STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION June 17, 2021 9:10 a.m.
V	No. 355120 Kent Circuit Court
JENNIFER MARIE HAMMERLUND, Defendant-Appellee.	LC No. 15-009717-FH

Before: BOONSTRA, P.J., and MARKEY and SERVITTO, JJ.

MARKEY, J.

In this interlocutory appeal, the prosecution appeals by delayed leave granted[1] the trial court's order that suppressed evidence and granted defendant a new trial on the basis of a violation of the Fourth Amendment. On appeal, the prosecution argues that the relevant precedent does not support application of the exclusionary rule with respect to the evidence in dispute, which is comprised of defendant's statements to the police and two breath-test results that were obtained following her arrest. Defendant was arrested inside of her home after a police officer grabbed defendant at the doorway of her house, and the two stumbled backward deeper into the interior of the home. The arresting officer acted absent a search or arrest warrant, probable cause that a felony had been committed by defendant, and absent the commission of a misdemeanor committed in his presence. Defendant never stepped outside or beyond the entrance of her home until after she was arrested and led away by the officer. The pertinent evidence was gathered after defendant exited her house. We conclude that this case demands application of the exclusionary rule to deter comparable deliberate conduct by the police in the future when contemplating making an arrest at a suspect's home. Accordingly, we affirm.

[1] *People v Hammerlund*, unpublished order of the Court of Appeals, entered December 16, 2020 (Docket No. 355120).

This case returns to this Court after a trip to our Supreme Court and a subsequent stop in the trial court. In *People v Hammerlund*, 504 Mich 442, 446-450; 939 NW2d 129 (2019), our Supreme Court summarized the facts of this case:

> Defendant, Jennifer Marie Hammerlund, was involved in a single-vehicle accident in the early morning hours of September 30, 2015, on a highway exit ramp in Wyoming, Michigan. According to defendant, another driver cut her off, causing her to overcorrect and lose control of her car. Her vehicle scraped a cement barrier and left a dent on a metal guardrail. Defendant suffered only minor injuries; however, the car was no longer drivable. She attempted to call her insurance company and then used a rideshare service to get home. She did not report the accident to police.
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> Soon after, Officer Erich Staman of the Wyoming Police Department was dispatched to the scene of a reported abandoned vehicle on the shoulder of the highway off-ramp. After observing the damage to the vehicle, as well as the guardrail and cement barrier, Officer Staman requested a tow truck and conducted an inventory search. He discovered that the vehicle was registered to defendant and that it contained paperwork bearing defendant's name, so he requested that officers from the Kentwood Police Department go to defendant's home to perform a welfare check.
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> In the meantime, according to defendant, she returned home, found that she was "really shaken up," and drank some alcohol. She then went into her room and went to bed. Only a few minutes later, the Kentwood officers arrived and told her roommate that they wished to speak with defendant. Defendant initially declined to leave her room; however, after her roommate spoke to the officers and reported back to defendant that the police would take her into custody and arrest the roommate for harboring a fugitive if she did not appear, defendant came to the door. After that, Officer Staman arrived at the home to "make contact" with defendant.
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> Officer Staman testified that when he arrived at defendant's home, he stood on her porch while she remained inside, approximately 15 to 20 feet away from the front door. He acknowledged that it "didn't appear that [defendant] wanted to come to the door . . . ." And, when asked whether defendant "made it pretty clear that she wasn't coming out of the home," he agreed, stating, "It seemed that she wasn't going to come out." During their short conversation, defendant admitted to driving the car that caused the damage. When he asked defendant to produce her identification she was "reluctant" to give it to him so she passed it to him through a third party in the home. Officer Staman testified that defendant told him that she "thought [Officer Staman] might be trying to coax her out of the house."
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> After verifying her information, Officer Staman offered the identification card back to defendant. He explained:
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> > 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 back to her, at which point I grabbed her by the arm and attempted to take her into custody . . . [f]or the hit and run that she just admitted to.

He said that when defendant pulled away he grabbed her again and "the momentum" took him inside the home two to three steps where he handcuffed defendant and completed the arrest.

Following the arrest, Officer Staman placed defendant into the back of his patrol car. After she was advised of and waived her . . . rights [under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)], defendant provided further details about the crash, which she described to the officer as possibly a "road rage situation." Officer Staman detected a smell of intoxicants that was "moderate at best" and asked defendant if alcohol played a role in the crash. She opined that it had not, but did acknowledge drinking alcohol earlier in the night after finishing her shift as a bartender and later indicated that she thought her blood alcohol level may have been over the legal limit. When asked if she had any alcohol to drink after the accident, defendant replied, "Absolutely not." Once transported to the county jail, defendant was given two successive breath tests, which indicated a blood alcohol content over the legal limit at .22 and .21, respectively. Consequently, defendant was charged with operating while intoxicated (OWI), third offense, MCL 257.625, and failing to report an accident resulting in damage to fixtures, MCL 257.621.

