



45 Ottawa Avenue SW
Suite 1100
P.O. Box 306
Grand Rapids, MI 49501-0306

 MERITAS LAW FIRMS WORLDWIDE

JEFFREY G. MUTH
Attorney at Law

616.831.1706
616.988.1706 fax
muthjg@millerjohnson.com

July 17, 2018

VIA FEDERAL EXPRESS

Clerk of the Court
Genesee County District Court
1415 Flushing Road
Flushing, MI 48433

Re: *People of the State of Michigan v. Nicolas Leonard Lyon*
Case No. 17T-01355-FY

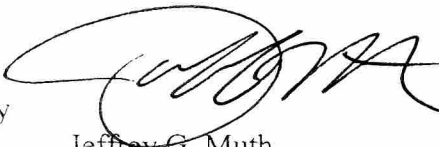
Dear Clerk:

Enclosed for filing is one (1) original and one (1) Judge's copy of *Association of State and Territorial Health Officials' Motion for Leave to File Amicus Curiae Brief in Support of Defendant* and *Proof of Service* of same regarding the above-referenced matter. A check in the amount of \$20.00 is enclosed for the filing fee.

Also enclosed are *Notice of Appearance's* for attorney Jeffrey G. Muth and attorney Patrick M. Jaicomo. If you should have any questions, please do not hesitate to contact me. Thank you.

Very truly yours,

MILLER JOHNSON

By 
Jeffrey G. Muth

JM:jmb
Enclosures

cc: Todd Flood
Charles E. Chamberlain

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

NICOLAS LEONARD LYON,

Defendant.

Case No. 17T-01355-FY

Hon. David J. Goggins

Todd Flood (P58555)
Special Assistant Attorney General
Michigan Department of Attorney General
Attorney for the People of the State of
Michigan
155 West Congress, Ste 603
Detroit, MI 48226
(810) 429-5030

Charles E. Chamberlain (P33536)
Wiley & Chamberlain LLP
Attorneys for the Defendant
300 Ottawa Ave NW, Ste 810
Grand Rapids, MI 49503
(616) 458-2212

Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
Miller Johnson
Attorneys for Amicus Curiae Association
of State and Territorial Health Officials
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS'
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF DEFENDANT

The Association of State and Territorial Health Officials ("ASTHO") moves this Court for leave to file a brief as amicus curiae in this Court. ASTHO states in support of its motion:

1. ASTHO is a national nonprofit organization representing public health agencies in the United States, its territories, U.S. Territories, and the

District of Columbia, as well as over 100,000 public health professionals employed by those agencies.

2. ASTHO members include epidemiologists and other scientific and medical experts, academics, and experienced public health administrators.
3. ASTHO's mission is to support, equip, and advocate for state and territorial health officials in their work of advancing the public's health and well-being.
4. As part of that mission, ASTHO advises its members and assists in policy development at all levels of government to support best practices in public health.
5. ASTHO has a significant interest in the outcome of this case because a fundamental issue before the Court is whether ASTHO's members—public health officials—should face criminal charges and trial for their professional decisions.
6. In seeking to punish public health officials for their administration of their professional responsibilities, this case could cause a threat to public health nationwide, which would create a serious obstacle to the life-and-death decisions that public health officials inevitably face when a serious public health crisis arises.
7. As friend of the Court, ASTHO will be able to present to the Court a different perspective regarding the issues in this case than those presented by the parties.

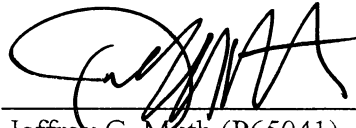
8. Michigan's judicial policy favors amicus filings. *Grand Rapids v Consumers Power Co*, 216 Mich 409, 414-415; 185 NW 852 (1921).

WHEREFORE, ASTHO requests that this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief and accept for filing ASTHO's proposed amicus curiae brief, which is attached as **Exhibit A**.

Respectfully submitted,

MILLER JOHNSON
Attorneys for Amicus Curiae Association of
State and Territorial Health Officials

Dated: July 17, 2018

By: 
Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

Of counsel:
Mitchell Y. Mirviss
Elizabeth C. Rinehart
Venable LLP
750 East Pratt Street, 9th Floor
Baltimore, MD 21202
(410) 244-7400

EXHIBIT A

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

NICOLAS LEONARD LYON,

Defendant.

Case No. 17T-01355-FY

Hon. David J. Goggins

Todd Flood (P58555)
Special Assistant Attorney General
Michigan Department of Attorney General
Attorney for the People of the State of
Michigan
155 West Congress. Ste 603
Detroit, MI 48226
(810) 429-5030

Charles E. Chamberlain (P33536)
Wiley & Chamberlain LLP
Attorneys for the Defendant
300 Ottawa Ave NW, Ste 810
Grand Rapids, MI 49503
(616) 458-2212

Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
Miller Johnson
Attorneys for Amicus Curiae Association
of State and Territorial Health Officials
45 Ottawa Ave. SW. Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

AMICUS CURIAE BRIEF FOR THE
ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS

TABLE OF CONTENTS

Index of Authorities	iii
Statement of Interest	4
I. ASTHO is a national nonprofit representing public health agencies and professionals across the country.	4
II. This prosecution greatly concerns ASTHO and its members, who fear that the criminalization of professional, discretionary decisionmaking will harm, not help, public health.....	4
Introduction.....	5
Argument	6
I. The Theory of the Case Violates Fundamental Criminal Law Principles.	6
A. Criminalizing public health analysis would be impermissibly vague.	6
B. Post hoc criminal evaluation of public health decisions is unjust.	8
C. The prosecution of health officials for their decision not to publicize an issue of public health is unprecedented and violates due process.....	9
D. The prosecution demonstrates the motivating purposes of civil immunity for government officials.	11
II. This Prosecution Threatens the Core Function of Public Health Nationwide.....	13
Conclusion	17

INDEX OF AUTHORITIES

Page(s)

Cases

<i>Cline v Frink Dairy Co.</i> , 274 US 445; 47 S Ct 681; 71 L Ed 1146 (1927)	10
<i>Connally v Gen Const Co.</i> , 269 US 385, 391; 46 S Ct 126, 127; 70 L Ed 322 (1926)	6
<i>Harlow v Fitzgerald</i> , 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982)	10, 11
<i>Morden v Grand Traverse Co.</i> , 275 Mich App 325; 738 NW2d 278 (2007)	10
<i>People v Coutu</i> , 235 Mich App 695; 599 NW2d 556 (1999)	12
<i>Savre v City of Ann Arbor</i> , unpublished opinion per curiam of the Court of Appeals, issued April 2, 2000 (Docket No. 212632)	11
<i>United States v Cohen Grocery Co.</i> , 255 US 81; 41 S Ct 298; 65 L Ed 516 (1921)	10

Statutes

MCL 750.478	12
MCL 750.481	12
MCL 752.11	12

Other Authorities

<i>Communicating Public Health Information Effectively: A Guide for Practitioners</i> 609 (Kindle ed. 2002)	6
<i>Control of Communicable Diseases</i> (David L. Heymann, MD, ed. 2015)	7, 12, 13

STATEMENT OF INTEREST

I. ASTHO is a national nonprofit representing public health agencies and professionals across the country.

Friend of the Court the Association of State and Territorial Health Officials (“ASTHO”) is a national nonprofit organization representing public health agencies in the United States, the U.S. Territories, and the District of Columbia, as well as over 100,000 public health professionals employed by these agencies. Our members include epidemiologists and other scientific and medical experts, academics, and experienced public health administrators. ASTHO’s mission is to support, equip, and advocate for state and territorial health officials in their work of advancing the public’s health and well-being. As part of that mission, ASTHO advises its members and assists in policy development at all levels of government to support best practices in public health.

II. This prosecution greatly concerns ASTHO and its members, who fear that the criminalization of professional, discretionary decisionmaking will harm, not help, public health.

ASTHO has a significant interest in the outcome of this case because a fundamental issue before the Court is whether ASTHO’s members—public health officials—should face criminal charges and trial for their professional decisions. In seeking to punish public health officials for their administration of their professional responsibilities, this case could cause a threat to public health nationwide. As discussed below, this risk would create a serious obstacle to the life-and-death decisions that public health officials inevitably face when a serious public health crisis arises.

In providing this analysis to the Court, ASTHO has drawn on the extensive clinical, epidemiological, and programmatic expertise of its members. Its board has carefully considered the allegations in the case and concluded that criminal prosecution of public health administrators’ responses to public health crises presents a major risk to public health practice and the public welfare.

