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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	**FILED UNDER AO 2019-6**
Plaintiff-Appellee,	Supreme Court No. 164191
vs.	
NICOLAS LYON,	Court of Appeals No. 360548
Defendant-Appellant.	7th Judicial Circuit No. 21-47378-FH

DEFENDANT-APPELLANT LYON'S SUPPLEMENTAL BRIEF IN SUPPORT OF BYPASS APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED

1. Whether the judicial-inquiry statute, MCL 767.3, *et seq*., violates Michigan's constitutional requirement of separation of powers, MICH CONST 1963, art III, § 2.

Defendant-Appellant answers: Yes
Prosecutor-Appellee answers: No
The trial court answered: No

2. Whether the judicial-inquiry statute confers charging authority on a member of the judiciary.

Defendant-Appellant answers: No
Prosecutor-Appellee answers: Yes
The trial court answered: Yes

3. Whether a defendant charged as a result of a judicial inquiry is entitled to a preliminary examination.

Defendant-Appellant answers: Yes
Prosecutor-Appellee answers: No
The trial court answered: No

4. Whether the proceedings conducted here as a judicial inquiry violated due process, Mich Const 1963, art I, § 17.

Defendant-Appellant answers: Yes
Prosecutor-Appellee answers: No
The trial court answered: No

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INTRODUCTION

This interlocutory appeal addresses the concern this Court expressed 50 years ago in *Bellanca* and urges clarification once and for all that a judicial inquiry is not what the media called it a century ago – a grand jury.

This supplemental brief will provide a summary of Director Lyon's arguments on the four issues as now framed by the Court and supplement the supporting authority. It will conclude by explaining in detail why the remedy sought – dismissal – is the only structurally available and appropriate remedy. Although the judicial inquiry statute contemplates a preliminary examination, ordering that such an exam be conducted after-the-fact here does not cure the fundamental defect in the charge which was the product of constitutional and statutory violations and relieved the prosecution of its solemn duty to take public responsibility for issuing a controversial and legally deficient indictment.

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SUMMARY STATEMENT OF FACTS AND PROCEEDINGS

As detailed at greater length in the Bypass Application, Director Lyon has been subjected to three separate investigations and two separate prosecutions – now in their seventh year – stemming from Flint's switch in its municipal water supply in 2014, a decision he had no role in making.

The first investigation led to Director Lyon being charged in June 2017 by the then-Attorney General with involuntary manslaughter and misconduct in office. The prosecution's general theory was that Director Lyon had failed to give timely notice of an outbreak of Legionnaires' disease in Genesee County in 2015 – even though MDHHS epidemiology and infectious-disease experts, working with the Genesee County Health Department, had given a targeted notice to hospitals and doctors in the affected area. This theory runs contrary to Michigan's constitutional status as a home-rule state. *See* MICH CONST 1963, art VII, § 22. The state health director "shall consider a local health department. . .to be the primary organization responsible for the organization, coordination, and delivery of those services and programs in the area served by the local health department." MCL 333.2235(2). The local health departments are given primary responsibility for the delivery of services in their area unless constrained under circumstances not applicable here. Yet the prosecution did not charge any one from the Genesee County Health Department.

After a preliminary exam that took almost a year, Director Lyon was bound over to circuit court where he promptly filed a motion to quash. The court absorbed the record and scheduled hearings.

In the meantime, a new Attorney General was elected who appointed the Solicitor General to handle the Flint water prosecutions. The Solicitor General restarted the investigation, claiming that the previous prosecution team had done a slipshod job. On the eve of the date the circuit had promised to rule on the motion to quash – likely a decision that would have gutted the prosecution's case – the Solicitor General dismissed the case without prejudice.

The Solicitor General's second investigation included execution of a search warrant on the entire Department of Attorney General to obtain records the prosecution claimed it did not have. It was successful: the new team obtained substantial information that the prior team recognized was privileged and confidential. Despite warnings from

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within and without the Department, the Solicitor General refused to establish any protocol – such as a taint or filter team – to protect against disclosure of this privileged information.

Rather than file a criminal complaint at that point, the Solicitor General initiated a third investigation that would take yet another year. She petitioned the circuit court in Genesee County to convene a secret judicial inquiry pursuant to MCL 767.3, *et seq*., initiating a process the Solicitor General thought would deprive the defendants of preliminary examinations (including cross examination and the opportunity to present evidence) and avoid any pre-trial judicial review of the proofs. *See* Bypass Application p 15 (EXHIBIT K).

The circuit court granted the Solicitor General's application in an order that directed the proceedings to commence retroactively beginning January 1, 2020, and continue for no longer than two, six-month sessions, consistent with the statute. Although the order authorized the judicial officer to investigate, consistent with the statute it did *not* authorize him to charge a criminal offense.

The resulting process did not conform to statutory requirements. From not using a court rule as required by statute, to administering the wrong oath, to filing the charging instrument out of time, the process was rife with irregularities. Above all, it was not a true judicial inquiry as the statute contemplated; it was just another prosecutorial investigation, masquerading under the auspices of a member of the judiciary. And it was held in secret.

Discovery issues have arisen in two forums – before the chief judge regarding the record of the judicial inquiry and before the trial judge regarding the criminal case. For more than a year, the parties have litigated issues involving production of the judicial-inquiry record, and that is how the defense obtained what information it has about the process. Trial-court discovery has come to a halt. Due to the prosecution's failure to safeguard the privileged and confidential material it seized in 2019, the trial court entered a protective order barring review and dissemination of any further discovery until the prosecution implements a taint team. The prosecution has declined to comply and just unsuccessfully appealed.[1] After more than a year, the

[1]The Court of Appeals denied the prosecution leave to appeal on March 24, 2022. *People v Nicolas Lyon*, No. 360124 (Mich Ct App).

prosecution estimates that it has produced only a quarter of the relevant material.

In addition to the dismissal motion that gave rise to this interlocutory appeal, Director Lyon has challenged the charges on both substantive and other procedural grounds. On October 28, 2021, he moved to dismiss the nine manslaughter counts based on the lack of any common law or statutory duty owed by a director of a state department, *see e.g., People v Beardsley*, 150 Mich 206 206; 113 NW2d 1128 (1908), and to dismiss the remaining count of willful neglect of duty for failure to allege a breach of a ministerial or nondiscretionary duty as required by the statute, *People v Parlovecchio*, 319 Mich App 237; 900 NW2d 356 (2017); *People v Waterstone*, 296 Mich App 121; 818 NW2d 432 (2012). And on November 24, 2021, he joined in the motion of Nancy Peeler to dismiss the case because the indictment was filed after the expiration of the term of the judicial inquiry.

These motions remain pending.

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ARGUMENT

I. The judicial-inquiry statute unconstitutionally vests the judiciary with prosecutorial powers

A. Summary of bypass application argument

As explained in more detail at pages 17-29 of the Bypass Application, while the Legislature has the power to create causes of action, it lacks the power to enlarge the judiciary's authority beyond that which is provided in the constitution. *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 361; 792 NW2d 686 (2010). Any legislation which purports to confer power belonging to one branch onto another is invalid. *Houseman* v *Kent Circuit Judge*, 58 Mich 364, 367; 25 NW 369 (1885).

So, any interpretation of the judicial-inquiry statute which would grant a judge charging authority violates these fundamental precepts, and therefore the Michigan Constitution, because it would vest purely executive authority in the hands of a judicial officer.