Defendant filed a pretrial motion to suppress evidence and dismiss the charges. In the motion, she argued that Officer Staman had violated her Fourth Amendment rights by arresting her inside her home without a warrant and that all the evidence gathered following that arrest was subject to the exclusionary rule. The trial court denied the suppression motion, concluding that the arrest was constitutionally valid pursuant to *United States v Santana*, 427 US 38, 96 S Ct 2406, 49 L Ed 2d 300 (1976). Specifically, it found that defendant was "in the middle of a consensual discussion with Officer Staman" when she "voluntarily approached him" and "voluntarily reached out of her door." Therefore, the court concluded that Officer Staman "was legitimately in that area and it did not violate the constitution for him to effectuate an arrest by grabbing her arm when she reached out of her doorway." The fact that the officer stepped inside defendant's home to complete the arrest did not change the result, according to the trial court, because the officer was "clearly in pursuit for the arrest at that point . . . ."

The case proceeded to trial. Defendant's theory of the case was that she became intoxicated only after the accident. However, she acknowledged that she did not tell any of the officers that she drank when she got home. Defendant's statements made to Officer Staman in his patrol car, as well as her blood-alcohol-content test results, were admitted at trial. After a jury trial, defendant was convicted as charged, and she was sentenced to five years' probation and four months in jail for violating MCL 257.625 and to a concurrent term of 60 days in jail for violating MCL 257.621.

> Defendant appealed, continuing to challenge the trial court's denial of her motion to suppress. The Court of Appeals, like the trial court, concluded that the arrest was constitutional under *Santana*, 427 US at 42, and that the trial court had not erred by denying defendant's motion. *People v Hammerlund*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 333827). [Citation omitted.]

The Michigan Supreme Court held that defendant's arrest violated her Fourth Amendment right to be free from unreasonable governmental intrusion into her home, summarizing its holding as follows:

> Officer Staman completed defendant's arrest inside her home, the place where the Constitution most protects her freedom from unreasonable governmental intrusion. Defendant was not subject to public arrest because she remained inside, she maintained her reasonable expectation of privacy, and her act of reaching out to retrieve her identification did not expose her to the public "as if she had been standing completely outside her house," *Santana*, 427 US at 42. In addition, the circumstances were insufficient to justify the hot-pursuit exception to the warrant requirement. Because the arrest was completed across the Fourth Amendment's "firm line at the entrance of the home," it was presumptively unreasonable. *Payton*[*v New York*], 445 US [573,] 586, 590 [; 100 S Ct 1371; 63 L Ed 2d 639 (1980)]. It is the prosecution's burden to overcome this presumption, [*People v*] *Oliver*, 417 Mich [366,] 380[; 338 NW2d 167 (1983)], and when the government's interest is to arrest for a minor offense, the presumption that a warrantless entry into a home was unreasonable is difficult to rebut, *Welsh*[*v Wisconsin*], 466 US [740,] 750[; 104 S Ct 2091; 80 L Ed 2d 732 (1984)]. The prosecution failed to overcome this presumption, and the trial court and the Court of Appeals erred by concluding otherwise. [*Hammerlund*, 504 Mich at 463.]

On the basis of this conclusion, our Supreme Court remanded the case to the trial court with instructions that the court address the separate issue regarding whether to apply the exclusionary rule. *Id.* Relevant to our analysis, the Supreme Court noted that "the facts that were known to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified felony." *Id.* at 453 n 5. The Court further noted that the "failure to report an accident resulting in damage to fixtures is a 90-day misdemeanor[;] . . . therefore, Officer Staman was not statutorily authorized to arrest defendant [under] . . . MCL 764.15(1)(d)." *Id.* at n 4.

Following the Supreme Court's decision and remand to the trial court, defendant moved both to suppress her statements and the breath-test results under the exclusionary rule and for a new trial. The trial court granted the motion, suppressing the evidence and ordering a new trial. The prosecution now appeals that order.

"Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo." *People v Frazier*, 478 Mich 231, 240; 733 NW2d 713 (2007). The Fourth Amendment of the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

With respect to the protection against unreasonable searches and seizures, "[t]he Michigan Constitution, Const 1963, art 1, § 11, provides coextensive protection to that of its federal counterpart." *Hammerlund*, 504 Mich at 451 n 3.

The exclusionary rule, which provides for the suppression of illegally seized evidence, reaches not only primary evidence that is obtained as a direct result of an illegal search or seizure, but also evidence that is discovered later and found to be derivative of the illegality, i.e., fruit of the poisonous tree. *People v Randolph*, 502 Mich 1, 16 n 31; 917 NW2d 249 (2018). In other words, the exclusionary rule forbids the use of direct and indirect evidence acquired through governmental misconduct, such as an illegal search by the police. *Id.*

The Fourth Amendment says nothing about excluding evidence at trial when its commands are violated; rather, the exclusionary rule is a prudential doctrine created by the United States Supreme Court to compel respect for the prohibition against unreasonable searches and seizures. *Davis v United States*, 564 US 229, 236; 131 S Ct 2419; 180 L Ed 2d 285 (2011). The sole purpose of the exclusionary rule is to deter future Fourth Amendment violations. *Id.* at 236-237. Where suppression would fail to yield any appreciable deterrence, exclusion of the evidence is unwarranted. *Id.* at 237. The deterrence benefits of exclusion vary with the culpability of a police officer's conduct. *Id.* at 238. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs to society in excluding evidence of criminal wrongdoing. *Id.* When, however, the police act with an objectively reasonable good-faith belief that their conduct falls within the confines of the law or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion serves no valid purpose. *Id.*

As discussed, our Supreme Court has already decided that defendant's arrest violated the Fourth Amendment. At issue in this appeal is whether evidence obtained following that arrest—namely, defendant's statements made to Officer Staman in his patrol car and the results of her breath tests—must be suppressed under the exclusionary rule. The prosecution argues that suppression is foreclosed by the United States Supreme Court's decision in *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990), which we shall address momentarily.

