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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	**FILED UNDER AO 2019-6**
Plaintiff-Appellee,	Supreme Court No. _____
vs.	
NICOLAS LYON,	Court of Appeals No. 360548
Defendant-Appellant.	7th Judicial Circuit No. 21-47378-FH

DEFENDANT-APPELLANT LYON'S BYPASS APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED AND RELIEF SOUGHT

Defendant-Appellant Nicolas Lyon, former director of the Michigan Department of Health & Human Services (MDHHS), seeks leave to appeal from the Genesee County Circuit Court's February 17, 2022, Order denying his motion to dismiss the "Grand Jury Felony Indictment." EXHIBIT A. The motion urged dismissal because (1) the so-called "one-person grand jury" proceeding which issued the indictment violated the Michigan Constitution by authorizing a single person to both investigate and charge an individual with a crime, and (2) the process used by the Attorney General and the judicial officer who conducted the proceeding violated both the judicial-inquiry statute and due process.

The circuit court register of actions is attached. EXHIBIT B.

The circuit court heard the parties on the motion on August 10, 2021, and a copy of the transcript of that hearing is attached. EXHIBIT C.

On March 8, 2022, Director Lyon filed an application for leave to appeal with the Michigan Court of Appeals, which is pending. *People v Nicolas Lyon*, No. 360548 (Mich Ct App).

Director Lyon respectfully requests that the Court grant this bypass application and order oral argument pursuant to MCR 7.305(H)(1), together with *People v Nancy Peeler*, No. 163667, which is scheduled for May 4, 2022, and reverse the circuit court's decision, dismissing the case.

STATEMENT OF APPELLATE JURISDICTION

The circuit court entered its written opinion and order on February 17, 2022. Director Lyon filed his application for leave to appeal with the Michigan Court of Appeals on March 8, 2022. The Court of Appeals has jurisdiction to consider the application pursuant to MCR 7.203(B)(1) and MCR 7.205(A)(1). This Court has jurisdiction pursuant to MCR 7.305(C)(1) to consider this Bypass Application.

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PENDING APPLICATIONS FOR LEAVE TO APPEAL IN RELATED AND OTHER CASES

At the same time the Attorney General filed charges against Director Lyon, she charged others whose cases were deemed related to Director Lyon's as arising out of circumstances involved with the 2014 switch in the municipal water supply in Flint (which took place before Director Lyon took his position). Some of those defendants filed motions in circuit court that are now the subject of applications for leave to appeal in this Court. In an order entered June 16, 2021, the trial court denied motions of related defendants to remand for a preliminary examination pursuant to the judicial-inquiry statute. On August 25, 2021, the Michigan Court of Appeals denied leave to appeal, and pending before this Court are the following applications:

People v Nancy Peeler
No. 163667 (Mich Sup Ct)
(oral argument scheduled pursuant to MCR 7.305(H)(1))

People v Gerald Ambrose
No. 163673 (Mich Sup Ct)
(stayed pending decision in *Peeler*)

People v Richard Louis Baird
No.163672 (Mich Sup Ct)
(stayed pending decision in *Peeler*)

People v Darnell Earley
No. 163665 (Mich Sup Ct)
(stayed pending decision in *Peeler*)

Issues related to the ones raised in this bypass application are also pending in recent applications to the Michigan Court of Appeals and this Court from two unrelated cases filed in the 7th Judicial Circuit, Genesee County. Those cases challenge the denial of motions filed in circuit court seeking a remand for a preliminary examination, similar to the challenges in the pending applications in *Peeler, Ambrose, Baird*, and *Earley*, referenced above. They are docketed as follows:

People v Kevin Lamont Tyler
No. 163979 (Mich Sup Ct)
(answer filed Feb 22, 2022)

People v Nickolas Patrick Hipps
No. 360053 (Mich Ct App)
(submitted on motion docket Mar 22, 2022)

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The Attorney General also has a pending application for leave to appeal with the Court of Appeals involving a different issue. In an order entered November 19, 2021, the trial court granted in part Director Lyon's motion for a protective order and directed that the Attorney General cease review and production of discovery materials and implement a taint team to review seized materials that included confidential and attorney-client information. The Attorney General moved for reconsideration, and on January 7, 2022, the circuit court denied that motion. On January 28, 2022, the Attorney General sought leave to appeal to the Court of Appeals, and the matter is docketed as follows:

People v Nicolas Lyon
No. 360124 (Mich Ct App)
(answer filed Feb 18, 2022)

In summary, similar issues involving the judicial-inquiry statute are before this Court in pending applications for leave to appeal in the following cases:

People v Nancy Peeler, No. 163667 (MOAA)
People v Gerald Ambrose, No. 163673 (stayed)
People v Richard Louis Baird, No.163672 (stayed)
People v Darnell Earley, No. 163665 (stayed)
People v Kevin Lamont Tyler, No. 163979

Issues *identical* to those presented by Director Lyon in this bypass application are before the Court of Appeals in applications pending in the following cases related to Director Lyon's:

People v Nancy Peeler, No. 360575
People v Richard Louis Baird, No. 360570

Similar issues involving the judicial-inquiry statute are before the Court of Appeals in an application in *People v Nickolas Patrick Hipps*, No. 360053 (Mich Ct App).

And Director Lyon's case is before the Court of Appeals in a pending application of the Attorney General: *People v Nicolas Lyon*, No. 360124 (Mich Ct App).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, of the Constitution of the State of Michigan of 1963, regarding general government provides:

> 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.

Article VI, Section 2, of the Constitution of the State of Michigan of 1963, regarding the judicial branch provides:

> Justices of the supreme court, judges of the court of appeals, circuit judges and other judges as provided by law shall be conservators of the peace within their respective jurisdictions.

MCL 767.3, entitled in part "proceedings before trial; inquiry, order, conducting," provides:

> Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry.

MCL 767.4, entitled in part "proceedings before trial; apprehension of suspect. . .period of inquiry," provides in pertinent part:

> If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed,

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the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. The judge conducting the inquiry under section 3 [MCL 767.3] shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 [MCL 767.5], except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. * * * Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before the judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting the inquiry, any prosecuting attorney and other persons who may at the discretion of the judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of the judge or after his services with the judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in the inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with the inquiry, who shall disclose or publish or cause to be published any of the proceedings of the inquiry otherwise than by issuing or executing processes prior to the indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related to the proceedings of the inquiry, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both fine and imprisonment in the discretion of the court. * * *

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the judicial-inquiry statute violates Michigan's constitutional requirement of separation of powers, MICH CONST 1963 art III, § 2, by authorizing a single member of the judiciary to simultaneously investigate and charge a citizen with a criminal offense.

Defendant-Appellant Answers: Yes
Prosecutor-Appellee Answers: No

2. Whether the judicial-inquiry statute confers charging authority on a member of the judiciary when the statute is silent as to such authority and specifically requires that the inquiry proceed "in like manner as upon formal complaint."

Defendant-Appellant Answers: No
Prosecutor-Appellee Answers: Yes

3. Whether the manner in which the Attorney General and the judicial officer conducted the judicial inquiry violated due process where the circuit court granted the application and assigned the judicial officer contrary to statute and the judicial officer administered the wrong oath to those participating in the inquiry, allowed extraneous participants, and did not observe other statutorily required procedures.

Defendant-Appellant Answers: Yes
Prosecutor-Appellee Answers: No

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INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

This interlocutory appeal involves what is popularly – and erroneously – called the "one-person grand jury" statute, a criminal investigative provision unique to Michigan. This application raises jurisprudentially significant, troublesome, and recurring questions regarding use of this statutorily prescribed process. Indeed, half a century ago, this Court warned that the "constitutionality of a system whereby a Judge accuses a person of a crime may not withstand our re-examination." *People v Bellanca*, 386 Mich 708, 715; 194 NW2d 863 (1972). Now is the time for that re-examination.

The statute's plain language does not authorize a judicial officer to do what was done here: file a criminal charge and simultaneously declare there to be probable cause sufficient to proceed to trial. If the statute were construed to provide such authority – as the circuit court held below – it would violate Michigan's constitutional requirement of separation of powers, because such a construction confers on the judiciary functions exclusively reserved for the executive, namely charging. The judicial officer's sole authority was to investigate, not charge. Moreover, any criminal charges must be the product of an investigation conducted according to statutory requirements. That did not happen here. The Solicitor General conducted an investigation of her choosing that had no statutory basis. For each of these independent reasons, the indictment must be dismissed.

This bypass application satisfies three grounds for appeal to this Court – the issues involve "a substantial question about the validity of a legislative act," have "significant public interest" where the case is "against an officer of the state," and involve "a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(1)-(3). Moreover, "delay in final adjudication is likely to cause substantial harm" in that the matter will proceed to trial – which will undoubtedly be costly and lengthy – premised on a constitutionally flawed investigative and charging process. MCR 7.305(B)(4). Moreover, the interpretation of the statute that is challenged here is subject to multiple pending applications under consideration by the Court, one of which is scheduled to be argued May 4, 2022, pursuant to MCR 7.305(H)(1). *People v Nancy Peeler*, No. 163667.

There are also multiple substantive reasons why this application warrants this Court's immediate review.

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It presents an issue of first impression. Neither the Michigan Court of Appeals nor this Court has addressed the constitutionality or authority of a judge to charge a criminal offense.

Here, the circuit court rewrote the terms of the judicial-inquiry statute to allow a judicial officer to play the roles of both investigator and prosecutor. That ruling involves a constitutional principle of major significance to the state's jurisprudence – separation of powers, which prohibits one person from assuming both judicial and executive roles. Moreover, the circuit court countenanced clear violations of the statutory requirements of the judicial inquiry process.

The significance of the validity of the judicial inquiry process is not limited to Director Lyon's case, or even all the other Flint water prosecutions. Having seen how the judicial inquiry process can be manipulated to skirt a proper charge followed by a preliminary examination, the Genesee County prosecutor has gone whole hog, invoking the process in *more than 60* recently-filed and unrelated criminal cases.

What's more, this Court's immediate resolution of the process's validity will result in a tremendous saving of judicial, government, and defendant resources. If dozens of cases are prosecuted until completion, and this Court then rules the judicial inquiry process unconstitutional, every one of those cases will need to be started from scratch and litigated a second time, with thorny limitations-period questions to boot.

The circuit court ruling was also clearly erroneous and will cause material injustice to Director Lyon. He was entitled to a process that does not blur executive and judicial roles and provides for a preliminary examination. As the first prosecution showed, Director Lyon can punch irreparable legal holes in the prosecution's theories when given a chance. The prosecution should not be allowed to use unconstitutional gamesmanship – including an *ex parte* investigatory and charging process where the prosecutor presents no exculpatory evidence to a purportedly impartial judicial officer – to charge on such weak evidence and even weaker legal theories.

