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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.

Court of Appeals No. 338877

Circuit Court No. 15-005091-FH

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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Statement Of Jurisdiction

Defendant-Appellant relies on the Statement of Jurisdiction previously filed in its Application for Leave to Appeal.

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 It repealed and incorporated a number of existing statutes, including the prohibition on incest.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

The definition of "blood or affinity" is at issue in this case. Mr. Moss pled to having consensual sex with his adoptive sister "JM." In ordering briefing, this Court asked for supplemental briefing on the issue of whether adoptive siblings are related by blood or affinity. They are related by neither. This Court should not jettison well-established definitions of "blood" and "affinity" in order to rewrite the criminal sexual conduct laws. That is the job of the Legislature.

Adoptive Siblings Are Not Related By Blood

Mr. Moss does not share a biological parent with the complainant in this case, JM. They were both adopted by the same woman, their foster mother. The trial court correctly concluded that sharing an adoptive parent does not transform two people who are not biologically related into blood relatives.App 128a-129a 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." *People v Zajaczkowski*, 493 Mich 6, 13 (2012) (citation and quotation marks omitted.) "By blood" is an alternative to "by affinity." *Id.*

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 the defendant was born. *Id.* at 9. The defendant and the victim in that case did not share either biological parent, and this Court held the relationship by blood element was not established. *Id.* at 9, 14. In a footnote, this

Court acknowledged that its holding meant that adoptive siblings would never fulfill the blood element, but adhered to "this Court's duty to enforce the clear statutory language that the Legislature has chosen." *Zajaczkowski*, 493 Mich at 14 n 18. "[P]olicy concerns are best left to the Legislature to address." *Id.*

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.

Adoptive Siblings Are Not Related By Affinity

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

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

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

This opinion was far better reasoned than the one by the Court of Appeals in *People v Armstrong,* 212 Mich App 121 (1995).The *Armstrong* court ignored the long-standing and accepted rule set forth in *Bliss* that "[t]he particular rule of common law adopted and in force in this state is not to be determined authoritatively by courts of another state." 149 Mich. at 609. The Court of Appeals in *Armstrong* did just that in refusing to follow *Bliss*. *Armstrong* acknowledged that the *Bliss* definition had been used as the "accepted meaning" of affinity for purposes of the criminal sexual conduct statutes in *People v Denmark*, 74 Mich App 402 (1977). Nonetheless, the *Armstrong* court chose to follow neither *Bliss* nor *Denmark*, and instead relied on a decision of the Washington Supreme Court*, In re Estate of Bordeaux*, 37 Wash2d 561 (1950). According to the Washington court, whether or not someone was related by affinity depended on the "legal context presented." Thus, the *Armstrong* court reasoned, it was free to reject the definition in *Bliss* because the court said that the use of the doctrine is "for the purpose only of determining whether . . . a juror or judge should be regarded as indifferent or biased *Armstrong* at 126 quoting *Bliss*.

The *Armstrong* court further explained that it was not constrained by *Denmark* because that case turned on whether or not the statute was unconstitutionally vague, and so legislative intent was not at issue. This reasoning is curious. In order to pass constitutional muster, a penal statute must define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson,* 461 US 352, 357 (1983) (citations omitted). There are at least three ways a penal statute may be found unconstitutionally vague: (1) failure to provide fair notice of what conduct is prohibited, (2) encouragement of arbitrary and discriminatory enforcement, or (3) being overbroad and impinging on First Amendment freedoms. *People v Howell,* 396 Mich 16, 20-21 (1976). To analyze the statute for purposes of a vagueness challenge, the *Denmark* court therefore had to determine whether a citizen would know what the statute meant. This is not mutually exclusive from legislative intent. Presumably the Legislature would know the

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same definitions a citizen would know, and would intend for the term to mean the same thing. Indeed, *Armstrong* cited *Denmark* for the proposition that "[t]he term 'affinity' is neither an unusual nor esoteric word; nor does the statute use the term in an uncommon or extraordinary context. Our courts have provided clear, legal definition of the concept on numerous occasions." *Denmark,* 74 Mich App at 408.

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

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

Other language in the criminal sexual conduct statute also undercuts the use of the *Armstrong* definition of affinity to include not just a "relationship by marriage," which the one here clearly is not, to include "ties other than marriage." Where the Legislature intended to protect those under 16 from people to whom they were tied to through a relationship other than blood, or marriage, they explicitly said so. MCL 750.520b(i) and MCL 750.520c(b)(i), both increase the severity of sexual assault penalties in cases where the victim is a "member of the same household" as the accused. Those in positions of authority over the victim are also subject to more severe penalties. MCL 750.520b(b)(iii), 750.520c(iii). To define the term

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"affinity" to include "ties other than marriage," such as members of the same household, would render these other, more specific sections superfluous. Reading the statute in this way would be contrary to the well-established rule that "when interpreting a statute, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v. Rea,* 500 Mich 422, 427-428 (2017) (citation and quotation marks omitted).

Further, with the amendment of MCL 750.520d(1)(d) and 750.520e(1)(d) in 1996, the phrase "blood or affinity" applies not only to minors but to everyone, young and old. Affinity should have the same definition for all of the sexual conduct statutes, and so the Legislature presumably had a purpose other than the protection of children in these provisions which apply to adult . Constitutional questions would undoubtedly arise if the Legislature limited sexual contact between consenting adults using the Random House College dictionary definition of affinity-- "relationship by marriage or by ties other than those of blood." A relationship by marriage has a known definition, but a "tie other than those of blood" is likely too vague to pass constitutional muster. *See Howell, supra.*

In sum, the *Armstrong* court's definition of the term affinity was contrary to basic principles of statutory construction and relied upon decisions of other states to question this Court's long-standing and clear definition of affinity. The trial court's further expansion of the term "affiinity" to include "adoption" -- a term the Legislature continued to use specifically when it intended to include adoptive children (see, eg MCL 700.2806(e)) -- was a policy decision, not an application of the plain language of the statute.

This Court should hold that the definition of affinity found in *Bliss* is applicable to the criminal sexual conduct statutes, and permit Mr. Moss to withdraw his plea.

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Judgment Appealed From And Relief Sought

Defendant-Appellant asks this Honorable Court to vacate the sentence, or any appropriate peremptory relief.

Respectfully submitted,

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/s/ Christine A. Pagac

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