STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENNIFER MARIE HAMMERLUND,

Defendant-Appellant.

_____/

Michigan Supreme Court
No. 156901

Court of Appeals
No. 333827

Kent County Circuit Court
No. 15-09717-FH

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

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STATEMENT OF APPELLATE JURISDICTION

The People accept that this Court has jurisdiction to consider applications for leave to appeal pursuant to MCR 7.303(B)(1) and MCR 7.305, that this Court possesses the authority to consider the questions presented for review by the parties pursuant to MCR 7.305(A)(1)(b), and to direct argument on a party's application for leave to appeal pursuant to MCR 7.305(H)(1). However, the People respectfully assert that, pursuant to the doctrine of party presentation, this Court lacks jurisdiction to hear the issue it directed the parties to address, which neither party preserved or raised.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **WHERE THIS COURT AND THE UNITED STATES SUPREME COURT HAVE REPEATEDLY HELD THAT APPELLATE COURTS ARE TO REFRAIN FROM CONSIDERING ARGUMENTS AND ISSUES BEYOND THOSE RAISED BY THE PARTIES, IS IT A VIOLATION OF THE PRINCIPLE OF PARTY PRESENTATION INHERENT IN AN ADVERSARIAL SYSTEM, OR AT LEAST CONTRARY TO THE DOCTRINE OF JUDICIAL RESTRAINT, FOR THIS COURT TO CONSIDER AN ISSUE RAISED SUA SPONTE?**

Defendant-Appellant presumably answers, "No."
Plaintiff-Appellee answers, "Yes."

II. **WHERE OFFICER STAMAN'S ARREST OF DEFENDANT WAS CONSISTENT WITH THE CONSTITUTION AND PRECEDENT APPLYING FOURTH AMENDMENT PROTECTIONS, DID THE TRIAL COURT COMMIT PLAIN ERROR IN FINDING THAT THE EXCLUSIONARY RULE DID NOT APPLY?**

Defendant-Appellant presumably answers, "Yes."
Plaintiff-Appellee answers, "No."

III. **ASSUMING ARGUENDO THAT THIS ISSUE IS PROPERLY PRESERVED, DID THE TRIAL COURT ERR UNDER THE HARMLESS ERROR ANALYSIS?**

Defendant-Appellant presumably answers, "Yes."
Plaintiff-Appellee answers, "No."

COUNTER-STATEMENT OF FACTS

Defendant Jennifer Marie Hammerlund was charged with operating a motor vehicle while intoxicated third offense[1] and failure to report a motor vehicle accident involving damage to fixtures.[2] Following a jury trial, Defendant was found guilty as charged on April 21, 2016.[3] The trial court sentenced Defendant on June 7, 2016, to a term of 60 months' probation with the first 120 days to be served in the Kent County Correctional Facility for the operating while intoxicated third offense conviction, and 60 days in jail for the failure to report a motor vehicle accident involving damage to fixtures conviction.[4]

A. Facts of the Incident:

On September 30, 2015, shortly after 3:30 a.m., Officer Erich Staman of the Wyoming Police Department – one of the department's four accident reconstructionists – was dispatched to an abandoned vehicle on southbound US-131 near the 54th Street off-ramp.[5] Officer Staman had been a police officer in the Battle Creek Police Department for seven years, and at the time of this incident had worked ten years with the Wyoming Police Department.[6] Officer Staman observed a dark-colored Chevrolet Malibu on the right-hand shoulder of the off-ramp, which was facing the wrong direction, and the driver's side of the vehicle was up against the concrete barrier.[7] He observed that the front of the vehicle had damage to it, and the concrete barrier had scrape marks along it, in addition to skid marks in the roadway.[8] Officer Staman traced those skid marks to the

[1] Contrary to MCL 257.625(1) & (9).
[2] Contrary to MCL 257.621 and MCL 257.901.
[3] 189b; The People stipulate in part to the use of the documents attached in Defendant's Appendix, and submit their own appendix containing additional documents cited herein.
[4] 10a.
[5] 99b-100b.
[6] 98b.
[7] 100b-101b.
[8] 100b.

opposite side of the off-ramp and observed a dented impact point in the metal guardrail on that side.[9] No one was observed in the vehicle or in the immediate area.[10] Officer Staman called a tow truck to have the vehicle removed and conducted an inventory search of the vehicle, during which he found various pieces of paperwork belonging to Defendant, and also discovered that the license plate and vehicle were both registered to Defendant, a resident of Kentwood.[11]

Officer Staman responded to Defendant's residence, where he observed Defendant standing "15 or 20 feet" inside from the door, and he stated that she appeared "very hesitant to come any closer […], especially after [he] asked if she had any I.D."[12] During their interaction, Officer Staman remained outside of Defendant's residence, communicating through the opened front door.[13] Officer Staman testified that she appeared intoxicated,[14] and, when Defendant produced her identification, she handed it to another individual who was in the residence, who then in turn gave it to Officer Staman.[15] He testified that Defendant initially stated she was not going to give him her identification because she thought it was his attempt to coax her into stepping outside.[16]

Officer Staman testified that Defendant indicated she had been driving the abandoned vehicle, that she suffered a bloody nose as a result of the accident, and that she had obtained a ride home to clean herself up.[17] Defendant further indicated that she had "a small amount" to drink prior to operating her motor vehicle, and that she believed the accident "was caused by an unknown

[9] 100b-101b.
[10] 101b.
[11] 102b.
[12] 108b.
[13] 110b.
[14] 109b-110b.
[15] 110b.
[16] 110b.
[17] 110b-111b.

third party driver in a truck that had cut her off and swerved and possibly may have hit her, which caused her to lose control" of her vehicle.[18] Officer Staman testified that when he returned Defendant's identification to her:

> [Defendant] had walked into the doorway and reached out to grab [t]he I.D. from me, at which point I took her into custody for the hit and run charge. During that we had a slight struggle between each other. She had pulled away, stepping back into her house, so I stepped inside the house and ended up taking her into custody without much difficulty.[19]

Once in custody in the rear of Officer Staman's police cruiser, Defendant waived her *Miranda* rights and stated that the accident may have been the result of road rage and stated that she had consumed two beers and a shot prior to driving.[20] Defendant further stated that she thought she may have been over the legal blood alcohol limit and that she had been home for 15 to 20 minutes before police arrived at her residence.[21] Defendant stated that she did not have anything to drink after arriving home following the accident.[22]

Officer Staman administered breath tests on Defendant at the Kent County Correctional Facility at 5:12 a.m. and 5:16 a.m., which resulted in a reading of 0.22 and 0.21 blood alcohol concentration, respectively.[23]

Defendant testified that she worked as a bartender and clocked-out at 9:15 p.m. the night of September 29, 2015, and had two beers and a shot with coworkers over dinner.[24] Defendant remained there until "just past last call, which is at 11:45 [p.m.]."[25] She testified that after this point she was drawn into a lengthy conversation with an acquaintance until just before 1:00 a.m.

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[18] 112b.
[19] 111b-112b.
[20] 112b-113b.
[21] 114b.
[22] 115b.
[23] 118b-119b.
[24] 130b.
[25] 130b.

on the 30th, and she left to go home at 2:30 a.m. after walking along the river.[26] Defendant testified that she was driving on southbound US-131 behind a person in a truck who was varying his speed and swerving side-to-side.[27] Defendant testified that she passed this motorist, but then that truck came alongside Defendant on the off-ramp and cut her off, causing her to "jerk [her] car over" and she lost control.[28] Defendant called her insurance company, but they were closed for the night.[29] Defendant testified that she obtained a ride home, and she began to clean her bloody nose and consumed a beer along with a "bunch of shots" of liquor.[30] "Maybe ten minutes later" Defendant's roommate informed her that the police were there.[31] Defendant testified that she never told the police that she consumed alcohol at home after the accident, and conceded that she in fact told them that she "absolutely [did] not" have anything to drink after the accident.[32] Finally, Defendant testified that she inspected the car afterward and found that "[t]he driver side tie rod had snapped which is what caused the shaking, and then eventually [her] tire gave way when [she] hit the concrete."[33]

