STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Servitto, P.J., and Murray and Borello, J.J.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v TERRENCE MITCHELL BRUCE, Defendant-Appellee. _____/	Supreme Court No. 156827 Court of Appeals No. 331232 Jackson Circuit Court No. 15-4688-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v STANLEY LYLE NICHOLSON, Defendant-Appellee. _____/	Supreme Court No. 156828 Court of Appeals No. 331233 Jackson Circuit Court No. 15-4688-FH

BRIEF ON APPEAL OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCL 600.215(3) and MCR 7.303(B)(1). On November 30, 2017, the People of the State of Michigan filed an application for leave to appeal the Court of Appeals' decision in this matter. In a March 21, 2018 Order, this Court granted leave to appeal, "limited to the issue whether the defendant federal border patrol agents were 'public officers' for purposes of the common-law crime of misconduct in office when they assisted – as members of a law enforcement task force that included Michigan State Police and Michigan motor carrier officers – in the execution of a search warrant."

STATEMENT OF QUESTIONS PRESENTED

1. A "public officer" for purposes of Michigan's common-law crime prohibiting misconduct in office includes an individual whose position, under state law, is created by the Legislature or an inferior body to carry out sovereign duties. When the defendants converted an individual's property for their own personal use during the execution of a search warrant, they were federal border patrol agents acting pursuant to a Michigan statute enabling them to "enforce state law to the same extent as a state or local officer." Are the defendants public officers?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Yes.

   Court of Appeals' answer: No.

   Court of Appeals' dissent: Yes.

STATUTES INVOLVED

MCL 750.505 provides:

> 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.

MCL 764.15d provides, in pertinent part:

> (1) A federal law enforcement officer may enforce state law to the same extent as a state or local officer only if all of the following conditions are met:
>
> > (a) The officer is authorized under federal law to arrest a person, with or without a warrant, for a violation of a federal statute.
> >
> > (b) The officer is authorized by federal law to carry a firearm in the performance of his or her duties.
> >
> > (c) One or more of the following apply:
> >
> > * * *
> >
> > > (iii) The officer is participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency.
> > >
> > > (iv) The officer is acting pursuant to the request of a state or local law enforcement officer or agency.
> >
> > * * *
>
> (2) Except as otherwise provided in subsection (3), a federal law enforcement officer who meets the requirements of subsection (1) has the privileges and immunities of a peace officer of this state.

INTRODUCTION

When an attorney is admitted to practice in Michigan *pro hac vice*, she surely knows that she is bound by Michigan's rules governing attorney conduct. It is plain common sense. Federal law enforcement officers authorized to act as Michigan law enforcement officers should be treated the same way—subject to Michigan law to the same extent as their state and local counterparts. This, too, is common sense. And it is supported by statute. The Michigan Legislature gives certain individuals the same substantive authority that it gives to the State Police: the authority to "enforce state law to the same extent as a state or local officer," and to enjoy "the privileges and immunities of a peace officer of this state." MCL 764.15d.

The defendants, Bruce and Nicholson, were federal border patrol agents permanently serving in a Michigan State Police task force comprised of state and federal law enforcement officers; because of their position in the task force, the defendants received authority under § 15d to enforce our State's laws. They abused that authority by converting private property for their own use while executing a search warrant.

The Department of Attorney General charged the defendants with misconduct-in-office and was therefore required to show that they are "public officers." Under long-settled Michigan common law, a public officer is an individual whose position is created by the Legislature and is endowed with the authority to carry out sovereign duties. The individual's title is unimportant. Rather, the law considers the substance of the Legislature's grant of authority. Michigan courts,

this one included, have consistently held law enforcement officers are public officers. Bruce and Nicholson ought to be treated no differently.

In addition to the strong statutory guidance, the proliferation of multijurisdictional task forces counsels in favor of treating each member enforcing Michigan law the same and establishing that the State will not countenance misconduct by the officers it entrusts to enforce its laws. This Court should reverse the Michigan Court of Appeals' judgment to the contrary.

STATEMENT OF FACTS AND PROCEEDINGS

Defendants Bruce and Nicholson are border patrol agents embedded in a joint task force with state law enforcement officers.