INTRODUCTION

Criminalizing discretionary decisionmaking in a public health crisis will impair, rather than advance, the quality of response to such crises. In the midst of a public health crisis, public health decisionmakers need room to think and respond rationally and creatively to the specific threats before them. Criminally charging public health officials for their professional decisions will impair the decisionmaking of those officials, and the current prosecution illustrates why. The State claims that Director Lyon had “a duty to notify the public of any and all serious health concerns.” **Exhibit 1**, Probable Cause Statement at 9. But public health decisionmaking does not fit within a one-size-fits-all model, such that public health officials have an unbending duty to “notify the public of any and all serious health concerns.” regardless of whether such notice may be unwarranted or even harmful to public health. Depending upon the circumstances, unthinking public notice could cause widespread panic, render impossible meaningful communication about public health risks, and impede proper efforts to address the crisis at hand. If public health and criminal law are to coexist and work together to protect the public welfare, public health officials must be able to use their professional judgment to find the correct balance between the public’s right to know about potential public health threats and the need for public health officials to investigate and effectively respond to such threats. This type of discretionary and nuanced analysis cannot thrive in the face of criminal liability and certainly does not conform to the prosecution’s mandatory duty of public notice.

We respectfully urge the Court to halt this criminalization of public health practice.

ARGUMENT

I. The Theory of the Case Violates Fundamental Criminal Law Principles.

A. Criminalizing public health analysis would be impermissibly vague.

One of the bedrock tenets of criminal law “is that conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal.” § 1.2(b) Nature of criminal law—Basic premises, 1 Subst. Crim. L. § 1.2(b) (3d ed.); *id.* § 1.2(e) Purpose of criminal law—Prevention of harm (“Of course, not all harmful conduct is criminal. There is the basic requirement that harmful conduct, to be criminal, must be prohibited by law.”). Due process does not permit a law so vague that a person cannot understand its meaning and application. See *Connally v Gen Const Co*, 269 US 385, 391; 46 S Ct 126; 70 L Ed 322 (1926).

The concept of a criminally enforceable duty in public health decisionmaking is too vague and uncertain to satisfy due process requirements, absent willfully improper conduct. Effective public health administration involves scientific ambiguity, debate, calm crisis management, and unflinching evaluation of how to respond better in the future. Because science is constantly evolving and the events in a crisis situation can change rapidly, public health officials must make decisions with information that is incomplete or subject to change. For example, the nature and means of transmission of an illness may be uncertain, as was the case with AIDS for many years, or Lyme disease, or even Legionnaires’ disease. These gaps must be filled with the scientific and experiential expertise of public health officials until more information is gathered.

This principle applies with equal force to communicating with the public. “The basis for responsible public health communication is scientific knowledge and consensus. ... Practitioners have a responsibility to examine the quality of the available scientific information *prior to performing any communication activity.*” David E. Nelson et al., *Communicating Public Health Information Effectively: A Guide for Practitioners* 609 (Kindle ed. 2002) (emphasis added). This

is a basic tenet of public health. Sometimes public disclosure is important because the means of transmission is known and is largely preventable with simple precautionary measures. An example of this would be the Zika virus and mosquito control. But often, and especially in a crisis, the means of transmission and proper precautions are unknown. If there is no public health justification for informing the public of a problem that has no identified source and no identified precautions for the public to take, notification of the public may be unnecessary or even harmful, causing hysteria, false reports of additional cases, and other counterproductive reactions.¹

Given this type of evolving analysis, pinpointing when a public health decision becomes criminal is untenable and thus violates due process. This prosecution provides no guidance as to when a decision to pursue scientific inquiry in lieu of rash public announcements is criminal and when it is merely open to simple criticism or debate. Public health officials have no way of knowing which conduct and what decisions, made in the ordinary course of performing their duties, would cross the invisible line. The little guidance the State provides—mandatory, immediate disclosure “of any and all serious health concerns,” without any guidance as to what constitutes a “serious health concern”—is overly simplistic, at odds with the realities of public health crisis management, and consequently unprecedented. The careful deliberation,

¹ This case falls firmly into the latter category. As discussed in more detail in [Epi Amicus], Legionnaires’ disease cannot be transmitted person to person. In order to cause illness, *Legionella*, the bacteria responsible for causing Legionnaires’ disease, usually must be inhaled, which requires aspirating or inhaling microscopic droplets of infected water. *Control of Communicable Diseases* 336 (David L. Heymann, MD, ed. 2015). Thus, responding to a Legionnaires’ disease outbreak requires identifying the physical source of the contaminated water. *Id.* Until the source is identified, no action can reduce the risk. The most typical sources of Legionnaires’ disease are the industrial heating and cooling systems of hospitals or hotels. *Id.*; *Legionella (Legionnaires’ Disease and Pontiac Fever)*, Centers for Disease Control and Prevention, <https://www.cdc.gov/legionella/about/causes-transmission.html> (last visited June 12, 2018). Public health officials reasonably look for a source in places known to present potential risks, because otherwise the potential sources are overwhelming, as water is ubiquitous.

investigation, and judgment of public health officials is inherently discretionary and subjective. A criminal courtroom should be the last place to decide questions of sound science and epidemiology. Incarceration should not be one of the consequences for making professional decisions grounded in concern for how best to serve the public.

B. Post hoc criminal evaluation of public health decisions is unjust.

Criminalization of public health decisions poses a second problem. Even if an official makes a decision without complete information—which often is necessary—the analysis of the available information can take time. Therefore, the immediate focus during a public health event is to identify the source of the harm and keep it from spreading to other areas. Public health officials must focus their energy and resources on interventions that will reduce risk to as many people as possible. Whether an intervention will reduce the risk to the public depends on the type of threat and the specifics of the situation. In hindsight, another response may be shown to have been more effective, but officials typically have no way to know for sure. Any attempt to impose criminal punishments for such actions likely would be tainted by information discovered after the fact, when there is more complete information. We do not see how public health decisions can be equitably or effectively policed in hindsight using the unambiguous and inflexible framework of criminal law.

Of course, sometimes decisionmakers make mistakes. This is inevitable, and there are adequate existing institutional means to address such errors. Among other things, there is a culture within the public emergency response system pursuant to which, following an emergency, a “hot wash” does or should occur to assess what could have been done better, as there will always be room for improvement. This framework has historically supported positive evolution in public health response. It preserves the discretion needed during a crisis while recognizing the need to identify lessons learned to inform future responses. Imposing criminal liability, post hoc, for

decisions that occurred in the middle of a crisis, by contrast, would not improve decisionmaking, but will chill effective response and undermine the type of honest and candid post-event analysis that is both commonplace and essential to improving our public health systems.

For example, in this case, whether the harm could have been prevented using other means is highly debated. Were there effective precautionary measures that the public could have taken based on the information available at the time? This is a question the public health community is seeking to answer through scientific means. On its face, such an analysis is ill-suited to resolution in a courtroom. The scientific basis for public health theory and practice, which requires exploration and elimination of potential answers through research and analysis, would be hampered by the threat of prosecution, and subjecting public health officials to criminal sanctions for engaging in this necessary and invaluable analysis would be patently unjust.

C. The prosecution of health officials for their decision not to publicize an issue of public health is unprecedented and violates due process.

This prosecution crosses the long-settled line protecting public officials against punishment for their performance of their duties. An official's exercise of judgment, made in good faith, has never been subject to criminal sanctions in this country. Reversing that principle now, in a field rife with uncertainty and in a case where there still are no clear answers, would not only violate due process, but it would make it impossible for public health officials to perform their duties responsibly. Instead of basing decisions on what is best for the public, the officials would be forced to consider whether a decision, regardless of its merit, would invoke a criminal charge. By any perspective, this prosecution is unprecedented. Even under civil standards, we are unaware of any case that has ever imposed liability on a public health official under comparable facts. Director Lyon had no reason to know that his decisions were wrongful, let alone potentially criminal. The law does not permit such a prosecution.

Applying a criminal statute to the regular exercise of public duties, without fair notice, violates due process. See *Cline v Frink Dairy Co*, 274 US 445, 465; 47 S Ct 681; 71 L Ed 1146 (1927) (holding state criminal statute unconstitutional because it would “hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge, involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result”); *United States v Cohen Grocery Co.*, 255 US 81, 89; 41 S Ct 298; 65 L Ed 516 (1921) (same: striking statute where criminal enforcement “leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against” as the very “to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury”).

