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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTONYA MOSS

Defendant-Appellant.

_____/

Supreme Court No. 162208

Court of Appeals No. 338877

Berrien County Circuit Court
No. 15-005091-FH

**APPELLEE'S SUPPLEMENTAL BRIEF**

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

**1.** ARE ADOPTIVE SIBLINGS RELATED BY BLOOD PURSUANT TO THE CRIMINAL SEXUAL CONDUCT STATUTES?

Court of Appeals Answers, "Yes"

Plaintiff-Appellee Answers, "Yes"

Defendant-Appellant Answers, "No"

**2.** IN THE ALTERNATIVE, ARE ADOPTIVE SIBLINGS RELATED BY AFFINITY PURSUANT TO THE CRIMINAL SEXUAL CONDUCT STATUTES?

Court of Appeals Answers, "No"

Plaintiff-Appellee Answers, "Yes"

Defendant-Appellant Answers, "No"

**3.** WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO ADVISE THAT ADOPTIVE SIBLINGS ARE NOT RELATED BY BLOOD OR AFFINITY PURSUANT TO THE CRIMINAL SEXUAL CONDUCT STATUTES?

Court of Appeals Answers, "No"

Plaintiff-Appellee Answers, "No"

Defendant-Appellant Answers, "Yes"

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## COUNTERSTATEMENT OF FACTS

The People accept the Defendant-Appellant's statement of facts, both factual background and procedural history. Other pertinent facts are contained in the People's Argument.

The People are responding to the Appellant's Supplemental Brief as ordered by this Court on 4/30/21.

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## ARGUMENT

### I. The Court of Appeals Correctly Found Adopted Family Members are Related by Blood under the Criminal Sexual Conduct Chapter of the Michigan Criminal Laws.

The defendant argues his plea was not supported by record evidence because adopted siblings are not related by blood or affinity as required by MCL 750.520d(1)(d), and he should be allowed to withdraw his plea. This argument was rejected by the Court of Appeals. This Court should also reject this argument.

The defendant relies upon *People v Zajaczkowski,* 493 Mich 6; 825 NW2d 554 (2012), in his argument that the condition of a relationship by blood or affinity was not met.

In *Zajaczkowski,* the defendant had sexual intercourse with a female victim who was between the ages of 13 and 16. 493 Mich at 9. He was charged with criminal sexual conduct in the 1st degree under MCL 750.520b(1)(b)(*ii*), which declares that a person is guilty of that crime if he or she engages in sexual penetration with another person between the ages of 13 and 16 and the actor is "related to the victim by blood or affinity to the fourth degree." The defendant was born during his mother's marriage to the victim's biological father. *Zajaczkowski*, 493 Mich at 9. But a DNA test later revealed that the victim's biological father was not the defendant's biological father. *Id*. Over defendant's challenges, the trial court and the Court of Appeals[1] ruled that because the defendant was *legally* the son of the victim's biological father, the defendant and the victim were brother and sister, and were therefore related by blood or affinity. *Id*. at 9-12.

[1] *People v Zajaczkowski*, 293 Mich App 370, 377-380; 810 NW2d 627 (2011).

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In *Zajaczkowski*, this Court only examined the issue of whether there was a relationship by blood in the context of a civil presumption applied to a child born during marriage pursuant to MCL 552.29. *Id*. at 12-13. A relationship by blood, the Court stated, "is defined as 'a relationship between persons arising by descent from a common ancestor' or a relationship 'by birth rather than marriage.'" *Id*. at 13 (citations omitted). Since the DNA evidence showed that the defendant and the victim did not have such a relationship, the plain language of MCL 750.520b(1)(b)(*ii*) did not support the conviction. *Zajaczkowski*, 493 Mich at 14.

In a footnote, the Court commented:

> The prosecution has raised the argument that this interpretation will result in unintended consequences regarding adopted children because if the blood relationship element can only be established through a biological relationship, then a sexual penetration committed by a member of an adoptive family against an adopted minor child may not be punishable under MCL 750.520b(1)(b)(*ii*). While we acknowledge that the prosecution raises valid policy concerns, such policy concerns are best left to the Legislature to address. It is this Court's duty to enforce the clear statutory language that the Legislature has chosen. [*Zajaczkowski*, 493 Mich at 14 n 18.]

