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Affidavit of John Moss

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STATE OF MICHIGAN

IN THE BERRIEN COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee

Circuit Court No. 15-5091 FH

-vs-

Honorable Donna B. Howard

JOHN ANTONYA MOSS,
Defendant-Appellant.
_____/

AFFIDAVIT OF DEFENDANT JOHN MOSS

STATE OF MICHIGAN)
) ss.
COUNTY OF IONIA)

JOHN MOSS, having first been duly sworn, hereby deposes and states as follows:

1. I pled no contest to criminal sexual conduct in the third degree (CSC-3d) based on sexual penetration with an individual related by blood or affinity to the third degree.

2. This plea was based upon a consensual sexual encounter between myself and my adoptive sister, who was 17 at the time.

3. I entered this plea because my attorney, Rodney Fuller, advised me that adoptive siblings are related by affinity for purposes of the charged offense. Thus, I could be convicted of CSC-3d regardless of whether the sex was consensual.

4. I have since learned that this advice was incorrect.

5. If I had known that a consensual sexual encounter between adoptive siblings does not constitute CSC-3d, I would not have entered a no contest plea to that charge.

6. I now wish to withdraw the plea and stand trial.

JOHN MOSS

Subscribed and sworn to before me this
30 day of 1, 2017.

Notary Public, Allegan County, Michigan
My commission expires: 1/16/23

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Plea Transcript, 6-20-16

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STATE OF MICHIGAN

IN THE BERRIEN COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
V Case No. 15-005091-FH
JOHN ANTONYA MOSS,
Defendant. /

PLEA

BEFORE THE HONORABLE DONNA B. HOWARD, TRIAL JUDGE

St. Joseph, Michigan - Monday, June 20, 2016

APPEARANCES:

For the People:
MR. JACOB L. JENISON, P76309
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St. Joseph, Michigan

Monday, June 20, 2016 - 9:11 a.m.

THE COURT: Mr. Mott, will you approach the podium?

We are here on 2015005091, People versus John An--is it "Antonya"?

THE DEFENDANT: Antonio.

THE COURT: Oh, Antoni-- Antonio?

THE DEFENDANT: Yeah.

THE COURT: Does it end in an "A"?

THE DEFENDANT: No.

THE COURT: Your middle name? How do you spell your middle name?

THE DEFENDANT: A-N-T-O-N-I-O.

THE COURT: A-N-T-O-N-O?

THE DEFENDANT: I-O.

THE COURT: I-O. Okay. Alright. You're here before the Court today for purposes of a status conference, and you have trial scheduled to begin next Tuesday; and I understand that you've been working with your attorney, your attorney has also had opportunities to discuss your matter with the prosecutor after having been charged with one count of Resisting and Obstructing, and three counts of--no, one count of Resisting and Obstructing, one count of Possession of Marijuana as a second offense, both two-year felonies, two counts of Criminal Sexual Conduct in the third degree, and also a charge of

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habitual offender. What's the status of the habitual offender?

MR. FULLER: That's gonna get-- That's gonna get dismissed.

MR. JENISON: That's also gonna be dismissed as Count 4.

THE COURT: Oh, alright.

MR. JENISON: Or excuse me, Count 5.

THE COURT: Through the work of your attorney, it looks like the prosecutor now is willing to dismiss Counts 1, 2, 4 and also the habitual offender status, which is listed as a Count 5, if you're willing to plead guilty as charged to Criminal Sexual Conduct in the third degree--or, plead--

MR. JENISON: No contest.

THE COURT: --no contest. Excuse me.

MR. FULLER: It's a no contest plea, yes.

THE COURT: No contest.

MR. FULLER: Based on--

THE COURT: Is that what you wish to do today, sir?

THE DEFENDANT: Yes.

THE COURT: All right. And, Mr. Fuller, the basis for the no contest plea?

MR. FULLER: Civil liability, your Honor.

THE COURT: All right. Mr. Moss, will you raise your right hand?

Do you solemnly swear or affirm that the testimony you

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shall give in the matter now pending before the Court shall be the truth, the whole truth and nothing but the truth, this you do under the pains and penalties of perjury?

THE DEFENDANT: Yes.

THE COURT: Alright, you can put your hand down. How far have you gone in school, sir?

THE DEFENDANT: Got my GED.

THE COURT: Okay, so you can read and write the English language?

THE DEFENDANT: Yes.

THE COURT: And you were able to read through this Advice of Rights form that Mr. Fuller presented to you this morning?

THE DEFENDANT: Yes.

THE COURT: All right. Have you taken any medications or other substances that would interfere with your ability to understand me?

THE DEFENDANT: Not that I know of.

THE COURT: Okay.

THE DEFENDANT: I'm on psych meds, though.

THE COURT: Okay. If-- Well, if I say something you don't understand, will you stop and let me know so I can try and explain it to you or Mr. Fuller can?

THE DEFENDANT: Yes.

THE COURT: Okay. And you went--met with Mr. Fuller

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and discussed this case, and this--

THE DEFENDANT: Yeah.

THE COURT: --upcoming status conference, correct?

THE DEFENDANT: Yes.

THE COURT: And he advised you of your rights, including presenting you with this written Advice of Rights form this morning, and you signed that form, correct?

THE DEFENDANT: Yes.

THE COURT: Do you have any additional questions for Mr. Fuller before we proceed with your plea?

THE DEFENDANT: No.

THE COURT: All right. And you're satisfied with the work that Mr. Fuller has done for you so far?

THE DEFENDANT: Yes.

THE COURT: All right. Are you on probation or parole for anything, sir?

THE DEFENDANT: No, ma'am.

THE COURT: All right. Let me read the charge to you.

The charge before you, sir, is that on or about November 11th of 2015, at 428 Thurgood in the city of Benton Harbor, Berrien County, Michigan, that you did engage in sexual penetration, to wit, penis to vagina, with a Jamira Moss, under the exigent circumstances that you effected that sexual penetration while you and the victim, Miss Jamira Moss, were related by affinity to the third degree. I believe it is

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brother and sister through adoption or foster. Is it adoption?

MR. JENISON: That's correct--

MR. FULLER: It's adoption.

MR. JENISON: --adoption, your Honor.

THE COURT: All right. That is a felony, with a maximum penalty of up to 15 years, mandatory AIDS and STD testing, possible restitution for any injury or damage to the victim, possible court costs, DNA sample would have to be taken in which you would receive a $60 dollar assessment, and... Is this... What is the age of the--Miss Moss, the victim?

MR. JENISON: Seventeen, judge.

THE COURT: Okay. There's still gonna be a lower level requirement for registration?

MR. FULLER: I this it's still Tier 3.

THE COURT: Is it still Tier 3?

MR. JENISON: Yes, judge.

THE COURT: All right. So registration on the sex offender registration would also be required by you, do you understand that?

THE DEFENDANT: Yes.

THE COURT: And as to that charge, how do you wish to plead, guilty, not guilty, or no contest?

THE DEFENDANT: No contest.

THE COURT: And the potential for civil liability is a sufficient basis upon which to accept the no contest plea.

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And, Mr. Jenison, you do not object to that no contest basis, correct?

MR. JENISON: No, judge, we--

THE COURT: All right.

MR. JENISON: --do not.

THE COURT: All right. And I referenced this already, Mr. Moss, you signed this Advice of Rights form--

THE DEFENDANT: Yes--

THE COURT: --this--

THE DEFENDANT: --ma'am.

THE COURT: --morning? And you had an opportunity to read through and understand those rights?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you understand that by pleading no contest it acts as a conviction on your record, and you're giving up your rights to a trial in this matter on all those counts, and, all the other rights that are contained on this form that you signed?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced, tricked or threatened you to get you to plead no contest to that charge?

THE DEFENDANT: No.

THE COURT: You're pleading no contest 'cause it's your free choice to do so?

THE DEFENDANT: Yes.

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THE COURT: And you understand that by--as I mentioned, by pleading guilty and if I--or, by pleading no contest and if I accept that plea, it acts as a conviction on your record, and any appeal of your conviction or your sentence will have to be by Application of Leave to the Court of Appeals; and what that means is the Court of Appeals could decide not to automatically hear your appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Jenison, would you place the plea agreement more formally on the record?

MR. JENISON: Yes. Thank you, judge. Defendant plead no contest to Count 3, CSC in third degree, blood or affinity, the People agree to dismiss the balance of the charges, and those are, Count one, Receding (sic) and Obstructing a Police Officer, Count 2, Possession of Marijuana, second offense, Count 4, CSC third, and Count 5, the habitual offender four.

Your Honor, the People also agree to a sentence on the minimum end of 72 months. Thank you, judge.

THE COURT: Your recommendation is gonna be: low end of 72, correct?

MR. JENISON: That's correct, judge.

THE COURT: Okay. And, Mr. Fuller, is that the entire agreement?

MR. FULLER: It is, your Honor. Just for clarification, the guidelines are actually 50 to 100, but, the

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recommendation is for 72.

THE COURT: Okay.

MR. JENISON: Yes.

THE COURT: Oh, it is 72, that's your recommendation.

MR. JENISON: That's--

MR. FULLER: That's--

MR. JENISON: Yes.

MR. FULLER: --the--

MR. JENISON: The minimum--

THE COURT: Okay.

MR. FULLER: --recommendation.

THE COURT: All right. I thought you meant between-- Thank you for that clarification. I thought you meant between whatever the guidelines end up being, up to 72 months. Alright, understood.

And with that clarification, Mr. Fuller, is that the entire agreement?

MR. FULLER: It is, your Honor.

THE COURT: All right. And, Mr. Moss, do you understand that also to be the entire agreement that's presented to you?

THE DEFENDANT: Yes.

THE COURT: And has anyone promised you anything else to get you to plead no contest today?

THE DEFENDANT: No.

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THE COURT: All right. And you understand that by pleading no contest today, you can't come back at a later time and say that your plea was because of some sort of force, trick, threat or promise we haven't discussed here on the record today?

THE DEFENDANT: Yes.

THE COURT: And you also can't come back at a later time and say that your plea wasn't your free and voluntary choice to make here today?

THE DEFENDANT: Yes.

THE COURT: Counsel, are either of you aware of any force, trick, threat, promise or inducement not otherwise stated on the record?

MR. FULLER: No, your Honor.

MR. JENISON: No, judge.

THE COURT: Let the record reflect the Court has had no participation in the plea agreement, or any possible sentence thereon.

Counsel, may I use the police report for establishing the factual basis?

MR. FULLER: Yes, your Honor.

MR. JENISON: Yes, judge, that's sufficient.

THE COURT: All right. And I understand, then, in reading that, along with the Information, that, on or about November 11th of 2015, at 428 Thurgrid--Thurgood in the city of Benton Harbor, Berrien County, Michigan, that, you were at the

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house on--where your mother, Wanda Moss, and your adoptive sisters, Ashley and Jamira, were staying. I'm not clear on whether you also lived in that house or were just visiting. But, in any event, you went up to the third floor, went into Jamira's--Jamira Moss' room - she is your adopted sister - and laid down in the bed with her. As Mr. Moss was lying in bed with Jamira, then, the--Jamira and Mr. Moss began to engage in sexual activity, that Mr. Moss got erect and Miss Mo--Jamira's shorts came down, and then she pushed up against Mr. Moss, he began to kiss her, including, on her backside and her butt area, then he began to have--he also kissed her in her area of her vagina, later leading to, then, having sexual intercourse with--between the two of them, his penis entering her vagina area.

Counsel, is-- And I think I established that they are related to the third degree by adoption as brother and sister. And with that, counsel, is that a sufficient factual basis?

MR. FULLER: Your--

MR. JENISON: It is--

MR. FULLER: --Honor--

MR. JENISON: --sufficient, your Honor.

MR. FULLER: --I would just add that, you know, that was consensual.

THE COURT: All right.

MR. FULLER: And with that, we--we agree that's sufficient.

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THE COURT: Agree, Mr. Jenison?

MR. JENISON: Yes, judge.

THE COURT: All right. I also believe with that clarification, then, a factual basis has been established. I also find, Mr. Moss, that, your plea is being made freely, voluntarily, and without compulsion, duress or the promise of benefit or leniency, and I do accept the plea.

Counsel, have I complied with MCR 6.302 b through d and all other applicable court rules?

MR. JENISON: You have--

MR. FULLER: Yes--

MR. JENISON: --your Honor.

MR. FULLER: --your Honor.

THE COURT: We have a sentencing date of August 8th at 1:30. The presentence investigation report will be available no later than August 5th.

Counsel, anything else on this matter?

MR. FULLER: Your Honor, I'd like to address the bond.

THE COURT: All right.

MR. FULLER: Your Honor, as has been established by the plea, this was a consensual act, and, we believe, and by clear and convincing evidence, my client poses no danger to the community. This is not a situation where he's a predator; there's been no history in the past of any kind of--this--this type of conduct at all. His conduct has been mainly marijuana

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charges and that's been a lot of his situation.

Your Honor, the bond at this time I think is $25,000 cash/surety. My client has indicated that, you know, he has--he has twins that were just recently born. He knows that he's gonna get some--some significant time. What we're asking for is that the bond be lowered to $25,000, ten percent, so that he might be able to at least have some time with his children before he has to--to go.

I know that he was out on bond when this occurred, however, under the circumstances this--this was kind of a family kind of a situation. This wasn't a situation where he was out menacing the community. We would ask that the Court con-- continue a bond, and we would ask that the Court reduce the bond to $25,000, ten percent.

THE COURT: Is-- Are the twins born of this Jamira, the victim?

MR. FULLER: No.

THE COURT: Okay.

MR. FULLER: No.

THE COURT: Alright, Mr. Jenison?

MR. JENISON: Judge, I think if you take a look at his criminal record, you also take in the fact that he was on bond for a gun charge when this incident happened. There's certainly not clear and convincing evidence that he's not a threat to the community, judge.

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Also, there's a no contest plea to a CSC third in which he's gonna be sentenced to a minimum of 72 months in prison. I don't think that a reduce--a reduction of bond would be sufficient, judge. I-- I think if he's gonna have time in prison, then it's time for him to--to--to sit down and then think about his actions, and start paying for those actions, judge. Thank you.

MR. FULLER: Two things, your Honor. One is that the gun charge, he was actually acquitted of those charges, except for a marijuana--except for the Possession of Marijuana.

In-- In addition, your Honor, as to flight, I think the--w--the bond condition would be GPS tether, so, he would have sufficient safeguards as to where he would be and what he would be doing.

MR. JENISON: Judge, in discussing flight, defendant tried to get away from the police officers in this incident, certainly showing he--he has the ability and the desire to--to--to run away from the police officers. I just wanna point that out to the Court.

THE COURT: He also has a-- He has a Possession of a Firearm by a Felon. So it--he doesn't have--he has gun charges on his record in terms of his recent past, that's a 2014.

THE DEFENDANT: Your Honor, can I say somethin'?

THE COURT: It-- As long as your-- As-- Okay.

THE DEFENDANT: Yeah, my bond situation, I was--I was-

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-I was been supposed to have bonded out, but the--the paperwork, or whatever, was messed up so they--I couldn't bond out. They--They been-- I got acquitted on the 15th of April and it's been messed up all the way until last week. So now I'm--now I can--I'm able to bond out. They told me I can't bond out because they had to get the paperwork from the courts. That's why I had sent you a letter saying, "I'm being held hostage," because--

THE COURT: Oh, that's what you were saying?

THE DEFENDANT: Yeah.

THE COURT: I could not-- You said, "Help me, I'm being held against--

THE DEFENDANT: Right.

THE COURT: --my will"--

THE DEFENDANT: I mean--

THE COURT: --or whatever, and, obviously, you're not voluntarily--

THE DEFENDANT: Right.

THE COURT: --staying in jail. So, I didn't understand what you meant by that--

THE DEFENDANT: Right. And they--

THE COURT: --statement.

THE DEFENDANT: --they just fixed my bond situation, so I wasn't able to bond out still, regardless.

THE COURT: So now you're able to bond out.

THE DEFENDANT: Not as of now.

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THE COURT: Okay, well then, I don't need to lower it.

THE DEFENDANT: Well, with the ten percent?

THE COURT: Oh. No. Oh, you're saying you were able to come up with $2500?

THE DEFENDANT: Yes.

THE COURT: Yes, but, given your history that has included multiple serious drug charges, including weapons charges, and given the gravity of the charge against you, I'm not giving you a ten percent bond. I will be willing to lower your current bond to $20,000, cash or surety. If you have the $2500, a bondsman--it's up to a bondsman whether he's willing to... The GPS and all other conditions still apply. He can go through a bondsman if he's able to. But, the seriousness of--nature of the offense, the time that he's facing, certainly, there is still that threat and I wanna know that a bondsman is willing to review that and put that up for him if he's--if he's able to, as well as having him on a GPS tether.

Alright, we will see you back. You can keep this, Mr. Fuller. You're remanded to the sheriff's department, sir.

MR. JENISON: Thank you, judge.

THE COURT: Thank you.

(At 9:31 a.m., court proceeding concluded)

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STATE OF MICHIGAN)
)
COUNTY OF BERRIEN)

I certify that this transcript, People of the State of Michigan versus John Antonya Moss, File Number 15-005091-FH, consisting of 18 pages, is a complete, true and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case by Lora Freehling, CER-8962, on Monday, June 20, 2016.

October 3, 2016

Vivian V. Burton

Vivian V. Burton, CER-3572
VJ TRANSCRIPTS
3792 Meadowbrook Rd.
Benton Harbor, MI 49022

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Sentence Transcript, 8-8-16

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STATE OF MICHIGAN

IN THE BERRIEN COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
V Case No. 15-005091-FH
JOHN ANTONYA MOSS,
Defendant. _____/

SENTENCE

BEFORE THE HONORABLE DONNA B. HOWARD, TRIAL JUDGE

St. Joseph, Michigan - Monday, August 8, 2016

APPEARANCES:

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St. Joseph, Michigan

Monday, August 8, 2016 - 3:15 p.m.

THE COURT: 2015005091, People versus John Antonio Moss. Good afternoon, sir.

THE DEFENDANT: Good afternoon.

THE COURT: You're John Moss, correct?

THE DEFENDANT: Yes.

THE COURT: You're here before the Court today for purposes of your sentencing; you're with your attorney, Rod Fuller. This is a sentencing after your no contest plea and conviction entered on June 20th of this year to Criminal Sexual Conduct in the third degree; pursuant to plea agreement, no supplements and dismissal of Counts 1, 2, 4, and the supplement is a habitual offender.

I believe there's going to be-- And, Mr. Moss, just so you know, I do have your prior letters; I also have letters from your pastor, and the victim, Jamira Moss, as well as Miss Shelby, that I have taken into consideration. But first, let's deal with the sentencing information report and the scoring. We have Mr. Jenison here for--on behalf of the People.

I did note that the crime class was incorrectly and therefore, I believe the guideline itself--the guideline range was scored incorrectly for the offense. It should've been a Class C and not B, as indicated in the report; correct, Mr. Jenison?

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MR. JENISON: Yes, judge. And I just wanna clarify, are we gonna be getting a copy of those letters that you have received?

THE COURT: If you-- On-- Some--

MR. JENISON: --for our file?

THE COURT: --of 'em would have been sent to you, I think, already - maybe not. Would you like to review those?

This one was-- One of 'em was just received on Friday, so.

MR. JENISON: Okay.

THE COURT: You can look at that one. I have those. I'll give you those.

While we're going through the scoring, let me--Mr. Jenison, have you could--was there an issue with the--one of the scores too that you questioned, OV 3?

MR. JENISON: Yes, judge. OV 3 is one offense variable that I think should be cher--or, should be changed from 0 to 10. The victim in this case did go through an extensive SANE exam and she did get medical treatment based on the sexual assault done by the defendant. OV 3 says that she needs to have--did have some kind of medical treatment. Clearly, based on the SANE observation and the SANE exam that was done by the sexual assault nurse, OV 3 should be scored at 10 points, your Honor.

THE COURT: Mr. Fuller?

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MR. FULLER: Yes, that's--we--we agree with that, with OV 3 at--being 10. But we also have some errors in the scoring; I think that the prosecutor, as well, has some other things--

THE COURT: Okay.

MR. FULLER: --to talk about with--with relation to that.

THE COURT: Alright, so there's no objection to the OV 3 being scored at a 10?

MR. FULLER: No, your Honor.

THE COURT: Okay. We'll make that adjustment. And then, Mr. Jenison, what other scores did you want to address with the Court?

MR. JENISON: Judge, offense variable--Offense Variable number 4, Psychological Injury, I did speak with the victim just outside the court today, she indicated that she has, in fact, gotten counseling for this incident. Counseling has since ceased, not because she doesn't wanna go anymore, but rather, because she turned 18 years old and those services are not provided for her anymore. I informed her to come to our office to speak with our victim advocate so she can continue counseling based on this--because of this incident, your honor.

THE COURT: Okay. So how old was she at the time of the offense?

MR. JENISON: Seventeen years old, judge.

THE COURT: Okay. Mr. Fuller?

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MR. FULLER: We have no objection to that.

THE COURT: Alright, so 10 points for OV 4. Any other offense variables, Mr. Jenison?

MR. JENISON: No offense variables, judge, but I do have a PRV.

THE COURT: Oh, okay.

MR. JENISON: Number six, PRV 6, the defendant was on bond for the R and O, and Possession of Marijuana, and CCW, I believe, judge, when this incident took place. Therefore, OV-- excuse me, PRV 6 should be scored at 10 points.

THE COURT: Wait, you're saying he was on a separate warrant for--or, a separate bond on a different R and O--

MR. JENISON: Yes--

THE COURT: --than the--

MR. JENISON: --judge.

THE COURT: --one that got dismissed in this case?

MR. JENISON: Yeah, different R and O.

THE COURT: Okay.

MR. JENISON: Or, excuse me, not an R and O. It was a CCW--that he was found guilty of Possession of Marijuana second, not guilty of the CCW, your Honor. He was on bond for that case when this incident took place.

THE COURT: Oh, okay. Is that the... That's the 2014, 1948 case?

THE DEFENDANT: No.

