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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

JOHN ANTONYA MOSS

Defendant-Appellant
_____/

Supreme Court No. 162208

Court of Appeals No. 338877

Lower Court No. 15-5091 FH

BERRIEN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

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FILED UNDER AO 2019-6
APPELLANT'S SUPPLEMENTAL BRIEF
CERTIFICATE OF COMPLIANCE

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Statement of Questions Presented

I. Under the plain language of the criminal sexual conduct statutes, is there no "blood" relationship between adoptive siblings? Should Mr. Moss be allowed to withdraw his plea?

Court of Appeals answers, "No."

John Antonya Moss answers, "Yes."

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Introduction

As adoptive siblings, Mr. Moss and the complainant, Jamira, do not share a common biological parent. Nor are they descended from a common ancestor. They are not related by blood. This Court should not jettison the well-established and common definition of "blood" in order to rewrite the criminal sexual conduct laws to include adoptive relatives within the definition of "blood relatives." This policy decision is the job of the Legislature. *See Ex parte Bourne,* 300 Mich 398, 402 (1942) ("The moral offense which petitioner undoubtedly committed and to which he pleaded guilty, should subject him to punishment, but if such punishment is not provided by the legislature then the lawmakers alone may correct the situation."). Mr. Moss should be allowed to withdraw his plea because there is no adequate factual basis for it.

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Statement of Facts

Factual Background

A sexual encounter occurred between John Moss and his adoptive sister Jamira on November 11, 2015. Appellant's Appendix (AA) 13a. John and Jamira were foster children, unrelated by blood, who had been legally adopted by a single woman, Wanda Moss. AA 115a.

Within a few hours of the encounter, Jamira called the police to report that John had sexually assaulted her. AA 116a. John has consistently maintained that they engaged in consensual sex. AA 13a.

Procedural History

The Government originally charged Mr. Moss with four offenses as a fourth habitual offender: (1) resisting and obstructing a police officer, MCL 750.81d; (2) possession of marijuana, MCL 333.7403(2)(d), with a second offense notice, MCL 333.7413; and (3 & 4) two counts of CSC-3d predicated upon relationship by blood or affinity or, alternatively, upon force or coercion, MCL 750.520d. AA 4a-5a. The parties ultimately entered an agreement whereby Mr. Moss pled no contest to one count of CSC-3d based on blood or affinity. AA 10a. The prosecution agreed to dismiss the remaining charges and the fourth habitual enhancement. AA 11a-12a. The prosecution also agreed to recommend a 72-month minimum prison term. AA 11a-12a.

The trial court relied upon police reports to establish a factual basis for the plea, finding "that [he] effected . . . sexual penetration while [he] and the victim, Miss Jamira Moss, were related by affinity to the third degree." AA 12a, 116a. Defense counsel "add[ed] that . . . [the sexual encounter] was consensual." AA 13a. The trial court determined a factual basis had been established and accepted Mr. Moss's plea. AA 14a.

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At sentencing, the trial court followed the bargained-for recommendation and imposed a prison sentence of 6 to 15 years. AA 63a. A resentencing was held the next day for the purposes of applying the correct sentencing grid for CSC-3d. AA 70a. The trial court resentenced Mr. Moss to the same prison sentence imposed the day before. AA 75a.

Mr. Moss filed a timely post-conviction motion for plea withdrawal. The motion argued that adoptive siblings are not related by blood or affinity for purposes of the CSC-3d statute, MCL 750.520d(1)(d). AA 86a. According to the motion, this meant that the record failed to supply a factual basis for CSC-3d based on blood or affinity. AA 115a. It also meant that Mr. Moss's plea was the product of ineffective assistance of counsel—namely, counsel's mistaken advice that Mr. Moss could be found guilty of CSC-3d even if the jury agreed that his encounter with his adoptive sister was consensual. App 100a.

The trial court denied this motion. AA 114a. It agreed that adoptive siblings are not related by blood for purposes of the CSC-3d statute. AA 121-122. "[W]hile 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." AA 122a. The trial court continued, "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." AA 122a. The court did find, however, that adoptive siblings are related by affinity. AA 122a-125a. "As such," the trial court concluded, "Defendant has not demonstrated that there was an inaccuracy or other defect in the taking of his plea under MCR 6.302, and therefore, withdrawal of the plea is not warranted pursuant to MCR 6.310, and must be denied." AA 125a.

