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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

PLAINTIFF,

SUPREME COURT NO. 163667

COURT OF APPEALS NO. 357754

v.

7TH JUDICIAL CIRCUIT NO. 21-047379-FH

NANCY PEELER

DEFENDANT.

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL

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APPENDIX

A. Circuit Court Order dated June 16, 2021

B. Court of Appeals Order dated August 26, 2021

C. Plaintiff's Request for 7th Adjournment

D. Motion for Nolle Prosequi

E. Application for Appointment of One-Person Grand Jury

F. Order Granting Appointment of One-Person Grand Jury

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H. Indictment

I. Record of Actions

J. Motion for Preliminary Examination (w/o exhibits)

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QUESTIONS PRESENTED

I. Whether Michigan's Judicial Investigation Statutes, MCL 767.3 and MCL 767.4, Require A Preliminary Examination When Used To Apprehend Any Person For A Felony?

Defendant-Appellant says: "Yes"

The Court of Appeals would say: "No"

II. Whether Due Process Requires The Preliminary Examination Provided For By MCL 767.4 To Be Held Before A Neutral Magistrate?

Defendant-Appellant says: "Yes"

The Court of Appeals would say: "No"

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INTRODUCTION

Nancy Peeler's Application for Leave To Appeal argues that the circuit court order denying her motion for preliminary examination on the felony charges filed against her by a single judge acting as a judicial investigator pursuant to MCL 767.3 and MCL 767.4 is erroneous and requires correction by this Court on interlocutory appeal. She explains in this Supplemental Brief that the plain language of these statutes when enacted in 1917 required a preliminary examination for "any case, matter or proceeding" that followed the appointment of a single judicial officer to act as an investigator who "causes the apprehension of such person or persons by proper process." Public Acts, 1917 – No. 196, Sec. 2. (App L: Public Acts 1917). A century later, the same language of that law, now codified as MCL 767.4, required a preliminary examination following the filing of criminal charges against Ms. Peeler on January 13, 2021.

The circuit court's order denying Ms. Peeler's motion for a preliminary examination adopted faulty prosecution analysis. It erroneously reasoned that because a judicial investigation has become popularly referred to as a "one-man grand jury," use of the terms "indictment" and "grand jury" in the statutes makes judicial investigations the equivalent of citizens grand jury proceedings pursuant to MCL 767.7, *et seq*. (App A: Order Denying Motion to Remand for Prelim Exam, pp. 7-8). Relying on *People v. Glass*, 464 Mich 266; 627 NW2d 261 (2001), and without properly considering the language, history or context of MCL 767.3 and MCL 767.4, the circuit court erroneously held there is no statutory right to a preliminary examination on charges brought by a judicial investigation. (Id, pp. 6-7).

The circuit court decision is plainly wrong and requires correction. It has denied Ms. Peeler the substantive right provided to her by statute to challenge the evidence and the serious

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allegations against her at a preliminary examination. The circuit court order denying her motion also should be corrected because it has been used erroneously and repeatedly in Genesee County Circuit Court to justify bypassing the preliminary examination process in variety of criminal proceedings. This Court should clarify that the language of the judicial investigation statutes of this state, MCL 767.3 and MCL 767.4, and this Court's prior decisions have always required preliminary examinations on felony charges before trial.

SUMMARY STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

As Nancy Peeler described in her statement of facts in support of her Application for Leave to Appeal, she is now charged for the second time since July 2016, based on the same constellation of facts arising from criminal investigations of the Flint water crisis. Each prosecution has alleged much the same theory of criminal conduct, that as a manager of the Early Childhood Health Section in the Michigan Department of Health and Human Services (MDHHS), Ms. Peeler failed to fairly report analyses of elevated blood lead levels in children to others in her agency in the summer of 2015 following the change of drinking water source by the City of Flint. She was charged the first time in July 2016 by the Attorney General's Office of Special Counsel in three counts alleging Misconduct in Office in violation of MCL 750.505 and Willful Neglect of Duty in violation of MCL 750.478. Before the close of evidence and opportunity for defense argument to the 67th District Court at Ms. Peeler's preliminary examination, that evidence failed to establish probable cause to support prosecution theories, the newly elected Attorney General, by Solicitor General Fadwa Hammoud, moved on May 10, 2019 for a six month adjournment. In the interest of judicial economy, the Solicitor General claimed additional time was necessary for newly appointed prosecutors to review what she described as

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systemic problems in her predecessor's investigation. (App C: Plaintiff's Request for 7th Adjournment, Brief pp. 1-3). After her motion was denied, she moved to dismiss. (App D: Motion for Nolle Prosequi).

