

STATE OF MICHIGAN
IN THE 7TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

JARROD AGEN
GERALD AMBROSE
RICHARD BAIRD
DARNELL EARLEY
NANCY PEELER,

Defendants.

Case No. 21-047372-FH (Agen)
21-047373-FH (Ambrose)
21-047374-FH (Ambrose)
21-047375-FH (Baird)
21-047376-FH (Earley)
21-047377-FH (Earley)
21-047379-FH (Peeler)

HON. ELIZABETH A. KELLY

**ORDER DENYING DEFENDANTS' MOTIONS TO REMAND FOR PRELIMINARY
EXAMINATION**

At a session of said Court held at the Courthouse
In the City of Flint, County of Genesee, Michigan
Wednesday, June 16, 2021:

PRESENT: THE HONORABLE ELIZABETH A. KELLY

I. INTRODUCTION

JARROD AGEN, GERALD AMBROSE, RICHARD BAIRD, DARNELL EARLEY, and NANCY PEELER (hereinafter "Defendants") have filed with this Court motions requesting remand for preliminary examination concerning the above-captioned cases. RICHARD BAIRD filed a "Motion to Proceed Upon a Formal Complaint in Conformity with MCL 767.4 and for Remand for Preliminary Exam" and NANCY PEELER filed a "Motion for Preliminary Examination." Briefs were submitted and oral arguments were tendered on April 6, 2021. Additionally, all of the above-captioned Defendants endorsed each other's arguments. As a result,

this order addresses and responds to all of Defendants' arguments and filings related to motions to remand for preliminary examination.

Pursuant to MCL 767.3 and MCL 767.4, Defendants were indicted by a one-person grand jury. Defendants now seek relief from this Court in the form of a remand to district court for preliminary examination. At the core of Defendants' argument is the assertion that the one-person grand jury does not actually function as a citizen's grand jury. More specifically, Defendants claim that the one-person grand jury solely performs an investigatory function, which entitles Defendants to preliminary examination upon request. This Court disagrees and does not find Defendants' arguments persuasive for the reasons set forth below.

II. STANDARD OF REVIEW

Although the standard of review was neither addressed by the People nor Defendants, the majority of the issues presented in Defendants' motions relate to the application and interpretation of the one-person grand jury statutes. "[I]t is well established that the interpretation and application of statutes is a question of law that is reviewed *de novo*." *People v Webb*, 458 Mich 265, 274 (1998) (emphasis added). Therefore, the application and interpretation of the one-person grand jury statutes are reviewed *de novo*. Likewise, to the extent that Defendants' motions address constitutional questions, those issues are reviewed *de novo*. *Wayne Co v Hathcock*, 471 Mich 445, 455 (2004).

III. DEFENDANTS HAVE NO RIGHT TO A PRELIMINARY EXAMINATION FOLLOWING AN INDICTMENT

As conceded by Defendants, a citizens' grand jury issues indictments and those indicted by a citizens' grand jury have no right to preliminary examination. Although enthusiastically argued, Defendants' assertion that indictments issued by a one-person grand jury do not foreclose

Defendants' right to preliminary examination is without merit. Regardless of whether indicted by citizens' grand jury or one-person grand jury, inditees have no right to preliminary examination. See *People v Glass*, 464 Mich 266, 283 (2001); *People v Green*, 322 Mich App 676, 685 (2018); *People v McGee*, 258 Mich App 683, 695 (2003).

A. THE ONE-PERSON GRAND JURY ISSUES INDICTMENTS

The statutes that create the citizens' grand jury and the one-person grand jury grant those bodies the power to issue indictments upon a finding of probable cause. See MCL 767.4; MCL 767.3; MCL 767.23.

The Michigan Compiled Laws create the citizens' grand jury and provide it with authority to issue indictments upon a finding of probable cause. More specifically, MCL 767.23 states that in a citizens' grand jury, "No indictment can be found without the concurrence of at least 9 grand jurors." Moreover, MCL 767.23a states, "A [citizens' grand jury] may indict a person for an offense committed in any county over which the grand jury has jurisdiction." Likewise, the Michigan Compiled Laws grant the one-person grand jury authority to issue indictments upon a finding of probable cause. See MCL 767.3; MCL 767.4. Notably, MCL 767.3 states in relevant part:

Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have **probable cause** to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry.