Even in a clear case of misconduct, criminal sanctions are not warranted unless the conduct is forbidden by law that gives advance warning that such conduct is criminal. See *Morden v Grand Traverse Co*, 275 Mich App 325, 343; 738 NW2d 278 (2007) (explaining that a doctor was entitled to immunity in a suit based on specific treatment decisions alleged to violate the Constitution “[b]ecause there was no court precedent predating [the doctor’s] actions that clearly established that such actions by a psychiatrist constitute deliberate indifference”); see also *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982) (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”). The type of surprise criminal liability in this case violates basic

principles of fairness and due process for any individual, but even more so for public officials, who typically rely on immunity from civil suits in order to best perform their jobs.

D. The prosecution demonstrates the motivating purposes of civil immunity for government officials.

The very notion of imposing criminal punishment for decisions that have never been deemed wrongful by any court, criminal or civil, would upend basic immunities afforded to public officials under the common law. Public officials have qualified immunity protecting them from civil liability for actions or decisions that, in hindsight, were not clearly established as wrongful at the time they occurred. By extension, this limited protection applies to criminal law as well.

The core reason for civil immunity is to protect officials and allow them to exercise their best judgment in performing their duties. See *Harlow*, 457 US at 806 (“As recognized at common law, public officers require this [immunity] protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”); *id.* at 807 (“[H]igh officials require greater protection than those with less complex discretionary responsibilities.”); see also *Sayre v City of Ann Arbor*, unpublished opinion per curiam of the Court of Appeals, issued April 2, 2000 (Docket No. 212632) (explaining that qualified immunity “gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law”) (internal quotation marks and citations omitted), attached as **Exhibit 2**.

Courts have long recognized that the threat of civil liability and trial poses great harm to an official’s service to the public, including “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Harlow*, 457 US at 816-17. This is especially true regarding “judgments surrounding discretionary action [which] almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions.” *Id.* Absent clear and flagrant misconduct, criminalizing a public officer’s exercise of

judgment has been consistently deemed inappropriate. *See, e.g., People v Coutu*, 235 Mich App 695, 705; 599 NW2d 556 (1999) (explaining that the common law crime of official misconduct requires improper or corrupt motives or violations of statutory duties); *id.* at 706 (“[The crime of official misconduct] does not encompass erroneous acts done by officers in good faith or honest mistakes committed by an officer in the discharge of his duties.”). The exercise of judgment makes this case distinct from other misdemeanor crimes in which officials willfully neglect to perform their duties. *See* MCL 750.478 (prohibiting “willful” neglect by a public official); MCL 752.11 (West) (prohibiting “wilfully and knowingly fail[ing] to uphold or enforce the law”); MCL 750.481 (West) (prohibiting an officer from “wilfully” neglecting to execute process). The prosecution’s theory of the case leaves no room for professional judgment.

There could conceivably be a case in which a public health officer willfully fails to perform a duty or so endangers the public health through willful acts as to warrant criminal sanctions. For example, if a public health official learned of a confirmed case of the Ebola virus in a local hospital but deliberately took no precautions to warn the medical community or other individuals who had had close contact with the patient, the official’s inaction would constitute knowing indifference to the serious risk of fatality. From a medical perspective, the failure to warn would be inexcusable. So, too, would a failure to isolate the patient from access to unprotected contact with the public. *See Control of Communicable Disease* 177 (stating that proper patient management for Ebola requires “immediate strict isolation in a private hospital room away from traffic patterns” and extensive use of isolation procedures, among other precautions). This type of behavior would truly present an official who either is “asleep on the job” or operating with total disregard for the safety of the community. Prosecution for such a dereliction of duty is not out of bounds, as the existence

of misconduct is indisputable, and the proper course of action would have been clearly established at the time the dereliction occurred.

But the response to Legionnaires' disease is not as clear-cut. *See id.* at 336 ("Two or more cases of legionellosis occurring among travelers to the same destination during a 1-year period or single case of laboratory-confirmed health care-associated Legionnaires' disease *should trigger additional case finding measures and an environmental assessment.*") (emphasis added). Unfortunately, during this assessment period, people can continue to contract the disease. This outcome, though tragic, does not demonstrate willful neglect on the part of public health officials. Instead, it is a consequence of the disease at issue and the way it must be addressed. Punishing public health officials because the characteristics of a disease made it difficult to ascertain the proper course of action serves no societal purpose. Liability should not attach where there is nothing an official should have done differently. Nor should the response to this problem be to eliminate the ability of public health officials to use their professional judgment. Such a drastic response would cause only more harm.

II. This Prosecution Threatens the Core Function of Public Health Nationwide.

The process of investigating the common sources of an outbreak and informing the public of how best to avoid transmission is fundamental to public health crisis management. Deciding how best to inform the public requires a careful balance of numerous considerations, with one overriding objective of protecting public health. If this prosecution is allowed to proceed, it will have an immediate effect on public health officials and the health of the public. Public health officials will need to notify the public of any and all public health threats regardless of whether such communication is advisable or beneficial. There are numerous risks to the public inherent in

subjecting officials to criminal liability for exercising their judgment in performing this crucial analysis.

First, for public health messages to be effective, they must be correct. Otherwise, there is a risk of public mistrust. But the messages often will *not* be correct when information is lacking and public health officials are unable to use their skills and judgment without fear of prosecution. As discussed above, the investigatory process cannot occur effectively when faced with potential criminal punishment for errors. Without proper investigation, the risk of error is significant.

Second, public health messages must be strategic. Inundating the public with premature warnings will diminish the effect of truly urgent information. Accordingly, officials must be given wide latitude to determine what needs to be said publicly, and when.

Finally, public health messages must consider the public's reaction and how to reduce the likelihood that the response will overshadow the message. Public notifications can have tremendous costs to public health even if the notice is correct. From AIDS to Ebola to Zika, we have seen repeated examples where public fear of the unknown impedes sound public health decisionmaking and intervention. The reality of public health decisionmaking is that members of the public may become angry about public health decisions or scared about the implications. Sometimes, public health officials must limit individual freedom (such as limiting travel to or from areas of extreme concentration of a disease), cause financial harm (such as when a restaurant or public attraction must be closed for health violations), or make strategic use of resources (such as determining where to concentrate testing or vaccinations). For example, if a public health official warns that a particular hospital is the source of a contagious disease outbreak, patients may refuse to receive care there, even though the outbreak has been safely contained. Although some patients may be able to obtain care elsewhere, others will not be able to do so, risking further negative

outcomes (perhaps even greater than those posed by the original threat). It is difficult enough for public health officials to resist the natural temptation to bow to the pressures of political influence or popular demand without having to consider whether the power of the state will be used to punish them for their mistakes. Criminal liability would further polarize the issues by adding the threat of punishment and incarceration in an atmosphere already thick with intense public scrutiny, heated emotions, and life-or-death consequences. This sends a chilling effect throughout the public health community.

There also is a real risk that such prosecutions will be influenced by the public's demand and the resulting political pressures. In situations where people are likely to be harmed, regardless of the decision; where a leader must make an unpopular decision; or where a leader must make a decision before all the information is obtained, the temptation to scapegoat the decisionmaker is always present. People understandably want an explanation of why a negative outcome happened and find someone to blame. But public health crises rarely present such clear-cut answers.

This case certainly is no exception. There is reasonable outrage about what happened with Flint's water supply. The public and the State seek to hold someone responsible. This is evident in the charging documents, which spend a disproportionate amount of time discussing the unrelated issue of lead in the water. See Probable Cause Statement at 2, 5. But criminal sanctions are not an appropriate mechanism to cure a system-wide failure, particularly criminal charges focusing on a tangential issue. The broad scope of the charging documents evinces the State's intent to use this prosecution as a political deflection, rather than to punish the alleged acts of individuals. In the process, though, the State is risking great harm to public health practice and society and eroding the protections necessary for officials to serve the public.

Had the officials in this case been required to announce that there had been instances of Legionnaires' disease, before determining the source of the outbreak or conducting a proper investigation, they could not have informed the public how to prevent transmission; they did not know. Speculation and panic would be almost certain. Had the officials made a "best guess" based on available research, they might have stated that Legionnaires' disease is commonly found in hotels and hospitals. This, in turn, would likely have caused the public to shun local hotels, causing wholly unnecessary grave economic harm to innocent businesses, or, even worse, to recklessly avoid hospitals, thereby *worsening* public health. Not only does the prosecution's theory of the case—that the transmission was through municipal water—indicate that such a warning would have been futile, it is entirely conceivable that the injured businesses or individuals would have sued and claimed that the official acted too quickly and made a mistake.