On December 27, 2019, the Solicitor General filed an Application in the 7th Judicial Circuit Court asking for the Chief Judge to appoint a single judge as a judicial investigator pursuant to MCL 767.3 to investigate "crimes relating to the "Flint Water Crisis. "Her application alleged probable cause to investigate criminal acts in offices of state and local government including in the Office of the Governor. Her application was granted on January 9, 2020, retroactive to January 1, 2020, for a six month term. (App E: Application For Appointment Of One-Person Grand Jury; App F: Order For Appointment Of One-Person Grand Jury). The Order of Appointment entered by the 7th Judicial Circuit Court described the limited authority of the appointed judge as that of an investigator to: "conduct his inquiry in accordance with law and enjoy the right and duties associated with this judicial investigatory position;" issue subpoenas for witness testimony; comply with secrecy; and, request assistance from the Solicitor General. (Id, pp. 2-3). The Order of Appointment made no specific mention of any authority for the judge to file a report, presentment, or criminal charge. The Order authorized a six month term of the investigation. It was extended by an order of the appointed judge for an additional six months, terminating on December 31, 2020, twelve months after its initial date to convene and about two weeks before the indictments against Ms. Peeler and each of the other eight defendants were filed. (App G: Order Extending, pp. 2-3).

Ms. Peeler was charged in a three count Indictment filed in the 7th Judicial Circuit Court on January 13, 2021. The Indictment was signed by the Honorable David Newblatt with a

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handwritten date, November 24, 2020. (App H: Indictment). While there is a Record of Action for the judicial investigation, the record has no entry for any activity concerning an indictment on any date before the January 13, 2021 filing date. (App I: Record of Actions). Like the original complaint filed in 2016, the 2021 Indictment makes similar charges in three counts that Ms. Peeler committed Misconduct in Office in violation of MCL 750.505 and Willful Neglect of Duty in violation of MCL 750.478 while acting as the MDHHS Early Childhood Health Section Manager.

Charges were filed the same day in eight other cases, all arising from the same one-man grand jury investigation, although on various dates all before January 13, 2021. Two of the indictments, charging former Flint Public Works Director Howard Croft and former Governor Richard Snyder, allege only misdemeanor offenses and were filed in the 67th District Court.

Motions were filed in the circuit court in March 2021 by four of the defendants, including Nancy Peeler, asking for preliminary examinations in the 67th District Court based on the plain language of MCL 767.4, and its history and context that required the circuit court to order her case to proceed after apprehension and appearance before the court "as if on a formal complaint." MCL 767.4. Ms. Peeler's motion also argued that because she had been charged by a judicial officer who had conflicting roles, acting as both an inquisitor and prosecutor exercising the power to decide what charges to file, the procedure violated her right to due process. (App J: Motion for Prelim Exam).

The circuit court denied the motions for each of the four defendants in a single written opinion filed on June 16, 2021. The court relied on *People v. Glass*, *supra*, for support. The circuit court held that Nancy Peeler has no statutory right to a preliminary examination because a

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defendant charged in an indictment by a citizens grand jury has no right to a preliminary examination and because all indictments, whether by citizens grand juries or "one-man grand juries" are "equal in the eyes of the law." (Appendix A: Order Denying Motion for Preliminary Exam, pp. 7-11). The court rejected Ms. Peeler's argument that due process requires an independent hearing to determine probable cause by a neutral and detached fact-finder because, it explained, the authority on which Ms. Peeler relied was "dicta" instead of precedent. (Appendix A: pp. 8-11). The Court of Appeals denied Peeler's Application for Leave to Appeal without reasons in an order dated August 25, 2021. (Appendix B: Order).