First, in *Payton*, 445 US at 576, the United States Supreme Court held "that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." (Citations omitted.) The Court emphasized that the right of a person to retreat into his or her home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment. *Id.* at 589-590. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house [and,] [a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590.

In this case, defendant was standing at the entrance of her home in the doorway when she extended her hand beyond the threshold of the doorway solely in order to retrieve her identification card from Officer Staman. The record clearly indicated that defendant had no intention or desire whatsoever to voluntarily step outside of her home, and she even informed Officer Staman of her belief that he was trying to coax her out of the house. Officer Staman grabbed her arm in an attempt to arrest her, but defendant pulled away, forcing Officer Staman to again grab for her arm. The momentum of their movements carried Officer Staman two or three steps inside the home where he handcuffed defendant. We are thus addressing a situation in which defendant never stepped outside or beyond the entrance of her house and was arrested inside of her home. Although, ostensibly, Officer Staman did not intentionally or deliberately enter the home, it is quite clear that he intended to arrest defendant at her home absent a warrant by engaging in a deliberate effort to draw her near the door where he could physically grab her and pull her out of the house. And it was Officer Staman's actions that set into motion the events that led to defendant's arrest inside the home.

Under these circumstances, we conclude that Officer Staman exhibited deliberate disregard for defendant's Fourth Amendment rights. We also find that the deterrent value of exclusion is strong and outweighs the resulting cost to society. Absent application of the exclusionary rule, we would effectively be giving our approval to conduct in which, taken to its logical end, police officers grab and pull suspects through open doors and windows, even though the suspects are squarely inside their homes and regardless whether an officer ends up inside a home as a result of a tussle at the door or window. Were we to allow the admission of the evidence in this case, there would be no deterrence to such behavior. And the opinion in *Harris* does not demand a different result. Indeed, *Harris* fully supports our holding.

In *Harris*, respondent Harris was suspected of having committed a murder, and the police entered his home without first procuring a warrant although the police did have probable cause to believe that Harris had indeed committed the murder. Inside the home, the police read Harris his *Miranda* rights and obtained a confession to the murder. Harris was arrested and taken to the police station, where he signed a written inculpatory statement after having been Mirandized a second time. Subsequently, Harris was again Mirandized before participating in a videotaped incriminating interview even though he had indicated that he wanted the interview to end. The New York trial court, pursuant to *Payton*, suppressed the first statement made in the home, along with the third statement for reasons irrelevant to our analysis, but the court admitted the written statement made at the police station. Harris was convicted of second-degree murder. The New York Court of Appeals reversed, concluding that the second statement was inadmissible because its connection to the arrest was not sufficiently attenuated, thereby constituting indirect fruits of an illegal search or arrest that had to be suppressed. *Harris*, 495 US at 15-17.

The Supreme Court "decline[d] to apply the exclusionary rule . . . because the rule . . . was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime." *Id.* at 17. The Court further indicated that "[b]ecause the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Id.* at 18. The *Harris* Court observed:

> For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible. [*Id.*]

The Court distinguished several cases in which the evidence obtained from a criminal defendant following arrest was suppressed because the police lacked probable cause. *Id.* at 18-19. The Supreme Court explained that those cases stood "for the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *Id.* at 19. Stated otherwise, the challenged evidence was the product of illegal governmental activity. *Id.* And the illegality was the absence of probable cause, with the wrong consisting of the police exercising control of the defendant's person at the point when the challenged evidence came into existence, i.e., wrongful detention. *Id.* The Court noted that Harris's "statement taken at the police station was not the product of being in unlawful custody." *Id.* The Supreme Court reasoned that "the police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into Harris'[s] home." *Id.*

Harris's stationhouse statement was deemed admissible "because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id.* at 20. The United States Supreme Court, concluding its opinion, stated:

> The 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; the purpose of the rule has thereby been vindicated. 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*. As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that anything which deters illegal searches is thereby commanded by the Fourth Amendment. Even though we decline to suppress statements made outside the home following a *Payton* violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home. If we did suppress statements like Harris'[s], moreover, the incremental deterrent value would be minimal. Given that the police have probable cause to arrest a suspect in Harris'[s] position, they need not violate *Payton* in order to interrogate the suspect. It is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate *Payton*. As a result, suppressing a station house statement obtained after a *Payton* violation will have little effect on the officers' actions, one way or another.
>
> 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*. [*Harris*, 495 US at 20-21 (quotation marks and citation omitted).[2]].

As best we can construe *Harris*, we conclude that it stands for the proposition that evidence obtained or gathered inside a house is subject to the exclusionary rule when there has been an unlawful governmental intrusion under the Fourth Amendment. But if the evidence were subsequently obtained or gathered outside the house, exclusion is not appropriate if there existed probable cause to arrest the defendant or if the defendant was not illegally or wrongfully detained, as assessed by information known to the police when arriving at a home. On the other hand, if probable cause is lacking or if a detention is otherwise unlawful or wrongful, the fruits of the search or arrest must be suppressed when they bear a sufficiently close relationship to the underlying illegality.

