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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

7th Circuit Court
Case No. 21-47378-FH

Fadwa A. Hammoud (P74185)
Solicitor General
Kim Worthy (P38875)
Wayne County Prosecutor
Gallant Fish (P82196)
Christopher Kessel (P71960)
Molly Kettler (P59877)
Attorneys for Plaintiff-Appellee
Solicitor General Division
3030 West Grand Boulevard
Cadillac Place, Suite 10-200
Detroit, MI 48202
313.456.3870

Charles E. Chamberlain, Jr. (P33536)
Britt M. Cobb (P69556)
WILLEY & CHAMBERLAIN LLP
Attorneys for Defendant-Appellant Lyon
300 Ottawa Avenue NW, Suite 810
Grand Rapids, MI 49503-2314
616.458.2212

Ronald G. DeWaard (P44117)
Brion B. Doyle (P67870)
Regan A. Gibson (P83322)
VARNUM LLP
Attorneys for Defendant-Appellant Lyon
333 Bridge Street NW, Suite 1700
Grand Rapids, MI 49503-5365
616.336.6000

John J. Bursch (P57679)
BURSCH LAW PLLC
Attorneys for Defendant-Appellant Lyon
9339 Cherry Valley Avenue SE, Unit 78
Caledonia, MI 49316-0004
616.450.4235

Devin S. Schindler (P41371)
Gaëtan Gerville-Réache (P68718)
Charles Ash (P55941)
Brian Lennon (P47361)
WARNER NORCROSS + JUDD LLP
Attorneys for Amicus Curiae Richard Snyder
150 Ottawa Avenue NW, Suite 1500
Grand Rapids, MI 49503-2832
616.752.2000

Alexander S. Rusek (P77581)
White Law PLLC
Attorneys for Amicus Curiae Howard D. Croft
2549 Jolly Road, Suite 340
Okemos, MI 48864
517.316.1195

Amici Brief of Gov. Richard Snyder and Howard Croft In Support of Defendant-Appellant Nicolas Lyon's Application for Leave to Appeal

Oral Argument Requested

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STATEMENT OF APPELLATE JURISDICTION

Appellant's statement of jurisdiction is complete and correct.

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STATEMENT OF QUESTIONS PRESENTED

1. Do MCL 767.3 and 767.4 confer charging authority on a member of the judiciary?

The Trial Court Answered:	Yes.
The Prosecution Answers:	Yes.
Defendant-Appellant Answers:	No.
Amici answer:	No.

2. If MCL 767.3 and MCL 767.4 are interpreted as conferring charging authority, do they violate Michigan's constitutional requirement of separation of powers, Mich Const 1963, art 3, § 2?

The Trial Court Answered:	No.
The Prosecution Answers:	No.
Defendant-Appellant Answers:	Yes.
Amici answer:	Yes.

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STATEMENT OF INTEREST[1]

Former Governor Richard Snyder ("Governor Snyder") and Mr. Howard D. Croft ("Mr. Croft"), who served as Director of the City of Flint Department of Public Works during some of the relevant period, have a profound interest in the Court's decision in this appeal by virtue of having been indicted by the same judge, pursuant to the same judicial inquiry, that gave rise to this appeal. Like Defendant-Appellant Nicolas Lyon ("Director Lyon") and six other individuals, Governor Snyder and Mr. Croft were indicted by a judge for the 7th Judicial Circuit for their alleged actions and inactions in relation to what has become commonly known as the Flint Water Crisis ("FWC").

Mr. Croft was originally charged on or about December 19, 2016, with various felonies and misdemeanors by the former Office of Special Counsel for the Michigan Attorney General.[2] Further, on or about June 14, 2017, the Michigan Attorney General published a "Notice of Intent to Seek Bindover on Additional Charge[s]" for Mr. Croft, which stated that the Michigan Attorney General would seek to charge him with involuntary manslaughter in the upcoming preliminary examination. In January 2019, newly-elected Attorney General Dana Nessel appointed Fadwa Hammoud as Solicitor General and tasked her with leading the criminal investigation into the Flint Water Crisis on behalf of the Michigan Attorney General. In June 2019, the Michigan Attorney General's Office dismissed *without prejudice* the criminal charges against Mr. Croft. However, the Michigan Attorney General's Office, assisted by Wayne County Prosecutor Kym Worthy, continued to investigate the nine defendants.

[1] No counsel for any other party authored this brief in part or whole, although Amici did expand upon a chart contained in Director Lyon's Brief. Nor did any counsel or party make any monetary contribution to fund the preparation or submission of this brief.

[2] Governor Snyder was not charged by the Office of Special Counsel.

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After these charges were dismissed by the Solicitor General, a secret, highly unusual, so-called one-man grand juror proceeding was constituted in Genesee County Circuit Court in January 2020. That proceeding continued through January 2021 and resulted in multiple Indictments being issued by the Court against the nine defendants for various misdemeanor and felony offenses. Both Governor Snyder and Mr. Croft were indicted on two counts of Willful Neglect of Duty contrary to MCL 750.478.

Governor Snyder's case is currently being held in abeyance as the Circuit Court, on appeal from the District Court, sorts out various jurisdictional and venue issues. The same is true of Mr. Croft's case, which is in abeyance while the Chief Judge of the District Court considers a motion to disqualify the District Court Judge.

This Court has granted a mini-oral argument in three related cases, *People v Baird*[3], *People v Peeler*[4] and *People v Lyon*[5], to consider, among other things, the questions of whether "(1) MCL 767.3 and MCL 767.4 violate Michigan's constitutional requirement of separation of powers, Mich Const 1963, art 3, § 2; [and] (2) whether those statutes confer charging authority on a member of the judiciary." (3/23/2022 MSC Order.) If the Court determines the statute as interpreted by the trial court is unconstitutional, or properly interprets the statute as not authorizing the judicial branch to become an arm of the prosecution, the charges against Governor Snyder and Mr. Croft should be dismissed. Accordingly, both *Amici* have an acute interest in the Court's ultimate decision.

[3] MSC Case No. 163672.

[4] MSC Case No. 163667.

[5] MSC Case No. 164191.

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Governor Snyder and Mr. Croft fully agree with Director Lyon's insightful and unanswerable supplemental brief, and they offer this amicus brief to further develop two points: First, properly interpreted, the Judicial Inquiry Statute does not allow the judiciary to exercise prosecutorial charging authority. Second, a contrary interpretation permits the judiciary to exercise executive charging authority in violation of the constitutional separation of powers.

