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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

NANCY PEELER, Case No. 163667

NICOLAS LYON, and Case No: 164191

RICHARD LOUIS BAIRD, Case No. 163372
Defendants-Appellants.

BRIEF *AMICUS CURIAE* OF CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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INTEREST OF THE *AMICI*

Since its founding in 1976, Criminal Defense Attorneys of Michigan [CDAM] has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the state's criminal defense bar in a wide array of matters.

As reflected in its by-laws, CDAM exists to, *inter alia*, "promote expertise in the area of criminal law, constitutional law and procedure, and to improve trial, administrative, and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation" and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities, and participates as an *amicus curiae* in litigation of relevance to the organization's interests.

As in this case, CDAM is often invited to file briefs amicus curiae by Michigan appellate courts. CDAM has a strong, direct institutional interest in this case because of the implications of the trial court's ruling on Michigan's criminal justice process.

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STATEMENT OF JURISDICTION

The jurisdictional statement in the Briefs of the parties on appeal is complete and correct.

STATEMENT OF QUESTION PRESENTED

I. SHOULD THIS COURT ADHERE TO ITS LONGSTANDING PRECEDENT RECOGNIZING THAT, IN A CRIMINAL CASE CHARGED AFTER A SINGLE JUDGE INQUIRY UNDER MCL 767.3 AND 767.4, A DEFENDANT HAS A STATUTORY RIGHT TO A PRELIMINARY EXAMINATION?

Amicus Curiae CDAM answers "Yes."

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STATEMENT OF FACTS

Amicus relies on the statements of facts of the parties.

ARGUMENT

I. THIS COURT SHOULD ADHERE TO ITS LONGSTANDING PRECEDENT RECOGNIZING THAT, IN A CRIMINAL CASE CHARGED AFTER A SINGLE JUDGE INQUIRY UNDER MCL 767.3 AND 767.4, A DEFENDANT HAS A STATUTORY RIGHT TO A PRELIMINARY EXAMINATION.

Standard of Review. Statutory interpretation is a question of law reviewed *de novo*.
Issue Preservation. The issue was preserved by Defendants' pretrial motions.

A. The Ruling Below is Based Upon a Misapplication of *Glass*.

For almost a century this Court has recognized that in the case of a criminal charge brought after a single judge inquiry[1] under MCL 767.4, a defendant has a statutory right to a preliminary examination, unlike a charge brought by a citizens' grand jury, where there is not such a right. The statutes establishing each process are

[1] This procedure is often referred to as a "one man grand jury," a phrase coined by early twentieth century newspapers. Amici suggest that use of the colloquialism leads to confusion by suggesting that the single judge inquiry and the citizens grand jury are substantially identical.

"Sometimes called a 'one-man grand jury,' the very concept is a contradiction in terms. The word 'grand' jury refers to the size body-traditionally as many as twenty-three members-to distinguish it from a twelve member 'petit' jury used at trial. It is like a two-door stretch limousine." Monea, *Grand Juries on the Grand River: A History of Citizen Grand Jury Investigations in Lansing*, 97 U. Det. Mercy L. Rev. 305 (2020).

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different. In *People v. Duncan*, 388 Mich. 489, 499 (1972), this Court rejected a claim that there was a right to a preliminary examination after an indictment by a citizens' grand jury based upon a statute providing for prompt exams, and specifically noted in contrast to the citizens' grand jury that there is a statutory right to a preliminary examination after an indictment by a single judge inquiry:

> The clear intent of the amendment was to provide for and stress the need of prompt examinations. If, by this section, the legislature had meant to add another preliminary examination After a grand jury indictment, it would have done so with more direct language than that just quoted as such a procedure would have been a radical change from past practices. ***When the legislature did intend to provide for a preliminary examination after a one-man grand jury indictment, it did so by specific statutory language***. (1927 P.A. 175, ch. VII, s 4, and ***M.C.L.A. s 767.4***; M.S.A. s 28.944). 388 Mich. at 498-499. (Emphasis added.)

