

STATE OF MICHIGAN  
IN THE SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

No. 159709

CHRISTOPHER LOUIS SINDONE,  
Defendant-Appellant.

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Court of Appeals No. 340328  
Circuit Court Case No. 17-000304-01-FH

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PLAINTIFF-APPELLEE'S  
SUPPLEMENTAL BRIEF ON APPEAL  
ORAL ARGUMENT REQUESTED

Timely filed in accordance with AO 2020-4  
and, as to format, AO 2019-6

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**COUNTERSTATEMENT OF JURISDICTION**

Defendant did not include a statement of jurisdiction in his supplemental brief. This Court has jurisdiction over this matter pursuant to MCR 7.303(B)(1).

**COUNTERSTATEMENT OF QUESTIONS PRESENTED**

**I.**

**A defendant who receives multiple punishments for the same offense has not been subjected to a double jeopardy violation when the Legislature has conveyed an intent to allow such either through clear statutory language, or, if unclear, the crimes at issue pass the abstract legal elements test. Here, the statutory language within second-degree arson and preparation to burn reveals clear legislative intent to allow multiple punishments for the same offense—and even if unclear, the crimes pass the abstract legal elements test because it is possible to commit arson without first preparing to burn. Has defendant’s right to be protected from being twice put in jeopardy for the same offense been violated?**

The Court of Appeals answered, “NO.”

The People answer, “NO.”

Defendant answers, “YES.”

## COUNTERSTATEMENT OF FACTS

This case arises from a fire defendant set at his estranged wife's mobile home trailer. First responders were called to 25173 Middlesex in the City of Woodhaven on the morning of Christmas Eve, 2016, after they received a report of a fire at a mobile home. 061b, 071b-072b, 098b-099b. Upon arrival, investigators discovered the trailer emitting smoke, with significant evidence of burning in the front bedroom. 099b. Less than a month prior, Jennifer Sindone (the victim) purchased the trailer, as she and her husband, defendant, were in the process of obtaining a divorce. 008b-009b. Jennifer was not home at the time of the fire, but had been spending the night at the property since she purchased it, and had moved several belongings into it, including clothing (both for herself and her children), furniture, sheets, Christmas décor, and other household goods. 010b, 012b. Moreover, despite the fact that it did not have a working kitchen and was in need of repairs, the property's utilities—electricity and water, at least—were turned on in Jennifer's name, and in working order. 010b, 011b-012b, 024b-025b. She was last at the mobile home the day before, when she left for work at approximately 6:30 a.m., on the morning of December 23, 2016. 012b.

On the afternoon of December 23, defendant picked Jennifer up at the completion of her work-day, and brought her back to the marital home they shared in the City of Monroe prior to separating. 021b, 118b. Although she intended to spend some time with her children that evening,<sup>1</sup> they were not at the Monroe address; defendant's mother, Laurie Stasa, was hosting an overnight for them at her house not far away. 022b, 056b, 119b. Instead, the pair went Christmas shopping

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<sup>1</sup> Defendant and Jennifer have two children in common, a set of eight-year-old (at the time of trial) twins; defendant has an older child from a different relationship, who also resided with the family. 019b-020b.

together for the kids and returned to the Monroe home where they both imbibed in alcohol.<sup>2</sup> After an hour or two, however, a verbal argument ensued; when defendant threatened to take his own life, Jennifer called 911. 043b, 121b-122b. Police responded around 9:00 p.m., and transported defendant to the Monroe County Hospital, where he was admitted to the emergency psychiatric unit, and not released until approximately 3:00 a.m. the following morning. 044b, 053b-054b.

After defendant was taken to the ER, Jennifer left the Monroe house, but in an attempt to “hide” from her husband,<sup>3</sup> who, in the interim, was sending threatening text messages to her mobile phone, she did not go to her new Woodhaven trailer. 024b, 044b-045b. When defendant returned to his Monroe home and Jennifer was not there, defendant drove to her Woodhaven property, only to find it empty. 121b, 127b. He let himself in with the key he possessed,<sup>4</sup> lit a candle for what he claimed was a “night light,” and proceeded to set the air mattress in the front bedroom on fire with it. 125b-126b, 128b.

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<sup>2</sup> Jennifer stated at trial that she had a couple of servings of Fireball whiskey; defendant testified that he drank about six beers and a half-pint of whiskey. 039b, 121b-123b. In addition to the medical marijuana he smoked, defendant admitted to taking prescription narcotics throughout the afternoon and evening: Percocet (10/325 mg; pain reliver with Oxycodone and Acetaminophen), Flexeril (10 mg; muscle relaxer), and Nortriptyline (25 mg; anti-depressant). 122-123b; Rx List, *Percocet* <<https://www.rxlist.com/percocet-drug.htm>> (accessed June 25, 2020); Rx List, *Flexeril* <<https://www.rxlist.com/flexeril-drug.htm>> (accessed June 25, 2020); RxList, *Nortriptyline* <<https://www.rxlist.com/nortriptyline-hydrochloride-drug.htm>> (accessed June 25, 2020).

<sup>3</sup> Admitted at trial without objection as *People’s Exhibit No. 4* was a 911 call placed by defendant’s mother in which she states her daughter-in-law was “hiding” from her son. *People’s Exhibit No. 4*, 4:04.

<sup>4</sup> Defendant claimed Jennifer had him make himself a copy of a key to her new house; she, however, insisted that was not the case. 037b, 126b. She knew he obtained a key somehow because he told her so, but defendant would not return it, and she could not afford to have the locks changed. 037b-038b.