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THE COURT: No, no. That's the--
THE DEFENDANT: 2015.
MR. JENISON: 2015003900, your Honor.
MR. FULLER: Your Honor, it was--ultimately, he was found not guilty.
THE DEFENDANT: By a trial.
MR. FULLER: By a trial.
THE COURT: But that was after the offense date in this case?
MR. FULLER: Correct.
THE COURT: Okay. You don't dispute that he was on bond in--
MR. FULLER: No.
THE COURT: --that case--
MR. FULLER: No.
THE COURT: --at the time--
MR. FULLER: No, no.
THE COURT: --of the offense?
MR. FULLER: No, your Honor.
THE COURT: So that will be PRV...
MR. JENISON: Six, judge.
THE COURT: Scored at a five, is that correct, Mr. Jenison? On bond, awaiting adjudication or sentencing for a--No, that's a misdemeanor.
MR. JENISON: That'd be 10 points, your Honor.

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THE COURT: Ten points. Oh yeah, 'cause it was for a felony. Any objection, Mr. Fuller?

MR. FULLER: No, your Honor.

THE COURT: Okay. So PRV 6 at 10 points. Alright, anything else, Mr. Jenison, in terms of the scoring first?

MR. JENISON: Nothing further from the People, judge.

THE COURT: All right. Now, Mr. Fuller, you had some additional score--

MR. FULLER: Yes-- Yes, your Honor. With relation to OV 11, they scored it at 50 points; it should be scored at 25 points. There were only two penetrations; one oral, one vaginal. And the one that is--forms the basis on this case, the vaginal penetration, it--formed the basis for the charge cannot be scored. So it's only one additional penetra--or, one additional penetration, which should be scored at 25, instead of 50.

THE COURT: Mr. Jenison, any response? O-- We're talking about OV 11.

MR. JENISON: OV 11, your Honor, I did speak with--I did speak with Mr. Fuller about this. Now, as far as the--the two penetrations, your Honor, I think it should be scored at 25 points because there was the sentencing offense, which was the penetration, as well as the digital penetration--excuse me, oral penetration. So I think OV 11 should be scored at 25 points.

Your Honor, may counsel approach, briefly?

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THE COURT: Yeah.

(At 3:24 p.m., bench conference)

(At 3:26 p.m., bench conference concluded)

THE COURT: Alright, let's get back to the scoring variables.

MR. FULLER: Can I have just a moment, your honor?

THE COURT: Cover the microphone, Mr. Fuller, please.

(At 3:26 p.m., DA and defendant confer)

MR. FULLER: Judge, moving on to OV 12--

THE COURT: Wait a minute, I wanna make--

MR. FULLER: Oh.

THE COURT: --a decision on-- There's a number of--

MR. FULLER: Oh, okay.

THE COURT: --'em so I wanna keep it straight.

MR. FULLER: All right.

THE COURT: Mr. Jenison... And-- So, the digital penetration, that was the count that got dismissed, correct?

MR. FULLER: It was--

MR. JENISON: Oral-- Oral penetration--

MR. FULLER: --oral.

MR. JENISON: --your Honor.

THE COURT: Or the oral--

MR. FULLER: There--

THE COURT: --excuse me. The oral penetration was the--or--the Count 4 that was charged and then dismissed as part

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of the plea?

MR. JENISON: Correct, judge.

THE COURT: And, that is taken into consideration under OV 12, correct?

MR. FULLER: No.

MR. JENISON: Are we talking about OV 11 right now, your Honor?

MR. FULLER: We're talking about OV 11.

THE COURT: I-- I know. My question is, is the oral penetration act--

MR. JENISON: If it's scored in--

THE COURT: --taken into consideration, either, under OV 12--

MR. FULLER: No, that was gonna be my next argument, your Honor, that's why I was gonna argue OV 12 was scored wrong because you can't--you can't count--if we're gonna count it under 11, you can't count it under--under 12.

THE COURT: So you're--you're suggesting that it not be scored under 11, but instead, should be scored--

MR. FULLER: No, the--

THE COURT: --12?

MR. FULLER: --other way around.

THE COURT: You-- You're saying that it should be scored as--

MR. FULLER: Under OV 11 as one--as one penetration

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which is 25 points.

THE COURT: You're saying an oral penetration and a vaginal penetration on the Count 4 that got dismissed is the same penetration?

MR. FULLER: No, no. What I'm saying, your Honor, is that--is that, they're two separate--they're two separate penetrations but you cannot score the penetration that's used for the--of--for the offense. It says that specifically in the--in the notations. And so, there's only one other one. There was only two. So if you can't count the one, the vaginal penetration, then there's only one additional penetration, which is, oral, that scores as 25 points.

THE COURT: The offense-- The vaginal penetration is the one penetration?

MR. FULLER: That's the one for the conviction, that's--

THE COURT: For the--

MR. FULLER: --correct.

THE COURT: --25?

MR. FULLER: No. It's the other one, because it's--it's the other one that--

THE COURT: "All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11."

MR. FULLER: But look at the bottom of that, judge,

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the very bottom.

THE COURT: Um-hum.

MR. FULLER: "The one penetration that forms the basis of a first or third degree criminal sexual conduct offense must not be counted for purposes of scoring OV 11."

THE COURT: All right. But you're saying--si-- you're...

MR. FULLER: What I'm suggesting is--is that--

THE COURT: You're saying the--the digital--the oral penetration was arising out of--

MR. FULLER: Correct.

THE COURT: --the vaginal?

MR. FULLER: Well, it--it was part of the same...

THE COURT: Event.

MR. FULLER: Event, I--I would assume. Unless-- Unless the Court thinks that--that there needs to be--that--that it all has to be one, then it would be scored at zero.

THE COURT: Alright, Mr. Jenison, what is your position on the scoring between OV 11 and OV 12?

MR. JENISON: Judge, my position on OV 11 is OV 11 should be scored at 25 points based on the oral penetration, your Honor. Obviously, we can't score the sentencing offense because it is the basis for a CSC third plea, and if it is in fact scored in OV 11, then, as the statute is required, you can't score it in OV 12 or 13, your Honor.

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THE COURT: Okay. So I had OV 11 marked as 25, so I think we're all in agreement on that. And then-- So, OV 11 is 25. Then OV 12, Mr. Fuller?

MR. FULLER: That should be scored at 5, your Honor, because you cannot use the--the other CSC. There was an R and O, and I think a Marijuana, second, and those are the only two that can be used as contemporaneous felonies.

THE COURT: It sounds right. Any objection, Mister--

MR. JENISON: No objection, your Honor.

THE COURT: No. Okay, so OV 12 would be a 5. Anything else, Mr. Fuller, in terms of the scores?

MR. FULLER: Yes, your Honor. As-- As it relates to OV 13, that should be actually 0. The basis on which they arrive at that was--I believe it was an assault with intent to rob while armed, and, assault with intent to commit great bodily harm. Those offenses were dismissed outright. They were not part of any plea agreement. There was no-- There wasn't a sufficient basis for the prosecutor to proceed on those. So those were dismissed outright for lack of evidence. So those can't be used as the basis for OV 13.

THE COURT: Mr. Jenison, do you have a third felonious within the five years then, 'cause we have two.

MR. JENISON: We have the CSC, your Honor, the sentencing offense--

MR. FULLER: That can't be-- That can't be counted.

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MR. JENISON: --including-- "The sentencing offense must be counted without regard--

THE COURT: Oh.

MR. FULLER: Because--

MR. JENISON: --whether the offense--

MR. FULLER: But if it's--

MR. JENISON: --resulted in a conviction."

MR. FULLER: But if it's counted under OV 11, it can't be counted under--

THE COURT: It wasn't counted--

MR. JENISON: It's not--

THE COURT: --under OV 11--

MR. JENISON: --counted on OV 11.

THE COURT: That was the digital-- That was the oral penetration that was counted under OV 11.

MR. FULLER: Oh, okay.

THE COURT: By statute, you can't count--

MR. FULLER: Oh, okay.

THE COURT: --the sentencing offense.

MR. FULLER: All right.

THE COURT: So we have three or more, R and O is-- against a person.

MR. JENISON: Two R and Os and a CSC, your Honor, which would be 25 points.

THE COURT: Oh, okay.

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MR. FULLER: Where's the two R and Os?

THE COURT: The other R-- What happened-- Did he-- So, the R--the other R and O, what happened with that R and O?

MR. FULLER: That got-- That got-- He found--got found not guilty by a jury verdict.

MR. JENISON: Is it, 2015 conviction for Resisting and Obstructing a Police Officer? Then we have a--

THE COURT: And, actually, it says "whether the offense resulted in a conviction."

MR. JENISON: So it's not to be a conviction.

MR. FULLER: Yeah, but if a jury finds him not guilty...

MR. JENISON: Well, we're talking about this--

THE COURT: I just read what the--

MR. JENISON: --present--

THE COURT: --statute says.

MR. FULLER: Right. I under-- I understand that. But if a jury finds him not guilty of that offense--

THE COURT: Well, he--

MR. JENISON: The jury didn't--

THE COURT: --just told me--

MR. JENISON: --find him--

THE COURT: --2015 conviction for R and O.

MR. FULLER: That's a different-- That's a different one?

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MR. JENISON: Yes.

MR. FULLER: Oh, okay.

THE COURT: So, either way, he's got the three. Okay. So OV 13 remains 25.

MR. FULLER: I have nothing a--additional as to the scoring, your Honor

THE COURT: Alright, let's see where we are then. So, for the PRV, that would be a 60. I don't believe that changes that level. And then our new numbers on--I think it ends up being the same, 'cause we--OV 11 dropped by 25 and then we added OV 3, 4, and 12-- Oh, no, that's not right. Let me just add it..., 95. So it dropped his OV score to a 95.

MR. FULLER: I don't think that changes the level as long as the--

THE COURT: Let me see.

MR. FULLER: --but it's a C grid.

THE COURT: See offense. PRV level stayed the same, an E. And then..., right, still ends up at a Level 6, at 95 fort--for a guideline range of 58 to 114.

MR. FULLER: Your Honor, I would note for the record that, when we originally had scored it, we had scored it a little lower, so, the guideline range that we were working with prior to that was 50 to 100. But there's nothing further that I don't think that--that I can argue with respect to the guideline.

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THE COURT: I think as part of the plea too, the recommendation from the People was gonna be a 72-month.

MR. FULLER: That-- That's correct. And-- And--

THE COURT: So it would've fallen--

MR. FULLER: --I--

THE COURT: --within the guideline either way in terms of their recommendation not to exceed.

MR. FULLER: That's true, your Honor.

THE COURT: So I don't--I don't know that that-- And that was an estimation as well, given that we have a number of charges and we even--as of today, we had to adjust some--some scoring there.

With that then, the guideline range is 58 to 114. Statutory max is 15 years for the offense. That guideline range is advisory pursuant to Lockridge, 'cause I believe it has been scored properly now with those adjustments.

Then, Mr. Jenison, any--any other additions or corrections? Oh, I would note, also, that I counted his jail credit as of today at 172. So I don't know if some--I don't know. One page it says "267", but then the date says "August 7", and I counted it month by month and I come up with 172 as of today. So, I made that adjustment--

MR. FULLER: When-- When did you--

THE COURT: --as well.

MR. FULLER: --come in, your Honor? When did you come

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in--

THE DEFENDANT: I came in November 11th for 2015.

THE COURT: Correct. So there was, 20 days in November, and then, full months all the way through July.

THE DEFENDANT: It'd be 270 days if I'm not mistaken.

MR. JENISON: Well, judge--

THE COURT: Well, I'm--

MR. JENISON: --he was on bond--

THE COURT: --I just said 272. Oh. When did he--

THE DEFENDANT: No I wasn't, never--

THE COURT: No, he's never--

THE DEFENDANT: --on bond.

THE COURT: --been on bond on this case.

MR. JENISON: No, I'm--I'm saying, for the prior incident, he was held on a prior--

THE DEFENDANT: I'm not counting that. I wasn't counting that. I've been in here since November 11--

THE COURT: The report--

THE DEFENDANT: --2015.

THE COURT: --said "November 11th."

THE DEFENDANT: And it's been 272 days.

MR. JENISON: He didn't go to trial on his offense until, I believe it was March or April, your Honor, for the CCW, 'cause he was on bond when that took place.

MR. FULLER: No, he--he--he--he got his bond revoked

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because of this charge.

THE COURT: Well, the department indicated and counted from November 11th of 2015--

MR. FULLER: So it's just--

THE COURT: --to today's--

MR. FULLER: --a matter--

THE COURT: --date.

MR. FULLER: --of addition.

THE DEFENDANT: Your Honor, I've been in here since November 11th and I haven't left since.

MR. JENISON: But, judge, I don't think those days should be counted if his bond was revoked, awaiting trial for--

MR. FULLER: Or not--

MR. JENISON: --a CCW.

THE COURT: He was arra-- But he--

THE DEFENDANT: I been--

THE COURT: --was already--

THE DEFENDANT: --in jail.

THE COURT: --under warrant on this case.

MR. FULLER: Yeah, he was on--

THE DEFENDANT: Yeah.

MR. FULLER: --bond on this case.

THE DEFENDANT: No, I wasn't on bond on this case.

THE COURT: He wasn't yet. He didn't get arraigned until the 23rd.

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MR. FULLER: Oh, okay.

THE COURT: So he--

MR. FULLER: He-- He still--

THE COURT: So you're--

MR. FULLER: --should get--

THE COURT: --saying--

MR. FULLER: --the time.

THE COURT: --it should count for the 23rd? I mean the warrant was issued--

THE DEFENDANT: 11th.

THE COURT: No, the incident was... Yeah, 'cause the R and O, he got chased down.

MR. FULLER: Right.

THE DEFENDANT: I haven't been out of jail since November 11th, not to be--

MR. JENISON: The, CSC charges was later, issued.

THE DEFENDANT: A week later.

THE COURT: Well, it's--under this case, though, he was charged with the Possession second, R and O on this case since his arrest on--and then--and then the ne--what, the Information was amended at that point?

MR. JENISON: Yes, judge. And then we added the--

THE COURT: So it was--

MR. JENISON: --CSC count.

THE COURT: --the same case, though. I mean he was

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arre-- I'm just-- I'm--

MR. FULLER: They just added--

THE COURT: --leaving it--

MR. FULLER: Yeah, they just added--

THE COURT: It's--

MR. FULLER: --another charge.

THE COURT: I'm adding a couple day-- I mean, it's November 11th; he's been incarcerated on the original charges; the complaint was amended; he was still under--under the same Information, it was just in amended Information, since November 11th; I counted it, 172 days of credit he's being given as of today's date.

Alright, then, Mr. Jenison, anything else in terms of the information--

MR. JENISON: Judge--

THE COURT: --in the report--

MR. JENISON: --just, on the front page, the cover page, it says "99 to 160 months", obviously that's changed--

THE COURT: Right.

MR. JENISON: --as well as the prior record variable-- variable, it says 52 on the front but, actually, it should be 60. There are no other additions or corrections from the People, your Honor.

THE COURT: Okay. Then, Mr. Fuller, any other additions or corrections, then?

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MR. FULLER: Yes, your Honor. On the face page it says that I'm a retained attorney. I'm actually a court appointed attorney. That's one. And then it says "status at time of offense", it says "probation". He was not on probation at all during the time of the offense.

The other part of it under "Evaluation and Plan", page one, under the "Evaluation and Plan", it talks about nonconsexual (sic) se--sexual intercourse. The plea was under affinity, consensual, and my client indicates that it was consensual and wants that to be changed to "consensual sexual intercourse".

THE COURT: It was a no contest plea, so I took the factual basis from the report.

MR. FULLER: That's correct, under--

THE COURT: He did--

MR. FULLER: --under affinity.

THE COURT: --he did not... I need to hear from Mr. Jenison on that issue.

MR. JENISON: Judge, this was originally charged as a CSC third under force or coercion and/or blood or affinity. He pled to the blood or affinity. Or, didn't plead to it, the no contest plea was the sexual intercourse act, which is what you took the facts to based on the police report. And then--

THE COURT: Right.

MR. JENISON: --it was indi--

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THE COURT: The police report--

MR. JENISON: --it was indicated that he was--so adopted brother and sister with the victim.

THE COURT: Right. But-- And now I have somebody sending a letter in terms of--apparently from Miss--under the signature of Miss Moss - it's not from her--

MR. JENISON: No, judge.

THE COURT: --but that letter did also indicate that it was consensual. The police report that I went off of and relied upon in terms of establishing the factual basis for the no contest plea indicated that there was activity suggested of it being nonconsensual and that he--she told the police that she pushed him off of her.

MR. FULLER: No, I think the--

THE COURT: Or, tried to.

MR. FULLER: I think-- I think the-- I think the--the--the point at which you used the police report was that she--according to the report, that she actually pushed her butt up against him and then that it was a consensual act. I-- My-- My remembering of the factual basis was not - and I made it clear on the record that it was consensual under the affinity, and not force or coercion.

THE COURT: I remember I did take it under the affinity. There is nothing in here about it being consensual, though, so I--that would've been something discussed on the

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record and not based on my reading of the police report.

MR. FULLER: But I did make that clear and I think the--I think the--the basis that you used in the police report was that.

THE DEFENDANT: No disrespect, your Honor--

THE COURT: I will just-- I won't put whether it was consensual or nonconsensual. I'll just say-- I'll delete the word "nonconsensual". So it'll say on the aforementioned date, "The defendant had sexual intercourse with his 17-year old adopted sister."

MR. FULLER: That's fine, your Honor.

The last correction would be on page 18, where it talks about education. It says that he did not get his GED. My client indicates that he, in fact, did get his GED.

THE COURT: This says he did. "MDOC Ryan Facility, in--in 2012, GED completion, general studies, GED certificate." Where--

MR. FULLER: Okay.

THE COURT: Where does it say that?

MR. FULLER: It's said-- Well, at the bottom it was talking about it, "however it was noted that at the time--

THE COURT: Well--

MR. FULLER: --MDOC did not reflect him receiving a GED", I don't know.

THE COURT: Okay.

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MR. FULLER: But--

THE COURT: Well, they reflected it here--

MR. FULLER: Then, I--

THE COURT: --he got it--

MR. FULLER: --don't know.

THE COURT: --so.

MR. FULLER: So he just wants to make sure that the Court understands that he did receive his GED.

THE COURT: And I do believe on the front page it does also say "GED completion". Which-- Well, we'll just end that sentence at "in Detroit, Michigan". He just, either has it or he doesn't. It just says "the previous PSI indicated that the defendant advised that he completed his GED while he was incarcerated in the Ryan Prison in Detroit, Michigan." So it says it, it says coming from him, advising that he has it, so.

MR. FULLER: We have no other additions or corrections--

THE COURT: All right.

MR. FULLER: --your Honor.

THE COURT: Mr. Moss, we're gonna talk about--just the report now, okay?

THE DEFENDANT: All right.

THE COURT: We'll discuss the recommendation and all that later in a minute.

In terms of the factual information, and we made a

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number of changes and corrections to it, but, anything else you wanted to bring to my attention that you feel is inaccurate or needs clarification, just the factual information in terms of family, education, work history, any of those things?

THE DEFENDANT: Last time I did have a PS-- Well, the last time that I was out and I had a p--a presentence investigation report, I had--it was five felonies instead of eight, and now this is making nine. I don-- I still don't understand how it went up to nine. But, he explained to me but then--when I took the cop--when I was in front of Cotter, I thought I took a cop to CCW and Possession, which was--the Possession was a misdemeanor, and the CCW was a felony, that's what actually made it five. So I don't understand now how that it is nine felonies now. That's my only concern. Everything else is--to knowledge is accurate.

THE COURT: So th--you think it should be how many?

THE DEFENDANT: Five, including this one, it'll be six.

THE COURT: Prior felonies. They counted one, two, three, four..., five-- What happened with number 5 of 12? What's the disposition on those? Is that where his CCW is, that 2014 case?

THE DEFENDANT: Yes.

THE COURT: So they dismissed-- Was that--

MR. FULLER: It was--

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THE COURT: Was that--
MR. FULLER: It was-- He was--
THE COURT: --a plea?
MR. FULLER: --acquitted. He was acquitted by a jury.
THE COURT: In the-- In-- On the Assault with Intent to Rob?
MR. FULLER: Oh. Oh, all--
THE COURT: The Armed--
MR. FULLER: --of tho--
THE COURT: --Robbery--
THE DEFENDANT: All of--
THE COURT: --Carjacking--
MR. FULLER: All of that was nollied, for lack of evidence.
THE DEFENDANT: Yeah, a jury-- That was a...
THE COURT: Okay, so that's the one that went to trial?
THE DEFENDANT: Yes.
MR. FULLER: No. That one never went to trial. I think it was--
THE COURT: Does--
MR. FULLER: --dismissed.
THE COURT: Everything was just dismissed?
THE DEFENDANT: It was dismissed during--
MR. FULLER: It was dis--

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THE DEFENDANT: --trial.
MR. FULLER: --dismissed--
THE COURT: Okay.
MR. FULLER: --at--at or near the time of trial.
THE DEFENDANT: No, I was actually in trial.
THE COURT: Five...
MR. FULLER: Oh, okay, it doesn't say it, but.
THE DEFENDANT: Yeah, I was actually in trial and she dismissed it.
THE COURT: Six..., seven... Well, I'm up to seven-- through number 7 of 12 twelve. You had two-- You had Possession of a Firearm by a Felon, and, Possession of a--Cocaine.
THE DEFENDANT: See, to my acknowledge, he was tellin' me that that was a--
THE COURT: That's number--
THE DEFENDANT: --misdemeanor.
THE COURT: --seven. Then you had the 2015 conviction for the R and O, that's eight.
THE DEFENDANT: Okay.
THE COURT: So I count eight, unless str-- Number 10 of 12 says "Possession of Marijuana, second"--
MR. JENISON: That should be a low severity felony, judge--
THE COURT: Yeah, that's--
MR. JENISON: --and not--

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THE COURT: --marked--

MR. JENISON: --a misdemeanor.

THE COURT: --incorrectly. So he did--he was convicted of the pos--Possession of Marijuana, second?

MR. FULLER: Yes.

MR. JENISON: Yes, your Honor, found guilty.

THE COURT: So that's number nine. Alright, so that's correct. So now that we verified that you have nine prow--prior felony convictions, not including this sentencing one, any other conditions or corrections you wanted to bring to my attention, Mr. Moss?

THE DEFENDANT: No, ma'am.

THE COURT: All right. Then I can rely on it for purposes of my sentence.

Mr. Jenison, do you have a victim who wishes to be heard?

MR. JENISON: We do, judge.

THE COURT: Are you Jamira Moss?

MISS MOSS: Um-hum.

THE COURT: All right. Thank you for your patience. I appreciate you coming forward today. What would you like the Court to know?

MISS MOSS: That this affected my life since November 11th. I wanted to kill myself. I can't sleep at night, and I'm scared of everything.

