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**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee,

-vs-

**JOHN ANTONYA MOSS**

Defendant-Appellant
_____/

**Supreme Court No**. _____

Court of Appeals No. 338877

Circuit Court No. 15-5091 FH

**NOTICE OF FILING**
**APPLICATION FOR LEAVE TO APPEAL IN THE MICHIGAN SUPREME COURT**
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**PLEASE TAKE NOTICE** that Defendant-Appellant has this day, **November 5, 2020**, filed an application for leave to appeal in the Michigan Supreme Court.

Undersigned hereby certifies that one copy of this Notice of Filing & Proof of Service were **SERVED** on each of the court clerks listed above by e-file today, **November 5, 2020**.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/ Christine A. Pagac
_____
**CHRISTINE A. PAGAC (P67095)**
Assistant Defender

Dated: November 5, 2020

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**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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**Supreme Court No.:**

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Plaintiff-Appellee,

**Lower Court No**. 15-5091 FH

-vs-

**JOHN ANTONYA MOSS**
Defendant-Appellant
_____/

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

**CHRISTINE A. PAGAC (P-67095)**
Attorney for Defendant-Appellant
_____

FILED UNDER AO 2019-6

**APPLICATION FOR LEAVE TO APPEAL**

CERTIFICATE OF COMPLIANCE

**STATE APPELLATE DEFENDER OFFICE**

**BY: CHRISTINE A. PAGAC (P-67095)**
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# Table of Contents

Index of Authorities ..... i

Judgment Appealed From And Relief Sought ..... v

Statement of Questions Presented ..... vi

Introduction: Why Relief Should Be Granted ..... 1

Statement of Facts ..... 2

Argument ..... 5

I. Adoptive siblings are not related by blood. The factual basis failed to establish the crime to which Mr. Moss pleaded no contest. He should be permitted to withdraw his plea. ..... 6

II. Mr. Moss also received ineffective assistance of counsel based on the mistaken advice that a consensual sexual encounter between adoptive siblings constituted a felony. He should be permitted to withdraw his no contest plea. ..... 18

