STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

NICOLAS LYON
NANCY PEELER
RICHARD LOUIS BAIRD **Nos. 164191, 163667, 163672**
Defendants-Appellant.

Genesee Circuit Court No. 21-047378-FH
Genesee Circuit Court No. 21-047379-FH
Genesee Circuit Court No. 21-047375-FH
COA Nos. 346809, 357754, 357715

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Does a judge functioning as a one-person grand juror under MCL 767.3 and MCL 767.4 have authority to investigate and to indict, which is consistent with Michigan Constitution; further, are those indicted not entitled to a second probable cause determination by way of a preliminary examination?

Amicus answers: "YES"

Argument

I.

A judge functioning as a one-person grand juror under MCL 767.3 and MCL 767.4 has authority to investigate and to indict, and that authority is consistent with the Michigan Constitution; further, those indicted are not entitled to a second probable cause determination by way of a preliminary examination.

Introduction

This Court has, on the several applications, directed that supplemental briefs be filed. In the Lyons case, the Court has specified issues essentially encompassing those in the Peeler and Baird cases. The issues are:

- whether MCL 767.3 and MCL 767.4 violate Michigan's constitutional requirement of separation of powers, Mich Const 1963, art 3, § 2;
- whether those statutes confer charging authority on a member of the judiciary;
- whether a defendant charged after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination; and
- whether the proceedings conducted pursuant to MCL 767.3 and MCL 767.4 violated due process, Mich Const 1963, art 1, § 17.

Amicus will direct its attention to the first three questions, combining the first two. Amicus answers that the statutes do not violate Michigan's specific separation of powers limitations, and that functioning as a grand jury, the one-person grand jury may issue indictments; and that those indicted do not have a right to a preliminary examination for a second probable cause determination after the probable cause determination made by the one-person grand juror.

A. MCL 767.3 and MCL 767.4 confer investigating and indicting authority on a one-person grand juror that is consistent with the Michigan Constitution

At first blush it might be said that the judicial power is "the power to hear and determine controversies between adverse parties, and questions in litigation,"[1] the executive power, with regard to criminal cases, is to investigate, charge, and prosecute individuals for violation of the law,[2] and under Michigan's specific separation-of-powers provision[3] ne'er the twain shall meet.[4] And this would be the case but for one thing—Article 6, § 29 of the Michigan Constitution. There the constitution provides that "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" (emphasis supplied).[5] And so, in addition to judicial power, circuit judges have the power and authority of "conservators of the peace." What does this mean, and, given that which this Court has previously said regarding the matter, how does stare decisis speak to the question presented in this case?

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[1] *Daniels v. People*, 6 Mich. 381, 388 (1859).

[2] *People v. Barksdale*, 219 Mich. App. 484, 487 (1996).

[3] "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Mich. Const. Art. 3, § 2.

[4] "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." *Genesee Prosecutor v. Genesee Circuit Judge*, 386 Mich. 672, 683–684 (1972).

[5] This provision has been in every Michigan constitution since 1850. Mich. Const. 1850 Art. 6, § 19, "Judges of the supreme court, circuit judges and justices of the peace shall be conservator of the peace within their respective jurisdiction"; Mich. Const. 1908, Art. 7, § 18, "Justices of the supreme court, circuit court judges and justices of the peace shall be conservators of the peace within their respective jurisdictions."

1. This Court has held that under the one-person grand jury statutes the grand juror may investigate and indict

What has this Court said previously regarding the authority of circuit judges as conservators of the peace, for this is not the first time this question has come before the Court? In *In re Slattery*[6] the "Petitioner assail[ed] the constitutionality of the 'one man grand jury statutes,' claiming that they impose non-judicial duties on a judge,"[7] citing a New York case written by Justice Cardozo when he was a member of the New York Court.[8] But this Court found the case distinguishable because "[t]he Constitution of the State of New York contains no similar provision to that of the State of Michigan which makes the circuit judge a conservator of the peace."[9] And the Court said that in *Averill v. Perrott,*[10] "speaking of conservators of the peace, we said: 'As such conservators, they had, when the constitution took effect, 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.'"[11] The Court thus upheld the statute against a separation-of-powers challenge, noting that "Because of the importance of the question, we have re-examined it with extreme care although the questions raised have been heretofore decided by this court a number

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[6] *In re Slattery*, 310 Mich. 458 (1945).

