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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

COA# 340328
LCT# 17-000304

Plaintiff-Appellee
v.
CHRISTOPHER LOUIS SINDONE
Defendant-Appellant. _____/

SCT#159709

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO COURT ORDER

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DEFENDANT'S STATEMENT OF QUESTIONS PRESENTED

I. Did the Michigan Legislature *in writing State arson statutes* express a clear intent to disallow dual convictions for the crimes of arson and preparation to burn based on the same conduct?

Defendant Sindone answers "Yes"

II. Does the same-elements test require vacating the Defendant's lesser (preparation to burn) conviction?

Defendant Sindone answers "YES"

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant CHRISTOPHER LOUIS SINDONE was convicted on July 3 , 2017 of 2nd Degree Arson, MCL 750.73(1) and Preparation to Burn a Dwelling, MCL 750.79(1)(d)(vi) after a bench trial held before the Honorable Kelly Ramsey in Wayne County Circuit Court. He was sentenced on August 1, 2017 to serve 12 – 40 years in prison with a concurrent 5-10 years in prison, with credit for 218 days. The court below issued a per curiam unpublished opinion on June 26, 2014 affirming. Defendant filed a timely Application for Leave in this Court. This Court issued an order asking the Defendant to file a Supplemental Brief specifically addressing legislative intent and whether the same elements test requires that the lesser offense (preparation to burn) be vacated by May 27, 2020. The clerk of this Court was also directed to schedule oral arguments on the Application. Defendant Sindone asks this Court to vacate the lesser offense or order a new trial entirely, and to further order resentencing, as the absence of the lesser offense will change the sentencing guidelines and require a new Presentence Report.

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STATEMENT OF FACTS

Christopher Louis Sindone was convicted on July 3 , 2017 of 2nd Degree Arson, MCL 750.73(1) and Arson, Preparation to Burn a Dwelling, MCL 750.79(1)(d)(vi) after a bench trial held before the Honorable Kelly Ramsey in Wayne County Circuit Court. He was sentenced on August 1, 2017 to serve 12 – 40 years in prison with a concurrent 5-10 years in prison, with credit for 218 days.

The issue before this Court involves the constitutional prohibition against double jeopardy; the statement of facts in the pleading will address that issue only.

Laurie Stasa, mother of the Defendant, was. watching the children of Christopher and Jennifer Sindone on December 23, 2016 at her home in Flat Rock. The children spent that night with her. At about 8am the next morning, December 24th, Defendant Sindone came to her house to pick up the three kids, he seemed to be in a hurry. (TT 6/29/17 p. 60). Defendant reportedly told Ms. Stasa that: " he lit a candle to burn that place down (the Woodhaven trailer) so she won't [have] nowhere to live (sic)" (TT 6/29/17 p. 63) Ms. Stasa asked the Defendant when he did this and he said "4 am". Ms. Stasa decided she should drive to the to the Woodhaven trailer. When she arrived, Ms. Stasa called 911. The 911 call was played for the Court. Defendant's counsel Slomski indicated that she thought the tape of the call exceeded the basic 911 call information, and she objected, but the court said she would admit it, and consider the entire call. (TT 6/29/17 p. 66)

Woodhaven Police Sergeant Nick Grunwald testified that he received a call to investigate a fire at about 11am on December 24th, 2016. When he arrived at the Sindone trailer,

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Woodhaven fire was on the scene. (TT 6/29/17 p. 76) The front window of the trailer appeared to have some soot on it. He noted and photographed many views of the interior, including what appeared to be a deflated air mattress on the floor. (TT 6/29/17 p. 76-86) Woodhaven Fire Chief Michael Clark also testified. He testified as to his various certifications and trainings and the Court qualified him as an expert.