This type of amorphous liability is inappropriate for civil penalties, but it is frightening when the penalty sought by the State could be incarceration. Nor is there any reason for the State to limit prosecutions to communication. If this prosecution is permitted to go forward, any exercise of an official's discretion would carry the potential for criminal sanctions. The officials would face enormous pressure to shift their focus away from scientific analysis and toward reducing liability. Defensive public health practice inevitably would distort officials' responses to risks and their willingness to assess and reassess their decisions.

None of these considerations seek to diminish or obstruct the public's right to know about public health issues. Rather, they seek to ensure that the public is informed and educated in the most effective way possible, with the least amount of harm to other essential variables, such as

individual privacy, personal freedom, or public health resources. Ignoring these issues harms the public and ultimately distracts from the critical information public health officials need to convey.

For all of these reasons, the State's prosecution is at direct odds with basic tenets of public health regarding whether and when the public should be informed of public health hazards. Criminal prosecution is not the proper means of policing officials whose decisions apply core principles that guide public health administration. As national, state, and local experts in public health who must make decisions like these as part of our regular work, we are deeply concerned that the State is criminalizing our exercise of professional judgment.

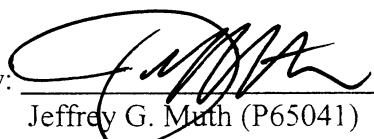
CONCLUSION

The events at issue were tragic. But criminalizing a public health official's decision to analyze the situation before informing the public will not prevent these types of events from occurring again. Even in hindsight, there is no warning sign that, had it been recognized, should have caused officials to react differently. The nature of the situation, including the circumstances of the outbreak and the type of disease, required a cautious approach. The State's theory of the case ignores this reality and instead jeopardizes the practice of public health officials and the welfare of the people they serve.

MILLER JOHNSON

Attorneys for Amicus Curiae Association of
State and Territorial Health Officials

Dated: July 17, 2018

By: 
Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

Of counsel:

Mitchell Y. Mirviss
Elizabeth C. Rinehart
Venable LLP
750 East Pratt Street, 9th Floor
Baltimore, MD 21202
(410) 244-7400

EXHIBIT 1

OFFICE OF SPECIAL COUNSEL
Investigator's Report



Attorney General Case No. 16-0004

DATE: June 14, 2017

Custody	DEFENDANT'S NAME	Age	Sex	Race	D.O.B.	SID
NIC	NICOLAS LEONARD LYON [REDACTED]	■	■	■	■	N/A

Offenses

COUNT 1 – HOMICIDE – MANSLAUGHTER – INVOLUNTARY

did cause the death of Robert Skidmore on December 13, 2015, as a result of of the negligent omission by said defendant to perform a legal duty, to wit: failing to alert the public about a Legionnaires' Disease outbreak in Genesee County, Michigan when he had notice that another outbreak was foreseeable and/or during the negligent performance of an act, to-wit: conducting an investigation of the Legionnaires' Disease outbreak in a grossly negligent manner; contrary to MCL 750.321. [750.321-C]

FELONY: 15 Years and/or \$7,500.00. DNA to be taken upon arrest.

COUNT 2 – MISCONDUCT IN OFFICE

did intentionally mislead and withhold information about the Legionnaires' Disease outbreak in Genesee County, Michigan from Governor Rick Snyder contrary to the duties enjoined upon him by the Michigan Public Health Code and/or directing a health official to discontinue an analysis that would aid in determining the source of the Legionnaires' Disease outbreak and save lives; contrary to MCL 750.505 [750.505].

FELONY: 5 Years and/or \$10,000.000

Place of Offense: CITY OF FLINT, MICHIGAN		Date: 2014 TO PRESENT		Date of Complaint 06/14/2017	
Complainant's Name JEFF SEIPENKO	Full Address SPECIAL AGENT	Age	Sex	Race	Phone No.
Person to Sign Complaint INFORMATION AND BELIEF		Reviewing Attorney & Bar No. SPECIAL ASSISTANT ATTORNEY GENERAL TODD FLOOD, P58555			

SPECIAL AGENT JEFFREY SEIPENKO
MICHIGAN ATTORNEY GENERAL

SPECIAL ASSISTANT ATTORNEY GENERAL
TODD FLOOD, P# 58555

PROBABLE CAUSE STATEMENT

I, Jeff Seipenko, a Special Agent assigned to the OFFICE OF SPECIAL COUNSEL, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, in support of this probable cause statement, state the following:

Defendant LYON was aware of Genesee County's Legionnaires' Disease outbreak at least by January 28, 2015 and did not notify the public until a year later. At that time, Defendant LYON knew that Legionnaires' Disease was deadly and that, if no mitigating steps were taken, the outbreak was likely to occur again. In his position as Director of the Michigan Department of Health and Human Services, Defendant LYON had a legal duty to protect public health. Defendant LYON exhibited gross negligence when he failed to alert the public about the deadly outbreak and by taking steps to suppress information illustrating obvious and apparent harms that were likely to result in serious injury. Defendant LYON willfully disregarded the deadly nature of the Legionnaires' Disease outbreak. Defendant LYON later stated that "he can't save everyone" and that "everyone has to die of something." Defendant LYON's acts and failure to act resulted in the death of at least one person, Robert Skidmore.

INTRODUCTION

1. On April 25, 2014, Flint's drinking water source was switched from pre-treated water received from the Detroit Water and Sewerage Department ("DWSD") to raw, untreated water from the Flint River. Flint's new water source was to be treated and distributed throughout the drinking water system by the Flint Water Treatment Plant ("FWTP"). Within one month of the water source switch, officials at the local, state, and federal level began receiving complaints from Flint residents on the Flint water supply system about Flint's drinking water quality. These complaints included, among other things, reports of severe discoloration, foul odor, and the onset of skin rashes.
2. By October 2014, Genesee County recorded 30 cases of Legionnaires' Disease for the previous six (6) months, while, in previous years, Genesee County recorded between two (2) and nine (9) cases of Legionnaires' Disease per year. Numerous witnesses have testified the record number of Legionnaires' Disease cases in 2014 is defined as an outbreak of the disease. On January 28, 2015, the Michigan Department of Health and Human Services ("MDHHS") State Epidemiologist, Corinne Miller, informed Defendant LYON of the outbreak.
3. On July 22, 2015, Governor Snyder's Chief of Staff, Dennis Muchmore, emailed Defendant LYON regarding reports of elevated levels of lead in Flint's drinking water supply. Defendant LYON then requested that his staff look into the issue. In September of 2015, Dr. Mona Hanna-Attisha, a pediatrician at Hurley Hospital in Flint, published her research findings showing a statistically significant increase in elevated blood lead levels in children in Flint since the city's switch in drinking water source. In response, Defendant LYON directed his staff to provide a "strong statement" that the blood lead levels were due to seasonal fluctuations.
4. In September 2015, Corinne Miller provided an update about a second wave of Flint's Legionnaires' Disease outbreak to Nancy Grijalva, Defendant LYON's Executive Administrative Assistant, that had occurred during the summer months of 2015.
5. On January 13, 2016, Governor Snyder declared a State of Emergency in Flint which, for the first time, notified the public about the Legionnaires' Disease outbreak. Soon thereafter, at the request of Governor Snyder's office, Shawn McElmurry, a Civil and Environmental Engineering Professor at

Wayne State University, put an academic team together to investigate any connection between the Legionnaires' Disease outbreak and Flint's switch in drinking water.

6. On April 25, 2016, Defendant LYON testified under oath at the Michigan Joint Select on the Flint Water Emergency, that their department was "not aware as they should have been" about the Legionnaires' Disease outbreak. At that same hearing, Defendant LYON testified that the MDHHS did not block the United States Centers for Disease Control and Prevention ("CDC") from helping the Genesee County Health Department ("GCHD"). The first time that Defendant LYON learned of significant health issues was from Dennis Muchmores' July 22, 2015 email.

VICTIM

7. Robert Skidmore, DOB: [REDACTED]; Last known address: [REDACTED]; DOD: December 13, 2015.
8. **Dr. Ahmed Abdel-Halim**, physician at McLaren Flint Hospital, will testify that Mr. Skidmore was admitted to the hospital on June 1, 2015 with symptoms consistent with pneumonia.
9. **Dr. Brian Hunter**, Genesee County Medical Examiner, will testify that he will not refute the medical doctor's findings that Legionnaires' Disease was a cause of Robert Skidmore's death.
10. **Dr. Sharook**, physician at McLaren Flint Hospital, will testify that on June 2, 2015, he collected Robert Skidmore's sputum sample and cultured the sample. The culture showed a positive result for the legionella antigen and was categorized with the outbreak identifier "GENESEE LEGIONELLA 2014." Mr. Skidmore died on December 13, 2015.
11. The investigation has shown that the CDC analyzed several sputum samples that showed a positive result for legionella bacteria, including a sample from Robert Skidmore. The antibody from Robert Skidmore's sputum sample matched an antibody from another victim's sputum sample. The second victim was a patient at Hurley Hospital in Flint and there are no known common sources of infection between the second victim and Robert Skidmore, except that they both received water at their respective hospitals from the Flint River.

