Court of Appeals it is correctly stated that:

"In construing a legislative enactment, we are not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used." *Frost-Pack Distrib Co v Grand Rapids*, 399 Mich 664, 683; 252 NW2d 747 (1977). The legislative chapter governing juveniles plainly states that it: shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents. [MCL 712A.1(3); see also MCR 3.902(B).]

The underlying opinion in the matter before this Honorable Court, it is submitted was correct in its determination when it stated that:

Juvenile judge noted that the continued adjudication of petitions would merely serve to provide the juvenile with a history of offenses, and the purpose of juvenile intervention, to rehabilitate in lieu of punishment, would not be served. The Legislature provided that court with the mechanism to address a juvenile's adjudications in a manner best suited to the juvenile's circumstances and needs, and the learned trial judge applied its provisions to best suit the needs of the child and the state. *People v. Diehl (In re Diehl)*, 2019 Mich. App. LEXIS 5682 (Mich. Ct. App. Sept. 19, 2019).

This ruling is consistent with the intent of the Juvenile Code which is to "rehabilitate in lieu of punishment" and that to add multiple petitions would not serve the purpose of addressing "a juvenile's adjudications in a manner best suited to the juvenile's circumstances and needs..." nor "conducive to the juvenile's welfare and the best interest of the state." [MCLS § 712A.1\(3\)](#)

Each child coming within the jurisdiction of the juvenile division of the probate court is to be provided with the care, guidance and control conducive to the child's welfare and the state's best interest, and the juvenile code is to be liberally construed in order to effectuate this purpose. *In re Webster*, 170 Mich. App. 100, 108, 427 N.W.2d 596, 600, 1988 Mich. App. LEXIS 416,

The Juvenile Code must be liberally construed in order to provide each child coming within the juvenile division's jurisdiction with such care, guidance, and control as will be conducive to the child's welfare and the state's best interest. Proceedings under the Juvenile Code are not criminal in nature. MCL 712A.1; MSA 27.3178(598.1). *People v. Dunbar*, 423 Mich. 380, 386, 377 N.W.2d 262, 264, 1985 Mich. LEXIS 986,

As stated in *People v. Matson (In re Matson)*, 2017 Mich. App. LEXIS 1707, 2017 WL 4803572

Michigan's Juvenile Code embraces the idea that minors are more susceptible to change and rehabilitation. The code "must be liberally construed in order to provide each child coming within the juvenile division's jurisdiction with such care, guidance, and control as will be conducive to the child's welfare and the state's best interest." *People v Dunbar*, 423 Mich 380, 386; 377 NW2d 262 (1985). When adjudicating a juvenile, his or her "prospects for rehabilitation [must] be seriously considered." *Id.* at 387, quoting *People v Schumacher*, 75 Mich App 505, 511; 256 NW2d 39 (1977).

Due to the unarguable intent of the Juvenile Code to it is to be liberally construed, to be geared towards rehabilitation rather than punishment and the conduciveness to the child's welfare and the state's best interest, it is not difficult to assert that any Statute that interacts and/or is

explicitly tied to the Juvenile Code is afforded these same intentions and protections. The CVRA being one of those Statutes therefore must be liberally construed, place rehabilitation over punishment and be conducive to the juvenile's welfare.

Adding multiple petitions, especially to one so young, is punitive. This is not the intent of the Juvenile Code. The trial judge was correct in placing rehabilitation over punishment and tailored her decision not arbitrarily or capriciously but with the full weight of the Juvenile Code and the CVRA rightfully and legally in her corner.

The family division of the Circuit Court has the following authority and jurisdiction:

(a) Exclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 17 years of age who is found within the county if 1 or more of the following apply:

(1) Except as otherwise provided in this sub-subdivision, the juvenile has violated any municipal ordinance or law of the state or of the United States. If the court enters into an agreement under section 2e of this chapter, the court has jurisdiction over a juvenile who committed a civil infraction as provided in that section. The court has jurisdiction over a juvenile 14 years of age or older who is charged with a specified juvenile violation only if the prosecuting attorney files a petition in the court instead of authorizing a complaint and warrant. As used in this sub-subdivision, "specified juvenile violation" means 1 or more of the following: [MCLS § 712A.2](#)

The juvenile in the case at bar was under the age of 14 at the time of the alleged commission of the offense(s). The first being domestic violence issued on July 24, 2017. The child was 12 at the time of the incident. This was neither a "specified juvenile offense" nor a juvenile over the age of 14. In such instances, the prosecutor must file a Petition as opposed to authorizing a complaint and warrant.

In the underlying case the prosecutor did file a petition but the juvenile was less than 14 at the time of the alleged offense. The prosecutor in this case asked for detention of the juvenile even though he was only 12 years old – an example of punishment which is anathema to the spirit and intent of the Juvenile Code. The prosecutor maintained this aggressive and punitive posture throughout the case and subsequent petitions that were filed.

The subsequent petitions were another domestic violence petition issued July 26, 2017 only two days after the first petition. Again, the juvenile was only 12 at the time. This petition was

authorized by the court. The prosecutor again requested out of home detention for this 12-year old juvenile and this time the court granted the prosecutor's request and the juvenile was remanded into custody, pending a psychological evaluation.

It is submitted that it was barbaric for the prosecutor to request a remand of a 12-year old into custody, especially one who purported to have psychological issues. Despite these mitigating circumstances the juvenile was removed from his Mother. Subsequently, the trial judge did accept the respondent-juvenile's no contest plea to one count of domestic violence and the case entered the dispositional phase. The juvenile received probation and was returned to the care of his Mother but at this point the 12-year old juvenile had been in custody for almost a month.

It is also offensive and far astray of the intent of the Juvenile Code that the prosecutor in his Supplement Brief would draw attention to the empathetic statement of the trial judge after disposition when she told the young boy to "hang in there, buddy" (135a). This underscores that the prosecutor from the outset had no intention of being fair or tailoring his/her actions to anything else but punishment.

A third petition dated November 28, 2017 – larceny in a building – was authorized by the court on January 18, 2018. At the time of the third petition the juvenile was still only 12-years old and was 12-years old when the trial judge decided to "strike the plea" (152a) to petitions two and three and would "take the plea under advisement" (152a)

Both domestic violence and larceny in a building are "offenses" under the CVRA. See MCL 780.781(1)(g)(i) and (ii). MCR 3.932(B) states that "[a] case involving the alleged commission of an offense listed in the [CVRA] may only be removed from the adjudicative process upon compliance with the procedures set forth in [MCL 780.786b]." MCL 780.786b(1) provides, in relevant part:

[A] case involving the alleged commission of an offense, as defined in [MCL 780.781], 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. . . . 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 [MCL 780.794]. [Emphasis added.]

