

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY EMMITT KENNEDY,

Defendant-Appellant.

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FOR PUBLICATION

December 14, 2023

9:20 a.m.

No. 363575

Kent Circuit Court

LC No. 03-011966-FC

Before: FEENEY, P.J., and RICK and HOOD, JJ.

RICK, J.

Defendant appeals by leave granted<sup>1</sup> the opinion and order denying his motion for relief from judgment. We affirm.

**I. FACTUAL BACKGROUND**

In 2003, defendant was indicted for murder by a one-man grand jury. Two years later, in 2005, a jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a); felon in possession of a firearm (felon-in-possession), MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, two to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. Defendant's sentences for felon-in-possession and felony-firearm were ordered to run concurrently with each other, but consecutive to the sentence for first-degree murder. His convictions and sentences were affirmed on direct appeal. *People v Kennedy*, unpublished per curiam opinion of the Court of Appeals, issued November 8, 2007 (Docket No. 271020).

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<sup>1</sup> *People v Kennedy*, unpublished order of the Court of Appeals, entered December 12, 2022 (Docket No. 363575).

In 2022, our Supreme Court held that one-man grand juries do not have the authority to issue indictments. *People v Peeler*, 509 Mich 381; 984 NW2d 80 (2022). Following the Court’s ruling in *Peeler*, defendant moved for relief from judgment in the trial court under MCR 6.500 *et seq.* Defendant argued that his convictions and sentences should be set aside because he was indicted by a one-man grand jury in direct contravention of *Peeler*, which he claimed should be retroactively applied. Additionally, defendant argued that his convictions and sentences should be vacated because the indicting judge did not have authority to issue an indictment against him, suggesting that the trial court never acquired personal jurisdiction over him.

The trial court denied defendant’s motion for relief from judgment. Quoting *People v Carp*, 496 Mich 440, 469-470; 852 NW2d 801 (2014), overruled by *Davis v Michigan*, 577 US 1186; 136 S Ct 1356; 194 L Ed 2d 339 (2016), the trial court explained that “[u]nder federal law, ‘[t]here is a general rule of nonretroactivity for cases on collateral review when it comes to applying new constitutional rules to cases that became final before the new rule was announced.’ ” It asserted that Michigan follows this general principle of nonretroactivity for new rules of criminal procedure. The trial court acknowledged that this Court has not addressed the retroactivity of *Peeler*, but observed that in similar cases, federal courts have found changes in law to be procedural and not applicable to collateral attacks once the window for direct appeal has closed. The trial court opined that defendant failed to provide proof that any aspect of *Peeler* should be applied retroactively. Likewise, the trial court rejected defendant’s argument that the trial court did not have authority to file an indictment against him and that the trial court thus did not have jurisdiction over the case. The trial court explained that a jurisdictional defect did not occur, but that even if it had, it did not render defendant’s convictions absolutely void, noting that defendant’s one-man grand jury indictment was followed by a unanimous jury conviction. Accordingly, the court denied defendant’s motion for relief from judgment. Defendant now appeals to this Court.

## II. ANALYSIS

Defendant argues that *Peeler* should be applied retroactively to this case, and that this Court should hold that he was not properly indicted in 2003 and vacate his convictions and sentences. We agree that *Peeler* applies retroactively, but we do not find that the retroactive application of *Peeler* entitles defendant to relief from judgment.

This Court reviews a trial court’s decision on a motion for relief from judgment for an abuse of discretion and the trial court’s findings of fact for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). As to whether *Peeler* can be retroactively applied, the retroactivity of a court’s decision is an issue of law that we review *de novo*. *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008).

### A. RETROACTIVITY

As is relevant to this appeal, our Supreme Court in *Peeler* examined MCL 767.3 and MCL 767.4, which authorizes a judge to investigate, subpoena witnesses, and issue arrest warrants. *Peeler*, 509 Mich at 395-397. The Court concluded that MCL 767.4 does not authorize trial courts to issue indictments arising out of one-man grand juries in the context of criminal prosecutions. *Id.* at 400. The Court further held that “if a criminal process begins with a one-man grand jury, the accused is entitled to a preliminary examination before being brought to trial.” *Id.*

The parties disagree over whether *Peeler* applies retroactively, as well as the appropriate test to determine retroactivity. Defendant argues that the appropriate test is the state standard set forth in *League of Women Voters of Mich v Secretary of State*, 506 Mich 561; 957 NW2d 731 (2020). To the contrary, the prosecutor argues on appeal that the federal standard for retroactivity instead applies, see *Teague v Lane*, 489 US 288, 310; 109 S Ct 1060; 103 L Ed 2d 334 (1989) (“[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”). The prosecutor maintains that the federal standard should apply, but argues that regardless of which standard this Court chooses, *Peeler* should not be given retroactive application.