[7] Id, 310 Mich. At 463.

[8] *In re Richardson*, 160 N.E. 655 (N.Y., 1928).

[9] *In re Slattery*, 310 Mich. at 464 (1945).

[10] *Averill v. Perrott*, 74 Mich. 296 (1889).

[11] *In re Slattery*, 310 Mich. at 466 (1945).

of times,"[12] and stating emphatically that "In order to dispel any doubt as to the finding of petitioner guilty of contempt, he [the one-person grand juror] proceeded to act as a circuit judge in regard to proceedings which he himself had conducted while acting as a one man grand jury."[13]

The statutes were attacked again in *In re Colacsides*[14]: "we come to appellant's contentions that this State's one-man grand jury law violates the separation of powers doctrine, as set forth in Article III, s 2, Constitution of 1963, and the due process clause of the Fourteenth Amendment."[15] Again this Court rejected the challenge. Referring to the statutes as creating a "unique one-man grand jury,"[16] the Court said that "[i]f If conservators of the peace possessed the powers now

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[12] Id. 310 Mich at 466-467:
In *Mundy v. McDonald*, 216 Mich. 444, 185 N.W. 877, 20 A.L.R. 398, the case of *Johnson v. Morton*, 94 Mich. 1, 53 N.W. 816, was referred to, and we held that the defendant, a circuit judge, acted in a judicial capacity in conducting an examination in proceedings for the discovery of crime, similar to the circumstances in the instant case. In the case of *People v. Doe*, 226 Mich. 5, 196 N.W. 757, while the decision of the trial court was upheld by an equally divided court, 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. Mr. Justice Fellows, in writing the opinion upholding the trial court, stated that he found no merit in appellant's objection to the constitutionality of the act on the ground that it conferred non-judicial duties upon circuit judges. In *People v. Wolfson*, 264 Mich. 409, 250 N.W. 260, a like objection was raised by defendant who had been adjudged guilty of contempt by a circuit judge, sitting as a one man grand jury, and we again upheld the act in a unanimous opinion of the court. Also see, *Johnson v. Morton*, 94 Mich. 1, 53 N.W. 816. In *People v. St. John*, 284 Mich. 24, 278 N.W. 754, wherein defendant's conviction for perjury before a one man grand jury was affirmed by an evenly divided court, the only point on which the court disagreed was the form of the complaint. . . . . There are many other cases wherein we have affirmed convictions for contempt in one man grand jury proceedings similar to the one in the instant case. See *People v. Bommarito*, 270 Mich. 455, 259 N.W. 310; *In re Wilkowski*, 270 Mich. 687, 259 N.W. 658; *In re Schnitzer*, 295 Mich. 736, 295 N.W. 478; *In re Ward*, 295 Mich. 742, 295 N.W. 483; *In re Cohen*, 295 Mich. 748, 295 N.W. 481.

[13] Id., 310 Mich. at 467.

[14] *In re Colacasides*, 379 Mich. 69 (1967***).***

[15] Id., 379 Mich. at 89.

[16] Id., 379 Mich. at 90.

exercised by circuit judges as one-man grand jurors, *whether executive or judicial in nature*, the exercise of such powers would not violate Art. III, s 2, either because they are judicial in nature or because, if executive, they are expressly authorized by Art. VI, s 29 and, thus, within the exception stated in Art. III, s 2," and concluded that indeed "conservators of the peace at common law possessed the *power to investigate crime* for the purpose of apprehending offenders." The Court thus held that "circuit judges now possess such investigative power, as conservators of the peace, and their exercise of such power in the performance of duties as one-man grand jurors does not violate Art. III, s 2 of our Constitution of 1963."[17] History, the Court said, "adds weight to the reasoning of Justice Butzel's opinion in *Slattery*," for "[c]onservators of the peace, historically, were empowered to make investigations and 'get up' a case," and thus the statutes do "no violence to our separation of powers doctrine," and do "not violate either our State Constitution's separation of powers provision or the Fourteenth Amendment's due process clause."[18]

One-person grand jurors have acted to investigate and indict for over 100 years,[19] and all challenges to their authority so to do on the ground that the statutes are unconstitutional have been rejected. There are references to the return of indictments by the grand jurors for almost as long.[20]

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[17] Id., 379 Mich. at 91.