It is incontrovertible that all three petitions are offenses under the CVRA. It is equally incontrovertible that there is a procedure under the CVRA that the trial court can notice its intent to remove such petitions from the adjudicative process once procedural rules are followed. The Appellant does not contend that such procedures were properly followed.

The recommendation as to disposition by the probation officer was that despite the two additional petitions that the recommendation would be probation. In the spirit and intent of the Juvenile Code, the trial court correctly took this dispositional recommendation into consideration when she said that “I can’t give more probation of more services to you than you have right now even if is sentence you in a disposition” (153a)

Again, this is a correct application of the Juvenile Code which is rehabilitative rather than punitive. It is submitted that there was no reason, other than the prosecutor’s desire to add more adjudications to the young man’s record, especially when the prosecutor was well aware of the recommendation of probation.

Another petty and offensive posture of the prosecutor in his Supplemental Brief was to highlight that the trial judge stated to the young man that “you look very nice,” and “did you dress up for me” (159a) as if this was some sort of bias on the part of the judge. We are dealing with a 12-year old boy – to insinuate that the judge was biased or sympathetic to juvenile is unfounded and disgraceful.

The trial judge following proper procedure, then filed a notice to the prosecutor of removal of the two petitions from the adjudicative process. As discussed in detail below, such notice is permitted both under the Juvenile Code as buttressed by MCL 780.786b. Whether or not the notice merely parroted a section of the Juvenile Justice Bench Book is irrelevant and does not make invalid the availability and legality of the notice.

Similarly, no where in the Juvenile Code nor the CVRA does it mandate that the trial judge cite case law or court rules in her notice to the prosecutor but it is incorrect to state that no statute was cited as the notice provision came directly from the language in MCL 780.786b(1). The trial judge correctly asserted and the court of appeals agreed that MCL 780.786b(1) did give the Judge the authority to dismiss petitions from the adjudicative process provided the notice and other provisions of MCL 780.786b(1) were followed. No where in the record nor does the prosecutor contend that such procedures were not followed.

Appellant cites the case of *Coal. Protecting Auto No-Fault v. Mich. Catastrophic Claims Ass'n*, 317 Mich. App. 1, 894 N.W.2d 758, 2016 Mich. App. LEXIS 1591 to forward the concept of expression unius est exclusion alterius – to assert that 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.

This case dealt with the issue of whether the Michigan Catastrophic Claims Association (MCCA) was a public body subject to the Freedom of Information Act (FOIA), MCL 15.231 et seq. HOLDINGS: [1]-The MCCA was a public body for purposes of the FOIA because it was a body that was created by state authority, the legislature did not violate 1963 Const, art. 4, § 25 when it enacted MCL 500.134(4), and although the MCCA was a public body, its records were exempt from disclosure under MCL 500.134(4) and (6)(c).

This is about as far away from a juvenile delinquency issue that one can get and is therefore distinguishable and inapplicable to the specific issue before the court.

This doctrine is mentioned in a footnote to the case and was not determinative of the penultimate issue nor did it specifically mention the passing of Legislation as Appellant wrongly asserts. The footnote merely states that [T]he doctrine of *expressio unius est exclusio alterius* . . . means the express mention of one thing implies the exclusion of another." *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014) (quotation marks and citation omitted). It does not attach the phrase that “when legislation is passed” as Appellant asserts in his Supplemental Brief.

*People v. Krukowski*, 2019 Mich. App. LEXIS 4395, 2019 WL 3519251 which cites the MidAmerican Energy case puts the doctrine of *expressio unius est exclusio alterius* in proper perspective:

... support, or help from." The failure to seek a certain type of medical care is not equivalent to withdrawing protection, help, or support from a child, or giving a child up with the intent never to claim an interest in the child. Moreover, under the doctrine of *expressio unius est exclusio alterius* , the "express mention of one thing implies the exclusion of another." *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*(On Remand), 317 Mich App 1, 15n 6;894 NW2d 758(2016) ...

It is disingenuous at best to imply that this doctrine applies to the interplay between the Juvenile Code and the CVRA.

The Court of Appeals, it is submitted correctly applied the law and material proceedings of fact, that the trial court had the authority to dismiss authorized petitions over the objection of the prosecutor provided MCL 780.786b(1) was properly noticed and procedurally intact and that there existed no authority prohibiting the Judge to do so.

Appellant also *People v. Smith*, 496 Mich. 133, 134, 852 N.W.2d 127, 129, 2014 Mich. LEXIS 1083, 2014 WL 2765735 which was an adult criminal case that dealt with the delayed sentencing provisions of MCL 771.1(2). The court of appeals in the underlying case properly pointed out that *Smith* was not persuasive as the dismissal of the cases in the case at bar occurred before a plea or disposition was accepted regarding Petitions number two and three.

As such, the trial court acted in accordance with MCL 780.786b in ultimately dismissing the second and third petitions and there exists no legal or equitable basis to remand the case back before a different judge. Appellant asserts that there is no reference in the Juvenile Code of the Court Rules to a trial judge being empowered to unauthorize a previously authorized petition – but neither do they state otherwise. If it were the intent of the Legislature to prohibit such conduct it would have expressly said so. But reference is made in the Juvenile Code to the CVRA:

MCLS @ 712A.2f states:

... The court may transfer a case from the formal calendar to the consent calendar at any time before disposition. A case involving the alleged commission of an offense as that term is defined in section 31 of the William Van Regenmorter crime victim's rights act, 1985 PA 87 , MCL 780.781 , shall only be placed on the consent calendar upon compliance with the procedures set forth in section 36b of the William Van Regenmorter crime victim's rights act, 1985 PA 87 , MCL 780.786b . (4) After a case ...MCLS @ 712A.2f

It is clear, at least to this Appellee, that both the Juvenile code emphasis rehabilitation over punishment, the child's welfare, liberal construction of court rules and statutes, that a juvenile court is vested with broad discretion to arrive at solutions balancing the needs of the child with interests of society." *State ex rel. S.R.*, 08-785, pp. 4-5 (La.App. 4 Cir. 10/8/08), 995 So.2d 63, 66, that

Again, the Michigan Juvenile Code should be liberally construed in order to provide each child coming within the juvenile division's jurisdiction with such care, guidance, and control as

will be conducive to the child's welfare and the best interest of the state. Mich. Comp. Laws § 712A.1, Mich. Stat. Ann. § 27.3178(598.1). *In re Jagers*, 224 Mich. App. 359, 360, 568 N.W.2d 837, 838, 1997 Mich. App. LEXIS 233, \*1 and that “One goal of the Children's Code is to avoid a ruling which “[the juvenile judge] knows is only a dead end for the child.” *State ex rel. D.R.*, 10-0406, p. 5

**II. MCL 780.786b does provide family courts with the independent authority to remove an already authorized delinquency matter from the adjudicative process without the prosecution’s consent**

This case presents a question of statutory interpretation. We review such questions de novo. We review the sentencing court's factual findings for clear error. *People v. Garrison*, 495 Mich. 362, 366-367, 852 N.W.2d 45, 47, 2014 Mich. LEXIS 1025, \*2  
Sec. 36b.

