STATE OF MICHIGAN
IN THE 67TH DISTRICT COURT, GENESEE COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

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

NICOLAS LEONARD LYON,

Defendant.

COMMUNITY BASED ORGANIZING PARTNERS MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND MEMORANDUM IN SUPPORT

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Community Based Organizing Partners (CBOP), by its attorneys, moves for leave to file a brief as amicus curiae in this matter. Under Michigan Court Rule 1.105, the Court has discretion to consider this brief in its deliberations. See, e.g., *Attorney General v Blue Cross Blue Shield of Michigan*, 291 Mich App 64, 92; 810 NW2d 603 (2010) (recognizing trial court's discretion to allow amicus briefs); *Toll Northville LTD v Township of Northville*, 272 Mich App 352, 358; 726 NW2d 57 (2006), vacating judgment in part on other grounds by *Toll Northville LTD v Township of Northville*, 480 Mich 6 (2008) (describing without censure the filing of an amicus brief at the trial court level). In support of its motion, Amicus states as follows:

1. CBOP is a non-profit organization located in Flint, Michigan and founded in 1994. CBOP's members include over 50 local organizations that focus on a diverse range of issues, including public health, education, and civil rights. Since the beginning of the Flint Water Crisis, CBOP has focused on helping families recover, while ensuring justice for those responsible.

2. In seeking leave to file this brief, CBOP has a singular purpose: to assist the court in understanding the crime of misconduct in office. CBOP's attorneys include former prosecutors and law professors, who are qualified to play this role. The brief neither assesses the prosecution's evidence to support this crime, nor addresses the other crimes in the prosecution's bindover motion.

Although narrow, this task of elucidating the crime of misconduct in office is important for three reasons. First, this crime has not received extensive attention

by the courts. Only in the last twenty years have Michigan appellate courts given focused attention to this crime. Second, the Special Counsel prosecuting these cases has charged this felony more than any other, so the questions this Court must answer will appear again and again. And third, this crime remains a critical means of government accountability. CBOP is committed to ensuring an accurate and robust understanding of this crime as a means of accountability for the Flint Water Crisis and beyond.

3. CBOP respectfully submits that granting this brief would advance the administration of justice by assisting the Court in analyzing the issues in the bindover motion, would not prejudice any party to this case, and would not delay the schedule established by this Court.

4. In the interests of expediency, CBOP's proposed brief is attached to this motion.

WHEREFORE, Community Based Organizing Partners respectfully requests that this Court enter an order granting it leave to file the proposed amicus curiae brief that accompanies this motion.

Dated: July 16, 2018

Respectfully submitted,

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BRIEF OF AMICUS CURIAE COMMUNITY BASED ORGANIZING PARTNERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Secondary Sources

INTEREST OF AMICUS CURIAE

Community Based Organizing Partners (CBOP) is located in Flint, Michigan and was founded in 1994. CBOP's members include over 50 local organizations that focus on a diverse range of issues, including public health, education, and civil rights, and participate in academic research regarding these issues. The people behind this partnership share one experience in common: they all drank Flint's poisoned water. From day one, CBOP has focused on helping Flint families recover, while ensuring justice for those responsible.

Several voices – the well-connected, who neither live in Flint nor experienced this horror – have publicly criticized the idea of criminal accountability for the Flint Water Crisis. CBOP dissents. It believes a thorough examination by the criminal justice system is fitting and necessary.

This brief has a singular purpose: to assist the court in understanding the crime of misconduct in office. CBOP's attorneys include former prosecutors and law professors, who are qualified to play this role. The brief neither assesses the prosecution's evidence to support this crime, nor addresses the other crimes in the prosecution's bindover motion. Although narrow, this brief aims to fulfill a nonetheless important role of elucidating the law.

This task is important for at least three reasons. First, the crime of misconduct in office has not received extensive attention by the courts. Only in the last 20 years have Michigan appellate courts examined this crime; many relevant

legal issues remain unexplored; and this crime carries the interpretive challenges that mark any common law offense in an age when criminal law is largely codified.

