

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

**Supreme Court No. 152247**

Plaintiff-Appellant

**Court of Appeals No. 320560**

**Lower Court No. 13-00380 FH**

-vs-

**AMDEBIRHAN ABERE ALEMU**

Defendant-Appellee

\_\_\_\_\_  
**KENT COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellant

\_\_\_\_\_  
**ANNE YANTUS (P 39445)**

Attorney for Defendant-Appellee

**DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF**

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

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**STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE PROSECUTOR WAIVE THE OPPORTUNITY TO FILE THIS APPEAL GIVEN ITS PREVIOUS BARGAIN AND CONDUCT IN THE MATTER? MOREOVER, DOES THE FILING OF THIS APPEAL CONSTITUTE A BREACH OF THE BARGAIN IN VIOLATION OF THE STATE AND FEDERAL DUE PROCESS CLAUSES? FURTHER, IS THERE NO JUSTICIABLE CONTROVERSY AS THE PROSECUTOR IS NOT AN AGGRIEVED PARTY AND SEEKS NOTHING MORE THAN AN ADVISORY OPINION?**

Court of Appeals made no answer.

Defendant-Appellee answers, "Yes".

- II. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE REQUEST FOR DIVERSION UNDER MCL 333.7411 WHERE THE CRIME WAS MINOR –MISDEMEANOR POSSESSION OF MARIJUANA - AND THE DEFENDANT WAS THE PERFECT CANDIDATE FOR DIVERSION?**

Court of Appeals answered, "Yes."

Defendant-Appellee answers, "Yes".

## COUNTER STATEMENT OF FACTS

Defendant-Appellee Amdebirhan Alemu pleaded guilty to the misdemeanor offense of possession of marijuana, MCL 333.7403(2)(d), on March 26, 2013, in the Kent County Circuit Court. The Honorable Dennis B. Leiber sentenced Mr. Alemu to a term of one year probation and a \$1,000 fine on May 23, 2013.

As part of a plea bargain, the prosecutor agreed to dismiss the felony charge of possession with intent to deliver marijuana in exchange for Mr. Alemu's guilty plea to the added misdemeanor charge of possession of marijuana. (3/26/2013 T 5-6) The prosecutor also agreed that it was "taking no position" on the defense request for deferral of proceedings under MCL 333.7411. (3/26/13 T 6)

The facts are undisputed. On December 23, 2012, Grand Rapids Police found Mr. Alemu parked in his vehicle talking on his phone at the Cambridge Square Apartment complex. (PSI<sup>1</sup> 2) The officer approached Mr. Alemu and questioned him as to his purpose for being in the parking lot. (PSI 2-3) The officer spotted a box of clear plastic sandwich bags within the vehicle. (PSI 2) The officer's prior experience, coupled with the fact that the Cambridge Square Apartment complex had a no trespass letter on file with the department, prompted the officer to arrest Mr. Alemu for trespassing. (PSI 2) Mr. Alemu then consented to a search of his vehicle, which search produced a glass jar containing marijuana, a plastic bag containing a small amount of marijuana, and a digital scale. (PSI 2) Mr. Alemu denied selling drugs, and stated that the marijuana was for his own use and for friends who were home from school for the holidays. (PSI 2) Mr. Alemu was subsequently taken to the Kent County Jail without incident. (PSI 2)

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<sup>1</sup> PSI refers to presentence investigation report.

At sentencing, Mr. Alemu requested, and the presentence investigator recommended, that his case be diverted under MCL 333.7411. (5/23/13 T 4) However, based on the presence of plastic bags and a scale, and because the trial judge believed Mr. Alemu to have possessed a pound of marijuana, the trial judge denied the request for diversion. (5/23/13 T 7) In fact, Mr. Alemu possessed less than an ounce of marijuana.<sup>2</sup> (PSI 2-3)

With the assistance of appellate counsel, Mr. Alemu filed a post-conviction motion to correct the sentence. He pointed out the trial court's mistake as to the amount of marijuana and asked the court to reconsider the request for deferral under MCL 333.7411. Judge Leiber denied the request, reasoning that while there was a mistake as to the amount of marijuana, the court's intent was to deny 7411 status because the court wanted to provide an incentive for good behavior and would consider setting aside the conviction after five years pursuant to the adult expungement statute (MCL 780.621). (2/14/14 T 4, 12-13) Judge Leiber commented that the presence of a scale in the car and whether this defendant was sharing drugs with friends over the holidays, as opposed to selling to others, was not dispositive to his decision (2/14/14 T 12-13)

Mr. Alemu filed a delayed application for leave to appeal on February 27, 2014. The Court of Appeals granted leave to appeal on May 1, 2014. The Court of Appeals reversed by unpublished opinion date July 7, 2015, with a majority of the court concluding that while the trial judge had wanted the defendant to "earn" dismissal of the conviction by means of the adult expungement statute, the trial judge failed to recognize that an offender must "earn" dismissal of the charge with deferral under MCL 333.7411. *Court of Appeals Opinion*, Appendix A. The Honorable Jane E. Markey dissented, concluding that deference should be given to the trial court's decision to deny deferral. *Id.*

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<sup>2</sup> He possessed 23.61 grams (PSI 2-3). There are 28.35 grams to an ounce. Webster's Ninth New Collegiate Dictionary (Merriam-Webster, 1987) p. 1338.

Throughout the course of the lower court proceedings, including the appeal to the Court of Appeals, the prosecutor took no position on the defendant's request for diversion. The prosecutor offered no comments at sentencing. (5/23/13 T 5) Faced with the defendant's post-conviction motion, the prosecutor filed an email response stating that it would not be taking a position and "if we took something now, then that would violate the plea agreement." (2/14/14 T 3-4)

The prosecutor filed no response to defendant's application for leave to appeal when it was filed in the Court of Appeals. After leave was granted, the prosecutor filed an answer taking "no position." *Plaintiff-Appellee's Brief on Appeal*, Appendix B. The prosecutor's answer made clear that it would take no position at all on defendant's argument: "It is our position that we would also violate the plea agreement by taking any position on the defendant's argument in this Court." *Id.*, at 2.

Now, despite the plea bargain and the prosecutor's repeated stance that it would take no position and not respond to the diversion request, the prosecutor has filed an application for leave to appeal and the Court has granted oral argument. *Order*, Appendix C.

**I. THE PROSECUTOR WAIVED THE OPPORTUNITY TO FILE THIS APPEAL GIVEN ITS PREVIOUS BARGAIN AND CONDUCT IN THE MATTER. MOREOVER, THE FILING OF THIS APPEAL CONSTITUTES A BREACH OF THE BARGAIN IN VIOLATION OF THE STATE AND FEDERAL DUE PROCESS CLAUSES. FURTHER, THERE IS NO JUSTICIABLE CONTROVERSY AS THE PROSECUTOR IS NOT AN AGGRIEVED PARTY AND SEEKS NOTHING MORE THAN AN ADVISORY OPINION.**

This Court, after hearing oral argument or even before argument, should dismiss the prosecutor's application for leave to appeal. The prosecutor promised that it was "taking no position on 7411" [deferral of conviction under MCL 333.7411] as part of the plea bargain. (3/26/13 T 6) The prosecutor honored its commitment throughout the earlier proceedings when the request for 7411 status was denied. The prosecutor now files this application for leave to appeal after the defendant prevailed in the Court of Appeals. This appeal is an untenable and impermissible attempt to challenge the result below.

In its order granting oral argument, the Court directed briefing of two issues: "(1) whether the plea bargain's stipulation that the People would take 'no position on 7411' precludes the People from filing this application; and (2) whether the People's formal adoption of 'no position' in the Court of Appeals waived their ability to request relief in this Court." *Order*, Appendix C.

Questions of law including are subject to de novo review. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

***The Prosecutor Has Waived this Appeal***

Waiver refers to the intentional relinquishment of a known right. *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012). A party may be estopped on waiver grounds from

asserting a position on appeal that is contrary to the position taken by the party in the lower courts: “When a cause of action is presented for appellate review, a party is bound to the theory on which the cause was prosecuted or defended in the court below.” *Gross v General Motors Corp*, 448 Mich 147, 162 n 8; 528 NW2d 707 (1995).

The Kent County Prosecutor’s Office has waived the opportunity to file this appeal. By word and deed, the Kent County Prosecutor manifested its position on multiple occasions that the plea bargain precluded a response from it at sentencing and also on appeal. The parties’ understanding of the plea bargain is controlling when there is any question as to the scope of the bargain. See *People v Swirles (After Remand)*, 218 Mich App 133, 135-137; 553 NW2d 357 (1996) (defendant and defense counsel acquiesced in prosecutor’s interpretation of plea agreement by not objecting to prosecutor’s specific recommendation at sentencing) ; *United States v Skidmore*, 998 F2d 372, 375 (CA 6, 1993) (courts look to what parties reasonably understood terms of bargain to be).