The Hometown Security Team is a joint task force under the authority of the Michigan State Police (MSP), staffed by state and federal law enforcement agents. (125a–126a.) Two federal border patrol agents, defendants Bruce and Nicholson, were "permanently embedded" with the task force; in other words, "[t]hey didn't have other regular duty assignments. That was their job assignment." (127a; 178a, 179a–180a.) Another law enforcement team, the Jackson Narcotics Enforcement Team, also included state and local officers and worked in conjunction with the task force.

The task force, Bruce and Nicholson included, and the narcotics team combined to execute a search warrant at a suspected drug property near Ann Arbor. (127a.) Michael Teachout, an MSP Trooper, created a tabulation during the search, which accounts for every single item "of evidentiary value" seized by the police

during execution of a search warrant. (88a, 94a.) Seized items were loaded into the truck and trailer of the Jackson Narcotics Enforcement Team. (90a.) According to Teachout, other officers were "[a]bsolutely not" permitted to "make a decision to take property to the truck without making sure it's [in the] tabulation." (90a.)

Both Teachout and Assistant MSP Post Commander David Cook testified that taking any property from a residence for personal use, even "a quarter," is not permitted because it is against the law as well as the official orders of the MSP. (95a–96a, 151a, 154a). No one had authority to take private property from a person's residence that was not being seized for forfeiture or evidentiary value. (159a.)

Defendants take items for their own personal use.

At trial, Nicholson testified that, while he was working with the Hometown Security Team, he took and followed orders of MSP. (259a–260a.) He stated that he considered himself a "peace officer" and explained his experience conducting search warrants in Detroit and as a police officer for the State of Maine. (273a, 275a–276a, 280a–281a.) He admitted that he knew that when executing a search warrant he should not "take anything from [a] house even though it's trash." (282a.)

Nonetheless, Nicholson, who said his role was to "perform external security" during execution of the search warrant (262a), admitted that he took an old thermometer from the property as a souvenir. (264a–270a.) Nicholson confirmed that, after attempting to fix it up, he simply threw the thermometer in the garbage

at home. (270a.) He also testified that, when an officer came to his house days later to investigate the taking, "[a]t that point I realized that it was not a piece of trash [but] that it was somebody's property that had been removed from the home and I was responsible for it." (272a.) At trial, Nicholson's excuse was that an MSP trooper gave him the thermometer and told him that he should take it and fix it up, knowing that Nicholson was a "tinkerer of sorts." (264a.) This contradicted Nicholson's prior statement to Charles Christensen, the investigator in charge of this case. Nicholson told Christensen that "no officer ever told him he could take the property" and that no officer made any comments about taking "whatever you want illegally." (217a.)

About a week after execution of the search warrant, the task force's leader, MSP Sergeant Steven Temelko, received information that Nicholson's co-defendant Bruce had also taken property from one of the locations during execution of the search warrant. (188a–189a.) Sergeant Temelko asked Bruce about it, and Bruce "advised he did take a chair." (189a.) Bruce said that he did so out of "stupidity." (190a.)

The trial court denies the defendants' motion to dismiss the misconduct-in-office charges.

Before trial, Bruce and Nicholson filed a joint motion to dismiss the misconduct-in-office charges because they were not "public officers" subject to that crime. The trial court considered whether a federal border patrol agent acting in concert with state officers is a public officer. (28a.) The court recognized that,

pursuant to MCL 764.15d, federal officers can enforce state law to the same extent as state or local officers. (28a–29a.) The court found that the defendants were participating in a joint investigation with state and local law enforcement and that the defendants "were acting under the color of the State Police powers that were there present as they were a joint venture at that point in time." (29a.) Because the defendants were essentially acting as part of MSP, they were public officers, and the Court denied the motion. (29a.)

For the same reasons, the Court subsequently denied the defendants' motions for directed verdicts that raised the same issue. (255a–256a.)

The jury convicts.

The jury found Nicholson and Bruce guilty of misconduct-in-office; they were both acquitted of a separate charge of larceny in a building. (287a–288a.) The court sentenced each defendant to 12 months' probation. (287a–288a.)

A split Michigan Court of Appeals panel determines that defendants are not public officers.