Defendant asserts that the prosecution’s analysis of this issue under the federal standard is misplaced because this case only involves a straightforward interpretation of state statutory language, and does not implicate any major constitutional rights that might be better suited to review under the federal standard for retroactivity. We agree. The federal test balances “the important goals of finality and comity with the liberty interests of those imprisoned pursuant to rules later deemed unconstitutional.” *Montgomery v Louisiana*, 577 US 190, 212; 136 S Ct 718; 193 L Ed 2d 599 (2016). Principles of comity and concerns regarding constitutionality are not at play in this case. Instead, *Peeler* simply involves the interpretation of state law. In fact, the Court in *Peeler*, 509 Mich at 400, specifically invoked the rule of constitutional avoidance, and declined to address the constitutionality of MCL 767.4. Thus, it is this Court’s opinion that the state test for retroactivity is the appropriate test to apply with regard to *Peeler* and MCL 767.4.

Under the Michigan standard, judicial decisions are generally given retroactive effect. *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). However, “a more flexible approach is warranted where injustice might result from full retroactivity.” *Id.* The threshold question for determining whether a decision should be applied retroactively is “whether the decision clearly establishe[s] a new principle of law.” *League of Women Voters*, 506 Mich at 565 (quotation marks and citation omitted). “A rule of law is new for purposes of resolving the question of its retroactive application . . . either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision.” *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982). Stated differently, “a rule is new where clear precedent is overruled or when an issue of first impression whose resolution was not clearly foreshadowed is decided.” *People v Sexton*, 458 Mich 43, 60 n 42; 580 NW2d 404 (1998).

“If a decision establishes a new principle of law, we then consider three factors: (1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.” *League of Women Voters*, 508 Mich at 565-566 (quotation marks and citation omitted). Under the first factor, “a law may be applied retroactively when it concerns the ascertainment of guilt or innocence; however, a new rule of procedure . . . which does not affect the integrity of the fact-finding process should be given prospective effect.” *Maxson*, 482 Mich at 393 (quotation marks and citation omitted). The second and third factor are often considered together because “the amount of past reliance will often have a profound affect [sic] on the administration of justice.” *Sexton*, 458 Mich at 63.

Defendant argues that *Peeler* did not announce a new rule for purposes of the threshold question. He contends that our Supreme Court’s interpretation of MCL 767.4 in *Peeler* could

hardly be said to have established a new rule of law because the principle of law at issue is clearly stated in the language of the statute and has been since its amendment in 1951. We agree. This case is similar to *Phillips*, 416 Mich 63. There, our Supreme Court addressed the threshold analysis in a case dealing with a juvenile defendant who was convicted without a preliminary examination, which is also what happened to defendant in the instant case. *Id.* at 63. The *Phillips* defendant moved for a new trial premised on the retroactive application of *People v Dunigan*, 409 Mich 765, 298 NW2d 430 (1980), wherein our Supreme Court held that “when jurisdiction of a juvenile offender is waived to the circuit court, the defendant is entitled to a preliminary examination before he may be charged in a criminal information unless examination is waived by the defendant or he is a fugitive from justice.” *Phillips*, 416 Mich at 66. The *Phillips* Court held that the principle in *Dunigan* was not new because it did not announce a departure from clear precedent or present an issue of first impression. *Id.* at 67-68. The Court explained that no evidence suggested that there was a widespread practice of denying preliminary examinations to juveniles waived into the circuit court. *Id.* at 69-70. Further, the Court explained that even if this were widely practiced, it was wholly without legal justification because it was contrary to the language of MCL 767.42, a broad statutory mandate that had existed since 1859. *Id.* at 71.

Like *Phillips*, *Peeler* did not overrule established precedent permitting trial courts to issue indictments arising out of one-man grand juries. Instead, the *Peeler* Court reached its holding by giving effect to the intent of the Legislature as inferred from the text of MCL 767.4. See *Peeler*, 509 Mich at 396-397. The Court addressed a few earlier cases in which a defendant was indicted by a one-man grand jury. See *id.* at 399, citing *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967); *People v Green*, 322 Mich App 676; 913 NW2d 385 (2018), overruled in part by *Peeler*, 509 Mich 381. Likewise, the *Peeler* Court’s decision was not a holding “of first impression such that it was not adumbrated by any earlier appellate decision.” *Phillips*, 416 Mich at 68; see also *Sexton*, 458 Mich at 60 n 42. Again, this decision was premised on our Supreme Court’s reading of the statutory language. We thus conclude that the *Peeler* Court did not announce a new principle of law, and that the trial court’s ruling on this point must be reversed.

