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STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(GADOLA, C.J., AND PATEL AND YOUNG, JJ.)

IN RE BARBER/ESPINOZA, MINORS

Supreme Court Case No. 167745
Court of Appeals Case No. 369359

39th Circuit Court – Lenawee County
Case No. 23-000033-NA

NASTASSJA A. THOMAS (P83409)
VIRTUOUS LEGAL SERVICES, PLLC
Attorney for DHHS Petitioner-Appellee
PO Box 221
Saline, MI 48176
(734) 506-0561
nthomas@vlspllc.com

VIVEK S. SANKARAN (P68538)
CHILD WELFARE APPELLATE CLINIC
University of Michigan Law School
Attorney for Respondent-Appellee
701 S. State St.
Ann Arbor, MI 48109
(734) 763-5001
vss@umich.edu

CARSON K. HOWATT (P87613)
PUBLIC DEFENDER'S OFFICE
LGAL-Appellant
113 W. Front St.
Adrian, MI 49221
(517) 264-5348
Carson.howatt@lenawee.mi.us

NICOLE S. UNDERWOOD (P76073)
UNDERWOOD LAW, PLLC
Attorney for Non-Respondent Father
126 E. Church St.
Adrian, MI 49221
(517) 260-1576
nicoleunderwoodlaw@gmail.com

LGAL-APPELLANT AND PETITIONER-APPELLEE'S JOINT SUPPLEMENTAL REPLY BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

		Page
Table of Authorities		iii
Introduction (Summary Reply)		1
Rebuttal Arguments		2
I.	Ms. Espinoza ignores the definition of "abuse" in her reading of MCL 722.638(1)(a).	2
II.	Whether termination at initial disposition was mandatory pursuant to MCL 722.638(1) and (2) or permissive pursuant to MCL 722.638(3), failure to provide Ms. Espinoza with reasonable efforts towards reunification did not amount to plain error affecting her substantial rights.	4
III.	Ms. Espinoza's substantial rights were not affected by the failure to advise her of her right to appeal a removal because the children were not removed from her care.	6
IV.	The plain language of MCL 722.638(3) was satisfied and Ms. Espinoza's proposed limitations to it would render it entirely superfluous.	6
Conclusion and Relief Requested		7
Certificate of Compliance with MCL 7.212		9

RECEIVED by MSC 4/11/2025 3:44:16 PM

TABLE OF AUTHORITIES

CASES

In re Barber/Espinoza, __ Mich App at __; __ NW3d __ (2024) (Docket No. 369359) 1, 2, 4, 6

In re Barber/Espinoza, __Mich __; __ NW3d __ (2025) 2

In re Bell, 341 Mich App 596; 991 NW2d 251 (2022) 5

In re England, 314 Mich App 245; 887 NW2d 10 (2016) 3

In re Ferranti, 504 Mich 1; 943 NW2d 610 (2019) 4

In re Guardianship of AMMD, __ Mich App __; __ NW3d __ (2024) 7

In re Horton/Lee, unpublished per curiam opinion of the Court of Appeals, issued Nov. 20, 2024 (Docket No. 370031) 5

In re Moss, 301 Mich App 76; 836 NW2d 182 (2013) 5

In re SJ, unpublished per curiam opinion of the Court of Appeals, issued Feb. 11, 2025 (Docket No. 369626) 5

In re Yarbrough, 314 Mich App 111; 885 NW2d 878 (2016) 5

Mathews v Eldridge, 424 US 319; 96 SCt 893; 47 LEd2d 18 (1976) 5

People v Carines, 460 Mich 750; 597 NW2d 130 (1999) 6

People v Cunningham, 496 Mich 145; 852 NW2d 118 (2014) 3

People v King, 512 Mich 1; 999 NW2d 670 (2023) 4, 6

STATUTES

MCL 712A.13a(1)(c) 7

MCL 712A.13a(1)(g) 7

MCL 722.622(g) 3

MCL 722.638(1) 3

RECEIVED by MSC 4/11/2025 3:44:16 PM

INTRODUCTION

- "CB disclosed that on two separate occasions, ***respondent observed adult men sexually abusing*** CB and failed to do anything to stop the abuse. The abuse included oral and anal penetration. CB stated that respondent allowed one of the incidents to occur in order to get drugs from the man."[1]
- "We find no issue with the trial court's underlying factual finding that ***CB was subjected to the sexual abuse alleged, which respondent either facilitated or knew about without intervening***."[2]
- "We acknowledge the extremely serious facts of this case. But while we might personally view a ***parent sex trafficking their child*** as particularly egregious conduct, that [sic] is not our role in this case or in our system of jurisprudence. If the Legislature desires such conduct to constitute an aggravating circumstance obviating the need for reunification efforts, it should amend the statutory scheme to so provide."[3]
- The Court of Appeals **affirmed the trial court's judicial determination** that CB was subjected to sexual abuse which Ms. Espinoza "either facilitated or knew about without intervening.[4]

