APPENDIX A

Court of Appeals of New York

The PEOPLE of the State of New York,
Respondent,
v.
Sean GARVIN,
Appellant.

Oct. 24, 2017.

STEIN, J.

In this case, we are asked to overrule our prior decisions holding that a warrantless arrest of a suspect in the threshold of a residence is permissible under the Fourth Amendment, provided that the suspect has voluntarily answered the door and the police have not crossed the threshold. We decline to do so, and now reaffirm our long-standing rule.

I.

Defendant was convicted of four counts of third-degree robbery and one count of attempted third-degree robbery in connection with a string of bank robberies. He was arrested without a warrant inside the doorway of his home on the same day that police obtained a match for his fingerprint on a demand note used during one of the robberies. The arresting officer testified that he was instructed by a detective to go to defendant's residence to arrest him. Upon arriving there, three officers in plain clothes walked to the top of an interior staircase in the two-family house, while two detectives went to the rear of the building. One of the officers knocked on the apartment door, which was opened by another person in

the residence. The officer did not know whether defendant lived on the first or the second floor and, because she did not recognize defendant when he appeared in the doorway, the officer asked if his girlfriend lived there.[1] After defendant stated that his girlfriend was not there and closed the door, the officers walked down the stairs, and the arresting officer announced that he had recognized defendant from a photograph. The officers then returned to the apartment door.

The arresting officer knocked on the door, and defendant opened it. While defendant was standing in the doorway of his apartment, the officer told him that he was under arrest and, when defendant turned around and put his hands behind his back, the officer handcuffed him. The officer did not enter defendant's apartment—he placed the handcuffs on defendant as defendant stood in the doorway. Defendant was transported to the precinct, where he waived his *Miranda* rights, agreed to speak with the detectives, and initially denied involvement in the robberies. After the investigating detective informed defendant that both his and his girlfriend's fingerprints were found on demand notes recovered from the locations of the robberies, defendant confessed.

At his subsequent suppression hearing, defendant argued that the police violated *Payton v. New York*, 445 U.S. 573 (1980) by entering his home without consent or a warrant; he maintained that there was an absence of exigent circumstances once police had surrounded the home so that he could not leave.

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[1] Police had also obtained a fingerprint from defendant's girlfriend on a demand note used in one of the robberies.

He further asserted that the police did not wait for him to exit the premises before he was arrested, and that the police had ample time to obtain an arrest warrant, but did not do so because they wanted to question him without counsel.

Supreme Court denied the motion to suppress. Following a bench trial, defendant was convicted as stated above. The People requested that defendant be adjudicated a persistent felony offender based upon prior first-and second-degree robbery convictions. Following a hearing, the court adjudicated defendant a persistent felony offender and sentenced him to an aggregate term of 15 years to life in prison.

The Appellate Division affirmed, with one Justice dissenting (130 A.D.3d 644 [2d Dept.2015]). That Court concluded that defendant's warrantless arrest did not violate *Payton* (*see id.* at 645). The Appellate Division made factual findings that, after entering the front door of the house, passing through a vestibule and climbing the stairs, "[o]ne of the officers knocked on the closed apartment door, the defendant opened it, and the officer effectuated the arrest in the doorway. The arresting officer did not go inside the defendant's apartment, or reach in to pull the defendant out" (*id.* [citations omitted]). Most critically here, the Appellate Division found that "defendant was arrested at the threshold of his apartment, after he voluntarily emerged" (*id.* [internal quotation marks and citation omitted]).[2] Thus, the Appellate

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[2] In his dissent, Judge Wilson acknowledges that we are bound by the Appellate Division's findings of facts, but takes issue with our "interpretation of those findings" (Wilson, J., dissenting op. at 212, 66 N.Y.S.3d at 188, 88 N.E.3d at 346). Judge Wilson's lengthy "interpretation" of the facts, however, conflicts with the findings of the Appellate Division.

Division concluded that defendant had voluntarily "surrendered the enhanced constitutional protection of the home" (*id.* [internal quotation marks and citation omitted]). The Appellate Division also upheld the persistent felony offender adjudication. The dissenting Justice diverged from the majority only with respect to the denial of defendant's motion to suppress, concluding that the People failed to establish that the initial police entry into the building where defendant lived was lawful because there was no evidence that the police knew the building was a two-family house, rather than a one-family house, prior to entering it (*see id.* at 646).

The dissenting Justice thereafter granted defendant leave to appeal.

II.

Defendant's primary argument is that his post-arrest statements and the physical evidence recovered from him at the precinct should have been suppressed because his warrantless arrest in the doorway of his apartment was unconstitutional under *Payton.* Specifically, he asserts that the arrest violated his constitutional right to be free from unreasonable searches and seizures because he opened his door only in response to knocking by police officers who were there for the sole purpose of arresting him without a warrant. Defendant's arguments are refuted by our precedent.

Although "[i]t is axiomatic that *warrantless entries into a home* to make an arrest are presumptively unreasonable" (*People v. McBride,* 14 N.Y.3d 440, 445 [2010] [internal quotation marks and citation omitted and emphasis added]), we "have long recognized that the Fourth Amendment is not violated every time police enter a private premises without a

warrant" (*People v. Molnar,* 98 N.Y.2d 328, 331 [2002]). There are "a number of 'carefully delineated' exceptions to the Fourth Amendment's Warrant Clause" in that context (*Molnar,* 98 N.Y.2d at 331, quoting *Welsh v. Wisconsin,* 466 U.S. 740, 749–750 [1984]). One of those exceptions is consent to entry (*see id.* at 331 n. 1; *People v. Levan,* 62 N.Y.2d 139, 142 [1984]). Similarly, we have repeatedly and consistently recognized that, even where "the police could have obtained an arrest warrant for [a] defendant from a neutral magistrate before it dispatched . . . members from its force to [the] defendant's home . . ., there [i]s nothing illegal about the police going to [a] defendant's apartment and requesting that he [or she] voluntarily come out" (*McBride,* 14 N.Y.3d at 447; *see People v. Spencer,* 29 N.Y.3d 302, 312 [2017]; *People v. Reynoso,* 2 N.Y.3d 820, 821 [2004]; *People v. Minley,* 68 N.Y.2d 952, 953–954 [1986]).

The Supreme Court of the United States held in *Payton* itself that "the Fourth Amendment . . . prohibits the police from making a *warrantless and nonconsensual entry into a suspect's home* in order to make a routine felony arrest" (445 U.S. at 576 [emphasis added]) despite "ample time to obtain a warrant" (*id.* at 583). The Court explained that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant" (*id.* at 590).

As the Supreme Court has subsequently explained, *Payton* does not prohibit the police from knocking on a suspect's door because, "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who

knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak" (*Kentucky v. King,* 563 U.S. 452, 469–470 [2011]).

However, police may not compel a suspect to open a door by threatening to violate the Fourth Amendment by, "for example, . . . announcing that they would break down the door if the occupants did not open the door voluntarily" (*id.* at 471).[3] Nor does *Payton* prohibit a warrantless arrest in the doorway; indeed, "the warrant requirement makes sense only in terms of the *entry,* rather than the arrest [because] the arrest itself is no more threatening or humiliating than a street arrest" (3 Wayne R. LaFave, Search and Seizure § 6.1[e] [5th ed. 2012] [internal quotation marks omitted]).

Consistent with that understanding of *Payton* as prohibiting only "the police . . . crossing the threshold of a suspect's home to effect a warrantless arrest in the absence of exigent circumstances" (*Minley,* 68 N.Y.2d at 953), we have upheld warrantless arrests—both planned and unplanned—of defendants who emerged from their homes after police knocked on an open door and requested that the defendant come out (*see Spencer,* 29 N.Y.3d at 312, *revg. on oth-*

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[3] In *Florida v. Jardines,* the Supreme Court further recognized that there is an "implicit license [that] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do'" (569 U.S. 1, 8 [2013], quoting *Kentucky v. King,* 563 U.S. 452, 469 [2011]; *see People v. Kozlowski,* 69 N.Y.2d 761, 762–763 [1987]).

er grounds 135 A.D.3d 608 [1st Dept. 2016]), used a noncoercive ruse to lure the defendant outside (*see People v. Roe,* 73 N.Y.2d 1004, 1005 [1989], *affg.* 136 A.D.2d 140 [3d Dept. 1988]), or directed the defendant to come out after seeing him peek through a window (*see Minley,* 68 N.Y.2d at 953). We also upheld a planned, warrantless arrest where the defendant either voluntarily exited his house, or stood behind his mother in the front doorway, and stuck his head out of the door in response to a police request that he come outside (*see Reynoso,* 2 N.Y.3d at 821, *affg.* 309 A.D.2d 769 [2d Dept. 2003]). In other words, for purposes of determining whether there was a *Payton* violation, we have deemed it to be irrelevant whether the defendant was actually standing outside his home or was standing "in the doorway," and we have upheld a threshold arrest, like that at issue here.[4] Critically, the police never entered the defendants' homes in these cases and, thus, the intrusion prohibited by *Payton* did not occur.

III.

Despite our jurisprudence on this issue, defendant and two of our dissenting colleagues, Judges Wilson and Rivera, urge us to adopt a new rule that warrantless "threshold/doorway arrests" violate *Pay-*

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[4] Defendant argues that *Reynoso* is distinguishable because that case did not address instances in which police go to a suspect's residence with the subjective intent to make a warrantless arrest and lure the suspect to the doorstep for that purpose. However, the facts in *Reynoso* demonstrate that the police did just that—they used a ruse to get the defendant to the door, where the officers requested that he come outside and he either voluntarily exited the house or stood in the doorway (*see* 309 A.D.2d 769, 771 [2d Dept. 2003, McGinity, J., dissenting]). Thus, we reject defendant's argument that there is any meaningful distinction between *Reynoso* and this case.

ton when the only reason the arrestee is in the doorway is that he or she was summoned there by police. Defendant purports to find support for this rule in *United States v. Allen*, 813 F.3d 76 (2d Cir. 2016), which he urges us to adopt and characterizes as holding that the police may not go to a suspect's home and lure him or her to the doorstep for the sole purpose of making a warrantless arrest.[5] However, we are not bound by *Allen*[6] and, in any event, it is distinguishable. In that case, police went to the defendant's apartment with the plan of arresting him (*see id.* at 78). After they knocked on the defendant's door, he stepped out onto his second floor porch and police requested that he come down to speak with them (*see id.* at 79). The defendant complied and, af-

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[5] Two of the dissenters would go further and hold that "if the police plan to arrest someone who is at home, absent exigent circumstances, until they have an arrest warrant, they may not go to the person's door to arrest him or cause him to leave his home to arrest him outside of it" (Wilson, J., dissenting op. at 214), and that an "arrest is constitutionally invalid" when "the sole reason the police went to defendant's home was to effect his arrest . . . without a warrant" (Rivera, J., dissenting op. at 205). As explained below, a rule turning on subjective police intent is "fundamentally inconsistent with . . . Fourth Amendment jurisprudence" (*Kentucky v. King,* 563 U.S. 452, 464 [2011])

[6] To the extent Judge Wilson suggests that we should adopt *Allen* to "ensur[e] our protections are no less than those guaranteed by the local federal courts" (Wilson, J., dissenting op. at 213 n. 4, 66 N.Y.S.3d at 189 n. 4, 88 N.E.3d at 347 n. 4), we emphasize that, while "the interpretation of a Federal constitutional question by the lower Federal courts may serve as useful and persuasive authority for our Court[,] [it is] not binding [on] us" (*People v. Kin Kan,* 78 N.Y.2d 54, 60 [1991]; *see People v. Pignataro,* 22 N.Y.3d 381, 386 n. 3 [2013]). In other words, we do not abandon our jurisprudence in response to every new lower federal court decision.

ter speaking to the officers for several minutes, they told him that he would have to come down to the police station to be processed for an alleged assault—i.e., that he was under arrest (*see id.*). The Second Circuit noted that "neither party dispute[d] that [the defendant] was arrested while he was still inside his home" or that the defendant "was arrested while standing inside the threshold of his home" (*see id.* at 80 n. 6). Thus, "th[e] case concern[ed] an 'across the threshold' arrest" (*id.*)—i.e., while the police remained outside on the sidewalk (*see id.* at 79), the defendant "was arrested specifically 'in' his home rather than 'on' the threshold or in a 'public place' " (*id.* at 89 [Lohier, J., concurring]). After the defendant was arrested, police accompanied him upstairs in his home so that he could retrieve a pair of shoes; once inside, the officers saw, among other things, drug paraphernalia and obtained a search warrant (*see id.* at 79).

The Second Circuit held that, "where law enforcement officers have summoned a suspect to the door of his home, *and he remains inside the home's confines,* they may not effect a warrantless 'across the threshold' arrest in the absence of exigent circumstances" (*id.* at 82 [emphasis added]). That is, "[a] police officer not armed with a warrant may approach a home and knock," but "may [not] go to a person's home . . . and then arrest him *while he remains in his home*" (*id.* at 84 [emphasis added]). Although the Second Circuit recognized that a federal " circuit split" exists on the issue, with some courts holding that police do not violate *Payton* unless they enter the home, that court reasoned that *Payton* turns on the arrested person's location, not the loca-

tion or conduct of the officers (*see id.* at 78, 81–82, 85).[7]

Here, the issues of where defendant was standing at the time of his arrest and whether he was in that location voluntarily are mixed questions of law and fact (*see Spencer,* 29 N.Y.3d at 312). We are, therefore, bound by the Appellate Division's finding that defendant was arrested "in the doorway" after he "voluntarily emerged," for which there is record support (130 A.D.3d at 645; *see People v. Bradford,* 15 N.Y.3d 329, [2010]). Thus, *Allen,* which applies to "'across the threshold' arrests" (813 F.3d at 81, 85, 87, 88), is distinguishable and does not apply here.

IV.

Defendant further claims that this case is ultimately about closing a loophole to our decision in

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[7] The Second Circuit further declined to adopt the rationale of other Federal Circuit Courts that do *not* require police entry into a home to invalidate an arrest, rejecting what it deemed "the legal fiction of constructive or coercive entry, a doctrine under which certain types of police conduct will be deemed an entry" (*United States v. Allen,* 813 F.3d 76, 81 [2d Cir. 2016]; *see e.g. United States v. Reeves,* 524 F.3d 1161, 1164–1165 [10th Cir. 2008] [holding that defendant opened his door and stepped out of motel room in response to coercive police conduct after officers made phone calls to the room, knocked on the door and window with flashlights, and loudly identified themselves as police officers over the course of 20 minutes]). As recognized by the Second Circuit, that doctrine applies only if a police "command to the occupant to submit to arrest is sufficiently forceful and compelling" (*Allen,* 813 F.3d at 88). Here, no such command was given before defendant voluntarily entered the threshold of his apartment door—there was simply a knock on the door. Moreover, defendant does not ask us to apply the constructive entry rule in this case.