B. Defendant's Motion to Suppress:

Before Defendant's trial commenced, Defendant filed a motion to suppress and dismiss, arguing that Officer Staman lacked the authority to arrest Defendant since the crime of failure to report a motor vehicle accident involving damage to fixtures is only a 90-day misdemeanor and he lacked an arrest warrant, in an asserted violation of MCL 764.15.[34] In the alternative, Defendant

[26] 131b.
[27] 132b-133b.
[28] 133b-134b.
[29] 144b.
[30] 136b-137b.
[31] 138b-139b.
[32] 145b-146b.
[33] 149b.
[34] 30a; 32a-35a.

argued that Officer Staman's entry into Defendant's residence during her apprehension without her permission and without an arrest warrant was not authorized.[35] Therefore, Defendant argued, any evidence of Defendant's intoxication was discovered incident to an unlawful arrest.[36] The People responded that statutory exclusions for warrantless arrests do not trigger the exclusionary rule if the underlying conduct was constitutional.[37] The People argued that because it is undisputed that Defendant was involved in a motor vehicle accident causing damage to fixtures, and Defendant admitted as much, Officer Staman had probable cause to arrest Defendant, thereby making it constitutional.[38] The People further argued that the conduct of Officer Staman, i.e., beginning his arrest of Defendant outside the threshold of her residence then crossing the threshold to complete the arrest, was constitutional.[39]

The trial court heard the motion on February 8, 2016, and conducted an evidentiary hearing on the matter on March 16, 2016. During that hearing, Officer Staman testified that:

> [Defendant was] standing inside the residence 15 or 20 feet back from the door. It didn't appear that she wanted to come to the door to speak to me, so I just spoke to her from outside on the porch. She verbally told me her name was Jennifer Hammerlund. It was her car. She was involved in the accident.
>
> * * *
>
> I asked her for her I.D. just so I could verify with a picture I.D. She was reluctant to give it to me, so she had given it to a third party in the house. I never got their name, but they handed it to me on her behalf.
>
> * * *
>
> And then I had to give the I.D. back to her, so I made sure I gave it back to Ms. Hammerlund. In doing that she came to the door where I was standing and reached out to get the I.D. as I gave it to her, at which point I grabbed her by the arm and attempted to take her into custody.[40]
>
> * * *

[35] 30a; 32a-35a.
[36] 30a; 32a-35a; 40a-43a.
[37] 198b-201b.
[38] *Id*.
[39] *Id*.
[40] 52a-54a.

> I stood on the outside of the porch when I initially grabbed [Defendant's arm], and she had pulled away, which caused me to have to grab it again, and the momentum took us inside, maybe two or three steps inside the doorway.[41]
>
> * * *
>
> I was under the impression [failure to report a motor vehicle accident involving damage to fixtures] was a 93-day misdemeanor.[42]

Officer Staman further testified that Defendant was handcuffed inside her residence, then taken outside to the police cruiser.[43]

The trial court issued its written Opinion and Order on March 18, 2016, denying Defendant's motion, finding that probable cause for the warrantless arrest of Defendant existed, thus making it a constitutional arrest which does not implicate the exclusionary rule.[44]

C. Court of Appeals:

Defendant appealed her convictions to our Court of Appeals, arguing: (1) the trial court erred in denying Defendant's motion to suppress because (a) Officer Staman unlawfully entered Defendant's residence and arrested her without a warrant, (b) Defendant's statements and her blood alcohol concentration must be suppressed because they are fruit of a poisonous tree, and (c) the trial court's error was not harmless.[45]

The People responded that the standard of review for a trial court's findings of fact in a suppression hearing are reviewed for clear error, while questions of law are reviewed de novo, and whether the exclusionary rule applies is also reviewed de novo.[46] The People argued that the United States Supreme Court's holding in *United States v Santana*[47] was controlling in the matter, that Officer Staman possessed sufficient probable cause to arrest Defendant both for damage to fixtures

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[41] 55a-56a.
[42] 54a.
[43] 58a.
[44] 17a-19a.
[45] 203b-224b.
[46] 226b-242b.
[47] *United States v Santana*, 427 US 38, 42; 96 S Ct 2406; 49 L Ed 2d 300 (1976).

and for operating a motor vehicle while intoxicated, that a warrantless arrest may be effectuated in a public space, and that a person standing in the doorway of one's residence is indeed in a public place.[48] Because Defendant placed herself in public by approaching the doorway and extending her arm beyond the threshold, she was subject to arrest, and the trial court did not commit clear error in denying Defendant's motion to suppress and dismiss.[49]

The Court of Appeals affirmed Defendant's convictions and sentences, holding that the trial court did not err in denying the application of the exclusionary rule based solely on a violation of MCL 764.15.[50] The Court further held that there was sufficient probable cause to arrest Defendant, which was not in dispute on appeal by Defendant, therefore the trial court did not err when it found that Defendant's arrest was otherwise constitutionally valid.[51] Finally, the Court held that Defendant's argument fails under *Santana* through Defendant voluntarily moving into the doorway, and thereby exposing herself to "a fundamentally unique characteristic of a public place that she had not up to that point[:] touch. By extending her arm beyond the threshold, she went further than the defendant in *Santana*[…]."[52]

D. Defendant's Application to this Court:

Defendant's application for leave to appeal before this Court raised the same issues and arguments asserted before the Court of Appeals. On May 30, 2018, this Court ordered oral argument on whether to grant the application and directed supplemental briefing on "whether it is

[48] 237b-238b.
[49] 240b.
[50] *People v Hammerlund*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 333827), 23a.
[51] 23a.
[52] 24a-25a.

constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest."[53]

Further factual development will be included in the Argument section as needed.

[53] *People v Hammerlund*, 501 Mich 1086; 911 NW2d 732 (2018).

ARGUMENT

I. Where this Court and the United States Supreme Court have repeatedly held that appellate courts are to refrain from considering arguments and issues beyond those raised by the parties, it is a violation of the principle of party presentation inherent in an adversarial system, or at least contrary to the doctrine of judicial restraint, for this Court to consider an issue raised sua sponte.

This Court, in its Order directing that oral argument be conducted in this matter, ordered the parties to:

> [address] whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest.[54]

Neither appellant nor appellee had previously raised this issue and had not argued it in the trial court, the Court of Appeals, or to this Court on application.[55] This is not simply a new argument that the parties did not present to the judicial branch for resolution, but rather constitutes an entirely new claim, and is therefore outside this Court's appellate jurisdiction. Notwithstanding the provision in MCR 7.305(H)(4)(a) limiting the issues on appeal to those raised in appellant's application before this Court, "[u]nless otherwise ordered by the Court," this Court is precluded from sua sponte creating this issue through the principle of party presentation.

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[54] *People v Hammerlund*, 501 Mich 1086; 911 NW2d 732 (2018).

[55] Defendant asserts that this matter was preserved through her filing a pre-trial motion to suppress. Defendant's Supplemental Brief, 10. However, that motion to suppress was premised on an argument that Officer Staman lacked the authority to arrest Defendant pursuant to MCL 764.15, or, in the alternative, that entering Defendant's residence without an arrest warrant was unlawful (30a). Therefore, the People assert that this matter was not preserved by Defendant asserting a different argument. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), citing *People v Bushard*, 444 Mich 384, 390 n 4; 508 NW2d 745 (1993).

A. The Michigan Supreme Court's Jurisdiction:

"[T]his court […] has […] no original jurisdiction in cases where by the Constitution its jurisdiction is appellate."[56] Michigan's Constitution draws distinctions between original and appellate jurisdiction,[57] and this Court has repeatedly enforced this distinction by reversing lower appellate courts for adding claims or causes of action that were not asserted in the court of original jurisdiction.[58]

No less than the seminal case of *Marbury v Madison* drew the distinction between a court's appellate and original jurisdictions, stating that "[i]f congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."[59] "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."[60]

Because no party asserted the claim of the constitutional permissibility for "a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place

[56] *People v Bigge*, 288 Mich 417, 430; 285 NW2d 5 (1939).
[57] Const 1963, art 6, § 4 (providing this Court with appellate jurisdiction), Const 1963, art 6, § 13 (providing circuit courts both original and appellate jurisdiction).
[58] See e.g. *Cross v Eaton*, 48 Mich 184; 12 NW 35 (1882) (recognizing that the circuit court in exercising its appellate jurisdiction could not enlarge a claim, let alone add a new one, as such an exercise would constitute an impermissible exercise of original jurisdiction); *Fowler v Hyland*, 48 Mich 179; 12 NW 26 (1882) (prohibiting the amendment of a claim as such a practice would constitute an impermissible exercise of original jurisdiction); *Bigge*, 288 Mich at 430 ("[T]his court has no appellate jurisdiction in cases where by the Constitution its jurisdiction is original, and *no original jurisdiction in cases where by the Constitution its jurisdiction is appellate*.") (emphasis added).
[59] *Marbury v Madison*, 5 US (1 Cranch) 137, 174; 2 L Ed 60 (1803).
[60] *Marbury*, 5 US at 175.

to perform a warrantless arrest," the review of this claim is not within the judicial power of this Court.