The Michigan Court of Appeals majority concluded that Bruce and Nicholson were not public officers and were therefore exempt from the crime of misconduct-in-office. (292a.) The panel quoted this Court's opinion in *People v Coutu*, 459 Mich 348, 354 (1999), which set forth a number of elements to be examined to determine whether an individual is a public officer, the first of which states that the individual's position "must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the

legislature." (292a.) Focusing on the fact that the "the position of federal border patrol agent was not created by the Michigan Constitution or by the Legislature" or an inferior state authority, the majority held that the People had not established that the defendants satisfied the *Coutu* framework. (292a.). The panel majority limited its discussion of § 15d to a single sentence: "While MCL 764.15d allows federal law enforcement officers to enforce state law 'to the same extent as a state or local officer' if certain conditions are met, the fact that defendants were temporarily enforcing Michigan law bears no relation to how their positions were created." (292a.)

Because it held that the People had not established the first element required to prove that the defendants were public officers, the court vacated the misconduct-in-office convictions and declined to consider the remaining *Coutu* factors or the defendant's other claims. (292a.)

The Court of Appeals dissent would have concluded, under *Coutu*, that the defendant are public officers.

Judge Borello, in dissent, would have affirmed the defendants' convictions. He would have concluded that at the time of the charged offense, defendants were in positions that were created by the state legislature through § 15d. The statute "confer[ed] state authority upon" the defendants, who were operating as part of the MSP-led task force. (292a.) The position that defendants held was as task force members; § 15d created defendants' positions. (292a.) Judge Borello relied on the

legislative determination that federal officers can act as state law enforcement officers under certain circumstances:

> [T]he Legislature crafted a law that permits federal law enforcement officers to act under the color of state law to the same extent as state or local officers under certain circumstances such as part of a joint federal-state investigation. See MCL 764.15d(1)(c)(iii)-(iv). Hence at the time of the offenses, defendants were operating not as border patrol agents but as part of a joint task force. The only way defendants could participate in the joint task force was by state statute, MCL 764.15d. The majority fails to address the impact that MCL 764.15d has on whether the federal officers, at the time the offense was committed, were acting in law enforcement positions—i.e. [Hometown Security Team] members—that were created by the Legislature pursuant to the statutory authorization under MCL 764.15d. [296a.]

Disagreeing with the majority on the first element, the dissent examined the rest of the *Coutu* elements, finding that each was satisfied, and would have held that Bruce and Nicholson were public officers subject to the crime of misconduct in office. (296a–297a.)

STANDARD OF REVIEW

Whether a defendant is a public officer is a question of law reviewed de novo. *People v Coutu*, 459 Mich 348, 353 (1999).

On appeal, Bruce and Nicholson challenged the trial court's decision not to grant their motion for a directed verdict and pretrial motion to dismiss, respectively. A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Bylsma*, 493 Mich 17, 26 (2012). An abuse of discretion occurs when the circuit court's decision falls outside the range of principled outcomes. *People v Jones*, 497 Mich 155, 161 (2014).

ARGUMENT

I. Bruce and Nicholson are public officers, just like any other state or local law enforcement officer, because they were granted specific statutory authority to act and be treated as state or local law enforcement participating in a joint state-federal investigative team.

The law ought not make a distinction between two individuals who are delegated precisely the same authority, perform the same duties, and are clothed with the same privileges. This case of first impression presents the question whether this State's common-law crime of misconduct in office encompasses federal officers acting under the authorization of state law, even though they lack a formal title. Because this Court has eschewed the sacrifice of substance for form when determining who is a public officer, holding that this crime does encompass the defendants would merely be reiterating that long-established principle.

Given the interconnectedness of law enforcement on the local, state, and federal levels—especially facing the challenges of terrorism, immigration enforcement, and the interstate drug and firearm trade—law enforcement officers are, more than ever, compiled in joint task forces. Law enforcement officers serving on those task forces and enforcing Michigan law should be subject to the same standard of conduct, no matter who signs their paychecks.

A. Law enforcement officials have consistently been considered public officers subject to the crime of misconduct in office.

The Legislature created a position of public trust for federal agents when it permitted them to enforce state law to the same extent as state and local officers. This plain delegation of sovereign authority, MCL 764.15d, establishes a public

office. That the Legislature did not prescribe a specific name for that office is of no moment.

