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STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE BARBER/ESPINOZA, Minors

MSC No. 167745

COA No. 369359

Lenawee County Circuit Court,
Juvenile Division,
Case No. 23-00033-NA

_____/

AMICUS CURIAE BRIEF – CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

IN SUPPORT OF
RESPONDENT-APPELLEE MOTHER

Criminal Defense Attorneys of Michigan

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Statement of Questions Presented

I. Does the statutory scheme plainly require that reasonable efforts to reunify these children and their mother must be made where the mother was not the perpetrator of criminal sexual conduct involving penetration? See MCL 712A.19a(2)(a), MCL 722.638(1) and (2).

CDAM answers, "Yes."

II. The requirement to make reasonable efforts to reunify the children with their mother cannot be circumvented by means of MCL 722.638(3), as such would not comport with legislative intent expressed in the clear words of the statutes and it would render the statutory scheme unconstitutional? In any event, the government did not satisfy the requirements of MCL 722.638(3)?

CDAM answers, "Yes."

III. As to this Court's questions about plain error affecting the respondent-mother's substantial rights, should this Court extend the *Davis* modification to the *Carines* plain error test into the review of orders terminating parental rights?

CDAM answers, "Yes."

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Interest of Amicus Curiae

Since its founding in 1976, the Criminal Defense Attorneys of Michigan ("CDAM") has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM exists, in part, to "promote expertise in the area of criminal law, constitutional law, and procedure and to improve trial, administrative and appellate advocacy," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." CDAM Bylaws, art 1, sec 2.

Why is CDAM interested in a termination of parental rights case? Because we see the aftermath of these cases for clients in countless cases across Michigan. Termination of parental rights is perhaps the most serious "collateral" consequence that our clients face from criminal convictions. Separating children from their parents, even under the worst of familial circumstances, is emotionally difficult. But when the government rips children from their parents unlawfully, it inflicts life-long, even generational, trauma on them. And sometimes that trauma reverberates out into the rest of the community in the form of additional crimes.

Statement of Facts

CDAM relies on the Statement of Facts in Respondent-Appellee-Mother Chrystal Espinoza's Supplemental Brief filed in this Honorable Court. Below, CDAM highlights some facts most pertinent to its arguments.

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CDAM finds it particularly noteworthy that the events that formed the basis for the petition to immediately terminate this mother's parental rights took place at least five years before the petition was filed, the mother's rights were completely terminated despite that she was not the primary custodial parent but only had visitation time with the children, and there was no indication of present-day abuse.[1] Additionally, this mother had already been making efforts to improve herself and her parenting, including taking suboxone for four years to treat her addiction. 42b.

Also noteworthy, the government conceded in the trial court that the case did not meet the criteria of MCL 722.638(1) that allow it to dispense with reasonable efforts to reunify. 54b. The government told the court that MCL 722.638(1) does not specifically designate sex trafficking or substance abuse in front of children as aggravating circumstances. 53b-54b. But the government and the children's guardian ad litem believed that *their* agreement that reunification services should be withheld from the mother meant that the court could proceed to immediate termination under MCL 722.638(3). 54b-55b.

[1] Respondent-Appellee's supplemental brief, p 10: "Although CB was 14 at the time the petition was filed, the petition was based on alleged sexual abuse that had happened to CB when she was between the ages of 2 and 9. 9b, 10b. The petition did not contain any allegations that ME had been abused, nor did it contain any facts alleging that the children had been abused or neglected by Ms. Espinoza over the last five years." Later, CB testified that approximately six to ten years prior to the hearing, her mother – high on drugs – had allowed her to be sexually assaulted by one of her mother's friends. 23b, 27b.

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Arguments

I. The statutory scheme plainly requires that reasonable efforts to reunify these children and their mother must be made where the mother was not the perpetrator of criminal sexual conduct involving penetration. See MCL 712A.19a(2)(a), MCL 722.638(1) and (2).

CDAM agrees with the statutory construction analysis done by Appellee-Mother Espinoza in her supplemental brief in this Court, Issues I and II, and by the Court of Appeals in its opinion below. *In re Barber/Espinoza, Minors*, __ Mich App __ (9/19/2024), slip op pp 4-8. The statutes at issue plainly evidence that the Legislature knows how to differentiate between a principal and an aider and abettor, and that it made deliberate choices about when to use which language. Reasonable efforts to reunify children with a parent must be made when that parent was not personally the perpetrator of criminal sexual conduct involving penetration. See MCL 712A.19a(2)(a), MCL 722.638(1) and (2). It is not the judiciary's role to second-guess the policy decisions of the other branches or to alter the words of a statute to reach a different desired result. *People v Harris*, 499 Mich 332, 345 (2016).

