

STATE OF MICHIGAN
In the SUPREME COURT

Appeal from the Michigan Court of Appeals
Servitto, P.J, Murry, and Borello J.J.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant

Supreme Court No. 156827

Court of Appeals No. 331232

v

Circuit Court No. 15-4688-FH

TERRENCE MITCHELL BRUCE,
Defendant-Appellee

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant

Supreme Court No. 156828

Court of Appeals No. 331233

v

Circuit Court No. 15-4688-FH

STANLEY LYLE NICHOLSON,
Defendant-Appellee.

BRIEF ON APPEAL FOR
DEFENDANTS-APPELLEES TERRENCE BRUCE and
STANLEY NICHOLSON

Oral Argument Requested

ROSEMARY GORDON PÁNUCO (P33275)
Law Office of Rosemary Gordon Pánuco
Appellate counsel for Defendant-Appellees Terrence Bruce & Stanley Nicholson
7320 N. LaCholla Blvd. Ste. 154, PMB #310
Tucson, Arizona 85741
(520) 797-6928
Appeals1@aol.com

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JURISDICTIONAL STATEMENT

Defendants-Appellees Terrence Bruce and Stanley Nicholson were convicted after a jury trial in the Circuit Court for Jackson County and sentenced by the trial court. They each filed a timely claim of appeal from their criminal convictions on January 14, 2016.

The court of appeals decided this case in an unpublished opinion dated October 5, 2017 (Nos. 331232 & 331233). [289a – 301a]. Since the court of appeals decided the case based on their conclusion that a Border Patrol agent was not a “public officer” the court did not reach the other issues raised on appeal. [292a].

On November 30, 2017 the People filed their Application for Leave to Appeal.

On March 21, 2018 this Court granted leave to appeal limited to the issue whether the defendant federal border patrol agents were “public officers” for the 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.” [302a]. This Court has jurisdiction to consider this appeal under MCR 7.303(B)(1).

**COUNTER-STATEMENT OF
QUESTION PRESENTED FOR REVIEW**

The first element of misconduct in office is that the defendant must be a “public officer.” Border Patrol agents are not “public officers” because their position is created by Congress who defines and limits their power and authority. And, Border Patrol agents are not police officers under either federal or Michigan law. Did the court of appeals correctly hold that Border Patrol agents were not “public officers” and that the misconduct in office charge should have been dismissed?

Defendants-Appellees answer: YES

The Court of Appeals answers: YES

Plaintiff-Appellant answers: NO

INTRODUCTION

This case involves a very narrow question: is a Border Patrol agent temporarily assigned to the Hometown Security Team (HST), which was helping out the Jackson Narcotics Enforcement Team (JNET) in executing a pair of search warrants, a “public officer” for the purpose of being charged with the common-law crime of “misconduct in office? Here the majority of the court of appeals panel correctly determined that Border Patrol agents were not “public officers” and that the trial court should have dismissed that charge prior to trial. There are five reasons why this Court should affirm the court of appeals decision.

First, the position of U.S. Border Patrol agent does not satisfy the elements for a Michigan “public officer” under the test articulated in *People v Freedland*, 308 Mich. 449, 457-458; 14 NW2d 62 (1944). Congress, not the Michigan legislature, created the Border Patrol and specifically limits their authority to act on matters not related to immigration.

Second, since Border Patrol officers are much different from deputy sheriffs, *People v Coutu [Coutu I]*, 459 Mich. 348; 589 NW2d 458 (1999) does not apply to make them “public officers.”

Third, Border Patrol agents do not satisfy any definition of a Michigan police officer. Even the federal courts do not consider them law enforcement officers.

Fourth, while a Border Patrol agent is a federal officer, they are not considered law enforcement officers because their mission and duties are limited by federal law.

Fifth, there is no need or reason to expand the definition of “public officer” to include Border Patrol agents because there are criminal and civil remedies available to protect Michigan citizens from any illegal conduct by them.

This Court should decline the State’s invitation to find that anyone associated with a taskforce is a “public officer” for the purposes of a misconduct in office charge because it would mean abandoning the *Freedland* test and would be contrary to Michigan statutes dealing with multijurisdictional taskforces and police officers in general.

ISSUE PRESERVATION & STANDARD OF REVIEW

This issue was preserved for appellate review. Nicholson joined in the Bruce’s motion to dismiss based on the fact a U.S. Border Patrol agent was not a public officer. [21a-28a]. In the motion for a directed verdict at the end of the trial, Nicholson adopted Bruce’s argument that the prosecutor did not prove that the border patrol agents were “public officers” for the purposes of misconduct in office. [239a-242a]. This issue was raised in and decided by the court of appeals. [298a-292a].