"Judicial power is the power of the court to decide and pronounce its judgment and to carry it into effect between persons and parties who bring a case before it for decision."[61] The judicial power of an appellate court means the court "is capable of acting only when *the subject is submitted to it by a party* who asserts his rights in the form prescribed by law."[62] A court lacks the power to hear and resolve a claim which no party has brought before it.[63] "It is well established that '[t]he judicial power […] is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.'"[64]

B. This Court's Statements on Party Presentation, Issue Preservation, and Judicial Power:

Over the course of time, most members of this Court have announced a reluctance to create new issues for litigants, and have followed the principle of party presentation, limiting this Court's review of a matter to issues raised by the parties.

Chief Justice Markman has reiterated Michigan's "general and longstanding rule […] that 'issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances.'"[65] Indeed, in this matter neither party attempted to raise this specific issue until ordered to do so by this Court.

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[61] *Goetz v Black*, 256 Mich 564, 569-570; 240 NW 94 (1932), citing *Muskrat v United States*, 219 US 346; 31 S Ct 250; 55 L Ed 246 (1910).

[62] *Muskrat*, 219 US at 358, quoting *Osborn v Bank of US*, 22 US 738; 6 L Ed 204 (1824) (quotation marks omitted, emphasis added).

[63] *Kent County Prosecuting Attorney v Kent County Circuit Judges*, 110 Mich App 404, 408; 313 NW2d 125 (1981).

[64] *Woodbury v Res-Care Premier, Inc*, 495 Mich 961; 843 NW2d 746 (2014) (MARKMAN, J., concurring in part and dissenting in part), quoting *Anway v Grand Rapids Railway Company*, 211 Mich 592, 616; 179 NW 350 (1920) (citation and quotation marks omitted in original).

[65] *People v Cain*, 498 Mich 108, 114; 869 NW2d 829 (2015), quoting *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

As Justice McCormack stated earlier this year when addressing an issue not properly presented by a party, "[w]e decline to reach this argument because we conclude that the plaintiffs abandoned it by failing to assert it in their applications for leave to appeal."[66] "'In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[67]

Justice Viviano, in a concurrence to an order from this Court, recently reiterated then-Judge Scalia's assertion that "it is not our role to find and develop unpreserved arguments on behalf of litigants."[68] Justice Wilder dissented in this Court's remand order in *In re Jackson*, stating that where a party does not properly preserve a particular argument, the application for leave to appeal should be denied.[69]

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[66] *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, ___ Mich ___, ___; ___ NW2d ___ (2018) (Docket No. 155204) slip op at 10.

[67] *Michigan Gun Owners*, ___ Mich at ___ (Docket No. 155204) slip op at 10-11, quoting *Greenlaw v United States*, 554 US 237, 243; 128 S Ct 2559; 171 L Ed 2d 399 (2008).

Justice McCormack went on to state in response to the dissent that "[p]erhaps if the plaintiffs had articulated the dissent's theory, we would have found it appropriate to resolve it. But they didn't. […] And whatever the propriety of the Court's decision in *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), to resolve that case on an issue not raised in the defendant's briefing, at least it was raised at oral argument and not expressly disclaimed. That significantly distinguishes this case from *Mack* and exposes the dissent's judicial overreach: The dissent is ready to say point, game, match for the plaintiffs on an argument almost entirely of its own construction. There are plenty of considerations counseling against the dissent's position that it is 'of no consequence' that the plaintiffs have not made the dissent's argument. If it is truly 'of no consequence,' *best we ditch the adversarial system of law today, as under the dissent's approach we the Court will always know not only the better answer than any supplied by the parties but even the better questions than those asked by the parties*." *Michigan Gun Owners, Inc*, ___ Mich at ___ (Docket No. 155204) slip op at 11 n 9 (emphasis added).

[68] *People v Worthington*, ___ Mich ___; ___ NW2d ___ (2018) (Docket No. 153209) (VIVIANO, J., concurring), citing and quoting *Carducci v Regan*, 714 F 2d 171, 177 (CA DC, 1983) (opinion for the court by SCALIA, J.).

[69] *In re Jackson*, ___ Mich ___; 915 NW2d 476 (2018) (Docket No. 156755) (WILDER, J., dissenting). However, the People note that Justice Wilder joined Justice Zahra's dissent in this Court's order in *People v Worthington*, stating that "this Court[…] raised and developed the

Justice Clement has stated, "we should decline to advance […] argument[s] *for* the parties when they have not only not made it for themselves, but instead […] improvidently ceded this issue during oral argument. […] I believe this is consistent with our concern for judicial modesty recently articulated in *People v Arnold* and the admonition that 'appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.' Declining to reach an argument the parties themselves have not raised does nothing to prejudice our ability to take it up in the future, in a case in which the issue is properly presented."[70]

C. The United States Supreme Court's Statements on Party Presentation:

The People note that Michigan as a sovereign state is free to establish its own jurisdictional limitations for its courts separate from the standards adopted in the federal government. However, the United States Supreme Court has taken occasion to comment on the basic judicial principles of party presentation, judicial restraint, and the inherent nature of our adversarial court system, separate from the federal limitations on court jurisdiction, and such instruction is persuasive.

Justice Scalia stated "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling

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theory that now grants defendant relief in this case[, …] [and] I would suggest that we are obligated to do so by our oaths of office." *Worthington*, ___ Mich at ___, n 3 (ZAHRA, J., dissenting). Justice Wilder has also previously stated that "[w]hile I take rules regarding issue preservation and abandonment very seriously, believing them to be essential to the function of our adversarial system[…], on balance the equities [in this case] favor waiving such requirements under these circumstances." *Michigan Gun Owners, Inc*, ___ Mich at ___, slip op at 4 (WILDER, J., concurring in part and dissenting in part) citing *Greenlaw*, 554 US at 243.

[70] *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, ___ Mich ___, ___; ___ NW2d ___ (2018) (Docket No. 155204) slip op at 2 (CLEMENT, J., concurring), quoting *Jefferson v Upton*, 560 US 284, 301; 130 S Ct 2217; 176 L Ed 2d 1032 (2010) (SCALIA, J., dissenting) (emphasis in original, quotation marks and citation omitted), referencing *People v Arnold*, ___ Mich ___, ___; ___ NW2d ___ (2018) (Docket No. 154764) slip op at 37.

them to relief."[71] In the context of courts recharacterizing in propria persona litigants' filings, Justice Scalia went on to critically state that such a practice "is thus a paternalistic judicial exception to the principle of party self-determination, born of the belief that the 'parties know better' assumption does not hold true for *pro se* prisoner litigants."[72] It is axiomatic that if appellate courts are to refrain from recharacterizing a lay person's filings to avoid adopting paternalistic judicial exceptions, then appellate courts must also refrain from doing so when the parties are represented by counsel.

