No. 17-1320

IN THE

Supreme Court of the United States

SEAN GARVIN,

Petitioner,

v.

NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The order of the New York Court of Appeals, affirming defendant's judgment of conviction is published at 30 N.Y.3d 174, 88 N.E.3d 319 (N.Y. 2017) (Pet. App. 1a-64a). The order is reprinted in Petitioner's appendix at p. 1a.

The decision of the Appellate Division is reported at 130 A.D.3d 644, 13 N.Y.S.3d 215 (App. Div. 2015) (Pet. App. 65a -68a).

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

The Sixth Amendment of the United States Constitution states:

> 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.

STATEMENT OF THE CASE

Introduction

During a seven-day period in January, 2011, Sean Garvin[1] robbed four banks in Queens, New York, and attempted to rob another bank. In each robbery, Garvin handed over a note demanding money and threatened to shoot the teller if he or she did not comply. In two of the robberies, Garvin put his hand in his pocket, leading the tellers to believe that he had a gun. Garvin's fingerprints were found on one of the demand notes, all of the notes were in his handwriting, and his DNA was on a scarf left behind outside one of the banks by the robber. After his arrest, Garvin made oral and written statements admitting his guilt to each of the robberies. Police recovered $542 from Garvin's pocket when he was searched at the police precinct.

The lower state courts subsequently found as fact that at the time of Garvin's warrantless arrest, Garvin stood "in the doorway" of his apartment and had "voluntarily emerged" from his home. The New York Court of Appeals adopted those findings, interpreting them to mean, as a factual matter, that Garvin had not remained on the inside of the threshold when he answered the door; indeed, the court distinguished the facts here from cases in which a defendant opens the door to a knock by police and then remains entirely inside the confines of the home. This factual distinction, along with the undisputed fact that the police never crossed the threshold of Garvin's home, led that court to uphold the arrest in this case.

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[1]Garvin, petitioner in this proceeding, was a criminal defendant in all proceedings below. This brief will continue to refer to him as such or by his last name.

The Suppression Hearing

At the hearing to suppress Garvin's statement and the evidence recovered, the State presented the testimony of Detectives Phillip Schurr and Cecil Weatherly. Detective Schurr testified about his investigation of the robberies and learning that Garvin's fingerprint was found on one of the demand notes. Based on this, he instructed Detective Weatherly to go to Garvin's house and arrest him (Pet. App. 1a).

Weatherly and two other detectives, all in plain clothes, entered a multi-family house and walked up an interior staircase to his second-floor apartment. One of the detectives knocked on the door, which was opened by another person. Garvin was standing inside the apartment, but the detective did not recognize him. The detective asked for Garvin's girlfriend, and Garvin responded that she was not at home and closed the door (Pet. App. 2a).

The detectives descended the staircase and Weatherly told the other detectives that he had recognized Garvin from a photograph. Weatherly walked up the stairs, with the other detectives behind him. He knocked on the door, and Garvin opened it. While Garvin was standing in the doorway of his apartment, Weatherly told him that he was under arrest. Garvin turned around, put his hands behind his back, and Weatherly handcuffed him. Weatherly did not enter Garvin's apartment and placed the handcuffs on Garvin while Garvin was still standing in the doorway (Pet. App. 2a).

At the close of the hearing, defense counsel argued that Garvin's arrest violated his rights under *Payton v. New York*, 445 U.S. 573 (1980), because the police entered his home without consent or a warrant, and in the absence of exigent circumstances. Counsel

also argued that the police did not wait for Garvin to exit the premises before he was arrested, and that the police had ample time to obtain an arrest warrant, but failed to do so because they wanted to question him without counsel (Pet. App. 3a).

The suppression court denied the motion. Garvin proceeded to a bench trial and was convicted of four counts of Robbery in the Third Degree and one count of Attempted Robbery in the Third Degree. The State requested that the court adjudicate Garvin a persistent felony offender based on prior first- and second-degree robbery convictions. The court conducted the required hearing and adjudicated Garvin a persistent felony offender and sentenced him to an aggregate prison term of from fifteen years to life (Pet. App. 3a).