Nancy Peeler filed two additional challenges in the circuit court to the prosecutors' use of the judicial investigation statutes to file the charges against her in this case. She joined in and adopted the Motion to Dismiss in the circuit court made by Defendant Nicholas Lyon, 7th Circuit Court Case Number 21-047378, which argued that the Michigan Constitution requirement for separation of powers was violated in this case by the judge appointed as a judicial investigator assuming the role of prosecutor to exercise executive functions to frame charges and to file them against Ms. Peeler in circuit court. On denial of that motion by the circuit court, Ms. Peeler filed an Application for Leave to Appeal in the Court of Appeals. (COA Case No. 357754). Her Application for Leave to Appeal remains pending in the Court of Appeals. Mr. Lyon's motion is now on review by this Court on his bypass application for leave to appeal (Supreme Court Case No. 164191) and is scheduled for argument before this Court on the same day as the hearing scheduled for Ms. Peeler's Application for Leave to Appeal. Ms. Peeler has agreed with the Attorney General that her Application for Leave to Appeal pending in the Court of Appeals on her separation of powers motion to dismiss should be held in abeyance until resolution of the

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Lyon bypass application for leave to appeal.

Ms. Peeler has also filed a motion in the circuit court on November 23, 2021 asking that it dismiss her case because the charging document was filed after the statutory term of the judicial investigator expired pursuant to the Order of Appointment. (App K: Peeler Motion to Dismiss Indictment). According to the circuit court Order of Appointment, the term of the judicial officer began January 1, 2020. It was extended by the appointed judicial officer's own order for a second six month term. Ms. Peeler has argued that two six month terms, if valid, expired before the charges in her case were filed on January 13, 2021; and, that because the appointed judge no longer had any authority to act on January 13, 2021 when he was responsible for filing the charging document with the court, the charges now pending against her should be dismissed. No decision has been made by the circuit court on this motion as of this date.

ARGUMENT

I. MICHIGAN'S JUDICIAL INVESTIGATION STATUTES, MCL 767.3 AND MCL 767.4, REQUIRE A PRELIMINARY EXAMINATION WHEN USED TO APPREHEND ANY PERSON FOR A FELONY.

A. Statutory History

Michigan's "unique" judicial investigation procedures were enacted in 1917 as Public Acts of 1917, No. 196, "to authorize proceedings for the discovery of crime, and to provide penalties for a violation of such procedure." *In re Oliver*, 333 US 257, 262 (1948). The 1917 Public Act, now compiled as MCL 767.3 and MCL 767.4, required that a case, matter or proceeding initiated by a judicial investigator, a procedure now commonly referred to as a "one person grand jury," "shall proceed" by preliminary examination before a neutral magistrate "as if upon formal complaint." (App L: Public Acts 1917). Multiple decisions of this Court since 1917

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have acknowledged and relied on that statutory language to require a preliminary examination prior to trial in cases initiated by judicial investigation. The Legislature reaffirmed the right to preliminary examination in 1947 by an amendment to the statute that requires disqualification of a judge appointed as a judicial investigator from conducting the preliminary examination in his or her own case. Public Acts 1947–No.33; MCL 767.4. (App M: Public Acts 1947). Obviously, disqualification is unnecessary where there is no right to preliminary examination.

Michigan's judicial investigation statutes were adopted in 1917 to authorize a judge to investigate allegations of criminal conduct, to issue witness subpoenas witnesses, to hold recalcitrant witnesses in contempt and to grant immunity. The Act was proposed by the State Bar Association as an alternative to the traditional complaint and warrant procedures because police and prosecutors lacked powers to compel testimony during investigations.[1] It was also thought that the law provided an alternative to the existing citizen grand jury process that had grown into disuse as of that date. Scigliano, Robert G, The Michigan *One-Man Grand Jury*, Governmental Research Bureau, Michigan State University, East Lansing, Michigan, 1957, at pp. 16-21. The Act was modeled on a 1885 Detroit police court judicial investigation law that similarly gave judges in Detroit powers to subpoena witnesses, grant immunity, cause the apprehension of accused and to proceed "in like manner as upon formal complaint by the injured party or other person." (App N: Public Acts, 1885, No. 161, Section 20.)

