AEQUITAS

Michigan One-Person Grand Juries

Question Presented

Are there any legal or ethical issues raised by statutorily-created "one-person grand juries?"

Research Points

The "one-person grand jury" is specific to Michigan and is explicitly provided for by Michigan statute. It operates similarly to the inquests one might find in other countries. Wisconsin and South Dakota have similar mechanisms, but they are referred to as "John Doe proceedings." The purposes of such statutes are to speed up investigations and to reduce opportunities for offenders and their allies to intimidate victims and witnesses.

A. People v. Peeler

Recently, the Supreme Court of Michigan decided *People v. Peeler*. 984 N.W.2d 80 (Mich. 2022). *Peeler* involved state employees investigated and charged for their roles in the Flint water crisis. *Id*. at 81. With this case, the court clarified two important aspect of one-person grand jury proceedings.

i. Right to a Preliminary Examination

First, the court held that a defendant who is charged pursuant to a one-person grand jury procedure is entitled to a preliminary examination (also known as preliminary hearing). *Id*. at 84. The court found that the statutory language establishing one-person grand juries conferred the right to a preliminary examination. *Id*. Particularly, the court found that MCL 767.4 requires that judges treat one-person-grand-jury-charged cases in the same manner as cases in which a formal complaint has been filed. *Id*. When formal complaints are filed "an arrest warrant is issued, the accused is apprehended, *and the court holds a preliminary examination before an information may issue*." *Id*. (emphasis added).

The court also rejected the argument that a preliminary examination holds the same function as a one-person grand jury procedure. *Id*. at 85. The government argued that a preliminary examination would be redundant in one-person grand jury proceedings because, as would be done in a preliminary examination, "the statutory scheme requires the judge to make a finding of probable cause that the defendant committed the crime." *Id*. However, the court ultimately rejected this argument because it determined that the probable cause required in both proceedings would be different. As the court explained, probable cause to *arrest* (which the statute requires and authorizes a judge to order) is different from probable cause to *bind over* (which must be found at a preliminary examination to bind the defendant over on felony charges), because the probable cause

required for a bind over is greater than that required for an arrest and imposes a different standard of proof. *Id*.

ii. Charging Authority

Second, the court held that the one-person grand jury statute does not authorize a judge to initiate charges by issuing indictments. *Id*. at 88. The court determined that, as opposed to the statutes governing ordinary grand juries, the one-person grand jury statute never mentions that a judge may issue an indictment. *Id*. at 86–87. Indeed, the legislative history of the one-person grand jury statute shows that the legislature initially authorized judges to issue indictments, but later removed that authority. *Id*. at 87. The statutory scheme is clear that a judge may authorize an arrest warrant; it does not authorize the judge to "issue an arrest warrant explicitly and issue an indictment at the same time implicitly." *Id*. Furthermore, the court found that the swearing of an oath as required in ordinary grand juries, is not present in one-person grand jury proceedings. "The absence of this hallmark of the grand-jury process is more evidence that the one-man grand-jury statutes do not authorize a judge to initiate charges by issuing indictments." *Id*. at 87–88.

B. Other Limitations to One-Person Grand Juries

The Supreme Court of Michigan has previously addressed the constitutionality of one-person grand juries. In *In re Colascasides*, the appellant was found guilty of contempt for refusal to testify in a one-man grand jury proceeding and challenged his conviction, in part, by alleging that Michigan's one-person grand jury statute was unconstitutional. *See* 150 N.W.2d 1, 3 (Mich. 1967). The appellant claimed that a "judicial officer cannot also perform investigative duties without violating the separation of powers" of the Michigan Constitution. *Id*. at 11. The court disagreed with the appellant and went on to explain that the Michigan one-person grand jury statute does not violate the separation of powers provision because judicial officers are considered "conservators of the peace." *Id. See also* Mich. Const. art. VI, § 29 ("Justices of the supreme court, judges of the court of appeals, circuit judges and other judges as provided by law shall be conservators of the peace within their respective jurisdictions"). Conservators of the peace have the power to "investigate crime[s] for the purpose of apprehending offenders." *Id*. Therefore, the one-person grand jury statute does not violate the separation of powers provision when it allows judicial officers to investigate crimes. *Id*. at 11–12. Furthermore, the court also rejected appellant's argument that the statute violated the Due Process Clause of the U.S. Constitution because the statute is presumptively constitutional as the law has been amended in accordance with Supreme Court precedent. *See id*. at 14–15.

There are also some limitations to one-person grand juries relating to judicial disqualification:

- There is a statutory requirement that any judge participating in an inquiry which continues more than 30 days will be disqualified from appointment or election to any other office other than the one held at the time of the inquiry.
- A judge who serves as the one-person grand jury cannot also preside at a contempt hearing or at a hearing for any other charges arising out of the same one-person grand jury
- A judge could be disqualified from hearing a case where bias is probable, the judge is involved in other matters concerning the defendant, or where he or she may have prejudged the case.

- The Michigan Code of Judicial Conduct is fairly vague and open-ended. The relevant portions include the requirement that a judge must perform independently and impartially as well as avoid impropriety.

Statutes

MICH. COMP. LAWS ANN. § 767.3 (West 2023). PROCEEDINGS BEFORE TRIAL; INQUIRY, ORDER CONDUCTING; SUMMONING WITNESSES, PROCEEDINGS, FEES SUBPOENA, APPEARANCE; NOTIFICATION TO JUDGE; TAKING TESTIMONY; LEGAL COUNSEL; REVELATION BY ATTORNEY, PENALTY; TESTIMONY IN PRESENCE OF JUDGE; DISQUALIFICATION OF JUDGE, ETC.