Chief Clark was called in on December 24th, 2016. He and his team found light smoke in the air in the living room. Heavier smoke was present in the bedroom, but no fire or flames. There was "some" evidence of something burning. (TT 6/29/17 p. 99) He determined that there must have been some flames at the head of the bed due to marks on the wall. There was no evidence that the fire had been electrical in origin. There was no accelerant used and the cause of ignition was "undetermined". It appeared that the fire was not extinguished with water or a fire extinguisher. (TT 6/29/17 p. 99-107) The bedroom windows were closed and soot was present; Clark postulated that the fire used up the available oxygen in the closed bedroom and snuffed itself out. [1]

The prosecution rested and Defense counsel waived her previously reserved opening statement. Defendant Sindone chose to testify on his own behalf. Defendant Sindone had a key to the Woodhaven trailer because Jennifer had given him the keys and told him to make a copy. After arriving back at the Monroe trailer at 3:15am on December 24tth, and finding Jennifer gone, he stayed there for a half and hour and then drove to the Woodhaven trailer, because he thought Jennifer might be there. (TT 6/29/17 p. 130) She was not there. He was very tired and under the influence of the medication and alcohol. He went into the bedroom and lit candles to have a night-light and counter the smell of the marijuana. He passed out. He awoke to find a

[1] Defendant argued in his original appeal that his trial counsel should have sought the services of an independent arson expert, as the prosecution's explanation of and description of the fire lacked detail and clarity.

fire on the floor next to the bed. (TT 6/29/17 p. 132) The fire caused the air mattress to burst, which blew out most of the fire. He slapped the fire and did not see any more flames. There was now no place to sleep, so he left the Woodhaven trailer. The fire was out; there was no need to call the fire department. (TT 6/29/17 p. 133) He went back to the Monroe trailer and fell asleep until 8am. Then he went to Laurie Stasa's (his mother) to pick up his kids. He was not rushing and there was no disagreement with his mother, and Defendant Sindone denied telling his mother that he had started a fire.

Trial continued on Monday, July 3rd, 2018. Defendant Sindone reiterated that the fire was an accident, that he was drunk and high at the time. (TT 7/3/17 p. 10) On cross-exam he agreed that he placed a candle on the floor next to the bed, he was not thinking right. He woke up and the blankets were on fire. He admitted he told Jennifer the whole thing was "god's work" because the accidental fire forced them to not ever live in Woodhaven where the water was contaminated. (TT 7/3/17 p. 14) Defendant Sindone and his wife were set to begin marriage counseling in January. (TT 7/3/17 p. 14)

The parties gave closing arguments. The trial court, Judge Ramsey, stated first that intoxication is not a defense. (TT 7/3/17 p. 35) She noted that the pictures of the bedroom showed it was damaged beyond the need for mere cleaning, and as such met the requirement of "damaged" or "destroyed".

The trial court said that Ms. Stasa testified that she thought he [Defendant] was going to "hurt me" *but in fact there was no such testimony found in the transcript*. (TT 7/3/17 p. 37) The trial court opined that the Defendant's testimony that air from the mattress put out the fire was not believable. (TT 7/3/17 p. 39) inexplicably, the court noted that since there was no evidence of water used to put the fire out, she believes the fire was intentionally set. (TT 7/3/17 p. 40)

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The court then stated that it found evidence satisfying the elements of Arson, 2nd degree. Furthermore, because the Defendant put a candle next to something flammable, the elements of "Preparation to burn" were also met. The property damage charge was also met. Sentencing was set for August 1, 2017. (TT 7/3/17 p. 42)

At sentencing, Judge Ramsey told Mr. Sindone that he was selfish, unpredictable and dangerous. She imposed a 12- 40 year (144 months minimum) sentence for the arson, 2nd degree, with a concurrent sentence of 5-10 years for preparation to burn. (ST 8/1/17 p. 47)

Defendant Sindone appealed as of right and moved for remand, which was denied. He moved for remand again, and In Pro Per when his discovery materials were finally made available to him. MCR 7.211. The court of appeals below denied all motions to remand, and affirmed his convictions (but ordered resentencing) in an unpublished *per curiam* opinion dated April 11, 2019. Judge Shapiro wrote separately indicating that he believed that the Defendant's convictions for both preparation to burn and arson of a dwelling violated the principles of double jeopardy, and he would have vacated the preparation to burn conviction. Resentencing has not been held pending the outcome of this double jeopardy issue. Defendant appealed the lower court's affirmation of his convictions. This court granted oral arguments and requested a supplemental brief in support of Defendant's Application for Leave to appeal on April 15, 2020.

