STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

JOHN ANTONYA MOSS,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 338877

Circuit Court No. 15-005091-FH

BERRIEN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
CHRISTOPHER M. SMITH (P70189)
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

STATE APPELLATE DEFENDER OFFICE

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NOTICE OF HEARING

TO: BERRIEN COUNTY PROSECUTOR

PLEASE TAKE NOTICE that on Tuesday, November 7, 2017, the undersigned will move this Honorable Court to grant the within Application for Leave to Appeal.

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Christopher M. Smith
CHRISTOPHER M. SMITH (P70189)

Date: October 11, 2017

IDEN No. 30023

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Berrien County Circuit Court by plea of no contest and a judgment of sentence entered on August 12, 2016. Defendant-Appellant requested the appointment of appellate counsel on August 16, 2016. The offenses occurred after the effective date of the November, 1994 ballot Proposal B which eliminated the right to file a claim of appeal from plea-based convictions.

On February 8, 2017, Defendant-Appellant filed a timely motion for plea withdrawal under MCR 6.310. See *Circuit Court Docket Entries*, p.5. The circuit court denied this motion in an opinion and order entered on May 30, 2017. *Id.*; *Appendix B: Circuit Court's Order*. The Court of Appeals had jurisdiction to consider Defendant-Appellant's delayed application for leave to appeal because it was filed within 21 days of the order denying plea withdrawal. MCR 7.203(B); MCR 7.205(G)(4). This Court has jurisdiction to consider this application for leave to appeal because it has been filed within 56 days of the intermediate appellate court's order denying leave to appeal. MCR 7.305(C)(2)(c).

STATEMENT OF QUESTIONS PRESENTED

I. ARE ADOPTIVE SIBLINGS RELATED BY BLOOD OR AFFINITY? DID THE FACTUAL BASIS FAIL TO ESTABLISH THE CRIME TO WHICH MR. MOSS PLEADED NO CONTEST? SHOULD HE THEREFORE BE PERMITTED TO WITHDRAW HIS PLEA?

Trial Court answers, "No," to all three questions.

Defendant-Appellant answers, "Yes," to all three questions.

II. DID MR. MOSS RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE MISTAKEN ADVICE THAT A CONSENSUAL SEXUAL ENCOUNTER BETWEEN ADOPTIVE SIBLINGS CONSTITUTED A FELONY? SHOULD HE BE PERMITTED TO WITHDRAW HIS NO CONTEST PLEA.

Trial Court made no answer given its resolution of Issue I.

Defendant-Appellant answers, "Yes," to both questions

STATEMENT OF FACTS

This appeal stems from a judgment entered in the Berrien County Circuit Court by the Honorable Donna Howard. Defendant-Appellant John Moss pleaded no contest to criminal sexual conduct in the third-degree ("CSC-3d") based on blood or affinity, MCL 750.520d(1)(d). (PT 9).[1] The trial court sentenced Mr. Moss to six to 15 years in prison. (ST 44);[2] (RST 8).[3] Mr. Moss subsequently moved for plea withdrawal, but the trial court denied that motion. *People v Moss*, unpublished opinion and order of the Berrien County Circuit Court entered May 30, 2017 (Docket No. 2015-005091-FH) (attached as Appendix B). The Court of Appeals denied leave to appeal this ruling. *People v Moss*, unpublished order of the Court of Appeals entered August 21, 2017 (Docket No. 338877) (attached as Appendix A). He now seeks leave to appeal to this Court.

A. Factual Background

The events underlying Mr. Moss's conviction took place in Benton Harbor on November 11, 2015. (PT 11). There is no dispute that a sexual encounter occurred between Mr. Moss and his adoptive sister, Jamira Moss. The parties disagreed, however, on whether that encounter was consensual. The complainant told the police that the sexual encounter was non-consensual. (PSR 5).[4] Conversely, Mr. Moss indicated that he and the complainant engaged in consensual sexual activity involving oral sex and vaginal intercourse. (PT 12). During the investigation, Mr. Moss maintained that "he is not a rapist[.]" (PSR 6).

The complainant reported her accusation to the police within two hours of the incident. Shortly thereafter, two officers went to the scene of the incident "to locate and apprehend the

[1] "PT" refers to the transcript of the plea-taking proceedings of June 20, 2016.

[2] "ST" refers to the transcript of the sentencing proceedings of August 8, 2016.

[3] "RST" refers to the transcript of the resentencing proceedings of August 9, 2016.

[4] "PSR" refers to the presentence investigation report, which has been filed separately. All citations rely upon the pagination within the Portable Document Format ("PDF").

suspect[.]" (PSR 5). When they arrived, they learned that Mr. Moss had fled on foot. (PSR 5). He ran several blocks before the police finally caught up with him. (PSR 5). As they placed him into custody, they found six individually wrapped baggies of marijuana on his person. (PSR 5).