INTRODUCTION

Properly applying basic tools of statutory interpretation can only lead to one conclusion in this appeal: that the Judicial Inquiry Statute (MCL 767.3 to 767.6b) does not allow the judiciary to exercise prosecutorial charging authority. The lower court's conflation of that statute with the broader Citizen's Grand Jury Statute is not supported by either the language or the purposes of the two statutes. Rather, the textual differences between the two highlight the fact that the Legislature intended the judiciary to play only an investigative role.

Moreover, an interpretation of the Judicial Inquiry Statute that does grant charging authority to a member of the judiciary should be avoided because it would render the statute unconstitutional. The indictment of Governor Snyder, Mr. Croft, Director Lyon and six others by a single judge highlights the constitutional separation of powers concerns raised by Director Lyon. It is one thing for the judicial branch to *hear* a case brought by an independent prosecutor against the highest executive official in Michigan. It is quite another for the judicial branch to be part of the prosecution team.

If the constitutional principles upon which this State (and the federal government before it) are based are to have any meaning in 2022, interpreting the Judicial Inquiry Statute, MCL 767.3 and 767.4, as allowing the judiciary to exercise executive prosecutorial authority cannot stand. Fortunately, the statute can and should be interpreted based on its plain language to avoid

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the constitutional crisis. Accordingly, *Amici* respectfully request that the lower court's opinion be reversed.

STATEMENT OF FACTS

The general and procedural facts relevant to this matter are fully explained by Director Lyon in his Bypass Application and Supplemental Brief and relied upon for this brief.

ARGUMENT

I. The lower court ignored the language of the statute and improperly conflated the Judicial Inquiry Statute with the Citizen's Grand Jury Statute.

The fundamental error in the lower court's opinion begins with its first line: "[a]cting in his capacity as a one-person grand juror, [the Judge] signed an indictment." (2/17/2022 Order Denying Def's Mot to Dismiss 1.) The term "juror" does not appear anywhere in the statute and the term "one-person grand jury" was the creation of early 20th century newspaper reporters. (Lyon Bypass App 18.) The title of the Judicial Inquiry Statute currently only refers to an "inquiry," consistent with the body of the statute itself, which uses that term throughout. See, e.g., MCL 767.6b ("Within 90 days after the termination *of such inquiry*, such judge shall file . . . a public accounting."). The limited investigatory nature of the current process is consistent with the original version of the act, which provided the judiciary no indictment authority either. 1917 PA 196. That limitation was reflected in the title of the original act, which simply called itself "An Act to Authorize Proceedings *for the Discovery of Crime*, and to Provide Penalties for a Violation of Such Procedure." See *id*. (emphasis added). "Discovering crime" is not the same as "issuing indictments and prosecuting crime," a power given exclusively to the executive branch. See, e.g., *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995).

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The power to indict was given to the Judicial Branch in the 1949 version of the statute, but then the Legislature, perhaps recognizing that prosecuting cases was not an appropriate role for the judiciary, specifically repealed the provision that gave judges such power several years later. Compare 1949 PA 311 ("[O]rders returning Indictments shall be signed by 3 judges") with MCL 767.4 ("[J]udge shall make a written finding"). The lower court and the Prosecution do not contest—because they cannot—the fact that the plain language of the current statute does not authorize the judiciary to exercise final prosecutorial authority. Simply said, that specific authority was taken away when the statute was amended. This should be the end of the inquiry. "When the express terms of a statute give us one answer and extratextual considerations [like a "misnomer" penned by the press] suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v Clayton Co, Georgia*, -- US --; 140 S Ct 1731, 1737 (2020). This is particularly true here, where (1) fundamental constitutional rights are at stake and (2) the "extratextual considerations" distill to a "misnomer" penned by newspaper reporters nearly 100 years ago. See *In re Slattery*, 310 Mich 458 (1945); *Glenn R Winters, The Michigan One-Man Grand Jury*, 28 J Am Jud Soc 137, 138 (1945).

Recognizing the absence of specific language supporting their argument, the Prosecution and the lower court shifted their focus from the plain language of the Judicial Inquiry Statute to the Citizen's Grand Jury Statute, arguing that because the latter allows citizens to issue indictments, the former must allow a single judge to do the same. The crux of the lower court's opinion is that the Judicial Inquiry Statute must authorize indictments because it runs "parallel" to the Citizen's Grand Jury Statute. (2/17/2022 Order Denying Def's Mot to Dismiss ("Parallel to a citizen's grand jury, a one-person grand jury has the power to issue indictments.")

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On the contrary, these are two different statutes with different language, different history and different purposes. Citizen grand juries were recognized in the first Michigan Constitution, which specifically gave them the power to indict: "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury." Mich Const 1835, art 1, § 11. The right to citizen grand juries was removed in Michigan's 1850 Constitution, but they were later reauthorized to issue indictments as a discretionary matter by statute enacted in 1859. MCL 767.7. As pointed out by Director Lyon, the Judicial Inquiry Statute came about 82 years later to vest the Courts with the limited power to investigate public corruption and organized crime. (Lyon Bypass Appl 18.)

Expanding upon a chart contained in Director Lyon's supplemental brief, a side-by-side comparison of the two statutes highlights the stark difference between a statute intended to allow for "inquiries" versus one that authorizes the issue of indictments:

Issue	**Judicial Inquiry Statute, MCL 767.3-767.6b ("JIS")**	**Citizen's Grand Jury Statute; MCL 767.7, et seq ("CGJ")**	**Comment**
Title	"Proceedings before trial: *Inquiry*"	"Grand Jury"	Per the Prosecution's brief; "chapter titles," while not controlling, can be "useful navigational aids." (Prosecution Supp'l Br 11.) The titles preview two different procedures with two different goals; requiring two different names. The judge engages in an "inquiry."

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Issue	**Judicial Inquiry Statute, MCL 767.3-767.6b ("JIS")**	**Citizen's Grand Jury Statute; MCL 767.7, et seq ("CGJ")**	**Comment**
Use of term "Grand Jury"	2 times, once in relation to the calling of witnesses and the second to proscribe disclosure of material.	95 times	The Legislature knew how to create a true "grand jury" that could issue "indictments," and chose not to use that language to describe the "judicial investigator."
Use of the term "Jurors"	0 times	26 times	The judge is not a "juror" or a "grand juror." He or she is an *investigator*.
Use of the term "Indictment"	4 times; but never in the context of a judge actually issuing an indictment.	106 times	If the Legislature intended to give an investigating judge the power to indict, it would have done so, just like it did 106 times in the CGJ.
Oath	No provision.	MCL 767.9 (for jurors): "You as grand jurors of this inquest do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge . . . so help you God."	Grand jurors granted the power to indict are required to take an oath promising to make a "true presentment." Judges investigating have no reason to give an oath because they are not authorized to indict.
Charging Instrument	No provision.	Issue an "indictment."	The judicial investigator has no statutory authority to charge anyone for the conduct he or she is investigating.