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ARGUMENTS

I. The Michigan Legislature *in writing State arson statutes* expressed a clear intent to disallow dual convictions for the crimes of arson and preparation to burn based on the same conduct.

Issue Preservation: Defendant did not present a double-jeopardy argument to the trial court; however, a double-jeopardy issue involves a significant constitutional matter that will be considered on appeal regardless of whether the defendant raised it before the trial court. *People v Colon*, 250 Mich App 59, 62 (2002).

Standard of Review: A double-jeopardy argument presents a question of constitutional law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599 (2001).

Discussion: The *Colon* court stated "The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15." In other words, the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *People v Squires*, 240 Mich App 454, 456 (2000). However, this Court, in *People v Denio*, 454 Mich 691, 706 (1997) and then in *People v Miller*, 498 Mich 13, 19 (2015), stated that the intent of the Legislature is the governing factor under the double jeopardy clause of the United States and Michigan constitutions. In *Denio*, supra at 709, this Court explained "Thus, if the Legislature desires, it may specifically authorize penalties for what would otherwise be the "same offense." *People v Sturgis*, 427 Mich 392, 403 (1986). "[C]umulative punishment of the same conduct under two different statutes in a single trial does not run afoul of the Double Jeopardy Clause in either the federal or state system." Id.

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Thus, this case presents questions of law regarding statutory interpretation and the application of our state and federal Constitutions, which should also be reviewed *de novo.* Its order of April 15, 2020, this Court directed the parties to address how *People v Miller*, 498 Mich 13, 19 (2015) applies in this case.

In *Miller*, this Court examined OUIL statutes in Michigan- a complex set of statutes prohibiting a variety of behavior. This Court found in *Miller* that in some instances the legislature had *specifically* provided for double punishments and/or multiple convictions, and so by extension, where such multiple convictions were not specifically allowed in the OUIL statutes, they violated the double jeopardy clause of the Michigan and United States constitutions.

In contrast, the Michigan arson statutes do not specifically allow double punishments in any of their permutations. It is instructive to examine the other statutes that were part of Public Act 328 from 1931, which included our current 2nd degree Arson and preparation to burn statutes [2] Indeed several statutes first enacted in the same public act in 1931 time specifically allow for multiple convictions. For example, MCL 750.85 (Torture) states that multiple convictions are not prohibited, as does the original Assault With Intent to Murder statute, c.[3]

In other words, *if* the legislature saw fit to specifically allow multiple punishments in **some** cases, their choice to stay silent in others must be deemed intentional, See *Miller, supra*. The choice of the Michigan legislature to prohibit preparation to burn as well as completed arson

[2] MCL 750.73(1) MCL 750.79(1)(d)(vi) Appendix 8a
[3] Full Statutes, Appendix 9a

can be viewed as criminalizing a specific kind of attempted crime. [4]

This Court should find that where other statutes enacted in the same public act in 1931 specifically allow for multiple convictions, where the arson statutes do not, to support a finding that double punishment/conviction violates double jeopardy in this case. To reach the opposite conclusion would violate our well-recognized rule that 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." *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146 (2002). See also *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210 (1993)("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."). (as quoted *in Miller*, supra).

The legislature's intent was clear- it did not intend for multiple punishments and multiple convictions in cases such as Mr. Sindone's and his preparation to burn conviction must be vacated.

[4] Defendant asks this Court to note that the Michigan "preparation to burn" language and statute is quite unique in American jurisprudence. No other states have similar statutes and there is no similar statute in the Federal criminal code or in the model penal code. Some states prohibit arson "preparation" as part of their attempted arson statute, separate from arson itself. See West Virginia Statute Appendix 10a

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II. The same-elements test requires vacating Defendant's lesser (preparation to burn) conviction.

Issue Preservation: Defendant did not present a double-jeopardy argument to the trial court; however, a double-jeopardy issue involves a significant constitutional matter that will be considered on appeal regardless of whether the defendant raised it before the trial court. *People v Colon*, 250 Mich App 59, 62 (2002).

Standard of Review: A double-jeopardy argument presents a question of constitutional law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599(2001).

