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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 REPLY BRIEF IN SUPPORT OF BYPASS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

The prosecution describes the judicial inquiry as "one of the defining aspects" of our State's criminal justice system. PROS SUPP BR 1. That description is true – if by "defining" the prosecution means "unique among all 51 United States criminal justice systems for purportedly granting the exclusive, executive charging power to the judiciary." The time for this Court to determine the validity of such extraordinary power is now.

Contrary to the prosecution's arguments, this Court has never made that determination. Neither *In re Slattery* nor *In re Colacasides* addressed whether the judicial-inquiry statute gives judges the authority to charge, much less whether such authority is constitutional. In case after case, this Court has held that the judicial power is limited to the authority to hear and decide controversies, and to make binding judgments representing them. *Johnson v Kramer Bros Freight lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959). Conversely, 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." *People v Gillis*, 474 Mich 105, 141 n19; 712 NW2d 419 (2006) (emphasis added).

Dismissal is the only appropriate remedy for the prosecution's attempt to slough off on a judicial officer the prosecution's exclusive responsibility to indict – not to mention the numerous abuses of the judicial-inquiry statute that took place here. Accordingly, the indictment must be dismissed.

In making that decision, this Court need defer in no way to the trial court's ruling. *See People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); contra PROS SUPP BR 5. Because the motion sought dismissal on legal grounds, it is subject to review for legal error. *Id.* Constitutional issues and questions of statutory interpretation are reviewed *de novo*. *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008).

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ARGUMENT

I. Interpreting the judicial-inquiry statute to confer charging authority on a judicial officer violates Michigan's constitutional requirement of separation of powers, MICH CONST 1963 art III, § 2

A. Precedent is only in peril from the prosecution

The trial court's interpretation of the judicial-inquiry statute sanctions the issuance of criminal charges by a judge, which violates the Michigan Constitution. LYON SUPP BR 5-11. The prosecution contends that so holding requires this Court to overrule *In re Slattery*, 310 Mich 458; 17 NW2d 251 (1945), and *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). Not so.

Slattery involved contempt power, and the challenge was by one who had been held in contempt. It did not involve one who had been charged nor the question of whether a judge can charge. Accordingly, the Court confined its holding to the constitution's judicial-department provisions, not the separation of powers provision, and simply held that when a judicial officer holds a witness in contempt he performs a judicial function. Moreover, any value *Slattery* may have had in 1945 was quickly undermined by in *In re Oliver*, 333 US 257 (1948), which held that it violated due process for a judicial officer to summarily convict a witness of contempt in secret proceedings, and *In re Murchison*, 349 US 133 (1955), which held that it violates due process for a judicial officer to preside at a contempt hearing.

Colacasides was confined to the power to investigate; it had nothing to do with charging power, so this Court addressed a very narrow aspect of the statute. It observed that in "this country it is not normally the function of a judge to investigate the occurrence of crime," 379 Mich at 89, and contrasted investigatory powers with the customary powers of a judicial officer. It cast the constitutional question in terms of the scope of investigatory power – not charging authority – and 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, § 2 of our Constitution of 1963." *Id* at 91 (emphasis supplied).

The prosecution also argues that because citizen grand juries can indict, so may a judicial inquiry. But this analogy proves Director Lyon's point. The Michigan Constitution prevents the Legislature from

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delegating the executive charging authority to the judiciary. It does not prevent the Legislature from delegating charging decisions to members of the community comprising a traditional grand jury because they are *not* another branch of government.

Accordingly, it is the prosecution that seeks to disturb precedent. After all, "[i]t 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." *People v Smith*, 496 Mich 133, 141; 852 NW2d 127 (2014), citing *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). LYON SUPP BR 5-11.

B. History does not favor the prosecution

To affirm this long line of precedent, the Court need not conduct a historical review of what powers "conservators of the peace" may have held hundreds of years ago in England. Contra PROS SUPP BR 35-39. The prosecution's historical analysis is wrong – conservators lacked a power to indict – but that is of no moment today. Article III, § 7 of Michigan's 1963 Constitution makes clear that only "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." And there is no argument that conservators of the peace held indictment power in 1963. That historical fact is dispositive.