In this case, Officer Staman did not have probable cause to arrest defendant for OWI or any other felony. We are bound by our Supreme Court's determination that "the facts that were known to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified felony." *Hammerlund*, 504 Mich at 453 n 5. This was a legal determination by the Supreme Court, and one made by a body superior to this Court. "If an appellate court has passed *on a legal question* and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995) (quotation marks, citation, and brackets omitted). Furthermore, "[w]hen a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *People v Kevorkian*, 447 Mich 436, 487 n 65; 527 NW2d 714 (1994) (quotation marks, citations, and emphasis omitted). The prosecution's arguments to the contrary are entirely unavailing.

Additionally, as observed earlier, the *Hammerlund* Court noted that the "failure to report an accident resulting in damage to fixtures is a 90-day misdemeanor[;] . . . therefore, Officer Staman was not statutorily authorized to arrest defendant [under] . . . MCL 764.15(1)(d)." *Hammerlund*, 504 Mich at 453 n 4. MCL 764.15 provides, in relevant part, as follows:

> (1) A peace officer, without a warrant, may arrest a person in any of the following situations:
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> (a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.
>
> * * *

[2] This Court adopted *Harris* in *People v Dowdy*, 211 Mich App 562, 568-70; 536 NW2d 794 (1995).

> (d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days . . . has been committed and reasonable cause to believe the person committed it.

Accordingly, Officer Staman did not have a legal basis to arrest defendant for a 90-day misdemeanor committed outside his presence. Thus, detaining defendant was wrongful and unlawful. We recognize that there was probable cause that defendant committed the misdemeanor and that the unlawfulness of the arrest relative to the misdemeanor was statutory and not constitutional. Nevertheless, the bottom line is that the arrest and detention were against the law. Defendant should not have been taken into custody.

In sum, probable cause was lacking, and the detention was otherwise unlawful or wrongful. Because Officer Staman lacked probable cause to arrest defendant for a felony and lacked the legal authority to arrest defendant for a misdemeanor, the case is easily distinguishable from *Harris*, falling into the class of cases that the *Harris* Court found distinguishable and that had properly applied the exclusionary rule. The statements defendant made to Officer Staman and the two breath tests bore a sufficiently close relationship to the underlying illegality, in that the evidence was the direct product of defendant being in unlawful custody. Defendant was illegally arrested and almost immediately made statements to Officer Staman in the back of his patrol car. And soon thereafter she submitted to the two breath tests at the county jail. We hold that the trial court did not err when it applied the exclusionary rule.

The prosecution also argues that the trial court abused its discretion when it granted defendant a new trial. Again, we disagree. This Court reviews for an abuse of discretion a trial court's decision on a motion for a new trial. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Bergman*, 312 Mich App 471, 483; 879 NW2d 278 (2015) (quotation marks and citation omitted).

MCR 6.431 governs motions for new trial in criminal cases and subsection (B) provides as follows:

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

In the trial court's estimation, the breath test results were critical to the issue of intoxication, and the statements defendant made denying drinking after the accident were vital to the issue of when she became intoxicated. The prosecution argues that the trial court failed to identify the particular ground that would have supported appellate reversal and did not state whether it believed that the verdict constituted a miscarriage of justice. It is unclear how the suppression of "critical" evidence would not, **on** appeal, have warranted reversal. And a verdict supported by evidence deemed critical that should have been suppressed would certainly render the verdict a miscarriage of justice. Even in its argument that there was no miscarriage of justice, the prosecution explicitly relies on the suppressed evidence. If anything, the prosecution's argument appears to be an

admission that the trial court's grant of a new trial was proper. Under the circumstances of this case wherein there was a Fourth Amendment violation and critical evidence was presented that should have been suppressed under the exclusionary rule, a new trial is wholly warranted.

We affirm.

/s/ Jane E. Markey
/s/ Deborah A. Servitto

STATE OF MICHIGAN

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V

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Before: BOONSTRA, P.J., and MARKEY and SERVITTO, JJ.

BOONSTRA, P.J. (*dissenting*).

I respectfully dissent. I do so not so much out of disagreement with the majority's legal analysis, but rather because, with due respect to our Supreme Court, it in my judgment overstepped in this case, and the majority—as well as the trial court—not surprisingly felt constrained as a result. Should this matter make its way back up to our Supreme Court, I would encourage the Court to rectify matters by vacating footnote 5 of its opinion in this case and by again remanding the case to the trial court for its determination, in the first instance, of issues that neither it nor this Court have ever decided, but that appear to have been prematurely decided by the Supreme Court, albeit in passing in footnote 5, without ever having been previously raised in or decided by any court.

A brief procedural recap. The trial court initially denied defendant's motion to suppress evidence and to dismiss the charges against her. The case proceeded to trial. A jury rendered a guilty verdict on charges of operating under the influence of intoxicants (third offense) (OUI), MCL 257.625, and failure to report an accident resulting in damage to fixtures, MCL 257.621. This Court affirmed.[1] Our Supreme Court scheduled oral argument on defendant's application for leave to appeal. It further directed the parties to file supplemental briefs addressing "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a

[1] *People v Hammerlund*, unpublished opinion of the Court of Appeals, issued October17, 2017 (Docket No. 333827).

person located in his or her home to enter a public place to perform a warrantless arrest." And it invited briefs amicus curiae.[2]

Defendant framed the issue before the Supreme Court in its application for leave to appeal as follows:

> BECAUSE OFFICER STAMAN UNLAWFULLY ENTERED DEFENDANT-APPELLANT JENNIFER HAMMERLUND'S HOME AND ARRESTED HER WITHOUT A WARRANT WHEN HE GRABBED HER ARM WHILE SHE ATTEMPTED TO RETRIEVE HER IDENTIFICATION, DID THE CIRCUIT COURT ERR BY DENYING MS. HAMMERLUND'S MOTION TO SUPPRESS?

