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

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

PEOPLE'S RESPONSE BRIEF ON APPEAL

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ARGUMENT

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

In his supplemental brief, Lyon continues to argue that MCL 767.3 and MCL 767.4 create a purely investigative body without the power to issue charges. (Def's Supp Br, pp 12–18.) The thrust of Lyon's argument is that the one-person grand jury is not properly considered a grand jury. (*Id.*) He relies primarily on two arguments: (1) that the text of the statutes gives no indication that the judge conducting the proceedings may issues charges, (*id.* at 13–15), and (2) that the differences between the one-person grand jury and the citizen's grand jury demonstrate that the two perform different functions, (*id.* at 15–18). Neither argument survives scrutiny.

A. Lyon asks this Court to overlook that MCL 767.3 and MCL 767.4 refer to a "grand jury" that issues "indictments."

Looking first to the statutory text, Lyon argues that MCL 767.3 and MCL 767.4 contain no language conferring the power to charge on the judge conducting the proceedings. (Def's Supp Br, p 13.) Lyon reaches this conclusion using a novel method of statutory interpretation: while he concedes that the statutes use the terms "grand jury" and "indictment," he argues that "the frequency with which these particular terms are used is instructive." (*Id.* at 14.) Comparing the number of times those terms appear in the eight one-person grand jury statutes (MCL 767.3 to MCL 767.6b), versus the thirty-two citizens' and multi-county grand jury statutes

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(MCL 767.7 *et seq*.), Lyon argues that the use of those terms in the one-person grand jury statutes has no real meaning. (Def's Supp Br, pp 13–15.)

But, of course, those terms do have meaning, and Lyon's novel interpretive approach runs headlong into the basic principle that *every* word must be given effect. See *People v Pinkney*, 501 Mich 259, 282 (2018) ("As a general rule, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." (cleaned up)). The use of the term "grand jury" does, in fact, communicate that the Legislature intended to create a grand jury. (See Pl's Supp Br, pp 9–11.) And the use of the term "indictment" indicates that it is the grand jury that issues charges at the conclusion of the proceedings. (See *id.* at 15–17.) The case law, which Lyon largely ignores, has recognized both these facts. (See *id.* at 12–14, 18–20.)

The statutes' references to the "inquiry" does not change this conclusion. Lyon asserts that the Legislature's use of this term "is particularly revealing," (Def's Supp Br, pp 14–15), without expounding upon what exactly the use of this term reveals. Regardless, Lyon's argument only holds water if the citizens' grand jury statutes *do not* describe those proceedings as an "inquiry." But they do. E.g., MCL 767.9 (oath of citizens' grand jurors "of this inquest" to "diligently inquire"); MCL 767.19e ("The witness may discuss fully with his or her legal counsel any matter relating to the witness's part in the inquiry" and "has the right to have legal counsel present in the room in which the inquiry is held."); MCL 767.19f (secrecy provision "in connection with any grand jury inquiry").

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Thus, the Legislature's decision to refer to the investigatory proceedings as an "inquiry" is consistent with the Legislature's clear intent that the inquiring judge perform the functions of a grand jury—investigating and charging crime.

B. The differences between the one-person grand jury and the citizens' grand jury relate to form, not function.

Lyon next compares the one-person grand jury proceedings with the citizens' grand jury and multi-county grand jury proceedings, arguing that the differences between these procedures necessitate the conclusion that they perform different functions. (Def's Supp Br, pp 15–16.)

As an initial matter, the perceived differences that Lyon identifies are suspect. For example, he points out that a one-person grand jury is convened by a court on the filing of a "complaint" or "application," whereas a citizen's grand jury is "initiated and supervised by the court." (*Id.* at 15.) But there is no apparent difference between these: MCL 767.3, similar to MCL 767.7, requires a "judge in his discretion [to] make an order directing that an inquiry be made" by the one-person grand jury. And a multicounty citizens' grand jury is initiated by petition, too. MCL 767.7b. Lyon also claims that MCL 767.3 and MCL 767.4, unlike the citizens' grand jury statutes, do not "specifically identify the charging instrument to be issued." (*Id.*) But, as he recognized on the previous page, MCL 767.4 repeatedly refers to an "indictment." (*Id.* at 14.) Thus, several of the differences Lyon identifies are not really differences at all.