Unlike *Zajaczkowski*, however, this case does not involve a rebuttable presumption of legitimacy. Instead, it involves a declaration by the Legislature in the Adoption Code that an adopted child is considered a child by blood.

MCL 710.60 reads:

> (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 entitles to all the rights of parents.
>
> (2) After entry of the order of the adoption, there is no distinction between the rights and duties of natural progeny and adopted persons, and the

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> 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.)

Before the passage of 1974 Public Act 296, MCL 710.9 [now MCL 710.60], read:

> Upon entry of the order of adoption, such child shall, in the case of a change of name, thereafter be known and called by said new name, and the person or persons so adopting said child shall thereupon stand in the place of a parent or parents to such child in law, in all respects as though the adopted child had been the natural child of the adopting parents, and be liable to all the duties and entitled to all the rights of parents thereto. Thereupon there shall be no distinction in any way between the rights and duties of natural children and adopted children, and such child shall thereupon become the heir at law of such adopting person or persons, as well as the heir at law of the lineal and collateral kindred of the adopting person or persons, and entitled to inherit property from such person or persons in accordance with the law of descent and distribution of this state: ***Provided, That nothing herein shall affect his right to inherit from or through his natural parents***. . . . [Emphasis added.]

Thus, before the enactment of Public Act 296, an adopted child remained in the blood streams of both his or her natural parents ***and*** his or her adopting parents. Under the new Michigan Adoption Code, however, the Legislature resolved this ambiguity by taking the adopted child out of the blood stream of his or her natural parents and placing the child, by operation of law, exclusively into the blood stream of his or her adopting parents.

This removal of the adopted child from the lineage of his or her natural parents and exclusive placement into the lineage of his or her adopted parents was a major change incorporated into the 1974 passage of the Michigan Adoption Code. This change evinced the Legislature's intent to create a new family where an adopted child would become a "natural" child of his or her adoptive parents. In *In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998), the Court of Appeals identified this as one of MCL 710.60's purposes, saying:

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> The 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***. . . . (emphasis added)

The plain language of MCL 710.60(1) now equates an adopted child with one who "***had been born***" to the adopted parent. The Legislature also expressly placed the adopted child in the lineage of the new parent, "being an heir at law of the lineal and collateral kindred of the adopting parent." MCL 710.60(2). The word "lineal" is defined as "a lineal descendant; a direct blood relative." *Black's Law Dictionary* (8th ed), p 949. "Kin" is defined as "one's relatives; family." *Id.* at p 886. "Relative" is defined as "a person connected with another by blood or affinity; a person who is kin with another." *Id.* at p 1315. Thus, by operation of law, the adopted child is now related ***by blood*** to his or her adoptive parents and to his or her new lineal and collateral kin.

After the enactment of the Michigan Adoption Code, it was unnecessary for the Legislature to add "by adoption" as an alternative to "by blood or affinity" because the Legislature defined an adopted child as a child in the direct blood line of the adopting parent. The Legislature is presumed to know of existing legislation on the same subject. *People v Buckley*, 302 Mich 12, 21; 4 NW2d 448 (1942). Therefore, adding "by adoption" to the phrase "by blood or affinity to the fourth degree" would be a redundancy under the express terms of MCL 710.60(1) and (2).

Furthermore, statutes which relate to the same persons or things, or which have a common purpose, are to be read *in pari materia.* Strict construction will not be given to one statute where doing so would defeat the main purpose of another on the same subject. *Detroit v Michigan Bell Telephone Co*, 374 Mich 543, 558, 561; 132 NW2d 660 (1965).

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Clearly, the purpose of MCL 750.520b(1)(b)(ii) is to protect children within a family from sexual assault by other family members by increasing the possible punishment. A determination that an "adopted child" whom the Legislature has legally transformed into a "natural child" is afforded less protection under Michigan's criminal sexual conduct code would defeat the Legislature's express and unambiguous purpose of creating a "new and complete" family after adoption.