People v. Harris, in which "we h[e]ld that our State Constitution requires that statements obtained from an accused following a *Payton* violation must be suppressed unless the taint resulting from the violation has been attenuated" (77 N.Y.2d 434, 437 [1991]). We explained that, "[u]nder both Federal and State law, the right to counsel attaches once criminal proceedings have commenced" (*id.* at 439). However, while "[u]nder the [f]ederal rule, . . . criminal proceedings do not necessarily start when an arrest warrant is issued . . . , criminal proceedings must be instituted before the police can obtain a warrant" in New York (*id.* at 439–440). Thus, in New York, "police are prohibited from questioning a suspect after an arrest pursuant to a warrant unless counsel is present," creating an incentive "to violate *Payton* . . . because doing so enables them to circumvent the accused's indelible right to counsel" (*id.* at 440). Defendant, as well as Judges Rivera and Wilson in their respective dissents, focuses on the intent of the police in going to a defendant's home and urges that sanctioning preplanned doorway arrests—or, presumably, arrests where the police request that the defendant step outside to speak to them with the intent of effectuating a preplanned arrest—similarly permits police to circumvent a suspect's right to counsel. Thus, defendant contends, and the two dissenters on this issue agree, that we should prohibit arrests where the police lure a suspect to the door with the subjective intent of making a preplanned, warrantless arrest.

Inasmuch as *Harris* applies only to statements obtained following a *Payton* violation, suppressing defendant's statements here would require us to overrule our prior cases holding that preplanned, warrantless arrests do not violate *Payton* where the

defendant exited his residence or stood on the threshold either due to a police request or to a ruse employed by the police.[8] We decline to do so based upon the principle of stare decisis, "the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (*People v. Peque,* 22 N.Y.3d 168, 194 [2013] [internal quotation marks and citation omitted], *cert. denied sub nom. Thomas v. New York,* 135 S.Ct. 90 [2014]). Stare decisis "rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes" (*People v. Bing,* 76 N.Y.2d 331, 338 [1990]), as well as the "humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors" (*People v. Hobson,* 39 N.Y.2d 479, 488 [1976]).

While we apply the doctrine less rigidly in resolving constitutional issues (*see Bing,* 76 N.Y.2d at

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[8] In addition to advocating that we overrule our prior cases, Judge Wilson views those cases as irrelevant because they concern only the application of *Payton* and the Fourth Amendment and do not address whether greater protection is warranted under the State Constitution. Any issues regarding whether New York Constitution, article I, § 12 provides *greater* protection or "should" "provide[ ] greater clarity" (Wilson, J., dissenting op. at 213, 66 N.Y.S.3d at 190, 88 N.E.3d at 348) are unpreserved here because, in the suppression hearing, defendant did not argue that the State Constitution provides greater protections than its federal counterpart to defendants subject to warrantless arrests in the home. Therefore, we do not opine on the merits of such an argument.

338,), "[e]ven under the most flexible version of the doctrine applicable to constitutional jurisprudence, prior decisions should not be overruled unless a 'compelling justification' exists for such a drastic step" (*Matter of State Farm Mut. Auto. Ins. Co. v. Fitzgerald,* 25 N.Y.3d 799, 819 [2015]). We have found such "compelling justification[s]" when a prior decision has led "to an unworkable rule, or . . . create[d] more questions than it resolves; adherence to a recent precedent involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience; or a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience" (*Peque,* 22 N.Y.3d at 194 [internal quotation marks and citations omitted]).

None of those justifications exist here; nor are we persuaded that the "lessons of experience and the force of better reasoning" (*Bing,* 76 N.Y.2d at 338, [internal quotation marks and citations omitted]) compel us to abandon our line of prior decisions on the issue that is now before us yet again.

Far from being unworkable, as the Appellate Division noted in this case, the current rule "is clear and easily understood: a person enjoys enhanced constitutional protection from a warrantless arrest in the interior of the home, but not on the threshold itself or the exterior" (130 A.D.3d at 645). Moreover, we are not asked to overrule a recent precedent that conflicts with a broader, preexisting doctrine, but to adopt a rule that looks to the subjective intent of the police and is, therefore, "fundamentally inconsistent with . . . Fourth Amendment jurisprudence" itself (*Kentucky v. King,* 563 U.S. at 464). Both this Court and the Supreme Court have "rejected a subjective approach, asking only whether the circumstances,

viewed *objectively,* justify the action" (*id.* [internal quotation marks omitted]; *see People v. Robinson,* 97 N.Y.2d 341, 349 [2001]). As both Courts have explained, "'[t]he touchstone of the Fourth Amendment is reasonableness'—not the warrant requirement" (*see Molnar,* 98 N.Y.2d at 331, quoting *United States v. Knights,* 534 U.S. 112, 118 [2001]). Therefore, this Court has emphasized that "the 'Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever the subjective intent*'" (*People v. Robinson,* 97 N.Y.2d at 349 [emphasis added], quoting *Whren v. United States,* 517 U.S. 806, 814 [1996]). Based on long experience, we "acknowledge[d] the difficulty, if not futility, of basing the constitutional validity of searches or seizures on judicial determinations of the subjective motivation of police officers" (*id.* at 350 [internal quotation marks and citation omitted]). Thus, under the circumstances presented here, it is not our prior precedent that "involves collision with a prior doctrine more embracing in its scope" (*Peque,* 22 N.Y.3d at 194), but the rule proposed by defendant, as well as the even broader rule proposed by Judges Wilson and Rivera in dissent.

With respect to the effect of the current rule on our own jurisprudence, it certainly cannot be said that "the Judges considering these cases [have been] sharply divided . . . about how to apply the . . . rule [or] about the more fundamental question of whether the facts presented are even encompassed within it" (*Bing,* 76 N.Y.2d at 348). Rather, all of our prior cases addressing the issue over the last 30 years—from *Minley* to *Spencer*—have been unanimous and posed little difficulty. Moreover, *Spencer,* decided just a few months ago, reaffirmed both *Reynoso* and *Minley.* Overturning those cases now would both undermine

the purposes of stare decisis—which are "to promote efficiency and provide guidance and consistency in future cases" (*Bing,* 76 N.Y.2d at 338)—and "unsettle the belief 'that bedrock principles are founded in the law rather than in the proclivities of individuals' " (*id.* at 361 [Kaye, J., concurring in part and dissenting in part], quoting *Vasquez v. Hillery,* 474 U.S. 254, 265 [1986]). Furthermore, the various rules urged by defendant and Judges Wilson and Rivera would throw into confusion a "'bright line' rule[ ]" that has long "'guide[d] the decisions of law enforcement and judicial personnel who must understand and implement our decisions in their day-to-day operations in the field'" (*People v. Garcia,* 20 N.Y.3d 317, 323 [2012], quoting *People v. P.J. Video,* 68 N.Y.2d 296, 305 [1986], *cert. denied* 479 U.S. 1091 [1987]).

As for the cold light of logic and experience, "[p]ermitting the police to make a warrantless arrest of a person who answers the door (or who is properly summoned to the door . . .)" has been described as "mak[ing] great sense" (3 Wayne R. LaFave, Search and Seizure § 6.1[e] [5th ed. 2012]). Under that rule, to which we have consistently adhered,

> "the police are quite properly relieved from having to obtain arrest warrants in a large number of cases in advance, and the warrant process is thereby not overtaxed (thus giving greater assurance it will not become a mechanical routine). But if in a particular case in which there were no exigent circumstances to start with the intended arrestee at the door elects to exercise the security of the premises by not submitting to the arrest, then it is hardly unfair that the police should be required to withdraw and return another time with a warrant" (*id.*).

In contrast, the Supreme Court has rejected the approach advanced by defendant—and that forms the basis of the reasoning of two of the dissenters (*see* Wilson, J., dissenting op. at 218–220; Rivera, J., dissenting op. at 208–209)—that "fault[s] law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek . . . to speak with an occupant" (*Kentucky v. King,* 563 U.S. at 466). The Court explained that such an approach "unjustifiably interferes with legitimate law enforcement strategies" (*id.*).[9]

In short, there is no compelling justification to overrule our prior cases in order to expand *Harris* by recognizing a new category of *Payton* violations based on subjective police intent. Rather, overruling our prior cases would present an unacceptable obstruction to law enforcement, eliminate a clear and workable rule that has guided the courts for decades, undermine predictability in the law and reliance upon our decisions, and suggest that "our decisions arise [not] from a continuum of legal principle[,] [but]

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[9] In contrast to Judge Wilson's unsupported assumptions about the "relative ease of securing an arrest warrant" (Wilson, J., dissenting op. at 220, 66 N.Y.S.3d at 195, 88 N.E.3d at 353), the Supreme Court observed that "the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant" and that such a reason is "entirely proper" (*Kentucky v. King,* 563 U.S. at 466–467). In any event, there may be many legitimate reasons why it would be impractical in a particular situation to obtain a warrant or wait for a defendant to exit the home.

the personal caprice of the members of this Court" (*Peque,* 22 N.Y.3d at 194). Such a result is untenable.

V.

Defendant's remaining arguments do not require extended discussion. His additional challenges to the legality of his arrest and the lack of attenuation of his subsequent statements from that arrest are either unpreserved, academic or unreviewable pursuant to the *LaFontaine/Concepcion* rule, which precludes us "from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court" (*People v. Ingram,* 18 N.Y.3d 948, 949 [2012]; *see People v. Concepcion,* 17 N.Y.3d 192 [2011]; *People v. LaFontaine,* 92 N.Y.2d 470 [1998]).[10] His claim that his statement to police was involuntary presents a mixed question, and there is record support for the conclusion of the Appellate Division to the contrary. Finally, defendant's challenge to his persistent felony offender adjudication is governed by our decision in *People v. Prindle*, 29 N.Y.3d 463, (2017), which requires an affirmance here. Contrary to defendant's contentions, neither *Hurst v. Florida*,

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[10] With respect to the issue of defendant's reasonable expectation of privacy addressed by Judge Rivera in her dissent, in *People v. Hansen*, 99 N.Y.2d 339, 346 n. 6 (2003), *affg.* 290 A.D.2d 47 (2002), this Court recognized that a "distinction" can exist "between the two residences—a single-family house and a two-family house—impacting the constitutional analysis" (Rivera, J., dissenting op. at 201, 66 N.Y.S.3d at 181, 88 N.E.3d at 339). Therefore, the burden was on defendant to establish a reasonable expectation of privacy in the shared area of the two-family house (*see e.g. People v. Leach,* 21 N.Y.3d 969 [2013]). Defendant, however, not only made no specific offer of proof, but also failed to make any arguments in this regard and, thus, the issue is not preserved for our review (*see* CPL 470.05[2]).

136 S.Ct. 616 (2016) nor *Descamps v. United States*, 570 U.S. 254 (2013) compels a different result. Nor have any new reasons been presented that would otherwise require us to retreat from an interpretation that we reaffirmed as recently as *Prindle.*

Accordingly, the order of the Appellate Division should be affirmed.

FAHEY, J. (dissenting in part)

I would vacate defendant's sentence and remit to Supreme Court for resentencing. New York's persistent felony offender sentencing scheme is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). I disagree with this Court's line of cases from *People v. Rosen*, 96 N.Y.2d 329 (2001) to *People v. Prindle*, 29 N.Y.3d 463 (2017), holding that the statutory sentencing scheme lies "outside the scope of the *Apprendi* rule, because it exposes defendants to an enhanced sentencing range based only on the existence of two prior felony convictions" (*Prindle,* 29 N.Y.3d at 466). However, I agree with the majority's analysis of the *Payton* issue in this case and with the Court's disposition of defendant's remaining arguments. Consequently, I dissent, but only in part.

I.

A persistent felony offender is, by definition, an individual, "other than a persistent violent felony offender as defined in [Penal Law §] 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies," specifically defined (Penal Law § 70.10[1][a]). Being a "persistent felony offender" is, however, only one of two necessary conditions for the imposition of an enhanced sentence under the pertinent sentencing statute, Penal Law § 70.10. The other necessary condition is

that the sentencing court must be of the reasoned opinion, as set out in the sentencing record, "that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (Penal Law § 70.10[2]). If the first necessary condition is met, but not the second, a persistent felony offender may not be given enhanced sentencing.

The Criminal Procedure Law confirms that both conditions are necessary, and that neither is on its own sufficient. Persistent felony offender enhanced sentencing "*may not be imposed unless* . . . the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, *and* (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest" (CPL 400.20[1] [emphases added]).

On the second prong, the sentencing court, in order to reach the "opinion" that enhanced sentencing is warranted, "must . . . make such *findings of fact* as it deems relevant" (CPL 400.20[9] [emphasis added]). Moreover, a record of the basis for the sentencing court's findings must be set forth (*see* CPL 400.20[3][b]).

The two necessary conditions have differing standards of proof. "A finding that the defendant is a persistent felony offender, as defined in [Penal Law § 70.10(1)], must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the issue of guilt," whereas

"[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence" (CPL 400.20[5]).

II.

The United States Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny that, under the Due Process Clause of the Fourteenth Amendment and the right to a jury trial guaranteed by the Sixth Amendment, a jury must determine each element of a crime beyond a reasonable doubt, including any fact that has the effect of increasing the prescribed range of penalties to which a defendant is exposed at sentencing (*see Apprendi,* 530 U.S. at 489–490; *see also Alleyne v. United States,* 570 U.S. 99 [2013] ["Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt"]). One exception is a fact admitted by the defendant (*see Blakely v. Washington,* 542 U.S. 296, 303 [2004]), and the other is the established fact of a prior felony conviction (*see Almendarez–Torres v. United States,* 523 U.S. 224).

At issue in *Apprendi* was a hate crime sentencing scheme that allowed a judge to increase a defendant's penalty beyond the maximum sentence range authorized for a particular crime, based on the judge's finding by a preponderance of the evidence that defendant committed a crime with the intent to intimidate based on race, religion, color, gender, ethnicity, sexual orientation, or handicap. *Apprendi*

ruled that a jury, not a judge, must find, beyond a reasonable doubt, that a defendant acted with such a biased purpose, in order for the sentencing enhancement to be imposed. The hate crime statute violated the Constitution because it required a judge to find an element that would increase the defendant's sentence, instead of submitting that question of fact to the jury, and it allowed the judge to decide the fact using a lesser standard of proof.