It appears that only seven states recognize sex trafficking[2] or sexual exploitation[3], by a parent, as an aggravating circumstance. Michigan is not among

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[2] Only Idaho, Indiana, Maine, Ohio, Texas, Washington, and Wisconsin recognize sex trafficking by a parent as an aggravated circumstance. Child Welfare Information Gateway (2020), *Reasonable efforts to preserve or reunify families and achieve permanency for children.* U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, p 3, 3 FN 8. https://www.childwelfare.gov/resources/reasonable-efforts-preserve-or-reunify-families-and-achieve-permanency-children/

[3] Only Arizona, Arkansas, California, Connecticut, Florida, Maine, and Massachusetts recognize sexual exploitation by a parent as an aggravated circumstance. *Id.* FN 9.

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them. The government's concessions below in the trial court and in the Court of Appeals that sex trafficking by a parent was not an aggravating circumstance were correct.[4]

Given the very limited number of states that have expanded their definitions of aggravated circumstances to include sex trafficking or sexual exploitation, it does not appear that Michigan is any danger of losing federal funding by faithfully following the statutes set forth by the Michigan Legislature, as alluded to by the amicus brief from the Michigan Probate Judges Association and Coalition Of Child Welfare Appellate Attorneys. Even so, any concerns in that regard would need to be addressed to our Legislature, as the exclusions of these categories from the definition of aggravated circumstances are policy decisions and only the Legislature can change the language of the statutes. See *People v Harris*, 499 Mich 332, 345 (2016).

II. The requirement to make reasonable efforts to reunify the children with their mother cannot be circumvented by means of MCL 722.638(3), as such would not comport with legislative intent expressed in the clear words of the statutes and it would render the statutory scheme unconstitutional. In any event, the government did not satisfy the requirements of MCL 722.638(3).

[4] Moreover, "a party is bound to the theory on which the cause was prosecuted or defended in the court below." *Gross v Gen. Motors Corp.*, 448 Mich 147, 162 n 8 (1995); see also *Dwelley v Tom McDonnell, Inc.*, 334 Mich 229, 233 (1952). Particularly where fundamental liberty interests are involved, this Court does not normally allow the government to change its position during the appeal or raise new arguments. See *People v Walker*, 504 Mich 267, 276 n 3 (2019); *People v McGraw*, 484 Mich 120, 131 n 36 (2009).
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In child protection proceedings, this Court is loath to "endorse the all too common decisions of the DHS and the circuit courts to cut corners by ignoring the mandates of statutes and court rules." *Mason,* 468 Mich at 167. The trial court's termination of the mother's parental rights cannot be alternatively affirmed under MCL 722.638(3).

Allowing the government and the attorney for the child to circumvent the statutory provisions specifically delineating when termination can proceed in the absence of reunification efforts is unsupported by the statutory scheme. Moreover, even if the statutory scheme allowed for it, such circumvention would violate a parent's Due Process rights. Finally, the substantive requirements of MCL 712A.19b, incorporated within MCL 722.638(3), were not met.

This Court has examined these statutes many times and concluded that reasonable efforts to reunify parents with their child must be made in all cases, including for a non-custodial parent, unless a court finds that the case meets a specific exception set forth in MCL 712A.19a(2)(aggravated circumstances), referenced in MCL 722.638(1).[5] See, e.g., *In re Simonetta*, 507 Mich 943 (2021); *In re Hicks*, 500 Mich 79, 85-86 (2017); *In re Mason*, 486 Mich 142, 152 (2010), and *In re Rood*, 483 Mich. 73, 99-100 (2009).

[5] MCL 722.638(2) only applies where a petition was submitted as required by subsection (1), which did not occur here. Subsection (2) provides that if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIIA of 1939 PA 288, MCL 712A.19b.

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If this Court were to adopt the government's position on 722.638(3), it would effectively nullify 712A.19a(2), which this Court cannot do.[6] It is not the judiciary's role to second-guess the policy decisions of the other branches or to alter the words of a statute to reach a different desired result. *People v Harris*, 499 Mich 332, 345 (2016).