A. Deficient Performance ..... 20

B. Prejudice ..... 22

Conclusion and Request for Relief ..... 24

RECEIVED by MSC 11/5/2020 3:10:07 PM

# Index of Authorities

## Cases

*Bliss v Caille Bros Co*, 149 Mich 601 (1907) .....4, 15, 16, 17

*Bousley v United States*, 523 US 614 (1998) .....21, 22

*Brady v United States*, 397 US 742 (1970).....23

*Guilty Plea Cases*, 395 Mich 96; 235 NW2d 132 (1975).....8, 20

*Hill v Lockhart*, 474 US 52 (1985).....23, 26

*In re Estate of Bordeaux*, 37 Wash 2d 561 (1950) .....16

*Kimmelman v Morris*, 477 US 365 (1986).....24

*Kolender v Lawson*, 461 US 352 (1983).....17

*Lafler v Cooper*, 566 US 156 (2012).....23, 24

*Padilla v Kentucky*, 559 US 356 (2010).....24

*People v. Rea*, 500 Mich 422 (2017) .....19

*People v Armstrong*, 212 Mich App 121 (1995) .....passim

*People v Booth*, 414 Mich 343; 324 NW2d 741 (1982).....8

*People v Carbin*, 463 Mich 590 (2001).....23

*People v Cole*, 491 Mich 325; 817 NW2d 497 (2012) .....7, 21

*People v Denmark*, 74 Mich App 402 (1977) .....5, 15, 16, 18

*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) .....27

*People v Goodman*, 58 Mich App 220 (1975).....8

*People v Grant*, 47 Mich 477 (2004).....23, 24

*People v Henry*, 239 Mich App 140; 607 NW2d 767 (1999) .....21

*People v Howell*, 396 Mich 16 (1976).....17

*People v LaVearn*, 448 Mich 207 (1995) .....23

*People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002).....21

*People v Patmore*, 264 Mich App 139; 693 NW2d 385 (2004).....8

*People v Pickens*, 446 Mich 298 (1994).....22

*People v Pubrat*, 451 Mich 589 (1996).....22

*People v Russell*, 266 Mich App 307 (2005).....15

*People v Smith*, 423 Mich 427 (1985).....11, 12

*People v Washington*, 501 Mich 342 (2018).....11

*People v Waterstone*, 296 Mich App 121; 818 NW2d 432 (2012).....7

*People v Werner*, 254 Mich App 528 (2002).....23

*People v Zajaczkowski*, 493 Mich 6; 825 NW2d 554 (2012).....passim

*Rompilla v Beard*, 545 US 374 (2005).....24

*Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).....21, 22, 23

*Wiggins v Smith*, 539 US 510 (2003).....24, 25

**Constitution, Statutes & Rules**

Const 1963, art 1, § 17.....8, 22

MCL 205.27a(12).....13

MCL 208.1105(2).....13

MCL 208.1111(1)(x).....13

MCL 333.21311a(8)(b).....13

MCL 333.7403(2)(d).....2

MCL 333.7413.....2

MCL 400.112g(6)(c).....13

MCL 400.707(2).....13

MCL 554.1012(a)(i)(B).....13



RECEIVED by MSC 11/5/2020 3:10:07 PM

MCL 554.524 ..... 13
MCL 700.2114 ..... 10
MCL 700.2806 ..... 13
MCL 700.5204(2)(c)(iii) ..... 13
MCL 710.21a ..... 11
MCL 710.21a(d) ..... 11
MCL 710.22(u) ..... 12
MCL 710.26(2) ..... 12
MCL 710.27(6) ..... 12
MCL 710.60 ..... 10, 12, 14
MCL 710.60(2) ..... 4, 10, 11
MCL 710.610(2) ..... 10
MCL 722.111 ..... 13
MCL 722.124 ..... 13
MCL 722.124c ..... 14
MCL 722.26c(1)(b)(iii) ..... 13
MCL 722.925(g) ..... 14
MCL 750.33 ..... 6
MCL 750.333 ..... 6
MCL 750.520b ..... 4
MCL 750.520b(1)(a)(ii) and 750.520c(b)(iv) ..... 6
MCL 750.520b(b)(iii), 750.520c(iii) ..... 19
MCL 750.520b(i) ..... 19
MCL 750.520c(b)(i) ..... 19



RECEIVED by MSC 11/5/2020 3:10:07 PM

MCL 750.520d ..... 2

MCL 750.520d(1)(d) ..... 2, 3, 7, 9

MCL 750.520e ..... 4

MCL 750.520e(1)(d) ..... 11

MCL 750.81d ..... 2

US Const Amends VI, XIV ..... 22

US Const, Am XIV ..... 8, 21

Fed. R. Crim P 11 ..... 20

MCR 6.302 ..... 4

MCR 6.302(A) ..... 8

MCR 6.302(D)(2)(b) ..... 8

MCR 6.310 ..... 4

MCR 6.310(D) ..... 7

MCR 7.305(B)(3) ..... iv, 1

MCR 7.305(B)(5) ..... iv, 1

MCR 7.305(C)(2) ..... iv

**Other Authorities**

1998 PA 386 ..... 10

K Cobb & N Schauer, "Michigan's Criminal Sexual Assault Law,", 8 U Mich J L Reform 217 (1974) ..... 6



RECEIVED by MSC 11/5/2020 3:10:07 PM

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## Judgment Appealed From And Relief Sought

Defendant-Appellant John Moss appeals from the September 10, 2020, published Court of Appeals decision affirming the trial court's denial of the motion to withdraw his plea. (Appendix A) This application is being filed within 56 days of the opinion as required by MCR 7.305(C)(2). The opinion was rendered after this Court's April 19, 2019 order remanding the case to the Court of Appeals as on leave granted after the March 6, 2019 argument on application.

Mr. Moss seeks review because the decision is clearly erroneous, will cause material injustice, and conflicts with a Supreme Court decision and other Michigan Court of Appeals decisions, MCR 7.305(B)(5). The issues raised also involve legal principles of major significance to the state's jurisprudence, MCR 7.305(B)(3). Mr. Moss asks this Court to grant this application for leave to appeal or order other appropriate relief.

Respectfully submitted,

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## Statement of Questions Presented

**I. Adoptive siblings are not related by blood. The factual basis failed to establish the crime to which Mr. Moss pleaded no contest. Should he be permitted to withdraw his plea?**

Trial Court answered "Yes, but they are related by affinity."

Court of Appeals answers, "No."

John Antonya Moss answers, "Yes."

**II. Mr. Moss also received ineffective assistance of counsel based on the mistaken advice that a consensual sexual encounter between adoptive siblings constituted a felony. Should he be permitted to withdraw his no contest plea?**

Trial Court answered "No"

Court of Appeals answers, "No."

John Antonya Moss answers, "Yes."

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## Introduction: Why Relief Should Be Granted

This case is making its second trip to this Court after a remand to the Court of Appeals to determine whether foster children adopted by a single woman are related by "blood or affinity" under the criminal sexual conduct statutes. In a published opinion, the Court of Appeals incorrectly expanded the common definition of blood to include adoption, despite the fact that it runs counter to numerous statutes that use both "blood and adoption," among other things. Rewriting the law is the job of the Legislature, not the courts, and for this reason this Court should grant leave.

Mr. Moss seeks review because the decision is clearly erroneous, will cause material injustice, and conflicts with a Supreme Court decision and other Michigan Court of Appeals decisions, MCR 7.305(B)(5). The issues raised also involve legal principles of major significance to the state's jurisprudence, MCR 7.305(B)(3).

Mr. Moss asks this Court to grant this application for leave to appeal or order other appropriate relief.

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# STATEMENT OF FACTS

This appeal stems from a judgment entered in the Berrien County Circuit Court by the Honorable Donna Howard. Defendant-Appellant John Moss pleaded no contest to criminal sexual conduct in the third-degree ("CSC-3d") based on blood or affinity, MCL 750.520d(1)(d). PT 9. The trial court sentenced Mr. Moss to six to 15 years in prison. Judgment of Sentence. Mr. Moss subsequently moved for plea withdrawal, but the trial court denied that motion. May 30, 2017 Order

## Factual Background

A sexual encounter occurred between Mr. Moss and his adoptive sister Jamira on November 11, 2015. PT 11. Mr. Moss and Jamira were foster children, unrelated by blood, who had been legally adopted by Wanda Moss. 5/30/17 Order 2.

Within a few hours of the encounter, Ms. Moss called the police to report that Mr. Moss had sexually assaulted her. 5/30/17 Order 3. Mr. Moss asserted that he and the complainant engaged in consensual sexual activity involving oral sex and vaginal intercourse. PT 12.

## Procedural History

The Government originally charged Mr. Moss with four offenses as a fourth habitual offender: (1) resisting and obstructing a police officer, MCL 750.81d; (2) possession of marijuana, MCL 333.7403(2)(d), with a second offense notice, MCL 333.7413; and (3 & 4) two counts of CSC-3d predicated upon relationship by blood or affinity or, alternatively, upon force or coercion, MCL 750.520d. See *Felony Information*. The parties ultimately entered an agreement whereby Mr. Moss agreed to plead no contest to one count of CSC-3d based on blood or affinity. PT 9. The prosecution agreed to dismiss the remaining charges and the fourth habitual enhancement. PT 9. The prosecution also agreed to recommend a 72-month prison term. PT 9.

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The trial court relied upon police reports to establish a factual basis for the plea, finding "that [he] effected . . . sexual penetration while [he] and the victim, Miss Jamira Moss, were related by affinity to the third degree." PT 6; 5/30/17 Order 3. Defense counsel "add[ed] that . . . [the sexual encounter] was consensual." PT 12. The trial court determined a factual basis had been established and accepted Mr. Moss's plea. PT 13.

At sentencing, the trial court followed the bargained-for recommendation and imposed a prison sentence of 6 to 15 years. ST 44. A resentencing was held the next day for the purposes of applying the correct sentencing grid for CSC-3d. RST 3. The trial court resentenced Mr. Moss to the same prison sentence imposed the day before. RST 8.

Mr. Moss filed a timely post-conviction motion for plea withdrawal. The motion argued that adoptive siblings are not related by blood or affinity for purposes of the CSC-3d statute, MCL 750.520d(1)(d). *Id.* at 2. According to the motion, this meant that the record failed to supply a factual basis for CSC-3d based on blood or affinity. *Id.* It also meant that Mr. Moss's plea was the product of assistance of counsel—namely, counsel's mistaken advice that he could be found guilty of CSC-3d even if the jury agreed that his encounter with his adoptive sister was consensual. *Id.*

The trial court denied this motion. 5/30/17 Order. It agreed that adoptive siblings are not related by blood for purposes of the CSC-3d statute. *Id.* at 8-9. But it held that adoptive siblings are related by affinity. *Id.* at 9-12. "As such," the trial court concluded, "Defendant has not demonstrated that there was an inaccuracy or other defect in the taking of his plea under MCR 6.302, and therefore, withdrawal of the plea is not warranted pursuant to MCR 6.310, and must be denied." *Id.* at 12.

Mr. Moss filed a timely application for leave to appeal to the Court of Appeals, which was denied in August 2017. He filed a timely application for leave to appeal to the Michigan Supreme Court, which

granted oral argument on application on the question of whether adoptive siblings are related by blood or affinity. 5/16/18 Order. The Court ordered the parties to "address whether the proper definition of "affinity" is that found in *Bliss v Caille Bros Co,* 149 Mich 601 (1907), or *People v Armstrong,* 212 Mich App 121 (1995). The Michigan Supreme Court heard argument in March 2019 and in April 2019 remanded the case back to the Court of Appeals as on leave granted. 4/19/19 Order. The Order required the Court to "specifically address whether a family relation that arises from a legal adoption, see MCL 710.60(2) (". . . After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons. . .") (1) is effectively a "blood" relation, as that term is used in MCL 750.520b – MCL 750.520e; or (2) is a relation by "affinity," as that term is used in MCL 750.520b – MCL 750.520e, see *Bliss v Caille Bros Co,* 149 Mich 601, 608 (1907); *People v Armstrong,* 212 Mich App 121 (1995); *People v Denmark,* 74 Mich App 402 (1977)."

The Court of Appeals affirmed, holding that the adoption created a relationship by blood, but not one of affinity because they were not related by marriage. This timely application followed.

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## Argument

In 1974, the Michigan Legislature adopted a revolutionary sexual assault law. *See* K Cobb & N Schauer, "Michigan's Criminal Sexual Assault Law," 8 U Mich J L Reform 217 (1974). The new statute was gender neutral. It included a rape shield provision. It repealed and incorporated a number of existing statutes, including the prohibition on incest. *Id* at 219; *see* MCL 750.333. With respect to incest, the Legislature expanded the existing prohibition on "adultery or fornication" from a ban within certain degrees of "consanguinity" to a ban on sexual contact with minors within a certain degree of "blood or affinity." *Compare* MCL 750.33 with current MCL 750.520b(1)(a)(ii) and 750.520c(b)(iv). Relevant to this case, in 1996, the Legislature amended the statute to prohibit all sexual contact between consenting adults related to each other "by blood or affinity to the third degree." 750.520d(1)(d); 750.520e(b)(1)(d).

The definition of "blood or affinity" is at issue in this case. Mr. Moss pled to having consensual sex with his adoptive sister "JM." Relying on the adoption statute in this Court's remand order, the Court of Appeals concluded that Mr. Moss and JM are related by blood, but not affinity. This Court should not jettison the well-established and common definition of "blood" in order to rewrite the criminal sexual conduct laws. That is the job of the Legislature.

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## I. Adoptive siblings are not related by blood. The factual basis failed to establish the crime to which Mr. Moss pleaded no contest. He should be permitted to withdraw his plea.

### *Issue Preservation*

Mr. Moss preserved this issue by first raising it in the trial court in a timely post-conviction motion for plea withdrawal. MCR 6.310(D).

### *Standard of Review*

This Court reviews a trial court's decision on a motion for plea withdrawal for an abuse of discretion. *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012). A trial court necessarily abuses its discretion when it makes an error of law. *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). Questions of law—such as constitutional issues or issues concerning the proper application of a statute or court rule—are subject to *de novo* review. *Cole*, 491 Mich at 330.