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More importantly, the purported differences Lyon identifies do not support his conclusion that the one-person grand jury does not perform the *function* of a grand jury—issuing charges on a finding of probable cause. See *People v Pichitino*, 337 Mich 90, 94 (1953) (recognizing the one-person grand jury as one of Michigan's three charging mechanisms). The one-person grand jury, the citizens' grand jury, and the multi-county grand jury are different entities, and each have differences in form. But each serves the same function.

Lyon also argues that the one-person and citizens' grand juries do not achieve the same policy ends. (Def's Supp Br, pp 16–17.) Citing federal case law, he argues that the grand jury protects the public from unfounded prosecution. (*Id.* at 16.) And, citing no case law, he argues that a prosecutor charging by information is accountable to the public. (*Id.* at 17.) By contrast, the one-person grand jury "would circumvent accountability to the public for charging decisions." (*Id.*)

Putting aside the fact that both judges and prosecutors are elected—and the fact that a prosecutor might participate in a citizens' grand jury, whose legality and function are established—Lyon's policy argument misses the point. The purpose of a grand jury or a preliminary examination is not for the court of public opinion to have an opportunity to weigh in. The point of both is "to determine whether there is probable cause to believe that a person committed a crime." *People v Green*, 322 Mich App 676, 687 (2018). The one-person grand jury, the citizens' grand jury, the multi-county grand jury, and the preliminary examination all serve this same purpose. See *id.* at 687; *Pichitino*, 337 Mich at 94.

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Finally, Lyon argues that the probable cause determination made by the one-person grand jury is different from the probable cause determination made at a preliminary examination. (Def's Supp Br, pp 17–18.) He argues that the one-person grand jury only finds probable cause to arrest, rather than probable cause to charge, which he argues is a higher standard. (*Id.*) And he points out that, unlike at a preliminary examination, the one-person grand jury proceedings do not include the cross-examination of witnesses. (*Id.*)

This argument too lacks merit. Lyon's argument is contrary to the text of MCL 767.4, which provides that prosecution "shall proceed" if probable cause is found, as well as the case law recognizing that the one-person grand jury is determining whether probable cause exists to charge. See *Green*, 322 Mich App at 687; *Pichitino*, 337 Mich at 94.

Ultimately, Lyon's attempts to distinguish the one-person grand jury from the citizen's grand jury are not persuasive in light of the statutes' plain language. Even if the two are different in form, they serve the same function.

II. The one-person grand jury does not violate separation of powers.

In his supplemental brief, Lyon sets aside this Court's prior decisions upholding the constitutionality of the one-person grand jury, relying instead on general principles and broad assertions. In so doing, Lyon's argument becomes unmoored from both the text of the statutes and the case law.

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A. Lyon disregards this Court's prior cases.

Lyon blows past this Court's prior cases, concluding that they are not relevant to the challenge he raises. (Def's Supp Br, pp 6–7.) Per Lyon, *Mundy* and *Doe* are inapposite because they did not deal specifically with constitutional challenges to the one-person grand jury. (*Id.* at 6.) And *Slattery* and *Colacasides*, Lyon argues, have no bearing because they did not consider whether the one-person grand jury's charging power violates the separation of powers. (*Id.* at 6–7.)

But those cases are not only relevant to, but determinative of, the issue in this case. *Mundy* and *Doe* reflect this Court's understanding, from the earliest days of the one-person grand jury, that the judge acting as grand juror performs a judicial function. (See Pl's Supp Br, pp 22–23.) Building on those cases, *Slattery* and *Colacasides* held broadly that the one-person grand jury does not violate the separation of powers. (See *id.* at 23–28.)

Lyon may believe that those cases were wrongly decided, but arguing that point would require him to address this Court's reasoning in those cases. Lyon makes no attempt to do so. Instead, Lyon continues to build his argument on the general principle that charging discretion rests with the prosecutor.