B. Procedural History

The prosecution originally charged Mr. Moss with four offenses as a fourth habitual offender: (1) resisting and obstructing a police officer, MCL 750.81d; (2) possession of marijuana, MCL 333.7403(2)(d), with a second offense notice, MCL 333.7413; and (3 & 4) two counts of CSC-3d predicated upon relationship by blood or affinity or, alternatively, upon force or coercion, MCL 750.520d. See *Felony Information*. One count of CSC-3d was based on penile/vaginal penetration; the other was based on oral/vaginal sexual penetration. *Id.*

The parties ultimately entered an agreement whereby Mr. Moss agreed to plead no contest to one count of CSC-3d based on blood or affinity. (PT 9). The prosecution agreed to dismiss the remaining charges and the fourth habitual enhancement. (PT 9). The prosecution also agreed to recommend a 72-month prison term. (PT 9).

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

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

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

The trial court denied this motion. *People v Moss*, unpublished opinion and order of the Berrien County Circuit Court entered May 30, 2017 (Docket No. 2015-005091-FH) (attached as Appendix B). It agreed that adoptive siblings are not related by blood for purposes of the CSC-3d statute. *Id.* at 8-9. But it held that adoptive siblings are related by affinity. *Id.* at 9-12. "As such," the trial court concluded, "Defendant has not demonstrated that there was an inaccuracy or other defect in the taking of his plea under MCR 6.302, and therefore, withdrawal of the plea is not warranted pursuant to MCR 6.310, and must be denied." *Id.* at 12.

Mr. Moss now seeks leave to appeal this ruling.

I. ADOPTIVE SIBLINGS ARE NOT RELATED BY BLOOD OR AFFINITY. THE FACTUAL BASIS FAILED TO ESTABLISH THE CRIME TO WHICH MR. MOSS PLEADED NO CONTEST. HE SHOULD THEREFORE BE PERMITTED TO WITHDRAW HIS PLEA.

Issue Preservation

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

Standard of Review

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

Analysis

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

Due process forbids a trial court from accepting a no contest plea without a sufficient finding of guilt. US Const, Am XIV; Const 1963, art 1, § 17; *Guilty Plea Cases*, 395 Mich 96, 128-129; 235 NW2d 132 (1975).[5] Similarly, MCR 6.302(A) provides that a trial court may not accept a plea unless it is convinced that the plea is accurate. Additionally, MCR 6.302(D)(2)(b) requires trial

[5] See also *People v Goodman*, 58 Mich App 220, 222; 227 NW2d 261 (1975) (stating that for plea waiver purposes, it is immaterial whether defendant pleads guilty or no contest).

courts to make a record "that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading."

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

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

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

A. <u>No Relationship By Blood</u>

The trial court correctly concluded that Mr. Moss is not related to Jamira Moss by blood. *People v Moss*, unpublished opinion and order of the Berrien County Circuit Court entered May 30, 2017 (Docket No. 2015-005091-FH) (attached as Appendix B), pp. 8-9. For purposes of interpreting CSC statutes, this Court has defined a relationship by blood as "a relationship between persons arising by descent from a common ancestor or a relationship by birth rather than by

marriage." *Zajaczkowski*, 493 Mich at 13 (citations and quotation marks omitted). "[T]he term 'by blood' is used . . . to indicate an alternative to the term 'by affinity.'" *Id.* (citation omitted).

This Court has explicitly recognized that adoptive siblings are not related by blood for purposes of the CSC statutes. In *Zajaczkowski*, the defendant's mother was married to the victim's father at the time he was born. *Id.* at 9. The defendant and the victim in that case did not share either biological parent, and this Court held the element of a relationship by blood was not established. *Id.* at 9, 14. In a footnote, this Court acknowledged that its holding meant that adoptive siblings would never fulfill the blood element, but adhered to "this Court's duty to enforce the *clear* statutory language that the Legislature has chosen." *Zajaczkowski*, 493 Mich at 14 n 18 (emphasis added). "[P]olicy concerns are best left to the Legislature to address." *Id.*

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

B. <u>No Relationship By Affinity</u>

The *Zajackowski* Court did not have the occasion to address whether a relationship by affinity existed in that case. *Id.* at 12. This is because "the prosecution conceded in the Court of Appeals that there is no evidence of a relationship by affinity between the victim and defendant." *Id.* But this Court nevertheless noted that it had previously defined "affinity" in *Bliss v Caille Bros Co*, 149 Mich 601, 608; 113 NW2d 317 (1907), to mean:

> [T]he 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 the blood relatives of the husband. [*Id.* at 13-14].