Footnote 18 of *Zajaczkowski*, moreover, did not expressly state that a defendant could *not* be convicted under MCL 750.520b(1)(b)(ii) if his victim was an *adopted* child. If, however, the language in footnote 18 was intended to affirmatively hold that such prosecution would not be sufficient under MCL 750.520b(1)(b)(ii) if the victim was adopted, this language is obiter dictum when these statements concerning a principle of law were not essential to determination of the case. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597; 374 NW2d 905 (1985). "[O]biter dicta lacks the force of adjudication and is not binding under the principle of stare decisis." *People v Borchard-Ruhland*, 460 Mich 278, 284 n 4; 597 NW2d 1 (1990).

Indeed, the sole issue before the Court in *Zajaczkowski* was whether a presumption of legitimacy under the civil law could satisfy the element of "by blood" for prosecution under MCL 750.520b(1)(b)(ii) where the presumption was rebutted by DNA testing which determined that the defendant and the victim were not biologically related. This case, on the other hand, does not involve a rebuttable presumption. Instead, it involves the transformation of rights and duties that occur by operation of law when a child is adopted – an issue upon which *Zajaczkowski* is not controlling for all of the reasons just discussed.

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The defendant goes on to state "effectively" related by blood would cast too wide a net for the statute. Examples of godparents and long term partners are given as examples. This fear is without justification. First, there are no statutes that would make godparents legally related or placed in the bloodline as the Adoption Code does. Second, there would still be the second prong of the statute to satisfy, that being a relationship within the third degree of consanguinity. The requirement of a relationship of consanguinity would limit the statute's reach and make the statute clear as to what actions are against the law.

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## II. Alternatively, Adopted Family Members are Related by Affinity Under the Criminal Sexual Conduct Chapter of the Michigan Criminal Laws.

Alternatively, if the victim is found not to be related by blood, this Court should find the victim is related by affinity.

Defendant pled no contest under MCL 750.520d(1)(d), which provides that a person is guilty of criminal sexual conduct in the 3rd degree if he or she engages in sexual penetration with another person and "[t]hat other person is related to the actor by blood or affinity to the third degree…." As previously noted, the defendant relies on *Zajaczkowski* for his claim that this condition was not met.

This Court did not address directly whether a relationship by affinity existed in *Zajaczkowski*. 493 Mich at 12. The Court only examined the issue of whether there was a relationship by blood. *Id*. at 12-13. The instant case is distinguishable from *Zajaczkowski* as it involves a relationship between the defendant and the victim through adoption.

"The fundamental task of statutory construction is to discover and give effect to the intent of the Legislature." *Borchard-Ruhland*, 460 Mich at 284. The task of discerning the legislature's intent begins by examining the language of the statute itself. *Tryc v Michigan Veteran's Facility* 451 Mich 129, 135; 545 NW2d 642 (1996). "Where the language of the statute is unambiguous, the plain meaning reflects the legislature's intent and a court must apply the statute as written.… Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent." *Borchard-Ruhland,* 460 Mich at 284-285, citing *Luttrell v Department of Corrections*, 421 Mich 93; 365 NW2d 74 (1984). Further, the Court must

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"use common sense and should construe the statute to avoid unreasonable consequences." *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

In determining the meaning of "affinity" in the context of the criminal sexual conduct statutes, 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 Bylsma*, 315 Mich App 363, 378; 889 NW2d 729 (2016), quoting *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). "Statutory language should be given a reasonable construction, considering its purpose and the object sought to be accomplished." *People v Armstrong*, 212 Mich App 121, 127; 536 NW2d 789 (1995). *Armstrong* went on to state that "[i]n fashioning the criminal sexual conduct statute, M.C.L 750.520a *et seq;* M.S.A. 28.788(1) *et seq.*, the Legislature intended to protect young persons with whom they have a special relationship, such as relatives." *Id.*

The criminal sexual conduct statutes do not give a specific definition to the term "affinity." MCL 750.520a. But the term 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 Mich App 402, 408; 254 NW2d 61 (1977). In *Armstrong*, the Court of Appeals examined the word in the context of a criminal sexual contact between a stepbrother and stepsister. *Armstrong* indicated that affinity is "not capable of a precise definition." 212 Mich App at 125; citing *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." *Armstrong*, 212 Mich App at 125.