The Appeal

On July 1, 2015, the New York State Appellate Division, Second Department, affirmed Garvin's judgment of conviction, holding that his arrest did not violate *Payton*. *See People v. Garvin*, 13 N.Y.S.3d 215 (App. Div. 2015). The court found that the officer effectuated the arrest while Garvin was in the doorway and that the police never entered Garvin's apartment or reached in to pull Garvin out. Because Garvin was arrested after he had "voluntarily emerged" from his apartment and, thus, surrendered the enhanced constitutional protection of his home, the court held that his warrantless arrest did not violate *Payton* (Pet. App. 65a-66a).

The court also held that the trial court providently exercised its discretion in sentencing Garvin as a persistent felony offender (Pet. App. 67a).

A justice of the Appellate Division granted Garvin leave to appeal to the New York Court of Appeals. In that court, Garvin argued, as relevant here, that the warrantless arrest in his threshold was

improper under *Payton*, and that, in order to avoid circumvention of the state right to counsel, which is triggered by an arrest warrant, the court should hold that the police may not approach a suspect's door for the purpose of effectuating an arrest if they have time to get a warrant. The State responded that *United States v. Santana,* 427 U.S. 38 (1976*),* and the Court of Appeals' prior caselaw permitted warrantless threshold arrests. The State also argued that there were exigent circumstances creating a need for an immediate arrest, including the ongoing string of armed robberies over the period of a few days and the fact that the police had already spoken to Garvin's girlfriend, alerting Garvin to their interest in him as a suspect.

With regard to the Sixth Amendment issue, Garvin claimed that New York's discretionary persistent felony offender statute was unconstitutional, relying on the this Court's decisions in *Hurst v. Florida*, 136 S. Ct. 626 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013). The State argued that Garvin failed to preserve his claim, and the prior Court of Appeals cases upholding the statute were properly decided and *stare decisis* dictated that they be followed. The State also argued that *Hurst* and *Descamps* were distinguishable and did not warrant a departure from the court's well-established *Apprendi* jurisprudence.

In a decision dated October 24, 2017, the New York State Court of Appeals affirmed Garvin's judgment of conviction, holding that Garvin's arrest did not violate the Fourth Amendment and that his adjudication as a persistent felony offender did not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Pet. App. 1a-18a).

Regarding Garvin's Fourth Amendment claim, the court began its analysis by noting that it was bound by the factual findings of the Appellate Division, which concluded that Garvin was arrested "in the doorway" of his apartment and had "voluntarily

emerged" from his apartment, because those findings had support in the record (Pet. App. 10a).

The court then reviewed its prior decisions regarding warrantless arrests and noted that it had consistently held that, even when the police could have obtained an arrest warrant, there was nothing illegal about the police going to a suspect's apartment door and requesting that he voluntarily come out (Pet. App. 4a-5a). The court then reviewed this Court's cases, starting with *Payton*, and stated that *Payton* held that the Fourth Amendment drew a "firm line" at the entrance to the house, but subsequent cases held that *Payton* does not prohibit the police from knocking on a suspect's door because in doing so, they do nothing more than any private citizen might do (Pet. App. 5a-6a, 6a, n.3, citing *Kentucky v. King,* 563 U.S. 452 [2011]). The court, however, stated that police could not compel a suspect to open the door by, for example, threatening to violate the Fourth Amendment (Pet. App. 6a).

The court then specifically addressed the Second Circuit's opinion in *United States v. Allen*, 813 F.3d 76 (2d Cir. 2016). Emphasizing that the Second Circuit decision turned on the fact that the defendant "remain[ed] inside the home's confines" and that the arrest took place "across the threshold," the court distinguished the facts in this case, noting that the lower courts here found that Garvin had "voluntarily emerged" from his home and was "in the doorway." The court held that because of this factual distinction, *Allen*'s ruling as to "across the threshold" arrests was inapposite (Pet. App. 7a-10a).

The court went on to address at length the argument that the police must obtain a warrant in advance of proceeding to a defendant's home for the purpose of arresting him because to allow otherwise would circumvent the state right to counsel, which is triggered upon the issuance of an arrest warrant (Pet. App. 11a-14a). The court refused to adopt such a rule,

finding that an inquiry into the subjective intent of the police should not be inserted into the constitutional analysis (Pet. App. 14a).

Finally, regarding the *Apprendi* claim, the court affirmed Garvin's adjudication as a persistent felony offender, adhering to its decision in *People v. Prindle*, 80 N.E.3d 1026 (N.Y. 2017), *cert. denied*, 138 S. Ct. 514 (2017).