In subsequent years, the *Apprendi* doctrine has been applied "to instances involving plea bargains, sentencing guidelines, criminal fines, mandatory minimums, and . . . capital punishment" (*Hurst v. Florida,* 136 S.Ct. 616, 621 [2016] [citations omitted], citing *Blakely v. Washington,* 542 U.S. 296 [2004]; *United States v. Booker,* 543 U.S. 220 [2005]; *Southern Union Co. v. United States,* 567 U.S. 343 [2012]; *Alleyne,* 570 U.S. 99 [2013]; *Ring v. Arizona,* 536 U.S. 584 [2002]).

This Court first considered the import of *Apprendi* in *People v. Rosen*, 96 N.Y.2d 329 (2001), in which the defendant contended that the persistent felony offender sentencing provisions of Penal Law § 70.10 and CPL 400.20(5) violated his right to trial by jury under *Apprendi.* This Court analyzed the statutes as follows:

"Under New York law, to be sentenced as a persistent felony offender, the court must first conclude that defendant had previously been convicted of two or more felonies for which a sentence of over one year was imposed. Only after it has been established that defendant is a twice prior convicted felon may the sentencing court, based on the preponderance of the evidence, review '[m]atters pertaining to the defendant's history and character and the nature and cir-

cumstances of his criminal conduct . . . established by any relevant evidence, not legally privileged' to determine whether actually to issue an enhanced sentence (CPL 400.20[5]). It is clear from the foregoing statutory framework that the prior felony convictions are the sole [determinant] of whether a defendant is subject to enhanced sentencing as a persistent felony offender." (*Rosen,* 96 N.Y.2d at 334–335.)

This analysis was fundamentally flawed. It is true, of course, that under Penal Law § 70.10, for a defendant to be sentenced as a persistent felony offender, the court must first conclude that defendant had previously been convicted of two or more felonies for which a sentence of over one year had been imposed. That is the first necessary condition of persistent felony offender enhanced sentencing. It is also true that the sentencing court would only review the defendant's history and character and the nature and circumstances of his or her criminal conduct after concluding that the first condition had been met. However, it was a complete non sequitur to conclude from these propositions that prior felony convictions are the *sole* determinant of whether a defendant is subject to persistent felony offender enhanced sentencing.

The statute is clear that a defendant is subject to enhanced sentencing—i.e., may have enhanced sentencing imposed on him—as a persistent felony offender only if *both* statutory necessary conditions are met. Only "[w]hen the court has found . . . that a person is a persistent felony offender, *and* . . . it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public inter-

est," may the court impose the enhanced sentence (Penal Law § 70.10[2] [emphasis added]).

The *Rosen* Court, after thus misreading the statutory language, added that the sentencing court, in deciding whether extended incarceration and life-time supervision will best serve the public interest, is "only fulfilling its traditional role . . . in determining an appropriate sentence within the permissible statutory range" (*Rosen,* 96 N.Y.2d at 335). This analysis, clearly designed to suggest that the second necessary condition of persistent felony offender enhanced sentencing is purely discretionary, rather than a fact-finding exercise, misstated the sentencing court's task. Deciding whether "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (penal law § 70.10[2]) is deciding a question that has one of only two answers: yes, the public interest is best served by extended incarceration and lifetime supervision, or no, it is not. It is not an exercise in determining a sentence within a range. That comes later, when the sentencing court actually imposes the sentence. Moreover, as the statutes themselves clarify, the Penal Law § 70.10(2) determination involves making "findings of fact" (CPL 400.20[9]).

In *People v. Rivera*, 5 N.Y.3d 61 (2005), the defendant—one of many to do so—asked the Court to overturn *Rosen.* The Court declined. While properly analyzing the question to be "whether any facts beyond those essential to the jury's verdict (other than prior convictions or admissions) were necessary for the trial judge to impose the persistent felony offender sentence" (*Rivera,* 5 N.Y.3d at 65–66), the Court reiterated its earlier flawed conclusion that a de-

fendant's prior convictions constitute the sole determinant for whether he or she is subject to persistent felony offender sentencing, suggesting that Penal Law § 70.10 "authorizes" sentencing as a persistent felony offender "once the court finds persistent felony offender status" (*id.* at 66). *Rivera* ignored the clear statutory language making the Penal Law § 70.10(2) determination a necessary condition of the imposition of persistent felony offender sentencing.

Contrary to *Rivera,* the mere existence of the prior felonies is not a "sufficient condition[ ] for imposition of the authorized sentence for recidivism" (*Rivera,* 5 N.Y.3d at 68; *see also Prindle,* 29 N.Y.3d at 467), but only a necessary condition. As Chief Judge Kaye observed in her dissent, "[f]itting the definition of a persistent felony offender under Penal Law § 70.10(1) is necessary but not sufficient to render a defendant eligible for enhanced sentencing under CPL 400.20. Rather, an enhanced sentence is available only for those who additionally are found to be of such history and character, and to have committed their criminal conduct under such circumstances, that extended incarceration and lifetime supervision will best serve the public interest. The persistent felony offender statute thus stands in stark contrast to Penal Law § 70.08, which requires that all three-time violent felons be sentenced to an indeterminate life term on the basis of the prior convictions alone" (*Rivera,* 5 N.Y.3d at 73 [Kaye, Ch. J., dissenting] [citation omitted]).

Other Judges of this Court have dissented in persistent felony offender sentencing cases for the same reason, among others (*see Rivera,* 5 N.Y.3d at 79–80 [Ciparick, J., dissenting]; *People v. Battles,* 16 N.Y.3d 54, 63–65 [2010, Lippman, Ch. J., dissenting in part]; *People v. Giles,* 24 N.Y.3d 1066, 1073–1074

[2014, Abdus–Salaam, J., concurring in part and dissenting in part]). As Judge Ciparick noted, review of related statutes confirms Chief Judge Kaye's insight.

"Had the Legislature intended for the inquiry to end at recidivism, it could, for example, have replicated the language of Penal Law § 70.08, which mandates sentencing for persistent violent felony offenders based solely on recidivism, or it could have used the [similar] language of Penal Law § 70.04 or § 70.06 as it relates to second felony offenders and second violent felony offenders" (*Rivera,* 5 N.Y.3d at 80 [Ciparick, J., dissenting]).

III.

The *Rivera* Court further erred by holding that a sentencing court's Penal Law § 70.10(2) determination—that the defendant's character and criminality indicate that the public interest is best served by extended incarceration and lifetime supervision—"describes the exercise of judicial discretion characteristic of indeterminate sentencing schemes" (*id.* at 66) and "falls squarely within the most traditional discretionary sentencing role of the judge" (*id.* at 69). As the Court put it, "[o]nce the defendant is adjudicated a persistent felony offender, the requirement that the sentencing justice reach an opinion as to the defendant's history and character is merely another way of saying that the court should exercise its discretion" (*id.* at 71).

This was an attempt to give an alternate source of support for the *Rosen* Court's notion that a sentencing court's determination that enhanced sentencing would serve the public interest was simply a matter of the sentencing court's "fulfilling its traditional role" (*Rosen,* 96 N.Y.2d at 335). In a footnote, the *Rivera* Court suggested that judicial findings

prohibited by *Apprendi* "relate to the crime for which the defendant was on trial and, as quintessential fact questions, would properly have been subject to proof before the jury, in stark contrast to traditional sentencing analysis of factors like the defendant's difficult childhood, remorse or self-perceived economic dependence on a life of crime" (*Rivera,* 5 N.Y.3d at 69 n. 8).

Rivera, however, was inconsistent with *Apprendi* and its progeny. The exercise of determining whether enhanced sentencing would serve the public interest may involve the application of the sentencing judge's discretion, but it is no less factual for being, in the end, discretionary in nature. In order to exercise discretion on the subject of whether enhanced sentencing would serve the public interest, the sentencing court must first make findings concerning "the facts surrounding defendant's history and character" (*Rivera,* 5 N.Y.3d at 67), or, as the Criminal Procedure Law puts it, "must . . . make such *findings of fact* as it deems relevant" (CPL 400.20[9] [emphasis added]). Furthermore, as Chief Judge Kaye noted in her dissent in *Rivera,* the Supreme Court has made it "clear that any factfinding essential to sentence enhancement must be decided by a jury, even if it is general and unspecified in nature, and even if the ultimate sentencing determination is discretionary" (*Rivera,* 5 N.Y.3d at 73–74 [Kaye, Ch. J., dissenting] [footnote and emphasis omitted]).

The Supreme Court had clarified that point in *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that *Apprendi* was violated where the sentencing court had to find that defendant acted with "deliberate cruelty" in order to impose enhanced sentencing). In *Blakely,* the Supreme Court observed that "[w]hether the judge's authority to impose an en-

hanced sentence depends on finding a specified fact . . ., one of several specified facts . . ., or any aggravating fact . . ., it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact" (*Blakely,* 542 U.S. at 305 [emphasis omitted]). Moreover, the Supreme Court explained, it does not "matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He [or she] cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence" (*Blakely,* 542 U.S. at 305 n. 8 [emphasis omitted]).

In other words, "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from [*Apprendi*]. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied" (*Cunningham v. California,* 549 U.S. 270, 290 [2007]).

Rivera, like *Rosen* before it, was not correctly decided, because the findings contemplated by Penal Law § 70.10(2) involve facts that have the effect of increasing the prescribed range of penalties to which a defendant is exposed at sentencing, within the meaning of *Apprendi.* In sum, it is clear that a sentencing court, in deciding "that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best

serve the public interest" (Penal Law § 70.10[2]), is necessarily making factual findings that must instead be made by the jury, under *Apprendi.*

IV.

"The constitutionality of sentences imposed under this sentencing scheme has, not surprisingly, been a practically constant subject of litigation since *Apprendi* " (*Battles,* 16 N.Y.3d at 61 [Lippman, Ch. J., dissenting in part]). In the years since *Rosen* and *Rivera,* this Court has reiterated the misguided analysis provided in those opinions: that the first prong of Penal Law § 70.10 is the sole determinant of persistent felony offender sentencing, and that

"New York's sentencing scheme, by requiring that sentencing courts consider defendant's 'history and character' and the 'nature and circumstances' of defendant's conduct in deciding where, within a range, to impose an enhanced sentence, sets the parameters for the performance of one of the sentencing court's most traditional and basic functions, i.e., the exercise of sentencing discretion" (*People v. Quinones,* 12 N.Y.3d 116, 130 [2009]; *see also Prindle,* 29 N.Y.3d at 466–467).

The foregoing discussion of the statutes, however, demonstrates that Penal Law § 70.10(2) is a separate necessary condition, and does not simply allow a sentencing court to "decid[e] where, within a range, to impose an enhanced sentence" (*Quinones,* 12 N.Y.3d at 130); rather, it requires that a sentencing court decide *whether* the factual circumstances of defendant's crimes and character warrant enhanced sentencing, before imposition of any enhanced sentence is permissible.

As my colleague Judge Abdus–Salaam wrote, a "recitation of the statutory terms suffices to show

that . . . the persistent felony offender sentencing scheme violates the *Apprendi* rule," and the Court's "*Apprendi* precedents have devolved into hollow and discredited words supporting a clearly unconstitutional sentencing framework" (*Giles,* 24 N.Y.3d at 1074 [Abdus–Salaam, J., concurring in part and dissenting in part]).

V.

I do not quarrel with the majority's statement that the resolution of the *Apprendi* issue here "is governed by" our precedents (majority op. at 189, 66 N.Y.S.3d at 172–73, 88 N.E.3d at 330–31), but I believe there is "compelling justification for" overruling our prior holdings in this area, because they "create[ ] more questions than [they] resolve[ ]" and "no longer serve[ ] the ends of justice or withstand[ ] the cold light of logic and experience" (*People v. Peque,* 22 N.Y.3d 168, 194 [2013] [internal quotation marks and citations omitted]).

I add a final comment on their larger significance and "real effect" (*Battles,* 16 N.Y.3d at 65 [Lippman, Ch. J., dissenting in part]) in our system of justice. Exposing defendants to criminal penalties more severe than could be imposed based upon the jury verdict and prior convictions alone, without a jury making the factual determinations necessary for the enhancement in punishment, is abhorrent not only to the Federal Constitution but also to basic justice. For example, under Penal Law § 70.10, a nonviolent serial shoplifter convicted of criminal possession of stolen property in the fourth degree, a class E felony for which the maximum sentence is four years' imprisonment (*see* Penal Law § 70.00[2][e]), may be given "the sentence of imprisonment authorized by [Penal Law § 70.00] for a class A–I felony" (Penal

Law § 70.10[2]), which is a minimum sentence of 15 years to life (*see* Penal Law § 70.00[3][a][i]; *see People v. Ellison,* 124 A.D.3d 1230 [4th Dept. 2015], *lv. denied* 25 N.Y.3d 1201 [2015], *vacated and mot. for writ of error coram nobis granted* 136 A.D.3d 1354 [2016] [granting motion in light of defense counsel's failure to challenge finding that defendant is a persistent felony offender]). Applying the Court's interpretation of the statutory sentencing scheme allows a judge, without jury fact-finding on the factual circumstances of defendant's history and character, to punish such a shoplifter with the penalty associated with violent crimes such as kidnapping in the first degree (Penal Law § 135.25), aggravated murder (Penal Law § 125.26), or murder in the first or second degree (Penal Law §§ 125.27, 125.25). Silence in the face of such injustice would amount to acquiescence. Accordingly, I dissent.

RIVERA, J. (dissenting)

The Fourth Amendment and our State Constitution provide "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (U.S. Const. 4th Amend.; N.Y. Const., art. I, § 12; *Payton v. New York,* 445 U.S. 573 [1980]). These constitutional protections afforded individuals reflect the societal recognition of the home as "the sacred retreat to which families repair for their privacy and their daily way of living" (*Gregory v. Chicago,* 394 U.S. 111, 125 [1969, Black, J., concurring]). Hence, a warrantless entry by police to effectuate a home arrest, the most intrusive of government invasions into a person's privacy, is "presumptively unreasonable" (*Payton v. New York,* 445 U.S. 573, 586 [1980]). The People bear "the

burden of overcoming that presumption" (*People v. Hodge,* 44 N.Y.2d 553, 557 [1978]), and thus "defendant has no burden to show he had an 'expectation of privacy' in his apartment" (*People v. Levan,* 62 N.Y.2d 139, 144 [1984]).