### Analysis

Adoptive siblings are not related by blood or affinity. See *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012) (discussed *infra*). Mr. Moss does not share a biological parent with Jamira Moss; nor are their biological parents married. The record therefore fails to establish a "blood or affinity" relationship within the meaning of MCL 750.520d(1)(d). Absent a sufficient factual basis, Mr. Moss must be permitted to withdraw his no contest plea to CSC-3d based on blood or affinity.

Due process forbids a trial court from accepting a no contest plea without a sufficient finding of guilt. US Const, Am XIV; Const 1963, art 1, § 17; *Guilty Plea Cases*, 395 Mich 96, 128-129; 235 NW2d 132 (1975).[1] Similarly, MCR 6.302(A) provides that a trial court may not accept a

[1] See also *People v Goodman*, 58 Mich App 220, 222 (1975) (stating that for plea waiver purposes, it is immaterial whether defendant pleads guilty or no contest).

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plea unless it is convinced that the plea is accurate. Additionally, MCR 6.302(D)(2)(b) requires trial courts to make a record "that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading."

It is well settled that a defendant may challenge his plea-based conviction on appeal where the factual basis fails to establish an essential element of the offense. See, e.g., *Guilty Plea Cases*, 395 Mich at 128-129. "In the case of a plea of nolo contendere, the standard to be applied by an appellate court in its review of the adequacy of factual bases for a plea is whether the trier of fact could properly convict on the facts elicited from reliable sources." *People v Patmore*, 264 Mich App 139, 151; 693 NW2d 385 (2004) (citing *People v Booth*, 414 Mich 343; 324 NW2d 741 (1982)).

If the factual basis for the plea fails to establish an element of the crime, the prosecutor is given the opportunity to establish the missing element. *Guilty Plea Cases*, 395 Mich at 129. "If [the prosecutor] is able to do so and there is no contrary evidence, the judgment of conviction shall be affirmed." *Id.* But "[i]f contrary evidence is produced . . . the court shall decide the matter in the exercise of its discretion." *Id.*

Here, the factual basis for the plea failed to establish the blood or affinity elements of CSC-3d, blood or affinity. That offense requires proof that the defendant (1) engaged in sexual penetration with another person, and (2) was related to the complainant by blood or affinity to the third degree. MCL 750.520d(1)(d). Mr. Moss's conviction is predicated upon the allegation that he is related to Jamira Moss, his adoptive sister, by blood or affinity. PT 6, 12.

**Blood**

Mr. Moss does not share a biological parent with the complainant in this case, JM. They were both adopted by the same woman, their foster mother. The trial court correctly concluded that sharing an adoptive parent does not transform two people who are not biologically

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related into blood relatives. App 128a-129a For purposes of interpreting CSC statutes, the Supreme Court has defined a relationship by blood as "a relationship between persons arising by descent from a common ancestor or a relationship by birth rather than by marriage." *People v Zajaczkowski*, 493 Mich 6, 13 (2012) (citation and quotation marks omitted.) "By blood" is an alternative to "by affinity." *Id.* In *Zajaczkowski*, the defendant's mother was married to the victim's father at the time the defendant was born. *Id.* at 9. The defendant and the victim in that case did not share either biological parent, and this Court held the relationship by blood element was not established. *Id.* at 9, 14. In a footnote, this Court acknowledged that its holding meant that adoptive siblings would never fulfill the blood element, but adhered to "this Court's duty to enforce the clear statutory language that the Legislature has chosen." *Zajaczkowski*, 493 Mich at 14 n 18. "[P]olicy concerns are best left to the Legislature to address." *Id.* This approach is consistent with the common definition of blood, and deference to interpreting the CSC statute consistently with its plain language.

As adoptive siblings, Mr. Moss and the complainant do not share a common biological parent. Nor are they descended from a common ancestor. Thus, they are not related by blood.

**MCL 710.60 did not change the meaning of blood in the sexual assault statutes.**

MCL 710.60(2) did not create a blood relationship as that term is used in the Penal Code. MCL 710.610(2) provides:

> After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons, and the adopted person becomes an heir at law of the adopting parent or parents and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, except as provided in section

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> 2114(2) of the estates and protected individuals code, 1998 PA 386, MCL 700.2114, an adopted child is no longer an heir at law of a parent whose rights have been terminated under this chapter or chapter XIIA or the lineal or collateral kindred of that parent, nor is an adopted adult an heir at law of a person who was his or her parent at the time the order of adoption was entered or the lineal or collateral kindred of that person, except that a right, title, or interest that has vested before entry of the final order of adoption is not divested by that order.

The purpose of the Adoption Code is, as it relates to this section, "to achieve permanency and stability for adoptees as quickly as possible." MCL 710.21a(d)[2]. The purpose of the Penal Code, in contrast, is to define crimes. *People v Smith,* 423 Mich 427, 437 (1985). It does not set forth rights or duties. The purpose of MCL 710.60(2) is very clearly to establish inheritance rights, and to terminate them from the child's natural family.