MCL 767.4 provides that once the investigating judge issues a warrant and an arrest is made, "the judge having jurisdiction shall proceed with the case, matter or proceeding ***in like manner as upon formal complaint***." MCL 767.4. (Emphasis added). A complaint starts the process for a preliminary exam in district court to determine probable cause. To proceed "in a like manner" as a complaint, the charging decision made by an investigating judge must begin with a preliminary examination.

In the 1950s the legislature amended MCL 767.4 and disqualified the investigating judge "from *acting as the examining magistrate in connection with the*

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hearing on the complaint or indictment, . . . or from hearing any motion to dismiss or quash any complaint or indictment . . . ." (Emphasis added.) The plain language is clear: if indicted, Defendants' cases must proceed "in a like manner" as a formal complaint, meaning they are entitled to preliminary examinations, and the investigating judge may not preside over the preliminary exam. MCL 767.4. The practice before then had been for the judge who conducted the inquiry to conduct the preliminary examination. See, e.g., *People v McCrea,* 303 Mich. 213 (1942). This was the background against which the legislature prohibited the investigating judge from serving as the preliminary examination magistrate, a process which had been the subject of much criticism.

The issue arises here because of the Genesee Circuit Court's misapplication of this Court's decision in *People v. Glass*, 464 Mich. 266 (2018). The Circuit Court below, and the state here, erroneously conflate the single judge inquiry with the citizens' grand jury, failing to acknowledge that *Glass* dealt ***only*** with an issue about a citizens' grand jury and ***not at all*** with the single judge inquiry.

Prior to *Glass*, it does not appear to have ever been questioned that there is a right to a preliminary examination on a charge brought after a single judge inquiry. But *Glass* was later misinterpreted. Anecdotally, on information and belief, from about 2014 to 2019, a circuit judge in Wayne County conducted judicial inquiries in

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certain shooting cases, and, if charges were brought, the defendants were arraigned on the charges in Circuit Court, with no preliminary examination. One of those cases was *People v. Green*, 322 Mich. App. 676 (2018). Defendant argued unsuccessfully on appeal that he was deprived of his rights to counsel and confrontation by use of the single judge inquiry. But Green did not raise the issue posed here, that he was deprived of his statutory right to a preliminary examination.

In Plaintiff-Appellee's Answer in Opposition to Defendant's Application for Leave to Appeal in this Court in *Green*, the Wayne County Prosecutor argued that there was no right to a preliminary examination after a single judge inquiry, because of the holding in *Glass*.[2] This mistaken belief appears to have been the basis for the examination-less procedure employed for several years in Wayne Circuit, which does

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[2] The prosecutor's Answer, Docket Entry No. 53 in Docket No. 157355, argued, at p. 4:

> "First, defendant says that the trial court should not have 'accepted' the grand jury proceedings as 'appropriate grounds for a bindover to Circuit Court.' Defendant was indicted by a one-person grand jury. There is no 'bindover' in this situation, as defendant repeatedly says. A case proceeds to trial after an indictment; there is neither a preliminary examination, nor any bindover, which is the result of a preliminary examination before a district court. This Court has so held, consistent with statute. 4. There was no 'bindover' for the trial court to 'accept' or which he could have 'rejected.'
>
> 4. *People v. Glass*, 464 Mich. 266, 283 (2001)."

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not appear to have ever been challenged by defendants.

The same misunderstanding determined the Circuit Court's decision in this case. In its opinion issued June 16, 2021, the circuit judge found that a "one person grand jury" was substantially similar to a citizens' grand jury, and therefore under *Glass* there was no right to a preliminary examination after a charge issued by a "one person grand jury." But as this Court's precedents make clear, the two processes are based upon distinct statutes, and those establishing the judicial inquiry provide a right to a preliminary examination which the citizens' grand jury statutes do not.