The statute setting the penalty for misconduct in office leaves its definition to the common law. 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 . . . ."). Under the common law, misconduct in office is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Perkins*, 468 Mich 448, 456 (2003), quoting *People v Coutu,* 459 Mich 348, 354 (1999). The crime of misconduct in office applies only to those stationed to act in the public trust. The universe of individuals subject to this common-law crime is limited to "public officers," also called "public officials." *Coutu*, 459 Mich at 358 n 12 (there is "no distinction between the terms 'public officer' and 'public official' ").

This Court has long recognized a broad definition of "public office," stating that the "correct rule" focuses on the *duties delegated* and the *functions performed* by the individual:

> A public office is the *right, authority and duty* created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is *invested with some portion of the sovereign functions of the government*, to be exercised by him for the benefit of the public. The individual so invested is a public officer. [*People v Freedland*, 308 Mich 449, 455 (1944) (emphasis added), quoting Meechem on Public Offices and Officers §§ 1 and 2.]

Accordingly, "public office" is defined *not* as a formal position with a title, but as "the right, authority and duty" conferred by law. A public officer is not a position category determined by human resources; it is a delegation of authority and duty by

the Legislature. 63 Am Jur 2d Public Officers and Employees § 42 ("The creation of an office need not necessarily be declared in express words. Any language which shows legislative intent to create the office is sufficient."); see also, e.g., *Ryan v Riley*, 223 P 1027 (Cal App 1924) ("Upon first impression it might appear questionable as to whether any such office was in fact created, but upon further consideration and investigation it seems clear that the language used conveys the intent as well as embodies the intent of the legislature to call into existence such an office notwithstanding the fact that the functions of that office are to be gathered only from the general terms of the section, to wit, to enforce the provisions of the Motor Vehicle Act . . . .").

Precedent has defined "public officer" to describe a wide range of individuals, in law enforcement and otherwise. See, e.g., *Coutu*, 459 Mich at 357 (law enforcement personnel, including deputy sheriffs, are public officials in this context); *People v Milton*, 257 Mich App 467, 468 (2003) (city police officer); *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 585 (1997) ("[P]ublic school academy board members are public officials and are subject to all applicable law pertaining to public officials."); *Dosker v Andrus*, 342 Mich 548, 552 (1955) (deputy register of deeds); *Graves v City of Lansing*, 149 Mich App 359, 364 (1986) (mayor and city treasurer).

The inquiry whether a law enforcement official in particular is a public officer depends on the "context" in which the question is asked, though in cases "addressing the relationship between law enforcement personnel *and the discharge*

of their duties, courts have *consistently* concluded they are public officials." *Coutu*, 459 Mich at 357–358 (emphasis added; collecting cases).

In recent years, this Court centered on elements to be considered when evaluating whether a person occupies 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 officer or body;
>
> (5) it must have some permanency and continuity, and not be only temporary or occasional. [*Coutu*, 459 Mich at 354–355 (citation omitted).]

A sixth element, which is "also of assistance in determining whether a position is a public office," is the existence of an oath or bond requirement. *Id.* at 355.

B. By operation of statute, federal agents acting as state law enforcement officers are "public officers."

Bruce and Nicholson were not acting as federal border patrol agents when they were executing a search warrant under Michigan law; they were acting, pursuant to statute, as state law enforcement officers.

The Supreme Court has said "the creation of offices . . . is a legislative function." *Cochnower v United States*, 248 US 405, 407, *mod* 249 US 588 (1919). As

described above, Michigan law agrees. An office subject to the crime of misconduct in office "must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature." *Coutu*, 459 Mich at 354. The applicable statute here is MCL 764.15d (§ 15d), because it delegates authority and duties to federal law enforcement officers who, like Bruce and Nicholson here, meet certain criteria:

> (1) *A federal law enforcement officer may enforce state law to the same extent as a state or local officer* only if all of the following conditions are met:
>
> > (a) The officer is authorized under federal law to arrest a person, with or without a warrant, for a violation of a federal statute.
> >
> > (b) The officer is authorized by federal law to carry a firearm in the performance of his or her duties.
> >
> > (c) One or more of the following apply:
> >
> > > (i) The officer possesses a state warrant for the arrest of the person for the commission of a felony.
> > >
> > > (ii) The officer has received positive information from an authoritative source, in writing or by telegraph, telephone, teletype, radio, computer, or other means, that another federal law enforcement officer or a peace officer possesses a state warrant for the arrest of the person for the commission of a felony.
> > >
> > > (iii) The officer is *participating in a joint investigation* conducted by a federal agency and a state or local law enforcement agency.
> > >
> > > (iv) The officer is *acting pursuant to the request of a state or local law enforcement officer or agency*.
> > >
> > > (v) The officer is responding to an emergency.