Whereas he claimed at trial that the fire started by accident when he fell asleep, defendant's own mother (Stasa) testified to the contrary. 068b, 128b; 141b. At 8:00 a.m. on December 24, she and her grandchildren were still sleeping when defendant showed up and abruptly demanded the kids had to come home. 056b-057b. Stasa attempted to help pack them up, as her son was acting abnormally frantic; defendant was in such a hurry that he demanded the children go outside without shoes or coats, despite the fact that it was a cold winter day. 057b-058b. He told his mother that he went over to Jennifer's Woodhaven residence around 4:00 a.m. that morning and lit a candle to "burn that place down so she won't [have] nowhere to live." 059b-060b, 068b. Defendant even repeated the admission when Stasa was in disbelief. 060b. Worried that her son was telling the truth, Stasa drove over to the mobile home and proceeded to call 911 when she found evidence of a fire. 060b-061b; *People's Exhibit No. 4*. She told emergency dispatch that defendant admitted to going to the location earlier that morning to burn the place down. *People's Exhibit No. 4*, 4:30.

At trial, defendant denied ever telling his mother that he intentionally set the fire, claiming it to be a lie, but unable to explain why she would make up such a story. 132b. He maintained that on the night of the crime, he placed the candle on the floor next to the mattress before he fell asleep, and when he awoke, the mattress was on fire. 129b; 141b. He claimed that he "slapped" the fire out with his bare hands until the flames—which were two to three feet high—were gone, although the air released when the mattress burst "blew most of it out." 129b; 142b-143b, 149b. Defendant testified that despite extinguishing the fire himself, he did not sustain any injuries. 143b. On cross-examination, he admitted to sending his mother a text message on the afternoon following the fire relating that a police officer had advised

Jennifer that defendant could burn marital property if he wanted to. 143b; *People's Exhibit No. 3*. Later on, at trial, he explained that he intended to live at the Woodhaven trailer after he and Jennifer attended marriage counseling. 145b.

Arson investigator Mike Clark could not specify the cause of the fire's ignition, but did rule out the appliances, electrical hazards, and spontaneous combustion as the source. 101b, 103b. He also determined, based on laboratory results, that an accelerant was not used. 102b. Though the cause was deemed "undetermined," the point of origin was based on the burn patterns on the walls: it started at the head of the inflatable mattress, which was melted and burned. 99b-100b, 103b. In regard to how the fire did not engulf the entire trailer, Clark stated that it most likely "snuffed itself out" due to lack of oxygen, a common occurrence when windows and doors are closed, as was the case here. 104b-105b.

Following a bench trial before the Honorable Kelly Ramsey, defendant was convicted of one count of second-degree arson<sup>5</sup> and preparation to burn,<sup>6</sup> and was sentenced on August 1, 2017 as a habitual offender (third offense)<sup>7</sup> to 12 to 40 years' imprisonment on the former, concurrent to 5 to 10 years' on the latter.<sup>8</sup> 197b.

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<sup>5</sup> MCL 750.73.

<sup>6</sup> MCL 750.79.

<sup>7</sup> MCL 769.11.

<sup>8</sup> Although the trial transcripts plainly state the trial court found defendant guilty of a third count, preparation to burn property valued at \$1,000 or more but less than \$20,000 (MCL 750.79(1)(c)(i)), after consulting with the assistant prosecutor at trial, this writer submits that said transcripts are erroneous. ("The Court concludes that property damage is incorporated in the arson and will find the defendant guilty of count three.") All of the sentencing orders, in addition to the presentence investigation report, support the fact that the court found defendant *not guilty* of this third count and defendant does not contend otherwise.

Defendant filed a claim of appeal to the Court of Appeals (COA), in which he argued: (1) that his trial attorney rendered ineffective assistance when she failed to argue the property burned was not a dwelling and failed to utilize an arson investigator, (2) that his convictions for both second-degree arson and preparation to burn are in violation of double-jeopardy protections, (3) that the property burned was not a dwelling, and (4) that the trial court erred in the scoring of sentencing guidelines, and trial counsel was ineffective for failing to object to the errors. The COA affirmed defendant's convictions but remanded for resentencing after finding that the trial court erred in the assessment of points for offense variables (OVs) 1 and 9.<sup>9</sup>

Subsequently, defendant filed an application for leave to appeal to this Court, arguing the same issues raised in the court below. This Court scheduled oral argument on whether to grant the application or take other action, ordering the parties, in light of *People v Miller*,<sup>10</sup> to file supplemental briefs addressing:

- (1) Whether the Legislature expressed a clear intent to allow or disallow dual convictions for the same conduct under both MCL 750.73 (second-degree arson) and MCL 750.79(1)(d)(vi) (preparation to burn), and
- (2) If not, whether the same-elements test requires vacating the lesser conviction.

The People now respond. This brief should be considered timely filed pursuant to AO 2020-4. Additional facts may be set forth, *infra*.

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<sup>9</sup> *People v Sindone*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2019 (Docket No. 340328), pp. 7-8, 10-12.

<sup>10</sup> *People v Miller*, 498 Mich 13, 19; 869 NW2d 204 (2015).

## ARGUMENT

### I.

**A defendant who receives multiple punishments for the same offense has not been subjected to a double jeopardy violation when the Legislature has conveyed an intent to allow such either through clear statutory language, or, if unclear, the crimes at issue pass the abstract legal elements test. Here, the statutory language within second-degree arson and preparation to burn reveals clear legislative intent to allow multiple punishments for the same offense—and even if unclear, the crimes pass the abstract legal elements test because it is possible to commit arson without first preparing to burn. Defendant’s right to be protected from being twice put in jeopardy for the same offense has not been violated.**

#### Standard of Review

Because he did not object in the trial court, defendant failed to preserve the issue of whether his arson and preparation to burn convictions are in violation of double jeopardy.<sup>11</sup> Though the issue presents a significant constitutional question that will be considered on appeal, an unpreserved claim that a defendant’s double jeopardy rights have been violated is reviewed for plain error affecting his substantial rights.<sup>12</sup> To merit relief under the plain-error standard of review, a defendant must show that: (1) there was an error; (2) the error was plain, that is, clear or obvious; and (3) the plain error affected his substantial rights.<sup>13</sup> Once he satisfies these three requirements, the reviewing court must still exercise its discretion and reverse only when (4) the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.<sup>14</sup>

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<sup>11</sup> *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008) (citation omitted).