Justice Ginsburg has stated that "[appellate courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do *we normally decide only questions presented by the parties*."[73]

As Justice Sotomayor has stated, "[t]he majority's choice to reach an issue not presented by the parties, briefed, or argued, disregards our rules[…]. And it ignores a fundamental premise of our adversarial system: 'that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'"[74]

Justice O'Connor once cautioned that, "[t]he doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."[75] Where a claim was not raised by the parties in lower courts, Justice O'Connor – either through

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[71] *Castro v United States*, 540 US 375, 386; 124 S Ct 786; 157 L Ed 2d 778 (2003).
[72] *Id*.
[73] *Greenlaw*, 554 US at 244 (quotation marks and citation omitted, emphasis added).
[74] *Knox v Service Employees International Union, Local 1000*, 567 US 298, 325-326; 132 S Ct 2277; 183 L Ed 2d 281 (2012) (SOTOMAYOR, J., concurring in part) quoting *NASA v Nelson*, 562 US 134, 147 n 10; 131 S Ct 746; 178 L Ed 2d 667 (2011) (opinion for the Court by ALITO, J.) (quoting *Carducci*, 714 F 2d at 177 (opinion for the court by SCALIA, J.)).
[75] *Lebron v National Railroad Passenger Corp*, 513 US 374, 408; 115 S Ct 961; 130 L Ed 2d 902 (1995) (O'CONNOR, J., dissenting).

jurisdictional or prudential bases – held that such arguments should not be considered by the Court.[76]

This Court's creation of a new issue for Defendant in this matter runs afoul of the principle of party presentation, the doctrine of judicial restraint, and our adversarial system. Such a practice turns this appellate court into a court of original jurisdiction, which the Michigan Constitution prohibits. Therefore, this Court lacks jurisdiction to hear claims beyond those asserted in Defendant's application for leave to appeal to this Court.

D. Even if this Court has Jurisdiction, it Should Decline to Consider the New Issue:

In *People v Vaughn* this Court stated, "This Court has long recognized the importance of preserving issues for appellate review. As a result, [t]his Court disfavors consideration of unpreserved claims of error, even unpreserved claims of constitutional error."[77] Not only does consideration of an unpreserved court-created issue make it appear the Court is taking on the role of a party by raising new issues, and undermining the "judicial modesty" discussed in *Arnold*,[78] it also forces the Court to make decisions on an incomplete record. Because the issue of compelling, coercing, or enticing was not raised below, neither the People nor Defendant presented evidence or asked questions regarding this issue.

Should this Court decide this new issue on the merits, this Court would be making a decision on a factual assumption that had not been raised or discussed below. This Court would be deciding the matter without the trial court's factual findings on the issue based on the witnesses' testimony and demeanor before it. Assuming what is relevant for an issue that was not raised, this Court eliminates the purpose of having an evidentiary hearing on the motion to suppress and

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[76] *Yee v City of Escondido*, 503 US 519, 533; 112 S Ct 1522; 118 L Ed 2d 153 (1992).
[77] *People v Vaughn*, 491 Mich 642, 653-654; 821 NW2d 288 (2012) (quotation marks and citation omitted).
[78] *Arnold*, ___ Mich at ___ (Docket No. 154764) slip op at 37.

removes the trial court's ability to make factual determinations subject to the clearly erroneous standard of review.[79] Furthermore, deciding an issue that had not been previously raised also deprives this Court of the legal insight and analysis of the trial court and the Court of Appeals.

Therefore, even if this Court could consider the new issue it asked the parties to brief, it should not do so. The legal and factual record was not generated to address this issue, and a decision on the merits of the issue raised by this Court can only be based on assumptions from questions which were asked for different purposes and an incomplete record.[80]

[79] See MCR 2.613(C).

[80] See also Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v United States*, 149 U Pa L Rev 287, 302 (2000) ("The nature of the adversary system is such that courts are to rule on the arguments made by the parties to the litigation only. Except for issues of subject matter jurisdiction, it is not for the courts to raise arguments themselves. […] [the] core characteristic of the adversary system[is] a passive decisionmaker who rules on the arguments made by the parties."); Devins & Prakash, *Reverse Advisory Opinions*, 80 U Chi L Rev 859, 886 (2013) ("The federal legal system, unlike civil law systems, is adversarial, not inquisitorial. And while the boundaries of what constitutes an adversarial system are subject to debate, there is no question that '[p]arties, rather than officers of the state, control[ ] case preparation.' Indeed, 'party presentation is cited as the major distinction' between the federal system and the inquisitorial systems of continental Europe." (citations omitted)).

II. The trial court correctly determined that Officer Staman's actions were consistent with the Constitution and therefore the exclusionary rule did not apply. There was not error, let alone plain error.[81]

Standard of Review: Unpreserved claims of constitutional error are reviewed for plain error.[82] "Appellate courts may grant relief for unpreserved errors if the proponent of the error can satisfy the 'plain error' standard, which has four parts (the '*Carines* prongs'). The first three *Carines* prongs require establishing that (1) an error occurred, (2) the error was 'plain' – i.e., clear or obvious, and (3) the error affected substantial rights – i.e., the outcome of the lower court proceedings was affected. If the first three elements are satisfied, the fourth *Carines* prong calls upon an appellate court to 'exercise its discretion in deciding whether to reverse,' and (4) relief is warranted only when the court determines that the plain, forfeited error resulted in the conviction of an actually innocent defendant or 'seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings.' While '[m]eeting all four prongs is difficult, as it should be,' the plain error test affords defendant sufficient protection[…]."[83]

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[81] The People point out the difficulty of applying the plain error standard to a matter not considered by the trial court because it then begs the question, "whose error?" As this claim was not raised by Defendant it is therefore unpreserved, meaning it was not addressed by either the trial court or the Court of Appeals. While the People have framed the plain error analysis here to focus on Officer Staman's actions as if there had been a ruling on the propriety of his actions, under the argument posited by this Court, there is no actual finding by the trial court for this Court to review. This further illustrates an additional complication involved when this Court sua sponte creates an issue for the parties.

The People also hereby incorporate by reference the law and argument raised in the Plaintiff-Appellee's Answer in Opposition to Defendant-Appellant's Application for Leave to Appeal to the Michigan Supreme Court in response to the matters raised by Defendant in the Court of Appeals, and in her application to this Court.

[82] *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

[83] *Cain*, 498 Mich at 116, quoting *Carines*, 460 Mich at 763 and *Puckett v United States*, 556 US 129, 135; 129 S Ct 1423; 173 L Ed 2d 266 (2009) (quotation marks and citations omitted).

"The failure to establish a plain error that affected a substantial right precludes a reviewing court from acting on such an error."[84]

"The fourth *Carines* prong embodies the general rule that an appellate court will not correct errors that a party failed to raise below. Reversal is required only in the most serious cases, those in which the error contributed to the conviction of an actually innocent person or otherwise undermined the fairness and integrity of the process to such a degree that an appellate court cannot countenance that error."[85] "[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis," determining whether an error occurred "*in the particular case*."[86]

Discussion: Assuming arguendo that the question of whether the police officer in this matter compelled, coerced, or otherwise enticed Defendant to enter a public space subjecting her to arrest is properly before this Court, Defendant failed to preserve this issue and therefore it is subject to the plain error standard of review. The People maintain that an error did not occur; that even if an error occurred it cannot be characterized as plain; and that if an error occurred, it did not result in the conviction of an actually innocent defendant, and it did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings – thereby failing to satisfy the first, second, and fourth prongs of *Carines*.

Furthermore, Defendant asserts that this Court should adopt the constructive entry doctrine to entitle Defendant to the relief she seeks. However, this Court has held that its review of unpreserved claims of constitutional error, and the fourth prong of *Carines*, is limited to the four corners of the particular case and therefore may not be employed to pronounce a new rule

[84] *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).
[85] *Cain*, 498 Mich at 119, citing *United States v Olano*, 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508 (1993).
[86] *Cain*, 498 Mich at 121 (emphasis in original).

applicable to subsequent cases.[87] Because Defendant would need this Court to pronounce a new rule to entitle her to relief, Defendant cannot obtain the relief she seeks.

A. Defendant has Not Preserved the Issue and it is Therefore Subject to the Plain Error Standard of Review:

Defendant asserts that this issue was preserved through her pre-trial motion to suppress.[88] However, this is incorrect. Defendant's motion asserted that Officer Staman lacked the authority to arrest Defendant since the crime of failure to report a motor vehicle accident involving damage to fixtures is only a 90-day misdemeanor and he lacked an arrest warrant, in an asserted violation of MCL 764.15.[89] In the alternative, Defendant argued that Officer Staman's entry into Defendant's residence during her apprehension without her permission and without an arrest warrant was not authorized.[90] Defendant never raised the issue of whether she was compelled, coerced, or otherwise enticed at any point during the procedural history of this matter.[91]

Our Court of Appeals has held that where one claim and argument is employed to support a motion to suppress in the trial court, but a different claim and argument is raised before the Court of Appeals to support suppression of the same statements, that claim and argument is unpreserved for appellate purposes.[92] Therefore, it cannot be said that Defendant's motion to suppress filed

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[87] *Cain*, 498 Mich at 121 ("[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis," determining whether an error occurred "*in the particular case*.") (emphasis in original). The People have been able to find only one post-*Carines* instance where this Court employed a plain error standard of review and issued a substantive change in the law. See *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

[88] Defendant's Supplemental Brief, 10.