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

Appellant contends that this issue raises questions of law that are reviewed de novo on appeal. While this is certainly the standard of review, MCL 780.786b states directly in the body of the statute that such removal of a delinquency petition from the adjudicative process is prohibited “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.”

In addition, it is critical to point out the line preceding the one aforementioned: 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. The Appellant goes to great lengths to discuss diversion and the consent calendar where the prosecution is not typically involved but the statute also states “or made subject to *any other prepetition or preadjudication* procedure that removes the case from the adjudicative process” [emphasis added]

So judicial authority to act without the consent existed prior to the amendment of the statute which required prosecutorial approval prior to the placing of a delinquency matter on diversion or the consent calendar. Prior to this amendment such cases could be diverted or placed on the consent calendar without prosecutorial consent. The CVRA was codified in 1985 and it was not until 2000 that the statute was modified to require prosecutorial consent regarding consent calendar cases and diversion. But the notice provision was not left intact.

This amendment did not alter or modify the MCL 780.786b notice provision and likewise is not only confined to diversion or the consent calendar but any other prepetition or pre-adjudication petitions. Any other means exactly that: “any other”. The utilization of MCL 780.786b in this context then applies to any other pre-adjudication procedure that removes a delinquency petition from the adjudicative process.

It gives the trial judge such power both pre-petition or pre-adjudication. Diversion and the consent calendar are pre-petition; removing a case from the adjudication process is post-authorization but pre-adjudication. It is clear that this is permissible under MCL 780.786b.

The issue of “shall not” vs “may not” did amend the statute to require that the prosecutor become involved in consent calendar and diversion issues but again it did not change the notice provision – which still stands. This means that a family court Judge can still make a decision to remove a petition from the adjudicative process as long as it provides notice to the prosecutor of its intention to do so. Again, this was done in the instant case. The prosecutor was notified, given an opportunity to address the court on the issue before the case is removed from the adjudicative

process. MCL 780.786b provides protections for the victim. The victim shall also be given notice of the proceeding and the right to present at the hearing and to address the court.

[MCLS @ 712A.2f](#) points out that:

... The court may transfer a case from the formal calendar to the consent calendar at any time before disposition. A case involving the alleged commission of an offense as that term is defined in section 31 of the William Van Regenmorter crime victim's rights act, 1985 PA 87 , MCL 780.781 , shall only be placed on the consent calendar upon compliance with the procedures set forth in section 36b of the William Van Regenmorter crime victim's rights act, 1985 PA 87 , MCL 780.786b . (4) After a case ...[MCLS @ 712A.2f](#)

This again, is authority for the proposition that the trial judge has the authority to remove a delinquency petition from the adjudicative process as long as it complies with MCL.786b which as stated contains the notice requirement that remains intact despite numerous amendments.

It is noteworthy to consider Section (10)(a) of [MCLS § 712A.2f](#) which states that:

- (10) If it appears to the court at any time that proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court shall proceed as follows:
- (a) If the court did not authorize the original petition, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition to determine whether the petition should be authorized.

Section (10)(a) permits the court where the petition has not been authorized to transfer the case to the formal calendar without a hearing – meaning without input or notice to the prosecutor. So, the consent and/or objection power of the prosecutor does not exist under this circumstance and the trial court can sua sponte make such a determination without the consent or input from the prosecutor. It is submitted then that prosecutorial consent, prosecutorial objection or even notice in a delinquency petition is not absolute.

MCL 780.786b telegraphed its legislative intent when the statute was drafted and the legislators anticipated and specifically laid out provisions whereby a family court judge has the authority to remove a delinquency petition from the adjudicative process as long as certain procedures are followed: This is exactly what the trial court did in the case at bar and there is no

where in the record, nor argued by the Appellant, that this procedure was not followed strictly to the letter of the law.

In fact, the Appellant cites cases in support of his argument that 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.

The rules of statutory construction are well established. *Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 236, 596 N.W.2d 119, 123, 1999 Mich. LEXIS 1335, \*8-9.

The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co*, 447 Mich. 93, 98; 523 N.W.2d 310 (1994). See also *Nation v W D E Electric Co*, 454 Mich. 489, 494; 563 N.W.2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide "the most reliable evidence of its intent . . . ." *United States v Turkette*, 452 U.S. 576, 593; 101 S. Ct. 2524; 69 L. Ed. 2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich. 129, 135; 545 N.W.2d 642 (1996). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. HN5 *Luttrell v Dep't of Corrections*, 421 Mich. 93; 365 N.W.2d 74 (1984).

MCL 780.786b is not ambiguous: it specifically states that the trial court cannot remove a delinquency petition 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." Once again, this was followed to the letter by the trial court and is a proper and permissible use of MCL 780.786b.

In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as "its placement and purpose in the statutory scheme." *Bailey v United States*, 516 U.S. 137, 145; 116 S. Ct. 501; 133 L. Ed. 2d 472 (1995). See also *Holloway v United States*, 526 U.S. 1; 119 S. Ct. 966; 143 L. Ed. 2d 1 (1999). As far as possible, effect should be given to every phrase, clause, and word in the statute. *Gebhardt v O'Rourke*, 444 Mich. 535, 542; 510 N.W.2d 900 (1994). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. HN6 *Aetna Finance Co v Gutierrez*, 96 N.M. 538; 632 P.2d 1176 (1981).

*Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 237, 596 N.W.2d 119, 123, 1999 Mich. LEXIS 1335, \*9-10

It is conceded that the legislative history and the amendments to the CVRA over the years have enhanced both protections to victims and increased the authority of the prosecution. However, as stated repeatedly throughout Appellee's Brief – the authority and power of the prosecutor is not absolute and there are exceptions and limits to these powers. Specifically, MCL 780.786b(1).

A plain reading of this section makes it crystal clear that the Legislature in making various amendments over the years left the notice section intact. It specifically provides a procedure for the family court trial jurist to remove a delinquency petition regarding a juvenile as long as the notice procedures are followed. If the Legislature – which has made numerous amendments – intended for this procedure to be altered it certainly had ample opportunity to do so. Instead it left the procedure intact and one can only conclude it was left intact for the exact purpose the trial court utilized in the instant case.