There were three dissenting opinions. Judge Wilson took issue with the majority's interpretation of the facts in the case on the Fourth Amendment issue. Discussing the distinction the majority drew with the Second Circuit's decision in *Allen*, he wrote that he "underst[ood] 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." (Pet. App. 49a-50a). He continued, without contradiction from the majority, "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." (Pet. App. 50a). The majority had concluded that Garvin, unwittingly, "did exactly that." (Pet. App. 50a).

In her dissent, Judge Rivera stated that the police violated *Payton* by their initial entry into the common area of Garvin's two-family house and by their warrantless arrest of Garvin in his home in the absence of exigent circumstances (Pet. App. 30a-46a). Judge Fahey dissented on the Sixth Amendment issue only, stating that he would hold that New York's persistent felony offender statute violated *Apprendi* (Pet. App. 18a-30a).

SUMMARY OF ARGUMENT

In *United States v. Santana*, 427 U.S. 38 (1976), this Court held that the police did not require a warrant to arrest a defendant standing "in the doorway" of her home, which, under the facts there, meant that defendant was in the door frame of the premises: one step forward would have put her entirely outside and one step backward entirely inside. In this case, the New York courts determined as a factual matter that defendant here too was "in the doorway" of his home at the time of arrest, and, more specifically, that, after he answered the door, he had not remained inside the home's confines. Indeed, the court factually distinguished this case from the Second Circuit's decision in *United States v. Allen*, 813 F.3d 76, 89 (2d Cir. 2016), because there the defendant, while coming to the front door in response to the police, remained entirely inside the threshold of his home whereas, here, the defendant had not. The Court of Appeals' factual distinction was consistent with other state caselaw interpreting *Santana*, which has held that, even where a defendant voluntarily answers the door, the police may not effectuate an arrest across the threshold if defendant remains entirely inside. *People v. Gonzales*, 972 N.Y.S.2d 642 (App. Div. 2013), *appeal dismissed*, 6 N.E.3d 604 (N.Y. 2014), *cert. denied*, 135 S. Ct. 434 (2014).

Petitioner nevertheless characterizes the ruling of the court below as one permitting across-the-threshold arrests, where the defendant remains entirely inside the premises. According to defendant, that ruling puts New York's high court in direct conflict with the Second Circuit's decision in *Allen*. But the court below specifically declined to adopt the holding that defendant claims it espoused. Indeed, the court found that the facts here did not present that question, and thus did not rule on the issue.

Because the decision below turns on a factual finding rather than an issue of law, and because the

court below never adopted the legal rule defendant wishes to challenge, this Court should deny certiorari.

Furthermore, defendant's Sixth Amendment claim is also meritless and unworthy of review. The New York Court of Appeals – the ultimate expositor of New York law – has repeatedly held that prior convictions are the sole determinant of enhanced sentencing under the discretionary persistent felony offender statute and, thus, the sentencing scheme does not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). New York State's highest court's interpretation of its own state's law is binding on defendant and this Court, *see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and review of defendant's Sixth Amendment claim is unwarranted.

ARGUMENT

I. The New York Court of Appeals' Fourth Amendment Ruling Turns on an Issue of Fact and Not the Legal Issue Defendant Seeks to Raise Here.

The Fourth Amendment issue is unworthy of this Court's review because the New York Court of Appeals decision turned on a factual question rather than the legal issue defendant seeks to present to this Court. The Court of Appeals expressly adopted, and found dispositive, a factual finding of the lower New York courts that defendant stood "in his doorway" at the moment of his arrest, which the court factually interpreted to mean that, after he answered the door, defendant "voluntarily emerged" from his apartment and did not remain on the inside of the threshold. This factual finding placed the court's decision squarely within this Court's ruling in *Santana* permitting warrantless arrests in precisely these circumstances.

Moreover, the court below did not hold, as defendant would have it, that all "across-the-threshold" arrests are permissible; indeed, it specifically declined

to justify the arrest here on that theory, which had been rejected by the Second Circuit in *Allen*. Because the court below did not adopt the rule that defendant wishes to challenge, and because its decision did not create a conflict with the Second Circuit or other federal circuit courts on this issue, this Court should deny certiorari.

In *United States v. Santana*, 427 U.S. 38 (1976), this Court upheld the warrantless arrest of a suspect in the vestibule of her house. The police originally observed Santana standing "in the doorway" of her home, and this Court noted in a footnote that one step forward would have put her outside and one step backward would have put her in the vestibule. This Court found the arrest lawful, because Santana, while standing in the doorway, was in a public place and had no expectation of privacy. She "was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house," and, having exposed herself to the public, was no longer subject to Fourth Amendment protection. *Id.* at 42. Moreover, she could not thwart the otherwise proper arrest by retreating into the vestibule of her house after she saw the police. *Id.* at 42-43.