The People did not rebut that presumption here because they failed to establish, as a constitutional matter, that defendant lacked any reasonable expectation of privacy in the location of the house where he was arrested, and that the arrest comes within one of the "carefully delineated" narrow exceptions to the warrant requirement (*People v. Molnar,* 98 N.Y.2d 328, 331 [2002], citing *Welsh v. Wisconsin,* 466 U.S. 740, 749–750 [1984]). This is enough, in my opinion, to find the police violated defendant's rights. However, the unreasonable intrusions that mark this case are not limited to a single constitutional violation caused by entering the commonly-shared areas of a two-family house. The People also failed to justify the police visit to defendant's home for the sole purpose of making a warrantless arrest, as this action undermined defendant's constitutionally protected indelible right to counsel (N.Y. Const., art. I, § 6; *People v. Lopez,* 16 N.Y.3d 375, 377 [2011]). Therefore, unlike the majority, I conclude that defendant's post-arrest statements were obtained in violation of his rights, and I dissent.

I.

A.

After establishing probable cause for defendant's arrest, the police proceeded without a warrant to his home to make the arrest. Within minutes of arriving at the home, the police made two uninvited and unannounced entries through the front door of the two-family house where defendant lived. Both times they

walked through the vestibule immediately behind the front door and proceeded up the stairs that lead to defendant's second-floor apartment. At the top of the stairs the police knocked and spoke briefly to the person who opened the door. On the second trip through defendant's house and back up the stairs, the police again knocked on defendant's apartment door, and this time, when defendant opened the door and while standing in the doorway, the police told him he was under arrest.

The People incorrectly argue that defendant has absolutely no privacy expectation in the area between the front door of the house and the door leading directly to his living space because his privacy interests only attach on the apartment side of the upstairs door threshold. In support of this claim, the People rely on evidence at the suppression hearing that established that defendant lived in a second floor apartment of a two-family house. That alone, however, is insufficient to meet the People's heavy burden.[1] The constitutional inquiry centers on whether it was reasonable for defendant to assume

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[1] The majority recognizes that a resident of a two-family house may have a privacy interest in a common area, yet suggests that we have previously decided that the burden of establishing this interest always shifts to defendant. The citation to *People v. Leach*, 21 N.Y.3d 969 (2013), however, betrays the infirmity of this position. In that case, defendant resided in his grandmother's apartment, and there was record support that his grandmother did not want defendant to have unfettered access to all areas of the apartment, including a guest room used solely by other grandchildren in which a weapon was found (*id.* at 971–972). This suggests nothing about an individual's expectation of privacy inside the shared, enclosed hallway of their two-family home—defendant here does not claim to have a reasonable expectation of privacy in his downstairs neighbor's living quarters.

that the vestibule and stairway inside his house are private areas, which the police may not enter without consent or some other lawful basis (*Levan,* 62 N.Y.2d at 144).

It is a basic principle of article I, § 12 of the New York Constitution and the Fourth Amendment to the United States Constitution that warrantless searches and seizures inside a home are presumptively unreasonable (*People v. Knapp,* 52 N.Y.2d 689, 694 [1981]; *Brigham City v. Stuart,* 547 U.S. 398, 403 [2006]). This holds true even in a two-family house where the residents share common areas. The United States Supreme Court has made clear that an individual can have a reasonable expectation of privacy in an area despite not having its exclusive use (*Mancusi v. DeForte,* 392 U.S. 364, 368 [1968]). Further, the United States Supreme Court long ago rejected the notion that a defendant has no privacy expectations simply because a space may be accessible to the public since what a defendant "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (*Katz v. United States,* 389 U.S. 347, 351 [1967]). Thus, the fact that defendant lived in the second floor apartment of a two-family house does not automatically strip him of the constitutional protections afforded to the residents of the house in areas that they share in common. The concept of the house as a home would be meaningless if it could be so easily compartmentalized into publicly unprotected spheres.

Even under the majority's analysis that the current law establishes a bright-line rule that the police may not cross the house threshold to make a warrantless arrest (majority op. at 180, 66 N.Y.S.3d at 165–66, 88 N.E.3d at 323–24), I cannot agree that the threshold is yards beyond the front door of the

house and up a flight of stairs. Whether it is reasonable to view this area as holding some modicum of privacy depends on the relationship between the individual and the space (*Katz,* 389 U.S. at 351, 88 S.Ct. 507). Residents would not imagine that simply by living in a two-family house, they effectively forfeit their privacy to all areas except for that space which is not commonly shared by the residents of the house or invited guests. Nor would they believe that they have exited their "sacred retreat" and the sanctuary of their home by stepping into an area with limited access to outsiders. Human experience leads to the conclusion that a resident of an upstairs living area in a two-family house has a privacy interest effective at the door leading into the building. The purpose of a front door to someone's home is to ensure the privacy and security of those living behind it. It signals for all who approach that the home is not a public venue. When one approaches a door to a house, one seeks permission to enter because of our common understanding that this is a private residence.

Unrelated cohabitants with individual apartments in a two-family house may share the doorway vestibule area and the steps leading to various parts of the home, storing personal items and engaging in private conversations in these spaces, further illustrating that these living arrangements are based on the presumption that the space behind the front door is part of the home and within the residents' zone of privacy. Even the shared use of common areas by other residents and guests, "does not render such areas 'public' with respect to the constitutional prerequisites for permissible entry by the police" (*People v. Garriga,* 189 A.D.2d 236, 241 [1st Dept. 1993]). It is one thing to accept that in a shared home you will

come across other residents at the front door, in the hallway, perhaps at the steps leading to the basement, attic, or upstairs apartment; it is quite another to give up all rights to privacy from government intrusion into these same shared spaces. The former is a necessary and inherent consequence of the living arrangement itself; the latter requires voluntary abnegation of all expectations of privacy. Absent conduct by residents suggesting a shared environment is actually public, a resident of a two-family house is entitled to the same constitutional protections as those in a single-family house in these common areas. There is no distinction as matter of law between the two residences—a single-family house and a two-family house—impacting the constitutional analysis.

There are also societal interests in protecting a resident's privacy in these common areas of the home (*Oliver v. United States,* 466 U.S. 170, 178 [1984] ["In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion"]; *Johnson v. United States,* 333 U.S. 10, 14 [1948] ["The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance"]). The conception of "home" may "extend to facilities shared by several persons not related to each other" (*see People v. Powell,* 54 N.Y.2d 524, 531 [1981]). People's lives are not so atomized and impersonal in these shared environments to negate the constitutional protection of privacy afforded a resident whose home includes communal space. As our shared living arrangements

necessarily reflect family commitments, evolving social norms, limited personal finances, and market forces that drive housing preferences and vacancy rates, these factors redefine concepts of "intimacy" and communal interaction. Residents, like defendant, should not be penalized and stripped of their constitutional protections based on choices driven, in part, by financial and family concerns (*Garriga,* 189 A.D.2d at 241).

Here, the People failed to present any evidence that defendant's expectation of privacy in the shared area of a two-family house should be treated any differently from that of a resident living in a single-family house. Nor did they establish that defendant's expectation is unreasonable as a constitutional matter because he had forgone any privacy interest in the entrance to the house and the stairs leading to his apartment. The People did not introduce evidence that the vestibule and staircase were generally open and accessible to the public. There was no testimony that the officers observed unannounced people freely entering and exiting the house (*cf. People v. Hansen,* 290 A.D.2d 47, 52–53 [2002] [testimony established hallway of two-family home was "a public hallway, open to anyone who wants to walk in off the street"]). The police did not even testify as to how the front door was open, thus failing to establish the means for some public access to this area, or that they had consent to enter the house. Even if the vestibule was accessible to the public, the people failed to elicit evidence to suggest that defendant did not have an expectation of privacy to the only internal means to reach him: the steps and area immediately outside his apartment door. It is the People's burden to rebut the presumption that the space was private, and their evidence fell far short of establishing a basis for

the police to cross the "firm line at the entrance of the house" that marks the constitutional perimeter of the "home" (*Payton,* 445 U.S. at 590; *Kirk v. Louisiana,* 536 U.S. 635, 638 [2002]; *Hodge,* 44 N.Y.2d at 557).

The People argue that defendant had no more privacy interest in the vestibule and stairs leading to his second-floor living space than a tenant in a large apartment complex or multiunit apartment building has in the building lobby and stairwell. This comparison ignores the intimacy inherent in living in a house that distinguishes it from a multiunit building where the first floor is open and accessible to the public. Unlike the small foyer entry of a home which is closed off to the public, a building lobby may be open to the public and serve as an extension of the steps or path leading to the building. As such, the lobby is transformed into public space, where strangers walk through and sometimes ascend the stairs. For some buildings, a visitor must enter the lobby in order to be announced to the tenant. For these reasons we have held that "hallways and stairways of large multiple dwellings, where delivery [and] service [personnel], visitors and other strangers are continually moving, must be considered public places" (*People v. Peters,* 18 N.Y.2d 238, 244 [1966], *affd. sub nom. Sibron v. New York,* 392 U.S. 40 [1968]; *see also People v. Powell,* 54 N.Y.2d 524 [1981] [lobby of six story men's shelter was public place and not part of home]; *cf. People v. Allen,* 54 A.D.3d 868, 869 [2d Dept. 2008] ["Although the apartment building had only six apartments, the defendant failed to demonstrate that he had any legitimate expectation of privacy in the apartment building's vestibule, as it was accessible to all tenants and their invitees"]). Given the number of people who

pass through a lobby, tenants in these multiple-unit dwellings have a diminished expectation of privacy in these open, publicly-accessible spaces that is not experienced by persons who share closed, common areas in a two-family house.

Other jurisdictions have recognized the need for some evidence of public access akin to that found in a larger, multiunit building before reducing residents' expectations of privacy. The Sixth Circuit, for example, has held that the "nature of the living arrangement in a duplex, as opposed to a multi-unit building, leads [to the conclusion] that a tenant in a duplex has a reasonable expectation of privacy in common areas shared only by the duplex's tenants and the landlady" (*United States v. King,* 227 F.3d 732, 746 [6th Cir. 2000] [emphasis omitted], quoting *United States v. McCaster,* 193 F.3d 930, 935 [8th Cir. 1999, Heaney, J., concurring in part and dissenting in part]). The Ninth Circuit has similarly held that in a building containing two apartments and the landlord's living quarters, the tenants "exercised considerably more control over access to [the entryway to the two apartments] than would be true in a multiunit complex, and hence could reasonably be said to have a greater reasonable expectation of privacy than would be true of occupants of large apartment buildings" (*United States v. Fluker,* 543 F.2d 709, 716 [9th Cir. 1976]). The Supreme Court of Connecticut has held that a defendant has an expectation of privacy in the common basement of a two-family house (*State v. Reddick,* 207 Conn. 323, 332 [1988]). As the Fifth Circuit has noted, "[c]ontemporary concepts of living such as multi-unit dwellings must not dilute [a defendant's] right to privacy any more than is absolutely required" (*Fixel v. Wainwright,* 492 F.2d 480, 484 [5th Cir. 1974]). As the

Fifth Circuit has noted, "[c]ontemporary concepts of living such as multi-unit dwellings must not dilute [a defendant's] right to privacy any more than is absolutely required" (*Fixel v. Wainwright,* 492 F.2d 480, 484 [5th Cir. 1974]).

Like other persons living in two-family houses, absent evidence evincing intent to create an "open house" environment, defendant had a reasonable expectation of privacy in the vestibule and staircase for these constituted part of his home. As such, he was entitled to the constitutional protection against a warrantless home arrest, and the police entry violated *Payton.*[2]

B.

Contrary to the People's argument the issue is preserved for our review. In order to preserve an issue, a defendant must register a protest at a time when the court has the opportunity of effectively altering its response (*see* CPL 470.05[2]; *People v. Graham,* 25 N.Y.3d 994, 996 [2015]). Here, defense counsel argued that the police entered defendant's home in violation of *Payton,* and the People responded that he had no legitimate right to privacy in the hallway. Defense counsel argued that since the police were "unaware as to how they gained entry into the two-family home," the judge should be careful when considering *Payton,* as there was no testimony defendant "actually exited the residence before he was arrested." This protest sufficiently preserved the issue.

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[2] Nor did the People establish that the warrantless arrest was justified under one of the narrow exceptions to the warrant requirement, such as when emergency aid is required, when in hot pursuit of a fleeing suspect, to prevent the imminent destruction of evidence, etc. (*see Kentucky v. King,* 563 U.S. 452, 460 [2011])

Even assuming arguendo that defense counsel's statements lacked specificity, an issue is preserved if "the court expressly decided the question raised on appeal" (CPL 470.05[2]). The court, by necessity if not implication, decided that defendant had no privacy interest in the area between the front doorway and the door leading to defendant's living space when it denied defendant's motion to suppress and concluded the arrest was outside the home because it was conducted "in the hallway of his apartment building." Unsurprisingly, the Appellate Division treated the issue as preserved, holding that "where the defendant lived in the upstairs apartment of a building containing two separate apartments, there is clearly a distinction between homes and common areas such as halls and lobbies . . . which are not within an individual tenant's zone of privacy" (*People v. Garvin,* 130 A.D.3d 644, 645 [2d Dept. 2015] [internal quotation marks omitted]).

II.

A.

There is a second ground for concluding the arrest is constitutionally invalid. Like Judge Wilson, I would apply *Payton* where, as here, the sole reason the police went to defendant's home was to effect his arrest, and in doing so without a warrant, they undermined defendant's indelible right to counsel. I agree with Judge Wilson that the majority's reasons for not applying *Payton* are unpersuasive (Wilson, J., dissenting op. at 213–216). I write separately to discuss the interplay between these constitutional protections.

B.

"[W]e have delineated an independent body of search and seizure law under the State Constitution"

that implicates the defendant's indelible right to counsel (*People v. Harris,* 77 N.Y.2d 434, 438 [1991]). As the Court has emphasized,

"The safeguards guaranteed by this State's Right to Counsel Clause are unique (N.Y. Const., art. I, § 6). By constitutional and statutory interpretation, we have established a protective body of law in this area resting on concerns of due process, self-incrimination and the right to counsel provisions of the State Constitution which is substantially greater than that recognized by other State jurisdictions and far more expansive than the Federal counterpart. The Court has described the New York rule as a 'cherished principle,' rooted in this State's prerevolutionary constitutional law and developed 'independent of its Federal counterpart.' The highest degree of judicial vigilance is required to safeguard it. Manifestly, protection of the right to counsel has become a matter of singular concern in New York and it is appropriate that we consider the effect of *Payton* violations upon it" (*Harris,* 77 N.Y.2d at 439 [internal quotation marks, brackets and citations omitted]).