Even if we were to disagree with defendant on this threshold question, we would nevertheless be inclined to conclude that under the applicable test, *Peeler* must be given retroactive effect. Under the first prong, this Court considers the purpose of the new rule. Generally, this prong favors retroactive application when the purpose of the rule “concerns the ascertainment of guilt or innocence.” *Maxson*, 482 Mich at 393 (quotation marks and citation omitted). MCL 767.4 does not directly involve the ascertainment of guilt or innocence because a defendant is still presumed innocent at the indictment stage of the criminal process, see *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010), cert den 567 US 918; 132 S Ct 2773; 183 L Ed 2d 642 (2012). But regardless, it puts trial courts on notice that they cannot indict a defendant using a one-man grand jury. The holding enunciated in *Peeler* also implicates the integrity of the fact-finding process and ensures that defendants are granted the right to a preliminary examination before trial. Thus, we would hold that the first factor favors retroactive application.

Under the second prong, this Court considers “the extent of the reliance on the old rule,” *League of Women Voters*, 508 Mich at 565-566 (quotation marks and citation omitted). According to the *Peeler* Court, indictment via one-man grand jury was a little invoked procedure in Michigan history. 509 Mich at 393. The Court pointed to only two cases in which a defendant was indicted by a one-man grand jury, noting that evidence of the practice was mixed because one-man grand

juries were also used merely to authorize warrants. *Id.* at 399, citing *In re Colacasides*, 379 Mich 69; *Green*, 322 Mich App 676. In any event, indictment by a one-man grand jury does not appear to have ever been a ubiquitous or commonly used practice. Thus, there appears to be little reliance on the old procedure. The second factor therefore also favors the retroactive application of *Peeler*.

Finally, under the third prong, this Court considers the “effect of retroactivity on the administration of justice.” *League of Women Voters*, 508 Mich at 565-566 (quotation marks and citation omitted). As discussed in relation to the second factor, this issue does not appear to affect a large number of defendants and it does not appear that retroactively applying *Peeler* would undermine the validity of a large number of convictions. Further, retroactively applying *Peeler* would not automatically entitle a defendant convicted in an otherwise fair trial to a new trial. Instead, a defendant indicted using this procedure and later convicted would either need to make a claim under *Peeler* on direct review, or otherwise meet the criteria of MCR 6.508(D) to establish entitlement to relief from judgment. Accordingly, the third factor also favors retroactive application. For all of these reasons, we conclude that the trial court erred by finding that *Peeler* should not be given retroactive effect.

## B. APPLICATION

Despite defendant’s successful argument that *Peeler* should be retroactively applied, we nevertheless conclude that defendant has failed to show entitlement to relief from judgment under MCR 6.508(D). “The defendant has the burden of establishing entitlement to the relief requested.” MCR 6.508(D). Relevant to this appeal:

The court may not grant relief to the defendant if the motion

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(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, *unless the defendant establishes that a retroactive change in the law has undermined the prior decision*; for purposes of this provision, a court is not precluded from considering previously decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence;

(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 . . . . [MCR 6.508(D)(2)-(3) (emphasis added).]

Defendant raises the same arguments on appeal that he raised in his motion for relief from judgment: He first asserts that this Court should set aside his convictions and sentence because *Peeler* must be given retroactive effect, and additionally argues that the trial court never obtained personal jurisdiction over him because the one-man grand jury had no authority to issue an indictment against him.

We first note that defendant does not identify whether he is asking for relief under MCR 6.508(D)(2) or (3). Given that defendant argues on appeal that *Peeler* is a retroactive change in law, we presume that he is likely asserting entitlement to relief from judgment under MCR 6.508(D)(2). This subsection requires a defendant to allege “grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision . . . .” However, defendant has never raised a claim regarding the failure to comply with MCL 767.4 in a previous appeal or a previous motion for relief from judgment. We therefore conclude that MCR 6.508(D)(2) is not the appropriate subsection under which defendant may seek relief.

If, instead, defendant intended to argue that he was entitled to relief under MCR 6.508(D)(3), he must demonstrate both good cause and actual prejudice in order to show entitlement to relief from judgment, unless the grounds for relief are a jurisdiction defect. MCR 6.508(D)(3)(a) & (b). Defendant makes no attempt to argue good cause or actual prejudice. He merely states that if *Peeler* is given retroactive effect, his convictions and sentences must be vacated, and he must be afforded a new trial. We decline to make defendant’s argument on this issue for him. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (“It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” (quotation marks and citation omitted)).

