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STATE OF MICHIGAN
IN THE SUPREME COURT
Bypass Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs-Appellees, v NICOLAS LYON, Defendant-Appellant. _____/	Supreme Court No. 164191 Court of Appeals No. 356809 Genesee Circuit Court No. 21-047378-FH

BRIEF ON APPEAL OF PLAINTIFFS-APPELLEES THE PEOPLE OF THE STATE OF MICHIGAN

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Plaintiff-Appellee, the People of the State of Michigan, agree with Defendant-Appellant, Nicolas Lyon, that this Court has jurisdiction to consider Lyon's bypass application for leave to appeal pursuant to MCR 7.305(C)(1) and MCL 600.215.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Do Michigan's one-person grand jury statutes, MCL 767.3 and MCL 767.4, confer charging authority on a judge acting as one-person grand jury?

   Appellant's answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Did not answer.

2. Do MCL 767.3 and MCL 767.4 violate the separation of powers provision of Michigan's Constitution, Mich Const 1963, art III, § 2?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: Did not answer.

3. Is a defendant charged by a one-person grand jury entitled to a preliminary examination?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: Did not answer.

4. Did the one-person grand jury proceedings in this case violate Lyon's due process rights?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: Did not answer.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, art 3, § 2 Separation of powers of government.

> 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.

Const 1963, art 6, § 2 Conservators of the peace.

> 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

> 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. In any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order. The proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony. The witnesses shall not receive any compensation or remuneration other than witness fees as paid witnesses in other criminal proceedings. The witness 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. Whenever a subpoena is issued by the judge conducting the inquiry, commanding the appearance of a witness before the judge forthwith upon the service of such subpoena, and, following the service thereof, the witness arrives at the time and place stated in the subpoena, the judge issuing the same shall be forthwith notified of the appearance by the officer serving the subpoena, and the judge forthwith shall appear and take the testimony of the witness. Any person called before the

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grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. The witness shall have the right to have counsel present in the room where the inquiry is held. All matters revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in section 4. No testimony shall be taken or given by any witness except in the presence of the judge.

Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of the inquiry. The disqualification shall not extend more than 1 year from date of termination of the inquiry, as determined by final order of the judge entered prior to such date.

MCL 767.4

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 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, 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 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, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. If upon such inquiry the judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance in office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against the officer. The finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against the officer shall proceed in the method prescribed by law for a hearing and determination of said charges. 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

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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, and the offense when committed by a public official shall also constitute malfeasance in office. The limitations, restrictions and penalties relating to the uttering, publishing or disclosing of any statement pertaining to any information or evidence, imposed by this section, do not apply to disclosures of information or evidence made by a judge conducting such an investigation to another judge concurrently conducting an investigation as provided in section 3. Upon the termination of the inquiry if the judge shall make no presentment of crime or wrongdoing as to any person whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

No 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.

In the event any judge conducting such inquiry shall be unable to continue because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

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INTRODUCTION

While it no longer commands the same attention it has in the past, Michigan's one-person grand jury is one of the defining aspects of this State's criminal justice system. When first enacted, the one-person grand jury was the subject of near-constant scrutiny and debate, not only among legal scholars, but in the Legislature, in the courts, and even among the drafters of the Constitution of 1963. Over the years, the dust settled. The Legislature modified the institution, clarifying the one-person grand jury's powers and adding safeguards against abuse. Scholars recognized the one-person grand jury's legitimacy and usefulness. This Court examined the statutes creating the one-person grand jury, first in 1945 and again in 1967, and concluded in both instances that the institution is constitutional. And, when the drafters of the Constitution considered the institution, they not only expressly declined to abolish it but also took affirmative steps to maintain its validity. Today, the one-person grand jury is accepted as one of Michigan's three charging procedures, alongside the citizen's grand jury and the information coupled with a preliminary examination.

Lyon asks this Court to turn a blind eye to this history. He asserts that the constitutionality of the one-person grand jury is still an open question: when this Court previously considered its constitutionality, Lyon explains, the Court overlooked the fact that the one-person grand jury issues charges. No matter, Lyon argues; the Legislature never intended for the one-person grand jury to issue charges anyways.

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But the statutes, and the cases interpretating them, say differently. Both the statutes' text and their amendment history make clear that the one-person grand jury is, in fact, a grand jury that issues indictments. When this Court considered the constitutionality of the one-person grand jury, the Court was well aware of this fact. And this Court concluded that the one-person grand jury does not violate the separation of powers.

Stare decisis cautions against overturning any prior decisions of this Court, and particularly decisions that affect the foundations of the State's criminal justice system. But this Court need not base its decision in this case solely on stare decisis. This Court's reasons for upholding the constitutionality of the one-person grand jury withstand' s a thorough reexamination. Rather than departing from this precedent, the People ask this Court to deny Lyon's application for leave to appeal or, in the alternative, to affirm the circuit court.

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STATEMENT OF FACTS AND PROCEEDINGS

In January 2021, following a year-long investigation, Genesee County Circuit Judge David J. Newblatt, acting pursuant to MCL 767.3 and MCL 767.4, signed an indictment charging Lyon with nine counts of involuntary manslaughter and one count of willful neglect of duty. (Def's Ex G.) These charges arose out of Lyon's actions and inactions related to the Flint Water Crisis. (*Id.*) The grand jury also charged eight other defendants in connection with the Flint Water Crisis—Jarrod Agen, Gerald Ambrose, Richard Baird, Howard Croft, Darnell Earley, Nancy Peeler, Richard Snyder, and Eden Wells.

1. Defendant Baird's Motion for a Preliminary Examination

About two months after the grand jury issued its charges, Defendant Baird filed a motion to remand for a preliminary examination. Defendants Agen, Ambrose, Earley, and Peeler joined Baird's motion. (See Pl's Ex C, p 1.) In claiming entitlement to a preliminary examination, Baird argued, in part, that the one-person grand jury, unlike the citizen's grand jury, does not have the power to issue indictments.

The trial court denied Baird's motion, holding that "[p]arallel to a citizens' grand jury, a one-person grand jury has the power to issue indictments upon a finding of probable case." (*Id.* at 4.) Because an indictment does not require a preliminary examination, the court explained, defendants were not entitled to preliminary examinations. (*Id.* at 10–11.) Thus, the court denied defendants' motion. (*Id.*)

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Baird, Ambrose, Earley, and Peeler appealed. The Court of Appeals denied leave to appeal, and defendants sought leave to appeal with this Court. On March 17, 2022, this Court ordered oral argument on Peeler's application, (Pl's Ex B), and on March 30, 2022, this Court ordered oral argument on Baird's application as well, (Pl's Ex C).

2. Defendant Lyon's Motion to Dismiss

On July 2, 2021, Lyon filed the motion to dismiss that is the subject of this appeal. Defendants Ambrose, Baird, and Peeler joined Lyon's motion. (See Def's Ex A, p 1.) In his motion, Lyon raised three arguments: (1) the one-person grand jury does not have the power to indict, (2) if it does have the power to indict, the one-person grand jury violates separation of powers, and (3) the grand jury proceedings in this case violated Lyon's due process rights. (See Def's App, p 3.)

The trial court denied Lyon's motion to dismiss. (Def's Ex A.) The court started out by recognizing that it had already decided some of the arguments that the defendants had raised. (*Id.* at 2.) The court expressed, however, that it would "give[] defendants the benefit of the doubt that they did not intentionally file inappropriate cumulative pleadings." (*Id.*)

The court proceeded to reiterate that the one-person grand jury does have the power to charge by indictment. Looking to the text of MCL 767.3 and MCL 767.4, as well as Michigan case law, the court explained that the one-person grand jury, like the citizen's grand jury, has the power to find probable cause and issue indictments. (Def's Ex A, pp 3–6.)

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From there, the court considered and rejected Lyon's argument that MCL 767.3 and MCL 767.4 violate the separation of powers. The court first noted that while "Defendant asserts that the one-person grand jury's constitutionality is an unsettled question . . . decades of Michigan Supreme Court precedent establish otherwise." (*Id.* at 7.) Looking to this Court's prior decisions, the trial court recognized that this Court expressly considered and rejected the argument that MCL 767.3 and MCL 767.4 violate the separation of powers. (*Id.* at 7–8.)

The trial court also concluded that the grand jury proceedings in this case did not violate due process, explaining that Lyon's claims that the proceedings violated the terms of the statutes did not "hold water." (Def's Ex A, p 10.)

Defendants Lyon, Peeler, and Baird filed applications for leave to appeal in the Court of Appeals. On March 22, 2022, Lyon filed a bypass application with this Court, and on March 23, 2022, this Court ordered oral argument on the application. (Pl's Ex A.) Peeler's and Baird's applications for leave to appeal in the Court of Appeals are yet pending as of the writing of this brief.

STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss is reviewed for an abuse of discretion. *People v Bylsma*, 493 Mich 17, 26 (2012). Underlying questions of statutory interpretation and constitutional law are reviewed de novo. *Id.*; *People v Trakhtenberg*, 493 Mich 38, 47 (2012).

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SUMMARY OF ARGUMENT

This Court asked the parties to brief four issues: (1) whether MCL 767.3 and MCL 767.4 confer charging authority, (2) whether those statutes violate separation of powers, (3) whether a defendant charged under those statutes is entitled to a preliminary examination, and (4) whether the proceedings conducted in this case violated due process.

Regarding the first issue, the answer is in the name—the one-person grand jury, like the traditional grand jury, has the power to issue indictments. And the one-person grand jury is accurately named; the text of MCL 767.3 and MCL 767.4, their amendment history, and the cases interpreting them all confirm this. Similarly, the text, amendment history, and case law all support the fact that the one-person grand jury initiates criminal proceedings by issuing indictments.

Regarding the second issue, this Court has already determined that the one-person grand jury does not violate the separation of powers, first in *In re Slattery*, 310 Mich 458 (1945), and again in *In re Colacasides*, 379 Mich 69 (1967). This Court's holding in *Colacasides* was broad: "[T]he one-man grand jury statute does not violate either our State Constitution's separation of powers provision or the Fourteenth Amendment's due process clause." *Id.* at 75. And, given that the appellant in that case had been indicted by a one-person grand jury, this Court was clearly aware of the one-person grand jury's charging power. *Id.* at 78.

This Court identified three reasons for upholding the constitutionality of the one-person grand jury, each of which withstands scrutiny, even when specifically considering the one-person grand jury's charging power. Those reasons are:

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(1) Like a traditional grand jury, the judge acting as a one-person grand jury performs a judicial, not an executive, function when it issues indictments.