The Kent County Prosecutor’s Office waived this appeal by a consistent course of action from the plea hearing forward. As part of the plea bargain, the prosecutor’s office promised that it was “taking no position on 7411.” (3/26/13 T 6) At sentencing, and after defense counsel asked the court to adopt the recommendation of the presentence investigator for a term of probation under MCL 333.7411, the trial prosecutor (the same prosecutor who filed this appeal) declined all opportunity to speak: “We have no further comment, your Honor.” (5/23/13 T 5)

In response to defendant’s post-conviction motion to correct the sentence (alleging a significant mistake of fact on the part of the trial judge when denying the request for 7411 diversion), the chief appellate prosecutor (Timothy McMorrow<sup>3</sup>) filed an email which indicated

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<sup>3</sup> Timothy McMorrow was the chief appellate prosecutor, but he is now a Supreme Court Commissioner with this Court.

“he would not be filing a response to this. As part of the plea agreement, we took no position on sentencing, and if we took something now, then that would violate the plea agreement.” (2/14/14 T 3-4)

When defendant filed his application for leave to appeal with the Court of Appeals, the Kent County Prosecutor’s Office filed no response. After leave was granted, the chief appellate prosecutor filed an answer taking “no position” and waiving oral argument. *Plaintiff-Appellee’s Brief on Appeal* p 2, Appendix B. Mr. McMorrow’s statement was that his office could take no position at all with respect to defendant’s appeal: “It is our position that we would also violate the plea agreement by taking any position on the defendant’s argument in this Court.” *Id.*, at 2.

Eight months later, Mr. McMorrow retired and James Benison, who was the prosecutor at sentencing, succeeded him as opposing counsel. *Court of Appeals Docket Entries*, Appendix D. Mr. Benison filed no additional pleadings and did not request oral argument. He filed no motion for rehearing when the Court of Appeals released its opinion.

As the Court can see, the Kent County Prosecutor’s Office has repeatedly demonstrated by word and deed that it would take no position on the request for 7411 status. This position of “no position” included no comments at sentencing, no comments in response to the post-conviction motion, and no comments in response to the appeal. Despite multiple opportunities to voice a position as to the length of probation, whether the trial judge made a mistake of fact, whether the trial judge correctly applied the law, and whether defendant’s appeal had merit on any point, the prosecutor took no position. The prosecutor further waived oral argument in the Court of Appeals. See *Plaintiff-Appellee’s Brief on Appeal*, Appendix B.

Such a consistent approach spells only one thing: waiver. This is more than a mere failure to object in the court below, although “[t]his Court has repeatedly declined to consider

arguments not presented at a lower court level . . . .” *Booth Newspapers, Inc. v University of Michigan Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993). This is also more than mere failure to file a responsive brief, although the Court has also declined to grant leave to appeal in circumstances where the prosecutor (again, the Kent County Prosecutor) “failed to file a brief in the Court of Appeals, and now complains of the result reached by that court.” *People v Adams*, 468 Mich 860; 657 NW2d 119 (2003). Rather, the Kent County Prosecutor’s approach reflects a knowing choice and intentional abandonment of any position on appeal. See *People v Bryant*, 483 Mich 132, 156-157; 768 NW2d 65 (2009) (where prosecutor did not raise dying declaration argument until the Supreme Court granted leave to appeal, the “prosecutor has either effectively conceded that the victim’s statements did not constitute a dying declaration or, at the very least, has abandoned this issue.”), vacated on other gds in *Michigan v Bryant*, 562 US 344 (2011).

There is no need to explore the limits of the Court’s discretion to consider issues not properly before it as the record demonstrates intentional waiver. Waiver “‘extinguishe[s] any error’ . . . , thereby foreclosing appellate review.” *People v McKinley*, 496 Mich 410, 418; 852 NW2d 770 (2014), quoting *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Although there is no error to review, the Court might also recognize that the rule of issue preservation, also known as the “raise or lose rule,” exists in part to promote respect for the adversarial process and litigant choices. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J Trial & App Advoc 179, 180-183 (2012). It was designed to protect against what occurred here, where “unsuccessful litigants would be free to second guess tactical or deliberate decisions made in the lower court or otherwise seek to re-try or re-adjudicate the matter on appeal when the desired result is not reached below.” *Id.*

Mr. Alemu convicted himself by means of a guilty plea, thereby relinquishing his valuable right to trial, in return for the prosecutor's promise to take no position on his request for diversion under MCL 333.7411. If the prosecutor is allowed now to challenge the Court of Appeals' conclusion that the trial court erred in denying 7411 status, Mr. Alemu has lost an important component of the plea bargain. In essence, the Kent County Prosecutor will be allowed to retain the conviction and also secure the result it desires on 7411 status. This is disrespectful to the criminal justice process, but more importantly it is an unfair and illegitimate form of plea bargaining.

The Court should dismiss the application for leave to appeal due to a steady course of conduct by the prosecutor that waived any claim of error.

### ***The Prosecutor Breached the Terms of the Bargain***

When the prosecutor makes a promise to the defendant and there is detrimental reliance on that promise, "elementary notions of due process" require relief when the prosecutor fails to uphold the promise. *People v Wyngaard*, 462 Mich 659, 664-665; 614 NW2d 143 (2000); US Const Am V & XIV; Const 1963, art 1, § 17. The prosecutor is a public official who makes a "pledge of public faith" when negotiating with a party. *People v Reagan*, 395 Mich 306, 309; 235 NW2d 581 (1975). As the United States Supreme Court recognized, "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty" require that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v New York*, 404 US 257, 262 (1971).

The Kent County Prosecutor has acknowledged the potential breach of its bargain in the application for leave to appeal (see page 2 of the application), but failed to cite or otherwise

recognize the case of *People v Arriaga*, 199 Mich App 166; 501 NW2d 200 (1993). In *Arriaga*, the Court of Appeals dismissed a similar appeal where the prosecutor promised to take no position regarding a departure below the sentencing guidelines range, but then appealed when the trial judge departed below the range. The *Arriaga* court dismissed the prosecutor's appeal:

The prosecutor's appeal from the lawful sentence constitutes a breach of the agreement with defendant. We refuse to condone the breach by evaluating the trial court's discretion in sentencing defendant as it did. [*Id.* at 169.]

In line with *Arriaga*, other sources agree that when a defendant waives the right to trial in return for the prosecutor's commitment on some aspect of sentencing, "it is reasonable to expect continuing prosecutorial adherence to the agreement: a prosecutor's commitment to a specified sentence recommendation would be of little value if the government's tongue is to be freed at a later, related proceeding." Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U of Chi L Rev 751, 767-71 (1985). See also *State v Wills*, 244 Kan 62; 765 P2d 1114 (Kan, 1988) (prosecutor's promise to make favorable sentence recommendation held binding at post-sentence hearing).

The Kent County Prosecutor nevertheless argues that it may "advocat[e] for the validity of a court order" in "upper-level appellate proceedings . . . ." *Application for Leave to Appeal* p. 2. It furnishes no support for this bald assertion. Further, it does not make the claim that Mr. Alemu was ineligible for 7411 status (it cannot make this claim as Mr. Alemu meets all statutory eligibility requirements) or that the sentence exceeded statutory limits. Likewise, it does not make the claim – at least directly – that it is challenging the reasoning of the Court of Appeals as opposed to the result reached. It does not make this claim because the Court has many times rejected an argument for reversal where the lower court reached the right result for the wrong reason. See e.g., *People v Brownridge*, 459 Mich 456, 462; 591 NW2d 26 (1999); *Mulholland v*

*DEC Intern Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989); *Vittiglio v Vittiglio*, 493 Mich 936; 825 NW2d 584 (2013) (Markman, J., concurring in denial of leave to appeal).

Instead, it would appear the Kent County Prosecutor has simply changed its position on appeal. And it would appear the argument it now makes is that it has somehow retained the discretion to change its position *in the Supreme Court only* (i.e., “upper-level appellate proceedings) as part of the plea bargain.

The state may not avoid its commitments with “hypertechnical” interpretations of the plea agreement. In *United States v McCray*, 849 F2d 304 (CA 8, 1988), the Eighth Circuit found a breach of the bargain where the government promised to remain silent at sentencing but then opposed the defendant’s request for early parole eligibility. On appeal, although the government argued “that it complied with the agreement because it remained silent until after the district court imposed the sentence,” the Eight Circuit disagreed with this “hypertechnical” argument:

The government argues that it complied with the agreement because it remained silent until after the district court imposed the sentence, commenting only on the manner in which it should be executed. We find this distinction hypertechnical.

In *United States v. Carbone*, 739 F.2d 45 (2d Cir.1984), the government agreed to make no recommendation as to sentence, but objected to the defense counsel's request for a suspended sentence under 18 U.S.C. § 3651 made after the court had announced the sentence. *Id.* at 46. The Second Circuit found that the government had breached the agreement, stating, “[t]he most straightforward interpretation of the government's promise to ‘make no recommendation \* \* \* as to the sentence \* \* \* ’ is that it would cover the entire sentencing hearing.” *Id.* at 47; see *United States v. Corsentino*, 685 F.2d 48, 52 (2d Cir.1982). The Second Circuit also noted that if the government had wished to restrict its promise only to the time prior to the district court's announcement of the sentence, it could have so provided. *Carbone*, 739 F.2d at 47. In addition, *McCray's* agreement expressly provided that the government would not be bound at “any other proceeding,” implying that the

government agreed to be bound for the entire sentencing hearing.  
[894 F2d at 305.]

