

**STATE OF MICHIGAN
IN THE 67TH JUDICIAL DISTRICT COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Case No. 17T-01355-FY
Hon. David J. Goggins

NICOLAS LEONARD LYON,

Defendant.

TODD F. FLOOD (P58555) PAUL STABLEIN (P42544) ALEX EDELEN (P80971) RACHEL K. WOLFE (P79204) MICHIGAN DEPARTMENT OF THE ATTORNEY GENERAL OFFICE OF SPECIAL COUNSEL Attorneys for the People 155 W. Congress, Ste. 603 Detroit, MI 48226 (248) 547-1032	JOHN J. BURSCH (P57679) BURSCH LAW PLLC 9339 Cherry Valley Ave, SE, Unit 78 Caledonia, MI 49316 (616) 450-4235 CHARLES E. CHAMBERLAIN, JR. (P33536) WILLEY & CHAMBERLAIN Attorney for Defendant 300 Ottawa Ave NW, Ste. 810 Grand Rapids, MI 49503 (616) 458-2212
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**PEOPLE OF THE STATE OF MICHIGAN'S MOTION FOR BINDOVER OF
DEFENDANT NICOLAS LEONARD LYON**

NOW COME The People of the State of Michigan, by and through the MICHIGAN DEPARTMENT OF THE ATTORNEY GENERAL, OFFICE OF SPECIAL COUNSEL, and for the reasons described in the attached brief, respectfully request that this Honorable Court bind defendant, NICOLAS LEONARD LYON, over for trial in the circuit court on the charges of (1) involuntary manslaughter, MCL 750.321, for his role in the death of Robert Skidmore, (2) involuntary manslaughter for his role in the death of John Snyder, and (3) misconduct in office, MCL 750.505.

Respectfully Submitted,

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Dated: July 16, 2018

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MICHIGAN DEPARTMENT OF THE ATTORNEY GENERAL OFFICE OF SPECIAL COUNSEL Todd F. Flood (P58555) Paul Stablein (P42544) Rachel K. Wolfe (P79204) Alex Edelen (P80971) 155 W. Congress, Ste. 603 Detroit, MI 48226 (248) 547-1032 <i>Attorneys for the People of the State of Michigan</i>	BURSCHE LAW PLLC JOHN J. BURSCHE (P57679) 9339 Cherry Valley Ave, SE, Unit 78 Caledonia, MI 49316 (616) 450-4235 WILLEY & CHAMBERLAIN Charles E. Chamberlain, Jr. (P33536) 300 Ottawa Ave NW, Ste. 810 Grand Rapids, MI 49503 (616) 458-2212 <i>Attorneys for Defendant Nicolas Leonard Lyon</i>
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**PEOPLE OF THE STATE OF MICHIGAN’S BRIEF IN SUPPORT OF MOTION FOR
BINDER OF DEFENDANT NICOLAS LEONARD LYON**

The disastrous results of the decision to switch the city of Flint’s water source from the Detroit Water and Sewerage Department (DWSD) to the Flint River are a matter of public knowledge, (Exhibit 36),¹ and well-known to this Court. In an effort to save the city of Flint millions of dollars, state-appointed emergency managers, with the approval and participation of numerous state officials, announced on May 1, 2013, that Flint would be terminating its contract with the DWSD and would begin receiving water from the Karegnondi Water Authority (KWA). Until the switch could be completed, Flint would source its water from the Flint River. Despite

¹ Exhibits are identified consistent with their order of admission at the preliminary examination.

warnings that Flint's water treatment system was not prepared to handle the switch, the Flint Water Treatment Plant began drawing and distributing potable water from the Flint River on April 25, 2014.

Within weeks of the switch, Flint residents began expressing serious concerns over the quality of their drinking water, reporting that the water was discolored, carried a bad odor, and was causing skin rashes (PE IV, pp 51-53, 56). Complaints increased in frequency, and in early August 2014, fecal coliform bacteria were detected in the water supply. Flint issued Boil Water Advisories (BWAs) in August 2014 and September 2014. On October 13, 2014, General Motors (GM) announced that it would no longer use Flint water in its Genesee County plant because of the water's corrosive effects. In November 2014, Flint water exceeded the maximum contaminant level for total Trihalomethanes (TTHM), a known carcinogen (PE IV, pp 56-57). By July 22, 2015, Governor Snyder's Executive Office had been made aware that lead was a "major problem" in Flint's water supply (PE V, p 77; Exhibit 40). In September 2015, Michigan Department of Health and Human Services (DHHS) officials began criticizing research conducted by Dr. Mona Hanna-Attisha, which showed an increase in the number of Flint children with elevated blood lead levels (PE I, p 30; Exhibit 7). It was not until October 2015, that government officials acknowledged the harmful effects of Flint River water and ordered the city to switch back to pretreated water from the DWSD (PE VII, p 32).

Incidents of Legionnaires' Disease had increased substantially in June, 2014 (PE XI, pp 8, 10). Julie Borowski, Director of Compliance and Risk Management at McLaren Hospital, reported three cases of Legionnaires' that month, a remarkable number given that McLaren typically treated only one or two cases annually (PE XI, p 10). Genesee County saw five cases of Legionnaires' Disease in July of that year, followed by 10 in August, eight in September, five in October, three

in November, and five in December (PE XI, pp 13, 26). The number of cases observed in October, November, and December was especially concerning, because Legionella concentrations are temperature dependent, typically resulting in fewer cases of Legionnaires' Disease in colder months (PE VIII, pp 152-153). Additionally, in August 2014, McLaren began hyper-chlorinating its water system on a monthly basis, rather than biannually, in order to prevent the spread of Legionella (PE XI, p 21). In September, 2014, Borowski directed a member of her staff to contact the State for assistance with the outbreak (PE XI, pp 20-21). Hospital staff contacted DHHS Epidemiologist Tim Bolen with a report of building water testing results because they "needed help. We wanted them to have all the information so they could help us." (PE XI, p 40). Despite having the authority to issue an order declaring an emergency and shutting down the hospital to prevent the proliferation of suspected hospital-related infections, no one from the DHHS reported to inspect the hospital (PE XI, pp 25-26, 29).

On October 13, 2014, less than a week after GM announced its decision to pull out of the Flint water system, DHHS Epidemiologist Shannon Johnson alerted DHHS officials, including Susan Bohm, Jay Fiedler, and Jim Collins, to the possibility that the Legionnaires' Disease outbreak was related to the water switch:

I spoke with Tim [Bolen] late last week about the ongoing Legionnaire's [sic] increase in Genesee County. They've had 30 cases of Legionnaire's [sic] Disease reported into the [Michigan Disease Surveillance System] from June-present this year, where in previous years (2009-2013) they've had a range from 2-9 cases reported during this same time frame. *Genesee initially thought the increase was associated with McLaren Flint Hospital as a source, but after Tim and I both reviewed the preliminary data it was pretty clear that many of the cases did not fit with this hypothesis.* In addition, the picture has been clouded by the fact that most cases being reported did not have onset dates recorded. *The current hypothesis is that the source of the outbreak may be the Flint municipal water.* [Exhibit 18 (emphasis added).]