(2) Even if the judge acting as one-person grand jury performs an executive function when issuing charges, Const 1963, art 6, § 29 granting judges the powers of conservators, permits this.

(3) The Legislature has ensured that a judge cannot exercise the full power of either the executive or the judicial branch when acting as a one-person grand jury.

Putting aside the substantive arguments, Lyon's constitutional challenge must also fail because the proceedings *in this case* did not violate the separation of powers. As a result, Lyon's facial challenge to the statute fails. Finally, principles of stare decisis weigh heavily against overturing this Court's precedent in this case.

Regarding the statutory entitlement to a preliminary examination, MCL 767.3 and MCL 767.4, by their plain language, do not require a preliminary examination. In the interest of judicial economy, this brief incorporates by reference the arguments set forth in the People's brief in *People v Peeler* and *People v Baird*, to be argued alongside this case.

Regarding due process, Lyon does not, in any meaningful way, make a due process argument. Instead, he identifies numerous perceived "irregularities" in the one-person grand jury proceedings. Upon closer inspection, each of these is based on either a misreading of the statutes or has no basis in the statutes at all.

Ultimately, Lyon treats as an open question an issue that this Court correctly decided twice-over. This Court should deny Lyon's application for leave to appeal.

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ARGUMENT

I. The one-person grand jury has the power to issue charges.

Whether MCL 767.3 and MCL 767.4 confer charging authority on a judge acting as one-person grand jury is a threshold question to Lyon's separation-of-powers argument. If the statutes do not confer charging authority, then Lyon's constitutional challenge dissipates. (Def's App, p 17.)

But the one-person grand jury, like the citizen's grand jury, does issue charges. Both the text of the one-person grand jury statutes and the past century of Michigan case law interpreting those statutes require this conclusion.

A. MCL 767.3 and MCL 767.4 create a grand jury.

The one-person grand jury statutes, MCL 767.3 and MCL 767.4, are not an easy read.[1] First enacted in 1917, and refashioned several times since, the statutes' complicated history is reflected in their dense text.

The general outline of the proceedings authorized by the statutes is clear. The proceedings begin with either "the filing of any complaint" or "the application" of a prosecutor or the Attorney General. MCL 767.3. If the judge reviewing the complaint or application finds "probable cause to suspect that any crime, offense or misdemeanor has been committed within his [or her] jurisdiction," the judge (or

[1] MCL 767.3 and MCL 767.4 create the one-person grand jury and are the focus of Lyon's constitutional challenge. MCL 767.4 through MCL 767.6b, however, also govern one-person grand jury proceedings. See generally 1951 PA 276 (Pl's Ex. __).

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another judge in that court) may conduct an inquiry. *Id.* The "judge conducting the inquiry" is authorized to compel witnesses to appear and to testify. *Id.*

At the conclusion of the proceedings, if the judge finds "probable cause to suspect any person to be guilty" of "any offense," then the judge may order the person's arrest. MCL 767.4. The case is then transferred to "the judge having jurisdiction," who is to proceed with the case "in like manner as upon formal complaint." *Id.* The judge who conducted the inquiry is, at this point, "disqualified" from any further involvement in the case. *Id.*

Beyond these basic characteristics, and relevant to the issues before this Court, the text and its statutory history compel two additional conclusions. First, the proceedings authorized by MCL 767.3 and MCL 767.4 are grand jury proceedings. Second, the judge conducting the proceedings is authorized to issue charges at the conclusion of those proceedings.

1. The statutes, by their plain language, create a grand jury.

MCL 767.3 and MCL 767.4 explicitly refer to the authorized proceedings as a "grand jury." MCL 767.3 provides that "[a]ny person called before *the grand jury*," (emphasis added), has a right to counsel. Similarly, MCL 767.4a, which was enacted alongside amendments to MCL 767.3 and MCL 767.4, protects the secrecy of any documents "used in connection with any grand jury inquiry." See 1949 PA 311 (Pl's Ex. I.) Thus, the statutes, by their plain language, consider the judicial inquiry to be a grand jury proceeding.

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Moreover, examining the nature of the proceedings authorized by MCL 767.3 and MCL 767.4, the parallels to the grand jury process are obvious. Like a grand jury, the proceedings authorized by MCL 767.3 and MCL 767.4 are initiated for the purpose of investigating alleged crimes. See MCL 767.3; *People v Lay*, 193 Mich 476, 485 (1916) ("A grand jury is convened for the general purpose of investigating all such charges of crime as may be brought to its consideration."). Like a grand jury, the judge conducting the proceedings is granted the power to compel witness to appear and testify under threat of contempt. See MCL 767.3; MCL 767.5; MCL 767.19c. As with the grand jury, witnesses appearing to testify are entitled to counsel. MCL 767.3; MCL 767.19e. As with the grand jury, the prosecutor or attorney general may participate in the proceedings. See MCL 767.3; MCL 767.4; MCL 767.20. And, like a grand jury, the proceedings are protected by strict secrecy provisions. See MCL 767.4; MCL 767.18; MCL 767.19f. Thus, the judicial inquiry is not a "grand jury" in name only; it also acts like a grand jury.

The statutory history of MCL 767.3 and MCL 767.4 further cements this conclusion. When the statutes were first enacted in 1917, they explicitly incorporated the law governing grand juries, at least in part, into the newly created proceedings. See 1917 PA 197, § 2 (Pl's Ex. G) (providing that the secrecy of the proceedings would "be governed by the provisions of law relative to grand jurors"). In 1949, just over thirty years after first enacting MCL 767.3 and MCL 767.4, the Legislature overhauled the two statutes. See 1949 PA 311 (Pl's Ex. I.) Rather than a single judge conducting the proceedings, the proceedings would now be conducted

by a panel of three judges. *Id.*, § 3. The statutes repeatedly referred to the investigating body as a "grand jury." The prosecutor participating in the proceedings was a "grand jury prosecutor." *Id.*, § 3. And participants in the proceedings were bound to secrecy "while in the services of said grand jury or after his services with the grand jury." *Id.*, § 4. When the Legislature returned to the single-judge proceedings three years later, it continued to refer to investigating body as a "grand jury," as is reflected in the current versions of the statutes. See 1951 PA 276 (Pl's Ex. J.)

Finally, the title of the chapter containing MCL 767.3 and MCL 767.4 only further confirms that the Legislature intended the entity created by those statutes to be a grand jury. See *People v Bruce*, 504 Mich 555, (2019) (explaining that "statutory titles" and "chapter titles," while not controlling, can be "useful navigational aids"), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012), pp 221–222. In 1927, when MCL 767.3 and MCL 767.4 were incorporated into the newly formed Code of Criminal Procedure, they were placed in Chapter VII, which was (and is) entitled "Grand Juries, Indictments, Information and Proceedings Before Trial." 1927 PA 175 (Pl's Ex. H.)

The plain language, amendment history, and statutory title all speak with one voice: the Legislature's intent with MCL 767.3 and MCL 767.4 was to create a single-member grand jury.

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2. The courts have recognized that the proceedings authorized by the statutes are grand jury proceedings.

Not surprisingly, given the clear indications in the text that MCL 767.3 and MCL 767.4 create a single-member grand jury, Michigan courts have, from early on, recognized the institution as a grand jury and have accepted the title "one-person grand jury" as appropriate.[2]

In *People v Doe*, decided only a few years after the statutes were first enacted, this Court unquestioningly described the judge below as "sitting as one man grand jury." 226 Mich 5, 6 (1924). Over the next twenty years, this Court continued to refer to the "one-man grand jury," "one-man grand jury proceeding[s]," and "one-man grand jury investigation[s]." See, e.g., *People v Wolfson*, 264 Mich 409, 410–412 (1933); *People v O'Hara*, 278 Mich 281, 292–293 (1936); *People v St. John*, 284 Mich 24, 24–25 (1938).

In 1945, this Court addressed the title head-on. In *Slattery*, this Court explained that a proceeding conducted under MCL 767.3 and MCL 767.4 (then 1929 CL 17217, *et seq*.) "is popularly known as a 'one man grand jury' proceeding." *Slattery*, 310 Mich at 461. This Court noted that the title "may be a misnomer" but went on to conclude that "it nevertheless is descriptive, and we refer to the examination as that of a 'one man grand jury.'" *Id.*

[2] The courts have historically used the title "one-man grand jury." More recently, the courts have used the title "one-person grand jury." See, e.g., *People v Green*, 322 Mich App 676 (2018). This brief uses the latter title.

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In the years since *Slattery*, Michigan courts have continued to recognize the title as appropriate through consistent use. See, e.g., *People v Pichitino*, 337 Mich 90, 94 (1953); *Colacasides*, 379 Mich at 74; *People v Cash*, 388 Mich 153, 155 (1972); *People v McIntire*, 461 Mich 147, 149 (1999); *People v Green*, 322 Mich App 676, 679 (2018), lv den 504 Mich 963 (2019).

Even the federal courts have relied on the title. See, e.g., *Ringstaff v Mintzes*, 539 F Supp 1124, 1129 (ED Mich, 1982) (discussing Michigan's "two different types of grand juries: the general grand jury and the one-man grand jury"); *Wiskotoni v Michigan National Bank-West*, 716 F2d 378 (CA 6, 1983) ("[O]ne-man grand juries are authorized by Mich. Comp. Laws § 767.3 *et seq*.").

Lyon, in arguing that MCL 767.3 and MCL 767.4 do not create a grand jury, latches onto the comment in *Slattery* that the title "may be misnomer." [3] (Def's App, p 18); *Slattery*, 310 Mich at 461. In light of the title being a "misnomer," Lyon elects to exclusively use the title "one-person judicial inquiry," rather than "one-person grand jury." (Def's App, p 18 & n 12.) In so doing, Lyon turns a blind eye to not

[3] Lyon assumes that this Court referred to the title as a possible "misnomer" because it questioned the nature of the proceedings. But this Court likely considered the title a "misnomer" for a much simpler reason, based on the size of the "grand jury." As recognized by legal scholar Nino Monea, the title "one-man grand jury" is linguistically "a contradiction in terms. The word 'grand' jury refers to the size body--traditionally as many as twenty-three members--to distinguish it from a twelve member 'petit' jury used at trial." Nino Monea, *Grand Juries on the Grand River: A History of Citizen Grand Jury Investigations in Lansing*, 97 U Det Mercy L Rev 305, 349 (2020). A "one-man *grand* jury," Monea explains, "is like a two-door stretch limousine." *Id.* (emphasis added). See also Winters, *One-Man Grand Jury*, 28 J Am Jud Soc at 150 ("It is merely a historical accident that a trial jury should be termed 'petit' and an accusing jury 'grand.' Neither one is more grand or more petty than the other.")