The determination of whether the defendants are “public officers” is a question of law that is reviewed de novo. *People v Coutu [Coutu I]*, 459 Mich. 348, 353; 589 NW2d 458 (1999). The interpretation and application of statutes is also a question of law that is reviewed de novo. *Id.*

COUNTER-STATEMENT OF MATERIAL FACTS

The State charged both Terrence Bruce and Stanley Nicholson with the common law offense of Misconduct in Office (MCL § 750.505) for accepting a stool (Bruce) and a thermometer (Nicholson) from Michigan State Police (MSP) officer Ziecina during a search warrant execution at 6575 Ann Arbor Road, Leoni Township, Michigan as well as Larceny in a Building (MCL § 750.360) involving the same items. The jury acquitted them of the Larceny in a Building charge; but convicted them of the Misconduct in Office count. [94b].¹ The trial court sentenced each defendant to twelve months of probation. [287a and 288a]. As of the date of this Brief, both defendants have already completed their sentences.

Terrence Bruce and Stanley Nicholson were Border Patrol agents assigned to the MSP Hometown Security Team (HST). [126a, 147a, 185a, 258a; 3b]. Bruce had been on the team for a while and Nicholson had only been on the team for a few weeks.[258a – 259a; 3b]. As Border Patrol agents their primary mission was to prevent terrorism and weapons from coming into the country. [258a – 259a; 10b].

¹ “b” refers to pages in the Appellee’s Appendix.

Their secondary mission was to detect, detain, and stop illegal immigration as well as gather intelligence for the Border Patrol. [259a]. As part of the HST, their primary function was to just ride along with the MSP troopers and bring back intelligence to the Border Patrol station. [86a -87a, 134a, 191a, 259a].

On December 23, 2014, the HST was called upon to help JNET² with the execution of two search warrants for a pair of houses on Ann Arbor Road. [84a-86a, 89a-90a, 146a-147a, 192a; 63b-65b]. The Border Patrol agents were assigned perimeter security when the entry into the house was made by the MSP officers. [262a; 4b, 75b]. After the entry into the homes was made by the police, the Border Patrol agents were tasked with carrying out the items that the police decided to seize. [215a, 262a; 4b-8b, 12b, 75b].

Bruce and the stool: Teachout identified the picture of the stool he was sitting on while he did his tabulation as Exhibit 1. [92a]. The stool had no evidentiary value. [97a]. Border Patrol agent Migliore said he saw Bruce looking at a stool with wheels and a leather seat that someone had glued jewelry on to. [7b]. Nicholson said that he saw Bruce with the stool when they got back to the Border Patrol station. [278a].

Bruce talked to Ziecina about wanting to return it the day after the raid. [220a, 222a]. He did return it to the Jackson MSP post when asked to return it. [189a, 190a].

Nicholson and the thermometer: While Nicholson was taking a break in the garage with MSP officers Schreiber and Carpenter, and motor carrier officer Morgan,

² JNET: Jackson Narcotics Enforcement Team. [146a].

MSP officer Ziecina³ came in with a round object in his hand. [263a-262a]. He gave it to Nicholson and said that he had heard Nicholson was a tinkerer of sorts and thought he could make a plaque or something like a frame to go around it. [264a, 266a]. Migliore saw Nicholson looking at something he wasn't sure what it was, perhaps a thermometer. [5b-6b]. But he didn't really know what Nicholson had in his hand and doesn't know what he did with it. [8b, 14b].

MSP officer Schreiber mentioned that the entire residence was going to be seized and everything that did not have an evidentiary value would be thrown away. [264a]. Nicholson had no reason to believe that Ziecina was lying to him about taking the thermometer and making something nice out of it. [267a-268a]. And, he was pretty sure that Schreiber said that a dumpster would be brought in for the stuff that would be thrown away. [225a-226a, 264a-265a]. No one in the garage contradicted what Schreiber said and so Nicholson believed him. [265a]. Nicholson scanned the faces of everyone in the garage to be sure what the situation was, and no one gave any indication that he would not be allowed to take the thermometer. [265a, 267a]. Since Nicholson had never been in this situation before, he believed the MSP officers that the thermometer was junk and that he could take it. [268a].

The thermometer was about the size of a grapefruit, old, beaten up, dirty, completely discolored, and it had a rusty greenish metal frame. [176a-178a, 265a, 267a]. It looked like it had been sitting out in the yard and that is why Nicholson

³ Ziecina's name is misspelled throughout the trial transcript as Zicina.

thought it looked like trash. [177a-178a, 225a-229a, 265a-267a].

A day or two after the search warrant execution, Nicholson tried to clean the lens of the thermometer with a specially tipped dremel tool and some polishing compound. [269a]. He started to clean the lens at its dirtiest point, but he held the dremel tool in its position for too long and it burrowed through the lens making the thermometer completely useless. [176a-177a, 219a, 269a, 283a-284a]. Nicholson threw it in the trash and gave it no other thought. [176a, 220a, 270a, 280a, 284a].