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THE COURT: So this letter that the Court received on Friday--

MISS MOSS: Is not from me. I never--

THE COURT: You didn't write--

MISS MOSS: --send no--

THE COURT: --that?

MISS MOSS: --letter. No.

UNIDENTIFIED PERSON: Your Honor, can I glance? I've been her teacher since the 9th grade. I can see from here that is not her handwriting. She has very distinctive handwriting and that is not--it's beautiful handwriting, and that is not it.

THE COURT: All right.

MISS BRIGGS-STERNANAN: And she--

THE COURT: What's your name?

MISS BRIGGS-STERNANAN: I'm sorry. my name is Shay, S-H-A-Y. You ready? B-R-I-G-G-S, hyphen S-T-E-R-N-A-N-A-N. Briggs-Sternanan. Thank you. Sorry, it's one.

THE COURT: Oh, alright, so that's clarified for the Court; 'cause in that letter, somebody wrote under--pretending to be you, saying that, it was consensual and you didn't want him to go to--to prison, and you were just mad or jealous, something to that effect.

MISS MOSS: No. It wasn't me.

THE COURT: Okay. Well, I'm glad you had the courage to come forward and explain that. Anything else you want me to

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know?

MISS MOSS: Yes. I've been going to counseling, been doing everything, been trying to get help and ain't nothing helping. I gotta deal with it for the rest of my life.

THE COURT: If you need to attend counseling, as a victim, you would be entitled to some sort of restitution. Now, I don't know how collectable he is in his current situation. But, I think Mr. Jenison also spoke to you about possibly getting some additional counseling if you're able to through the child assessment center and that sort of thing, to continue to make sure you can continue to heal and deal with this, you know, ongoing situation and damage that has occurred to you, alright?

MISS MOSS: Um-hum.

THE COURT: Anything else?

MISS MOSS: No.

THE COURT: Are you-- Are you in school?

MISS MOSS: Yes.

THE COURT: What grade are you in?

MISS MOSS: This is my last year.

THE COURT: Are you a senior?

MISS MOSS: Yeah.

THE COURT: Where do you go to school?

MISS MOSS: Benton Harbor High School.

THE COURT: All right. Are you gonna try and go on to some college too?

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MISS MOSS: Um-hum.

THE COURT: Are you?

MISS MOSS: Um-hum.

THE COURT: All right. Well, good luck with that, and we'll be thinking of you. I appreciate you coming forward. That took a lot of courage. Thank you.

Alright, Mr. Jenison, anything else, then, on behalf of the People?

MR. JENISON: Judge, this has been a long case, it's been going on since November. Mr. Moss continued to try to weasel out of the situation, saying he had information in cases, having people write false letters to the court--

MR. FULLER: Judge, there's no--there's no evidence that he did that.

MR. JENISON: I think it's pretty clear that that just happened.

MR. FULLER: No, we don't know who did that.

THE DEFENDANT: I'm in jail.

THE COURT: All right.

MR. JENISON: Either way, someone wrote a false letter on his behalf, indicating that it was Miss Moss, that she didn't want him to go to prison, and, you know, Mr. Moss is in the v-- visitations that I could see and having discussions and listening to his--his--his interviews, he considers himself a ladies' man, and that's what he claims he is and this time, he

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got burned. And he needs to go to prison for awhile and he needs to sit down for a long, long time.

Judge, I know we agreed on 72 months on--on the--the sentencing guideline range--or, excuse me, not the guideline range, but the sentence of 72 months and I ask that you follow that, and Mr. Moss needs to make sure that he knows that he can't be doing this. He's gonna be on a sex offender registration for the next 25 years after he's paroled, and I just hope he understands that the last victim he can ever get his hands on was Miss Moss, it doesn't happen to anybody else, judge. Thank you.

THE COURT: All right. Mr. Fuller?

MR. FULLER: Your Honor, the--the agreement is--is as stated. However, I think that Mr. Moss wants for--people to understand where he comes from; and I think I'm a little more able to understand a little bit about Mr. Moss, more so, than others. I've spent a lot of my career doing guardian ad litem work upstairs and representing children in child neglect cases, and so, I have a unique insight into kind of how Mr. Moss ended up in this position. He was a foster child. He was taken from his parents and--when he was five years old, and he was moved around to different foster homes and then ended up with Wanda Moss, and she eventually adopted him and she also adopted Jamira.

It's easy for us that haven't been cut off the way

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foster children have from their families and from their past and not knowing where they belong. You know, my client had sexual intercourse with his adopted sister. Now in most of our circles we'd say, "Well that's--that's abominable. You don't do those kinds of things." But for someone who's been in the foster care system, who doesn't, a lot of times, feel that even the people that are--have adopted him are his family, it--it's easy to see how something like this could happen.

You couple that with the fact that there are no male role models for a young child. Oftentimes the adoption process, a--a female adopts children, only, and there's no male presence there, and oftentimes there are several children, and--and most of the time the adoptive parents are trying to do the right thing, to try to provide a stable environment for children but oftentimes that's not as good as--as they think that they're doing, especially with a male child who has needs that are different from a female child. And so--

THE COURT: Well, he was 25 at the time of the offense. He wasn't a child.

MR. FULLER: That-- That's true. But--

THE COURT: Okay.

MR. FULLER: --when you--when you go through the foster care system, you end up in a place with reactive attachment disorder, where you don't feel that any place is home. And so, what I--what I'm getting at is that he had

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consensual sex with his--his adopted sister that other people would find that abominable, that's something that he doesn't consider her to be--to be family in the same sense that others might, because of the trauma that he's been through as a foster child.

And so, he--what he wants everyone to understand is that he's not a predator, he's not someone that stalks around waiting for young women to attack them. This was a situation that he regrets. He's embarrassed by it. It hurts him. He can-- He would do anything to take it back. And, he--the--the biggest thing is he does not want people to think of him as some type of sexual predator who's going to prey on young women, and/or prey on children. He has children now of his own that he wants to try to raise. But he wants the Court to know that and I think that the Court should know that perspective when knowing Mr. Moss.

THE COURT: I appreciate that. And, Mr. Moss, would you like to state anything further before I proceed with your sentence?

THE DEFENDANT: Yes.

THE COURT: I do have-- Like I mentioned earlier when we first started your sentencing, I have several letters that you had written to me, much of which Mr. Fuller just outlined again for the Court and I did take the time to read through those letters that you had provided to me; anything additional

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with respect to further statement from you?

THE DEFENDANT: Yes. The first one I wrote-- Excuse me. The first one I wrote, I really didn't understand, especially about this affinity law because I never heard of it, but, as my lawyer, he talked to me and he explained to me and I--I understand but I don't understand.

And the second thing I wanna say is, first of all, I am very embarrassed to be standing in front of you in this type of situation. Not once in my entire life have I ever, ever disrespected a lady. I was put in a foster home since I was five years old. I've been on my own since I was 13 years old. That's, kind of, one of the reasons why my record is extensive. But not once-- My Mama is a victim of rape. My girlfriend at this time is a victim of rape. I never, ever, ever, ever even thought about even coming at this situation like this. But at the end of the day, I can't be around her because I was being honest and I told them, "Yes, there was consensual--a consensual act." She's not above age, and she's not my sister.

This family-- This same family done abused me, molested me and took me through hell and back. Right now-- I'm on psych meds right now. I smoke marijuana everyday to block out the images that I've been through. I've been on the streets damn near dying. I wake up in cold sweats every night. I don't know what's going on and I don't--and I really--and I still don't understand it. I pray every night and I ask God, "What is

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going on?" But, obviously, I can't get around it because, like he said, it's--it's about the affinity law. I was being honest about that. I even tried to talk to this man, which is the prosecutor, and I tried to explain to him what I've been through and what I'm still going through. He still didn't understand me; he still--because I understand he's from another side of the world, and--and--and, somewhat, it--it kind of depresses me because, I lean for--I've been leaning on the system since five years old for justice, for help, and I've been getting to the total opposite.

Now, I'm sitting here asking like, "What is going on?" Just, because you siding with this young lady, if that's the case--and it was--if it was consensual, then, she should be prosecuted too because I'm going through the same thing. I never, not once-- If a person was gonna sit up here and just molest a person, why would he stay in the same place? Why would that person just sit up there and go beyond measures by having--

THE COURT: You didn't stay in the same place, Mr. Moss, you ran.

THE DEFENDANT: No, I was there--

THE COURT: You ran.

THE DEFENDANT: --the whole-- I was there the whole night. I ran when the police came because it was--

THE COURT: Exactly.

THE DEFENDANT: --it was nonsense and I was already on

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bond. But at the end of the day--

THE COURT: She's 17.

THE DEFENDANT: That's still--

THE COURT: You're 25.

THE DEFENDANT: That's still above--

THE COURT: You're--

THE DEFENDANT: --age.

THE COURT: --25 years old and you stayed and went in the house, and you went into a 17-year olds bedroom.

THE DEFENDANT: But they let me in. Them the same people that let me in, and she told me to come in.

THE COURT: This is a house that you--you'd spent hours writing me, telling me what a horrible place it was, yet at 25, you chose to go into that house, and stay. There's nowhere else in this city-- You're a grown man. There's nowhere else in this city for you to stay?

THE DEFENDANT: They called--

THE COURT: You--

THE DEFENDANT: --me there. They told-- She told me to come over there. And I had-- And I would have my--

THE COURT: Okay.

THE DEFENDANT: --phone to prove it.

THE COURT: All right. It doesn't make any sense.

THE DEFENDANT: That's all I wanted to say, your Honor. I have--

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THE COURT: All right.

THE DEFENDANT: --kids of my own now and they--and I had--I just had don't--

THE COURT: I know.

THE DEFENDANT: --two twins that came May 12th. And--And do you think I--

THE COURT: Look at--

THE DEFENDANT: --would want--

THE COURT: --them.

THE DEFENDANT: --that for my babies? No. I'm not--

THE COURT: Exactly!

THE DEFENDANT: I'm not this type.

THE COURT: She's somebody's baby.

THE DEFENDANT: I'm not this--

THE COURT: She's--

THE DEFENDANT: --person, though.

THE COURT: --17 years old.

THE DEFENDANT: It was consensual. I understand that. Okay--

THE COURT: She's 17.

THE DEFENDANT: --I understand that, that it was a--it was--it--it--it--it was--it was an affinity act, but at the end of the day, I was--I was led into that situation.

THE COURT: You were not led. That is perfectly clear to me. You were not led. At the--

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THE DEFENDANT: I guess--

THE COURT: --same time you're having sex with a 17 year old, you had already been pregnating this other girl.

THE DEFENDANT: She was already pregnant. And I wasn't-- We wasn't together but we was gon be good--

THE COURT: The timing--

THE DEFENDANT: --co-parents.

THE COURT: --of it. These babies were born in May.

THE DEFENDANT: Right.

THE COURT: So you're--you're having sex with whomever. It-- It makes-- It still make-- It just boggles my mind what you've put this young lady through.

THE DEFENDANT: She put me through. Not just her, but me--

THE COURT: Alright--

THE DEFENDANT: --also.

THE COURT: --stop talking. I gave you a lot of time, I read through your letters, now it's my turn.

THE DEFENDANT: All right.

THE COURT: And I'm telling you, from reading everything, from going over everything, spending a lot of time, pages of notes, it doesn't make any sense. Your story does not make any sense.

I-- I get it in terms of the foster care system failed you, but you--it does not justify every bad act; hustlin',

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dealin' drugs, taking drugs, not--that doesn't excuse you to commit crimes and to go have--and commit sexual acts. The conviction you pled to, it's no contest plea, those are, acts that are unlawful. And when you see her, did you not even listen to her, what she said? If you're saying that all foster kids have some sort of, you know, negative, that they get some kind of excuse, she's--she wasn't out there doing that same thing. Did she come into your bedroom? No. She did not. She had-- There's another girl who walks in on you two.

THE DEFENDANT: And gave a different--

THE COURT: You cannot--

THE DEFENDANT: --description.

THE COURT: --use that excuse for the rest of your life, to--to say that society owes you. That's plain and simple. You have to finally say and fight to do what's right. I showed you these. I'll let you take these. You brought these little girls into this world and now, they're ending up-- You haven't even seen them, have you? Have you held them?

THE DEFENDANT: No.

THE COURT: No. And you're doing the same thing to them by your actions, all, to just have sex with somebody? That was worth it to you?

THE DEFENDANT: Naw, but--

THE COURT: She didn't owe it to you.

THE DEFENDANT: It was--

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THE COURT: Society--

THE DEFENDANT: --consensual.

THE COURT: --didn't owe it to you, that you just get to go around and have sex with whoever you want. You-- You wrote in here that you knew--you cut it off because you knew it was wrong. You knew something was up otherwise you wouldn't have snuck around like you did.

THE DEFENDANT: I guess you'll side with her 'cause she's a lady, huh?

THE COURT: Stop talking. You make your way into your adopted sister's room, in a place where you blame your adoptive mother on your circumstances at 25 years old instead of being out; you knew you had babies on the way; are you out getting a job; are you trying to work; you got a high school--the--the Department of Corrections when you were in prison before helped you get your high school diploma; are you using that in any positive way, no.

THE DEFENDANT: I was--

THE COURT: You have--

THE DEFENDANT: --working--

THE COURT: --been given--

THE DEFENDANT: --and I had a--

THE COURT: --multiple chances by--to be in this community, efforts have been made, despite your difficult beginning. I-- I get it. But, you've been placed on probation,

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you've been paroled, all of those programs that you had an opportunity, all through your time in--in juvenile, they gave you opportunities to try and turn your life around and set you on the right path, and you continued to choose to rely on what happened to you in the past. Now, because of your actions, this young lady has to go forward and think about you and what you did for a very long time, and we can just hope and pray that she can get beyond it and use that in a positive way to make sure that she is more educated, that she doesn't let anyone else take advantage of her like you took advantage of her.

For that crime that you pled to, you must be punished, and I certainly do not--affinity or not, it's a sexual--unlawful sexual act, period, and, I don't treat that lightly. I don't treat what the victim is going through, lightly. It's your-- You-- You asked for second chances, multiple times, in--in all your communications to me, and, your second chance is really through the--the plea agreement, because, through the guidelines, you could be sent away, and no one would--would really think otherwise by sending you away for 9 or 10 years for the acts that you committed.

But your second chance is that I'm going to sentence you for proposes of punishment, reformation and deterrence, protection of the public, utmost, because, it's one line after another of non positive things in our community. I mean, other than these beautiful baby girls that you brought into this

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world, it's very difficult to see what positive things you're trying to bring to us. They have to grow up. And, just like you did, you got taken away from your--your parents, and you used that in a negative way, you haven't built on anything that--that we have been trying to teach you as you have grown up, and now you are 26 years old.

THE DEFENDANT: I-- I have jobs, and, I've been in--I was just in college.

THE COURT: Not legal ones.

THE DEFENDANT: Yes, I have. I was working at Hof--Hoffman Die cast--

THE COURT: Alright.

THE DEFENDANT: --Javis, Chassix, them the jobs--

THE COURT: Well, you're--

THE DEFENDANT: --I just had.

THE COURT: --not working there now, 'cause you just spent 272 dollar--272 days incarcerated, and, I believe that the guidelines, although advisory pursuant to Lockridge, are appropriate as they've been scored properly for the impact and the circumstances that you have inflicted on our community and Miss Moss.

And, therefore, I am sentencing you to 72 months to--a minimum to 15 years, credit for 272; mandatory state cost of $68, victim's rights of $130. I will waive the attorney fee. He had a DNA from a prior offense, I believe, so he doesn't need

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a DNA. So, $198 will be the balance on this file. No restitution is being requested. If at any time, Mr. Jenison, that Miss Moss needs some reimbursement for any additional counseling or medical, you will file the appropriate motion, I trust?

MR. JENISON: Absolutely, judge.

MR. FULLER: Your Honor, can that be paid a--when he's on parole?

THE COURT: Prior to release from parole.

Counsel, anything else on this matter? I will als-- He also needs to be-- The report indicated that he had a prior AIDS and STD testing. I don't know if that was--if that's updated. So that needs to be checked to see if there is any-- how old that prior testing was, but, he needs to make sure that it's updated since, 'cause he was sleeping with multiple people.

THE DEFENDANT: It was just taken, your Honor.

MR. FULLER: Your-- Your honor, he--he's indicated to me there's some restitution on some prior files. I don't know how that works, but, we would ask--

THE COURT: That has nothing to do with his sentence in this case. That's however those were--those judgments were entered. So I don't have any--I don't have any authority to change those at this time. I'm-- I only did the mandatory state cost and victim's rights on this case, its $198, and I've marked the file to pay prior to release from parole. And I already

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waived the attorney fee for him. Anything else, then, Mr. Fuller?

MR. FULLER: No, your Honor?

THE COURT: Mr. Jenison?

MR. JENISON: Judge, just asking for a copy of those letters that were sent to the Court.

THE COURT: All right. And, Mr. Moss, I will give you--did you--have you received any of these for--

THE DEFENDANT: No, I got--

THE COURT: --in mail?

THE DEFENDANT: --I got one.

THE COURT: Here, I'll let-- Mr. Koern, if you'll give those. I will give those. For the record, they were provided by his children's mother, so he can take those with him. They're beautiful and I hope they continue--

THE DEFENDANT: Thank you.

THE COURT: --to grow well.

THE DEFENDANT: Thank you.

THE COURT: The bailiff handed you a form, if not already, if you wish to appeal your conviction and your sentence in this matter and you need the assistance of an appointed attorney, you need to fill out the front and back, sign both sides, and return to the court within 42 days.

Good luck to you, sir. You're remanded to the sheriff's department.

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MR. JENISON: Thank you, judge.

(At 4:15 p.m., court proceeding concluded)

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STATE OF MICHIGAN)
)
COUNTY OF BERRIEN)

I certify that this transcript, People of the State of Michigan versus John Antonya Moss, File Number 15-005091-FH, consisting of 48 pages, is a complete, true and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case by Lora Freehling, CER-8962, on Monday, August 8, 2016.

October 3, 2016

Vivian V. Burton

Vivian V. Burton, CER-3572
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STATE OF MICHIGAN

BERRIEN COUNTY TRIAL COURT

COPY

THE PEOPLE OF THE STATE OF MICHIGAN,

v File No. 2015-005091-FH

JOHN ANTONYA MOSS,

Defendant.
_____/

RESENTENCE

BEFORE THE HONORABLE DONNA B. HOWARD DISTRICT JUDGE

Saint Joseph, Michigan - Tuesday, August 9, 2016

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APPELLATE DEFENDER OFFICE

SHARON J. TYLER
BERRIEN COUNTY TRIAL COURT
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None

EXHIBITS Marked Admitted

None

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Saint Joseph, Michigan

Tuesday, August 9, 2016 - 02:40 p.m.

THE COURT: Mr. Moss, please approach the podium. I'm recalling 2015-005091, People versus John Antonya Moss. And we had a long afternoon yesterday Mr. Moss in proceeding with your sentencing and as you'll recall there was a long discussion over scoring and your guidelines.

Initially, prior to me entering your sentence, and it was discovered after we concluded your sentencing. That the crime class for the offense was changed in error. It was initially scored as a class B offense, which changes the grid in the guidelines.

So we have returned to continue, amend, and resentence you, with the corrected -- correction being made to that crime classification. And I -- it was brought to the Court's attention by both attorneys in message later after the sentencing's concluded yesterday and then we met in chambers this morning. Is that correct gentleman?

MR. FULLER: Correct.

MR. JENISON: Yes, Judge.

THE COURT: And I'm not sure who discovered it first, or who wants to make record, but I need to hear from both counsel that we -- after further reviewing the classifications for the offense that in fact historically there was a change from a class C offense, pre 2000, and

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subsequently in October of 2000 the classification was changed from a class C to a class B. Mr. Jenison?

MR. JENISON: Yes, Judge. Shortly after sentencing I was speaking with another APA indicating the changes in the guideline range that was made to the PSIR, one of those changes was changing it from a B grid to a C grid. Because in speaking with Mr. Fuller and going over the guidelines time and time again the CSC 3rd is in fact a 15 year felony. But little known to us that was actually scored in a B grade as a 20 year felony, even though the maximum penalty is a 15 year felony for a CSC 3rd.

THE COURT: All right. And Mr. Fuller you agree or checked on your own accord in terms of the change and the proper classification?

MR. FULLER: The only -- the only issue that I had was it's -- the only was looking at the guidelines and looking at the shaded portion versus the non-shaded portion. And earlier I was of the opinion that it was actually changed from a B to a C, but apparently that's not the case and then I agree with the prosecutor, I guess was amended the other way around. It doesn't make a whole lot of sense to have guidelines that high with the 2/3 rule for a 15 year felony. But nonetheless apparently that's what has happened.

THE COURT: Okay. And it does say in the sentencing guidelines, I am looking at the 2015 version, just because

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that's the one I've been using. We just recently received the 2016 version.

MR. FULLER: It's the same.

THE COURT: But I believe it's the same as the 2016 version. Indicating at least in my version on page 191, in the alphabetical crime listing that the shaded versions indicate that the statute governing the felony offense described on that line has been amended, deleted, or replaced.

So even though, and I assumed the same thing, I was looking at the highlighted version in checking that when I did hear that the Prosecutor, and I believe the Prosecutor's Office, several of them have proceeded in believing that it was also a C classification, kind of off of memory. And it was only recently brought to the Prosecutor's attention and in looking back at it, it does indicate that the classification for B was made effective October 1st of 2000.

So it has been around awhile. I also verified that under MCL 777.16y, again indicating that the classification for Criminal Sexual Conduct in the 3rd Degree has a statutory max of 15 years. But the classification is under class B.

So with that are -- we need to correct and revert back to the original classification on the sentencing information report, which was originally classified as a class B by the writer of the report. I'm not sure who from the Department wrote this. But the preparer and make that

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correction to indicate that it is in fact a class B. And with that the scoring being otherwise -- off the various variables based on the conversation remains unchanged. Still has 60 as the PRV, a total OV score of 95, but then it changes the guideline range and I'm correcting to the extent the record yesterday reflected a different guideline as well as on the page 1 of the front of the PSA, as well as on the scoring information sheet. That with a class B offense with those scores it would be a guideline range of 99 to a 160.

Mr. Fuller, any objection with respect to that adjusted guideline?

MR. FULLER: No, your Honor.