Regardless, it does not appear that the procedure required by MCL 722.638(3) was even followed in this case. The government consulted the child's guardian ad litem, not the child's attorney as required by that subsection.

Additionally, the interpretation that the government and others advance regarding MCL 722.638(3) would violate parents' substantive and procedural Due Process rights. Parents have substantive Due Process rights to a relationship with their children, and everyone has procedural Due Process rights. US Const, Amend XIV; *Moore v East City of Cleveland, Ohio*, 431 US 494, 503-504 (1977); Const 1963, art1, § 17; see *In re Sanders*, 495 Mich 394, 409-411 (2014). Due Process rights do not dissipate in child protection proceedings, even for non-custodial parents:

> [T]he "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v Kramer*, 455 US 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982). Accordingly, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753–754, 102 S Ct 1388.

[6] In interpreting a statute, effect must be given to every word, phrase, and clause and a court must avoid rendering any part of the statute surplusage or nugatory. *People v Bonilla-Machodo*, 489 Mich 412, 422 (2011). When interpreting different statutes that use different language attention must be paid so that a court does not construe one or both in a way that treats any word as surplusage or nugatory. *People v McGraw*, 484 Mich 120, 126 (2009); *People v Carter*, 503 Mich 221, 229 n 29 (2019).

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Rood, 483 Mich at 76.

Due Process would be violated if MCL 722.638(3) allows the trial court to proceed to immediate termination without offering reunification services based simply on the desires of the government and/or an agreement between the government and the child's attorney, without meaningful input from the parents or a meaningful way for the parents to challenge the same. See *In re Ferranti*, 504 Mich 1, 31-35 (a trial court's *in camera* interview of a child deprived the parents of Due Process); see also *Rood,* 483 Mich at 92, 109-115.

Finally, the mother's procedural and substantive Due Process rights would be violated by proceeding to immediate termination under MCR 722.628(3) based on her failure to protect CB from sexual abuse by a third party, that occurred several years earlier, without any evaluation of mother's present-day ability to protect CB from similar danger. MCL 722.638(3) references MCL 712A.19b, and MCL 712A.19b requires a showing of present danger or a reasonable likelihood of future danger. In fact, recent case law demonstrates that the lack of present danger is basis for a court to dismiss a petition outright at the preliminary hearing. *In re KNK*, __ Mich App __ (10/7/2024) (Docket no. 370841). Yet this case takes things several steps further despite that lack of present danger.

Here, the trial court found that MCL 712A.19b(3)(b)(i) (parent's act caused child or sibling sexual abuse and sexual abuse is *reasonably likely to happen again*), (b)(ii) (parent failed to prevent sexual abuse and sexual abuse is r*easonably likely to happen again*) and (j) (*reasonable likelihood of harm*) were met. *In re*

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Barber/Espinoza, ___ Mich App ____, slip op 1 (emphasis added). But there was no reasonable likelihood of future harm under the *status quo*, and certainly if the government gave services to the mother, the future would look even more promising.

Perhaps the most striking feature of this case is the lack of any readily apparent need to sever all legal bonds between this mother and her children at the time the termination petition was filed. The instances of sexual abuse by others that were alleged, as to CB only, took place at least five years and maybe as many as 10 years before the petition was filed. At that time, the mother was in the throes of a drug addiction, but she had been treating the addiction for the past four years. The mother was not presently the primary custodial parent but only had visitation time with the children, including therapeutic visiting time with CB. There was no indication of any such abuse since the alleged, old instances. The mother had already been making efforts to improve herself and her parenting. (See Statement of Facts in mother's supplemental brief.) CB's gut-wrenching plea epitomizes the tragedy of the termination of her mother's parental rights in this case:

> "I wanted to tell her that I do love her and miss her and I know that she can do this and I really believe in you. And I just want you to get the help and I don't want this to be the end of it. I do, really, want to see you and I do really love you and I just want you to succeed. . . I know it's so, so hard but I know you can do this. And I really believe in you." 31b.

The Court of Appeals was correct to reverse the trial court's order terminating this mother's parental rights without requiring the government to provide reasonable reunification services. This Court should deny leave to appeal or affirm the Court of Appeals.