On December 30, 2014 when Detective Furlong came to his house to speak to him, Nicholson assumed it was about the other Border Patrol Officer – Terry Bruce. [270a]. He was puzzled when Furlong began his questioning with a statement that he had reason to believe that Nicholson had an item, a thermometer/barometer. [176a, 270a-271a]. At that point Nicholson realized that it was not a piece of trash, but rather it was someone else's property and he was responsible for it. [272a]. He did not realize it was wrong to accept the thermometer and believed under the circumstances that he had permission to take it. [272a, 275a].

The prosecution introduced several witnesses who described the search warrant execution at the two houses on Ann Arbor Road and what they didn't see. MSP officer Teachout, who tabulated the items seized on the raid [87a, 98a], could not identify Nicholson or Bruce as the Border Patrol agents who were there [86a-88a, 99a], and he did not see anyone take anything for personal use. [95a]. MSP sergeant Temelko participated in the initial search of the second residence.

[184a]. He did not see anyone take anything for personal use. [186a]. MSP officer Schreiber, who was the K-9 handler at the search warrant execution [125a, 129a, 136a-137a], did not see anyone take any property for personal use. [130a-131a]. MSP assistant post commander Cook, who was in charge of JNET at the time [145a-146a], denied seeing or knowing of anyone taking any property. [150a, 154a].

Teachout explained that they were looking for evidence and high value items purchased with drug money that could be auctioned. [106a- 108a]. Cook admitted describing many things as “junk” because they had no value to what they were doing at the house.[152a, 203a]. He said that junk did not have a specific meaning in his mind and offered the example that to him anything except a Harley Davidson motorcycle was “junk.” [166a]. In other words, “junk” meant useless to the MSP. [167a]. Schreiber denied saying that the leftover items would be tossed into a dumpster because they were trash. [132a, 144a]. He did remember seeing Ziecina coming in to the garage; but denied seeing him hand Nicholson anything. 142a-143a].

Other facts will be added as needed to the arguments, *infra*.

ARGUMENT

The first element of misconduct in office is that the defendant must be a “public officer.” Border Patrol agents are not “public officers” because their position is created by Congress who defines and limits their power and authority. And, Border Patrol agents are not police officers under either federal or Michigan law. The court of appeals correctly held that Border Patrol agents were not “public officers” and that the misconduct in office charge should have been dismissed.

This Court granted leave to consider the question of whether 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. [302a]. The answer to that question is no. The position of U.S. Border Patrol agent does not satisfy the criteria for a Michigan “public officer” under the test articulated in *People v Freedland*, supra. Since Border Patrol officers are much different from deputy sheriffs, *Coutu I* does not apply to make them “public officers.” Border Patrol agents do not satisfy any definition of a Michigan police officer. And while a Border Patrol agent is a federal officer, they are not considered law enforcement officers because their mission and duties are limited by federal statute. Border Patrol agents are simply not Michigan “public officers.”

Misconduct in Office

The elements of the Michigan common-law offense of misconduct in office are: 1) The person must be a public officer; 2) The conduct must be in the exercise

of the duties of the office or done under the color of the office; 3) The acts were malfeasance or misfeasance; and 4) The acts must be corrupt behavior. *People v Carlin (On Remand)*, 239 Mich.App. 49, 64; 607 NW2d 733 (1999). The first element of this crime is what is at issue here.

The *Freedland* test for who is a Public Officer

In *Freedland* this Court was confronted with the question of whether an account examiner for the Michigan State Sales Tax division was a “public officer”⁴ and to decide that question, it adopted a test developed in *State ex rel. Barney v Hawkins*, 79 Mont. 506; 257 P. 411, 418 (1927). To be a “public officer” the **person’s position** must satisfy **all** of the following elements:

- 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

⁴ The Court determined he was not a public officer, but rather a public employee.

subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; and 5) It must have some permanency and continuity, and not be only temporary or occasional. *Freedland*, supra at 457-458.

The court can also consider whether the position requires an oath or a bond. *People ex rel. Throop v Langdon*, 40 Mich. 673 (1879).

Since *Freedland* was decided, this test has been used whenever courts are called upon to decide whether a person is a “public officer” or a “public official.” See e.g. *Dosker v Andrus*, 342 Mich. 548, 551; 70 NW2d 765 (1955) (deputy register of deeds a public official for purposes of being exempted from mandatory retirement); *Meiland v Cody*, 359 Mich. 78, 86-87; 101 NW2d 336 (1960) (court reporter not a public officer for the purposes of whether a mandamus action was proper); *Banfield v Wood*, 104 Mich.App. 279, 282; 304 NW2d 551 (1981) (prison camp supervisor not a state official for Court of Claims jurisdiction); *People v Clark*, 134 Mich.App. 324, 326-328; 350 NW2d 878 (1984) (water commissioner for City of Ecorse a public officer for conviction of accepting a bribe). In *Coutu I*, this Court applied the *Freedland* test to hold that a deputy sheriff was a public officer for the purposes of the common-law offense of misconduct in office. Given the history and utility of the *Freedland* test, it is appropriate to use it here to determine if a Border Patrol agent is a Michigan “public officer” who could then be charged with the common law crime of misconduct in office.