THE DIRECTOR AND HIS DUTIES

12. Pursuant to Article 4, Section 51 of the Michigan Constitution of 1963, the Department of Public Health for the State of Michigan, presently referred to as the Michigan Department of Health and Human Services ("MDHHS"), 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. MCL 333.2221.
13. In furtherance of the duties assigned by the Michigan Constitution and the Michigan Public Health Code, the MDHHS exercises broad oversight of community health programs and initiatives throughout the State of Michigan.
14. While the Michigan Legislature assigned responsibility for "protecting, preserving, and promoting the health and safety of the people of Michigan," to the MDHHS itself, the functions assigned to the MDHHS by the Michigan Public Health Code vest in the Director or in an employee or agent of the

MDHHS who is assigned the function in accordance with internal administrative procedures of the department established by the Director. A function vested by law in a nonautonomous entity of the MDHHS may be exercised by the Director. MCL 333.2205.

15. During the relevant time period, Defendant LYON served as the Director of the MDHHS, and is charged with “protecting, preserving, and promoting the health and safety of the people of Michigan.” As such, the functions assigned by the Public Health Code to the respective state departments vested with him or employees or agents designated by him.

CHRONOLOGY

16. **Bonnie Childs**, Public Health Supervisor for the Communicable Disease Program at the GCHD, will testify that on June 24, 2014, Tim Bolen, Region 3 Epidemiologist within the Surveillance Section of the MDHHS, and she attended a “bug fuzz” meeting. Bug fuzz meetings are monthly meetings hosted by the GCHD, which are attended by, but not limited to, infection control practitioners from local hospitals, and are conducted for the purpose of updating the GCHD as to ongoing infectious disease concerns in Genesee County. Those present at the June 2014 meeting became concerned about Legionnaire’s Disease and expressed the need to “be careful about monitoring Legionnaires’ numbers.”
17. **Shannon Johnson**, Infectious Disease Epidemiologist at the MDHHS, will testify that on October 13, 2014, she created an illustration of the Legionnaires’ Disease outbreak in Genesee County in the form of epi-curves. These epi-curves showed approximately a three-fold increase in Legionnaires’ Disease cases as compared to 2013. Shannon Johnson will also testify that on January 28, 2015, she sent an email to her colleagues in the Communicable Disease Division of the MDHHS, advising them that Corinne Miller took her epi-curves to MDHHS Deputy Director Sue Moran’s office for a meeting with Defendant LYON.
18. **Susan Bohm**, Unit Manager of Enteric and Respiratory Illnesses Epidemiology Unit at the MDHHS, will testify that on October 17 and 21, 2014, she sent an email to her staff summarizing two calls she had with Liane Shekter-Smith, Chief of the Office of Drinking Water and Municipal Assistance at the Michigan Department of Environmental Quality (“MDEQ”). During these calls, Liane Shekter-Smith expressed concern that the MDHHS would announce the Flint River as the source of the Legionnaires’ Disease outbreak. Additionally, Liane Shekter-Smith informed Susan Bohm that Governor Snyder’s office had already “been involved.”
19. **Corinne Miller**, former State Epidemiologist and Director of the Bureau of Epidemiology at the MDHHS, will testify that on **January 28, 2015**, she provided Defendant LYON with epi-curves illustrating the 2014 Legionnaires’ Disease outbreak in Genesee County. She explained the epi-curves to Defendant LYON and informed him that he could not rule out Flint’s water as a possible source of the outbreak. Additionally, on the same day, several members of the MDHHS and the MDEQ communicated in an email about a conference call scheduled to take place that afternoon at or about 2:00 PM.

Corinne Miller will testify that on September 10, 2015, Defendant LYON’s secretary requested Corinne Miller to provide an update regarding the second wave of the Legionnaires’ Disease outbreak. Corinne Miller provided that update and assumed that the secretary’s request was on behalf of Defendant LYON and that he received her update.

20. **Linda Dykema**, Director of the Division of Environmental Health at the MDHHS, will testify that on January 28, 2015, she had a standing meeting with Corinne Miller. During the meeting, Corinne Miller told Linda Dykema that she had briefed Defendant LYON’s office on the concerns with legionella in

Genesee County. After the meeting, Linda Dykema sent an email to her staff at 1:49 PM, directing them that should they receive any phone calls regarding Flint on the MDHHS hotline, they should refer callers directly to her. Linda Dykema was “[s]haring this information [with her staff] to make [them] aware that there is a political situation that we don’t want to stumble into should we get hotline calls.” Her instruction to her staff stemmed from her desire to protect those under her supervision from getting into trouble with management (Defendant LYON) and potentially Governor Snyder’s Office. Given the tense environment in which she was working, akin to “walking on eggshells,” her decision to provide this direction to her staff was a tactical one. Additionally, Corrine Miller had suggested to her that if the Flint River water was the cause of the disease, it would be bad or embarrassing for Governor Snyder, because that decision had been made under emergency management.

Linda Dykema will also testify that on September 28, 2015, in response to Dr. Mona Hanna-Attisha’s published blood lead testing results, Defendant LYON asked his staff for “an analysis of the Virginia Tech/Hurley data and their conclusions.” He wanted “to make a strong statement with a demonstration of proof that the lead blood levels seen are not out of the ordinary and are attributable to seasonal fluctuations” without reference to any empirical evidence or substantiation.

21. **Harvey Hollins III**, Director of Governor Snyder’s Office of Urban Affairs and Initiatives, will testify that on March 13, 2015, he received an email from Brad Wurfel, Public Information Officer of the MDEQ, advising Hollins that his staff became aware of a Legionnaires’ Disease outbreak in Genesee County in December 2014. Brad Wurfel also stated that “[a]t a January meeting with area hospitals, [Michigan Department of Community Health], [M]DEQ and others, Defendant LYON reportedly directed the county health folks, in terms not uncertain, to get this done as a priority.” Harvey Hollins will testify that even though he was informed of the outbreak in March 2015, he assumed the appropriate Department Directors would have informed Governor Snyder.
22. **Jay Fiedler**, Manager of the Surveillance and Infectious Disease Epidemiology Section of the MDHHS, will testify that information about the Legionnaires’ Disease outbreak should have been released to the public in March of 2015.
23. **Laurel Garrison**, contact for the Legionellosis Surveillance & Outbreak Response Division at the CDC, will testify that on April 27, 2015, she emailed Suzanne Cupal of the GCHD and Jay Fiedler of the MDHHS, and stated that the leadership at the CDC was “very concerned about this Legionnaires’ Disease outbreak” because it was “one of the largest [they] know of in the past decade, and community-wide, and in [their] opinion and experience, it needs a comprehensive investigation.” At the end of the email, Garrison offered field assistance in the form of an Epi-Aid, which was declined by the MDHHS.
24. **Dennis Muchmore**, Governor Snyder’s former Chief of Staff, will testify that on July 22, 2015, he attended a meeting with Harvey Hollins, Dr. Laura Sullivan, and Reverends Alfred Harris, Wallace Hill, and Allen Overton. During this meeting, Dennis Muchmore took hand written notes indicating that lead was a big problem in Flint. Following the meeting, Dennis Muchmore emailed Defendant LYON stating that the people of Flint were “concerned . . . about the lead level studies they are receiving from the [M]DEQ samples,” that they are “getting blown off by us” and the citizens “are scared and worried about the health impacts.” Dennis Muchmore then asked Defendant LYON to personally look into the citizen’s concerns.
25. **Tim Becker**, former Deputy Director of the MDHHS, will testify that while Defendant LYON was on temporary leave, he was the interim Director of the MDHHS from February to March of 2016. During his time as Director, Becker gave public notice of a health hazard when plastics fluorinated carbons (PFCs) were seeping into the water table at Wurtsmith Air Force Base. Without definitively knowing that citizens were being affected by the PFCs, Becker notified the public because of the “risk posed.”

Tim Becker will also testify that he believed Defendant LYON learned about the Legionnaires' Disease outbreak one day before Governor Snyder publicly announced Genesee County's Legionnaires' Disease outbreak on **January 13, 2016**. Specifically, on January 12, 2016, Becker received a final report depicting either the 2014 or 2015 outbreak. After reviewing the report, he brought it to Defendant LYON and Defendant LYON stated that they needed to tell Governor Snyder the information about the outbreak immediately.