Rather than make an argument regarding good cause or actual prejudice, defendant attempts to set forth an alternative argument, in which he frames the issue as one involving a jurisdictional defect. As earlier noted, defendant argues that the trial court did not have personal jurisdiction over him because he was improperly indicted. But in doing so, defendant appears to read jurisdictional language into the *Peeler* decision that is not present. Recently, our Supreme Court noted that state and federal courts in general have “use[d] the term ‘jurisdiction’ imprecisely, to refer both to the subject-matter and the personal jurisdiction of the court, and to the court’s general authority to take action.” *People v Washington*, 508 Mich 107, 124; 972 NW2d 767 (2021). The Court explained that defects in jurisdiction generally render a trial court’s decision void from the start. *Id.* at 129. It further explained the type of language that Michigan courts use to discuss jurisdictional defects as compared to errors in the exercise of jurisdiction:

Although the usage of these terms is not wholly consistent, generally, the terms “vest” and “jurisdiction” are used to refer to the existence of jurisdiction. See, e.g., *Paley v Coca Cola Co*, 389 Mich 583, 599, 209 NW2d 232 (1973) (discussing the subject-matter jurisdiction of the circuit court and using the terms “vest,” “vested,” and “jurisdiction” rather than “power” or “authority”); *Campbell v St John Hosp*, 434 Mich 608, 613-614, 455 NW2d 695 (1990) (same); *Davis v Dep’t of Corrections*, 251 Mich App 372, 374, 378, 651 NW2d 486 (2002) (same). In contrast, the terms “power” and “authority” are generally used to refer to errors in the exercise of jurisdiction and other nonjurisdictional errors. See, e.g., *People v Comer*, 500 Mich 278, 292-293, 901 NW2d 553 (2017) (discussing a trial court’s nonjurisdictional error using the language “authorized” and “authority” rather than “vest” and “jurisdiction”). [*Washington*, 508 Mich at 125 n 5.]

Defendant seems to have latched on to the use of the word “authorize” as used in *Peeler*, 509 Mich at 400, to draw the conclusion that the Supreme Court held that trial courts lack personal jurisdiction when a one-man grand jury is used to indict a defendant. But nothing in the text of *Peeler* supports defendant’s conclusion, as the *Peeler* Court never used the term “authority” in reference to personal jurisdiction over a defendant. Indeed, the *Peeler* Court made no pronouncement on the issue of personal jurisdiction at all.

Moreover, further analysis of our caselaw does not suggest that the indictment via one-man grand jury without a preliminary examination deprived the circuit court of personal jurisdiction over defendant. Generally, a circuit court acquires personal jurisdiction over a criminal defendant “upon the filing in the circuit court of the return of the magistrate before whom petitioner had waived preliminary examination, binding the defendant over to the circuit court for trial.” *In re Elliott*, 315 Mich 662,675; 24 NW2d 528 (1946), or “before whom the defendant had been examined or waived examination,” *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 119; 215 NW2d 145 (1974) (quotation marks and citation omitted). We agree that defendant was indicted using a faulty procedure, and that no preliminary examination was held. However, we hold that the error here does not require reversal because defendant’s trial and conviction were valid and did not contain any apparent defects. In *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990), our Supreme Court held that errors in a grand jury or preliminary examination proceeding are “not ground[s] for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error.” This is so because in Michigan, a preliminary examination is a legislative, not constitutional, right. *Id.* at 603. Indeed, “[t]he Legislature, which created the preliminary examination procedure, has also mandated by statute that a conviction shall not be reversed where error is harmless[.]” *Id.*, citing MCL 769.26. Given that defendant has not shown any errors that would have affected the trial, and considering that he was otherwise validly convicted, any error in the indictment or preliminary examination process does not warrant reversal. Accordingly, for all of the foregoing reasons, defendant has failed to meet his burden to show entitlement to relief from judgment.

### III. CONCLUSION

We hold that the trial court erred by concluding that *Peeler* may not be given retroactive effect. However, because defendant has failed to show entitlement to relief from judgment, we conclude that the trial court’s ruling must be affirmed.<sup>2</sup>

/s/ Michelle M. Rick  
/s/ Kathleen A. Feeney  
/s/ Noah P. Hood

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<sup>2</sup> In this matter, because the trial court ultimately reached the correct result, we decline to remand for correction of the trial court’s opinion and order denying defendant’s motion for relief from judgment. See *People v Meeker*, 340 Mich App 559, 569; 986 NW2d 622 (2022) (stating that “[t]his Court will affirm a lower court’s ruling when the court reaches the right result, albeit for the wrong reason.” (quotation marks and citation omitted)).