Mr. Moss filed a timely application for leave to appeal to the Court of Appeals, which was denied in August 2017. He appealed to this Court, which granted oral argument on application on the question of whether adoptive siblings are related by blood or affinity. 5/16/18 Order. This

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

The Court of Appeals affirmed, holding that the adoption created a relationship effectively by blood, but not one of affinity because they were not related by marriage. This timely application followed, and this Court again granted argument on application, asking the parties to address the question of whether John and Jamira are "effectively related by blood for purposes of MCL 750.520d(1)(d)." 4/30/21 Order

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Argument

I. Under the plain language of the criminal sexual conduct statutes, there is no "blood" relationship between adoptive siblings. Mr. Moss should be allowed to withdraw his plea.

This Court has asked the parties to brief whether John Moss and Jamira are "effectively related by blood" for purposes of MCL 750.520d(1)(d). They are not.

First, the word "effectively" appears nowhere in MCL 750.520d(1)(d), and has never appeared in that part of the Michigan Penal Code. In 1974, the Michigan Legislature rewrote the state's sexual assault statutes. *See* K Cobb & N Schauer, "Michigan's Criminal Sexual Assault Law," 8 U Mich J L Reform 217, 219 (1974); MCL 750.333.[1] With respect to incest, the Legislature expanded the existing prohibition on "adultery or fornication" from a ban within certain degrees of "consanguinity" to a ban o n sexual contact with minors within a certain degree of "blood or affinity." *Compare* MCL 750.33 with current MCL 750.520b(1)(a)(ii) and 750.520c(b)(iv). In 1996, prompted apparently by some highly publicized cases, the Legislature extended the statute to prohibit sexual contact between consenting adults, as well as minors, related to each other "by blood or affinity to the third degree." 750.520d(1)(d); 750.520e(b)(1)(d); S.B. 762 (S-2), 763 (S-1), & H.B. 5076 (S-1): Criminal Sexual Conduct: Incest Revised First Analysis available

[1] The former incest statute provided: "Any person who is within the degree of consanguinity with another within which marriages are prohibited or declared by law to be incestuous and void, and shall marry such other person, or shall commit adultery or fornication with such other person, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than ten years." *Ex parte Bourne,* 300 Mich 398, 400 (1942). It did not criminalize sexual relations between relatives by affinity. *Id.* Under the previous statute, incest also required consent, distinguishing it from the crime of rape. *People v Burwell,* 106 Mich 27, 30 (1895) ("It is settled in this state that the assent of both parties is required to establish the crime of incest.").

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at https://www.legislature.mi.gov/documents/1995-1996/billanalysis/Senate/htm/1995-SFA-0762-A.htm.

MCL 750.710d(1)(d) currently provides, in relevant part:

> 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.

By its plain language, MCL 750.520d(1)(d) only criminalizes sexual relationships between people who are actually related by blood, not those who are "effectively" blood relatives.[2] Expanding the meaning of "by blood" in the statute is inconsistent with familiar and well-established rules of statutory construction: the plain meaning of the critical words as well as placement and purpose in the statutory scheme. *People v Washington,* 501 Mich 342, 352 (2018). "If the statute's language is clear and unambiguous, then the statute must be enforced as written." *Id.*

In *People v Zajackzowski,* 493 Mich 6 (2012), the central question was the definition of a "blood" relationship in these same criminal sexual conduct statutes. This Court defined a relationship by blood as "a relationship between persons arising by descent from a common

[2] MCL 750.520b(1)(b)(i) and MCL 750.520c(1)(b)(i) do, however, criminalize sexual relationships with children under the age of 16 by people in the "same household as the victim." People living in the same household could be seen as being "effectively blood relatives." MCL 750.520d does not include the "same household" provision these other statutes do.

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ancestor or a relationship by birth rather than by marriage." 493 Mich 6, 13 (2012) (cleaned up). This Court rejected efforts to extend that definition beyond its plain meaning based on the civil presumption of the legitimacy of children born within wedlock. In a footnote, this Court acknowledged that its holding meant that adoptive siblings would never fulfill the blood element, but adhered to "this Court's duty to enforce the clear statutory language that the Legislature has chosen." *Zajaczkowski*, 493 Mich at 14 n 18. "[P]olicy concerns are best left to the Legislature to address." *Id.* This approach is consistent with the common definition of blood, and deference to interpreting the CSC statute consistently with its plain language.

The Adoption Code does not support a different interpretation of the Penal Code. MCL 710.60(2) did not create a blood relationship as that term is used in the Penal Code. MCL 710.610(2) provides:

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

The purpose of the Adoption Code is, as it relates to MCL 710.610, "to achieve permanency and stability for adoptees as quickly as

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possible." MCL 710.21a(d)[3]. The purpose of MCL 710.60(2) is very clearly to establish inheritance rights within the adoptive family, and to terminate them from the child's natural family for inheritance purposes. The purpose of the Penal Code, in contrast, is to define crimes. *People v Smith,* 423 Mich 427, 437 (1985).

Only statutes which relate to the same persons or things, or which have a common purpose, are to be read *in pari materia.* The Adoption Code and the Penal Code do not have a common purpose. They also should not be said to apply to the same persons since to do so would require the Penal Code to be read *in pari materia* with every statute since the Penal Code applies to all people. While the prosecution has asserted that the purpose of the Penal Code is to protect children, and the Court of Appeals has agreed, this is not a stated purpose of the Code and any definition of "by blood" would apply not just to children but also to consenting adults. *See* MCL 750.520e(1)(d). Also, since MCL 710.610 ends the lineal and kindred relationship between the adopted child and their natural parents, it appears that an adopted child would no longer be related "by blood" to their birth family for purposes of the Penal Code, which seems inconsistent with the genetic concerns that led the Legislature to criminalize sexual relationships between actual (as opposed to effective) blood relatives. It also would not protect children who are adopted but may reconnect or continue relationships with members of their birth families.

The Court of Appeals erred in expanding the term "blood" beyond its plain meaning based on MCL 710.60. The Legislature is presumed to have intended that every word be given effect, and to know of existing legislation on the same subject. *People v Smith,* 423 Mich 427, 441

[3] While the section also speaks of the "best interest of adoptees," that provision is directed to the "procedures and services" of children in need of adoption; in other words to procedural fairness in the adoption procedures. *See* MCL 710.21a. Reading the phrase that the "rights of the adoptee shall be paramount," would lift adoptees over all other people, which is an absurd result.

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(1985). Reading MCL 710.60 to expand the term related by "blood" to mean "blood or adoption" is inconsistent with the way the Legislature has continued to differentiate between relations by blood and adoption in provisions both within the Adoption Code, and outside of it.

Within the Adoption Code, the Legislature has been clear that a relation by adoption is distinct from a relation by blood. See MCL 710.22(u) (defines "relative" as someone related "within the fifth degree by marriage, blood, or adoption"); MCL 710.26(2) ("This subsection also applies to . . . the adoption of a child related to the petitioner within the fifth degree by marriage, blood or adoption."); MCL 710.27(6) (subsection does not apply to the adoption of a child related within the fifth degree by "marriage, blood, or adoption"). The Legislature has also continued to include both "blood" and "adoption" when defining or describing a relationship in numerous statutes, including statutes that were adopted very recently. MCL 205.27a(12) (defining related as siblings "by blood or by adoption"); MCL 208.1105(2) (defining related as siblings "by blood or by adoption"); MCL 208.1111(1)(x) (defining related to include siblings whether by "blood or by adoption"); MCL 333.21311a(8)(b) (defining "related" as including certain relationships by "marriage, blood, or adoption"); MCL 400.112g(6)(c) (defining "caretaker relative" as "any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient"); MCL 400.707(2) (defining the term related to certain relationships "by marriage, blood, or adoption"); MCL 554.524 (Uniform Transfers To Minors Act defines "member of the minor's family" as certain relations whether by "blood or by adoption"); MCL 554.1012(a)(i)(B) (Uniform Commercial Real Estate Receivership Act defines "affiliate" to include lineal ancestor or descendant "whether by blood or adoption" and certain relatives, again by "blood or adoption"); MCL 700.2806 (definition of relative of ex-spouse for purpose of estate law); MCL 700.5204(2)(c)(iii) (one of the conditions for appointment of guardian for child is that the person being appointed is "related to the minor within the fifth degree by marriage, blood, or adoption"); MCL 722.26c(1)(b)(iii) (third party may seek custody if, among other things, they are "related to the child within the fifth degree