The prosecuting attorney is an elected official responsible to the citizens. MICH CONST 1963, art VII, § 4. As chief law enforcement officer, the prosecutor has exclusive authority to decide whether to prosecute a person and what charges to file. *People v Williams*, 244 Mich App. 249, 251-52; 625 NW2d 132 (2001). Michigan courts have routinely held that any interference with the prosecutorial function by the judiciary is unlawful. *People v Muniz*, 259 Mich App 176; 675 NW2d 597 (2003); *People v Jones*, 252 Mich App 1; 650 NW2d 717 (2002).

The observations of (then-future) Justice Cardozo regarding a similar New York law are worthy of emphasizing:

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

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

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As highlighted in the Bypass Application, half a century ago this Court warned that the "constitutionality of a system whereby a Judge accuses a person of a crime may not withstand our re-examination." *People v Bellanca*, 386 Mich 708, 715; 194 NW2d 863 (1972). With this appeal, that re-examination has begun.

B. A judge is a judge, not a prosecutor

The Court's jurisprudence regarding judicial inquiries provides little guidance because those cases presented questions that did not involve the one presented here – whether the judicial officer has authority to charge. But the Court's jurisprudence regarding the important role of a prosecutor calls into question the viability of a statute giving the judicial branch the power to initiate a prosecution.

1. Decisions involving the judicial inquiry provisions simply do not reach the ultimate question here. For example, *Mundy v McDonald*, 216 Mich 444; 185 NW 877 (1921), had nothing to do with charging power. It involved the judicial officer's issuance of a report of misconduct under the statute against a mayor. No formal complaint or warrant was issued. Moreover, the Court was not presented with a separation of powers question. It did hold that the judge was acting in a judicial capacity, 216 Mich at 454, but that does not address the question of whether the exercise of charging power would be constitutional.

People v Doe, 226 Mich 5; 196 NW 757 (1924), involved a challenge to a contempt holding by a witness ("a graduate of the Law Department of the University of Michigan") before a judicial inquiry who did, indeed, challenge its constitutionality. *Id* at 6. But the Court expressly avoided the constitutional question by finding there had been no contempt. 226 Mich at 7 (disposition on the contempt issue made "it unnecessary to discuss the other propositions").

In re Slattery, 310 Mich 458; 17 NW2d 251 (1945), also challenged the constitutionality of the judicial-inquiry statute, but the question presented was whether it was constitutional for the judicial officer to hold a witness in contempt. All the Court held, though, was that a judge acts in a judicial capacity when holding someone in contempt. Whether the judicial officer had the authority to charge was not before the Court.

Similarly, *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967), dealt solely with the judicial officer's authority to investigate and hold someone in contempt, not the power to charge, and *People v Bellanca*, 386 Mich 708; 194 NW2d 863 (1972), dealt with an issue unrelated to

the judicial officer's power. It dealt exclusively with the question of the rights of a defendant who had been charged by a judicial inquiry to witness testimony. Interestingly – and incidental to a related issue – the disclosure of the testimony that the Court did order was in contemplation of a preliminary examination being held.

2. Although the body of law involving judicial inquiries leaves the constitutional question open, this Court's other jurisprudence definitively closes it: this Court has correctly held that while "the Legislature has the power to create causes of actions, it does not have the power to expand the judicial authority granted to the courts by the Michigan Constitution." *Lansing Schools Educ Ass'n*, 487 Mich at 361, citing *Michigan Citizens for Water Conservation v Nestlé Waters NA, Inc*, 479 Mich 280, 302-03; 737 NW2d 447 (2007). "'[E]ach branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'" *Judicial Att'ys Ass'n v State*, 459 Mich 291, 305; 586 NW2d 894 (1998).

So what is the "judicial authority" that the judicial branch possesses under Michigan's Constitution? It is defined in Article VI, § 1: "the judicial power of the state is vested exclusively in one court of justice." And this Court has clearly held for nearly 150 years that "The judicial power referred to [in the Constitution] is the authority to hear and decide controversies, and to make binding orders and judgments respecting them." *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959), quoting *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884). Accord, *e.g.*, *Goetz v Black*, 256 Mich 564, 569-70; 240 NW 94 (1932) ("Judicial power is the power of the court to decide and pronounce its judgment and to carry it into effect between persons and parties who bring a case before it for decision."), citing *Muskrat v United States*, 219 US 346 (1911). To put it another way, the "judicial power" encompasses "interpret[ing]" laws, "to declare what [the law] is or has been," "determin[ing] whether, in a particular case, [rules of law] have been transgressed," and "ascertain[ing] existing rights." *In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63 (1940) (quotation omitted).

Here, the judicial-inquiry statute vests in the judiciary a power that has nothing to do with interpreting laws, finding facts, or rendering a judgment in a disputed case: the power to charge or indict a Michigan citizen with a crime. And this Court has been unequivocal in holding that such power is reserved to the executive branch alone: "The power

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to determine whether to charge a defendant [with a criminal offense] and what charge should be brought is an executive power, which vests *exclusively* in the prosecutor." *People v Gillis*, 474 Mich 105, 141 n19; 712 NW2d 419 (2006) (emphasis added).

That is why "the prosecutor alone possesses the authority to determine whether to prosecute the accused." *People v Williams*, 244 Mich App at 254. And it is why the "exercise of judicial power over the discharge of the prosecutor's duties 'is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires.'" *Gillis*, 474 Mich at 141 n19, quoting *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995).

The Court can imagine the chaos if the rule were otherwise. Under the same theory that the prosecution pushes here, a trial court could elect to change a prosecutor's charges at trial, enhancing or diminishing the counts the prosecutor carefully selected whenever the court feels, in its opinion, that different charges are more appropriate. Yet this Court has held that a "trial court ha[s] no legal basis to trump the prosecutor's charging decision." *People v Smith*, 496 Mich 133, 141; 852 NW2d 127 (2014). Why? "It is axiomatic that the power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests *exclusively* in the prosecutor." *Id*, citing *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972).

The *Genesee Prosecutor* case is illustrative. There, a prosecutor sought a writ of superintending control after a Genesee County Circuit Court judge accepted – over the prosecutor's objection – a plea to an offense that the prosecutor had chosen not to charge and which was not even a lesser included offense of the charge actually brought. In granting the prosecutor relief, this Court observed that the "conduct of a prosecution on behalf of the People by the prosecutor is an executive act." 386 Mich at 683, citing *People v Dickerson*, 164 Mich 148, 153; 129 NW2d 199 (1910). Accordingly, the determination which charge to bring "is an executive function and a part of the duties of the prosecutor. For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. It also violates our fundamental sense of fair play." *Id* at 683-84, citing MICH CONST 1963, art 3, § 2. As a result, a trial judge "act[s] without authority in amending the information over the objection of the

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prosecutor." *Id.* at 684. That holding applies with equal force to a judge who takes it upon herself to issue an indictment under the judicial-inquiry statute.

In the circuit court, the prosecution relied on *Makowski v Governor*, 495 Mich 465; 852 NW2d 61 (2014), for the broad, nondeterminative proposition that separation of powers need not be "airtight." But the case is irrelevant here, because *Makowski* did not involve the judiciary usurping the Governor's pardon power but merely defining the scope of it, 495 Mich at 471-72, a quintessential judicial function under Michigan's Constitution.