Second, the Special Counsel prosecuting these cases has charged this felony more than any other. The questions this Court must answer will arise again and again.

And third, this crime is a critical means of government accountability. The Michigan Legislature has so far failed to pass a comprehensive law that creates criminal liability for public officials who abuse citizen trust and harm the people they are supposed to serve, clearly spelling out by statute the elements of these crimes. Until the legislature acts, CBOP is committed to ensuring an accurate and robust understanding of this common law crime as a means of accountability for the Flint Water Crisis and beyond.

INTRODUCTION

Michigan recognizes common law crimes not otherwise abrogated by statute. Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."). The legislature designated such crimes as five-year felonies under MCL 750.505:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

The Michigan Supreme Court has expressly recognized the common law crime of misconduct in office as a felony punishable under this statute. *People v Coutu*, 459 Mich 348; 589 NW2d 458 (1999). This offense traces to the beginning of English law and evolved over centuries. See McBain, *Modernising the Common Law Offence of Misconduct in a Public or Judicial Office*, 7 J Pol & L 46, 47-75 (2014) (summarizing cases and treatises). Despite the crime's long lineage, Michigan's appellate record only reflects focused attention on the crime beginning in the 1990s, with *Coutu*, 459 Mich 348 (1999), as the seminal case.[1]

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[1] The common law crime of course shaped early Michigan statutes addressing crimes related to public office, such as bribery, embezzlement, and fraud. And a provision first included in the Michigan Constitution of 1850 clearly reflects its influence: "The governor shall have power . . . to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein" various state officers. Const 1850, art 12, § 8. A version of that same provision appears in the Michigan Constitution today. Const 1963, art 5, § 10. Counsel's review of Michigan's appellate record beginning with *Coutu*, 459 Mich 348, reveals 23 cases (6 published; 17 unpublished) that involved a distinct set of facts including one or more charges for misconduct in office reviewed on appeal (and not counting separately cases appealed to the Michigan Supreme Court or returned to the Michigan Court of Appeals on remand).

To prove misconduct in office, the prosecution must establish four elements.[2] The first three elements constitute the actus reus of the crime: the defendant is (1) a public officer (2) who committed misconduct (3) in the exercise of official duties or under the color of office. The final element constitutes the mens rea of the crime: (4) the defendant acted with corrupt intent. This brief examines each of these elements.

ARGUMENT

I. First, the prosecution must prove the defendant is a public officer.

A. This proof must satisfy a five-part test.

The Michigan Supreme Court has interpreted the crime of misconduct in office to apply only to public officers. In *Coutu*, 459 Mich at 354, quoting *People v Freedland*, 308 Mich 449, 457-58; 14 NW2d 62 (1944), the Court recognized a five-part test for determining whether a position constitutes a public office:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior

[2] The Michigan Court of Appeals sometimes lists three elements. See, e.g., *People v Milton*, 257 Mich App 467, 471; 668 NW2d 387 (2003) ("To convict on the charge of misconduct in office, the prosecutor must prove that the defendant (1) is a public officer, (2) the misconduct occurred in the exercise of the duties of the office or under the color of the office, and (3) is corrupt behavior."). This brief treats the act of misconduct, and the fact that it occurred in the exercise of a defendant's duties or under color of office, as separate elements.

officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.

The Court also affirmed that the taking of an oath and bond requirements, while not necessary, support the conclusion that a position is a public office. *Id.* at 355.

Coutu echoes language from *Freedland* that these five elements are "indispensable." *Id.* at 354; compare *Freedland*, 308 Mich at 457. Although at least two pre-*Coutu* opinions questioned whether *Freedland* considered every factor necessary, *Hamilton v Reynolds,* 129 Mich App 375, 379; 341 NW2d 152 (1983); *Dearborn Fire Fighters Union v City of Dearborn*, 394 Mich 229, 309; 231 NW2d 226 (1975) (WILLIAMS, J., concurring), *Coutu* answers that question in the affirmative.