But none of the cases that Lyon cites for this principle consider how that principle applies in the context of the one-person grand jury. Instead, those cases addressed instances where the court simultaneously exercised both the full power of the judiciary (presiding over a criminal case) and the power of the executive (directing the prosecutor's charging decisions). (See Pl's Br at 30, 43.) In the context of the one-person grand jury, by contrast, a judge relinquishes at least of

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portion of his or her judicial power and takes up the mantle of a grand jury. (See *id.* at 43.) As this Court correctly recognized in *Slattery* and *Colacasides*, Michigan judges have the constitutional authority to exercise the powers of a grand jury, whether that power is considered judicial or executive. (See *id.* at 29–39.) And pursuant MCL 767.4, if a judge exercises the powers of a grand jury, then they may play no other role in the life of the criminal case.

Lyon argues that MCL 767.3 and MCL 767.4 do, in fact, allow a judge to wield the full powers of the both the judiciary and the executive, but his argument lacks any connection to the text of the statutes.

He argues that, if the one-person grand jury has charging authority, then "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." (Def's Supp Br, p 8.) But this has no basis in the text, which prohibits the judge from playing any role in the criminal proceedings following the issuance of charges. MCL 767.4.

He further claims that the statutes are "not carefully tailored," (Def's Br, p 10), have "no structural limitations or purpose," (*id.* at 11), and constitute "a complete abdication of prosecutorial power transferred to the judiciary," (*id.*). These assertions do not merely ignore the text; they are in direct conflict with it. As this Court has recognized, the statutes contain numerous safeguards against abuse in the form of limitations on the one-person grand jury's powers. See *In re Colacasides*, 379 Mich 69, 98–99 (1967); (Pl's Br, pp 40–43).

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Ultimately, by striking his own path apart from this Court's prior decisions, Lyon relies on broadly stated assertions that conflict not only with those prior decisions, but also the text of the statutes themselves.

B. Lyon's reliance on sister-state statutes falls flat.

In support of his position, Lyon looks to statutes from Oklahoma, Vermont, South Dakota, Wisconsin, Washington, and Connecticut, which authorize judges to conduct investigations into crime. (Def's Supp Br, pp 27–30.) Lyon asserts that, of these six states, only Wisconsin's statute allows the judge to issue charges at the conclusion of the proceedings and that the Wisconsin Supreme Court has not yet considered whether this charging power violates the separation of powers.

It is not clear whether Lyon relies on these statutes to argue that Michigan's statutes do not confer charging authority or that they violate separation of powers. He begins his discussion of the sister-state statutes by claiming that "Michigan is an outlier," but he concludes by asserting that "Michigan's statute does not give the judicial office any authority whatsoever to charge." (Def's Supp Br, pp 27, 30.) Thus, the inference he attempts to pull from these statutes is unclear. Regardless, the sister-state statutes and case law that Lyon cites support neither proposition.

That some sister-state statutes do not confer charging power does not mean that Michigan's statutes also do not. To start with the obvious, Michigan's statutes are interpreted according to their own text, which create a "grand jury" that issues an "indictment." MCL 767.3; MCL 767.4. Notably, at least one of the sister-state cases on which Lyon relies, in comparing its statute to Michigan's, recognizes that

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Michigan's statutory scheme does confer charging power on the one-person grand jury. See *State v Manning*, 86 Wash 2d 272, 274–275 (1975).

Moreover, scholars have recognized for many years that Michigan's one-person grand jury is unique in the extent to which it has been developed and utilized. See, e.g., Scigliano, *The Michigan One-Man Grand Jury* (1957), p 15 ("The most significant use made of the judicial inquisition as an alternative to the grand jury has occurred in Michigan."); Winters, *The Michigan One-Man Grand Jury*, 28 J Am Jud Soc 137, 141 (1945) ("Although a close approximation to the Michigan one-man grand jury is thus seen to exist or have existed in a dozen of the states . . . , it has reached its greatest development in Michigan."). Thus, the fact that Michigan's one-person grand jury is an "outlier" actually supports the conclusion that it has charging authority.

This does not mean that the one-person grand jury violates separation of powers. If anything, it again points in the opposite direction. Michigan's one-person grand jury has been considered an outlier from its early years, and yet this Court has consistently upheld the institution against constitutional attack.