In New York, the indelible right to counsel attaches when the police commence formal proceedings by filing an accusatory instrument (*People v. Samuels,* 49 N.Y.2d 218, 221 [1980]). Under the Criminal Procedure Law, an arrest warrant may not issue until an accusatory instrument has been filed (CPL 120.20). "Thus, in New York once an arrest warrant is authorized, criminal proceedings have begun, the indelible right to counsel attaches and police may not question a suspect in the absence of an attorney" (*Harris,* 77 N.Y.2d at 440, citing *Samuels,* 49 N.Y.2d at 221–222). It would be the simplest of things for police to avoid the mandates of our Constitution and sidestep a defendant's indelible right to counsel by

visiting a defendant solely to effectuate a house arrest without a warrant. Surely that is not what we intended when this Court recognized the broader protections afforded under our Constitution (*People v. Bing,* 76 N.Y.2d 331, 339 [1990] [state right to counsel "far more expansive than the Federal counterpart"]).

Fourth Amendment jurisprudence and our independent analysis under our constitutional search and seizure and indelible right to counsel provisions dictate that defendant's statements were obtained in violation of his constitutional rights. Any other decision would make it too easy for police to avoid the warrant requirement and its attendant right to counsel. As my dissenting colleague points out, there are various ways in which the "doorway threshold" rule adopted by the majority undermines defendant's rights and potentially escalates the tension inherent in a visit from the police (Wilson, J., dissenting op. at 218–220, 66 N.Y.S.3d at 193–95, 88 N.E.3d at 351–53). An attempted warrantless home arrest places a defendant in the dangerous position of risking a forced entry if defendant refuses to open the door, or after initially opening and then attempting to close the door to retreat inside. These actions may raise suspicion or suggest the existence of exigent circumstance. Police may very well believe, for example, that evidence is being or about to be destroyed, that defendant is attempting to secure a weapon, placing the officers in imminent danger of bodily harm, or that defendant is attempting to flee (*see People v. McBride,* 14 N.Y.3d 440 [2010]; *People v. Riffas,* 120 A.D.3d 1438 [2d Dept. 2014]). A rule that prevents these situations benefits defendants, police, and society.

We must be mindful that the police interaction illustrated by this case implicates express constitutional provisions intended to protect the individual from government overreach and abuse of power—the right to be secure from unreasonable warrantless government intrusions of the home, and the indelible right to counsel—and, as such, requires robust judicial oversight. The Court has made it abundantly clear that our "independent body of search and seizure law" be read so as to "best promote[ ] the protection of the individual rights" of the People of the State of New York, and that our indelible right to counsel is a "cherished principle" entitled to "[t]he highest degree of judicial vigilance . . . to safeguard it" (*Harris,* 77 N.Y.2d at 438 [internal quotation marks, brackets and citations omitted]; *see also People v. Lopez,* 16 N.Y.3d 375, 380 [2011]; *People v. Jones,* 2 N.Y.3d 235, 240 [2004]).

This right to counsel must be kept inviolate. Otherwise, we would encourage warrantless home arrests and normalize behavior that both the State and Federal Constitutions expressly prohibit. The possibility of suppressing unlawfully obtained information is insufficient to offset countervailing forces seeking to secure inculpatory information. We have warned against this danger in the federal context where the right to counsel does not attach with the issuance of an arrest warrant (*Harris,* 77 N.Y.2d at 440). The practical effect of the federal rules "is that little incentive exists for police to evade *Payton* in the hopes of securing a statement" and "the incremental deterrent resulting from suppressing statements made after an illegal arrest in the home [is] minimal" (*Harris,* 77 N.Y.2d at 440).

Federal law does not dictate or guide the analysis of our broader protections under the State Consti-

tution (*People v. P.J. Video,* 68 N.Y.2d 296, 304 [1986] ["(T)his (C)ourt has adopted independent standards under the State Constitution when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens" (internal quotation marks omitted)]). In any case, federal jurisprudence does not support the conclusion that every warrantless threshold arrest is constitutionally permissible. Significantly, the specific question presented in defendant's appeal—whether a warrantless home arrest is permissible when the police summon a person to the door for the sole purpose of making an arrest—is an open question not resolved by United States Supreme Court precedent. Contrary to the majority's conclusion, *Kentucky v. King*, 563 U.S. 452 (2011) does not provide clear guidance as to how the Supreme Court would rule if the question were squarely presented to that Court (majority op. at 186).

In *King,* the Court considered the limited question of the circumstances under which police impermissibly create an exigency (563 U.S. at 471). Officers ended up outside the defendant's apartment immediately after a fellow officer observed a controlled drug buy involving a resident of a neighboring apartment. Smelling marijuana smoke, they banged on the apartment door, and announced themselves as police (*id.* at 456). Immediately afterwards they heard people and things moving inside the apartment, leading them to believe that evidence was about to be destroyed, at which point they forcibly entered by kicking in the door (*id.*). The Supreme Court held that the officers' conduct was entirely consistent with the Fourth Amendment (*id.* at 471). In contrast to *King,* here the police had probable

cause before they set out to defendant's apartment, and yet went directly to his home with the sole intention of making a warrantless arrest, without any suggestion of exigent circumstances. Their intent in avoiding the warrant requirement was not solely to make an inquiry, gather more evidence, or seek consent for a search (*id.* at 466–467), but to arrest defendant, take him to the precinct, and ask him questions outside the presence of a lawyer.[3]

In upholding the warrantless search in *King,* the Court recognized that the police may approach a suspect, even in the privacy of the person's home to ask questions, because "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private [person] might do" (*id.* at 469). However, when law enforcement's only reason to approach a person at the home is to make an arrest, the police are attempting something quite different from the uninvited knock of the average person. It is true that a suspect can lawfully ignore a police officer's knock and inquiry (*id.* at 469–470 ["(W)hether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obli-

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[3] The majority's claim that the Court has rejected the subjective approach and only considers the reasonableness of police conduct misses the point (majority op. at 186, 66 N.Y.S.3d at 169–70, 88 N.E.3d at 327–88). The undisputed purpose of the police visit to the defendant's home is an appropriate consideration here, just as it was in *King.* As Judge Wilson and I explain, viewed objectively, the circumstances did not justify the action, which was unreasonable and thus a violation of defendant's rights (*see King,* 563 U.S. at 464 citing *Brigham City,* 547 U.S. at 404; *see* Wilson, J., dissenting op. at 218, 66 N.Y.S.3d at 193–94, 88 N.E.3d at 351–52).

gation to open the door or to speak"]). In reality, it cannot be denied that a police officer's statement carries the force of an official command not easily disregarded. Of course, the presence of the police at one's home for any reason would cause concern or apprehension for anyone, but an officer seeking to make an arrest intensifies this natural reaction.

Furthermore, as the majority acknowledges (majority op. at 182, 66 N.Y.S.3d at 166–67, 88 N.E.3d at 324–25), there are federal circuit courts that have interpreted the Fourth Amendment to prohibit certain warrantless home arrests outside the home as *Payton* violations (*see Fisher v. City of San Jose,* 558 F.3d 1069, 1074–1075 [9th Cir. 2009 en banc] [defendant seized when police surrounded his home, even though arrest happened outside]; *United States v. Saari,* 272 F.3d 804, 807–808 [6th Cir. 2001] [defendant under arrest when cops knocked forcefully on door with guns drawn]; *United States v. Reeves,* 524 F.3d 1161, 1165 [10th Cir. 2008] [officers effectively commanding defendant to open door constituted an arrest]; *see also United States v. Allen,* 813 F.3d 76, 81 [2d Cir. 2016] [recognizing circuit courts holding officers may violate *Payton* without entering defendant's home]). These decisions are animated by the purposes of the Fourth Amendment to protect the individual's right to be secure in the home and free from potential abuse and deployment of coercive tactics that render the protections all but illusory.

If the police determine that securing a warrant is too time-consuming or impractical under the circumstances (not argued here), the police may wait for a defendant to exit the home. Of course, such a warrantless arrest is also subject to certain constitutional constraints (*see People v. De Bour,* 40 N.Y.2d 210, 222–223 [1976] [officers cannot ask pointed questions

of an individual without a founded suspicion that criminality is afoot, cannot forcibly stop and detain without reasonable suspicion, cannot arrest without probable cause]). So long as police action comports with the law, the question of where to execute an arrest is left to the discretion of the officials in charge.

III.

The police violated defendant's constitutional rights against a warrantless home arrest and his indelible right to counsel when they went to his home without a warrant for the sole purpose of arresting him, and effectuated the arrest in the absence of exigent circumstances. I dissent from the majority's suggestion that such conduct is both constitutionally permissible and a required outcome of our case law.

Whether this violation requires the reversal of defendant's conviction is a different question and one not properly before us on this appeal. In this case, because the courts below did not address the People's alternative grounds in support of defendant's conviction, the matter should be reversed and remitted to permit consideration of those arguments.[4]

WILSON, J. (dissenting)

Absent exigent circumstances, officers planning to arrest a suspect at home must obtain a warrant. The majority's analysis neither satisfies the Federal and State Constitutions nor serves the interests of New York citizens and law enforcement officers. Indeed, the precedents on which the majority relies "recognize that it would have been more prudent if

[4] Given my conclusion that the matter should be remitted, I do not opine on the merits of defendant's challenge to the persistent felony offender statute (Penal Law § 70.10).

the police obtained a warrant for defendant's arrest before going to his home" (*People v. McBride,* 14 N.Y.3d 440, 447 [2010]). Because the police planned to arrest him, did not obtain a warrant, and no exigent circumstances were present, Mr. Garvin's threshold arrest was unlawful and his case should be remanded to the Appellate Division to consider whether the fruits of that arrest were sufficiently attenuated to admit into evidence or whether any error in admitting them was harmless beyond a reasonable doubt.

I. *Payton v. New York* and the United States Constitution

In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court held that, in the absence of exigent circumstances, the Fourth Amendment prohibits law enforcement officials from making a warrantless and nonconsensual entry into a suspect's home to arrest him. Although *Payton* addressed one oft-reserved question—whether and under what circumstances federal law enforcement officers may enter the home of a suspect—it, and its failure to grapple squarely with the legacy of *United States v. Santana*, 427 U.S. 38 (1976), raised numerous others.[1] In *United States v. Allen*, 813 F.3d 76 (2d Cir. 2016), the United States Court of Appeals for the Second Circuit re-

[1] Among them: what constitutes a defendant's home, whether force or ruses of various descriptions can induce a defendant to leave it, how to determine the admissibility of statements made subsequent to a violation, and if its protections apply when a defendant either briefly exits his home and is pursued back into it or is in the home of a third party. "In following the rule enunciated in *Payton,* New York courts have had to resolve numerous issues that have arisen in the wake of its interpretation" (1–3 Barry Kamins, New York Search & Seizure § 3.04 [2017]).

solved two of the most vexing: where is the threshold, and whose position relative to it is determinative? For the reasons stated in its thorough opinion, which I would adopt in full, the Second Circuit concluded that "where law enforcement officers summon a suspect to the door of his home and place him under arrest while he remains within his home, in the absence of exigent circumstances, *Payton* is violated regardless of whether the officers physically cross the threshold" (*id.* at 88–89).[2]

The majority does not take issue with *Allen's* conclusion. Instead, it attempts to distinguish the facts of that case from those before us (majority op. at 182–183, 66 N.Y.S.3d at 166–68, 88 N.E.3d at 324–26). Dennis Allen, Jr. was arrested "at the front door" or "inside the threshold" of his home (*Allen,* 813 F.3d at 78, 79). Sean Garvin was arrested "at the threshold" or "in the doorway" of his (*People v. Garvin,* 130 A.D.3d 644, 645 [2d Dept. 2015]); he did not step into the hallway. Although the Appellate Division found, in language borrowed from a prior opinion, that Mr. Garvin "voluntarily emerged," there is nothing in its decision to indicate that he emerged *from the apartment and into the hall,* as opposed to from the recesses of the apartment to the door. In neither instance did law enforcement officers enter the apartment.

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[2] As the majority correctly points out, the Second Circuit did not go so far as to require a warrant before the police could arrest a suspect who voluntarily departed the home's confines and joined the police on the exterior of the threshold prior to her arrest (*Allen,* 813 F.3d at 78 ["if Allen had come out of the apartment into the street and been arrested there, no warrant would be required" (emphasis omitted)]).

I understand the majority to be saying that the factfinders concluded Mr. Allen was inside his apartment, beside the open door, where Mr. Garvin had advanced until he was standing between the doorjambs: his toes in the hallway; his heels in his home. Under the majority's rule, the threshold is the narrow area between the doorjambs, and a suspect who pierces the plane of the door with any part of his body, for any length of time, forgoes the protection of his home. Under its interpretation of the Appellate Division's findings, Mr. Garvin (however unwittingly) did exactly that.

We are bound by the findings of fact made by the Appellate Division. I am not bound, however, by the majority's interpretation of those findings, and I see nothing in the Appellate Division's choice of prepositions that constitutes a finding that the People met their burden to prove Mr. Garvin (or a portion of him) had crossed the threshold of his apartment. Even were I to assume that was the relevant threshold—a proposition I join Judge Rivera in doubting—the protections of the Federal and State Constitutions and the prospect of a life behind bars should not turn on the vagaries of a prepositional phrase. Those vagaries are amply illustrated in this case by the People's key witness, who testified that both he and the defendant were simultaneously standing "in the doorway"—an implausible scenario if that witness, like the majority, understood the phrase to mean precisely the space between the doorjambs, and one that suggests he, like most people, understood "in the doorway" to mean "near it," possibly in- or outside, or some of each.

Nor does a consultation of the record, which includes the following colloquy with that witness,

whose testimony the court credited, resolve the ambiguity:

"[Detective:] . . . we placed handcuffs on him at the doorway.

"[Defense:] Inside the apartment or outside the apartment?

"[Detective:] Inside the doorway.

"[Defense:] He had stepped out of his apartment?

"[The People]: Judge, I'm going to object.

"THE COURT: Counsel, rephrase it.

"[Defense:] When you say, 'inside the doorway', in the apartment or outside the apartment?

"[Detective:] Inside the doorway.

"[Defense:] Inside the doorway.

"[Detective:] He was standing at the doorway.