Over decades, numerous Michigan appellate decisions have recognized that preliminary exams have been held following a charging decision by a single judge inquiry. See, *e.g.*, *People v. McCrea*, 303 Mich. 213 (1942)(inquisitor can conduct preliminary examination); *People v. Roxborough*, 307 Mich. 575 (1943)(inquisitor can conduct preliminary examination); *In re Slattery,* 310 Mich. 458, 464 (1945)(warrant issued, exam held); *People v. Birch*, 329 Mich. 38 (1950)(warrant issued, exam held); *People v Hancock*, 326 Mich. 471 (1950)(inquisitor can preside over preliminary exam)*; People v. Pickett,* 339 Mich. 294 (1954)(warrant issued, exam held); *People v. Bellanca*, 386 Mich. 708, 712, 718 (1972)(where a judge indicts, defense counsel must have access to portions of the record prior to the preliminary examination); *People v. Allen,* 15 Mich. App. 387, 389 (1968)(indictment

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issued, exam held); *People v DiPonio*, 20 Mich. App. 658, 661, 665 (1969)(indictment issued, exam waived, defendant's motion to quash granted); *People v Hoffman* 205 Mich. App. 1, 3 (1994)(indictment issued, exam held).

The fact that MCR 6.112(B) provides that "[a]n indictment is returned and filed without a preliminary examination" does not undermine this longstanding interpretation.[3] The rule necessarily only refers to charges brought from the citizens' grand jury process, not from a judicial inquiry. Since there is a statutory right to a preliminary examination after a charge brought by a judicial inquisitor, this Court is without authority to alter that right through its rule making power. *Glass, supra*, 466 Mich. at 282-283: "The establishment of the right to a preliminary examination is more than a matter of procedure and beyond the powers vested in the Court by Const. 1963, art. 6, § 5; it is a matter of public policy for the legislative branch." To pass state constitutional muster, the court rule must be read to apply only to indictments issued by citizens' grand juries and not to those issued after a judicial inquiry.

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[3] MCR 6.112(B) reads:

> (B) Use of Information or Indictment. A prosecution must be based on an information or an indictment. Unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination. An indictment is returned and filed without a preliminary examination. When this occurs, the indictment shall commence judicial proceedings.

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This issue has far wider application to the clients of *amici* than just those criminal cases arising out of the Flint water crisis. For example, according to the Genesee County Circuit Court Administrator, as of April 12, 2022, there were seventy-one (71) cases not connected to the Flint water crisis cases pending in Genesee Circuit. Those 71 cases went straight to Circuit Court without a preliminary examination after the single judge inquiry.

In the press, the Genesee County Prosecutor has praised the process as "more efficient" in moving cases through the court system, by eliminating the preliminary examination.[4] But efficiency is not a basis to overrule decades of precedent. This novel attempt to enact a momentous change in Michigan's criminal justice process is occurring without the involvement of the legislature. The state's arguments, supposedly couched in plain English, disregard precedent and cherrypick definitions for terms like "indictment," which have multiple legal meanings.[5]

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[4] "Genesee County starts using one-person grand jury to set some felony cases for trial," available at: https://www.mlive.com/news/flint/2021/09/genesee-county-starts-using-one-person-grand-jury-to-set-some-felony-cases-for-trial.html

[5] The Code of Criminal Procedure, MCL 761.1(g), provides seven different definitions of the term "indictment":

(i) An indictment.
(ii) An information.
(iii) A presentment.

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This effort to sidestep the preliminary examination process is occurring after relatively recent unsuccessful attempts by the attorney general and prosecutors to persuade the legislature to eliminate most or all preliminary exams. See, *e.g.*, Langam, *Preliminary-Examination Reform: in Fairness We Trust or Waste of Time and Resources?* 28 T.M. Cooley L. Rev. 231 (2011).

This Court should grant leave to consider whether to adhere to longstanding precedent that there is a right to a preliminary examination after a charge by a single judge inquiry, or issue an opinion so finding and reversing the Genesee Circuit Court. Otherwise, this issue might escape review, since preliminary examination errors could be mooted by a trial verdict.

B. Nearly a century of history confirms a right to a preliminary exam.

The history of these statutes demonstrates the consistent use of preliminary examinations following a judge's charging decision.