Finally, Director Lyon respectfully requests that the Court order oral argument pursuant to MCR 7.305(H)(1), together with *People v Nancy Peeler*, No. 163667, for critical – and practical – reasons. The issues are intertwined. While in *Peeler* the Court will consider the availability of a preliminary examination following a charge stemming

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from a judicial inquiry, the issues in this application are more fundamental. Construction of the statute regarding the extent of the judicial officer's authority necessarily requires construing the statute's provisions regarding the availability of a preliminary examination. Director Lyon's appeal also raises the question whether a judicial officer even has authority to charge a criminal offense and it challenges – on constitutional and statutory grounds – the propriety of the judicial inquiry that was conducted here, which included Ms. Peeler.

For these reasons, Director Lyon respectfully submits that the Court should immediately grant this Bypass Application and order that oral argument be held on the Application on May 4, 2002, concurrently with *Peeler*.

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STATEMENT OF PROCEEDINGS

On December 27, 2019, the Solicitor General applied to the 7th Judicial Circuit, Genesee County, requesting that it convene a "one-person grand jury" to investigate "crimes relating to the 'Flint Water Crisis.'" EXHIBIT D (App at 1). The court granted the application, and it ordered proceedings to commence retroactively – to January 1, 2020. EXHIBIT E (Order ¶ 2 at 2). The order expressly provided, as required by statute, that proceedings "shall continue no longer than six (6) months, unless extended by the specific order of this Court or this Court's successor for an additional period not to exceed six (6) months." Exhibit E (Order ¶ 7, at 3).

In an order entered June 4, 2020, the judicial officer purported to extend the inquiry under the statute to January 9, 2021, which was longer than allowed by statute. EXHIBIT F. Moreover, not until January 13, 2021 – again outside the statutory time limits – were charges filed against Director Lyon in a document entitled, "Grand Jury Felony Indictment," ostensibly executed on January 8, 2021, alleging nine counts of manslaughter, MCL 750.321, and a single misdemeanor count of misconduct in office, MCL 750.478. EXHIBIT G.

On July 2, 2021, Director Lyon filed a motion to dismiss on the basis that use of the judicial inquiry process here violated Michigan's constitutional requirement of separation of powers and that the process used by the Attorney General and the judicial officer violated the judicial-inquiry statute and due process. After supplemental briefing and oral argument, on February 17, 2022, the trial court denied the motion in a written opinion and order. EXHIBIT A.

From this order Director Lyon seeks bypass leave to appeal.

The trial court held that MCL 767.3 and 767.4 give the judicial officer authority to issue an indictment. It concluded that indictments issued following a judicial inquiry are the same as indictments returned by citizens grand juries and should be treated the same. It further reasoned that further citizen grand juries are specifically authorized by statute in MCL 767.23, 767.23a to issue indictments and therefore, MCL 767.4, which mentions the word "indictment" twice, likewise provides authority to the judicial officer to issue indictments on a finding of probable cause. EXHIBIT A (Order at 3).

In ruling, the circuit court also relied on the Court of Appeals decision in *People v Green*, 322 Mich App 676, 685; 913 NW2d 385

(2018), which addressed whether the right to counsel attaches at a judicial inquiry proceeding. There, the court parenthetically noted that under MCL 767.4 "the trial court 'shall proceed with the case' after the one-person grand jury returns an indictment." In the circuit court's estimation, that parenthetical *dicta* from *Green* means that MCL 767.4 authorizes the judicial officer conducting an inquiry to issue a criminal charge in the form of an indictment.

The circuit court further held that it does not violate separation of powers for a judicial officer to issue criminal charges, a role typically reserved for the executive branch. It said that judicial officers are not performing an executive function by issuing indictments because the legislature authorized the judicial officer to do so in MCL 767.3 and 767.4. And it reasoned that even if the judicial officer were performing an executive function by charging, it would not violate separation of powers because the judicial-inquiry statutes do not allocate the "whole power" of charging to the judiciary.

Finally, the court below held that none of the many irregularities in how the judicial inquiry was used in this case – or all of them taken together – amounts to a due process violation. EXHIBIT A (Order at 10-11).

As part of the litigation in the trial court, Director Lyon moved for a protective order for reasons more fully described below. In an order entered November 19, 2021, the trial court granted that motion in part. It directed that the Attorney General cease review and production of discovery materials and implement a taint team to review seized materials that include confidential and attorney-client information. The Attorney General has sought leave to appeal to the Court of Appeals alleging error, which application is pending in that matter. *People v Nicolas Lyon*, No. 360124 (Mich Ct App).

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STATEMENT OF FACTS

This case is the second prosecution of Director Lyon and is the product of three separate investigations into Flint's switch in its municipal water supply in 2014. The investigations all concerned whether Director Lyon committed crimes in connection with MDHHS' public health investigation of an outbreak of Legionnaires' Disease in Genesee County during 2014 and 2015.

The first investigation began in 2016, took a year-and-a-half and resulted in charges being voluntarily dismissed in 2019 after a year-long preliminary examination. The second was initiated by the newly elected Attorney General and took another year without charges being filed. The third was a judicial inquiry, initiated at the request of the Solicitor General in 2020, which took yet another year, and produced the nine-count indictment which is the subject of this appeal.

The issues presented in this appeal require an understanding of the history of these investigations, which is detailed below. Above all, though, they require an understanding of Director Lyon's role as the head of a 14,000-person agency with a $25 billion budget. He is not a physician or an epidemiologist. He necessarily relied on the expertise of a large professional staff who were tasked with working with the local health department and others to analyze data from the outbreak. Moreover, these were critical times for MDHHS. On September 29, 2014, Nick Lyon became director of the Michigan Department of Community Health (MDCH). Less than six months later – and just weeks after he was notified about a Legionnaires uptick in Genesee County – the Governor's office announced the merged or MDCH with the Department of Human Services to become MDHHS. Director Lyon was the new agency's first director, and his initial responsibilities during 2015 consisted of merging Michigan's two largest agencies while supervising many matters that were critical to Michigan's public health and social services safety net.

I. *People v Nicolas Leonard Lyon*, No. 18-43638-FH

A. The first investigation

More than six years ago, on January 15, 2016, the Attorney General appointed a Special Assistant Attorney General, Todd F. Flood, to investigate the 2014 switch in the municipal water supply in Flint. Mr. Flood established the Office of Special Counsel (OSC), hiring a legal and investigative staff to perform prosecutorial functions. Special

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Counsel was needed because the Attorney General was representing many state officials, including Director Lyon, in various lawsuits that involved the switch in Flint's municipal water supply.

For a year-and-a-half, the OSC conducted its investigation. It interviewed witnesses, sometimes using investigative subpoenas under MCL 767A.1, *et seq*., executed search warrants, subpoenaed documents, and collaborated with other law enforcements agencies, including the Genesee County Prosecuting Attorney.

A critical part to its investigation was obtaining voluminous records from various state agencies, including MDHHS, the Office of the Governor, the Michigan Department of Environmental Quality (MDEQ), and the Department of Treasury. (This effort would be greatly impacted years later by the current prosecution team, which is now the subject of the Attorney General's pending leave application.) To comply with these demands, state agencies hired outside counsel. Assistant Attorneys General (AAGs) from the Civil Division who also represented the various agencies coordinated the response to the subpoenas and discovery demands. They, in turn, hired an eDiscovery vendor to assist with the document collection, review, and production. The parties worked cooperatively and agreed on search terms and a production schedule.

A significant challenge was protecting from disclosure attorney-client communications and attorney work product, especially since several government employees were targets of the OSC investigation and defendants in pending civil actions represented by the AAGs. Accordingly, a privilege review process was established so that the agencies had the opportunity to review potentially privileged material prior to production. The agencies provided extensive privilege logs. This ensured that the OSC investigative processes would not be tainted by the receipt and use of privileged information.

MDHHS was represented by its in-house counsel and the civil AAGs, and it retained outside counsel to handle matters related to the OSC criminal investigation. Director Lyon was represented by the AAGs in civil litigation, and he had separate counsel for the criminal investigation. Because there was significant overlap in issues, the Department of Attorney General on behalf of Director Lyon and MDHHS entered into a common-interest agreement so they could freely pursue their common interests and protect the privilege, work product, and confidentiality attached to shared communications and documents.

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Director Lyon naturally relied on the common-interest agreement to protect information shared with parties to the agreement and their counsel.

The OSC was aggressive in its efforts to obtain records, and it was not without criticism. In fact, the OSC prevailed on the circuit court to enter *ex parte* protective orders – in collaboration with McLaren Hospital and the Genesee County Prosecuting Attorney – to conceal vital information from MDHHS inhibiting its public health investigation. MDHSS learned of the orders and sought a writ of superintending control, and the Court of Appeals summarily vacated the protective orders in 2016 in a scathing opinion condemning what had occurred. *See Dep't of Health & Human Services v Genesee Circuit Judge*, 318 Mich App 395; 899 NW2d 57 (2016).

B. The original charges

Beginning in 2016, the OSC charged 15 people with various offenses, including employees of MDHHS, MDEQ, and the City of Flint, together with two emergency city managers. On June 14, 2017, Director Lyon was charged in the 67th District Court, Genesee County, in a complaint alleging manslaughter, MCL 750.321, and misconduct in office, MCL 750.505. Following a preliminary examination that took 26 days spanning 11 months, Director Lyon was bound over to circuit court on August 20, 2018.[1]

On bindover, the case was assigned to Hon. Joseph J. Farah. Within three weeks, on September 10, 2018, Director Lyon filed a motion to quash the felony charges and a motion to dismiss a misdemeanor count of willful neglect of duty, MCL 750.478, that had been added.[2] The matter was fully briefed by the parties and set for oral argument in early February 2019.[3]

While handling the dispositive motions, Judge Farah became deeply knowledgeable about the underlying facts and the prosecution's novel legal theories. He read nearly 3,000 pages of preliminary

[1]Eden V. Wells, M.D., the state's chief medical executive assigned to MDHHS, was also bound over to circuit court, and she had a pending motion to dismiss before Judge Farah as well. The other Flint water prosecutions were at varying stages at the time.

[2]The OSC filed its Felony Information on September 26, 2018. EXHIBIT H.

[3]Dr. Wells also filed a motion to quash on February 25, 2019, which was fully briefed by the parties and awaiting a date for oral argument at the time of dismissal.

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examination transcript, reviewed over 200 exhibits, and studied hundreds of pages of briefing by the parties and amici. Over two full days of oral argument, he posed tough questions that the prosecution was unable to answer about the viability of its legal theories, especially as to the most serious charges of manslaughter.[4] At the conclusion of the second day of argument on February 6, 2019, Judge Farah announced that he planned to have a decision within 90 days. It's fair to say that, based on his comments, Judge Farah was prepared to issue a decision that severely undercut the prosecution's core theories.

C. The prosecution stalls to delay a ruling

A new Attorney General was sworn in on January 1, 2019. Within days, she appointed the Solicitor General to handle and supervise the pending prosecutions initiated by the OSC. "New Solicitor General Hammoud to Lead Flint Criminal Cases," ATTORNEY GENERAL PRESS RELEASE (Jan 15, 2019). After the Solicitor General observed the prosecution's disastrous showing at the first oral argument, she sought a six-month stay claiming she just "learned of the existence of millions of pages of documents, as well as phone extractions and other materials stored on hard drives recovered in a State-owned facility's basement" that it said had not been previously turned over by various state departments. EXHIBIT I (Plaintiff's Request for Stay at 2-3).

