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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICOLAS LYON,

Defendant-Appellant.
_____/

Supreme Court No. 164191

Court of Appeals No. 360548

Genesee County Circuit Court
LC No. 21-047378-FH

BRIEF AMICUS CURIAE OF JARROD AGEN IN SUPPORT OF DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

DICKINSON WRIGHT PLLC
J. Benjamin Dolan (P47839)
Phillip J. DeRosier (P55595)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

Seth B. Waxman
International Square
1825 Eye Street, N.W., Suite 900
Washington, D.C. 20006
(202) 466-5956

Attorneys for Amicus Curiae Jarrod Agen

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ORDER APPEALED AND RELIEF SOUGHT

Amicus Curiae Jarrod Agen relies on Defendant Nicolas Lyon's statement of the order being appealed and relief sought.

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STATEMENT OF QUESTION INVOLVED

Jarrod Agen submits this amicus brief to address the following question from the Court's March 23, 2022 order directing oral argument on Defendant Nicolas Lyon's application for leave to appeal: "Whether the proceedings conducted pursuant to MCL 767.3 and MCL 767.4 violated due process, Mich Const 1963, art 1, § 17."

Defendant-Appellant answers:	Yes.
Plaintiff-Appellee answers:	No.
Amicus Jarrod Agen answers:	Yes.

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STATEMENT OF INTEREST AND INTRODUCTION[1]

Amicus Curiae Jarrod Agen submits this brief in support of Defendant Nicolas Lyon's application for leave to appeal. In January 2014, Mr. Agen joined the Michigan Governor's Office as Director of Communications, where he was the lead spokesperson for the Governor, handled media inquiries, and coordinated public events and major speeches. On January 4, 2016, Mr. Agen became the Governor's Chief of Staff, where he was responsible for managing the Executive Office's staff, coordinating with the Governor's cabinet, and advising the Governor. In January 2017, Mr. Agen left the Governor's Office.

Like Mr. Lyon and the related defendants discussed in Mr. Lyon's application, Mr. Agen has been charged with a crime in connection with the decision to switch the city of Flint's water source to the Flint River—a decision he took no part in. Indeed, it was made in 2013, prior to Mr. Agen's tenure in the Governor's office. Also like Mr. Lyon and the other defendants, Mr. Agen's indictment came out of the secret judicial inquiry that the Michigan Solicitor General convinced the circuit court in Genesee County to convene under MCL 767.3 *et seq*.

The specific charge against Mr. Agen stems from testimony he gave in response to an investigative subpoena issued by the Michigan Attorney General's office pursuant to MCL 767A.1 *et seq*. Although Mr. Agen testified in Ingham County, the judicial officer conducting the judicial inquiry issued an indictment in Genesee County charging him with perjury under MCL 767A.9, despite explicit language in MCL 767.3 limiting the judicial officer's authority to investigate crimes "committed within his jurisdiction," i.e., Genesee County.

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[1] This brief was not authored by counsel for a party to this case in whole or in part, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. MCR 7.315(H)(4).

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Mr. Agen vehemently denies making any false statements under oath, but he was denied the ability to challenge this false claim due to the prosecution's decision to circumvent due process via a secret judicial inquiry in a county without jurisdiction.

As Mr. Lyon explains, the secret judicial inquiry that resulted in the charges against him, Mr. Agen, and the other defendants is contrary to the separation of powers. It also failed even to comport with the very statute that authorized it. In his application and supplemental brief, Mr. Lyon details various ways in which the judicial-inquiry statute itself was not complied with, depriving him of due process. Although Mr. Lyon identifies a significant list of due process violations, those are not the only ones. The Court should also be aware of the way in which the statute was violated in Mr. Agen's case, because it further illustrates how the prosecution has abused the judicial-inquiry process in these cases.

STATEMENT OF FACTS AND PROCEEDINGS

Mr. Agen relies on Mr. Lyon's statement of facts, but offers the following facts about his own case for additional context.

As mentioned previously, Mr. Agen worked in the Governor's office as Director of Communications and then Chief of Staff from 2014-2016. Mr. Agen left the Governor's Office in January 2017 to take on various roles in the President's new administration in Washington, D.C. On February 11, 2017, Mr. Agen voluntarily flew back to Michigan and truthfully testified for approximately three hours in a meeting room located in the Office of the Michigan Attorney General, G. Mennen Williams Building, 525 West Ottawa Street, Lansing, Michigan (*i.e.*, in Ingham County, not Genesee County). For the next four years, Mr. Agen heard nothing from the Attorney General's Office or anyone else regarding his testimony.

