**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellant,

-vs-

**JAMES LEE**

Defendant-Appellee.
_____/

**Michigan Supreme Court No. 157176**

Court of Appeals Nos. 334308

Circuit Court No. 16-1002-01

# DEFENDANT-APPELLEE'S ANSWER TO THE PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL

**STATE APPELLATE DEFENDER OFFICE**

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**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellant,

-vs-

**JAMES LEE**

Defendant-Appellee.
_____/

**Michigan Supreme Court No. 156738**

Court of Appeals Nos. 334308

Circuit Court No. 16-1002-01

**DEFENDANT- APPELLEE'S ANSWER IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

Defendant-Appellee, JAMES LEE, though his attorney, the State Appellate Defender office by Jason R. Eggert, respectfully asks this Court to deny Plaintiff's application for leave to appeal.

1. Plaintiff's application relies on the same arguments made in the Court of Appeals.

2. Ms. Lee's briefs[1] in the Court of Appeals adequately addressed the issues.

3. The Court of Appeals did not err in finding that the jury verdict on Child Abuse Second Degree was not supported by sufficient evidence when the prosecution never proved that Mr. Lee knowingly or intentionally committed any *act* likely to cause harm to a child.

4. The charges were related to two instances of anal penetration of Mr. Lee's 15 year-old nephew and Mr. Lee's boyfriend, Victor Smith. Mr. Lee was the legal guardian of his nephew. The allegations were that, after the first assault, Mr. Lee's nephew told him that Smith had sex with him. His nephew claimed that Mr. Lee told him he would take care of it. Mr. Lee,

[1] Please see Attachment A – Mr. Lee's Brief on Appeal; Attachment B – Mr. Lee's Reply Brief; Attachment C – Supplemental Authority.

however, did not remove Smith from the home. The prosecution proceeded on a theory that Mr. Lee should be held criminally responsible for the second assault because he "did nothing" to prevent Smith from having sex with Edward after he was notified of the first instance of assault.

5. The Court of Appeals opinion was soundly based on the law. In particular, the Court of Appeals relied upon its recent published decision in *People v Murphy*, ___ Mich App ___ ; ___ NW2d ___ (2017)(Docket No. 331620).[2] This Court denied the prosecution's application for leave to appeal in that case on March 7, 2018.[3] Plaintiff's application does not demonstrate grounds for granting leave to appeal.

6. In sum, there are no proper grounds for this Court to grant leave under MCR 7.305(B).

**WHEREFORE**, for the foregoing reasons, Defendant-Appellee James Lee asks that this Honorable Court deny the prosecution's Application for Leave to Appeal.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Jason R. Eggert
BY:_____

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Dated: March 8, 2018

[2] See Attachment D – Court of Appeals Opinion in *People v Murphy*
[3] See Attachment E - Order Denying Prosecution's Application for Leave to Appeal – *People v Murphy*

# INDEX OF APPENDICES

# APPENDIX A

Brief on Appeal - January 10, 2017

Approved, Michigan Court of Appeals

| LOWER COURT<br>Wayne County Circuit Court | Electronically Filed<br>BRIEF COVER PAGE | CASE NO.<br>Lower Court 16-1002-01<br>Court of Appeals 334308 |
|---|---|---|

(Short title of case)
Case Name: **People v. James Lee**

1. Brief Type (select one):
☒ APPELLANT(S) ☐ APPELLEE(S) ☐ REPLY
☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS
☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **James Lee**

3. ☐ This brief is in response to a brief filed on by .

4. ORAL ARGUMENT: ☒ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- ☒ Table of Contents [MCR 7.212(C)(2)]
- ☒ Index of Authorities [MCR 7.212(C)(3)]
- ☒ Jurisdictional Statement [MCR 7.212(C)(4)]
- ☒ Statement of Questions [MCR 7.212(C)(5)]
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- ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- ☒ Relief Requested [MCR 7.212(C)(9)]
- ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Douglas W. Baker**
Signing Attorney's Bar No. [if any]: **(P49453)**

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DWB*BOA 1-10-17.docx*29916 January 10, 2017
James Lee

# TABLE OF AUTHORITIES

## Cases



## Statutes and Constitutional Provisions



## Rules

## STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on July 21, 2016. A Claim of Appeal was filed on August 11, 2016, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated August 2, 2016, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

## STATEMENT OF QUESTIONS PRESENTED

I. WAS THERE INSUFFICIENT EVIDENCE TO SUPPORT MR. LEE'S SECOND-DEGREE CHILD-ABUSE CONVICTION BECAUSE THE OMISSION AT ISSUE IS NOT CONTEMPLATED BY MCL 750.136B(3)?

Trial Court made no answer.

Defendant-Appellant answers, "Yes."

# STATEMENT OF FACTS

## Introduction

Defendant-Appellant James Lee was charged with in the Wayne County Circuit Court with one count of first-degree criminal sexual criminal sexual conduct and one count of second-degree child abuse. (PE, 35).[1]

The charges were related to two instances of anal penetration of Mr. Lee's 15-year-old nephew, Edward Lewis, Jr., ("Edward"), by Mr. Lee's boyfriend, Victor Smith ("Smith"). Mr. Lee was Edward's legal guardian. (T II, 116-117). The allegations were that, after the first assault, Edward told Mr. Lee that Smith had sex with him. Edward claimed Mr. Lee told him he would "take care of it." (T II, 155). Mr. Lee, however, did not remove Smith from the home. It was the prosecution's theory that Mr. Lee should be held criminally responsible for the second sexual assault because he "did nothing" to prevent the Smith from having sex with Edward after he was notified of the first instance of assault. (T II, 26-28).

On June 10, 2016, following a three day trial jury trial before the Honorable Kevin J. Cox, the jury acquitted Mr. Lee of first-degree criminal sexual conduct, but convicted him of second-degree child abuse. (T III, 78-83).

On July 21, 2016, Judge Cox sentenced Mr. Lee to serve a two-year probationary term, with 119 days credit for pre-trial custody. (ST, 13, 19).

## The Trial

[1] Transcripts in this matter will be referred by an abbreviated name and page number, i.e. (T II, 123). Each transcript will be referred to by the following abbreviated titles:

Preliminary Exam = PE
Evidentiary Hearing (May 26, 2016) = EH
Trial Volume I = T I
Trial Volume II = T II
Trial Volume III = T III
Sentencing = ST

Mr. Lee has substantial hearing issues. (EH, 27-28). Those hearing issues required the use of three sign-language interpreters at trial. (T II, 3-5). As a child, Mr. Lee also attended special classes for deaf students at Pershing High School. (EH, 28-29). While Mr. Lee was able to communicate with others, he often used a special program called "Sorensen" to conduct phone calls. (EH, 33). By using the program, an interpreter would be patched into the call via video and sign the conversation to Mr. Lee to ensure he understood what the other person was saying. (EH, 33).