Under the *Freedland* test a Border Patrol agent is not a “public officer”

(1)

The *Freedland* test’s first element is whether the person’s position was created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature. *Freedland*, supra at 457. While the test articulated by the Montana Supreme Court in 1927, did not specify the state constitution or state legislature, the test it developed was based upon state law and state legislative powers. See *Hawkins*, supra at 413-418.⁵ The question in *Hawkins* was one of Montana state law regarding the interpretation of a Montana state crime. Here the question is one of Michigan law regarding the interpretation of an element of a Michigan common law crime -- misconduct in office. It is only logical that when a Michigan offense requires the defendant to be a “public officer” it means that he must be a “public officer” as defined by Michigan law.

The court of appeals reasoned that “the” Constitution and “the” legislature in the *Freedland* test meant the Michigan Constitution and the Michigan legislature based on the general interpretation of definite articles and nouns as they appear in statutes citing *Robinson v City of Detroit*, 462 Mich. 439, 462; 613 NW2d 307 (2000). [292a]. The court of appeals also pointed out that Michigan case law refers to this state’s lawmaking branch as the Legislature, while referring to the nation’s

⁵ Citing law from Rhode Island, Mississippi, Missouri, South Carolina, Nevada, North Carolina, Utah, Mississippi, California, Pennsylvania, Massachusetts, Georgia, Ohio, New York, Michigan, Oklahoma, Texas, Kentucky, Georgia, Iowa, Maine, Connecticut, Illinois, New Jersey, Alabama, and Maryland.

lawmaking branch as Congress citing as examples *Taxpayers of Mich. Against Casinos v State*, 471 Mich. 306, 332; 685 NW2d 221 (2004); *Moorman v Moorman*, 340 Mich. 636, 643; 66 NW2d 248 (1954) and *Mich. Dep't of Civil Rights ex rel Jones v Mich. Dept of Civil Serv.*, 101 Mich.App. 295, 307; 301 NW2d 12 (1980). [292a]. The terms “legislature” and “Congress” are not synonymous. [292a].

Moreover, the idea that the terms describing the bodies that must create the position in the first part of the *Freedland* test means the Michigan Constitution and the Michigan legislature is supported by MCL 15.181(e)⁶ defining what a “public officer” is. That statute specifically refers to the Michigan Constitution and the laws of “this state” when defining the term “public officer.” The court of appeals analysis finding that the test refers to the Michigan Constitution and the Michigan Legislature makes sense based on the *Freedland* decision itself as well as on the subsequent cases applying the test.

The position of Border Patrol agent was not created by the Michigan Constitution, the Michigan legislature, or any Michigan municipality or other body authorized to do so by the Michigan Legislature. On May 28, 1924 the United

⁶ (e) “Public officer” means a person who is elected or appointed to any of the following:

- (i) An office established by the state constitution of 1963.
- (ii) A public office of a city, village, township, or county in this state.
- (iii) A department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state. See also MCL § 750.368 (d).

States Congress established the Border Patrol as part of the Immigration Bureau in the Department of Labor through the Labor Appropriation Act of 1924. [124b]. In 1933, President Franklin D. Roosevelt combined the Bureau of Immigration and the Bureau of Naturalization into the Immigration and Naturalization Service (INS). [125b]. After the 911 attacks, the Department of Homeland Security came into being through the Homeland Security Act of 2002 and the Border Patrol was eventually moved to the newly created Customs and Border Protection Department. [127b]; 6 U.S.C. § 211; 6 U.S.C. § 251; and 6 U.S.C. § 252. There is no question that the position of Border Patrol agent was created by Congress, not the Michigan Constitution or the Michigan legislation. Border Patrol agents are not “public officers” under the first element of the *Freedland* test.

(2)

The *Freedland* test’s second element is whether the person’s position “possess[es] a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public.” *Freedland*, supra at 457-458. The argument is the same that “the sovereign power of government” means Michigan’s sovereign power, not sovereign power generally. Since 1924 the Border Patrol has exercised a portion of the sovereign power of the United States government to protect our nation’s borders by detecting and preventing the entry of illegal aliens into the United States, as well as preventing the illegal trafficking of people and contraband. [123b-127b]. There is no Michigan statute specifically authorizing the Border Patrol to exercise the sovereign power of the State of Michigan. Nor does

the State of Michigan have the authority to legislate on matters of immigration or border security. “The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.” *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948) (citation omitted). A Border Patrol agent does not exercise any portion of the sovereign power of the State of Michigan and does not satisfy the second element for being a Michigan “public officer.”