Only statutes which relate to the same persons or things, or which have a common purpose, are to be read *in pari materia.* The Adoption Code and the Penal Code do not have a common purpose, and should not be said to apply to the same persons since to do so would require the Penal Code to be read *in pari materia* with every statute since the Penal Code applies to all people. While the prosecution asserts that the purpose of the Penal Code was to protect children, and the Court of Appeals has agreed, this is not a stated purpose of the Code and any

---

[2] While the section also speaks of the "best interest of adoptees," that provision is directed to the "procedures and services" of children in need of adoption; in other words to procedural fairness in the adoption procedures. *See* MCL 710.21a. Read more broadly, that the "rights of the adoptee shall be paramount," would effectively mean that people who were adopted would always prevail in any lawsuit, which is an absurd result.

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definition would apply not just to adults engaging in a consensual encounter. *See* MCL 750.520e(1)(d)(prohibiting even consensual encounters between people related by blood).

Applying other familiar and well-established rules of statutory construction, the plain meaning of the critical words as well as its placement and purpose in the statutory scheme must be considered. *People v Washington,* 501 Mich 342, 352 (2018). "If the statute's language is clear and unambiguous, then the statute must be enforced as written." *Id.* In *People v Zajackzowski,* 493 Mich 6 (2012), the central question was the definition of a "blood" relationship in these same criminal sexual conduct statutes. The Supreme Court held that blood "is defined as 'a relationship between persons arising from descent from a common ancestor' or a relationship 'by birth rather than by marriage.'" 493 Mich 6, 13 (2012). In *Zajackzowski,* the Court rejected efforts to extend that definition beyond its plain meaning based on the civil presumption of the legitimacy of children born within wedlock.

The Court of Appeals erred in expanding the term "blood" beyond its plain meaning based on MCL 710.60. The Legislature has made clear that it did not intend for MCL 710.60 to create a "blood relationship" for all purposes and for interpreting all statutes. The Legislature may be presumed to have intended that every word be given effect, and to know of existing legislation on the same subject. *People v Smith,* 423 Mich 427, 441 (1985). Reading MCL 710.60 to expand the term related by "blood" to mean "blood or adoption" is inconsistent with the way the Legislature has continued to differentiate between relations by blood, marriage and adoption in provisions both within the Adoption Code, and outside of it.

Within the Adoption Code, the Legislature has continued to be clear that a relation by adoption is distinct from a relation by blood. See MCL 710.22(u)(defines "relative" as someone related "within the fifth degree by marriage, blood, or adoption"); MCL 710.26(2)("This subsection also applies to . . . the adoption of a child related to the petitioner within the fifth degree by marriage, blood or adoption."); MCL 710.27(6) (subsection does not apply to the adoption of a child related

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within the fifth degree by "marriage, blood, or adoption") The Legislature has also continued to include both "blood" and "adoption" when defining or describing a relationship in numerous statutes, including statutes that were adopted very recently. MCL 205.27a(12) (defining related as siblings "by blood or by adoption); MCL 208.1105(2) (defining related as siblings "by blood or by adoption"); MCL 208.1111(1)(x) (defining related to include siblings whether by "blood or by adoption"); MCL 333.21311a(8)(b) (defining "related" as including certain relationships by "marriage, blood, or adoption"); MCL 400.112g(6)(c) (defining "caretaker relative" as "any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient"); MCL 400.707(2) (defining the term related to certain relationships "by marriage, blood, or adoption"); MCL 554.524 (Uniform Transfers To Minors Act defines "member of the minor's family" as certain relations whether by "blood or by adoption"); MCL 554.1012(a)(i)(B) (Uniform Commercial Real Estate Receivership Act defines "affiliate" to include lineal ancestor or descendant "whether by blood or adoption" and certain relatives, again by "blood or adoption"); MCL 700.2806 (definition of relative of ex-spouse for purpose of estate law); MCL 700.5204(2)(c)(iii) (one of the conditions for appointment of guardian for child is that the person being appointed is "related to the minor within the fifth degree by marriage, blood, or adoption"); MCL 722.26c(1)(b)(iii) (third party may seek custody if, among other things, they are "related to the child within the fifth degree by marriage, blood, or adoption"); MCL 722.111 (definitions in Children Code for "family child care home" and "group child care home" excepts children related to adult member of household by "blood, marriage or adoption" in versions adopted within the last year); MCL 722.124 (power to place child includes people "related to a child by blood, marriage, or adoption"); MCL 722.124c (section does not apply to adoption of a child related to the petitioner "within the fifth degree by blood, marriage, or adoption"); MCL 722.925(g)(complaints permitted to be made by adults "related to the child within the fifth degree by marriage, blood, or adoption").

This Court has said that policy decisions are best left to the Legislature. Reading MCL 710.60 to create a blood relationship between people once an adoption is final would render the term "adoption" superfluous in all of these statutes. The Court of Appeals interpretation does not acknowledge this fact.

As the Legislature has demonstrated that it continues to differentiate between blood, marriage and adoption, and to specify adoption when they want to include that relationship, this Court should not presume that in the case of the Penal Code the Legislature intended something else entirely. Rather, it should assume that the Legislature intended to use the common meaning of "blood" to not include adopted children.