Mr. Lee became Edward's guardian when Edward was 14 years old and remained so for about a year and a half. (T II, 116, 139). Mr. Lee became the guardian because, as Edward's father explained, his family was having financial difficulties and could not provide for him. (T II 116-117). Those difficulties included not having a working refrigerator or stove. (T II, 116-117). Edward also mentioned another reason: fights with his brother. (T II, 174). While Edward was in Mr. Lee's care, his father failed to visit him for more than a year.(T II, 128).

In addition to the lack of financial resources at home, Edward is learning disabled. (T II, 119). This disability gave him problems with his ability to speak and understand others. (T II, 119). According to his father, it was necessary to repeat information to Edward at least "two or three times so he can understand what you tellin' him." (T II, 119).

During the time he was in Mr. Lee's care, Edward lived in an apartment on Petosky in the city of Detroit. (T II, 140-141). Mr. Lee fed, clothed and made sure Edward went to school every day. (T II, 143). Edward did not know sign language and only communicated with Mr. Lee by speaking to him. (T II, 143). Edward claimed, despite Mr. Lee's difficulties hearing, Mr. Lee had no problems hearing him. (T II, 144).

Shortly after Edward moved in with him, Mr. Lee's boyfriend Victor Smith also started living in the apartment. (T II, 140). Smith testified he moved in because he had surgery on his foot and could not walk after the procedure. (T II, 222).

**First Instance of Sexual Assault**

At some point while Edward lived in the apartment with Mr. Lee, Smith had anal sex with Edward. (T II, 146). According to Edward, the intercourse happened in his bedroom. (T II, 147-149). Edward claimed that Mr. Lee was home when the act occurred, but was asleep in his room when it happened. (T II, 149). Edward testified that the anal sex felt "not good." (T II, 151).

Edward told Mr. Lee what happened the next morning when he got up. (T II, 170). He did not tell Mr. Lee that the anal sex hurt. (T II, 153). According to Edward, after hearing about what happened, Mr. Lee told him "okay, I got it."(T II,154). Edward understood this to mean Mr. Lee would take care of it. (T II, 155). Edward also claimed Mr. Lee told him he would kick Smith out of the house. (T II, 155). Smith, however, was not kicked out of the apartment. (T II, 155). Edward claimed that Mr. Lee did nothing to prevent sexual intercourse from occurring again. (T II, 156).

**Second Sexual Assault**

Shortly after the first incident, Smith had anal sex with Edward again. (T II, 157). Mr. Lee was not home at the time of the second sexual assault. (T II, 157). Edward told Mr. Lee about the second sexual assault when he got home and Mr. Lee told him "okay, I got it." (T II, 160). Mr. Lee then called his father, Shawn Bryant, who came to pick up Edward and called the police. (T II, 173). Edward was then interviewed by "Kids Talk" about both instances of sexual assault. (T II, 163).

**CPS interview of Mr. Lee and Smith**

On March 18, 2015, Jonnathan Meade ("Meade") received a CPS referral for allegations of abuse or neglect concerning Edward. (T II, 43-44). As part of this referral, Mr. Meade spoke with Mr. Lee, Victor Smith and Edward Lewis' parents. He also conducted the interview of Edward at Kids Talk. (T II, 43-44).

Meade interviewed Mr. Lee and Smith at Mr. Lee's apartment. (T II, 46). According to Meade, "Mr. Lee indicated that the allegations were true." (T II, 47). Meade testified those allegations were "sexual abuse, regarding failure to protect, as far as sexual interaction between Mr. Smith and Edward Lewis." (T II, 47).

According to Meade, Mr. Lee also indicated his understanding that "Edward had solicited sex from Mr. Smith." (T II, 48). Meade clarified that Mr. Lee did not use the word "solicited," but told him that Edward had sex with Smith on two different occasions. (T II, 48).

Meade testified Mr. Lee told him that on the first occasion, he, Edward and Smith were all talking in the kitchen. (T II, 48). At some point in the conversation, Smith went to the bathroom. (T II, 48). While Smith was using the bathroom, the door was cracked open and "Edward came back and indicated that he had saw [sic] Mr. Smith's penis and that he wanted him." (T II, 48). Meade claimed Mr. Lee told him he left the house at some point after this occurred and, while he was gone, Smith and Edward had sex. (T II, 49).

After the first instance of sexual intercourse, Mr. Lee "confronted Mr. Smith about the interaction." (T II, 49). However, Meade claimed "Mr. Lee indicated that he didn't do anything about it, because he didn't consider it to be rape . . . because Edward indicated that he wanted it." (T II, 50). Meade also testified that Mr. Lee did not kick Smith out of house, call CPS or police, or move Edward out of the home. (T II, 51).

Meade also discussed the second instance of sexual intercourse between Smith and Edward. Meade testified that Mr. Lee told him that, after being informed Smith had sex with Edward again, he once again confronted Smith. (T II, 52-53). Mr. Lee informed Meade that he told Smith he could no longer have "any interaction" with Edward because "his trust level had lowered, for Mr. Smith, as far as their relationship was concerned." (T II, 53). Mr. Meade explained that Mr. Lee said he "understood" why the situation could be considered a failure to protect. (T II, 55). He said, though, that he did not think anything was done wrong regarding the first instance of sexual assault. (T II, 54).

Meade also interviewed Smith. According to Meade, Smith said everything Mr. Lee told him was true. (T II, 56).

**Testimony of Victor Smith**

Victor Smith denied having sex with Edward. (T II, 223). He testified he moved into the home after having foot surgery and that Mr. Lee was helping him with his recovery. (T II, 224).

Smith testified that did not get along with Edward. (T II, 223 ). He testified that Edward "expressed" wanting to have sex with him, but that they did not in fact have sex. (T II, 225).

**Closing Argument**

During both opening and closing argument, it was the prosecution's theory that Mr. Lee should be convicted because he did "absolutely nothing" to prevent Smith from having sex with Edward after he was notified of the first instance of assault. (T II, 26-28; T III, 25-26, 29). According to the prosecution, Mr. Lee had a legal obligation, one which he would be held criminally responsible for failing to perform, to "notify Protective Services, call the Police, kick [Smith] out, move [Edward] out to another residence, to do something to prevent this from happening a second time." (T III, 25).

It was trial counsel's theory that Mr. Lee should be acquitted of the charges because this was a case of "prosecutorial overreach." (T III, 30).

## I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. LEE'S SECOND-DEGREE CHILD-ABUSE CONVICTION BECAUSE THE OMISSION AT ISSUE IS NOT CONTEMPLATED BY MCL 750.136B(3).