The 1885 Detroit police court statute enabled a "police justice" who had probable cause to believe an indictable crime had been committed within the jurisdiction of the court to require

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[1] That deficiency was remedied by statutes authorizing prosecution investigative subpoenas. MCL 767a.1, *et seq.*; *People v. Farquarson*, 274 Mich App 268, 731 NW2d 797 (2007).

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witnesses to testify before him. It provided that:

> Upon such inquiry the police justice shall be satisfied that such crime, misdemeanor, or offense has been committed, and that there is probable cause to suspect any particular person or person to be guilty thereof, he may cause the apprehension of such person or person by proper process, and upon the return of such process served or executed, the police justice shall proceed with the case, matter, or proceeding in like manner as upon formal complaint by the injured party or other person.

The 1917 Act effectively extended those procedures state-wide. It provided for initiation of an investigation by a justice or judge upon the filing of complaint or an application by a prosecuting attorney and finding by the judge that there was "probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance, shall have been committed within his jurisdiction." (App L: Public Acts, 1917 –No. 196, at Section 1). The statute provided that upon such finding, the judge would be authorized to issue subpoenas and to compel testimony of witnesses. (Id.). According to Section 2, if satisfied there was probable cause to suspect any person or persons to be guilty of a crime, the judge was then empowered to "cause the apprehension of such person or persons by proper process, and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint . . ." *Id.*

The only mention of the term "grand jury" in the statute or its title appears as a reference to secrecy "relative to grand jurors." ("the justice, judge, prosecuting attorney and other person or person who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provision of law relative to grand jurors.") (App L: Public Acts, 1917-No.197, Sec. 2). The commonly used phrase "one-man grand juror/jury" appears nowhere in the Act. The statute has been recodified as MCL 767.3 and MCL 767.4. It has been substantively amended four

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times.[2] The phrase "as if on formal complaint," referring to the procedure for preliminary examination, remains as follows:

> If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served and executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint.

MCL 767.4.

B. Judicial Decisions Applying MCL 767.3 and MCL 767.4

Early decisions from this Court reaffirm the right to preliminary examination provided by the Act, now by MCL 767.4.

In *People v. St. John*, 284 Mich 24; 278 NW 754 (1938), Justice Bushnell, writing for an equally divided court, affirmed the perjury conviction of a defendant who had been charged with giving perjurious testimony before Circuit Judge Gadola, "who had been sitting as the 'one-man grand jury.'" *Id.* at 25. According to the Opinion, St. John waived his right to preliminary examination after arraignment and was held for trial. St. John argued unsuccessfully on appeal

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[2] Public Acts, 1921–No. 395 (App O: Public Acts of 1921 - No. 395), added authority for the investigative judge to take steps to cause the removal from office of a public official who has been guilty of misfeasance, malfeasance or willful neglect of duty; Public Acts 1947 -No. 33 (App W: Public Acts of 1949), now MCL 767.4, provided for disqualification of a judge from acting as the examining magistrate in his or her own case; Public Acts 1949 –No. 311 (App P: Public Acts 1949), reformed the judicial investigation procedures to use a panel of three judges; and, Public Acts 1951 –No. 276 (App Q: Public Acts of 1951), changed procedures back to use of a single judge and incorporated other procedural changes. *See, In re Colacasides*, 379 Mich 69, 98; 150 NW2d 1(1967), listing changes made after the U.S. Supreme Court decision in *In re Oliver*, 333 US 257 (1948), which held that the Act's contempt procedure violated due process. Among those changes, as noted by this Court in *Colacasides* is: "The grand juror no longer may act as the examining magistrate at a hearing on a complaint or indictment resulting from the inquiry." *Id.* at 99.

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that the evidence against him at trial was insufficient to support his conviction. In a dissenting opinion, Chief Justice Wiest explained that the contextually awkward term "grand jury" used to refer to the statute is "somewhat of a misnomer."

> It is somewhat of a misnomer to term the proceeding a 'one man grand jury,' for it is special and does not confer the general powers of a grand jury. The statute provides for a special investigation under a complaint of the commission of an alleged crime; it does not authorize a grand inquest, with power of a roving inquiry and presentment of offenders generally. When the statutory authority is properly invoked, it operates in a specific instance as an aid toward bringing criminal offenders to trial.