Our goal in interpreting a statute is to give effect to the intent of the Legislature as expressed in the statute's language. Absent ambiguity, we assume that the Legislature intended for the words in the statute to be given their plain meaning, and we enforce the statute as written. *Garrison supra at 367.*

It is submitted that there is no ambiguity – the statute is clear – and the statute should be enforced as written. Contrary to Appellant's assertion the act, while imposing additional restrictions and procedures – the purpose of the law was not to totally foreclose a family court trial judge authority of dismiss or unauthorize petitions. Appellant goes to great lengths to provide a Legislative History of MCL 780.786b(1) but does not provide any insight into the Legislature's intent on keeping intact the notice provision when a jurist is contemplating dismissing or unauthorizing a petition. Further, the Appellant focuses almost exclusively in his Legislative analysis on the diversion and consent calendar docket which do indeed require prosecutorial consent, notice and an opportunity to be heard.

But this does not laser focus on the penultimate issue of the trial court's authority to independently remove an already authorized petition from the adjudication process without the prosecutor's consent which this Honorable Court directed the parties to address when it Ordered the parties to file Supplemental Briefs.

Again, the Appellant mischaracterizes and puts forth his own interpretation – without any authority in support – to hypothesize that the sole intent of the amendments to MCL 780.786b(1) were for the sole purpose of dealing with diversionary and consent calendar cases. This is just not so.

MCL 780.786b(1) does discuss diversionary and consent calendar cases but it does not preclude that similar procedures can be utilized by the trial court to deal in the same fashion with both authorized and non-authorized petitions both pre and post adjudication.

At this risk of being repeatedly repetitive, the Statute clearly states that the trial court can utilize MCL 780.786b(1) for any delinquency petition at any stage of the proceedings as long as the notice requirements and an opportunity for both the victim and the prosecutor being heard on the matter are followed.

The *Garrison* case which the Appellant cites, deals with the issue of restitution under the CVRA and is distinguishable from the case at bar. The CVRA addresses the issue of restitution but again this is not the issue before this Honorable Court. *Garrison* nowhere addresses the issue of the separation of powers doctrine between a trial judges authority to unauthorize a petition nor the power of the prosecution to object. Again, it has been submitted repeatedly that the prosecution does not have absolute power over all juvenile delinquency petition. MCL 780.786b(1) is but one example.

The absurd result that the Appellant asserts would result from the instance case just simply does not bear out. *Piccalo v. Nix*, 2002 Mich. LEXIS 733, 466 Mich. 861, 643 N.W.2d 233; *McAuley v. GMC*, 457 Mich. 513, 578 N.W.2d 282, 1998 Mich. LEXIS 1292. These cases stand for the proposition that Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. They are distinguishable from the instant case as they dealt with remedies, costs and attorney fees in a civil litigation lawsuit.

There is no absurd result in the instant case. As argued below the trial court is permitted to consider numerous factors when making a decision to unauthorize a petition. The objection of the prosecutor is but one factor. As stated in *State ex rel. G.S.*, 287 So. 3d 752, 762, 2019 La. App. LEXIS 2179, 2019-0605 (La.App. 4 Cir. 12/04/19);, 2019 WL 6542409

A "juvenile court is vested with broad discretion to arrive at solutions balancing the needs of the child with interests of society." *State ex rel. S.R.*, 08-785, pp. 4-5 (La.App. 4 Cir. 10/8/08), 995 So.2d 63, 66 (citing *State in Interest of R.W. and N.W.*, 97-0268 (La.App. 4 Cir. 4/16/97), 693 So.2d 257). One goal of the Children's

Code is to avoid a ruling which "[the juvenile judge] knows is only a dead end for the child." *State ex rel. D.R.*, 10-0406, p. 5 (La. App. 4 Cir. 10/20/10), 51 So. 3d 121, 124 (quoting McGough & Triche, *Louisiana Children's Code Handbook* 2009-2010 (West), pp. 479-80 (quoting Polier, *A View from the Bench* 30 (1964))).

This is exactly the situation in the instant case. The trial judge avoided an adjudication that she felt was heavy handed, a piling on and an over charging of the Juvenile which would serve no legitimate purpose – who was only 12 years old at the time of alleged misconduct – and stated that she did not feel that giving the juvenile a “huge criminal record” was in the best interests of justice or Respondent’s future. (TR 4-24-18 pg 163a) This is the “dead end for the child” that the trial court considered in making its decision to unauthorize the Petitions.

**III. The Family Court’s decision to “unauthorize” two delinquency petitions did not encroach on the prosecution’s charging authority in violation of the Separation of Power Clause, Const 1963, art 3, § 2.**

Although juvenile proceedings are not criminal or adversarial in nature, MCL 712A.1; MSA 27.3178(598.1), JCR 1969, 1.3, the respective roles of the prosecutor and the court are functionally equivalent to adult criminal prosecutions. *In re Robinson*, 180 Mich. App. 454, 458, 447 N.W.2d 765, 768, 1989 Mich. App. LEXIS 582,

Appellant takes the position that under no circumstances does a trial court ever have the power to sua sponte dismiss charges, or in the case of juveniles – Petitions. This simply is not so. There are instances in Michigan and precedents in other jurisdictions, that in certain circumstances such a power exists.

In the case of *People v. Sierb*, 456 Mich 519; 581 NW2d 219 (1998) which the Appellant cites in his brief as authority for the proposition that the separation of powers doctrine forbids a jurist from dismissing petitions in any and all cases – does not make such a determination. The *Sierb* Appellate Court at 219 Mich App 127 ; 555 NW2d 728 (1996) at 730, overruled on other grounds states that:

The county prosecutor is a constitutional officer with discretion to decide whether to initiate criminal charges. The principle of separation of powers restricts judicial interference with a prosecutor's exercise of executive discretion. [People v Herrick, 216 Mich. App. 594, 598; 550 N.W.2d 541 \(1996\)](#). Dismissal over prosecutorial objection is normally available as a remedy only

when permitted by a statute or when there is an insufficiency of evidence. In certain other situations, however, constitutional guarantees will require dismissal. [People v Morris, 77 Mich. App. 561, 563; 258 N.W.2d 559 \(1977\).](#)

It is clearly stated that dismissal is permissible over prosecutorial objection “when permitted by a statute”. In the instant case the trial court utilized a statute – the CVRA – which permits dismissal under certain circumstances. As such neither the trial court nor the Court of Appeals erred when finding that the CVRA can be used to dismiss juvenile delinquency petitions over the objections of the prosecutor.

Other Michigan cases have made the same finding: *People v. Leonard*, 144 Mich App 492 at 495; 375 NW2d 745 *citing People v. Monday*, 70 Mich App 518; 245 NW2d 811 (1976) “this Court aligned itself with the majority of states in holding that a trial judge may dismiss charges without prosecutorial consent only if there is insufficient evidence or a permissive statute”.