[18] Id., 379 Mich. at 93.

And Bishop's 1913 treatise, 1 Joel Prentiss Bishop, *New Criminal Procedure* § 225, p. 173-174 (1913), says that conservators of the peace could cause "persons suspect of any crime to be arrested, and may examine and commit them, or hold them by bail before trial before the proper court," and the conservators of the peace included "every court of record."

[19] The statutes were first enacted in 1917: 1917 PA 196.

[20] See e.g. *People v. McCrea*, 303 Mich. 213, 224 (1942) ("the circuit judges . . . designated Circuit Judge Homer Ferguson to act as a one-man grand jury . . . . As a result of the grand jury investigation indictments were returned").

Though it is true that a half-century ago in *dicta* this Court said that "[t]he constitutionality of a system whereby a Judge accuses a person of crime may not withstand our re-examination,"[21] until now no such reexamination has occurred, raising reliance interests. It is also true that the simple fact of this Court's order in *Lyon* suggests a Justice or Justices may have concern that prior decisions of this Court on the subject were wrongly decided. But even if that has occurred, and is correct, it is not enough to set aside the existing precedent.

2. Under principles of stare decisis, this Court should adhere to its holdings that under the one-person grand jury statutes the grand juror may investigate and indict

This Court has said that to conclude precedent was wrongly decided is insufficient to overrule it, as "we don't disrupt precedent whenever that's the case"—"the mere fact that a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate."[22] The Court also considers, in addition to the correctness of the prior precedent, "whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision."[23] Here, for the reasons stated by the decisions, and explicated in the assistant attorney general's brief, the decisions are not incorrect, which would end the inquiry.[24] But even if they are subject to doubt, they scarcely

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[21] *People v. Bellanca*, 386 Mich. 708, 715 (1972).

[22] *In re Ferranti*, 504 Mich. 1, 25 (2019), quoting *Coldwater v. Consumers Energy Co*., 500 Mich. 158, 172 (2017).

[23] Id.

[24] MCL 767.4 provides that "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." What indictment?—except one issued by the

defy practical workability. One-person grand juries have been investigating and indicting for decades. Indeed, the statutes are employed regularly[25] (one-person grand juries have sat in recent years in Wayne County), and by as early as 1948 there had been approximately 300 one-person grand juries.[26] The Ferguson one-person grand jury in the early 1940's "produced several hundred indictments,"[27] and approximately 150 convictions, including of the Detroit mayor, the superintendent of police, members of the common council, the Wayne County Prosecuting Attorney,[28] the Wayne County sheriff, two members of the board of auditors, and numerous other individuals.[29] This also demonstrates that reliance interests are high. Not only has precedent been relied on in this case, but in many others where one-person grand jurors have indicted individuals,

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one-person grand juror. Further, MCL 767.3 says that "Any person called before the 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," plainly referring to the actions of the inquiry as those of a grand jury. And MCL 767.4 in its non-disclosure provisions also refers to indictments issued by the one-person grand juror: "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 . . . *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 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."

It makes no sense to prohibit disclosure that an "indictment has been found" by the one-person grand juror if the one-person grand juror cannot issue indictments.

[25] See e.g. *People v. Green*, 322 Mich. App. 676, 679 (2018).

[26] R. Scigliano, *The Michigan One-Man Grand Jury* (1957), p. 46.

[27] Id., at 48.