Discussion: Even if this Court finds that legislative intent is unclear, (Issue I) the Defendant argues that the two convictions violate the *Blockburger*[5] rule. When legislative intent is not clear, Michigan courts apply the "abstract legal elements" test articulated in *People v Ream* 481 Mich 223 (2008) to ascertain whether the Legislature intended to classify two offenses as the "same offense" for double jeopardy purposes. This test focuses on the statutory elements of the offense to ascertain whether the Legislature intended to classify two offenses as the "same offense" for double jeopardy purposes.

Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" US Const, Am V. The prohibition against double jeopardy protects individuals in three ways: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects

[5] See *Garrett v United States*, 471 US 773, 779; 105 S Ct 2407; 85 L Ed 2d 764 (1985) "that the Blockburger rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history"

against multiple punishments for the same offense." The first two protections comprise the "successive prosecutions" strand of double jeopardy, while the third protection is known as the "multiple punishments" strand. Because defendant was convicted of and sentenced for both 2nd degree Arson, MCL 750.73(1) and Preparation to Burn MCL 750.79(1)(d)(vi) arising from the same conduct at the same trial, this case involves the multiple punishments strand of double jeopardy.

The multiple punishments strand of double jeopardy "is designed to ensure that courts confine their sentences to the limits established by the Legislature" and therefore acts as a "restraint on the prosecutor and the Courts." The multiple punishments strand is not violated where a legislature specifically authorizes cumulative punishment. Const 1963, art 1, § 15. Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if "each of the offenses for which defendant was convicted has an element that the other does not . . . ."This means that, under the *Ream* test, two offenses will only be considered the "same offense" where it is impossible to commit the greater offense without also committing the lesser offense.

This is exactly the case here. MCL 750.79 prohibits this conduct: "1) A person who uses, arranges, places, devises, or distributes an inflammable, combustible, or explosive material, liquid, or substance or any device in or near a building, structure, other real property, or personal property with the intent to commit arson in any degree" . To be convicted of MCL 750.79 (known colloquially as 'preparation to burn') you must first place something flammable (such as a candle) near something flammable (an air mattress you are intending to sleep on) with the intent to commit arson. To be found guilty of 2nd degree arson, MCL 750.73, a person must

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"1) willfully or maliciously burn[], damage[], or destroy[] by fire or explosive a dwelling, regardless of whether it is occupied, unoccupied, or vacant at the time of the fire or explosion, or its contents". A person cannot *cause something to burn* without placing something *that will start that fire*. A person cannot commit the burning without a flame. There is no way to be an arsonist without preparing to burn. MCL 750.79 was clearly designed by the legislature to apply to those individuals who readied an accelerant or attempted arson but *never actually committed* the arson. If the dual conviction suffered by Defendant Sindone here is allowed by this Court*, every person in Michigan convicted of arson should also be convicted of preparation to burn.*

MCL 750.79 should have been treated by Judge Ramsey as an alternative charge. It was most likely used here by the Wayne County prosecutor as a failsafe in case the miniscule accidental fire which was completely extinguished by the time anyone arrived at the dilapidated trailer was so insignificant and insufficient that it could not even be considered a fire for purposes of the arson statute.

Defendant's conviction on both counts cannot stand, and this Court should vacate one of them. Preferably, given that this was a bench trial, this Court should order an entire new trial where the prosecutor is specifically advised that the Defendant may only be convicted of one or the other. Judge Ramsey was confused by the multiple charges and her finding of facts reflect this. If preparation to burn is eliminated, the Defendant's sentencing factors are altered also, and as such must be considered at the already-ordered resentencing in the court below.

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RELIEF REQUESTED

Defendant Sindone respectfully requests that this Court grant his Application for leave, or in the alternative, order that his conviction of preparation to burn be vacated, or order an entire new trial. He is already entitled to be resentenced based on a prior order of the court below.

Respectfully submitted,

Respectfully submitted,

BY: -s-Kristina L. Dunne _-s-_
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DATED: MAY 26, 2020

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STATE OF MICHIGAN
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Defendant-Appellant. /

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PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

I, KRISTINA L. DUNNE hereby affirm that on 5/26/2020 I served a copy of the DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO COURT ORDER, APPENDICES, AND Proof of Service upon:

Prosecuting Attorney, Wayne County

electronically

s/s Kristina L. Dunne

Dated: May 26, 2020