**Issue Preservation**

Trial counsel moved for a directed verdict. (T II, 201-204). However, an insufficient-evidence claim is reviewable on appeal even when not raised below. *People v Wright*, 44 Mich App 111, 114 (1972).

**Standard of review**

An appellate court reviews insufficient-evidence claims de novo to determine whether a rational trier of fact could have found that the defendant's guilt was proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1980); *People v Wolfe*, 440 Mich 508, 515 (1992); *People v Hampton*, 407 Mich 354, 368 (1979). Evidentiary conflicts are to be resolved by viewing the evidence in the light most favorable to the prosecution. *Wolfe*, 440 Mich at 515.

Due process requires a verdict to be supported by legally sufficient evidence for each element of the crime. US Const Am XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358 (1970); *Jackson*, 443 US at 307. "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *People v Patterson*, 428 Mich 502, 525 (1987) (quoting *Winship*, supra).

Statutory interpretation questions are also generally reviewed de novo. *People v Idziak*, 484 Mich 549, 554 (2009).

**Argument**

James Lee was convicted of second-degree child abuse based on the theory he "did nothing" to prevent harm to his nephew, Edward Lewis, after he was informed his roommate and boyfriend, Victor Smith, had sex with him. (T II, 26-28; T III, 25-26, 29). This omission is insufficient to sustain his conviction for second-degree child abuse statute.

While the second-degree child abuse statute does proscribe some types of omissions, it does not proscribe the type of omission at issue here. The second degree child abuse statute, MCL 750.136b(3), has three subsections. Each section criminalizes different forms of child abuse. A person may be convicted of second-degree child abuse if any of the following circumstances apply:

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

At issue here is an omission. MCL 750.136b(1)(c) defines omission. It provides: "Omission' means a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child."[2]

[2] Subsection (b) criminalizes knowing or intentional acts "likely to cause serious physical or mental harm to a child regardless of whether harm results." MCL 750.136b(1)(f)&(g) define serious physical and mental harm. They provide:

> (f) "Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

The prosecution's theory at trial was that Mr. Lee "did nothing" after hearing about the alleged sexual abuse of his 15 year old nephew by his boyfriend and roommate, Victor Smith. (T II, 28). Based on the plain language of the second-degree statute, however, this omission is simply outside of the scope of the statute.

First, Mr. Lee's failure to act is not covered by MCL 750.136b(3)(a). As stated above, the term "omission" in the second-degree child abuse statute has been defined by the Legislature. According to the Legislature, omissions, for purposes of the second-degree statute, are limited to failures "to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c). The statute makes no mention of a general obligation to prevent harm to a child.

Second, the conduct at issue here is not covered by MCL 750.136b(3)(b) & (c) because both subsections criminalize acts, not omissions. Subsection (b) criminalizes knowingly or intentionally committing an act likely to cause serious harm, while subsection (c) criminalizes cruel acts. Here, the trial evidence supports one conclusion—that Mr. Lee did nothing after being informed Smith had sex with Edward. This alleged conduct—an omission, not an act—is simply not covered by either subsection (b) or (c).

---

> (g) "Serious mental harm" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

Subsection (c) prohibits an individual from committing knowing and intentional cruel acts to a child. MCL 750.136b(1)(b) defines cruel as "brutal, inhuman, sadistic, or that which torments."

This Court has interpreted the statute the same way. *People v Borom*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2013 (Docket No 313750).[3] *Borom* concluded that MCL 750.136b(3)(a)-(c) does not criminalize every omission. *Id*. at 2. *Borom* recognized the scope of the second-degree statute is limited to the omissions defined in MCL 750.136b(1)(c):

> the term "omission" in the second-degree child abuse statute is defined by the Legislature. An "omission" includes only a willful failure to provide food, clothing, or shelter, or a willful abandonment. MCL 750.136b(1)(c). An "omission" does not cover the failure to act to protect a child from harm. Thus, MCL 750.136b(3)(a) does not cover the failure to prevent harm to a child. The other parts of the second-degree child abuse statute also do not cover the failure to prevent harm to a child with the intent to cause serious harm or knowledge that serious harm will be caused. The second part of MCL 750.136b(3)(a) punishes reckless acts that cause serious physical or mental harm. A reckless act causing serious harm differs from knowingly and intentionally causing serious harm. MCL 750.136b(3)(b) and (c) also do not cover the conduct at issue because they punish knowingly or intentionally committing an act likely to cause serious harm and knowingly or intentionally committing an act that is cruel, but neither requires that harm resulted.

*Id*. at 2.

---

[3] This Court is not bound to follow *Borom* because it is an unpublished decision. MCR 7.215(C)(1). *Borom* is more persuasive than a normal unpublished decision, however, because the Court addressed the scope of the second-degree statute not casually, but at the explicit direction of our Supreme Court:

> On order of the Court, the application for leave to appeal the January 31, 2013 order of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration, as on leave granted, of: (1) whether a parent's failure to act to prevent harm to his or her child satisfies the requirement for a knowing or intentional act under the first-degree child abuse statute, MCL 750.136b(2), in light of MCL 750.136b(3) that separately punishes omissions and reckless conduct as second-degree child abuse; (2) if so, whether the failure to prevent a person who may be dangerous to the child to have contact with the child violates the first-degree child abuse statute; (3) whether there is a common law duty of a parent to prevent injury to his or her child; and, (4) assuming that there is such a duty under the common law, whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime.

*People v Borom*, 494 Mich 859 (2013).

The Legislature made clear what it was criminalizing and, by defining the types of omissions covered under the statute, limited its scope. The goal of statutory interpretation is to discern the Legislature's intent based on the statutory language. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr., Inc. v Holly Twp.*, 224 Mich App 28, 32 (1997); *People v Nix*, 301 Mich App 195, 199 (2013). The plain language of MCL 750.136b(3)(a)-(c) shows a clear and unambiguous intent to limit omissions to "willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c). This clear language requires the Court to conclude that the omission here, of another sort altogether, was not proscribed by the second-degree child-abuse statute.

Mr. Lee's conviction must be vacated because the omission at issue is not criminalized by the plain language of the second-degree statute. The proofs fail to satisfy the statutory definition of omission, and also fall outside the scope of MCL 750.136b(3)(b)&(c) because those provisions only criminalize acts. Because the evidence to support it is insufficient, the Court must vacate Mr. Lee's conviction.

## SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks this Honorable Court to reverse his conviction.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Douglas W. Baker

BY:_____

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Dated: January 10, 2017

# APPENDIX B

Reply Brief - July 11, 2017

Approved, Michigan Court of Appeals

| LOWER COURT | Electronically Filed | CASE NO. |
|---|---|---|
| Wayne County Circuit Court | BRIEF COVER PAGE | Lower Court 16-1002-01<br>Court of Appeals 334308 |

(Short title of case)
Case Name: **People v. James Lee**

1. Brief Type (select one):
☐ APPELLANT(S) ☐ APPELLEE(S) ☒ REPLY
☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS
☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **James Lee**

3. ☒ This brief is in response to a brief filed on June 21, 2017, by the Wayne County Prosecutor.

4. ORAL ARGUMENT: ☒ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- ☒ Table of Contents [MCR 7.212(C)(2)]
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- ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- ☒ Relief Requested [MCR 7.212(C)(9)]
- ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Douglas W. Baker/Jason R. Eggert**
Signing Attorney's Bar No. [if any]: **(P49453)/(P75452)**

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DWB*Reply Brief.docx*29916 July 11, 2017

James Lee

# TABLE OF AUTHORITIES

## Cases



## Statutes

## I. BECAUSE THE PROSECUTION NEVER PRESENTED EVIDENCE THAT MR. LEE DID A KNOWING OR INTENTIONAL ACT, THE EVIDENCE WAS INSUFFICIENT TO CONVICT HIM OF SECOND-DEGREE CHILD ABUSE.

The prosecution argues Mr. Lee's conviction for second-degree child abuse should be upheld because he committed an act by "allow[ing] Smith to remain in the house" after having knowledge of a previous sexual assault. See Prosecution's BOA at 9.

The prosecution's argument lacks merit and ignores the distinction between acts and omissions. In its brief, the prosecution fails to explain how Mr. Lee's alleged conduct can be considered an act. Although the prosecution goes to great lengths to recast the alleged conduct as an "affirmative act," its own descriptions of the alleged conduct describe an omission, not an act. See Prosecution's BOA at 9-10. Indeed, throughout the brief, Mr. Lee's alleged conduct of allowing Mr. Smith to remain in the home is described as a "fail[ure] to protect" or a "failure to prevent harm." See Prosecution's BOA at 10.

The cases relied on by the prosecution further support the conclusion that the alleged conduct involves an omission, not an act. In support of its argument, the prosecution relies on a civil case establishing that an individual may have a civil cause of action based on a guardian's common law duty to protect a child against acts of third parties[1] and an Illinois Supreme Court decision involving the common law duty to protect.[2] Neither case supports their position that there was sufficient evidence of second-degree child abuse or that Mr. Lee committed an "affirmative" act by doing nothing after hearing his nephew was sexually assaulted by Smith. Instead, both of these cases involve the imposition of liability, in some form, based on an individual's failure to perform a duty. In other words, these cases involve omissions. By relying

[1] *Babula v Robertson*, 212 Mich App 45 (1995)
[2] *Illinois v Stanciel*, 153 Ill2d 218 (1992).

on these cases, the prosecution is essentially conceding that this case involves an omission, not an act. Indeed, it was the prosecution's theory at trial was that Mr. Lee "did nothing" after hearing about the alleged sexual abuse of his 15 year old nephew by his boyfriend and roommate, Victor Smith. (T II, 28). The prosecution's attempt to recast that alleged conduct as an "affirmative act" on appeal changes nothing.

The prosecution's reliance on these cases also demonstrates its failure to come to grips with the plain language of the second-degree child abuse statute. When the Legislature drafted the second-degree statute, it expressly limited the types of omissions that fall within its scope. See MCL 750.136b(1)(c) (defining "omission" as a "willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child"). The second-degree statute simply does not cover a failure to prevent generalized harm to a child and, as a result, does not contemplate the creation of such a duty. See *People v Borom*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2013 (Docket No 313750)(recognizing that the second-degree child abuse statute does not cover a failure to prevent harm to a child).[3] Therefore, no matter which subdivision of the statute is applied, the evidence is insufficient.

Finally, the prosecution attempts to rely on language from *People v Maynor*, 470 Mich 289 (2004) to argue Mr. Lee's conviction should be upheld. *Maynor*, however, only dealt with the application of the first-degree child abuse statute and, therefore, has no application to this case. The prosecution's reliance on *Maynor* is misplaced.

[3] The *Borom* opinion was made an attachment to Mr. Lee's Brief on Appeal.

## SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

**WHEREFORE**, for the foregoing reasons and those contained in the Brief on Appeal, Defendant-Appellant asks this Court to reverse his conviction.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Douglas W. Baker

BY:_____

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Dated: July 11, 2017

# APPENDIX C

Supplemental Authority - September 19, 2017

**STATE OF MICHIGAN**

**IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**JAMES LEE**

Defendant-Appellant
_____/

**Court of Appeals No.** 334308

**Lower Court No.** 16-1002-01

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee
_____

**DOUGLAS W. BAKER (P49453)**
Attorney for Defendant-Appellant
_____

# SUPPLEMENTAL AUTHORITY (MCR 7.212(F))

**STATE APPELLATE DEFENDER OFFICE**

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**SUPPLEMENTAL AUTHORITY (MCR 7.212(F))**

Defendant-Appellant James Lee files this communication, pursuant to MCR 7.212(F), to call the court's attention to new authority. In particular, Mr. Lee would like to apprise the court of its recent decision in *People v Murphy*, ___ Mich App ___; ___ NW2d ___ (2017)(Docket No. 331620). *Murphy* has a direct impact on the issue raised in Mr. Lee's appeal.

In *Murphy*, this Court addressed the issue of whether there was sufficient evidence to sustain Kimberly Murphy's conviction for second degree child abuse where it was the prosecution's theory that Ms. Murphy committed an act when her child died of ingesting morphine and the evidence showed the home was in a filthy condition, prescription morphine pills were in the home, and she failed to clean to ensure the morphine pills were removed. *Id*. at __; slip op at 2-3.

This Court concluded the evidence was insufficient because Ms. Murphy did not commit an act by failing to protect her child or provide a safe home environment. The Court explained "[s]imply failing to take action does not constitute an act."

*Murphy*, therefore, provides published authority for the proposition that "failing to take action does not constitute an act." *Id*. at ___; slip op 3-4. This is precisely at issue in Mr. Lee's appeal because the prosecution argues his conviction for second degree child abuse should be sustained because he committed an act by "failing to protect" or "failing to prevent harm" to a child. *Murphy* provides the only binding authority on this issue and, as a result, this Court should reverse.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**
/s/ Douglas W. Baker
BY:_____
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Dated: September 19, 2017

# APPENDIX D

Court of Appeal Opinion - September 19, 2017

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>KIMBERLY ANITRA MURPHY,<br><br>Defendant-Appellant. | FOR PUBLICATION<br>September 19, 2017<br>9:05 a.m.<br><br>No. 331620<br>Macomb Circuit Court<br>LC No. 2015-000548-FH |

Before: GLEICHER, P.J., and M. J. KELLY and SHAPIRO, JJ.