In May 1917, Governor Albert Sleeper signed a bill authorizing a novel procedure for the "discovery of crime, and to provide penalties for a violation of such

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(iv) A complaint.
(v) A warrant.
(vi) A formal written accusation.
(vii) Unless a contrary intention appears, a count contained in any document described in subparagraphs (i) through (vi).

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procedure." Mich. Pub. Acts (1917), Public Act 196. The law gave any person, public official or private citizen, the ability to file a criminal complaint. See MCL 767.3. Upon reviewing the complaint, if a judge found "probable cause to suspect that any crime" occurred in their jurisdiction, the judge could initiate an investigation. MCL 767.3.

To conduct the investigation, the judge could preside in secret, compel witness testimony, and hold witnesses in contempt. MCL 767.3. If the secret investigation persuaded the judge that a crime had been committed and the judge "suspected the guilty party, he could then proceed as he would on a regular complaint, issuing warrants and conducting the preliminary examination." Scigliano, *The Michigan One-Man Grand Jury*, Government Research Bureau Michigan State University (1957) at15; MCL 767.4. The earliest version of the law permitted the investigating judge to also preside over the preliminary examination and, if necessary, the trial. *Id*. at 18 (the judge "was empowered to issue warrants, to bind over for trial, and to preside at the trial itself.").

Prior to the passage of the single judge inquiry statutes, Michigan had two distinct processes for initiating criminal charges. Michigan's first constitution required almost every criminal offense to originate via grand jury indictment. Mich Const 1835 Art I, § 11. The 1850 constitution watered down the grand-jury

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requirement, Mich Const 1850, Art VI, § 28, and by 1859 the legislature permitted the use of preliminary examination and information. Mich. Pub. Act (1859), Pub. Act No 138. By the early 20th century, exam and information had supplanted the grand jury as the most common process for bringing charges in Michigan. Scigliano, at 12 & n 37.

The single judge inquiry statutes blended aspects of both grand jury and information, creating a process akin to a judicial inquest. *Id*. at 13-14, 21. The single judge inquiry laws gave a judge investigatory power similar to that of a grand jury: if a specific complaint alleged what appeared to be a crime but lacked the particulars necessary to make an arrest or file charges, the judge could call witnesses, take testimony, and learn the particulars. *Id*. at 20. If the investigation persuaded the judge that a crime had occurred, the judge could issue the necessary warrants or charging document, preside over the preliminary exam, and then proceed to trial on an information. *McCrea*, *supra*, 303 Mich. at 224-225, 248; see also MCL 767.4.

The novel procedure grew out of twin concerns over how local prosecutors operated. In the early 20th century, county prosecutors could not subpoena witnesses, could not compel testimony, and could not grant immunity. Scigliano, at 20. Those limitations sometimes made it difficult to proceed by information. *Id*. Compounding the procedural difficulties, local prosecutors could not "always be

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depended upon to launch investigations when it would mean stirring up a nest of political hornets." *Id*. Because local prosecutors faced local voters, local political pressures or "politically supported wrongdoing" might prevent prosecutors from taking action. *Id*. Hence the passage of the single judge inquiry statutes.

The single judge inquiry had its "heyday" between 1939 and 1948. *Id*. at 46. During those years, civic organizations turned to the single judge inquiry to combat endemic political corruption and illegal activity. *Id*. at 21; 48. Single judge inquiries swelled in size, power, and scope, so much so that by 1948, some 15,000 witnesses had appeared before investigating judges, and in 1944 alone, at least 50 such investigations were ongoing. *Id*. at, 46. Two judicial investigations, in particular, generated over twenty cases that eventually reached this Court. *Id*. at 57.

Ferguson Investigation. Travel back to Summer 1939, in Detroit. A suicide note made public some salacious allegations of police corruption, and an uproar ensued. *Id*. at 47. The Wayne County prosecuting attorney, Duncan McCrea, was Up North at the time, so an assistant prosecuting attorney started an investigation. *Id*. at 47. When McCrea returned from vacation, he put a stop to the inquiry and resisted political pressure to restart it. *Id*. Eventually, the Detroit Citizens League urged the Wayne County Circuit Court to do something about the allegations, and the court impaneled a single judge inquiry. *Id*. at 48.