Similarly, *Local 321 v City of Dearborn,* 311 Mich 674; 19 NW2d 140 (1945), has some broad language but provides no relevant guidance here. That case was an action by city employees to compel the city and its civil service board to comply with a resolution of the city council regarding compensation. The case turned on the legality of the resolution which provided for a method of fixing compensation different from that in the city charter. The employees challenged those provisions of the city charter that delegated to the civil service board the power to set compensation. They reasoned that a city department – the civil service board – could not interfere with the actions of the city council as a legislative body, notwithstanding the provisions of the city charter. The Court held that there was no constitutional issue because the city council retained the power to appropriate funds for compensation.

The question here is whether the judiciary can exercise exclusive executive charging power. It cannot, for all the reasons this Court has stated in numerous cases spanning the past century-and-a-half.

For the judicial officer to assume broad prosecutorial powers of investigation and charge determination usurps the role reserved to the executive.

C. The power conferred is not incidental

The prosecution contended in the circuit court that no constitutional issue arises from the judicial officer's issuance of charges because the authority that the Legislature conferred on the judiciary in the judicial-inquiry statute is limited and specific enough not to encroach on the authority of the executive. In other words, it maintains that under the statute, the authority that the judicial officer exercises – and that the prosecution cedes – is just incidental. Such an argument trivializes the actual scope of the judicial-inquiry statute and what

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happened here. The authority to criminally charge is not incidental; rather, it is a fundamental power and duty of the prosecution, as this Court has held.

The attorney general is a constitutional officer, MICH CONST 1963, art V, §§ 3, 21, who has the statutory authority to "appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." MCL 14.28. County prosecuting attorneys are also constitutional officers whose duties are to "appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested." MICH CONST 1963, art VII, § 4; MCL 49.153. No constitutional or statutory provision gives anyone other than these constitutional officers the authority to initiate criminal prosecutions in the courts of this state.

The prosecutive function is central to our criminal justice system, as it is the prosecutor – and only the prosecutor – who decides whom to charge. The prosecutor is no ordinary lawyer or advocate, either. The role is so critical and unique that special ethical rules govern the position. MRPC 3.8; *see Berger v United States*, 295 US 78, 84 (1935). This authority – and the responsibility that comes with it – is no incidental executive function.

But that is exactly what the prosecution contends, which is wrong for several reasons. First, as discussed above, the authority conferred on the judicial officer is the authority constitutionally and statutorily conferred exclusively on the executive. Second, according to the prosecution, in a judicial inquiry a prosecutor cedes all investigatory and charging authority to the judicial officer, limited only by the scope of the judicial officer's own order. It is up to the judicial officer – and the judicial officer alone – to decide who to charge, what to charge, and when to charge, and the prosecutor is relegated to being a mere assistant. Here, for example, the prosecution did not even countersign or endorse the charging instrument. Finally, the judicial-inquiry statute is not carefully tailored to limit what charging authority is conferred. There is no structural reason or necessity for the judicial officer to have such broad powers. The judicial officer's role could be confined to investigating, leaving the prosecutive decisions for the prosecuting attorney, but it is not. The role could be confined to circumstances that present structural problems for the executive, such as in the case of

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independent counsel, but it does not. The role could be confined by subject matter, but it is not.

The prosecution may contend that judicial inquiries are limited in scope, as the statute requires them to be "specific to common intent of the scope of the inquiry to be conducted." MCL 767.3. Any such argument, however, is circular because it is the *judicial officer* who reviews the petition "in his discretion" and thereby determines the scope of the inquiry. In other words, the statute gives the judicial officer the discretion to determine just how far and wide to investigate and prosecute – and to charge criminal offenses – exactly the type of conduct that this Court has previously prohibited.

As Justice Scalia observed in a context not too different from what is now before this Court,

> [t]he judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them – which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes. Rather, since the prosecution of law violators is part of the implementation of the laws, it is – at least to the extent that it is publicly exercised – executive power, vested by the Constitution in the President.

Young v United States, 481 US 787, 816 (1987) (Scalia, J., concurring) (citations omitted).

D. Structural defects render the judicial-inquiry statute unconstitutional

The structural concerns that Justices Cardozo and Scalia identified are the very same ones at issue here, and that is what renders the judicial-inquiry statute unconstitutional as interpreted by the lower court. It confers upon the judicial officer – with few guardrails – broad prosecutorial authority with no structural limitations or purpose. It is an alternative means to indict a citizen that has no support or place under Michigan law. Reading the judicial-inquiry statute to give the judicial officer the power to charge is no incidental overlap in powers among branches. It is a complete abdication of prosecutorial power transferred to the judiciary.

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II. The judicial-inquiry statute does not confer charging authority on a member of the judiciary

A. Summary of bypass application argument

As explained at pages 30-35 of the Bypass Application, this Court need not reach the constitutional question, though, because the judicial-inquiry statute does not confer charging authority on the judicial officer. It specifies that only when the judicial officer finds probable cause does the case proceed, and then only upon formal complaint. It does not confer authority on the judicial officer to issue a complaint or any other charging instrument.

The judicial officer is to investigate and present findings to a proper prosecuting authority with the prosecutor exercising discretion to file a charge, whether that be called an indictment or complaint, followed by a preliminary examination. The statutory steps are plain:

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

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

The distinction between vesting courts with incidental authority to investigate under the judicial-inquiry statute and the core authority to charge is highlighted in *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). Although this Court found no separation of powers issue, it did not address the question now before this Court – the authority of a judicial officer to actually charge an offense – because it dealt only with the court's power to investigate.

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People v Green, 322 Mich App 676; 913 NW2d 385 (2018), upon which the trial court relied substantially, superficially appears to provide some guidance, but it is inapposite. There the defendant alleged ineffective assistance of counsel on the basis that counsel had not challenged violations of rights to counsel and confrontation due to the use of the one-person judicial inquiry. In rejecting the claim, the Court of Appeals simply observed that the procedure

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

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

B. A judicial inquiry is not a grand jury

The prosecution maintains – as the trial court held – that language of the statutes suggests that judicial inquiries and citizen grand juries are equivalent, and that the judicial inquiry is a substitute for a preliminary examination. But judicial inquiries and grand juries are not the same, and a judicial inquiry is hardly a substitute for a preliminary examination.

1. Statutory language

The language of the statute supports none of the prosecution's claims. Use of the terms "grand jury" and "indictment" in the judicial-inquiry statute shed little light on any analysis, and the judicial-inquiry statute identifies its process in terms very different from those for grand jury proceedings. It refers to the process as an "inquiry," not a grand jury. Moreover, *nowhere* in the judicial-inquiry statute is there any language conferring upon the judicial officer the powers of a prosecutor to select whom to charge and to issue criminal charges. The language confines those powers to investigating. Nothing more.

The prosecution maintains that because the language of the judicial-inquiry statute, MCL 767.3, 767.4, borrows language from grand jury provisions, MCL 767.7, *et seq*., the processes are essentially

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one and the same. Even a cursory review of the language used underscores the flaw in that argument.

Below are how the terms are used among the different statutory provisions:

Term	***Judicial Inquiry MCL 767.3 to 767.6b***	***Grand Jury MCL 767.7, et seq.***
"grand jury"	2 times	95 times
"juror(s)"	0 times	26 times
"indictment"	4 times	106 times
"inquiry"	41 times	3 times
"presentment"	1 time	1 time (quoting oath)
name of charging instrument	none identified ("may cause the apprehension. . .by proper process")	indictment, MCL 767.23 (9 jurors)

Not only is the frequency with which these particular terms are used instructive, but the context in which these terms appear is important.