Similarly, in *Lee v. Grandison*, 1996 U.S. Dist. LEXIS 13921 at 9, the U.S. District Court for the Western District of Michigan stated that: “Trial courts can also dismiss the criminal charges over the objection of a prosecutor where permitted by statute, or there is insufficient evidence.”

Therefore, there is Michigan precedent for the proposition that a trial court can dismiss juvenile delinquency petitions despite prosecutorial objection where there exists a statute which permits such an action – in the instant case – the CVRA.

See also *People v. Williamson*, 138 Mich. App. 397, 399; 360 NW2d 199, 200 (1984):

Trial courts may dismiss criminal charges over the prosecutor's objection only where permitted by statute or where there is an insufficiency of the evidence. *People v Augustus Jones*, 94 Mich App 516, 519; 288 NW2d 411 (1979); *People v Morris*, 77 Mich App 561, 563; 258 NW2d 559 (1977), *lv den* 402 Mich 844 (1977). The issue here is whether the trial court was authorized under the nolle prosequi statute to dismiss the charge in this case. MCL 767.29; MSA 28.969

*Williamson* dealt with the issue of whether the trial court had the authority to dismiss pursuant to MCL 767.29. In the case at bar the same issue exists but pursuant to a different statute: MCLS § 780.751.

*State ex rel. G.S.*, 287 So. 3d 752, 756, 2019 La. App. LEXIS 2179, 2019-0605 (La.App. 4 Cir. 12/04/19);, 2019 WL 6542409, more specifically analyzed the interplay between juvenile adjudication proceedings, permissive statutes and the unique characteristics of such proceedings.

It stated as follows:

The unique nature of the juvenile system is manifested in and requires a juvenile court to take notice of (1) its non-criminal, or civil nature, (2) its focus on rehabilitation rather than retribution and on individual treatment and wellbeing of children, and (3) the juvenile court judge's role as *parens patriae* (common guardian of the community and children) in managing the welfare of children involved in a juvenile proceeding. *State ex rel. D.R.*, 10-0406, p. 5 (La.App. 4 Cir. 10/20/10), 51 So.3d 121, 124.; *In re C.B.*, 97-2783, p. 10, 708 So.2d at 396-97.

The Louisiana Court of Appeals *at 762* went on to state that:

A "juvenile court is vested with broad discretion to arrive at solutions balancing the needs of the child with interests of society." *State ex rel. S.R.*, 08-785, pp. 4-5 (La.App. 4 Cir. 10/8/08), 995 So.2d 63, 66 (citing *State in Interest of R.W. and N.W.*, 97-0268 (La.App. 4 Cir. 4/16/97), 693 So.2d 257). One goal of the Children's Code is to avoid a ruling which "[the juvenile judge] knows is only a dead end for the child." *State ex rel. D.R.*, 10-0406, p. 5 (La. App. 4 Cir. 10/20/10), 51 So. 3d 121, 124 (quoting McGough & Triche, *Louisiana Children's Code Handbook* 2009-2010 (West), pp. 479-80 (quoting Polier, *A View from the Bench* 30 (1964))).

This is exactly the situation in the instant case. The trial judge avoided an adjudication that she felt was a heavy handed and was an over charging of the Juvenile – who was only 12 years old at the time of alleged misconduct – and stated that she did not feel that giving the juvenile a “huge criminal record” was in the best interests of justice or Respondent’s future. (TR 4-24-18 pg 163a) This is the “dead end for the child” that the trial court considered in making its decision to unauthorize the Petitions.

Similarly in *Commonwealth v. Turner*, 2000 Mass. Super. LEXIS 15, 8-9, 11 Mass. L. Rep. 193, the court stated that:

This Court recognizes the constitutional prerogative of the District Attorney as to whether and when to press a prosecution. Article 30 of the Massachusetts Declaration of Rights. Nothing is more fundamental to our system of justice than that principle of the separation of powers which compels the Judiciary to forbear from

interference with the Executive's decision to proceed with a prosecution. See, generally, *Commonwealth v. Brandano*, 359 Mass. 332, 269 N.E.2d 84 (1971). Accordingly, a court is constrained to pay deference to a District Attorney's determination that a prosecution ought go forward and to forego any inclination to halt a prosecution merely because the judge considers that subjecting the accused to the criminal process is inappropriate. Notwithstanding that powerful, basic constitutional limitation upon the judicial authority, Massachusetts law does provide, in those rare instances where public justice will be better served by not prosecuting, that the judiciary may foreclose an otherwise lawful prosecution.

The foregoing *Turner* case is particularly instructive as it analyzes the power of the Prosecutor vis a vis the Separation of Powers doctrine which is one of the issues before this Honorable Court. While almost exclusive prerogative exists with the Prosecutor to levy charges against an individual, such prerogative is not absolute. The *Turner* case stated that the Superior Court had the authority to dismiss charges prior to trial, over the objection of the Prosecutor where the dismissal was in the interests of public justice.

As such, there does exist those “rare circumstances” where “public justice will be better served by not prosecuting” and in such circumstances “the judiciary may foreclose an otherwise lawful prosecution”. This is exactly the issue in the instant case. It is submitted that the CVRA is such a statute that permits a trial court under certain circumstances to dismiss juvenile delinquency petitions over prosecutorial objection where public justice will be better served.

The separation of powers doctrine is codified in Const 1963, art 3, S 2 and states 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.

As argued above in the cited decision, this separation is not absolute and there are exceptions to what appears at first blush to be a black and white section of the State Constitution. The lines are oftentimes blurred and there are examples when the issue is actually a gray area. Even this section of the constitution provides an exception: “except as expressly provided in this constitution.”

As Appellant points out in *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998) the court stated that:

"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 the 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 [\*\*12] that was the sense designed to be conveyed." [*Traverse City School Dist v Attorney General*, 384 Mich. 390, 405; 185 N.W.2d 9 (1971), quoting Cooley's Const Lim 81 (emphasis in original).]

It should be noted that this case involved a dispute over whether the storm water service charge imposed by Lansing Ordinance No. 925 was a valid user fee or a tax that violates the Headlee Amendment, Const 1963, art 9, § 31. As such, the factual context could not be more disparate than the instant case. However, it does provide an analysis regarding statutory construction of the State Constitution.

Appellant fails to provide the emphasized portions of the court's ruling as identified above – the emphasized italicized portions were emphasized in the original. Those are as follows:

1. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.*
2. *the intent to be arrived at is that of the people,*
3. *but rather that they have accepted them in the sense most obvious to the common understanding*

Interpretation by reasonable minds, the intent to be arrived is that of the people and acceptance is to be in the sense most obvious to the common understanding can only be interpreted to be that a common-sense application is to be applied when applying and interpreting Constitutional proclamations.