The prosecution responded to the application by incorporating the arguments it presented in its brief on appeal to this Court. At the Supreme Court's direction, the parties filed supplemental briefs (including a reply brief filed by defendant) addressing the issue raised by the Supreme Court in its May 30 2018 order. At the Supreme Court's invitation, the Prosecuting Attorneys Association of Michigan field a brief amicus curiae. The Supreme Court held oral argument on the application on April 24, 2019.

On July 23, 2019, the Supreme Court issued its opinion and order reversing the judgment of the Court of Appeals and remanding to the trial court "for further proceedings not inconsistent with this opinion." *People v Hammerlund*, 504 Mich 442, 446; 939 NW2d 129 (2019).[3] It noted that it was not deciding the issue that it has asked the parties to address by way of supplemental briefs, but that its direction to the parties to address that issue "does not mean that we are imprudently or incorrectly deciding the very legal issues decided by the trial court and the Court of Appeals and briefed by the parties on appeal to this Court." *Id*. at 450 n 2.

That leads me to consider what legal issues were in fact decided by the trial court and the Court of Appeals and briefed by the parties. As this Court previously described the trial court's initial ruling, "[t]he trial court issued a written opinion denying defendant's motion [to suppress and dismiss], ruling that 'there was a constitutionally valid arrest and defendant's attempt to flee from that arrest did not render [the arrest] unconstitutional.' "[4] More specifically, the trial court assumed that the arrest on the misdemeanor failure to report charge *did* violate Michigan *statutory* law, but found that the statute did not provide a basis for applying the exclusionary rule as a matter of *constitutional* law.

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[2] *People v Hammerlund*, unpublished order of the Supreme Court, entered May 30, 2018 (Docket No. 156901).

[3] Justice ZAHRA, joined by Justice MARKMAN, dissented. *Hammerlund*, 504 Mich at 463 (ZAHRA, J. dissenting).

[4] *People v Hammerlund*, unpublished opinion of the Court of Appeals, issued October17, 2017 (Docket No. 333827) at *2.

This Court affirmed. It agreed with the trial court that MCL 764.15[5] does not create a remedy of exclusion. It further agreed with the trial court that although the misdemeanor arrest was statutorily infirm, it was "constitutionally valid" because "[a] warrantless arrest does not offend the constitution when 'probable cause to arrest existed at the moment the arrest was made by the officer,' " and because "defendant does not dispute there was probable cause for the arrest."[6] This Court further clarified that its probable cause assessment—like the trial court's—related solely to the misdemeanor charge of failure to report an accident resulting in damage to fixtures, MCL 257.621.[7] This Court—like the trial court—offered no analysis of whether there was probable cause for an arrest relating to the OUI charge, MCL 257.625.

Fast-forward now to defendant's application for leave to appeal to our Supreme Court. As noted, the issue raised by defendant in her application to the Supreme Court focused on the propriety of the police officer's conduct in entering her home after grabbing her arm as she reached toward him (while he was standing outside her home) and then arresting her in her home without a warrant. Defendant did not raise the issue of whether there was probable cause for an arrest relating to the OUI charge or how a determination of that issue would affect the analysis of the constitutionality of the arrest for purposes of applying (or not) the exclusionary rule with respect to evidence obtained after the arrest. And, from my review of the record, the only mention of the issue in all of the briefing before the Supreme Court was made by the prosecution, as an aside in a footnote, after noting that defendant did not contest the fact that there was probable cause to arrest defendant on the misdemeanor failure to report charge:

> Furthermore, Officer Staman testified that he observed Defendant who appeared to be intoxicated (Tr I, 108-109). Given the short passage of time between when Officer Staman responded to the scene of the accident and his interaction with Defendant, and Defendant's admission that she had been operating the vehicle, there was also sufficient probable cause to arrest Defendant for operating a motor

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[5] MCL 764.15(1)(d) provides that a peace officer may make a warrantless arrest if the officer "has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days . . . has been committed and reasonable cause to believe the person committed it." *Id*. The offense of failure to report an accident resulting in damage to fixtures, MCL 257.621, of which defendant was convicted, is a misdemeanor punishable by "imprisonment for not more than 90 days[.]" MCL 257.901(2).

[6] *Hammerlund,* unpublished opinion of the Court of Appeals, issued October17, 2017 (Docket No. 333827) at *2.

[7] *Hammerlund,* unpublished opinion of the Court of Appeals, issued October17, 2017 (Docket No. 333827) at *2, n 3 (While not in dispute, there was sufficient evidence in the record to demonstrate probable cause for an arrest. Officer Staman discovered an abandoned car registered to defendant that showed signs it had been the cause of damage to public road fixtures. Subsequently, defendant made pre-arrest statements that she was driving and that she had left the scene of the accident without reporting the damage.").