THE COURT: All right. I don't believe there's anywhere else in the report that needs to be corrected with respect to that then anything else on behalf -- the People -- the plea agreement included their recommendation of 72 months. So regardless of the adjusted guideline, their recommendation doesn't change. Is there anything further you want to say on behalf of your client before I impose the sentence?

MR. FULLER: No, your Honor.

THE COURT: All right. And Mr. Moss, I don't know if you understood all of that or if you had an opportunity to speak with Mr. Fuller. Do you have any questions for Mr. Fuller about what I just corrected from your presentence investigation report and your SIR in terms of the guidelines?

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MR. MOSS: I mean there's a lot of things I don't understand, but, it is what it is.

THE COURT: All right. Well, if you have a question I want to give you that opportunity and you can just cover the microphone and ask your attorney about that.

MR. MOSS: How do I go about by getting my PSI?

THE COURT: Once it's corrected, that you would work through your counsel and discussions. You're not gonna get to -- normally you don't get to keep those. So you can review it. If you have a question about it. You're not gonna get to keep a copy of it.

MR. MOSS: Oh, okay.

THE COURT: Any other questions?

MR. MOSS: (non verbal response)

THE COURT: All right. As I stated multiple times on the record yesterday, pursuant to People v Lockridge, the guidelines themselves are advisory. Taking all that into consideration and I did, Mr. Moss, even under his -- originally when I started, before we changed the scoring and everything was under the impression the guideline was gonna be under a class B scoring. So I had considered that and in coming up with your sentence taking into consideration the People's recommendation of 72 months and the mitigating factors, and by mitigating I mean that which your attorney expressed as your well as your statements expressed in terms

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of your historical background, your childhood, and the difficulties that you had in addressing some of your issues and the -- your placements and things like that.

I did take that all into consideration and therefore believe that even with the higher guideline, that your sentence of 72 months is reasonable and appropriate under the circumstances to address all of the issues in terms of both punishment but also an opportunity for reformation, deterrence of others, and the protection of the public. It achieves all of those goals.

It gives you an opportunity to, if you wish to take advantage of whatever programs and maturity that you need to continue so that when you are able to leave the prison system you will be on a better footing to address those issues and move forward with your life, including being a father to your baby girls.

So with that I'm sentencing you to 72 months to 15 years with credit for as of today 273 days.

MR. MOSS: I also have another question, your Honor.

THE COURT: Is it for your attorney?

MR. MOSS: When I asked him, he said he didn't know.

MR. FULLER: You talking about transcripts?

MR. MOSS: No, the registry and stuff like that. They said they was gonna bring it to me and I never got it. I mean, I don't know --

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THE COURT: He want the register of actions you mean?

MR. FULLER: No. He's taking about the registration for SORA.

THE COURT: Oh, that information.

MR. FULLER: Yeah.

THE COURT: He'll get that through the -- I think when he get's classified in Jackson he'll get that initial information. Right or how does that happen?

MR. RIMPSON: Typically the Probation Department --

THE COURT: Oh.

MR. RIMPSON: --prior to sentencing, have the individual sign it. I believe, if I'm correct, I think someone went over to the jail to have him sign it but he wasn't available. I'll make sure today --

THE COURT: Oh, okay.

MR. RIMPSON: -- that it is printed out. I will review it with Mr. Moss once he returns to the jail. And provide him a with a copy of it as well, your Honor.

MR. MOSS: Thank you.

THE COURT: Thank you, Mr. Rimpson.

MR. MOSS: Thank you.

THE COURT: The other terms, in terms of the fines and costs remain the same, $198 broken into a mandatory State Cost of $68, Victims Rights of $130. That to be paid prior to

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release from any parole. And also we will need to follow up with making sure he's had an updated STD and Aids test. He represented to the Court yesterday that he had had an updated test. So we just want to make sure that that occurred.

MR. MOSS: On record, do I have any restitution that I have to pay?

THE COURT: No.

MR. MOSS: Okay.

THE COURT: Not currently. The only thing on this case that you have to pay is ultimately the $198.

MR. MOSS: Okay.

THE COURT: And those are State imposed fines and assessments.

MR. MOSS: So I don't have to pay anything until I get out?

THE COURT: Well, I -- there's -- you may be collecting. It all depends on whether you're prisoner account has a balance on it or not.

MR. MOSS: I don't understand.

THE COURT: Well, the Department of Corrections may seek to start collecting that sooner once you're in prison and serving your time.

MR. MOSS: But I thought it was up to you that you said I could pay it as --

THE COURT: And I marked it prior to -- that's under

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a completely different statute and policy and practice of the Department of Corrections. It's a Department of Corrections -- you're being remanded to the Department of Corrections, so that is a procedure and regulations that are -- that occur through the Department of Corrections.

MR. MOSS: All right.

THE COURT: My judgment stands that it is to be paid prior to release from any probation or parole. So once you are out on parole, you're not gonna be discharged until you pay the $198, but whether the Department pursues it sooner than that would be up to the Department of Corrections.

MR. MOSS: All right.

THE COURT: All right. Did I sign -- is this today's form? Counsel anything else that I need to address at this time?

MR. JENISON: No, Judge, thank you.

MR. FULLER: No Judge.

THE COURT: All right. I need a new appellate form. The Bailiff is handing you a form, it's similar to the one that you received yesterday. If you wish to appeal your conviction or sentence in this matter and you need the assistance of appointed attorney to do so, fill out the front and back completely, sign both sides, and return it to the court within 42 days. You understand.

MR. MOSS: Yeah.

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THE COURT: Good luck to you, sir. You are remanded to the Sheriff's Department.

(At 2:55 p.m., proceedings concluded)

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I certify that this transcript, consisting of 13 pages, is a complete, true, and accurate record of the People of the State of Michigan v John Antonya Mosss and testimony taken in this case as recorded on Tuesday, August 9, 2016.

Date: October 23, 2016

Kim Williams, CER 8866
Berrien County Courthouse
811 Port Street
St. Joseph, Michigan, 49085
(269) 983-7111

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Motion to Withdraw Plea Transcript, 3-31-17

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STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT

PEOPLE OF THE STATE OF MICHIGAN

File No. 2015-5091-FH

Vs.

JOHN ANTOYA MOSS

Defendant.
_____/

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FILED

VIDEO PROCEEDINGS - MOTION TO WITHDRAW PLEA OR ALTERNATIVELY AMEND THE JUDGMENT OF SENTENCE

BEFORE THE HONORABLE DONNA B. HOWARD, TRIAL JUDGE

Saint Joseph, Michigan - Friday, March 31, 2017

APPEARANCES:

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WITNESSES: DEFENDANT

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Saint Joseph, Michigan

Friday, March 31, 2017 at 8:52 a.m.

THE COURT: Can you hear me, Mr. Moss?

MR. MOSS: Yes.

THE COURT: Oh, okay. Can you see me?

MR. MOSS: Yes.

THE COURT: All right. And is your monitor working?

MR. SMITH: No.

MS. PRIEBE: No.

THE BAILIFF: Well, you need power. Hang on.

MR. SMITH: I got blue light.

THE BAILIFF: It shows--it says "no signal" but it is on.

THE COURT: I don't think--I don't know if that works.

MR. PIERANGELI: I…

THE COURT: That does not work. That's only--works if it's like a DVD or something.

THE BAILIFF: Oh, okay. All right. Well, then why don't you go over here? I'm sorry.

MR. SMITH: Oh, that's all right. We're…

THE BAILIFF: All right.

MR. PIERANGELI: Oh, that's going to be way too close to me.

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THE COURT: He can't--the only time he's--Mr. Moss will be able to see--Mr. Moss, your attorneys are here in the courtroom.

MR. MOSS: Okay.

THE COURT: And so if you hear the voices, they're just sitting at a table, so you're--they're out of your view. But they are here and we'll have them make a record of their appearance. I'm going to call your case, 2015-005091, People versus John Antoya Moss.

And we are here before the Court today for purposes of a Motion to Withdraw Plea or Alternatively Amend the Judgment of Sentence that was filed for you by your attorneys. The Prosecutor has filed, on behalf of the People, a response to that motion.

And, counsel, will you state your appearances for the record?

MR. PIERANGELI: Your Honor, Steve Pierangeli on behalf of the People.

MR. SMITH: Good morning, Your Honor. Christopher Smith from the State Appellate Defender Office, here on behalf of Mr. Moss. Also, to my right, is Savannah Priebe. She's a third-year law student at Michigan State. And we've made a written motion to allow her to handle the Motion for Plea Withdrawal today.

THE COURT: All right. Will you move your folder

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so it's not covering the microphone?

MR. SMITH: Certainly, Your Honor.

THE COURT: Thank you. Mr. Moss, were you able to hear the attorneys talk?

MR. MOSS: A little bit.

THE COURT: Okay. Actually, what we'll do is, I--I think he'll be able to hear better if you come up to the podium when you speak.

So they just did introductions. When they're speaking, they're going to come up to the podium and--and provide any further comment.

I--with respect to the motion, I believe I have some initial questions, but if--given that this is Mr. Moss's motion, we will begin with the defense. Anything further to add outside of the written motion?

I--I would state, as a preliminary issue, the alternative portion of the motion, with respect to the amendment for the Judgment of Sentence, that issue appears to be stipulated by the parties, and I would also concur in that--in that.

The judge--the original judgment, I believe, stated that the basis for the conviction was multiple variables and that, based on the plea taken, it really should be blood or affinity as the basis for the conviction of criminal sexual conduct third degree.

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MR. PIERANGELI: The People would agree with that, ma'am.

THE COURT: So, really, based on the motion, what is remaining is that primary issue of whether or not--and correct me if I'm wrong--whether or not Mr. Moss and his sister, who were both--who are siblings by adoption, and that there is no blood connection between--biological blood relationship between the two of them, whether that was a satisfactory basis to establish the blood or affinity relationship required under the CSC third offenses, is that correct?

MR. PIERANGELI: Yes, ma'am.

MR. SMITH: (no verbal response)

MS. PRIEBE: (no verbal response)

THE COURT: You have to speak out loud, you can't nod your head.

MS. PRIEBE: Oh, yes, Your Honor.

MR. SMITH: Yes.

THE COURT: Okay. And with respect to that argument, the defense cited for the Court the *People v Zajaczkowski*--if I'm pronouncing that right--case as that basis, a Supreme Court case at 493 Mich 6, a 2012 case. And I have reviewed that case.

Then, counsel, is there anything further you want to supplement or address/highlight for the Court for purposes

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of your motion?

MS. PRIEBE: Yes, Your Honor. Would you like me to come up there?

THE COURT: Please.

MS. PRIEBE: Good morning. The main issue that we'd like to highlight--and the--I--I pronounce is "*Zajaczkowski*" case--I don't know how you actually pronounce it--would be that the board specifically stated that we should not look to other codes or statutes to determine what the legislative intent was, and that, in such cases, we should specifically look to the criminal statute to form that legislative intent.

And, further, the Court stated in that case that it was--as the legislative intent wasn't as it was written in this criminal statute, that it was very possible that adopted siblings could not be as affinity, based on the way the legislative has worded that statute specifically.

THE COURT: You're suggesting that *People v Zajaczkowski*…

MS. PRIEBE: Yeah.

THE COURT: …that's easier…

MS. PRIEBE: That case.

THE COURT: …for me to pronounce *Zajaczkowski* with a "J" in there. So, I apologize if I'm mispronouncing that. But you're suggesting that the case specifically holds that

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adoptive siblings are not related by blood and--or affinity?

MS. PRIEBE: No. Arguably…

THE COURT: Okay.

MS. PRIEBE: …arguably, that is dicta, that--when the Court discusses that specific issue of adoptive siblings, but they do address that the prosecution was concerned about that issue in that case, which was a different--it wasn't a CSC third, it was a CSC first, but it still required the blood or affinity.

And so, in that case, they were determining if there was a blood relationship or a relationship by affinity, and the Court…

THE COURT: Well, they weren't really addressing affinity, were they? They were just…

MS. PRIEBE: No.

THE COURT: …addressing blood, because the parties had stipulated that they weren't addressing the affinity relationship or condition?

MS. PRIEBE: Yes. However, the issue was that there was no DNA, there was no biological connection by DNA.

THE COURT: Right, that would be the blood component of it?

MS. PRIEBE: Correct, correct. So then the prosecution had argued that…

(At 9:00 a.m., the Polycom loses connection and

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Mr. Moss is no longer present)

MS. PRIEBE: …based on the legal--the father--in the divorce in that case, the father was the legal father of the defendant, even though…

THE BAILIFF: (inaudible)

THE COURT: Oh, you miss…

THE BAILIFF: No (inaudible).

(At 9:00 a.m., the Polycom is reconnected and Mr. Moss is present in the courtroom)

THE COURT: Mr. Moss, did we--did we lose you for a second?

MR. MOSS: Yes, it cut off.

THE COURT: All right. Up to that point that we cut off, were you hearing the attorney speak?

MR. MOSS: Yes.

THE COURT: Okay. I'm going to have her continue.

MR. MOSS: Okay.

MS. PRIEBE: So, arguably, in that case, the--the prosecution--not arguably--but, in that case, the prosecution was relying on the Probate Code and the fact that that--they were using that say that there was a legal relationship between the defendant and the victim in that case. But…

THE COURT: But the whole…

MS. PRIEBE: …the Court…

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THE COURT: …the--I don't mean to interrupt you, but the whole…

MS. PRIEBE: Uh-huh.

THE COURT: …argument that they were making was to establish that that--it should be considered as having a blood relationship, even though they--biologically, they were not, isn't that correct?

MS. PRIEBE: Yes. And I guess I…

THE COURT: Okay, so…

MS. PRIEBE: …would address that in saying that they were using that as--based on marriage. And, I guess, in this case, the prosecution is using that based on affinity--or I mean based on adoption, I'm sorry.

So, technically, the argument is just--I guess, the argument that I'm making is that the Court says that you should look to the criminal statute when you're determining--I'm using their analysis to determine that, in this case, we should look to the criminal statute to determine what the affinity would be in this case, and their analysis says to look to the criminal statute and the legislative intent in order to ascertain what affinity would be, and they said that affinity was the consequence of marriage.

THE COURT: Who said that?

MS. PRIEBE: The Court in *Zajaczkowski* or

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Zajaczkowski.

THE COURT: Where is that cited in--in that case?

MS. PRIEBE: It is cited on--forgive me, I didn't have the exact page--but it is on page four, it looks like.

THE COURT: Okay. So are you changing your position from what you stated in the motion, under paragraph eight, that,

> "The Michigan Supreme Court recently noted that adoptive siblings are not related by blood or affinity."?

MS. PRIEBE: No, they did note it in the case. It was noted in the case.

THE COURT: But you concede that that was…

MS. PRIEBE: It's arguably dicta, but it's still persuasive.

THE COURT: All right. What would be your position with respect to if Mr. Moss and--instead of being adoptive siblings, were stepbrother and stepsister?

MS. PRIEBE: Um…

THE COURT: Those, arguably, are not blood-related.

MS. PRIEBE: Uh-huh. Well, that, under the definition of "by marriage", I believe, would then make them

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related by affinity.

However, in the *Zajaczkowski* case--or *Zajaczkowski* case--the defendant and the victim had--their parents had been married at one point, but they weren't married at the point of the time that this conduct took place, so, I guess, in--it would only be if their parents were still married at the time.

And if--and, also, to discern that case, they--was also talking about the fact that--well, one, that they didn't have a biological parent; and two, that they didn't live in the home together. They hadn't--they weren't raised as siblings together in the home.

THE COURT: That's the *Zajaczkowski*…

MS. PRIEBE: *Zajaczkowski*, yes. And then, similarly--similarly, in this case, the two, Mr. Moss and Jamara Moss were not living in the same home, and it's my understanding that they hadn't been for a substantial period of time.

THE COURT: Didn't the incident happen in the family home?

MS. PRIEBE: Yes, but he was not residing there at the time. He didn't live in the home, he was visiting the home.

THE COURT: So would you--would--if he was, if the facts showed that he was living there at the time?

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MS. PRIEBE: I don't--I don't think that would have changed it, but that was just a point to be made to--because it's similar to the *Zajaczkowski* case.

THE COURT: And looking at the legislative intent…

MS. PRIEBE: Uh-huh.

THE COURT: …as you mentioned, obviously, the legislative intent for the criminal sexual conduct statutes, you would agree, is to protect young people…

MS. PRIEBE: Uh-huh.

THE COURT: …from sexual contact…

MS. PRIEBE: I would agree.

THE COURT: …from certain persons who have special relationships?

MS. PRIEBE: I would agree. And I think that the intent of the statute is to protect people from undue influence of people residing in the home, feeling pressured from a close family member to engage in such conduct. However, I don't believe that was present in this situation.

THE COURT: So it would be your position that you have two adoptive siblings who are raised in the home, one--one goes away to college and is no longer residing in the home, comes home over a holiday, and then rapes his little sister, who's also adopted, that doesn't count?

MS. PRIEBE: That's an--that's an inaccurate depiction of what happened here.

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THE COURT: I'm not talking about what happened. I'm ask--I'm trying to understand what your position is with--because you keep stressing the fact that it was--that Mr. Moss wasn't in--a resident, or that that is somehow a material element of deciding whether or not there's affinity relationship.

MS. PRIEBE: I guess I would say I--I wouldn't say that's a material element, I would say that it's--it just adds to what makes him not--what makes it a similar case to *Zajaczkowski*. The court looked to just a few factors, such as the fact that they were not biologically related, and the fact that there was no actual cohabitation in the home. Those are just…

THE COURT: Well, if it's by…

MS. PRIEBE: …factors.

THE COURT: …if they were biologically related, then--then you would just go under the blood element of it.

MS. PRIEBE: Yes.

THE COURT: So I'm focusing on the affinity portion…

MS. PRIEBE: Yes.

THE COURT: …of the argument, in that what--what, in your mind, then, would establish--what circumstances would establish an affinity?

MS. PRIEBE: Well, one thing would be if the

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relationship was nonconsensual, I think would be…

THE COURT: But that's--well, affinity is regarding the circumstances…

MS. PRIEBE: The…

THE COURT: …of the…

MS. PRIEBE: …yes, the…

THE COURT: …relationship, not the activity that occurred that is being charged.

MS. PRIEBE: Uh-huh.

THE COURT: It's not the offense itself, it's what is the relationship between the two individuals?

MS. PRIEBE: Yes. And I believe, based on the Supreme Court's definition of affinity, then that would be relatives of marriage.

So, I guess, to answer your question, if the two siblings--the two stepsiblings had grown up in the home together, had--were--and there was some reason to believe that there was, I guess, an undue influence on the person for the reason why--I--I believe that the…

THE COURT: So you're suggesting only--only because--there has to be two parents then, so one--one parent cannot adopt two children, and you can't create an affinity between those two adoptive siblings--there's only a single parent, or the parent eventually gets divorced--that destroys the affinity relationship for purposes of the CSC

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statutes?

MS. PRIEBE: Based on the legislative intent, they didn't address--they didn't address that, so I believe that…

THE COURT: But they did--they did address, and you agree, that the legislative intent was to protect young people from sexual contact with people whom--with whom they have a special relationship?

MS. PRIEBE: (no verbal response)

THE COURT: Correct?

MS. PRIEBE: Correct.

THE COURT: So the fact that--you're--you're saying the fact that Mr. Moss--that Mrs. Moss--or his adoptive mother--was a single parent, that the two adopted siblings could not have the affinity relationship, but if Mrs. Moss were married and there was--there were two parents--well, then what the--what's--if--you're shaking your head "no". What is the--why do you keep stressing that there has to be a marriage?

MS. PRIEBE: Well, just because that's the way that the Court defined it--well, that's the way the Court described it in their case.

I believe what's important is that they--the way the Court analyzed this similar situation in *Zajaczkowski* was that you had to look to the intent of the statute. And, because the legislature did not address this, the Court was

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not the proper venue to discern who--like why this was not in the statute.

So my--I guess my position is that it's not whether there's two parents or there's one parent, it's whether…

THE COURT: Well…

MS. PRIEBE: …the legislative intent was to include adoptive siblings or to not include adoptive siblings.

THE COURT: Okay.

MS. PRIEBE: And…

THE COURT: The Zajaczkowski…

MS. PRIEBE: Sorry--I'm sorry.

THE COURT: …Zajaczkowski case does not specifically hold that adoptive siblings cannot--you cannot reach a--an affinity basis simply because they're adoptive siblings?

MS. PRIEBE: Not specifically, no.

THE COURT: Right.

MS. PRIEBE: But they do address the issue in dicta in their footnote, which they say that--they acknowledge that the prosecution--their point that adoptive siblings could then--in this case, it was a criminal sexual conduct first--they could then engage in this activity and then be protected, and they said, "Yes, that's definitely a possibility," but that's not for them to discern, it is for

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the legislative--the legislature to amend that if they believe that's incorrect.

THE COURT: And didn't that case look to affinity by a dictionary definition?

MS. PRIEBE: They did. They looked at Black's Law Dictionary, and they also looked at the Webster's College Dictionary.

THE COURT: And what were the definitions that they cited in that?

MS. PRIEBE: For--do you want blood and affinity, or just affinity?

THE COURT: Just affinity.

MS. PRIEBE: For affinity, they said that,

> "Affinity is a relationship--or the relation existing and consequence of marriage between each of the married persons and the blood relatives of the other."

THE COURT: So if there's another dictionary Definition, the Court could also look to any number of--of dictionary definitions?

MS. PRIEBE: They could, but, in this case, this is what they chose to use to define it, and now the--the Supreme Court has used it. This is--that definition would

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be precedent, as opposed to the--what you referred to as "dicta" in the adopted siblings.

THE COURT: Well, I'm referring to just another college--Random House College Dictionary, which defines affinity as,

"A relationship by marriage or by ties other than those of blood."

MS. PRIEBE: And, in which case, the--I would go back to the legislative intent. And the court did address this--the Court of Appeals decision, and they said that they went outside by adding language that the legislature did not include, so I guess that would be similar to adding language to the definition.

And I would also add that, because this--this case doesn't involve child custody or paternity or things like that, the case specific--or the court specifically said that we should not look to outside codes or statutes to define what the legislative--what the legislature meant in the statute.

THE COURT: Other than you--you can refer to the dictionary definitions?

MS. PRIEBE: Well, I can refer to what the court defined as affinity.

THE COURT: From the dictionary?

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MS. PRIEBE: From what they--what they discerned was the legislative intent, whether they thought the legislative looked to the dictionary or not.

THE COURT: Anything else, then?