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Judge Homer Ferguson led the investigation, and it lasted over two years, inquiring into a broad swath of public corruption. *Id*. at 48. Primarily, Judge Ferguson discovered that Duncan McCrea, the Wayne County Prosecutor, devised and ran a protection racket for Detroit mobsters. *Id*. at 48-49. McCrea's scheme allowed Detroit and Wayne County public officials to extort some of the proceeds from illegal gambling and prostitution. *Id*. at 49. No doubt McCrea was the ringleader, and he made well over $100,000 for his crimes over the course of a decade. See *McCrea*, *supra*, 303 Mich. at 227-238 (detailing the trial testimony establishing McCrea's guilt); see also, Scigliano, at 50.

Not surprisingly, Judge Ferguson indicted McCrea and others, charging them with, among other things, conspiracy to obstruct justice. *McCrea*, *supra*, 303 Mich. at 224-225. ***McCrea received a preliminary exam after indictment***, and Judge Ferguson presided over it, even denying McCrea's motion to quash the indictment. *Id*. at 247-248. After a jury convicted McCrea, he appealed and insisted it violated due process for Judge Ferguson to initiate the charges, preside over the preliminary exam, and deny the motion to quash. *Id*. This Court rejected McCrea's due-process claim, and others too, and affirmed his conviction. *Id*. at 248; 286.

Carr Investigation. A second judicial inquiry of note occurred in 1940's Ingham County, also at the urging of the Detroit Citizens League. Scigliano, at 51.

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Judge Leland Carr spent three years investigating bribery allegations up and down the state. *Id*. at 50-52. The investigation swept up a host of lawmakers and lobbyists, a former regent for the University of Michigan, and a number of Republican Party leaders, including a former mayor of Flint. *Id*. at 52-53.

Judge Carr's sprawling investigation also spawned litigation, and much of it highlighted the ***dissimilarities*** between a single judge inquiry and a grand jury. *In Re Slattery, supra,* is instructive. During his investigation, Judge Carr subpoenaed Francis Slattery, then the vice president of Michigan National Bank. *Id*. 310 Mich. at 462. Although Slattery never fancied himself a lobbyist, he spent months in Lansing trying to persuade legislators to kill a bank-reform proposal. *Id.* Judge Carr believed Slattery was party to a conversation with a lawmaker, identified only as "A," wherein "A" offered to switch his vote for the right price. *Slattery*, *supra*, 310 Mich. at 462. But when Judge Carr pressed Slattery on the specifics of the conversation, Slattery's memory failed him. *Id.* at 462; 469-472. Carr stopped the questioning, held Slattery in contempt, and sentenced him to 60 days jail. *Id.* at 462-463.

Slattery appealed and claimed the single judge inquiry statutes gave nonjudicial powers to a judge, thus violating the state's constitution. *Id.* at 462. But this Court rejected Slattery's challenge, in part because Judge Carr exercised what the Court

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characterized as a quintessential *judicial* power in holding Slattery in contempt. *Id.* at 466. In support, this Court referenced numerous opinions upholding contempt convictions arising out of a witness's appearance before a single judge inquiry. *Id.* at 477 (collecting cases). And this Court highlighted all the ways Slattery's testimony supported Judge Carr's contempt finding. *Id.* at 469-472. This Court rejected Slattery's challenge because Carr acted more like a circuit judge than a grand juror.

Although Judge Carr's inquest survived Slattery's constitutional challenge, it eventually failed in other significant respects. The investigation failed to produce big-ticket convictions, which was especially problematic, given that ***Judge Carr made it his practice to preside over the preliminary examinations on charges he initiated***. Scigliano, at 52 - 54 (emphasis added). In one notable case, Judge Carr charged the former mayor of Flint for allegedly violating the state's liquor laws, but after the state presented all its evidence at trial, the presiding circuit judge directed the jury to acquit. *Id.* at 53.