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Issue	**Judicial Inquiry Statute, MCL 767.3-767.6b ("JIS")**	**Citizen's Grand Jury Statute; MCL 767.7, et seq ("CGJ")**	**Comment**
Return of Indictment	No provision.	Foreperson presents indictment to the court in the presence of grand jury, and presiding judge returns indictment to court with jurisdiction, MCL 767.25.	With no power to indict in the first instance, a "return" provision is unnecessary. You cannot "return" something you had no power to issue in the first place.
Limitation of Actions	No provision.	Indictment must be "found and filed" by varying time periods prescribed by statute, MCL 767.24.	Again, no provision regarding limitation of actions because there is no power to indict in the first instance.
Options Upon Completion	Apprehension and then "proceeding in like manner as upon formal complaint." MCL 767.4.	To issue indictments, or not, a term used 106 times in the statute.	The right to "indict" is clearly spelled out in the CGJ statute. In contrast, the JIS only allows for the issue of "findings" that may or may not lead to charges.
Report of "no finding"	MCL 767.4.	No provision.	The key word here is "finding." Investigators make "findings;" CGJs issue indictments.
Duty Upon Completion	"(H)e may cause the apprehension of such person by proper process" followed by a different judge "proceeding in like manner as upon formal complaint." MCL 767.4.	"A grand jury convened under section 7c may indict a person for an offense committed." MCL 767.23a	The Legislature did not give the one-person judicial investigator the power to indict. It gave that power to citizen grand juries.

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Issue	Judicial Inquiry Statute, MCL 767.3-767.6b ("JIS")	Citizen's Grand Jury Statute; MCL 767.7, et seq ("CGJ")	Comment
Ultimate responsibility	To "inquire" and make written findings of misfeasance or malfeasance of public officers. MCL 767.4.	To Indict: the term "indictment" is once again used 106 times in the statute.	If the Legislature intended to give the judiciary the power to indict, it would have explicitly said so, *just like it did in the CGJ Statute.*
Public Accounting	The judge must file with the court clerk a public accounting of all monies disbursed by the judge within 90 days of the termination of an "inquiry." MCL 767.6b.	No Provision	The judge can hire personnel to assist him in his or her *inquiry*. In the CGJ Statute, any "assistance" is provided by the prosecuting attorney.

A. The basic rules of statutory interpretation establish that the Legislature did not intend to give judges prosecutorial authority.

Given these differences, multiple rules of statutory interpretation all lead to the conclusion that the Judicial Inquiry Statute did not give judges the power to indict. First, "[t]he omission of a provision in one part of a statute that is included in another part of the same statute" must be "construed as intentional." *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017). This is particularly true here, given that all doubts in interpreting a criminal statute must be resolved in favor of the defendant. See, e.g., *People v Jahner*, 433 Mich 490, 498-499; 446 NW2d 151 (1989) ("It is a fundamental rule of construction of criminal statutes that they cannot be extended to cases not included within the clear and obvious import of their language.").

Here, the 1835 Michigan Constitution citizen grand juries were granted the power to *indict*, but that term was not used by the Legislature in describing the powers it gave to the

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investigating judge. The Legislature knows how to use the word "indict," and in fact did so in a portion of the Judicial Inquiry Statute where it used the term "indictment" for the limited purpose of disqualifying the investigating judge in connection with subsequent proceedings arising from his or her investigation. MCL 767.4. The conclusion follows that "the omission of [the] provision" allowing the investigating judge to issue an "indictment" when it used that term elsewhere in the same statute for different purposes must be "construed as intentional." *Nickola*, 500 Mich at 125. If the Legislature intended to vest a judge with prosecutorial authority, it knew how to do so and would have done so—just like it did in 1835 when it gave citizen grand juries the exclusive authority to indict,[6] see Const 1835, art 1, § 11, and just like it did in the 1949 version of the statute, which allowed the court to "indict,"—a provision that is absent from the current version. To quote the Prosecution: "The lack of express language in favor of [Prosecution's] theory—especially since it is easy to see how the Legislature could have spoken expressly—speaks volumes." (Prosecution Supp'l Br 15, *People v Peeler*, No. 163667 (Mich, appeal docketed Oct 19, 2021).)

This point is well demonstrated in *People v Jahner*, 433 Mich 490; 446 NW2d 151 (1989). Michigan adopted a "lifer law" statute which allowed anyone with a life sentence to apply for parole after ten years except "prisoners sentenced for life for murder in the first degree." MCL 791.234(4). Michigan's conspiracy statute, in turn, provided that individuals convicted of conspiracy to engage in murder got the same penalty as an actual murderer. MCL 750.157a. The defendants were convicted of *conspiracy* to engage in murder in the first degree and sought parole after serving more than ten years. *Jahner*, 433 Mich at 493. The government

[6] Of course if it had done so, the statute would be unconstitutional; an issue discussed in Part II below.

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argued that they were not eligible for parole because the "lifer law" (no parole for murderers) applied to the defendants because of the language of the conspiracy statute (conspiracy = same punishment as actual crime). *Id*. at 496-497. In essence, like the Prosecution here, which asks this Court to conflate the Judicial Inquiry Statute with the Citizen's Grand Jury Statute, the prosecution in *Jahner* asked the court to conflate the "murder" statute with the "conspiracy" statute.

The court rejected this effort to equate "conspiracy to commit murder in the first degree" with actually committing "murder in the first degree" because, *inter alia* (1) such an interpretation violated the rule that ambiguity in a criminal statute must be resolved in favor of the defendant and (2) "the parole prohibition in the 'lifer law' which expressly applies to first-degree murder does not apply to the separate and distinct crime of conspiracy to commit that offense." *Id.* at 497, 500-501. Applying similar logic here, the Citizen's Grand Jury Statute, which allows for indictments, does not apply to the separate and distinct powers given to the Court in the investigatory statute, which does not allow for indictments.