B. The courts' application of each factor in the *Freedland* test sheds light on what positions constitute public offices.

Courts have usually concluded a position satisfies the first factor by pointing to an express provision creating the position in the Constitution, state statutes, or a relevant municipal law. *Coutu* held that a state law expressly creating the office of deputy sheriff easily satisfied this requirement. *Coutu*, 459 Mich at 355. In *People v VanSickle (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 7, 1999 (Docket No. 191839), however, the court of appeals suggested that an express provision creating the specific office in question is not necessary. After reviewing the *Freedland* test, the court held that the position of lieutenant police officer was a public office. "[A]lthough the Legislature has not explicitly provided for the creation of lieutenant police officers, it has provided for townships to establish a police department, M.C.L. § 41.181 . . . which may 'employ and

appoint on behalf of an individual township a police chief and fire chief and other police and fire officers,' M.C.L. § 41.806(1)." *Id.* at 2. According to the court, a statute that generally authorized the creation of a position, without particularly identifying it, satisfied this first factor.

The second factor is whether the position exercises sovereign power. *Coutu*, 459 Mich at 354. Applying this test, the courts have often considered whether a position includes the power to exercise significant discretion. In *Coutu*, 459 Mich at 355, the Court said the facts of the case satisfied the second requirement because "as law enforcement personnel, deputy sheriffs exercise sovereign power while engaged in the discretionary discharge of their duties." In contrast, court stenographers, who do not exercise significant discretion, lacked this power and were therefore not public officers. *Meiland v Cody*, 359 Mich 78, 87; 101 NW2d 336 (1960).

Under the third factor, a public office has powers and duties "directly or impliedly" defined "by the legislature or through legislative authority." *Coutu*, 459 Mich at 354. Although the courts have given little attention to this factor, *Coutu* concluded the position satisfied this requirement because "the Legislature defined *in part* the powers and duties of deputy sheriffs." *Id.* at 355 (emphasis added). A partial definition, it seems, is sufficient. Moreover, the clause, "or through legislative authority," *id.* at 354, suggests that duties defined by administrative rules and regulations – a power conferred by the legislature – would also satisfy this requirement.

The fourth factor defines a public office as a position independent of any superior except the law, or a subordinate office created by law and reporting to a superior office. *Coutu*, 459 Mich at 354. As this language suggests, a person who reports to a higher authority can still be a public officer. In a case that did not involve the common law crime of misconduct in office, the court of appeals concluded the director of state mental health facilities was a public officer even though this position reported to someone else.

> Such directors are under the authority of the director of the Department of Mental Health and possess considerable administrative and decision-making authority, as delegated by the state director and conferred by the Legislature . . . to protect and promote public health and to foster and support institutions for the care of the mentally handicapped.

Hamilton, 129 Mich App at 379-80. The positions of deputy sheriff, *Coutu*, 459 Mich at 355, and lieutenant police officer, *VanSickle*, unpub op at 2, both satisfied this factor, as well, despite reporting to higher-level officials.

Lastly, according to the fifth factor the position must have some permanency and continuity. *Coutu*, 459 Mich at 354. This requirement is not too exacting. In one case the court of appeals concluded that an emergency manager, despite the position's temporary nature, satisfied this requirement. See *People v Blackwell*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2012 (Docket No. 302473), p 2.

This five-part test is expansive and covers a broad range of public officials. *Coutu* applied the common law crime of misconduct in office to deputy sheriffs. *Coutu*, 459 Mich at 350. Perhaps not surprisingly, given the importance of *Coutu*,