M. J. KELLY, J.

Defendant, Kimberly Murphy, was convicted following a jury trial of second-degree child abuse, MCL 750.136b(3). Murphy was sentenced to 36 to 120 months' imprisonment, with 76 days of credit for jail time served. Because the jury verdict is not supported by sufficient evidence, we vacate Murphy's conviction and sentence.

## I. BASIC FACTS

This case arises from the death of Murphy's 11-month-old daughter, Trinity Murphy.[1] The prosecutor presented evidence showing that Trinity died after ingesting a toxic quantity of morphine.[2] The prosecutor's theory was that Trinity died because of her parents' "reckless acts,"

[1] Trinity's father, Harold Murphy, was also charged in connection with her death. He was tried jointly with Murphy, convicted of second-degree child abuse, and sentenced. He has not appealed.

[2] It is not clear where Trinity found the morphine pill. However, there was testimony that her grandmother, who had been living in the home, had been prescribed morphine for pain management. The grandmother had colon cancer and had passed away about a month before Trinity's death. Murphy admitted to a police detective that a pill could have possibly fallen on the floor in the grandmother's bedroom. The police also located a prescription pill bottle containing morphine pills in a closet in the grandmother's former bedroom, but they appeared to be out of reach of an 11-month-old child. Thus, although speculative, the prosecutor argued that a pill had likely fallen to the floor and because Trinity's parents failed to clean the bedroom Trinity was able to find and consume it.

which she contended consisted of "their inaction" and their inability to protect their child and provide a safe home environment. In support of her theory, the prosecutor presented substantial evidence showing that the home was in a deplorable and filthy condition, that there were prescription morphine pills in the home, and that Trinity's parents had failed to clean the home to ensure that the morphine pills were removed after Trinity's grandmother (who was prescribed the medication and had been living in the home) passed away. The defense theory was that no reckless act taken by Murphy caused Trinity's death.

## II. SUFFICIENCY OF THE EVIDENCE

### A. STANDARD OF REVIEW

Murphy argues that there was insufficient evidence to convict her of second-degree child abuse. We review de novo challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). When reviewing a challenge to the sufficiency of the evidence, "[a]ll conflicts in the evidence must be resolved in favor of the prosecution, and circumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime." *People v Solloway*, 316 Mich App 174, 180-181; 891 NW2d 255 (2016) (citations omitted). " 'It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.' " *People v Henry*, 315 Mich App 130, 135; 889 NW2d 1 (2016), quoting *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

### B. ANALYSIS

Under MCL 750.136b(3), a person is guilty of second-degree child abuse under three circumstances:

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

Only subsection (a) is applicable in this case. Under subsection (a), a person can be convicted of second-degree child abuse if his or her "omission causes serious physical harm or serious mental harm to a child" or if his or her "reckless act causes serious physical harm or serious mental harm to a child." MCL 750.136b(3)(a).[3] The prosecutor proceeded under a theory that Murphy

[3] Person is defined as "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person." MCL 750.136b(1)(d). There is no

had committed a reckless act causing serious physical harm to Trinity, not that her omission caused serious physical harm to Trinity, and that was the only theory that the jury was instructed on.[4] To establish second-degree child abuse based on a reckless act, the prosecution must prove that a defendant (1) was a parent or a guardian of the child or had care or authority over the child; (2) that he or she committed a reckless act, (3) that as a result, the child suffered serious physical harm; and (4) that the child was under 18 years old at the time. See M Crim JI 17.20. Generally, a determination of whether an act is reckless is a jury question. See *People v Edwards*, 206 Mich App 694, 696-697; 522 NW2d 727 (1994).

The question in this case, however, is not whether Murphy was "reckless."[5] Instead, it is whether she committed a "reckless *act*." The statute does not define what constitutes an "act" for purposes of MCL 750.136b(3)(a). Black's Law Dictionary (10th ed) defines "act" as "1. Something done or performed, esp. voluntarily; a deed" or "2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world." Thus, in order to constitute a "reckless act" under the statute, the defendant must do something and do it recklessly. Simply failing to take an action does not constitute an act. The prosecutor presented no evidence that any affirmative act taken by Murphy led to Trinity's death. Instead, she only directed the jury to Murphy's reckless *inaction*, i.e., her failure to clean her house to ensure that morphine pills were not in reach of Trinity.

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dispute in this case that Murphy qualifies as a "person" under the statute. Nor is there any dispute that she suffered serious physical harm.

[4] We note that under the facts presented to the jury, Murphy could not have been convicted of second-degree child abuse on an omission theory because the statute defines "omission" as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c). Here, there is no evidence that Murphy willfully failed to provide food, clothing, or shelter to Trinity or that she willfully abandoned her.

[5] The concurrence takes issue with the definition of "reckless" set forth in *People v Gregg*, 206 Mich App 208; 520 NW2d 690 (1994) and the definition of "reckless" adopted by the trial court in this case. We also have serious concerns about the loose definition in *Gregg* and the definition adopted by the trial court. However, given that the issue is not outcome determinative, we decline to address it now, especially in the absence of briefing on the issue.

Because there is no evidence in the record of a reckless act taken by Murphy that caused Trinity to suffer serious physical abuse, we vacate her conviction and sentence for second-degree child abuse.[6]

/s/ Michael J. Kelly
/s/ Douglas B. Shapiro

[6] Given our resolution of this issue we need not address Murphy's argument that she was completely deprived of the assistance of a lawyer during a portion of the trial or that her jail-credit was improperly calculated. Nevertheless, we are compelled to briefly discuss the ineffective assistance claim. Here, it is undisputed that for approximately 27-minutes during the trial, Murphy's lawyer was completely absent while her co-defendant's lawyer cross-examined a police detective and while the prosecutor conducted a re-direct examination of the detective. The questions asked during Murphy's lawyer's absence included questions pertaining to Murphy that were arguably inculpatory. Although the lawyer's absence likely did not amount to a complete denial of counsel so as to constitute a structural error under *United States v Cronic*, 466 US 648, 659-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984), we find the court's willingness to proceed without Murphy's lawyer disturbing. A criminal defendant should not be punished for his or her lawyer's failure to timely appear for court proceedings. While the absence was undoubtedly inconvenient for the court, the jury, opposing lawyers, and the witnesses, the proposition that the presence of a lawyer in the courtroom is necessary for a party's proper defense is so fundamental that it hardly requires a citation to authority and it should not have been so lightly ignored by the trial court.