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only the decades of cases from this Court preceding and following *Slattery*, but also *Slattery* itself. This Court in *Slattery* expressly adopted the title and has not deviated from that course since.

Interestingly, legal scholar Glenn R. Winters, writing shortly after *Slattery* was decided, noted as follows regarding the title "one-man grand jury":

> It is frequently referred to as a "misnomer," but there is nothing misleading about it, it gives a clear idea of the nature of the institution, and has been used freely and exclusively in briefs, opinions, and everywhere else, even by those who apologize for it. The Michigan Supreme Court, in the *Slattery* opinion, declares that in spite of some people calling it a "misnomer," the term is descriptive and will be used by the court. The time will come when the apologies will be discontinued. [Glenn R. Winters, *The Michigan One-Man Grand Jury*, 28 J Am Jud Soc 137, 150 (1945).]

As Winters predicted, Michigan courts have only become more confident in referring to the institution as a one-person grand jury, recognizing that the title accurately reflects the nature of the institution created by MCL 767.3 and MCL 767.4. The statutes' text, structure, and history attest that the institution created is a single-member grand jury.

B. The one-person grand jury, like the citizens' grand jury, issues indictments.

Given that the one-person grand jury is appropriately titled, it is not surprising that the one-person grand jury, like other grand juries, issues indictments. This is clearly reflected in the text of the statutes, Michigan case law, and the Court Rules enacted by this Court.

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1. MCL 767.3 and MCL 767.4 contemplate that the judge may issue charges at the conclusion of proceedings.

Just as both the plain language and the statutory history of MCL 767.3 and MCL 767.4 reflect that the institution created is a single-member grand jury, so both also reflect that this grand jury initiates criminal proceedings at the conclusion of the investigatory proceedings by issuing indictments.

That the one-person grand jury initiates criminal proceedings is evident from the first sentence of MCL 767.4: if the judge conducting the inquiry finds probable cause, then "he may cause the apprehension of such person," and "the judge having jurisdiction *shall proceed with the case*, matter or proceeding in like manner as upon formal complaint." MCL 767.4 (emphasis added). The parties dispute the meaning of "upon formal complaint" as it relates to whether the charged individual is entitled to a preliminary examination. But, as to whether the one-person grand jury issues charges, the statute is clear: if the grand jury finds probable cause, then the criminal case "shall proceed." See *People v Lockridge*, 498 Mich 358 (2015) ("As we have stated many times, 'shall' indicates a mandatory directive."). The one-person grand jury does not refer the case to the prosecutor's office, recommending that the prosecutor initiate criminal proceedings. The one-person grand jury, having found probable cause that a person committed specific crimes, initiates the proceedings to prosecute those crimes.

Earlier versions of the statutes are in accord. Prior to their amendment in 1947, the statutes authorized the judge conducting the inquiry to immediately proceed with the case upon finding probable cause: "If upon such inquiry the justice

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or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof . . . the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint." See 1927 PA 175 (Pl's Ex. H). Under the current version, the charges are transferred to a different judge, but the Legislative intent that the criminal proceedings shall commence immediately remains the same.

That the one-person grand jury issues charges are also established by the text's repeated references to the "indictment" that follows the one-person grand jury investigation. After the investigatory proceedings have concluded, the judge who conducted the proceedings may not preside over a "hearing on the complaint or *indictment*," or any "motion to dismiss or quash any complaint or *indictment*."[4] MCL 767.4 (emphasis added). And the statute penalizes any person "who shall disclose the fact that any *indictment for a felony* has been found against any person not in custody or under recognizance," unless "issuing or executing processes prior to the *indictment*." *Id.* (emphasis added).

The use of the term "indictment" confirms that it is the grand juror who issues charges, as an indictment is historically issued by a grand jury. Compare MCL 767.25 (providing that an indictment shall be certified by the foreman of the grand jury), with MCL 767.40 (providing that an information "shall be subscribed

[4] The reference to "complaint *or* indictment" is explained by the fact that the statutes authorize the grand jury to charge difference levels of offenses, i.e., misdemeanors (complaints) and felonies (indictments). See MCL 767.3 (initiating inquiry upon "probable cause to suspect that any crime, offense or misdemeanor has been committed"); MCL 767.4 (prohibiting disclosure of "felony indictment").

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by the prosecuting attorney"). See also 41 Am Jur 2d, Indictments & Informations, § 1 ("An 'indictment' is a grand jury's written accusation of crime."); *id.*, § 3 ("An information is a written accusation of criminal conduct prepared or filed by a prosecutor in the name of the State without the intervention of a grand jury."). Thus, the use of that term to describe the charging instrument that follows the proceedings authorized by MCL 767.3 and MCL 767.4 signals that it is the judge functioning as grand jury that issues the charges.[5]

Again, the statutory history is instructive. When the Legislature replaced the one-person grand jury with a three-judge grand jury in 1949, the statutes stated, "No order, decision or finding by said judges shall be valid unless concurred in by 2 of them: Provided, That *orders returning indictments shall be signed by 3 judges*." See 1949 PA 311 (Pl's Ex. I) (emphasis added). Obviously, when the Legislature returned to the one-judge format, it omitted this language—the number of signatures was no longer an issue. See 1951 PA 276 (Pl's Ex J). As demonstrated by its consistent use of the term, however, the Legislature has always intended that the grand jury created by these statutes issues indictments.

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[5] Lyon points out that MCL 761.1, the definitions section for the Code of Criminal Procedure, provides that "indictment" can mean, inter alia, "indictment," "information," "presentment," "complaint," or "warrant." MCL 761.1(g). But, rather than concluding that "the term indictment can mean anything," (Def's App, p 35 n 18), we must read the term in context to determine its meaning. See *People v Pinkney*, 501 Mich 259 (2018) ("We examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." (cleaned up)). Here, MCL 767.4 is found in Chapter VII of the Code of Criminal Procedure, which establishes and differentiates the procedures for indictments returned by grand juries and informations filed by prosecutors. In this context, the term "indictment" likely means "indictment," i.e., a grand jury's charging document.

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2. Michigan courts have recognized that the one-person grand jury, like the citizens' grand jury, has the power to issue indictments.

The courts, too, have recognized that the one-person grand jury issues indictments. Most recently, the Court of Appeals in *People v Green* recognized that MCL 767.3 and MCL 767.4 create an "alternative charging procedure." 322 Mich App at 687. In *Green*, the defendant argued that the one-person grand jury violated his Sixth Amendment rights to counsel and to confrontation. *Id.* at 683. He argued, among other things, that the one-person grand jury proceedings improperly replaced the preliminary examination. *Id.* at 687. The Court of Appeals, rejecting this argument, explained that the two procedures serve the same purpose: a probable cause determination by a judge. *Id.* at 687. Accordingly, the court explained, the one-person grand jury and the information following a preliminary examination are two equally valid charging mechanisms.[6] See *id.* at 686–687.

Lyon attempts to tease the opposite conclusion out of *Green*. The court in *Green*, in holding that the right to counsel had not attached, explained that "because the one-person grand jury 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." *Id.* at 685. Lyon argues that this holding "acknowledges that the judicial officer's function is limited to investigation, not charging." (Def's App, p 33.)

[6] This Court denied *Green's* application for leave to appeal. 504 Mich 963 (2019).

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Lyon misreads the case. The court in *Green* recognized that the defendant had no right to counsel during the one-person grand jury proceedings because charges had *not yet* been issued. *Id.* That the one-person grand jury issues charges *at the conclusion of the proceedings* is made clear by the fact that the defendant in *Green* "was indicted by a one-person grand jury." *Id.* at 681. See also *id.* at 685 ("See . . . MCL 767.4 (providing that the trial court 'shall proceed with the case' after the one-person grand jury returns an indictment).").

Further, while *Green* is helpful in its thorough discussion of the one-person grand jury, it is only one example. Michigan courts have consistently recognized that the one-person grand jury stands on equal footing with the citizen's grand jury. See, e.g., *Morris*, 228 Mich App at 382–383 (recognizing that Michigan grand juries are divided into "two specific subclassifications: one-man grand juries . . . and citizens' grand juries"); *Pichitino*, 337 Mich at 93–94 (recognizing the information, the citizens' grand jury, and the one-person grand jury as Michigan's three "methods of initiating criminal prosecutions"). And Michigan courts have decided numerous cases involving indictments issued by one-person grand juries. See, e.g., *People v Taylor*, 386 Mich 204, 206 (1971) (recognizing that defendant was indicted by one-person grand jury); *Colacasides*, 379 Mich at 76 (recognizing that appellant was indicted by one-person grand jury); *Baldori v Smith*, 219 Mich App 713, 716 (1996) (recognizing that plaintiffs were indicted by one-person grand jury). Thus, that the one-person grand jury issues indictments is settled in the Michigan courts.

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Lyon cites *Oakman v Recorder of City of Detroit*, 207 Mich 15 (1919), as supporting a contrary view. (Def's App, p 34 n 19.) Per Lyon, the judge conducting the inquiry in *Oakman* issued "an informal complaint and finding of probable cause," rather than an indictment. (*Id.*, quoting *Oakman*, 207 Mich at 20). Lyon asserts that *Oakman* reflects the Legislature's original intent for how the inquiries authorized by MCL 767.3 and MCL 767.4 would operate.

Only one problem: this Court in *Oakman* held that the informal finding of probable cause, unaccompanied by an indictment, was ultra vires. *Oakman*, 207 Mich at 23. This Court relied on its prior decision in *Bennett v Kalamazoo Circuit Judge*, 183 Mich 200, 212 (1914), which held that a grand jury does not have the authority to issue an informal report, finding evidence of wrongdoing, if the report is not accompanied by an indictment. On this basis, this Court in *Oakman* concluded that the judge conducting the inquiry, "acting either as a conservator of the peace or in the exercise of powers analogous to those possessed by grand juries," was not authorized to issue an informal finding unaccompanied by formal charges. *Oakman*, 207 Mich at 23.

Thus, *Oakman* supports the conclusion opposite that for which Lyon cites it. The *Oakman* judge was acting outside his authority precisely because he issued an informal finding of probable cause, rather than an indictment. Taken together, *Bennett* and *Oakman* only further support the conclusion that the one-person grand jury is authorized to issue charges via indictment.

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3. The Michigan Court Rules also recognize that the one-person grand jury issues indictments.