Third, the Prosecution's argument that the phrase "like manner as upon formal complaint" means the same thing as the word "indictment" used in the Citizen's Grand Jury Statute cannot stand because "the use of different terms within similar statutes generally implies that different meanings were intended." 2A Singer & Singer, Sutherland Statutory Construction, (7th ed), § 46:6, p 252. Simply put, "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings." *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). This principle applies even when the rule of leniency is not implicated. In *United States Fidelity & Guarantee Co*, to cite one of many examples, the plaintiff insurance companies sought to

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conflate the term "benefits" used in one statute with the term "coverages" used in another. 484 Mich at 13-15. By doing so, the insurance companies were hoping to save money because the term "benefits" as defined in one statute only required the insurance companies to pay "reasonable charges." *Id*. at 15 n 14. The definition of their "coverage" liability in a different statute, in contrast, required them to pay 100 percent of the loss, even if the expenses incurred by the insured were "unreasonable." *Id*. Relying on the "benefits" provision, the insurance companies attempted to inject the "reasonableness" requirement into the statute, which set forth their "coverages" liability, arguing that the terms "coverages" and "benefits" were synonymous. *Id*. at 13-15. Of course, the Prosecution is making the same argument here, namely, that the terms "formal complaint" and "indictment" are synonymous.

This Court rejected the insurance companies' argument, because "[i]f the Legislature had intended the same meaning in both statutory provisions, it would have used the same word." *Id.* at 14. The same is true here. Twenty-five words after it uses the term "formal complaint," the statute uses the word "indictment" in its disqualification language: "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." MCL 767.4. It also uses that term 106 times in the Citizen's Grand Jury Statute. Just as the words "benefits" and "coverages" do not mean the same thing, the words "formal complaint" and "indictment" cannot mean the same thing.

Finally, the lower court's interpretation of the Judicial Inquiry Statute also violates the principle that "[t]he very grant of specified powers under restrictions, is an exclusion of other powers in reference to the same subject matter, not granted by the charter." *Sebewaing Indus Inc v Village of Sebewaing*, 337 Mich 530, 546; 60 NW2d 444 (1953). Here, the Judicial Inquiry

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Statute gives the inquiring judge the "specific powers" to call witnesses, take testimony, issue arrest warrants, issue reports and generally "inquire" as to whether a crime has been committed. When the inquiry involves "any public officer, elective or appointive," like Governor Snyder and Mr. Croft, the investigating judge's powers are further limited to notifying "the public board or body having jurisdiction under the law to conduct removal proceedings against the officer." MCL 767.4. The very grant of these limited powers "is an exclusion of other powers," like the power to "indict" the public officials being investigated; which simply does not appear in the list of powers given to the investigating judge.

B. The lower court erred by not properly applying the basic rules of statutory interpretation.

Applying the proper rules of statutory interpretation illustrates the flaw in the lower court's statement that "in *Pichitino,* the Michigan Supreme Court outlined the three types of charging instruments in Michigan: the filing of (1) an information; (2) an indictment by a traditional grand jury; and (3) an *indictment* by a one-person grand jury. *People v Pichitino*, 337 Mich 90, 92-93; 59 NW2d 100 (1953)." (2/17/2022 Order Denying Def's Mot to Dismiss 9 (emphasis added).) *Pichitino* was decided under the 1949 version of the statute which specifically allowed the investigating judges to issue indictments, language that was long ago stripped by Legislature from the statute. Yes, three procedures still exist—but only two for the purpose of charging; one now serves only the purpose of "inquiring," preparing reports and issuing arrest warrants.

Much of the lower court's opinion was based on language in the Judicial Inquiry Statute that allows the judicial investigator to issue an arrest warrant if "the judge shall be satisfied that . . . there is probable cause to suspect any person to be guilty thereof." MCL 767.4. According to the lower court, this language stands for the proposition that both the judicial investigation and

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the preliminary examination "serve the same function: to determine whether there is probable cause to believe that a person committed a crime." (2/17/2022 Order Denying Def's Mot to Dismiss 5 (cleaned up).) The Prosecution makes the same argument, asserting that a preliminary examination would be duplicative of the finding of probable cause to issue an arrest warrant. The exact opposite is true.

First, the language quoted by the lower court again highlights that the judicial investigator is *limited* to issuing arrest warrants. After all, the statute does not say that the judicial investigator can issue arrest warrants *and* indictments. A "probable cause" determination for an *arrest* is different than a probable cause determination for an *indictment*. As a matter of hornbook law, "the probable cause required for a bindover is greater than that required for an arrest [in] that it imposes a different standard of proof . . . . [T]he arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing *and* to the probability that the government will be able to establish guilt at trial." LaFave & Israel, *Criminal Procedure* (2d ed), 14.3, p 668–669 (citations omitted). This distinction between the arrest standard and the indictment standard was explained by the court in *People v Cohen*, which noted "because the probable cause determination after a preliminary hearing is made during a legal proceeding incorporating all the safeguards of evidentiary rulings as in a trial, it is an entirely separate legal proceeding distinct from the probable cause judgment to arrest made by the police officer in the field." 294 Mich App 70, 76; 816 NW2d 474 (2011) (quoting *Williams v Kobel*, 789 F2d 463, 468 (CA 7, 1986)); see also Grano, *Implementing the Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure Part I*, 32 Wayne L R 1007, 1037–1038 (1986) ("[T]he preliminary examination would not serve its

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screening function effectively if it evaluated the existence of probable cause under an arrest standard.").

Simply put, the statute envisions the finding of probable cause sufficient to support an arrest, not an indictment. The two are not the same. The circuit court's failure to recognize this caused it to draw a false comparison to the Citizen's Grand Jury Statute and misinterpret the Judicial Inquiry Statute.

C. The history cited by the Prosecution supports the plain language meaning of the statute.

Recognizing that the plain language of the statute does not call the judge a "grand juror" and does not allow the judge to issue indictments, the Prosecution turns instead to history. Good, because the history supports Defendant's position. The Prosecution admits:

> In 1949, just over thirty years after first enacting MCL 767.3 and MCL 767.4, the Legislature overhauled the two statutes. See 1949 PA 311 (Pl's Ex. I.) Rather than a single judge conducting the proceedings, the proceedings would now be conducted by a panel of three judges. Id., § 3. The statutes repeatedly referred to the investigating body as a "grand jury." The prosecutor participating in the proceedings was a "grand jury prosecutor." [Prosecution Supp'l Br 10-11].

But the language of the current statute, in discussing the role of the judge, removes the key references to "Grand Juror" from the two critical elements:

- The final product:

1949	v.	Current Version
"No order, decision or finding by said judges shall be valid unless concurred in by 2 of them: Provided, **That orders returning Indictments** shall be signed by 3 judges." (Emphasis added).		"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 . . . and . . . the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint."

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- The prosecutor's title:

1949	v.	Current Version
"No special **grand jury prosecutor** shall be eligible for reappointment as a special grand jury prosecutor within a period of 3 years . . . ."		Eliminated the position of "grand jury" prosecutor and uses only the term "prosecutor."

In doing so, the Legislature changed the role of the judge from "grand juror" to someone performing an "inquiry" and changed the role of the prosecutor from a "grand jury prosecutor" to just a "prosecutor." After all, there is no need for a "grand jury prosecutor" when the judge is acting as an investigator.