(3)

The *Freedland* test’s third element is that for the person’s position the “powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority.” *Freedland*, supra at 458. Again, in harmony with the rest of the test “the legislature” means powers and duties conferred by the Michigan legislature or through their authority. e.g. delegation to municipalities. Congress created the United States Border Patrol and defined the duties of its agents in 8 U.S.C. § 1357 as having the power to interrogate any alien or person believed to be an alien; arrest any alien who is entering or attempting to enter the United States in violation of any immigration

laws; board and search any vessel, aircraft, conveyance, or vehicle within a reasonable distance from the border to prevent the entry of illegal aliens; to arrest anyone for felonies cognizable under the any law of the United States regulating aliens; and to arrest a person for federal offenses committed in the officer's presence. [117b – 118b]. If a federal felony is not committed in the agent's presence, a Border Patrol agent must be authorized under regulations prescribed by the Attorney General, which include certifications, to make an arrest. 8 U.S.C. 1357(5)(B). [118b]. As a federal officer, a Border Patrol agent has limited arrest power, especially when viewed in contrast to a DEA agent's arrest powers. Compare 8 U.S.C. § 1357 [117b – 120b] with 21 U.S.C. § 878. Not only are a Border Patrol agent's arrest powers limited with regard to federal offenses that are not immigration related, there is nothing in 8 U.S.C. § 1357 to suggest that a Border Patrol agent has the power or authority to enforce any state law. Border Patrol agents have neither the power nor the duty to enforce Michigan law and do not satisfy the third part of the test for being a Michigan "public officer."

(4)

The *Freedland* test's fourth element is that the duties of the position "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. In line with the rest of the test and that it refers to "the" legislature, it is logical that a subordinate office must be authorized by the Michigan legislature.

Here that is not the case. The Border Patrol is a sub-section of the Customs and Border Protection Department, which itself is a sub-department of the Department of Homeland Security. [127b]. An agent in the Border Patrol answers to his superiors in the Border Patrol, who answer to the bosses in the Customs and Border Protection Department, who ultimately answer to the Secretary of the Department of Homeland Security. Nowhere in this chain of command is there any subordinate office created or authorized by the Michigan legislature. A case on point is *Coutu I*, where the subordinate office of “deputy sheriff” was specifically created by the Michigan legislature in MCL §51.70. That is not true here because the position of Border Patrol agent is not independent and was not created as a subordinate office by the Michigan legislature, thus it fails the fourth element of the *Freedland* test for “public officer.”

(5)

The fifth *Freedland* element is that the position must have some permanency and continuity and not be temporary or occasional. *Freedland*, supra at 458. While an agent’s position with the Border Patrol is permanent in nature, these agents were only temporarily assigned to the Hometown Security Team (HST). [258a; 3b].⁷ The agents were assigned to work with HST to help with illegal alien issues and bring back intelligence to the Border Patrol. [259a; 10b]. Since Bruce and Nicholson’s assignment to work with the HST was temporary in nature, it is not a

⁷ While Lt. Furlong described them as “permanently embedded”, he clarified that he meant that they were not assigned any other duties beyond HST. [178a].

permanent Michigan position that falls within the permanency element of the *Freedland* test.

The court of appeals correctly found that a Border Patrol agent did not meet the first criteria of the *Freedland* test. The test adopted in *Freedland* specifically stated that “all five elements are indispensable to any position of public employment, in order to make it a public office..” *Freedland*, supra at 457. Failing to meet the first element is enough to find that the position of Border Patrol agent is not a Michigan “public office.” The fact that the position of Border Patrol agent fails all of the other elements under the *Freedland* test is even stronger evidence that Border Patrol agents Bruce and Nicholson cannot be consider “public officers” for the charge of misconduct in office.

A Border Patrol Agent is not a Police Officer

At trial the State’s own witnesses testified that U.S. Border Patrol agents did not have police officer status in Michigan [192a; 11b, 15b, 17b, 75b]; that they were not deputized in Michigan by anyone [99a, 161a; 75b]; and that none of them were members of any Michigan police organization [134a]. Yet, the State tries to characterize the Border Patrol agents as police officers because Michigan law holds that police officers are “public officers” for the common-law crime of misconduct in office. Border Patrol agents are not police officers under federal or Michigan law.

The federal courts do not consider Border Patrol agents to be police officers. Border Patrol agents are not a general law enforcement officers because their

authority and duties are circumscribed by statute and limited in scope.⁸ *Ortiz v U.S. Border Patrol*, 39 F.Supp.2d 1321, 1326 (D.N.M. 1999). “Border Patrol agents’ powers to search and arrest are tightly controlled by statute and regulation, and are focused on their primary mission of interdiction of alien traffic into this country. *See e.g., United States v Santa Maria*, 15 F.3d 879, 881-882 (9th Cir.1994).” *Id.* “As federal officers, Border Patrol agents are limited to their statutory powers.” *United States v Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009). “[C]ustoms agents are not general guardians of the public peace, as are state or local police. Their powers...to search and arrest person are limited by statute.” *United States v Diamond*, 471 F.2d 771, 773 (9th Cir.1973). “Congress limited the Border Patrol’s general arrest authority out of concern that a broader command would interfere with their paramount responsibility to enforce immigration laws under Title 8.” *United States v Perkins*, 177 F.Supp.2d 570, 578 (W.D. Tex. 2001). Border Patrol agents are not considered to be law enforcement officers by the federal courts who have examined their authority and duties.