26. **Jarrold Agen**, Governor Snyder's former Chief of Staff, provided testimony that in December 2015, Harvey Hollins called him after Hollins attended a Flint Water Advisory Task Force meeting. Harvey Hollins advised Jarrod Agen that the Legionnaires' Disease outbreak was discussed at the meeting. On January 11, 2016, Jarrod Agen called a meeting at which the Legionnaires' Disease outbreak was an agenda item. Jarrod Agen asked Defendant LYON to look into the outbreak. On January 13, 2016, Jarrod Agen called Defendant LYON and asked if he had any results about the outbreak. Defendant LYON stated that there was indeed an outbreak, that there was reason to be concerned, and that Governor Snyder should know. Jarrod Agen met with Governor Snyder on January 13, 2016, and told Governor Snyder what Defendant LYON said about the Legionnaires' Disease outbreak. Governor Snyder made a public announcement disclosing the Legionnaires' Disease outbreak later that day.
27. The Office of Special Counsel has sworn testimony from a member of Governor Snyder's Cabinet that on January 11, 2016, the cabinet member was in a meeting with Defendant LYON, Eden Wells, Governor Snyder, Keith Creagh, and others. At this meeting, Defendant LYON and Eden Wells were discussing the Legionnaires' Disease outbreak amongst themselves. Others in that meeting overheard their conversation and inquired further into the details of the outbreak. Defendant LYON acknowledged that there was a Legionnaires' Disease outbreak, but explained that it was isolated to one healthcare institution.
28. **Julie Borowski**, Compliance Director at McLaren Hospital in Flint, will testify that on February 14, 2017, McLaren received a letter from Defendant LYON ordering the hospital to correct conditions because "McLaren Flint's water system is a nuisance, unsanitary condition, or cause of illness," or they would shut the hospital down. McLaren has always been in compliance with regulations and has followed all demands from the MDHHS. Julie Borowski will also testify that she and her colleagues believe that Defendant LYON is wrongfully attempting to intimidate McLaren and suggest that it is the cause of the Legionnaires' Disease outbreak.
29. **Shawn McElmurry**, Associate Professor of Civil Engineering at Wayne State University, will testify that in January of 2016, he was contacted by Harvey Hollins of Governor Snyder's Office and was asked to conduct research into whether Flint's switch in drinking water source caused the Legionnaires' Disease outbreak. Shawn McElmurry put together a research team known as the Flint Area Community and Environmental Partnership (FACHEP). In early summer 2016 meeting Shawn McElmurry had a meeting with Dr. Paul Kilgore, Defendant LYON, and Governor Snyder's Senior Advisor, regarding increased surveillance of the Legionnaires' Disease outbreak since they did not yet know the source of the outbreak. Defendant LYON indicated that the surveillance was something they could not afford. Dr. Kilgore responded to Defendant LYON that the decision he was making could cause more people to die. Defendant LYON responded that he "**couldn't save everyone.**" On August 12, 2016, Shawn McElmurry attended a Flint Water Inter-Agency Coordinating Committee meeting. After the meeting, Shawn McElmurry had a discussion with Defendant LYON, MDEQ Director Keith Creagh, Chief Medical Executive of Michigan, Eden Wells, and others. Defendant LYON directed Shawn McElmurry to explain the samples he was collecting, including the samples from Flint resident's water filters. Defendant LYON questioned the scientific value of Shawn McElmurry's study and stated that Shawn McElmurry had to balance the value of finding information and upsetting the public. On December 16,

2016, after a member of Shawn McElmurry's research team, Dr. Marcus Zervos, publicly stated that the research team still had concerns about the water, Shawn McElmurry received a phone call from a Senior Advisor to Governor Snyder. The advisor told Shawn McElmurry that he "needed to get on message," that the statement made by Dr. Marcus Zervos made his boss "very unhappy," and threatened to call Wayne State University's President Roy Wilson and to pull funding for his research. In a February 2017 meeting with Shawn McElmurry, Defendant LYON, and Eden Wells, Shawn McElmurry was directed to stop his retrospective analysis because it "proved problematic."

30. **Dr. Paul Kilgore**, Associate Professor at Wayne State University's School of Pharmacy, will testify that in a 2016 meeting with Shawn McElmurry, Defendant LYON, and Governor Snyder's Senior Advisor, Defendant LYON and the Senior Advisor objected to Paul Kilgore and Shawn McElmurry's research. Paul Kilgore explained the necessity of their research because they still did not know the source of the outbreak, and more people could die. Defendant LYON responded that **"they have to die of something."**

Further, Paul Kilgore will testify that, with the information available to the MDHHS, a Legionnaires' Disease outbreak should have been publicly declared in October 2014.

31. **Dr. Janet Stout**, President and Director of Special Pathogens Laboratory at the University of Pittsburgh, will testify that Flint's source water change and the subsequent management of the municipal water system caused conditions to develop within the municipal water distribution system that promoted legionella growth and dispersion, amplification, and the significant increase in cases of Legionnaires' Disease in Genesee County in 2014 and 2015. Further, that there is currently no evidence or information that demonstrates that the water system at McLaren-Flint hospital is currently at a greater risk for colonization or amplification of legionella than other comparable buildings in Flint.
32. **Governor Rick Snyder**, Governor of the State of Michigan, testified in front of the United States Congress on March 17, 2016 and stated the following in regards to the Legionnaires' Disease outbreak: "That was clearly a case where the MDHHS should have done more to escalate the issue to get it visible to the public and to me."

THE MICHIGAN JOINT SELECT COMMITTEE ON THE FLINT WATER EMERGENCY

33. On April 25, 2016, Defendant LYON appeared before the Joint Select Committee on the Flint Water Emergency. Prior to this appearance and pursuant to the Joint Select Committee's subpoena power, Defendant LYON submitted formal responses to Joint Select Committee questions sent out on April 20, 2105. During the April 25th Joint Select Committee session, the members of the committee repeatedly referred to the written responses Defendant LYON submitted.
34. During questioning conducted by Senator Jim Ananich, the following questions were posed to Defendant LYON who provided the following response:

Q: Does your department do any regular reports about diseases in the state for anyone in the Governor's office? And if so, what are those reports called and who gets them?

A: I'm not aware that we provide regular reports into the executive office about diseases. There are many statutory requirements and programmatic requirements that we have. But generally we try to handle those within the Department of Health and Human Services

Q: So none of those reports that you know of, legionella or others, are provided to the Governor's office?

A: I did not – through the time frame before January of this year, I did not send any formal reports, nor were any prepared, for the purpose of informing the executive office, no.

35. The testimony continued as follows:

Q: Couldn't Dr. [Matthew] Davis have been aware of both threats? [Referring to ebola and legionella.] And if he wasn't aware of legionella outbreak in 2014, whose decision was it not to tell him?

A: Well, I think that goes right back to what I said about the internal communications issue. And we're looking at that and that's a part of our investigation. Certainly... Certainly we weren't as aware as we could have been about the legionella outbreak that was going on in Genesee County.

36. During questioning conducted by Representative Edward Canfield, the following question was posed to Defendant LYON who provided the following response:

Q: And so my question to you is are you aware of any [M]DHHS memos or anything that were - discussions that were made, that would have restricted someone from the Genesee Department of Community Health to - or Health Department to contact the CDC?

A: I've read the email that's been reported to have done that, and I also – I think it's also important to note that we have six CD[C] staff embedded within the Department of Health and Human Services that help us with investigations.

We were in very regular contact with the Genesee County Health Department about any requests that they needed help with and what they were asking for, including - and especially around that time - I believe the development of the questionnaire that was going to be used in the community to try to assess what the potential exposure to legionella was.

What....What CDC had – CDC is brought in generally at the request of the state departments, as a whole. So we did not block them from making that contact, but what was said was with - in using CDC's guidance on this, is that those requests should come from the state.

And certainly we were sharing information about this with CDC as well.

37. During questioning conducted by Senator Joe Hune, the following question was posed to Defendant LYON who also provided the following response:

Q: Question number 9, in your response, Director Lyon to Senator Stamas' questions, question number 9 is "when does the department become involved in a public drinking water problem?" Your response is "our involvement is typically triggered by a request from another State agency, from a federal agency, the EPA, from a local health department, or from a private citizen." So, was your

involvement too slow?

A: From my perspective, I think we didn't have enough information to really act - the first that I became aware of potentially significant health-related issues, it was brought to my attention by Dennis Muchmore's email, and certainly we looked into our information at that point, did an analysis that was later proved to be insufficient to really address what was happening in Flint.