Grand Jury. This term is used in the judicial-inquiry statute once to indicate that a person called before the "grand jury" has the right to counsel, MCL 767.3, and once to proscribe disclosure of material "used in connection with any grand jury inquiry," MCL 767.4a. But neither reference even suggests that the judicial inquiry is governed by the provisions pertaining to grand juries.

Indictment. This term is used once to preclude the judicial officer from acting as an "examining magistrate" in connection with "the hearing on the complaint or indictment," MCL 767.4, once to preclude the judicial officer from hearing a motion to quash, *id*, and twice to prescribe disclosure of "the fact that any indictment" has been returned, MCL 767.4. These references shed no light on the character of the judicial inquiry, as the term is not unique to grand jury proceedings and is defined to mean any type of charging instrument. MCL 761.1(g). Above all, use of the term "indictment" says nothing about the judicial officer's authority. None of these references suggests that the judicial officer has authority to sign the charging instrument or to file charges.

Inquiry. This term is particularly revealing as it is used in virtually every sentence of the principal provisions, MCL 767.3 and 767.4. In MCL 767.3, the term "inquiry" is used no fewer than 12 times (*e.g.*, "order directing that an inquiry be made," "order. . .shall be specific

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to common intent of the scope of the inquiry"), and in MCL 767.4, it is used 18 times (*e.g.*, "if upon such inquiry," the "judge conducting the inquiry," "while conducting such inquiry"). The term is virtually nonexistent among the grand jury provisions, and the few times it is used in that context, it is in the most generic sense.

Presentment. Arguably, this is the charging instrument a judicial inquiry generates, because the statute provides that "[u]pon 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" file a report with the consent of the person. MCL 767.4. This interpretation is also supported by the earlier caselaw.

Above all, there is nothing in the words that the Legislature selected that brings judicial inquiries within the body of law applicable to citizen grand juries.

2. Statutory structure

The structure of the statutes does not suggest that they are equivalent, either. The judicial-inquiry statute is confined to just a few provisions, MCL 767.3 through 767.6b. The grand jury provisions – both citizen grand juries and multi-county grand juries – are covered by MCL 767.7 through MCL 767.96. Judicial inquiries and grand juries are very different creatures, and the statutory provisions make that clear. There are many differences.

Judicial inquiries are initiated upon "any complaint" or on application by a prosecuting official. MCL 767.3. Citizen grand juries, in contrast, are initiated and supervised by the court, and multi-county grand juries are only on application by the Attorney General. MCL 767.7, 767.7b. The grand jury provisions specifically identify the charging instrument to be issued – an indictment – as well as its form, and the judicial inquiry provisions do not. MCL 767.43. For grand juries, there is a process for the return of indictment, which requires the foreperson to present the charge to the court in the presence of the grand jurors, and it is the supervising judge who has responsibility to return to the court with proper jurisdiction. MCL 767.25. For the judicial inquiry there is no process specified.

Unlike judicial inquiry proceedings, citizen grand juries are also not limited in scope. Citizen grand juries are given wide latitude to inquire into violations of criminal law and, once convened, have broad

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authority to investigate potential offenses without limitation. *People v Morris*, 228 Mich App 380, 384; 579 NW2d 109 (1998). Some have gone so far as to say citizen grand juries can perform "fishing expeditions." *Id* at 384 n3. Conversely, judicial inquiries are specifically limited in scope per statute. Judicial inquiries must confine an investigation and "shall be specific to common intent of the scope of the inquiry to be conducted." MCL 767.3.

The judicial-inquiry statute specifically requires a public accounting, MCL 767.6b, yet there is no such requirement for grand juries. The grand jury provisions identify how costs are to be borne – whether by the county or the state – yet the judicial-inquiry statute does not. MCL 767.96.

Dismissal of a grand jury indictment requires reasons and leave of court, MCL 767.29, yet the judicial-inquiry statute is silent on the question. Grand juries can be recalled to conclude business, but a judicial inquiry cannot. MCL 767.7a; 767.4. The judicial-inquiry statute also provides that under certain circumstances, the judicial officer may make a report finding no basis to charge, MCL 767.4, yet the grand jury statutes do not. The judicial-inquiry statute also requires the judicial officer to make a report to the appropriate government agency regarding misconduct by employees, but the grand jury provisions do not. MCL 767.4.

The statutes are structured in very different ways and should be interpreted as such.

3. Statutory function

Judicial inquiries and citizens grand juries perform different functions. The judicial inquiry's function is simply to investigate. Charging authority remains with the prosecuting authority who is accountable to the public for charging decisions. The citizen grand jury's primary function is to stand between the government and the accused to protect the accused from government harassment and unfounded prosecution. *Wood v Georgia*, 370 US 375, 390 (1962). Neutrality is expected, because citizens, unlike prosecutors, have "no election to win or executive appointment to keep." *United States v Dionisio,* 410 US 1, 45-48 (1973). In other words, charges brought by citizen grand juries are viewed as being inherently protected from government overreach because the citizens make the decision, *not* government officials. The grand jury is accountable to the public because it is the public.

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Similarly, when the public prosecutor issues a charge by way of complaint, the prosecutor is accountable to the public for its charging decision. The public can assess the propriety of the charging decision by evaluating evidence presented in a public, adversarial, preliminary examination process and the prosecutor will be held to answer to the public for its decisions through the election process.

But if the judicial officer in a judicial inquiry were allowed to issue a charge following a secret, uncontested proceeding, it would circumvent accountability to the public for charging decisions. The public cannot evaluate secret proceedings with untested allegations for governmental overreach and the prosecutor is not called to answer to the public for charging decision.

4. Statutory reconciliation

A close examination of the statutory language reveals that it is not necessarily in conflict with the constitutional limitations, because "probable cause" has different meanings depending on the context. The standard by which a judicial officer evaluates information varies depending on the function being performed.

The judicial-inquiry statute clearly provides that upon a finding of "probable cause," the judicial officer has the authority to issue an arrest warrant, MCL 767.4 ("may cause the apprehension of such person"). But probable cause to support an arrest is simply not equivalent to probable cause to bind a defendant over for trial. *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion,* 452 Mich 92, 115; 549 NW2d 849 (1996).

For a preliminary examination, there must be "enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt," *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). Moreover, the review involves the magistrate's consideration of all the evidence, including cross-examination of prosecution witnesses and evidence offered by the defense. MCL 766.112; *People v Anderson*, 501 Mich 175; 912 NW2d 503 (2018); *see also People v Johnson*, 502 Mich 541; 918 NW2d 676 (2018).

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Therefore, the standard applied here merely supports arrest. A charge must still be filed which must withstand the scrutiny of the higher standard of review of a preliminary examination. Because the judicial officer's authority is limited to causing one's arrest, the proofs have been necessarily subjected to a lower standard of proof. As some commentators have noted, at a preliminary examination

> the assessment of probable cause will be made at an adversary rather than an *ex parte* proceeding. Even where use of hearsay is permitted, that hearsay will be presented through the testimony of a witness, who can be cross-examined as to the source of the hearsay, rather than through a showing based entirely on affidavits. Also, the arrest standard, directed primarily at police, is expressed in terms of "the factual and practical distinctions of everyday life in which reasonable and prudent men, not legal technicians act," while the charging decision being reviewed at the preliminary hearing is, by its nature, one involving the "legal technicians" of the prosecutor's office. Under the arrest standard, considerable uncertainty must be tolerated on occasion because of the need to allow the police to take affirmative action in ambiguous circumstances, but no comparable exigencies are presented when the charging decision is made.

Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, CRIMINAL PROCEDURE § 14.03, at 906 (6th ed rev 2017).

So it is here. The findings of the judicial officer as part of a judicial inquiry are merely preliminary and subjected to a lesser standard that that which is required to bind a person over for trial. The judicial officer does not act as a neutral and detached magistrate; rather, he functions much like a police officer who evaluates information which he presents to a judge to secure an arrest warrant.

III. A defendant charged with a felony after a judicial inquiry is entitled to a preliminary examination

A. Summary of bypass application argument

Director Lyon's Bypass Application explains at pages 33-35 that upon a finding of probable cause, a matter is to proceed "as upon formal complaint." MCL 767.4. This Court has expressly interpreted that provision to require a preliminary examination. In *People v Duncan*,

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388 Mich 489, 498-99; 201 NW2d 629 (1972), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001), this Court noted the preliminary nature of judicial inquiries. It specifically contrasted the process set forth in MCL 767.4 with citizen grand juries and observed:

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

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

B. Michigan authority does not say what the prosecution wants it to say

The prosecution relies on *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001), for its contention that there is no right to a preliminary examination following an "indictment." But here *Glass* does not control for several reasons. To begin, it did not involve a judicial inquiry; it was a citizen grand jury case. The basis on which this Court overruled *Duncan* – improper use of rulemaking authority – is not present here. Above all, *Glass* left undisturbed that part of *Duncan* which held that the Legislature contemplated a preliminary examination under the terms of the judicial-inquiry statute. Also undisturbed by *Glass* are the important public policy reasons for holding a preliminary examination following an indictment, articulated in *Duncan* namely, the need to have a prosecutor's evidence tested and evaluated in an open forum prior to trial. *Duncan* recognized that due process and equal protection concerns weigh in favor of a preliminary examination following an indictment.

This interpretation is well-supported. Michigan has long provided preliminary examinations following judicial inquiries, starting at its inception. *See, e.g., People v Bellanca*, 386 Mich at 715; *People v Birch*, 329 Mich 38, 42; 44 NW2d 859 (1950); *People v Robinson*, 306 Mich 167, 181; 10 NW2d 817 (1943); *People v McCrea*, 303 Mich 213, 247; 6 NW2d 489 (1942). That right was not called into question until *Glass*'s broad language was misinterpreted.

Because the charges here arose from a judicial inquiry – not a citizen grand jury – a preliminary examination was required. But, as

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discussed more fully below, the lack of a preliminary examination here is only part of the problem, and even a preliminary examination cannot cure constitutional infirmities.

IV. The judicial-inquiry proceedings violated due process

A. Introduction

To understand the due process violation here requires an understanding of the true scope of the prosecution's contentions. The interpretation of the judicial-inquiry statute that it advocates – and that the trial court's opinion condones – provides that:

- the prosecution may secretly petition the court to have a judge perform a prosecutorial function – the investigation of allegations of criminal wrongdoing
- the court then secretly decides whether to grant the petition and determines the scope of the investigation and which judge to conduct it
- the judge then secretly initiates and conducts the investigation with the assistance of the prosecutor who filed the petition
- the judge may use judicial power to compel testimony
- the judge may use judicial powers of contempt
- the judge decides who to charge
- the judge decides what offenses to charge
- the judge drafts and signs the "indictment"
- the judge files the "indictment" – and in this case in the very court in which the judge sits
- the judge decides who to arrest
- and the judge can do all these things without any rules or standards, even though the statute requires there to be a rule

Then when the indictment is filed, it is with the imprimatur of the judiciary, misleading the public to believe that a neutral and detached judicial officer has reviewed and approved it. And – again, according to the prosecution – there is no vehicle by which to challenge the substance of allegations before trial.

The lower court's interpretation of the statute violates due process, because it countenances a procedure that allows for a "star chamber" form of justice long ago rejected in the United States and the State of Michigan. Moreover, the way the judicial-inquiry statute was

misused here violated due process, because the prosecution did not observe many statutory requirements and the indictment was filed by the judicial officer acting as both accuser and adjudicator.

B. Summary of bypass application argument

Leaving aside the constitutional problems inherent in the judiciary acting as a prosecutor and issuing an indictment, the manner in which the prosecution used the judicial-inquiry statute here violated due process guarantees of the Michigan and United States constitutions. US CONST AMEND V; MICH CONST 1963, art I, § 17.

From the initiation of the inquiry through the return of the "indictments," the judicial-inquiry statute's carefully reticulated requirements were treated as though they did not exist. Even though the statute specifically requires the initiation of the process be pursuant to local court rules, there was none. Therefore, there was no process or standard to consider the petition that was made or to select the judicial officer to conduct the inquiry. The investigation spanned a full year with 45 witnesses being called and 1,400 exhibits being offered. Yet, the judicial officer incurred *no* expenses. Contrary to the statutory intent and requirements, this was the prosecution's presentation and argument to an investigator, not an independent inquiry conducted by a judicial officer. *See Petition of Hickerson*, 301 Mich at 282, citing *In re Petition for Investigation of Recount*, 270 Mich 328; 258 NW 776 (1935) (judge, not prosecutor, must control proceedings). From not using a court rule as required by statute, to administering the wrong oath, to filing the charging instrument out of time, an already questionable process was riddled with irregularities.

Simply put, the judicial inquiry here amounted to an *ex parte* preliminary examination – something that does not exist under Michigan law. What was missing from this process was the defendant, defense counsel, cross examination, the opportunity to present exculpatory evidence, and a probable cause determination by a neutral and detached magistrate, which are required in a preliminary examination. In fact, the statute recognizes that the judicial officer does not function as a neutral and detached arbiter. It specifically precludes the judicial officer from presiding at the preliminary examination. MCL 767.4 (judicial officer "shall be disqualified from acting as the examining magistrate").

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C. As interpreted by the lower court, the judicial-inquiry statute violates due process because its structure undermines the requirements of objectivity, checks and balances and fundamental fairness

At its core, due process in criminal cases embodies the concept of fairness, objectivity and deference to constitutional rights. The Fourth, Fifth and Sixth Amendments, along with the general requirements of due process, were adopted in part to avoid a "'far-reaching evil – a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Michigan v Tucker*, 417 US 433, 440 (1974), quoting *Ullmann v United States*, 350 US 422, 428 (1956), and discussing Fifth Amendment right against self-incrimination. Hence, the notion of a single judge operating in secret to prosecute individuals has been criticized as being contrary to our system's distrust of "the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber." *In re Oliver*, 333 US 257, 268-69 (1948). This is because, among other things, due process requires that "[t]he awful instruments of the criminal law []not be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v United States*, 318 US 332, 343 (1943). Due process was violated here because the statute, as interpreted by the lower court, allows the "awful instruments" of criminal law to be vested with a single member of the judiciary. And the prosecution misused the judicial inquiry statute to enlist the aid of the judiciary to act as a "a prosecuting attorney, policeman [and] detective."