MCL 767.3 (emphasis added). Additionally, MCL 767.4 states in relevant part:

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 or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. 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 a summons or subpoena.

MCL 767.4 (emphasis added).

In *Green*, the Michigan Court of Appeals indicated that the one-person grand jury issues indictments after a finding of probable cause. *Green*, 322 Mich App at 687. The court stated, “[B]ecause [the one-person grand jury] is an alternative charging procedure, it does not replace . . . the preliminary examination as defendant asserts.” *Id.* (quotations omitted). Both the one-person grand jury and the preliminary examination “serve the same function: to determine whether there is probable cause to believe that a person committed a crime.” *Id.* “Moreover, in both a one-person grand jury and a preliminary examination, the individual who decides whether there is probable cause is the same: a judge. MCL 767.3 (one-person grand jury); MCL 766.13 (preliminary examination).” *Id.*

Parallel to a citizens’ grand jury, a one-person grand jury has the power to issue indictments upon a finding of probable cause. Here, the Honorable David Newblatt acted as a one-person grand jury and returned indictments against Defendants pursuant to MCL 767.3 and MCL 767.4. As noted above, MCL 767.4 states, “If . . . the judge shall be satisfied that . . . there is **probable cause** to suspect any person to be guilty thereof, he may cause the apprehension of such person . . . and . . . shall proceed with the case . . . in like manner as upon formal complaint.” MCL 767.4 (emphasis added). Additionally, MCL 767.4 goes on to say, “The judge conducting the inquiry under [MCL

767.3] shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment[.]” MCL 767.4 (emphasis added). In *Green*, the Michigan Court of Appeals, provides a useful interpretation of MCL 767.3 and 767.4. The court indicated that MCL 767.3 and MCL 767.4 are the statutes that create the one-person grand jury. *Id.* In fact, according to the court’s interpretation of MCL 767.4, the statute directs the trial court to “proceed with the case after the one-person grand jury returns an indictment.” *Id.* at 685 (quotations omitted). Likewise, the court held that the one-person grand jury issues these indictments after a finding of probable cause. *Id.* at 687. Therefore, the case law is clear: upon a finding of probable cause, a one-person grand jury returns an indictment and MCL 767.4 directs the trial court to proceed with the case following the issuance of that indictment. Thus, this Court finds that the one-person grand jury does in fact issue indictments and does not merely perform an investigatory function.

**B. A DEFENDANT CHARGED BY GRAND JURY INDICTMENT IS NOT ENTITLED TO A
PRELIMINARY EXAMINATION**

The Michigan Supreme Court and the Michigan Court of Appeals have held that indictees have no right to preliminary examination. This legal standard is not predicated on whether the issuing body is a citizens’ grand jury or a one-person grand jury. See *Glass*, 464 Mich at 283; *Green*, 322 Mich App at 685; *McGee*, 258 Mich App at 695.

In *Glass*, the Michigan Supreme Court discussed a defendant’s right to preliminary examination and the impact of an indictment. *Glass*, 464 Mich at 278-79. The Court indicated that a defendant has no “right to indictment by grand jury; rather, indictment by grand jury is an alternative charging procedure created by the legislature.” *Id.* at 287. The Court asserted that “[t]he establishment of the right to a preliminary examination is more than a matter of procedure and

beyond the powers vested in the Court . . . ; it is a matter of public policy for the legislative branch.” *Id.* at 282-83. Importantly, the Court ruled that indictees have no right to a preliminary examination. *Id.* at 283.

In *McGee*, the Michigan Court of Appeals expressed the Michigan Supreme Court’s earlier assertion that indictees have no right to a preliminary examination. *McGee*, 258 Mich App at 695. The court stated that a defendant “does not have a constitutional right to a preliminary examination, a procedure established by the Legislature . . . and recognized by court rule.” *Id.* In accordance with *Glass*, the Michigan Court of Appeals reasoned, “Where a criminal prosecution is initiated by the filing of an information rather than by indictment, the accused has a statutory right to a preliminary examination.” *Id.* Similarly, in *Green*, the Michigan Court of Appeals again indicated that indictees do not have a right to preliminary examination. *Green*, 322 Mich App at 685.