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When interpreting a statute, "provisions … shall be construed to the fair import of their terms, to promote justice and to effect the objects of the law." MCL 750.2. A court should construe a word undefined in the statute according to its "common and approved usage. In doing so, resorting to the dictionary definition is appropriate." *Armstrong*, 212 Mich App at 127. The Court in *Armstrong* referred to the Random House College Dictionary and its definition of the term "affinity" as meaning a "relationship by marriage or ties other than those of blood." *Id.*

The *Armstrong* Court considered the definition given in *Bliss v Caille Bros Co*, 149 Mich 601; 113 NW 2d 317 (1907). The Michigan Supreme Court in *Bliss* was interpreting "affinity" in the context of a judge presiding over a case where the judge was related by consanguinity or affinity to either of the parties. *Id* at 607. The Court stated affinity was defined as the "relation existing in consequence of marriage between each of the married persons and the blood relatives of the other…" *Id* at 608. But the Court in *Bliss* stated the doctrine used to interpret the meaning of affinity was "for the purpose only of determining whether, in support of a high public policy affecting the administration of the law, a juror or judge should be regarded as indifferent or biased." *Id.*

*Bliss* was decided decades prior to the enactment of the criminal sexual conduct statutes. Given the limited basis for which the *Bliss* Court was considering the term "affinity," the Court in *Armstrong* set out to interpret the term in the context of the criminal sexual conduct statute and was correct in rejecting the limited definition for the term "affinity" as stated in *Bliss*.

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While the *Armstrong* case dealt with step-siblings, the definition for affinity is applicable in the instant case. Cases interpreting the Michigan Adoption Code, MCL 710.21, have reiterated that an adoption creates a "new and complete substitute relationship after adoption." *In re Handorf*, 285 Mich App 384, 388; 776 NW2d 374 (2009). This relationship by adoption fits squarely within the definition of a relationship by ties other than those of blood. This interpretation protects adopted children in line with the legislative intent to "protect young persons with whom they have a special relationship, such as relatives." *Armstrong*, 212 Mich App at 127.

By adopting the *Armstrong* definition of affinity, this Court does not make other sections of the criminal sexual conduct statutes superfluous. Cases could arise when a victim is sexually assaulted where the perpetrator is related to the victim through adoption and not a member of the same household, as in 750.520b(1)(b)(i) and 750.520c(1)(b)(i). For example, the aunt or uncle of a child through adoption who does not live with the child commits criminal sexual conduct against that child.

The defendant has pointed to multiple statutes that use the terms "marriage, blood, or adoption." These statutes indicate, according to the defendant's argument, that the Legislature considered there to be a distinction between marriage and adoption. If that is accurate, the Legislature could have simply stated "marriage" in the criminal sexual conduct statutes, but instead it used the term "affinity." The use of the term "affinity" indicates the intent to reach beyond the limited relationship created by marriage alone.

As stated previously, this interpretation would not cast too wide of a net or make it difficult to determine what actions are illegal pursuant to the criminal sexual conduct statutes. There would still be the second prong of the statute to satisfy, that being a

relationship within the third degree of consanguinity. The requirement of a relationship of consanguinity would limit the statute's reach and make the statute clear as to what actions are against the law.

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## III. The Defendant-Appellant's Trial Counsel was not Ineffective.

Based on the above arguments, trial counsel was not ineffective for failing to raise the issue of a relationship by blood or affinity between the defendant and the victim. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Erickson*, 288 Mich App 192, 201; 793 NW2d 120 (2010). The defendant's argument for ineffective assistance of counsel is without merit based on the previous arguments.

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## CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly found the defendant and victim in the instant matter were related by blood for the purposes of criminal sexual conduct in the 3rd degree through adoption. In the alternative, the adoption of the victim and defendant by the same person created a relationship of affinity within the 3rd degree of consanguinity. Under either interpretation, the element for criminal sexual conduct in the 3rd degree pursuant to MCL 750.520d that the defendant be related by blood or affinity to the victim was satisfied.

Accordingly, the People ask this Court to affirm the decision of the Court of Appeals.

Respectfully Submitted,

Dated: 9/20/2021

/s/ Steven Pierangeli
Steven Pierangeli
Prosecuting Attorney