This historic analysis establishes two things. First, to make explicit what has already been implicitly argued, "[w]here the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." *In re MCI Telecoms Compl*, 460 Mich 396, 415; 596 NW2d 164 (1999). In 1951 the Legislature stripped the judicial officer of authority to issue indictments. As a matter of first principles, the Court should not now "explicitly authorize what the Legislature explicitly rejected."

Second, this comparison explains why the current statute retained the term "grand jury" two times, once in relation to the calling of witnesses and the second to proscribe disclosure of material. In these limited circumstances, the Legislature appears to have wanted to incorporate the broader law of citizen grand juries. But when it came to the ultimate power of the judicial investigator, the Legislature specifically removed his or her power to indict in favor of performing an "inquiry" that leads to a report. The Prosecution admits history is important here.

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And indeed it is because it establishes that the judge performing a judicial inquiry today has no authority to indict.

II. The Court should properly interpret the Judicial Inquiry Statute based on its plain language because any other interpretation would violate the separation of powers.

A. Commencing criminal prosecutions is an executive function.

The Lower Court here made no attempt to examine the separation of powers from first principles, but rather simply cited a handful of cases where the issue was not squarely raised or decided. Courts agree that "[t]he decision to prosecute under one statute rather than another, or to prosecute at all, is an *exclusively executive function*, vested within the discretion of the prosecutor." *People v Killebrew*, 416 Mich 189, 200 n 1; 330 NW2d 834 (1982) (emphasis added); *Heckler v Chaney*, 470 US 821, 831; 105 S Ct 1649 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); *United States v Batchelder*, 442 US 114; 99 S Ct 2198 (1979) (stating "[w]hether to prosecute and what charge to file or bring" is generally vested with prosecutors); *Wayte v United States*, 470 US 598, 607; 105 S Ct 1524 (1985) (acknowledging the prosecutor's discretion to decide what charges to bring.)

Citing three cases, the lower court dismissed the foregoing precedent, stating flatly "the grand jury process is a judicial inquiry." For the statute as written (as opposed to being interpreted to add the missing words "indict"), this is largely true. The act of "investigating" or making "inquires" can be a judicial function. Contra *The Grand Jury as an Investigatory Body*, 74 Harv L Rev 590 (1961) (criticizing Michigan's investigatory statute as imposing a non-judicial role on judges.) The act of calling witnesses and hearing testimony is also a function

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shared among the branches. Issuing arrest warrants, as allowed by the statute, is also a judicial function. But allowing a judge to unilaterally decide "to prosecute under one statute rather than another, or to prosecute at all" and to unilaterally *indict* individuals following a secret proceeding is most assuredly not a judicial function. *Killebrew*, 416 Mich at 200 n 1. This much is clear from the three cases the lower court cited to support its argument.

The lower court first cites *In re Slattery*, 310 Mich 458, 466; 17 NW2d 251 (1945). The actual ruling in *Slattery* is that "[w]hen a complaint had been filed by the attorney general, it became incumbent upon the judge as a circuit judge to *make an investigation.* He was neither a prosecuting attorney, policeman or detective." *Id.* at 466 (emphasis added). Yes, the *investigatory* function imposed by the Judicial Inquiry Statute can reflect a quasi-judicial/quasi-executive task. The same is not true of being responsible for actual commencement of criminal charges through indictment, which the court made clear in its discussion of how matters are supposed to proceed: "if the judge finds that a crime has been committed, he orders a warrant to be issued, and *an examination held in open court before a magistrate* and, if probable cause is shown, the accused is bound over for trial in the proper court." *Id.* at 464. The Court in *Slattery* was careful to distinguish the "judicial task" (issuing an arrest warrant and then holding a preliminary examination) from the executive work of the "prosecuting attorney, policeman and detective." *Id*. at 466.

The Court next cited *Cobbledick v United States*, 309 US 323, 327; 60 S Ct 540 (1940), which involved citizen grand juries and said nothing about judges filing indictments. As will be discussed further below, a one-person investigating judge is not the same thing as a citizen's grand jury made up of 13 to 17 laypeople. They have different purposes, procedures, history and place in our constitutional structure. (See Section II.B.) The same is true of the final case cited

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by the lower court, *Hale v Henkel*, 201 US 43, 66; 26 S Ct 370 (1906), where the court was quick to distinguish the role of the grand jury and that of prosecutors:

> As criminal prosecutions are instituted by the state through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to (the Jurors') attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings.

In the state of Michigan, the officer "selected for (the) purpose" of instituting criminal prosecutions is a prosecutor. The court's ruling in *Hale* is consistent with the Michigan precedent that the executive branch—and not courts acting unilaterally—have the exclusive authority to prosecute crimes.

On a related point, the prosecution claims in its brief that Director Lyon is asking the Court to overrule *In re Slattery* and *In re Colacasides.* Untrue. These two cases exist comfortably side-by-side with the Defendant's position here. The Prosecution claims that these two cases ruled that the Judicial Inquiry Statute does not violate separation of powers. The only question presented in *Colacasides* was whether a member of the judiciary could be granted "the power to *investigate* crime for the purpose of *apprehending offenders*." *In re Colacasides*, 379 Mich 69, 91; 150 NW2d 1 (1967). The same is true in *In re Slattery,* where the only issue was whether a judicial investigator could find a recalcitrant witness "guilty of contempt, not as a one-man grand jury but as a circuit judge." 310 Mich at 478. In regard to separation of power, the Court noted that "conducting an examination in proceedings for the discovery of crime" was a quasi-judicial task. *Id.* at 467. Neither case involved the fundamental issue presented here; i.e., whether "[t]he constitutionality of a system whereby a judge accuses a person of crime" can stand this Court's examination. *People v Bellanca*, 386 Mich 708, 716; 194 NW2d 863 (1972).

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The *investigatory powers* considered in *Slattery* and *Colacasides* are not being challenged here, but rather the notion that a sitting judge has the unilateral authority to initiate criminal proceedings. The judicial inquiry statute as actually written does allow for the quasi-judicial task of making an "inquiry." But adding to the list the "power to indict," and with it the power to "prosecute under one statute rather than another, or to prosecute at all" is where the problem arises. *Killebrew*, 416 Mich at 200 n 1. Thus, the only remaining question is whether the separation of powers required by the Michigan Constitution allows the judiciary to share the "exclusively executive function" of commencing prosecutions. The answer is assuredly no.