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[4]Among the many questions the trial court posed to the prosecution were the following:

> Because Corinne Miller by her testimony. . .quotes the director as saying he wanted to be kept informed, but she doesn't remember expressing any concern or facial expressions. . .. Anywhere in there does she say anything about, you know, I'm just going to use it in common parlance – Nick, get on this, put out a public notice, this is serious? (pp 12-13)
>
> What should the notice have said that would have gone out in January of '15? . .. Be on the lookout for what? Guard against what? Stay away from what? Don't drink Flint water? Don't shower with Flint water? What should it have said? This isn't a drinking illness. (p 19)
>
> Is there any authority that you have found where [MCL] 333.2221 has been the authority for charging somebody with manslaughter? (p 22)
>
> He did say in the January 28th meeting as reported keep me posted on this and try to get other records from McLaren. Isn't that enough? (p 58)
>
> We've established what their jobs are. We've established their hierarchy or roles. We've established that they were involved in the conversation. Now, let's get to this question. What did they say? What did they provide, emails, text messages, whatever the case may be? Other than the epi curve, what did they impart. . .to Director Lyon? (pp 62-63).

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But in an extraordinary turn of events, the Attorney General's office, through another arm of the office, intervened to advise the circuit court that the Solicitor General's claims were untrue.[5] EXHIBIT J (Department of Attorney General's Brief Explaining Its Intervention in this Case at 1).

At a hearing on May 3, 2019, the circuit court denied the Solicitor General's stay request and advised the parties that it would rule on the pending motion to quash on June 14, 2019. It noted that the Solicitor General would effectively have another six weeks to review the so-called previously undisclosed materials and that it should roll up its sleeves, look through the material and advise the court if it found something concrete related to the case.[6]

D. The prosecution dismisses to avoid a bad ruling

The Solicitor General brought nothing additional to the circuit court's attention during that six-week accommodation. Instead, the day before the court was scheduled to rule on the motion to quash, the Solicitor General filed a motion for *nolle prosequi* terminating the prosecution against Director Lyon and others. By voluntarily

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[5]The challenge to the Solicitor General's specious allegations was dramatic and emphatic:

> The People alleged that the Department [Attorney General's office] took direction from Director Lyon's defense attorney on what documents the Department's clients should produce in response to the Office of Special Counsel's (OSC) investigative subpoenas. *That is not true.*
>
> The People allege that the Department concealed millions of responsive documents from them in a basement. *That is not true.*
>
> The People allege that the Department failed to respond to the investigative subpoenas issued by the OSC. *That is not true.*
>
> The People allege that the Department represented that phone data did not exist when it did exist. *That is not true.*
>
> The People allege that the Department was complicit in an alleged destruction of evidence. *That is not true.*
>
> The People allege that the Department produced millions of pages of documents in a non-searchable format. *That is not true.*

[6]In the meantime, on May 8, 2019, the court denied the defendant's motion to dismiss the misdemeanor count, and the defendant filed an application for leave to appeal with the Court of Appeals. The application was then voluntarily dismissed following entry of the motion for *nolle prosequi.*

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dismissing on June 13, 2019, the prosecution ducked a potentially disastrous outcome on the felony charges.

II. *People v Nicolas Lyon*, No. 20-47378-FH

A. The second investigation

Having essentially lost on the evidence and the law in the first round of charges, the Solicitor General took a new tack designed to circumvent a preliminary examination. For almost a year, the prosecution reviewed the results of the OSC investigation, issued another round of subpoenas, interviewed witnesses – most who had already testified or been interviewed – and executed search warrants.

Central to this second investigation – and the source of continuing controversy – were search warrants that were executed on the Michigan Department of Attorney General, its eDiscovery vendor, and the Department of Technology, Management & Budget (DTMB). The breadth of these warrants issue in May 2019 resulted in the Solicitor General seizing all kinds of attorney-client communications and attorney work product. Among the material it seized was the very material that counsel for the parties had diligently sought to segregate years earlier due to privilege and confidentiality, creating privilege logs.

When counsel for Director Lyon learned of the warrants' execution, he demanded to know what protections were in place to safeguard confidential information. The Solicitor General ignored him and did nothing.[7]

B. The third investigation

After spending nearly another year investigating, on December 27, 2019, the Solicitor General petitioned the 7th Judicial Circuit, Genesee County, to conduct a "one-person grand jury" investigation. The Solicitor General did so with the apparent intent to deprive the defendants of a preliminary examination and avoid any judicial review prior to trial in the form of a motion to quash.[8] There really was no need

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[7]This transgression led the circuit court to grant Director Lyon's motion for a protective order barring review and dissemination of any further discovery until the Solicitor General establishes a taint team, which ruling the Solicitor General has appealed.

[8]EXHIBIT K ("New Flint water criminal cases will move faster than former court proceedings: All nine defendants will go straight to trial under grand jury process," ABC 12 NEWS).

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for another investigation, much less a secret one. Most of the witnesses who testified during the judicial inquiry had testified previously in the *several* preliminary examinations that were held in 2017 and 2018, had provided testimony pursuant to investigative subpoena, or had voluntarily been interviewed, sometimes on multiple occasions. In fact, many who appeared in the judicial inquiry were public figures whose information was well known and well publicized, and some were academics who had published on the pertinent subjects. The same was true for the exhibits that were submitted during the year-long judicial inquiry – they were the same documents and evidence used in the preliminary examinations and produced in discovery. There was, of course, no cross examination.

1. The appointment of the judicial officer

The Solicitor General's December 27, 2019, application requested that the circuit court "convene a one-person grand jury pursuant to MCL 767.3 for the purposes of investigating crimes relating to the 'Flint Water Crisis,' including conduct before, during, and after the city of Flint's ('City') April 2014 switch of its water source from the Detroit Water and Sewerage Department ('DWSD')." EXHIBIT D (App at 1).

On January 9, 2020, the chief judge, Hon. Duncan M. Beagle, granted the application and issued an order that Hon. David J. Newblatt "sit as a one-person grand jury in the above captioned matter." EXHIBIT E (Order ¶ 1 at 1). Importantly, the order directed the proceedings commence retroactively beginning January 1, 2020, instructing that the "appointed judge shall convene one-person grand jury proceedings on January 1, 2020, in Genesee County and continue in session from time to time as directed by the Court. . .." *Id* (Order ¶ 2 at 2).

The order expressly provided that proceedings "shall continue no longer than six (6) months, unless extended by the specific order of this Court or this Court's successor for an additional period not to exceed six (6) months." Exhibit E (Order ¶ 7, at 3). This provision was consistent with express statutory requirement that: "[n]o inquiry or proceeding under this chapter shall continue longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months." MCL 767.4. In other words, the order provided that absent an extension being granted by Judge Beagle (or his successor), the proceeding would conclude June 30, 2020, but Judge Beagle (or his successor) could extend the judicial inquiry by six-months, to December 31, 2020.

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The order also authorized the judicial officer to compel persons to appear and answer questions pursuant to summons or subpoena, MCL 767.3, and comply with secrecy and administrative provisions applicable to judicial inquiries. Curiously, the order also conferred on the judicial officer statutory authority applicable only to *citizens* grand juries. For example, citing MCL 767.20, it authorized the judicial officer to "request the Solicitor General of the State of Michigan, or her designees, to examine witnesses in the presence of the grand jury, and advise the grand jury on legal matters," or, citing MCL 767.22, "alternatively, entertain a request from the Solicitor General of the State of Michigan for her, or her designees, to appear before the grand jury to offer information regarding any matter cognizable by the grand jury." EXHIBIT E (Order ¶ 4(b) at 3).

The process utilized to convene the judicial inquiry deviated substantially from the statutory requirements. The defense continues to litigate requests for production of information about the judicial inquiry, so there is much yet to learn. Given the information provided to date, however, it is evident that the process used to investigate and charge Director Lyon was rife with irregularities that did not conform to the requirements of the statute. In fact, it appears that the Solicitor General made up her own investigative method, which has no statutory authority.

As more fully explained in the Argument below, MCL 767.3 has specific requirements for establishing a judicial inquiry. It expressly requires that orders regarding applications and appointments of judicial officers "shall be made in accordance with the rules of such court," yet the 7th Judicial Circuit has no rules on the subject. Once the inquiry was convened, the judicial officer administered an oath to over 40 people – AAGs, other judges, court staff, and the sheriff. In particular, they were all administered an oath

> to *diligently inquire* into and make true presentment in *seeking indictment* of all such matters and things as shall be given you in charge or otherwise come to your knowledge, *touching your grand jury service*.

TRANSCRIPT at 6-11 (Jan 23, 2020) (emphasis supplied).[9] That oath – which is actually the citizens grand jury oath – required those who took

[9]Attached as a collective exhibit are excerpts from the proceedings of the judicial inquiry. EXHIBIT L.

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it to investigate and *charge* people with crimes, which was not their responsibility. *See* MCL 767.9.

The judicial-inquiry statute makes no provision for advocates, yet that is exactly the role that the Solicitor General and the AAGs played. The judicial officer is to be the investigator who may have assistants, but he is not the charging official required to take an oath to indict. Nor are those who assist.

2. The judicial inquiry proceedings

The investigation continued for several months and was extended. In a June 4, 2020, order, the judicial officer – not the chief judge – purportedly modified the chief judge's order, stating that "the One-Person Grand Jury appointed by and through this court in an Order dated January 9, 2020, due to expire on July 9, 2020, is hereby extended for six (6) months to January 9, 2021. All other orders in the Order dated January 9, 2020, remain in effect." EXHIBIT F. That order was invalid twice over. First, it was signed by an individual who lacked authority to extend his own authority. Second, it extended the proceeding well after the one-year period that the governing statute allowed (January 1, 2021).

The judicial inquiry took more than a year to complete. Judge Newblatt signed a "Grand Jury Felony Indictment" dated January 8, 2021, charging Defendant-Appellant Lyon with nine counts of involuntary manslaughter, MCL 750.321, and one count of willful neglect of duty in violation of MCL 750.478. EXHIBIT G. There were no proceedings on that date, and there is no record of what transpired. The register of actions does not reflect that there was any business that day, nor does it reflect the signing or filing of the indictment.

The Attorney General retained the indictment and filed it on January 13, 2021. Filed on the same day were "Grand Jury Felony Indictments" against six other defendants and misdemeanor "Grand Jury Indictments" against two others.[10] Those charged with felonies were arraigned before Hon. Elizabeth A. Kelly, circuit judge, and those

[10]The felony cases are *People v Jarrod Peter Agen,* No. 21-047372-FH, *People v Gerald Ambrose*, Nos. 21-047373-FH, 21-047374-FH, *People v Richard Baird*, No. 21-047375-FH, *People v Darnell Earley*, Nos. 21-047376-FH, 21-047377-FH, *People v Nancy Peeler*, No. 21-047379-FH, and *People v Eden Wells,* No. 21-047380-FH. The misdemeanor cases are *People v Richard Snyder*, No. 21G-0046-SM and *People v Howard Croft,* No. 21G-0047-SM.

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charged with misdemeanors were arraigned before different district judges to whom their cases had been assigned.