> vehicle while intoxicated, which at best is a 93-day misdemeanor (MCL 257.625). [Prosecution's brief at 8, n 48].

Further, from my review of the oral arguments before the Supreme Court on defendant's application for leave to appeal, not a single word was uttered on the subject by counsel for either party or by any of the Justices.

Yet, the Supreme Court, in its July 23, 2019 opinion, while devoting the lion's share of its analysis to the issue raised by defendant in its application (i.e., the propriety of the officer's entry into defendant's home under the particular factual circumstances presented), crossed beyond the issues raised by defendant and the issues actually decided in the trial court and in this Court to address and seemingly decide—in the first instance—whether there was probable cause for arrest with respect to the OUI charge.[8] Indeed, both the Supreme Court majority and the Supreme Court dissent addressed that issue (albeit while reaching different conclusions).[9] The dissent would have held that there was probable cause for an OUI arrest (and that there therefore was no statutory violation in that regard[10]):

> Regardless of the propriety of an arrest for defendant's failure to report an accident causing damage to fixtures, Officer Staman *also* had probable cause to initiate an arrest for operating a vehicle under the influence of intoxicating liquor, third offense, in violation of MCL 257.625(9)(c). The felony information and affidavit of probable cause in the record state that defendant had been convicted of operating while intoxicated twice in the past—once in 1998 and once in 2006. Officer Staman testified at the evidentiary hearing that when he was dispatched to the scene of the accident, he found defendant's vehicle abandoned, facing the wrong direction on an exit ramp from US-131, and showing signs that it had struck both of the protective barriers on the exit ramp. Defendant, herself, did not report the accident to the police. After Officer Staman arrived at defendant's home, he observed

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[8] Generally, an appellate court will not decide an issue that the trial court was not presented with and did not decide. *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989). Moreover, when our Supreme Court grants a party's application for leave to appeal, the issues to be considered by the Court are generally limited to all or some of the issues raised in the application. See *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994); see also MCR 7.305(H)(4)(a).

[9] The Supreme Court majority and the Supreme Court dissent agreed that there was probable cause for arrest relating to the misdemeanor failure to report charge (and that defendant did not contend otherwise), but differed about whether the statutory violation (in making a warrantless arrest for a 90-day misdemeanor not committed in the officer's presence) was appropriately remedied as a matter of constitutional law by the application of the exclusionary rule. *Hammerlund*, 504 Mich at 453-462 (opinion of the Court by CAVANAGH, J.) and *id*. at 473-483 (ZAHRA, J., dissenting).

[10] MCL 764.15(b) and (c) permit a police offer to arrest a person without a warrant if a felony has been committed and the officer has actual knowledge, or the probable cause to believe, that the person committed it. MCL 764.15(h) specifically authorizes a police offer to arrest a person if the officer has probable cause to suspect that the person had been operated a motor vehicle while intoxicated when that vehicle was involved in an accident.

> defendant leaning against a wall as if to maintain balance. He also noticed that her speech was slurred prior to transporting her to the police station. A violation of MCL 257.625(9)(c) would constitute a felony. Thus, Officer Staman was statutorily authorized under MCL 764.15(1)(b) and (h) to arrest defendant, notwithstanding his mistaken belief that failure to report an accident to fixtures was a 93-day misdemeanor. [*Hammerlund*, 504 Mich at 476-479 (Zahra, J. dissenting) (footnotes omitted)].

The Supreme Court majority also addressed the issue, albeit only in passing in footnote 5, a footnote that initially characterized the lower court record as vague and inadequate with respect to that issue, but which then seemingly reached a conclusion contrary to that of the dissent notwithstanding the majority's own characterizations of the deficiencies of the lower court record:

> The dissent concludes that Officer Staman also possessed probable cause to arrest defendant for OWI-3d because he observed that defendant was "leaning against a wall as if to maintain balance," "that her speech was slurred prior to transporting her to the police station," and that she had previous OWI convictions. There are multiple problems with this conclusion. First, that defendant was slurring her speech and unstable on her feet *could possibly provide probable cause* to believe that she was under the influence when the crash occurred; however, considering the fact that defendant was in an accident in which her head collided with a steering wheel and the intervening time between the accident and the police contact, *without more concrete facts* it is a stretch to conclude that any unsteadiness or warped speech stemmed from intoxication that was present at the time she operated the vehicle. Second, *the record is vague* about when exactly Officer Staman noticed defendant slurring her speech, and it is unclear whether it was while she remained inside her home or only after she was arrested. Third, relatedly, *there is nothing in the record* to indicate that Officer Staman was aware of defendant's prior OWI convictions before he made the arrest. The dissent speculates that Officer Staman "may well have been aware of" the prior convictions, but cites nothing in the record that supports such a statement other than the fact that OWI convictions are reported to the secretary of state under MCL 257.625(21)(a).
>
> Further, what Officer Staman observed or discovered *after* the arrest is not relevant to whether the officer had probable cause to arrest in the first place. Probable cause to arrest exists where the facts and circumstances *known* to the officer would warrant a person of reasonable caution to believe that the offense was committed by the suspect. *Champion*, 452 Mich. at 115, 549 N.W.2d 849. The dissent's reliance on *Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004), is misplaced. *Devenpeck*, as the dissent acknowledges, states that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the *known* facts provide probable cause." *Id.* at 153, 125 S. Ct. 588. *As we have discussed*, the facts that were *known* to Officer Staman at the time of the arrest *were not sufficient to establish probable cause for OWI* or any other identified felony. The dissent's position would allow the police to retroactively manufacture probable cause where none existed at the time the arrest was made. *Most important, however, is that even if we were to conclude that the officer*

> *possessed probable cause to arrest defendant for OWI, it would not render this a constitutional arrest because there was no legitimate hot pursuit*. [*Hammerlund*, 504 Mich at 453 n 5 (first through fourth emphasis added; fifth, sixth, and seventh emphasis in original; eighth and ninth emphasis added).)].