The prosecutor must take care when negotiating and fulfilling the bargain. In *United States v Crusco*, 536 F2d 21 (CA 3, 1976), the Third Circuit reversed where the government promised to take no position on sentencing, but then painted the defendant as a major figure in organized crime and a danger to the community. The court concluded that “[o]nly a stubbornly literal mind would refuse to regard the Government’s commentary as communicating a position on appeal.” *Id.*, at 26. The court rejected the “government’s strict and narrow interpretation” of the bargain, and chided the government for its failure to draft the bargain it really wanted:

The Government's final argument that it would have breached the plea bargain only if it had actually recommended the terms of a sentence is thus answered. We believe that such a strict and narrow interpretation of its commitment is untenable, and we must reject it. An unqualified promise of the prosecution not to take a position on sentencing obviously jeopardizes the Government's position in the sentencing process and may require the Government to remain silent when it should stand up and speak. The Government, therefore, must also clearly understand the scope and depth of its commitment and the need for precision in plea bargaining. It may reach port in the plea bargaining process but founder there because of careless or loose language in its commitment. Once it makes a promise, Santobello requires strict adherence. [*Id.*]

Here, the Kent County Prosecutor reserved no discretion in its plea bargain either to offer comments about the sentence or respond to the appeal. It also manifested the contrary belief, from the time of sentencing through the Court of Appeals, that it could not respond. When there is any doubt as to the scope of the bargain, imprecision, ambiguities and loose language are all held against the government. *United States v Wells*, 211 F3d 988, 995 (CA 6, 2000) (“trial court should hold the government to ‘a greater degree of responsibility than the defendant for imprecisions or ambiguities . . . in plea agreements.’”) (internal citation omitted).

That one prosecutor may disagree with the bargain reached by another prosecutor offers no cause for breach of the bargain. In *Santobello*, one prosecutor promised to make no recommendation at sentencing while another prosecutor, apparently unaware of the bargain, took a strong position against the defendant at sentencing. The Supreme Court reversed despite the “inadvertent” breach, although reminding the prosecutor that “[t]he staff lawyers in a prosecutor's office have the burden of ‘letting the left hand know what the right hand is doing’ or has done.” 404 US at 262. In a concurring opinion, Justice Douglas explained that all members of the prosecutor’s office are bound by the bargain whether they agree with it or not, and one prosecutor cannot *contrive* to avoid the bargain of another:

I agree both with THE CHIEF JUSTICE and with Mr. Justice MARSHALL that New York did not keep its ‘plea bargain’ with petitioner and that it is no excuse for the default merely because a member of the prosecutor's staff who was not a party to the ‘plea bargain’ was in charge of the case when it came before the New York court. The staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member. If responsibility could be evaded that way, the prosecution would have designed another deceptive ‘contrivance,’ akin to those we condemned in *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791, and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217. [404 US at 262 (Douglas, J., concurring).]

The Kent County Prosecutor seeks to reframe this issue not as a contrivance to avoid the bargain, but rather as a broader request for “clarification” of the abuse of discretion standard for all deferral proceedings in criminal cases. But, in reality, granting that request here gives the prosecutor an end run around the plea bargain. This is simply not the right case to address an argument created at the very last moment by the prosecutor. If there is any need to clarify the law, the Court should wait for a case where the prosecutor did not agree below to take no position on whether to grant deferral of proceedings.

Accordingly, the Court should find a breach of the plea bargain and dismiss the

application for leave to appeal. *Arriaga, supra*. See also *Santobello v New York, supra*; US Const, Am XIV; Const 1963, art 1, § 17.

***There Is No Case in Controversy or Aggrieved Party***

The Court should also dismiss the application as the prosecutor has no stake in these proceedings.

The prosecutor's appeal in this matter is non-justiciable as it is precluded by traditional case and controversy requirements. The prosecutor is not an aggrieved party in this case. "An aggrieved party is not one who is merely disappointed over a certain result." *Federated Ins Co v Oakland County Road Com'n*, 475 Mich 286, 291; 715 NW2d 846 (2006). "[To] have standing on appeal, a litigant must have suffered a concrete and particularized injury . . . ." *Id.* at 291. A party's "interest in the proper enforcement of a statute has never been thought sufficient to confer standing . . . ." *Id.*, at 291 n 4.

The Kent County Prosecutor had no stake in the defendant's request for 7411 status. It agreed to take no position on this request, and it has never argued that Mr. Alemu was undeserving of leniency or undeserving of the request for pre-sentence diversion. In essence, it has suffered no injury as a result of the Court of Appeals decision. That it may fear a future in which some judge accords "persuasive value" to the Court of Appeals opinion does not confer a "concrete and particularized injury" in this case.

The prosecutor's interest is merely academic. This Court concluded that an appeal that presents "nothing but abstract questions of law" is moot:

"[T]he judicial power ... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Anway v. Grand Rapids R. Co.*, 211 Mich. 592, 616, 179 N.W. 350 (1920) (quoting *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 [1911] ) (emphasis added). As a

result, “this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before” it. *Federated Publications, Inc. v. City of Lansing*, 467 Mich. 98, 112, 649 N.W.2d 383 (2002). In accordance with these principles, this case is moot because it presents “nothing but abstract questions of law, which do not rest upon existing facts or rights.” [*Anglers of Au Sable, Inc v Department of Environmental Quality*, 489 Mich 884; 796 NW2d 240 (2011).]

The Court does not offer advisory opinions. *Detroit Fire Fighters Ass’n v Detroit*, 408 Mich 663, 697 n 15; 293 NW2d 278 (1980) (Williams, J., for affirmance in part, reversal in part). According to the Michigan Constitution, the Court has the power to offer advisory opinions regarding the constitutionality of legislation when requested to do so by the state legislature or governor. Const 1963, art 3, § 8; *In re Request for Advisory Opinion of Constitutionality of 1975 PA 227*, 395 Mich 148, 149; 235 NW2d 321 (1975). This case does not fall within the limited constitutional exception for advisory opinions.

Accordingly, the Court should dismiss the application for leave to appeal for lack of an aggrieved party and a moot issue.

**II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE REQUEST FOR DIVERSION UNDER MCL 333.7411 WHERE THE CRIME WAS MINOR – MISDEMEANOR POSSESSION OF MARIJUANA - AND THE DEFENDANT WAS THE PERFECT CANDIDATE FOR DIVERSION.**

The Court should not reach the merits of the prosecutor’s appeal given the breach of the plea bargain. Mr. Alemu would nevertheless note that he is deserving of the relief granted by the Court of Appeals.

This case involves a preserved request for placement on probation under the deferred conviction process of MCL 333.7411. (5/23/13 T 4) The trial court denied the request at sentencing and also in response to a timely post-conviction motion. (5/23/13 T 9; 2/14/14 T 12-13) The Court of Appeals reversed by unpublished opinion dated July 7, 2015. *Court of Appeals Opinion*, Appendix A.

The trial court has discretion to sentence an offender to probation without a conviction under MCL 333.7411. *People v Ware*, 239 Mich App 437, 441; 608 NW2d 94 (2000). The trial court’s exercise of discretion is reviewed for an abuse of discretion. See *People v Khanani*, 296 Mich App 175, 177-178; 817 NW2d 655 (2012) (decision to grant status under Holmes Youthful Trainee Act reviewed for abuse of discretion). “An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

The Court of Appeals properly reversed the trial judge’s refusal to divert the case from the conviction process under MCL 333.7411. Mr. Alemu presented as the perfect candidate for diversion status. Moreover, the trial court’s stated reason – that Mr. Alemu could petition for

expunction five years after the sentence was served – fails to recognize the purpose of statutory diversion programs.

Mr. Alemu pleaded guilty to possession of marijuana, a misdemeanor offense under MCL 333.7403(2)(d). He did so in exchange for the prosecutor's promise to dismiss the initial charge of possession with intent to deliver marijuana. (3/26/13 T 5-6) Additionally, as part of the plea agreement, the prosecutor agreed to take no position on 7411 status (i.e., disposition under MCL 333.7411). (3/26/13 T 6)

The presentence investigator recommended that Mr. Alemu be given 7411 status. (PSI 2) Defense counsel asked the court to follow that recommendation. (5/23/13 T 5) Mr. Alemu spoke of his "stupid" behavior and his desire to continue with his education. (5/23/13 T 5) He had previously informed the trial judge during the plea proceeding that he was an undergraduate student at the University of Michigan and planned to attend dental school at the graduate level. (3/26/13 T 3-4) The trial judge denied the request for 7411 placement at sentencing, relying in part on the "pound" of marijuana found in the car:

[THE COURT:] I appreciate what he is telling you Mr. Parker. I am totally incredulous this University of Michigan student who is bright and capable is trying to tell me that he has a glass jar with a *pound of marijuana* and a box of sandwich baggies that's open, a digital scale in his door, and he's just doing this to decant a small, usable amount anytime he goes from home to home to visit friends over the holiday.

