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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
PLAINTIFF - APPELLEE,

MSC # _____

COA #: 365226

v.

LCN #: 2012-003652-FC

TODD DOUGLAS ROBINSON
DEFENDANT - APPELLANT.

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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A. Michigan Court of Appeals Opinion Affirming Circuit Court's Denial of Motion for Relief from Judgment, *People v Robinson,* Case No. 365226, ___NW2d___, Slip Opinion, June 13, 2024

B. Michigan Court of Appeals Order Denying Reconsideration, *People v. Robinson*, Case No. 365226, July 29, 2024

C. Michigan Court of Appeals Opinion, *People v. Robinson,* Case No. 317282, 2015 WL 3604464, June 9, 2015

D. Indictment and Order Authorizing Issuance of Warrant, November 16, 2012.

E. Register of Actions, Jackson County Circuit Court, Case No. 12-003652-FC

F. Demand For Preliminary Examination Or Alternatively To Quash Information, December 10, 2012

G. Circuit Court Opinion and Order After Evidentiary Hearing, April 8, 2015

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L. Michigan One-Man Grand Jury Is Nullified, 33 J. AM. JUD. Soc. 58 (1949).

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STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Todd Robinson seeks leave to appeal from the published opinion of the Michigan Court of Appeals, filed June 13, 2024, affirming denial of his Motion for Relief from Judgment and denial of his motion for reconsideration filed July 29, 2024.

Defendant-Appellant sought relief from judgment because he was indicted by a one-man grand juror and denied a preliminary examination. He asked the Circuit Court for relief from judgment because the indictment filed by a judge acting pursuant to MCL 767.4 was void and the circuit court, therefore, was without jurisdiction. The Circuit Court denied his motion. The Court of Appeals affirmed.

The Court of Appeals Opinion is attached as Appendix A.

The Court of Appeals Order denying his motion for reconsideration is attached as Appendix B.

Defendant-Appellant Robinson respectfully requests that this Court to grant his Application for Leave to Appeal, order full briefing on the merits and oral argument, reverse the lower courts and remand with direction for his case to be dismissed.

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STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals filed its Opinion on June 13, 2024 and it filed its Order denying reconsideration on July 29, 2024.

Mr. Robinson has filed this application for leave to appeal on September 19, 2024.

This Court has jurisdiction to consider Mr. Robinson's application pursuant to MCR 7.303(B)(1). This Application for Leave is timely filed within 56 days of the Court of Appeals order denying Defendant Robinson's Motion for Reconsideration. MCR 7.305(C)(2).

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STATEMENT OF QUESTIONS PRESENTED

I. Whether an indictment by a judge appointed to act pursuant to MCL 767.3 and MCL 767.4 is void because a judge is without authority to indict?

Defendant-Appellant says: "Yes"
The Court of Appeals would say: "No"

II. Whether an indictment by a judge is void and a fundamental jurisdictional defect a defendant may challenge in a motion for collateral relief?

Defendant-Appellant says: "Yes"
The Court of Appeals would say: "No"

III. Whether the Court of Appeals holding, that a judge's indictment is merely a procedural error, is erroneous?

Defendant-Appellant says: "Yes"
The Court of Appeals would say: "No"

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INTRODUCTION

Defendant-Appellant Robinson's Application for Leave to Appeal presents questions of major significance to the jurisprudence of this State concerning circuit courts' power to adjudicate a criminal prosecution begun by an indictment authored by a judge appointed as a judicial investigator pursuant to the so-called one-man grand jury statutes, MCL 767.3 and MCL 767.4: whether a judge's indictment is a fundamental jurisdictional defect and void; and, whether an accused charged in a one-man grand jury indictment is eligible for relief from judgment pursuant to MCR 6.508(D)(3) because the indictment is a jurisdictional defect within the meaning of the rule.

Defendant-Appellant Robinson's issues presented in this application are framed by the June 28, 2022 decision in *People v Peeler*, 509 Mich 381 (2022), which holds that the language of MCL 767.4 provides no authority for a judge appointed to conduct a judicial inquiry to indict and grants a right to a preliminary examination for anyone accused after such inquiry. 509 Mich at 391, 395. *Peeler* reversed circuit court denials of defendants' motions for preliminary examinations and to dismiss. It remanded to the circuit court "for further proceedings consistent with [its] opinion," *Id.* at 386. The decision in *Peeler* examined the language, history and context of Michigan's judicial inquiry statutes, MCL 767.3 and MCL 767.4, on appeals by defendants from their *pre-trial* challenges to indictments filed by a judge after a secret judicial inquiry, referred to in *Peeler* as "a Star Chamber comeback." 509 Mich at 386. Defendant-Appellant Robinson asks this Court to apply the same analysis to his *post-conviction* challenge to the judge's indictment in his case on his motion for relief from judgment.