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | FOR PUBLICATION<br>September 19, 2017 |
| v | No. 331620<br>Macomb Circuit Court |
| KIMBERLY ANITRA MURPHY,<br><br>Defendant-Appellant. | LC No. 2015-000548-FH |

Before: GLEICHER, P.J., and M. J. KELLY and SHAPIRO, JJ.

GLEICHER, J. (*concurring*).

I fully concur with the majority's determination that Kimberly Murphy did not engage in an affirmative act that caused harm to Trinity. I write separately to express my view that even if Murphy's failure to clean her home could be regarded as an "act," it did not meet the applicable mens rea standard: recklessness. This alternative ground also supports vacating Murphy's conviction.

## I. FACTUAL BACKGROUND

No one knows how or where Trinity found the morphine pill that the prosecution theorizes took the child's life. The investigators' best guess is that the pill landed on the floor of Murphy's mother's bedroom at some unknown point in time, and that Trinity found it when she crawled around on the room's un-vacuumed carpet. But this is truly a guess, as the investigators noted that the pills were otherwise contained in a child-proof vial kept in a closet, on a shelf above Trinity's reach.

The trial evidence focused relentlessly on the conditions of the home—the filthy kitchen and bathroom, the smelly garbage bags in the laundry room, and the unpleasant, dirty, and, as characterized by an investigator, altogether "deplorable" state of the home. No evidence was presented, however, about any specific circumstances that led to Trinity's ingestion of the pill. After Murphy's mother, Muriel Cheeks, died of cancer, one of Murphy's adult children moved into Cheeks's bedroom. Trinity watched television in that room during the evening before the child died. The lead investigator speculated that Cheeks or one of her caregivers may have accidentally dropped one of Cheeks's brownish-colored morphine pills on the brown carpet, and that two weeks later, Trinity ate it.

During her closing argument, the prosecutor strenuously maintained that Murphy's tolerance of the filthy living conditions equated with a reckless act consistent with second-degree child abuse: "Their recklessness was their inability to care. Their indifference to consequence. Their inability to go in and make sure that medication was taken out of the house. Make sure that room was kept in an environment fit for children." The prosecutor emphasized the filthy conditions in the home and that Child Protective Services had previously intervened for that reason:

> There was evidence in the case that talked about the defendants' prior Child Protective Service history. And that's really important because we know that this isn't a onetime thing. This is how they've always been. Their whole entire lives.
>
> Services were provided to this family. Is there anything we can do to help you make your home conditions more fit? More fit for your children. We will do anything we need to do. We will help you pay your rent. We will help you with your heating bill. We will provide you beds. But every [sic] their hands out to get any of these services, they don't turn around and do anything to better their children. In fact, their children were consistently sent to school in unkempt conditions.
>
> And why is that important? It leads directly back to their lifestyle. The lifestyle they've always had. One in which that was reckless and one that is just indifferent to the consequences of their actions.[1]

In her rebuttal argument the prosecutor persisted in hammering this theme:

> Their recklessness was their inability to care. Their indifference to consequence. Their inability to go in and make sure that medication was taken out of the house. Make sure that room was kept in an environment fit for children. An environment that they were taught about. Child Protective Services comes in their house. Let's help fix this. Let's do what we need to do. Here's an intensive program. Here's another program. Here's another program. This isn't an accident. This isn't some oh well we didn't know. It's not cleaning day. It's not laundry day. We just didn't vacuum. They didn't even find a vacuum in the house. There's a brand new broom.
>
> * * *
>
> There were no cleaning supplies in the house. Police said that and found nothing in the (inaudible).

[1] The trial court sustained an objection to this argument but did not instruct the jury to disregard it.

> That's the defendant's recklessness. That's what they did. They're [sic] unkempt house. They're [sic] inability to clean. They're [sic] inaction caused Trinity to die. It was not Trinity's time to go. That baby is not here today because of what they failed to do. Give her living conditions that were safe.

The trial court instructed the jury that it could find Murphy guilty if it determined that Murphy had committed "some reckless act," as a result of which "Trinity Murphy suffered a serious physical harm." The court defined "reckless" as "[u]tterly unconcerned about the consequences of some action. Indifferent to consequences."

## II. RECKLESSNESS, NEGLIGENCE, AND THE CRIMINAL LAW

According to the prosecutor's brief on appeal, "[a]t trial, the People argued that Defendant's 'reckless act' was her failure to protect Trinity by maintaining a safe living environment, and that such recklessness ultimately allowed Trinity to find and ingest the morphine." The majority correctly rejects this argument, summarizing that "[s]imply failing to take an action does not constitute an act." I would add that even if Murphy "acted" by permitting Trinity access to Cheeks' bedroom, as a matter of law that act was not reckless.

Unfortunately, the Legislature did not provide a definition of the term "reckless" used in the second-degree child abuse statute, MCL 750.136b(3)(a). In *People v Gregg*, 206 Mich App 208; 520 NW2d 690 (1994), this Court considered whether the fourth-degree child abuse statute, MCL 750.136b(5), was unconstitutionally vague because it too lacks a definition of "reckless." We concluded that a dictionary definition sufficed to explain the term, and cited two dictionaries for guidance:

> Black's Law Dictionary (6th ed) defines "reckless" as:
>
> > Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.
>
> *The Random House College Dictionary, Revised Edition*, defines "reckless" as:
>
> > 1. utterly unconcerned about the consequences of some action; without caution; careless . . . . 2. characterized by or proceeding from such carelessness. [*Id*. at 212.]

"Given these dictionary definitions of the word 'reckless' and applying its plain and ordinary meaning to the language of the statute," this Court upheld the statute's constitutionality. *Id*.

In the years since *Gregg* was decided, a number of unpublished decisions have cited it for the proposition that garden-variety carelessness is included in the definition of "recklessness" under the second or fourth-degree child abuse statutes. Here, the trial court used the first

*Random House College Dictionary* definition to instruct the jury as to the term's meaning ("utterly unconcerned about the consequences of some action").

I respectfully suggest that *Gregg* was wrongly decided, and that this case showcases the need for a definition of "reckless" consistent with fundamental criminal law principles rather than dictionary definitions.[2]

The Legislature is free to make certain acts criminal regardless of intent, *People v Quinn*, 440 Mich 178, 189; 487 NW2d 194 (1992), just as it may decide to "impose a criminal responsibility for a tort that theretofore carried with it only civil liability." *People v McMurchy*, 249 Mich 147, 162; 228 NW 723 (1930). This Court has similarly expounded that "[t]he Legislature has the power to define a crime without regard to the presence or absence of criminal intent or culpability in its commission." *People v McKee*, 15 Mich App 382, 385; 166 NW2d 688 (1968). When the Legislature identifies a requisite intent without defining it, I submit that the legal definition of that intent must comport with the common law. Under the common law, "recklessness" and "carelessness" involve different and distinct mental states, and this Court erred in *Gregg* by conflating them.