⁸ Much like Michigan Motor Carrier Officers who are limited by statute to exercising the authority of peace officers only for purposes of enforcing laws pertaining to commercial vehicles and are not considered peace officers. MCL § 28.6d; *Michigan State Employees Ass’n. v Attorney General*, 197 Mich.App. 528, 530-531; 496 NW2d 370 (1992); *People v Carrick*, 220 Mich.App. 17, 20-21; 558 NW2d 242 (1996).

⁹ Omitting Footnote 30 citing to H.R. REP. 101-681(I), at 414 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554; *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. On Immigration, Refugees, and Int’l Law of the House Comm. on the Judiciary*, 101st Cong. 46 (1990); and 28 C.F.R. § 0.105.

The State characterizes Border Patrol agents as a “police officers” because that means they would be considered “public officers” for the purposes of the misconduct in office charge. The leading case on this is *Coutu I*, where this Court held that a deputy sheriff was a “public officer” for the purposes of the misconduct in office offense using the *Freedland* test. *Coutu I*, at 461. This Court made that decision based on the following: the position of deputy sheriff was the created by the legislature (MCL §51.70); deputy sheriffs exercise sovereign power while engaged in the discretionary discharge of their duties (*Tzatzken v Detroit*, 226 Mich. 603, 608; 198 NW 214 (1924)); the legislature defined in part the powers and duties of deputy sheriffs (MCL §51.75; MCL §51.76(2); and MCL §51.221); since the legislature authorized the appointment of deputy sheriffs who are placed under the control of the sheriff, this Court concluded that the fourth element of the *Freedland* test was satisfied (MCL §51.70); and finally, this Court noted that deputy sheriffs “are generally positions of permanent employment” and that they are required to take an oath before entering upon their duties of office. *Coutu I*, at 356. In *People v Hardrick*, 258 Mich.App. 238, 245; 671 NW2d 548 (2003) the court of appeals agreed with the trial court that a police officer (not a deputy sheriff), was a public officer for the purposes of evaluating a charge of misconduct in office, simply citing *Coutu I*, supra.

This case is distinguishable from *Coutu I* and *Hardrick* because the Border Patrol agent position was not created by Michigan law; it was created by the United States Congress in 1924. A Border Patrol agent exercises a portion of the

sovereign power of the United States government, not the sovereign power of the State of Michigan. Congress defines the powers and duties of a Border Patrol agent, not the Michigan legislature. Border Patrol agents do not perform their duties independently and without the control of a superior power other than the law. And finally, the agents' assignment to HST was temporary in nature and not a permanent position in Michigan. The position of a federal Border Patrol agent is much different from that of a Michigan deputy sheriff. This Court's decision in *Coutu I* does not compel the conclusion that a Border Patrol agent is a police officer and thus a "public officer" for the purposes of the misconduct in office offense.

Michigan law provides further support for the conclusion that a Border Patrol agent is not a police officer and should not be considered as such. The Michigan Commission on Law Enforcement Standards Act defines a "police officer" at MCL 28.602(1):

- (1) "Police officer" or "law enforcement officer" means, unless the context requires otherwise, any of the following:
 - (i) A regularly employed member of a law enforcement agency authorized and established by law, including common law, who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state. Police officer or law enforcement officer does not include a person serving solely because he or she occupies any other office or position.
 - (ii) A law enforcement officer of a Michigan Indian tribal police force, subject to the limitations set forth in section 9(7).
 - (iii) The sergeant at arms or any assistant sergeant at arms of either house of the legislature who is commissioned as a police officer by that respective house of the legislature as

provided by the legislative sergeant at arms police powers act, 2001 PA 185, MCL 7.381 to 4.382.

(iv) A law enforcement officer of a multicounty metropolitan district, subject to the limitations of section 9(8).

(v) A county prosecuting attorney's investigator sworn and fully empowered by the sheriff of that county.

(vi) A fire arson investigator from a fire department within a village, city, township, or county who is sworn and fully empowered by the chief of police of that village, city, township, or county. [Emphasis added].

Neither Bruce nor Nicholson were regularly employed by any law enforcement agency responsible for enforcement of the general criminal laws in Michigan; were members of a Michigan Indian tribal police force; were a sergeant at arms for the legislature; were investigators for a prosecuting attorney's office; or were fire arson investigators. Border Patrol agents do not fall within the Michigan statutory definition of a "police officer."

The State also argues that they were police officers because they were part of the Hometown Security Team. The HST was "a criminal intervention team assigned to the freeways mostly." [125a]. And the Border Patrol agents rode along with MSP troopers to back them up. [134a]. But being part of a multijurisdictional team does not convert Border Patrol agents Bruce and Nicholson into police officers or for that matter "public officers."