[89] 30a; 32a-35a.

[90] 30a; 32a-35a.

[91] Similarly, Defendant's argument that *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017) is relevant to this Court's decision has never been raised before. Because the record appears to indicate that Defendant was awake and with friends in the residence, there is no basis to claim that the implied license to approach was violated. Further, Officer Staman likely had a community caretaking reason to approach and determine if Defendant had been injured by way of a concussion or otherwise.

[92] *People v Lumsden*, 168 Mich App 286, 291-292; 423 NW2d 645 (1988).

before the trial court can act to preserve the matter now before this Court, and this issue of whether Defendant was compelled, coerced, or otherwise enticed must be reviewed for plain error.[93]

B. Defendant's Fourth Amendment Rights and Rights Pursuant to Const 1963, Art 1, § 11 were Not Violated:

"[T]he Michigan Constitution is to be construed to provide the same protection as that secured by the Fourth Amendment, absent compelling reason to impose a different interpretation."[94]

"An arrest without a warrant of an individual in a public place upon probable cause does not violate constitutional prohibitions against unreasonable arrest or search and seizure."[95] "[A] police officer is not authorized to enter a private home without consent to make a misdemeanor arrest without a warrant."[96] However, police effectuating an arrest in a public place may pursue a defendant into a private place, as a suspect cannot evade a lawful arrest merely by escaping into a private place such as a defendant's home.[97] Furthermore, a person standing in the doorway of one's residence is in a public place, and has no expectation of privacy for the purposes of the Fourth Amendment.[98] "What a person knowingly exposes to the public, even in his own house or office,

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[93] To the extent that this Court has held that it can consider an "unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented," *People v Washington*, 501 Mich 342, ___ n 21; 916 NW2d 477 (2018), quoting *McNeil v Charlevoix Co*, 484 Mich 69, 81 n 8; 772 NW2d 18 (2009) (quotation marks omitted), the People argue that the facts in this matter have not been sufficiently developed because this matter was not raised in the trial court. Specifically, Officer Staman's demeanor and the other responding officers' interactions with Defendant were not in dispute, and therefore were not placed on the record. The precise nature of how Officer Staman offered Defendant her identification back to her was not placed on the record.

[94] *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011) (quotation marks and citations omitted), see also *People v Collins*, 438 Mich 8, 40; 475 NW2d 684 (1991).

[95] *People v Collier*, 183 Mich App 473, 475; 455 NW2d 313 (1989) citing *Santana*, 427 US at 42.

[96] *People v Rice*, 192 Mich App 240, 245; 481 NW2d 10 (1991).

[97] *Santana*, 427 US at 43.

[98] *Id*. at 42; see also *Illinois v McArthur*, 531 US 326, 335; 121 S Ct 946; 148 L Ed 2d 838 (2001) ("a person standing in the doorway of a house is 'in a "public" place,' and hence subject to arrest without a warrant permitting entry of the home.").

is not a subject of Fourth Amendment protection,"[99] and if a subject is "exposed to public view, speech, hearing, and touch as if [the subject] had been standing completely outside of [the] house," then that person is considered to be in a public place.[100]

In *United States v Santana*, police were engaging in a drug investigation and obtained information that the defendant had the money from the various drug deals.[101] When police arrived at the defendant's address, they found her "standing in the doorway of the house with a brown paper bag in her hand. They pulled up to within 15 feet of [the defendant] and got out of their van, shouting 'police,' and displaying their identification."[102] The defendant then attempted to retreat into her house, and police followed her through the opened door and effectuated the arrest.[103] The United States Supreme Court held that the defendant standing in her doorway placed her in a public place with no expectation of privacy, and therefore her warrantless arrest was constitutional under *United States v Watson*.[104]

1. *United States v Santana* and *Payton v New York* are not mutually exclusive:

Defendant cites *Payton v New York*[105] to support her assertion that the police officers in this matter violated her Fourth Amendment rights, specifically for the proposition that there is a "firm line" at the entrance to one's residence that the Fourth Amendment protects.[106] However, the Supreme Court's holding in *Santana* permitting warrantless entry into one's residence and

[99] *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967).
[100] *Santana*, 427 US at 42, citing *Hester v United States*, 265 US 57, 59; 44 S Ct 445; 68 L Ed 898 (1924).
[101] *Santana*, 427 US at 40.
[102] *Id*.
[103] *Id*.
[104] *Id*. at 42, citing *United States v Watson*, 423 US 411; 96 S Ct 820; 46 L Ed 2d 598 (1976).
[105] *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980).
[106] Defendant's Supplemental Brief, 11; *Payton*, 445 US at 589-590.

Payton's "firm line" holding are not mutually exclusive, with *Payton* being factually distinct from the matter before this Court.

In *United States v Santana*, the police had arranged to conduct a controlled purchase of heroin; the purchaser was given the money, went into defendant Santana's house, came out of the house and briefly spoke with defendant Alejandro, and then got into the vehicle of the undercover police officer.[107] Upon producing the heroin, the undercover police officer displayed his badge and arrested the purchaser, who told the officer that defendant Santana had the money in the house.[108] Police then returned to Santana's house, observing her standing in the doorway of the house with a brown paper bag in her hand; as police got out of their van shouting "police" and displaying their identification, Santana retreated into the vestibule of her house.[109] Police entered the vestibule through the open door and arrested Santana.[110] The Supreme Court held that Santana was in public – thus subjecting her to a warrantless arrest – because she not only was "merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."[111]

The distinguishing facts between *Santana* and the case at bar is that Defendant voluntarily placed herself into the public sphere by not employing her compatriot to retrieve her driver's license as she had when Officer Staman requested to see her identification; rather, she chose to walk over to Officer Staman following the offer of returning her license to her. The Court in *Santana* engaged in a hot pursuit analysis because in that matter Defendant, upon seeing law enforcement, retreated into her home in an attempt to thwart her arrest, with the Court concluding

[107] *Santana*, 427 US at 39-40.
[108] *Id*. at 40.
[109] *Id*. at 40.
[110] *Id*. at 40-41.
[111] *Id*. at 42, citing *Hester*, 265 US at 59.

that "a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*,[112] by the expedient of escaping to a private place."[113]

In *Payton v New York*, decided four years later, the matter concerned two cases challenging "New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest."[114] In one case, Payton was suspected in a murder investigation, and law enforcement proceeded to his apartment without a warrant.[115] After knocking on his door to no avail, police officers broke open his door to find no one in the residence, but seized a .30-caliber shell casing suspected to be related to the murder.[116] In the other case, Riddick had been identified as the perpetrator of two armed robberies, and law enforcement went to his residence without an arrest warrant.[117] After knocking on the door, Riddick's three-year-old son answered, and the police officers observed Riddick inside the room sitting on a bed; the police entered the house, arrested him, and searched a chest of drawers discovering weapons and narcotics.[118] In both cases the trial court found that suppression was unwarranted as in both instances police entry into the residences was authorized by New York statute.[119]

Neither case in *Payton* involved suspects who were in a public place when police initiated their arrests. The Supreme Court recognized that the New York courts declined to evaluate the matters under any other criteria other than routine arrests, so the Court also declined to evaluate the matter through the lenses of emergency or exigent circumstances, police authority, or probable

[112] *Watson*, 423 US 411.
[113] *Santana*, 427 US at 42-43.
[114] *Payton*, 445 US at 574.
[115] *Id*. at 576.
[116] *Id*. at 576-577.
[117] *Id*. at 578.
[118] *Id*. at 578.
[119] *Id*. at 577-578.

cause.[120] The Court, in addressing whether law enforcement may enter an individual's residence, without consent or an arrest warrant, to effectuate a routine arrest, simply stated that in such a context the Fourth Amendment prohibited such conduct.[121]

The Court in *Payton* did not comment on, let alone overturn, *Santana*'s holding that a defendant placing themselves in a public place by standing in the entryway to their residence subjected themselves to a warrantless arrest in a public place.