CONCLUSION

The investigation has shown that Defendant LYON received notice of a deadly Legionnaires' Disease outbreak in Genesee County at least one year before he informed the public. As the Director of the MDHHS, he has a duty to notify the public of any and all serious health concerns. After being informed warned about a potentially fatal health risk, Defendant LYON deliberately failed to inform the public of a deadly Legionnaires' Disease outbreak, which resulted in the death of Robert Skidmore. Furthermore, Defendant LYON participated in covering up the source of Genesee County's Legionnaires' Disease outbreak by repeatedly attempting to prevent an independent researcher from looking into the cause of the outbreak.

OFFICE OF SPECIAL COUNSEL



RECOMMENDATIONS

IN CUSTODY: NO	FLINT WATER INVESTIGATION	Date: 06/14/2017	☐ Further Investigation Ordered ☐ Further Investigation Completed
I RECOMMEND THE ISSUING OF A WARRANT AGAINST:			MISDEMEANOR

FELONY					
DEFENDANT'S NAME	Age	Sex	Race	D.O.B	SID NO
NICOLAS LEONARD LYON [REDACTED]	■	■	■	■	N/A
COUNT 1 – HOMICIDE – MANSLAUGHTER – INVOLUNTARY did cause the death of Robert Skidmore on December 13, 2015, as a result of of the negligent omission by said defendant to perform a legal duty, to wit: failing to alert the public about a Legionnaires' Disease outbreak in Genesee County, Michigan when he had notice that another outbreak was foreseeable and/or during the negligent performance of an act, to-wit: conducting an investigation of the Legionnaires' Disease outbreak in a grossly negligent manner; contrary to MCL 750.321. [750.321-C] FELONY: 15 Years and/or \$7,500.00. DNA to be taken upon arrest. COUNT 2 – MISCONDUCT IN OFFICE did intentionally mislead and withhold information about the Legionnaires' Disease outbreak in Genesee County, Michigan from Governor Rick Snyder contrary to the duties enjoined upon him by the Michigan Public Health Code and/or directing a health official to discontinue an analysis that would aid in determining the source of the Legionnaires' Disease outbreak and save lives; contrary to MCL 750.505 [750.505]. FELONY: 5 Years and/or \$10,000.000					
Date Completed: 06/14/2017			Signed: SPECIAL ASSISTANT ATTORNEY GENERAL TODD FLOOD, P# 58555		

**OFFICE OF SPECIAL COUNSEL
WITNESS LIST**

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No.

vs.

Hon.

NICOLAS LEONARD LYON

Defendant(s).

_____ /

The names and residences of the witnesses for the People in the above-entitled cause are listed below. The witnesses the people intend to produce at trial, pursuant to MCLA 767.40a(3), are designated by an “X” in the boxes to the left.

	Last Name	First Name	RESIDENCES (List next leave/furlough dates for all police witness) (List phone numbers for all civilian witness)
	Agen	Jarrod	
	Becker	Tim	
	Bohm	Susan	
	Borowski	Julie	
	Brue	Stan	
	Childs	Bonnie	
	Dykema	Linda	
	Fiedler	Jay	
	Garrison	Laurel	
	Henry	James	
	Hollins	Harvey	
	Kilgore	Paul	
	McElmurry	Shawn	
	Miller	Corinne	
	Muchmore	Dennis	
	Sullivan	Laura	

Officer in charge of case
OIC Telephone Number
SAAG

SAAG

Date: _____

Trial SAAG

Date: _____

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bindover/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN 67th 7th JUDICIAL DISTRICT JUDICIAL CIRCUIT	INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT
--	-------------------------------------	--

District Court ORI: MI-

Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN		Defendant's name and address NICOLAS LYON v [REDACTED]		Victim or complainant J. Seipenko	
				Complaining witness J. Seipenko	
Codefendant(s) (if known)				Date: On or about 2014-present	
City/Twp./Village Flint	County in Michigan Genesee	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB [REDACTED]
Police agency report no. 16-0004	Charge Involuntary Manslaughter, Misconduct in Office			Maximum penalty 15 years	
☐ A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		☐ Oper./Chauf. ☐ CDL	Vehicle Type	Defendant DLN	

Witnesses

STATE OF MICHIGAN, COUNTY OF GENESEE .

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this county appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT 1 – HOMICIDE – MANSLAUGHTER – INVOLUNTARY

did cause the death of Robert Skidmore on December 13, 2015, as a result of of the negligent omission by said defendant to perform a legal duty, to wit: failing to alert the public about a Legionnaires' Disease outbreak in Genesee County, Michigan when he had notice that another outbreak was foreseeable and/or during the negligent performance of an act, to-wit: conducting an investigation of the Legionnaires' Disease outbreak in a grossly negligent manner; contrary to MCL 750.321. [750.321-C]
FELONY: 15 Years and/or \$7,500.00. DNA to be taken upon arrest.

COUNT 2 – MISCONDUCT IN OFFICE

did intentionally mislead and withhold information about the Legionnaires' Disease outbreak in Genesee County, Michigan from Governor Rick Snyder contrary to the duties enjoined upon him by the Michigan Public Health Code and/or directing a health official to discontinue an analysis that would aid in determining the source of the Legionnaires' Disease outbreak and save lives; contrary to MCL 750.505 [750.505].
FELONY: 5 Years and/or \$10,000.000

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

By: _____

Date

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bindover/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

67th 7th	STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT	COMPLAINT FELONY	CASE NO. DISTRICT CIRCUIT
-------------	---	-----------------------------	---

District Court ORI: MI-

Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN		Defendant's name and address NICOLAS LYON v [REDACTED]		Victim or complainant J. Seipenko	
Codefendant(s) (if known)				Complaining witness J. Seipenko	
City/Twp./Village Flint		County in Michigan Genesee	Defendant TCN	Defendant CTN	Defendant SID Defendant DOB [REDACTED]
Police agency report no. 16-0004	Charge Involuntary Manslaughter, Misconduct in Office			Maximum penalty 15 years	
☐ A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		☐ Oper./Chauf. ☐ CDL	Vehicle Type	Defendant DLN	

Witnesses

STATE OF MICHIGAN, COUNTY OF GENESEE .

The complaining witness says that on the date and at the location described, the defendant, contrary to law,

COUNT 1 – HOMICIDE – MANSLAUGHTER – INVOLUNTARY

did cause the death of Robert Skidmore on December 13, 2015, as a result of of the negligent omission by said defendant to perform a legal duty, to wit: failing to alert the public about a Legionnaires' Disease outbreak in Genesee County, Michigan when he had notice that another outbreak was foreseeable and/or during the negligent performance of an act, to-wit: conducting an investigation of the Legionnaires' Disease outbreak in a grossly negligent manner; contrary to MCL 750.321. [750.321-C]

FELONY: 15 Years and/or \$7,500.00. DNA to be taken upon arrest.

COUNT 2 – MISCONDUCT IN OFFICE

did intentionally mislead and withhold information about the Legionnaires' Disease outbreak in Genesee County, Michigan from Governor Rick Snyder contrary to the duties enjoined upon him by the Michigan Public Health Code and/or directing a health official to discontinue an analysis that would aid in determining the source of the Legionnaires' Disease outbreak and save lives; contrary to MCL 750.505 [750.505].

FELONY: 5 Years and/or \$10,000.000

☐ The complaining witness asks that defendant be apprehended and dealt with according to law.

Warrant authorized on _____ by: Date
Prosecuting official _____
☐ Security for costs posted

Complaining witness signature _____

Subscribed and sworn to before me on _____ .
Date

Judge/Magistrate/Clerk _____

Bar no. _____

67th 7th	STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT	WARRANT FELONY	CASE NO. DISTRICT CIRCUIT
-------------	---	---------------------------	---

District Court ORI: MI-

Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN		Defendant's name and address NICOLAS LYON v [REDACTED]		Victim or complainant J. Seipenko	
				Complaining witness J. Seipenko	
Codefendant(s) (if known)				Date: On or about 2014-present	
City/Twp./Village Flint	County in Michigan Genesee	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB [REDACTED]
Police agency report no. 16-0004	Charge Involuntary Manslaughter, Misconduct in Office			Maximum penalty 15 years	
☐ A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		☐ Oper./Chauf. ☐ CDL	Vehicle Type	Defendant DLN	

Witnesses

STATE OF MICHIGAN, COUNTY OF GENESEE .**To any peace officer or court officer authorized to make arrest:** The complaining witness has filed a sworn complaint in this court stating that on the date and the location described, the defendant, contrary to law,**COUNT 1 – HOMICIDE – MANSLAUGHTER – INVOLUNTARY**

did cause the death of Robert Skidmore on December 13, 2015, as a result of of the negligent omission by said defendant to perform a legal duty, to wit: failing to alert the public about a Legionnaires' Disease outbreak in Genesee County, Michigan when he had notice that another outbreak was foreseeable and/or during the negligent performance of an act, to-wit: conducting an investigation of the Legionnaires' Disease outbreak in a grossly negligent manner; contrary to MCL 750.321. [750.321-C]

FELONY: 15 Years and/or \$7,500.00. DNA to be taken upon arrest.

