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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

TODD DOUGLAS ROBINSON,

Defendant-Appellant.

Case No. 167595
Court of Appeals No. 365226
Circuit Court No. 12-003652-FC

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.

CDAM is often invited to file briefs amicus curiae by this Court. 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.

RECEIVED by MSC 11/15/2024 11:39:26 AM

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

STATEMENT OF JURISDICTION v

STATEMENT OF QUESTION PRESENTED v

STATEMENT OF FACTS 1

ARGUMENT:

I. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CLARIFY THE REMEDY FOR A VIOLATION O F THIS COURT'S DECISION IN *PEOPLE v. PEELER* WHEN A "ONE MAN GRAND JUROR" ISSUES AN ILLEGAL INDICTMENT AND THE TRIAL COURT SKIPS THE BINDOVER PROCESS. 1

A. The *Peeler* Decision. 1

B. Leave Should be Granted to Provide Guidance to the Lower Courts on the Issue of Remedy for Violations of *Peeler*. 5

RELIEF REQUESTED 9

CERTIFICATE OF WORD COUNT 9

RECEIVED by MSC 11/15/2024 11:39:26 AM

INDEX OF AUTHORITIES

CASES

People v Agen, et al., 7th Circuit Court Case No. 21-04732-FH *et seq.* 3, 6

People v. Duncan, 388 Mich. 489 (1972) 2

People v. Glass, 464 Mich. 266 (2018) 3, 4

People v. Green, 322 Mich. App. 676 (2018) 3

People v. Bobby Kennedy, ___ Mich. App. __, 2023 WL 8656058 (December 14, 2023), vacated and remanded, *People v. Kennedy*, ___ Mich. __, 6 N,W, 3d 402 (MSC Docket No. 166594, May 31, 2024) 7

People v. Peeler, 509 Mich. 381 (2022) . . . . . *passim*

COURT RULES AND STATUTES

MCL 767.3 1

MCL 767.4 . . . . . *passim*

RECEIVED by MSC 11/15/2024 11:39:26 AM

STATEMENT OF JURISDICTION

The jurisdictional statement in Appellant's Application for Leave to Appeal is complete and correct.

STATEMENT OF QUESTION PRESENTED

I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CLARIFY THE REMEDY FOR A VIOLATION O F THIS COURT'S DECISION IN *PEOPLE v. PEELER* WHEN A "ONE MAN GRAND JUROR" ISSUES AN ILLEGAL INDICTMENT AND THE TRIAL COURT SKIPS THE BINDOVER PROCESS?

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 GRANT LEAVE TO APPEAL TO CLARIFY THE REMEDY FOR A VIOLATION O F THIS COURT'S DECISION IN *PEOPLE v. PEELER* WHEN A "ONE MAN GRAND JUROR" ISSUES AN ILLEGAL INDICTMENT AND THE TRIAL COURT SKIPS THE BINDOVER PROCESS.

Standard of Review. Statutory interpretation is a question of law reviewed *de novo*.

A. The *Peeler* Decision

In *People v. Peeler*, 509 Mich. 381, 386-387 (2022), this Court addressed two principal questions regarding the so-called "one man grand juror" statutes, MCL 767.3 and 767.4: (1) when charged by a one man grand juror, is a defendant entitled to a preliminary examination; and (2) can a judge sitting as a "grand juror" issue an indictment against a defendant?

This Court held that (1) a defendant charged under these statutes is entitled to a preliminary examination, and (2) that a judge sitting as a "grand juror" does not have the authority to issue an indictment. The Court remanded the cases to the Genesee Circuit Court for further proceedings consistent with the opinion.

This Court reached its conclusion regarding the right to a preliminary

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examination based upon the single judge inquiry, or "one man grand jury statute, MCL 767.4, which provides that when a "one man grand juror" finds probable cause that an offense was committed, the court "shall proceed with the case, matter or proceeding ***in like manner as upon formal complaint.***". (Emphasis added.) This Court noted that its precedents had consistently acknowledged that this language provides a right to a preliminary examination after a "one man grand juror" finds probable cause that an offense was committed. *Peeler*, 509 Mich. at 391-392, citing *People v. Duncan*, 388 Mich. 489, 498-499 (1972)(recognizing MCL 767.4 as a statute with "specific statutory language" providing for a preliminary examination).

As the Court noted, "[w]e know how that process works," *i.e.*, namely a formal complaint, then an arrest warrant, followed by a preliminary examination. The *Peeler* opinion noted that numerous other of its historic precedents had recognized the right to a preliminary exam after a finding of probable cause by a judge sitting as a "one man grand juror." 509 Mich. at 393-394.[1] The issue whether a defendant charged by a "one man grand juror" is entitled to a preliminary examination was never

[1] In its Answer in this case, the state argues that *Peeler* should not be retroactively applied. But as *Peeler* held, this Court's precedents had consistently recognized the right to a preliminary examination after criminal charges by a "one man grand juror." *Duncan, supra*, and the additional cases cited by *Peeler* at 509 Mich. 392-393. There was never a change in interpretation of the statute by this Court since its passage almost a hundred years ago, and therefore no issue of retroactivity.

RECEIVED by MSC 11/15/2024 11:39:26 AM

questioned in this Court prior to *Peeler*. Prior litigation was focused on the power of the grand juror to investigate.

The aberration in the lower courts in the Flint Water Cases, *Peeler et al*, and numerous other prosecutions, arose from a misinterpretation of this Court's decision in *People v. Glass*, 464 Mich. 266 (2018). In *Glass*, this Court held that the *Duncan* decision exceeded this Court's rule making authority in holding there is a substantive right to a preliminary examination after an indictment by a citizens' grand jury, despite the fact that the citizens' grand jury statute does not provide for it. In the Flint Water Cases, and numerous cases below, circuit courts erroneously conflated the single judge inquiry process with the citizens' grand jury process, and failed to recognize that *Glass* dealt ***only*** with an issue regarding the citizens' grand jury and ***not at all*** with the statutes establishing a "one man grand juror." *People v Agen, et al.,* 7th Circuit Court Case No. 21-04732-FH *et seq.,* Order Granting Dismissal of Felony Flint Water Cases, October 4, 2022. Exhibit A.

Anecdotally, from about 2014 to 2019, a circuit judge in Wayne County conducted judicial inquiries in certain cases pursuant to MCL 763.4, and, if charges were brought, the defendants were arraigned on the charges in Circuit Court, with no preliminary examination, skipping the bindover process. One of those cases was *People v. Green*, 322 Mich. App. 676 (2018). Green argued unsuccessfully on appeal

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that he was deprived of his rights to counsel and confrontation by use of the single judge inquiry. Green did ***not*** raise on appeal the issue that he was deprived of his statutory right to a preliminary examination.

In *Green*, the Court of Appeals held (technically in *dicta*, since the defense had not raised a claim there was a statutory right to a preliminary examination), that the one person grand jury procedure "serve[s] the same function" as a preliminary examination. 322 Mich. App. At 687. In *Peeler*, this Court expressly overruled that holding in *Green*, because probable cause to arrest is a lesser standard than probable cause to bind over. *Peeler, supra*, 509 Mich. at 394. And, of course, because the charging process set out in the statute requires a preliminary examination.

In Plaintiff-Appellee's Answer in Opposition to Green's Application for Leave to Appeal in this Court, the Wayne County Prosecutor argued that there was no right to a preliminary examination after a single judge inquiry, because of *Glass*.[2] This

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[2] The prosecutor's Answer to Defendant Green's Application for Leave to Appeal in this Court, 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'

RECEIVED by MSC 11/15/2024 11:39:26 AM

mistaken interpretation of *Glass* was the basis for the practice of skipping the bindover process which was employed in Wayne Circuit, and copied elsewhere.

But, as *Peeler* held, this Court's precedents had clearly recognized the citizens' grand jury and the "one man grand juror" processes are based upon different statutes, and those establishing the judicial inquiry ("one man grand juror") provide a right to a preliminary examination, while the citizens' grand jury statutes do not.

In addition, in *Peeler*, this Court held that based upon the clear language of MCL 767.4, a judge conducting a single judge inquiry does not have the authority to issue an indictment, only an arrest warrant, to initiate a criminal case. 509 Mich. at 395-400. The Court noted that historically at times judges sitting as "one man grand jurors" had issued indictments, but that the power of a judge to do so was "simply an unchallenged assumption, until now." *Id*. at 399-400.

Since the statute does not provide that a judge sitting as a "grand juror" can issue an indictment, while it expressly says a judge can "cause the apprehension of such person by proper process", this Court concluded that there was no *implicit* authority to issue an indictment where there was *explicit* authority only to issue an arrest warrant. *Id*. at 397. Because this Court resolved the issue as a matter of

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or which he could have 'rejected.'

4. *People v. Glass*, 464 Mich. 266, 283 (2001)."