When a statute omits a definition of a legal term of art, our Supreme Court looks to the common law for guidance. In *McMurchy*, 249 Mich at 169-170, our Supreme Court elucidated the definition of "negligence" that applied to the negligent homicide statute under consideration. "Negligence . . . consists of a want of reasonable care or in the failure of duty which a person of ordinary prudence should exercise under all the existing circumstances in view of the probable injury." *Id*. The "settled" law regarding negligence "is neither vague, uncertain, or indefinite," the *McMurchy* Court explained, and "[j]ust as we can ascertain civil liability by certain rules, so also can we determine criminal liability by similar rules." *Id*. at 170-171. And "[t]he very same evidentiary facts required to prove civil liability for negligence may be used to prove criminal liability." *Id*. at 170.

Recklessness and negligence are not interchangeable legal concepts, however. Our Supreme Court has defined reckless misconduct in the civil context as bordering on willfulness; the reckless actor appreciates that harm may result from his act, but does not care:

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[2] *Gregg* relied in part on the sixth edition of *Black's Law Dictionary*, which was published in 1990. The current edition defines "reckless" differently, and in a manner consistent with use of the term by most courts:

> Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence; it is a gross deviation from what a reasonable person would do. [*Black's Law Dictionary* (10th ed), p 1462.]

The dictionary then directs readers to compare—"Cf."—the contrasting definition of "careless."

> "One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the wilful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not." [*Gibbard v Cursan*, 225 Mich 311, 321; 196 NW 398 (1923), quoting *Atchison, Topeka & Sante Fe R Co v Baker*, 79 Kan 183; 98 P 804 (1908).]

The Legislature's approach to the gross negligence exception to governmental immunity sheds further light on the meaning of "recklessness" under Michigan law by equating the two concepts. Gross negligence is defined by the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). The Supreme Court has followed the Legislature's lead, using the terms "gross negligence" and "reckless" interchangeably when interpreting the meaning of "gross negligence." See *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999) ("In addition to requiring that a plaintiff show reckless conduct, the content or substance of the evidence proffered must be admissible in evidence.").

> This Court has applied the gross negligence/recklessness standard quite rigorously:
>
> > Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.
> >
> > The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004) (citation omitted).]

Assuming that under Michigan law gross negligence and reckless are roughly congruent concepts, the standard they describe differs substantially from that of general negligence. A grossly negligent or reckless individual is willfully indifferent to the safety of others, while a negligent actor merely fails to measure up to the standard of ordinary care.

The United States Supreme Court explored the meaning of the term "recklessness" in *Farmer v Brennan*, 511 US 825; 114 S Ct 1970; 128 L Ed 2d 811 (1994), a case addressing the

liability of prison officials for assaults committed by inmates against a transsexual prisoner. Longstanding Supreme Court precedent established that to state a claim under the Eighth Amendment, a prisoner must prove that prison officials were deliberately indifferent to his or her medical needs. *Id*. at 834. In *Farmer*, the Court explored the meaning of "deliberate indifference," honing in on the mental state required to justify liability. The Court explained that the deliberate indifference standard "entails something more than mere negligence," and something less than "purpose or knowledge." *Id*. at 835-836. The Court observed that many Courts of Appeal had "routinely equated deliberate indifference to recklessness," and turned to a detailed examination of the contours of that standard. *Id*. at 836.

"[T]he term recklessness is not self-defining," the Court began, and its characteristics differ depending on whether the underlying case is civil or criminal:

> The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. See Prosser and Keeton § 34, pp 213-214; Restatement (Second) of Torts § 500 (1965). *The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.* See R. Perkins & R. Boyce, Criminal Law 850-851 (3d ed 1982); J. Hall, General Principles of Criminal Law 115-116, 120, 128 (2d ed 1960) . . .; American Law Institute, Model Penal Code § 2.02(2)(c), and Comment 3 (1985); but see *Commonwealth v. Pierce*, 138 Mass 165, 175-178 (1884) (Holmes, J) (adopting an objective approach to criminal recklessness). [*Id*. at 836-837 (emphasis added).]

The prisoner-petitioner in *Farmer* urged the Court to adopt the civil-law recklessness paradigm, while the warden-respondent advocated the approach consistent with the criminal law. The Court chose a definition much closer to the latter:

> We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. [*Id*. at 837.]

Summarizing, the Court held, "subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Id*. at 839-840.

Drawing on these precedents, I suggest that the "reckless" standard incorporated in MCL 750.136b(a) requires proof that a defendant disregarded a known, substantial, and unjustifiable risk of serious injury. In my view, recklessness requires *conscious* disregard of risk—anything

less, such as mere "indifference," is more consistent with negligence.[3] A second aspect of the "recklessness" concept bears emphasis. When used in civil cases in Michigan or by the United States Supreme Court, determining whether conduct is "reckless" inherently involves an assessment of *risk*. Shortcutting the analysis to "carelessness" or "utter indifference to consequences" omits this critical component of the concept.[4]

The portion of the second-degree child abuse statute governing Murphy's prosecution does not criminalize parental negligence. Rather, the prosecutor charged Murphy under the subsection of the statute declaring that "a person is guilty of child abuse in the second degree if . . . the person's reckless act causes serious physical harm or serious mental harm to a child." MCL 750.136b(3)(a). The same subsection of the statute permits conviction on proof that "the person's omission causes serious physical harm or serious mental harm to a child." Notably, the Legislature specifically defined the "omission" in this context as "a *willful* failure to provide the food, clothing, or shelter necessary for a child's welfare or the *willful* abandonment of a child." MCL 750.136b(c).

The statutory language leads to two inescapable conclusions: the Legislature intended that a person could be convicted under MCL 750.136b(c) only on proof of "recklessness" or "willful" failure to provide for a child's needs. The statute simply does not countenance conviction based on mere negligence, despite *Gregg*.

The Model Penal Code supplies a definition of "recklessly" that comports with Michigan law and, in my view, merits adoption:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material

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[3] Although somewhat difficult to parse, obiter dictum in *People v Datema*, 448 Mich 585, 598-599; 533 NW2d 272 (1995), seems to signal the Court's approval of a definition of "reckless" that incorporated the concepts of "wantonness" and "willfulness." "Wilful and wanton misconduct . . . describes conduct that is *either* wilful—i.e., intentional, *or* its effective equivalent. 'Willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm *or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does.*' " *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994) (emphasis in original).

[4] These ideas are neither new nor my own. As a justice of the Massachusetts Supreme Court, Oliver Wendell Holmes described the role of risk as follows:

> If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance. [*Commonwealth v Pierce*, 138 Mass 165, 179 (1884).]