Now, that doesn't seem like simply just taking a small amount just to use with your friends. It seems to me in this apartment complex where you were, that you were providing a means to dispense to the willing. That's how it comes across to me.

Now, I have to determine credibility. Maybe I'm wrong. I don't believe you. You're sure you want to stick with that?

THE DEFENDANT: Yes, your Honor. The reason I was in the apartment complex was because I was talking on the phone with

my girlfriend, and I decided to just pull over. I was not there to do anything else.

THE COURT: I see. \* \* \* I'm putting you on probation for a year. \* \* \* For this one year that you're on probation to me, you will follow all other recommendations plus permit entry into your home . . . and you will pay a fine of \$1,000. That's the cost for this choice.

\* \* \*

MR. PARKER: Is the Court granting 7411?

THE COURT: I am not. [5/23/13 T 7-9.]

By post-conviction motion, Mr. Alemu moved to correct the trial court's misperception of the facts. There was not a pound of marijuana, but in fact 23 grams – less than an ounce.<sup>4</sup> (PSI 2-3) Mr. Alemu also reiterated his explanation for the crime: that he was going to share the marijuana with friends over the winter holidays. (2/14/14 T 8-9) The instant offense occurred on December 23, 2012, as Mr. Alemu was driving home to Grand Rapids from Ann Arbor for the holiday break. (PSI 2-3) Despite this explanation, and despite correction of the amount of marijuana, the trial judge again denied 7411 status. Judge Leiber explained that he was denying the request not because of the digital scale in the car or the earlier question as to whether defendant was selling or merely sharing with friends. (2/14/14 T 12-13) Rather, he was denying the request because he wanted Mr. Alemu to wait five years before he could petition for formal expunction (presumably under the adult expunction statute, MCL 780.621):

[THE COURT:] But in any event, he's taking advantage of this sobering reality and making important and we hope long-lasting change in his life.

I believe incentives matter. And with regard to section 7411, my decision not to grant it was not based on any quantity stated or any colloquy between the defendant and myself. My decision not to

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<sup>4</sup> The presentence report contained contradictory information as to the amount of marijuana, first reporting the officer's perception that there was a pound and then reporting the actual weight of 23.61 grams. (PSI 2-3) In response to the post-conviction motion, the trial judge ordered correction of the report to strike reference to the "pound" of marijuana. *Order*, Appendix F.

grant it was the recognition that at twenty years of age, this young man had no prior criminal record, that the amount involved – he had no history of trafficking in drugs or narcotics or any other kind of substance abuse, had an education that was well grounded and the potential of a bright future.

Incentives matter, as I say, and I'm saying now that which I had in mind when I fashioned the sentence was to give to the defendant the opportunity for expungement under a different section of the law, namely: the general statute which requires a five-year period of abstinence, except for minor offenses, and the subsequent consideration presuming that he continues in the path that he has chosen. [2/14/14 T 12-13.]

Judge Leiber nevertheless acknowledged that Mr. Alemu was doing well, had matured and was taking advantage of the opportunities in his life. (2/14/14 T 12) The trial judge conceded there was less than an ounce of marijuana found in Mr. Alemu's car. (2/14/14 T 4)

The trial court's decision represents an abuse of discretion given this offender's age, academic standing, lack of prior record, minor nature of the offense and the very purpose of the statutorily-authorized diversion program.

MCL 333.7411 offers the court the ability to place a first time offender, charged with certain low-level drug offenses including possession of marijuana, on probation without an adjudication of guilt. Upon successful completion of the terms and conditions of probation, the court must discharge the individual and dismiss the proceedings:

Sec. 7411. (1) When an individual who has not previously been convicted of an offense under this article or under any statute of the United States or of any state relating to narcotic drugs, coca leaves, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under section 7403(2)(a)(v), 7403(2)(b), (c), or (d), or of use of a controlled substance under section 7404, or possession or use of an imitation controlled substance under section 7341 for a second time, the court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that shall include, but are not limited to, payment of a probation supervision fee as prescribed in

section 3c of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3c. The terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1084. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and, except as otherwise provided by law, is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413. There may be only 1 discharge and dismissal under this section as to an individual. [MCL 333.7411(1).]

The “apparent purpose of . . . [7411] . . . is to grant trial courts discretion to provide an ultimately noncriminal sanction for first-time offenders who commit less serious drug crimes.” *Ware*, 239 Mich App at 441.

As MCL 333.7411 makes clear, the trial court may place the offender on probation in order to monitor the offender’s behavior over a period of time.

Mr. Alemu was (and continues to be) the perfect candidate for placement on 7411 status. He was a first time offender who had no prior convictions and no prior arrests. (PSI 3-4) He was 20 years old at the time of sentencing and is now 23 (PSI coverpage). He was convicted of the misdemeanor offense of possession of marijuana. MCL 333.7403(2)(d). The prosecutor did not oppose 7411 placement, and the presentence investigator recommended it. (3/26/13 T 6; PSI 1-2)

Mr. Alemu was a full-time student at the University of Michigan majoring in psychology and hoping to attend dental school. (3/26/13 T 4; PSI 1) He worked as a research assistant for Dr. Martia Inglehart. (PSI 1) He completed a marijuana education program before pleading guilty. *Kent County Court Services Update Status Report* (this document is found in the circuit court file). He accepted full responsibility for his actions and pleaded guilty a mere three

months after arrest. (3/26/2013 T 8; PSI 1)

This Court has stated that “criminal punishment must fit the offender rather than the offense alone and that sound discretion must be exercised in sentencing matters.” *People v Triplett*, 407 Mich 510, 513; 287 NW2d 165 (1980) (citing *People v McFarlin*, 389 Mich.557, 574; 208 NW2d 504 (1973)). Assessment of the offender is more important than assessment of the offense in many ways. *People v Mazzie*, 429 Mich 29, 33; 413 NW2d 1 (1987) (“Under our present framework of indeterminate sentencing, sentences are based more on an assessment of the offender than the offense.”). Moreover, “the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society’s need for protection and its interest in maximizing the offender’s rehabilitative potential.” *McFarlin*, 389 Mich at 574.

As the case law makes clear, the trial judge was required to consider Mr. Alemu’s personal circumstances and the lack of a prior record when imposing sentence. Here, those circumstances were all exemplary. Mr. Alemu was an intelligent young man with no prior record – not even a single prior arrest. He completed a marijuana substance abuse class before the guilty plea, and complied with all terms and conditions of his probation after sentencing. (2/14/14 T 5). During the appeal process, he continued to work and attend classes as a full-time student, and was selected as Programming Chair for the University of Michigan’s Black Student Union. *Letter from Tyrell Collier, President of Black Student Union* (this letter was attached to defendant’s post-conviction motion). His excellent post-sentence behavior led the trial judge to remark that he was doing well and taking advantage of the opportunities presented to him. (2/14/14 T 12) For this very reason, the trial judge indicated he would (and subsequently did) grant an early discharge from probation. (2/14/14 T 14)

In effect, the trial judge gave this defendant a nine-month probationary term. The order granting an early discharge from probation reflects termination of probation “with improvement.” *Motion and Order for Discharge of Probation (with Improvement)*, Appendix E. Yet the judge denied 7411 diversion status because the judge wanted to monitor Mr. Alemu’s behavior for a longer period of time. This decision is hard to reconcile with the early discharge from probation and an offender who appeared to be one of the most likely individuals to learn his lesson from the criminal justice system and a person most deserving of an opportunity for diversion. In effect, there appears to be a level of arbitrariness in the trial court’s actions.

Trial courts routinely grant 7411 diversion status for young offenders charged with minor offenses. This is true not only for marijuana offenses, but for some cocaine and other drug crimes. See *People v Benjamin*, 283 Mich App 526, 527; 769 NW2d 748 (2009) (7411 status for possession of less than 25 grams of cocaine); *Carr v Midland County Concealed Weapons Licensing Bd*, 259 Mich App 428, 430-31; 674 NW2d 709 (2003) (7411 status for obtaining a controlled substance by fraud); *Ware, supra* (holding 7411 status not precluded for simultaneous convictions of conspiracy to deliver marijuana and possession of cocaine).