COUNT 2 – MISCONDUCT IN OFFICE

did intentionally mislead and withhold information about the Legionnaires' Disease outbreak in Genesee County, Michigan from Governor Rick Snyder contrary to the duties enjoined upon him by the Michigan Public Health Code and/or directing a health official to discontinue an analysis that would aid in determining the source of the Legionnaires' Disease outbreak and save lives; contrary to MCL 750.505 [750.505].

FELONY: 5 Years and/or \$10,000.000

Upon examination of the complaining witness, I find that the offense charged was committed and that there is probable cause to believe that defendant committed the offense. THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN,

☐ a. I order you to arrest and bring defendant before the _____ District Court immediately.

☐ b. I order you to bring defendant before the _____ District Court.

Date

Judge/Magistrate

Bar no.

See return on reverse side.

RETURN

As ordered in this warrant, the defendant was arrested on _____ at _____
Date Time

at _____ .
Place of arrest

Date

Peace officer

67th 7th	STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT	BINDOVER/TRANSFER AFTER PRELIMINARY EXAMINATION FELONY	CASE NO. DISTRICT CIRCUIT
-------------	---	---	--

District Court ORI: MI-

Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN		Defendant's name and address NICOLAS LYON v [REDACTED]		Victim or complainant J. Seipenko	
Codefendant(s) (if known)				Complaining witness J. Seipenko	
City/Twp./Village Flint	County in Michigan Genesee	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB [REDACTED]
Police agency report no. 16-0004	Charge Involuntary Manslaughter, Misconduct in Office			Maximum penalty 15 years	
☐ A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		☐ Oper./Chauf. ☐ CDL	Vehicle Type	Defendant DLN	

Date: _____

District judge: _____

Reporter/Recorder

Cert.no.

Represented by counsel

Bar no.

Bar no.

EXAMINATION WAIVER

- I, the defendant, understand:
 - I have a right to employ an attorney.
 - I may request a court-appointed attorney if I am financially unable to employ one.
 - I have a right to a preliminary examination where it must be shown that a crime was committed and probable cause exists to charge me with the crime.
- I voluntarily waive my right to a preliminary examination and understand that I will be bound over to circuit court on the charges in the complaint and warrant (or as amended).

Defendant attorney

Bar no.

Defendant

I consent to this waiver:

Prosecuting attorney

Bar no.

ADULT BINDOVER

- ☐ 3. Examination was waived on _____ .
Date
- ☐ 4. Examination was held on _____ and it was found that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed the offense.
- ☐ 5. The defendant is bound over to circuit court to appear on _____ at _____ .
Date Time
- ☐ on the charge(s) in the complaint.
- ☐ on the amended charge(s) of _____

_____ MCL/PACC Code _____ .

6. Bond is set in the amount of \$ _____. Type of bond: _____ ☐ Posted

Date

Judge

Bar no.

Certification of transmittal and bindover/transfer for juvenile are printed on other side.

MCL 764.1 et seq., MCL 766.1 et seq., MCL 767.1 et seq., MCR 6.110

JUVENILE BINDOVER/TRANSER

- ☐ 3. Examination was waived on _____ .
Date
- ☐ 4. Examination was held on _____ and it was found that
Date
- ☐ there is probable cause that a life offense occurred and there is probable cause that the juvenile committed the life offense.
- ☐ there is no probable cause that a life offense occurred or there is no probable cause that the juvenile committed the life offense, but some other offense occurred that if committed by an adult would constitute a crime, and there is probable cause to believe the juvenile committed that offense.
- ☐ 5. The juvenile is bound over to circuit court criminal division to appear on _____ at _____ .
Date Time
- ☐ on the charge(s) in the complaint.
- ☐ on the amended charge(s) of _____
- _____ MCL/PACC Code _____ .
- ☐ 6. This case is transferred to the family division of the circuit court for further proceedings
☐ immediately.
- ☐ on _____ at _____ .
Date Time
7. Bond is set in the amount of \$ _____. Type of bond: _____ ☐ Posted

Date

Judge Bar no.

MCL 766.14(2), MCR 6.911

CERTIFICATION

I certify that on this date I have transmitted to the _____ circuit court criminal division the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, and any recognizances received.

Date

Court clerk

Note: Send a copy of this bindover to the Michigan State Police Criminal Justice Information Center.

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

NICOLAS LEONARD LYON,

Defendant.

Case No. 17T-01355-FY

Hon. David J. Goggins

TODD FLOOD (P58555)
Special Assistant Attorney General
Michigan Department of Attorney
General
Attorney for the People of the State of
Michigan
155 West Congress, Ste 603
Detroit, MI 48226
(810) 429-5030

CHARLES E. CHAMBERLAIN (P33536)
Wiley & Chamberlain LLP
Attorneys for the Defendant
300 Ottawa Ave NW, Ste 810
Grand Rapids, MI 49503
(616) 458-2212

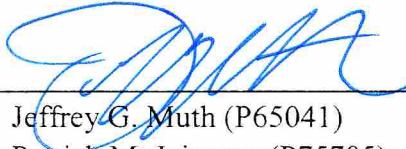
Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
Miller Johnson
Attorneys for Amicus Curiae Association of
State and Territorial Health Officials
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

NOTICE OF APPEARANCE

Jeffrey G. Muth, of Miller Johnson, hereby enters his appearance as counsel for Amicus Curiae, Association of State and Territorial Health Officials, in the above-captioned matter.

MILLER JOHNSON
Attorneys for Amicus Curiae Association of State
and Territorial Health Officials

Dated: July 17, 2018

By: 
Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

NICOLAS LEONARD LYON,

Defendant.

Case No. 17T-01355-FY

Hon. David J. Goggins

TODD FLOOD (P58555)
Special Assistant Attorney General
Michigan Department of Attorney
General
Attorney for the People of the State of
Michigan
155 West Congress, Ste 603
Detroit, MI 48226
(810) 429-5030

CHARLES E. CHAMBERLAIN (P33536)
Wiley & Chamberlain LLP
Attorneys for the Defendant
300 Ottawa Ave NW, Ste 810
Grand Rapids, MI 49503
(616) 458-2212

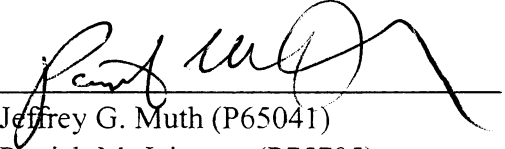
Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
Miller Johnson
Attorneys for Amicus Curiae Association of
State and Territorial Health Officials
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

NOTICE OF APPEARANCE

Patrick M. Jaicomo, of Miller Johnson, hereby enters his appearance as counsel for Amicus Curiae, Association of State and Territorial Health Officials, in the above-captioned matter.

MILLER JOHNSON
Attorneys for Amicus Curiae Association of State
and Territorial Health Officials

Dated: July 17, 2018

By: 
Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

NICOLAS LEONARD LYON,

Defendant.

Case No. 17T-01355-FY

Hon. David J. Goggins

TODD FLOOD (P58555)
Special Assistant Attorney General
Michigan Department of Attorney
General
Attorney for the People of the State of
Michigan
155 West Congress, Ste 603
Detroit, MI 48226
(810) 429-5030

CHARLES E. CHAMBERLAIN (P33536)
Wiley & Chamberlain LLP
Attorneys for the Defendant
300 Ottawa Ave NW, Ste 810
Grand Rapids, MI 49503
(616) 458-2212

Jeffrey G. Muth (P65041)
Patrick M. Jaicomo (P75705)
Miller Johnson
Attorneys for Amicus Curiae Association of
State and Territorial Health Officials
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700

PROOF OF SERVICE

Jessica Brickner states that she is an employee of Miller Johnson and that on the 17th day of July, 2018, she served a copy of Association of State and Territorial Health Officials' Motion for Leave to File Amicus Curiae Brief in Support of Defendant and Notice of Appearance's for attorney Jeffrey G. Muth and Patrick M. Jaicomo via first class mail on:

