

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

v

**SHAWQUANDA BOROM**

Defendant-Appellant.

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**Supreme Court No. 148674**

**Court of Appeals No. 313750**

**Lower Court No. 12-4559-01**

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

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**BRIEF OF AMICUS CURIAE  
CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**

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### INTEREST OF THE AMICUS

Criminal Defense Attorneys of Michigan (CDAM) was founded in 1976 and is a statewide association of criminal defense lawyers practicing in the trial and appellate courts in Michigan. CDAM represents the interests of the state's criminal defense bar in a wide array of matters. CDAM has a strong and direct institutional interest in this litigation because of the implications of this case on the rights of all accused Michigan citizens to not face trial on a theory of accomplice liability that is not supported by Michigan law.

By its bylaws, CDAM exists to, *inter alia*, “promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy, “provide superior training for persons engaged in criminal defense,” “educate the bench, bar and public of the need for quality and integrity in defense services and representation,” and “guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws.” To further its goals, CDAM conducts two different 2 1/2 day training conferences a year for criminal defense attorneys, conducts a 5-day Trial College in partnership with the Thomas M. Cooley Law School, provides information to the Michigan legislature regarding contemplated changes of laws, and participates as an *amicus curiae* in litigation relevant to CDAM's interests.

As in this case, CDAM is often invited to file briefs *amicus curiae* by the Michigan appellate courts. The Michigan Supreme Court has given CDAM permission to file as *amicus curiae* without seeking leave of that Court. MCL 7.306(D)(2).

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**STATEMENT OF QUESTION PRESENTED**

I. WHERE THE DEFENDANT FAILED TO ACT ACCORDING TO A LEGAL DUTY, BUT PROVIDED NO OTHER FORMS OF ASSISTANCE TO THE PERPETRATOR OF THE CRIME IS IT LEGALLY IMPOSSIBLE TO CONVICT UNDER AN AIDING AND ABETTING THEORY UNDER MCL 767.39 WHERE THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AFFIRMATIVE ACTION?

Court of Appeals answers "No".

Defendant-Appellant answers "Yes".

Amicus Curiae answers "Yes".

### **STATEMENT OF FACTS**

Amicus Curiae Criminal Defense Attorneys of Michigan hereby adopts the Statement of Facts presented by Defendant-Appellant Shawquanda Borom in her Supplemental Brief on Appeal in this action.

**I. WHERE THE DEFENDANT FAILED TO ACT ACCORDING TO A LEGAL DUTY, BUT PROVIDED NO OTHER FORMS OF ASSISTANCE TO THE PERPETRATOR OF THE CRIME, AIDING AND ABETTING UNDER MCL 767.39 CANNOT BE PROVEN, AS SO FINDING WOULD UNDULY EXPAND ACCOMPLICE CULPABILITY BEYOND WHAT THE LEGISLATURE INTENDED OR THE STATUTE OTHERWISE ALLOWS.**

**Issue Preservation**

Amicus Curiae Criminal Defense Attorneys of Michigan hereby adopts the statement of Issue Preservation presented by Defendant-Appellant Shawquanda Borom in her Supplemental Brief on Appeal in this action.

**Standard of Review**

The interpretation of statutes is a question of law and is reviewed *de novo*. *People v Moore*, 470 Mich 56, 61; 679 NW2d 41 (2004).

**Discussion**

In this case, the Wayne County Prosecutor seeks to use accomplice liability under Michigan's aiding and abetting statute, MCL 767.39, to provide a harsher penalty for an alleged omission already addressed by a separate statute. This strained reading of MCL 767.39 conflicts with the plain language of Michigan's aiding and abetting statute, which has been interpreted by this Court to require an affirmative act. In proceeding under this admittedly novel theory, the prosecutor asks this Court to blur a hard line recognized in Michigan law that accomplice liability requires affirmative action and intent.

Expanding aider-and-abettor culpability under MCL 767.39 to include those who fail to act according to a legal duty will have far-reaching and perverse consequences. Michigan has defined by statute a large collection of persons and relationships that confer a legal duty to affirmatively act, and the legislature has further set concrete but limited criminal penalties for failure to follow those duties. The criminal exposure for those who fail to act should be limited to the punishment set forth in the statute creating the duty. For example, a teacher's omission by

failing to immediately report suspected child abuse, as required by MCL 722.623, is punishable by imprisonment up to 93 days and a fine up to \$500. MCL 722.633. A teacher who is guilty of such an omission should not be doubly—and shockingly more severely—as punished as an aider and abettor for a failure to act according to the duty, and thereby possibly subjected to life imprisonment as an accomplice to first-degree child abuse. MCL 750.136b(2). In the face of the legislature’s clear directive of how omissions should be treated under MCL 750.136b (as second-degree child abuse) and MCL 722.621 *et seq.* (as misdemeanor failure to report suspected child abuse), this Court should not allow the prosecutor to broadly expand culpability by re-forming MCL 767.39 to equate failure to act according to a legal duty with aiding and abetting.

**A. Expanding the Scope of MCL 767.39 to Reach Those Who Fail to Act According To a Legal Duty Could Expose Teachers, Physicians, Dentists, Clergy, and a Host of Others to Accomplice Culpability For Failure to Report Another’s Child Abuse.**

Michigan law confers a duty to act in response to suspected child abuse on a number of persons. Specifically, the following thirty classes of persons have an affirmative duty to orally report child abuse immediately, and follow up with a written report no later than seventy-two hours thereafter:

- Physicians,
- Dentists,
- Physician’s assistants,
- Registered dental hygienists,
- Medical examiners,
- Nurses,
- Persons licensed to provide emergency medical care,
- Audiologists,
- Psychologists,
- Marriage and family therapists,
- Licensed professional counselors,
- Social workers,
- Licensed master’s social workers,
- Licensed bachelor’s social workers,
- Registered social service technicians,

- Social service technicians,
- Persons employed in a professional capacity in any office of the friend of the court,
- School administrators,
- School counselors,
- School teachers,
- Law enforcement officers,
- Members of the clergy,
- Regulated child care providers,
- Department employees of an eligibility specialist,
- Family independence managers,
- Family independence specialists,
- Social services specialists,
- Social work specialists,
- Social work specialist managers, and
- Welfare services specialists.

MCL 722.623. Under Michigan law, any person identified above who knowingly fails to report a suspected case of abuse or neglect is guilty of a misdemeanor, punishable by imprisonment for not more than 93 days, a fine of not more than \$500.00, or both. MCL 722.633. Likewise, “[a] person who is required ... to report an instance of suspected child abuse or neglect and who fails to do so is civilly liable for the damages proximately caused by the failure.” *Id.*

Clearly, under MCL 722.623, the above-identified persons have a legal duty to act: that is, such persons affirmatively must report suspected child abuse or neglect “immediately,” and follow up with a written report no more than seventy-two hours later. *Doe v Doe*, 289 Mich App 211, 214, 809 NW2d 163, 165 (2010) (recognizing the “clear and unambiguous” duty to report child abuse in MCL 722.623). Also true, however, is the legislature’s unambiguous upper limit on the criminal exposure for such conduct: a misdemeanor conviction, 93 days’ imprisonment, and a \$500 fine.

Answering “No” to the question presented in this case would unduly interpose accomplice culpability (including charges of first-degree felony child abuse) upon teachers, clergy, physicians, and others when—by the direct actions of a separate wrongdoer—a child is

harmful after a failure to report suspected child abuse. Such an expansion of MCL 767.39 would stunningly amplify the penalties for failure to report suspected child abuse by several degrees of magnitude. Furthermore, such an interpretation would unreasonably dilute the meaning of “accessory” under MCL 767.39. Under well-settled Michigan law articulated by this Court, to be guilty of aiding and abetting, “[s]ome form of active, overt participation toward the accomplishment of the offense is required, as is a completed crime and a guilty principal.” *People v Carter*, 415 Mich 558, 580; 330 NW2d 314 (1982).