The *Bolt* case stated that: "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). By implication, there is no bright-line test for distinguishing between the separation of powers doctrine and the trial courts application of the CVRA. Again, *The*

*interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.*

The Appellant concedes this fact in his supplemental brief when citing *Dearborn Twp v. Dearborn Twp Clerk*, 334 Mich 673, 692; 55 NW 2d 201 (1952) and *Sharp v. Genesee Co Election Comm*, 145 Mich App 200, 209; 377 NW2d 389 (1985) which both state that “it is not possible to wholly avoid conflicts between the several departments of government” and “that some overlapping is permissible provided the area of one branch’s exercise of another branch’s power is very limited and specific.”

This is exactly the issue that presents itself before this Honorable Court: Was the trial judge’s use of the CVRA a permissible overlapping? It is submitted that it was permissible because the judicial power exercised was “very limited and specific” *Sharp supra* at 209.

Under the doctrine of the separation of powers as interpreted by Madison and reinterpreted in *Piasecki* and *Soap & Detergent Ass’n, supra*, the functions of the three branches of government need not be kept wholly separate. Some overlapping is permissible provided the area of one branch's exercise of another branch's power is very limited and specific. *Sharp v. Genesee County Election Com., 145 Mich. App. 200, 209, 377 N.W.2d 389, 393, 1985 Mich. App. LEXIS 2891, \*13*

The separation of powers doctrine has never been interpreted in Michigan as meaning there can never be any overlapping of functions between branches or no control by one branch over the acts of another. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752; 330 NW2d 346 (1982). Some 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). *People v. Trinity*, 189 Mich. App. 19, 22-23, 471 N.W.2d 626, 628, 1991 Mich. App. LEXIS 163, \*5

Appellant also cites *People v. Ford*, 417 Mich. 66, 84, 331 N.W.2d 878, 884, 1982 Mich. LEXIS 625, \*30-31 as authority that Prosecutors have broad discretion in determining under which of two applicable statutes to prosecute. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). However, as this court pointed out, that discretion is not unlimited. *Bordenkircher v Hayes*, 434 U.S. 357, 365; 98 S Ct 663; 54 L Ed 2d 604 (1978). This Court can review and correct an abuse of discretion. *Genesee Prosecutor v Genesee*

*Circuit Judge*, 391 Mich 115, 121; 215 NW2d 145 (1974). It is the danger of arbitrary and discriminatory law enforcement that must be protected against.

An issue before this court is whether charging a 12-years old boy with additional charges was an abuse of discretion and whether or not it was in the public interest do so. This issue does not violate the separation of powers doctrine which states that under certain circumstance when supported by statute, the trial court can utilize a statute – CVRA – to ensure that the prosecutor does not overreach and abuse their discretion by tacking on excessive charges when it serves no legitimate purpose other than to punish the juvenile. This is anathema to the Juvenile Code which places a high value on rehabilitation, the welfare and best interest of the child rather than punishment. It should be noted that the juvenile in this case has complied with all probationary requirements as imposed by the trial court.

The *Ford* case goes on to state that “other factors which should be considered include the circumstances under which the crime took place, such as the offender's role in the crime and his motive, and factors personal to the particular offender, such as age and general background.

*People v. Ford*, 417 Mich. 66, 84-85, 331 N.W.2d 878, 884, 1982 Mich. LEXIS 625, \*31

This is exactly what the trial court considered in its decision to unauthorize two delinquency petitions, namely the factors personal to the juvenile, such as age and general background. As stated the age of the juvenile was only 12-years old

Appellant also relies on the following: “According to separation-of-powers principles, the constitutional responsibility to determine the grounds for prosecution rests with the prosecutor alone.” *People v. Muniz*, 259 Mich. App. 176, 178, 675 N.W.2d 597, 598, 2003 Mich. App. LEXIS 2648, \*3. This case is distinguishable as it dealt with the issue of whether the prosecutor should have utilized an amended statute in bringing charges or relying on the former statute. The Judge in that case dismissed the charges in that it did not comply with the new statute but the court of appeals reversed stating that the prosecutor was permitted to levy charges based on the statute that was in place at the time of the offense.

It is submitted that the prosecutor does not have unfettered discretion to issue charges against an individual when such charges are ultra vires or an abuse of discretion. But that is secondary to the issue at hand. While the prosecutor has broad discretion in bringing charges, the instant case does not deal with the prosecutors ability to levy charges but whether or not the trial judge can

unauthorize such charges. For all of the reasons cited above, it is argued that the trial judge does have the authority to do such that.

Appellant has cited numerous cases that identify when the judicial branch has violated the separation of powers clause as it relates to the power of the prosecutor to decide which charges should be brought against an individual, the grounds for such charges, the discretion to decide on which charges to bring when there are different levels of punishment or consequences to a juvenile in deciding whether or not the charge as an adult, litigation and trial strategy, to retry a case when there was a mistrial, and the like.

However not one case cited by Appellant addresses the ultimate issue before the court nor provides any authority whatsoever, to establish or at least make a cogent argument, that a family court judge does not have the authority to unauthorize delinquency petitions over the prosecutor's objections. All of the decisions relied upon are adult criminal or civil cases of a non-family court nature and none of these cases address the issue this Honorable Court has directed the parties to focus on.

Conversely, Appellee contends that he has cited numerous cases and authorities to establish that dismissal is permissible over prosecutorial objection under certain circumstances.

**IV. To the extent that the family court erred, such error was harmless, MCR 3.902(A); MCR 2.613**

The following case that deals with the notice provisions of the CVRA illustrates a circumstance where harmless error can exist. Therefore, harmless error can exist in the exact same fact pattern that is before this Honorable Court for Review. The Appellee though does not assert that any error was made, let alone harmless error – his position is that the trial judge properly followed the law and procedure in all aspects of the case from beginning to end. This includes the issue of whether or not the trial judge accepted the pleas to Petitions One and Two and then revoked the acceptance.

For sake of argument however, if this revocation is considered to be in error, then such error is harmless and is not a harmful error that by necessity mandates reversal.

Although analogous, juvenile delinquency proceedings are not adult criminal proceedings. *In re Wilson*, 113 Mich App 113, 121; 317 NW2d 309 (1982). This would constitute an

"adjudication," analogous to a criminal conviction, that the court has jurisdiction over the juvenile under MCL 712A.2(a)(1). See MCR 3.903(A)(26); *In re Whittaker*, 239 Mich App 26, 28-30; 607 NW2d 387 (1999); *In re Wilson*, 113 Mich App 113, 121; 317 NW2d 309 (1982).

"[J]uvenile justice procedures are governed by the applicable statutes and court rules, with an emphasis on rehabilitation rather than retribution." *In re Whittaker, supra* at 28-29.