In *In re Murchison*, 349 US 133 (1955) – a Michigan judicial-inquiry statute challenge – the United States Supreme Court held that a judge cannot charge a witness with contempt and then proceed to try and convict the person. The Court reasoned that an unconstitutional potential for bias exists when the same person acts as both accuser and adjudicator. *Id* at 136-37. Moreover, the due process concern is with the *potential* for bias, not just actual bias. *Id* ("'Every procedure which would offer a possible temptation to the average man as a judge. . .not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Tumey v Ohio*, 273 US 510, 532 (1927). . . . [T]o perform its high function in the best way 'justice

must satisfy the appearance of justice.'" *Offutt v United States*, 348 US 11, 14 (1954)).

The Supreme Court reaffirmed these bedrock principles more recently in *Williams v Pennsylvania*, 579 US 1 (2016). There, the Pennsylvania Supreme Court had reviewed a defendant's challenge to his death penalty sentence. Sitting on the court reviewing that challenge was a justice who had been the prosecutor who had sought the death penalty against the petitioner in the first instance. The justice denied the defendant's motion for recusal. In finding a due process violation, the Supreme Court held that an "unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id* at 8, citing *Murchison*, 349 US at 136-37. The Court went on hold that the justice's participation in the court's decision violated due process and that the violation constituted a "structural error even if the judge in question did not cast a deciding vote" which was not amenable to harmless error review. *Id* at 14.

What *Murchison* and *Williams* teach us is that there is injury to the independence of the judiciary when one of its members is involved in the prosecutorial process, and that is what gives rises to a structural due process error. Here, as the trial court interpreted the statute, the judicial officer may perform all the functions of a prosecutor while simultaneously using his authority as a judge to, among other things, compel testimony and hold witnesses in contempt.

Such an interpretation violates due process which embodies requirements of judicial objectivity, checks and balances, and fundamental fairness.

D. The judicial inquiry was implemented in a way which deprived Director Lyon of a due process and a critical statutory right

What occurred here was not an independent "judicial inquiry" envisioned by the statute, but rather a cynical ploy by the prosecution to circumvent Director Lyon's due process rights. Even aside from the impropriety of a judge serving as a prosecutor, policeman and detective, the manner in which this judicial inquiry was carried out violated due process. Although a defendant does not have a constitutional right to a preliminary examination, he has a statutory right to one. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990); MCL 766.1, MCL 767.42(1). The process used here was expressly designed to, and in fact did, circumvent

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that right. The Solicitor General's public comments make clear what the strategy was. She declared that there would be no need for preliminary examinations, and that all defendants would go directly to trial. She even said that it would save money because defense counsel would not spend time preparing arguments or challenges to the evidence prior to trial. *See* Bypass Application p 15 (EXHIBIT K).

MCL 766.1 provides that "in all criminal causes" a person has the right to a preliminary examination. That examination involves the magistrate's consideration of all the evidence, including cross-examination of prosecution witnesses and evidence offered by the defense. MCL 766.112; *People v Anderson*, 501 Mich 175; 912 NW2d 503 (2018); *see also People v Johnson*, 502 Mich 541; 918 NW2d 676 (2018). It is an essential part of the criminal process as it provides to the defense an opportunity to challenge the evidence before trial and before a neutral and detached judicial officer. Moreover, the examining magistrate's role is to evaluate the evidence, including issues of credibility, to determine whether there is probable cause. *Anderson*, 501 Mich at 184-85. Having the opportunity to challenge the evidence before trial is vital, and it is particularly important here, given the novelty of the charges, the voluminous evidence, and the likely length of any potential trial. But the prosecution maintains that the only means to test the legal sufficiency of the proofs is to go to trial.

Glass may have overruled *Duncan* for exceeding rulemaking authority, but it did not undermine or abandon what the Court in *Duncan* had recognized as the important public policy reasons behind the preliminary examination – due process is served when a defendant can confront and cross-examine his accusers, can understand the theories and evidence supporting the accusations and can "weed out groundless or unsupported charges" to "relieve the accused of the degradation and expense of the criminal trial." *Duncan*, 388 Mich at 499; *see also People v Bellanca*, 386 Mich at 713-14, citing *Coleman v Alabama*, 399 US 1 (1970).

Yet here the judicial officer worked secretly with the politically-motivated prosecution to develop evidence and charges – from the perspective of a criminal investigator, not as a neutral and detached magistrate. Director Lyon and the other defendants have not had the opportunity to contemporaneously challenge the evidence before a judicial officer whose duty it is to evaluate the admissibility, weight, and credibility of the evidence.

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Even when its provisions have been properly followed, the judicial-inquiry statute has been subject to due process criticism as noted in *In re Oliver*, 333 US 257 (1948), and *In re Murchison*, 349 US 133 (1955). *Colacasides* considered a due process challenge, which took into account those criticisms. In finding no constitutional issue, the Court contrasted those many criticisms with the many amendments to the statute. For example, it noted that the statute now affords witnesses more rights and limits the judicial officer's powers. It noted that the judicial officer could not act as the examining magistrate or hear a motion to dismiss or quash and that that the judicial officer has reduced contempt powers and that restrictions were put in place to limit the scope of inquiries. 379 Mich 98-99. But those amendments do not address the fundamental concerns presented here. Moreover, as the Court noted five years later – and 50 years ago – in *Bellanca*, the statute's constitutionality is an open question.

The judicial-inquiry statute has very specific and narrowly drawn requirements, many of which are designed to ensure the integrity of the process, especially in response to growing criticism over the years. But the prosecution did not comply with many of those provisions and embarked on a process untethered to law, due process, and fairness. Even administrative agencies that do not follow their own procedural rules violate one's due process rights. *Abbott v Howard*, 182 Mich App 243; 451 NW2d 597 (1990); *United States v Caceres*, 440 US 741, 751 n14 (1979); *Morton v Ruiz*, 415 US 199, 235 (1974). *A fortiori*, the statutory violations here rise to the level of a due process violation.

If the statute is read to provide the judicial officer with the power to control the process independent of the petitioning prosecutors, that is not what happened here. The prosecution selected the witnesses to call, the evidence to seek, and the evidence to present to the judicial officer – and paid for the entire process – as if it were an adversarial hearing before a neutral and detached judicial officer, which it was not. This necessarily calls into question the independence of the judiciary and violated due process. Above all, the "indictment" here cannot represent a finding of probable cause of any kind because it is the product of an "unconstitutional potential for bias" drafted by the same person "acting as both accuser and adjudicator." *Williams*, 579 US at 8; *Murchison*, 349 US at 136-37.

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The judicial-inquiry statute as used here violated federal and state constitutional guarantees, resulting in a fundamental structural error requiring dismissal of the charge that the investigation produced.

E. The process violated the clear intent and purpose of the statute

When the Solicitor General petitioned to convene an inquiry, there had already been *four years* of investigations, *five* separate preliminary examinations that had taken over a year, some of which were ongoing, and multiple complex motions filed in circuit court. There was precious little left – if anything – to investigate.

When the petition was filed, a multitude of witnesses had cooperated with the OSC and Solicitor General in various ways. They included politicians, government officials, medical and other professionals, and academicians – all with extensive and valuable information and few without opinions. In fact, most of the witnesses who appeared in the judicial inquiry had testified or cooperated in the previous investigations, including the several year-long preliminary examinations. There was no need to seek testimony this way because it had already been taken repeatedly in public and private proceedings. The judicial inquiry provided no unique ability to secure testimony; it allowed the prosecution to *exclude* all the damaging testimony and documents that resulted in the trial court getting to the brink of issuing a decision that would have annihilated the prosecution's charges.