Those are facts the Court of Appeals found in its decision that Ms. Espinoza urges this Court to Affirm. Those are the facts that Ms. Espinoza adopted in her Answer to the LGAL's Application for Leave to Appeal.[5] Those are the facts, none of which Ms. Espinoza challenged in any way – not in any motion for reconsideration filed in the Court of Appeals, and not in a cross-application filed with this Court.

The related and well-established fact is that CB is credible: "Respondent essentially challenges the credibility of CB's allegations, but we defer to the trial court on this matter […] ***the trial court explicitly found CB credible*** […]."[6] And, accordingly, based on these established facts

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[1] *In re Barber/Espinoza*, __ Mich App at __; __ NW3d __ (2024) (Docket No. 369359); slip op at 1 (emphasis added).

[2] *Id*. at __; slip op at 8, n 5 (emphasis added).

[3] *Id*. at __; slip op at8, n 4 (emphasis added).

[4] *Id*. at __; slip op at 8, n 5 (emphasis added).

[5] AE-Resp't's Answer to Appl. for Leave to Appeal, p 5, Nov. 8, 2024.

[6] *Barber/Espinoza*, __ Mich App at __; slip op at 8, n 5 (emphases added).

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and findings, this Court's order properly asked the parties to brief: whether reasonable efforts are necessary when a parent facilitates, encourages, or allows a third party to sexually abuse her child in exchange for some benefit to herself.[7] Simply put, this Court properly accepted what both the trial court and the Court of Appeals have already found and confirmed as facts.

Now, Ms. Espinoza attempts to relitigate the confirmed facts as articulated by the Court of Appeals by asserting "clear and convincing evidence did not support a finding that Ms. Espinoza had arranged for CB to be sexually abused for some benefit to her."[8] She contradictorily asks this Court to ignore (or reverse) the facts found by the Court of Appeals yet affirm its ultimate holding. This Court should reject Ms. Espinoza's belated and improper collateral attacks on both CB's credibility and the well-documented and agreed-upon established facts of this case.

REBUTTAL ARGUMENTS

I. Ms. Espinoza ignores the definition of "abuse" in her reading of MCL 722.638(1)(a).

Notwithstanding Ms. Espinoza's 11th hour argument that clear and convincing evidence did not exist to support a finding that Ms. Espinoza facilitated, encouraged, or allowed a third party to sexually abuse her child in exchange for some benefit to herself, the Court of Appeals unequivocally held, "CB was subjected to the sexual abuse alleged, which respondent either facilitated or knew about without intervening."[9]

Ms. Espinoza contends that "abuse" does not include sexual exploitation or trafficking one's child.[10] The LGAL in her Application, and the LGAL and the Department in their joint supplemental brief have stated the canons of statutory construction. Notably, "[t]his Court must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory."[11] And, ironically, Ms. Espinoza now jettisons the definition of "abuse" – which she specifically included in her answer to the LGAL's Application

[7] *In re Barber/Espinoza*, __Mich __; __ NW3d __ (2025).

[8] AE-Resp't's Suppl. Br., p 19, March 31, 2025.

[9] *Barber/Espinoza*, __ Mich App at __; slip op at 8, n 5.

[10] AE-Resp't's Suppl. Br., p 19 ("The L-GAL and DHHS attempt to obfuscate the plain reading of the statute by arguing that Ms. Espinoza bused CB by sexually exploiting or trafficking her.").

[11] *People v Cunningham*, 496 Mich 145, 153-54; 852 NW2d 118 (2014) (cleaned up) (superseded by statute).