Starting first with the CVRA notice requirement, "Although a family court failed to comply with the requirements of MCL 780.786b(1) by not providing the prosecutor with written notice of the removal of a juvenile's case from the adjudicative process, the error was harmless because the victim had actual notice of an adjudicative hearing but failed to appear." *People v. Lee (In re Lee)*, 282 Mich. App. 90, 761 N.W.2d 432, 2009 Mich. App. LEXIS 95 (Mich. Ct. App. 2009).

#### [MCLS § 780.786b](#)

We know that this was not what happened in the instant case; the trial judge followed the notice requirement and the procedures of the Juvenile Code and the CVRA precisely. As such there can be no argument that any error existed at all – let alone harmless error. For Appellant to suggest that this constituted reversible error is simply misplaced and misguided and not founded in case law, statute or court rule.

In general, the family court has jurisdiction over juveniles within its judicial circuit that have "violated any municipal ordinance or law of the state or of the United States." MCL 712A.2(a)(1) The court rules do not define "adjudicative process," but, clearly, it is the judicial procedure that could lead to the court's fact-finding determination that the petition's allegations are true. This would constitute an "adjudication," analogous to a criminal conviction, that the court has jurisdiction over the juvenile under MCL 712A.2(a)(1). See MCR 3.903(A)(26); *In re Whittaker*, 239 Mich App 26, 28-30; 607 NW2d 387 (1999); *In re Wilson*, 113 Mich App 113, 121; 317 NW2d 309 (1982).

Since the "adjudicative process" is not defined in the Michigan Court rules, one has to focus on judicial procedure. It is the following of judicial procedure that leads to the adjudication of a juvenile delinquency petition. As stated above in the three other issues this Honorable Court ordered the parties to address, the trial court in the case at bar properly followed judicial procedure.

Again, the CVRA procedure was followed meticulously and the Juvenile Code expressly addresses the CVRA and the procedures to be followed. As such both the Juvenile Code and the

CVRA were properly applied in the instant case. "A case involving the alleged commission of an offense listed in the Crime Victim's Rights Act, MCL 780.781(1)(f), may only be removed from the adjudicative process upon compliance with the procedures set forth in that act. See MCL 780.786b. *Lee supra at 94*

MCR 3.932(B) provides that diversion of a juvenile case in which it is alleged that the minor committed an offense listed in § 31(1)(f) of the CVRA is governed by MCL 780.786b(1), which provides: Except for a dismissal based upon a judicial finding on the record that the petition and the facts supporting it are insufficient to support a claim of jurisdiction under section 2(a)(1) of chapter XIA of the probate code of 1939, 1939 PA 288, MCL 712A.2, a case involving the alleged commission of an offense, as defined in section 31, by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process *unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process. Before any formal or informal action is taken, the prosecutor shall give the victim notice of the time and place of the hearing on the proposed removal of the case from the adjudicative process. The victim has the right to attend the hearing and to address the court at the hearing.* As part of any other order removing any case from the adjudicative process, the court shall order the juvenile or the juvenile's parents to provide full restitution as provided in section 44. [Emphasis added by the court.] [*Lee at 436-437*]

We also note that appeals in these cases pertain solely to the procedural requirements of MCL 780.786b(1) and the court rules. No one argues in these appeals that the family court judges abused their discretion in making the substantive decisions to divert these cases to the consent calendar. See MCL 722.824. *Lee at 95*

As such we again are directed when reviewing the actions of a trial court judge, to focus on the procedural requirements; as argued repeatedly such procedures were followed to the letter. In the *Lee* case the court stated that: "We now review the record in the cases at bar in light of the plain requirements of MCL 780.786b(1) and the pertinent court rules." *Lee at 96*

Regarding the issue of harmless error, the *Lee* case went on to state that:

Although we conclude that the family court erred, reversal is not necessarily warranted. Although analogous, juvenile delinquency proceedings are not adult criminal proceedings. *In re Wilson, supra*

at 121. "[J]uvenile justice procedures are governed by the applicable statutes and court rules, with an emphasis on rehabilitation rather than retribution." *In re Whittaker, supra* at 28-29. The court rules provide that harmless error analysis applies to juvenile delinquency proceedings. Subchapter 3.900 of the court rules generally "govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code." MCR 3.901(A)(1). "Other Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides." MCR 3.901(A)(2). But, MCR 3.902(A) specifically incorporates the harmless error standard of the civil procedure court rules by providing, in part that "[I]imitations on corrections of error are governed by MCR 2.613." MCR 2.613(A), provides, in pertinent part that "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." [People v. Lee \(In re Lee\), 282 Mich. App. 90, 99, 761 N.W.2d 432, 438, 2009 Mich. App. LEXIS 95, \\*11-12](#)

The Juvenile-Appellee in the instant case came to the attention of the court more than three years ago and was 12-years old at the time. The first Petition was issued on July 24, 2017. The court of appeals has addressed the issue of the passage of time and the end result of such cases. In the case at bar, the juvenile has successfully completed probation on the first adjudicated petition, was not violated and has not had any contact with law enforcement since. The two subsequent petitions which are at issue, were never adjudicated and should not be considered as additional adjudications – and nonetheless even if this Honorable Court were to remand for reinstatement of the petitions – it would not serve the public interest nor be in the spirit of rehabilitation rather than punishment as the Appellant would request this Court to Order.

This reasoning is borne out in the *Lee* case at 100:

Finally, the passage of time favors our finding that reversing the family court's order would be inconsistent with substantial justice. One of two outcomes is likely to have already occurred: the juvenile has either successfully completed a consent calendar case plan, MCR 3.932(C)(7), or the juvenile has been unsuccessful in that regard with the juvenile's own actions likely to have ended the special status conferred by assignment to the consent calendar, MCR 3.932(C)(8).

Regarding the issue of the juvenile tendering a plea the *Lee* case also addressed this issue. Although it must be noted in fairness that this involved the return of the case to the consent calendar in conjunction with the provisions of the CRVR. But nonetheless it is submitted that it is equally applicable to a plea tendered on the formal court docket. It should be noted that the trial judge in the instant case ultimately did not accept the juvenile's pleas to petitions two and three, therefore we remain in the pre-adjudicative stage of the proceedings.

In the *Lee* case the prosecutor did not object to the withdrawal of the plea but the court did provide guidance as to the authority of the trial court to do so:

On appeal, the prosecutor does not argue that because the minor had tendered a plea, MCR 3.932(C)(2) precluded the family court from removing the case to the consent calendar. We simply note our agreement with the family court's analysis of the court rules. Provided that the court has complied with the notice requirements of MCL 780.786b(1) with respect to juvenile cases alleging the minor committed a CVRA offense, the family court may remove a juvenile case from the adjudicative process to the consent calendar "at any time before disposition." MCR 3.932(C) and (D). [People v. Lee \(In re Lee\)](#), 282 Mich. App. 90, 104, 761 N.W.2d 432, 440, 2009 Mich. App. LEXIS 95, \*18

Whether or not a trial judge can accept a plea and then subsequently reverse that acceptance is commonplace in both the adult criminal and juvenile delinquency arenas.