In *Payton v. New York*, 445 U.S. 573 (1980), the Court held that the Fourth Amendment prohibits the police from making a warrantless entry into a suspect's home to make an arrest without the suspect's consent or exigent circumstances. In that case, the police had broken down Payton's door with crowbars to arrest him. No one was home, but the police recovered a shell casing that was in plain view inside the apartment. In the companion case, *Riddick v. New York*, defendant's three-year-old son answered the door, after which the police rushed in and arrested him. While in the house, police opened a chest of drawers and recovered drugs. *Id.* at 576-578, 583.

This Court invalidated the arrests, holding 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." *Payton v. New York*, 445 U.S. at 590. This is so because the Fourth Amendment protects an individual's privacy, and there is no place that the zone of privacy is so clearly defined than by the unambiguous physical dimensions of a person's home. *Id*. at 589.

But *Payton* did not overrule the decision in *Santana*, nor did it hold that the warrantless arrest of a defendant who voluntarily emerges from his home and stands in the doorway as Santana did would constitute a Fourth Amendment violation. Courts across the nation have continued to rely on *Santana* and even defendant does not now argue that *Payton* somehow overruled its precise holding – that someone literally standing in his or her doorway, where one step forward would place him or her outside and one step backward inside, may be arrested without a warrant.

Here, the Court of Appeals did no more than apply that holding, adopting the factual finding of the courts below that defendant, like Santana, was "in his doorway" at the moment of arrest. Moreover, there can be little doubt that the Court of Appeals interpreted this factual finding to mean precisely what it meant in *Santana*, that defendant was within the door frame of the premises. This is so for many reasons. First, the Court used the precise same language as in *Santana*, the meaning of which this Court had explained in a footnote, to reach the same result. In both cases, defendant was "in the doorway." (Pet. App. 2a, 10a) (twice describing facts as showing defendant stood "in the doorway").

Second, the Court distinguished the Second Circuit's decision in *Allen* on the ground that in that case, the defendant remained entirely inside the premises throughout the encounter. The Court of

Appeals twice emphasized that the Second Circuit decision was grounded in the conclusion that the defendant in *Allen* "remain[ed] inside the home's confines" and that the arrest took place "across the threshold," which distinguished *Allen*'s facts from the facts here (Pet. App. 8a-10a). The Court of Appeals could not then have believed that defendant here was entirely inside his threshold at the time of his arrest, or else there would have been no factual distinction at all.

Third, the dissenter below expressly interpreted the majority opinion – without contradiction from the majority – to mean that defendant was standing in the door frame at the time of the arrest; indeed, this factual finding was precisely what Judge Wilson argued was unjustified by the record.[2] As Judge Wilson wrote, the majority necessarily concluded that "Mr. Garvin had advanced until he was standing between the doorjambs: his toes in the hallway; his heels in his home." (Pet. App. 50a). Rather than disputing that interpretation, the majority simply reiterated in a footnote that it was bound by the lower court's determination of the facts and that Judge Wilson's interpretation – that defendant remained entirely inside the premises after opening the door – was contrary to the lower court's findings (Pet. App. 3a, n. 2).

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[2]Contrary to Judge Wilson's complaint, there was record support for the factual finding upon which the majority rested its conclusion – that defendant was "in the doorway," meaning "between the door jambs." Detective Weatherly testified that when he placed the handcuffs on defendant, who was then "in the doorway," he did not have to reach inside defendant's apartment (Pet. App. 2a-3a). Thus, Weatherly, in using the doorway language, must have meant that defendant was literally within the door frame or door jambs – otherwise his statement could not have been true. The fact that, in Judge Wilson's view, other record evidence tended to show something different did not alter the record support for the factual finding that the majority relied upon.

The factual finding upon which the majority relied – that defendant stood in the doorway or doorframe itself – as applied to *Santana*'s undisputed legal conclusion that warrantless arrests were permissible under such circumstances, was by itself sufficient to support the ruling of the court below. Indeed, the police in *Santana* arguably committed a much greater intrusion than here, as in that case they pursued the defendant into her vestibule, invading the sanctity of her home, whereas here the police never crossed the threshold. The Court of Appeals' decision, then, rested on its factual view of the record and on *Santana*'s undisputed legal ruling.