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**Adoptive Siblings Are Not Related By Affinity**

Because the issue of affinity was the basis for the trial court's denial of Mr. Moss's motion to withdraw his plea, and was addressed in this Court's remand order, Mr. Moss asserts that the Court of Appeals correctly limited the definition of affinity to a marital relationship. The long-standing definition of affinity does not include adoptive siblings. While the statute does not define the term, the Court of Appeals has recognized that the term is "neither an unusual nor esoteric word; nor does the statute use the term in an uncommon or extraordinary context." *People v Denmark,* 74 Mich App 402, 408-409 (1977); *People v Russell*, 266 Mich App 307, 311 (2005)(quoting *Denmark*); *People v Armstrong,* 212 Mich App 121, 127-128 (1995). The Court of Appeals in *Denmark,* interpreting the criminal sexual conduct statute soon after it was written, used the Michigan Supreme Court's definition of the term from *Bliss v Caille Bros*, 149 Mich 601 (1907). In *Bliss*, the Court was asked to interpret a Michigan statute disqualifying judges, and jurors, by reason of "consanguinity or affinity" to either of the parties. *Bliss v Caille Bros,* 149 Mich 601 (1907). *Bliss* ultimately defined the term as "the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other," conclude ing that a husband is related by affinity to all the blood relatives of his wife, and a wife by affinity to all the blood relatives of her husband. *Id.* at 608. This was the "more modern authority," and the Court specifically rejected a line of cases adopting a broader definition that would hold there to be an affinity "between the husband and one who is connected by marriage with a blood relative of the wife." *Id.* at 609. Thus, two unrelated men did not become related by affinity by marrying women who are cousins. *Id.*

The *Bliss* Court reached this conclusion after outlining the religious origins and history of the legal doctrine of affinity. "It grew out of the canonical maxim that sexual union makes man and woman one flesh." *Id.* at 607. The Court explained that the rules were intricate, varied over time, and proved "the amazing ingenuity of the churchmen." *Id.* Because the rules were complicated, over time the law became confused as bits of canon law were recognized or ignored. Since the

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statute merely used the term affinity, without more, the Court had to decide how much of the doctrine survived. "[T]he use of the doctrine attempted is for the purposes only of determining whether, in support of a high public policy affecting the administration of the law, a juror or judge should be regarded as indifferent or biased." *Id.* at 608.

This opinion was far better reasoned than the one by the Court of Appeals in *People v Armstrong,* 212 Mich App 121 (1995).The *Armstrong* court ignored the long-standing and accepted rule set forth in *Bliss* that "[t]he particular rule of common law adopted and in force in this state is not to be determined authoritatively by courts of another state." 149 Mich. at 609. The Court of Appeals in *Armstrong* did just that in refusing to follow *Bliss*. *Armstrong* acknowledged that the *Bliss* definition had been used as the "accepted meaning" of affinity for purposes of the criminal sexual conduct statutes in *People v Denmark*, 74 Mich App 402 (1977). Nonetheless, the *Armstrong* court chose to follow neither *Bliss* nor *Denmark*, and instead relied on a decision of the Washington Supreme Court*, In re Estate of Bordeaux*, 37 Wash2d 561 (1950).

According to the Washington court, whether or not someone was related by affinity depended on the "legal context presented." Thus, the *Armstrong* court reasoned, it was free to reject the definition in *Bliss* because the court said that the use of the doctrine is "for the purpose only of determining whether . . . a juror or judge should be regarded as indifferent or biased *Armstrong* at 126 quoting *Bliss*.

The *Armstrong* court further explained that it was not constrained by *Denmark* because that case turned on whether or not the statute was unconstitutionally vague, and so legislative intent was not at issue. This reasoning is curious. In order to pass constitutional muster, a penal statute must define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson,* 461 US 352, 357 (1983) (citations omitted). There are at least three ways a penal statute may be found unconstitutionally vague: (1) failure to provide fair notice

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of what conduct is prohibited, (2) encouragement of arbitrary and discriminatory enforcement, or (3) being overbroad and impinging on First Amendment freedoms. *People v Howell,* 396 Mich 16, 20-21 (1976). To analyze the statute for purposes of a vagueness challenge, the *Denmark* court therefore had to determine whether a citizen would know what the statute meant. This is not mutually exclusive from legislative intent. Presumably the Legislature would know the same definitions a citizen would know, and would intend for the term to mean the same thing. Indeed, *Armstrong* cited *Denmark* for the proposition that "[t]he term 'affinity' is neither an unusual nor esoteric word; nor does the statute use the term in an uncommon or extraordinary context. Our courts have provided clear, legal definition of the concept on numerous occasions." *Denmark,* 74 Mich App at 408.

Having dismissed the *Bliss* and *Denmark* decisions, the *Armstrong* court claimed that principles of statutory construction required it to look to dictionary definitions rather than the definition the Michigan courts had been using for nearly 90 years in order to determine legislative intent. The dictionary definition used came from the Random House College Dictionary as a "relationship by marriage or by ties other than those of blood," as well as from a 1982 Florida Court of Appeals decision that the "common and ordinary meaning of affinity is marriage." *Armstrong*, 212 Mich App at 128. The court then expanded the *Bliss* definition of affinity beyond that of just the blood relatives of a spouse, to the definition that the *Bliss* court had rejected as not in keeping with modern authority: making the blood relatives of a husband related by affinity to the blood relatives of the wife.

Applying circular reasoning, the *Armstrong* court claimed that its redefinition was more consistent with the Legislature's intent, because the Legislature intended to protect young persons from sexual contact with "persons with whom they have a special relationship, such as relatives." *Id*. at 127-128. A broader definition would protect children from more people, therefore this must have been the Legislature's intent. The Court of Appeals did not explain why they believed this public policy required a broader definition for affinity than protecting

the justice system from judges and jurors biased in favor of their relatives.