<sup>12</sup> *McGee*, *supra* (citation omitted).

<sup>13</sup> *People v Carines*, 460 Mich 750, 763-764; 596 NW2d 130 (1999).

<sup>14</sup> *Carines*, *supra*.

## Discussion

This Court asks the parties to address whether the Legislature expressed a clear intent to either allow or disallow dual convictions for both arson and preparation to burn and, if not, whether the same-elements test requires vacation of the lesser conviction. Though defendant contends that the Legislature's silence regarding multiple punishments equates to a clear intent to prohibit the same, such analysis is over-simplified and fails to take a comprehensive look at the statutes involved and the principles of determining legislative intent. That the statutes which govern second-degree arson and preparation to burn do not explicitly state, "multiple punishments are permitted," does not automatically mean that the Legislature has not conveyed a clear intent to allow the same. To the contrary, specific wording found in some but not all of the crimes within the arson chapter of the Michigan Penal Code make it evident that the Legislature intended to permit cumulative punishments for second-degree arson and preparation to burn. Moreover, even if legislative intent is deemed unclear, arson and preparation to burn pass the abstract legal elements test in that it is indeed possible to commit arson without first preparing to burn. Because there was no error, defendant cannot establish the plain error necessary to prevail in this matter. Consequently, this Court should deny his application for leave to appeal.

### A. A Comment on the Multiple-Punishments Strand

Both the United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense.<sup>15</sup> This

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<sup>15</sup> US Const, Am V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"); Const 1963, art 1 §15 ("No person shall be subject for the same offense to be twice put in jeopardy."); *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996).

prohibition has commonly been interpreted to protect individuals from (1) a subsequent prosecution for the same offense after acquittal, (2) a subsequent prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.<sup>16</sup> It should first be noted, however, that whether double jeopardy protection extends to multiple punishments stemming from the same—not *subsequent*—prosecutions, has been refuted by the United States Supreme Court (SCOTUS).

In *Hudson v United States*, the Court explicitly stated, “The [Double Jeopardy] Clause protects only against the imposition of multiple criminal punishments for the same offense ..., and then *only* when such occurs in *successive* proceedings.”<sup>17</sup> In his concurrence, Justice Scalia explained:

Indeed, it was the absurdity of trying to force the *Halper* analysis upon the Montana tax scheme at issue in *Department of Revenue of Mont. V Kurth Ranch* ... that prompted me to focus on the prior question whether the Double Jeopardy Clause even contains a multiple-punishments prong .... That evaluation led me to the conclusion that the Double Jeopardy Clause prohibits successive prosecution, not successive punishment, and that we should therefore “put the *Halper* genie back in the bottle.” . . . Today’s opinion uses a somewhat different bottle than I would, returning the law to its state immediately prior to *Halper*—*which acknowledged a constitutional prohibition of multiple punishments but required successive criminal prosecutions*. So long as that requirement is maintained, our multiple-punishments jurisprudence essentially duplicates what I believe to be the correct double-jeopardy law, and will be as harmless in the future as it was pre-*Halper*. Accordingly, I am pleased to concur.<sup>[18]</sup>

It is well-settled that Michigan’s “Double Jeopardy Clause is essentially identical to its federal counterpart” and is “construed consistently with

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<sup>16</sup> *Miller, supra*, at 17.

<sup>17</sup> *Hudson v United States*, 522 US 93, 99; 118 SCt 488, 493; L Ed 2d 450 (1997) (emphasis added; citations omitted).

<sup>18</sup> *Hudson, supra*, at 106 (emphasis added) (SCALIA, J., concurring).

the corresponding federal provision.”<sup>19</sup> “[W]e have been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art. 1 § 15....”<sup>20</sup> Accordingly, because this case does not involve *successive* prosecutions, defendant’s double jeopardy rights could not have been violated.<sup>21</sup>

Still, it is a violation of a defendant’s due process rights when he is subjected to greater punishment than authorized by the legislature. “[T]he guarantee of the process provided by the law of the land, ... assures prior legislative authorization for whatever punishment is imposed.”<sup>22</sup> It follows then, regardless of whether this case is framed as a double jeopardy or due process issue, an analysis of the legislative intent of the statutes involved is required.

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<sup>19</sup> *People v Nutt*, 469 Mich 565, 575, 594; 677 NW2d 1 (2004).

<sup>20</sup> *Miller, supra*, at 27 n 9 (citation and quotation marks omitted).

<sup>21</sup> A number of federal cases have cited *Hudson, supra*, for this proposition. *United States v Beaty*, 147 F3d 522, 524 (6th Cir. 1998) (“It has long been understood, however, that [the Double Jeopardy] Clause does not prohibit the imposition of any additional sanction that could, “in common parlance,” be described as punishment. The Clause protects only against the imposition of multiple criminal punishments for the same offense and then only when such occurs in successive proceedings”); *United States v Hatchett*, 245 F3d 625, 630 (CA 7, 2001) (“The Supreme Court has made clear, however, that the Double Jeopardy Clause proscribes multiple punishments for a single offense only when those punishments are imposed in successive proceedings”); *United States v Van Waeyenberghe*, 481 F3d 951, 958 (CA 7, 2007) (“The Double Jeopardy Clause protects only against multiple punishments meted out in successive proceedings”); *United States v Kennedy*, 630 F Appx 955, 957, 2015 WL 6648134 (11th Cir. 2015) (“The Double Jeopardy Clause protects only against the imposition of multiple punishments for the same offense, and then only when such occurs in successive proceedings”).