Defendant-Appellant Robinson's prosecution began in November 2012 with an

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indictment filed by a judge acting pursuant to the same judicial investigation statutes at issue in *Peeler*. After Mr. Robinson's arraignment in circuit court, he filed a motion to request a preliminary examination or to quash. His motion was denied. After a jury trial, conviction, sentence and appeals, he filed a pro se motion for relief from judgment in July 2022. He argued, based on the language of MCL 767.4 and *Peeler*, that the circuit court was without jurisdiction because the judge's indictment was null and void. The Circuit Court denied his motion. It held the decision in *Peeler* had no applicability to the 2012 indictment in his case and that even if he was wrongly denied a preliminary examination, he made no showing of prejudice. Exhibit J.

The Court of Appeals affirmed in a published decision on June 13, 2024. Appendix A. Although it ruled that "Robinson was *improperly* subjected to indictment by a one-man grand jury without a preliminary examination," and though it characterized its decision as a "close call" based on diverging authorities which do not "clearly address[]" the issue, Slip Op at 6, 10 (emphasis added), it held indictment errors and denial of a preliminary examination in Mr. Robinson's case were harmless procedural errors and not jurisdictional defects within the meaning of MCR 6.508(D)(3). Slip Op at 12. It holds, contrary to controlling authority for claims like Mr. Robinson's that would "preclude the state from ever prosecuting the defendant for the crime regardless of his factual guilt",[1] that criminal charges brought by a judge are merely procedural defects subject to harmless error review. *Id*. ("We also find that the error here did not deprive the trial court of subject-matter jurisdiction because it was "procedural.") The Court denied Mr. Robinson's motion for reconsideration, which raised "palpable errors," on July 29,

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[1] *People v. New*, 427 Mich 482, 488 (1986)*; People v. Johnson*, 396 Mich 424 (1976); *People v Carpentier*, 446 Mich 19 (1994); *People v. Glass*, 464 Mich 266 (2001)

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2024, without explanation. Appendix B.

Defendant-Appellant Robinson now asks this Court to grant his application for leave to appeal because the Court of Appeals published decision, holding that a void indictment is merely a procedural defect, is erroneous and because his application squarely addresses issues important to the jurisprudence of this State concerning "the very *authority* of the state to bring a defendant to trial" on a void indictment brought by a judge with no lawful authority to indict. *People v. White*, 411 Mich 366,398 (1981)(Moody, J., concurring in part and dissenting in part).

STATEMENT OF PROCEEDINGS AND FACTS

Police began a criminal investigation after the murder of Eshaum Gant on December 23, 2011 in Jackson, Michigan. No charges were brought until Jackson County Circuit Judge Edward J. Grant filed an indictment as a one-man grand juror on November 16, 2012. He charged Todd Robinson in two counts with open murder and felony firearm. Appendix D: Indictment.

Mr. Robinson was arrested on a warrant authored by the judge/grand juror and was held without bond and without a probable cause determination by a neutral and detached magistrate in violation of the Fourth Amendment. *Gerstein v. Pugh*, 420 US 103, 113 (1975)("To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible"). The judge/grand juror was not a neutral and detached magistrate.[2] Appendix E: Register of Actions (ROA), p.1; Appendix D: Indictment And Order

[2] See, MCL 767.4, which provides that: "The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to summons

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Authorizing Issuance Of Warrant, 11/16/12. On November 20, 2012, the prosecuting attorney filed an information alleging the same offenses without a preliminary examination and bindover, prerequisites required by MCL 767.42. Appendix E, ROA at p. 1.

Mr. Robinson filed a motion before trial, on December 11, 2012, demanding a preliminary examination or dismissal. He argued the indictment and information were void and without a probable cause. He asked for a preliminary examination relying on *People v. Duncan*, 388 Mich 489, 498-499 (1972) ("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."). Appendix F: Demand For Preliminary Examination Or Alternatively To Quash Information, 12/10/12. The court denied the motion explaining that no examination was required on an indictment filed by a grand juror. Appendix E: ROA, 1/18/13 at 3.

Trial began on April 29, 2013. Mr. Robinson was found guilty. He was sentenced on June 13, 2013 to life followed by two years for felony firearm. Appendix E: ROA.

The evidence at trial was summarized by the Court of Appeals on Mr. Robinson's direct appeal. Appendix C, at 1.

> Defendant was convicted of shooting and killing the victim as part of a drug deal involving promethazine. The evidence against defendant was both direct and circumstantial. Two witnesses –Joe Kelley and Troy Heard, both long-time friends of defendant–testified that the three men were playing their regular game of dominoes at the Kelley's house. Kelley testified that defendant went to the kitchen to talk with someone, probably a man but Kelley did not know who it was, and went out the back door with the person. Minutes later, Kelley heard a gunshot from "out back." Heard went outside briefly, returned, and said he had to leave. Kelley saw defendant looking in his truck, and saw a man he did not recognize lying down by the

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or subpoena."