B. The Judicial Inquiry Statute, as interpreted by the Lower Court, violates separation of powers.

The Michigan Constitution, (and the federal constitution upon which it is generally based), created a structure designed to protect liberty. Nearly 150 years ago, Justice Thomas M. Cooley wrote:

> Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power *by the same implication which forbids the courts to take upon themselves his duties.* [*Sutherland v Governor*, 29 Mich 320, 324–325; 18 Am Rep 89 (1874) (emphasis added).]

For this reason, the rule "favoring strict separation of powers prevails" and Michigan courts have "jealously guarded the right to keep distinctly separate one department from another." *Dearborn Twp v Dail*, 334 Mich 673, 682; 55 NW2d 201 (1952). For that reason, courts in Michigan have consistently "struck down attempts by the legislature to give nonjudicial

power to courts." *Id.* at 682-683 (collecting cases). To cite one of many examples, this Court in *Dearborn Township* ruled unconstitutional a statue which allowed justices of the peace to sit on township boards because the separation of powers prohibits judicial officers from exercising non-judicial duties. As stated by this Court, "keeping the three great branches of government separate and distinct from each other is essential to the maintenance of a republican form of government." *Id.* at 683.

Recognizing and enforcing that structure becomes particularly important when the government seeks to use its ample power to imprison its citizens. Hence, in the realm of criminal law, citizens can only be punished by the agreement of all three branches operating *independently* within their spheres. The Legislature acts by creating the underlying crime. The executive branch acts by deciding whether to file criminal charges. The final check comes from the judiciary, which serves as an independent and neutral font of justice in adjudicating the charges. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan L Rev 989, 1017 (2006) ("Each branch must agree before criminal power can be exercised against an individual. [The Legislature] must criminalize the conduct, the executive must decide to prosecute, and the judiciary . . . must agree to convict.").

Vesting the judiciary with a prosecutorial function—which this Court has already stated belongs "*exclusively*" to the executive branch—undermines this finely-honed system of checks and balances in a number of ways which threaten individual liberty. As stated by Montesquieu, who coined the term "trias politica" and whose view forms the foundation of our system of government, "[a]ll would be lost . . . if the powers of executing public resolutions . . . and of judging the crimes or the disputes of individuals" were united in "the same man or the same body of principal men." Montesquieu, *The Spirit of the Laws* (Cambridge Univ Press, 1994), 9

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157. No less than James Madison agrees, arguing in *The Federalist No. 47* that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" and "[w]ere [the power of judging] joined to the executive power, the judge might behave with all the violence of an oppressor." *The Federalist Papers* No. 47 (James Madison) (Clinton Rossiter ed, 1961) (cleaned up). Add to the chorus Alexander Hamilton who observed that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." *The Federalist Papers* No. 78 (Alexander Hamilton) (Clinton Rossiter ed, 1961).

The danger to the constitutional structure of granting prosecutorial authority to judges was highlighted by this Court in *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982). The primary issue in *Killebrew* was whether a judge could actively engage in sentence plea bargaining along with the prosecutor. After recognizing that plea bargaining was traditionally an executive function, the Court ultimately ruled that a judge's role in that process must be limited to either accepting or rejecting the plea agreement and *not* being actively involved in the negotiations between the executive and criminal defendants. *Killebrew*, 416 Mich at 204.

Killebrew stands for two propositions. First, as mentioned above, the Court held that the decision to prosecute is *exclusively* an executive function. This finding should end the debate in favor of the Defendants. Second, the Court relied on several factors in concluding that courts cannot share the executive function, all of which apply with greater force here. The primary problem with judges being involved in the executive function, the Court ruled, was that it destroyed the image of the judiciary as an independent and neutral arbiter of justice:

> [A judge's] participation in the plea bargaining process depreciates the image of the trial judge that is necessary to public confidence

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> in the impartial and objective administration of criminal justice. As a result of his participation, the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he has suggested to the defendant. [*Killebrew*, 416 Mich at 204.]

How can the judiciary be a "neutral arbiter" when it was responsible for the decision to prosecute and chose what charges to bring?[7] Regardless of how honorable the judge may be, the problem is that "the *appearance* of covert activity which result[s] from off-the-record discussions destroys a defendant's faith in the judge's neutrality, as well as the public's respect for the law." *Id.* at 211 (emphasis added). Here, the charges resulted from the "covert activities" of the investigating judge and the Attorney General operating in total secrecy. If the concept of judicial independence means anything, it means the executive and judiciary must stay in their respective lanes and should not even appear to serve on the same team.

In an echo of the separation of powers arguments made here, this Court in *Killebrew* also noted that a judge's participation in plea agreements (an executive function) would interfere with the strictly judicial function of imposing a sentence. *Id.* at 205. This blurring of the lines undermines a judge's role of being "a detached and neutral judicial official" with ultimate responsibility of deciding the penalty. *Id.*

Here, the charges brought in the criminal complaint would have a huge impact on the ultimate penalty if a conviction were secured. This penalty, under the lower court's decision, would be determined by the same branch that brought the charges in the first instance. This is the exact kind of line-blurring condemned by this Court in *Killebrew*, where it held that "the

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[7] This criticism is already manifesting. See e.g., Cohn, Hon. Avern, *Why the One-Man Grand Jury in Flint Case is Unfair*, Detroit News <www.detroitnews.com/story/opinion/2021/03/11/letter-why-one-man-grand-jury-flint-case-unfair/ 4645860001> (accessed April 20, 2022); Editorial Board, *Michigan Should Scrap One-Man Grand Juries, Detroit News* <www.detroitnews.com/story/opinion/2021/03/03/editorial-michigan-should-scrap-one-man-grand-juries/6889795002> (accessed April 20, 2022).

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decision to prosecute under one statute rather than another, or to prosecute at all, is an *exclusively executive function*, vested within the discretion of the prosecutor." *Id.* at 199 n 1 (emphasis added).

Not surprisingly, there are few cases like this one because the whole notion of judges being prosecutors is so foreign to our constitutional structure that it rarely happens. A highly critical article in the Harvard Law Review from 1961 noted that Michigan was the only state in the country in which "judges perform an investigatory function." *The Grand Jury As an Investigatory Body*, 74 Harv L Rev 590, 604 (1961).[8] But in the rare situations where such authority has been conferred, courts have not hesitated to rule in favor of the separation of powers. Justice Cardozo's ruling in *In the Matter of Richardson*, 247 NY 401, 411-412; 160 NE 655 (1928), and the other criticisms of Michigan's investigative statute (as interpreted here by the lower court) were discussed ably by Director Lyon and will not be repeated here. But consider also the Wyoming Supreme Court's decision in *In re Padget*, 678 P2d 870 (1984), a case involving allegations of perjury by a police informant.