"[Defense:] Okay. And the handcuffs, detective, were placed on him when he was by the doorway?

"[Detective:] Yes."[3]

Thus, contrary to the majority, I understand the Appellate Division to have found Mr. Garvin was inside, rather than partially outside, his apartment

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[3] The arrest, furthermore, took place when the police first told Mr. Garvin he was under arrest—several seconds before he was handcuffed. In the words of the People's witness, "When I knocked on the door, he answered the door this time. I looked at him. He looked at me. I said, you're under arrest. He turned around, put his hands behind his back, and I handcuffed him." This version of the story further supports the suggestion that it is fair to understand the Appellate Division's finding Mr. Garvin was "in the doorway" to mean "just inside the doorway" rather than "on the sill." The witness does not describe Mr. Garvin stepping forward after opening the door, and it would be surprisingly aggressive for any person to open a door and advance on a trio of officers.

and thus subject to the protections of the Federal Constitution elaborated in *Allen.*[4] At the very least, there is no record evidence to support a finding that he was fully outside when arrested.

However, because the majority treats this case as one in which some fragment of the defendant's body exited his home before he was arrested, I note that nothing in today's decision precludes a lower court or a latter decision from adopting *Allen* when confronted by a case in which a defendant consented to an arrest while remaining entirely inside his home. Similarly, because no police officer crossed the threshold or otherwise conducted a search of Mr. Garvin's apartment, nothing in today's decision prevents a future court from announcing a rule that would suppress evidence seized during a consensual search after a warrantless threshold arrest.

II. The New York Constitution

The Court's disagreement over the present facts and their implication, as well as the at least three-way circuit split over how to apply *Payton* in similar circumstances (*see Allen,* 813 F.3d at 81), suggest it is time for us to consider whether the New York Constitution provides greater clarity to police officers, private citizens, and future litigants than the present federal rule, which implicates defendants in a high-stakes game of inches that they do not know they are playing. I believe that it should.

I would therefore go further than *Allen* and prohibit purposeful warrantless arrests of suspects who

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[4] In addition to *Allen's* persuasive force, we have an interest in ensuring our protections are no less than those guaranteed by the local federal courts.

are induced to leave their homes by the actions (be they direct or furtive, and however noncoercive) of the police. In other words, if the police plan to arrest someone who is at home, absent exigent circumstances, until they have an arrest warrant, they may not go to the person's door to arrest him or cause him to leave his home to arrest him outside of it.

As an initial matter, "we have not hesitated in the past to interpret article I, § 12 of the State Constitution independently of its Federal counterpart when necessary to assure that our State's citizens are adequately protected from unreasonable governmental intrusions" (*People v. Scott,* 79 N.Y.2d 474, 496–497 [1992]). In case after case, "this court has demonstrated its willingness to adopt more protective standards under the State Constitution when doing so best promotes 'predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens' " (*People v. Torres,* 74 N.Y.2d 224, 228 [1989], quoting *People v. P.J. Video,* 68 N.Y.2d 296, 304 [1986], and *People v. Johnson,* 66 N.Y.2d 398, 407 [1985]).

One of the most significant of those cases, despite our initial failure to anticipate the Supreme Court's holding in *Payton* (*see People v. Payton,* 45 N.Y.2d 300 [1978]), is *People v. Harris*, 77 N.Y.2d 434 (1991). That case held, as I would here, that "the Supreme Court's rule does not adequately protect the search and seizure rights of citizens of New York" and that our constitution provided greater protections than its federal counterpart to defendants subject to warrantless home arrests (*id.* at 437, 568 N.Y.S.2d 702, 570 N.E.2d 1051). It also instructed that "[s]tate courts, when asked to do so, are *bound* to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court" (*id.* [emphasis add-

ed]), as "the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy" (*Scott,* 79 N.Y.2d at 496). Mr. Garvin asks us to apply ours here.[5]

The application of the New York Constitution to the present case is affected by the principle of stare decisis. The majority points to four prior cases in which this Court has held that certain warrantless threshold arrests do not violate *Payton: People v. Minley*, 68 N.Y.2d 952 (1986), *People v. Reynoso*, 2 N.Y.3d 820 (2004), *People v. McBride*, 14 N.Y.3d 440 (2010), and *People v. Spencer*, 29 N.Y.3d 302 (2017).

None of those four cases, however, addresses the question Mr. Garvin raises. They deal, as the majority itself concedes (majority op. at 180, 66 N.Y.S.3d at 165–66, 88 N.E.3d at 323–24), only with the application of *Payton* and the Fourth Amendment. Because

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[5] The majority declines to address this argument on the ground that Mr. Garvin failed to raise the lawfulness of his arrest under the New York Constitution at the suppression hearing (majority op. at 185 n. 8). At the suppression hearing, Mr. Garvin's counsel expressly advised the Court that he was relying on the omnibus motion papers previously filed with the Court. Those papers expressly state: "The Defendant moves for a hearing to determine whether Defendant was improperly seized and unlawfully detained in violation of the Defendant's constitutional rights derived from both the United States Constitution, Fourth and Fourteenth Amendments, *New York State Constitution, Article [I], Section 12* " (emphasis added). Furthermore, Mr. Garvin maintained at the hearing that the violation of "both his federal and state constitutional rights" was specifically intended to circumvent his right to counsel. These arguments sufficed to preserve the issue for the review he now requests. As the majority believes the issue was not preserved, the question of whether our constitution affords more protection in this regard than its federal counterpart remains open.

they do not consider whether any matters peculiar to this state warrant greater protection under article I, § 12, I approach that inquiry as an issue of first impression. Even were our decisions in *Minley, Reynoso, McBride,* and *Spencer* to bear on today's issue, both "lessons of experience and the force of better reasoning" (*People v. Bing,* 76 N.Y.2d 331, 338 [1990]) would compel me to abandon that line of decisions.

As to the force of better reasoning, it is indisputable that none of the cases cited by the majority elaborate on how to apply *Payton* to threshold arrests. *Minley* and *Reynoso* are mere memoranda, devoid of any reasoning. *Minley* treats an issue the Appellate Division had concluded was "not properly preserved for appeal"; indeed, the Appellate Division "assume [d] . . . that the warrantless arrest was illegal under *Payton* " (*People v. Minley,* 112 A.D.2d 712, 712 [4th Dept. 1985]). *Reynoso* disposes in two sentences of disputed facts, without remanding for the Appellate Division's determination the possibility that a detective reached across the threshold to pull defendant out of his home (*People v. Reynoso,* 309 A.D.2d 769 [2d Dept. 2003])—a scenario that seems unlikely to comport with even a narrow reading of *Payton* or our application thereof in *People v. Levan*, 62 N.Y.2d 139 (1984); *but see People v. Ashcroft,* 33 A.D.3d 429, 429 (1st Dept. 2006) ("The police did not violate defendant's Fourth Amendment rights when they reached in and pulled him out as he stood in close proximity to his doorway, since, by his actions, defendant knowingly and voluntarily presented himself for public view"). *McBride* is about whether the police created the exigent circumstances they used to justify their entry, not threshold arrests, and occasioned both a two-Judge dissent and a cautionary

aside from the majority that anticipated the rule I suggest today (14 N.Y.3d at 449 [Pigott, J., dissenting] ["(T)he real issue is 'could the police, as required by the Fourth Amendment and legions of cases, have obtained a warrant prior to going to defendant's apartment when they clearly intended to effect an arrest?'"]). *Spencer,* as well as Mr. Spencer's brief, treated the *Payton* issue in that case as a footnote to the central contest over juror disqualification. Measured against the depth of analysis provided by the federal courts, and against fresh reasoning occasioned by the lessons of experience, the precedents on which the majority relies suggest a nearly weightless brand of stare decisis.

As to those lessons of experience, they demonstrate that, contrary to the majority and the Appellate Division's contention, the current rule is not clearly and easily understood. Perhaps because, as Supreme Court recently bemoaned, "[n]o New York case since *Payton* appears to have addressed the issue" of what constitutes a "threshold" (*People v. Mendoza,* 49 Misc.3d 1007, 1012 [Sup. Ct., N.Y. County 2015]), the current rule has failed to protect New York citizens from illegal searches (*People v. Kozlowski,* 69 N.Y.2d 761 [1987]; *People v. Riffas,* 120 A.D.3d 1438 [2d Dept. 2014]; *Mendoza,* 49 Misc. 3d 1007 [finding that police had violated the defendant's Fourth Amendment rights]; *see also People v. Correa,* 55 A.D.3d 1380 [4th Dept.2008]; *Reynoso,* 309 A.D.2d 769; *People v. Anderson,* 146 A.D.2d 638 [2d Dept. 1989] [declining to suppress evidence gathered by police who breached the threshold]). For the same reason, it has failed to safeguard the court system from constant appellate litigation (*see e.g. Kozlowski,* 69 N.Y.2d 761; *People v. Spencer,* 135 A.D.3d 608 [1st Dept. 2016]; *Garvin,* 130 A.D.3d 644; *Riffas,*

120 A.D.3d 1438; *People v. Pearson,* 82 A.D.3d 475 [1st Dept.2011]; *Correa,* 55 A.D.3d 1380; *People v. Rodriguez,* 21 A.D.3d 1400 [4th Dept. 2005]; *Reynoso,* 309 A.D.2d 769; *People v. Andino,* 256 A.D.2d 153 [1st Dept. 1998]; *Mauceri v. County of Suffolk,* 234 A.D.2d 350 [2d Dept. 1996]; *People v. Schiavo,* 212 A.D.2d 816 [2d Dept. 1995]; *People v. Francis,* 209 A.D.2d 539 [2d Dept. 1994]; *People v. Min Chul Shin,* 200 A.D.2d 770 [2d Dept. 1994]; *People v. Rosario,* 179 A.D.2d 442 [1st Dept. 1992]; *People v. Lewis,* 172 A.D.2d 775 [2d Dept. 1991]; *People v. Marzan*, 161 A.D.2d 416 [1st Dept. 1990]; *Anderson,* 146 A.D.2d 638; *People v. Brown,* 144 A.D.2d 975 [1st Dept. 1988]; *People v. Nonni,* 141 A.D.2d 862 [2d Dept. 1988]).

As this Court's first sustained consideration of the validity of threshold arrests, today's opinion may resolve some of that ambiguity by defining the threshold to mean only the narrow space between the doorjambs. But in doing so, it provides not only a uniform line to lower courts but also a better guide to those witnesses willing to tailor their testimony to the law. The rule the majority upholds invites both parties—but especially those parties better versed in the law—to engage in unverifiable he-said, he-said contests on the stand. Even for honest witnesses—and I assume the witnesses here were completely truthful—the rule presents defendants who may not wish to testify with an unpleasant dilemma and tests the precise spatial recall of participants in what is typically a tension-fraught situation where all parties are focused on their safety, not architectural niceties. Moreover, a clear rule can founder on everyday imprecisions of language, as illustrated by the difference the majority and I have about what the Appellate Division found here. A rule requiring po-

lice, in the absence of exigent circumstances, to obtain a warrant before (a) going to a home for the purpose of arresting a suspect or (b) causing that suspect to enter or cross the threshold, offers a far brighter line (*see United States v. Holland,* 755 F.2d 253, 259 [2d Cir. 1985, Newman, J., dissenting] ["I appreciate the majority's preference for a 'clearly-defined boundary line' that will be readily apparent to an officer in the field. However, that line already exists for cases such as this: the line between arrests with a warrant and those without a warrant"]). Although the majority criticizes that alternative for looking to the subjective intent of the police (majority op. at 184, 66 N.Y.S.3d at 168–69, 88 N.E.3d at 326–27), it will prove easier to verify whether the police visited a house to make an arrest or merely to further an investigation than whether a suspect's nose crossed the threshold (*see United States v. Titemore,* 335 F. Supp. 2d 502 [D. Vt. 2004]). The cases the majority cites discourage investigations into whether individual officers acted in bad faith or with an invidious purpose (*Kentucky v. King,* 563 U.S. 452 [2011]; *Whren v. United States,* 517 U.S. 806 [1996]); far from requiring that kind of subjective analysis, a rule declaring purposeful at-home arrests absent exigent circumstances unreasonable searches and seizures under the New York Constitution takes an objective view of the circumstances. The Second Circuit had no difficulty establishing police officers in *Allen* planned to arrest the defendant (813 F.3d at 78 ["four Springfield police officers went to Allen's apartment with the pre-formed plan to arrest him" (internal quotation marks omitted)]).

The present rule is not only subject to confusion and manipulation, but also has practical repercussions that subvert both the ideals of the New York

bill of rights and the goals of our law enforcement officers.

Adherence to the majority's rule "involves collision with a prior doctrine more embracing in its scope" (*People v. Peque,* 22 N.Y.3d 168 [2013]). As Judge Rivera explains in her dissent, "the safeguards guaranteed by the State's Right to Counsel Clause are unique . . . and far more expansive than the federal counterpart" (77 N.Y.2d at 439). Their protection requires the "highest degree of judicial diligence" (*id.*). New York police "have every reason to violate *Payton* . . . because doing so enables them to circumvent the accused's indelible right to counsel," which would attach were an arrest warrant obtained (*id.* at 440). Indeed, the evidence indicated that the police were motivated by just such considerations in this case. Even though they had developed probable cause for Mr. Garvin's arrest by 2:45 p.m. on the day of the arrest, they did not attempt to secure a warrant or stake out his house. Instead, to question him in the absence of an attorney and while his girlfriend's presence in police custody—secured through deceitful statements by a detective—might motivate a confession, they elected to effect a warrantless threshold arrest. Here as in *Harris,* "this interplay between the right to counsel rules established by New York law and the State's search and seizure provisions . . . provides a compelling reason for deviating" from the federal rule (*id.*).

When the police call on a suspect's home with the intention of making an arrest, one of several scenarios can unfold. In most instances, that suspect will acquiesce to the police's simple request to leave the home—an exchange that results in peaceful arrests but operates in derogation of the right to counsel and, in some instances, as an unwitting waiver of the

suspect's right to avoid unreasonable searches of that home (*see e.g. Allen,* 813 F.3d at 79 ["Allen, who had appeared at the door in his stocking feet, asked whether he could retrieve his shoes and inform his 12–year–old daughter, who was upstairs in the apartment, that he would be leaving with the officers. The officers advised Allen that he could not return upstairs unless they accompanied him, which they did"]; *Nonni,* 141 A.D.2d at 862 ["Detective McCormack then announced from his position outside the doorway that the defendant was under arrest. The defendant responded by stating, 'Let's take it off the street'. The defendant thereupon turned and walked into the house with the police following him"]; *Rosario,* 179 A.D.2d at 442 ["The police officers identified themselves and arrested defendant at the doorway of his apartment. Defendant, who wore nothing above the waist, was told to get a shirt. The police officers followed defendant into his apartment as he went to retrieve his shirt"]).