The judicial-inquiry statute requires that the judicial officer account for the expenses incurred in the investigation within 90 days in a public filing. MCL 767.6b. Only after inquiry by counsel, the judicial officer filed his accounting which reflects that the court somehow spent *no money* on the investigation. EXHIBIT M. Obviously, the Attorney General did.

The record also reflects instances in which the AAG's communicated with the judicial officer "off the record." As discussed more fully below in the Argument, there were additional irregularities where the inquiry simply did not conform to the statutory requirements. Instead, the judicial inquiry took on a hybrid form – the Solicitor General blended the statutes relating to the judicial inquiry with statutes relating to the citizens grand juries to come up with something entirely new.

C. The new and current charges

The "Grand Jury Felony Indictment" alleges nine counts of manslaughter charging that Director Lyon caused the deaths "by the grossly negligent failure" to "protect the health of the citizens of Michigan and/or by the grossly negligent performance of that duty in accordance with the public health case." EXHIBIT G. The remaining count, a misdemeanor, alleges that Director Lyon "did willfully neglect his mandatory legal duty to protect the health of the citizens of Michigan under the Michigan Public Health Code." These charges are indistinguishable from those the prosecution filed under the OSC.

Although seven of the nine defendants had been previously charged with similar offenses in cases that the Attorney General voluntarily dismissed in 2019 (to avoid an unfavorable ruling), all current cases involve charges that are the product of the "one-person grand jury" investigation. As stated above, the Attorney General has openly acknowledged that they chose this seldom-used investigative process to avoid a preliminary examination and presumably skirt any judicial review of the allegations prior to trial. EXHIBIT K.

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III. Discovery Regarding the Judicial Inquiry

Discovery issues have been addressed in two forums – before Chief Judge Beagle regarding the record of the judicial inquiry and before Judge Kelly regarding the criminal case.

For more than a year, the parties have litigated issues involving production of the record of the judicial inquiry, and it is still ongoing. In January 2020, pursuant to MCR 6.107, Director Lyon filed a motion before the chief judge requesting transcripts of proceedings and exhibits, together with all applications and orders. Transcripts for 31 days of proceedings involving 48 witnesses were produced, together with the application and orders. Director Lyon has supplemented his requests by seeking additional materials that should comprise the record of the inquiry, but these have yet to be released to him.

Among the additional items that have been produced are legal memoranda the Solicitor General provided the judicial officer, subpoenas issued by the Solicitor General and the judicial officers, and background memoranda. Also ordered produced were opinions of the judicial officer that were never made part of the record. They were not filed with the clerk, they do not appear on the register of actions, and they were not transmitted to this Court with the record as required by statute. For some unexplained reason, they were retained by the Attorney General, not the court.

Discovery in the trial court has come to a halt. Due to the Attorney General's failure to safeguard confidential material it seized in 2019, the trial court granted Director Lyon's motion for a protective order barring the review and dissemination of any further discovery until the Attorney General implements a taint team, a ruling that the Attorney General has appealed. After more than a year, the Attorney General estimates that they have produced about a quarter of the material that has yet to be produced.

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ARGUMENT

I. Interpreting the judicial-inquiry statute to confer charging authority on a judicial officer violates Michigan's constitutional requirement of separation of powers, MICH CONST 1963 art III, § 2

Standard of Review. Constitutional issues and questions of statutory interpretation are reviewed *de novo*. *People v Wiley*, 324 Mich App 130; 919 NW2d 802 (2018); *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008).

A. Introduction

In a 1972 case involving the judicial-inquiry statute, this Court warned that "[t]he constitutionality of a system whereby a Judge accuses a person of crime may not withstand our re-examination." *People v Bellanca*, 386 Mich 708, 715; 194 NW2d 863 (1972). In *Bellanca* the court ruled that the confrontation clause of the state constitution required production of transcripts of testimony taken by a one-person judicial inquiry.[11] Not briefed by the parties in *Bellanca* was the broader question of whether vesting a member of the judiciary with the power to indict – assuming the statute actually authorized it – violated separation of powers. The court left that question for another day. That day is today, and the statute cannot "withstand [this Court's] reexamination."

This constitutional violation only arises if the statute is interpreted as vesting the investigating judge with charging power, as the circuit court held. Fortunately, the statute can be logically interpreted as not conferring this executive function onto the judiciary thereby avoiding the constitutional problem, as discussed below in Argument II, *infra*.

B. Perspective: History of the Judicial-Inquiry Statute

Michigan's oft-criticized judicial-inquiry statute has a long and tumultuous history. First enacted in 1917 and entitled An Act to

[11]Interestingly, the production was in contemplation of a preliminary examination being held. 386 Mich at 712 ("the preliminary hearing is a judicial proceeding designed to establish probable cause that a crime has been committed and probable cause to believe the accused committed it. It is a critical stage of our criminal process.").

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Authorize Proceedings for the Discovery of Crime, and to Provide Penalties for a Violation of Such Procedure, it grew out of a recommendation of the Committee on Law Reform of the Michigan State Bar Association in 1915. In fact, its origins can be traced back to when Detroit police courts were established and given inquisitorial powers. Joannes Buiteweg, *History of Michigan's One-Man Grand Jury*, 33 U DET LJ 399-400 (1956) (citing 1885 PA 161, § 20); Robert G. Scigliano, *The Michigan One-Man Grand Jury and the Courts: An Appraisal*, 37 U DET LJ 432 (1960).

The statute was designed to strike a balance between the "unwieldy and ineffective" citizen's grand jury and the limited powers regular law enforcement had at the time to conduct public corruption and organized crime investigations. *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). Its primary purpose was to facilitate the investigation of crimes by using the traditional powers of the judiciary to compel the attendance of witnesses and grant immunity. *Id.* But, because the original enactment referenced the secrecy and immunity provisions of the citizen's grand jury statute, the judicial inquiry proceedings began to be equated with grand jury proceedings and the media began using the term "one-man grand jury" to describe the statute. *Oakman v Recorder of City of Detroit*, 207 Mich 15; 173 NW 346 (1919).

Over 75 years ago this Court said that the term "one-man grand jury" is a "misnomer," but the term nevertheless took hold to describe judicial inquiry proceedings. *In re Slattery*, 310 Mich 458; 17 NW2d 251 (1945); Glenn R. Winters, *The Michigan One-Man Grand Jury*, 28 J AM JUD SOC 137, 138 (1945).[12] More properly stated, the statute allows for a "one-person judicial inquiry" and not a "grand jury."

Throughout its long history, the statute has been the subject of criticism and debate, including repeal in 1949 and a challenge at the constitutional convention in 1963, only to survive in its current form. Twice the United States Supreme Court has considered and restricted the statute's contempt provisions, *In Re Oliver*, 333 US 257 (1949), *In Re Murchison*, 349 US 133 (1955), but it has never considered a direct challenge to the statute's structure, despite at least one justice's concern over its constitutionality. *In re Oliver*, 333 US 257, 279 (1948) (Rutledge, J) ("aggregation of powers and inherently concomitant denial of historic

[12]The phrase first appears in caselaw in 1924 in *People v Doe*, 226 Mich 5; 196 NW 757 (1924). Given that this Court regards the term to be a misnomer, this brief refers to the statute as the "one-person judicial-inquiry statute."

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freedoms were unknown to the common law" and "cannot stand the test of constitutionality"). To this day, popular criticism and debate persist among scholars and legislators alike. EXHIBIT N (Cohn, Hon. Avern, "Why the One-Man Grand Jury in Flint Case is Unfair," *Detroit News* (Mar 10, 2021); Editorial Board, "Michigan Should Scrap One-Man Grand Juries," *Detroit News* (Mar 5, 2021)). In fact, legislation has been introduced to abolish the practice entirely. 2021 SB 159.[13]

As a practical matter, the need for the one-person judicial inquiry disappeared a quarter of a century ago when the Legislature enacted the investigative subpoena act. MCL 767A.1, *et seq*; 1995 PA 148. That act gives prosecutors the tools they need to investigate crimes with judicial enforcement of process and orders of immunity for testimony. Prosecutors can issue subpoenas for testimony and documents, and the judiciary is empowered to enforce the subpoenas. Moreover, secrecy provisions apply. The act was a major expansion of prosecutorial powers, designed to enhance investigations while avoiding the more complicated process of a citizen's grand jury.

Investigative subpoenas were used liberally in round one of the so-called Flint water cases. But investigatory subpoenas are simply an investigative tool – not a charging mechanism – so the prosecutor is left to charge by complaint and warrant followed by a preliminary examination provided for by statute.

C. The structure of the one-person judicial-inquiry statute

MCL 767.3 confers on a judicial officer the power to perform an inquiry into whether crimes have been committed within the jurisdiction. Specific prerequisites apply. An investigation may be initiated only upon "the filing of [a] complaint." MCL 767.3. Then, only if the complaint demonstrates "probable cause to suspect [a] crime. . .has been committed within [the] jurisdiction" is a judge authorized to order "that an inquiry be made into the matter relating to such complaint." *Id*. Any order calling for an inquiry "shall be specific to common intent and scope of the inquiry." *Id*. In counties such as Genesee "the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court." *Id*. If those requirements are met, the judicial officer may compel witnesses to appear and answer

[13]For an excellent review and analysis of the statute's early history, see Robert G. Scigliano, THE MICHIGAN ONE-MAN GRAND JURY (Michigan State Board of Agriculture 1957).

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questions about alleged violation of law which is the subject of the inquiry. MCL 767.3.

If the inquiry satisfies the judicial officer "that there is probable cause to suspect any person to be guilty thereof, [the judicial officer] may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint." MCL 767.4. If the judicial officer does not make a presentment, with the person's consent the judicial officer may file a "report of no finding of criminal guilt." *Id.* A "presentment" is not a formal charge; it is a statement of what wrongdoing has been found and generally forms the basis for a formal charge. *Bennett v Kalamazoo Circuit Judge*, 183 Mich 200; 150 NW 141 (1914).

Under this scheme, the judge acts solely as an investigator. The investigation is "under the control of the judge and *not* under the control of either the prosecuting attorney or the Attorney General, one in which the public is interested, and which is entrusted by the statute to the judge." *In re Petition for Investigation*, 270 Mich 328; 258 NW 776 (1935) (per curiam) (emphasis added). The statutes simply do not provide authority for the judicial officer to issue a formal charge, either by complaint or indictment. Charging comes after apprehension by process. The judge has the authority to request members of the bar to assist in the investigation, but proceedings are supposed to be under the control of the judge – not the Attorney General or prosecuting attorney. *Petition of Hickerson*, 301 Mich 278; 3 NW2d 274 (1942).

Because of the power vested in a single judicial officer, there are many limitations on such investigations. For example, witnesses may not be compensated apart from ordinary fees, and they may not be "employed in any capacity by the judge or by any person connected" with the investigation. MCL 767.3. All testimony must be taken before the investigating judge. *Id*. Moreover, an investigation "shall continue no longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months," *i.e.*, 12 months total. MCL 767.4.