A logical distinction exists between traditional acts of aiding and abetting under MCL 767.39, on the one hand, and failure to perform a legal duty, on the other. For example, in *People v Robinson*, 475 Mich 1; 715 NW2d 44, 46 (2006), this Court found that an assailant was culpable as an accessory to second-degree murder under MCL 767.39, as he participated in assault but left the scene before the principal actor fired a deadly gunshot. *Id.* at 15. And in *People v Plunkett*, 485 Mich 50, 780 NW2d 280, 288 (2010), this Court held that “[a] defendant who transported another person to an illegal narcotics transaction, provided the money for this transaction, and intended that the money be used to purchase narcotics may be bound over for trial under MCL 750.317a and MCL 333.7401(2)(a) for aiding and abetting the delivery of narcotics.” *Id.* at 65-66. In contrast to those accomplice liability cases, “accessory” under MCL 767.39 should not be redefined to treat those who neglect a duty to act as *equivalent* in culpability as principal actors. See *People v Penn*, 70 Mich App 638, 649, 247 NW2d 575, 580 (1976) (“Michigan’s aiding and abetting statute provides that punishment of an aider and abettor will be equivalent with that of the principal.”).

**B. This Court Should Not Expand Accomplice Liability Under MCL 767.39 When Omissions are Punishable Under Separate Statutes.**

In determining whether an expansion beyond the text of MCL 767.39 is warranted, this Court should consider how the Michigan legislature otherwise addresses omissions to act under a legal duty. In *State v Jackson*, 976 P2d 1229 (Wash. 1999), the Supreme Court of Washington faced a similar factual scenario—and a similar accomplice liability statute—to those at issue here. Specifically, that case involved the death of a young child at the hands of a foster father. The foster mother was charged with second-degree felony murder as an accomplice. *Id.* at 1232. The prosecution charged that by failing to perform her duty to protect the child, the foster mother was culpable under Washington’s accomplice liability statute. *Id.* at 1233. The *Jackson* Court recognized that, under Washington law, parents do have a lawful duty to care for and protect their children. *Id.* at 1233. The Court next turned to the question of whether failing to act according to that duty subjects a parent to criminal accomplice liability. The Washington statute—which is substantively similar to MCL 767.39—states:

A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of a crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning to commit it;  
or

(b) his conduct is expressly declared by law to establish his complicity.

RCW 9A.08020(3). In interpreting the statute, the Washington Supreme Court noted that the text of the statute itself does not extend accomplice culpability for a failure to act according to a legal duty. *Jackson*, 976 P2d at 1233.

Importantly, the *Jackson* Court next considered whether the omission to act was otherwise punishable under a separate statute. The Court recognized:

Significantly, the Legislature has imposed liability in other criminal statutes for omissions to act. For example, it has done so in .... the first degree criminal mistreatment statute<sup>1</sup>, and in ... RCW 9A.42.030, the second degree criminal mistreatment statute.<sup>2</sup> ... In addition, as the State itself observes in its brief, RCW 26.44.030(1)(c) makes it a crime for an adult who has reasonable cause to believe a child has suffered severe abuse to fail to report such abuse to the authorities. Because in RCW 26.44.030, 9A.42.020, and 9A.42.030 the Legislature has imposed criminal liability for an omission to act, we can presume that it was aware of the concept of omission liability when it adopted the accomplice liability statute. Accordingly, we can conclude only that its failure to include liability for a failure to act in the accomplice liability statute was deliberate. As a consequence, we should refrain from reading omission liability into RCW 9A.08.020.

*Id.* at 1234. Thus, when examining whether the Washington legislature intended accomplice culpability to arise from omissions, the *Jackson* Court was persuaded by the fact that *other* statutes explicitly criminalize omissions while the accomplice liability statute remained silent.