The trial court did not apply the *Bliss/Zajackowski* definition in its opinion and order. *People v Moss*, unpublished opinion and order of the Berrien County Circuit Court entered May 30, 2017

(Docket No. 2015-005091-FH) (attached as Appendix B), pp. 9-12. It apparently considered this part of *Zajackowski* to be dicta, since affinity was not contested in that case. See *id.* at 7. Instead, the trial court relied upon a pre-*Zajackowski* case—*People v Armstrong*—which had held that the *Bliss* definition of affinity does not apply to the statutes defining criminal sexual conduct. *Id.* at 10 (quoting *People v Armstrong*, 212 Mich App 121, 125-126; 536 NW2d 789 (1995)[6]).

Armstrong, however, is no longer good law. The Court of Appeals recently recognized that, "based on our Supreme Court's more recent opinion in *Zajackowski* and its reliance on *Bliss*, we conclude that . . . [the] expanded definition of affinity in *Armstrong* is not controlling in this case." *Lewis v Farmers Ins Exch*, 315 Mich App 202, 213; 888 NW2d 916 (2016). "[S]ince *Armstrong* was decided, the Michigan Supreme Court's *Zajackowski* decision reaffirmed the *Bliss* definition of affinity, without mentioning the limiting language emphasized by the *Armstrong* Court." *Id.* at 214 (citing *Zajackowski*, 493 Mich at 13-14). Thus, the *Bliss/Zajackowski* definition "remains the commonly understood meaning of affinity under Michigan law." *Id.*

The trial court therefore erred by applying the *Armstrong* definition rather than the *Bliss/Zajackowski* definition. Had it applied the correct definition, it would have found that no relationship by affinity exists between Mr. Moss and his adoptive sibling. Such a relationship is a byproduct of a marriage. *Zajaczkowski*, 493 Mich at 13-14 (quoting *Bliss*, 149 Mich at 608). "A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband." *Id.* Because no marriage connects Mr. Moss's blood relatives to those of his adoptive sibling, there can be no affinity relationship.

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[6] The *Armstrong* Court relied upon a dictionary to define "affinity" as a "relationship by marriage or by ties other than those of blood." *Id.* (citing *Random House College Dictionary* (rev ed)). Using this definition, the Court held that step-siblings are related by affinity "because they were family members related by marriage." *Id.* *Armstrong* did not address whether adoptive siblings are related by affinity.

C. No Factual Basis for Plea

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

Mr. Moss should therefore be permitted to withdraw his plea. *Guilty Plea Cases*, 395 Mich at 129. The inadequacy of the factual basis raises serious questions about whether Mr. Moss could enter a knowing and voluntary plea.[7] His trial lawyer advised both Mr. Moss and the trial court that the factual basis presented established CSC-3d based on blood or affinity. (PT 12). This led Mr. Moss to believe that there was no point in presenting his side of the story to a jury. But as set forth above, Mr. Moss would be entitled to an acquittal if the jury accepted his version of events. For all of these reasons, plea withdrawal is warranted.

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

II. MR. MOSS ALSO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE MISTAKEN ADVICE THAT A CONSENSUAL SEXUAL ENCOUNTER BETWEEN ADOPTIVE SIBLINGS CONSTITUTED A FELONY. HE SHOULD BE PERMITTED TO WITHDRAW HIS NO CONTEST PLEA.

Issue Preservation

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

Standard of Review

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

Analysis

Mr. Moss did not receive accurate advice on the existence of affinity between himself and his adoptive sister, Jamira Moss. A plea agreement must be knowing, intelligent, and voluntary for it to be valid, and satisfy the Due Process clause of the United States Constitution. See *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012); US Const, Am XIV. In *Bousley v United States*, 523 US 614, 619; 118 S Ct 1604; 140 L Ed 2d 828 (1998), the United States Supreme Court agreed that if a defendant, "nor his counsel, nor the court correctly understood the essential elements of the crime with which [defendant] was charged . . . petitioner's plea would be . . . constitutionally invalid." The Court's affirmation in *Bousley* is directly parallel to Mr. Moss's current situation.

Mr. Moss asserts that his plea was unknowing and involuntary where counsel provided incomplete and erroneous advice during plea bargaining. Specifically, counsel advised him that he could be convicted of CSC-3d even if the jury agreed that Jamira Moss consented to the sexual

encounter. *Affidavit of Defendant John Moss* (appended as Appendix C). Mr. Moss was unaware and was not advised that he did not share a "blood or affinity" relationship with Jamira Moss. *Id.* He would not have entered his plea if he were aware of this possibility; he would have instead taken the case to trial. *Id.* Because Mr. Moss received inaccurate advice regarding the nature of the offense and possible defenses, he should be granted an opportunity to withdraw his plea.