the vast majority of appellate cases addressing this crime involve law enforcement officers as defendants.[3] See, e.g., *People v Milton*, 257 Mich App 467; 668 NW2d 387 (2003) (police officer); *People v Perkins*, 468 Mich 448; 662 NW2d 727 (2003) (deputy sheriff); *People v Hardrick*, 258 Mich App 238; 671 NW2d 548 (2003) (police officer). Not all misconduct in office cases, however, follow this pattern. See, e.g., *Blackwell*, upub op at 2 (emergency manager). Moreover, the courts applying the *Freedland* test under other statutes have recognized a broad spectrum of public officers. See, e.g., *Dosker v Andrus*, 342 Mich 548, 553; 70 NW2d 765 (1955) (county register of deeds); *Raven v Board of Comm'rs of Wayne County*, 32 Mich App 4, 9; 188 NW2d 197 (1971) (deputy county medical examiner); *People v Clark*, 134 Mich App 324, 329; 350 NW2d 878 (1984) (water commissioner); *Hamilton*, 129 Mich App at 379-80 (director of state mental health facilities).

II. Second, the prosecution must prove the defendant committed misconduct.

A. Misconduct can take the form of malfeasance, misfeasance, or nonfeasance.

The act of the crime, strictly speaking, is some misconduct. Michigan recognizes three types of misconduct. "An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, *malfeasance*, (2) for committing a lawful act in a wrongful manner, *misfeasance*, or (3) for failing to perform any act that the duties of the office require of the officer, *nonfeasance*." *Perkins*, 468 Mich at 456 (citing Perkins & Boyce, Criminal Law (3d ed), p 540)

[3] Of the 23 published and unpublished cases mentioned earlier in footnote 2, 17 of those cases involved defendants who were law enforcement officers.

(emphases added). The first two types are acts of commission; the last type is an act of omission. Each type renders a person liable for the same crime – misconduct in office.

As an act of commission, misconduct takes the form of either malfeasance or misfeasance. A police officer who engaged in sex acts with a nude dancer, and claimed the acts were part of a criminal investigation, committed malfeasance. *People v Channells*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 22, 2015 (Docket Nos. 321333, 321450), p 11. An officer who used his position of authority to assault a prisoner also committed malfeasance. *Milton*, 257 Mich App at 475. In both cases the court recognized the act as wrongful in itself. On the other hand, police officers who provided false information in reports documenting a search and arrest committed misfeasance because the underlying reporting activity was lawful but performed in a wrongful manner. *People v Welcome*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 20, 2011 (Docket No. 298792), p 2.

As an act of omission, misconduct is called nonfeasance and involves the failure to perform some duty. Under the common law, a duty can take two forms: a ministerial or non-ministerial duty. See Perkins & Boyce, p 546-47 (discussing these two types of duties); *People v Waterstone*, 296 Mich App 121, 138-40; 818 NW2d 432 (2012) (applying this distinction). The distinction between these types turns on whether the fulfillment of the duty requires the public officer to exercise

discretion: a ministerial duty does not require the exercise of discretion; a non-ministerial duty does. See Perkins & Boyce, p 546-47.

A judge who failed to disclose certain communications and perjured testimony committed nonfeasance involving failure to perform a ministerial duty. *Waterstone,* 296 Mich App at 140. The law required disclosure and did not give the judge discretion in fulfilling this duty. As discussed below in Section II.C, MCL 750.478, which creates the misdemeanor of willful neglect of duty by a public officer, abrogates the common law offense where the defendant fails to perform a ministerial duty.

Michigan's appellate record does not yet contain examples of a public officer failing to perform a non-ministerial duty, although the law clearly contemplates liability for these omissions. One treatise, cited extensively by Michigan courts, gives the example of *Rex v. Williams.* Perkins & Boyce, p. 548 n 23 (citing *Rex v Williams*, 97 Eng Rep 851 (1762)). English law charged justices of the peace (JPs) with issuing licenses on behalf of the Crown "which they had a discretion to grant or refuse, as they should see to be right and proper." *Williams*, 97 Eng Rep 851. In *Williams*, the JPs refused to issue licenses to applicants who voted against the JPs' recommended candidates for members of Parliament. The JPs did not have to issue a license to everyone who applied. The duty, therefore, was not ministerial; JPs exercised discretion in deciding who to license. The misconduct lies in *how* the official exercises this discretion and is closely tied to the defendant's state of mind: whether the defendant manifested what *Williams* called a "corrupt motive" or intent

(see Section IV). *Id.* This assessment is necessary to distinguish garden variety exercises of discretion that result in inaction—whether wise or not— but do not create criminal liability, from the nonfeasance that constitutes misconduct.