MS. PRIEBE: We do have one other alternative argument, but it's--you don't--if our facts don't prevail in this argument, then it's not necessary for me to…

THE COURT: What would…

MS. PRIEBE: …address it at that time.

THE COURT: …what part (inaudible)?

MS. PRIEBE: Ineffective assistance of counsel, based on this ineffective--or I mean the insufficient factual basis, which would be a similar argument.

THE COURT: Just the fact that the attorney did not bring that up at the time of the plea?

MS. PRIEBE: Correct. Yes, Your Honor.

THE COURT: Is there anything additional, outside of your brief, that you would be--bring forth on that issue of ineffective assistance of counsel?

MS. PRIEBE: Not at that time--not at this time.

THE COURT: All right. Then I'm going to hear from Mr. Pierangeli in response.

MS. PRIEBE: Thank you.

THE COURT: Anything further beyond your brief, Mr. Pierangeli, to highlight for the Court at this time?

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MR. PIERANGELI: Your Honor, the brief we filed with the Court deals mostly with the idea of the blood and the Adoption Code versus the Paternity Act and the differences between those.

In--and I have nothing additional to add to the idea that the victim in this case was placed into the bloodline, along with Mr. Moss, and are related by blood under the Adoption Code.

In terms of the affinity, Your Honor, there are--it was noted in that *People v Zajaczkowski*,

> "When citing to affinity race--relation existing and consequence of marriage between each of the married persons and the blood relatives of the other."

They were citing to a 1907 case, *Bliss versus Caille Brothers Company*, which dealt with, I believe, if I'm not mistaken, a Judge's hearing of the case and their relationship to a party involved. It didn't deal specifically with adoption or anything along those lines.

There was a--another case, however, at the Court of Appeals that talked about the definition of affinity. That was *People v Armstrong*, 212 Mich App 121. When the Court of Appeals went through the criminal sexual conduct statute and

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stated, on page 790--I'm sorry--127,

"The legislature intended to protect young person from sexual contact by persons with whom they have a special relationship, such as relatives."

They go on to state, on 127/128 about the term "affinity".

"Neither an unusual nor esoteric word, nor is a criminal--or does that criminal sexual conduct statute use the term in an uncommon or extraordinary context."

They cite to the Random House College Dictionary.

"Affinity is a relationship by marriage or ties other than those of blood."

So, I think, Your Honor, there's two arguments here that, one, under the Adoption Code, the victim in this case and Mr. Moss in this case are placed in the blood line, and there were policy reasons for that.

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Two, in terms of the affinity, the *Armstrong* case is different than the *Zajaczkowski* case. It is different than the Black's Law Dictionary. The People could see that, in terms of what the definition of affinity is. They use a difference define--dictionary definition.

A lot of the other case law defines it as a relationship by marriage. They do expand on that and say by marriage or other ties less than those of blood to define affinity in dealing with the sexual assault statute.

So the adoption, I believe, would fit under those "other than those of marriage or blood" under the affinity party, Your Honor.

THE COURT: And do you know what the factual circumstances are in the record as to Mr. Moss living in the home?

MR. PIERANGELI: It's my understanding in talking with the trial attorney about that that he was not presently living in the home at the time.

THE COURT: So how did he end up there that night?

MR. PIERANGELI: Just came over.

THE COURT: And then he stayed the night?

MR. PIERANGELI: Yes--yes, ma'am.

THE COURT: And is there a record evidence of when he last lived in the home?

MR. PIERANGELI: I don't believe there's any

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record evidence of that. No, ma'am.

THE COURT: Okay.

MR. PIERANGELI: And just for the record, Your Honor, in our response, we did not respond to the ineffective assistance of counsel part of their brief, figuring that if--depending on what the Judge determined on part one of their brief, it really was a moot point, in terms of part two, the ineffective assistance, ma'am.

THE COURT: And what's the People's position with respect to--you cited to *People* v *Armstrong*, and that was a situation of stepbrother and stepsister.

MR. PIERANGELI: Yes, ma'am.

THE COURT: Is it different, or is it on a case-by-case basis, or they're the same, because, clearly, between stepbrother and stepsister there's no blood relationship, so they're really focused on the affinity component of the statute and requirement. And then with respect to adopted siblings, including in this case there's no blood, other than your argument…

MR. PIERANGELI: Yes, ma'am.

THE COURT: …that legally they should be considered blood related…

MR. PIERANGELI: Yes.

THE COURT: …because of the Adoption Code and that argument?

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MR. PIERANGELI: There's no blood as for DNA.

THE COURT: Correct.

MR. PIERANGELI: The People can see that.

THE COURT: No biological…

MR. PIERANGELI: Yes.

THE COURT: …connection between the two, much like stepsiblings.

MR. PIERANGELI: Yes, ma'am.

THE COURT: And so Armstrong really--their basis is kind of conceding that there's no blood relationship, and that it's the stepbrother and stepsister is strictly affinity, and that would be consistent with, really, what *Zajaczkowski* is speaking of with--in--in terms of the blood component of it, correct? That they didn't even address blood, because they just…

MR. PIERANGELI: Yes.

THE COURT: …they just looked to the affinity?

MR. PIERANGELI: Yes.

THE COURT: So are adopted siblings more akin to the situation here in *Armstrong* or in the *Zajaczkowski* case?

MR. PIERANGELI: I think *Zajaczkowski* is distinguishable from this case, okay? There, we're dealing with the Paternity Act and the presumption, which is rebuttable. A presumption. And the idea that, while born during the marriage, they're presumed to be a child of the

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marriage and presumed to be that blood relative.

And that's different than this case here, where there's the adoption. And that deals with the Adoption Code, which states--it's a definitive statement in the Adoption Code saying that they are now, by law, as if having been born to the adoptive parents, and their ties to their natural, biological parents, rights have been terminated, those sever and they're not heir now to those people. So that's why I think it's distinguishable from *Zajaczkowski*.

In terms of *Armstrong*, they didn't need to deal with adoption, because--or they didn't need to deal with the blood part of that, because they were directly, by marriage, mother and father, so they were stepsiblings. So they didn't have to deal with the blood. Based on the history of affinity, they very clearly fit within affinity by a relationship of marriage.

Now--so I think, in this case, it fits both under blood on the Adoption Code, but I also think it fits under the affinity, because this is similar to *Armstrong* in the fact that you're trying to protect these children from a special relationship and protect them from being vulnerable.

So what would be the difference, essentially, between having two stepsiblings and two adopted siblings? The victim is still going to be in the same precarious position. So they should be included with the legislative intent in

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the broad definition of affinity, like *Armstrong*. It's the purpose of protecting these young children.

THE COURT: And so in establishing the affinity component, then, does the Court take it in a case-by-case basis of--you know, are any stepbrother and stepsister automatically going to--because it--they were joined by--by marriage, in terms of their relationship, of becoming stepbrother and stepsister, are they automatically falling under the category of affinity…

MR. PIERANGELI: Affinity.

THE COURT: …much like adopted siblings? Is your argument that no matter what, they--all adopted siblings should be, no matter what the circumstances are, in terms of when the incident occurred, or the offense is alleged to have occurred…

MR. PIERANGELI: In…

THE COURT: …and the circumstances of the family unit?

MR. PIERANGELI: …as the law is written, I believe it--it is similar, yes. By the--by the joining of the marriage and making them stepsiblings, they are covered under the statute. And I believe by the adoption and making them adopted siblings, they're put in the same situation and be considered under the statute. I'm not sure if that…

THE COURT: Even if they never lived together?

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MR. PIERANGELI: Even if they never lived together, no. I hope that answer--I think that answered what the Court was asking.

THE COURT: So a step--a stepbrother who's 22 years old, never lived in the--in the marital home, away at college/work, whatever, only was present at the wedding then comes--comes and stays with the--comes to visit and has a sexual encounter--consensual sexual encounter with the 18-year old stepsister, which he's only seen--he's--she's only seen once, that is still an affinity relationship?

MR. PIERANGELI: Under the statute, technically, that would still be an affinity relationship, yes.

THE COURT: Okay.

MR. PIERANGELI: I guess, in terms of the policy of charging or not, that's a different question. But under the statute, that would be under the affinitive relationship.

THE COURT: All right. And to you, same circumstances, but they're--in terms of like an age gap--but the--but the difference being the--they were adopted. One is adopted, grows up, goes off, leaves the home, and then many years later--it does happen--the family decides to adopt another child and, automatically, because even--even if it's a 10-year gap between the two of the adoptions, and the older sibling never lived in the home, that is

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automatically both a blood relationship, as--under the Adoption Code, and, to you, an affinity relationship?

MR. PIERANGELI: Yes, under the--under the law, I believe it would be; yes, ma'am.

THE COURT: Okay. Anything else, then, further you want to highlight?

MR. PIERANGELI: No, ma'am. We would rest on the brief. Thank you.

THE COURT: Anything further, then, from the defense in rebuttal?

MS. PRIEBE: Yes, just quickly, Your Honor. We would just like to re-emphasize that the Michigan Supreme Court has already defined blood and affinity, and, so, at this point--using the dictionary definition and not the Probate Code--which, at this point, would then make that definition precedent.

And because it's binding precedent, we're just asking this Court to apply the definitions that the court--the Michigan Supreme Court has already made or adopted--and apply it to this case that these adoptive siblings do not fall under either of those definitions. And then one…

THE COURT: But didn't you--didn't you concede that--that what they were saying about that was in dicta, and so it's persuasive, but not precedential?

MS. PRIEBE: No, Your Honor. We--I…

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THE COURT: What part are you saying then--because you did say that…

MS. PRIEBE: I conceded that the adoptive siblings was--okay, I--I see where you're going with that. What I mean is we should apply their blood definition and their affinity definition to then…

THE COURT: As precedential?

MS. PRIEBE: As precedential.

THE COURT: Not persuasive?

MS. PRIEBE: As precedential, not persuasive, to then be persuaded that adoptive siblings do not satisfy either of those definitions.

THE COURT: So the Supreme Court, if they pick one--one dictionary definition, we stick with that dictionary definition and not look to any other dictionary definition. That is the precedence that you're saying?

MS. PRIEBE: The Supreme Court--what the Supreme Court has said is binding precedent, correct.

THE COURT: In terms of the definition of affinity?

MS. PRIEBE: In terms of what they--in terms of what they adopt as the definition of affinity and their case law.

THE COURT: And then--what their ruling was in dicta about the fact that adoptive siblings do--may or may

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not meet that definition, or their note that adoptive siblings should not be considered related by blood or affinity, that, you are suggesting, is…

MS. PRIEBE: Persuasive…

THE COURT: …persuasive?

MS. PRIEBE: …authority.

THE COURT: All right.

MS. PRIEBE: Yes, Your Honor.

THE COURT: Okay. To be applied in this case?

MS. PRIEBE: Correct.

THE COURT: Anything else?

MS. PRIEBE: No, Your Honor. We would just ask, at this time, that you request--or you grant our plea withdrawal request.

THE COURT: I'm going to consider the further oral arguments today and issue my--and take it under advisement and issue a written opinion as to my decision. Counsel, anything else in this matter?

MS. PRIEBE: No, Your Honor. Thank you, Your Honor.

MS. PRIEBE: No, Your Honor, thank you.

THE COURT: Mr. Moss, this matter is concluded. I'll be issuing a written opinion as to my decision, which will be provided to you.

MR. MOSS: Okay.

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THE COURT: Thank you.

MR. MOSS: Can I ask a question?

THE COURT: I'm sorry?

MR. MOSS: Can I ask my lawyer something real quick?

THE COURT: Well, we're recording everything you say and…

MR. SMITH: Mr. Moss, I'll set up a visit with you and follow-up, okay?

THE COURT: If you couldn't hear him, he said-- Mr. Smith said he's going to contact you and set up a meeting so you two can speak in private.

MR. MOSS: Okay, all right. That's all I wanted to know, thanks.

THE COURT: All right, very good.

(At 9:30 a.m., proceedings concluded)

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CERTIFICATE

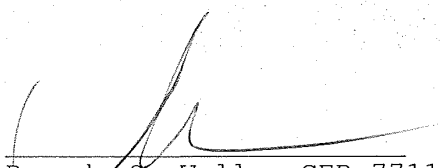
STATE OF MICHIGAN)

COUNTY OF BERRIEN)

I certify that this transcript, People of the State of Michigan versus John Antoya Moss, File Number 2015-5091-FH, is a true and accurate transcription to the best of my ability of the video proceeding in this case before Honorable Donna B. Howard on March 31, 2017 as recorded by Lora Freehling.

Videotape proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or the for the content of the videotape provided.

July 25, 2017



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Trial Court Order and Opinion Denying Plea Withdrawal, 5-30-17

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STATE OF MICHIGAN
BERRIEN COUINTY TRIAL COURT – CRIMINAL DIVISION
811 Port Street, St. Joseph, Michigan 49085 (269) 983-7111)

DUPLICATE ORIGINAL

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

vs

File No. 2015-005091-FH

JOHN A. MOSS (#598228)
Defendant.

HON. DONNA B. HOWARD

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At a session of the Berrien County Trial Court, held
On the 30th day of May, 2017, in the City of
St. Joseph, Berrien County, Michigan,

OPINION AND ORDER ON DEFENDANT'S MOTION FOR WITHDRAWAL OF PLEA OR CORRECTION OF JUDGMENT OF SENTENCE

I. INTRODUCTION

This matter comes before the Court on Defendant John Moss' Motion for Withdrawal of Plea, pursuant to MCR 6.310, or Correction of Judgment of Sentence, pursuant to MCR 6.435, of his conviction by *nolo contendere* plea to third-degree criminal sexual conduct ("CSC-3rd"), MCL §750.520d, entered on June 20, 2016. Defendant was sentenced by this Court on August 8, 2016 (and resentenced on August 9, 2016)[1] to 72 months minimum[2] to 15 years statutory

[1] Due to an error in the noted offense classification (Class B versus Class C) discussed by the parties and Court at that time of the August 8th sentencing, Defendant was resentenced on August 9th to allow for correction and clarification of the subject CSC–3rd offense being in the B classification; not C classification, and the associated

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maximum of incarceration, with 273 days of jail credit as of August 9th.[3] (*See,* Judgment, 8/12/16). Defendant timely sought appointed appellate counsel and was granted same. Defendant, through counsel, filed the instant motion on or about February 8, 2017. The People filed its responsive brief on or about March 17, 2017. The matter proceeded to hearing and oral argument on March 31, 2017. The primary issue argued in the motion to withdraw plea is whether the plea could be accepted for Defendant's CSC-3rd on the basis of "blood or affinity." More specifically, the question raised is whether a sufficient factual basis was established in the taking of Defendant's plea, and particularly the necessary element of Defendant and the victim being related to the third degree by "blood or affinity" for purposes of MCL §750.520d(1)(d) where they are adopted siblings, who are not known to biologically share DNA. In the alternative, Defendant's motion also raised a request to correct the exigent circumstance upon which Defendant's plea and conviction to CSC-3rd was based as reflected in the judgment of sentence from "multiple variables" to "blood or affinity." (Motion, ¶9, p 2).

II. FACTUAL BACKGROUND

In this case, it is undisputed that Defendant, the victim, and the victim's younger sister were initially foster children placed into the guardianship and home of Wanda Moss, and were subsequently legally adopted by Wanda Moss. Through the adoptions, Defendant and the victim became adoptive siblings, each related to Wanda Moss as her adopted children, and residing with Wanda Moss for an unspecified time.

At the time of the offense, November 11, 2015, it is clear that Wanda Moss resided in Benton Harbor, Michigan, with the victim, then 17 years old, and the victim's younger sister. It is not clear from the record whether Defendant, then 25 years old, was still residing at the same residence on a regular basis, or how it came to be that Defendant was staying at the residence on that particular date, other than reference in the Presentence Investigation Report ("PSIR"), that Defendant advised police during an interview that "he had arrived at his mother's house at approximately 5:00 a.m. and had to climb through a bathroom window as no one would answer the door." (PSIR, Form CFJ-284, p 3).

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guidelines adjusted therefrom. For reasons stated at Defendant's resentencing, Defendant's incarceration sentence remained unchanged. (*See,* Resentence Tr, 8/9/16).

[2] Notably, the 72 month minimum incarceration imposed was below the scored sentencing guidelines of 99-160, but consistent with the sentencing agreement between the parties as part of Defendant's plea.

[3] Upon further review of the record for purposes of the instant motion, it appears Defendant may have been awarded eight (8) extra jail credit days to which he was not entitled for the convicted offense. MCL §769.11b.

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In any event, there is no question that Defendant was in the residence on the morning of November 11, 2015, and that Defendant went up to the third floor of the residence, entered the victim's bedroom, climbed into her bed where she was previously sleeping, and began to engage in sexual activity with the victim, including kissing her butt area and her vagina, and eventually having sexual intercourse - penis to vagina. (Plea Tr, p 12).

According to the PSIR Agent's Description of the Offense, the police report also indicated that a few hours after the incident in question, law enforcement was dispatched to Lakeland Hospital on November 11, 2015, to meet with the victim. The responding officer described his conversation with the victim in pertinent part that:

> [T]he victim "appeared distraught, her eyes were blood shot from crying. . . .[She] advised she was sleeping in her room during the morning of November 11, 2015 and when she woke up, **her brother** was on top of her and in between her legs inserting his penis into her vagina. . . [S]he attempted to stop him by pushing him but was unsuccessful in doing so. The victim further advised that she was afraid to try to push him off again as she did not know what he would do and she just waited for Mr. Moss to get done.

(PSIR, Form CFJ-284, p 3)(emphasis added).

With those events, as well as additional events occurring later that same day with law enforcement's attempts and eventual apprehension of Defendant led to a number of felony charges being authorized against Defendant – resisting and obstructing a police officer (Count 1), possession of marijuana – second offense (Count 2), CSC-3rd "multiple variables" (Count 3), separate count of CSC-3rd "multiple variables" (Count 4), and the habitual offender four supplement (Count 5).

Ultimately, the parties reached a plea agreement. Prior to the taking of Defendant's plea, a brief bench conference was held at defense counsel's request, at which time defense counsel advised the Court that the plea agreement involved a no contest plea for one count of CSC-3rd with the exigent basis of "blood or affinity" only[4] and dismissal of all other charges. Specifically, counsel was asked what the basis for the "affinity" was, and counsel confirmed it would be through their adoption. Further, defense counsel presented the Court with a copy of the police report (presumably the same police report later referenced and incorporated into the PSIR) to be used in establishing the necessary factual basis during the plea process. Defendant was present in the courtroom during this initial exchange between the Court and counsel.

[4] As part of the plea agreement, the alternative exigent circumstance of "force or coercion" under MCL §750.520d(1)(b) initially charged against Defendant was dropped.

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Once placed under oath, a number of preliminary questions were asked of Defendant by the Court as to his rights and the plea agreement. (Plea Tr, pp 3-11). The Court read the information for the one count of CSC-3rd to include sexual intercourse between Defendant and the victim while related by affinity to the third degree, brother and sister through adoption or foster. Counsel acknowledged and confirmed the "affinity" relationship by adoption. (Plea Tr, p 7). In reciting the plea offer, the assistant prosecutor indicated that in entering a plea of no contest to CSC-3rd by blood or affinity (only), the People agree to dismiss the balance of the charges (which included resisting and obstructing a police officer (Count 1), possession of marijuana – second offense (Count 2), separate count of CSC-3rd (Count 4), and the habitual offender four supplement (Count 5). In addition, for Defendant's plea, the People also agreed to a sentencing agreement as to incarceration for a minimum of 72 months. (Plea Tr, 9-10). Both defense counsel and Defendant acknowledged the accuracy of the agreement recited. (Plea Tr, 10-11).

By stipulation of the parties, the police report was accepted into the record for purposes of establishing the factual basis of the CSC-3rd offense. The Court paraphrased some of those facts for the parties, including the stipulated fact that Defendant and the victim were "related to the third degree by adoption as brother and sister." (Plea Tr, pp 11-12). Counsel acknowledged the sufficient factual basis for the CSC-3rd plea, and also confirmed on the record that the Court complied with MCR 6.302 in the taking of the plea. (Plea Tr, pp 12-13). At the conclusion of the proceeding, the Court returned the copy of the police report that had been incorporated into the plea to defense counsel. (Plea Tr, p 17).

As referenced above, Defendant was sentenced on August 8, 2016, and then resentenced on August 9, 2016. On August 8th the parties reviewed and discussed in detail certain scoring of variables for purposes of setting the sentencing guidelines, as well as the accuracy of the PSIR content and certain changes were made. (Sentencing Tr, 8/8/16, pp, 4-29). Both Defendant and his counsel acknowledged the accuracy of the PSIR once the changes and clarifications were made. (Sentencing Tr, 8/8/16, pp 25-29). Upon Defendant's resentencing on August 9th, the only notable changes to the PSIR were to correct the offense classification and corresponding sentencing guidelines. (Resentencing Tr, 8/9/16, pp 3-8).

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III. LEGAL STANDARDS

A. Withdrawal of Plea

A defendant's ability to withdraw his plea, whether guilty or no contest, is governed by the Michigan Court Rules. *People v Blanton,* 317 MichApp 107; – NW2d – (2016). Rule 6.310 governs the withdrawal of pleas. More specifically in this case MCR 6.310(C) controls as Defendant seeks to withdraw his plea after his sentencing. Rule 6.310(C) provides that:

> The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

Thus, a defendant seeking to withdraw his plea after sentencing must demonstrate that there was a defect in the plea-taking process. *People v Brown*, 492 Mich 684, 692-693; 822 NW2d 208 (2012). To be a valid plea, a plea must be "understanding, voluntary, and accurate." *Id.* at 688-689, citing MCR 6.302. A defendant has no right to withdraw a plea once the trial court has accepted it. *People v Patmore,* 264 MichApp 139, 149; 693 NW2d 385 (2004), lv den 473 Mich 884 (2005). The focus of a plea proceeding "is to ensure that any defendant who has entered into a sentence agreement has made a knowing, understanding, and informed plea decision." *Id.* at 693 (quotations mark and citations omitted). The decision whether to permit or deny a defendant to withdraw his plea is within the sound discretion of the trial court. *People v Williams*, 288 MichApp 67, 71; 792 NW2d 384 (2010), aff'd 491 Mich 164 (2012).