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> fence, and called 911. On cross-examination, Kelley said that he did not see defendant with a gun that night.
>
> Heard testified that someone knocked at the back door, and defendant answered. Heard identified the victim as being the man at the door. Defendant and the victim were negotiating over the sale of promethazine. Defendant came back to the table, laid a gun on the table, and said "it ain't gonna go down like they think." There was another knock at the back door and defendant answered. Heard then heard what sounded like a gunshot. Heard looked out the kitchen window and saw defendant move the victim to the fence. As Heard was leaving, defendant said that the victim drew a gun on him and walked him out of the house. The next morning Detective Stiles went to Heard's house and Heard told a different story. Later, Heard got arrested with a gun, and Stiles again came to see him. Heard testified that he had a gun charge pending but expected nothing in exchange for his testimony at defendant's trial.

On direct appeal, the court ordered a remand for an evidentiary hearing to decide whether a new trial was required because of "false or misleading statements made by the prosecutor during the trial stage" concerning promises of leniency to prosecution witness Heard. Appendix G: Circuit Court Opinion and Order After Evidentiary Hearing. The circuit court denied the motion on remand. It held that even though Heard testified falsely at trial that he had not been offered immunity on his own firearms offenses arising from the trial facts without correction by the prosecutor, the error was harmless. Id. at 2.

A panel of the Court of Appeals adopted the trial court findings and affirmed. Appendix C: *People v. Robinson*, 2015 WL 3604464 at *4, Michigan Court of Appeals No. 317282, 6/9/15. ("Moreover, in light of the trial court's conclusion that this error was harmless, there can be no plain error."). The Defendant's Application for Leave to Appeal was denied. *People v. Robinson*, 499 Mich 861 (2016).

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Mr. Robinson applied for collateral relief twice after his direct appeals arguing that trial errors and constitutionally ineffective counsel denied him a fair trial. The United States District Court for the Eastern District of Michigan rejected his motion filed pursuant to 28 USC § 2254. *Robinson v. Brewer,* No. 16-cv-11925, 2018 WL 1570353 (ED Mich, March 30, 2018). On February 8, 2019, the circuit court denied Mr. Robinson's motion for relief from judgment brought pursuant to MCR 6.508. Appendix H: Order Following Motion for Relief from Judgment.

Mr. Robinson filed a second motion asking for relief from judgment on July 20, 2022, after this Court's decision in *People v Peeler*, 509 Mich 381 (2022). His pro se motion was styled as one made pursuant to MCR 2.612(c)(1)(d) for relief from a void judgment. He argued that *Peeler* clarified a long standing misunderstanding that a judge appointed to conduct a judicial inquiry has authority to indict. Appendix I: Motion for Relief from Judgment, 7/20/22. He asked for relief from his conviction because the indictment that began his case was void and because the circuit court was without jurisdiction where there had been no bindover after a preliminary examination and finding of probable cause as required by MCL 767.42. (Preliminary examination as prerequisite to filing of information). His motion and brief relied on *People v. Goecke*, 457 Mich 442, 459 (1998)("Had no return been filed, the circuit court would not have acquired jurisdiction over the case or the accused."). Appendix I: Motion for Relief from Judgment at 11, ("...the Circuit Court still did not acquire[] subject-matter jurisdiction over the case or inpersonam jurisdiction over the petitioner because the court denied the Preliminary Examination and therefore, no Magistrate's 'return' was ever filed.").

The circuit court denied Mr. Robinson's motion on December 28, 2022. Appendix J:

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Order Following Motion For Relief From Judgment. It read MCR 6.502(G) to prohibit Mr. Robinson's motion because he had filed a prior motion for relief from judgment on July 30, 2018, on different grounds, that was denied on February 8, 2019.[3] The circuit court decided Mr. Robinson was ineligible for relief on a second motion for relief from judgment because *Peeler* did not announce a retroactive change in the law. The opinion did not discuss either Mr. Robinson's argument that the judge's indictment that began his prosecution was void or that the circuit court lacked jurisdiction to proceed to trial in his case because it denied his motion for preliminary examination required by MCL 767.42, a prerequisite to a proper bindover and for the circuit court to acquire jurisdiction.

The Court of Appeals affirmed in a published opinion. *People v Robinson,* Case No. 365226, __NW2d__, 2024 WL 2981519, June 13, 2024. It acknowledged that *Peeler* holds, "based on the proper interpretation of longstanding statutory authority in existence since well before Robinson's indictment and conviction in this case", that a judge has no authority under MCL 767.4 to indict and that a defendant charged after a judicial inquiry has a right to a preliminary examination, but decided the errors were only procedural. Slip Op at 5.

It examined the issue presented by *Robinson* to determine whether the one-man grand jury indictment that began his prosecution was merely procedural defect and held the indictment, although defective, was a procedural defect that did not "deprive" the circuit court of jurisdiction.