<sup>22</sup> *Department of Revenue of Montana v Kurth Ranch*, 511 US 767, 798; 114 S Ct 1937, 1955; 128 L Ed 2d 767 (1994) (SCALIA, J., dissenting) (abrogation of *Kurth Ranch* by *Hudson* recognized in *United States v Warneke*, 199 F3d 906, 908 (CA 7, 1999)).

## B. Legislative Intent of Arson versus Preparation to Burn

Michigan courts have construed the purpose of the “multiple-punishments” strand of double jeopardy as protecting a “defendant from having more punishment imposed than the Legislature intended”<sup>23</sup>—a protection “designed to ensure that courts confine their sentences to the limits established by the Legislature[.]”<sup>24</sup> The prohibition against double jeopardy, therefore, is *not a restriction on the legislative authority* to define crimes and assign punishments.<sup>25</sup> Put another way: so long as the Legislature intended to authorize multiple punishments, a defendant’s double jeopardy rights are not violated when he is cumulatively punished under more than one statute for the same offense.<sup>26</sup> “Thus, this Court’s inquiry when determining whether the Legislature intended to authorize cumulative punishment for certain criminal conduct necessarily focuses on the intent of the Legislature.”<sup>27</sup> Importantly, “[u]nder neither the federal nor the Michigan double jeopardy provisions does this Court sit as a superlegislature, instructing the Legislature on what it can make separate crimes.”<sup>28</sup>

The goal of this Court, when interpreting a statute, “is to give effect to the Legislature’s intent, focusing on the statute’s plain language.”<sup>29</sup> This requires an examination of “the statute as a whole, reading individual words and phrases in the context of the entire

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<sup>23</sup> *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004).

<sup>24</sup> *Miller, supra*, at 17-18 (citation and quotation marks omitted).

<sup>25</sup> *Ford, supra*, at 448.

<sup>26</sup> *Miller, supra*, at 18 (citation and quotation marks omitted).

<sup>27</sup> *People v Walker*, 234 Mich App 299, 304; 593 NW2d 673 (1999), citing *People v Griffis*, 218 Mich App 95, 100-101; 553 NW2d 642 (1996).

<sup>28</sup> *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984) (overruled by *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007)).

<sup>29</sup> *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018) (citation and quotation marks omitted).

legislative scheme”<sup>30</sup> and “in view of its structure and of the physical and logical relation of its many parts.”<sup>31</sup> Unambiguous statutory language “must be enforced as written.”<sup>32</sup> In fact, further judicial construction of a clear statute is not only not required, but prohibited.<sup>33</sup>

The statutes at issue in this case include MCL 750.73, “second-degree arson,” and MCL 750.79, “preparation to burn.”<sup>34</sup> As charged against defendant, they state:

Sec. 73. (1) Except as provided in section 72, a person who willfully or maliciously burns, damages, or destroys 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, is guilty of second degree arson.

(2) Subsection (1) applies regardless of whether the person owns the dwelling or its contents.

(3) Second degree arson is a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$20,000.00 or 3 times the value of the property damaged or destroyed, whichever is greater, or both imprisonment and a fine.<sup>[35]</sup>

Sec. 79. (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 or who aids, counsels, induces, persuades, or procures another to do so is guilty of a crime as follows:

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<sup>30</sup> *Pinkney, supra* (citation and quotation marks omitted).

<sup>31</sup> *Ally Financial Inc. v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018).

<sup>32</sup> *Pinkney, supra* (citation and quotation marks omitted).

<sup>33</sup> *Pinkney, supra*.

<sup>34</sup> Formally titled, “using inflammable, combustible, or explosive material, liquid, or substance near building or personal property with intent to commit arson of any degree; aiding or abetting; total value of property; enhanced sentence; prior convictions.” MCL 750.79.

<sup>35</sup> MCL 750.73(1) – (3).

(d) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$15,000.00 or 3 times the combined value of the property damaged or destroyed, whichever is greater, or both imprisonment and a fine:

\* \* \*

(vi) The property is a dwelling. This subparagraph applies regardless of whether the person owns the dwelling.<sup>[36]</sup>

Admittedly, none of the arson statutes explicitly state that multiple punishments for the same offense are permissible.<sup>37</sup> That does not necessarily mean, however, that the legislative intent is not clear. To the contrary, a review of all of the statutes within the arson chapter of the Michigan Penal Code, with close attention to the crimes at hand, reveals that the Legislature intentionally prohibited multiple punishments from some, but not all, arson crimes.<sup>38</sup> The People submit to this Court that the prohibition of *only* some multiple punishments signifies the Legislature's intent to allow them with others.

A look at this Court's analysis in *Miller* is helpful in explaining this issue. There, for the same offense, the defendant was charged with two crimes under separate subsections of the operating while intoxicated (OWI) statute: operating while intoxicated and operating while intoxicated causing injury, MCL 257.625(1) and (5), respectively.<sup>39</sup> Though both Subsections (1) and (5) are silent regarding the authorization of multiple punishments and therefore do not convey legislative intent when read in isolation, this Court observed that the interpretation of statutory language requires its examination as a

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<sup>36</sup> MCL 750.79(1)(d)(vi).

<sup>37</sup> MCL 750.71 through MCL 750.79.

<sup>38</sup> MCL 750.71 through MCL 750.79.