No public announcement was made regarding the outbreak or its connection to Flint water. More than six months later, on May 29, 2015, Bohm mailed a letter to Sue Forrest of McLaren Hospital declaring the outbreak of Legionnaire's Disease over (PE XI, p 65). According to Borowski, staff at McLaren "found it very strange that it was declared as over because it was never declared to begin with and we were still seeing cases." (PE XI, p 69.) In fact, cases of Legionnaires' Disease continued to be reported. At least 87 cases of Legionnaires' Disease were reported and nine people in Genesee County were killed by the disease before the DHHS, in conjunction with Governor Rick Snyder, informed the public of the outbreak more than a year later, on January 13, 2016.

Defendant was Director of the DHHS during the series of events comprising what is now known as the "Flint Water Crisis." The question before this Court is whether the People have presented sufficient evidence to hold Defendant criminally liable for the role he played in the management of this crisis. For the reasons more fully described herein, probable cause exists to support Defendant's bindover to the circuit court for trial on the charges of (1) involuntary manslaughter for his role in the death of Robert Skidmore, (2) involuntary manslaughter for his role in the death of John Snyder, and (3) misconduct in office.²

I. RELEVANT FACTS AND PROCEDURE

Defendant learned on January 28, 2015, that there was an outbreak of Legionnaires' Disease in Genesee County, the beginning of which coincided with the switch of Flint's drinking water source from the DWSD to the Flint River. Defendant was also made aware that a similar

² Count 4 charges the defendant with the misdemeanor offense of neglect of duty, a violation of MCL 750.478. Misdemeanor offenses, though cognizable by this Honorable Court, when charged in the same complaint and part of the same facts and circumstances, simply follow felony offenses to the circuit court for final disposition. *People v Bidwell*, 205 Mich App 355, 358; 522 NW2d 138 (1994) ("Where a person is charged with a felony and a misdemeanor, the circuit court has jurisdiction of the entire case, even though it has no jurisdiction over the misdemeanor charges alone.")

increase in cases was not occurring in surrounding counties. (PE II, pp 86, 92.) On that day, DHHS Director of Epidemiology Corinne Miller emailed an update regarding the Legionnaires' Disease outbreak to DHHS Deputy Director of Population Health Susan Moran (PE I, pp 20-22; Exhibit 3). Moran forwarded the email to DHHS Chief Deputy Director Tim Becker and Defendant who, on January 30, 2015, forwarded a copy to himself (PE I, pp 22-23; Exhibit 3).

The ongoing concern over Legionnaires' Disease was again brought to Defendant's attention on July 22, 2015, when Governor Snyder's Chief of Staff Dennis Muchmore sent Defendant an email requesting that he look into Flint's water issues (PE V, p 76; Defense Exhibit O). That same day, Defendant created a note on his phone which stated, in relevant part, "(update on Legionnaires (hospital))." (PE XIV, p 31; Exhibit 67.) On September 16, 2015, Miller emailed Moran an update on the Legionnaires' Disease outbreak (PE III, pp 18-19). In her email, Miller reported the number of cases in 2015 and indicated that 73% of the cases involved individuals that did not live on Flint water (Exhibit 23). Two days after Miller sent this email, Defendant relayed the information to members of Governor Snyder's cabinet (PE XXII, pp 17-18). This is the *third* time Defendant was notified of the outbreak.

In the second week of January 2016, Becker received a comprehensive report of the Legionnaires' Disease outbreak from 2014, which included an epi-curve graph similar to the one Miller had delivered to Defendant a year prior (PE I, pp 35-37). He shared the report with Defendant and DHHS Senior Deputy Director for External Relations and Communications Geralyn Lasher the same day (PE I, pp 36-38). After seeing the report, Becker testified that, between Defendant, Lasher, and himself, it "was kind of the AHA moment if you will that we've got something here that needs to be raised to [the Governor's Office]." (PE I, pp 52, 115.) Based on Defendant's reaction, Becker believed that he and Defendant were learning of the Legionnaires'

outbreak for the first time (PE I, pp 38-43). Becker does not remember Defendant, at any point during this conversation, suggesting that the public should be notified (PE I, p 52). Becker could not say why the consensus was to tell the Governor about the outbreak first and not the public (PE I, pp 115-116). Days later, on January 13, 2016, Defendant stood with Governor Snyder during the first public announcement acknowledging the outbreak of Legionnaires' Disease in Genesee County. By that time, the outbreak had claimed at least nine lives.³

II. STANDARD OF REVIEW

“[T]he purpose of a preliminary examination is to determine whether a crime has been committed and if there [is] probable cause to believe that the defendant committed it.” *People v Laws*, 218 Mich App 447, 451-452; 554 NW2d 586 (1996) (quotation marks and citation omitted; second alteration in original). The probable cause standard of proof is less rigorous than that of guilt beyond a reasonable doubt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). In fact, “the gap between probable cause and guilt beyond a reasonable doubt is broad.” *Id.* Probable cause requires only a quantum of evidence “sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief” of the defendant’s guilt. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997) (quotation marks and citations omitted). “It is sufficient that the prosecutor presents some evidence with respect to each element of the offense charged, or evidence from which the elements may be inferred.” *People v Harlan*, 258 Mich App 137, 145; 669 NW2d 872 (2003) (quotation marks and citation omitted). The prosecution’s evidence may be either direct or circumstantial. *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000).

³ Further facts in support of the People’s Motion for Bindover will be presented in the discussion section of this brief.

When the district court conducts a preliminary examination, it may weigh the credibility of witnesses. *Laws*, 218 Mich App at 452. However, “the role of the magistrate is not that of ultimate finder of fact; where the evidence conflicts and raises a reasonable doubt regarding the defendant’s guilt, the issue is one for the jury[.]” *Id.* “If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court *must* bind the defendant over for trial.” MCR 6.110(E) (emphasis added); see also MCL 766.13 (employing the mandatory term “shall”); *People v Taylor*, 316 Mich App 52, 54; 890 NW2d 891 (2016).

III. THERE IS PROBABLE CAUSE TO SUPPORT A BINDOVER ON TWO COUNTS OF INVOLUNTARY MANSLAUGHTER

The prosecution is requesting that this Honorable Court bind Defendant over for trial on two separate counts of involuntary manslaughter—one for his role in the death of Robert Skidmore and one for his role in the death of John Snyder—under one of two possible theories. The evidence to support the elements of each count is substantially the same. Except where otherwise noted, the following discussion applies to both counts.