> (2) Except as otherwise provided in subsection (3), a *federal law enforcement officer who meets the requirements of subsection (1) has the privileges and immunities of a peace officer of this state*. [Emphasis added.]

First things first: Bruce and Nicholson have not disputed on appeal that they were acting pursuant to this statute when assisting in execution of the search warrant. Nor could they, because Bruce and Nicholson meet the requirements of both § 15d (1)(c)(*iii*) (because they were "participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency") and § 15d (1)(c)(*iv*) (because they were "acting pursuant to the request of a state or local law enforcement officer or agency").

The question, then, becomes whether a federal agent acting pursuant to § 15d should be immune from the charge of misconduct in office for conduct arising from the performance of that individual's duties as a state or local officer. A "consideration of the legislative intent in framing the particular statute," *Freedland*, 308 Mich at 457, leads to the conclusion that the Legislature created a "public office" for federal officers acting pursuant to § 15d. When Bruce and Nicholson wore the hat of state law enforcement officers as part of the HST task force, they had the authority, the "privileges," and the "immunities" of a state law enforcement officer. MCL 764.15d(1) & (2). *Freedland* recognized these characteristics as the core of what makes an individual a public officer: "the right[s], authorit[ies] and dut[ies] conferred by law." 308 Mich at 455. These officers were also, through § 15d, "individual[s] invested with some portion of the sovereign functions of the government," *Freedland*, 308 Mich at 455; they were entrusted with

"enforc[ing] state law to the same extent as a state or local officer." MCL 764.15d(1).

To exclude these individuals from the ambit of the misconduct-in-office crime would be to immunize certain officers from this important check on the abuse of public office. That the Legislature did not affix a particular title to this position is of no moment. Such a formalistic requirement would rob *Freedland* and its progeny of its command that each inquiry rests on the context and the Legislature's intent. *Freedland*, 308 Mich at 457 ("Manifestly, however, each case should be decided on its peculiar facts, and *involves necessarily a consideration of the legislative intent in framing the particular statute* by which the position, whatever it may be, is created.") (emphasis added); *Coutu*, 459 Mich at 357 (recognizing that "context" matters for this precise question); see also *People v Jackson*, 487 Mich 783, 800 (2010) (cautioning against unnecessarily "elevating form over substance").

An individual who "may enforce state law to the same extent as a state or local officer" and who "has the privileges and immunities of a peace officer of this state" holds a public office and should similarly bear its burdens. To hold otherwise would effectively immunize certain members of an MSP-led joint task force from the applicable criminal law because their W-2s come from another source.

C. Holding Bruce and Nicholson accountable as public officers is consistent with the Legislature's stated intent—to provide such individuals with the weighty opportunity (and responsibility) to enforce Michigan's laws—and would not have ill, ancillary effects.

A finding that federal officers acting under § 15d are acting in a position created by state law fits comfortably within this Court's precedent—law enforcement officers have always been considered public officers. *Coutu*, 459 Mich at 357. But to the extent an incremental change in the common law is necessary, it is warranted given the Legislature's clear signal and the modern nature of integrated law enforcement.

"The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions." *Bugbee v Fowle*, 277 Mich 485, 492 (1936), quoting *Dimick v Schiedt*, 293 US 474, 487 (1935). Unlike the statutes of this State, enacted by the Legislature and static by their plain language, the common law represents "the accumulated expressions of the various judicial tribunals." *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242 (2013). The common law "develops incrementally," over time and through experience, and "gradually evolve[es]" through adjudication of individual disputes." *Id.* at 243. Mindful of its power to alter the law with the votes of a majority of justices, this Court has recognized the importance of making any changes to the common law in an incremental manner. See *id.* at 243 n 1.