Other language in the criminal sexual conduct statute also undercuts the use of the *Armstrong* definition of affinity to include not just a "relationship by marriage," which the one here clearly is not, to include "ties other than marriage." The Court of Appeals correctly limited *Armstrong* to marital relationships. Where the Legislature intended to protect those under 16 from people to whom they were tied to through a relationship other than blood, or marriage, they explicitly said so. MCL 750.520b(i) and MCL 750.520c(b)(i), both increase the severity of sexual assault penalties in cases where the victim is a "member of the same household" as the accused. Those in positions of authority over the victim are also subject to more severe penalties. MCL 750.520b(b)(iii), 750.520c(iii). To define the term "affinity" to include "ties other than marriage," such as members of the same household, would render these other, more specific sections superfluous. Reading the statute in this way would be contrary to the well-established rule that "when interpreting a statute, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v. Rea,* 500 Mich 422, 427-428 (2017) (citation and quotation marks omitted)

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**No Factual Basis for Plea**

Thus, the factual basis does not establish the "blood or affinity" element of CSC-3d. Ordinarily, when the record fails to establish a sufficient factual basis for the plea, the prosecution is given the opportunity to establish the missing element. *Guilty Plea Cases*, 395 Mich at 129. Here, however, no set of facts would establish a blood or affinity relationship between Mr. Moss and the complainant. Nor could the prosecution simply switch the force or coercion basis for blood or affinity, as this was not the offense that Mr. Moss agreed not to contest.

Mr. Moss should therefore be permitted to withdraw his plea. *Guilty Plea Cases*, 395 Mich at 129. The inadequacy of the factual basis raises serious questions about whether Mr. Moss could enter a knowing and voluntary plea.[3] His trial lawyer advised both Mr. Moss and this Court that the factual basis presented established CSC-3d based on blood or affinity. (PT 12). This led Mr. Moss to believe that there was no point in presenting his side of the story to a jury. But as set forth above, Mr. Moss would be entitled to an acquittal if the jury accepted his version of events. For all of these reasons, plea withdrawal is warranted.

[3] Indeed, the federal courts have made it clear that the very purpose of requiring a factual basis is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." Fed. R. Crim P 11, Advisory Committee's Note (1966).

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## II. Mr. Moss also received ineffective assistance of counsel based on the mistaken advice that a consensual sexual encounter between adoptive siblings constituted a felony. He should be permitted to withdraw his no contest plea.

### *Issue Preservation*

A claim of ineffective assistance of counsel may be presented for the first time on appeal because it involves a constitutional error which likely affected the trial's outcome. *People v Henry,* 239 Mich App 140, 146; 607 NW2d 767 (1999). But Mr. Moss nevertheless preserved this issue for appeal by raising it in a timely post-conviction motion for plea withdrawal.

### *Standard of Review*

The performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of law and fact subject to *de novo* review. *Strickland v Washington,* 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002).

### *Analysis*

Mr. Moss did not receive accurate advice on the existence of affinity between himself and his adoptive sister, Jamira Moss. A plea agreement must be knowing, intelligent, and voluntary for it to be valid, and satisfy the Due Process clause of the United States Constitution. See *People v Cole*, 491 Mich 325 (2012); US Const, Am XIV. In *Bousley v United States*, 523 US 614, 619 (1998), the United States Supreme Court agreed that if a defendant, "nor his counsel, nor the court correctly understood the essential elements of the crime with which [defendant] was charged . . . petitioner's plea would be . . . constitutionally invalid." The Court's affirmation in *Bousley* is directly parallel to Mr. Moss's current situation.

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Mr. Moss asserts that his plea was unknowing and involuntary where counsel provided incomplete and erroneous advice during plea bargaining. Specifically, counsel advised him that he could be convicted of CSC-3d even if the jury agreed that Jamira Moss consented to the sexual encounter. *Affidavit of Defendant John Moss* attached to motion to withdraw plea. Mr. Moss was unaware and was not advised that he did not share a "blood or affinity" relationship with Jamira Moss. *Id.* He would not have entered his plea if he were aware of this possibility; he would have instead taken the case to trial. *Id.* Because Mr. Moss received inaccurate advice regarding the nature of the offense and possible defenses, he should be granted an opportunity to withdraw his plea.

The Sixth Amendment guarantees the right to the effective assistance of counsel during both the plea and sentencing proceedings. See generally *Strickland v Washington*, 466 US 668 (1984); *People v Pickens*, 446 Mich 298 (1994); *People v Pubrat*, 451 Mich 589, 594 (1996) (right to effective assistance of counsel at sentencing); US Const Amends VI, XIV; Const 1963, art 1, §§ 17, 20. More recently, the Supreme Court acknowledged that plea negotiations are a critical stage of the criminal proceeding requiring the effective assistance of counsel:

> The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. [*Lafler v Cooper*, 566 US 156, 165 (2012)].

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted. *Strickland*, 466 US at 687-688; *People v Carbin*, 463 Mich 590, 599-600 (2001); *People v Werner*, 254 Mich App 528, 534 (2002).

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In the context of inaccurate plea advice, a defendant seeking plea withdrawal must show that there is a reasonable probability that but for the errors the defendant would not have entered the plea. *Hill v Lockhart*, 474 US 52 (1985). Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id; People v LaVearn*, 448 Mich 207 (1995). Only when the defendant understands the consequences of the plea can the plea be considered voluntary. *Brady v United States*, 397 US 742 (1970).