Mr. Alemu would have been eligible for diversion under the Holmes Youthful Trainee Act as well. He was 20 years old at the time of the crime, and misdemeanor marijuana possession is an eligible crime. See MCL 762.11 *et seq.* The Court of Appeals has repeatedly acknowledged and approved HYTA placement for individuals convicted of crimes more serious than possession of marijuana. See *People v Giovannini*, 271 Mich App 409, 410; 722 NW2d 237 (2006) (remanded for reconsideration of HYTA placement for 17 year old who committed two separate second-degree home invasion offenses); *People v Bobek*, 217 Mich App 524, 532; 553 NW2d 18 (1996) (HYTA for world class skater who pleaded guilty to first-degree home

invasion); *People v Bandy*, 35 Mich App 53; 192 NW2d 115 (1971) (remanded for reconsideration of HYTA status for unarmed robbery).

Judge Leiber indicated his intent to consider a request for expungement five years after the sentence was completed. (2/14/14 T 13) He referred to the belief that “[i]ncentives matter.” (2/14/14 T 12, 13) But there was no recognition that the court could place this young man on probation under MCL 333.7411 for more than a year to monitor the offender’s behavior and provide an incentive, namely successful completion of probation without a conviction.<sup>5</sup>

The trial judge’s reasoning would appear to preclude 7411 status for most if not nearly every low-level drug offender. The same would be true for young offenders requesting placement under HYTA and appearing before this particular judge.

The Court of Appeals correctly held that the trial judge abused his discretion by failing to appreciate the statutory diversion process under MCL 333.7411 and the “earned” nature of the statutory remedy:

We agree with defendant that the trial court abused its discretion in denying deferral under § 7411(1). At the February 14, 2014 hearing, the trial court clarified that its decision to deny deferral was not rooted in the erroneous PSIR report stating that defendant possessed a pound of marijuana, or in its colloquy with defendant regarding his intent to sell the marijuana. Rather, the court stated that it would deny deferral under § 7411(1), “giving [defendant] the opportunity to earn it [expungement] as a matter of fact as opposed to granting it when his future is still uncertain.” The trial court’s stated reason for denying deferral – making sure that defendant “earn[ed] it” – *is the very purpose of § 7411(1)*. In order for a defendant to have the proceedings dismissed without an adjudication of guilt under § 7411(1), he or she must “earn it.” Any violation of

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<sup>5</sup> The trial judge made no distinction between misdemeanor and felony convictions in his analysis. As a general rule, there is a shorter period of probation available for misdemeanants under the general probation statute, MCL 771.2, although the available length of probation under MCL 333.7411 is undefined. The maximum period of probation for HYTA youthful offenders (i.e., offenders under 21 years of age) is three years. MCL 762.13(1)(b). The trial judge did not rely on the length of probation as a reason for denying defendant’s request, and defendant would note that individuals convicted of misdemeanor offenses would appear to be *more* deserving of leniency than those convicted of a felony offense.

probation allows the court to enter an adjudication of guilt. See MCL 333.7411(1). In other words, the defendant is to prove himself or herself. The defendant is not automatically entitled, under § 7411(1), to have the adjudication of guilt dismissed. The defendant, with a still uncertain future, must prove, by way of compliance with an order of probation, that he or she has earned a dismissal without an adjudication of guilt.

By denying defendant's request for probation under § 7411(1) for the reason that he had to prove his worth, the trial court misapprehended the process for a deferred adjudication under the statute. The point of requiring a defendant to comply with probation before obtaining a dismissal without an adjudication of guilt is to make the defendant "earn it." Defendant, by requesting the procedure set forth under § 7411(1), was asking for the opportunity to "earn it." In essence, defendant was requesting the very thing that the trial court cited as its sole reason for denying the request for deferral proceedings under § 7411(1). In denying defendant's request for this reason, the trial court misconstrued the deferral process set forth in § 7411(1) and necessarily abused its discretion. See *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012) ("A trial court necessarily abuses its discretion when it makes an error of law."); *Ware*, 239 Mich App at 442 (holding that the trial court abused its discretion when it misapplied § 7411(1)). Accordingly, we vacate defendant's sentence, including the adjudication of guilt, and remand for resentencing. *Ware*, 239 Mich App at 442. On remand, the case is placed in a presentence posture. See *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007); *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). Thus, on remand, the trial court is to consider defendant's request for deferral proceedings under § 7411(1) and is to decide the request on its merits. See *Ware*, 239 Mich App at 442. [*Court of Appeals Opinion* pp 4-5, Appendix A.]

The Court of Appeals correctly held that the trial judge misapplied the law. Post-conviction expungement is not a substitute for diversion from the criminal justice system, and the trial judge misunderstood the difference between these two statutory schemes. The Legislature has created two separate methods to avoid a criminal conviction, but the diversionary statutes exist for those who deserve leniency at the very outset of the criminal prosecution: the

first-time offender for certain crimes,<sup>6</sup> the youthful offender,<sup>7</sup> and those committing a one-time, low-level drug offense.<sup>8</sup> When a judge ignores the earned nature of *pre-sentence* diversionary programs, it ignores the intent of the legislature.

The trial judge's reasoning also ignores the damage to this offender's employment prospects during the five-year post-sentence period under the expungement statute. It is counter-productive to saddle a young offender with a conviction as he begins his professional career. Mr. Alemu graduated in 2014 from a respected university, but his criminal record will undoubtedly impair his employment prospects and future state licensing requests.<sup>9</sup> As the Court might imagine, a prior drug conviction, even one for marijuana, can have severe consequences on an applicant's efforts to be admitted to dental school (Mr. Alemu expressed desire to apply to dental school, 2/14/14 T 6). Dentists are licensed to administer controlled substances as part of their work,<sup>10</sup> and only 41% of all applicants to dental school were accepted and enrolled in 2010. ADEA (American Dental Education Association) Survey of U.S. Dental School Applicants and Enrollees, available at: <http://www.adea.org/publications/library/ADEAsurveysreports/Pages/ADEASurveyofUSDentalSchoolApplicantsandEnrollees20102011.aspx> (accessed 2-25-14).

Beyond obstacles in gaining acceptance to an accredited dental school, there is a state licensing process for dentists that requires disclosure of a misdemeanor marijuana conviction. See MCL 333.16174 (criminal records check for health care license); MCL 333.16177 (dentist

<sup>6</sup> Domestic violence, MCL 769.4a, and parental kidnapping, 750.350a(4).

<sup>7</sup> The Holmes Youthful Trainee Act, MCL 762.11 *et seq.*

<sup>8</sup> MCL 333.7411.

<sup>9</sup> Many statutes require a "criminal records check" including: MCL 15.183(9)(d) (school board members); MCL 28.515 (carrying concealed weapon by retired law enforcement officer); MCL 333.21313 (owner or operator of home for aged); MCL 380.1230a (school employees); MCL 400.713 (adult foster care); MCL 722.15 (child care organization); MCL 722.115 (foster care).

<sup>10</sup> See [http://www.michigan.gov/lara/0,4601,7-154-35299\\_63294\\_27529\\_27533---,00.html](http://www.michigan.gov/lara/0,4601,7-154-35299_63294_27529_27533---,00.html).

and other health care providers must report misdemeanor conviction for possession of controlled substance when applying for or renewing health care license). See also MCL 333.13522 (referring to state and federal regulations for use of radiation by dentists).

Mr. Alemu was a 20-year-old offender who was the perfect candidate for 7411 deferral. He had no prior record and the crime was minor. He was a full-time student with a promising career. The crime reflects youthful indiscretion at a time when young people make mistakes. To saddle him with a drug conviction that may preclude a promising career represents an unreasonable and unprincipled outcome. Ironically, the prosecutor has now delayed the process even further with this appeal, and the delay means that Mr. Alemu can show more than three years of crime-free behavior. This appeal is rapidly becoming moot, but the Court can take appropriate action by denying leave to appeal or affirming the decision of the Court of Appeals.

**SUMMARY AND RELIEF**

**WHEREFORE**, for the foregoing reasons, the Court should deny leave to appeal due to waiver, breach of the plea bargain and/or lack of a justiciable controversy. Alternatively, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Anne M. Yantus

BY: \_\_\_\_\_

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Dated: January 6, 2016

**Appendix A**

**7-5-15 Court of Appeals Opinion**

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

July 7, 2015

Plaintiff-Appellee,

v

No. 320560

Kent Circuit Court

AMDEBIRHAN ABDERE ALEMU,

LC No. 13-000380-FH

Defendant-Appellant.

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Before: BECKERING, P.J., and MARKEY and SHAPIRO, JJ.

PER CURIAM.

Defendant, Amdebirhan Abdere Alemu, appeals by leave granted the trial court's sentence imposed following his guilty plea for possession of marijuana, MCL 333.7403(2)(d). We vacate and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On or about December 23, 2012, police officers observed defendant in a parking lot of an apartment complex that was known to have a high number of drug sales. The officers approached defendant's car, and defendant told the officers that he had been in the parking lot making a telephone call. The officers noticed a box of clear plastic sandwich bags tucked between the driver's seat and the door. The officers arrested defendant for trespassing, and asked for permission to search the car. Defendant consented to the search. Upon searching the car, officers found a glass jar with approximately 21.24 grams<sup>1</sup> of marijuana inside. In addition, the officers found 2.37 grams in a zip-top bag, as well as a digital scale. Defendant told the officers that he did not intend to sell the marijuana, but rather, intended to share it with his friends who were home from school for the holidays.