A. Two Theories of Involuntary Manslaughter

“[I]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.” *People v Holschlag*, 471 Mich 1, 7; 684 NW2d 730 (2004) (quotation marks and citation omitted). Stated simply, “[m]anslaughter is murder without malice.” *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003).

“In Michigan, the penalty for manslaughter is codified, but the definition is left to the common law.” *People v Datema*, 448 Mich 585, 593; 533 NW2d 272 (1995); see also MCL

750.321. The Michigan Supreme Court has defined the common-law offense of involuntary manslaughter as “the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.” *People v Herron*, 464 Mich 593, 604-605; 628 NW2d 528 (2001) (quotation marks and citation omitted). This definition gives rise to three separate theories of involuntary manslaughter—two of which are relevant here.⁴

First, the crime of involuntary manslaughter embraces liability for a death caused by the defendant’s negligent omission to perform a legal duty. *Herron*, 464 Mich at 604-605. Involuntary manslaughter based on the omission to perform a legal duty encompasses the following elements: (1) that the defendant had a legal duty, (2) that the defendant had the capacity, means, and ability to perform the duty, (3) that the defendant acted with willful neglect or refused to perform the duty, and (4) that the victim’s death was caused by the defendant’s failure to act. *People v Hegedus (On Remand)*, 182 Mich App 21, 24; 451 NW2d 861 (1990), citing *People v Sealy*, 136 Mich App 168; 356 NW2d 614 (1984); see also M CRIM JI 16.13. Second, involuntary manslaughter can be predicated on a defendant’s negligence in performing an otherwise lawful act. *Id.* The elements of this type of manslaughter offense include (1) the death of an individual, (2) that the death was caused by some lawful act of the defendant, (3) gross negligence in the commission of the defendant’s otherwise lawful act, and (4) the lack of any lawful excuse or justification. See *Holtschlag*, 471 Mich at 17; see also M CRIM JI 16.10.

B. Defendant Lyon Had a Statutory Duty To Protect the Public Health

⁴ A thorough discussion and contemporaneous application of these two theories of involuntary manslaughter is provided in *People v Sails*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2017 (Docket No. 330192) (opinion is attached).

The duties of the DHHS are defined by the Legislature in MCL 333.2221 and vested in the Director under MCL 333.2205(1). In pertinent part, MCL 333.2221 provides:

(1) Pursuant to section 51 of article 4 of the state constitution of 1963,^[5] the department *shall* continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and agencies and health services delivery systems; and regulation of health care facilities and agencies and health services delivery systems to the extent provided by law.

(2) The department *shall*:

(a) Have general supervision of the interests of the health and life of the people of this state.

(b) Implement and enforce laws for which responsibility is vested in the department.

(c) Collect and utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.

(d) Make investigations and inquiries as to:

(i) The causes of disease and especially of epidemics.

(ii) The causes of morbidity and mortality.

(iii) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness. [Emphasis added.]

Further, as Defendant acknowledged, the DHHS “has a duty ‘to prevent the spread of diseases and the existence of sources of contamination.’ ” (Exhibit 71, quoting MCL 333.2226.) The Legislature’s use of the word “shall” constitutes “clear language designating a mandatory course of conduct.” *In re Estate of Weber*, 257 Mich App 558, 562; 669 NW2d 288 (2003). As DHHS Director, Defendant was *required* to “continually and diligently endeavor to prevent disease.” MCL 333.2221(1). He was *required* to “[c]ollect and utilize vital and health statistics . . . for the purpose of protecting the public health.” MCL 333.2221(2)(c). And he was *required*

⁵ Article IV, section 51 of the Michigan Constitution provides that “[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern,” and directs the legislature to “pass suitable laws for the protection and promotion of the public health.” Const 1963, art IV, § 51.

to “[m]ake investigations and inquiries as to . . . the causes of disease and especially epidemics.” MCL 333.2221(2)(d) (emphasis added).

C. Defendant Lyon Had the Capacity, Means, and Ability To Perform

The same statute that prescribes the duties of the DHHS Director imbues him with the power to carry out those duties. Under MCL 333.2221(2)(g), the DHHS is explicitly granted all “powers necessary or appropriate to perform the duties and exercise the powers given by law to the department and which are not otherwise prohibited by law.” These powers, like the duties of the DHHS, are vested in the Director under MCL 333.2205(1).

A defendant’s ability to perform depends on whether he has knowledge of the facts giving rise to the duty. See *Moning v Alfonso*, 400 Mich 425, 439; 254 NW2d 759 (1977), cited with approval in *Doe v Shapiro*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2008 (Docket Nos. 273950; 273962) (explaining that the existence of a duty depends in part on foreseeability, which in turn depends largely on knowledge; a copy of the unpublished opinion is attached). Here, the evidence presented at the preliminary examination established that Defendant knew of the Legionella outbreak and the risk it posed long before he made any effort to notify the public. In fact, Defendant learned of the Legionella outbreak approximately a year before making the public announcement.

State Epidemiologist Miller testified that on January 28, 2015, she met with Defendant and presented him with an “Epi-Curve Graph” of Legionnaires’ Disease case counts in Genesee County per month between January 1, 2009 and January 2015 (PE II, pp 84-85; Exhibit 20). The graph depicts a staggering increase in case counts starting in June 2014 and peaking in September 2014 (Exhibit 20), which is an indication that the Genesee County outbreak was linked to a “point source.” (PE II, p 85.) Miller “clearly” remembered “pointing out that the rise in cases began at

some point after the switch in the [Flint] water source,” because “we hadn’t seen anything as a sharp increase like this before in Genesee County and we hadn’t seen any similar increases in the surrounding counties so just, I was just pointing out that there was a relationship in time.” (PE II, p 92.)

Later that same day, Deputy Director Moran forwarded Defendant a copy of an email conversation between herself and Miller, in which Miller described the frustration of area hospitals with the local health department (Exhibit 3). In the emails, Miller describes an earlier call between herself and other DHHS (then Department of Community Health) officials, representatives from two Flint area hospitals, and DEQ staff, during which “most of the hour was spent by MDEQ and hospital staff speculating on the source of the Legionella infections[.]” (Exhibit 3.) According to Miller, “MDEQ expressed concern that this issue might reach the Governor’s office and I indicated it already had (and that [DHHS] would be assisting the locals in the investigation).” (Exhibit 3.) Two days later, on January 30, 2015, Defendant forwarded himself a copy of the email (Exhibit 3). The fact that Defendant not only received this email, but sent a copy to himself, demonstrates that he was aware of its contents. By January 28, 2015, Defendant knew about a Legionnaires’ Disease outbreak in Flint, knew that representatives from the MDEQ and area hospitals were expressing “concerns,” and knew that the outbreak was likely connected to the water switch (Exhibit 3).

That Legionella was an ongoing concern is reflected in a note entered on Defendant’s cell phone on July 22, 2015 (Exhibit 67). The note, headed “Flint,” reminds Defendant that by this time, the MDEQ had performed 80 tests and confirmed the existence of lead as “a result of the pipes from street to house.” (Exhibit 67.) The note also indicates the existence, and Defendant’s knowledge, of “[i]ncidents of a compromised system. Decreased oxygen in the water. Increased

anemia and other health issues. (Update on legionnaires (hospital).” (Exhibit 67.) The fact that this manually-entered note was found on Defendant’s cell phone supports the inference that Defendant wrote it and, at a minimum, knew that the Flint water supply was causing serious health problems. Defendant was still considering the harmful effects of the water switch, without acting to alleviate or investigate concerns, nearly seven months after he first learned of the Legionnaires’ Disease outbreak.

D. Defendant Lyon Acted with Willful Neglect and Refused to Perform

Citizens of Flint began complaining about the discoloration, foul taste, and unseemly odor emanating from the Flint River-sourced water within months of the switch from DWSD (PE IV, pp 51-53, 56). Fecal coliform bacteria was detected in the water, along with dangerous levels of TTHM, and two BWAs were issued during the same time period that citizens of Genesee County were experiencing an unprecedented outbreak of Legionnaires’ Disease. Defendant was aware of the hypothesis linking the outbreak to the water switch, and it is simply incredible that Defendant, given his clear legal duty to investigate for the purpose of promoting the public health, did not call for a switch back to DWSD or, at the very least, order that the water be immediately tested for Legionella.

Defendant, along with the Governor, finally notified the public of the Genesee County Legionnaires’ Disease outbreak and its connection to the water switch on January 13, 2016. The combination of Defendant’s legal duty to protect the health and safety of the public, and the fact that he failed to take steps to switch Flint back to safe water from the DWSD and notify the public for nearly a year after he was first made aware of a dangerous Legionnaires’ Disease outbreak, is sufficient to support the inference that Defendant acted with willful neglect of his duties.

Although relating specifically to the problem of lead in the water, an email from Defendant in a chain of communications between Defendant, Dennis Muchmore, and Governor Snyder's Chief of Staff Harvey Hollins, illustrates Defendant's intent to minimize the public's awareness of the water problems and his disregard for properly gathered scientific data. In the September 28, 2015 email, Defendant directs that "I need an analysis of the Virginia Tech/Hurley data and their conclusions. I would like to make a strong statement with a demonstration of proof that the blood lead levels seen are not out of the ordinary and are attributable to seasonal fluctuations." (PE III, p 102; Exhibit 7.) Similarly, Defendant's intent to cover up his involvement in the botched management of the water crisis and its dangerous consequences is demonstrated by the content of a November 26, 2015 email from Richard Baird, an advisor to Governor Snyder, to Michigan State Police Colonel Kristie Etue, advising that "...boss wants us to work through this without a disaster declaration if possible. Dan and Nick and I are working on it." (PE III, p 143.) Although these email communications were sent and received after both Mr. Snyder and Mr. Skidmore contracted Legionnaires' Disease, they are relevant and admissible⁶ to support the inference that Defendant's intent after learning about the outbreak and its connection with the water source was to minimize public knowledge and to prioritize the reputation of his own office over the public health.

Additionally, according to Dr. Lawrence Reynolds, a pediatrician and member of the Governor's Flint Advisory Task Force, Defendant was "rather glib and dismissive of" questions regarding DHHS involvement in the Legionnaires' outbreak posed during the task force's investigation. Specifically, Dr. Reynolds recalled that he

did expect a higher quality and level of information from the Director of [D]HHS, you know, saying the episodes or the outbreak occurred between this day and that day, there were this many cases, I'm not a physician or health professional but I

⁶ Under MRE 404(b)(1), relevant "[e]vidence of other crimes, wrongs, or acts" may be admissible to prove intent "whether such other crimes, wrongs, or acts are contemporaneous with, or prior *or subsequent* to the conduct at issue in the case." (Emphasis added.)

would direct you to a staff member who could give you further details, or I can send you more information. None of that was forthcoming so I really was not sure that our inquiry was taken sufficiently serious for the time and effort we had put in[.] [PE IV, p 20.]

Defendant's dismissive treatment of the Governor's investigators further supports the inference that he was acting in his own interests, rather than in the interests of public health. Similarly, Defendant's own demonstrably false statements during the January 13, 2016 public announcement of the harmful consequences of the Flint water switch indicate that Defendant was attempting to mislead the public about his own role in the disaster. Although Defendant knew about the harmful effects of the water switch months after it occurred, and had provided no notice to the public regarding the harmful effects of the switch or the associated Legionella outbreak, he claimed that the January announcement was "part of our efforts to be transparent and share information as quickly as possible as we can with the public[.]" (Exhibit 82.)

Under *People v Seals*, 285 Mich App 1, 5; 776 NW2d 314 (2009), false exculpatory statements can be introduced as circumstantial evidence of guilt. Here, Defendant was clearly attempting to relieve himself of responsibility for failing to act sooner. Not only does the evidence support the conclusion that Defendant willfully neglected to carry out his duty to the people of this state, it also suggests that he did so with the intent to deceive the public and prevent the spread of knowledge regarding his mismanagement of the water crisis.

E. Defendant Lyon's Failure To Act Constituted Gross Negligence

Here, the same evidence that supports Defendant's willful neglect of a known legal duty also supports the conclusion that Defendant's failure to inform the public of the Legionnaires' Disease outbreak amounted to gross negligence. "The kind of negligence required for manslaughter is something more than ordinary or simple negligence." *Herron*, 464 Mich at 605. "Criminal negligence, also referred to as gross negligence, lies within the extremes of intention

and negligence. As with intention, the actor realizes the risk of his behavior and consciously decides to create that risk. As with negligence, however, the actor does not seek to cause harm, but is simply ‘recklessly or wantonly indifferent to the results.’” *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997), quoting *Datema*, 448 Mich at 604. Proof of gross negligence amounting to involuntary manslaughter requires evidence to establish “(1) [the] defendant’s knowledge of a situation requiring the use of ordinary care and diligence to avert injury to another, (2) [the defendant’s] ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) [the defendant’s] failure to use care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.” *People v Albers*, 258 Mich App 578, 582; 672 NW2d 336 (2003); see also M CRIM JI 16.18.

Contrary to Defendant’s assertion during oral arguments on the bindover motion, the existence of a special relationship is not required before an individual can be held liable for involuntary manslaughter based on gross negligence. A defendant has a duty to exercise reasonable care when he has “knowledge of a situation requiring the use of ordinary care and diligence to avert injury to another.” *Id.* For example, in *Albers*, the Michigan Court of Appeals upheld a conviction for involuntary manslaughter after finding a mother grossly negligent for failing to take measures to prevent her son from obtaining a lighter and starting a fire that resulted in the death of another child. *Id.* at 580-584. The defendant in *Albers* had no relationship to the child victim, a resident of another apartment in the complex where she lived with her son. *Id.* at 581. However, the defendant knew that her son was prone to starting fires, and that he was likely to do so again if given the opportunity. *Id.* at 583. This knowledge, coupled with her failure to

take reasonable steps to prevent harm to others, was sufficient to hold her criminally liable for involuntary manslaughter based on gross negligence. *Id.* at 583-584.

Here, the evidence supports the conclusion that Defendant had knowledge of a situation requiring the use of ordinary care and diligence to avert injury to others. He knew that within months of the water switch, residents complained that Flint water was discolored, had an odor, and was causing rashes. He knew that it contained unsafe levels of several contaminants, and by January 28, 2015, he knew that a Legionnaires' Disease outbreak existed and was likely catalyzed by the water switch. It can be inferred that Defendant was aware that the water switch and the outbreak posed a risk of harm to the uninformed public. In fact, he personally requested updates on the outbreak on at least two occasions. Defendant was clearly aware of the Legionnaires' Disease outbreak, a situation not only requiring ordinary care and diligence but also adherence to a statutory duty, a full year before he made any effort to eliminate public contact with the source or alert the public to known health risks.

The question of what an "ordinary mind" might have found apparent when faced with Defendant's knowledge of the outbreak is a question of fact for the jury. *Holland v Liedel*, 197 Mich App 60, 65; 494 NW2d 772 (1992) ("Although the question of duty is ordinarily one of law for the court to decide, where a determination of duty depends on factual findings those findings must be found by the jury."). There is certainly evidence to support a probable cause determination that a reasonable person in Defendant's position would have known that a failure to act would be accompanied by a high risk of disastrous results.

As previously discussed, Defendant had both the authority and the capability to order an investigation or alert the public, but he chose not to. According to Becker, there was no reason not to issue a warning at an earlier date (PE I, pp 57-59).

F. There Is Probable Cause To Believe that Mr. Skidmore and Mr. Snyder Died of Legionnaires' Disease

There is no dispute that Mr. Snyder died on June 30, 2015, or that Mr. Skidmore died only months later, on December 13, 2015. It is anticipated that the defense will dispute the cause of these men's deaths. However, the prosecution has presented evidence to support the inference that both men died as a result of their exposure to Legionella bacteria that, due to the switch in water source from DWSD to the Flint River, had flourished in Flint's municipal water system. Both individuals were hospitalized at McLaren, which receives potable water from the Flint water distribution system (PE XI, p 10), shortly before testing positive for Legionella.

Mr. Snyder was admitted to McLaren Hospital from June 16, 2015 through June 22, 2015, for a burn on his right shoulder (PE XV, p 26). Maryanne Tribble, Mr. Snyder's daughter, testified that her father was "very active" and "in relatively good health" before the admission (PE X, pp 4-5, 7). Thereafter, however, Mr. Snyder became very ill and was readmitted to the hospital on June 30, 2015 (PE XV, p 26). A urine antigen test (UAT) taken that day tested positive for Legionella, and Mr. Snyder died several hours later (PE XV, pp 26-27). Doctor Joel Kahn, an expert in internal medicine and cardiovascular disease, testified that, in his opinion, Mr. Snyder's death occurred as the result of his Legionella infection (PE XV, pp 27, 29). Mr. Snyder's death certificate notes the cause of death as "healthcare associated pneumonia." (Exhibit 75.) However, the facts contained in a death certificate are merely prima facie evidence that may be rebutted by contrary evidence. See MCL 333.2886; *American Cas Co v Costello*, 174 Mich App 1, 7; 435 NW2d 760 (1989) ("Prima facie evidence is evidence which, *if not rebutted*, is sufficient by itself to establish the truth of a legal conclusion asserted by a party."). In any case, according to Dr. Kahn, "healthcare associated pneumonia," is a term that can be used simultaneously with, or in place of, "Legionnaires' Disease." (PE XV, p 30.)

Mr. Skidmore was admitted to McLaren Hospital on May 13, 2015, and received inpatient treatment until May 19, 2015 (PE XV, p 23). Mr. Skidmore also became very ill after discharge, and was readmitted to the hospital on June 1, 2015, with fever, chills, and shortness of breath (PE XV, p 23). Mr. Skidmore also tested positive for Legionella via UAT, and he was treated for Legionnaires' Disease (PE XV, pp 23-24). During his eight days of inpatient treatment, which lasted until June 9, 2015, Mr. Skidmore experienced a severe septic episode caused by the Legionella, which seriously impacted his internal organs, including his heart, and ultimately contributed to his December 13, 2015 death (PE XV, p 25). After his treatment, Mr. Skidmore's health dramatically declined and from June 2015 until his death six months later, Mr. Skidmore was admitted to the hospital eight more times (PE XV, p 24). His son, Robert J. Skidmore, testified that the difference in his father's condition before and after the June 2015 admission was "night and day." Mr. Skidmore, who loved to laugh, sing, visit family, and spend time at his cottage up north, became unable to fully care for himself. Although Mr. Skidmore had not required assistance before his bout with Legionnaires', it became necessary thereafter for his sons to take shifts at Mr. Skidmore's home to ensure that he was eating. (PE XV, pp 5-6, 10, 12, 14, 22.)

Dr. Kahn testified that, in his opinion, Mr. Skidmore's death was caused by the severe impact on his organs suffered as a result of sepsis due to the presence of Legionella in his system (PE XV, p 25). Dr. Kahn explained that his opinion was not inconsistent with the cause of death, "congestive heart failure," listed on Mr. Skidmore's death certificate (PE XV, p 31). According to Dr. Kahn, Legionella pneumonia septic involvement triggered the disease pathology which manifested as congestive heart failure (PE XV, p 31; Exhibit 62).

Prosecution witness Dr. Marcus Zervos, Division Head of Infectious Disease Division of Henry Ford Health, also testified that the causes of death listed on Mr. Skidmore's and Mr.

Snyder's death certificates are wholly consistent with Legionella infection (PE I, pp 165-169). The fact that Defendant's medical expert, Dr. Jeffrey Band, offered competing theories regarding the cause of these men's deaths, (PE XIX, pp 13, 17), does not negate the existence of probable cause. Conflicting evidence at the preliminary examination stage presents a question of fact that must ultimately be decided by a jury. *Laws*, 218 Mich App at 452.

G. *Defendant Lyons' Failure To Act Caused the Deaths of Mr. Skidmore and Mr. Snyder*

Involuntary manslaughter includes a causation component that is construed "in accordance with its common-law meaning." *People v Tims*, 449 Mich 83, 94; 534 NW2d 675 (1995). "The common-law causation element is comprised of two components, cause-in-fact and proximate/legal cause." *Id.* at 95. "Factual causation exists if a finder of fact determines that 'but for' [the] defendant's conduct the result would not have occurred." *People v Feezel*, 486 Mich 184, 194-195; 783 NW2d 67 (2010). With regard to proximate cause, the prosecution is required to prove that the defendant's act was a foreseeable cause of death. *Id.* at 195, 201-202.

In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found. Quite the contrary, all acts that proximately cause the harm are recognized by the law. [*People v Bailey*, 451 Mich 657, 676; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996).]

Generally, the existence of both factual and proximate causation is an issue that is determined by the finder of fact. *Feezel*, 486 Mich at 194-196, 201-202.

Importantly, the fact that both Mr. Skidmore and Mr. Snyder had preexisting conditions does not negate a finding that Legionnaires' Disease was a proximate cause of these men's untimely deaths. It is enough that Legionnaires' Disease *contributed to* their deaths. As our Court of Appeals has explained:

There may be more than one proximate cause of an injury. Two causes frequently operate concurrently so that both constitute a direct proximate cause of the resulting harm. Therefore, a defendant cannot escape liability for [his] negligent conduct simply because the negligence of others may also have contributed to the injury suffered by a plaintiff. When a number of factors contribute to produce an injury, one actor's negligence will be considered a proximate cause of the harm if it was a substantial factor in producing the injury. [*Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997).]

It is clear from the evidence presented above that Legionnaires' Disease was at least a cause, if not the cause, of Mr. Snyder and Mr. Skidmore's untimely deaths.

Defendant admits that he was aware of the Legionnaires' Disease outbreak in January, 2015, and that he had seen the epi-curve graph depicting a sharp increase in cases beginning in 2014. As has been made clear, Defendant was duty bound to protect the health of the citizens of Michigan, a duty that included an obligation to notify the public about a Legionnaires' Disease outbreak and make all efforts to eliminate the source of the outbreak and take action to ensure that the public was provided with safe water. Regardless, Defendant did not issue such a warning until January 13, 2016, (Exhibit 22), and took no action to eliminate the source of this disease or switch Flint's water back to the DWSD before that date. But for Defendant's negligent omissions, neither Mr. Snyder nor Mr. Skidmore would have contracted Legionnaires' Disease or died as a result.

The People have presented ample evidence that the water in Flint's municipal system after the switch from the DWSD was the source of Legionella contributing to the unprecedented disease outbreak in 2014 and 2015. Contrary to Defendant's argument, it is not necessary that "experts" agree that the water was the source. Cause in fact may be established by circumstantial evidence so long as the evidence facilitates "reasonable inferences of causation." *Genna v Jackson*, 286 Mich App 413, 417-418; 781 NW2d 124 (2009). Setting aside the testimony of multiple witnesses attributing the Legionella outbreak to the water switch, the fact that the Legionella outbreak began when the water was switched from DWSD, and ended contemporaneously with the switch back,

is sufficient to support an inference that the Flint river water was the source of Legionella. See *id.* at 421.

Additionally, as Dr. Kilgore testified, it was reasonably foreseeable that, based on the number of cases presented in 2014, a similar increase in cases would occur in 2015 without preventative action (PE VII, pp 51-52, 56). According to Dr. Zervos, notice of the outbreak to the public and providers would have made it more likely for physicians to recognize cases of Legionellosis: “if we knew that there was an increase in cases or was an epidemic then we would be more likely to test for it and treat for it[.]” (PE II, p 9.) This is especially true because the source of Legionella—“the source is always water” (PE I, p 163)—is one for which exposure can be controlled. Indeed, Miller acknowledged that “it would have been reasonable perhaps to release information earlier rather than later,” because “[i]f the water hypothesis was accurate,” fewer people would have been affected (PE III, p 13).

Had Defendant promptly mandated a switch back to safe drinking water, the source of Legionella infections would have been eliminated before Mr. Skidmore and Mr. Snyder contracted this deadly disease. Similarly, had Defendant issued public notice about the Legionnaires’ Disease a year earlier, citizens in Genesee County, including Mr. Snyder and Mr. Skidmore, could have taken precautions and protected themselves from harm. Borowski testified that had Defendant issued an outbreak notice to the public in 2014, hospital operations going forward would have been different (PE XI, p 102). Kimberly Worden, a nurse for Hamilton Community Health Network, testified that Legionella can be eradicated with a simple dose of antibiotics (PE XXII, p 97).

The People have presented evidence to support the inference that had the people of Flint been given an adequate warning, they would have responded in a way that minimized their risk of exposure to unsafe conditions. Defendant’s own expert, Dr. Marc Edwards, testified that Flint

residents were “[s]tressed and worried” about what was happening to their community “[f]rom the very beginning to the present day.” (PE XX, p 78.) Despite their fear, citizens of Flint took effective steps to minimize exposure to Flint River water after a series of BWAs were issued to the public (PE VII, p 59). A study performed by Dr. Shawn McElmurry showed that after the BWAs issued, “internet traffic on Google searches about water, Flint water, [and] water-related contamination” increased (PE VII, p 60). This same study revealed that when BWAs were issued, blood lead levels in the population subsided (PE VII, p 59). Dr. McElmurry directly attributed this result to the public awareness of the water problem, which enabled members of the public to take steps to protect themselves from the water’s harmful effects (PE VII, p 59). It is clear from this data that public notice in the case of the Legionnaires’ Disease outbreak would have spurred protective action by the public and reduced the potential for sickness and death.

To support a charge of involuntary manslaughter, it is not necessary to prove that Defendant knew that these specific victims, Mr. Skidmore and Mr. Snyder, would be seriously harmed and ultimately die of Legionnaires’ Disease. Defendant knew that the quality of the water being sourced to Flint residents was so poor that it was making people sick. He also knew that there was a serious outbreak of Legionnaires’ Disease in Genesee County. It is enough that Defendant had ample opportunity to order a return to the DWSD or, at least, warn the public about the outbreak.

Although ostensibly deciding the issue of whether a corporation may be considered a person capable of perpetrating involuntary manslaughter, the Michigan Court of Appeals in *People v General Dynamics Land Systems Inc*, 175 Mich App 701, 703; 438 NW2d 359 (1989), implicitly accepted the notion that a person may be charged with the involuntary manslaughter of a specific victim for gross negligence with respect to a general population of potential victims. In that case,

the Court reversed the district court's decision to dismiss charges of involuntary manslaughter brought against a corporation after the district court found insufficient evidence of gross negligence. *Id.* at 703, 705. The victim, a 32-year-old employee of the defendant corporation, had died, according to the medical examiner, of "cardiac arrhythmia caused by exposure to [Freon] fumes" while operating a tank that had been cleaned with a chemical solution containing Freon. *Id.* at 705 (PENZIEN, J., dissenting in part). The Court found that the trial court erred in refusing the bindover because questions of fact remained regarding the issues of the defendant's knowledge and causation. *Id.* at 703-704. Specifically, the Court relied on testimony that safety bulletins intended to prevent such injuries were never distributed to employees, that a procedure for safely cleaning tanks had never been instituted, and that the victim had died from exposure to a lethal dose of Freon. *Id.*

In *General Dynamics*, the Court ordered a remand for trial on a charge of involuntary manslaughter even though the defendant did not have direct knowledge that the specific victim who died was in danger. The circumstances of Defendant's gross negligence are very similar to those of the corporate defendant in *General Dynamics*. In that case, it was a corporate agent who failed to ensure that occupational safety requirements that would have prevented the victim's death were properly distributed. However, the facts of the case at bar make Defendant more culpable. In *General Dynamics*, several witnesses testified that no one at the company expected that overexposure to Freon would cause death. *Id.* at 707. Here, Defendant had direct knowledge of the Legionnaires' Disease outbreak and the harm that would result from his failure to alert the public. He simply chose to do nothing.

IV. THERE IS PROBABLE CAUSE TO SUPPORT A BINDOVER ON THE CHARGE OF MISCONDUCT IN OFFICE

A bindover on the charge of misconduct in office requires probable cause to believe (1) that the defendant is a public officer, (2) that the defendant committed misconduct, either by malfeasance or misfeasance, (3) that such behavior was corrupt, and (4) that the misconduct occurred in the exercise of the duties of his office or under the color of his office. *People v Milton*, 257 Mich App 467, 470-471; 668 NW2d 387 (2003) (quotation marks and citation omitted). As this Court is aware, Defendant conceded his status as a public officer at the July 11, 2018 hearing on the People's Motion for Bindover.

A. *Defendant Lyon Committed Misconduct*

Defendant engaged in corrupt behavior and acted in direct contravention of his duty to protect the public health when, under the color of his office, he intentionally prevented and delayed the progress of investigations into the connection between the Legionnaires' Disease outbreak and the Flint water switch. Under MCL 333.2221, the DHHS is duty bound to investigate the cause of diseases and epidemics and the cause, prevention, and control of environmental health hazards, nuisances, and sources of illness. Defendant, who is not a scientist, delegated this duty to the Flint Area Community Health and Environmental Partnership (FACHEP) group, by way of Governor Snyder, before undertaking to undermine the group's efforts and delay the initiation of FACHEP's important, health-related research.

FACHEP was established in January 2016, after Dr. McElmurry received a call from Harvey Hollins, in which Hollins asked if Dr. McElmurry had heard about Legionella problems in Flint. Hollins explained that the Governor wanted to know whether the change in Flint's drinking water supply caused the Legionnaires' Disease outbreak (PE VII, p 19). Dr. McElmurry indicated that he would need a team of researchers to answer that question, and Hollins asked Dr. McElmurry

what such a project would cost (PE VII, p 19). Dr. McElmurry opined that it would cost about a million dollars, and Hollins replied that money was not an issue (PE VII, p 19).

In response to Mr. Hollins' request, Dr. McElmurry assembled a team of twenty-two investigators from six different institutions (PE VII, p 66). Phase I of FACHEP's research project constituted an assessment of needs and defining the scope of future work (PE VII, pp 68-69). The mission of Phase II was to understand what occurred in Flint, reduce exposure to Legionnaires' and other diseases, and determine a cause of the outbreak (PE VII, p 70). FACHEP created a Phase II project description which was submitted to the DHHS on May 18, 2016 (PE VII, p 69; Exhibit 48). One of FACHEP's hypotheses was that they

would be able to detect a statistically significant difference in the concentration of Legionella in the water supply even in 2016, a year after they had switched back from Detroit water, that it would be statistically significant difference from water systems of similar kind of age and similar kind of compositions, so we proposed to collect random samples from within Flint's water system at approximately 284 homes and then matched that to about 284 homes surrounding Flint . . . but not on Flint water. . . , and then we were trying to match it with a third area that would be another comparison group. [PE VII, pp 74-75.]

FACHEP researchers wished to start sampling for Legionella during the summer of 2016, when the presence of Legionella would typically increase (PE VII, p 69). By the time FACHEP was commissioned to conduct their research, the source of Flint's water had already been switched back to the DWSD, and Flint's municipal water system was being progressively flushed of any Flint River water residuals. FACHEP was concerned with starting to sample as quickly as possible because every day they waited, the change in Flint's drinking water source back to the DWSD was decreasing the likelihood that they would be able to determine what had been present in the water before the switch back (PE VII, p 75). As time wore on, it became less and less likely that FACHEP would be able to determine whether Flint's water was the source of the Legionnaires' Disease outbreak.

According to testimony provided by Dr. McElmurry, Defendant “did raise objections to [FACHEP] doing the work.” (PE IX, p 57.) Dr. McElmurry explained that per the “normal process [FACHEP] researchers would provide a plan of work and it would get approved.” (PE VIII, p 29.) However, the DHHS became difficult to work with. Contract negotiations were unduly delayed and protracted for the apparent purpose of preventing FACHEP’s research. Dr. McElmurry explained that “[i]n this case we had many back and forths with the Michigan [DHHS] in which they [the plans] were modified, particularly with the second phase. There were major modifications that we didn’t have any control over.” (PE VIII, p 29.) As time went on, and the contract had not been executed, FACHEP researchers felt like they

were being set up to not be able to find anything and then have to pronounce that all was good, there was no problem, in which we would be put on the spot to essentially explain that even though we did all the sampling there was nothing we could tell from it because we weren’t sampling quick enough and that was a very difficult position for us. We didn’t want to be caught in that position. [PE VII, pp 75-76.]

The evidence presented at the preliminary examination suggests that Defendant supported and was directly involved in the DHHS interference with FACHEP’s research. In a May 2016 meeting with Defendant and others, there was a heated discussion regarding the importance of enhanced surveillance (PE VIII, p 53; PE IX, pp 73, 83-84). From FACHEP’s perspective, it did not appear that the DHHS had altered their monitoring of Legionnaires’ Disease (PE VIII, p 54). FACHEP researchers wanted to ensure that Defendant understood “that there needed to be sustained enhanced surveillance for a number of years to be assured that the risk of exposure to Legionnaires’ Disease had actually been resolved.” (PE VIII, p 54.) At this meeting, Dr. McElmurry recalls “Dr. Kilgore empathetically trying to impress upon Nick the gravity of the situation,” including the fact that the decisions Defendant was making could cause people to die (PE VIII, pp 54-55). Farah Hanley, Deputy Director of Financial Operations of the DHHS, was

also present at the meeting and testified that Dr. Kilgore's behavior was shocking to her because he is "always very calm." (PE XXI, p 84.) Defendant responded to the Dr. Kilgore's concern with: "I can't save everyone." (PE VIII, p 55.) Dr. McElmurry did not consider this response to be a joke, but rather "quite disgusting to hear." (PE VIII, p 55.) Defendant's reaction to the concerns expressed by FACHEP was consistently indifferent. When informed by FACHEP researchers that without an adequate investigation of the source of Legionella, people would lose their lives, Defendant declared that "*people are going to die of something.*" (PE II, pp 135-136, emphasis added.)