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for leave.[12] Both the Court of Appeals and Ms. Espinoza fail to give effect to the word "abuse", which is explicitly defined by statute.[13]

In giving effect to the word "abuse", as defined by MCL 722.622(g), MCL 722.638(1)(a) reads as follows:

> MCL 722.638(1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:
>
> (a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has [harm[ed] or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment] or a sibling of the child and the [harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment] included 1 or more of the following […]
>
> (ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.[14]

The legislature did not need to include words like "caused, facilitated, or allowed" or specifically include "sexual exploitation" on the "list of severe abuse" as suggested by Ms. Espinoza,[15] because the definition of "abuse" itself includes the actions an actor must take to constitute abuse. Those acts include harm or threatened harm through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment.[16] The facts of this case satisfy MCL 722.638(1) and (2) and MCL 712A.19a(2), as applicable.

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[12] AE-Resp't's Answer to Appl. for Leave to Appeal, pp 9-10.

[13] *See In re England*, 314 Mich App 245, 255-56; 887 NW2d 10 (2016) (holding "[U]nless explicitly defined in a statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.") (citation omitted).

[14] MCL 722.622(g) and MCL 722.638(1).

[15] *See* AE-Resp't's Suppl. Br., p 18.

[16] MCL 722.622(g).

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II. Whether termination at initial disposition was mandatory pursuant to MCL 722.638(1) and (2) or permissive pursuant to MCL 722.638(3), failure to provide Ms. Espinoza with reasonable efforts towards reunification did not amount to plain error affecting her substantial rights.

Structural errors "affect the very framework" of which a **trial** proceeds.[17] For instance, faults at adjudication; when respondents are not advised that their plea can be used against them at a termination hearing, or if a plea is improper and the "manner in which the trial court assume[s] jurisdiction violate[s] the respondent[s'] due process rights."[18] As argued in the LGAL and the Department's joint supplemental brief, the often-cited cases, which Ms. Espinoza again relies on for her arguments, are quite distinguishable from the facts of this case.[19] By contrast, the children in this case were not removed from their custodial parent. The non-custodial parent was given appropriate notice, was properly adjudicated, and the court properly dispensed with its order of disposition. There was no error, let alone a structural error.

However, if this Court determines there was an error at the trial court level and aggravated circumstances did not exist, it was not an obvious error.[20] Panels of the Court of Appeals have reached varying decisions regarding cases with similar facts.[21] A trial court, with no binding legal

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[17] *People v King*, 512 Mich 1, fn 5; 999 NW2d 670 (2023) ("The defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself. The purpose of the structural error doctrine is to ensure insistence on certain basic, *constitutional guarantees* that should define the framework of any criminal trial.") (cleaned up) (emphasis added).

[18] *In re Ferranti*, 504 Mich 1, 30; 943 NW2d 610 (2019).

[19] *See* LGAL-AT and Pet'r-AE Joint Suppl. Br., pp 25-27, March 10, 2025.

[20] "If different panels of the Court of Appeals are unable to agree on an issue, the issue is clearly subject to reasonable dispute. In short, when there exist two conflicting unpublished Court of Appeals' opinions on a particular issue, it cannot be said that the issue is not subject to reasonable dispute, and some might say that such circumstances constitute the very definition of when an issue is in fact subject to reasonable dispute." Joint *Amici Curiae* Br. of the MI Probate Judges Ass'n. and Coal. of Child Welfare App. Att'y in Support of the LGAL's Appl. for Leave to Appeal, and of the Joint Suppl. Br. of the DHHS and LGAL, p 35, April 7, 2025.

[21] *E.g., Barber/Espinoza*, __Mich App at __; slip op at 5-7 (comparing two unpublished cases with similar facts, *In re Bergren* and *In re Boyce*); and two unpublished cases decided post-*Barber/Espinoza* were both decided in accordance with *Boyce* – which the Court of Appeals itself effectively rejected in *Barber/Espinoza* in favor of *Bergren*. *See In re Horton/Lee*, unpublished per curiam opinion of the Court of Appeals, issued Nov. 20, 2024 (Docket No. 370031) and *In re SJ*, unpublished per curiam opinion of the Court of Appeals, issued Feb. 11, 2025 (Docket No. 369626). ** MCR 2.715(C) - These unpublished opinions are referenced to highlight the inconsistent decisions when parents are not the actor committing criminal sexual conduct, involving penetration, attempted penetration, or assault with intent to penetrate on their child(ren), but knew of the sexual abuse and failed to take reasonable steps to eliminate the risk of harm to their child(ren). For thoroughness, each unpublished opinion noted in this footnote is included in an accompanying Joint Appendix II.

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authority specific to the facts of the case to guide it, did not make a plain error in determining aggravated circumstances existed and reasonable efforts towards reunification were not required.