2. Federal constructive entry doctrine:

Defendant urges this Court to adopt a constructive entry doctrine to remedy such claimed errors in future matters. The United States Supreme Court has not adopted the constructive entry doctrine; rather, such a construct is a product of the lower federal courts, which this Court is not bound by.[122]

Even so, the factual accounts of the lower federal courts' cases that gave rise to adopting and applying the constructive entry doctrine are distinct from the matter before this Court.

The Court of Appeals for the Sixth Circuit adopted the constructive entry doctrine in *United States v Morgan*. In that matter, law enforcement were responding to the unlawful use of automatic weapons, pistols, and shotguns in a park.[123] The suspects were told to leave, and they did so, while advising the law enforcement officers that, if any arrests were attempted, they would draw their weapons and kill them.[124] The officers retreated and requested reinforcements, who then ultimately followed the defendant to his mother's house, where he was observed unpacking assorted weapons

[120] *Id*. at 583.
[121] *Id*. at 589-590.
[122] "Although state courts are bound by decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citations omitted); see also *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007).
[123] *United States v Morgan*, 743 F2d 1158, 1160 (CA 6, 1984).
[124] *Id*. at 1160.

from the trunk of his car.[125] Nine officers responded to the home, surrounding it, flooding the house with spotlights, and summoning the defendant through a bullhorn.[126] "Responding to the coercive activity outside of the house, [the defendant] appeared at the front door holding a pistol in his hand," where he was arrested outside of his mother's residence.[127] The court held that "[a]lthough there was not direct police entry into the [defendant's] home prior to [the defendant's] arrest, the constructive entry accomplished the same thing[…]."[128]

The Sixth Circuit later articulated in *United States v Thomas* that "[t]he question here is when we will deem officers to have crossed that 'threshold' [of a defendant's residence] in law when they have not done so in fact."[129] "[T]he law has long permitted officers to engage in consensual encounters with suspects without violating the Fourth Amendment."[130] "Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen's home."[131] The determination "between a permissible consensual encounter and an impermissible constructive entry […] turns on the show of force exhibited by the police."[132] Where there are no indications in the record such as "drawn weapons, raised voices, or coercive demands on the part of the police," but instead the record reflects that the defendant "opened the door willingly, and when requested, stepped out onto the porch," there is no constructive entry by law enforcement.[133]

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[125] *Id*. at 1160.
[126] *Id*. at 1160-1161.
[127] *Id*. at 1161.
[128] *Id*. at 1166.
[129] *United States v Thomas*, 430 F3d 274, 276-277 (CA 6, 2005).
[130] *Id*. at 277, citing *Bennett v City of Eastpointe*, 410 F3d 810, 821 (CA 6, 2005) (additional citations and quotations omitted).
[131] *Id*. at 277.
[132] *Id*. at 277-278.
[133] *Id*. at 278 (citation omitted).

The Court of Appeals for the Third Circuit employed the constructive entry doctrine and held that "[n]o reasonable person would have believed that he was free to remain in the house" when the police surrounded the house, pointed "machine guns" at the windows, and "the persons inside are *ordered* to leave the house backwards with their hands raised[…]."[134] The Court of Appeals for the Ninth Circuit also applied the constructive entry doctrine in a factually similar case.[135]

The Court of Appeals for the Tenth Circuit held that the constructive entry doctrine prohibits a warrantless arrest where the SWAT team surrounds the residence with rifles aimed and where the defendant was told over loudspeaker to exit the residence; "a reasonable person would have believed he had to come out of the home."[136]

The Court of Appeals for the Eleventh Circuit held that the constructive entry doctrine prohibits a defendant's consent to entry into a residence where FBI officers encircled the front of the defendant's apartment with weapons drawn, and who ordered the defendant to open the door.[137]

The constructive entry doctrine does not apply where officers, with no drawn weapons, no raised voices, and no coercive demands, ask a defendant to step out of his or her residence into public, and that defendant voluntarily complies with that request.[138]

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[134] *Sharrar v Felsing*, 128 F3d 810, 819 (CA 3, 1997) (emphasis added).
[135] See *United States v Al-Azzawy*, 784 F2d 890, 893 (CA 9, 1985).
[136] *United States v Maez*, 872 F2d 1444, 1450 (CA 10, 1989).
[137] *United States v Edmondson*, 791 F2d 1512, 1514 (CA 11, 1986).
[138] *Thomas*, 430 F3d at 278.

3. The Michigan Supreme Court expressly declined to adopt the constructive entry doctrine:

This Court expressly declined to adopt the constructive entry doctrine in *People v Gillam*, finding that the facts of that case would preclude such a doctrine's applicability, even if it were to be adopted.[139]

In *People v Gillam*, law enforcement had probable cause to arrest the defendant, who was on a tether in his apartment pursuant to the terms of his probation.[140] Five officers approached the defendant's apartment building: one stood observing the back terrace window, one remained in the stairwell, while one plain clothes officer and two uniformed officers knocked on the defendant's door.[141] The officers asked the defendant to step outside, and there was a discussion through the door about whether the defendant could leave his residence because of the tether, although the details of that exchange were disputed.[142] The defendant stepped outside and was arrested, and ultimately testified that "[t]here was something about it that made me feel threatened."[143] The incident was calm, cooperative, and no weapons were drawn.[144]

This Court held that "even assuming that the constructive entry doctrine applies, we conclude that [the] defendant here has not established that the police constructively entered his apartment in violation of his Fourth Amendment right to privacy."[145] "Unlike the siege tactics employed in [*United States v Morgan*], […] the actions of the officers in the instant case, according

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[139] *Gillam*, 479 Mich at 262 ("[W]e need not decide whether to adopt the constructive entry doctrine in this case because, even assuming that the constructive entry doctrine applies, we conclude that defendant here has not established that the police constructively entered his apartment in violation of his Fourth Amendment right to privacy. […] [T]he actions of the officers in the instant case, according to defendant himself, *merely involved knocking on his front door and asking him to step outside*." (Emphasis added)).

[140] *Id*. at 255.

[141] *Id*. at 255-256.

[142] *Id*. at 256.

[143] *Id*.

[144] *Id*.

[145] *Id*. at 262.

to [the] defendant himself, merely involved knocking on his front door and asking him to step outside."[146]

Much like the facts of *Gillam*, Officer Staman merely asked to see Defendant's identification, which was provided by a compatriot. Office Staman discussed Defendant's account of the night's events, during which Defendant was visibly intoxicated. Officer Staman offered the return of Defendant's identification, at which point Defendant voluntarily placed herself into a public space, extending her arm beyond the threshold of the doorway. No weapons were drawn. No coercive tactics were employed. No commands were issued by Officer Staman. Defendant's residence was not surrounded.

Even if this Court had elected to adopt the constructive entry doctrine in *Gillam*, or would do so now, it would plainly not apply in this matter.

4. Legal standard for when law enforcement may "compel, coerce, or […] entice" within the context of the Fourth Amendment:

Pursuant to this Court's order directing the parties to examine under what circumstances law enforcement may "compel, coerce, or […] entice" a subject to leave their residence in order to effectuate a warrantless arrest in public, the People will attempt to examine those three words as used in precedent within the context of the Fourth Amendment.

The United States Supreme Court has generally addressed the term "compel" – pertaining to law enforcement in the context of the Fourth Amendment – in cases involving the production of evidence, and more importantly, in the context of questioning suspects.[147]

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[146] *Id*.

[147] It is "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes[,] they have no right to compel them to answer." *Davis v Mississippi*, 394 US 721, 727 n 6; 89 S Ct 1394; 22 L Ed 2d 676 (1969).