When the petition was filed, the prosecution had all the records from the OSC investigations and prosecutions, and later seized millions more documents – including many it should not even have had because they were attorney-client and work-product privileged. The judicial inquiry provided no unique ability to obtain records.

When the petition was filed, the preliminary examinations, and the testimony of the witnesses, had been covered extensively in the media, as were the positions of the parties in the various papers filed. The secrecy of the judicial inquiry served no public purpose.

This was not an investigation of an underworld organization. This was not a cold case. It was not an investigation that required any of the features of the judicial inquiry.

This was an investigation in which the prosecution worked hand-in-glove with the judiciary to retool and recharge – and to avoid independent judicial review.

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Not only was there no legitimate investigative reason to use a judicial inquiry, the need for it has all but disappeared. As discussed above, in upholding the judicial-inquiry statute in 1967, this Court was driven by experience at the time. *Colacasides*, 379 Mich at 89-90. It reasoned that experience had taught that law enforcement is sometimes unable to do its job without compulsory process and that the 23-person citizen grand jury had become unwieldy. *Id.* The judicial-inquiry statute, in the Court's estimation, "resolved" that "dilemma by creating a vehicle that allowed for judicial investigators armed with the authority to call witnesses, issue subpoenas and the like. The experience that drove that decision no longer exists, though. The investigative subpoena statute, MCL 767A.1, *et seq*, provides a means for procuring testimony and immunizing witnesses – while letting prosecutors be prosecutors and judges be judges. And the size and composition of the citizens grand jury was changed shortly after *Colacasides*. MCL 767.11; 1970 PA 9.

Here use of the judicial inquiry was exclusively for tactical, not proper legal, reasons.

V. Other observations

A. Michigan is an outlier: A view of other jurisdictions

The law from other jurisdictions provides some guidance in analyzing the constitutional and statutory questions presented, as commentators have observed that over time other states have developed variations of Michigan's judicial inquiry system. *See, e.g.,* Robert G. Scigliano, THE MICHIGAN ONE-MAN GRAND JURY (Mich State Bd of Agric 1957); Glenn R. Winters, *The Michigan One-Man Grand Jury*, 28 J AM JUD SOC 137 (1945); Mordecai Konowitz, *The Grand Jury as an Investigating Body of Public Officials*, 10 ST JOHN'S L REV 219, 230 (1936). As recent commentators have observed:

> Several states authorize judicial inquests, which give the court authority to subpoena documents and witnesses in order to determine whether a crime has been committed and, if so, who committed it. Such inquests are known as "John Doe proceedings" in Wisconsin and South Dakota and as a "one-man grand jury" in Michigan. These inquiries typically are limited to a specific crime or event set forth in the application for the inquest. Although the *court is in control of the inquest and determines who will be*

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> *subpoenaed*, and can conduct the examination if it so chooses, the witness typically will be examined by the prosecutor (or in some instances, a special prosecutor appointed by the court).

3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, CRIMINAL PROCEDURE § 8.1(c) (4th ed) (emphasis supplied).[2] Some examples illustrate that these other provisions limit the judge's role by either confining it to investigation or checking it with the availability of a preliminary examination. The lower court's interpretation of the judicial inquiry statute makes Michigan an extreme outlier as the only state that would allow the judge to be a prosecutor whose actions are not subject to review by an adversarial process.

For example, Oklahoma has a version that dates back to 1916, which coincides with Michigan's statute which was enacted in 1917. 21 OKLA STAT § 951. Its provisions are confined to the investigation of gambling, and they authorize the judicial officer to investigate and compel testimony only. Upon probable cause finding, the district attorney – not the judge – is to "prepare an information." Moreover, the district attorney, is not compelled to file charges. *Kirkpatrick v Retail Merchants' Ass'n*, 140 Okla 118; 282 P 668 (1929).

Vermont's version also coincides with the enactment of the statute in Michigan. It provides that upon application of the prosecution, the court has authority to conduct an inquest and examine witnesses. VT STAT tit 13, § 5132, *et seq*. The Vermont Supreme Court upheld the statute under a separation of powers challenge in *In re DL*, 164 Vt 223; 669 A2d 1172 (1995), but notably the statute does not provide the judicial officer with charging authority. An inquest "*is not designed to be penal or accusatory*; its *sole function* is one of investigation." *State v Alexander*, 140 Vt 54, 60-61; 286 A2d 262 (1971) (emphasis supplied).

South Dakota's version, S.D. CODIFIED LAWS 23A-14-11, *et seq*., similarly authorizes a judicial investigation, but on the conclusion of it the judicial officer's authority to confined to issuing a "warrant for the arrest of the offender. . .further proceedings shall then be had as provided by law." S.D. CODIFIED LAWS § 23A-14-13.

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[2]The authors also note that such proceedings "are more aptly described as a form of judicial inquest." 3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, CRIMINAL PROCEDURE § 8.1(b) (4th ed).

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Wisconsin's version of the judicial inquiry process is called a John Doe proceeding. WIS STAT § 968.26. It grants the judicial officer the extraordinary authority to convene proceedings, to order secrecy, and to issue a complaint upon a finding of "sufficient credible evidence to warrant prosecution." WIS STAT § 968.26(b), (d); *see State v Circuit Court*, 214 Wis2d 605; 571 NW2d 385 (1997). But that authority to charge is limited to instances in which the prosecutor has declined a request from a member of the public to prosecute. WIS STAT § 968.26(b), (d). Although the statute has survived a limited attack based on the separation of powers, the judicial officer is not an investigator; rather, he is neutral and detached to serve as a check on the prosecutor and the complainant. *State v Washington*, 83 Wis2d 808, 823; 266 NW2d 597 (1978).

In answering a concern of potential abuse, the court observed on another occasion:

> While John Doe proceedings can be abused, the document produced by a John Doe does not *ipso facto* force the defendant to trial. The complaint which emanates from it is issued under the aegis of a judge but nevertheless must subsequently stand the scrutiny of an open court inspection in an adversary proceeding at the preliminary examination as a prerequisite to the filing of an information, arraignment, and trial.

State v Doe, 78 Wis2d 1616, 170-71; 254 NW2d 210 (1977); *see also State v Peterson*, 363 Wis2d 1, 70; 866 NW2d 165 (2015). In other words, even under the Wisconsin scheme, if the judge files the complaint because the prosecutor will not, the defendant remains entitled to a preliminary examination.

Washington has a "special inquiry judge" which is of relatively recent origin. The judicial officer is authorized to "hear evidence concerning criminal activity and corruption." WASH REV CODE §§ 10.27.050, 10.27.170. The purpose of the special inquiry judge is to investigate suspected crime or corruption with a view towards causing a criminal prosecution upon establishment of probable cause. "An essential difference between the special inquiry judge and the grand jury proceedings is that the grand jury is empowered to issue indictments while the special inquiry judge cannot." *State v Manning*, 86 Wash2d 272; 543 P2d 632 (1975), citing WASH REV CODE § 10.27.150.

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Connecticut has a judicial-inquiry statute, which has also come to be known as a "one-man grand jury." CONN GEN STAT § 54-47a. Originally enacted in 1941 and substantially amended in 1985, the statute confines judicial officer's role to making a report to the court with a copy to prosecuting officials. CONN GEN STAT § 54-47g. The report is open to public inspection unless a prosecuting authority objects pursuant to the statutory requirements. In *State v Rado*, 14 Conn App 322; 541 A2d 124 (1988), the Appellate Court of Connecticut addressed a separation of powers challenge to the statute and found no error. That challenge, however, was limited to the investigatory authority of the process, because the judicial officer is confined to investigating and does not have any authority to charge. *In re Investigation of the Grand Juror into the Bethel Police Dep't*, 188 Conn 601, 604; 452 A2d 935 (1982).