While both this Court and the Legislature have the constitutional authority to alter the common law, *Placek v City of Sterling Hts*, 405 Mich 638, 656 (1979), the Legislature has first dibs if it acts explicitly—the common law is removed from the

purview of the courts only if the Legislature clearly declares. See 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."); *Hamed v Wayne Co*, 490 Mich 1, 22 n 57 (2011) ("The Legislature is presumed to know the common law, and any abrogation of the common law must be explicit."). The Legislature did not clearly declare, through MCL 750.505, that the uncodified common-law crime was frozen in 1931. Nothing in the language of that provision even suggests that the Legislature intended the courts to forever halt the development of common-law crimes, and certainly there were no "explicit" restrictions set on it. *Hamed*, 490 Mich at 22 n 57. Compare MCL 750.505 with US Const, Am VII ("the right of trial by jury shall be preserved") and *Atlas Roofing Co, Inc v Occupational Safety & Health Review Com'n*, 430 US 442, 459 (1977) ("The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be 'preserved.' It thus did not purport to require a jury trial where none was required before."). MCL 750.505 simply states that common-law crimes that were not separately codified in the Michigan Penal Code in 1931 would constitute five-year felonies.

The fact that the 1931 Legislature did not codify misconduct in office implicitly speaks volumes for its intentions. If the Legislature had wanted to enact a particular version of that crime, it surely could have, just as it did with numerous other crimes in that very act. See generally 1931 PA 328. And the common law of criminal law continues to develop post-1931. See, e.g., *People v Aaron*, 409 Mich

672, 727 (1980) (abolishing the common-law felony-murder *mens rea* rule well after enaction of the statute outlawing felony-murder because "it is no longer acceptable to equate the intent to commit a felony with [malice]"). Accordingly, this Court retains governance of common law misconduct in office.

But this Court need not act in the dark. Indeed, the intent of the Legislature is a "necessary" consideration when determining whether an individual should be considered a public officer. *Freedland*, 308 Mich at 457. The plain language of § 15d makes clear the intent: treat certain federal officers as state officers. That intent is also reflected in the statute's legislative history. Senate Legislative Analysis, SB 155, February 11, 1999 (303a–304a) (expanding the authority of federal officers to enforce state law under MCL 764.15d in recognition that "[federal officers'] role now may be limited due to Michigan's [then-]narrow statutory authorization for them to enforce State law").

In addition to the statutory indications that these federal agents should be treated the same as their state and local counterparts, the integrated nature of law enforcement today provides a strong basis to treat them consistently. Law enforcement task forces that combine resources and personnel from local, state, and federal authorities are more and more common. See Rachel A. Harmon, *Federal Programs And The Real Costs Of Policing*, 90 NYU L Rev 870, 888–891 (2015) (enumerating the several federal efforts to establish multijurisdictional task forces to tackle various sorts of criminality involving narcotics, gang violence, firearms, human trafficking, and border security and trafficking). In our own state, the

Michigan State Police recognize at least twenty-two regional narcotics task forces that "are staffed by a combination of state, county, local, and federal law enforcement officers."[1] The proliferation of these task forces is the raison d'etre of § 15d. See Senate Legislative Analysis, SB 155, February 11, 1999 (303a–304a) (noting "increased number of task forces established by the Federal government that combine the efforts of Federal, state, and local law enforcement agencies"); cf. *Jackson v Estate of Green*, 484 Mich 209, 230 (2009) ("Not only is this interpretation consistent with the plain language of the statute, it is also consistent with the legislative history of the statute.").

Moreover, drawing the line that defendants advocate creates a perverse incentive for federal agents to flaunt the expectations of the very state that authorizes them to act at all. One might ask whether federal agents might be less apt to join in these joint state-federal law enforcement units for fear of subjecting themselves to greater risk of criminal liability. The People's response? Great. Any federal officer reluctant to refrain from malfeasance or acting with corrupt intent is not welcome to enforce this state's laws. It is not as if misconduct in office is a strict liability offense, or even one befalling negligent conduct—it criminalizes only "corrupt behavior." If an agent lacks confidence that he can act without corruption, Michigan is better off without him enforcing its laws. *Milton*, 257 Mich App at 475

[1] See Michigan State Police, Special Investigation Division, *available at* http://www.michigan.gov/msp/0,4643,7-123-72297_41992---,00.html; Michigan State Police, Narcotics Task Forces, *available at* http://www.michigan.gov/msp/0,4643,7-123-72297_41992-148869--,00.html.

("When a misguided police officer abuses or contorts the special privileges and powers afforded the officer, a public confidence is breached, resulting in a unique harm to society that threatens our system of justice.").