In my judgment, the Supreme Court jumped the gun in deciding this issue without the benefit of a fully-developed lower court record and without the benefit of a ruling by the trial court (or by this Court) on that issue. Neither of the lower courts ever opined on whether there was probable cause for an OUI arrest, or whether the exigent circumstances doctrine would apply with respect to the OUI charge, such that the officer's entry into defendant's home to effectuate an OUI arrest would be constitutionally valid. Instead, by bypassing the lower courts and the development of a factual record that would have enabled the lower courts to have opined on those issues, the Supreme Court jumped to a conclusion that was devoid of the requisite factual or legal analysis.

I note, for example, that the Supreme Court analyzed the "exigent circumstances" or "hot pursuit" issue solely in the context of the statutorily-defective arrest of defendant on the misdemeanor failure to report charge (not the OUI charge). Specifically, the Supreme Court said:

> Here, *defendant was suspected of a 90-day misdemeanor and there was no evidence of that crime that she could destroy*. Indeed, all the elements of the crime were already known to the police. There is no suggestion that any emergency existed that would have entitled the police to enter defendant's home throughout the conversation up to the point when defendant reached out to retrieve her identification. We fail to see how defendant's interaction at the doorway created any kind of emergency, let alone one that would outweigh her expectation of privacy in her home. [*Hammerlund*, 504 Mich at 461 (emphasis added)].

Had the Supreme Court analyzed the issue in the context of the OUI charge, then it would have had to consider, for example, whether the dissipation over time of defendant's blood alcohol content, among other factors, would constitute exigent circumstances justifying the officer's entry into defendant's home to effectuate the arrest on the OUI charge. As the Supreme Court dissent stated:

> The majority suggests that Officer Staman could not rely on the "hot pursuit" exception to the warrant requirement partly because there was no evidence that defendant could destroy; although it is worth noting that evidence in the form of defendant's measurable blood alcohol level would dissipate over time. Regardless, preventing the destruction of evidence is only *one* consideration in an analysis of exigent circumstances. See *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). In *Olson*, the United States Supreme Court stated:
>
> > The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, *or* imminent destruction of evidence . . . , *or* the need to prevent a suspect's escape, *or* the risk of danger to the police or to other persons inside or outside the dwelling." [*Id*.,

> quoting *State v. Olson*, 436 N.W.2d 92, 97 (Minn., 1989) (emphasis added; citation omitted).]
>
> Thus, while the arrest may not have been valid solely on the basis of an attempt to preserve evidence, entry into defendant's home was necessary to prevent the circumvention of a constitutionally proper arrest, which was initiated from a position outside the protected area inside the home. [*Hammerlund*, 504 Mich at 481 n 59 (ZAHRA, J., dissenting)].

So, why does all of this matter? Because in reaching a conclusion on ultimate issues that had never been decided by any lower court, and by reaching that conclusion without the development of an adequate factual record and while skipping important parts of the legal analysis, the Supreme Court put the cart before the horse, reached issues not raised by the parties or developed in the briefing, constrained the lower trial court from performing its proper role to develop the factual record and to decide issues in the first instance, and constrained this Court from considering and deciding the issue on appeal.[11] Instead, the Supreme Court decided the issue in the first instance, with the lower courts then being bound to follow the conclusion of the Supreme Court, notwithstanding the fact that in my judgment the Supreme Court should not have reached or decided the issue in the first place at that stage of the proceedings.[12]

All of this becomes painfully evident when one reviews the record of what transpired following the Supreme Court's remand of this matter to the trial court. By opinion and order dated April 14, 2020 (O&O 4/14/20), the trial court, on remand from the Supreme Court, granted defendant's motion to suppress and for a new trial. It set the stage for its analysis by highlighting the Supreme Court's above-quoted footnote 5, noting:

> Additionally, *although this Court never directly addressed the issue, part of the Michigan Supreme Court majority's analysis was based on the conclusion that the initial arrest could only have been for the 90-day misdemeanor failure to report offense* because "the facts that were known to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified

[11] Yet, the Supreme Court routinely declines to decide issues in the first instance, and instead remands matters to the lower courts in deference to their proper role in developing a factual record and in deciding issues in the first instance for review by the Supreme Court at an appropriate later time. See e.g., *People v Hickey*, 504 Mich 975; 933 NW2d 311 (2019); *People v Sheena*, 497 Mich 1021; 862 NW2d 648 (2015).

[12] In its July 23, 2019 opinion, the Supreme Court noted that "[w]hether suppression of evidence under the exclusionary rule is appropriate is an issue separate from whether defendant's Fourth Amendment rights where violated by police conduct." [*Hammerlund*, 504 Mich at 463 (emphasis added)]. It therefore remanded this case to the trial court to consider that issue. In my judgment, it should have included within the scope of that remand the issues that I have discussed in this opinion, rather than deciding those issues in the first instance and then constraining the trial court (and this Court) in the further proceedings on remand.