Id. at 33-34.

Four years later, in *People v. McCrea*, 303 Mich 213; 6 NW2d 489 (1942), this Court rejected the defendant's objection on appeal that he was denied a fair preliminary examination after indictment by Wayne County Circuit Judge Homer Ferguson who acted as a one-man grand juror to file the charges against McCrea in the form of an indictment. ("As a result of the grand jury investigation, indictments were returned and warrants were issued against McCrea and other defendants. The preliminary examinations were conducted before Judge Ferguson, and McCrea and other defendants were held for trial."). *Id.* at 224-25. It was of no consequence to the court's evaluation of McCrea's appeal that Judge Ferguson first charged the defendant in an "indictment" and then tried him after his preliminary examination on a charge filed as an "information." *People v. Kert*, 304 Mich 148, 158; 7 NW2d 251 (1943)("The [one-man] grand jury warrant took the place of an indictment, which under the Code of Criminal Procedure, 3 Comp Laws 1929, §17118 (App S)(Stat. Ann § 28.843), *see*, MCL 767.2, includes the words information, presentment, complaint, warrant and any other formal written accusation.")

According to the Opinion, 3 Comp Laws 1929, §§ 17217, and 17118, (App Q, App R)

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now MCL 767.3 and MCL 767.4), "authorized and empowered "Judge Homer Ferguson as the one-man grand juror to conduct the preliminary examination. *Id*. at 248.According to the opinion,"[t]he fact that Judge Ferguson had acted as a one-man grand jury and had filed a presentment with the Governor for McCrea's removal did not disqualify him from holding the preliminary examination." *Id*. at 248.

In other words, the use of the term "indictment" in *McCrea* to describe the initial charge by Judge Ferguson was consistent with the operative language in the judicial investigation statute, now MCL 767.4. The "indictment" was effectively a "formal complaint" for purposes of requiring a preliminary examination as a step required before trial.

This Court followed *McCrea* in *People v. Roxborough*, 307 Mich 575; 12 NW2d 466 (1943), a case related to the same Ferguson investigation. Roxborough made the same argument on appeal as did McCrea, that Judge Ferguson "who conducted the so-called 'one-man' grand jury and issued the warrant was thereby disqualified from conducting his preliminary examination." *Id*. at 580. The Court reached the same result as in *McCrea*, not questioning Roxborough's right to a preliminary examination, but concluding there was no prejudice inherent in the judge's dual roles: "Our attention has not been called to any act or conduct on the part of Judge Ferguson, while conducting the preliminary examination, from which prejudice or bias could be inferred." *Id.*

An amendment to the judicial investigation statute followed several years later, in 1947, after decisions in *McCrea* and *Roxborough* to fix the apparent conflict created by the same judge functioning in both roles. The change was obviously unnecessary if there had been no statutory preliminary examination requirement. *In re Colacasides*, 379 Mich 69, 150 NW 2d 1 (1967) The

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1947 amendment provided that the "grand juror" could no longer "act as the examining magistrate". *Id* at 98. It provided for disqualification of a judge conducting a judicial inquiry as examining magistrate. Public Act 1947-No. 33 (App M). It added the following:

> *Provided*, That the justice or judge conducting the inquiry under section 3, of this act 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.

In *Colacasides*, this Court overruled the appellant's objection to his contempt conviction based on his testimony before the Honorable George E. Bowles, who had presided over a one-man grand jury proceeding in Wayne Circuit Court. Colacasides objected on several grounds including that his contempt conviction violated the due process clause of the Fourteenth Amendment to the United States Constitution. *Id* at 75. In rejecting Colacasides' attack on the judicial investigation procedure under MCL 767.3, the court recounted "the fact that the one-man grand jury law, as it appears on our statute books today is very much different from that which heretofore has been reviewed for constitutional validity by this Court and by the United States Supreme Court in *Re Oliver*, *supra* at 98. In *In re Oliver*, the US Supreme Court held the Michigan judicial investigation procedures violated due process when they allowed a witness to be held in contempt by the grand juror in secret proceedings without an opportunity "to defend himself against the charge of false and evasive swearing was a denial of due process of law." 333 US 257, 273 (1948). According to the court, among the list of measures taken by the Legislature after the decision in *Oliver*, "to correct potential evils [in the law as originally enacted in 1917] disclosed by court decisions," *Id,* the 1947 amendment to the statute protecting the right to preliminary examination was high on the list. The opinion in *Colacasides* noted that