In other instances, law enforcement officers will resort to a variety of ruses to achieve the same result. The lower courts have upheld arrests subsequent to noncoercive subterfuges that, although validated by this Court's memoranda upholding *Reynoso* and *People v. Roe*, 73 N.Y.2d 1004 (1989), hardly instill a community's trust in the police (*see e.g. People v. Robinson,* 8 A.D.3d 131 [1st Dept. 2004] [police fabricated a noise complaint]; *People v. Hollings,* NYLJ, June 15, 2004 at 17, col 2, 2004 N.Y.L.J. LEXIS 2511 [Sup. Ct., Bronx County 2004] [police asked the defendant to help solve a fictitious crime]; *Reynoso,* 309 A.D.2d 769 [police had defendant's mother wake him at midnight because a fictitious friend was suffering an undisclosed emergency]; *People v. Williams,* 222 A.D.2d 721 [2d Dept. 1995] [po-

lice said that there had been an accident involving defendant's vehicle]; *People v. Gutkaiss,* 206 A.D.2d 628 [3d Dept. 1994] [police had defendant's relative call about construction work]; *People v. Coppin,* 202 A.D.2d 279 [1st Dept. 1994] [police officer said she might go out with defendant]). They have also derailed what should have been clean convictions because the police used impermissibly coercive means (*see e.g. People v. Fernandez,* 158 Misc. 2d 165 [Sup.Ct., N.Y. County 1993] [police impersonated a parole officer conducting a residence check]; *see also People v. Roe,* 136 A.D.2d 140 [3d Dept. 1988] ["if police had falsely informed defendant that there was a gas leak requiring his evacuation, his departure from his home would be no more voluntary than it would be had the police surrounded the premises and ordered him out with guns drawn"]).

In a final category of instances, the suspect will respond to the police's arrival either by refusing to answer or by opening and then attempting to close the door—the other horn of the "unfair dilemma" confronting suspects subject to warrantless home arrests (*United States v. Reed,* 572 F.2d 412, 423 n. 9 [2d Cir. 1978]). Whereas officers equipped with an arrest warrant would have more authority in the eyes of their suspect and the clear right to enter the house if the situation required, the majority's rule creates unfortunate uncertainties for all parties to the encounter. On some occasions, that uncertainty tempts the officers into compromising their case by effecting an unlawful arrest (*see e.g. Riffas,* 120 A.D.3d at 1438–1439 [when defendant, who had never crossed the threshold of his apartment, attempted to shut the door, the police violated his *Payton* rights by pushing the door open, pulling the defendant into the public hallway, and arresting him]). On others,

the mounting frustration of officers trapped outside the threshold presents a danger to the suspect, bystanders, and the arresting officers (*see e.g. McBride,* 14 N.Y.3d at 444 [police, frustrated by defendant's refusal to open the door, climbed his fire escape and knocked, guns drawn, on the window, sending the defendant's guest crying to the door]). This scenario also presents a danger to the People's case, as the police, who cannot enter the home without a warrant and "cannot by their own conduct create an appearance of exigency" (*Levan,* 62 N.Y.2d at 146), have provided notice to a suspect who now has an opportunity to flee, destroy physical evidence inside the home, or even arm himself in anticipation of resisting arrest.

None of these scenarios is desirable. They, and a variety of other questions occasioned by the current rule (*see* at 211 n. 1), can be avoided by creating a warrant requirement for the purposeful at-home arrests of suspects.[6] That requirement would protect the rights of citizens from abuse, our law enforcement officers from the threat of escalating circumstances, and the People from having a carefully planned case upended by credible testimony that a defendant had been securely inside his threshold or an officer had been, even inadvertently, out of bounds. It would not, because of the exigent circum-

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[6] The rule would not prevent the police from staking out a home and conducting a public arrest based on probable cause after a suspect exits that home without the State's prompting, although officers not wishing to wait could instead obtain an arrest warrant. It also would not prevent the police from effecting the unplanned arrest of a person whose home they approached for the purposes of making an inquiry (*cf. King,* 563 U.S. 452; *Allen,* 813 F.3d at 84–85 [discussing *United States v. Titemore,* 437 F.3d 251 (2006)]).

stances exception and the relative ease of securing an arrest warrant when probable cause exists, unduly hamper the important work of our police forces.

Although the People suggest they can meet their burden of demonstrating exigent circumstances justified the warrantless arrest in this case, there is no evidence to suggest the police faced an "urgent need" to apprehend their suspect (*McBride,* 14 N.Y.3d at 446, quoting *United States v. Martinez–Gonzalez,* 686 F.2d 93, 100 [2d Cir. 1982]). Any speculative danger that Mr. Garvin might commit another robbery, use a weapon, or attempt to flee could have been prevented by the simple expedient of stationing an officer outside his home while an arrest warrant was obtained. Any risk that he would realize the game was up and destroy the evidence was occasioned by the police and their scheme to bring Mr. Garvin's girlfriend and her daughter to the station as a form of leverage over the defendant. There is no record support for the conclusion that the police were faced with an exigency other than that which they created. To conclude otherwise would be to allow the exception to swallow the proposed rule. Applying that rule to the present circumstances, Mr. Garvin's arrest violated the State Constitution.

As a result, I would reverse the order of the Appellate Division and remit the case to that Court to determine whether the People have established that Mr. Garvin's statement, and the money recovered at the precinct, were attenuated from the violation or that the hearing court's refusal to suppress them was harmless beyond a reasonable doubt.

Chief Judge DIFIORE and Judges GARCIA and FEINMAN concur; Judge FAHEY dissents in part in an opinion; Judge RIVERA dissents in an opinion in

which Judge WILSON concurs, Judge WILSON in a separate dissenting opinion.

Order affirmed.

APPENDIX B

The People of the State of New York,
Respondent
v.
Sean Garvin, Also Known as Anthony Garvin,
Appellant.

Supreme Court, Appellate Division,
Second Department, New York
1543/11, 2012-09698

July 1, 2015

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Lewis, J.), rendered September 20, 2012, convicting him of robbery in the third degree (four counts) and attempted robbery in the third degree, after a nonjury trial, and imposing sentence. The appeal brings up for review the denial, after a hearing, of those branches of the defendant's omnibus motion which were to suppress physical evidence and his postarrest statements to law enforcement officials.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, his arrest did not violate his rights under *Payton v. New York* (445 U.S. 573 [1980]) and *People v. Levan* (62 NY2d 139, 144 [1984]). "The rule announced in *Payton* and applied in *Levan* is clear and easily understood: a person enjoys enhanced constitutional protection from a warrantless arrest in the interior of the home, but not on the threshold itself or the exterior" (*People*

v. Gonzales, 111 AD3d 147, 153 [2013]; *see Payton v. New York*, 445 U.S. at 590; *People v. Reynoso*, 2 NY3d 820, 821 [2004]). As pertinent to this case, where the defendant lived in the upstairs apartment of a building containing two separate apartments, there is clearly a "distinction between homes and common areas such as halls and lobbies . . . which are not within an individual tenant's zone of privacy" (*Mauceri v. County of Suffolk*, 234 AD2d 350, 350-351 [1996], citing *United States v. Holland*, 755 F2d 253, 255-256 [2d Cir 1985]; *see People v. Funches*, 89 NY2d 1005, 1007 [1997]; *People v. Allen*, 54 AD3d 868, 869 [2008]).

Here, the hearing evidence demonstrated that the police entered the building the defendant lived in through the front door. Thereafter, they passed through a vestibule before climbing the stairs to the defendant's upstairs apartment. One of the officers knocked on the closed apartment door, the defendant opened it, and the officer effectuated the arrest in the doorway. The arresting officer did not go inside the defendant's apartment (*cf. People v. Gonzales*, 111 AD3d at 148-153), or reach in to pull the defendant out (*cf. People v. Riffas*, 120 AD3d 1438 [2014]). Since the defendant was arrested at the threshold of his apartment, after he "voluntarily emerged [and thereby] surrendered the enhanced constitutional protection of the home" (*People v. Gonzales*, 111 AD3d at 152), his warrantless arrest did not violate *Payton* and *Levan* (*see People v. Reynoso*, 2 NY3d at 821; *People v. Hansen*, 290 AD2d 47, 52-53 [2002], *affd* 99 NY2d 339 [2003]). Accordingly, the hearing court properly denied those branches of the defendant's omnibus motion which were to suppress physical evidence and his postarrest statements to law enforcement officials as the fruits of an illegal arrest

(*see generally Wong Sun v. United States*, 371 U.S. 471, 488 [1963]).

The Supreme Court providently exercised its discretion in sentencing the defendant as a persistent felony offender (*see* Penal Law § 70.10 [2]; *People v. Boney*, 119 AD3d 701, 702 [2014]; *People v. Dixon*, 107 AD3d 735, 736 [2013]; *People v. Bazemore*, 100 AD3d 915 [2012]). The court's conclusion that the nature of the defendant's criminal conduct, his history, and his character warranted extended incarceration and lifetime supervision is supported by the record (*see People v. Dixon*, 107 AD3d at 736; *People v. Bazemore*, 100 AD3d at 915).

The defendant's remaining contentions are without merit or need not be reached in light of our determination.

Skelos, J.P., Balkin and Maltese, JJ., concur.

Hall, J., dissents, and votes to reverse the judgment, on the law and the facts, grant those branches of the defendant's omnibus motion which were to suppress physical evidence and his postarrest statements to law enforcement officials, and order a new trial, with the following memorandum:

"On a motion by a defendant to suppress physical evidence, 'the People have the burden of going forward to show the legality of the police conduct in the first instance' " (*People v. Spann*, 82 AD3d 1013, 1014 [2011], quoting *People v. Whitehurst*, 25 NY2d 389, 391 [1969]). Upon my review of the record, I find that the People failed to meet this burden. Accordingly, I respectfully dissent.

At the suppression hearing, the People failed to present sufficient evidence to show, in the first in-

stance, that the police entry into the building where the defendant lived was lawful. There was no evidence presented as to how the police officers entered the building. Although a police officer testified that the building was a "two-family house," there was no testimony that the police officers believed the building to be a two-family house prior to entering it. Furthermore, there was no evidence that the subject building was in any way distinguishable from a one-family house. Based on my reading of the hearing testimony, it can be reasonably inferred that the subject police officer testified that the building where the defendant lived was a "two-family house" based on his observations from inside the building, not from its outward appearance.

Under these circumstances, it is my opinion that the People failed to meet their burden of going forward to show the legality of the police conduct in the first instance. That is, the People failed to show that the police entry into the building where the defendant lived was lawful.

Accordingly, I find that those branches of the defendant's omnibus motion which were to suppress physical evidence and his postarrest statements to law enforcement officials should have been granted (*see People v. Garriga*, 189 AD2d 236 [1993]). I further conclude that the error described herein was not harmless beyond a reasonable doubt (*see People v. Alston*, 122 AD3d 934, 936 [2014]).

APPENDIX C

Court of Appeals of New York

The People of the State of New York,
Respondent,
v.
Michael E. Prindle,
Appellant.

Argued June 1, 2017
Decided June 29, 2017

Wilson, J.

"This appeal presents another *Apprendi* challenge to New York's discretionary persistent felony offender sentencing scheme. The primary issue before us is whether, in light of [*Alleyne v. United States* (133 S. Ct. 2151 [2013])], this sentencing scheme violates *Apprendi* [*v. New Jersey* (530 U.S. 466 [2000])] and defendant's due process and Sixth Amendment rights. We again uphold the constitutionality of New York's discretionary persistent felony offender sentencing scheme and further hold that defendant's constitutional rights were not violated" (*People v. Quinones*, 12 NY3d 116, 119 [2009]).

I.

The Sixth and Fourteenth Amendments guarantee criminal defendants in state courts "the right to a speedy and public trial, by an impartial jury." To satisfy that right, the People must prove each element of a crime beyond a reasonable doubt. Among those elements is any fact—other than one admitted by the defendant or involving the mere fact of a prior felony

conviction (*Almendarez-Torres v. United States*, 523 U.S. 224 [1998])—that has the effect of increasing the prescribed range of penalties to which a defendant is exposed (*see Apprendi*, 530 U.S. at 489-490). For nearly two decades, the United States Supreme Court has applied the *Apprendi* rule in cases involving capital punishment (*Hurst v. Florida*, 136 S. Ct. 616 [2016]; *Ring v. Arizona*, 536 U.S. 584 [2002]), broad judicial discretion to find aggravating factors (*Cunningham v. California*, 549 U.S. 270 [2007]; *Blakely v. Washington*, 542 U.S. 296 [2004]), the federal sentencing guidelines (*United States v. Booker*, 543 U.S. 220 [2005]), and mandatory minimum sentences (*Alleyne*, 133 S. Ct. 2151).

Each successive decision of the Supreme Court has brought renewed challenges to the constitutionality of New York's persistent felony offender statute. From the first of those challenges, we have held that the statute (Penal Law § 70.10 [1] [a]) falls within the exception provided by *Almendarez-Torres*, and thus outside the scope of the *Apprendi* rule, because it exposes defendants to an enhanced sentencing range based only on the existence of two prior felony convictions (*People v. Giles*, 24 NY3d 1066 [2014]; *People v. Battles*, 16 NY3d 54 [2010]; *People v. Quinones*, 12 NY3d 116 [2009]; *People v. Rivera*, 5 NY3d 61 [2005]; *People v. Rosen*, 96 NY2d 329 [2001]).[1] As we have consistently explained, the existence of those prior convictions—each the result of either a

[1] Although an "especially long and disturbing history of criminal convictions" is one factor a judge may consider in determining where in the expanded range to sentence a defendant (*Rivera*, 5 NY3d at 70), no assessment of the nature of the crimes underlying the prior convictions is called for by the initial persistent felony offender adjudication.

guilty plea or a jury verdict—is the "*sole determinant* of whether a defendant is subject to recidivist sentencing as a persistent felony offender" (*Rivera*, 5 NY3d at 66, citing *Rosen*, 96 NY2d at 335). Only after the existence of those prior convictions is established and the maximum permissible sentence raised does Supreme Court have "the discretion to choose *the appropriate sentence within a sentencing range prescribed by statute*" (*Quinones*, 12 NY3d at 129; *see* Penal Law § 70.10 [2]).[2]

"The court's opinion is, of course, subject to appellate review, as is any exercise of discretion. The Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident" and reduce it in the interest of justice to a sentence within the statutory range fixed by the legislature for the crime of conviction, without regard to the persistent felony offender enhancement (*Rivera*, 5 NY3d at 68-69). "In this way, the Appellate Division can and should mitigate inappropriately severe applications of the statute" (*id.*).