<sup>39</sup> *Miller, supra*, at 20; MCL 257.625(1) and (5).

whole—text should not be “quarantined.”<sup>40</sup> *Miller* hinged on a subsection of the OWI statute under which defendant was not charged: Subsection (7), operating while intoxicated with a minor in the vehicle,<sup>41</sup> wherein the Legislature explicitly authorized multiple punishments for violations of Subsection (7) and—*only*—either Subsection (4) or (5).<sup>42</sup> In finding that the Legislature intended to exclude all other multiple punishments other than the ones listed in Subsection (7), this Court acknowledged that “if the Legislature had intended to allow multiple punishments for Subsections (1) and (5), it clearly knew how to do so, as evidenced by the specific authorization in [Subsection (7)].”<sup>43</sup> That is, because Subsection (7) gave explicit authority for multiple punishments, the omission of such language in Subsections (1) and (5) was not an oversight, but an intentional silence signifying the Legislature’s prohibition of multiple punishments stemming from any other subsections not listed. Specifically in *Miller*, that meant the defendant’s convictions under Subsections (1) and (5) were barred by the Double Jeopardy Clause.

[T]o 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.” That is, had the Legislature generally intended to allow multiple punishments for every category of operating while intoxicated offense arising from the same conduct, there would have been no need for the Legislature to specifically authorize multiple punishments [in Subsection (7)]. To interpret MCL 257.625 as permitting multiple punishments for other operating while intoxicated offenses

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<sup>40</sup> *Miller, supra*, at 23.

<sup>41</sup> MCL 257.625(7).

<sup>42</sup> *Miller, supra*, at 23.

<sup>43</sup> *Miller*, at 24-25.

would improperly render the specific authorization under [Subsection (7)] surplusage.<sup>[44]</sup>

Here, the arson chapter consists of nine statutes, total. The first, MCL 750.71, provides definitions, while the remainder establish specific crimes that fall into one of two categories. The first group, herein Category 1, ranges in (descending) severity from first to fifth-degree, and even misdemeanor arson.<sup>45</sup> Category 2 includes arson of insured property and—pertinent to the case at hand—preparation to burn.<sup>46</sup> What sets these two categories of statutes apart is precise language that is included in the former and excluded from the latter: “Except as provided in...” Specifically, the Category 1 statutes begin with this wording; Category 2 statutes do not.

For example, the second-degree arson law states, “Except as provided in section 72,” followed by a description of how that crime is committed.<sup>47</sup> Section 72 refers to first-degree arson.<sup>48</sup> It follows that the statute specifically prohibits a person who is guilty of first-degree arson from also being found guilty of second-degree arson. Similarly, the third-degree arson statute provides, “Except as provided in sections 72 and 73...”<sup>49</sup> That is, a person who is found guilty of first or second-degree arson cannot also be found guilty of third-degree arson. The same is true for fourth-degree, fifth-degree, and misdemeanor arson: if guilty of a more severe subsection of arson, a person cannot also be guilty

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<sup>44</sup> *Miller*, at 25.

<sup>45</sup> MCL 750.72 through MCL 750.75, MCL 750.77, MCL 750.78. The misdemeanor-arson statute is formally titled, “Fire or explosive; prohibited acts; violation as misdemeanor; penalty.” MCL 750.78. To be clear, the penalty for fifth-degree arson is also a one-year (maximum) misdemeanor, similar but not identical to “misdemeanor-arson”).

<sup>46</sup> MCL 750.76; MCL 750.79.

<sup>47</sup> MCL 750.73(1).

<sup>48</sup> MCL 750.72.

<sup>49</sup> MCL 750.74(1).

of the less severe arson crime.<sup>50</sup> Multiple punishments are thus prohibited.

At the same time, none of the Category 1 statutes list Section 79 within the exceptions—and there are no exceptions listed in the Category 2 statutes. This wording denotes a clear legislative intent to carve out and allow certain cumulative punishments. As a result, whereas the Legislature has specifically prohibited multiple punishments stemming from the same offense for contemporaneous convictions for second-degree arson and first, third, fourth, fifth, and/or misdemeanor-arson, by not prohibiting the same for Category 2 crimes, it has in turn specifically permitted contemporaneous convictions for second-degree arson and preparation to burn convictions. That the “except as provided in” language has been incorporated in some of the arson chapter statutes and excluded from others evinces legislative intent to prohibit multiple punishments for particular, but not all, arson crimes. Even if it arises out of the same offense, multiple punishments for preparation to burn and first-degree through misdemeanor arson are permissible. Because courts “should avoid any construction that would render a statute, or any part of it, surplusage or nugatory,” the “except as provided in” language should not be ignored.<sup>51</sup> Furthermore, it is worth mentioning that the preparation to burn statute has recently been amended—not once but twice—in 2012 and 2014. None of the amendments have added the “except as provided” wording to preparation to burn, nor has preparation to burn been excluded from the Category 1 statutes.<sup>52</sup>

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<sup>50</sup> MCL 750.75(1); MCL 750.77(1); MCL 750.78(1).

<sup>51</sup> *Ypsilanti Housing Commission v O’Day*, 240 Mich App 621, 624; 618 NW2d 18 (2000), citing *Altman v Meridian Twp.*, 439 Mich 623, 635; 487 NW2d 155 (1992), modified 440 Mich 1204; 487 NW2d 155 (1992).

<sup>52</sup> MCL 750.79, as amended by 2012 PA 533, 2014 PA 111.