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one of those evils corrected by amendment was "[a] practice the statute allowed **formerly** and upheld in *People v. McCrea*, 303 Mich 213, 247, 248; 6 NW2d 489 (1942). See, also, September 1948 Michigan State Bar Journal, po. 66 (Vol. XXVII, No. 9)." *Colacasides*, *Id* at Note 11 (emphasis added).

This Court again reaffirmed the requirement of a preliminary examination following the filing of felony charges by a "so called 'one man grand jury" in *People v. Bellanca*, 386 Mich 708; 194 NW2d 863 (1972). The court in *Bellanca* put to the side its question about the "constitutionality of a system whereby a Judge accuses a person of crime " . . . as one that 'may not withstand our re-examination'" because it was not presented to the court by the parties. *Id*. at 715. The court, however, held that a person accused of a crime by a one-person grand jury has the right to the transcript of his testimony and relevant parts of the record in the judicial investigation that bear on guilt or innocence of the crime charged for use at his preliminary examination. "We perceive no reason why the accused should not have the transcript of the testimony of any witness touching on the matter in issue at the preliminary examination." *Id*. at 715.

Relying on *Coleman v. Alabama*, 399 US 1 (1970), the Court in *Bellanca* emphasized that a preliminary examination after a judicial investigation "is a critical stage of our criminal process." *Bellanca,* 386 Mich at 712. In *Coleman*, as quoted in *Bellanca*, the court delineated reasons for the importance of a preliminary examination to "expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over," to "fashion a vital impeachment tool for use in cross-examination of the States' witnesses at the trial," and to "more effectively discover the case the State has against [the] client." *Id.* at 714.

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Later the same year, for the second time since the Legislature made clear in 1947 that a defendant charged by a one-man grand jury has a right to a preliminary examination by a neutral judicial officer, in *People v. Duncan*, 388 Mich 489, 201 NW2d 629 (1972), the Court again affirmed that the judicial investigation statutes, using the language as upon "formal complaint," provide for preliminary examination "by specific statutory language." ("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 PA 175, 1927 PA 175 ch VII, s 4, and MCLA s 767.4; MSA s 28.944)." *People v. Duncan*, 388 Mich 489, 499; 201 NW2d 629 (1972), revs'd on other grounds, *see, Glass*, *supra,* 464 Mich 266 (2001). The question before the court in *Duncan*, though, was not the question here concerning the statutory right to preliminary examination after the filing of a felony charge by a judicial investigation. The question presented by the appellants in *Duncan* was whether a defendant indicted by a citizens' grand jury, under a separate statutory scheme, is entitled to a preliminary examination. *Id*. at 495. The court ruled there is such a right as a matter of judicial rule-making authority. That aspect of *Duncan* – not its citation to the judicial investigation statute as an example of statutory direction to proceed by preliminary examination – was reversed in 2001 by this Court in *People v. Glass*, 464 Mich 266; 627 NW2d 261 (2001).

Following this history, contrary to the circuit court opinion in this case, *People v. Glass* provides no rationale on which to think that the Legislature amended MCL 767.3 and MCL 767.4 to remove the right to preliminary examination for a defendant accused by a one-man grand jury or that this Court erred in its application of these statutes in any of its decisions. While *Glass* clearly overruled *Duncan* on the question of right to preliminary examination after indictment by

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a citizens grand jury empaneled pursuant to MCL 767.7 *et seq.*, *Glass*, contrary to the prosecution's misplaced analysis in this case, does not even address the judicial investigation statutes or more particularly the right to preliminary examination pursuant to those statutes. *Glass* provides no basis on which to conclude, as the circuit court erroneously did in this case, that judicial investigation procedures pursuant to MCL 767.3 and MCL 767.4 are the equivalent of those provided for by the detailed statutory scheme provided at MCL 767.7, *et seq.*

Neither of the two additional decisions relied on by the circuit court are either on point or persuasive. *People v. Green*, 322 Mich 676; 913 NW2d 385 (2018), considered the defendant's claim that she was denied her right to effective assistance of counsel by use of a one-person grand jury to charge her with offenses. *People v. McGee*, 258 Mich App 683; 672 NW2d 191 (2003), does not discuss the judicial investigation statutes.