Here, Defendants were indicted by a one-person grand jury and, as established from the foregoing caselaw, defendants charged by a grand jury are not entitled to a preliminary examination. In *Glass* and *Green*, the appellate courts noted each of the defendants were indicted by grand juries. Additionally, none of these cases established separate rules for indictments issued by one-person grand juries and citizens’ grand juries. What these cases did establish, however, is that defendants who have been indicted by a grand jury are not entitled to a separate preliminary examination. Thus, as each Defendant here was indicted by a grand jury, they are not now entitled to remand to the district court for a preliminary examination.

**C. INDICTMENTS ISSUED BY ONE-PERSON GRAND JURIES AND CITIZENS' GRAND JURIES ARE
EQUAL IN THE EYES OF THE LAW**

Indictments issued by a one-person grand jury carries equal weight to indictments issued by a citizens' grand jury. In both situations, indictments are issued by a grand jury after the finding of probable cause. See *Green*, 322 Mich App at 687.

The Michigan Court Rules acknowledge that a grand jury may be comprised of a single grand juror. See MCR 6.107(A); MCR 6.005(I)(1). For example, MCR 6.107(A) states, "Whenever an indictment is returned by a **grand jury or a grand juror**, the person accused in the indictment is entitled to the part of the record, including a transcript of the part of the testimony of all witnesses appearing before the **grand jury or grand juror[.]**" MCR 6.107(A) (emphasis added). Additionally, MCR 6.005(I)(1) states, "A witness called before a **grand jury or a grand juror** is entitled to have a lawyer present in the hearing room while the witness gives testimony." MCR 6.005(I)(1) (emphasis added).

In *Green*, while discussing a defendant's right to counsel, the Michigan Court of Appeals said, "[T]he one-person grand jury procedure is used to determine whether criminal proceedings should be instituted against an individual by way of an indictment[.]" *Green*, 322 Mich App at 685. Moreover, the court indicated "in both a one-person grand jury and a preliminary examination, the individual who decides whether there is probable cause is the same: a judge. MCL 767.3 (one-person grand jury; MCL 766.13 (preliminary examination)." *Id.* at 687. In other words, in *Green*, the Michigan Court of Appeals made it clear that, like a citizens' grand jury, a one-person grand jury has the power to issue formal indictments. *Id.*

Moreover, when discussing indictments, the Michigan Court Rules use the phrase "grand jury or a grand juror." MCR 6.107(A); MCR 6.005(I)(1). The use of the word "or" indicates that

the two forms of grand juries are interchangeable and are held in the same and/or similar light by the Michigan Court Rules. Additionally, nothing in the Michigan Court Rules indicate that indictments issued by a one-person grand jury are inferior to those issued by a citizens' grand jury.

The Michigan appellate courts are clear that one-person grand juries, like citizens' juries issue indictments after a determination of probable cause. Hence the court's language in *Green* that the "one-person grand jury procedure is used to determine whether criminal proceedings should be instituted against an individual by way of an indictment[.]" *Green*, 322 Mich App at 685. Taking this further, the case law illustrates that the one-person grand jury and citizens' grand jury perform the same function: they find the probable cause necessary to issue an indictment. This is precisely what has occurred in these cases and Defendants have not made a showing that the one-person grand jury's indictments carry less weight than those issued by a citizens' grand jury.

D. THE ONE-PERSON GRAND JURY SYSTEM DOES NOT VIOLATE DUE PROCESS

Defendants assert that the one-man grand jury system violates due process and the People failed to respond to Defendants assertion. However, Defendants rely on the following cases, which are not persuasive: *People v Duncan*, 388 Mich 489 (1972), overruled by *Glass*, 464 Mich 266 (2001); *In re Murchison*, 349 US 133 (1955); and *In re Oliver*, 333 US 257 (1948).

In *Duncan*, the Michigan Supreme Court opined the following dictum, "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." *Duncan*, 388 Mich at 489-99. However, this 1972 case was expressly overruled in 2001 by *Glass*, where the Michigan Supreme Court stated, "*Duncan* expressly declined to rely on due process principles in creating the right to a preliminary

examination.” *Glass*, 464 Mich at 282. *Glass* further *Duncan* stated, “We are persuaded that *Duncan* and the implementing court rules exceed this Court’s rulemaking authority.” *Id.*

In *Murchison*, the United States Supreme Court ruled that it violated due process when “the same judge presiding at [a] contempt hearing had also served as the ‘one-[person] grand jury’ out of which the contempt charges arose.” *In re Murchison*, 349 US 133, 134, 139 (1955). However, the Court neither examined whether the one-person grand jury system violates due process nor whether indictments issued by a one-person grand jury violate due process. *Id.* at 134.