In his separate Court of Appeals opinion for the instant case, Judge Shapiro relied on *People v Meshell* in support of his position that arson and preparation to burn convictions arising out of the same offense amount to a double jeopardy violation.<sup>53</sup> The *Meshell* court, however, employed similar reasoning as above when it found the Legislature did not intend multiple punishments for operating a methamphetamine laboratory<sup>54</sup> and operating a methamphetamine laboratory within five hundred feet of a residence.<sup>55</sup>

[T]he language of the statute suggests that the Legislature did not intend multiple punishments under the different subdivisions of MCL 333.7401c(2) .... Defendant was convicted of operating or maintaining a methamphetamine laboratory under MCL 7401c(2)(a), which provides that a person violating the section is guilty of a felony punishable as follows: “Except as provided in subdivisions (b) to (f), by imprisonment for not more than 10 years or a fine of not more than \$100,000 or both.” Those subdivisions, MCL 333.7401c(2)(b) to (f) provide for increased punishment if various aggravating factors are present. Defendant was also convicted of operating or maintaining a methamphetamine laboratory within five hundred feet of a residence under MCL 333.7401c(2)(d) ... This statutory language indicates that the Legislature intended that a defendant be convicted and sentenced under MCL 333.7401c(2)(a) for operating or maintaining a methamphetamine laboratory, *except as* provided in MCL 333.7401c(2)(b) to (f). Thus, if one of these subdivisions is applicable, the defendant should be convicted and sentenced under the appropriate subdivision.<sup>[56]</sup>

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<sup>53</sup> *People v Sindone*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2019 (Docket No. 340328) (SHAPIRO, concurring in part and dissenting in part), p. 2, citing *People v Meshell*, 265 Mich App 616, 633-634; 696 NW2d 754 (2005).

<sup>54</sup> MCL 333.7401c(1)(a) and (2)(a).

<sup>55</sup> MCL 333.7401c(1)(a) and (2)(d).

<sup>56</sup> *Meshell*, *supra*, at 631-632 (citations omitted) (emphasis in original).

Here, as in *Meshell*, the Legislature’s use of “except as provided in” conveys a clear intent, albeit with different results. Because “[c]ourts 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[,]” this Court should not assume that the Legislature mistakenly left out preparation to burn from second-degree arson’s multiple-punishments prohibition, as well as *any* prohibition language barring multiple punishments within preparation to burn statute itself.<sup>57</sup>

In a similar vein, language within the preparation to burn statute demonstrates the Legislature was aware that it was permitting cumulative punishment for arson and preparation to burn. There are several categories of preparation to burn, ranging from less to more severe based on the value of the property and the offender’s prior convictions; they are found within Subdivisions (1)(a) through (e).<sup>58</sup> Notably, the statute specifically states that any fine assessed should be not exceed “3 times the combined value of the *property damaged or destroyed*.”<sup>59</sup> Even more, Subdivision (d)(iv)<sup>60</sup> makes it a 10-year felony to prepare to burn property that “is a building, structure, or other real property, *and the fire or explosion results* in injury to any individual.”<sup>60</sup> If, as defendant maintains, the Legislature intended preparation to burn to encompass only the *attempt* to commit arson because it falls short of an actual burning, it would not have referred to property that was damaged or destroyed by fire or explosion.<sup>61</sup>

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<sup>57</sup> *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993).

<sup>58</sup> MCL 750.79(1)(a) through (e).

<sup>59</sup> MCL 750.79(1)(a), (b), (c), (d).

<sup>60</sup> MCL 750.79(d)(iv).

<sup>61</sup> The crime of arson is completed when property is “damaged” or “destroyed.” MCL 750.71 through MCL 750.79.

Though the People submit that the statutory language plainly demonstrates legislative intent in favor of cumulative punishment, a comparison between the precise penalties of Category 1 arson crimes and preparation to burn is also instructive, especially in light of defendant’s argument that preparation to burn “was clearly designed by the legislature to apply to those individuals who readied an accelerant or attempted arson but *never actually committed* the arson.”<sup>62</sup> Prior to *People v Ream, infra*, courts often examined the amount of punishment authorized by the Legislature when assessing double jeopardy issues.<sup>63</sup> “Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intent punishment under both statutes.”<sup>64</sup> Attached in the Appellee’s Appendix is a table categorizing all of the degrees of arson, as compared to the five penalties within preparation to burn; correlating acts match in color.<sup>65</sup> If nothing else, it is apparent from this table that the Legislature did not clearly design preparation to burn as a less aggravated version of arson—evident from the inconsistent relationships between the crimes and the fact that overlapping acts often carry the same (and in one instance, more severe) penalty.

For instance, the least-severe version of arson makes it a 93-day misdemeanor (with a maximum fine of \$500) to (1) willfully or maliciously burn, damage, or destroy by fire or explosive personal property valued less than \$200,<sup>66</sup> or (2) negligently, carelessly, or recklessly set fire to a hotel or motel or its contents which, in the process,

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<sup>62</sup> Defendant’s supplemental brief, p. 10 (emphasis in original).

<sup>63</sup> *Ford, supra*, at 447-448.

<sup>64</sup> *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997).

<sup>65</sup> Appellee’s Appendix, p. 199b-200b.

<sup>66</sup> MCL 750.78(1)(a)(iii).

places someone in danger.<sup>67</sup> The least severe version of preparation to burn is also a 93-day misdemeanor (and maximum \$500 fine) for preparing to burn property with a combined value less than \$200.<sup>68</sup> In other words, the least-severe versions of both the arson and preparation to burn statutes impose the same, exact punishment. The same is true for the next level of severity: it is a one-year misdemeanor to both burn and prepare to burn personal property valued between \$200 and \$1,000, or personal property valued less than \$200 if the offender has a prior arson conviction.<sup>69</sup> In another instance, fifth-degree arson, an offender who has a prior arson conviction is guilty when the act involves personal property with a value of \$1,000 or less; the punishment is a one-year misdemeanor and carries a maximum fine of \$2,000.<sup>70</sup> On the other hand, an offender with a prior arson conviction who prepares to burn property valued at roughly the same amount—less than \$1,000 but more than \$200—is guilty of a more severe five-year felony (\$10,000 fine).<sup>71</sup> Though this result is counter-intuitive, it is obvious that the Legislature had no intention of making preparation to burn a less severe arson statute, as defendant claims.<sup>72</sup>

Furthermore, even though they do not carry the force and effect of “law” or have the official sanction of the Supreme Court,<sup>73</sup> courts are required to utilize the Model Criminal Jury Instructions in most

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<sup>67</sup> MCL 750.78(1)(b).