II. DUE PROCESS REQUIRES THE PRELIMINARY EXAMINATION PROVIDED FOR BY MCL 767.4 TO BE HELD BEFORE A NEUTRAL MAGISTRATE.

As this Court has explained, the right to preliminary examination, when created by statute, serves several critical functions, including to expose weaknesses in the prosecution's case through cross-examination, to lay a groundwork for later cross-examination of witnesses at trial, and to provide an effective means for discovery of the prosecution's case. *People v. Lewis*, 501 Mich 1, 13-14, 903 NW2d 816 (2017)(McCormack, J. concurring); *Coleman v. Alabama*, 399 US 1, 8-9 (1970)(a preliminary hearing is a critical stage of criminal proceedings requiring provision of counsel).

The right to preliminary examination is critically important in this case where the prosecution was initiated by a judicial officer exercising prosecutorial discretion to determine and to file felony charges. *People v. Payne*, 424 Mich 475; 381 NW2d 391 (1985). In *Payne*, this

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Court held that for purposes of the Fourth Amendment, a magistrate who is also a deputy sheriff, was "incapable of satisfying the 'neutral and detached' requirement of the Fourth Amendment and its counterpart provision in art. 3, §2 of the Michigan Constitution." *Id*. at 482. The same rationale supports the conclusion here that due process requires a probable cause determination at a preliminary examination by a neutral magistrate in the context of the unique method the prosecution has elected to pursue here by use of MCL 767.3 and MCL 767.4 as an alternative to the traditional complaint procedure used by the Attorney General's Office of Special Counsel in this case to charge in 2016.

The United States Supreme Court has twice held that due process is violated in *In re Oliver,* 333 US 257 (1948), where these same judicial investigation statutes were used to permit a judge appointed as a grand juror to try a witness accused of contempt in secret proceedings and in *In re Murchison*, 349 US 133, 136 (1955), where they were used to permit the very same judicial officer before whom a witness accused of contempt testified in secret grand jury proceedings to try the accused contemnor in a public trial. The offending judicial role found to violate due process in both cases was the part of the judicial officer's role in which he functioned in "the accusatory process."

> A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.

More recently, in *Williams v. Pennsylvania*, 579 US 1 (2016), the Court emphasized that it is the status and function of a judicial officer in an accusatory role that offends due process so clearly that the Court held the violation to be *per se*, and requires no specific proof of prejudice

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to show grounds for relief. 579 US at 10.

In *Williams,* the court reversed Pennsylvania's high court denial of relief to Williams who unsuccessfully sought to recuse Chief Justice Castille from deciding his appeal. Williams had been convicted of murder 24 years earlier in a Pennsylvania state court and sentenced to death. The Chief Justice had been the prosecuting attorney at the time of Williams' trial who authorized the death penalty. *Id.* at 7. In an opinion by Justice Kennedy, the Supreme Court reversed because Justice Castille's "significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias." In the Court's estimation, the risk so endangered the appearance for neutrality that it held his participation in the case "must be forbidden if the guarantee of due process is to be adequately implemented." *Id* at 14, citing *Withrow v. Larkin*, 421 US 35, 47 (1975).

Although it was the death penalty that framed consideration of the issue presented to the Court by *Williams*, due process applies equally to the serious charges in this case as reason to require a preliminary examination.

CONCLUSION AND REQUEST FOR RELIEF

For all of the reasons stated, Defendant Peeler asks this Court to grant this Application and review the issues she has raised on their merits and to reverse the order of the Circuit Court denying her request for preliminary examination.

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Respectfully Submitted,

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DATE: April 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, 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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