All these provisions vary widely and have been interpreted under constitutional provisions and caselaw unique to those states. Although none directly addresses the issues involved with Michigan's judicial-inquiry statute, they do illustrate a principle vital to interpreting Michigan's provision: there is a clear distinction between the authority to investigate and the authority to charge. Some statutes plainly limit the role of the judicial officer to investigating. Others have been interpreted to confine the authority to investigation. Wisconsin's statute, which expressly provides for charging authority, limits that authority to unique circumstances, and its Supreme Court has yet to confront the specific question of charging authority.

Here, Michigan's statute does not give the judicial officer any authority whatsoever to charge. Upon conclusion of the investigation, the matter is to proceed "in like manner as upon formal complaint." MCL 767.4. There is no language suggesting that it is the judicial officer who has the authority to issue a complaint. Moreover, for the reasons previously stated, if the statute were so construed, it would unconstitutionally delegate executive charging powers to the judiciary.

B. Dismissal is the only appropriate remedy because the pending charge is the product of an unauthorized process

Criminal prosecutions may be initiated one of two ways, complaint and warrant filed by the prosecutor or grand jury indictment. When charges are commenced upon the filing of a complaint, they require the prosecutor's written approval endorsed on the complaint. MCR 6.101(C); MCL 764.1. The complaint must be sworn to before a

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magistrate or clerk. MCL 764.1(a)(1). The complaint serves two purposes – it initiates the proceedings and it provides the basis for issuance of a warrant. *People v Burrill*, 381 Mich 124, 128; 214 NW2d 823 (1974). Not only must the complaint conform to these requirements, but issuance of an arrest warrant also requires the court to make a finding of probable cause. MCL 764.1a(1); MCR 6.102(A). The defendant then has the right to a "prompt preliminary examination and determination by the examining magistrate in all criminal causes," MCL 766.1, and an information alleging a felony may not be filed until there has been a preliminary examination, MCL 767.42(1).

In the case of grand jury indictment, the indictment must be presented to the supervising judge by the foreperson in the presence of the jury, and the judge must return it to the court having jurisdiction over the offense. MCL 767.25. There is no right to a preliminary examination following a grand jury indictment. *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001); MCR 6.112(B).

Dismissal is required here because the charging instrument did not meet either the requirements of the complaint and warrant method or the grand jury procedure. The so-called "Grand Jury Felony Indictment" was signed, but not while the inquiry was in session, and it was not filed by the judicial officer. It was evidently given to an Assistant Attorney General who filed it outside the term of the judicial inquiry. The charging instrument does not conform to any statutory authority and cannot serve as a basis to charge Director Lyon. Labeling it an indictment does not make it a proper charging instrument.

If the Court were to merely remand this case for a preliminary examination, it would be in contravention of its own holding in *Glass*. There, the Court reversed the holding in *Duncan* which had found a right to a preliminary examination upon grand jury indictment. Its reasoning was that the *Duncan* court had exceeded its rulemaking authority by requiring preliminary examinations for those subject to grand jury indictment. For the same reasons the *Duncan* court exceeded its authority, this Court would exceed its authority were it to sustain the instant charge and simply remand for a preliminary examination. Although the statute contemplates a preliminary examination being held, it must necessarily follow the filing of a proper charge by a proper prosecuting authority.

Simply remanding the case to the district court for preliminary examination does not cure the indictment of its fundamental defect –

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that it was issued by a judge who did not have authority to issue a criminal charge, under either the constitution or the statute. The charges issued by the judicial officer must be dismissed. Indeed, to do anything else would have two adverse effects.

First, allowing judicial officers to charge while granting a preliminary examination would insulate prosecutors from the political scrutiny that ordinarily occurs when they make a charging decision. Where a prosecutor issues an indictment for apparently political reasons or lacking solid legal grounds – both concerns here – the prosecutor must face the voters and explain her decision to move forward with the criminal charges. But when a judicial officer issues the same indictment, the prosecutor is completely unaccountable. She can simply tell her constituents, "I presented all the evidence to a neutral judge, and she issued the indictment. I have no choice but to proceed with the prosecution." Such a scheme will harm thousands of future criminal defendants in Michigan.

Second, upholding judicial officers' charging authority while still ordering a preliminary examination dangerously blurs the line between a partial and an impartial judiciary. Here the judicial-inquiry process not only relieved the prosecution of its political responsibility for charging decisions, but it also simultaneously put the imprimatur of the judiciary on charges that have not been examined by a neutral and detached magistrate as contemplated by the criminal justice system. Criminal defense lawyers already have the difficult task of persuading wary defendants that judges are not in cahoots with prosecutors and the police. When the bench can not only conduct an investigation but issue an indictment, how can such a conspiracy theory possibly be rebutted? Maintaining not only an impartial judiciary but the *appearance* of an impartial judiciary requires that this Court order that the indictment be dismissed.

The prosecution's tactical success to date has been the result of its skillful efforts to avoid judicial scrutiny. In 2019, on the eve of a circuit court determination on the viability of its novel claims, the prosecution voluntarily dismissed the charges it had spent over two years pursuing – all to avoid an adverse ruling. Then when it restarted its investigation, it used search warrants when search warrants were not necessary – all to avoid a challenge. By doing so, affected parties were unable to seek contemporaneous judicial review, as they would if subpoenas been issued instead. And rather than proceeding with a

complaint and warrant, the prosecution devised a secretive process based on an antiquated and unconstitutional scheme – all to avoid a public adversary proceeding. Now is the time to start over, provide due process, and follow the rules – all of which begins with dismissal.

That result does not leave the prosecution without a remedy. The prosecution can do for proper reasons that which it did for tactical reasons in 2019 – comply with the requirements of criminal procedure. If the prosecution continues to believe there is probable cause to charge a state official who relied on expert subordinates to address an unprecedented and quickly developing public-health crisis, it can file a complaint against Director Lyon and the case will proceed to preliminary examination. The prosecution will then be accountable to the public for bringing the charge.

This is the same procedure that a future prosecutor will have to follow when reviewing the current Governor's reliance on experts who apparently recommended placing senior citizens with COVID in nursing homes, arguably resulting in many more deaths than those at issue here. in either situation, the public will be able to evaluate the prosecution's decision by viewing the evidence presented in a public forum, and the prosecution can answer to the public for that momentous decision.

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CONCLUSION

For the above reasons, and those articulated in the Bypass Application, Defendant-Appellant Director Lyon respectfully requests that the Court grant his Bypass Application, reverse the order of the trial court and order that the case be dismissed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This application is filed pursuant to AO 2019-6 and contains 12,084 countable words (exclusive of the title page, table of contents, index of authorities, statement of the basis of jurisdiction, statement of the questions involved, signature block, listing of counsel, certificate of compliance and exhibits) and is prepared in 12-point Century Schoolbook typeface.

s/ *Charles E. Chamberlain, Jr.*

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

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

DEFENDANT-APPELLANT LYON'S SUPPLEMENTAL BRIEF IN SUPPORT OF BYPASS APPLICATION FOR LEAVE TO APPEAL

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