### A. Deficient Performance

Under *Strickland*, deficient performance is performance that is objectively unreasonable in light of professional norms. *Strickland*, 466 US at 687-688. At a minimum, counsel must take reasonable steps to investigate, prepare, and present evidence to support a defense or to exculpate the defendant. *Strickland*, 466 US at 691; *People v Grant*, 47 Mich 477 (2004). The failure to present a defense constitutes ineffective assistance where the omitted defense could have affected the proceeding's outcome. *Id.* The Supreme Court has not limited presentation of a defense to matters that impact only guilt or innocence, but informing defendant of an "incorrect legal rule," and "failure to timely file a motion to suppress" can also constitute deficient performance. *Lafler*, 566 US at 165; *Kimmelman v Morris*, 477 US 365, 385 (1986). Both affirmative mis-advice and omissions in the plea negotiation process can constitute deficient performance under *Strickland*. *Padilla v Kentucky*, 559 US 356 (2010).

"Professional norms" includes the American Bar Association (ABA) Standards for Criminal Justice. *Rompilla v Beard,* 545 US 374, 375, 381 (2005); *Wiggins v Smith*, 539 US 510, 524, 533 (2003). Under ABA Standard 4-5.1(b) "[d]efense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea." Defense counsel must permit defendant to make the decision whether to enter a plea "after full consultation with counsel" and should consult

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with client regarding strategic and tactical decisions such as whether to file a trial motion. Standard 4-5.2(a) &(b).

Under these rules, proper advice regarding a plea offer must include an accurate description of the risks and hazards of trial, including the failure of the alleged facts to fulfill an element of the crime. In the context of investigations, appellate review of trial counsel's conduct of pretrial investigation must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable lawyer to investigate further. *Rompilla, supra* at 391; *Wiggins, supra* at 527. Thus, in the context advice about the merits of a plea offer, a reviewing court must inquire whether a reasonable lawyer would explain further.

In the present case, the advice concerning whether or not to accept the plea offered by the prosecutor did not fairly state "the risks, hazards or prospects of the case" because defense counsel advised Mr. Moss to plead no contest without proper explanation of possible defenses to the charges, specifically that an adoptive sibling is not related by affinity. The failure to present this option was unreasonable.

Mr. Moss asserts that trial counsel advised him "that adoptive siblings are related by affinity for purposes of the charged offense." See *Affidavit of Defendant John Moss* attached to motion to withdraw plea. Mr. Moss maintained that the sexual encounter was consensual. *Id.* Nonetheless, Mr. Moss was advised by his trial counsel that he still "could be convicted of the CSC-3d[,] regardless of whether the sex was consensual." *Id.*

A reasonable lawyer would have provided further explanation. It is true that the prosecutor could have brought the CSC-3d charge solely based on force/coercion, but the jury could not convict if it agreed that the sexual encounter was consensual. Trial counsel's advice to Mr. Moss failed to provide information regarding the lack of a blood or an affinity relationship between adoptive siblings, in CSC statutes, as interpreted by Michigan Courts. See *Zajaczkowski*, 493 Mich at 13-14.

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With this information, Mr. Moss would have been better informed and prepared to fight the CSC-3d charges because the sexual acts were consensual and not forced or coerced.

By advising that Mr. Moss could be convicted of the CSC-3d regardless of whether the sexual encounter was consensual, counsel overstated the hazards involved in going to trial. This was not a strategic decision. By stating that the affinity relationship existed and there was no way around it, counsel essentially advised Mr. Moss that there would be no defense because the option for arguing against an affinity relationship was not presented. For these reasons, counsel failed to perform his duty to serve as counsel guaranteed by the Sixth Amendment and Mr. Moss was prejudiced by counsel's failure.

**B. Prejudice**

The Supreme Court held in *Hill,* that in order to satisfy the "prejudice" requirement, the defendant must show that there is a "reasonable probability that, but for counsel's errors, defendant would not have pleaded guilty and would have insisted on going to trial." *Hill*, *supra* at 59. See also *Lafler*, *supra* at 11 (even "[t]he fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining.")

Here, Mr. Moss asserts that but for counsel's failure to advise, he would not have entered a no contest plea. *Affidavit of Defendant John Moss* attached to motion to withdraw plea. Mr. Moss's affidavit makes clear that but for counsel's failure to advise of the possibility of fighting the charges based only on force or coercion, he would have not pleaded no contest. *Id.* Under both the *Hill* and *Lafler* decisions, Mr. Moss is not required to show that the fact of a conviction would have been different but for the erroneous advice. Mr. Moss must only show that the outcome of the plea bargaining would have been different. He has established that in his affidavit by insisting he would not have entered a no contest plea.

Because counsel was deficient for failing to advise on the lack of a blood or affinity relationship between adoptive siblings, and because Mr. Moss would not have pleaded no contest had he known that the matter of consent was the main issue, his plea was not voluntarily entered. This Court should either grant Mr. Moss an opportunity to withdraw his plea, or, at a minimum, grant an evidentiary hearing, should this Court require additional facts for its determination.[4]

[4] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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## Conclusion and Request for Relief

John Antonya Moss asks this Honorable Court to allow him to withdraw his plea, or any appropriate peremptory relief.

Respectfully submitted,

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## Certificate of Compliance

I certify that this brief is in compliance with AO 2019-6 and contains 6,554 words per Microsoft Word, excluding the parts of the document exempted from AO 2019-6, that do not count toward the limitation.

Further, I certify that this brief follows the font, line spacing, margins and other electronic formatting requirements. This document has been prepared in wide-style Century Schoolbook, size 12 font with 18 points line spacing.

Respectfully submitted,

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