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[3] MCR 6.502(G) provides that a defendant may file "one and only one motion for relief from judgment," except for: "(a) a retroactive change in law that occurred after the first motion for relief from judgment was filed, (b) a claim of new evidence that was not discovered before the first such motion was filed, or (c) a final court order vacating one or more of the defendant's convictions either described in the judgment from which the defendant is seeking relief or upon which the judgment is based."

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Id at 9. ("For the foregoing reasons, we conclude that an indictment via one-man grand jury, although erroneous under *Peeler*, does not deprive the circuit court of subject-matter jurisdiction. Therefore, the judgment here was not void for lack of jurisdiction."). Id at 12. Citing *People v. Hall*, 435 Mich 599, 603 (1990), holding use of hearsay at a preliminary examination harmless error, it held denial of Mr. Robinson's demand for a preliminary examination and trial on a defective indictment did not warrant reversal. Slip Op at 12. It described its decision as a "close call" based on "authorities seemingly diverging on – and not clearly addressing – this issue." Slip Op at 10, 12.

For its reasons, the Court of Appeals explained that it found the generic remand language used in *Peeler*, "for further proceedings consistent with this opinion" and the absence of the term "jurisdiction" in the *Peeler* opinion insufficient to "implicate subject-matter jurisdiction". *Id* at 11. It also cited this Court's recent decision in *People v. Scott*, __ Mich at __; slip op at 18, a case holding that a circuit court is not divested of subject-matter jurisdiction during an interlocutory appeal, and cases from other jurisdictions finding insufficient indictment allegations to be procedural errors.

Defendant-Appellant's Motion for Reconsideration asked the Court to correct several fundamental errors. His motion argued that an indictment by a judge without authority is a jurisdictional defect, not a procedural defect, one that involves "the right of the government to prosecute a defendant in the first place," *People v. New*, 427 Mich 482, 492 (1986), and not a mere ministerial irregularity. *People v. Carpentier*, 446 Mich 19, 46 (1994)(Riley, J., concurring). The Court of Appeals denied Mr. Robinson's motion for reconsideration on July 29, 2024 without reasons. Appendix K: Motion for Reconsideration; Appendix B: Order Denying

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Reconsideration.

It is submitted, as discussed below, that Mr. Robinson's trial on a void indictment, where the charging authority was a judicial officer who plainly lacked the power to indict, and where there was no bindover after a finding of probable cause at a preliminary examination as required by the laws of this State, is a jurisdictional defect for which he should have been granted relief from judgment and that these errors are not mere irregularities in a charging procedure. The Court of Appeals decision in Mr. Robinson's case is squarely in conflict with the decision of the circuit court in *Peeler* on remand that dismissed seven separate cases charged by a judge "[b]ecause the one- person grand jury does not have power to issue indictments, the indictments [here] were void *ab initio*[, and] anything arising out of the invalid indictments [sic] irreconcilably tainted from inception." Slip at fn. 8. This Court should grant this Application, clarify the law, correct the errors below, and reverse the decisions of the lower courts.

ARGUMENT

I. AN INDICTMENT BY A JUDGE APPOINTED TO ACT PURSUANT TO MCL 767.3 AND MCL 767.4 IS VOID BECAUSE A JUDGE IS WITHOUT AUTHORITY TO INDICT.

Standard of Review: This Court reviews issues of statutory interpretation de novo. The proper interpretation and application of court rules is a question of law that is reviewed de novo. To the extent the issues presented involve questions of constitutional law, they are reviewed de novo. *People v Cole*, 491 Mich 325, 330-331 (2012); *People v. Williams*, 483 Mich 226, 231 (2009).

Mr. Robinson's case did not begin with a "charge[] the way that almost everyone in Michigan is charged - with a criminal complaint issued by a prosecutor and allowed a preliminary examination in open court at which the accused can hear and challenge the prosecution's evidence." *People v. Peeler*, 509 Mich 381, 386 (2022). There was no preceding

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warrant, complaint or preliminary examination and bindover in his case as a prerequisite for the circuit court to acquire jurisdiction. *People v. Curtis,* 389 Mich 698, 707 (1973)("This Court has consistently held that the Circuit Court acquires jurisdiction of the case upon the making of a proper return from the magistrate before whom the defendant had been examined or waived examination."). Instead Mr. Robinson was haled into court for the first time on an indictment and warrant that were void because they were prepared by a judge acting as a judicial investigator pursuant to MCL 767.4, and without a preliminary examination and bindover that he demanded and was denied. *People v Johnson*, 396 Mich 424, 443 (1976).