Contrary to the position of the Appellant, there was at no time since July 24, 2017 that any referee or the trial judge committed "miscarriage of justice" was "inconsistent with substantial justice" nor "affected substantial rights" It is not conceded that there was any error at all at any stage of the proceedings but if any error was made it certainly does not rise to the level that the Appellant asserts but was harmless at best.

There was no prejudice to the prosecutor. The Juvenile Code and the CVRA were correctly applied and strictly adhered to by the trial judge. The 12-year old boy was rehabilitated in the spirit of the Juvenile Code – three years have passed and there has been no further issues with this juvenile - and there was no need for the prosecutor to abandon his duty to both the public and the juvenile to ensure that proper and equal justice is applied towards a fair outcome rather than seek adjudications just for the sake of seeking them.

Appellant cites the case of [People v. Mateo](#), 453 Mich. 203, 551 N.W.2d 891, 1996 Mich. LEXIS 1921 as authority that the instant case was prejudicial to the prosecutor and was outcome

determinative. The *Mateo* case was an adult criminal case that dealt an error in the admission of a witness' testimony. The trial court found and the court of appeals agreed that this was harmless beyond a reasonable doubt. It has no bearing on the instant case except to the extent that even in a case where the defendant was charged with assault with intent to murder there can be harmless error during the course of jury trial.

As in the instant case, the *Mateo* case was not prejudicial nor outcome determinative nor affected the substantial rights of the defendant nor interfered with substantial justice. The court of appeals affirmed the conviction.

"No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444, 88 L. Ed. 834, 64 S. Ct. 660 (1944). Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court. The Rule has remained unchanged since the original version of the Criminal Rules, and was intended as "a restatement of existing law." Advisory Committee's Notes on Fed. Rule Crim. Proc. 52, 18 U. S. C. App., p. 833. It is paired, appropriately, with Rule 52(a), which governs nonforfeited errors. HN4 Rule 52 provides:

"(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

*United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508, 517-518, 1993 U.S. LEXIS 2986, \*12-13, 61 U.S.L.W. 4421, 93 Cal. Daily Op. Service 3040, 93 Daily Journal DAR 5188, 7 Fla. L. Weekly Fed. S 205

Once again Appellant asserts that there was no error whatsoever in the trial Judge's actions. Therefore, it matters not if the matter was preserved or unpreserved for appellate review.

There is no showing by the Appellant that any "substantial rights", "prejudice", , "miscarriage of justice" existed nor that "it affected the outcome of the proceedings". The cases cited by Appellant correctly state the distinction between harmless error, plain error and reversible error but none of these apply in the instant case. The cases cited are adult criminal cases and mostly deal with situations where the defendant is claiming such prejudice and asking the court to vacate the lower court's ruling or remand for a new trial. That is not the case here: the Appellant is using this argument as a sword rather than a shield as is typically the case where prejudice is alleged by a defendant.

For sake of argument, if the Appellant is permitted to use this provision as a sword and claim that the prosecutor's office was prejudiced, at best any error – and Appellee does not concede this point – was harmless and not outcome determinative. It is in fact the opposite. It is the Appellee who is prejudiced by an overzealous prosecution intended solely to punish and add multiple petitions to a 12-year old boy. As previously stated this young boy successfully completed the requirements of his probation on the first petition and there have no subsequent issues regarding him.

Appellant also cites the case of *Ariz. v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302, 1991 U.S. LEXIS 1854, 59 U.S.L.W. 4235, 91 Cal. Daily Op. Service 2209, 91 Daily Journal DAR 3530 as authority for the U.S. Supreme Court clarifying the difference between and constitutional trial error and a structural error that would cause reason for reversal.

This is another criminal adult case. This case deals with a coerced confession of a defendant vis a vis the 5<sup>th</sup> and 14<sup>th</sup> amendments of the United States Constitution. This court was obviously correct in finding that the admission of defendant's confession was not harmless error because it was unlikely that he would have been prosecuted at all absent the confession, the admission of the confession led to the admission of other evidence prejudicial to defendant, and the confession. This is a legitimate example of a harmful error that prejudiced the defendant's constitution rights and was outcome determinative. The *Fulminate* case bears no resemblance, is

not applicable to the facts of the instant case and does not involve a discussion of the CRVRA and the authority of the trial judge to dismiss delinquency petitions provided statutory protocols and procedures are followed – which is one of the core issues in this case.

This Honorable Court has held that errors made during the course of a trial are not automatically structural errors but can also be harmless errors. We of course did not have a jury trial in the case at bar but the distinction of structural errors versus harmless errors are factors for every court to consider. A structural error almost always requires reversal while a harmless error typically does not. The instant case contains no such “structural errors” The error in the Anderson case did not “justify automatic reversal as a structural error that infects the entire trial mechanism, it is a trial error occurring during the presentation of the case to the jury and thereby subject to a harmless error analysis.” *People v. Anderson*, 446 Mich. 392, 406, 521 N.W.2d 538, 545, 1994 Mich. LEXIS 2038,

Therefore, to the extent that there may have been harmless error – and again Appellant contends there was no error at all - committed by the trial judge it is not a structural error that requires reversal but a harmless error that does not prejudice the prosecutor nor was outcome determinative.

The other cases cited by Appellant that point to instances of structural error such as:

- (1) Deprivation of the right to counsel;
- (2) The impartiality of the trial judge;
- (3) An unlawful race-based exclusion of jury members;
- (4) The right to a public trial;

simply do not exist in the instant case.

There are no structural defects. There are no separation of powers doctrine violations. There is no reason to vacate the decision of the Court of Appeals as its reasoning was based on a sound constitutional and due process foundation. MCL 780.786b does provide the family court to revoke previously authorized petition over the objection of the prosecutor. Likewise, MCL712A.1 does not prohibit a family court judge from revoking such petitions especially when combined with MCL 780.786b which the court rules and the Juvenile Code expressly permit.

**RELIEF REQUESTED**

WHEREFORE, for the assertions, case law, statutes, court rules and both the Michigan and Supreme Court Constitutions and its applicable amendments as set forth above, the Respondent-Appellee requests that this Honorable Court deny Petitioner-Appellant's Application for Leave and to affirm the Opinion of the Court of Appeals.

Respectfully submitted,

BY:/s/ *Hugh R. Marshall*

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