Finally, while not binding, the Michigan Court Rules also recognize that MCL 767.3 and MCL 767.4 confer the power to issues charges. The Court Rules, in several places, refer to proceedings conducted by "a grand jury or a grand juror." See MCR 6.005(J)(1); MCR 6.107(A). Most significantly, MCR 6.107 which sets forth the procedure for a defendant to obtain grand jury records, provides for the tendering of records "[w]henever an *indictment is returned by a grand jury or a grand juror*." MCR 6.107(A) (emphasis added).

Thus, the plain language of the statutory text, the cases interpreting the text, and the Court Rules arising out of the text are all in agreement on this point: the one-person grand jury, like a citizen's grand jury, has the power to issue charges in the form of an indictment.

II. MCL 767.3 and MCL 767.4 do not violate the separation of powers.

Lyon's primary argument is that the one-person grand jury's charging power violates the separation of powers provision of the Michigan Constitution.

Michigan's separation of powers provision is found in Article 3, § 2 of the Michigan Constitution of 1963, which reads:

> 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.

Regarding the proper interpretation of Article 3, § 2, this Court has explained:

> While the Constitution provides for three separate branches of government, Const. 1963, art. 3, § 2, the boundaries between these

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> branches need not be airtight. In fact, "[i]n designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. The true meaning of the separation-of-powers doctrine is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution. [*Makowski v Governor*, 495 Mich 465, 483 (2014) (cleaned up).]

A. This Court repeatedly has upheld the constitutionality of the one-person grand jury.

Lyon's separation of powers argument treads well-worn territory. In a long line of cases, dating back to shortly after the statutes' enactment, this Court has repeatedly upheld the one-person grand jury statutes against constitutional challenges, including those brought under the separation of powers. This Court's prior decisions dispose of Lyon's challenge.

1. Early cases.

In *Mundy v McDonald*, decided in 1921, this Court held that a judge serving as a one-person grand jury "acted in a judicial capacity." 216 Mich 444, 454 (1921). *Mundy* did not involve a constitutional challenge, but rather an action for libel brought against a judge serving as a one-person grand jury. *Id.* at 446. Thus, the question of whether a one-person grand jury exercises judicial powers arose in the context of whether the grand juror was protected by judicial immunity. *Id.* at 454. The Court concluded that the grand juror did exercise judicial powers: "What he did, he did as a circuit judge." *Id.*

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Just a few years later, in *People v Doe*, a defendant challenged the constitutionality of the one-person grand jury on the basis "that it confers nonjudicial duties on circuit judges." 226 Mich 5, 18 (1924) (opinion of Fellows, J). The Court rejected this challenge. *Id.*[7] Explaining the Court's reasoning on this point, Justice Fellows, in his concurrence, simply cited *Mundy*'s holding that a judge functioning as a one-person grand jury acts in a judicial capacity. *Id.*

2. *In re Slattery.*

Two decades later, in *Slattery*, this Court revisited the question and analyzed the issue in more depth. Like *Doe*, *Slattery* involved a constitutional challenge on the basis that the one-person grand jury statutes "impose non-judicial duties on a judge." *Slattery*, 310 Mich at 463. In upholding the statutes' constitutionality, this Court in *Slattery* relied on several legal principles.

First, this Court explained that the one-person grand jury serves the same function as the historical grand jury, itself a judicial body. *Id.* at 465. Looking to U.S. Supreme Court precedent, the *Slattery* Court recognized that "[t]he Constitution itself makes the grand jury a part of the judicial process," *id.*, quoting *Cobbledick v United States*, 309 U.S. 323, 327 (1940), and that "[t]he proceeding before a grand jury constitutes 'a judicial inquiry,'" *id.*, quoting This Court went on to explain that the one-person grand jury statutes "serve the same purpose as the

[7] This Court in *Doe* affirmed by equal division. As this Court explained in a later opinion, "the question upon which there was a disagreement was not as to the constitutionality of the act but whether defendant, an attorney, was obliged to disclose information which he claimed was confidential." *Slattery*, 310 Mich at 467.

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constitutional provisions in regard to grand juries in other jurisdictions." *Id.* For this reason, the statutes "do not impose non-judicial duties upon the judiciary." *Id.*

Second, this Court reasoned that Michigan circuit judges are "conservators of the peace." *Id.* at 466, citing Const 1908, art 7, § 18. Conservators, this Court explained, historically held "the authority to apprehend offenders against the criminal laws of the state, and to hold examinations, and commit, bind over, or hold to bail, as well as other authority exercised by conservators of the peace." *Id.* at 466, quoting *Averell v Perrott*, 74 Mich 296, 298 (1889). Accordingly, when a circuit judge takes up the mantle of grand jury, he or she is "neither a prosecuting attorney, policemen or detective," but performs "judicial duties" and "proceed[s] in a judicial capacity." *Id.*

Third, and finally, this Court noted the line of cases dating back to *Mundy* recognizing the judicial nature of one-person grand jury proceedings. *Id.*, citing *Mundy*, 216 Mich at 444, *Doe*, 226 Mich at 5, *Wolfson*, 264 Mich at 409, and *St. John*, 284 Mich at 24. Having "re-examined [the issue] with extreme care," this Court in *Slattery* concluded, "So that there may be no further question, we hold that the judge conducting a one man grand jury proceeding is acting in a judicial capacity."[8] *Id.* at 467. The petitioner in *Slattery* sought review from the U.S. Supreme Court, but the Court denied certiorari. 325 US 876 (1945).

[8] Notably, this Court also explicitly considered and rejected then-Judge Cardozo's reasoning in *In re Richardson*, 247 NY 401 (1928), which Lyon cites as persuasive authority. *Slattery*, 310 Mich at 463–464; (Def's App, p 23, 27.)

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3. *In re Colacasides.*

Finally, in *Colacasides*, this Court again considered whether MCL 767.3 and MCL 767.4 violate the separation of powers. The appellant in that case had been indicted by a one-person grand jury for conspiracy and later held in contempt for refusing to testify at a subsequent one-person grand jury proceeding investigating the same subject matter. *Colacasides*, 379 Mich at 76–78. On appeal from the contempt conviction, the appellant argued that the one-person grand jury statutes violated both the separation of powers and due process. *Id.* at 89.

In upholding the constitutionality of the one-person grand jury, this Court in *Colacasides*, even more so than in *Slattery*, relied on the historical powers of a conservator of the peace. *Id.* at 90–93. Conservators of the peace, this Court recognized, "were empowered to make investigations and 'get up' a case." *Id.* at 93. Thus, this Court concluded that, even if the one-person grand jury exercises executive powers, it is authorized to do so by Article 6, § 29. *Id.* at 91.

This Court further noted that the records of the recent Constitutional Convention supported this conclusion. *Id.* at 94. At the Constitutional Convention of 1961 and 1962, the delegates debated whether to omit the provision granting judges the powers of conservators. *Id.*, citing 2 Constitutional Convention 1961 Record, p 2703. The delegates, after discussing *Slattery* at length, voted to include Article 6, § 29, in the Constitution in order to preserve the validity of the one-person grand jury. *Id.* at 94–95. Considering this history, this Court in *Colacasides* concluded "that the delegates correctly regarded the 'conservator' clause as important to the constitutional validity of our one-man grand jury law." *Id.* at 96.

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Ultimately, this Court concluded that "the one-man grand jury statute does not violate either our State Constitution's separation of powers provision or the Fourteenth Amendment's due process clause." *Id.* at 75. Notably, while this Court's conclusion as to the constitutionality of the one-person grand jury was unanimous, three justices wrote separately to opine that the majority's conservator of the peace analysis was not necessary, given that *Slattery* had already decided the issue. See *id.* at 101 (Adams, J, concurring); *id.* (Kavanagh, J, concurring).

B. Lyon's attempt to distinguish this precedent is not persuasive.

Lyon attempts to neatly sweep aside one hundred years of precedent by making one distinction—he argues that *Colacasides* addressed only the one-person grand jury's power to investigate, not its power to indict. (Def's App, pp 25–28.) According to Lyon, his constitutional challenge concerns only the latter, meaning that *Colacasides* does not control. This argument fails for several reasons.

Most importantly, Lyon reads *Colacasides* too narrowly. This Court's holding in *Colacasides* was stated broadly: "[T]he one-man grand jury statute does not violate either our State Constitution's separation of powers provision or the Fourteenth Amendment's due process clause." *Colacasides*, 379 Mich at 75. And while this Court's analysis largely focused on the investigative functions of the grand jury, nowhere did this Court expressly limit its holding or reserve for another day the question of whether the one-person grand jury's charging power violates the separation of powers.

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Moreover, this Court in *Colacasides* was fully aware that the one-person grand jury issued indictments. See *id.* at 78 ("[A]ppellant had been indicted by Grand Juror Piggins . . . ."). Thus, this Court understood the implications of its holding and meant what it said: "[T]he one-man grand jury statute does not violate . . . our State Constitution's separation of powers provision." *Id.* at 75.

In arguing that the constitutionality of the one-person grand jury is still an open question, Lyon relies heavily on one line of dicta from *People v Bellanca*, 386 Mich 708 (1972), in which this Court considered a defendant's right to grand jury records. After holding that a defendant indicted by a one-person grand jury is entitled to a transcript of his testimony, the Court in *Bellanca* commented that "[t]he constitutionality of a system whereby a Judge accuses a person of crime may not withstand our re-examination." *Id.* at 715. The Court provided no reason for questioning the constitutionality of the statutes, nor did the Court cite *Colacasides*, *Slattery*, or any of the preceding cases addressing the issue. Lyon largely builds his argument around this statement. (See Def's App, pp 1, 17, 27, 42.)

But *Bellanca*'s subsequent procedural history only confirms that the constitutionality of the one-person grand jury is a settled question.[9] On remand from this Court in *Bellanca*, the trial court, inspired by this Court's line in its

[9] Notably, by stating that "[t]he constitutionality of a system whereby a Judge accuses a person of crime may not withstand our *re-examination*," (emphasis added), this Court recognized that its prior examination (i.e., *Slattery* and *Colacasides*) concluded that the one-person grand jury's charging power is constitutional. This rebuts Lyon's assertion that *Colacasides* did not consider the one-person grand jury's charging power in upholding its constitutionality.

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opinion, declared the one-person grand jury unconstitutional. *People v Bellanca (On Remand)*, 43 Mich App 577, 579 (1972). The Court of Appeals reversed, holding that the trial court had exceeded its authority in reaching the constitutional question. *Id.* at 580. The Court of Appeals explained that the referenced line of this Court's opinion was "dictum" and that "[t]he Supreme Court of this State in a series of opinions beginning with *In re Slattery*, and as recently as *In re Colacasides*, has sustained the constitutionality of the One-Man Grand Jury statute." *Id.* (citations omitted). This Court denied leave to appeal from this opinion. 389 Mich 753 (1972).