The spate of litigation stemming from the Ferguson and Carr investigations generated a sizable chorus in favor of reforming the single judge inquiry statutes. Much of the reform movement found a home in the state bar, which opposed the process for impaneling a judicial investigation, the secrecy of the proceedings, the

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seemingly unlimited scope of the investigations, the length of the inquiries, and the fundamental fairness concerns litigated in *McCrea*. *Id*. at 59-64.

Eventually, the reform movement crystalized around a few ideas, all of which became amendments to the single judge inquiry statutes. The legislature limited the scope of the inquiry and placed a firm, 12 month time limit on the investigation. MCL 767.4. And in 1951 the legislature amended the judicial inquiry statutes to make clear that the investigating judge "shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, ..." MCL 767.4. The legislature also prohibited the investigating judge from "presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment . . . ." *Id.*

After amendment, the plain language of the statutes continued to confer a right to a preliminary exam, a reality this Court recognized in *People v Duncan*, *supra*. In October 1970, Duncan and others were arrested on charges of murder and conspiracy to commit murder. *Duncan*, *supra*, 388 Mich at 492. The prosecutor moved to adjourn the preliminary exam, and in the interval a citizens' grand jury indicted Duncan on the same charges. *Id.* The prosecutor dismissed the complaint and warrant, and Duncan was never given a preliminary examination. *Id.* at 493.

Duncan and others appealed two pretrial decisions, one on the scope of

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discovery and the other on the right to a preliminary exam following a citizens' grand jury indictment. *Id.* at 494. On the discovery issue, this Court applied *Bellanca, supra,* and granted access to the record. *Id.* at 495. The preliminary exam question was more difficult, because the United States Constitution did not require a preliminary exam at all, so if the defendants had a right to a preliminary exam after indictment by a citizens' grand jury, it had to be in the statutes. *Id.* at 495. After examining whether the legislature had intended to create a right to an exam, the Court found there was none, and contrasted the "one man grand jury" from the citizens' grand jury in that after an indictment by a "one man grand jury," the statute provided for a preliminary examination. *Id.* at 498-499, citing MCL 767.4. *Duncan's* read of the single judge inquiry statutes should control the outcome here: consistent with the plain language and history of MCL 767.3 and MCL 767.4, Defendants are entitled to a preliminary examination.

But there is a wrinkle this Court should correct. In *People v Glass*, *supra*, this Court overruled the portion of *Duncan* which granted a right to a preliminary examination following an indictment by a citizens' grand jury. *Glass*, 464 Mich. at 281-284. Subsequently, *Glass* has been misread to hold that *any* indictment does away with a preliminary examination.

Not so. *Glass* took issue with *Duncan* because *Duncan* elevated policy

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concerns over plain text. *Glass*, *supra*, 464 Mich. at 281-282, quoting *Duncan*, *supra*, 388 Mich. at 502. But nowhere does *Glass* discuss the plain text of the judicial inquiry statutes, which require a preliminary exam. Thus, *Glass* should be cabined to its facts—indictments issued by citizens' grand jury—and not read to upset the plain language and longstanding interpretation of the judicial inquiry statutes.

The upshot of the above history is significant for Defendants. Although a single judge inquiry bears some resemblance to a grand jury, ultimately the judicial inquisitor acts in a judicial capacity and is not really the same as a grand jury, the central point in *Slattery*. In addition, the single judge inquiry statutes confer a right to preliminary exam following a judge's charging decision and, throughout history, criminal proceedings initiated by a single judge inquiry routinely included preliminary examinations regardless of the name applied to the charging mechanism.

Consistent with plain text, precedent, and history, Defendants are entitled to a preliminary examination following the judge's charging decision. This Court should so hold.

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RELIEF REQUESTED

For all the above reasons, Amicus CDAM urges the Court to grant leave to appeal, or to issue a ruling reversing the Genesee Circuit Court and holding that Defendants have a right to a preliminary examination.

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