In *Oliver*, the United States Supreme Court held that it violates due process for a one-person grand jury to convict a witness of contempt for conduct in the grand jury hearings. *In re Oliver*, 333 US 257, 278 (1948). However, the decision did not address whether the one-person grand jury system is unconstitutional. *Id.* at 264. In fact, the Court stated, “The petition does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge and therefore we do not concern ourselves with that question.” *Id.*

Here, Defendants assert that the one-person grand jury system violates due process, unless the statute entitles Defendants to preliminary examination. The People unequivocally failed to provide this Court with any written argument relating to due process. Nevertheless, Defendants rely on loose arguments and irrelevant case law to no avail. The Defendants’ three “key cases” speak directly to the one-person grand jury system, yet, they do not address the specific issue at hand: whether the one-person grand jury system violates due process.

Defendants cite dictum from *Duncan*, but *Duncan* was subsequently overruled by *Glass*. Even if *Duncan* had not been overruled by a contemporary Michigan Supreme Court case, “A statement that is dictum does not constitute binding precedent[.]” *Allison v AEW Cap Mgmt, LLP*, 481 Mich 419, 437 (2008). Here, Defendants rely on the Court’s dictum to reveal the legislative

intent behind the one-person grand jury system. However, this Court is not persuaded that Defendants' due process rights were violated because of counsels' erroneous citation to dictum plucked from a reversed opinion.

Defendants also unpersuasively cite *Murchison* and *Oliver*, two United States Supreme Court decisions regarding contempt hearings arising out of one-person grand jury proceedings. See *Murchison*, 349 US at 134; *Oliver*, 333 US at 278. Neither of these cases addressed whether the one-person grand jury system violates due process. In fact, in *Oliver*, the Court stated, "The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge and therefore we do not concern ourselves with that question." *Oliver*, 333 US at 264. The Defendants now use these cases to challenge the traditional inquisitorial grand jury power of the one-person grand jury—the very thing that the United States Supreme Court held it was not addressing in its opinion. Simply put, neither of these cases are relevant to the due process claim made by Defendants.¹ Ultimately, "[a] party may not leave it to this Court to search for authority to sustain or reject its position." *Leitch v Switchenko*, 169 Mich App 761, 764 (1988). It is not this Court's duty to find case law, statutory authority, or facts to justify Defendants' motion. As a result, this Court is not persuaded that the one-person grand jury violates due process.

IV. CONCLUSION

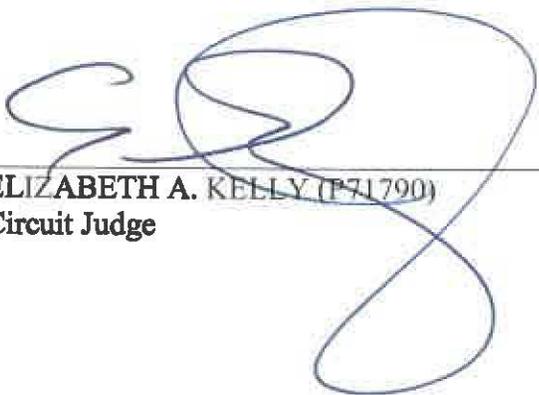
Defendants try to complicate an issue that, in essence, is straightforward: whether Defendants are entitled to preliminary examinations after being indicted by a one-person grand jury. They are not. Defendants are not entitled to preliminary examination because (1) one-person grand juries issue indictments after making a finding of probable cause; (2) indictees are not

¹ The Court notes that Defendants have provided other case law to attempt to sustain their position. However, these cases, like the ones noted above, are not persuasive.

entitled to a preliminary examination after such a finding; (3) one-person grand jury indictments and citizens' grand jury indictments are equal in the eyes of the law; and (4) the one person grand jury system does not violate due process. Therefore, Defendants have failed to state a claim for which relief may be granted. For the foregoing reasons, Defendants' motions are DENIED.

NOW THEREFORE, IT IS ORDERED: Defendant's Motions to Remand for Preliminary Examination are DENIED for the reasons stated above.

Dated: 6/16/2021



ELIZABETH A. KELLY (P71790)
Circuit Judge