Regarding "coercive" conduct by law enforcement in the context of the Fourth Amendment, the United States Supreme Court has held that "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."[148] "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage – provided they do not induce cooperation by coercive means. […] If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."[149] Where there is "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threats, no command, not even an authoritative tone of voice," no reasonable person would feel unable to terminate the encounter.[150]

The United States Supreme Court has not employed the term "entice" when referring to the conduct of law enforcement outside of the context of an entrapment claim.[151]

The lower federal courts have employed the word "compel" when describing law enforcement conduct within the lens of the Fourth Amendment in cases of obtaining blood samples of convicted offenders for a DNA database,[152] obtaining information from suspects,[153] officers

[148] *United States v Drayton*, 536 US 194, 200; 122 S Ct 2105; 153 L Ed 2d 242 (2002).
[149] *Id*. at 201 (citation omitted).
[150] *Id*. at 204.
[151] See for example *Hampton v United States*, 425 US 484, 498-499; 96 S Ct 1646; 48 L Ed 2d 113 (1976).
[152] *United States v Sczubelek*, 402 F3d 175, 184 (CA 3, 2005).
[153] "Absent coercive or intimidating behavior which negates the reasonable belief that compliance is not compelled, [the agent's] quest for additional identification and voluntarily given information from the defendant does not constitute a seizure under the fourth amendment." *United States v Collis*, 766 F2d 219, 221 (CA 6, 1985).

insisting parents accompany a suicidal daughter to the hospital,[154] and police questioning after a suspect has declined to answer.[155]

In the context of the constructive entry doctrine adopted by the Sixth Circuit, "coercive" has been defined as "such a show of authority that [the] [d]efendant reasonably believed he had no choice but to comply."[156]

It does not appear that the lower federal courts have employed the term "entice" in the context of examining law enforcement behavior within the context of the Fourth Amendment.

Collectively, it appears that the lower federal courts' application of law enforcement compelling, coercing, or enticing someone within the context of the Fourth Amendment all amounts to the following Supreme Court inquiry: whether a reasonable person would feel free to discontinue that encounter with law enforcement.[157]

Michigan appellate courts have employed the term "compel" within the context of the Fourth Amendment and law enforcement behavior when examining the legality of compulsory preliminary breath test for minors,[158] whether police interaction constitutes a seizure,[159] and notably within the context of whether Michigan should adopt the constructive entry doctrine.[160]

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[154] "Although we acknowledge that intimidating police behavior might, under some circumstances, cause one to reasonably believe that compliance is compelled, the officers' actions in this case did not rise to that level. There are no allegations that the officers intimidated Mrs. James with a threatening presence, engaged in any physical touching, or displayed a weapon. Nor did the officers order her to the police station for questioning or threaten to arrest her if she refused to accompany her daughter to the hospital." *James v City of Wilkes-Barre*, 700 F3d 675, 682 (CA 3, 2012).

[155] *United States v Esparza-Mendoza*, 386 F3d 953, 959 (CA 10, 2004).

[156] *United States v Saari*, 272 F3d 804, 809 (CA 6, 2001).

[157] *Drayton*, 536 US at 201.

[158] *People v Chowdhury*, 285 Mich App 509; 775 NW2d 845 (2009).

[159] *People v Daniels*, 160 Mich App 614, 617-620; 408 NW2d 398 (1987).

[160] *Gillam*, 479 Mich 253.

Our appellate courts have used the term "coerce" when examining actions by law enforcement in the context of the Fourth Amendment in cases of officers questioning a defendant,[161] when obtaining a suspect's consent to search,[162] and again, notably within the context of whether Michigan should adopt the constructive entry doctrine.[163]

Michigan appellate courts have generally not employed the term "entice" when referring to the conduct of law enforcement outside of the context of an entrapment claim.[164]

Collectively, it appears that, as with the federal courts' application, our state appellate courts' application of law enforcement compelling, coercing, or enticing someone within the context of the Fourth Amendment all amounts to the following Supreme Court inquiry: whether a reasonable person would feel free to discontinue that encounter with law enforcement.[165]

C. Defendant is Unable to Satisfy the Plain Error Standard:

Officer Staman's actions in this matter did not run afoul of Defendant's Fourth Amendment protections in this matter, regardless of whether this Court had elected to adopt the constructive entry doctrine in *Gillam*. Even if this Court were to find that Officer Staman's actions did constitute error, it cannot be said to be plain or obvious when considering the precedent supporting Officer Staman's actions. Finally, even if Defendant were able to satisfy the first three prongs of *Carines*,

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[161] *People v Bolduc*, 263 Mich App 430, 440-444; 688 NW2d 316 (2004) ("[W]e cannot say that the district court clearly erred in finding that the circumstances, as they existed when the police failed to leave and instead persisted by asking defendant to explain a bulging pocket, were inherently coercive." However, entitlement to relief "is compromised by the fact[…] that defendant exhibited no reluctance to answer [the officer's] question concerning the bulge in his pocket[…].").

[162] *People v Frohriep*, 247 Mich App 692, 701-704; 637 NW2d 562 (2001) (it is not a coercive search or seizure where police approach a defendant, told the defendant they had been informed that there were controlled substances on his property, and asked his permission to search, at which point the defendant consented to the search. "There is no indication that defendant was not free to end the encounter.").

[163] *Gillam*, 479 Mich 253.

[164] See for example *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991).

[165] *Drayton*, 536 US at 201.

she is unable to satisfy the fourth prong, and therefore Defendant is not entitled to the relief she seeks under the plain error analysis.

1. No error occurred:

The record shows that Officer Staman remained outside of Defendant's residence during his interaction with Defendant, prior to her arrest.[166] When asked to produce identification, Defendant handed her identification to a compatriot, who then handed it to Officer Staman.[167] At the conclusion of their conversation, Officer Staman offered to return Defendant's identification to her.[168] At that point, Defendant voluntarily chose not to again employ her compatriot to retrieve the identification.[169] Instead, Defendant voluntarily proceeded to the doorway and extended her arm beyond the door's threshold.[170] By United States Supreme Court precedent, Defendant exposed herself to a public space, voluntarily subjecting herself to arrest.[171] Police effectuating an arrest in a public place may pursue a defendant into a private place, as a suspect cannot evade a lawful arrest merely by escaping into a private place such as a defendant's home.[172] Therefore, no error occurred in this matter.

Even if this Court had adopted the constructive entry doctrine, there would still be no error, and Defendant would not be entitled to relief. In every case in the lower federal courts that have adopted such a doctrine which the People have examined, the circumstances have involved police action through the use of drawn weapons, flood lights, bullhorns, and other commands which

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[166] 110b.
[167] 110b.
[168] 52a-54a.
[169] 52a-54a.
[170] 52a-54a, 58a.
[171] *Santana*, 427 US at 42; see also *McArthur*, 531 US at 335 ("a person standing in the doorway of a house is 'in a "public" place,' and hence subject to arrest without a warrant permitting entry of the home.").
[172] *Santana*, 427 US at 43.

would cause a reasonable person to believe that they had no choice but to obey law enforcement's commands. The facts in this case are strikingly similar to *Gillam*, and every federal case declining to apply the constructive entry doctrine: Defendant voluntarily placed herself in a public space in the absence of any "compel[ling], coerc[ive], or otherwise entic[ing]" behavior on the part of law enforcement. Additionally, Defendant in this matter even testified that Officer Staman "was the only [officer] that was nice" to her, further belying a claim of impermissible constructive entry.[173]

Defendant has failed to satisfy the first prong of *Carines*, and therefore is not entitled to the relief she seeks.

2. Even if an error occurred, it cannot be said to be plain or obvious:

As already argued, Officer Staman was operating within the confines of the law as adopted by the United States Supreme Court, this Court, and our Court of Appeals. Even if this Court were to find that his actions constituted error, such a finding would alter the precedent upon which Officer Staman relied. Should this Court find that his actions constituted error, it cannot be said that the error was plain or obvious as a result.

Even if this Court had adopted the constructive entry doctrine, the facts of this matter are strikingly similar to cases in which the lower federal courts have declined to find that law enforcement engaged in an impermissible constructive entry into a defendant's residence.

Defendant has failed to satisfy the second prong of *Carines*, and therefore is not entitled to the relief she seeks.

3. Substantial rights:

Naturally, the entire inquiry into this matter concerns Defendant's substantial rights under the Fourth Amendment. Should this Court find that Officer Staman's actions constitute error, it is

[173] 146b.

axiomatic that that error would affect her substantial rights. Therefore, the third prong of *Carines* is satisfied essentially by default.

4. Even if the first three *Carines* prongs were satisfied, Defendant is not actually innocent, and the fairness, integrity or public reputation of the judicial proceedings were not seriously affected[174]:

Should this Court find that the first three *Carines* prongs are satisfied, Defendant is unable to satisfy the fourth requisite prong, and therefore is not entitled to relief.