<sup>68</sup> MCL 750.79(1)(a).

<sup>69</sup> MCL 750.78(1)(a)(i) and (ii); MCL 750.79(1)(b)(i) and (ii).

<sup>70</sup> MCL 750.77.

<sup>71</sup> MCL 750.79(1)(c)(ii).

<sup>72</sup> “[I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution.” *Decker v Flood*, 248 Mich.App. 75, 84; 638 N.W.2d 163 (2001) (citation and quotation marks omitted).

<sup>73</sup> *People v Vaughn*, 447 Mich 217, 235 n 13; 524 NW2d 217 (1994).

instances.<sup>74</sup> The jury instructions may, therefore, be persuasive regarding whether convictions for both second-degree arson and preparation to burn are permissible. Whereas all of the instructions for Category 1 arson crimes begin with an option of either “The defendant is charged with the crime of,” or “You may also consider the lesser charge of,”<sup>75</sup> the instructions for preparation to burn do not.<sup>76</sup> It is reasonable to infer, therefore, that even the authors of these instructions did not believe preparation to burn is an alternative charge to arson, as defendant advocates.<sup>77</sup>

### **C. Arson and Preparation to Burn Pass the Abstract Legal Elements Test**

Even if the Legislature has not clearly indicated whether it intends multiple punishments, this Court explained in *People v Ream* that “the statutory elements, not the particular facts of the case, are indicative of legislative intent[.]”<sup>78</sup> Logically, then, to determine legislative intent with regard to double jeopardy inquiries, one must focus on these *statutory* elements, as opposed to the *facts* of each individual case.<sup>79</sup> It follows that defendant’s argument that *he* could not have committed arson without first committing preparation to burn is of no consequence. The analysis of double jeopardy is not fact-dependent; the statutory language and legislative intent is the focus and answer. The real question is whether “it is impossible to commit the greater offense without also committing the lesser offense.”<sup>80</sup>

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<sup>74</sup> MCR 2.512(D).

<sup>75</sup> M Crim JI 31.4, 31.5, 31.6, and 31.7. Of course, instructions for first-degree arson are not included in this list, as that crime is the highest form of arson.

<sup>76</sup> M Crim JI 31.11, 31.12, 31.13, and 31.14.

<sup>77</sup> Defendant’s brief, p. 10.

<sup>78</sup> *People v Ream*, 481 Mich 223, 238; 750 NW2d 536 (2008).

<sup>79</sup> *Ream*, *supra*, at 238.

<sup>80</sup> *Miller*, *supra*, at 19.

In *People v Dickinson*, the Court of Appeals held that a defendant’s convictions—arising out of a single transaction—for both possession of heroin<sup>81</sup> and delivery of heroin,<sup>82</sup> were not a double jeopardy violation.<sup>83</sup> As the court explained, whether that particular defendant committed the crime of possession of heroin before committing delivery of heroin was of no consequence.<sup>84</sup> Because each crime required proof an element that the other did not—that is, proof of delivery for the crime of delivery of heroin, and proof of possession for the crime of possession of heroin—convictions for both were not a violation of double jeopardy.<sup>85</sup> To hold otherwise would add an unnecessary element of constructive possession to the crime of delivery, thus providing an escape from conviction for drug traffickers, “particularly those high in the distribution chain.”<sup>86</sup> “While this defendant may indeed have possessed the heroin before delivering it, the prosecution was not required to prove possession to convict her of delivery, or vice versa.”<sup>87</sup>

Here, just as in *Dickinson*, defendant’s argument that he could not commit second-degree arson without first committing preparation to burn is without merit. To the contrary, it is possible to commit arson without first preparing to burn. Second-degree arson requires proof that defendant (1) willfully or maliciously (2) burned, damaged, or destroyed by fire or explosive (3) a dwelling.<sup>88</sup> Preparation to burn a dwelling

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<sup>81</sup> MCL 333.7403.

<sup>82</sup> MCL 333.7401.

<sup>83</sup> *People v Dickinson*, 321 Mich App 1; 909 NW2d 24 (2017).

<sup>84</sup> *Dickinson*, *supra*, at 12.

<sup>85</sup> *Dickinson*, *supra*, at 14, 15.

<sup>86</sup> *Dickinson*, *supra*, at 15, quoting *People v Binder (On Remand)*, 215 Mich App 30, 35-36; 544 NW2d 714, vacated in part on other grounds 453 Mich 915; 554 NW2d 906 (1996).

<sup>87</sup> *Dickinson*, *supra*, at 15.

<sup>88</sup> MCL 750.73(1).

requires proof that he (1) used, arranged, placed, devised, or distributed (2) an inflammable, combustible, or explosive material, liquid, substance, or device (3) in or near a dwelling (4) with intent to commit arson in any degree.<sup>89</sup> Thus, defendant's convictions each require proof of an element that the other does not, and are therefore not a violation of the constitutional protection against double jeopardy. Whereas arson requires the prosecutor to prove that the property was actually burned,<sup>90</sup> damaged,<sup>91</sup> or destroyed, preparation to burn requires the prosecutor to show proof that defendant placed or arranged explosive or combustible materials in order to start a fire.