On March 26, 2013, defendant pleaded guilty to possession of marijuana. The trial court accepted his guilty plea. In exchange for the guilty plea, the prosecutor dismissed a felony charge for possession with intent to deliver marijuana. At the time of the plea hearing, defense

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<sup>1</sup> The amount of marijuana was mistakenly listed in the Presentence Investigation Report (PSIR) as one pound of marijuana.

counsel indicated he would be requesting that the trial court defer entering a judgment of guilt and place defendant on probation under MCL 333.7411(1), which allows the trial court, in cases involving certain controlled substance offenses, to place the offender on probation and defer entering an adjudication of guilt. If the offender complies with his or her probation, the trial court does not enter an adjudication of guilt; however, if the offender does not comply, the trial court enters an adjudication of guilt. See MCL 333.7411(1); *People v Benjamin*, 283 Mich App 526, 530; 769 NW2d 748 (2009).

In a subsequent "Petition for Narcotics Diversion Status," under § 7411(1), defendant argued that he was entitled to a deferred adjudication of guilt because the instant offense was his first offense, and because there were "equitable considerations" that warranted as much. The record indicates that defendant, a 20-year-old University of Michigan student, successfully completed a marijuana education program. The PSIR stated that defendant was a research assistant for one of his college professors. It also stated that defendant took responsibility for his offense and cooperated with the PSIR investigator. The PSIR recommended that the trial court place defendant on probation under § 7411(1).

At his sentencing hearing on May 23, 2013, defendant maintained that the marijuana in his car was for his friends over the holiday break; he denied intending to sell the drug. The trial court stated its disbelief of defendant's account, stating it was "totally incredulous" that defendant had "a pound of marijuana" a box of sandwich bags, and a digital scale, yet he was not planning to sell the drug. The trial court sentenced defendant to a year of probation. At the conclusion of the hearing, defense counsel asked the trial court if it was "granting 7411?" The trial court responded "I am not" with no further discussion of the matter.

In November 2013, defendant moved for resentencing, arguing that the trial court was under the mistaken belief that he possessed a pound of marijuana, when in reality he possessed only approximately 23 grams of the drug. Additionally, defendant requested that the trial court reconsider sentencing under § 7411(1), given defendant's age, the fact that he had no prior criminal history, and the fact that he had not been arrested since the instant offense. In addition, defendant noted that he had complied with his probation, paid all requisite fines and fees, had completed a marijuana educational program, and had received the recommendation of the probation department with regard to § 7411(1), as it stated in the PSIR that defendant was an "excellent" candidate for probation. Defendant also cited his status as a full-time college student, that his grades had improved after his arrest, and that he had been elected as the Programming Chair for a campus organization. Further, defendant stated that he hoped to apply to dental school following his graduation from college, and that a drug conviction could hinder his ability to be accepted into a dental program. Considering all of the above factors, defendant stated that he was an "ideal candidate for diversion" and asked the trial court to reconsider probation under § 7411(1).

The trial court held a hearing on the matter on February 14, 2014, and recognized the error in the PSIR regarding the amount of marijuana defendant possessed at the time of his

arrest. After hearing argument from defense counsel,<sup>2</sup> the trial court stated that it was denying defendant's request for a deferred adjudication of guilt under § 7411(1). The trial court prefaced its decision by stating, "I believe incentives matter." It then stated that its previous decision to deny placement under § 7411(1) "was not based on any quantity [of marijuana] stated or any colloquy between the defendant and myself . . ." and that it had considered defendant's age, lack of prior criminal history or substance abuse, as well as his education and "potential of a bright future." However, the trial court reiterated that "[i]ncentives matter" and that, in fashioning defendant's sentence, its intent was "to give the defendant the opportunity for expungement [of his conviction] under a different section of law, namely; the general statute which requires a five-year period of abstinence,<sup>3</sup> except for minor offenses, and the subsequent consideration presuming that he continues in the path that he has chosen." The court stated that defendant "may apply for expungement" in the future, provided he qualified "under the separate statute . . ." The court further explained, with regard to its statement that defendant could apply for expungement in five years:

But in that regard, those paths that he started will be shown to be a permanent path [sic], rather than giving him the opportunity to—giving him the opportunity to earn it [expungement] as a matter of fact as opposed to granting it when his future is still uncertain.

We note that despite the trial court's February 20, 2014 order requiring that the PSIR be corrected to delete reference to "approximately a pound" of marijuana on page 2, it appears that the PSIR has not been corrected. Thus, on remand, we order that the April 2013 PSIR be amended accordingly.

## II. MCL 333.7411

Defendant contends that the trial court abused its discretion by failing to defer the proceedings under § 7411(1). Because the statute affords the trial court discretion regarding whether to defer the proceedings, our review is for an abuse of that discretion. See *People v Ware*, 239 Mich App 437, 441; 608 NW2d 94 (2000). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

MCL 333.7411(1) permits a trial court to defer entering a judgment of guilt in certain scenarios, and provides:

When an individual who has not previously been convicted of an offense under this article or under any statute of the United States or of any state relating to

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<sup>2</sup> As part of defendant's plea deal, the prosecution agreed that it would take no position regarding MCL 333.7411(1). It has taken that same position on appeal.

<sup>3</sup> Presumably, the trial court was referring to MCL 780.261, which permits certain convictions to be expunged after five or more years.

narcotic drugs, coca leaves, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under section 7403(2)(a)(v), 7403(2)(b), (c), or (d),<sup>4</sup> or of use of a controlled substance under section 7404, or possession or use of an imitation controlled substance under section 7341 for a second time, the court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that shall include, but are not limited to, payment of a probation supervision fee as prescribed in section 3c of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3c. The terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1084. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and, except as otherwise provided by law, is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413. There may be only 1 discharge and dismissal under this section as to an individual.

Proceedings under § 7411 have been described as “deferral proceedings” under which the trial court does not adjudicate guilt when a plea is tendered. *Benjamin*, 283 Mich App at 530. “Instead, the trial court defers proceedings and places the individual on probation.” *Id.* If the defendant complies with the terms of probation, the trial court is required to discharge the individual without an adjudication of guilt. *Id.* Conversely, if the defendant fails to comply with the terms of his or her probation, the trial court is to enter an adjudication of guilt. *Id.* Thus, whether the trial court enters an adjudication of guilt is expressly contingent on the defendant’s compliance with probation. “The apparent purpose of the statute is to grant trial courts discretion to provide an ultimately noncriminal sanction for first-time offenders who commit less serious drug crimes.” *Ware*, 239 Mich App at 441.

We agree with defendant that the trial court abused its discretion in denying deferral under § 7411(1). At the February 14, 2014 hearing, the trial court clarified that its decision to deny deferral was not rooted in the erroneous PSIR report stating that defendant possessed a pound of marijuana, or in its colloquy with defendant regarding his intent to sell the marijuana. Rather, the court stated that it would deny deferral under § 7411(1), “giving [defendant] the opportunity to earn it [expungement] as a matter of fact as opposed to granting it when his future is still uncertain.” The trial court’s stated reason for denying deferral—making sure that defendant “earn[ed] it”—*is the very purpose of § 7411(1)*. In order for a defendant to have the

---

<sup>4</sup> Defendant pleaded guilty to possession of marijuana, MCL 333.7403(2)(d), and there is no dispute that such a plea made him eligible for consideration under § 7411(1).

proceedings dismissed without an adjudication of guilt under § 7411(1), he or she must “earn it.” Any violation of probation allows the court to enter an adjudication of guilt. See MCL 333.7411(1). In other words, the defendant is to prove himself or herself. The defendant is not automatically entitled, under § 7411(1), to have the adjudication of guilt dismissed. The defendant, with a still uncertain future, must prove, by way of compliance with an order of probation, that he or she has earned a dismissal without an adjudication of guilt.

By denying defendant’s request for probation under § 7411(1) for the reason that he had to prove his worth, the trial court misapprehended the process for a deferred adjudication under the statute. The point of requiring a defendant to comply with probation before obtaining a dismissal without an adjudication of guilt is to make the defendant “earn it.” Defendant, by requesting the procedure set forth under § 7411(1), was asking for the opportunity to “earn it.” In essence, defendant requested the very thing that the trial court cited as its sole reason for denying the request for deferral proceedings under § 7411(1). In denying defendant’s request for this reason, the trial court misconstrued the deferral process set forth in § 7411(1) and necessarily abused its discretion. See *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012) (“A trial court necessarily abuses its discretion when it makes an error of law.”); *Ware*, 239 Mich App at 442 (holding that the trial court abused its discretion when it misapplied § 7411(1)). Accordingly, we vacate defendant’s sentence, including the adjudication of guilt, and remand for resentencing. *Ware*, 239 Mich App at 442. On remand, the case is placed in a presentence posture. See *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007); *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). Thus, on remand, the trial court is to consider defendant’s request for deferral proceedings under § 7411(1) and is to decide the request on its merits. See *Ware*, 239 Mich App at 442.<sup>5</sup>

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering  
/s/ Douglas B. Shapiro

---

<sup>5</sup> Because we vacate and remand for reconsideration under § 7411(1), we need not consider defendant’s unpreserved argument that the trial court should have sentenced him under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMDEBIRHAN ABDERE ALEMU,

Defendant-Appellant.