The Court in *Padget* issued an order requiring a prosecutor to indict the informant after he testified pursuant to a statute which authorized "[t]he judge of the district court [to] . . . require the county and prosecuting attorney to prosecute any criminal by information." 678 P2d at 872 (quoting Wy Stat § 7-6-110). The executive branch refused to prosecute the informant and the judge held the prosecutor in contempt. The Wyoming Supreme Court ultimately struck

[8] The Harvard article was very critical of the Judicial Inquiry Statute, arguing: "Even assuming complete objectivity, an investigation conducted by a judge into the affairs of members of the party opposed to his own may have an aura of partisanship which will reduce public acceptance of the report and any recommendations contained therein. Moreover, any appearance of partisanship tends to reduce respect for the entire judiciary in all its facets, thus hindering it in performing its normal tasks." *The Grand Jury As an Investigatory Body*, 74 Harv L Rev 590, 604-605 (1961).

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down the statute based on separation of powers principles, using language directly applicable here:

> The statute here in question, § 7-6-110, supra, gives the *district court the power to make the charging decision* for the prosecuting attorney - indeed to order the prosecuting attorney to prosecute when he has reached the opposite conclusion. However, the statute does not require the district court to take into account the same considerations that the prosecuting attorney does . . . ." We think it is clear that as the charging decision is properly within the scope of duty of the executive branch, it is a violation of . . . the Wyoming Constitution for this decision to be made by the judicial branch. *Once the decision to prosecute has been made, then the judiciary becomes involved, but not before.* [*Id*. at 873 (emphasis added).]

The separation-of-power problems with the statute as interpreted by the lower court, which have been noted by the courts in New York and Wyoming and by Justice Rutledge in *In re Oliver*, 333 US 257, 279 (1948), not to mention others, are not theoretical. They go to the core of the checks and balances the founders believed to be critical to protect liberty. Consider the exercise of prosecutorial discretion. Michigan courts have long recognized that prosecutors—and prosecutors alone—have the discretion to decide whether to file charges in the first instance, the specific charges to be brought and when to file charges. See e.g., *Heckler*, 470 US at 832 ("[T]he decision of a prosecutor in the Executive Branch not to indict has long been regarded as the special province of the Executive Branch."). In exercising that authority, prosecutors are duty-bound to consider a number of factors, including the actual damage caused by the crime, the improper motives of the complainant and the prosecutor's independent determination of whether he or she can prove the crime beyond a reasonable doubt. See ABA Standards for Criminal Justice, (1982 Supp), § 3-3.4. The charges filed by prosecutors often result from pre-charge negotiations and compromises reached between defendants and prosecuting authorities. See, e.g., *Killebrew*, 416 Mich at 193 (" '[C]harge bargaining' is a traditionally accepted practice in Michigan.").

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Hence, the existence of prosecutorial discretion (which incorporates a prosecutor's special ethical obligations[9]) and separation of powers creates a two-step process to protect the public. Any proposed charges are first independently vetted by the prosecutor, who has an ethical obligation to consider a number of factors. They can also engage in pre-charge negotiations to facilitate swifter justice. In felony cases, a second check occurs through the preliminary examination process, where the charges are considered by the judiciary in an adversarial process. See *People v Anderson*, 501 Mich 175, 187; 912 NW2d 503 (2018) (recognizing that the magistrate presiding over preliminary examination has a duty to consider all of the evidence presented, including witness credibility, in determining whether the prosecution has established probable cause).

The lower court's interpretation of the Judicial Inquiry Statute destroys this first, critical step in the criminal process, to the detriment of defendants. Judges operating under the Judicial Inquiry Statute (as interpreted below) are prohibited from engaging in pre-sentence bargaining discussions because of the statute's secrecy requirements and the bar on judges' participating in plea bargaining. See *Killebrew*, 416 Mich at 200. The judge doing the investigating is also not bound by the ethical rules that apply to the executive branch. The Judicial Inquiry Statute as interpreted by the lower court destroys this independent "check" by allowing a single judge—acting in secret and not subject to the ethical rules that apply to prosecutors—to unilaterally select the crimes that will be charged, which will then be tried in the very courts that chose the charges in the first place.

The Judicial Inquiry Statute as interpreted by the lower court also destroys a second critical check on state power. In Michigan, the rights of criminal defendants are protected either

[9] See MRPC 3.8 *et seq*., Special Responsibilities of a Prosecutor.

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by granting them an adversarial preliminary examination or, under the Citizen's Grand Jury Statute, assurance that no criminal charges are brought unless they have first been vetted by a group of fellow citizens. This is no small matter. Simply put, *who* makes the decision to send a case to trial and *how* that decision is made is critical to separation of powers.

In Michigan, the system has long required that before the full weight of the criminal justice system is brought to bear, felony defendants be allowed to either have their day in open court (through a preliminary examination) or by review of the matter by their fellow citizens, who operate independently outside of the other branches (as in citizen grand juries). The lower court's interpretation eliminates that check by allowing the very branch which will also be hearing the case to decide whether to bring charges in the first place.

Are we living in a society that countenances the functional equivalent of a "star chamber" form of justice? A society where judges can be the "oppressor" warned of by Madison, free from the normal checks that guide charging decisions? One would hope not, given how the United States Supreme Court once chastised a Michigan judge who, operating under the Judicial Inquiry Statute, imprisoned a witness for alleged perjury:

> One need not wholly agree with a statement made on the subject by Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: "suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it." [*In re Oliver*, 333 US at 270–271.]

This danger cannot be casually disregarded by falsely equating the judge with a citizen grand jury. The decision of a judge who has not had the benefit of hearing both sides of the story is not the same as that made by a group of citizens operating independently of the judiciary. Citizen grand juries have existed since time immemorial to (1) act as a check on government power and

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(2) as a way to ensure the "voice of the community" is heard in the criminal justice system. See, e.g., *People v Morris*, 228 Mich App 380, 385; 579 NW2d 109 (1998); *Costello v United States*, 350 US 359, 362 (1956) (noting that historically citizen grand juries were "free from control by the Crown or judges"). As famously observed by Judge Learned Hand (in a case argued by future Supreme Court Justice Felix Frankfurter), the "purpose of the secrecy of the grand jury's doings is to insure *against* . . . judicial control. They are the voice of the community accusing its members, and the only protection from such accusation is in the conscience of that tribunal." *In re Kittle*, 180 F 946, 947 (CCSDNY 1910) (emphasis added); see also, Richard Calkins, *Grand Jury Secrecy*, 63 Mich L Rev 455 (1965) (discussing historic role of grand juries to protect against government overreach). This sentiment was reflected by James Wilson, who signed both the Declaration of Independence and the Constitution, who described the citizen grand jury "as a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered." Michael Daly Hawkins, *Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement* in Grand Jury 2.0: Modern Perspectives on the Grand Jury 119 (Roger Anthony Fairfax, Jr ed, 2011). Assigning the role of a citizen grand jury to a judge adulterates the institution, violates constitutional separation-of-powers principles and puts our system of ordered liberty at serious risk. The Judicial Inquiry Statute and the Citizen's Grand Jury Statute exist for profoundly different reasons and cannot be equated.

