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 TERENCE 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

REPLY BRIEF OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

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ARGUMENT

I. Defendants downplay the scope and applicability of the statute at issue, sidestepping the fact that they were, as law enforcement officers, entrusted by the Legislature to enforce Michigan law.

In their responsive brief, the defendants rely on a number of red herrings and misunderstand the pertinent statute in this case. The latter issue first. Defendants downplay the scope of MCL 764.15d, the principal statute in this case, repeatedly asserting that the statute simply authorizes an officer to make an arrest for a state law offense. (Def Br at 24–25.) Not so. Section 15d is much broader, permitting "[a] federal law enforcement officer [to] enforce state law to the same extent as a state or local officer" and providing them "the privileges and immunities" of state peace officers. Properly describing the breadth of § 15d is important because the common-law considers *the substance* of the Legislature's grant of authority when considering whether a person is a public officer. See *People v Freedland*, 308 Mich 449, 455 (1944). Section 15d's broad grant of authority deputizes qualifying individuals to act as state law enforcement officers.

Now, the red herrings. Defendants spend ample time minimizing the authority of federal Border Patrol agents. (Def Br at 19–27.) But the People have not argued that Bruce and Nicholson are public officers merely because they are federal Border Patrol agents. Rather, given their status as Border Patrol agents, they satisfy the criteria of § 15d(1)(a) and (b), which makes them eligible, as "federal law enforcement officer[s]," to "enforce state law to the same extent as a state or local officer." See § 15d(1)(a) (authorized to execute a federal arrest

warrant); § 15d(1)(b) (authorized to carry a firearm). Defendants have not strongly contested either of these elements, nor that they 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"). And, acting as state law enforcement officers authorized under this state statute, they are public officers. See *People v Coutu,* 459 Mich 348, 357 (1999).

In characterizing the statutory limitations of a Border Patrol agent's authority under *federal law*, defendants overlook the ability of *Michigan law* to empower individuals to enforce its own laws. In one of the cases defendants cite (Def Br at 20), the Ninth Circuit held that Border Patrol agents have limited federal powers pursuant to statute, and went on to recognize that to expand their authority beyond the federal statute "would grant Border Patrol agents unfettered discretion to investigate suspected violations of any and all cognizable criminal laws; it would, in effect, give to the Border Patrol the general police power *that the Constitution reserves to the States*." *United States v Juvenile Female*, 566 F3d 943, 948 (CA 9, 2009) (cleaned up; emphasis added). Thus, the Ninth Circuit recognized the States' authority to delegate their police power as they see fit. Michigan has seen fit to do so through § 15d, and in doing so created a position of public trust.

Defendants' arguments regarding the Michigan Commission on Law Enforcement Standards Act, MCL 28.601 *et seq*. (MCOLES Act), assume their

preferred conclusion. (Def Br at 22–26.) Their argument goes like this: because Border Patrol agents are not "law enforcement officers" under the MCOLES Act, they cannot be "police officers" or have "police officer status." The question becomes, why does this matter? The answer is, it doesn't.

Let's home in on the relevant vocabulary. The relevant term for deciding whether § 15d applies is "federal law enforcement officer." See MCL 764.15d(1). But defendants do not appear to contest that Border Patrol agents are "federal law enforcement officers," and for good reason. See, e.g., *Muniz-Muniz v United States Border Patrol*, 869 F3d 442, 443–44 (CA 6, 2017) ("The Station records all arrests in an 'apprehension log,' which includes information about each arrestee's nationality and specifies whether the Border Patrol or some other law-enforcement agency originally approached or stopped the person."); *United States v Sanders*, 937 F2d 1495, 1500 (CA 10, 1991) ("[S]ome deference is properly given to border patrol agents who, as law enforcement officers, are specifically trained to look for indicia of crime."); *Ysasi v Rivkind,* 856 F2d 1520, 1524–25 (CA Fed, 1988) (explaining that Border Patrol Agents are federal law enforcement officers for the purposes of the Federal Tort Claims Act).

Rather, defendants appear to take issue with their status as "police officers." (Def Br at 19) (Heading: "A Border Patrol Agent is not a Police Officer"). But to look to the MCOLES Act to figure out whether a federal Border Patrol agent is a "police officer" is simply beside the point. The question before this Court is whether they are "public officers," and the defendants' own brief admits that individuals can be

public officers without being *police* officers. (Def Br at 12) (conceding that under Michigan law a deputy register of deeds and a water commissioner are public officers). Moreover, this question is, at its base, one of common-law, and one that is answered by looking to the duties delegated to and the functions performed by the individuals in question. *Freedland*, 308 Mich at 455. By looking to the MCOLES Act to answer the question whether they are public officers, defendants ignore § 15d and the common-law mandate that courts looks to the substance of the person's charge, not the person's title. Section 15d exists for the sole purpose of defining when a federal law enforcement officer may enforce state law as a state or local officer would, i.e., execute the duties and functions of a public officer. To look, as defendants do, to whether the MCOLES Act defines Border Patrol agents in a particular way not only confuses the common-law question here but ignores the on-point statute.[1]

For largely the same reasons that the MCOLES Act is beside the point, MCL 15.181(e) is too. (Def Br at 14, 30.) That provision defines the statutory term "public officer" in the context of the statute outlawing a person holding incompatible public offices. See MCL 15.182(1). While the sweep of this statutory definition

[1] The definitions section of the MCOLES Act, which defendants rely on, was substantially revised in January 2017. See 2016 PA 289. The current definition of "law enforcement officer" that defendants focus on (previously located at MCL 28.602(l)(*i*)) was re-organized and now appears at MCL 28.602(f)(*i*)(A). The current version defines law enforcement officer as including "an individual employed by a law enforcement agency as . . . [a]n *individual authorized by law*, including common law, to prevent and detect crime and enforce the criminal laws of the state." This would plainly include Border Patrol agents under § 15d.

might overlap with the common-law definition, they are, by their terms, distinct inquiries. The statutory definition in MCL 15.181 cares about whether a person was elected or appointed to a position in a discrete number of state or local entities; the common-law definition looks to the *substance* of the position as delegated by the Legislature. See *People v Jackson*, 487 Mich 783, 800 (2010) (discussing avoidance of "elevating form over substance").

CONCLUSION AND RELIEF REQUESTED

In law and in fact, Bruce and Nicholson were acting as state law enforcement officers when they assisted, as members of a joint task force created under Michigan law, in the execution of a search warrant under Michigan law. And just like state law enforcement officers, they are "public officers" for the crime of misconduct-in-office.

This Court should reverse the Court of Appeals' judgment and reinstate the defendants' convictions.

Respectfully submitted,

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