D. Applying the rest of the *Coutu* elements, Bruce and Nicholson are public officers.

Though the *Coutu* elements are interconnected, a question remains whether they all must be *established* or just *considered*. Either way, the existence of § 15d and Michigan's consistency of calling law enforcement officials public officers show that Bruce and Nicholson are public officers.

1. The *Coutu* elements are necessary considerations, not conditions, when determining whether an individual is a public officer.

While *Coutu* refers to a list of "indispensable elements" for determining whether someone is a public officer, textual evidence in *Coutu* itself suggests that the elements outlined in that opinion should be treated merely as necessary factors to consider. *Coutu*, 459 Mich at 354. The Court of Appeals majority held that, because the first element of the *Coutu* elements was not established, that was the end of the inquiry. *Bruce*, majority op at 4 (292A). But textual clues in this Court's analysis suggest that the indispensable nature of the elements is that each must be considered, but not necessarily fulfilled.

The Court held that "[e]xamination of these elements *support[ ] the conclusion* that a deputy sheriff is a public official . . . ." *Id.* (emphasis added). This language suggests that the Court did not create a bright-line rule that *only*

individuals who satisfy every single element are considered public officials, but rather that the elements are factors that must be considered. If the elements took the form of necessary boxes to check, surely consideration of the elements would not merely *support* the conclusion that a deputy sheriff is a public official—such a conclusion would be *automatic*. The Court of Appeals' analysis improperly zeroed in on the first element of the *Coutu* framework and in so doing again repeated its mistake of ignoring context—here, the context in the *Coutu* opinion and in this Court's precedent. Cf. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 60–61 (2014) (in the context of statutory interpretation, the Court warned against reading a provision with "a magnifying glass to the exclusion of its relevant context").

Moreover, the Court stated that oath and bond requirements "are also of assistance" in the determination. *Coutu*, 459 Mich at 355. The Court's use of the phrase "also of assistance" suggests that the "indispensable elements" were each intended to *assist* in the determination of whether a person is a public officer, not that all of the elements must be present. Describing the requirement of a bond or an oath to be "also of assistance" either renders the remainder of the elements as mere factors to consider or else makes that bond or oath requirement superfluous.

2. Whatever the status of the *Coutu* elements, Bruce and Nicholson meet all of them.

On the strength of § 15d, which establishes the first *Coutu* factor, the remainder of the *Coutu* factors follow. This is unsurprising where *Coutu* itself held

that law enforcement personnel, including deputy sheriffs, are public officials in this context. 459 Mich at 357.

The **second** factor—the position has a delegation of the sovereign power to be exercised for the public benefit—is decided by *Coutu*. See 459 Mich at 355 ("*[A]s law enforcement personnel*," a deputy sheriff exercises sovereign authority); MCL 764.15d. The **third** factor—that the powers and duties are defined by the legislature or legislative authority—is set through § 15d, which treats Bruce and Nicholson as state or local officers. MCL 764.15d; see also, e.g., *Milton*, 257 Mich App at 468 (a city police officer is a public officer). Factor number **four**—the duties are performed independently or are of an inferior office that has been placed under the authority of a superior officer or body, *Coutu*, 459 Mich at 355—is met because either they exercised their ability to "enforce state law" independently or did so under the direction and control of MSP, which headed up the HST Team. (184a-185a.) **Fifth**, and finally, testimony at trial established that Bruce and Nicholson were "permanently embedded" with the HST task force; "[t]hey didn't have other regular duty assignments. That was their job assignment." Therefore, their positions had some permanence and continuity. *Coutu*, 459 Mich at 355. (127a; 179a-180a.)

To the extent this Court considers an oath or bond requirement, there is no record evidence that the officers swore an oath to support the *state* constitution,

though they do swear an oath of office to "support and defendant the Constitution of the United States" as federal border agents.[2]

CONCLUSION AND RELIEF REQUESTED

Bruce and Nicholson abused the authority that this State provided to them, converting private property for their own personal use while executing a search warrant. As law enforcement officers charged with enforcing state law, their convictions of misconduct in office should stand.

The People respectfully ask this Court to reverse the Court of Appeals' judgment.

Respectfully submitted,

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[2] See U.S. Customs and Border Protection, "On Your First Day," https://www.cbp.gov/employees/new-employee-resources/your-first-day.