B. To determine whether an officer has committed misconduct, Michigan courts look for violations of not only statutes, but also rules and agency policies.

As stated earlier, Michigan courts consider affirmative acts of misconduct to involve some "wrongful" conduct, and negative acts of misconduct to involve dereliction of some duty. See *Perkins*, 468 Mich at 456 (citing Perkins & Boyce, p 540). The courts, however, have not directly addressed what counts as a "wrong" or what counts as a "duty." In the case of a failure to perform a duty, must the duty appear in a statute? Likewise, in the case of malfeasance or misfeasance, must the wrongful conduct involve violation of a statute? Is the violation of a rule or policy sufficient?

The cases shed some light on these questions. In some cases, courts have looked to a separate felony or misdemeanor, recognized by statute, which may have stemmed from the same facts. Committing this other felony or misdemeanor in the exercise of official duties or under the color of office constituted misconduct. In so doing, the courts are careful to make clear that the crime of misconduct in office includes one or more elements not included in the other offense, otherwise the statutory crime would abrogate the common law crime. See Section II.C.

Milton is an example. 257 Mich App 467. In *Milton*, the defendant, a lieutenant police officer, was convicted of assault and battery, as well as misconduct

in office, for beating an uncooperative prisoner. The court of appeals affirmed both convictions. As to the latter, the court concluded that the misconduct "consisted not just of beating the nonviolent prisoner but of demoralizing, humiliating, oppressing, and intimidating the prisoner simply because the defendant, cloaked in the power and authority vested in him by the state, was in a position to do so." *Id.* at 474. In other words, the misconduct consisted in committing another felony under the color of office. In at least one decision, unpublished, the court of appeals concluded that a conviction for the other felony was not necessary. See *People v Milano*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2015 (Docket Nos. 318782, 318897), p 9 (upholding conviction for misconduct in office on theory that officer participated in assault, even though he was acquitted of that crime).

More often, however, courts have identified wrongful conduct, or identified a duty, in relationship to some rule, regulation, or policy. See, e.g., *Hardrick*, 258 Mich App at 243 ("Detroit police officers were governed by rules and regulations of conduct"); and *People v Coutu (On Remand)*, 235 Mich App 695, 698; 599 NW2d 556 (1999) (summary of "guidelines" for work-release facility where defendant worked). In one case, a violation of a contractual provision between a state agency and a municipality was sufficient. See *VanSickle*, unpub op at 3. In some instances, the courts have seemed to countenance even informal policies not recorded in writing. In *Channells*, defendant police officer used department money for sexual services while investigating a strip club. *Channells*, unpub op at 9. The court rejected defendant's argument that the court should overturn his conviction for misconduct

in office because of "the failure to identify the existence of any specific police department policy or procedure that was violated." *Id.* The court explained: "Irrespective of the existence of policies or procedures for the Special Investigations Unit, [defendant] as a police officer was under a continuing duty to uphold the law and to avoid conduct unbecoming an officer." *Id.* at 11 (quotation marks omitted).

In sum, Michigan courts have embraced a broad understanding of what counts as wrongful conduct, in the case of malfeasance or misfeasance, and a duty, in the case of nonfeasance. Not only violations of other statutes, but agency rules and policies, are sufficient.

C. The Michigan legislature has abrogated the common law crime of misconduct in office as to nonfeasance that involves a ministerial duty, although failure to perform a non-ministerial duty remains a felony under MCL 750.505.