C. Statutory safeguards do not save the statute

The prosecution contends that certain provisions of the judicial-inquiry statute save it from unconstitutionality. It contends that so long as the judicial officer who conducts the inquiry does not thereafter preside over the case, there is no separation of powers concern. PROS SUPP BR 42-43. The prosecution acknowledges the long line of authority prohibiting judges from presiding over criminal proceedings while directing prosecutorial decisions. *See Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672; 194 NW2d 693 (1972); *People v Muniz*, 259 Mich App 176; 675 NW2d 597 (2003); *People v Williams*, 244 Mich App 249; 625 NW2d 132 (2001); *People v Morrow*, 214 Mich App 158; 542 NW2d 324 (1995). But, it says, the judicial inquiry is different because the judicial officer is prohibited from presiding over the case *after* charges are filed.

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This contention also makes Director Lyon's point: a judicial officer who investigates and purports to determine probable cause cannot do both. The prosecution ignores that it relies on the "indictment" as the basis for probable cause, which was also the product of the judicial officer's prosecutorial investigation. Simultaneously charging and exercising judicial authority is what is clearly prohibited. *Application of Romney*, 381 Mich 1; 158 NW2d 564 (1968).

D. Unconstitutional is unconstitutional even if the prosecution likes it

The prosecution says that, assuming a separation of powers concern, there was no problem "as applied" here because the prosecution advocated for the charges. PROS SUPP BR at 49-51. Under this view, there is a constitutional violation only if the prosecution disagreed with the charge. But separation of powers does not exist to protect a branch of government; it exists to ensure citizens a proper form of government.

Again, the prosecution makes the argument for Director Lyon. LYON SUPP BR at 16-17. It is precisely because the *prosecutor* must make the charging decision – and be accountable to the public for it – that the charging decision cannot be delegated to the judiciary. It is up to the prosecutor to decide what charge to file and to proceed with as upon formal complaint.

E. The judicial-inquiry statute is not narrowly tailored for its intended purpose

Separation of powers can be violated in several ways, including where one branch usurps another's power, where a member of one branch wears too many hats, or where a statute provides for the sharing of power too broadly. *Hopkins v Parole Board*, 237 Mich App 629; 604 NW2d 686 (1999) (court has limited authority to review parole decisions; parole board has exclusive jurisdiction); *People v Payne*, 424 Mich 475; 381 NW2d 391 (1985) (deputy sheriff who also acts as magistrate may not issue search warrants).

What power is shared must be "very limited and specific." In *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728; 330 NW2d 346 (1982), the plaintiff challenged the governor's transfer of rule-making authority from one executive department to another claiming that only the Legislature could do so. This Court upheld the governor's power, noting critical limiting features: the area of executive exercise is limited, the executive is not the sole possessor of the power,

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and the Legislature retained the power of executive reorganization. *Id* at 752. *See also People v Trinity*, 189 Mich App 19, 23; 471 NW2d 626 (1991).

All these problems are implicated by the judicial-inquiry statute. The executive branch has exclusive power to charge, but under the statute the judge charges. The judge should not wear two hats, yet the judge does. And the statute could be limited and specific, but it is not.

What limitations the statute does place on the judge all involve judicial functions *after* the investigation,[1] not his executive functions *during* the investigation. The judge decides the investigation's scope, what evidence to gather, who gets immunity, and who to charge with what. This is not "very limited and specific," as the decision to charge citizens with crimes goes to the very core of the executive function vested solely with prosecutors who are politically answerable for those decisions. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998).