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by marriage, blood, or adoption"); MCL 722.111 (definitions in Children Code for "family child care home" and "group child care home" excepts children related to adult member of household by "blood, marriage or adoption"); MCL 722.124 (power to place child includes people "related to a child by blood, marriage, or adoption"); MCL 722.124c (section does not apply to adoption of a child related to the petitioner "within the fifth degree by blood, marriage, or adoption"); MCL 722.925(g)(complaints permitted to be made by adults "related to the child within the fifth degree by marriage, blood, or adoption").

Reading MCL 710.60 to create a blood relationship between people once an adoption is final would render the term "adoption" superfluous in all of these statutes. As the Legislature consistently differentiates between blood and adoption, and specifies adoption when they want to include that relationship, this Court should not presume that in the case of the Penal Code the Legislature intended something else entirely. Rather, it should assume that the Legislature intended to use the common meaning of "blood" to mean those who are from the same birth family.

Finally, expanding the meaning of "by blood" to mean "effectively related by blood" or the slightly narrower "by blood or adoption" would not have provided Mr. Moss with fair notice of the conduct proscribed. In other words, this new definition would make the statute void for vagueness. *See People v Petrella*, 424 Mich 221, 253 (1985); *Grayned v Rockford*, 408 US 104, 108-109 (1972). A statute may be challenged for vagueness on the grounds that it is "overbroad, impinging on First Amendment freedoms," or "does not provide fair notice of the conduct proscribed," or "is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed." *Id.* Counsel has found no instance in Michigan penal statutes where "by blood" has been interpreted to mean anything other than "by blood." Grafting the Adoption Code onto the Penal Code to change the meaning of the phrase in this one instance does not

provide fair notice to people that "by blood" also means "by adoption," let alone the far vaguer "effectively related by blood."

Given the complex relationships people have in real life, "effectively related by blood," could also be so indefinite as to confer unlimited discretion on a trier of fact to run afoul of the Constitution. "Godparents" could be "effectively related by blood." Long-term partners, and their children, could fall into this category, even after a split. The blood relatives (siblings, nieces and nephews, etc) of children who are adopted could potentially be viewed as blood relatives of everyone in the adopted child's "new" family. The Court should avoid redefining "by blood" in a way that would make the statute unconstitutionally vague, and continue to define the term as it has been traditionally defined.

For these reasons, this Court should read the statute using its plain language, following long accepted principles of statutory interpretation, and limit the meaning of "by blood" to those in a traditional, blood, familial line. Expansion of the statute to include adoptive (or other effective blood) relatives is the job of the Legislature.

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Conclusion

This Court should hold that adoption does not establish the "blood" element of CSC3d. Ordinarily, when the record fails to establish a sufficient factual basis for the plea, the prosecution is given the opportunity to establish the missing element. *Guilty Plea Cases*, 395 Mich at 129. Here, however, the existing facts could not establish a blood or affinity relationship between John and his adoptive sister Jamira. Mr. Moss should therefore be permitted to withdraw his plea. *Guilty Plea Cases*, 395 Mich at 129.[4]

Respectfully submitted,

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[4] Mr. Moss also argued in his leave application and in the courts below that he pled due to the ineffective assistance of trial counsel. He has not briefed it here because it was not included in the questions presented in this Court's order.

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Certificate of Compliance

I certify that this brief is in compliance with AO 2019-6 and contains 3,454 words per Microsoft Word, excluding the parts of the document exempted from AO 2019-6, that do not count toward the limitation.

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

Respectfully submitted,

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