One of the challenges here is that both the prosecution and the court below have conflated the one-person judicial inquiry with the citizens' grand jury statute, which is markedly different. MCL 767.7a, *et seq*. The citizen grand jury statute specifically provides for indictment by the grand jury's issuance of a true bill. MCL 767.23. The judicial-

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inquiry statute does not. It has always provided for the case to proceed "as upon formal complaint."

Unlike judicial inquiry proceedings, citizen grand juries are also not limited in scope. Citizen grand juries are given wide latitude to inquire into violations of criminal law and once convened, have broad authority to investigate potential offenses without limitation. *People v Morris*, 228 Mich App 380, 384; 579 NW2d 109 (1998). Some have gone so far as to say citizens' grand juries can perform "fishing expeditions." *Id* at 384 n3. Conversely, judicial inquiries are specifically limited in scope per statute. Judicial inquiries must confine an investigation and "shall be specific to common intent of the scope of the inquiry to be conducted." MCL 767.3.

These critical differences are consistent with the reality that the two proceedings serve different purposes. Citizens' grand juries were created to protect people from government overreach and ensure fair and effective law enforcement. *Morris*, 228 Mich App at 385 (citing *United States v Calandra*, 414 US 338, 343-44 (1974). Conversely, as detailed below, judicial inquiry proceedings were created to help with investigations involving recalcitrant witnesses. *Colacasides*, 379 Mich at 90-91.

D. Separation of powers limits the judicial officer's authority to investigating and does not authorize charging

The separation of powers between the executive, legislative and judicial branches of government is deeply embedded in the United States and Michigan Constitutions:

> 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.

MICH CONST 1963 art III, § 2.

Separation of powers is a "bulwark against tyranny" designed, among other things, to ensure that the executive and judicial power does not end up in the same hands. *United States v Brown*, 381 US 437, 443 (1965). And "although the Legislature has the power to create causes of actions, it has no power to expand the judicial authority granted to the courts by the Michigan Constitution." *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 361; 792 NW2d 686 (2010). For that

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reason, "an indispensable ingredient of the concept of coequal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'" *Judicial Att'ys Ass'n v State*, 459 Mich 291, 305; 586 NW2d 894 (1998) (quoting *Employees & Judge of the Second Judicial District v Hillsdale County,* 423 Mich 705, 717; 378 NW2d 744 (1985) and *United States v Will*, 449 US 200, 228 (1980)). Any legislation which purports to confer "the exercise of powers belonging to either of the others, cannot be regarded as valid." *Houseman* v *Kent Circuit Judge*, 58 Mich 364, 367; 25 NW 369 (1885).

Any interpretation of the judicial-inquiry statute which would grant a judge charging authority violates these fundamental precepts, and therefore the Michigan Constitution, because it would vest purely executive authority in the hands of a judicial officer. The indictment and prosecution of criminals is a uniquely executive function. *United States v Batchelder*, 442 US 114 (1979). Under the Michigan Constitution, the prosecutor is the "constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants." *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999); *see also Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-84, 194 NW2d 693 (1972). As the Court of Appeals recognized, under basic "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 NW2d 597 (2003).

The prosecuting attorney is an elected official responsible to the citizens of the county. MICH CONST 1963, art VII, § 4. As chief law enforcement officer of a county, the prosecutor has exclusive authority to decide whether to prosecute a person and what charges to file. *People v Williams*, 244 Mich App. 249, 251-52; 625 NW2d 132 (2001). "The prosecution is not for the benefit of the injured party, but for the public good." *Id* at 253. Thus, "the decision whether to dismiss a case or proceed to trial is within the prosecutor's sole discretion." *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995); *see also People v Killebrew*, 416 Mich 189, 200; 330 NW2d 834 (1982).

In recognition of the prosecutor's "sole" and exclusive authority, Michigan courts have routinely held that any interference of the prosecutorial function by the judiciary violates the separation of powers. *People v Muniz*, 259 Mich App 176; 675 NW2d 597 (2003) (court lacked

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authority to order prosecutor to issue new informations); *People v Jones*, 252 Mich App 1; 650 NW2d 717 (2002). So, for example, a judge does not have the authority to accept a guilty plea to a lesser charge over the objection of the prosecutor. *Genesee Prosecutor*, 386 Mich at 684. Judges cannot enter orders of *nolle prosequi* without the consent of the prosecutor (unless the prosecutor has abused its discretion) without violating the separation of powers. *People v Nelson*, 66 Mich App 60; 238 NW2d 201 (1975). And a judge's role in plea negotiations is limited to sentencing (a traditional judicial role) and not charging decisions. *Killebrew*, 416 Mich at 200; *see generally People v Sekelsky*, 2021 WL 2181069, No. 35214 (Mich Ct App May 27, 2021) (Beckering, J, concurring).[14]

Granting a judicial officer charging authority would go far beyond a judge participating in plea bargaining, issuing orders of *nolle prosequi* or ordering new informations as condemned in the foregoing cases. Rather, doing so purports to allow judges *to make the very charging decisions* which lie at the core of the executive power. This separation of powers principle led future Justice Cardozo to strike down a "one-man grand jury" statute in New York similar to Michigan's. Like the Michigan statute, the New York statute allowed for the appointment of a judge to investigate criminal activity. Justice Cardozo's description of the statute and conclusion are worthy of being quoted in full:

> [under the statute] the judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. . .. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court.

Matter of Richardson, 247 NY 401, 411-12; 160 NE 655 (1928).

Justice Cardozo's logic applies with even greater force here. The separation of powers is so critical to the protection of liberty that the only time Michigan courts have allowed the sharing of executive power is when a statute doing so is "very limited and specific." *People v Trinity*,

[14]Attached as EXHIBIT O.

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189 Mich App 19, 23; 471 NW2d 626 (1991); *see also People v Payne*, 424 Mich 475, 482-83; 381 NW2d 391 (1985) (deputy sheriff who acts as a magistrate may not issue search warrants because that determination must be made by a person whose loyalty is to the judiciary alone, not law enforcement). Allowing a judge to prosecute is not "very limited and specific." Rather, "[i]t is well settled" in Michigan that the decision as to what charges should be pursued in any given case goes to the very core of the executive function vested solely with prosecutors. *See, e.g., People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998) ("decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor"). Indeed, a prosecutor is the constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants. *People v Conat*, 238 Mich App at 149. A statute purporting to take away this "sole discretion" and vest it with a coordinate branch is not "very limited and specific"; rather it undermines the careful tripartite form of republican government guaranteed by the Michigan and United States Constitutions. US CONST, art IV, § 4 (guarantee clause); MICH CONST 1963, art III, § 2 (separation of powers clause).

Nowhere does the judicial-inquiry statute confer charging authority on the judicial officer. It does the opposite. It specifies that only when the judicial officer finds probable cause does the case proceed, and then only upon formal complaint.

E. Michigan authority supports the limited role of the judicial officer in a one-person judicial inquiry

The distinction between vesting courts with incidental authority to investigate criminality under the judicial-inquiry statute and the core authority to indict is highlighted in *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). The appellant in *Colacasides* was held in contempt for refusing to answer questions during the course of a judicial inquiry. On appeal, he challenged the judicial officer's authority to investigate offenses on separation of powers concerns. *Id* at 91. *Colacasides* – which dealt solely with the power of the judicial official to investigate, not indict – turned on a provision of the Michigan Constitution which grants circuit court judges the authority to act as "conservators of the peace." The Court ruled that there was no separation of powers issue because "conservators of the peace" at common law possessed the power to *investigate* crime. *Id*.

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For three reasons, *Colacasides* supports Director Lyon's position. First, *Colacasides* addressed whether a judge could investigate without running afoul of separation of power concerns. It did not address whether a judge could *charge* without running afoul of such constitutional concerns.

In terms of separation of powers, the power to "investigate" is not vested with any one branch. The Michigan Constitution recognizes that both the executive and legislature have the power to investigate, which this Court has defined as a "quasi-judicial" task. MICH CONST 1963, art I, § 17 (recognizing legislative and executive authority to conduct "fair" investigations); *Buback v Romney,* 380 Mich 209, 218; 156 NW2d 549 (1968) (executive and legislative "investigations have tended to assume a quasi-judicial character"). When the judiciary engages in investigations, it is not contravening a power reserved to the executive or legislature, but rather engaging in a "quasi-judicial" task. *Id.* All three branches can investigate; but the power to charge belongs exclusively to the executive branch.

Second, while *Colacasides* found that judges as conservators of the peace may investigate crime, there is no authority that gives conservators of the peace the power to charge. No Michigan court has ever specifically ruled that their power included the power to indict. Even if the judicial officer had authority under the "conservator of the peace clause" to perform the inquiry, that authority does not include the authority to charge one with a criminal offense. Conservators of the peace traditionally have the authority to issue arrest warrants for violations of the law, hold examinations, and commit to bail. *Averell v Perrott*, 74 Mich 296; 41 NW 929 (1889). Conservators of the peace also have the authority to investigate crime, *Application of Romney*, 381 Mich 1; 158 NW2d 564 (1968) (citing cases), and to order that bonds be posted in order to keep the peace. *In re Gosnell*, 234 Mich App 326; 594 NW2d 90 (1999); *In re Sanderson*, 289 Mich 165; 286 NW 198 (1939). As a conservator of the peace, the judicial inquirer here did not possess authority to charge crimes, only power to investigate. The indictment is therefore invalid and must be dismissed, as the courts lack jurisdiction.

To further illuminate this point, a brief foray into ancient English criminal procedure is necessary, if for no other reason that *Slattery* and *Colacasides* took the same journey. Candidly, the history dating back to the 13th century of conservators is complex, and their role changed innumerable times over the millennium. By the 16th century, the

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appellation of "conservators of the peace" applied to two distinct offices: "sheriffs," who primarily exercised an executive function, and "justices of the peace," who served the judicial function.[15] What is clear is that by the reign of Mary the 1st in 1553-54, "conservators of the peace" were not allowed to act as both executors and jurists. As described in the seminal 1831 treatise on the topic *The Justice of the Peace and Parish Officer,* in 1553-54, Parliament passed a law providing that "no sheriff shall exercise the office of justice of the peace during the time that he acts as sheriff." 1 M Sess 2 c 8 s 2. The law was necessary, according to the treatise, because a conservator of the peace "cannot act at the same time both as judge and officer for so he would command himself to execute his own precepts." RICHARD BURNS AND THOMAS CHITTY, THE JUSTICE OF THE PEACE AND PARISH OFFICER (Oxford Press 1831). The notion that a judicial "conservator of the peace" could act as a prosecuting officer was rejected nearly 450 years ago for reasons that are equally valid today.

This point is implicitly recognized by the court in *Colacasides*, which stated the "constant function [of conservators]" was to "take" or receive charges and not "make" them. 379 Mich at 92. Put into the context of criminal procedure and constitutional rights as they exist in 2022, however, nothing in the history of the conservators of the peace suggests that the judicial branch has the power to investigate, charge, and then officiate at the trial of the accused. Certainly, the English Parliament in 1554 agreed that this power did not exist; as should this Court. Combining these three functions into the same branch violates separation of powers and the checks and balances that come with it.