> element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. [Model Penal Code, § 2.02(c).]

Many states have adopted this definition, either statutorily or under the common law. See *State v O'Connell*, 149 Vt 114, 115 n 1; 540 A2d 1030 (1987); *People v Hall*, 999 P2d 207, 217 (Colo, 2000); *State v Chavez*, 146 NM 434, 445-446; 211 P3d 891 (2009).

*Chavez* supplies valuable insights applicable in child abuse cases. The defendant in that case was convicted of child abuse by endangerment based on "impoverished and dirty living conditions that, in the State's opinion, posed a significant danger" to Chavez's children. *Id*. at 436. One of the children, Shelby, died after having been placed to sleep in a dresser drawer filled with blankets and padding when her bassinet broke. *Id*. The jury acquitted the defendant of child abuse resulting in death, but found him guilty of child abuse by endangerment regarding that child and two other surviving children. *Id*.

The New Mexico Supreme Court granted leave to "explore the sufficiency and nature of the evidence necessary to sustain a child endangerment conviction when it is based only on filthy living conditions and without any underlying criminal conduct." *Id*. The Court observed that the applicable jury instruction directs the jury that to convict of child endangerment, it must find that "defendant's conduct created a *substantial and foreseeable risk* of harm." *Id*. at 440 (emphasis in original, quotation marks omitted). Whether the charged conduct meets that standard, the Court explained, depends on "the gravity of the risk that serves to place an individual on notice that his conduct is perilous, and potentially criminal[.]" *Id*. at 441. The Court reviewed cases from New Mexico and other jurisdictions in which convictions had been reversed because the risk of harm was "too remote, which may indicate that the harm was not foreseeable." *Id*. As applied to cases involving "filthy living conditions," the Court concluded that the state bears the burden of proving "a substantial and foreseeable risk that such filthy living conditions endangered the child." *Id*. at 442.

The *Chavez* Court also addressed in detail the charge levied against the defendant arising from his daughter's death. The state pursued that prosecution "under a criminal negligence theory and, therefore, was required to prove beyond a reasonable doubt that Defendant 'knew or should have known of the danger involved and acted with a reckless disregard for the safety and health of the child.' " *Id*. at 445.[5] The Court summarized this burden as follows:

> Thus, the State had the burden to first establish the actus reus of endangerment—that the drawer created a substantial and foreseeable risk of harm. Once the danger is established, the State must also show that a reasonable person would have apprehended the risk, and that Defendant recklessly disregarded the risk by allowing Shelby to sleep in the drawer.

[5] The Court specifically noted that this requirement was based on Model Penal Code, § 2.02(c).

> The State sought to show that the sleeping arrangement created a serious danger to Shelby due to Shelby's size in relation to the drawer and bedding. At five months old, Shelby was approximately twenty-six inches long. The drawer that Defendant chose for his daughter measured 29–by–15 inches. Several witnesses testified that the drawer, particularly when filled with soft bedding and a blanket, did not allow Shelby much room to move around. The State presented testimony that if the bedding blocked Shelby's nose and mouth, she may not have had room to free herself, creating a possibility that she could suffocate. In addition, witnesses testified that if Shelby became pressed up against the wall of the drawer, she might re-breathe her expelled air, high in carbon dioxide, creating a risk of asphyxiation. This is the sort of substantial injury contemplated by our endangerment statute.
>
> However, in addition to the gravity of the potential injury, we must also consider whether it was foreseeable that an injury would actually occur. In performing this review, we note the absence of evidence in the record to indicate that the sleeping conditions presented anything more than a mere possibility of harm. [*Id*. at 446.]

The trial evidence supported only that placing a child to sleep in a drawer carried a "very small, unpredictable and unmeasurable" degree of risk, especially when compared with "failing to secure a child in a car seat." *Id*. Further, the Court expounded, "[t]he elevated risk, if any, created by the small size of the drawer in relation to Shelby's body, and by including soft bedding in the drawer which restricted the infant's ability to move, is not quantifiable based solely on common knowledge or experience." *Id*. at 446-447. In language I find directly pertinent here, the Court expressed:

> Specific evidence was needed to assist the jury in ensuring that a conviction would be based on science and not emotion. This is particularly important in this case, where the trial focused on the death of an infant and the level of parenting was easy to criticize. Natural factors of sympathy and even outrage in the face of an infant death can create a perilous situation where judgment is based on emotion and not evidence. [*Id*. at 447.]

## III. APPLICATION

Applying the legal framework I have described, I conclude that Murphy's failure to vacuum her mother's bedroom or otherwise locate the stray pill did not evidence conscious disregard of a substantial and unjustifiable risk that death would result from her conduct. Perhaps Murphy was negligent in failing to clean Cheeks' room, and in permitting Trinity to crawl on a dirty carpet. But the standard is recklessness, not negligence. It stretches credulity that Murphy or any objective, reasonable person would have perceived that allowing the child in that room would expose her to a substantial and unjustifiable risk of serious harm. No evidence supports that Murphy consciously disregarded a *foreseeable* risk that the child would find something fatally toxic on the carpet and die; the pills were in a child-proof container and on a shelf above Trinity's reach. Nor can such awareness on Murphy's part be inferred. What occurred here was unforeseen, wholly unanticipated, and shocking. While most people

understand that filthy living conditions are not healthy for a child, it is a quantum leap to conclude that a dirty home necessarily presents a substantial and foreseeable risk of serious injury. And in this case, the harm was simply not predictable or foreseeable.

To demonstrate that Murphy's conduct created a substantial and unjustifiable risk of serious harm, the prosecutor would have had to produce some fact or create some inference supporting that Murphy knew or should have known that a pill had fallen on the carpet, or likely had fallen. No such facts or inferences exist. Even after all of the evidence collection and analysis had been completed, the source of the pill remains unclear. Assuming it was on the carpet—a good guess, but a guess nevertheless—no one knows when, how, or why that happened. The evidence did not come close to establishing a foreseeable danger or that Murphy disregarded a known, substantial and unjustifiable risk.

As in *Chavez*, this was a case built on emotion rather than fact or law. See *id*. at 447. Because any possible "act" that Murphy engaged in did not qualify as reckless, I would vacate her conviction on this ground.

/s/ Elizabeth L. Gleicher

**APPENDIX E**

Michigan Supreme Court Order - March 7, 2018

# Order

**Michigan Supreme Court**
**Lansing, Michigan**

March 7, 2018





156738

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 156738
COA: 331620
Macomb CC: 2015-000548-FH

KIMBERLY ANITRA MURPHY,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the September 19, 2017 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

a0209

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 7, 2018

Clerk