In evaluating whether a delegating statute is "very limited and specific," the Court need look no further than how else the Legislature has sought to solve the problem of "discovering crime" as was the purpose in 1917.[2] Consider the investigative subpoena statute the Legislature enacted over 25 years ago, MCL 767A.1, *et seq*. As the Attorney General notes in one of the department manuals:

> All prosecutors have experienced the frustration associated with critical witnesses who are unwilling to cooperate with an ongoing criminal investigation. By withholding information, such witnesses can effectively thwart an otherwise viable prosecution. Although there is an existing mechanism (the grand jury system) available to remedy such circumstances, grand juries are unwieldy, time-consuming, and expensive.

Michigan Department of Attorney General, *Investigative Subpoena Manual* (2013). The manual goes on to describe the virtues and conveniences of the system, highlighting that the statute provides a means of seeking immunity for witnesses, MCL 767A.7, holding

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[1]The judicial officer may not serve as the "examining magistrate," hear any motions to quash or dismiss, or serve as the trial judge. MCL 767.4. Also, he may not hear most forms of contempt. *Id*.

[2]When originally enacted, 1917 PA 196, was entitled "An Act to authorize proceedings for the discovery of crime, and to provide penalties for a violation of such procedure."

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recalcitrant witnesses in contempt, MCL 767A.9, and ensuring the secrecy of ongoing proceedings, MCL 767A.8.

Under the investigative subpoena statute, the executive and judicial branches stay in their proverbial lanes. The judge does not become a prosecutor; rather, the judge acts as a neutral and detached officer of the court. This statute is an excellent illustration of how the judicial-inquiry statute is not at all limited or specific. It needlessly confers power on the judiciary and entangles it unnecessarily in the affairs of the executive.

For all these reasons, the judicial inquiry statute violates the constitutional guarantee of separation of powers.

II. The judicial-inquiry statute does not confer charging authority on the investigating judicial officer making the indictment invalid and requiring dismissal

The Court need not reach the constitutional question because the judicial-inquiry statute does not say what the prosecution evidently thought it said when it chose this antiquated process to reinvestigate what was then the most investigated governmental decisions in Michigan history. LYON SUPP BR 12-18.

A. The statutory language

The prosecution spills much ink on statutory history, but the Court need look no further than the statutory language itself. It makes clear that the judicial officer has the authority to investigate. But there is nothing in the statutory language that says the judicial officer may issue a complaint, information, indictment, or any charge of any kind. Nothing. Yet the prosecution asks the Court to assume that it does and refers to the "repeated references" in the statute to the term, "indictment." It also points out that in 1949, when the Legislature created the three-judge judicial inquiry, it provided that the "order returning indictments shall be signed by 3 judges."

These points shed no light on the question presented. First, simply because the matter is to proceed promptly after a probable cause finding says nothing about the charging instrument. Second, the references to "indictment" – which are only four – say nothing about who has the authority to charge. The term is used once in reference to precluding the judicial officer's from acting as an examining magistrate,

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once in reference to precluding the judicial officer from hearing a motion to quash, and twice in reference to proscribing disclosure of that an indictment has been returned. No reference addresses the judicial officer's authority. Finally, reliance on the 1949 authority of the three-judge panel is irrelevant because that authority was repealed in 1951.

B. The court rules

The prosecution also relies on the court rules. But the rule regarding records of the judicial inquiry, MCR 6.107, and the rule regarding the right to counsel before a "grand juror," MCR 6.005(I)(1), do not provide any substantive authority for the judicial officer to issue a criminal charge. Anyway, substantive statutory rights control over court rules. *People v McGuffey*, 251 Mich App 155, 165; 64 9 NW2d 801 (2002). Here, the statutes provide for the judicial officer to "cause the apprehension of such person by proper process," *not* to charge an offense. Nothing in the procedural rules can be read to expand on that specific provision of authority by giving the judicial officer executive authority to charge an offense.