In other words, the statute mandates a two-part process: in step one, the court adjudicates the defendant a persistent felony offender if the necessary

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[2] Persistent felony offender statutes that require a judge to rely on traditional sentencing factors before exposing a defendant to an expanded sentencing range impermissibly infringe upon the province of the jury (*Cunningham*, 549 US at 290). However, *Apprendi* and its successors uniformly uphold sentencing laws that allow for such discretion *after* the defendant is determined to be eligible for the expanded sentencing range (*see e.g. Alleyne*, 133 S Ct at 2163; *Blakely*, 542 US at 309; *Apprendi*, 530 US at 481). Our Penal and Criminal Procedure Laws, as construed by *Rosen*, *Rivera* and their progeny, outline precisely such a law.

and sufficient fact of the two prior convictions is proved beyond a reasonable doubt, thereby exposing him to the sentencing range applicable to such offenders; in step two, it evaluates what sentence is warranted and sets forth an explanation of its opinion on that question for the record (*see* Penal Law § 70.10 [2]; *Rivera,* 5 NY3d at 6).

Although *Rivera* and several of our cases following it include dissents questioning the soundness of our construction of New York's persistent felony offender statute (*Giles*, 24 NY3d at 1073-1076 [Abdus-Salaam, J., concurring in part and dissenting in part]; *Battles*, 16 NY3d at 59-68 [Lippman, Ch. J., dissenting in part]; *Rivera*, 5 NY3d at 71-76 [Kaye, Ch. J., dissenting]; *Rivera*, 5 NY3d at 76-83 [Ciparick, J., dissenting]), that construction has withstood both Sixth Amendment scrutiny and the test of time.[3]For the reasons elaborated in our prior cases and the principle of stare decisis, our construction withstands Mr. Prindle's suit as well.

II.

In addition to asking us to discard our well-settled construction of the persistent felony offender statute established in *Rosen*, *Rivera*, *Quinones*, *Battles*, and *Giles* (a decision that would require us to strike down the statute as unconstitutional and hold the sentence at issue illegal), Mr. Prindle argues that

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[3] Even the detractors of our construction of the statute admit that the statute, as construed by this Court, is unquestionably constitutional (*Rivera*, 5 N.Y.3d at 72, 800 N.Y.S.2d 51, 833 N.E.2d 194 [Kaye, Ch. J., dissenting] ["I agree that the statutory scheme the Court describes would pass constitutional muster"]; *State v. Bell*, 283 Conn. 748, 808–809, 931 A.2d 198, 234 [2007] ["the majority's construction of the New York statute places it squarely outside the *Apprendi* proscription"]).

the Supreme Court's recent extension of *Apprendi* to increases in the mandatory minimum of a sentencing range requires us to declare that the statute, even as construed in our prior case law, violates the Sixth Amendment. His argument is unavailing because the persistent felony offender statute never increases the mandatory minimum sentence to which a persistent felony offender is exposed. Instead, persistent felons are subject to the same mandatory minimum as non-recidivist offenders guilty of the same crime.

In *Alleyne v. United States*, the Supreme Court applied *Apprendi* and remanded for resentencing the case of a defendant who was subjected to an increased, mandatory minimum term of imprisonment based on a judicial finding that he had brandished, rather than merely used or carried, a firearm in relation to a crime of violence (*Alleyne*, 133 S. Ct. at 2155-2156; 18 USC § 924 [c] [1] [A]). Overruling *Harris v. United States* (536 U.S. 545 [2002]), which had limited *Apprendi* to cases increasing the maximum sentence, the Court held that "a fact increasing either end of the [sentencing] range produces a new penalty and constitutes an ingredient of the offense" that must be proved to a jury beyond a reasonable doubt (*Alleyne*, 133 S. Ct. at 2160).

New York's persistent felony offender statute, however, does not increase the mandatory *minimum* sentence for defendants determined to be persistent felony offenders. After determining, on the sole basis of the predicate felonies, that a defendant is to be adjudicated a persistent felony offender, a sentencing court may choose to sentence that defendant to at least 15 years in prison but also retains "its discretion to hand down a sentence as if no recidivism finding existed" (*Rivera*, 5 NY3d at 68; Penal Law § 70.10 [2] [instructing judges that they *may* impose

an A-I sentence]). Moreover, after a defendant has been "adjudicated as a persistent felony offender" during step one, "the People retain the burden to show that the defendant deserves the higher sentence" (*Rivera*, 5 NY3d at 68). Thus, even though Mr. Prindle is a persistent felony offender, the minimum sentence he could have received has never changed. Although a judge, in sentencing a persistent felony offender, is limited to sentences in a non-continuous range composed of both a lower register (the sentence authorized by Penal Law §§ 70.00, 70.02, 70.04, 70.06 or 70.80 [5] for the crime of which the defendant stands convicted) and an upper one (the sentence authorized by that section for a class A-I felony, or between 15 and 25 years to life), the floor of that expanded range remains—as the sentencing court in this case recognized—the floor faced by offenders who have not been adjudicated persistent felony offenders (*see Portalatin v. Graham*, 624 F3d 69, 89 n 12 [2010]).[4]

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[4] Mr. Prindle makes much of the discontinuity between the sentencing range's two registers. Such discontinuities, however, are not unique to New York's persistent felony offender statute, are of no constitutional moment, and have been approved in previous *Apprendi* contexts. The range for persistent felony offenders in New York—the perigee and "apogee of potential sentences that are authorized based on factual predicates obtained in compliance with the Sixth Amendment: those found by the jury, those admitted by the defendant, and findings of recidivism" (*Portalatin*, 624 F3d at 88)—resembles the range for offenders subject to the permissible portion of the California determinate sentencing law at issue in *Cunningham*, which (as relevant) invited judges to exercise their discretion in deciding whether to sentence offenders to a lower term sentence of six years or a higher term sentence of 12 years, but did not empower them to sentence offenders to any term in between (*Cunningham*, 549 US at 278). The sentencing scheme in *Cunning-*

In attempting to apply *Alleyne* to the facts of this case, Mr. Prindle contends that judges sentencing defendants in accordance with the New York persistent felony offender statute are engaged in not a two- but a three-step process. In step one, the court relies on prior convictions to determine whether a defendant is a persistent felony offender; in step two, it relies on "the history and character of the defendant and the nature and circumstances of his [or her] criminal conduct" (Penal Law § 70.10 [2]) to form an opinion about whether that defendant should be sentenced as a non-recidivist or as a persistent felony offender; and, in step three, it relies on traditional sentencing factors to announce a sentence within whichever range was dictated by the results of step two. It is at the end of step two, on this view, that judicial fact-finding has impermissibly increased the minimum sentence to 15 years to life.

As we have repeatedly construed New York's persistent felony offender statute, it calls for sentencing courts to proceed in two steps, not three (*see Rivera*, 5 NY3d at 64 [explaining "the two-part nature of the proceeding"]). Mr. Prindle is attempting to create a Sixth Amendment violation where one does not exist by artificially cleaving step two into distinct pieces. What Mr. Prindle treats as steps two and three—although they may occur on different days—are really a single inquiry: where within the expanded range authorized by step one the actual sentence should fall. As we explained in *Rivera*, "[i]n practical terms, the legislative command that sentencing

ham was not struck down on that basis. Accordingly, we respect the legislature's power to prescribe an appropriate sentencing range and consider this equivalent to a case in which that range's two registers were overlapping or adjacent to one another.

courts consider the defendant's 'history and character' and the 'nature and circumstances' of the defendant's criminal conduct merely makes explicit what sentencing courts have always done in deciding where, within a range, to impose a sentence . . . The practice . . . falls squarely within the most traditional discretionary sentencing role of the judge" (*Rivera*, 5 NY3d at 69; *see id.* at 71 [reiterating that "the requirement that the sentencing justice reach an opinion as to the defendant's history and character is merely another way of saying that the court should exercise its discretion"]; *Giles*, 24 NY3d at 1071-1072 [Smith, J., concurring]; *Quinones*, 12 NY3d at 130; *Rosen*, 96 NY2d at 335).

Although the judge in this case announced that he planned to sentence Mr. Prindle within the upper register of the expanded range before hearing argument about where within that register his precise sentence should fall, his decision to be transparent about the court's intentions did not trespass on the Sixth Amendment. Nor was either the sentencing court or the Appellate Division prohibited from later deciding a sentence within the lower register would be the more appropriate punishment. In short, the minimum sentence did not increase because the lower courts always retained the discretion to sentence defendant "as if no recidivism finding existed" (*Rivera*, 5 NY3d at 68).

Even were Mr. Prindle correct in characterizing New York's persistent felony offender statute as increasing the sentencing floor for persistent felony offenders, that increase would not be the result of impermissible judicial fact-finding. The increase in the floor to 15 years—like the increase in the ceiling to life—would be based solely on the existence of two prior felony convictions. Indeed, as *Alleyne* is a mere

application of the *Apprendi* rule (*Hurst*, 136 S. Ct. at 621) and as its central contention is that there is "no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum" (*Alleyne*, 570 U.S. at —, 133 S. Ct. at 2163)—or, to put it another way, to distinguish *Apprendi* from *Alleyne*—it follows that the same construction that shelters our persistent felony offender regime from *Apprendi* would also save it from the latter case.

III.

For the foregoing reasons, we reaffirm our construction of the persistent felony offender statute and our conclusion that the statute falls squarely within the exception afforded by *Almendarez-Torres*.

We encourage sentencing courts and all parties engaged in these determinations to be careful to apply the persistent felony offender statute as we have construed it in *Rivera* and *Quinones*, a construction that is also thoroughly set out in the Second Circuit's opinion in *Portalatin v. Graham* (624 F3d 69 [2010], *supra*).

The sentencing court in this case followed the statutory procedure in determining that Mr. Prindle is, and should ultimately be sentenced as, a persistent felony offender. Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur; Judges Fahey and Feinman taking no part.

Order affirmed.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

● The Fourth Amendment to the United States Constitution provides:

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.

* * *

● The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * *

● New York Penal Law § 70.10(2) provides:

2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and

circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04, 70.06 or subdivision five of section 70.80 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

* * *

● New York Criminal Procedure Law § 400.20 provides:

1. Applicability. The provisions of this section govern the procedure that must be followed in order to impose the persistent felony offender sentence authorized by subdivision two of section 70.10 of the penal law. Such sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest.

2. Authorization for hearing. When information available to the court prior to sentencing indicates that the defendant is a persistent felony offender, and when, in the opinion of the court, the available information shows that a persistent felony offender sentence may be warranted, the court may order a hearing to determine (a) whether the defendant is in

fact a persistent felony offender, and (b) if so, whether a persistent felony offender sentence should be imposed.

3. Order directing a hearing. An order directing a hearing to determine whether the defendant should be sentenced as a persistent felony offender must be filed with the clerk of the court and must specify a date for the hearing not less than twenty days from the date the order is filed. The court must annex to and file with the order a statement setting forth the following:

(a) The dates and places of the previous convictions which render the defendant a persistent felony offender as defined in subdivision one of section 70.10 of the penal law; and

(b) The factors in the defendant's background and prior criminal conduct which the court deems relevant for the purpose of sentencing the defendant as a persistent felony offender.

4. Notice of hearing. Upon receipt of the order and statement of the court, the clerk of the court must send a notice of hearing to the defendant, his counsel and the district attorney. Such notice must specify the time and place of the hearing and the fact that the purpose of the hearing is to determine whether or not the defendant should be sentenced as a persistent felony offender. Each notice required to be sent hereunder must be accompanied by a copy of the statement of the court.

5. Burden and standard of proof; evidence. Upon any hearing held pursuant to this section the burden of proof is upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasona-

ble doubt by evidence admissible under the rules applicable to the trial of the issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.

6. Constitutionality of prior convictions. A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the Constitution of the United States may not be counted in determining whether the defendant is a persistent felony offender. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement of the court on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

7. Preliminary examination. When the defendant appears for the hearing the court must ask him whether he wishes to controvert any allegation made in the statement prepared by the court, and whether he wishes to present evidence on the issue of whether he is a persistent felony offender or on the question of his background and criminal conduct. If the defendant wishes to controvert any allegation in the statement of the court, he must specify the particular allegation or allegations he wishes to controvert. If he wishes to present evidence in his own behalf, he

must specify the nature of such evidence. Uncontroverted allegations in the statement of the court are deemed evidence in the record.

8. Cases where further hearing is not required. Where the uncontroverted allegations in the statement of the court are sufficient to support a finding that the defendant is a persistent felony offender and the court is satisfied that (a) the uncontroverted allegations with respect to the defendant's background and the nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender, and (b) the defendant either has no relevant evidence to present or the facts which could be established through the evidence offered by the defendant would not affect the court's decision, the court may enter a finding that the defendant is a persistent felony offender and sentence him in accordance with the provisions of subdivision two of section 70.10 of the penal law.

9. Cases where further hearing is required. Where the defendant controverts an allegation in the statement of the court and the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, or where the uncontroverted allegations with respect to the defendant's history and the nature of his prior criminal conduct do not warrant sentencing him as a persistent felony offender, or where the defendant has offered to present evidence to establish facts that would affect the court's decision on the question of whether a persistent felony offender sentence is warranted, the court may fix a date for a further hearing. Such hearing shall be before the court without a jury and either party may introduce evidence with respect to the

controverted allegations or any other matter relevant to the issue of whether or not the defendant should be sentenced as a persistent felony offender. At the conclusion of the hearing the court must make a finding as to whether or not the defendant is a persistent felony offender and, upon a finding that he is such, must then make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted. If the court both finds that the defendant is a persistent felony offender and is of the opinion that a persistent felony offender sentence is warranted, it may sentence the defendant in accordance with the provisions of subdivision two of section 70.10 of the penal law.

10. Termination of hearing. At any time during the pendency of a hearing pursuant to this section, the court may, in its discretion, terminate the hearing without making any finding. In such case, unless the court recommences the proceedings and makes the necessary findings, the defendant may not be sentenced as a persistent felony offender.