Peeler came to this Court on interlocutory appeals by several defendants who all challenged the authority of the circuit court to proceed on indictments filed by a judge pursuant to MCL 767.4, where there were no preliminary examinations as required by MCL 767.42. Defendant Peeler was an employee of the Michigan Department of Health and Human Services charged with misconduct related to use of childhood blood lead level data. The circuit court denied her motion for a preliminary examination followed by her appeal to this Court. Defendant Lyon was a former Director of the Michigan Department of Health and Human Services. He was charged with multiple counts of manslaughter and other offenses arising from his duties relating to the same matters. Lyon's motion argued the circuit court should dismiss because the judge appointed as a judicial investigator had no authority to indict and because ceding prosecutorial power to a judge by judicial decision would violate the Michigan Constitution's required separation of powers. The circuit court denied Lyon's motion and Lyon appealed to this court where his appeal was joined for argument and decision with Peeler's and a third defendant who had raised the same issues, Richard Baird.

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A. Statutory Language Provides No Authority For A Judge's Indictment

The decision in *Peeler* unmistakably holds, from its examination of the most obvious place to find clues to determine whether a judge can author an indictment, the language of MCL 767.4, that a judge appointed as a judicial investigator can not be empowered to indict. *Id* at 389. It should follow from its reading of the statute that an indictment by a judge who has no authority to act as a prosecutor is no indictment at all, or null and void. A void indictment is precisely the kind of jurisdictional defect a court has an obligation to notice. *People v. Washington,* 508 Mich at 130. Without "the very *authority* of the state to bring a defendant to trial", the circuit court in Mr. Robinson's case lacked jurisdiction in the first instance. *People v. White*, 411 Mich 366, 398 (1981); *People v. Curtis,* 389 Mich 698, 707 (1973).

The *Peeler* opinion confirms this meaning from the absence of the word "indict" as a verb ("to indict") and the use of the noun, "indictment" several times, but never to "say[] a judge may issue an indictment." *Id.* at 396. *Peeler* also relies on circumstantial evidence from the absence of a grand juror oath, required for a citizens grand jury to indict as the "hallmark of the grand jury process," as "more evidence that the one-man grand-jury statutes do not authorize a judge to initiate charges by issuing indictments." *Id.* at 398. In addition, *Peeler* relies on legislative history that rejected the power to indict for a judge after a 1947 amendment added power to indict for an enhanced three-judge panel, only to repeal that provision several years later. *Id*. at 397; 1947 P.A. 1947, No. 33, Imd. Eff. April 8.; Appendix L: Michigan One-Man Grand Jury Is Nullified, 33 J. AM. JUD. Soc. 58 (1949).

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B. Legal Background of MCL 767.4 Includes No History of Authority For A Judge's Indictment.

The *Peeler* decision confirms its holding with a comprehensive review of "Legal Background" for the judicial inquiry statutes. *Id*. at 389. It explains that the statutory scheme for Michigan's unique judicial inquiry scheme was enacted in 1917 as a stop-gap measure to add an additional investigative tool, not as a means to indict, thought at the time to be less cumbersome than a multi-person citizens grand jury. *Id*. at 389-90, citing *In re Colicasides,* 379 Mich 69, 89 (1967). *Peeler* also examines the role of judges in the statute's "checkered past," marked by abusive uses of judicial powers by the same judge to investigate and to charge and adjudge witnesses in contempt in secret proceedings, *In re Oliver*, 333 US 257 (1948) and *In re Murchison*, 349 US 133 (1955). The Supreme Court in *In re Oliver*, found "Michigan's unique one-man grand jury system" was intended only as an investigative tool. 333 US at 262. Several years later, in *People v. Bellanca*, 386 Mich 708, 715 (1972), this Court observed that the constitutionality of the so-called one-man grand jury statutes, because of the powers they gave a judge, still remained an open question. ("The constitutionality of a statute pursuant to which a judge accuses a person of a crime may not withstand our re-examination.").

Peeler also finds the colloquial term "one-man grand jury," commonly used to refer to the judicial investigation statutes, is a misnomer that appears nowhere in the statutes. *In re Slattery*, 310 Mich 458, 461 (1945). The nickname was apparently first coined in 1924 because an appointed judge is authorized to function in secret much like a citizens grand jury. *Peeler*, 509 Mich at 389, citing *People v. Doe*, 226 Mich 5 (1924). In this light, *Peeler* concludes that the misconceived "power of a judge conducting an inquiry to issue an indictment [was] simply an

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unchallenged assumption, until now." 509 Mich at 399.

C. Michigan Constitution, Const. 1963, art.3, s2, Requiring Separation Of Powers, Bars A Judge From Exercising Executive Authority To Prosecute.