Then, in January 2021, Mr. Agen learned that he was being charged with perjury in connection with the Flint water investigation, based on an indictment emanating from a secret

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judicial inquiry being conducted in Genesee County, not in Ingham County where he had actually testified. The indictment even goes so far as to allege that Mr. Agen made a "false statement or statements under oath" *in Genesee County*, when in fact Mr. Agen was never in Genesee County. His "investigative subpoena interview testimony" took place in Ingham County. As discussed below, that renders the indictment void because Ingham County is outside the judicial officer's territorial jurisdiction. Mr. Agen has filed a motion to dismiss the indictment on that and other grounds, which remains pending.

While this appeal is not about Mr. Agen's case, this additional violation of the judicial-inquiry statute is relevant here because it further exemplifies the manner in which that process has been misused in the Flint water prosecutions, how it is rife with the potential for abuse, and why it should be invalidated.

ARGUMENT[2]

Mr. Agen fully agrees with Mr. Lyon's argument that the judicial-inquiry statute violates the separation of powers and that a defendant charged as a result of a judicial inquiry is entitled to a preliminary examination. Mr. Agen also agrees with Mr. Lyon's argument that the judicial-inquiry statute has been violated in all of the ways that Mr. Lyon identifies in his application for leave to appeal and supplemental brief. Mr. Agen also believes it important for the Court to be aware of yet another misuse of the judicial-inquiry statute in these cases so that it fully appreciates the prosecutorial overreach to which Mr. Lyon, Mr. Agen, and the other defendants have been subjected.

[2] Mr. Agen agrees with Director Lyon that this case raises constitutional issues and questions of statutory interpretation that are reviewed de novo. *People v Wiley*, 324 Mich App 130; 919 NW2d 802 (2018); *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

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Under the judicial-inquiry statute, the judicial officer's jurisdiction is limited to investigating crimes taking place within the territorial limits of the county in which the judicial officer sits. This limitation is apparent from the text of MCL 767.3, which authorizes the judicial officer to perform an "inquiry" into whether "any crime . . . has been committed within his jurisdiction,"[3] and MCL 767.4, which authorizes charges to be brought if "upon such inquiry the judge shall be satisfied that any offense has been committed."[4]

By limiting the scope of the judicial officer's "inquiry" and any resulting charges "upon such inquiry" to crimes committed "within his jurisdiction,"[5] the judicial-inquiry statute plainly forecloses the charge that has been brought against Mr. Agen, which indisputably was an alleged offense taking place in Ingham County, not Genesee County as the indictment inaccurately states. Such a failure to adhere to the judicial-inquiry statute's own express limitations violates

[3] MCL 767.3 states, in relevant part:

> 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 . . . [*Id*. (emphasis added).]

[4] MCL 767.4 states, in relevant part:

> If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. . . .

[5] As this Court has recognized, the term "jurisdiction" in MCL 767.3 refers to the judicial officer's *territorial* jurisdiction. See *Petition of Hickerson*, 301 Mich 278, 282; 3 NW2d 274 (1942) (holding that in assessing the jurisdiction of a judicial officer acting as a "one-man grand jury," "the controlling element [is] the territorial jurisdiction of the court conducting the grand jury," not the court's subject-matter jurisdiction).

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due process in the same manner as the irregularities discussed in Mr. Lyon's application for leave to appeal and supplemental brief.

For this and other grounds addressed in his pending motion to dismiss, Mr. Agen fully expects the indictment issued against him to be quashed. But that is not the point of this amicus brief. It is that this and the other irregularities Mr. Lyon raises reveal the serious flaws inherent in a statute that purports to authorize a judge to issue criminal charges following an inquiry conducted entirely in secret. Mr. Agen asks that the Court take this into account when considering the issues raised in Mr. Lyon's application for leave to appeal.

CONCLUSION AND RELIEF REQUESTED

For these reasons and those discussed in Mr. Lyon's application for leave to appeal and supplemental brief, the Court should invalidate the judicial-inquiry statute because it violates separation of powers principles and inevitably leads to the sorts of due process violations that occurred in these cases.

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ Phillip J. DeRosier
By: _____
J. Benjamin Dolan (P47839)
Phillip J. DeRosier (P55595)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

Seth B. Waxman
International Square
1825 Eye Street, N.W., Suite 900
Washington, D.C. 20006
(202) 466-5956

Attorneys for Amicus Curiae Jarrod Agen

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