The third reason *Colacasides* does not control here is that reflexively incorporating the English Common law of the 14th century into the Michigan Constitution as it exists today would ignore the last 240 years of constitutional jurisprudence. An understanding of the importance of separation of powers did not exist in the 1300's when the

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[15] *See, e.g.*, Edward Hasted, "General history: Justices of the peace," in THE HISTORY AND TOPOGRAPHICAL SURVEY OF THE COUNTY OF KENT: VOLUME 1, pp 215-21 (Canterbury 1797) *available at* British History Online http://www.british-history.ac.uk/survey-kent/vol1/pp215-221 [accessed Mar 8, 2022] (In "the 34th year of king Edward III" "conservators of the peace" were given the power to try felonies "and then they acquired the more honourable appellation of justices of the peace.); 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY Ch. 34 (Little, Brown & Co 1908) (In middle age England, "the ordinary conservators of the peace were the sheriff, the coroner [and] the justices of the peace").

concept of conservator of the peace was first created. The separation of powers become a cornerstone of good governance nearly 400 years later when it was first discussed in detail in the writings of Montesquieu and Locke. *See, e.g.,* Montesquieu, THE SPIRIT OF THE LAWS, vol 1, trans Thomas Nugent (London: J Nourse, 1777), *pp 221-237, passim* ("There is as yet no liberty if the power of judging be not separated from legislative power and the executrix.") To ignore this history and rule that Judges can be prosecutors in 2021 because the Magistrate of Nottingham may or may not have had the power to engage in "indicting" someone in 1382 strains credulity. As pointed out by Justice Cardozo, "[c]enturies of common-law tradition warn us with echoing impressiveness that this is not a judge's work." *Matter of Richardson*, 247 NY at 411-12. Nearly another century has passed since those words were spoken in which Courts have consistently struck down efforts to weaken the separation of powers. As Justice Rutledge of the United States Supreme Court recognized in his review of the statute, the "aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law" and "cannot stand the test of constitutionality." To paraphrase this Court, "[t]he constitutionality of a system whereby a Judge accuses a person of crime [in the year 2022 cannot] withstand our re-examination." *People v Bellanca*, 386 Mich at 715.

This point was made evident in the Supreme Court's decision in *Morrison v Olson*, a case involving the constitutionality of an independent prosecutor statute. 487 US 654 (1988). The statute allowed the Attorney General to ask a "special division" of federal court judges to appoint a special prosecutor to investigate claims against executive officials. The statute was challenged for violating the separation of powers. The Court held for four reasons that vesting the appointment of an inferior and temporary executive official with the Court did not violate the "separation between the judiciary and the other branches of the Federal Government." 487 US at 680-81. A comparison of that decision with the judicial-inquiry statute highlights the unconstitutionality of vesting indictment authority with a judicial officer.

First, the Court noted in *Morrison* that the United States constitution specifically authorized the appointment of "inferior" executive officials by "courts of law." *Id* at 679. In contrast, nothing in

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the Michigan Constitution specifically authorizes Michigan Courts to commence the prosecution of criminal defendants.

Second, the Court noted that the powers granted to the judicial panel under the special counsel act were "passive," "administrative," and "ministerial" in nature, such as "receiving reports" or awarding attorneys' fees. *Id* at 681-85. Here, deciding whether to file criminal charges is anything but "passive" and ministerial; it goes to the heart of the executive function.

Third, the Court placed great weight on the fact that the appointing court had no authority to supervise the activities of the special prosecutor, stating "[t]he Act simply does not give the [judges] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority." *Id* at 681. Here, the proposed interpretation of the one-person investigatory statue would go far beyond conferring supervisory authority to awarding the judiciary actual "prosecutorial authority."

Finally, the court noted that the special prosecutor could be removed by the Attorney General "for cause" and was required whenever possible to abide by the rules laid down by the executive branch. Accordingly, the special prosecutor remained an executive officer under the control of the executive branch. *Id* at 695-96. But here the executive branch (*i.e.,* prosecutors) has no control whatsoever over the judicial official exercising prosecutorial authority. More importantly, the judicial official is subject only to the rules of the Court; not the rules that govern the activities of executive branch prosecutors. And, as discussed below, Genesee County did not have any rules governing these kinds of judicial investigations; meaning that the judicial official here had no rules to follow.

Justice Scalia's characteristically prescient dissent leads to the same conclusion. After first agreeing with the majority that the prosecutorial function belongs exclusively to the executive, *id* at 705, he observes that under the constitution, as is the case in Michigan, executive power rests exclusively with the executive, which does not mean *some* power; it means *all* the executive power. *Id.* Congress' conferring some executive authority on members of the judiciary is plainly proscribed by the separation of powers doctrine.

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So too in Michigan under article II, section 2, of the Constitution. If the judicial inquiry provisions are to be construed to give the judiciary the authority to charge, they violate the separation of powers doctrine.

F. The separation of powers violation here is even more evident when the judicial-inquiry statute gives unbridled authority to investigate and prosecute the highest members of the executive branch

The concerns which animate the Michigan Constitution's strict separation of powers are particularly pronounced given the roles played by the indicted individuals. This case does not involve a lowly bank official, as in *Slattery*, or a bar owner accused of giving bribes, as in *Colacasides*. Rather, the judiciary here is seeking to bring charges against the highest-ranking executive officials, including the former governor and a member of his cabinet, the director of MDHHS, Director Lyon. One can scarcely imagine a greater attack on the separation of powers than the legislature delegating to the judicial branch the ability to initiate a prosecution of the highest officials in the executive branch.

The danger in allowing the judiciary to interfere with the executive function was recognized in *Buback v Romney*, 380 Mich 209; 156 NW2d 549 (1968), a case that involved a statute which allowed the judiciary to preside over hearings on whether an executive official should be removed from office. The Michigan Supreme Court held that the legislature could not delegate to the judiciary powers that circumscribe executive function – removal of an executive from office – without violating the separation of powers. Per the court:

> [T]he separation of powers article would apply to a court as follows: No person (a judge) exercising powers (judicial power) of one branch (the court of justice which constitutes the judicial branch) shall exercise powers properly belonging to another branch.

Buback, 380 Mich at 226.

The logic of *Buback* applies with even greater force here. In *Buback* the statute was struck down even though the invasion of the Executive's authority was minimal because the court only had the authority to preside over removal hearings, not to make final removal decisions. Here, the investigatory statute has been interpreted as giving the judiciary final authority over the nature and timing of the charges, and who gets charged, all at the "very essence of prosecutorial discretion." *Morrison,* 487 US at 708 (Scalia, J, dissenting).

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Allowing the judiciary to unilaterally bring charges against high executive officials without any check would invade the Executive's authority to "take Care that the Laws be faithfully executed"; a power granted solely to the governor and his appointed department chiefs. MICH CONST 1963 art V, §§ 1, 2 and 8. As the United State Supreme Court has noted, "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Nixon v Fitzgerald,* 457 US 731, 750 (1982). But this "intolerable" invasion is exactly what is occurring here. The judiciary, acting in secrecy, has decided to unilaterally bring charges against high executive officials, second guessing the scope of their constitutional duties, without the benefit of due process, a transparent preliminary exam and bypassing the charging discretion the Michigan Constitution vests solely with prosecutors. This is an "intolerable" invasion of separation of powers.

But as explained below, the Court need not go so far as to hold the statute unconstitutional. It need only hold that the statute does not confer charging authority on the judicial officer conducting the inquiry under MCL 767.3, *et seq*.

II. The judicial-inquiry statute does not confer charging authority on the investigating judicial officer making the indictment invalid and requiring dismissal

Standard of Review. Constitutional issues and questions of statutory interpretation are reviewed *de novo*. *People v Wiley*, 324 Mich App 130; 919 NW2d 802 (2018); *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008).

A. Introduction

Whenever possible, courts should interpret statutes to avoid constitutional dilemmas. *See, e.g., House Speaker v Governor*, 443 Mich 560, 585; 506 NW2d 190 (1993) ("constitutional construction requires us, if possible, to avoid an interpretation that creates a constitutional invalidity"). The judicial inquiry statue should be interpreted as not granting the judiciary the power to indict.

In fact, a proper construction reveals that contrary to the contentions of the prosecution judicial inquiries do not confer on the judicial officer the power to charge citizens with criminal offenses, are

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not the functional equivalent of citizen grand juries, and are not a substitute for preliminary examinations.

B. The starting point: Statutory language

Nothing in the text of the judicial-inquiry statute authorizes the judicial officer to issue a criminal charge. The judicial officer is to investigate and present findings to a proper prosecuting authority with the prosecutor exercising discretion to file a charge, whether that be called an indictment or complaint, followed by a preliminary examination. The statutory steps are plain:

> (1) the court "make[s] an order directing that an inquiry be made,"
>
> (2) "designation of the judge to conduct the inquiry" is made "in accordance with the rules of such court,"
>
> (3) "such judge" requires persons to attend and answer questions, subject to certain rights and obligations, and
>
> (4) if "upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person,"
>
> (5) "he may cause the apprehension of such person by proper process," and
>
> (6) upon "return of such process," "the judge having jurisdiction shall proceed. . .in like manner *as upon formal complaint*."

MCL 767.3, 767.4 (emphasis supplied). There is no mention of the judicial officer having authority to issue a criminal charge.

Despite these straightforward steps, the prosecution maintains – as the trial court held – that language of the statute suggests that judicial inquiries and citizen grand juries are equal in the eyes of the law and serve the same function. It posits further that a judicial inquiry is a substitute for a preliminary examination and the judicial officer, not the prosecutor, has authority to charge a criminal offense. The language supports none of these misguided claims.

The term "grand jury" appears just twice in the judicial-inquiry statute to provide the right to counsel and to proscribe disclosure of

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proceedings.[16] When first enacted, 1917 PA 196 provided that secrecy was to be governed by the "provisions of law relative to grand jurors." That was the *only* mention of grand jurors or grand juries, and it plainly suggests that by borrowing from that body of law there is a different body of law for judicial inquiries. Moreover, these two current and incidental references simply do not provide or even suggest that the judicial officer has the authority to charge a criminal offense.

The same holds true for the term "indictment." It first appeared in the judicial-inquiry statute as part of the 1947 amendments in a very limited way – to preclude the judicial officer from "hearing any motion to dismiss or quash any complaint or *indictment*." In 1949, the term was used to penalize disclosure of the fact of indictment, and in 1951 it was used to penalize disclosure of proceedings prior to indictment. In none of these amendments, however, was "indictment" used to identify it as the exclusive charging instrument arising from a judicial inquiry. Moreover, there is nothing in the language conferring authority on the judicial officer to issue an "indictment."[17]

By contrast, the judicial-inquiry statute identifies its process in terms very different from those for grand jury proceedings. In MCL 767.3, the term "inquiry" is used no fewer than 14 times (*e.g.*, "order directing that an inquiry be made," "order. . .shall be specific to common intent of the scope of the inquiry"). In MCL 767.4, the term is used 18 times (*e.g.*, "if upon such inquiry," the "judge conducting the inquiry," "while conducting such inquiry"). Above all, *nowhere* is there any language conferring upon the judicial officer the powers of a prosecutor.