B. Correcting Judgment of Sentence

With respect to Defendant's alternative motion related to correcting the judgment of sentence, MCR 6.435 is applicable to correct a clerical error discovered, and such correction can be sought at any time. The Court has authority on its own initiative or on motion of a party to correct clerical mistakes in judgments and/or errors arising from an oversight or omission. MCR 6.435(A). A judgment of sentence that is erroneous because the judge misspoke or the clerk made a typing error is correctable under subsection A. *People v Peck*, 481 Mich 863, 864; 748 NW2d 235 (2008), citing MCR 6.435, 1989 STAFF COMMENT; *People v Howell*, 300 MichApp 638, 645-646; 834 NW2d 923 (2013).

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IV. ANALYSIS

A. Withdrawal of Plea

As referenced above, to be entitled to withdraw his plea, Defendant must demonstrate "a defect in the plea-taking process" which amounts to a plea which is not understandingly, voluntarily, or accurately made. *Brown, supra* at 692-693. In order for a plea to be voluntary and understanding, the defendant 'must be fully aware of the consequences of a conviction[.]'" *People v Blanton,* 317 MichApp 107; – NW2d – (2016). Based upon Defendant's motion, brief and argument, there does not appear to be any challenge that Defendant's no contest plea was understandingly and voluntarily made. The plea itself is consistent with that finding as well. (Plea Tr, pp 6-13).

Therefore, it appears that the sole basis upon which Defendant seeks to challenge his plea for purposes of his motion under MCR 6.310(C) is whether the no contest plea was accurate. *See, Brown, supra* at 688-689; MCR 6.302. An accurate *nolo contendere* (or no contest) plea must include the following:

> [T]he court may not question the defendant about participation in the crime. The court must:
>
> (a) state why a plea of nolo contendere is appropriate;
>
> (b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

MCR 6.302(D)(2).

Although not specified by Defendant's motion as a challenge to the plea's accuracy under MCR 6.302(D)(2), it appears Defendant's challenge is essentially under MCR 6.302(D)(2)(b). That is, Defendant appears to argue that at the plea hearing on June 20, 2016, there was insufficient factual support established on the record for a finding that Defendant was guilty of CSC-3rd based upon "blood or affinity," under MCL §750.520d(1)(d), where Defendant and the victim are siblings by adoption and not biologically related. (Def Mot ¶8(a); Brf, pp 3-6). The People have argued in response that Defendant qualifies through his adoption and that of the victim by Wanda Moss, and with reference to the Michigan Adoption Code, MCL §710.21, *et seq.*, as related to the third degree by "blood or affinity." (People Brf, pp 4-8)

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1. Sibling Relationship by "Blood or Affinity" under Criminal Sexual Conduct Statute

In this case, it is undisputed that Defendant was convicted by no contest plea to CSC-3rd under the exigent circumstance of "blood or affinity" pursuant to MCL §750.520d(1)(d). The statute provides in pertinent part that:

> (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> * * *
>
> (d) That other person is related to the actor **by blood or affinity to the third degree** and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

MCL §750.520d(1)(d)(emphasis added).

For a conviction under the criminal sexual conduct statute based upon the exigent circumstance of "blood or affinity" it is required there be proof that the defendant and victim are related "in one of two ways – by blood or by affinity." *People v Zajaczkowski,* 493 Mich 6, 14; 825 NW2d 554 (2012)(emphasis added). Defendant relies on the *Zajaczkowski* decision by the Supreme Court to argue that adoptive siblings are not related by either "blood or affinity." However, defense counsel is mistaken when suggesting to the Court that in the *Zajaczkowski* case, "the Michigan Supreme Court recently noted, adoptive siblings are not related by blood or affinity for purposes of MCL 750.520d(1)(d)." (Motion, ¶8(a), p 2). Rather, the Supreme Court specifically did not address in its holding the issue of whether adoption creates a relationship of "affinity."[5] In fact, relationships through adoption were not even discussed or mentioned in the entirety of the Supreme Court decision. *Zajaczkowski, supra.* The only issue the Supreme Court addressed is whether "a blood relationship" can be established for purposes of the first-degree criminal sexual conduct ("CSC-1st") statute, MCL §750.520b, when the defendant and victim are not biologically related. *Id* at 8, 12-13.

The Court now addresses both types of relationships – "blood" and "affinity" as it relates to the circumstances of the instant case and plea, involving Defendant and the victim being siblings by adoption.

[5] The prosecution did not argue for or present evidence of a relationship by "affinity." *Zajaczkowski, supra* at 12.

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a. Relationship by Blood

In *Zajaczkowski*, the defendant had sexual intercourse with a victim who was at least 13 but less than 16 at the time of the incident. The defendant was believed to be the half-brother of the victim (sharing the same biological father), and the defendant's legitimacy as the son of the victim's father's had been established under the Paternity Act, MCL §722.711, *et seq.*, and related records. However, at some point later it was determined through a DNA test that the defendant was in fact not the biological son of the victim's father, and therefore, not biologically related to the victim as a half-brother or other biological relative. The defendant was initially convicted pursuant to plea of CSC-1st, rather than CSC-3rd (victim 13<16), due to the added element of the defendant and victim being related by "blood" to the fourth degree. MCL §750.520b(1)(b)(ii). *Zajaczkowski, supra* at 9. In holding that there was no relationship "by blood" to the fourth degree under the circumstances, the Supreme Court in *Zajaczkowski* explained in pertinent part:

> A relationship by "blood" is defined as a relationship between persons arising by descent from a common ancestor" or a relationship by birth rather than by marriage. Moreover, as the Court of Appeals, [at 293 MichApp 370; 810 NW2d 627 (2011)] correctly noted, the context in which the term "by blood" is used in the statute indicates that it is meant as an alternative to the term "by affinity."
>
> * * *
>
> Under the statutory language, the third element of MCL 750.520b(1)(b)(*ii*) can *only* be met if defendant is related to the victim in one of two ways—by blood or by affinity. The conclusive DNA evidence establishes that the victim's father is not defendant's biological father. Defendant and the victim simply do not share a relationship arising by descent from a common ancestor, and they are not related by birth. Accordingly, defendant is not related to the victim by blood to the fourth degree.

Zajaczkowski, supra at 13-14 (quotation marks and citations omitted).

Likewise, in the case at bar, there has been no evidence presented to the Court through the plea or otherwise that Defendant and the victim are biologically related, *i.e.* having DNA in common, a "descent from a common ancestor," or "related by birth." Despite the People's suggestion in its responsive pleading and oral argument to the contrary (*i.e.* adoptive siblings should be considered related "by blood" for purposes of the criminal sexual conduct provisions), neither the Adoption Code, MCL §710.21, *et seq.*, nor related case law, alters whether someone is biologically, through shared DNA, related to someone else. Instead, and as even highlighted by the People, an adoption creates a legal lineage and/or inheritance succession for an adopted individual; "severing, at law, the prior, natural [*i.e.* formed by biology] family relationship and

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creating a **new and complete substitute** relationship." (People Brf, pp 5-6 (citations omitted; emphasis altered)). That is, while adoption legally places the adopted individual in the ancestral line of an adoptive parent, it does not alter DNA or create an actual biological connection between the adopted child and adopting parent. Had the Legislature intended such a specific interpretation of "by blood" for purposes of the criminal sexual conduct statutes, it could have included such a definition. *See, People v Vasquez*, 465 Mich 83, 94-96; 631 NW2d 711 (2001).

Moreover, for purposes of the relationship element used in the criminal sexual conduct statute, the Court finds the Supreme Court's holding in *Zajaczkowski, supra*, to be precedential and binding on this Court on the issue of establishing a relationship "by blood." In light of the above, the Court finds that the factual basis presented at the time of Defendant's plea was insufficient to demonstrate the necessary relationship "by blood" to the third degree for purposes of his conviction for CSC-3rd under MCL §750.520d(1)(d).

2. Relationship by Affinity

Next, the Court must consider whether there was a sufficient factual basis established at the time of Defendant's plea to support a relationship to the third degree "by affinity" between Defendant and the victim who are adopted siblings – brother and sister. The Court is tasked with interpreting the statute, and here more particularly the term "affinity," to "give effect to the Legislature's intent" in enacting that provision of the criminal sexual conduct statute. *People v Cole,* 491 Mich 325, 330; 817 NW2d 497 (2012), quoting *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). The first step is to look at the text itself. "The Legislature is presumed to have intended the meaning it plainly expressed, and clear statutory language must be enforced as written." *People v Loper*, 299 MichApp 451, 464; 830 NW2d 836 (2013). Further, the Court must "use common sense and should construe the statute to avoid unreasonable consequences." *In re RFF*, 242 MichApp 188, 198; 617 NW2d 745, 751 (2000).

In defining a particular word, such as "affinity," within the context of the criminal sexual conduct statute, the Court "must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme." *People v Blylsma*, 315 MichApp 363, 378; 889 NW2d 729 (2016), quoting, *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). As to the legislative purpose, it has been found that "[i]n fashioning the criminal sexual conduct statute, MCL §750.520 *et seq*; MSA §28.788(1) *et seq*, the Legislature intended to protect young persons from sexual contact by persons with whom they have a special relationship, **such as relatives**." *People v Armstrong,* 212 MichApp 121, 127; 536 NW2d 789

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(1995)(emphasis added). As to the specific term "affinity," the criminal sexual conduct statute does not provide a definition. *See*, MCL §750.520a, *et seq.* In addition, the appellate courts do not appear to have had an opportunity yet to specifically address the meaning of "affinity" in the context of adopted siblings engaging in sexual relations.

Nevertheless, the courts have long-observed that "affinity" is "neither an unusual nor esoteric word; nor does that criminal sexual conduct statute use the term in an uncommon or extraordinary context." *People v Denmark*, 74 MichApp 402, 408; 254 NW2d 61 (1977). Moreover, in *Armstrong, supra*, the Court of Appeals examined the meaning of "affinity" under the criminal sexual conduct statute where the sexual contact occurred between a stepbrother and stepsister. The Court of Appeals explained in pertinent part:

> The term "affinity" is not capable of precise definition. *In re Estate of Bordeaux*, 37 Wash2d 561, 564, 225 P2d 433 (1950). Rather, at common law, whether someone was related to another by affinity depended upon the legal context presented. See generally, *id* at 566-573, 225 P2d 433. The factual and legal context in which our Supreme Court defined affinity in *Bliss* [*v Caille Bros Co*, 149 Mich 601; 113 NW 317 (1907)] differs from the factual and legal context of this case. [*People v Reeves,* 448 Mich 1; 528 NW2d 728 (1994)] The *Bliss* definition of affinity also predates the statutes dealing with criminal sexual conduct by approximately six decades. See 1974 PA 266. Additionally, in *Bliss,* our Supreme Court expressly limited the applicability of the definition of affinity that it adopted.

Armstrong, supra at 125–26.

Under such circumstances, the Court is allowed to resort to dictionary definitions to ascertain the plain and ordinary meaning. *Id* at 127. As the *Armstrong* Court recognized, the "*Random House College Dictionary* (rev. ed.) defines the term 'affinity' as a 'relationship by marriage **or by ties other than those of blood.**'" *Id* at 128, quoting *People v Barajas,* 198 MichApp 551; 499 NW2d 396 (1993)(emphasis added). Further, the term "adopted" means "having been adopted: such as of a child; legally made the son or daughter of someone other than a biological parent." *Merriam-Webster Unabridged* (2017, Online ver.) The term adoption is defined as **"to take or receive into any kind of new relationship"** *Random House Kernerman Webster's College Dictionary* (ver. 2010)(emphasis added). Similarly, the Michigan Adoption Code, MCL §710.21, *et seq.*, and caselaw addressing same, have reiterated that an adoption creates **"a new and complete substitute relationship** after adoption." *In re Handorf,* 285 MichApp 384, 388; 776 NWd 374 (2009)(emphasis added; citation omitted).

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As the Court of Appeals explained in deciding that a stepbrother and stepsister were related by affinity:

> "In this time of divorce, remarriage, and extended families, we see no reason why the Legislature would give enhanced protection to a victim related to a perpetrator as an in-law, but not to a victim related to a perpetrator as a stepbrother or stepsister."

Armstrong, supra at 128. *See also*, *People v Clark (unpublished),* Docket 307694 (MichApp Jan 15, 2013), appeal den, 495 Mich 861 (2013)(CSC convictions upheld for sexual assaults upon adopted granddaughter and adopted daughter involving element of "blood or affinity"); *Graham v McKee (unpublished)*, Docket 1:13-CV-665, (WDMich FSupp, April 25, 2016), adopted report & den habeas corpus, (May 23, 2016) and *People v Graham (unpublished),* Docket 297830 (MichApp, Oct 11, 2011), appeal den, 491 Mich 886 (2012)(CSC charges which included element of relation by blood or affinity upheld for sexual acts by father with adopted daughter); *People v McPhee (unpublished),* Docket 258285, (MichApp, March 27, 2007)(brother-in-law to sister-in-law upheld as affinity to third degree for purposes of MCL §750.520d); *People v Russell*, 266 MichApp 307;703 NW2d 107 (2005)(conviction upheld for CSC-4th where victim's maternal aunt's husband deemed related to victim by affinity to third degree); *People v Goold,* 241 MichApp 333; 615 NW2d 794 (2000)(stepdaughter is a relative with three degrees of affinity for purposes of MCL §750.520d).

Similarly, to interpret in this day and age that two minor children, who are legally adopted into one family by the same single mother, and known to each other for years as adopted brother and sister, but later as they get older and presumably one moves out of the household, would be afforded less protections than a stepbrother, stepsister, stepdaughter, adopted daughter and/or other family relations, "would yield absurd results" under the criminal sexual conduct statutes. *Id.* at 128-129. Here, we have a single mother, Wanda Moss, who adopted several children out of the foster care system. Defendant was legally adopted when he was still a minor, and became the son of Wanda Moss. Defendant's sisters were also legally adopted into the same family, with the same mother. Despite Defendant claiming at the time of the offense to not consider the victim as a sister, certainly the victim described to the police that the sexual contact with Defendant involved waking up and "**her brother** was on top of her." (PSIR, Form CFJ-284, p 3)[6] Further, the Court finds that MCL §750.520d(1) inclusion of the exigent circumstance of

[6] Notably, that portion of the PSIR was taken from the police report, which itself was accepted into the record by stipulation of the parties for purposes of taking Defendant no contest plea.

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"blood or affinity" advances the legitimate State interests of prohibiting sexual relationships between individuals who have traditionally been considered incestuous, as well as protecting the sanctity of the family (in whatever more modern form the family unit may take).

Consequently, the Court finds, pursuant to the rules of statutory construction and the foregoing, that Defendant and the victim are related "by affinity" because they are siblings by adoption to the same adoptive parent, living and parented by that same parent in the same family household. As such, 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.

B. Correction to Judgment of Sentence

Alternatively, Defendant's motion raises an error in the judgment of sentence which indicates that the exigent basis of the CSC-3rd conviction was "multiple variables." (*See,* Judgment, 8/12/16). Instead, Defendant indicates that in the taking of the plea, pursuant to the parties' agreement, as well as the sentencing, the conviction was for CSC-3rd solely by "blood or affinity," and not "multiple variables." (Def Motion, ¶9, p 2). The People acknowledge same and do not object to said correction. (People Brf, p 8). The Court finds that the inclusion of "multiple variables" on the issued judgment of sentence (and amended judgment) does not reflect the plea agreement, plea, or sentence reflected in the record, and a correction is warranted pursuant to MCR 6.435(A) as a clerical error, and oversight by the Court in signing same. Defendant's motion with respect to the correction of the judgment of sentence to change "multiple variables" to "blood or affinity" is granted.

In addition, as an aside, in reviewing the record for purposes of Defendant's motion, the Court also became aware that Defendant was awarded what appears to be eight (8) extra days of jail credit to which he was not entitled for the convicted offense pursuant to MCL §769.11b. The jail credit statute provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond **for the offense of which he is convicted**, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

MCL §769.11b (emphasis added).

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At the time of Defendant's sentencing, Defendant argued and the Court accepted that he had been in jail continuously on this case from November 11, 2015, through to August 8, 2016. That totaled 272 days of jail credit. (*See,* Sentencing Tr, 8/8/16, pp 17-21 & 44; Judgment, 8/11/16). Upon Defendant's resentencing on August 9, 2016, an additional day was added for a total jail credit of 273 days. (*See*, Judgment, 8/12/16).

However, upon closer review of the record, it appears clear to the Court that Defendant was arrested on November 11, 2015, only on charges as initially warranted for resisting and obstructing a police officer (Count 1) and possession of marijuana – second offense (Count 2). (Information, 11/12/15). Defendant was arraigned on the two initial charges (Counts 1 & 2) on November 13, 2015. It was not until November 19, 2015, that an amended warrant was issued by the People adding Counts 3 and 4, each for CSC-3rd (multiple variables). (Amended Information, 11/19/15). Defendant was arraigned on the additional charges (Counts 3 & 4) on November 23, 2015.[7] It is the amended Count 3 for CSC-3rd (blood or affinity) to which Defendant was convicted by no contest plea. Consequently, pursuant to MCL §769.11b the earliest Defendant would receive jail credit for the convicted offense (Count 3) was November 19, 2015; not November 11, 2015.

With that said, the Court recognizes that the parties have not had an additional opportunity to be heard as to this particular later-discovered issue. As the corrected judgment has not yet entered based upon the Court's above rulings, the Court will provide a reasonable time for further response on this issue, only, before the corrected judgment is issued by the Court. MCR 6.435.

V. CONCLUSION

In light of the foregoing, the Court finds that Defendant is not entitled to withdrawal of his plea, as there was no defect in the plea-taking process because Defendant and the victim are related "by affinity" to the third degree as siblings by adoption. Alternatively, Defendant is entitled to a correction of the judgment of sentence from the current exigent circumstance for the CSC-3rd conviction "multiple variables" to be more accurately reflected as "blood or affinity." Therefore, and with the Court being further advised in the premises;

IT IS HEREBY ORDERED that Defendant's motion for withdrawal of plea is DENIED.

[7] A second amended information adding the notice of fourth habitual offender status (Count 5) was filed on or about January 8, 2016.

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IT IS HEREBY FURTHER ORDERED that Defendant's motion for correction of judgment is GRANTED.

ADDITIONALLY, IT IS HEREBY ORDERED that the parties may file and serve (including Judge's Copy) **by or before June 14, 2017,** any written objection, support, and/or other brief for the Court's consideration on the issue of Defendant's entitlement to jail credit days – namely whether it was to begin November 11, 2015, or November 19, 2015. The Court will await issuance of the corrected judgment of sentence until after it hears from the parties, and this remaining issue is resolved.

SO ORDERED.

DATED: 5/30/17

HONORABLE DONNA B. HOWARD
Trial Court Judge

Certificate of Service: The undersigned certifies that a copy of the foregoing Opinion and Order was served upon the attorneys and/or parties of record to the above cause by mailing the same to them at their respective addresses as disclosed by the file with postage fully prepaid (or inter-office if to Berrien County Prosecutor's Office) on:

5/30/17
Date

Deputy Clerk/Bailiff

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COA Order Denying Leave Application, 8-21-17

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Court of Appeals, State of Michigan

ORDER

People of MI v John Antonya Moss

Docket No. 338877

LC No. 2015-005091-FH

Michael J. Talbot
Presiding Judge

Kirsten Frank Kelly

Thomas C. Cameron
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

Presiding Judge

Received
AUG 25 2017
SADO Lansing

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 21 2017
Date

Chief Clerk

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Trial Court Docket Entries

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BERRIEN COUNTY JUSTICE SYSTEM
PUBLIC ACCESS CASE EVENT REPORT

Case Id: 2015005091-FH
Person Id: 50425535

MOSS, JOHN ANTONYA B M 505 160 BLK BRO
11/23/1989
CHG: 0

CLOSED OW

REL CASE ID: OFF TYPE: F TRACK: CTN: 111500576001
COMPLNT AGY: BH OFF DATE: 11/11/2015 07:48 FP CARD: CRT: 590C

ATTY: FELONY DEFENSE COUNSEL,
PROS: JENISON, JACOB L
JUDG: HOWARD, DONNA

1)	POLICE OFF-ASSLT/RESIST & OBST	ST	NOLLE PROSEQUI	CLOS
2)	CONT SUBS-POSS MARIJ 2ND	ST	NOLLE PROSEQUI	CLOS
3)	CSC-3RD DEG (MUL VARIBLS) +CSC-3RD INCEST+	ST	NO CONTEST	CLOS
4)	CSC-3RD DEG (MUL VARIBLS)	ST	NOLLE PROSEQUI	CLOS
5)	SUPP4	ST	NOLLE PROSEQUI	CLOS

11132015	DC CASE TYPE ASSIGNED		FY-590D
	RISK LEVEL		5
	ARRAIGNMENT HELD		
	AS TO COUNT		
	1,2		
	JUDGE/MAGISTRATE		BRUCE, GARY J
	DEFENDANT IN COURT		
	CT REPORTER/RECORDER		2015192DCR
	DEFNDT ADV OF CONTENT OF C&W		
	RIGHTS READ TO DEFENDANT		
2	DEF PLEAD NOT GUILTY		
	DEF DEMANDS TRIAL BY JURY		
X	DEF PETITIONED F/CT APPT ATTY		
	COURT APPOINTS DEFENSE FIRM		BRUCE, GARY J
	JUDGE ASSIGNED		PASULA, ANGELA M
	SCHED PRE EXAM	PE 11202015	0830 PASULA, ANGELA M
	SCHED EXAM	EX 11252015	0830 PASULA, ANGELA M
	COMMITTED IN LIEU OF BOND		
	BOND SET AT	7500.00	SURETY/CASH BOND
	AS TO COUNT		
	1,2		
	SC 7500.00		
	TETHER BOND COND	7500.00	SURETY/CASH BOND
	NO ALCOHOL/NO BARS		
	AVOID ALL CONTROLLED SUBSTANCE		
	SUBMIT TO ALC/DRUG TEST		
	CURFEW		
	24/7 UNLESS WORKING		
	NOT THREATEN, INTIMIDATE OR ABUSE		
	NO WEAPONS		
	GPS TETHER		
11192015	AMENDED COMPLAINT/WARRANT FILED		
11232015	ARRAIGNMENT HELD		
	AS TO COUNT		
	1,2,3,4		
	JUDGE/MAGISTRATE		COTTER, ARTHUR J
	DEFENDANT IN COURT		
	CT REPORTER/RECORDER		2015193DCR
	DEFNDT ADV OF CONTENT OF C&W		
	RIGHTS READ TO DEFENDANT		
1	DEF DEMANDS PRELIMINARY EXAM		
2	DEF DEMANDS PRELIMINARY EXAM		
3	DEF DEMANDS PRELIMINARY EXAM		
4	DEF DEMANDS PRELIMINARY EXAM		
X	DEF PETITIONED F/CT APPT ATTY		
	COURT APPOINTS DEFENSE FIRM		COTTER, ARTHUR J
	SCHED PRE EXAM	PE 12022015	0830 HOWARD, DONNA

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MOSS, JOHN ANTONYA

11232015	X	SCHED EXAM	EX 12082015	0830	HOWARD, DONNA
		COMMITTED IN LIEU OF BOND			
		BOND SET AT	25000.00		SURETY/CASH BOND
		AS TO COUNT			
		1,2,3,4			
		SC 25000.00			
		TETHER BOND COND	25000.00		SURETY/CASH BOND
		NO ALCOHOL/NO BARS			
		AVOID ALL CONTROLLED SUBSTANCE			
		SUBMIT TO ALC/DRUG TEST			
		DEF ORD N/CONT W/VICTIMS			
		JAMIRA RAISHA MOSS			
		NOTIFY LEIN BOND CONDITION			
		CURFEW			
		24/7 EXCEPT FOR COURT			
		NOT THREATEN, INTIMIDATE OR ABUSE			
		NO WEAPONS			
		GPS TETHER			
		SCHEDULE CANCELLED	EX 11252015	0830	PASULA, ANGELA M
12022015		PRE EXAM CONFERENCE CALLED			
		AS TO COUNT			
		1,2,3,4			
		JUDGE/MAGISTRATE			HOWARD, DONNA
		PROSECUTING ATTORNEY PRESENT			JENISON, JACOB L
		DEFN W/ATTY IN COURT			FULLER, RODNEY C
		CT REPORTER/RECORDER			2015191DCR
		DEFNDT ADV OF CONTENT OF C&W			
		RIGHTS READ TO DEFENDANT			
		PER DAP SET FOR 12/30/15			
		REQUEST FOR BOND REDUCTION DENIED			
	1	DEF WAIVES RT PRELIM 21 DAYS			
	2	DEF WAIVES RT PRELIM 21 DAYS			
	3	DEF WAIVES RT PRELIM 21 DAYS			
	4	DEF WAIVES RT PRELIM 21 DAYS			
	X	CASE ADJOURNED B/COURT			
		BOND CONTINUED			
		SCHEDULE ADJOURNED	PE 12022015	0830	HOWARD, DONNA
		DELAY IN CRIM PROCEED			OTHER (SPECIFY)
		SCHEDULE ADJOURNED	EX 12082015	0830	HOWARD, DONNA
		DELAY IN CRIM PROCEED			OTHER (SPECIFY)
		SCHED PRE EXAM	PE 12302015	0830	HOWARD, DONNA
		SCHED EXAM	EX 01052016	0830	HOWARD, DONNA
		DEF WAIVES RT PRELIM 21 DAYS			
01052016		JUDGE ASSIGNED			WILEY, DENNIS M
		PRELIMINARY EXAM CALLED			
		AS TO COUNT			
		1,2,3,4			
		JUDGE/MAGISTRATE			HOWARD, DONNA
		PROSECUTING ATTORNEY PRESENT			JENISON, JACOB L
		DEFN W/ATTY IN COURT			FULLER, RODNEY C
		CT REPORTER/RECORDER			2016191DCR
		DEFNDT ADV OF CONTENT OF C&W			
		RIGHTS READ TO DEFENDANT			
		DEF ADVISED OF RIGHTS (FELONY CASE)			
	1	DEF WAIVED PRELIMINARY EXAM			
	2	DEF WAIVED PRELIMINARY EXAM			
	3	DEF WAIVED PRELIMINARY EXAM			
	4	DEF WAIVED PRELIMINARY EXAM			
	X	DEFN B/O CIRCUIT CT			
		AS CHARGED			
		CASE SUFFIX (TYPE) CHGD			FH
		JUDGE ASSIGNED			WILEY, DENNIS M
		BOND CONTINUED			
		RECD RET F/DISTRICT CT			
		DEFN ENTRY PLEA N/GUILTY			
		MITTIMUS FILED			
		CRIMINAL SCHEDUL ORDER FILED			
		CERTIFICATE OF SERVICE			
01062016		PROSECUTING ATTORNEY ASSIGNED			JENISON, JACOB L
01072016		SCHED CASE CONFERENCE	CC 02052016	0830	HOWARD, DONNA

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MOSS, JOHN ANTONYA

01072016	X	SCHED STATUS CONFERENCE	ST 03072016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 03152016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 03162016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 03172016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 03182016	0830	HOWARD, DONNA
01112016		AMENDED INFORMATION FILED			
		WITNESS LIST			
		PROOF OF SERVICE FILED			
01252016		MOTION TO			
01252016		/FOR DISCOVERY/INSPECTION			
03022016		RESET STATUS CONFERENCE	ST 05232016	0830	HOWARD, DONNA
		DELAY IN CRIM PROCEED			OTHER (SPECIFY)
		RESET JURY TRIAL	JT 06022016	0830	HOWARD, DONNA
		DELAY IN CRIM PROCEED			OTHER (SPECIFY)
		RESET JURY TRIAL	JT 06032016	0830	HOWARD, DONNA
		DELAY IN CRIM PROCEED			OTHER (SPECIFY)
		SCHEDULE CANCELLED	JT 03172016	0830	HOWARD, DONNA
		SCHEDULE CANCELLED	JT 03182016	0830	HOWARD, DONNA
		CRIMINAL SCHEDUL ORDER FILED			
		AMENDED			
		CERTIFICATE OF SERVICE			
04292016		AMENDED/ADDITIONAL WITNESS LIST			
05112016		AMENDED/ADDITIONAL WITNESS LIST.			
05192016		JUDGE ASSIGNED			HOWARD, DONNA
05192016		JUDGE WILEY AND JUDGE HOWARD TALKED			
		AND JUDGE WILEY HAS OK'D CHANGING			
		JUDGE ASSIGNED TO JUDGE HOWARD.			
05232016		STATUS CONF CALLED			
		JUDGE/MAGISTRATE			HOWARD, DONNA
		PROSECUTING ATTORNEY PRESENT			JENISON, JACOB L
		DEFENSE ATTORNEY			FULLER, RODNEY C
		DEFENDANT IN COURT			
		CT REPORTER/RECORDER			2016194DCR
		DEF ADVISED OF RIGHTS (FELONY CASE)			
		ADJ JURY TRIAL TO NEW DATES			
05262016		SCHED STATUS CONFERENCE	ST 06202016	0830	HOWARD, DONNA
		SCHEDULE CANCELLED	JT 06022016	0830	HOWARD, DONNA
		SCHEDULE CANCELLED	JT 06032016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 06282016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 06292016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 06302016	0830	HOWARD, DONNA
		SCHED JURY TRIAL	JT 07012016	0830	HOWARD, DONNA
06012016		AMENDED/ADDITIONAL WITNESS LIST			
06202016	3	BOND AMENDED TO	20000.00		SURETY/CASH BOND
06202016	3	SC 20000.00			
		REMOVED BOND CONDITION			
		TETHER BOND COND			
		SC 25000.00			
		NEW BOND CONDITION			
		TETHER BOND COND	20000.00		SURETY/CASH BOND
	X	REARRAIGNMENT HELD			
		AS TO COUNT			
		1,2,3,4,5			
		JUDGE/MAGISTRATE			HOWARD, DONNA
		PROSECUTING ATTORNEY PRESENT			JENISON, JACOB L
		DEFENSE ATTORNEY			FULLER, RODNEY C
		DEFENDANT IN COURT			
		CT REPORTER/RECORDER			2016194DCR
		DEF ADVISED OF RIGHTS (FELONY CASE)			
		DEFN PLACED UNDER OATH			
	1	CHARGE DISPOSED AS			NOLLE PROSEQUI
	2	CHARGE DISPOSED AS			NOLLE PROSEQUI
	3	CHARGE DISPOSED AS			NO CONTEST
	4	CHARGE DISPOSED AS			NOLLE PROSEQUI
	5	CHARGE DISPOSED AS			NOLLE PROSEQUI
	X	PLEA AGREEMENT AS FOLLOWS:			
	X	DEF PLEADS NO CONTEST TO CT 3 AND			
		PROS WILL DISMISS CT 1, CT 2, CT 4,			
		AND CT 5 SUPP CHARGE. PROS WILL			
		ALSO RECOMMEND SENTENCING ON THE			

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06202016	X	MIN END OF 72 MONTHS.			
		CT ORDER PRESENT INVEST			
		SCHED PRE-SENTENCE REVIEW	PS 08052016	0100	PROBATION, OFFICER D
		SCHED SENTENCING	SN 08082016	0130	HOWARD, DONNA
		DEF ADVISED OF RIGHTS (FELONY CASE)			
		MITTIMUS FILED			
		ORDER DIRECT POST CONVICTION APP			
06212016		CLOSED BOND	7500.00		SURETY/CASH BOND
		SCHEDULE CANCELLED	JT 06282016	0830	HOWARD, DONNA
		SCHEDULE CANCELLED	JT 06292016	0830	HOWARD, DONNA
		SCHEDULE CANCELLED	JT 06302016	0830	HOWARD, DONNA
		SCHEDULE CANCELLED	JT 07012016	0830	HOWARD, DONNA
06222016		NOLLE PROSEQUI FORM PRINTED			
		INFORMATION FILED			
08082016	3	SENTENCING HELD			
		JUDGE/MAGISTRATE			HOWARD, DONNA
		PROSECUTING ATTORNEY PRESENT			JENISON, JACOB L
		DEFENSE ATTORNEY			FULLER, RODNEY C
		CT REPORTER/RECORDER			2016194DCR
		DEFENDANT IN COURT			
		DEF BEFORE COURT FOR SENTENCING			
		STATE PRISON SOUTHERN MICHIGAN	0072 MONTHS	0015	YEARS
		CREDIT ON MIN. & MAX FOR	0272 DAYS		
		COURT RECOMMENDS			
		STD/AIDS UPDATE NEEDED			
		STATE COSTS	68.00		
		V/R ASSESSMENT ORDER	130.00		
		DEF ADVISED OF RIGHT TO APPEAL			
		SENTENCING INFORMATION REPORT	0058 MONTHS	0114	MONTHS
		INCARCERATION COST IS	116424.00		
		DEF REMANDED SHERIFF CUSTODY			
	X	CLOSED BOND	20000.00		SURETY/CASH BOND
	1	LEIN DATA SENT TO STATE POLICE			
	2	LEIN DATA SENT TO STATE POLICE			
	3	LEIN DATA SENT TO STATE POLICE			
	4	LEIN DATA SENT TO STATE POLICE			
	5	LEIN DATA SENT TO STATE POLICE			
	X	ORDER CANCEL LEIN BOND COND			
		CERTIFICATE OF REMOVAL			
	3	MITTIMUS FILED			
08092016	X	JUDGMENT OF SENTENCE FORM			
		REMIT PRISONER FUNDS FORM PRINTED			
	3	MITTIMUS FILED			
		RESENTENCING HELD			
		JUDGE/MAGISTRATE			HOWARD, DONNA
		PROSECUTING ATTORNEY PRESENT			JENISON, JACOB L
		DEFENSE ATTORNEY			FULLER, RODNEY C
		CT REPORTER/RECORDER			2016194DCR
		DEFENDANT IN COURT			
		DEF BEFORE COURT FOR SENTENCING			
		STATE PRISON SOUTHERN MICHIGAN	0072 MONTHS	0015	YEARS
		CREDIT ON MIN. & MAX FOR	0273 DAYS		
		COURT RECOMMENDS			
		STD/AIDS UPDATE NEEDED			
		STATE COSTS	68.00		
		V/R ASSESSMENT ORDER	130.00		
		DEF ADVISED OF RIGHT TO APPEAL			
		SENTENCING INFORMATION REPORT	0099 MONTHS	0160	MONTHS
		INCARCERATION COST IS	116424.00		
		DEF REMANDED SHERIFF CUSTODY			
08112016	X	JUDGMENT OF SENTENCE FORM			
		REMIT PRISONER FUNDS FORM PRINTED			
		JUDGMENT OF SENTENCE FORM			
		REMIT PRISONER FUNDS FORM PRINTED			
	3	REMIT PRISONER FUNDS FORM FILED			
		JUDGMENT OF SENTENCE FILED			
08122016		JUDGMENT OF SENTENCE FILED			
08162016	X	NOTICE OF APPEAL FILED			
		REQUEST FOR APPOINTMENT ATTY			
		SENT COPY OF APPEAL TO JUDGE			

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09142016	X	ORDER APPOINT APPEAL COUNSEL	
09142016	X	STATE APPELLATE DEFENDER OFFICE 645 GRISWOLD, PENOBSCOT BLDG., SUITE 3300 DETROIT MI 48226 313-256-9833 CERTIFICATE OF MAILING	
09212016		REPORTERS CERTIFICATE FILED REPORTERS CERTIFICATE FILED	
09282016		ORDER APPOINT APPEAL COUNSEL	
09282016		ORDER AMENDED STATE APPELLATE DEFENDER OFFICE 645 GRISWOLD, PENOBSCOT BLDG., SUITE 3300 DETROIT MI 48226 CERTIFICATE OF MAILING	
10042016		FILED TRANSCRIPT OF	
10042016		PLEA ON 06/20/16 REPTERS NOTICE-TRANSCRIPT FILED FILED TRANSCRIPT OF SENTENCE ON 08/08/16 REPTERS NOTICE-TRANSCRIPT FILED	
10132016		REPORTERS CERTIFICATE FILED	
10242016		FILED TRANSCRIPT OF	
10242016		STATUS CONFERENCE 5/23/16 FILED TRANSCRIPT OF RESENTENCE 8/9/16	
10262016		REPTERS NOTICE-TRANSCRIPT FILED	
10262016		AFFIDAVIT OF MAILING REPORTERS CERTIFICATE FILED	
11012016		SENT COPY OF COMPLETE FILE PLUS 2 TRANSCRIPTS (RESENTENCE AND STATUS CONFERENCE) TO: STATE APPELLATE DEFENDER OFFICE 645 GRISWOLD, PENOBSCOT BLDG., SUITE 3300 DETROIT MI 48226 313-256-9833	
02082017		NOTICE OF HEARING & CERTIFICATE OF SERVICE MOTION TO WITHDRAW PLEA OR, ALTERNATIVELY, TO AMEND THE JUDGMENT OF SENTENCE BRIEF IN SUPPORT OF MOTION TO WITHDRAW PLEA OR, ALTERNATIVELY, TO AMEND THE JUDGMENT OF SERVICE DEFENDANT-APPELLANT'S MOTION TO ALLOW LAW STUDENT TO APPEAR ON HIS BEHALF	
02152017		SCHED MOTION CRIMINAL SCHEDUL ORDER FILED CERTIFICATE OF SERVICE	MT 03312017 0830 HOWARD, DONNA
03172017		PEOPLE'S ANSWER TO MOTION TO WITHDRAW PLEA OR TO AMEND THE JUDGMENT OF SENTENCE, PEOPLE'S BRIEF IN SUPPORT OF ANSWER TO MOTION TO WITHDRAW PLEA OR TO AMEND THE JUDGMENT OF SENTENCE, AND PROOF OF SERVICE	
03312017		MOTION TO WITHDRAW PLEA JUDGE/MAGISTRATE PROSECUTING ATTORNEY PRESENT DEFENSE ATTORNEY DEFENDANT IN COURT CT REPORTER/RECORDER DEF ADVISED OF RIGHTS (FELONY CASE) COURT HEARD FROM PARTIES AND TAKES THIS UNDER ADVISEMENT, HER WRITTEN OPINION TO BE ENTERED.	HOWARD, DONNA PIERANGELI, STEVE SMITH, CHRISTOPHER M 2017194DCR

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MOSS, JOHN ANTONYA

05302017	X	OPINION & ORDER	
05302017	X	ON DEFENDANT'S MOTION FOR WITHDRAWAL OF PLEA OR CORRECTION OF JUDGMENT OF SENTENCE AND PROOF OF SERVICE	
	3	AMENDED ORDER	
		JUDGE/MAGISTRATE	HOWARD, DONNA
		COURT RECOMMENDS STD/AIDS UPDATE NEEDED MONETARY OBLIGATIONS TO BE PAID PRIOR TO RELEASE FROM PAROLE	
06142017	X	DEFENDANT'S OBJECTION TO REDUCTION OF JAIL CREDIT & CERTIFICATE OF SERVICE	
06212017		STIP AND ORDER	
06212017		REGARDING CALCULATION OF JAIL CREDIT	
06292017		ORDER	
06292017		CLAIM OF APPEAL AMENDED-ADDITIONAL TRANSCRIPT OF 3-31-17 & CERTIFICATE OF MAILING	
07062017		JUDGMENT OF SENTENCE FORM REMIT PRISONER FUNDS FORM PRINTED	
07102017	3	AMENDED JUDGMENT	
07122017	X	REPORTERS CERTIFICATE FILED	
07282017		REPTERS NOTICE-TRANSCRIPT FILED FILED TRANSCRIPT OF VIDEO PROCEEDINGS - MOTION TO WITHDRAW PLEA OR ALTERNATIVELY AMEND THE JUDGMENT OF SENTENCE 3/31/2017 MAILED TRANSCRIPT COPY TO ATTORNEY	
08242017		ORDER FROM APPEAL COURT (STATE)	
08242017		DELAYED APPLICATION FOR LEAVE TO APPEAL IS DENIED APPEAL DENIED CASE CLOSED OWING	
	1	LEIN DATA SENT TO STATE POLICE	
	2	LEIN DATA SENT TO STATE POLICE	
	3	LEIN DATA SENT TO STATE POLICE	
	4	LEIN DATA SENT TO STATE POLICE	
	5	LEIN DATA SENT TO STATE POLICE	
10312017	X	RECORD PROD CHECKLIST FOR APPEAL CT	
10312017	X	COMPLETE FILE & 5 TRANSCRIPTS SENT SUPREME COURT CLERK'S OFFICE RECORDS DEPT. 925 W. OTTAWA ST., 4TH FLOOR LANSING, MI 48915 (STATUS 5/23/16, PLEA 6/20/16, SENTENCE 8/8/16, RESENTENCE 8/9/16, VIDEO 3/31/17)	
05162018		ORDER FROM SUPREME COURT	
05162018		APPLICATION FOR LEAVE TO APPEAL THE 8/21/2017 ORDER OF THE COURT OF APPEALS IS CONSIDERED. WE DIRECT THE CLERK TO SCHEDULE ORAL ARGUMENT ON WHETHER TO GRANT THE APPLICATION OR TAKE OTHER ACTION. THE APPELLANT SHALL FILE A SUPPLEMENTAL BRIEF WITHIN 42 DAYS OF THIS ORDER.	
07062018		ORDER FROM SUPREME COURT	
07062018		MOTION OF DEFENDANT-APPELLANT TO EXTEND THE TIME FOR FILING SUPPLEMENTAL BRIEF IS GRANTED (TIMELY IF SUBMITTED BY 7/27/2018)	
08082018		ORDER FROM SUPREME COURT	
08082018		SECOND MOTION TO EXTEND TIME FOR FILING SUPPLEMENTAL BRIEF IS GRANTED. IT WILL BE ACCEPTED AS	

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MOSS, JOHN ANTONYA

08082018	X	TIMELY IF SUBMITTED ON OR BEFORE 8/26/2018
09142018		ORDER FROM SUPREME COURT
09142018		THIRD MOTION TO EXTEND TIME FOR FILING SUPPLEMENTAL BRIEF IS GRANTED (FILE BY 9/23/2018)

*** END OF DATA ***

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MSC Order After Oral Argument on Application, 4-19-19

Order

Michigan Supreme Court
Lansing, Michigan

April 19, 2019

156616

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 156616
COA: 338877
Berrien CC: 2015-005091-FH

JOHN ANTONYA MOSS,
Defendant-Appellant.

_____/

On March 6, 2019, the Court heard oral argument on the application for leave to appeal the August 21, 2017 order of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals shall 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).

We do not retain jurisdiction.

t0416

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

April 19, 2019

Clerk

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COA Opinion After Remand, 9-10-20

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTONYA MOSS,

Defendant-Appellant.

FOR PUBLICATION
September 10, 2020
9:00 a.m.

No. 338877
Berrien Circuit Court
LC No. 2015-005091-FH

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

SHAPIRO, P.J.

Defendant pleaded no contest to third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(d) (related by blood or affinity and sexual penetration occurs) against his adoptive sister (complainant). After being sentenced to 6 to 15 years' imprisonment, defendant later moved to withdraw his plea on the grounds that it lacked an adequate factual basis, arguing that although he and the complainant shared an adoptive parent, they were not related "by blood or affinity." The trial court denied the motion, and we denied defendant's application for leave to appeal. Defendant applied for leave to appeal in the Michigan Supreme Court, which, after hearing argument on the application, remanded the case to us for consideration as on leave granted. For the reasons stated in this opinion, we affirm the trial court's denial of defendant's motion to withdraw his plea.

I. FACTS & PROCEDURAL HISTORY

Defendant and complainant were legally adopted out of the foster care system by a single woman. At the time of the offense that occurred in the family home, defendant was 25 years old and complainant was 17 years old. It is unclear from the record whether defendant was living at the family home or was just visiting. In any event, defendant told the police that he climbed through the bathroom window at 5:00 a.m. because no one answered the door. It is undisputed that defendant then went to complainant's bedroom and sexually penetrated her. Complainant went to the hospital and reported that she had been sexually assaulted by her brother; defendant maintains that the sex was consensual.

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Defendant was arrested and charged, as a habitual offender, with resisting and obstructing an officer, possession of marijuana (second offense), and two counts of CSC-III (related by blood or affinity, and using force or coercion contrary to MCL 750.520d(1)(b)). The prosecution agreed to dismiss the charges of resisting and obstructing, possession of marijuana, the CSC-III count involving force or coercion, and the habitual-offender status in exchange for defendant entering a no-contest plea to the CSC-III charge based on relation by blood or affinity. The prosecution also agreed to recommend a minimum sentence of 6 years' imprisonment. The trial court accepted defendant's plea on the basis that he was related to complainant by affinity.