*Id.* The *Jackson* Court thus found it untenable that the legislature would silently intend accomplice liability to apply to omissions when the other crimes-by-omission statutes are explicit in criminalizing omissions.

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<sup>1</sup> (1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

(2) Criminal mistreatment in the first degree is a class B felony.

Rev. Code Wash. § 9A.42.020.

<sup>2</sup> (1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she recklessly, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

(2) Criminal mistreatment in the second degree is a class C felony.

Rev. Code Wash. § 9A.42.030.

In the instant case, this Court should likewise decline to expand the definition of accessory to those who neglect a legal duty, because the Michigan legislature separately criminalized those omissions and set the appropriate criminal penalties therefor. Specifically, the omission from reporting suspected child abuse is codified as a misdemeanor punishable by up to 93 days in prison and a \$500 fine. MCL 722.633. Furthermore, the facts as alleged by the prosecutor in this case could arguably be charged as second-degree child abuse,<sup>3</sup> which mandates:

A person is guilty of child abuse in the second degree if ...[t]he 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.

MCL 750.136b(3). Thus, before undertaking a strained reading of MCL 767.39, this Court should consider that omitting a required action in response to suspected child abuse is already criminalized by the Michigan legislature in other statutes. See MCL 722.621 *et seq.* (criminalizing failure to report suspected child abuse for certain specified classes of persons); see also MCL 750.136b(3); *People v Todd*, 196 Mich App. 357, 360 492 NW2d 521, 523 (1992) (“Second-degree child abuse is committed where a person’s omission causes serious physical or mental harm or where a person’s reckless act causes serious physical harm to a child.”) *vacated on other grounds*, 441 Mich. 922 (1993).

Because the Legislature addresses omissions in separate statutes, it is inappropriate to reinterpret MCL 767.39 to cover conduct addressed elsewhere. In *Lash v Traverse City*, 479 Mich. 180, 196, 735 NW2d 628, 638 (2007), this Court addressed whether the statutory limitations on residency restrictions in governmental hiring decisions should be read to include a private right of action against a city. *Id.* at 194. There, this Court looked to other explicit

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<sup>3</sup> Amicus Curiae assert that any such charges are not evidence of guilt, and Ms. Borom is constitutionally entitled to demand proof beyond a reasonable doubt on each element. *Sullivan v Louisiana*, 508 US 275, 279 (1993).

statutory provisions extending a right to sue to find that the legislature did not intend its silence to extend an additional cause of action.

Rather, the fact that the Legislature has explicitly permitted damage suits in other provisions of chapter 15 provides persuasive evidence that the Legislature did not intend to create a private cause of action for violation of this particular provision.

*Id.* at 196. Here, too, the Court should conclude that the explicit statutory provisions addressing omissions to act according to a legal duty need no improvement or supplementation by a strained, novel interpretation of MCL 767.39, and the legislature did not intend its abstention from mentioning omissions in MCL 767.39 as an invitation to permit such an expansive interpretation of accomplice liability.

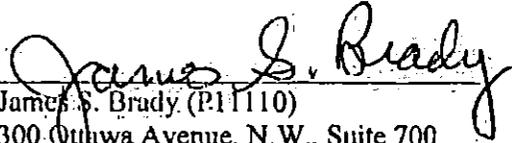
#### **SUMMARY AND RELIEF**

The Michigan Legislature has already addressed omissions to act according to a legal duty in the statutes proscribing criminal penalties for such omissions. Imposing additional criminal exposure by redefining accessory to include those omitting to act would frustrate the clear limits of MCL 767.39, and would shockingly elevate potential penalties for a wide range of persons holding legal duties to act. MCL 767.39 simply does not support such an expansive interpretation. Therefore, Amicus Curiae Criminal Defense Attorneys of Michigan respectfully requests that this Court issue an opinion reversing the Court of Appeals, vacating the original Trial Court Order denying the Motion to Quash, and remanding this case to the Trial Court to effectuate its decision.

Respectfully Submitted,

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