[28] "As a result of the grand jury investigation indictments were returned and warrants were issued against [prosecuting attorney] McCrea and other defendants." *People v. McCrea*, 303 Mich. 213, 224–225 (1942).

[29] Scigliano, p. 48.

and persons have consequently been convicted by plea or trial.[30] A change in course on the constitutionality of the statutes would put all these convictions and investigations in question.

And no change in the law undermines the prior precedent. In fact, the constitutional convention record, as set out in *Colacasides* and by the assistant attorney general, supports application of stare decisis. Amicus does not wish to re-plow the ground so ably scoured[31] by the attorney general, but only to make a few points of emphasis. Initially, the recommendation to the convention in an exclusion report was to strike the provision contained in the 1908 constitution that justices and judges are conservators of the peace. But on being advised that it was this language this Court relied on to sustain the constitutionality of the one-person grand jury, the committee said it was not its intent to inadvertently render the one-person grand jury unconstitutional; rather "if it is to be abolished, it should be abolished by the agency and body which created the one man grand jury system, namely, the legislature."[32] Mr. Danhof, later Judge Danhof, said that if the one-person grand jury was to be abolished in the constitution, it should be by "a straight out action,"[33] which led to a

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[30] See *People v. Green*, supra; *People v. Jones*, 2017 WL 127735 (2017); *People v. McGowan*, 2009 WL 4827442, at 1 (2009) ("it was not until a one-man grand jury was convened in the fall of 2005 that information was obtained and this case burst wide open.' Following a five-day hearing, in early 2006 the grand jury authorized indictments for Heath McGowan, Clint McGowan, Eddie Griffes, Michael Hansen and Melissa Mudgett on 14 separate counts, including open murder and felony murder. In addition, indictments were also authorized for Tara Waldorf and Brian Hansen3 for one count each of accessory after the fact").

[31] A plow was not useful on the farm unless it scoured; that is, went through the soil without needing the dirt cleaned from it. See https://www.answers.com/Q/What_does_a_self_scouring_plow_do.

And see "Facts and Myths About the Gettysburg Address," https://www.thoughtco.com/facts-and-myths-gettysburg-address-1691829 ("T]he myth that Lincoln was disappointed in the result [of the Gettysburg Address]—that he told the unreliable [Ward] Lamon that his speech, like a bad plow, 'won't scour'—has no basis. He had done what he wanted to do").

[32] Convention Record, p. 2703.

[33] Id.

proposal to add a provision to the constitution that "one man grand juries are hereby abolished."[34] The proposal did not carry.[35] It appears, then, that the "conservators of the peace" language remained in the state constitution, where it had been since 1850, precisely to permit the one-person grand jury to continue, with abolition or change being left to the legislature.

It is true, of course, that constitutional meaning is not determined by ascertaining the intent or expectation of the drafters, or, for that matter, even the ratifiers, but rather by ascertaining, as near as can be done, "the text's original meaning to the ratifiers, the people, at the time of ratification."[36] And as Justice Viviano has pointed out, citing Professor Whittington, "[c]ontemporaneous expectations about how the constitutional text applied in a case are useful only to the extent they shed light on the original public meaning."[37] As one article puts it, the object is to ascertain, as best as possible, "the original, non-idiosyncratic meaning of words and phrases in the Constitution: how the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases,

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[34] Id., at 2709.

[35] Id, at 2710.

[36] "The primary rule is that of "'common understanding,'" as Justice COOLEY explained long ago: A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.'"

Citizens Protecting Michigan's Const. v. Sec'y of State, 503 Mich. 42, 61 (2018).