In the fifty years since *Bellanca* was decided, this Court has declined to revisit the constitutionality of the one-person grand jury and has denied leave to appeal in at least one case raising a constitutional challenge to the procedure. See *Green*, 322 Mich App at 676, lv den 504 Mich 963 (2019). As recognized by the Court of Appeals in *Bellanca*, the constitutionality of the one-person grand jury is a settled question.

C. *Slattery* and *Colacasides* were correctly decided.

Having determined that this Court's prior decisions already answer the question that Lyon raises, the next question is whether those prior decisions were correctly decided. In other words, could the constitutionality of the one-person grand jury's charging power "withstand [this Court's] re-examination"? *Bellanca*, 386 Mich at 715. Taking a deeper dive into this Court's reasoning in both *Slattery* and *Colacasides*, those cases do indeed withstand reexamination.

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In *Slattery* and *Colacasides*, this Court identified at least three reasons for concluding that the one-person grand jury does not violate the separation of powers, each of which, on further consideration, remains valid. First, the judge functioning as a one-person grand jury, like the traditional grand jury, performs a judicial function. Second, even if judge functioning as a one-person grand jury exercises executive powers, the Michigan Constitution authorizes the judge to do so by defining the officeholder as a conservator of the peace. Third, and finally, the one-person grand jury statutes carefully avoid any potential conflicts of interest that could give rise to separation of powers concerns. For each of these reasons, this Court can confidently reaffirm the constitutionality of MCL 767.3 and MCL 767.4.

1. The one-person grand jury, like the citizens' grand jury, performs a judicial function when it issues indictments.

As discussed above, this Court in *Slattery* recognized that "[t]he one-person grand jury statutes of this State . . . serve the same purpose as the constitutional provisions in regard to grand juries in other jurisdictions." *Slattery*, 310 Mich at 465. While *Slattery*'s discussion on this point was brief, the underlying legal principles are sound.

As an initial matter, nothing prohibited the Michigan Legislature from creating a single-member grand jury. The states, not bound by this facet of the Fifth Amendment, are free to modify or abolish the traditional grand jury. See *Hurtado v California*, 110 US 516, 538 (1884). See also Scigliano, *One-Man Grand Jury*, p 11 ("[The States] may modify the powers, the size, or other features of the

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common law grand jury, or they may, if they choose, abolish the grand jury entirely."). Indeed, nothing prevents the States from reducing the size of the grand jury "even to a single member." *In re Oliver*, 333 US 257, 283–284 (1948) (Frankfurter, J, concurring). In Michigan, the Legislature has exercised its Constitutional latitude to adopt multiple charging mechanisms, including the one-person grand jury. See *Pichitino*, 337 Mich at 94.

Lyon asserts, however, that the one-person grand jury statutes, by conferring the power to charge on a member of the judiciary, divests the prosecutor of a "purely executive authority" that cannot be delegated to another branch. (Def's App, pp 21–24.) In support, Lyon cites cases standing for the general rule that prosecutors are allowed discretion when making charging determinations. See *Genesee Prosecutor v Genesee County Circuit Judge*, 386 Mich 672, 684 (1972) (trial court lacked authority to amend the information filed by the prosecutor); *People v Muniz*, 259 Mich App 176, 178–179 (2003) (same); *People v Nelson*, 66 Mich App 60, 65–66 (1975) (trial court lacked authority to dismiss charges filed by prosecutor); *People v Morrow*, 214 Mich App 158, 165 (1995) (same); *People v Williams*, 244 Mich App 249, 251 (2001) (same); *People v Jones*, 252 Mich App 1, 11 (2002) (trial court lacked authority to prevent prosecutor from dismissing charges); *People v Conat*, 238 Mich App 134, 149–150 (1999) (prosecutorial discretion affecting the severity of punishment does not violate separation of powers). Lyon asserts that "[g]ranting a judicial officer charging authority would go far beyond" the improper conduct rejected by these cases. (Def's App, p 23.)

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Lyon's assertion, however, ignores the fact that the traditional grand jury—also a judicial body—holds power to charge as well. Just as the traditional grand jury issues charges without violating the separation of powers, so too does the one-person grand jury.

The power of the grand jury to investigate and indict is clearly established. From its conception, "the grand jury perform[ed] three functions: it is an accusative body, it is an inquisitorial body, and it is a protective body." Scigliano, *The Michigan One-Man Grand Jury*, p 8. "The accusative function of the grand jury is the most ancient of the grand jury's three functions." *Id.* This is reflected in the U.S. Constitution, which mandates that, in federal courts, no person may be tried "unless on a presentment or indictment of a Grand Jury." U.S. Const, Am V.

Historically, the grand jury has held the authority to act independently of the prosecutor, meaning that it may investigate and charge crimes of its own accord. At common law, the grand jury would issue charges independently via a presentment, which the prosecutor was then obligated to act upon. See Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 Creighton L Rev 821, 836–838 (2000) ("In early America, a presentment was thought to be an indictment without a prosecutor's signature and a mandate to a district attorney to initiate a prosecution.") See also *Bennett*, 183 Mich at 204–207 (discussing the function of the presentment at common law).[10]

[10] In *Bennett*, this Court rejected the grand jury's issuance of an informal "report," containing only general accusations, not formal charges. *Bennett*, 183 Mich at 212. In discussing the role that presentments historically played, this Court, quoting

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The U.S. Supreme Court, in the context of considering whether a grand jury could proceed in the absence of a specific charge brought by a prosecutor, explained as follows regarding the powers of the grand jury:

> We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that, in summoning witnesses, it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. [*Hale*, 201 US at 65, overruled on other grounds by *Murphy v Waterfront Com'n of New York Harbor*, 378 US 52 (1964).]

Similarly, in *Frisbie v United States*, the Court recognized that "in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment." 157 U.S. 160, 163 (1895).

Today, in the federal courts, the Federal Rules of Criminal Procedure require that all indictments be signed by an attorney from the government, thus precluding federal grand juries from issuing indictments independently of the prosecutor. See

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Blackstone, explained, "A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king . . . upon which the officer of the court must afterwards frame an indictment." *Id.* at 205, quoting 4 Blackstone, Commentaries, p 301. As recognized by Justice Ostrander in his concurrence, the "report" issued by the grand jury in that case was not a proper "presentment" in the historical sense. *Id.* at 212 (Ostrander, J, concurring).

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Rehberg v Paulk, 566 US 356, 372 n 2 (2012). In other jurisdictions, however, "the grand jury may return an indictment and initiate a prosecution without the prosecutor's signature."[11] *Id.* See also LaFave, Criminal Procedure, § 13.3(d) (4th ed.) ("Most jurisdictions permit the grand jury to initiate prosecution by indictment even though the prosecutor opposes prosecution."); Scigliano, *One-Man Grand Jury*, pp 12–13 ("Although it meets only at the call of the circuit court, the [citizens'] grand jury is not limited to crimes placed before it by the court, nor to the bills of the prosecuting attorney.").

This Court has noted that the one-person grand jury exercises this historical power. See *St. John*, 284 Mich at 28. In the context of holding that the one-person grand jury has jurisdiction "to investigate into any crimes that might be brought to his attention," this Court recognized that the powers of the one-person grand jury are "analogous to the power of the old grand jury to make independent inquiry into offenses as to which no formal bill of indictment had been filed by the prosecuting officer." *Id.*, citing *Bennett*, 183 Mich at 205.

Thus, while Lyon is correct that the courts typically cannot interfere with the prosecutor's charging discretion,[12] Lyon is not correct in asserting that issuing

[11] The Code of Criminal Procedure requires only the grand jury foreman to sign an indictment. See MCL 767.23; 1 Gillespie Mich Crim Law and Proc § 8:17 (2d ed.).

[12] Even this rule is not absolute. See *Genesee County Prosecutor v Genesee Circuit Judge (Genesee II)*, 391 Mich 115, 121 (1974) (explaining that a judge may "reverse or revise" a prosecutor's decisions "only if it appears on the record that they have abused the power confided to them").

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charges is a purely executive function that can never be shared with another branch of government. At common law and today, the grand jury has also issued charges.

Moreover, the fact that MCL 767.3 and MCL 767.4 confer charging authority on a member of the judiciary does not mean that the one-person grand jury violates separation of powers while the traditional grand jury does not. This Court in *Slattery* recognized that grand jury proceedings are inherently judicial in nature. See *Slattery*, 310 Mich at 465. The grand jury is "a part of the judicial process" and "constitutes a judicial inquiry of the most ancient lineage." *Id.*, quoting *Cobbledick*, 309 US at 327. This Court has elsewhere described the grand jury as "an arm of the court." *In re Archer*, 134 Mich 408, 410 (1903). See also Toomey, *Discretionary Power in the Judiciary to Organize a Special Investigating Grand Jury*, 111 U Pa L Rev 954, 959 (1963) (describing the grand jury as "'an arm of the court' whose investigations were fundamentally judicial"). And, under the Code of Criminal Procedure, it is a judge who convenes a grand jury, MCL 767.7, and presides over the grand jury proceedings, MCL 767.25(3).

Thus, the one-person grand jury serves the same purpose as the traditional grand jury and exercises the same powers: investigating crimes and issuing charges. And the one-person grand jury, like the traditional grand jury, performs a judicial function. Accordingly, as *Slattery* properly recognized, the one-person grand jury does not offend the separation of powers.

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2. The one-person grand jury exercises the powers of a conservator of the peace.

This Court, in both *Slattery* and *Colacasides*, recognized another basis for upholding the constitutionality of the one-person grand jury: under Article 6, § 29 of the Michigan Constitution, Michigan judges are also conservators of the peace.[13] *Slattery*, 310 Mich at 465–466; *Colacasides*, 379 Mich at 90–91. In *Slattery*, this Court relied on this provision to further confirm that a one-person grand jury performed a judicial function. *Slattery*, 310 Mich at 466. Later, in *Colacasides*, this Court clarified that, even if a one-person grand jury wields executive powers, the judge is authorized to do so as a conservator of the peace. *Colacasides*, 379 Mich at 91 ("[T]he exercise of such powers would not violate Art. III, § 2, either because they are judicial in nature or because, if executive, they are expressly authorized by Art. VI, § 29.").

Lyon attacks this reasoning on two bases.

First, Lyon accuses this Court in *Colacasides* of "reflexively incorporating the English Common law of the 14th century into the Michigan Constitution." (Def's App, p 26.) He argues that the separation of powers has come a long way in the last 400 years: just "because the Magistrate of Nottingham may or may not have had the power to engage in 'indicting'" does not mean "that Judges can be prosecutors in 2021." (*Id.* at 27.)