---

UNPUBLISHED

July 7, 2015

No. 320560

Kent Circuit Court

LC No. 13-000380-FH

Before: BECKERING, P.J., and MARKEY and SHAPIRO, JJ.

MARKEY, J. (*dissenting*).

I respectfully dissent from the majority's decision to reverse the trial court's decision in this matter because I do not believe a full review of the record supports a finding that the trial court's holding constituted an abuse of discretion—a high hurdle for this court to achieve. The trial judge in this matter is extremely experienced and certainly well familiar with the applicable law. That he may have originally misunderstood one fact of defendant's case does not lead me to conclude either that he did not comprehend either the scope of his discretion, the application of the law or the ramifications of his deciding to sentence defendant as he did. We do not have the ability to perceive the subjective factors that may also affect a judge's sentencing, such as demeanor, attitude, voice inflections, etc., which is another reason why finding an abuse of discretion in a situation such as this is even more difficult. Consequently, I would affirm.

/s/ Jane E. Markey

**Appendix B**

**Prosecutor's Brief on Appeal**

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

PEOPLE OF THE STATE  
OF MICHIGAN,

Plaintiff-Appellee,

Court of Appeals  
No. 320560

vs

AMDEBIRHAN ABERE ALEMU,

Kent County Circuit  
Court No. 13-00380-FH

Defendant-Appellant.

\_\_\_\_\_ /

**PLAINTIFF-APPELLEE'S BRIEF ON APPEAL**

**ORAL ARGUMENT NOT REQUESTED**

William A. Forsyth (P 23770)  
Kent County Prosecuting Attorney

Timothy K. McMorrow (P 25386)  
Chief Appellate Attorney

Business Address:  
82 Ionia NW  
Suite 450  
Grand Rapids, Mi 49503  
(616) 632-6710

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COUNTER-STATEMENT OF QUESTIONS PRESENTED ..... ii

COUNTER-STATEMENT OF FACTS ..... 1

ARGUMENT ..... 2

RELIEF REQUESTED ..... 3

**INDEX OF AUTHORITIES**

**Cases**

MCL 333.7411 .....2

**STATEMENT OF APPELLATE JURISDICTION**

The People accept Defendant-Appellant’s Statement of Appellate Jurisdiction, and accept that this matter is properly before this Court pursuant to leave granted on May 1, 2014.

**COUNTER-STATEMENT OF QUESTION PRESENTED**

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT’S REQUEST FOR DIVERSION UNDER MCL 333.7411?

For the reasons stated herein, the People take no position on the question presented.

**COUNTER-STATEMENT OF FACTS**

The People accept Defendant-Appellant's Statement of Facts.

**ARGUMENT**

SINCE THE PEOPLE AGREED TO TAKE NO POSITION ON WHETHER THE DEFENDANT’S CASE SHOULD BE TREATED UNDER MCL 333.7411, WE SHALL TAKE NO POSITION ON THE DEFENDANT’S APPEAL.

Standard of Review. The People accept Defendant-Appellant’s statement on the standard of review.

Discussion. As the defendant accurately notes, the People agreed to take no position on whether the trial court should consider the defendant’s case under MCL 333.7411 (Plea, p 6). For this reason, we also took no position at the motion for resentencing (2/14/14 Motion, pp 3-4).

It is our position that we would also violate the plea agreement by taking any position on the defendant’s argument in this Court. We are filing this brief solely to advise this Court that in accord with the plea agreement we are taking no position. We have not requested oral argument, and unless this Court orders otherwise will not appear for oral argument in this matter.

**RELIEF REQUESTED**

WHEREFORE, for the reasons stated herein, the People take no position on the defendant's requested relief on appeal.

Respectfully submitted,

William A. Forsyth (P 23770)  
Kent County Prosecuting Attorney

Dated: June 3, 2014

By: /s/ Timothy K. McMorrow  
Timothy K. McMorrow (P 25386)  
Chief Appellate Attorney

**Appendix C**

**11-25-15 Michigan Supreme Court order granting oral argument**

# Order

November 25, 2015

152247

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

v

AMDEBIRHAN ABDERE ALEMU,  
Defendant-Appellee.

SC: 152247  
COA: 320560  
Kent CC: 13-000380-FH

26783 P  
AY  
Michigan Supreme Court  
Lansing, Michigan

Robert P. Young, Jr.,  
Chief Justice

Stephen J. Markman  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano  
Richard H. Bernstein  
Joan L. Larsen,  
Justices

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On order of the Court, the application for leave to appeal the July 7, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order, and shall include among the issues to be briefed: (1) whether the plea bargain's stipulation that the People would take "no position on 7411" precludes the People from filing this application; and (2) whether the People's formal adoption of "no position" in the Court of Appeals waived their ability to request relief in this Court. The parties should not submit mere restatements of their application papers.

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NOV 30 2015

APPELLATE DEFENDER OFFICE



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 25, 2015

Clerk

**Appendix D**

**Court of Appeals Docket Entries**

Home Cases, Opinions &amp; Orders

# Case Search

Case Docket Number Search Results - 320560

Appellate Docket Sheet

**COA Case Number: 320560****MSC Case Number: 152247****PEOPLE OF MI V AMDEBIRHAN ABDERE ALEMU**


---

1	PEOPLE OF MI Oral Argument: N Timely: Y	PL-AE	PRS	(54429) BENISON JAMES 82 IONIA AVENUE NW SUITE 450 GRAND RAPIDS MI 49503 (616) 632-6710
2	ALEMU AMDEBIRHAN ABDERE Oral Argument: Y Timely: Y	DF-AT	SAD	(39445) YANTUS ANNE 645 GRISWOLD 3300 PENOBSCOT BUILDING DETROIT MI 48226-4281 (313) 256-9833

---

**COA Status: OPEN      MSC Status: Pending on Application****Case Flags: Guilty Plea; Proposal B Appeal**

02/27/2014 1 Delayed App for Leave - Criminal

Proof of Service Date: 02/27/2014

Register of Actions: Y

Answer Due: 03/20/2014

Fee Code: PI

Attorney: 39445 - YANTUS ANNE

05/23/2013 2 Order Appealed From

From: KENT CIRCUIT COURT

Case Number: 13-000380-FH

Trial Court Judge: 22889 LEIBER DENNIS B

Nature of Case:

Control Subs - Possess Marijuana

02/25/2014 7 Steno Certificate - Tr Request Received

Date: 02/19/2014

Reporter: 5219 - VANDENHEUVEL BOBBIE JO

Hearings:

02/14/2014

02/27/2014 4 Other

For Party: 2 ALEMU AMDEBIRHAN ABDERE DF-AT

Attorney: 39445 - YANTUS ANNE

Comments: Statement in delayed app that 2/14/2014 motion hearing transcript has been requested.

02/27/2014 5 Transcript Filed By Party

Date: 02/27/2014

Filed By Attorney: 39445 - YANTUS ANNE

Hearings:

- 03/26/2013 Plea  
05/23/2013 Sentence  
Comments: Linked to Evt. 1
- 02/27/2014 6 Presentence Investigation Report - Confidential  
Date: 02/27/2014  
For Party: 2 ALEMU AMDEBIRHAN ABDERE DF-AT  
Attorney: 39445 - YANTUS ANNE
- 03/10/2014 8 Notice of Filing Transcript  
Date: 03/07/2014  
Reporter: 5219 - VANDENHEUVEL BOBBIE JO  
Hearings:  
02/14/2014
- 03/13/2014 9 Transcript Filed By Party  
Date: 03/13/2014  
Filed By Attorney: 39445 - YANTUS ANNE  
Hearings:  
02/14/2014 Mo Correct Invalid Sent
- 04/22/2014 10 Submitted On Motion Docket  
Event: 1 Delayed App for Leave - Criminal  
District: G  
Item #: 11
- 05/01/2014 11 Order: Application - Grant - Delayed App for Leave -  
View document in PDF format  
Event: 1 Delayed App for Leave - Criminal  
Panel: DBS,JEM,MTB  
Attorney: 39445 - YANTUS ANNE  
Comments: Limited to Issues raised in application and supporting brief
- 05/12/2014 14 Brief: Appellant  
Proof of Service Date: 05/12/2014  
Oral Argument Requested: Y  
Timely Filed: Y  
Filed By Attorney: 39445 - YANTUS ANNE  
For Party: 2 ALEMU AMDEBIRHAN ABDERE DF-AT
- 06/03/2014 15 Brief: Appellee  
Proof of Service Date: 06/03/2014  
Oral Argument Requested: N  
Timely Filed: Y  
Filed By Attorney: 25386 - MCMORROW TIMOTHY K  
For Party: 1 PEOPLE OF MI PL-AE
- 06/05/2014 16 Noticed  
Record: REQST  
Mail Date: 06/06/2014
- 06/18/2014 17 Record Filed  
Comments: FILE (TRNS INCL)
- 02/17/2015 23 Email Contact  
For Party: 1 PEOPLE OF MI PL-AE  
Attorney: 25386 - MCMORROW TIMOTHY K  
Comments: Assistant Prs James Benison (P54429) handling all appeals in place of Tim McMorrow (retired)
- 05/05/2015 29 Submitted on Case Call  
District: G  
Item #: 3