Defendant is not actually innocent in this matter. Defendant admitted to driving,[175] to abandoning her vehicle,[176] and to drinking.[177] Defendant's blood alcohol concentration, taken at 5:12 a.m. when the crash occurred at approximately between 2:30 a.m. and 3:30 a.m., was found to be 0.22 and 0.21, respectively.[178] The evidence and Defendant's own admissions conclusively establish that she committed the acts for which she was charged and convicted.

Defendant is unable to establish that the fairness, integrity, or public reputation of the judicial proceedings were seriously affected by this alleged error. Such an error has been found where an error in scoring offense variables resulted in "sending an individual to prison and depriving him of his liberty for a period longer than authorized by law,"[179] or where a prosecutor makes "references to defendant's post-arrest, post-*Miranda* silence [and] violated defendant's due process rights[…]."[180] However, this Court has also held that the converse is also true, that "it

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[174] Again, the People point out the difficulty of applying the plain error standard to a matter not considered by the trial court. The alleged error occurred outside of the judicial proceedings in this matter, which is the focus of a portion of *Carines*'s fourth prong. This further illustrates an additional complication involved when this Court sua sponte creates an issue for the parties.
[175] 110b-111b, 133b-134b.
[176] 110b-111b, 136b-137b.
[177] 112b-114b, 136b-137b.
[178] 99b-100b, 118b-119b, 131b, 140b.
[179] *Kimble*, 470 Mich at 313.
[180] *People v Shafier*, 483 Mich 205, 224; 768 NW2d 305 (2009).

would be the reversal of convictions for error that did not affect the judgment that would seriously affect the fairness, integrity or public reputation of the judicial proceedings."[181]

It cannot be said that the fairness, integrity, or public reputation of the judicial proceedings were seriously affected by this alleged error through Officer Staman effectuating Defendant's arrest pursuant to established precedent on the matter as articulated by Michigan's appellate courts and the United States Supreme Court. Even if this Court had adopted the constructive entry doctrine, or elects to do so now, the facts of this matter do not establish that Officer Staman constructively entered Defendant's residence to effectuate her arrest. As such, the judicial proceedings' fairness, integrity, or public reputation could not be tainted by an arrest that was conducted pursuant to established law.

[181] *Pipes*, 475 Mich at 283-284 (quotation marks and citation omitted).

III. Assuming arguendo that this issue was properly preserved, Defendant is still not entitled to relief.

Standard of Review: "The harmless-error test applies to preserved [claims of] constitutional error[.]"[182] "If the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt."[183] "A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"[184] There must be no "reasonable possibility that the evidence complained of might have contributed to the conviction."[185]

Discussion: The People maintain that this issue was unpreserved by Defendant and is therefore subject to the plain error analysis. However, assuming arguendo that this Court finds Defendant sufficiently preserved this matter through her motion to suppress and dismiss, this matter would be subject to the harmless error analysis. As previously argued, the People maintain that there was not error in this case. However, should this Court find that the matter is preserved, and that Officer Staman's actions constitute error, the People would be forced to concede that Defendant's post-arrest statements would be entitled to suppression.

A. Officer Staman's Actions Do Not Constitute Error Under the Harmless Error Analysis:

The People reiterate the argument made previously in this supplemental brief, asserting that no error occurred in this matter. Officer Staman's actions in this matter did not run afoul of Defendant's Fourth Amendment protections in this matter, regardless of whether this Court had

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[182] *People v Kowalski*, 489 Mich 488, 505 n 30; 803 NW2d 200 (2011), citing *Carines*, 460 Mich at 774.
[183] *Carines*, 460 Mich at 774.
[184] *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States*, 527 US 1, 18; 119 S Ct 1827; 144 L Ed 2d 35 (1999).
[185] *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994) (quotation marks and citations omitted).

elected to adopt the constructive entry doctrine in *Gillam*. Defendant exposed herself to a public space, voluntarily subjecting herself to arrest.[186] Police effectuating an arrest in a public place may pursue a defendant into a private place, as a suspect cannot evade a lawful arrest merely by escaping into a private place such as a defendant's home.[187]

Even if this Court had adopted the constructive entry doctrine, there would still be no error, and Defendant would not be entitled to relief. In every case in the lower federal courts that have adopted such a doctrine, the circumstances have involved police action through the use of drawn weapons, flood lights, bull horns, and other commands which would cause a reasonable person to believe that they had no choice but to obey law enforcement's commands. The facts in this case are strikingly similar to *Gillam*, and every federal case the People have found declining to apply the constructive entry doctrine: Defendant voluntarily placed herself in a public space in the absence of any "compel[ling], coerc[ive], or otherwise entic[ing]" behavior on the part of law enforcement. Additionally, Defendant in this matter even testified that Officer Staman "was the only [officer] that was nice" to her, further belying a claim of impermissible constructive entry.[188]

B. However, if this Court Finds Error it is Not Clear Beyond a Reasonable Doubt that a Rational Jury would have Found Defendant Guilty Absent the Error:

Assuming arguendo that this Court nonetheless finds that Defendant properly preserved this matter, and that Officer Staman's actions constitute error under the harmless error analysis through the adoption and violation of the constructive entry doctrine, the People would be forced to concede.

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[186] *Santana*, 427 US at 42; see also *McArthur*, 531 US at 335 ("a person standing in the doorway of a house is "in a 'public' place," and hence subject to arrest without a warrant permitting entry of the home.").
[187] *Santana*, 427 US at 43.
[188] 146b.

The evidence obtained subsequent to Defendant's arrest include her statements and her blood alcohol concentration of .022 and 0.21.[189] The People acknowledge that such evidence indeed "contributed to the conviction."[190] However, because Defendant's breath alcohol concentration was obtained after her arrest, under the implied consent statute, MCL 257.625a, those results may still be admissible. The alleged preserved error would not satisfy the harmless error analysis, and Defendant's post-arrest statements would be entitled to suppression. However, the People assert that, pursuant to the implied consent statute, should this Court find error under the harmless error analysis, this Court should remand this matter to the trial court for an attenuation analysis in lieu of vacating Defendant's convictions and sentences.[191]

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[189] 99b-100b, 118b-119b, 131b, 140b.

[190] *Anderson (After Remand)*, 446 Mich at 406 (quotation marks and citations omitted).

[191] Should this Court decline to now adopt the constructive entry doctrine advocated by Defendant, but still find that Officer Staman committed a *Payton* violation despite the arrest originating in a public space pursuant to *Santana*, the People assert that pursuant to *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990), Defendant's admissions immediately after her arrest might not be admissible, but her blood alcohol concentrations would remain admissible.

The United States Supreme Court in *Harris* held that "[a]lthough it had long been settled that a warrantless arrest in a public place was permissible as long as the arresting officer had probable cause, *Payton* nevertheless drew a line at the entrance to the home. […] Nothing in the reasoning of that case suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house." *Id*. at 17-18. The Court went on to conclude that "[t]he warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded as it should have been[…]. We are not required by the Constitution to go further and suppress statements later made by Harris in order to deter police from violating *Payton*." *Id*. at 20. "We hold that, where the police have probable cause to arrest a suspect, *the exclusionary rule does not bar* the State's use of a statement made by the defendant outside of his home, *even though* the statement is taken after an arrest made in the home in violation of *Payton*." *Id*. at 21 (emphasis added).

The holding in *Harris* was adopted by our Court of Appeals in *People v Dowdy*, 211 Mich App 562, 568-570; 536 NW2d 794 (1995), which also reemphasized that "[i]n Fourth Amendment

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully request that Defendant's application for leave to appeal be DENIED.

Respectfully submitted,

Christopher R. Becker (P 53752)
Kent County Prosecuting Attorney

Dated: October 9, 2018

By: /s/ Andrew J. Lukas
Andrew J. Lukas (P 79633)
Assistant Prosecuting Attorney

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cases, both this Court and the Supreme Court have held that the Michigan Constitution does not provide more protection than the United States Constitution." *Id*. at 569.

Therefore, should this Court instead find there to be a *Payton* violation in this matter, Defendant's blood alcohol concentrations would not be entitled to suppression, and it remains clear beyond a reasonable doubt that a jury would have found Defendant guilty absent the error. As such, Defendant is not entitled to relief under the harmless error analysis.