C. Precedent does not confer on the judicial officer authority to charge an offense

In its order denying the motion, the trial court relied heavily on *People v Green*, 322 Mich App 676; 913 NW2d 385 (2018). But *Green* is

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[16]MCL 767.3 provides that "[a]ny person called before the *grand jury* shall at all times be entitled to legal counsel. . .." (emphasis supplied). MCL 767.4 provides that "[i[t shall be unlawful. . .to possess, use, publish, or make known. . .any testimony, exhibits or secret proceedings obtained or used in connection with any *grand jury* inquiry. . .." (emphasis supplied).

[17]These incidental references have no significance for an additional reason. The Criminal Code of Procedure, first enacted in 1927, expressly provides that "indictment" means an "indictment, information, *presentment*, complaint, warrant and formal written accusation." MCL 761.1(g) (emphasis supplied). *Oakman v Recorder of City of Detroit*, 207 Mich 15; 173 NW 346 (1919) (judicial officer conducting the inquiry issued a *presentment*, an informal complaint).

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inapposite. The defendant in *Green* alleged ineffective assistance of counsel on the basis that counsel had not challenged violations of rights to counsel and confrontation due to the use of the one-person judicial inquiry. In rejecting the claim, the Court of Appeals simply observed that the procedure

> is used to determine *whether criminal proceedings should be instituted* against an individual by way of an indictment, *there is not yet a formal charge, preliminary hearing*, indictment, information, or arraignment that indicates adversarial judicial proceedings have begun. . ..

322 Mich App at 685 (emphasis supplied). *Green* acknowledges that the judicial officer's function is limited to investigation, not charging. Moreover, nothing in the *dicta* remotely suggests that the judicial officer has the authority to charge. In fact, it suggests otherwise. The court specifically underscored that the inquiry precedes any "formal charge" or "preliminary hearing."

D. Precedent also requires that there be a preliminary examination following a judicial inquiry

As stated above, upon a finding of probable cause the matter is to proceed "as upon formal complaint." MCL 767.4. This Court has interpreted that provision to require a preliminary examination on the charge.

In *People v Duncan*, 388 Mich 489, 498-99; 201 NW2d 629 (1972), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001), this Court noted the preliminary nature of judicial inquiries. It specifically contrasted the process with citizens grand juries and observed that when the Legislature expressly intended to provide for a preliminary examination – unlike the citizens' grand jury procedure – it knew how to do so:

> When the legislature did intend to provide for a preliminary examination after a one-man grand jury indictment, it did so by specific statutory language.

Duncan, 388 Mich at 498-99 (citing 1927 PA 175, ch VII, § 4; MCL 767.4). Other statutory language supports this conclusion, which expressly provides that the judicial officer conducting the inquiry "shall be disqualified from acting as the *examining magistrate* in connection with the hearing on the complaint or indictment." MCL 767.4 (emphasis supplied).

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Glass – on which the prosecution relies to avoid a preliminary examination – simply does not address the judicial inquiry process, and it cannot be read to overturn a century of this Court's holdings consistent with the plain language of the statute for several reasons. First, *Glass* did not involve a judicial inquiry. Second, the basis on which *Glass* overruled *Duncan* was the prior court's improper reliance on its rulemaking authority to create a right to a preliminary examination. *Glass*, 464 Mich at 283. The challenge here, however, does not rely on the Court's rulemaking authority, so the infirmity noted in *Glass* does not apply. Third, although *Glass* notes that *Duncan* did not rely on due process principles to create the right to a preliminary examination, *Glass*, 464 Mich at 282, that is irrelevant. The challenge here does not rely on due process principles alone. It relies on the *interpretation of the statute* which *Glass*'s holding did not affect, and it relies on separation of powers principles not even presented or considered. *Duncan* noted the basic proposition, which *Glass* left undisturbed: that the Legislature expressly provided for a preliminary examination under the terms of the one-person judicial inquiry statutory scheme. *Duncan*, 388 Mich at 498-99.[18]

This interpretation is augmented by the fact that Michigan has long provided preliminary examinations following judicial inquiries. *Oakman v Recorder of City of Detroit*, 207 Mich 15; 173 NW 346 (1919) (presentment followed by formal complaint and preliminary examination);[19] *People v McCrea*, 303 Mich 213, 247; 6 NW2d 489 (1942) (judicial officer conducting inquiry was not precluded from presiding at preliminary examination); *People v Bellanca*, 386 Mich 708, 715; 194

[18]We recognize that MCR 6.112(B) does, indeed, provide that an "indictment is returned and filed without a preliminary examination," suggesting that the defendant is not entitled to a preliminary examination here. This issue still comes down to interpreting the right the Legislature created in MCL 767.4, which, in fact, provides for a preliminary examination. *Duncan*, 388 Mich at 498-99. The court rule does not control here, because substantive rights provided for by statute control over court rule provisions. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002); *see also Stenzel v Best Buy Co, Inc*, 320 Mich App 262; 906 NW2d 801 (2017). Moreover, as explained above, the term indictment can mean anything. MCL 761.1(g).

[19]*Oakman* is instructive as to the original intent before the term "one-man grand jury" became popular. There the judge issued a presentment, "an informal complaint and finding of probable cause." After presentment, warrants and a complaint were issued. The presentment was simply and initial probable cause finding followed by a formal complaint. The "judge having jurisdiction" then proceeded in "in like manner as upon formal complaint."

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NW2d 863 (1972) (defendant entitled to discovery for preliminary examination following judicial inquiry).

E. Summary

From this analysis, three ineluctable conclusions emerge: (1) the judicial officer is just an investigator, *not* a prosecutor with authority to charge criminal offenses, (2) judicial inquiries are *not* the same as grand juries, and (3) they are *not* substitutes for probable cause determinations of preliminary examinations.

Here, the judicial officer was the sole signatory on the indictment, certifying that the "foregoing indictment is a TRUE BILL," EXHIBIT G, and the charge was filed in circuit court without a preliminary examination having been held. Filing the indictment by the judicial officer purported to confer jurisdiction. But the indictment is invalid because it was issued by a judge who was without authority to do so. The circuit court has no jurisdiction, and the charges must be dismissed.

III. The indictment must also be dismissed because it was the product of an investigation that violated the terms of the judicial-inquiry statute and Director Lyon's right to due process

Standard of Review. Constitutional issues and questions of statutory interpretation are reviewed *de novo*. *People v Wiley*, 324 Mich App 130; 919 NW2d 802 (2018); *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008).

A. The investigation did not comply with the judicial-inquiry statute

As stated above, the chief judge appointed a colleague as a "one-person grand juror" pursuant to MCL 767.3. Before initiation of such proceedings, however, there are prescribed statutory requirements, many of which were violated here. Those violations include the following:

Investigation initiated contrary to statute. Under the statute, the order directing an inquiry "shall be made in accordance with the rules of such court." MCL 767.3. Other counties have specific rules establishing the method for reviewing and approving applications to conduct investigations. *See, e.g.,* Ingham County, 30th Judicial Circuit (Rule 6.107); Oakland County, 6th Judicial Circuit (Rule 6.107). Genesee County does not. EXHIBIT P. So, the investigation was ordered by some unknown and *ad hoc* means contrary to the statute.

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Judicial officer designated contrary to statute. Under the statute, the designation of the judicial officer to conduct the inquiry is also to be made pursuant to court rule. But, again, there was no court rule here. Although another judicial officer was drawn by lot, the chief judge reassigned the matter to Judge Newblatt, citing MCR 8.111(B) on assignment, not reassignment. There is no indication that the protocol for reassignment was followed.

Wrong oath administered. At the commencement of the proceedings, court staff and staff of the Attorney General were all administered an oath

> to *diligently inquire* into and make true presentment in *seeking indictment* of all such matters and things as shall be given you in charge or otherwise come to your knowledge, *touching your grand jury service*.

TRANSCRIPT at 6-11 (Jan 23, 2020) (emphasis supplied).[20] That oath – which is the citizens' grand jury oath – required those who took it to investigate and *charge* people with crimes. *See* MCL 767.9. The judicial officer acknowledged that it simply administered the oath that he had been given by the Attorney General.[21] This process necessarily calls into question the role of the various people who took this oath, particularly since the judicial-inquiry statute makes no provision for such extraneous participants.[22]

Indictments returned off the record. The indictment against Director Lyon purports to have been signed on January 8, 2021 – out of time – but it was not contemporaneously filed with the court. The judicial inquiry was not in session on that date, so there is no transcript of any proceedings. The register of actions for the proceeding bears no entry on that date. And the material the court sent to this Court as required by statute did not include the indictments or any indication as to when they were returned. The indictment does not appear as part of

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[20] *See* note 9, *supra*; EXHIBIT L.

[21] In fact, one of the judges noted the scope of the oath, and the investigating judicial officer responded, "That's the oath that. . .we were provided. . .by the AG's office." TRANSCRIPT at 13 (Jan 23, 2020).

[22] The judicial officers who took the oath were Hon. Duncan M. Beagle, Hon. Richard B. Yuille, Hon. Nathaniel C. Perry III, and Hon. Christopher R. Odette.

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the record until it was filed with the circuit court on January 13, 2021 – well beyond the term of the judicial officer.[23]

Indictments filed out of time. The order granting the application expressly provided that the term was to begin January 1, 2020. It also provided that proceedings "shall continue no longer than six (6) months, unless extended by the specific order of this Court or this Court's successor for an additional period not to exceed six (6) months." EXHIBIT E (Order ¶ 7, at 3). In a June 4, 2020, order, the judicial officer – not the chief judge – purportedly modified the chief judge's order, stating that "the One-Person Grand Jury appointed by and through this court in an Order dated January 9, 2020, due to expire on July 9, 2020, is hereby extended for six (6) months to January 9, 2021. All other orders in the Order dated January 9, 2020, remain in effect." EXHIBIT F. But the June 4, 2020, order was not entered by the chief judge or his successor. And the June 4, 2020, order lacked the legal authority to extend the judicial inquiry proceedings past December 31, 2020, under MCL 767.4. The indictment was not filed until January 13, 2020, which, under any interpretation of the orders, was beyond the term of the judicial inquiry, rendering the instrument defective.[24]

And while the circuit court order denying the motion to dismiss essentially equates an indictment issued after a judicial inquiry with an indictment issued by a citizens' grand jury, the indictment issued here does not even comply with the citizens' grand jury pleading requirement. MCL 767.25 requires the endorsement of witnesses on the indictments returned by a citizens' grand jury. The indictment here contains none.

Extraneous officials. The oath was administered to more than 40 people, including the Solicitor General, various AAGs and staff, the sheriff and court staff. But the judicial-inquiry statute makes no provision for all these extraneous persons charged with investigating and returning indictments. It is the responsibility of the judicial officer

[23]Provisions regarding citizen grand juries require that the foreperson present the indictment to the supervising judge in the presence of the grand jury and that the supervising judge return the indictment to the court having jurisdiction over the offense. MCL 767.25.

[24]The timeliness of the indictment, although raised by the defense in its motion to dismiss, was not addressed by the trial court in its order denying the motion. This is likely because the issue was also made part of a separate motion to dismiss filed by a related defendant, Nancy Peeler, in which Director Lyon joined. The trial court has yet to rule on that motion.