The doctrine of separation of powers provides additional reasons for the same conclusion, that a judge has never had power to control the "institution and conduct of prosecutions." *People ex rel. Leonard v. Papp*, 386 Mich 672, 699 (1972); *People v. Curtis*, 389 Mich 698, 710 (1973); *Genesee County v. Genesee Circuit Judge*, 391 Mich 115, 121 (1974); *People v. Sierb*, 456 Mich 519, 533 (1998). In *Papp,* this Court held that a circuit judge has no power to determine the statute for prosecution of an accused defendant over the objection of the prosecutor. "For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. Const 1963, art.3, s2. It also violates our fundamental sense of fair play." *Papp,* 386 Mich at 684.

D. Circuit Court Proceedings Without A Preliminary Examination And Bindover Is A Jurisdictional Defect.

Initiation of Mr. Robinson's case in circuit court was a jurisdictional defect, even if there had been some basis for a judge to act as a prosecutor by filing an indictment, because there was no preliminary examination and bind over as required by MCL 767.42 and MCR 6.110(G) for the circuit court to acquire jurisdiction. Mr Robinson demanded a preliminary examination before trial in 2012 but was denied by the circuit court. The circuit court was without jurisdiction to proceed, for any reason other than to dismiss, without a preliminary examination and proper bind over. *People v Curtis*, 389 Mich 698, 708 (1973).

The finding by the examining magistrate that a crime had been committed and there was a

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probable cause to believe defendant guilty thereof was a necessary prerequisite to the filing of an information. This binding conclusion and finding of the examining magistrate is a judicial determination, and constitutes the basis of the right of the prosecuting attorney to proceed in the circuit court by filing an information against defendant. Without such finding and determination by the examining magistrate, the prosecuting attorney is without jurisdiction to proceed in the circuit court by filing an information against defendant. *People v. Dochstader*, 274 Mich 238, 244 (1936)*; People v. Evans*, 72 Mich 367, 387 (1888); *Genesse Prosecutor v. Genesee Circuit Court Judge*, 391 Mich 115, 119 (1974)("The circuit court acquires jurisdiction of a criminal prosecution 'upon the making of a *proper return* from the magistrate before whom the defendant had been examined or waived examination.") (emphasis added).

In *Peeler*, this Court explained that a judge before whom a case is pending after a judicial investigation must treat any charge the same as a case in which a formal complaint has been filed by requiring a preliminary examination, unless waived by the defendant. *Peeler*, 509 Mich at 392-393. In *Peeler,* denial of the defendants' motions for preliminary examinations was one of the bases for this Court to reverse. *Id* at 395.

The right to a preliminary examination is more than a matter of procedure. *People v. Glass*, 464 Mich 266, 282 (2001); *Coleman v. Alabama*, 399 US 1 (1970). Defense counsel uses it "to expose weaknesses in the prosecution's case through cross-examination, lays the grounds for later impeachment at trial, effectively discovers the prosecution's case, and makes arguments related to bail or psychiatric examinations." *People v. Lewis*, 501 Mich 1, 13 (2017)(McCormick, J., concurring) In *Lewis*, Justice McCormick, concurring, added that the preliminary examination is often "a critical client counseling moment" and that communications with opposing counsel

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"give the defendant important information about the evidence against him or her." *Id*. at 14. According to Justice McCormick, "harmless-error review in cases such as this invites a potentially problematic level of speculation into judicial review." *Id.*

Because Mr. Robinson was denied a preliminary examination required for the circuit court to acquire jurisdiction and because the indictment charging Mr. Robinson was void, this Court should grant leave to appeal and reverse for much the same reasons it did in *Peeler.*

II. AN INDICTMENT BY A JUDGE IS VOID AND A FUNDAMENTAL JURISDICTIONAL DEFECT A DEFENDANT MAY CHALLENGE IN A MOTION FOR COLLATERAL RELIEF.

> **STANDARD OF REVIEW**: This Court reviews issues of statutory interpretation de novo. The proper interpretation and application of court rules is a question of law that is reviewed de novo. To the extent the issues presented involve questions of constitutional law, they are reviewed de novo. *People v. Cole*, 491 Mich 325, 330-331 (2012).

As explained in *People v. Carpentier*, 446 Mich 19, (1994), a defendant may properly challenge his conviction on a void indictment by a motion for relief from judgment under MCR 6.508(D)(3)[4]. According to the rule, a defendant may not bring a second or subsequent motion for relief from judgement on grounds that could have been raised in prior appeals "*other than*

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[4] MCR 6.508(D)(3) provides in pertinent part that:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> * * *
>
> (3) alleges grounds for relief, *other than jurisdictional defects*, which could have been raised on appeal from the conviction ** and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such ground on appeal or in a prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief [emphasis added]

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jurisdictional defects." A defendant may raise a claim that the indictment in his case is void because the defect is "so fundamental to our system of justice that no matter how long the delay in challenging the conviction, the courts must hear the appeal." *People v. Carpentier*, 446 Mich at 43.

This Court also explained in *Washington*, that a defendant may challenge his conviction based on a subject-matter jurisdiction defect on a second or successive motion for relief from judgment under MCR 6.500 *et seq.,* because the rule "does not limit a trial court's ability to recognize a subject-matter jurisdiction error and remedy it." *Id.* at 131.