Defendant had different objections to parts of the home sampling study at different times (PE VIII, p 86), and by August, 2016, FACHEP's Phase II research still had not begun. Dr. McElmurry testified that during an August 5, 2016 meeting with Defendant, Eden Wells, and several other individuals, Dr. McElmurry's research suggestions were met with strong resistance (PE VIII, pp 67-69). Although Defendant was present for the entire meeting, he did not offer support for the research, express that he wanted Dr. McElmurry and his team to conduct further research, ask Dr. McElmurry to discuss any of the scientific methods Dr. McElmurry's team had proposed, or ask Dr. McElmurry to consult with any other experts in order to discover the cause of the Legionella outbreak (PE VIII, pp 69-73). In fact, according to Dr. McElmurry, Defendant suggested to Dr. McElmurry that "people" at the United States Environmental Protection Agency were not in favor of FACHEP doing any sampling (PE VIII, p 79).

In an August 12, 2016 email to Dr. Kilgore and Dr. Zervos, among others, Dr. McElmurry expressed grave concerns over a request by the "state" that he not sample water filters for bacterial DNA:

Eden [Wells] warned me that the state does not want me to sample filters. I told her this has a major impact on the science but she indicated that this may be a red line.

In a conversation with Bryce, I brought this up. He indicated that Keith Creigh was particularly concerned about this. He also said the state does not want to find DNA in the water, dead or alive. I told him the purpose of sampling was to understand how much is in the water and that finding DNA on the filters would show the filters are working. He indicated he understood this and personally would like to have this information but that communicating this was a real issue.

I'm in FWICC now and going to talk with Nick Lyons [sic], Keith Creigh, and others to push back on this. I'm seriously concerned they have no interest in understanding this better but rather they are interested in just pulling out of Flint. [Exhibit 53.]

At the preliminary examination, Dr. McElmurry confirmed that his email memorialized discussions occurring before a Flint Water Interagency Coordination Committee (FWICC) meeting earlier that day (PE VIII, pp 42-44). After the FWICC meeting, Defendant and other state employees had another discussion with Dr. McElmurry (PE VIII, pp 45-46). Dr. McElmurry testified that during this discussion, Defendant's "tone and his demeanor suggested he was very skeptical." (PE VIII, p 48.) According to Dr. McElmurry, "it appeared they [Defendant and other state employees] did not want us [FACHEP] to be sampling [bacterial DNA] and so I was trying to explain that we were only collecting water on the upstream side of the filters and not what was coming through because in my opinion it seemed like they were very concerned that we might find something that would be bad with the filters that they were promoting and handing out to residents to mitigate problems with lead." (PE VIII, p 48.)

MCL 333.2221 requires the DHHS to investigate the cause of disease. Although Defendant effectively delegated this duty to FACHEP, the team tasked with investigating the cause of the Legionnaires' Disease outbreak, Defendant actively interfered with the progress of FACHEP's research. Defendant, who is not a scientist, questioned the scope and validity of FACHEP's study

from at least May to August 2016, when the contract terms between DHHS and FACHEP were finally agreed upon and the contract was executed (Exhibit 50). What is critical to note is that the May to August timeframe is when *Legionella* is most prevalent in water and would be the prime time to sample the water, allowing for a more comprehensive analysis of the bacterial content in Flint's drinking water supply. By delaying the execution of the contract, Defendant forced FACHEP to collect subpar data in an effort to prevent FACHEP from connecting the switch in Flint's drinking water source to the Legionnaires' Disease outbreak.

B. Defendant Lyon Acted with Corrupt Intent

The prosecution has set forth evidence to support a finding of probable cause to believe Defendant committed the alleged misconduct with corrupt intent. "Corruption, as an element of misconduct in office, is used in the sense of depravity, perversion, or taint." *People v Milton*, 257 Mich App 467, 471; 668 NW2d 387 (2003) (quotation marks and citation omitted). "[C]orrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer." *People v Waterstone*, 296 Mich App 121, 142; 818 NW2d 432 (2012) (quotation marks and citation omitted). For example, "[i]t is corrupt for an officer purposely to violate the duties of his office." *Id.*, quoting *People v Coutu*, 235 Mich App 695, 706-707; 599 NW2d 556 (1999). Further, corrupt intent can be inferred where "the acts alleged against defendants demonstrate a tainted or perverse use of the powers and privileges granted them, or a perversion of the trust placed in them by the people of this state[.]" *Milton*, 257 Mich App at 472 (quotation marks and citation omitted).

The same evidence that supports the element of willful neglect for the involuntary manslaughter charge supports the inference that Defendant was not acting, as he was obligated to do, in the interest of public health. The evidence presented by the prosecution at Defendant's

preliminary examination supports the inference that Defendant's act of preventing further research was committed with the intent to prevent the public from learning about the DHHS's abdication of duty with respect to Legionnaires' Disease prevention and the dangerous effects of the water switch. Additionally, Dr. McElmurry testified that Defendant "made it abundantly clear that money was a major issue for [Defendant] and that he didn't think it was necessary [for FACHEP] to do the work." (PE IX, p 57.) Defendant's conduct constitutes a perversion of the trust placed in him as an officer of the DHHS by the people of this state to protect the general interests of health and safety.

C. Defendant Lyon's Misconduct Occurred in the Exercise of His Official Duties

To support a charge of misconduct in office, there must be probable cause to believe that the defendant's wrongdoing results from or directly affects the performance of his official duties. *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003). At all times relevant to this charge, Defendant was acting in his official role as DHHS Director. Additionally, the effect Defendant had on FACHEP could not have occurred absent his direct authority to act.

Not only did Defendant's alleged misconduct occur while Defendant was acting under the color of his office, it also constituted a direct abdication of his statutory duty to investigate the cause of a disease outbreak. See MCL 333.2221(d)(i). His conduct then, if proven beyond a reasonable doubt, constitutes misconduct in office. Based on the now available evidence, there is probable cause to bind Defendant over on this charge.

V. CONCLUSION

WHEREFORE, for the reasons discussed herein, the People of the State of Michigan, by and through their attorneys, respectfully request that this Honorable Court bind defendant, NICOLAS LEONARD LYON, over for trial in the circuit court on the charges of (1) involuntary

manslaughter for his role in the death of Robert Skidmore, (2) involuntary manslaughter for his role in the death of John Snyder, and (3) misconduct in office.

Respectfully Submitted,



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