RECEIVED by MSC 11/15/2024 11:39:26 AM

statutory interpretation, the Court declined to address Defendant Lyon's constitutional arguments that permitting a judge to issue charges violated the separation of powers and due process. Id. at 400.

B. Leave Should be Granted to Provide Guidance to the Lower Courts on the Issue of Remedy for Violations of *Peeler*.

Because *Peeler* was before this Court on on an interlocutory appeal from the denial of defense motions in the trial court, the opinion was terse as to remedy:

> We remand to the Genesee Circuit Court for further proceedings consistent with this opinion. *Id*. at 400.

Since *Peeler*, lower courts have struggled with the remedy issue and reached inconsistent results. Those issues of remedy are posed not only in this case, but in multiple others currently moving through the lower courts. The issues will continue to be raised until this Court provides guidance.

On remand from this Court in the Flint Water Cases, the charges were dismissed against seven Defendants, by the Genesee Circuit Court on remand. *People v Agen, et al.,* 7th Circuit Court Case No. 21-04732-FH *et seq.,* Order Granting Dismissal of Felony Flint Water Cases, October 4, 2022. Exhibit A. The Court concluded that since *Peeler* held that a one person grand juror does not have the authority to issue indictments, the indictments issued in that case were void *ab initio*.

RECEIVED by MSC 11/15/2024 11:39:26 AM

Slip Opinion, at p. 4. The Court also concluded that since the indictment was void, no further proceedings, even preliminary examinations, were permissible. Id. at pp 4-6.

In the published Court of Appeals decision in this case, where the Defendant was indicted by a one man grand juror and the mandatory bindover process was skipped, the Court of Appeals found that the use of an unauthorized indictment and the skipping of the mandatory bindover process were mere "procedural" errors, cured by an error free jury trial. Slip Opinion, at pp. 10-12. The Court noted that this conclusion was "admittedly a ***close call*** whether the improper indictment procedure here deprived the circuit court of subject-matter jurisdiction and necessarily rendered the court's judgment void." (Emphasis added.) Slip Opinion, at 10.

A major flaw in the *Robinson* decision is that its logic has no limits. Under the Court of Appeals' rationale, any error in the disregard of the charging process is rendered harmless by a trial, despite the fact that the charging process - including the authority to indict - is statutorily mandatory. If an unauthorized indictment and the failure to follow the charging process, including a preliminary examination, can be disregarded as mere "procedural" errors, this becomes no process at all. If, for example, a court imposed a consecutive sentence in a case where there was not authority do to do so, an appellate court would not characterize the void sentence as

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a "mere procedural error" and then go on to examine whether the sentence was proportional. The judgment would simply be void, as was the indictment in this case.

These issues are pending in the case of *People v. Bobby Kennedy*, ___ Mich. App. __, 2023 WL 8656058 (December 14, 2023), vacated and remanded by this Court to the Court of Appeals for reconsideration. *People v. Kennedy*, ___ Mich. __, 6 N,W, 3d 402 (MSC Docket No. 166594, May 31, 2024).

In addition, there are multiple cases pending in circuit courts around the state which pose the issue of remedy. See, *e.g.*, *People v. Rodney McKee*, Jackson County Circuit Court, Docket No. 15-002788-FC (Motion for Relief from Judgment pending); *People v. Robert Clarke*, Wayne County Circuit Court, Docket No. 18-007088-FC (Motion for Relief From Judgment pending).

And Wayne Circuit is apparently not consistent in its treatment of the issue. *Cf. People v. Anthony Wilcox*, Wayne County Circuit Court Docket No. 18-001375-01-FC (Motion for Relief From Judgment denied), with *People v. Rashaun Wilcox*, Wayne County Circuit Court Docket No. 18-009035-01-FC (Motion to Dismiss for failure to hold preliminary examination granted without prejudice).

The issues of what remedies are available after *Peeler* in cases which were initiated by unauthorized indictments and which skipped the mandatory bindover process will continue to confound the lower courts until this Court provides guidance.

RECEIVED by MSC 11/15/2024 11:39:26 AM

The fact that the Court of Appeals characterized this case as a "close call" is really a request to this Court to clarify the question of remedy post-*Peeler*.

RELIEF REQUESTED

For all the above reasons, Amicus CDAM urges the Court to grant leave to appeal to Defendant-Appellant and reverse the decision of the Court of Appeals.

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CERTIFICATE OF WORD COUNT

I certify that, according to a word count computed by the word processing program on which this Brief was produced, this Brief contains 2,206 words.

s/John Minock