The indictment in Mr. Robinson's case is void and a jurisdictional defect eligible for relief under MCR 6.508(D)(3) because it is authored by a judge. A void indictment is a jurisdictional defect because its effect is that there should have been no trial in the first place. *People v. Johnson,* 396 Mich 424, 444 (1976). A void indictment to initiate prosecution is a defect that implicates "the very *authority* of the state to bring a defendant to trial." *People v. White*, 411 Mich 366, 392-401 (1981)(Moody, J., concurring). It may never be waived. The practical result of denial of the due process right to a determination of probable cause by a neutral and detached magistrate and bindover for the circuit court to acquire jurisdiction required by MCL 767.42, is "to prevent a trial from taking place at all." *Id.* at 395. A defendant "may always challenge whether the state had a right to bring the prosecution in the first place." *Id.* at 442. "[T]he state has no legitimate interest in securing a conviction" without proving jurisdiction. *People v. New*, 427 Mich 482, 491 (1986).

The test for determining that a void indictment is a jurisdictional defect and a defect in subject-matter jurisdiction within the meaning of the rule is a practical one that "reach[es]

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beyond the factual determination of the defendant's guilt and implicate[s] the very *authority* of the state to bring a defendant to trial,"quoting *People v. White*, 411 Mich 366, 398 (1981) (Moody, J., concurring in part and dissenting in part). "Jurisdictional defects do not include review of the merits of the case ... but only those challenges that question the very authority of the court to convict and sentence the defendant." *People v. Carpentier*, 446 Mich 19, (1994) (Riley, J., concurring) An indictment by a judge without authority is a jurisdictional defect. Others include double jeopardy, *Johnson,* 396 Mich at 445; entrapment, *White*, 411 Mich at 387; improper jurisdiction. *Carpentier*, 446 Mich at 47.

Subject-matter jurisdiction is the authority of a court "to hear and determine a case." *People v. Washington*, 508 Mich 107, 121 (2021). The circuit court acquires jurisdiction over a case when it is bound over after a preliminary examination. *Id* at 122, citing MCR 6.08(B)("The circuit court has jurisdiction over all felonies from the bindover from the district court unless otherwise provided by law."); *see also,* 508 Mich at 128, citing *People v. Veling*, 443 Mich 23, 32 (1993)("*Veling* concerned the acquisition and retaining of original jurisdiction among trial courts".); 508 Mich at 136, (Viviano, J., dissenting)("Jurisdiction of a criminal defendant is acquired by the circuit court 'upon the filing ...of the return of the magistrate before whom the defendant had waived a preliminary examination' or 'before whom the defendant had been examined."). The Court of Appeals erred by concluding a void indictment is only a procedural error because a circuit court can never acquire jurisdiction from a void indictment filed by a judge. Appendix M: Report of the Special Committee To Study and Report Upon the One-Man Grand Jury Law, 26 Mich St B J 11, 59 (1947). Without a valid indictment from which to acquire subject-matter jurisdiction, the circuit court in Mr. Robinson's case was without authority to

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proceed ab initio.

In *Washington,* this court explained that a sentence imposed when the circuit court lacks subject-matter jurisdiction is void *ab initio* because there is no valid sentence to review and MCR 6.501 "does not limit a trial court's ability to recognize a subject-matter jurisdiction error and remedy it." Unlike other errors that a defendant may lose the ability to raise, "jurisdiction goes the trial court's very authority to bind the parties to the action at hand." *Id*. at 132. In *Washington*, this Court held that the trial court lacked subject-matter jurisdiction to re-sentence the defendant while his application for leave to appeal, on his direct appeal, was pending in the Supreme Court. *Id.* In Mr. Robinson's case, the circuit court lacked jurisdiction on the void indictment *ab initio.*

III. THE COURT OF APPEALS HOLDING, THAT A JUDGE'S INDICTMENT IS MERELY A PROCEDURAL ERROR, IS ERRONEOUS.

> **STANDARD OF REVIEW**: This Court reviews issues of statutory interpretation de novo. The proper interpretation and application of court rules is a question of law that is reviewed de novo. To the extent the issues presented involve questions of constitutional law, they are reviewed de novo. *People v Cole*, 491 Mich 325, 330-331 (2012).

Although the Court of Appeals agrees the indictment that began Mr. Robinson's prosecution was erroneous under *Peeler*, it concludes the indictment error is merely one of procedure.

> And our Supreme Court never said that the improper procedure rendered the indictments in *Peeler* void. For the foregoing reasons, we conclude that an indictment via one-man grand jury, although erroneous under *Peeler*, does not deprive the circuit court of subject-matter jurisdiction. Therefore, the judgment here was not void for lack of jurisdiction.

Slip Op. at 12.