[13] When *Slattery* was decided, this provision was found in Const 1908, art 7, § 18. Also, Const 1963, art 6, § 29, is now codified in MCL 762.1a.

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This argument makes little sense, given that Article 6, § 29, incorporates the English common law. 379 Mich at 90–91. Thus, Lyon argues not against this Court's reasoning, but against the Michigan Constitution.

Second, Lyon argues that conservators of the peace did not hold the power to charge crimes, meaning that Article 6, § 29, does not give the one-person grand jury the power to issue charges. (Def's App, pp 25–26.) Based on the history of the office, Lyon concludes that conservators were limited to investigations into crime and were never authorized to issue charges. (*Id.*)

A brief examination of the history of the office, however, makes clear that conservators of the peace exercised broad, executive powers, essentially performing all the duties of law enforcement.

The original conservators of the peace were knights tasked with enforcement of the law. See *Colacasides*, 379 Mich at 92, quoting Taswell-Langmead, English Constitutional History (11th ed), p 126 ("In the appointment of knights to receive the oaths may probably be discerned the germ of the office of conservator, later justice, of the peace."). See also 1 Stubbs, Constitutional History of England (6th ed) ("The enforcement of the edict was committed to knights assigned for the purpose; this is probably the origin of the office of the conservator of the peace, out of which, in the reign of Edward III, the existing functions of the justices of the peace were developed . . . ."); 1 Robinson, English Institutions, p 451 ("Knights assigned to enforce the oath of peace, and the hue and cry, appear as early as the year 1195.").

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Later, when the office developed into the conservator of the peace, the officeholders continued to be tasked with general enforcement of the law. See *Colacasides*, 379 Mich at 92, quoting Taswell-Langmead, English Constitutional History, p 126 ("*Custodes pacis* were assigned in 1252, 1253, and 1264, and from 1285 were closely associated with the enforcement of the statute of Winchester."). See also 3 Burn, The Justice of the Peace and the Parish Officer (17th ed), p 4 ("The general duty of the conservators of the peace by the common law, is to employ their own, and to command the help of others, to arrest and pacify all such who in their presence, and within their jurisdiction, shall go about to break the peace." (cleaned up)).

The office of conservator was broad, incorporating virtually all public officers involved in law enforcement. See Burn, Justice of the Peace, p 2 (explaining that the lord chancellor, courts of record, justices of the peace, coroners, and constables, were all properly considered conservators of the peace).

Not surprisingly, then, conservators of the peace, and later justices of the peace, were involved in all aspects of the law enforcement. Indeed, "[t]he principal organ of county government in fact [was] the justices of the peace." *Colacasides*, 379 Mich at 92 (cleaned up), quoting Taswell-Langmead, English Constitutional History, pp 685–686. As explained by legal historian Sir James Fitzjames Stephen:

> The foundation of the whole system of criminal procedure was the prerogative of keeping the peace, which is as old as the monarchy itself, and which was, as it still is, embodied in the expression, "The King's Peace," the legal name of the normal state of society. This prerogative was exercised at all times through officers collectively described as the Conservators of the Peace. The King and certain

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> great officers (the chancellor, the constable, the marshal, the steward, and the judges of the King's Bench) were conservators of the peace throughout England, but the ordinary conservators of the peace were the sheriff, the coroner, the justices of the peace, the constable, each in his own district. [Fitzjames Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century*, in 2 Select Essays in Anglo-American Legal History (1908), p 444.]

This Court has recognized the broad nature of the powers of the conservator. In *Sanderson*, on which *Colacasides* relied, this Court stated that "[c]onservators of the peace appear to have been regarded as no more judicial than executive officers" and that "several of the high executive functionaries exercised their powers." *In re Sanderson*, 289 Mich 165, 170 (1939), quoting *Daniels v People*, 6 Mich 381, 390 (1859). And in *Colacasides*, this Court quoted historian R.M. Jackson's observation that this power "was in the nature of police powers in 'getting up' a case, not really a judicial activity and suitable only for a society that lacked an adequate police force." *Colacasides*, 379 Mich at 93, quoting Jackson, *The Machinery of Justice in England* (4th ed, 1964), pp 92–93.

In arguing that conservators exercised only limited powers, Lyon points to this Court's statement in *Colacasides* that conservators would "take" charges. 379 Mich at 92, quoting Taswell-Langmead, English Constitutional History, pp 685–686. Lyon takes this to mean that conservators would literally "take" a charge from a prosecutor, contrasted with "making" charges, a term that Lyon invents. (Def's App, p 26.) But prosecutors were not involved in the process of initiating criminal proceedings until later in history. As R.M. Jackson explained regarding the "preliminary inquiry" into the commission of a crime:

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> Since the creation of efficient police forces during the last century the nature of preliminary inquiries by justices has changed. It is no longer any part of the justices' duty to 'get up' the case. Their duty is to ascertain whether the prosecution has produced evidence on which the accused ought to stand trial. [R.M. Jackson, The Machinery of Justice in England (3d Ed., 1960), p 92.]

Similarly, Fitzjames Stephens wrote regarding the preliminary inquiry:

> Speaking generally, the difference between the procedure established in the sixteenth century and the procedure of the nineteenth is that under the first the magistrate acts the part of the public prosecutor, whereas under the second he occupies the position of preliminary judge. [Fitzjames Stephnes, *Criminal Procedure*, p 461.]

Thus, when conservators were "taking" indictments or "getting up" a case, they were not reviewing charges brought by prosecutors, as Lyon argues. Conservators were tasked with determining charges. Not until later did prosecutors fill this role.

Of course, Lyon is correct that the office of justice of the peace eventually developed into an exclusively judicial role. (See Def's App, p 26.) But Article 6, § 29 grants judges the powers of "conservators of the peace." See also 2 Official Record, Constitutional Convention 1961, p 2703. And the history of the office reflects that conservators performed a wide array of law enforcement functions, including the initiation of criminal proceedings. Accordingly, even if a judge serving as a one-person grand jury performs an executive function when issuing charges, this does not violate Article 3, § 2 of the Michigan Constitution because Article 6, § 29 grants judges this power.

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3. The one-person grand jury statutes avoid conflicts of interests that could create separation of powers concerns.

Of course, that Michigan judges can exercise the broad powers of conservators does not mean that judges should be permitted "to investigate, charge, and then officiate at the trial of the accused." (Def's App, p 26.) But the one-person grand jury statutes explicitly prohibit this. And thus the third reason for concluding that MCL 767.3 and MCL 767.4 do not violate separation of powers: the Legislature has crafted the statutes so as to avoid conflicts of interest that could run afoul of the separation of powers.

As this Court has recognized, the separation of powers does not mean that the power of one branch can never be exercised by another. See *Makowski*, 495 Mich at 482. "While the Constitution provides for three separate branches of government the boundaries between these branches need not be airtight." *Id.* (cleaned up). See also *Judicial Attorneys Ass'n v State*, 459 Mich 291, 296 (1998) ("This Court has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers."). Instead, "the true meaning of the separation-of-powers doctrine is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." *Makowski*, 495 Mich at 482 (cleaned up).

Similarly, Professor Robert Scigliano, who wrote extensively on the one-person grand jury, warned against "the belief that what are called legislative, executive, and judicial functions can be clearly identified and separated from each

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other." Scigliano, *Inquisitorial Proceedings and Separation of Functions: The Case of the One-Man Grand Jury*, 38 U Det LJ 82, 84 (1960). He explained that the commingling of functions between the branches is both inevitable and common practice. *Id.* at 85. The concern at the heart of separation of powers, Professor Scigliano wrote, is whether "a particular combination [of functions] sets the official or agency to working at cross-purposes." *Id.* In other words, "no official should decide matters when his involvement has strongly predisposed him to act in a certain way." *Id.*

Neither this Court nor Professor Scigliano are outliers in this conception of the separation of powers. See Note, *The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification*, 87 Yale L J 1692, 1696 n 21 (1978) (explaining that the Madisonian conception of the separation of powers, which recognizes the commingling of functions, "is now generally accepted in the United States"). The "separation of powers" has even been referred to as a "misnomer," "since many 'powers' are held in common by all three branches." Toomey, *Discretionary Power in the Judiciary*, 111 U Pa L Rev at 960.

Applying these principles to the one-person grand jury, the question is not simply whether MCL 767.3 and MCL 767.4 confer a traditionally executive power on the judiciary. As discussed above, judges in Michigan, as conservators of the peace, have authority to perform traditionally executive functions. More importantly, the separation of powers does not require that one branch never exercise the powers of another.

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The question instead is whether the statutes concentrate power in the judiciary so as to place in the judge's hands "the whole power of either of the other departments." *Makowski*, 495 Mich at 482. Or, in Professor Scigliano's words, the question is whether the judge is "working at cross-purposes," so as to be "judge in his own cause." Scigliano, *Separation of Functions*, 38 U Det LJ at 84.

The Legislature has taken care to ensure that this is not the case. Under the statute, the judge acting as grand juror cannot preside over any charge of contempt arising out of the proceedings, hear any motion challenging the indictment, or preside over the trial on the indictment. See MCL 767.4.

This Court in *Colacasides* relied on these provisions of the statute in holding that the one-person grand jury does not violate due process. 379 Mich at 98–99. Listing the many safeguards the Legislature put in place, this Court rejected the appellant's argument that "the law . . . reposes in the one-man grand jury such 'awful authority' that we should strike it down as violative of our current concepts of due process." *Id.* at 98.

But these safeguards are also key to the separation of powers analysis. As Professor Scigliano recognized, "The result of the measures taken by the Michigan legislature and the United States Supreme Court has been to divest Michigan judges of those functions which set them at cross-purposes in functioning under the one-man grand jury law." Scigliano, *Separation of Functions*, 38 U Det LJ at 84. In other words, "[w]hen they assume the role of inquisitors, the judges must in effect relinquish their judicial role." *Id.*

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This conception of the separation of powers fits with this Court's analysis of the conservator power. This Court concluded in *Sanderson* that "[t]he power of a justice of the peace acting as a conservator of the peace . . . is something entirely separate and distinct from the ordinary jurisdiction and power of a justice of the peace to hold court." 289 Mich at 169. Accordingly, a judge exercises the power of a conservator "not as a member of a court while in session, but as an officer in that special capacity." *Id.* at 170. So too, when taking up the mantle of the grand jury, a judge "must in effect relinquish their judicial role." Scigliano, *Separation of Functions*, 38 U Det LJ at 84.