Michigan law incorporates common law crimes, including the crime of misconduct in office, to the extent such crimes are not codified. The statute states: "Any person who shall commit any indictable offense at the common law, *for the punishment of which no provision is expressly made by any statute of this state*, shall be guilty of a felony." MCL 750.505 (emphasis added). The test, which the Court first articulated in *People v Davis*, is whether a common law crime "sets forth all the elements of the statutory offense." *People v. Davis*, 290 N.W.2d 366, 368 (1980); see also *People v Thomas*, 438 Mich 448, 453; 475 NW2d 288 (1991); *Milton*, 257 Mich App at 472-73; *Waterstone*, 296 Mich App at 134. If it does, the statute abrogates the common law.

The courts have applied this rule to the common law offense of misconduct in office on a few occasions. In *Milton*, 257 Mich App 467, the court easily upheld a police officer's conviction for misconduct in office alongside a conviction for assault and battery for his treatment of a prisoner. Laying the elements of the two crimes side-by-side, the court concluded: "Obviously, the misconduct in office charge did not set forth all the elements of the statutory offense of assault and battery, M.C.L. § 750.81; accordingly, a charge of misconduct in office was not precluded." *Id.* at 473. As partially quoted earlier, the court explained why the common law crime applied under these facts:

> [W]e reject defendant's claim that his misconduct consisted *solely* of his assaultive behavior. . . . This 'mistreatment' consisted not just of beating the nonviolent prisoner but of demoralizing, humiliating, oppressing, and intimidating the prisoner simply because the defendant, cloaked in the power and authority vested in him by the state, was in a position to do so.

Id. at 475 (emphasis in original).

The court of appeals' most extensive consideration of whether a statute abrogates the common law crime of misconduct in office is *Waterstone*, 296 Mich App 121. The attorney general charged a judge with several counts of misconduct in office for failing to disclose certain communications and perjured testimony. The court held that MCL 750.478 abrogated the common law crime of misconduct in office as charged by the attorney general. *Id.* at 126. The statutory provision reads:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or

a fine of not more than $1,000.00.

MCL 750.478.

The court first compared the actus reus of the two crimes and concluded that MCL 750.478 and the crime of misconduct in office as charged, both concern omissions. *Waterstone*, 296 Mich App at 136. Turning to the mens rea, the court likewise found both crimes punished a purposeful failure to act. *Id.* at 138. "It thus appears that the crime of willful neglect of duty under MCL 750.478 is the same as the crime of misconduct in office under the common law in relationship to a nonfeasance theory of prosecution." *Id.* at 136. As a result, the court affirmed the dismissal of the misconduct in office charges. *Id.* at 144.

While *Waterstone* occasionally appears to suggest that MCL 750.478 abrogates the common law crime of misconduct in office as applied to any act of nonfeasance, a close reading of the opinion clearly rejects this too-broad conclusion. Recall the earlier distinction between ministerial and non-ministerial duties. See Section II.A. *Waterstone* invokes this distinction and makes clear that MCL 750.478 only abrogates the common law crime where a defendant fails to perform a ministerial duty. Comparing the mens rea terms of the two crimes, the court concludes: "On consideration of the authorities cited above, we see no relevant difference between corrupt behavior and willful neglect in the context of nonfeasance in relationship to a legal duty or obligation *concerning nondiscretionary or ministerial acts.*" *Id.* at 138 (emphasis added). The court made clear this conclusion was not merely a result of judicial restraint: refusing to extend

its holding beyond what the facts of the case demand. "MCL 750.478 addresses ministerial or nondiscretionary acts, because it speaks of performing duties 'enjoined by law.' " *Id.* at 140. The attorney general had charged the judge with misconduct in office for "willfully neglecting her judicial duties." *Id.* at 145. These charges could not stand because the omissions concerned ministerial duties. *Waterstone* leaves open the option for a prosecutor to charge misconduct in office for nonfeasance when a public officer fails to perform duties that involve discretion.

III. Third, the prosecution must prove the defendant acted in the exercise of official duties or under the color of office.