- Panel: JMB,JEM,DBS
- 07/07/2015 39 Opinion - Per Curiam - Unpublished  
View document in PDF format  
Pages: 5  
Panel: JMB,JEM,DBS  
Result: Vacated and Remanded
- 07/07/2015 40 Opinion - Dissenting  
View document in PDF format  
Pages: 1  
Author: JEM
- 09/01/2015 41 SCt: Application for Leave to SCt  
Supreme Court No: 152247  
Answer Due: 09/29/2015  
Fee: E-Pay  
For Party: 1  
Attorney: 54429 - BENISON JAMES
- 09/03/2015 42 Supreme Court - File & Record Sent To  
File Location: Z  
Comments: sc#152247 lcf:psir
- 09/03/2015 43 SCt: COA and TCt Received  
1 files
- 09/04/2015 44 Other  
For Party: 1 PEOPLE OF MI PL-AE  
Attorney: 54429 - BENISON JAMES  
Comments: Notice of filing application for leave to appeal in the Supreme Court
- 09/23/2015 45 SCt: Answer - SCt Application  
Filing Date: 09/23/2015  
For Party: 2 ALEMU AMDEBIRHAN ABDERE DF-AT  
Filed By Attorney: 39445 - YANTUS ANNE
- 11/25/2015 46 SCt Order: MOAA -Oral Argument on Lv Appl  
View document in PDF format
- 12/16/2015 47 Motion: Oral Argument - Access to Recording  
Proof of Service Date: 12/16/2015  
Filed By Attorney: 54429 - BENISON JAMES  
For Party: 1 PEOPLE OF MI PL-AE  
Fee Code: EPAY  
Answer Due: 12/23/2015
- 12/29/2015 48 Submitted On Special Motion Docket  
Event: 47 Oral Argument - Access to Recording  
District: C  
Item #: 1
- 01/04/2016 49 Order: Oral Argument - Grant Access to Recording  
View document in PDF format  
View document in PDF format  
Event: 47 Oral Argument - Access to Recording  
Panel: JMB,JEM,DBS  
Attorney: 54429 - BENISON JAMES
- 01/05/2016 50 Oral Argument Recording - Rec`d Fee; Sent Temp Link  
Date: 01/05/2016  
For Party: 1 PEOPLE OF MI PL-AE  
Attorney: 54429 - BENISON JAMES

Fee Code: EPAY

Comments: james.benison@kentcountymi.gov

Case Listing Complete

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**Appendix E**

**Motion and order for discharge from probation**

Approved, SCAO

Original - Court  
1st copy - Probation Department 2nd copy - defendant  
3rd copy - Prosecutor

CFJ-149

STATE OF MICHIGAN JUDICIAL CIRCUIT 17th Circuit Court - Kent County	<b>MOTION AND ORDER FOR DISCHARGE FROM PROBATION</b>	CASE NO. (1)1300380-FH
---	--	---------------------------

ORI MI-MI410025J	Court Address Courthouse, 180 Ottawa Avenue NW Suite 2400 Grand Rapids, Michigan 49503	Court Telephone No. (616) 632-5480
---------------------	--	---------------------------------------

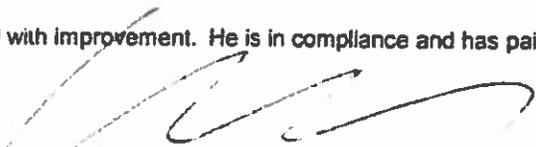
THE PEOPLE OF THE STATE OF MICHIGAN  Kent County	V	Defendant's name, address and telephone no. Alemu, Amdebirhan Abdere 1104 PACKARD ST APT 5 ANN ARBOR, Michigan 48104 (616) 690-9705		
		CTN 41-12015450-99	TCN	SID 3622198T
				DOB 11/29/1992

Date of Probation	Offense
5/23/2013	(1) 333.74032D - Controlled Substance-Possession Of Marijuana
Term of Probation 1 year	

I respectfully move this court to discharge the defendant from probation for the following reasons:

It is respectfully recommended that this probationer be discharged with improvement. He is in compliance and has paid the financial assessments in full.

2/13/14  
Date

  
Probation Officer CHERYL L BURDO

**ORDER OF PROBATION DISCHARGE**

1. THE COURT FINDS that all conditions of probation  were  were not successfully completed.
- a. The Defendant was ordered to drug treatment court and  did  did not successfully complete the program.

**IT IS ORDERED:**

2. The defendant is discharged from probation supervision. Any unfulfilled financial obligations or conditions of the sentence imposed by this court can be pursued according to law.

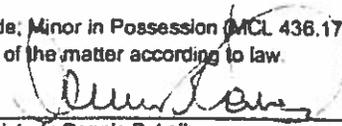
3. The plea or finding of guilt under the:
- |   |   |
|---|---|
| <input type="checkbox"/> Controlled Substance Act (MCL 333.74(1))                 | <input type="checkbox"/> Parental Kidnapping Act (MCL 750.350a) |
| <input type="checkbox"/> Drug Treatment Court (MCL 600.1076)                      | <input type="checkbox"/> Spouse Abuse Act (MCL 769.4a)          |
| <input type="checkbox"/> Penal Code; Practicing under the Influence (MCL 750.430) |   |

is set aside and the case is dismissed. The records of arrest and discharge or dismissal in this case shall be retained as a nonpublic record according to law.

4. The defendant is released from the status of Youthful Trainee under the Holmes Youthful Trainee Act (MCL 762.14) and the case is dismissed. The record of arrest and discharge or dismissal in this case shall be retained as a nonpublic record according to law
5. The plea or finding of guilt under the Michigan Liquor Control Code; Minor in Possession (MCL 436.1703) is set aside and the case is dismissed. The court shall maintain a nonpublic record of the matter according to law.

2-14-14  
Date

REC'D & FILED

  
Judge/Magistrate Dennis B. Leiber

P22889  
Bar No.

JUDGE LEIBER

If item 1a, 3, or 4 is checked, the clerk of the court shall advise the Michigan State Police Criminal Justice Information Center of the disposition as required under MCL 769.16a.

Alemu, Amdebirhan Abdere - 872626  
02/13/2014 13:51:24

MC 245 (5/07) MOTION AND ORDER FOR DISCHARGE FROM PROBATION  
MCL 769.1, MCL 769.1a, MCL 771.5, MCL 780.766(13), MCL 780.794(13), MCL 780.826(13), MCL 780.905, MCL 791.225A(6)

**Appendix F**

**Trial Court Order denying Motion to Correct Invalid Sentence**

STATE OF MICHIGAN  
IN THE KENT COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

Court of Appeals No.

Circuit Court No. 13-00380 FH

-vs-

Honorable Dennis B. Leiber

AMDEBIRHAN ABERE ALEMU

Defendant.

ORDER

At said session of said Court held in the County of Kent, City of Grand Rapids, State of Michigan, on this 20 day of February, 2014.

**THE HONORABLE DENNIS B. LEIBER**  
Kent County Circuit Court Judge

This matter having come for argument in open court on February 14, 2014, upon Defendant's Motion to Correct Invalid Sentence, and hearing having been had thereon, with argument of counsel, and the Court being otherwise fully advised in the premises;

**IT IS ORDERED** that said **MOTION TO CORRECT INVALID SENTENCE** (i.e., for resentencing) be and the same is hereby **DENIED**. **IT IS FURTHER ORDERED** that the request to amend the probationary order to grant 7411 status under MCL 333.7411 is hereby **DENIED**. **IT IS FURTHER ORDERED** that the presentence report shall be corrected to delete reference to "approximately a pound of" marijuana on page 2. A copy of the corrected presentence report shall be forwarded to appellate counsel, Anne Yantus.

**DENNIS B. LEIBER**  
\_\_\_\_\_  
HONORABLE DENNIS B. LEIBER

Prepared by:  
**STATE APPELLATE DEFENDER  
OFFICE**  
ANNE YANTUS (P 39445)  
Managing Attorney  
Special Unit, Pleas/Early Releases  
26783P-G

Approved by:  
**KENT COUNTY PROSECUTOR**  
*Tim McMorro - with permission*  
**TIMOTHY K. MCMORROW (P 25386)**  
Chief Appellate Prosecuting Attorney

**RECEIVED**

FEB 24 2014