Most importantly, defendant's argument that "there is no way to be an arsonist without preparing to burn," is simply not true. None of the degrees of arson specifically require proof that the defendant actually *set* the fire (either by his own hands or through an aiding and abetting theory).

There are additional cases where intent can be charged even though negligence was the original cause of the fire. Such occurs where an unintentional and insignificant fire is purposely allowed to extend, thereby causing a greater fire than would have occurred if the fire when first observed had been extinguished or had reasonable effort been made to reduce the fire's spread. If it can be proven that a person so abetted the fire's spread or moved property into its path, the court may charge criminal intent and place the accused under the charge of arson even though the cause of the fire was unintended.<sup>[92]</sup>

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<sup>89</sup> MCL 750.79(1)(d)(vi).

<sup>90</sup> Defined by statute as "setting fire to, or doing any act that results in the starting of a fire[.]" MCL 750.71(b).

<sup>91</sup> Defined by statute, "in addition to its ordinary meaning," as "charring, melting, scorching, burning, or breaking." MCL 750.71(c).

<sup>92</sup> Sadler, *The Crime of Arson*, 41 J. Crim. L. & Criminology 290, 296 (1950-1951).

To reiterate, arson can be committed when a fire's origin is unintentional or negligent and the offender purposely allows it to extend or escalate, resulting in a greater fire than would have otherwise occurred.<sup>93</sup> Even more:

[I]f upon discovery of a fire (which has started from some sort of negligence and [is] unintentional) the discoverer shuts down the sprinkler system, his act can be considered as criminal intent and he may be then charged with arson.<sup>[94]</sup>

Turning off a sprinkler system does not involve the use, placement, arrangement, et cetera of an inflammable, combustible or explosive substance—so there is no preparation to burn. Yet it still rises to the level of arson because the discoverer develops a willful or malicious state of mind, seizes the opportunity, and causes the fire to spread to more than what would have been burned, damaged, or destroyed without his actions. Assuming in the example above that a dwelling is involved, the defendant would be guilty of second-degree arson in Michigan because his actions caused the fire to burn, damage, or destroy more of the dwelling or its contents. Instead of the fire being contained to a small portion of the property, for instance in the kitchen, it is allowed to engulf the entire dwelling. Because it is possible to commit arson without first preparing to burn, the crimes at issue pass the abstract legal elements test and defendant's convictions are not a violation of his protection against double jeopardy.<sup>95</sup>

Lastly, it must be pointed out that, although not abundant, convictions for arson and preparation to burn that stem from the same

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Ream, supra*, at 241-242.

fire are by no means unprecedented.<sup>96</sup> In fact, in *People v Kelley*, a published opinion, the Court of Appeals held that the defendant's convictions for both arson of a building and preparation to burn that same building were not "void for multiplicity."<sup>97</sup> Defendant's convictions for second-degree arson and preparation to burn, therefore, are not the aberration that he so claims.

### Conclusion

Defendant's argument that his convictions for both second-degree arson and preparation to burn violate his right to be protected against double jeopardy is without merit. Not only does the statutory language

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<sup>96</sup> *People v Mason*, 10 Mich App 404; 159 NW2d 360 (1968) (defendant convicted of both burning of a dwelling house and preparing to burn the same dwelling house); *People v Collins*, 28 Mich App 417; 184 NW2d 554 (1970) (defendant convicted of both burning of a dwelling house and preparation to burn real property); *People v Robinson*, 37 Mich App 15; 194 NW2d 436 (1971), reversed in part on other grounds, 388 Mich 806; 387 NW2d 919 (1972) (defendant convicted of burning real property and preparing to burn real property); *People v Desjardins*, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2009 (Docket No. 286617), *lv den* 486 Mich 901; 780 NW2d 812 (2010) (no double jeopardy violation as a result of defendant's convictions for arson and preparation to burn); *People v Al-Sawadi* unpublished per curiam opinion of the Court of Appeals, issued July 18, 2017 (Docket No. 331684), *lv den* 503 Mich 1003; 924 NW2d 581 (2019) (defendant convicted for first-degree arson and preparing to burn real property); *People v Watkins*, unpublished per curiam opinion of the Court of Appeals, issued February 7, 2019 (Docket No. 341266), *lv den* 504 Mich 904; 929 NW2d 367 (2019) (defendant convicted of second-degree arson, arson of insured personal property, and preparation to burn a dwelling); *People v Knox*, unpublished per curiam opinion of the Court of Appeals, issued August 20, 2019 (Docket Nos. 342165, 342179), *lv den* \_\_\_ Mich \_\_\_; 940 NW2d 90 (2020) (defendant convicted of fourth-degree arson and preparation to burn); *People v Nickerson*, unpublished per curiam opinion of the Court of Appeals, issued June 4, 2019 (Docket No. 342280) (defendant convicted of fourth-degree arson and preparation to burn a dwelling).

<sup>97</sup> *People v Kelley*, 32 Mich App 126, 150; 188 NW2d 654 (1971), relying on *People v Rabin*, 317 Mich 654, 661-; 24 NW2d 126 (1947) (Holding that, as a result of the statutory language, defendant's multiple arson convictions resulting from the same fire were not "void for multiplicity," even despite the fact that "[w]here there are two counts charging different grades of the same offense it has been the general practice in England and in this country to pass judgment according to the count charging the highest grade of offense.")

permit multiple punishments for the same offense with regard to the crimes at issue, but the crimes pass the abstract legal elements test in that it is possible to commit arson without preparing to burn. Consequently, defendant has not established any error, much less one that is plain, and cannot prevail.

**RELIEF**

THEREFORE, the People respectfully request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

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June 25, 2020

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**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook, set to 150% line spacing. This document contains 7,564 countable words.

June 25, 2020

/s/ Mary Casey Cretu  
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