The portion of the Michigan Commission on Law Enforcement Standards Act that deals with multi-jurisdictional taskforces is MCL § 28.609(8):

(8) A law enforcement officer of a multicounty metropolitan district, other than a law enforcement officer employed by a law enforcement agency created under the public body law enforcement agency act, is not empowered to exercise the

authority of a peace officer under the laws of this state and shall not be employed in a position for which peace officer authority is granted under the laws of this state unless all of the following requirements are met:

(a) The law enforcement officer has met or exceeded minimum standards for certification under this act.

(b) The law enforcement officer is deputized by the sheriff or sheriffs of the county or counties in which the land of the multicounty metropolitan district employing the law enforcement officer is located and in which the law enforcement officer will work, pursuant to section 70 of 1846 RS 14, MCL 51.70.

(c) The deputation or appointment of the law enforcement officer is made pursuant to a written agreement that includes terms the deputizing authority under subdivision (b) may require between the state or local law enforcement agency and the governing board of the multicounty metropolitan district employing the law enforcement officer.

(d) The written agreement described in subdivision (c) is filed with the commission. [Emphasis added]

Agents Bruce and Nicholson do not fall within the definition of law enforcement officer in a taskforce because neither one of them met or exceeded the minimum standards for police officer certification [99a, 161a, 179a, 192a, 223a; 11b, 15b, 75b, 114b], they weren't deputized [99a, 161a, 179a, 223a; 75b, 114b], and there was no written agreement with the U.S. Border Patrol that was on file with the Commission (Michigan Commission on Law Enforcement Standards). [182a, 223a]. Border patrol agents do not come within the definition of a Michigan law enforcement officer merely because they are part of a taskforce.

The State relies on the Michigan statute defining when a federal law enforcement officer can make an arrest for a state law offense (MCL § 764.15d) to prove that Border Patrol agents were police officers and thus should be considered "public officers" for the purposes of the misconduct in office charge. MCL §

764.15d provides that a federal law enforcement officer may make an arrest to enforce state law 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 a 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.

MCL § 764.15d only addresses when a federal law enforcement officer can make an arrest for the violation of a Michigan state law offense. This statute is not a general grant of police powers to federal agents because it only authorizes them to make an arrest under limited circumstances, which are carefully circumscribed to ensure Michigan law is followed, e.g. there must be a state warrant for arrest, there must be state or local law enforcement involvement, or there is an emergency. Moreover, the federal courts do not consider Border Patrol agents federal “law enforcement” officers. MCL § 764.15d does not provide a basis for finding that a Border Patrol agent is a Michigan police officer and thus a “public officer.”

The evidence at trial showed that Border Patrol agents did not have police officer status in Michigan:

- they were not deputized in Michigan by anyone [99a, 161a, 179a, 223a; 75b, 114b];
- they were not licensed Michigan police officers [99a, 161a, 179a, 192a, 223a; 11b, 15b, 75b, 114b];
- they could not initiate any stops on their own [192a; 18b] and had to have local Michigan police do that unless it was an immigration stop. [192a, 17b, 24b-26b];
- they don't make any seizures, the MSP does that [23b];
- they had no authority to enforce Michigan law [10b]; and
- Michigan State police officers described the Border Patrol agents function with HST as just riding along with HST members. [86a-87a, 134a, 191a].

Bruce and Nicholson were assigned to HST to help with any immigration issues and to bring back intelligence to the Border Patrol. [259a; 10b]. Michigan is a border state with its unique border issues. During Prohibition, liquor smuggling was a big concern along the Canadian border because is often accompanied alien smuggling. [125b]. Today Border Patrol concerns have shifted to terrorists and terrorist weapons as well as their primary mission duty to combat illegal immigration and protect our borders. [126b - 127b]. When they were helping with the execution of JNET's search warrants, there was nothing that fell within their duties or authority –no illegal aliens [100a, 135a; 11b], no international smuggling

of contraband [100a, 135a, 11b], and there were no exigent circumstances. [100a, 135a, 11b, 115b].

The most telling evidence that the Michigan State Police did not consider the Border Patrol agents to be police officers is that during the search warrant raid, they were relegated to perimeter security and helping load up the items that the police officers determined were to be seized. [215a, 262a; 4b-8b, 12b, 75b]. They were just extra bodies to help with the grunt work of the search warrant execution. The evidence at trial supports the conclusion that Agents Bruce and Nicholson were not “police officers” who could be considered a “public officers” for the purpose of being charged with misconduct in office.