> felony." *Id*. at 453 n 5. [O&O 4/14/20 at 3 (emphasis added) (quoting *Hammerlund*, 504 Mich at 453 n 5)].

The trial court further reiterated that "*Again, based on the holding of the Michigan Supreme Court*, the illegality in this case was entry into defendant's home to arrest defendant *for the 90-day misdemeanor offense* for failure to report the accident." *Id*. at 7 (emphasis added). In a lengthy footnote, the trial court explained:

> *As mentioned above, this Court had never decided the issue of whether there was probable cause to believe defendant committed any crime other than the 90-day misdemeanor* for failing to report an accident causing damage to fixtures. Rather, it was decided that, even assuming the arrest was only justified by the failure to report, it did not make the actions unconstitutional. *Still, the Michigan Supreme Court majority did explicitly rule that failing to report was the only legal justification for the arrest. See Hammerlund, 504 Mich at 453 n 5.* The minor nature of the crime was referenced multiple times in the opinion as part of the analysis and not as mere dicta, so *this Court is bound by this conclusion*. See, e.g., *id*. at 461 (discussing the minor nature of the failing to-report crime in relation to potential exigent circumstances). *However, respectfully, this Court notes that if it had been directly faced with the issue, the combination of facts known by Officer Staman at the time of the arrest (e.g., the accident, the abandoned vehicle facing the wrong way on a highway offramp, the late hour, defendant's decision to just get a ride home and abandon her car for the night rather than report the accident, defendant's slurred speech, and defendant's difficulty balancing) would have likely led this Court to conclude there was at least also probable cause for the crime of operating while intoxicated in violation of MCL 257.625.* See *Devenpeck v Alford*, 543 US 146 (2004) (holding probable cause analysis related to an arrest is based on an objective analysis of the facts known to the officer at the time of an arrest, not the subjective intent of the officer). Even assuming Officer Staman did not know at the time about defendant's other convictions that made this violation a felony, it is still at least a 93-day misdemeanor, it involves different evidentiary and investigatory issues, and it implicates much more serious public safety concerns than merely failing to report an accident causing damage to fixtures. *Regardless, given the Michigan Supreme Court majority's clear holding that Officer Staman only had probable cause for the failure to report offense, this Court need not address whether or how probable cause related to operating while intoxicated might affect the application of the exclusionary rule.* [*Id*. at 7, n 3 (emphasis added)].

In concluding its opinion on remand, the trial court emphasized yet again the constraints that it felt as a result of the Supreme Court deciding an issue that the trial court itself had never addressed:

> *It should be remembered that the ruling today is based on the Michigan Supreme Court majority's conclusion that this case involves "a person suspected of a minor misdemeanor* [being] subjected to a warrantless arrest inside her home in the middle of the night." *Hammerlund*, 504 Mich at 459-460. *The arrest was held to have been unreasonable and solely based on the offense for failure to report the accident.*

> *Id*. *It was also held that there was no exigency to justify the timing and location of the arrest, at least in part because all the elements of that crime were already known to police at the time of the arrest and there was no evidence of that crime that could be destroyed*. *Id*. at 461-462. *In light of those holdings*, this Court finds application of the exclusionary rule to be required to protect the constitutional interests at stake. [Id. at 9-10 (emphasis added; footnote omitted)].

For good measure, the trial court added the following additional footnote:

> *Again, to be clear, this Court expresses no opinion as to whether or how the existence of probable cause at the time of the arrest related to the offense of operating while intoxicated would impact this result. (See note 3 above.)* [*Id*. at 10, n 6 (emphasis added)].

One need not read very far between the lines to appreciate the extent to which the trial court felt that the Supreme Court had usurped the trial court's proper role as the fact-finder and as the court whose job it is to apply the facts in deciding legal issues in the first instance. The trial court further clearly expressed that it, as the fact-finder and initial decision-maker, likely would have decided the issue differently than the Supreme Court did, but that it was constrained from even reaching the issue because the Supreme Court had stepped in to decide it first. By rushing to judgment on that issue, the Supreme Court effectively dictated the result in the trial court and altered the posture of the case on further appeal. With respect to our Supreme Court, that is not how our judicial system is supposed to work.

So now, here we are again in the Court of Appeals. And here we are passing upon an outcome in the trial court that appears to be quite different from the outcome that the trial court would have reached had it properly been allowed to decide the issue in the first instance. Instead, we are reviewing a decision of the trial court that the trial court felt was dictated by the Supreme Court (even though it was contrary to what the trial court likely would have otherwise ruled). And this Court, unsurprisingly, feels equally constrained by the Supreme Court's ruling. As the majority states, "We are bound by our Supreme Court's determination that 'the facts that were known to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified felony.' *Hammerlund*, 504 Mich at 453 n 5."

If this is indeed how our system of justice is going to operate, then one might fairly wonder why we don't simply skip the fact-finding and initial decision-making that by design take place in the trial courts of this state, and the deliberations that subsequently occur in this Court on an initial appeal, and instead simply "Advance to Go" in the Supreme Court.

For these reasons, I respectfully dissent.

/s/ Mark T. Boonstra