[37] *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 489 (2020) (Viviano, J., concurring) (citing Whittington, "Originalism: A Critical Introduction," 82 Fordham L. Rev. 375, 385 (2013).

in context, at the time they were adopted, and within the political and linguistic community in which they were adopted."[38]

The matter is complicated when the constitution employs rather obscure language, or terms of art, as with the use in Art. 6, § 2 of the term "conservators of the peace." Ascertaining the original meaning must take account of uses of any terms of art,[39] and those taking the original public meaning approach to constitutional meaning largely agree on the need to interpret legal terms of art based on their legal meaning of the time.[40] Here, the accompanying Address to the People, which may be considered as an aid to construction,[41] says only "No change from sec. 18, Article VII of the present constitution except for new language to recognize 'judges of the court of appeals' and 'other judges as provided by law.'" And so circuit judges have been conservators of the peace since the 1850 constitution,[42] and the People in ratifying the current provision understood at least that no change, except those additions indicated—court of appeals judges, and other judges as provided by law—was accomplished by the 1963 provision from the 1908 provision (and the 1850 provision). The understanding expressed in the *Slattery* opinion, mentioned by Judge Danhof when proposing

[38] Vasan Kesavan & Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," 91 Geo. L.J. 1113, 1132 (2003).

[39] See Michael Stokes Paulsen, Federalist Society, Showcase Panel IV: Originalism and Precedent [2019 National Lawyers Convention], YOUTUBE (Dec. 11, 2019), https://www.youtube.com/watch?v=5H4csaIC7v0.

[40] See Caleb Nelson, "Originalism and Interpretive Conventions," 70 U. Chi. L. Rev. 519, 549 (2003) (originalists consider themselves bound by "founding-era understandings of specialized legal constructions or terms of art"); Lawrence B. Solum, "District of Columbia v. Heller and Originalism," 103 NW. U. L. Rev. 923, 967-970 (2009) ("terms of art" must be construed based on their meaning to experts in the relevant art).

[41] *People v. Nutt*, 469 Mich. 565, 574 (2004).

[42] 1850 Mich. Const. Art. 6, § 19.

restoring the language to the draft of the provision for the 1963 constitution,[43] expounded upon by *Colacasides,* should, then, prevail.[44]

B. An indictment by a one-person grand juror need not be followed by a preliminary examination

Again, amicus has no desire to burden the resources of the Court by simply repeating the fine arguments of the assistant attorney general,[45] but would simply emphasize several points.[46]

The defendants argue that because MCL 767.4 says that after the one-person grand juror causes the arrest of the person regarding whom it has found probable cause to believe has committed an offense, "the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint," "formal complaint" must mean the formal complaint that must be filed before an arrest warrant is issued, and so a preliminary examination must follow. And so, after a determination of probable cause by a judge, based on evidence, there should be a second determination of probable cause on the taking of evidence, and by an inferior court (the district court). But this would be an odd way for the legislature to put the matter. It seems that what is meant is that the case is to proceed "as though" ("in like manner") it was commenced by a formal

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[43] "[O]ne of the items which Justice Butzel referred to constantly in about 3 pages of his opinion was the fact that circuit judges by the Constitution of 1908 were authorized to be conservators of the peace and that their duties and functions sitting as a grand jury would be within this particular section." Convention Record, p. 2703.

[44] Amicus joins also the fine analysis of the assistant attorney general.

[45] "Those favoring the practice of restricting the filing of amicus briefs suggest that such briefs often merely duplicate the arguments of the parties and thus waste the court's time." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (CA 3, 2002).

[46] On the other side of fn 45, "the Court's opinion in this case effectively eliminates any role for amicus curiae in the practice of this circuit, when it holds that an argument raised by an amicus may not be considered by the Court." *Eldred v. Ashcroft*, 255 F.3d 849, 852 (CA DC, 2001) (Sentelle, J., dissenting from denial of rehearing en banc).

complaint, and so proceed before that court which has jurisdiction of the matter, be it a misdemeanor or felony, in the ordinary fashion (to trial). Though the holding of a preliminary examination seems not foreclosed, given the disqualification of the judge sitting as a grand juror from acting as "examining magistrate" on the complaint, the provision that the grand-juror judge may not hear any motion to quash "the complaint or indictment"—no mention made of an information—or from presiding at trial, is suggestive that, as is generally the case with indictments, a second probable-cause determination is not required, and the case may proceed to trial.

Relief

Wherefore, amicus requests that this Court grant that relief requested by the assistant attorney general.

Respectfully submitted,

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