No public policy reason to find Border Patrol agents are “public officers”

The State urges this Court to find that Border Patrol agents are “public officers” so that they can be prosecuted under the common-law offense of misconduct in office because without this finding, federal officers will violate the rights of Michigan citizens with impunity. That is just not true. Like any person in the State of Michigan, if a Border Patrol agent commits a crime, they are subject to prosecution for that crime. The agents here were charged with larceny in a building under MCL § 750.360. See e.g. Sam Milton, an Ecorse police lieutenant, was charged with felonious assault (convicted of assault and battery) in addition to misconduct in office for beating a prisoner (*People v Milton*, 257 Mich.App. 467, 473; 668 NW2d 387 (2003)); and Gerald Carlin, an Oakland County deputy sheriff, was charged with removal, mutilation, or destruction of public records in

addition to misconduct in office charges (*People v Carlin (On Remand)*, 239 Mich.App. 49, 54; 607 NW2d 733 (1999)). Being Border Patrol agents makes no difference to the State's ability to charge them with a substantive criminal offense, unless the State chooses to additionally charge them with the common-law crime of misconduct in office.

MCL § 750.505 is a catchall provision that sets the punishment for “any indictable offense at the common law” that has no punishment set by a Michigan statute. The common-law crime of misconduct in office falls under this catchall provision, but it is a narrow offense designed to reach acts by public officers that don't necessarily fall within the elements of a specific criminal offense. A good example of this is the situation in *Coutu I*, where deputy sheriffs were affording work-release inmates preferential treatment in exchange for gifts and favors, including allowing them to stay out overnight, work additional hours, and travel out-of-state. *Coutu I*, at 350-351. This Court does not need to broaden the definition of “public officer” to include federal Border Patrol agents to protect the people of Michigan. To do so would require discarding the *Freedland* test, which has proven its utility over time. There are plenty of criminal laws on the books to protect the public and there are civil remedies as well.

For example, Benjamin Scott,¹⁰ the target of the MSP raid here, filed a civil case against the police due to the destruction of the houses he rented and the

¹⁰ The criminal case against Scott, the occupant of the houses where the search warrants were executed, was dismissed because the trial court ruled that crucial

numerous items that were missing after the police left. [49b-50b]. Scott described the condition of the houses as “destroyed” when he returned after the search warrants had been executed. [40b]. His ceramic heaters were broken as was the glass in his coffee table.[41b]. Light bulbs had been smashed and thrown in his washing machine. [41b, 44b]. There was dog food dumped all around the house.[41b, 44b]. His goods were strewn about the house and yard. [44b]. He testified that there were so many items missing after the execution of the search warrant that he “could spend the afternoon describing all the things that are missing.” [46b]. Plus, these missing items were not on the MSP tabulation sheets. [46b]. Much more was missing than just the stool and an old thermometer. [49b, 59b-60b]. With the very real possibility of civil remedies, there is no need to expand the definition of “public officer” beyond the *Freedland* test.

SUMMARY

In their position as United States Border Patrol agents, Bruce and Nicholson did not meet the definition of a “public officer” to satisfy the first element of the common law offense of misconduct in office because their position was created by Congress, not the Michigan legislature. *Freedland*, supra. Their position did not meet the requirements of the *Freedland* test’s other elements either. Border Patrol agents do not fall with the definition of “public officer” set forth in MCL 15.181(e) or the definition of a police officer set forth in MCL 28.602(1). There is nothing in

information was withheld that should be been in the search warrant. [54b, 57b, 103b, 108b-111b].

either 8 U.S.C. § 1357 or MCL 764.15d that gives Border Patrol agents the broad enforcement powers given to Michigan police officers. Since Bruce and Nicholson's position as Border Patrol agents do not fall within any definition of "public officer" for the common law crime of misconduct in office, the court of appeals correctly held that the trial court erred when it denied the pre-trial motion to dismiss that count and properly vacated the agents' convictions. The court of appeals decision is not clearly erroneous, and it will not cause material injustice to anyone.

Underlying the case against Border Patrol agents Bruce and Nicholson is the fact that the State's case against Scott and the anticipated forfeiture 'went bad.' Bruce and Nicholson were singled out for felony charges¹¹ because they were convenient scapegoats. This case never should have gotten past the motion to dismiss the misconduct in office charge. The court of appeals correctly decided the question of whether Bruce and Nicholson were "public officers" and reached the right result here. There is no reason or need to expand the definition of "public officer" to include Border Patrol agents in this case.

¹¹ Under 18 U.S.C. 654 the conduct in this case is a misdemeanor, if the necessary intent could be proven.

RELIEF

Terrence Bruce and Stanley Nicholson respectfully request that this Honorable Court AFFIRM the Court of Appeals decision in this case; or in the alternative, if this Court finds that they meet the definition of a public officer, they respectfully request that these consolidated cases be remanded to the Court of Appeals for consideration of the other issues raised on the appeal.¹²

Respectfully submitted,

/s/ Rosemary Gordon Pánuco

ROSEMARY GORDON PÁNUCO

(Mich. Bar. No. P-33275)

Attorney for Defendants-Appellees Terrence Bruce and Stanley Nicholson
7320 N. La Cholla Blvd, Ste. 154- PMB #310
Tucson, Arizona 85741-2354
Telephone: (520) 797-6928
E-mail: appeals1@aol.com

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¹² The court of appeals did not consider the remaining issues on appeal. [292a].