[...]

Sec. 3. 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. In any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order. The proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony. . . .

Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of the inquiry. The disqualification shall not extend more than 1 year from date of termination of the inquiry, as determined by final order of the judge entered prior to such date.

MICH. COMP. LAWS ANN. § 767.4 (West 2023). PROCEEDINGS BEFORE TRIAL; APPREHENSION OF SUSPECT; DISQUALIFICATION AS EXAMINING MAGISTRATE; FINDING AS TO MISCONDUCT IN OFFICE; DISCLOSURES OF PROCEEDINGS, ETC., PENALTY; REPORT OF NO FINDING OF CRIMINAL GUILT; PERIOD OF INQUIRY; SUCCESSOR JUDGE, APPOINTMENT

Sec. 4. 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. . . .

MCR 2.003(C)(a)-(c) (West 2019). Disqualification of a judge

[...]

(C) Grounds.

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 U.S. 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

(c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

Michigan Code of Judicial Conduct, Canon 1 (West 2019). A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

Michigan Code of Judicial Conduct, Canon 2(A), (B) (West 2019). A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public

scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

MICHIGAN CODE OF JUDICIAL CONDUCT, CANON 3(A)(1), (C) (West 2019). A JUDGE SHOULD PERFORM THE DUTIES OF OFFICE IMPARTIALLY AND DILIGENTLY

A. Adjudicative Responsibilities. (1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

C. Disqualification. A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(C).

Case Law

In re Murchison, 349 U.S. 133 (1955).
A judge who serves as the "one-person grand jury" cannot also preside at a contempt hearing (or any other charges) arising out of the same grand jury.

Johnson v. Mississippi, 403 U.S. 212, 213 (1971).
A risk for bias exists when the judge is enmeshed in other matters involving the petitioner.

Withrow v. Larkin, 421 U.S. 35, 47 (1975).
There need not be a showing of actual bias to disqualify a judge if experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

In re Colascasides, 150 N.W.2d 1 (Mich. 1967).
One-person grand jury statute does not violate the State Constitution’s separation of powers or the 14th amendment right to due process

Crampton v. Michigan Department of State, 235 N.W.2d 352 (Mich. 1975)
Disqualification of a judge is necessary when the adjudicators had personally conducted the initial investigation, amassed evidence, and filed and prosecuted charges

People v. Potter, 320 N.W.2d 313 (Mich. Ct. App. 1982).

When a judge has participated as a prosecutor in an action against the defendant within the previous two years, disqualification is automatic. A showing of bias is not required.

People v. Lowenstein, 325 N.W.2d 462 (Mich. Ct. App. 1982).

The test for determining whether a trial judge should disqualify him or herself because of bias or prejudice is whether there is a likelihood of bias or an appearance of bias so that the judge is unable to hold the balance between vindicating the interests of the court and the interests of the accused.

People v. Upshaw, 431 N.W.2d 520 (Mich. Ct. App. 1988).

Disqualification of a trial judge as the finder of fact in a subsequent trial is not required solely because the judge sat as the trier of fact in a former trial, without some special circumstances that increase the risk of unfairness.

"John Doe Proceedings" in Other States

WIS. STAT. ANN. § 968.26 (WEST 2022). JOHN DOE PROCEEDING

[...]

(2)(b) - . . . the district attorney shall, within 90 days of receiving the referral, issue charges or refuse to issue charges. If the district attorney refuses to issue charges, the district attorney shall forward to the judge in whose jurisdiction the crime has allegedly been committed all law enforcement investigative reports on the matter that are in the custody of the district attorney, his or her records and case files on the matter, and a written explanation why he or she refused to issue charges. The judge may require a law enforcement agency to provide to him or her any investigative reports that the law enforcement agency has on the matter. The judge shall convene a proceeding as described under sub. (3) if he or she determines that a proceeding is necessary to determine if a crime has been committed. When determining if a proceeding is necessary, the judge may consider the law enforcement investigative reports, the records and case files of the district attorney, and any other written records that the judge finds relevant.

(2)(c) - In a proceeding convened under par. (b), the judge shall subpoena and examine under oath the complainant and any witnesses that the judge determines to be necessary and appropriate to ascertain whether a crime has been committed and by whom committed. The judge shall consider the credibility of testimony in support of and opposed to the person's complaint.

(2)(d) - In a proceeding convened under par. (b), the judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant a prosecution of the complaint. The judge shall

consider, in addition to any testimony under par. (c), the law enforcement investigative reports, the records and case files of the district attorney, and any other written reports that the judge finds relevant.

S.D. Codified Laws § 23A-14-11 (West 2023). John Doe subpoena for examination before magistrate--Compelling obedience

Whenever a complaint verified positively or upon information and belief by a prosecuting attorney is laid before a committing magistrate that a criminal offense has been committed in this state and asking for an investigation of the same, such magistrate shall issue his subpoena requiring any person he may deem proper to attend before him at the time and place mentioned in such subpoena and submit to an examination and give testimony concerning any violation of law about which he may be questioned. No witness shall refuse to comply with such subpoena because his fee therefor has not been paid in advance and his attendance may be compelled by attachment as in the case of other witnesses.

S.D. Codified Laws § 23A-14-13 (West 2023). Record of John Doe testimony--Warrant for arrest of offender

The testimony of a witness attending pursuant to § 23A-14-11 shall be reduced to writing by the committing magistrate or some person under his direction. If the offense complained of appears to have been committed, a warrant for the arrest of the offender shall be issued and further proceedings shall then be had as provided by law.