After sentencing, defendant was appointed appellate counsel and moved to withdraw his no-contest plea. He argued that there was no factual basis supporting the CSC-III conviction because adoptive siblings are not related by blood or affinity, relying primarily on *People v Zajaczkowski*, 493 Mich 6; 825 NW2d 554 (2012). Defendant also asserted that his trial counsel was ineffective for advising him that he could be found guilty of CSC-III even if the jury agreed that the encounter with complainant was consensual. In a written opinion and order, the trial court determined that adoptive siblings are related by affinity and denied defendant's motion to withdraw. As noted, we denied leave to appeal and so now consider the issue for the first time.[1]

In remanding the case to this Court, the Supreme Court directed us 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; 113 NW 317 (1907); *People v Armstrong*, 212 Mich App 121; 536 NW2d 789 (1995); *People v Denmark*, 74 Mich App 402; 254 NW2d 61 (1977). [*People v Moss*, 503 Mich 1009 (2019).]

Having fully reviewed the issue consistent with the Supreme Court's order, we hold that defendant and complainant are effectively related by blood and so there was an adequate factual basis for defendant's no-contest plea.

[1] Generally, we review for an abuse of discretion a trial court's denial of a defendant's motion to withdraw a plea. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). However, whether there was a sufficient factual basis for defendant's plea turns solely on statutory interpretation, which is a question of law reviewed de novo. *People v Willams*, 491 Mich 164, 169; 814 NW2d 270 (2012). The goal of statutory interpretation is to discern and give effect to the Legislature's intent. *People v Flick*, 487 Mich 1, 10; 790 NW2d 295 (2010).

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II. ANALYSIS

A. BLOOD

Multiple CSC offenses include as an element or alternate element of the offense that the defendant was related to the complainant "by blood or affinity" to either the third or fourth degree. See MCL 750.520b–MCL 750.520e. In this case, defendant pleaded no contest to CSC-III contrary to MCL 750.520d(1)(d), which prohibits a person from engaging in sexual penetration with another person who "is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter."

Section 60 of the Michigan Adoption Code, MCL 710.21 *et seq*., is "commonly referred to as the effect-of-adoption statute." *Jones v Slick*, 242 Mich App 715, 736; 619 NW2d 733 (2000). In pertinent part, MCL 710.60 provides:

> (1) After the entry of an order of adoption, if the adoptee's name is changed, the adoptee shall be known and called by the new name. The person or persons adopting the adoptee then become the parent or parents of the adoptee under the law *as though the adopted person had been born to the adopting parents* and are liable for all the duties and entitled to all the rights of parents.
>
> (2) 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, . . . 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 . . . . [Emphasis Added.]

We have explained that

> [t]he effect of [MCL 710.60(1)] is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child. The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption. [*In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998).]

By virtue of MCL 710.60, "it is as though [the adopted children] had been born to [the adoptive parent.]" *Wilson v King*, 298 Mich App 378, 382; 827 NW2d 203 (2012).

It is clear therefore that, under the Adoption Code, both defendant and complainant are treated as the natural progeny of their adoptive mother. The former biological ties of defendant and complainant were each severed by adoption and a completely new relationship was substituted. Given that the law treats both defendant and complainant as biological children of the adoptive mother, it follows that a constructive biological relationship exists between them as well. Each adopted child is placed in the lineage of the adoptive parent, meaning that, by law, the

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children share a common ancestor. Accordingly, we conclude that siblings by adoption are effectively related by blood as that term is used in MCL 750.520(d)(1)(d).

We reject defendant's argument that *Zajaczkowski* compels a different result. First, if that was true, it is difficult to see why the Supreme Court would remand the case to us rather than resolving the case by order. Second, the facts in *Zajaczkowski* presented a very different question. In that case, there was neither a biological relationship nor a definitive legal relationship between the defendant and the complainant. The defendant was born during the marriage of his mother to the complainant's father. *Zajaczkowski*, 493 Mich at 9. Although the complainant's father was identified as defendant's legal father in the divorce judgment, a DNA test later established that the complainant's father was not the defendant's biological father. *Id*. In our review of the case, we concluded that MCL 552.29's presumption of legitimacy to all children born to a marriage controlled and noted that the defendant did not have standing to rebut that presumption. *Id*. at 11-12. The Supreme Court rejected that view, finding that "nothing in the language of MCL 750.520b(1)(b)(*ii*) indicates that a relationship by blood can be established through this presumption." *Id*. at 14. Further, the Court "decline[d] to conclude as a matter of law that defendant shares a common ancestor with the victim and is thereby related to the victim by blood merely because defendant may be considered the issue of his mother's marriage to the victim's father for legitimacy purposes." *Id*. at 15.

The Supreme Court made clear that the presumption of legitimacy under MCL 552.29 is just that: a presumption that can be rebutted. The presumption is not conclusive proof of a biological relationship, although "in the absence of a determinative DNA test, the prosecution may use evidence that a person was born during a marriage as evidence that the defendant is related to the victim by blood . . . ." *Zajaczkowski*, 493 Mich at 15 n 20. But in cases where the lack of a biological relationship is established by a DNA test, as in *Zajaczkowski*, the presumption of legitimacy carries no weight for purposes of showing a blood relationship under the CSC statutes. By contrast, the familial relationship established by adoption is *conclusive* rather than presumptive. The Adoption Code creates an unrebuttable familial relationship between children adopted into the same family. By law, adoptive children effectively become the biological children of the adoptive parent, and the necessary implication is that the constructive biological relationship extends between adoptive siblings.

Defendant specifically relies on footnote 18 in *Zajaczkowski*, which can be read to suggest that relations arising by adoption do not constitute blood relationships for purposes of MCL 750.520b–MCL 750.520e. See *Zajaczkowski*, 493 Mich at 14 n 18. However, as noted, *Zajaczkowski* did not involve an adopted family member and there was no argument made regarding the effect of the Adoption Code. Given that, we view footnote 18 as dicta, at least until such time as the Supreme Court directs us otherwise. See *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999) ("It is a well-settled rule that obiter dicta[, i.e., a statement not necessary to the determination of the case,] lacks the force of an adjudication and is not binding under the principle of stare decisis.").

Further, we think it is highly unlikely that the Legislature intended to treat adoptive siblings different than biological siblings for purposes of the CSC statutes. We reached a similar conclusion in *Armstrong*, 212 Mich App 121, in which we were tasked with deciding whether stepsiblings were related by affinity under the CSC statutes. We reasoned in part:

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> In looking to the object of the second-degree criminal sexual conduct statute and the harm it is designed to remedy, and in applying a reasonable construction that best accomplishes the purpose of that statute in this case, we are persuaded that the term "affinity" encompasses the relation between a stepbrother and a stepsister. If the term were not so construed, then the first- and second-degree criminal sexual conduct statutes would impose a penalty more severe where the perpetrator sexually assaulted a spouse's brother or sister than where the perpetrator sexually assaulted a stepbrother or stepsister. In this time of divorce, remarriage, and extended families, we see no reason why the Legislature would give enhanced protection to a victim related to a perpetrator as an in-law but not to a victim related to a perpetrator as a stepbrother or stepsister. Thus, defining the term "affinity" to encompass the relation between a stepbrother and a stepsister avoids a construction of the second-degree criminal sexual conduct statute that would yield absurd results. [*Id*. at 128-129.]

We find this reasoning applicable to the case at hand. That is, we can discern no reason why the Legislature would have intended to afford greater protection to persons committing sex crimes against adoptive rather than biological siblings. Siblings, whether adoptive or biological, are the type of potential victims that the statute aims to protect because there exists special relationship between them that is vulnerable to exploitation. See *id*. at 128 ("In fashioning the criminal sexual conduct statute, MCL 750.520a *et seq*. . . .; the Legislature intended to protect young persons from sexual contact by persons with whom they have a special relationship, such as relatives.").[2]

In sum, because adoptive siblings are effectively related by blood through the Adoption Code, there was a sufficient factual basis supporting defendant's no-contest plea to CSC-III on the basis of relation by blood or affinity, and the trial court did not err by denying defendant's motion to withdraw his plea.

B. AFFINITY

Given our holding that there is effectively a blood relationship in this case, it is not necessary that we decide whether a relationship by affinity also exists. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues."). However, considering the Supreme Court's remand order, we will address the issue.

In 1907, the Supreme Court in *Bliss*, 149 Mich 601, defined "affinity" in the context of judicial disqualification as

[2] Defendant argues that MCL 750.520d(1)(d) is not restricted by age, and so the purpose of that statute should not be construed as the protection of young people. However, we are construing a relation by blood as that term is used in MCL 750.520b-MCL 750.520e, which includes provisions that are expressly aimed at protecting minors and other vulnerable persons from sexual contact from relatives.

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> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all blood relatives of the husband.

Both this Court and the Supreme Court have quoted the *Bliss* definition with approval in CSC cases. See *Denmark*, 74 Mich App at 408; *Zajaczkowski*, 493 Mich at 13-14.

In *Armstrong*, 212 Mich App at 126, however, this Court interpreted the term anew, determining that the *Bliss* definition was not controlling for purposes of "whether the Legislature intended the term 'affinity' to encompass stepbrothers and stepsisters" in the context of applying the CSC statutes. *Armstrong*, 212 Mich App at 126. In holding that stepsiblings were related by affinity, this Court reasoned in part:

> The term "affinity" is "neither an unusual nor esoteric word; nor does that criminal sexual conduct statute use the term in an uncommon or extraordinary context." *Denmark*, [74 Mich App at 408]. *Random House College Dictionary* (rev ed) defines the term "affinity" as a "relationship by marriage or by ties other than those of blood." [*People v Barjas*, 198 Mich App 551, 555; 499 NW2d 396 (1993)]; see also MCL § 8.3a . . . . The common and ordinary meaning of affinity is marriage. *State v CH*, 421 So 2d 62, 63 (Fla App, 1982). The term "step" is defined as "a prefix used in kinship terms denoting members of a family related by the remarriage of a parent and not by blood." *Random House College Dictionary* (rev ed). Thus, pursuant to the rules of statutory construction, it would appear that defendant and the victim were related by affinity because they were family members related by marriage. [*Id*. at 127-128.]

In this case, the trial court relied on the lay dictionary definition quoted in *Armstrong*, i.e., that affinity extends to a relationship by marriage *or by ties other than those of blood*. While this single, broad definition may support extending the term affinity to relationships beyond those arising from marriage, *Armstrong* nonetheless concluded that stepsiblings were related by affinity "because they were family members related *by marriage*." *Id*. at 128 (emphasis added). Thus, regardless of the various definitions, affinity has always been understood so as to exist via a marriage, and we are not aware of any published case holding to the contrary. Here, the relationship of the two adopted children did not arise from a marriage and so it is not a relationship by affinity.

C. EFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues that his trial counsel was ineffective for advising him that he could be convicted of CSC-III even if the jury agreed that the sexual encounter was consensual.[3]

[3] Because the trial court did not hold an evidentiary hearing, our review of his ineffective assistance of counsel claim is limited to errors apparent on the record. See *People v Payne*, 285 Mich App

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However, because we conclude that defendant was effectively related to his adoptive sister by blood, defendant could be convicted under MCL 750.520d(1)(d), which does not require the use of force or coercion. Accordingly, trial counsel's advice was not deficient and defendant's claim of ineffective assistance of counsel is without merit.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Anica Letica

181, 188; 774 NW2d 714. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 242 Mich App 656, 659; 620 NW2d 19 (2000).

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COA Docket Entries

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Case Search

Case Docket Number Search Results - 338877

Appellate Docket Sheet
COA Case Number: 338877
MSC Case Number: 162208
PEOPLE OF MI V JOHN ANTONYA MOSS

1	PEOPLE OF MI Oral Argument: Y Timely: Y	PL-AE	PRS	(67320) **PIERANGELI STEVEN**
2	MOSS JOHN ANTONYA Oral Argument: Y Timely: Y	DF-AT	SAD	(67095) **PAGAC CHRISTINE A**

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application
Case Flags: Guilty Plea; Proposal B Appeal

06/20/2017 1 Delayed App for Leave - Criminal
Proof of Service Date: 06/20/2017
Register of Actions: Y
Answer Due: 07/11/2017
Fee Code: PI
Attorney: 70189 - SMITH CHRISTOPHER M

08/12/2016 2 Order Appealed From
From: BERRIEN CIRCUIT COURT
Case Number: 2015-005091-FH
Trial Court Judge: 57635 HOWARD DONNA B
Nature of Case:
CSC-3

06/20/2017 3 Transcript Filed By Party
Date: 06/20/2017
Filed By Attorney: 70189 - SMITH CHRISTOPHER M
Hearings:
06/20/2016 Plea
08/08/2016 Sentence
08/09/2016 Resentence
Comments: Efiled with application and linked to event 1

06/20/2017 4 Presentence Investigation Report or Other Confidential Material
Date: 06/20/2017
For Party: 2 MOSS JOHN ANTONYA DF-AT
Attorney: 70189 - SMITH CHRISTOPHER M

07/05/2017 5 Steno Certificate - Tr Request Received
Date: 06/29/2017
Timely: Y
Reporter: 7711 - WALLS BRENDA S
Hearings:
03/31/2017

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07/27/2017 6 Notice Of Filing Transcript
Date: 07/26/2017
Reporter: 7711 - WALLS BRENDA S
Comments: complete per steno

08/04/2017 7 Transcript Filed By Party
Date: 08/04/2017
Timely: Y
Filed By Attorney: 70189 - SMITH CHRISTOPHER M
Hearings:
03/31/2017 Mot Hrg

08/15/2017 8 Submitted on Motion Docket
Event: 1 Delayed App for Leave - Criminal
District: D
Item #: 7

08/21/2017 9 Order: Application - Deny - Delayed App for Leave
View document in PDF format
Event: 1 Delayed App for Leave - Criminal
Panel: MJT,KFK,TCC
Attorney: 70189 - SMITH CHRISTOPHER M

10/11/2017 10 SCt: Application for Leave to SCt
Supreme Court No: 156616
Answer Due: 11/08/2017
Fee: State
For Party: 2
Attorney: 70189 - SMITH CHRISTOPHER M

10/20/2017 11 Supreme Court - File Sent To
File Location: Z
Comments: sc#156616

10/20/2017 12 SCt: COA File - Received

11/01/2017 13 SCt: Trial Court Record Received
5 tr; 1 files

03/12/2018 16 SCt: Answer - SCt Application/Complaint
Filing Date: 03/12/2018
For Party: 1 PEOPLE OF MI PL-AE
Filed By Attorney: 49413 - MEAD AARON J

05/16/2018 18 SCt Order: MOAA -Oral Argument on Lv Appl
View document in PDF format
Comments: Sequential brf'g. Invited AC=CDAM, PAAM.

06/29/2018 19 SCt Motion: Housekeeping
Party: 2
Filed by Attorney: 67095 - PAGAC CHRISTINE A
Comments: Motion to extend time to 7-27-18 to file AT Supp Brf

07/06/2018 20 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant motion to extend time for filing DFAT supp brf to 7/27/18.

08/01/2018 21 SCt Motion: Housekeeping
Party: 2
Filed by Attorney: 67095 - PAGAC CHRISTINE A
Comments: 2nd motion to extend time to 8-26-18 to file AT Supplemental Brief

RECEIVED by MSC 8/30/2021 10:44:00 AM

08/08/2018 22 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant motion of DFAT to extend time for filing supp brf to 8/26/18.

09/06/2018 23 SCt Motion: Housekeeping
Party: 2
Filed by Attorney: 67095 - PAGAC CHRISTINE A
Comments: Motion to extend time to 9-23-2018 to file AT supplemental brief

09/14/2018 24 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant DFAT motion to extend time for filing supp brf to 9-24-18.

09/24/2018 25 SCt: MOAA - AT supp'l brf
Filing Date: 09/24/2018
For Party: 2 MOSS JOHN ANTONYA DF-AT
Filed By Attorney: 67095 - PAGAC CHRISTINE A
Timely: Y

10/12/2018 26 SCt Motion: Housekeeping
Party: 1
Filed by Attorney
Comments: Motion to extend time for filing PLAE supp brf to 11-14-18.

10/19/2018 27 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant PLAE motion to extend time for filing its supp brf to 11-14-18.

10/26/2018 28 SCt: Miscellaneous Filing
Filing Date: 10/26/2018
For Party: 1 PEOPLE OF MI PL-AE
Filed By Attorney: 1111 - BERRIEN COUNTY PROSECUTOR
Comments: Resolution of invoice for event #26 (10-12-2018 motion).

11/14/2018 29 SCt: MOAA - AE supp'l brf
Filing Date: 11/14/2018
For Party: 1 PEOPLE OF MI PL-AE
Filed By Attorney: 49413 - MEAD AARON J

01/22/2019 30 Oral Arguments Scheduled
Proof Of Service Date: 01/22/2019
Comments: MOAA March 2019.

02/22/2019 31 Correspondence Sent
Proof Of Service Date: 02/22/2019
Comments: Clk ltr to attys re addressing additional issue at OA.

03/01/2019 32 SCt: Supplement
Filing Date: 03/01/2019
For Party: 2 MOSS JOHN ANTONYA DF-AT
Filed By Attorney: 67095 - PAGAC CHRISTINE A
Comments: re additional issue

03/01/2019 33 SCt: Supplement
Filing Date: 03/01/2019
For Party: 2 MOSS JOHN ANTONYA DF-AT
Filed By Attorney: 67095 - PAGAC CHRISTINE A
Comments: Amended supplement addressing additional issue.

03/06/2019 35 Oral Arguments Held
Proof Of Service Date: 03/06/2019

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Comments: MOAA - March case call.

04/19/2019 36 SCt Order: Remand as Leave Granted
View document in PDF format

04/25/2019 37 Record Filed
File Location:
Comments: lcf;5 tr--SC Remand

04/25/2019 38 Supreme Court - File Ret`d By - Re-Open as on Leave Granted
File Location:

04/25/2019 40 Correspondence Sent
For Party: 2 MOSS JOHN ANTONYA DF-AT
Attorney: 67095 - PAGAC CHRISTINE A
Comments: Letter advising COA file reopened. AT's brief due June 14, 2019.

06/14/2019 45 Motion: Extend Time - Appellant
Proof of Service Date: 06/14/2019
Filed By Attorney: 67095 - PAGAC CHRISTINE A
For Party: 2 MOSS JOHN ANTONYA DF-AT
Fee Code: PI
Requested Extension: 08/09/2019
Answer Due: 06/21/2019

06/25/2019 46 Submitted on Administrative Motion Docket
Event: 45 Extend Time - Appellant
District: G

07/01/2019 47 Order: Extend Time - Appellant Brief - Grant
View document in PDF format
Event: 45 Extend Time - Appellant
Panel: CMM
Attorney: 67095 - PAGAC CHRISTINE A
Extension Date: 08/09/2019

08/13/2019 48 Invol Dismissal Warning - No Appellant Brief
Attorney: 67095 - PAGAC CHRISTINE A
Due Date: 09/03/2019

09/03/2019 49 Brief: Appellant
Proof of Service Date: 09/03/2019
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 67095 - PAGAC CHRISTINE A
For Party: 2 MOSS JOHN ANTONYA DF-AT

09/05/2019 50 Oral Arg Advise Ltr Sent
Attorney: 67095 - PAGAC CHRISTINE A

10/09/2019 51 Noticed
Record: FILED
Mail Date: 10/10/2019

10/10/2019 52 Stips: Extend Time - AE Brief
Extend Until: 11/05/2019
Filed By Attorney: 49413 - MEAD AARON J
For Party: 1 PEOPLE OF MI PL-AE
P/S Date: 10/10/2019

11/22/2019 54 Motion: Extend Time - Appellee

RECEIVED by MSC 8/30/2021 10:44:00 AM

Proof of Service Date: 11/22/2019
Filed By Attorney: 49413 - MEAD AARON J
For Party: 1 PEOPLE OF MI PL-AE
Requested Extension: 12/03/2019
Answer Due: 11/29/2019
Comments: Bf-AE filed w/motion

11/22/2019 60 Brief: Appellee
Proof of Service Date: 11/22/2019
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 67320 - PIERANGELI STEVEN
For Party: 1 PEOPLE OF MI PL-AE

11/25/2019 55 Defective Filing Letter
Event: 54
Defect:
Fees: $100 Motion - Cured

11/27/2019 56 Fee - Motion - Defect Cured
For Party: 1 PEOPLE OF MI PL-AE
Attorney: 49413 - MEAD AARON J

11/27/2019 57 Defect Cured
Event: 54
Defect:
Fees: $100 Motion - Cured

12/03/2019 58 Submitted on Administrative Motion Docket
Event: 54 Extend Time - Appellee
District: G

12/06/2019 59 Order: Extend Time - Appellee Brief - Grant
View document in PDF format
Event: 54 Extend Time - Appellee
Panel: JMB
Attorney: 67320 - PIERANGELI STEVEN
Extension Date: 11/22/2019
Comments: The brief rec'd 11/22/19 is considered as timely filed.

07/15/2020 72 Motion: Oral Argument on Case Call
Proof of Service Date: 07/15/2020
Filed By Attorney: 67095 - PAGAC CHRISTINE A
For Party: 2 MOSS JOHN ANTONYA DF-AT
Fee Code: PI
Answer Due: 07/22/2020

07/15/2020 73 Submitted on Motion Docket Affecting Call
Event: 72 Oral Argument on Case Call
District: G

07/21/2020 74 Email Contact
Comments: Case Call Oral Argument E-mail Notice for August 7, 2020 at 10:00 a.m.

07/23/2020 75 Order: Oral Argument - Grant
View document in PDF format
Event: 72 Oral Argument on Case Call
Panel: DBS,DAS,AL
Attorney: 67095 - PAGAC CHRISTINE A

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08/07/2020 69 Submitted on Case Call
District: G
Item #: 13
Panel: DBS,DAS,AL

08/07/2020 76 Oral Argument Audio
Listen to audio in MP3 format

09/10/2020 81 Opinion - Authored - Published
View document in PDF format
Pages: 7
Panel: DBS,DAS,AL
Author: DBS
Result: L/Ct Judgment/Order Affirmed

11/05/2020 82 SCt: Application for Leave to SCt
Supreme Court No: 162208
Answer Due: 12/03/2020
Fee: Indigent Person
For Party: 2
Attorney: 67095 - PAGAC CHRISTINE A
Comments: Prior MSC No. 156616.

01/27/2021 83 Supreme Court - Record Sent To
File Location:
Comments: sc#162208 lcf;5 tr

01/28/2021 84 SCt: Trial Court Record Received
5 tr; 1 files

04/30/2021 85 SCt Order: MOAA -Oral Argument on Lv Appl
View document in PDF format
Comments: Invited AC=PAAM, CDAM.

Case Listing Complete