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to investigate – and investigate alone. Although he is entitled to appoint persons to assist him, he did not do so and proceedings are under the control of the judge, not the Attorney General or prosecuting attorney. *Petition of Hickerson*, 301 Mich 278; 3 NW2d 274 (1942). The Solicitor General and the AAGs regularly appeared during the proceedings "on behalf of the People," offered "People's Exhibits," and made "closing arguments" on behalf of the People.[25] They did not function in their proper role as judicial officer's assistants; instead, they were *ex parte* advocates treating the judicial officer as if he were a citizen grand jury. The judicial officer is to conduct the investigation and he may have assistants, but he is not the charging official. It is up the prosecuting official to charge in his or her discretion. Beyond the investigation, his authority is limited to "caus[ing] the apprehension of such person by proper process" with the case proceeding before "the judge having jurisdiction [who] shall proceed with the case. . .in like manner as on formal complaint." MCL 767.4.

Public accounting. The judicial-inquiry statute includes a special provision requiring the judicial officer to account for the expenses incurred in the investigation. Here, however, the judicial officer's public accounting reflects that the court did not spend any money on the investigation – even though the investigation spanned a full year involving 47 witnesses and more than 1,400 exhibits. EXHIBIT M. Obviously, the Attorney General is the one who financed and controlled this investigation, not the judicial officer, which is – again – not contemplated by the statute. An example of a public accounting from another judicial inquiry conducted in Ingham County reflects the proper role of the judicial officer and those who assist in the investigation. EXHIBIT Q.

Off-the-record contacts. The record also reflects instances in which the AAGs communicated with the judicial officer by means other than on the record. There were requests for off-the-record discussions, and it appears that documents and other materials were sent to the judicial officer off the record. TRANSCRIPT at 132 (Feb 29, 2020); TRANSCRIPT at 46 (Oct 15, 2020); TRANSCRIPT at 68 (Nov 17, 2020);

[25]"Fadwa Hammoud, Solicitor General on behalf of the People from the Attorney General's office." TRANSCRIPT at 3 (Feb 17, 2020). "Molly Kettler on behalf of the People of the State of Michigan. . . . We're going to make a closing argument today regarding our request for involuntary manslaughter indictments for Nick Lyon and Eden Wells." TRANSCRIPT at 5 (Nov 12, 2020).

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TRANSCRIPT at 5 (Dec 2, 2020). Moreover, the transcripts reflect that the indictments were evidently prepared not by the judicial officer but by Attorney General's office and, in some cases, handled off the record. TRANSCRIPT at 53-54 (Dec 17, 2020).

Witnesses in the employ of the Attorney General. Under the judicial-inquiry statute, witnesses "shall not be employed in any capacity by the judge or *by any person connected with such inquiry*, within the scope of the inquiry being conducted." MCL 767.3 (emphasis supplied). But at least two witnesses who appeared were employed by the Attorney General. TRANSCRIPT at 80 (Mar 16, 2020); TRANSCRIPT at 4 (Jul 31, 2020).

As if these irregularities were not enough, other aspects of the judicial inquiry did not observe traditional notions of judicial independence. For example, the judge who authorized expansive – and controversial – search warrants on the Department of Attorney General, its eDiscovery vendor, and DTMB, was later sworn in to take part in the judicial inquiry. Moreover, the Solicitor General chose on occasion to use investigative subpoenas to compel the testimony of witnesses. But those applications were not made to a neutral and detached judicial officer. They were made to, and approved by, the judicial officer conducting the judicial inquiry, Judge Newblatt.

Apart from being a product of its times, the judicial inquiry process, 1917 PA 196, was created to address three infirmities in the criminal justice system that existed more than a century ago. Prosecutors did not have the power to subpoena witnesses and put them under oath, they could not compel testimony and punish for contempt, and they had no independent authority to grant immunity to secure needed testimony. Robert G. Scigliano, THE MICHIGAN ONE-MAN GRAND JURY 20 (Michigan State Board of Agriculture 1957). Today, that is no longer the case. Prosecutors now have the benefit of the investigative subpoena statute, MCL 767.1, *et seq*., which empowers them to compel testimony, seek contempt sanctions and authorize immunity.

Here, the Attorney General did not petition for a judicial inquiry for any proper investigative purpose. It could have used the methods of the OSC, which included interviews and investigative subpoenas, but it did not. Use of the judicial inquiry as a tactic rather than a tool is best illustrated in the results obtained. Of all the fact witnesses pertaining to Director Lyon identified to date, *none* was new to the case. In fact, 10 of them testified at preliminary examinations in 2017 and 2018, and for

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all the others the OSC had produced either witness statements or investigative subpoena transcripts. Many were state employees whose emails and other information was previously disclosed. Some were people who agreed to speak with the defense. Some even had made very public statements. The exhibits were all part of the original database. This was not a new investigation. It was an old investigation re-packaged to avoid a preliminary examination, and it hardly required compulsory process or secrecy.

And if there were any question as to the prosecution's intentions, the Solicitor General's public comments remove all doubt. In announcing the charges on January 13, 2014, she conflated the judicial inquiry process with a federal grand jury, evidently not explaining or knowing the difference. She declared that there would be no need for preliminary examinations, and that all defendants would go directly to trial. She even said that it would save money because defense counsel would not spend time preparing arguments or challenges to the evidence prior to trial. EXHIBIT K.

Why was the prosecution so determined to avoid a preliminary examination and a motion to quash? Because when the defense was allowed to cross-examine the exact same witnesses, introduce exculpatory documentary exhibits, and file motions seeking to dismiss the exact same charges, the prosecution was on the eve of seeing its entire case unravel. It was only by gaming the system that the prosecution could avoid seeing its case blown up a second time. And if there is any doubt that was what the prosecution was trying to do, it is removed by the fact that the prosecution failed to provide the exculpatory evidence the defense team developed in the first prosecution. For example, the prosecution failed in the judicial inquiry to provide:

- evidence that MDHHS led and worked with the local health department on giving notice of the outbreak, which was provided to the entire medical community in Genesee County *within days* of Director Lyon being told of the situation
- evidence that the likely source of the outbreak was McLaren Hospital with which MDHHS and the local health department were working to mitigate its problem, which caused the decrease in cases likely the result of McLaren's mitigation efforts

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- evidence – factual or expert – of causation between any failure by Director Lyon and the deaths that are alleged

This proceeding was not designed to investigate. Indeed, there was no need to investigate. The process was designed to delay and bring different charges under the mistaken belief that the proofs would not be tested prior to trial.

B. The investigation violated due process

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "[n]o person shall. . .be deprived of life, liberty, or property without due process of law. US CONST AMEND V. Michigan provides the same guarantee in its Constitution's Declaration of Rights: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." MICH CONST 1963 art 1, § 17. The manner in which the judicial-inquiry statute was used here violates these guarantees and requires dismissal of the Grand Jury Felony Indictment.

From the initiation of the inquiry through the return of the "indictments," the judicial-inquiry statute's carefully reticulated requirements were treated as though they did not exist. Even administrative agencies that do not follow their own procedural rules violate one's due process rights. *Abbott v Howard*, 182 Mich App 243; 451 NW2d 597 (1990) (voiding worker's compensation award under due process principles under Michigan and United States constitutions when agency did not follow its own procedural rules); *see also United States v Caceres*, 440 US 741, 751 n14 (1979) ("It does not necessarily follow. . .as a matter of logic or law" that an agency has no duty to follow its own rules); *Morton v Ruiz*, 415 US 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."). *A fortiori*, the statutory violations here rise to the level of a due process violation.

We recognize that there are limits to the protections due process provides. For example, in *Barclay v Florida*, 463 US 939 (1983), the Supreme Court upheld a death sentence even though it had been imposed in violation of state law. A "'mere error of state law' is not a denial of due process." 463 US 954 (citing *Gryger v Burke*, 334 US 728 (1948)). But here the due process concerns are not mere violations of rules. They are structural and based on a charging scheme that violates separation of powers.

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From the record available to date, we know several things. Even though the statute specifically requires the court to have rules, it did not. The "order [directing an inquiry] and the designation of the judge" shall be pursuant to local rules. MCL 767.3. As a consequence, there was no process or standard to consider whatever petition that was made. There was no process or standard for selecting the judicial officer to conduct the inquiry. We also know that over the course of a year, about 45 witnesses were called and 1,400 exhibits were offered. Yet, the judicial officer incurred no expenses. EXHIBIT M. Contrary to the intent and requirements of the statute, this was the Attorney General's presentation and argument to a judicial officer, not an independent investigation conducted by a judicial officer. *See Petition of Hickerson*, 301 Mich at 282 (citing *In re Petition for Investigation of Recount*, 270 Mich 328; 258 NW 776 (1935)). Simply put, it was an illegal *ex parte* preliminary examination without the defendant. What is missing is a probable cause determination by a neutral and detached magistrate or body because the investigating judicial officer cannot perform that function under the literal terms of the statute, MCL 767.4 ("shall be disqualified from acting as the examining magistrate") or the requirements of due process.

In addition to these apparent infirmities, further examination of the grand jury proceedings themselves may very well reveal other irregularities, just adding to this due process argument.

Even when its provisions have been properly followed, the judicial-inquiry statute has been subject to due process criticism over time as noted in *Oliver* and *Murchison*, particularly in Justice Rutledge's observations in *Oliver*. *Colacasides* considered a due process challenge, which took into account those criticisms. In finding no constitutional issue, the court contrasted those many criticisms with the many amendments to the statute. For example, it noted that the statute now affords witnesses more rights and limits the judicial officer's powers. It noted that the judicial officer could not act as the examining magistrate or hear a motion to dismiss or quash and that that the judicial officer has reduced contempt powers and that restrictions were put in place to limit the scope of inquiries. 379 Mich 98-99. Those many amendments, however, do not address the fundamental concerns presented here. Moreover, as the Court noted five years later – and 50 years ago – in *Bellanca*, the statute's constitutionality is an open question.

The judicial-inquiry statute as used here violated federal and state constitutional guarantees, and the charge that the investigation under which it was conducted produced must be dismissed.

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CONCLUSION

For the above reasons, Defendant-Appellant Director Lyon respectfully requests that the Court immediately consider and grant this Bypass Application, order oral argument on the Application on May 4, 2022, together with *Peeler*; reverse; and order that the case be dismissed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This application is filed pursuant to AO 2019-6 and contains 15,961 countable words (exclusive of the title page, table of contents, index of authorities, statement of the basis of jurisdiction, statement of the questions involved, signature block, listing of counsel, certificate of compliance and exhibits) and is prepared in 12-point Century Schoolbook typeface.

s/ *Charles E. Chamberlain, Jr.*

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

Tracy L. Evans, being first duly sworn, deposes and says that she is a paralegal in the employ of the law firm of WILLEY & CHAMBERLAIN LLP, and that she served a true copy of the attached:

DEFENDANT-APPELLANT LYON'S
BYPASS APPLICATION FOR LEAVE TO APPEAL,
INDEX OF EXHIBITS, and
DEFENDANT-APPELLANT LYON'S
MOTION FOR IMMEDIATE CONSIDERATION

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