The Sixth Amendment guarantees the right to the effective assistance of counsel during both the plea and sentencing proceedings. See generally *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 88 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996) (right to effective assistance of counsel at sentencing); US Const Amends VI, XIV; Const 1963, art 1, §§ 17, 20. More recently, the United States Supreme Court acknowledged that plea negotiations are a critical stage of the criminal proceeding requiring the effective assistance of counsel:

> The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. [*Lafler v Cooper*, 566 US 156, 165; 132 S Ct 1376; 182 L Ed 2d 398 (2012)].

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted. *Strickland*, 466 US at 687-688; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). In the context of inaccurate plea advice, a defendant seeking plea withdrawal must show that there is a reasonable probability that but for the errors the defendant would not have entered the plea. *Hill v Lockhart*, 474 US 52; 106 S Ct 366; 88 L Ed 2d 203 (1985). Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id; People v LaVearn*, 448 Mich 207;

528 NW2d 721 (1995). Only when the defendant understands the consequences of the plea can the plea be considered voluntary. *Brady v United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

A. Deficient Performance

Under *Strickland*, deficient performance is performance that is objectively unreasonable in light of professional norms. *Strickland*, 466 US at 687-688. At a minimum, counsel must take reasonable steps to investigate, prepare, and present evidence to support a defense or to exculpate the defendant. *Strickland*, 466 US at 691; *People v Grant*, 47 Mich 477; 784 NW2d 686 (2004). The failure to present a defense constitutes ineffective assistance where the omitted defense could have affected the proceeding's outcome. *Id.* The Supreme Court has not limited presentation of a defense to matters that impact only guilt or innocence, but informing defendant of an "incorrect legal rule," and "failure to timely file a motion to suppress" can also constitute deficient performance. *Lafler*, 566 US at 165; *Kimmelman v Morris*, 477 US 365, 385; 106 S Ct 2574; 91 L Ed 2d 305 (1986). Both affirmative mis-advice and omissions in the plea negotiation process can constitute deficient performance under *Strickland*. *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

"Professional norms" includes the American Bar Association (ABA) Standards for Criminal Justice. *Rompilla v Beard*, 545 US 374, 375, 381; 125 S Ct 2456; 162 L Ed 2d 360 (2005); *Wiggins v Smith*, 539 US 510, 524, 533; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Under ABA Standard 4-5.1(b) "[d]efense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea." Defense counsel must permit defendant to make the decision whether to enter a plea "after full consultation with counsel" and should consult with client regarding strategic and tactical decisions such as whether to file a trial motion. Standard 4-5.2(a) &(b).

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

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

In an affidavit filed with his motion for plea withdrawal, Mr. Moss asserted that trial counsel advised him "that adoptive siblings are related by affinity for purposes of the charged offense." See *Affidavit of Defendant John Moss* (appended as Appendix C). Mr. Moss maintained that the sexual encounter was consensual. *Id.* But his trial counsel incorrectly advised him that he still "could be convicted of the CSC-3d[,] regardless of whether the sex was consensual." *Id.*

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

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

B. Prejudice

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

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

Because counsel was deficient for failing to advise on the lack of an affinity relationship between adoptive siblings, and because Mr. Moss would not have pleaded no contest had he known

that the matter of consent was the main issue, his plea was not voluntarily entered. This Court should either grant Mr. Moss an opportunity to withdraw his plea, or, at a minimum, grant an evidentiary hearing, should this Court require additional facts for its determination.[8]

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

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

In denying Mr. Moss's motion for plea withdrawal, the Berrien County Circuit Court erroneously concluded that adoptive siblings are related by affinity for purposes of MCL 750.520d(1)(d). *People v Moss*, unpublished opinion and order of the Berrien County Circuit Court entered May 30, 2017 (Docket No. 2015-005091-FH) (attached as Appendix B). This Court, however, has long defined "affinity" as "the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other[.]" *Zajaczkowski*, 493 Mich at 13-14 (quoting *Bliss*, 149 Mich at 608). Because no marriage connects Mr. Moss's blood relatives to those of his adoptive sibling, there can be no affinity relationship.

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks this Honorable Court to impose one or more of the following remedies: (1) peremptorily vacate his convictions and remand this case to the Berrien County Circuit Court with instructions to give him the opportunity to affirm or withdraw his plea; (2) grant leave to appeal; (3) order oral argument on the application; (4) remand this case to the Court of Appeals as on leave granted; and/or (5) remand this case to the Berrien County Circuit Court for a *Ginther* hearing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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Dated: October 11, 2017