Additionally, if this Court determines there was an error, Ms. Espinoza and the Court of Appeals confuse constitutional due process entitlements with the Department's statutory obligation to offer reasonable efforts towards reunification. Due to word limitations here, the LGAL and the Department incorporate by reference pages 37-42 of the Joint Amici Curiae Brief of the Michigan Probate Judges Association and Coalition of Child Welfare Appellate Attorneys, which specifically addresses this issue.[22]

Even maintaining the question of whether there was a violation of procedural due process, as "it is not clear how respondent could establish outcome determinative error concerning the denial of reunification services" – *Mathew v. Eldridge* ("*Eldridge*")[23] is an appropriate balancing test employable to determine whether an individual's due process rights were protected on an individual basis.[24] Instead of affording Ms. Espinoza extreme advocacy, the Court of Appeals could have applied the *Eldridge* test in balancing the interests of the parties in this case, to determine whether due process required her to receive a case service plan towards reunification. Applying *Eldridge* easily answers the question as to "how an aggrieved respondent could establish outcome-determinative error concerning the denial of reunifications services altogether."[25]

Finally, missing from the Court of Appeals analysis, and prior briefings by the parties, but recognized by the Joint Amici Brief, is the fourth prong in the clear error analysis under *Carines*: Reversal is warranted only when an error seriously affected the fairness, integrity or public reputation of judicial proceedings.[26] Thus, even if the three other prongs favored Ms. Espinoza,

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[22] Joint *Amici Curiae* Br., pp 37-42, April 7, 2025.

[23] *Mathews v Eldridge*, 424 US 319; 96 SCt 893; 47 LEd2d 18 (1976).

[24] *E.g., In re Yarbrough*, 314 Mich App 111; 885 NW2d 878 (2016) (The court emphasized that the adversarial nature of child protective proceedings, combined with the complexity of medical evidence, necessitated expert consultation to ensure due process. The application of the *Eldridge* factors demonstrated the need for additional procedural safeguards to protect the respondents' rights.); *In re Bell*, 341 Mich App 596; 991 NW2d 251 (2022) (The court applied the *Eldridge* factors in determining due process did not require a victim-witness to undergo an independent medical examination, highlighting the balance between the parents' due process rights, the child's interest in bodily integrity, and the state's interests in safeguarding the child's wellbeing.); and *In re Moss*, 301 Mich App 76; 836 NW2d 182 (2013) (The court applied the *Eldridge* factors in determining a preponderance of the evidence standard was appropriate when proving termination of parental rights is in the child's best interests.)

[25] *Barber/Espinoza*, __Mich App at __; slip op at 9.

[26] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *see also King*, 512 Mich at 10 ("The formal rebuttable presumption in cases of *forfeited structural error* shifts the burden to the prosecutor to demonstrate that the error

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the fourth prong requires this Court to affirm the trial court's decision. Due to word limitations here, the LGAL and the Department incorporate by reference pages 44-46 of the Joint Amici Curiae Brief on this issue.[27]

III. Ms. Espinoza's substantial rights were not affected by the failure to advise her of her right to appeal a removal because the children were not removed from her care.

Ms. Espinoza simply states the children were removed, as her *ispse dixit*, without supporting authority.[28] It is imperative recall that the children were not removed from Ms. Espinoza and they were not in foster care.[29] Accordingly, the LGAL and the Department reiterate that the case law cited by Ms. Espinoza in her Supplemental Brief is distinguishable from this case, which is further addressed in their Supplemental Brief.[30]

IV. The plain language of MCL 722.638(3) was satisfied and Ms. Espinoza's proposed limitations to it would render it entirely superfluous.

Ms. Espinoza argues that MCL 722.638(3) does not alleviate the court from making an aggravated circumstances determination pursuant to MCL 712A.19a. But she does not offer an explanation as to why the legislature incorporated MCL 712A.19b (i.e., statutory grounds for termination of parental rights) into MCL 722.638(3), but did not mention MCL 712A.19a(2) (i.e., the permanency planning statute). Furthermore, Ms. Espinoza does not explain how a permanency planning statute can apply to the pre-disposition stages of child protective proceedings when, as here, children are not removed from their custodial parent.

Ms. Espinoza focuses on the definition of "child's attorney" to refute the LGAL and the Department's claim that it met the statutory requirements of MCL 722.638(3). Suggesting that the LGAL is **not** the child's attorney, defies a common sense application of the statute - under that

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did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. In such instances, the prosecutor must present specific facts that affirmatively demonstrate that, despite the error, the overall fairness, integrity, and reputation of the trial court proceedings were preserved.") (cleaned up) (emphasis added).