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III. As to this Court's questions about plain error affecting the respondent-mother's substantial rights, this Court should extend the *Davis* modification to the *Carines* plain error test into the review of orders terminating parental rights.

In *In re Ferranti*, 504 Mich 1 (2019), this Court overruled its decision in *In re Hatcher*, 443 Mich 426 (1993) (collateral bar rule). In its place, this Court adopted the plain error review test from *People v Carines*, 460 Mich 750 (1999), for unpreserved constitutional errors in criminal cases, to be used in appeals from orders terminating parental rights, including for errors in the adjudicative stage. CDAM now urges this Court to similarly extend the modification made to the *Carines* plain error test from *People v Davis*, 509 Mich 52 (2022), into the review of orders terminating parental rights.

The *Davis* modification to the *Carines* plain error test altered the third and fourth prongs of the test for structural errors. Under *Davis*, forfeited structural errors are deemed to satisfy the third prong. *Davis,* 509 Mich at 73-74. As to the fourth prong, it is no longer the defendant's burden to demonstrate that the plain, forfeited structural error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Davis*, 509 Mich at 75-76. Instead, there is a rebuttable presumption that structural errors satisfy this fourth prong. *Id*.

This Court made those changes to the plain error test in criminal cases because it concluded that, like preserved structural errors, forfeited structural errors defy analysis under the third prong of the plain-error standard, and often render a trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence.

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Davis, 509 Mich at 73-74. Likewise, as to the fourth prong, "a trial that has been rendered fundamentally unfair or had its framework affected by structural error is generally one whose fairness, integrity, or public reputation has been damaged." *Id.* at 75. This Court explained that "[g]iven this conceptual overlap between the third and fourth prongs of the plain-error standard and that a forfeited structural error automatically satisfies the third prong of the plain-error standard, a forfeited structural error is very likely to also satisfy the fourth prong of the plain-error test." *Id.* at 76. This Court found that the prosecutor was in a better position to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding, than the defendant was in to identify the harm. *Id.*

For the same reasons that this Court overruled *Hatcher* and adopted *Carines* as to orders terminating parental rights, in *Ferranti*, it should now likewise extend the *Davis* modification to such cases. The right to parent one's own children "is essential to the orderly pursuit of happiness by free men and is perhaps the oldest of the fundamental liberty interests." *In re Ferranti*, 504 Mich at 28 (citations omitted). The Legislature has expressed its intent in the juvenile code to support children in their own homes, see MCL 712A.1(3) ("This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state."). *Id.* at 27-28.

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The errors in this case were structural errors. As to the trial court erroneously proceeding to immediate termination without offering reunification services, the Court of Appeals noted that "(1) it is unclear how an aggrieved respondent could establish outcome-determinative error concerning the denial of reunification services altogether and (2) the error improperly dispensed with a critical aspect of a child protective proceeding—the requirement to offer reunification services before terminating parental rights—affected the very framework within which this case progressed, undermined the foundation of the rest of the proceedings…" *In re Barber/Espinoza, Minors*, ___ Mich App ___ (9/19/24), slip op p 9. The Court went on: "there is simply no way to know how termination may have proceeded differently when respondent was improperly denied any opportunity to rectify her situation and demonstrate a willingness and ability to parent notwithstanding her earlier concerning conduct." *Id.* at 10. As to the failure to apprise the mother of her appellate rights, the Court of Appeals made similar observations. *Id.* at 12. Further, both errors deprived the mother of entire proceedings, the wrongful denial of reunification services and an appeal at that stage.

Errors affecting the very framework of the case or denying an entire critical proceeding, and the resulting difficulty for the aggrieved party to establish outcome-determinative harm are hallmarks of structural error. *Davis*, 509 Mich at 67; *Roe v Flores-Ortega,* 528 US 470, 483 (2000), citing *Smith v Robbins*, 528 US 259, 286 (2000) ("there is no disciplined way to "accord any 'presumption of reliability'... to judicial proceedings that never took place.")

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Structural errors such as those here should automatically satisfy the third prong of the plain error test and the government should bear the burden of rebutting a presumption that the parent is entitled to relief under the fourth prong. This Court should apply the *Davis* modification to the *Carines* plain error test into the review of orders terminating parental rights.

Summary and Request for Relief

Wherefore, **CDAM** respectfully requests this Honorable Court to deny leave to appeal or to affirm the Court of Appeals.

Respectfully submitted,

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