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The Court of Appeals decision in Mr. Robinson's case is erroneous for several reasons, all involving its interpretation and application of MCL 767.4 and this Court's holdings in *Peeler*. *Peeler* holds two things about the statute, first that a judge has no authority to indict, and second, that in the case of a charge following a judicial inquiry, the accused has a right to a preliminary examination. The opinion explains that the statute has always meant both. The Court of Appeals agrees with that meaning but is mistaken to conclude the error is only one of procedure. Slip Op at 9.

The meaning of a right to a preliminary examination is plain enough. Mr. Robinson demanded one after he was indicted in 2012. His motion was denied. According to MCL 767.42, the circuit court was without authority to proceed without a proper bind over and without jurisdiction. On that basis, the circuit court erred by denying his motion for relief from judgment because there was a jurisdictional defect within the meaning of MCR 6.508(D)(3).

Both lower courts also erred because the judge's indictment, without authority, was null and void. The circuit court was obligated to take notice of that jurisdictional defect, *People v. Washington*, 508 Mich 107, 130 (2021), and to grant Mr. Robinson relief on his motion for that reason. *Peeler's* careful review of the language, history and context of MCL 767.4, the judicial investigation statute, makes clear that the circuit court could not acquire jurisdiction over a void indictment authored by a judge.

The Court of Appeals decision is fundamentally erroneous because the indictment by a judge in this case is a substantive defect going to "the very power of the State to bring the defendant into court." *People v. Johnson*, 396 Mich at 444, citing *Blackledge v. Perry*, 417 US 21, 30 (1974). As explained by *Peeler,* a judge has no power to indict to initiate a prosecution.

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Our statutes require a bindover after a preliminary examination which was denied here, or a citizens grand jury indictment, for a circuit court to acquire jurisdiction. *See,* MCL 767.42; MCL 767.23a. There is no other mechanism provided by our laws to initiate prosecution in the circuit court. Because the indictment in this case was a jurisdictional defect, it was error for the circuit court to deny Mr. Robinson's motion and for the Court of Appeals to affirm.

In *People v Scott*, __ Mich__ (2024), (Docket No. 164790), cited by the Court of Appeals, see, *Robinson*, Slip Op. at 8 and 12, this Court held that "a trial court's failure to adhere to court rules staying proceedings while an interlocutory appeal is pending is a procedural error ...", *Scott,* Slip at 29. *Scott* presented the question whether an automatic stay of remand proceedings barred the trial court from addressing aspects of the interlocutory appeal. *Scott* at Slip *1. *Scott* also distinguished the rule in *Washington*, that a direct appeal from a final judgment divests the trial court "of subject-matter jurisdiction over those aspects of the case involved in the appeal." *Washington* at 126. Each case concerns questions involving subject-matter jurisdiction in the context of appeals, interlocutory or direct. Neither squarely addresses the question presented here, whether the circuit court was without subject-matter jurisdiction on a void indictment filed to initiate Mr. Robinson's case and erred by denying his motion for relief from judgment.

The Court of Appeals in this case also erred by finding "further support," *Robinson*, Slip Op. at 12, in cases from other jurisdictions holding that deficiencies in content of a charging document do not deprive a court of power to adjudicate a case, referencing, for example, *United States v. Cotton*, 535 US 625, 630 (2002). None of these concern the lack of authority to initiate a prosecution by indictment pursuant to a statutory scheme similar to Michigan's unique judicial

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investigation statutes.

In *Cotton,* on direct appeal, the Court held that an *omission* from an otherwise valid indictment of sentence enhancement allegations did not deprive a trial court of jurisdiction to impose an enhanced sentence, above the primary statutory maximum. Cited decisions from several state courts hold much the same concerning indictment content deficiencies. *State v. Ortiz*, 162 N H 585 (2011)(an indictment failed to include a definition of an element); *State v. Maldonado*, 223 Ariz 309 (2010)(no error where the defendant was first charged by a complaint and bound over and arraigned after a preliminary examination even though a formal information was not filed until after trial began); *State v. Gentry*, 363 S Ct 93 (2005)(failure to allege all offense elements in indictments not error).

Because the indictment authored by a judge which haled Mr. Robinson into court for the first time was void and a jurisdictional defect and because he was denied a preliminary examination necessary to fix jurisdiction in the circuit court, the Court of Appeals decision is erroneous. This Court should grant leave to appeal, order briefing on the merits and oral argument, reverse and remand with direction that Mr. Robinson's case be dismissed.

CONCLUSION

For all the above reasons, Defendant-Appellant Robinson respectfully requests that the Court grant this Application for leave to appeal, reverse the decisions of the lower courts and order that his Motion for Relief from Judgment be granted.

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Respectfully Submitted,

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DATE: September 19, 2024

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2024, I electronically filed the foregoing paper with the MiFile system which will send notification of such filing to all parties of record.

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