Further, Lyon is incorrect in his assertion that Wisconsin—the only state he identifies that has a judicial inquiry with charging authority—has not considered a separation of powers challenge to this power. In *State v Unnamed Defendant*, 150 Wis 2d 352 (1989), decided about a decade after the cases that Lyon cites, the Wisconsin Supreme Court did consider a separation of powers challenge to the charging power of a judge conducting a "John Doe proceeding."

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The Wisconsin Supreme Court in *Unnamed Defendant* explained that the judge conducting a John Doe proceeding both investigates alleged crime and, on finding probable cause, initiates prosecution. *Id.* at 359. The court recognized that it had previously upheld the John Doe proceeding against a separation of powers challenge, but the court acknowledged that its prior decision had focused largely on the investigative power of the judge. *Id.* at 359–360. The court also recognized that it had previously held that charging crimes was exclusively the province of the executive. *Id.* at 358. The court explained, however, that "not all governmental powers . . . are exclusively committed to one branch of government" and that separation of powers is concerned with preventing "the concentration of unchecked power in the hands of one branch." *Id.* at 360–361. Recognizing the long-standing role of John Doe proceedings in Wisconsin, the court ultimately reaffirmed its constitutionality. *Id.* at 367.

Thus, Lyon's examples again work against him. The sister-state cases he relies on only further illustrate the charging power and constitutionality of the one-person grand jury.

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

Lyon again expressly declines to seek a preliminary examination as alternative relief. (Def's Supp Br, pp 19–20.) To the extent Lyon addresses this argument substantively, this brief incorporates by reference the People's combined response brief in *People v Peeler*, No. 163667, and *People v Baird*, No. 163672.

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IV. The one-person grand jury proceedings did not violate due process.

In his supplemental brief, Lyon switches gears from arguing primarily that the proceedings in this case violated due process by not complying with the statutes to now arguing that the statutes themselves violate due process. (Def's Supp Br, pp 22–25.) He argues that MCL 767.3 and MCL 767.4 allow "the 'awful instruments' of criminal law to be vested in a single member of the judiciary." (*Id.* at 22.)

But in *Colacasides* this Court rejected this exact argument. *Colacasides*, 379 Mich at 98 ("[A]ppellant contends that the law still reposes in the one-man grand jury such 'awful authority' that we should strike it down as violative of our current concepts of due process."); *id.* at 101 ("[A]ppellant has failed to persuade us . . . ."). Lyon acknowledges this is passing but argues summarily that this Court's reasoning did not "address the fundamental concerns presented here." He does not expand on this point.

In reality, the focus of Lyon's due process argument is the motivations he attributes to the People, rather than the constitutionality of the procedure itself. (See Def's Supp Br, p 21 ("[T]he judicial inquiry here amounted to an *ex parte* preliminary examination . . . ."); *id.* at 23 ("a cynical ploy by the prosecution to circumvent Director Lyon's due process rights"); *id.* at 24 ("[T]he judicial officer worked secretly with the politically-motivated prosecution . . . ."); *id.* at 26 ("[T]he prosecution worked hand-in-glove with the judiciary to retool and recharge – and to avoid independent judicial review."); *id.* at 27 ("[U]se of the judicial inquiry was exclusively for tactical, not proper legal, reasons.").) Lyon's argument fails for at least two reasons.

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First, as evidenced by the numerous cases Lyon cites regarding the prosecutor's charging discretion, the People did not violate due process by exercising that discretion. See *Green*, 322 Mich App at 686–687 ("Having been created, the [one-person grand jury] procedure may be invoked at a prosecutor's discretion."). Here, Lyon is caught between arguing that the People improperly exercised their charging authority and that the one-person grand jury interferes with the prosecutor's charging discretion. (See Pl's Supp Br, p 50.)

Second, regarding Lyon's focus on the secrecy of the proceedings and the lack of cross-examination, Lyon ignores that a citizen's grand jury would have operated in the same way. Thus, his argument that the one-person grand jury violated due process on this basis also lacks weight.

Ultimately, Lyon continues to put forward a due process argument with no foundation in due process itself.

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CONCLUSION AND RELIEF REQUESTED

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

Respectfully submitted,

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