C. A judicial inquiry is not a citizen grand jury

The prosecution's fallback is that the judicial inquiry is functionally equivalent to a citizen grand jury, so the judicial officer must be able to issue a charge as well. Never mind that the statute does not say so, or that this Court has never interpreted it that way outside the contempt arena. The prosecution maintains that simply because we have come to call the judicial inquiry a "one-person grand jury" it means that it functions like a citizen grand jury. But, as Director Lyon outlined in his supplemental brief, the judicial inquiry and the citizens grand jury schemes in Michigan are very different in statutory language, structure, and function. LYON SUPP BR § II, at 12-18.

Without any express statutory authority to the contrary, charging authority must remain where it belongs – with the prosecution – to proceed with the ordinary complaint and warrant process as the statute directs.

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

The judicial-inquiry statute plainly contemplates the availability of a preliminary exam for felonies. That right flows from the *charge*.

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Why else would the statute provide that the judicial officer cannot serve as the "examining magistrate" or hear a motion to quash unless it contemplates a preliminary exam? The prosecution devotes considerable time delving into history, but it cites not a single case in which a preliminary exam was denied for a felony charge from the enactment of the judicial-inquiry statute in 1917 until the bench and bar began to misinterpret *Glass* 20 years ago.

The prosecution maintains that a prosecutor and judge can get together, investigate in secret, charge someone with felonies, and have those charges escape all judicial review prior to trial. No preliminary examination. No motion to quash. Straight to trial. That defies logic and common sense. For the same reasons it did not want the circuit court here to scrutinize the factual and legal infirmities in its case three years ago, the prosecution is trying to place its allegations against Director Lyon beyond reach of any judicial officer until trial. That's the opposite of due process.

The prosecution further contends that Director Lyon has no statutory right to a preliminary exam because he waived that right by not joining the other defendants' motions to remand. That's incorrect. Waiver is the intentional relinquishment of a known right, *People v Davis*, No. 161398, slip op at 7-8 (Mich Sup Ct Mar 14, 2022), which did not occur here. Simply because Director Lyon pursued another form of relief – dismissal – does not mean that he abandoned the right to a preliminary exam should the case not be dismissed. The trial court has not set a deadline for motions; in fact, it has not even scheduled a pretrial conference until July.

IV. The judicial-inquiry proceedings violated due process

The prosecution says that the many documented irregularities in this proceeding do not matter, because no single irregularity constitutes a right belonging to a suspect. The prosecution does not dispute that the investigation did not conform to the statute, and it does not even bother to offer an excuse. It even concedes that it ran the show, not the judge. As for the wrong oath being administered to those who purportedly assisted the judge, the prosecution asks what was it to do when the citizens grand jury oath was the only oath prescribed? Such a claim underscores that the prosecution does not appreciate the difference between judicial inquiries and grand juries. The judicial

officer could have crafted an oath appropriate to the tasks being undertaken – and not just use what the prosecution provided.

Claims that all the irregularities were harmless might have some weight if this were not an interlocutory appeal. *See People v Manning*, 243 Mich App 615, 640; 624 NW2d 746 (2000) (harmless error analysis not appropriate on interlocutory appeal because it would be impossible to determine whether any error is harmless). Moreover, a preliminary examination might alleviate some of the due-process deficiencies here, but the prosecution maintains that Director Lyon is not entitled to one.

The prosecution ignores the more fundamental due-process concern presented. The judicial officer here acted as accuser and adjudicator – something not in dispute – which is a fundamental due-process violation. *Williams v Pennsylvania*, 579 US 1 (2016); *In re Murchison*, 349 US 133 (1955). And it is even more egregious when the judicial officer and prosecution do not observe many of the statutory requirements.

The indictment was the product of a flawed process violative of due process and must be dismissed. Dismissal does not leave the prosecution without options. LYON SUPP BR § V(B) at 30-33. It need only follow the law.

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CONCLUSION

For the above reasons, and those previously provided, 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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Dated: April 21, 2022

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CERTIFICATE OF COMPLIANCE

This application is filed pursuant to AO 2019-6 and contains 3,181 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.

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PROOF OF SERVICE

STATE OF MICHIGAN)
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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:

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