This Court can reconcile these principles with the cases cited by Lyon, which prohibit the court from interfering in the prosecutor's charging discretion. (See Def's App, pp 21–23.) *Genesee Prosecutor*, *Williams*, *Morrow*, *Muniz*, and the other cases on which Lyon relies make clear that a judge must not be allowed to *simultaneously* perform both prosecutorial and judicial functions. In other words, a judge cannot both preside over criminal proceedings (a judicial function) and direct the prosecutor in his or her charging decisions (an executive function).

In context of the one-person grand jury, however, the judge acting as grand jury, whether viewed as performing the judicial function of a grand jury or as exercising the executive powers of a conservators, plays no conflicting roles. Accordingly, the statutes do not violate the separation of powers.

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D. Principles of stare decisis weigh against overruling *Slattery* and *Colacasides*.

Even if a majority of this Court were to conclude that *Slattery* and *Colacasides* were incorrectly decided, principles of stare decisis weigh strongly in favor of retaining, rather than overruling, those decisions.

"Stare decisis is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson v City of Detroit*, 462 Mich 439, 463 (2000). "[T]his Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so." *People v Feezel*, 486 Mich 184, 212 (2010).

This Court has articulated a four-part test for determining whether to depart from stare decisis. *Id.* at 212–213. This Court must consider: (1) "whether the previous decision was wrongly decided," (2) "whether the decision defies practical workability," (3) "whether reliance interests would work an undue hardship if the decision were overturned," and (4) "whether changes in the law or facts no longer justify the decision." *Id.* Each of these factors cautions against overruling this Court's prior decisions in *Slattery* and *Colacasides*.

First, *Slattery* and *Colacasides* were correctly decided. For the reasons articulated above, those cases correctly held that MCL 767.3 and MCL 767.4 do not violate the separation of powers. Specifically, the charging power conferred by the statutes, which Lyon claims this Court overlooked in *Slattery* and *Colacasides*, does no violence to the separation of powers.

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Second, the continued viability of the one-person grand jury has not created workability problems. Instead, the operation of the one-person grand jury, as upheld by *Slattery* and *Colacasides*, has been straightforward. The courts have recognized the one-person grand jury as an alternative charging mechanism, and it has operated as such. See *Pichitino*, 337 Mich at 94; *Green*, 322 Mich App at 686.

Lyon proposed solution—resolving the constitutional question by holding that the one-person grand jury does not have charging power, (Def's App, p 30)—would, however, "defy practical workability." See *Feezel*, 486 Mich at 212–213 (cleaned up). As an initial matter, the procedure created by MCL 767.3 and MCL 767.4 would no longer constitute the "alternative charging procedure" that the courts have recognized. *Green*, 322 Mich App at 687. More importantly, the statutes would be stripped of any purpose whatsoever. This Court in *Oakman* held that a judge conducting one-person grand jury proceedings lacks authority to issue an informal finding of probable cause unaccompanied by formal charges. See *Oakman*, 207 Mich at 23. If a judge operating pursuant to MCL 767.3 and MCL 767.4 does not have the power to issue formal charges, then the judicial inquiry would be meaningless. Lyon admits as much. (Def's App, p 19.) The judge could neither issue charges nor issue a finding of probable cause. The statutes would be unworkable. Thus, this factor weighs strongly in favor of adherence to stare decisis.

Third, over a century of reliance on the one-person grand jury cautions against overruling *Slattery* and *Colacasides*. In weighing reliance interests, this Court considers "whether the previous decision has become so embedded, so

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accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Pohutski v City of Allen Park*, 465 Mich 675, 694 (2002). Here, the "real-world dislocations" would be the dismissal of likely hundreds of pending charges brought under these statutes. Lyon accuses the Genesee County Prosecutor of going "whole hog" by utilizing the one-person person grand jury "in *more than 60* recently-filed and unrelated criminal cases." (Def's App, p 2.) But nothing about this was improper—for the past century, both the text of the statutes and the cases interpretating that text have confirmed that the statutes create a legitimate charging procedure. And this Court declared this procedure constitutional in *Slattery* and *Colacasides*.

Moreover, while Lyon paints the one-person grand jury as "oft criticized," (Def's App, p 17, 18, 19, 42), the reality is that legal scholars have recognized its value from its inception and, more importantly, both the Legislature and the drafters of the Michigan Constitution of 1963 have chosen to retain the institution.

Regarding its value, Judge Pliny Marsh, writing in 1924, observed that "[n]either its legal soundness, nor its practical effectiveness, is any longer questioned." Marsh, *Michigan's "One Man Grand Jury*," 8 J Am Jud Soc 121, 123 (1924). Legal scholar Glenn Winters, writing in 1945, declared that "the advantages of the one-man grand jury procedure far outweigh anything that has yet been said against it." Winters, *One-Man Grand Jury*, 28 J Am Jud Soc at 149. And Professor Scigliano, writing in 1957, opined that "the one-man grand jury filled a void in Michigan's criminal system." Scigliano, *One Man Grand Jury*, p 86.

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Legal scholars have also recognized the one-person grand jury's particular usefulness for conducting large-scale investigations, especially into wrongdoing in the political realm.[14] See Scigliano, *One-Man Grand Jury* at 85 ("During its history, it has been used in investigations of widespread political importance and, in fact, its special value appears to be in situations involving political corruption and conspiracy."). See also Marsh, *"One-Man Grand Jury*," 8 J Am Jud Soc at 121 ("Grand juries have rarely been called, except in those instances where a political scandal has necessitated the interrogating of many witnesses in secret for the purpose of securing information upon which to base a criminal charge.").

More important than its usefulness, the Legislature has chosen to retain the one-person grand jury. The Legislature, in fact, has put forth significant effort in not only retaining, but also improving, the institution over time. See Scigliano, *One-Man Grand Jury*, pp 75–76 (discussing the various amendments to the statute). And, after repealing the one-person grand jury in 1949, the Legislature reenacted it only two years later. *Id.* at 72–75.

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[14] Lyon argues that the use of the one-person grand jury in this case to investigate crimes committed by public officials in fact further cements its unconstitutionality. (Def's App, pp 29–30.) He points out that the defendants in this case are not "lowly bank official[s]" or "bar owner[s]" but high-ranking executive officials. (*Id.*) Allowing a judge to issue charges for crimes committed by these individuals, Lyon argues, is an "invasion of the Executive's authority" and a "second guessing [of] the scope of their constitutional duties." (*Id.*) But, of course, public officials, like all citizens, are subject to prosecution for crimes allegedly committed. Further, both the scale the investigation in this case and the highly-politicized nature of the public discourse around the investigation, reflects the value, recognized by the scholars, of the one-person grand jury proceedings.

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Further, as recognized by this Court in *Colacasides*, the drafters of Michigan's 1963 Constitution at the Constitutional Convention expressly considered and opted to retain the one-person grand jury. *Colacasides*, 379 Mich at 94–95. The delegates not only kept the powers of conservators in the Constitution to avoid changing the one-person grand jury, which the delegates believed to be the province of the Legislature, but they also voted down, by an overwhelming margin, a proposal to abolish the one-person grand jury. *Id.* ("The proposal was defeated, 73-32."), citing 2 Constitutional Convention 1961 Record, pp 2703, 2709–2710.

Thus, the reliance interests here are significant. Since this Court declared the one-person grand jury constitutional 77 years ago in *Slattery* and 55 years ago in *Colacasides*, the courts have continued to recognize the institution as an alternative charging mechanism and prosecutors have continued to rely on it as such, particularly for cases such as this involving sensitive issues and massive bodies of evidence. Moreover, the Legislature, having already modified and improved the institution, has opted to retain it.[15] To now declare the one-person grand jury unconstitutional would remove what has become a settled part of the landscape of Michigan law.

Fourth, and finally, there have been no "changes in the law or facts" that render this Court's decisions in *Slattery* and *Colacasides* no longer justified. See *Feezel*, 486 Mich at 213. MCL 767.3 and MCL 767.4 have not changed since

[15] Lyon notes one Senator's recent proposal to eliminate the one-person grand jury. (Def's App, p 19, citing 2021 SB 159.) That bill garnered not a single cosponsor and died in committee.

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Colacasides was decided, nor does Lyon assert that the institution been widely abused in the intervening years. Thus, nothing in the legal or factual landscape has shifted so as to warrant reconsideration of the statutes' constitutionality.

Accordingly, while stare decisis is not an "inexorable command," *Robinson*, 462 Mich at 464 (cleaned up), none of the factors this Court has historically applied support departing from stare decisis in this case.

E. Lyon cannot establish that MCL 767.3 and MCL 767.4 are facially unconstitutional.

Lyon does not expressly state whether he raises a facial or as-applied challenge to the constitutionality of MCL 767.3 and MCL 767.4. See generally *Judicial Attorneys Ass'n*, 459 Mich at 303. Lyon makes no claim, however, that the one-person grand jury proceedings in this case uniquely violated the separation of powers; instead, his separation of powers argument assails the statutes generally. As a result, Lyon necessarily raises a facial challenge. Accordingly, he "must establish that no set of circumstances exists under which the act would be valid." *Id.* (cleaned up). Even if Lyon could show that a judge initiating charges would violate the separation of powers in some instances, however, he cannot show that the proceedings in this case violated separation of powers.

As an initial matter, the fact that a judge, rather than a prosecutor, signed the indictment charging Lyon does not create a separation of powers concern, as Lyon appears to argue. (See Def's App, p 35 ("Here, the judicial officer was the sole signatory on the indictment, certifying that the "foregoing indictment is a TRUE

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BILL . . . .").) In the context of the citizen's grand jury, the grand jury foreman, not the prosecutor, signs the indictment, MCL 767.23, and tenders the indictment to the court, MCL 767.25(1). Thus, the signature alone cannot be the deciding factor.

Instead, if the one-person grand jury's charging power did raise separation of powers concerns, then those concerns would arise when the judge acting as grand jury issued charges over the objection of the prosecutor. This is reflected in each of the cases cited by Lyon involving judicial interference with the prosecutor's charging discretion; in each case, the trial court unilaterally took action to which the prosecutor was opposed. See *Genesee Prosecutor*, 386 Mich at 684 (judge added charge over prosecutor's objection); *Muniz*, 259 Mich App at 178 (judge ordered prosecutor to issue new informations over prosecutor's objection); *Williams*, 244 Mich App at 251 (judge dismissed charges over prosecutor's objection); *Morrow*, 214 Mich App at 159 (same); *Nelson*, 66 Mich App at 66 (same); *Jones*, 252 Mich App at 11 (judge denied prosecutor's motion to dismiss).