With respect, a single member of the judiciary cannot replace the "voice of the community" and act jointly as juror and prosecutor, particularly when the purpose of the citizen's grand jury is to provide independence from the judiciary. If constitutional principles still hold sway in 2022 (and one would hope so), the Judicial Inquiry Statute cannot be interpreted as giving the judicial branch charging authority.

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C. The Prosecution's argument regarding "conservators of the peace" actually supports Director Lyon's position.

The forays both parties made into the history of "conservators of the peace" illustrate the separation of powers problem raised by the Prosecution's interpretation of the Judicial Inquiry Statute. (See Lyon Bypass App 26.) Any reliance on the "conservators of the peace" provision by the Prosecution is misplaced because, as stated by this Court, the fact that "justices of the peace are also made conservators of the peace by 208 Article VII, § 18 of the Constitution, does not constitute the granting of nonjudicial authority to justices, but merely imposes upon them a function possessed by all judicial officers of the State of Michigan." *Dearborn Twp v Dail*, 334 Mich 673, 688; 55 NW2d 201 (1952). And the Court need look no further than the Prosecution's Supplemental Brief to establish that "judicial officers" as "conservators of the peace" did not have charging authority for at least the last 449 years. Quoting authority, the Prosecution's brief states, "[t]he general duty of the conservators of the peace by the common law, is to employ their own, and to command the help of others, to arrest and pacify all such who in their presence, and within their jurisdiction, shall go about to break the peace." (Prosecution Supp'l Br 37 (quoting 3 Burn, *The Justice of the Peace and the Parish Officer* (17th ed), p 4) (cleaned up).)

Notice what is missing in this discussion—the right to indict. Rather, the quoted resource describes the conservators' powers as being limited to "command others to arrest," similar to issuing an arrest warrant, or "pacify," as in the ability to hold detainees until due process kicks in. These powers are not at issue here.

Second, the Prosecution cites historian R.M. Jackson for the proposition that the conservator's power "was in the nature of police powers in 'getting up' a case, *not really a judicial activity and suitable only for a society that lacked an adequate police force*." (Prosecution Supp'l Br 38 (quoting *The Machinery of Justice in England* (4th ed), p 92–93)

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(emphasis added).) As previously pointed out by the Prosecution, England came to this same conclusion in the 1550s when it by statute codified the principle that conservators of the peace "cannot act at the same time both as judge and officer for so he would command himself to execute his own precepts." Richard Burns and Thomas Chitty, *The Justice of the Peace and Parish Offic*er (Oxford Press 1831). Jurists operating as conservators of the peace have not had the power to "get up" a case for nearly 450 years.

Finally, the Prosecution admits that "Lyon is correct that the office of justice of the peace eventually developed into an exclusively judicial role." (Prosecution Supp'l Br 39.) By at least 1553, "conservators of the peace" operating in a judicial role did not have the authority to do what the inquiry judge did here. (See Lyon Bypass App 26.) In essence, the Prosecution asks the Court to turn back the clock to pre-1552, ignoring 449 years of English common law and the separation of powers revolution embodied in the Michigan (and United States) constitutions. But the Michigan Constitution does not allow the Prosecution to turn back the clock in this manner. The Michigan Constitution fixes the common law as it existed in 1963, not the 1200s:

> The 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. [Mich Const 1963, art 3, § 7 (emphasis added).]

And what was the status of the common law in regard to the power of judicial "conservators of the peace" in 1963 and since the 1600s? The Prosecution helpfully tells us:

> It is no longer any part of the justices' duty to 'get up' the case . . . . Speaking generally, the difference between the procedure established in the sixteenth century and the procedure of the nineteenth is that under the first the magistrate acts the part of the public prosecutor, whereas under the second he occupies the position of preliminary judge. [Prosecution Supp'l Br 39 (quoting Fitzjames Stephnes, Criminal Procedure 461).]

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As now admitted by the Prosecution, judges engaging in judicial inquires cannot "get up the case" and act as "public prosecutors" by, say, deciding what charges to bring and commencing criminal actions.[10] Which, of course, is exactly what happened here.

The Prosecution's efforts to turn back the clock to pre-1553 undermine the separation of powers would lead to absurd conclusions. In Michigan, state police commissioners and individual officers are designated as "conservators of the peace." See MCL 28.6. So are village presidents and aldermen of fourth-class cities. See MCL 64.2; MCL 87.5. Taken to its logical endpoint, the Prosecution's argument would vest these executive officials with the power to act as knights of the round table with the power to arrest, hold trials, convict, decide appropriate punishment, and the like. (See Prosecution Supp'l Br 36.) This is not the system created by our founders; nor is it a system we would want.

CONCLUSION AND REQUESTED RELIEF

History, the plain language of the relevant statutes and the Michigan Constitution all lead to the inescapable conclusion that judges were not vested with the authority to act as prosecutors. Any effort to blur the lines between the executive function of "getting up" a case and the judicial function undermines our system of separation of powers. This Court should reverse the lower court and instruct the circuit court to enter an order dismissing the Indictments before the Court in this appeal.

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[10] *In re Sanderson*, 289 Mich 165; 286 NW 198 (1939), the primary case relied upon by the Prosecution to the contrary, does not stand for the proposition for which it has been cited. The only issue in *Sanderson* was whether a justice of the peace could require a defendant to be detained until a "surety" was paid *after a complaint had been filed and after the defendant been tried and found guilty*. The justice of the peace did not commence the criminal proceeding or act as a prosecutor but rather engaged in the ordinary judicial acts of holding a trial and setting the conditions for release; i.e., payment of surety.

Respectfully submitted,

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WARNER NORCROSS + JUDD LLP

By */s/ Devin S. Schindler*
Devin S. Schindler (P41371)
Gaëtan Gerville-Réache (P68718)
Charles Ash (P55941)
Brian Lennon (P47361)
Warner Norcross + Judd LLP

Attorneys for *Amicus Curiae* Richard Snyder

By */s/ Alexander S. Rusek*
Alexander S. Rusek (P77581)
White Law PLLC

Attorneys for *Amicus Curiae* Howard D. Croft

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