In *Coutu*, the Court partially defined misconduct in office as " 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' " *Coutu*, 459 Mich. at 354 (quoting Perkins & Boyce, p 543). The Court later restated the rule in *Perkins* as requiring a nexus between the charged conduct and the defendant's status as a public officer. *Perkins*, 468 Mich at 455; see also *id.* at 456 ("the officer's wrongdoing must result from or directly affect the performance of his official duties").

> The mere coincidence that a crime has been committed by one who happens to be a public officer is not sufficient to establish official misconduct. For this offense it is necessary not only that the offender be an officer, or one who presumes to act as an officer, but the misconduct, if not actually in the exercise of the duties of his office, must be done under color of his office.

Id. at 456 (quoting Perkins & Boyce, p 541). A person acts "under color of his office" when the act is done "because he is an officer or because of the opportunity afforded by that fact." *Id.*

As a result, a person might act as a public official in one setting, but not another. For example, a police officer is not necessarily a public official when facing charges for off-duty assault and battery. *Coutu*, 459 Mich at 356 (citing *Burnett v Moore*, 111 Mich App 646, 648-50; 314 NW2d 458 (1981)). The mere fact that a police officer commits the charged conduct while on duty, however, is also insufficient. In *Perkins* a police officer committed a sex act with a sixteen-year old girl in his squad car while on duty. Nonetheless, the Court held that "the charged conduct arose from a longstanding sexual relationship with the complainant. . . . Whatever influence defendant's office may once have had on the complainant, there was no evidence that it influenced her to have sexual relations with defendant on the subject occasion." *Perkins*, 468 Mich at 457. By contrast, a police officer who engaged in sexual activities while on duty with an intoxicated person he was charged to protect easily satisfied the nexus requirement. *People v Paravas*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2014 (Docket No. 311291), p 4.

IV. Fourth, the prosecution must prove the defendant acted with corrupt intent.

As mentioned earlier, *Coutu* defined misconduct in office to include " 'corrupt behavior,' " *Coutu*, 459 Mich at 354 (quoting Perkins & Boyce, p 543), also called "corrupt intent," *Perkins*, 468 Mich at 456. The Court described "corrupt" to mean " 'a sense of depravity, perversion or taint.' " *Id.* (quoting Perkins & Boyce, p 542). "If 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 . . . they are sufficient to sustain a charge of misconduct in office." *Coutu (On Remand)*, 235 Mich App at 707. *Coutu (On Remand)* offered this explanation: "a corrupt 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." *Id.* at 706. Corrupt intent is "intentional, purposeful, deliberate, and knowing wrongful behavior." *Waterstone*, 296 Mich App at 138. Mere "negligence is not corruption." Perkins & Boyce, p 542.

Although the word "corrupt" can have a more narrow meaning, its use here is broad. It is not limited to acting with intent to gain someone else's money or property. *Id.* Neither is it limited to cases of quid pro quo. *Id.*; see also *Coutu*, 459 Mich. at 351 (noting, and impliedly rejecting, the district court's dismissal of the charges against the *Coutu* defendants because the prosecution failed to establish quid pro quo for the misconduct). In the case of an omission, it includes purposeful failure to fulfill non-ministerial duties. *Waterstone*, 296 Mich App at 139. In sum, a defendant acts with corrupt intent when he or she purposefully commits the misconduct, whether by commission or omission.

CONCLUSION

The common law crime of misconduct in office remains a chargeable offense in Michigan law under the Michigan Constitution, art 3, § 7, MCL 750.505, and multiple decisions of the Michigan Supreme Court and the Michigan Court of Appeals. To prove misconduct in office, the prosecution must establish four elements: that the defendant is (1) a public officer (2) who committed misconduct (3)

in the exercise of official duties or under the color of office, (4) while acting with corrupt intent. The offense is broad, covering a wide range of government actors who purposefully commit misconduct, including a failure to carry-out a non-ministerial duty. As a first-hand witness to the havoc caused by the Flint Water Crisis, amicus curiae believes this robust crime must be applied with thoroughness and rigor to determine criminal liability for this crisis.

Dated: July 16, 2018

Respectfully submitted,

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