[27] Joint *Amici Curiae* Br., pp 44-46.

[28] AE-Resp't's Suppl. Br., p 23.

[29] *See* LGAL-AT and Pet'r-AE Joint Suppl. Br., pp 29-30.

[30] *See* LGAL-AT and Pet'r-AE Joint Suppl. Br., pp 25-27.

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logic, MCL 722.638(3) could only apply if the child had a court appointed attorney.[31] Ms. Espinoza includes the definitions of "attorney" and "lawyer-guardian ad litem", but she disregards the fact that the LGAL is appointed to represent the child, that for purposes of notice, "attorney" includes the child's LGAL,[32] and the LGAL represents the child.[33]

CONCLUSION AND RELIEF REQUESTED

Utilizing distinguishable case law as legal authority does not make faulty arguments that ignore the plain language of relevant court rules and statutes applicable, correct, or stronger. In giving effect to every word in the relevant court rules and statutes – whether the children were removed from Ms. Espinoza matters, whether they were released to their non-respondent custodial parent matters, whether Ms. Espinoza was afforded a fair trial matters, and whether the trial court's order of disposition appropriately considered what was best for the children matters. CB suffered serious abuse that "nicely messed [her] up"[34] because of Ms. Espinoza's deliberate actions. For Ms. Espinoza to call her daughter a liar who gave an "award-winning" performance[35] to now twist CB's obviously compassionate testimony as "proof" that "even CB wants her mother to have a chance…" is not only misleading this Court, it is an affront to CB's courage which allowed her to come into open court and ask the child protective authorities to keep her and her little brother safe – from their mother.[36] CB's testimony captures her yearning for protection from her mother – the protection that the child protection laws are supposed to provide children. CB's testimony was not,

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[31] *In re Guardianship of AMMD*, __ Mich App __, __; __ NW3d __ (2024), slip op at 4 ("Courts should not abandon common sense when construing a statute.").

[32] *See* MCL 712A.13a(1)(c) "Attorney" means, if **appointed to represent a child** in a proceeding under section 2(b) or (c) of this chapter, an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan Rules of Professional Conduct. An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. **For the purpose of a notice required under these sections, attorney includes a child's lawyer-guardian ad litem.** (Emphasis added).

[33] *See* MCL 712A.13a(1)(g) "Lawyer-guardian ad litem" means an attorney appointed under section 17c of this chapter. A **lawyer-guardian ad litem represents the child**, and has the powers and duties, as set forth in section 17d of this chapter. (Emphasis added).

[34] J.A. 274a-75a, March 10, 2025; *see also* J.A. II, p 2.028a, April 11, 2025 (The updated LGAL report highlights the significant and long-term effects that CB suffers because of her trauma.)

[35] J.A. 051a-52a.

[36] J.A. 294a-95a.

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as Ms. Espinoza now spins it, the hope that her mother would be afforded more benefit under the law than herself and her little brother.

Again, the LGAL and the Department urge this Court to keep CB and ME in the forefront of its analysis – they deserve the maximum protection accorded to them by the rules and laws enacted to serve as safeguards for children. They deserve an opportunity to have finality and remain in the safety of their familial home with their father and stepmother. For CB and ME to settle into permanent normal family life, the LGAL and the Department respectfully ask this Court to reverse the Court of Appeals' decision in this matter and affirm the trial court's order terminating the respondent's parental rights.

Respectfully Submitted,

/s/ Carson K. Howatt
CARSON K. HOWATT (P87613)
PUBLIC DEFENDER'S OFFICE
LGAL for the Barber/Espinoza Minors
113 W. Front St.
Adrian, MI 49221
(517) 264-5348
Carson.howatt@lenawee.mi.us

Nastassja A. Thomas
NASTASSJA A. THOMAS (P83409)
VIRTUOUS LEGAL SERVICES, PLLC
Attorney for Lenawee MDHHS
PO Box 221
Saline, MI 48176
(734) 506-0561
nthomas@vlspllc.com

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CERTIFICATE OF COMPLIANCE WITH MCL 7.212

In compliance with MCL 7.212(G) and ADM File No. 2019-16, I certify that this brief contains approximately 3,145 countable words and the typeface used in this brief is Times New Roman, set in a 12-point font, except for footnotes.

Dated: 04/11/2025

/s/ Nastassja A. Thomas
NASTASSJA A. THOMAS (P83409)