But that is not what happened in this case. The one-person grand jury was convened on the application of the Solicitor General, acting on behalf of the People. (See Def's Ex D.) The People worked closely with the one-person grand jury in its investigation, which Lyon ironically claims violated the terms of the statutes and due process. (See Def's App, pp 37–38.) And, not surprisingly, when the one-person grand jury returned the indictment against Lyon, the People proceeded to prosecute the charges contained in the indictment without objection.

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As a result, even if this Court were to conclude that MCL 767.3 and MCL 767.4 could violate separation of powers in some contexts, the application of the statutes in this case did not violate separation of powers. There was no improper inference with the prosecutor's charging discretion because the People initiated the proceedings, participated in the proceedings, and voluntarily pursued the charges arising out of the proceedings. In other words, the proceedings in this case operated in the same fashion as a citizen's grand jury.

Thus, even if this Court disagrees with the substantive separation of powers analysis set forth above, Lyon's constitution challenge must fail. Because the proceedings in this case did not violate separation of powers, Lyon cannot succeed in bringing either an as-applied or a facial challenge to MCL 767.3 and MCL 767.4.

III. Lyon does not have a statutory right to a preliminary examination.

Lyon has waived a statutory challenge to the lack of a preliminary examination in his case. He did not join Defendant Baird's motion to remand for a preliminary examination, and his motion to dismiss did not seek this as alternative relief. Moreover, in both his trial court brief and his application for leave to appeal, Lyon expressly stated that "whether one is entitled to a preliminary examination is not directly involved here." (Pl's Ex E, p 32 n 20; Pl's Ex F, p 33 n 1.) Thus, while Lyon has argued that MCL 767.3 and MCL 767.4 require a preliminary examination, he has affirmatively declined to seek that relief. As a result, he cannot now "seek appellate review of a claimed deprivation" of a preliminary examination. See *People v Carter*, 462 Mich 206, 215 (2000).

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To the extent this Court reaches the merits of this issue in Lyon's case, this brief incorporates by reference the arguments on this issue set forth in the People's consolidated brief in *People v Peeler*, MSC Docket No. 163667, and *People v Baird*, MSC Docket No. 163672, which are scheduled to be argued alongside this case.

IV. The grand jury proceedings in this case did not violate either the statutes or Lyon's due process rights.

Finally, in addition to his constitutional challenge against the one-person grand jury statutes, Lyon also challenges the investigation in this case, arguing that it violated both the terms of the statutes and due process. At this point, Lyon offers only a rapid-fire list of perceived violations of MCL 767.3 and MCL 767.4. He does not explain how these statutory violations rise to the level of due process violations, beyond noting that administrative agencies must follow their own rules and asserting that the statutory violations in this case "are structural and based on a charging scheme that violates separation of powers." (Def's App, p 41.)

Putting aside the fact that Lyon articulates no meaningful basis for claiming a due process violation, his arguments fail because the purported statutory violations he identifies are either based on misreadings of the statutes or have no basis in the statutes at all.

First, Lyon's argues that the one-person grand jury was "initiated contrary to statute" and that the grand juror was "designated contrary to statute" because the Genesee County Circuit Court does not have a local court rule governing the appointment of a one-person grand jury. He argues that this violated MCL 767.3,

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which requires that "the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court." MCL 767.3.

But, as the trial court recognized, "[n]othing in the statute requires the local court to adopt a one-person grand jury specific court rule or makes it a violation of due process to fail to adopt such a rule." (Def's Ex A, pp 10–11.) By stating that "the designation of the judge . . . shall be made in accordance with the rules of such court," MCL 767.3, provides that the local court, rather than the statute, determines the procedure for designating a judge as a one-person grand jury. The statute does not require the local court to enact a specific local court rule governing this process. Moreover, even if the statute did somehow require this, Lyon cannot show how the existence of a relevant court rule would have affected the designation. See *People v Mateo*, 453 Mich 203, 215 (1996) (holding that preserved nonconstitutional errors require a showing of prejudice).

Second, Lyon argues the participants in the grand jury proceedings were administered the "[w]rong oath." (Def's App, p 36.) Lyon does not identify the "right oath," nor does he explain how the oath that was administered violated MCL 767.3 or MCL 767.4. And, again, Lyon makes no showing of prejudice. See *Mateo*, 453 Mich at 215.

Third, Lyon points out that the register of actions does not contain an entry for the signing of his indictment and that the record does not contain transcripts for that date. Lyon makes no argument as to why this was improper under the statutes, which strictly prohibit any disclosure of "the fact that any indictment for a

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felony has been found against any person not in custody or under recognizance." See MCL 767.4. And Lyon makes no argument as to prejudice. See *Mateo*, 453 Mich at 215.

Fourth, Lyon argues that the indictments were untimely because they were filed with the clerk of the court after the expiration of the grand jury's statutory term.[16] (Def's App, p 37). Lyon's argument has several parts. He starts by pointing out that the order of appointment purported to commence the grand jury proceedings on January 1, 2020. He then argues that the grand juror, rather than the chief judge, improperly extended the proceedings on June 4, 2020. Finally, he argues that, because the indictment was filed with the clerk on January 13, 2021, it was untimely.

Each of the arguments underlying Lyon's assertion are faulty. Regarding the commencement date, the order of appointment did not issue until January 9, 2020; thus, it was on that date that the grand juror was authorized to commence proceedings. See *People v Weathersby*, 204 Mich App 98, 105 (1994) ("[A] grand juror is authorized to conduct an inquiry upon the issuance of the order appointing the grand juror."), overruled on other grounds by *People v Stevens*, 498 Mich 162 (2015). Regarding the grand juror extending his own term, MCL 767.4 expressly provides that the judge conducting the inquiry may extend the proceedings. See

[16] Lyon raised this argument below in a supplemental brief filed after oral argument on his motion. The trial court did not address this argument in its opinion denying the motion to dismiss. (See Def's Ex A.) Defendants Agen, Ambrose, Baird, Peeler, and Wells have since made this same argument in motions that are pending before the trial court.

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MCL 767.4 ("No 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." (emphasis added)). For these reasons, the grand jury was still operating with his statutory term of authority when he signed the indictment charging Lyon on January 8, 2021.

Regarding Lyon's assertion that the indictment was not filed with the clerk prior to the expiration of the grand jury's term, the statute nowhere requires this. Judge Newblatt concluded his investigation into crimes potentially committed by Lyon with the signing of the indictment. The statute does not require that the grand juror then file the indictment with the clerk of the court prior to the expiration of his term. Moreover, even if the indictment was untimely under MCL 767.4, the indictment would not be void. See *Weathersby*, 204 Mich App at 106–107 (holding that "the expiration of the statutory period did not invalidate the indictments" issued by the one-person grand jury).

Fifth, Lyon argues that the one-person grand jury proceedings improperly included "extraneous officials." Looking to the grand jury's public accounting, Lyon asserts that "[o]bviously, the Attorney General is the one who financed and controlled this investigation, not the judicial officer." (Def's App, pp 37–38.) This was improper, Lyon claims, because under MCL 767.3 and MCL 767.4 "[i]t is the responsibility of the judicial officer to investigate—and investigate alone." (Def's App, pp 37–38.)

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As the trial court correctly recognized, those statutes unambiguously contemplate that the Attorney General or county prosecutor may be involved in the investigation. (Def's Ex A, p 11.) The proceedings may be initiated "upon the application of the prosecuting attorney or attorney general" and "[a]ny judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry" is barred from seeking election or appointment to another public office for one year. MCL 767.3. Thus, while the statutes do not require the participation of the attorney general, see *Petition of Hickerson*, 301 Mich 278, 283 (1942), they certainly does not bar it.[17] And, again, Lyon makes no argument as to prejudice. See *Mateo*, 453 Mich at 215.

Sixth, Lyon argues that the record indicates that the People at times communicated with the grand jury off the record. Lyon does not explain how these alleged communications were improper or prejudicial. See *Mateo*, 453 Mich at 215.

Seventh, Lyon argues that the one-person grand jury improperly heard testimony from two investigators employed by the Department of the Attorney General, contrary to MCL 767.3. But the statute only prohibits the testimony of witnesses "employed . . . *within the scope of the inquiry*." MCL 767.3 (emphasis added). In other words, the statute prohibits the grand juror or the prosecutor from

[17] Lyon cites *Hickerson* for the proposition that the "proceedings are under the control of the judge, not the Attorney General or prosecuting attorney." (Def's App, p 28.) But *Hickerson* recognized an *exception* to the general rule that the one-person grand jury does not *require* the participation of the prosecutor. See 301 Mich at 283 (holding that the grand juror can only grant witness immunity on motion of the prosecutor).

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placing a witness on the payroll for purposes of the grand jury proceedings, which would be an obvious work-around of the prohibition in the previous sentence against paying witnesses. See MCL 767.3 ("The witnesses shall not receive any compensation or remuneration other than witness fees as paid witnesses in other criminal proceedings."). The statute, not surprisingly, does not prohibit the grand juror from hearing the testimony of the lead investigator into the alleged crime.

Eighth, Lyon argues generally that the one-person grand jury "did not observe traditional notions of judicial independence." (Def's App, p 39.) By this, Lyon means that a judge who signed a search warrant later participated in the grand jury proceedings and that the judge who conducted the proceedings approved applications for investigative subpoenas. Given that the grand jury proceedings are for the purpose of investigating crime, Lyon's unsupported assertions that these actions were improper fall flat.

Finally, Lyon attacks the motivation behind the People's use of a one-person grand jury, arguing that the institution no longer serves any legitimate purpose and that the People used it merely to avoid a preliminary examination. But the fact that Lyon would have preferred a different charging mechanism does not mean that the use of the one-person grand jury was improper. More importantly, as discussed above, the one-person grand jury is particularly suited for cases just like this—large scale investigations into wrongdoing in the political realm. And Lyon's sole focus on the overlap between the one-person grand jury investigation and his own prior criminal proceedings ignores the fact that the grand jury also investigated and

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charged *eight other individuals*, including persons not charged previously. The grand jury investigation was not merely a regurgitation of prior proceedings (which would be permissible in any event under double-jeopardy jurisprudence). Instead, it was a proper and efficient method of conducting a large-scale criminal investigation.

Ultimately, the violations that Lyon identifies have no statutory basis and, in some instances, are invented out of whole cloth. Lyon has not shown that the grand jury proceedings were contrary to the statutes, much less violated due process.

CONCLUSION AND RELIEF REQUESTED

The People respectfully request that this Court deny Lyon's application for leave to appeal or, in the alternative, to affirm.

Respectfully submitted,

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