Nevertheless, defendant seeks review in this Court, arguing that this Court should decide whether a defendant who stays entirely in his home when he answers the door may be arrested "across the threshold" without a warrant. But review of this issue is unwarranted for two central reasons.

First, the state court found as a factual matter that defendant was not entirely within his home at the time of his arrest, but was instead quite literally within the doorway. This state court factual determination is entitled to deference in this Court. Indeed, as this Court has stated, in the absence of exceptional circumstances, the Court defers to state court findings of fact, even when those facts relate to a constitutional issue, as "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Hernandez v. New York*, 500 U.S. 352, 366 (1991); *see, e.g.*, *Minnesota v. Olson*, 495 U.S. 91 (1990). And even if the factual determination were not correct, this Court will not ordinarily grant review simply to address a factual error, rather than a legal one. *See* Stephen M. Shapiro, Supreme Court Practice, § 3.28 (10th ed. 2013) (this Court "will not exert its jurisdiction merely to review a decision of a state court upon a question of fact" or re-examine the state court's findings of fact once a case is before it).

Second, the Court did not adopt the legal rule that defendant seeks to challenge. The court did not hold that all across-the-threshold arrests were permissible; rather, it expressly declined to decide that issue at all, as resolution of that question was unnecessary to resolve the dispute here (Pet. App. 10a). Indeed, the Court of Appeals, noting that *Allen* prohibited "across the threshold" arrests where the defendant remains inside at all times, found the ruling inapposite to this case and did not either adopt or reject *Allen*'s rule.

Moreover, a ruling allowing all across-the-threshold arrests would be inconsistent with other New York caselaw suppressing evidence resulting from threshold arrests of defendants who remained on the inside of their homes. In *People v. Gonzales*, 972 N.Y.S.2d 642 (App. Div. 2013), *appeal dismissed*, 6 N.E.3d 604 (N.Y. 2014), *cert. denied*, 135 S. Ct. 434 (2014), the Second Department – the same court that upheld the arrest in this case – invalidated an arrest where the defendant voluntarily answered the door when the police knocked but remained inside his premises at all times. When leave to appeal was granted by the dissenter in the Second Department, the Court of Appeals dismissed the appeal on the ground that the factual finding as to defendant's location was dispositive. *See also People v. Spencer*, 78 N.E.3d 1178 (N.Y. 2017) (holding that *Payton* did not apply where defendant voluntarily exited his apartment); *People v. Reynoso*, 814 N.E.2d 456 (N.Y. 2004) (*Payton* did not apply where defendant was either outside his home or placed his head between door jambs to see who was outside).[3]

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[3]In *Spencer*, the Court of Appeals made clear that its prior precedent should also be interpreted to mean that *Payton* does not apply to a defendant who voluntarily comes outside his home. *People v. Spencer*, 78 N.E.3d at 1184 (citing *People v. Minley*, 502 N.E.2d 1002 (N.Y. 1986)).

And because the Court of Appeals did not hold that across-the-threshold arrests were permissible, there is no irreconcilable split between the decision of the New York Court of Appeals and the Second Circuit's ruling in *Allen*. Because of the factual determination made by the New York Court of Appeals, *Allen*'s ruling was "distinguishable and does not apply here." (Pet. App. 10a).

Similarly, the various approaches of other courts to this question do not provide a reason to grant certiorari in this case. Assuming that courts would come out differently on the issue of whether an "across-the-threshold" arrest, where the defendant remains inside at all times, is proper, here, as the Court of Appeals made abundantly clear, that question was inapposite because defendant did not remain inside. And if the other cases defendant cites present inconsistent answers on that question, then certiorari would be appropriate in one of those cases rather than this one, but this Court has consistently denied certiorari. *United States v. Thomas*, 430 F.3d 274 (6th Cir. 2005), *cert. denied*, 549 U.S. 819 (2006); *People v. Gonzales*, 972 N.Y.S.2d 642 (App. Div. 2013), *cert. denied*, 135 S. Ct. 434 (2014); *People v. Gillam*, 734 N.W.2d 585 (Mich. 2007), *cert. denied*, 552 U.S. 1107 (2008).

Still further, contrary to defendant's assertion (Petition: 12-13, 21-22), the Court of Appeals did not adopt the reasoning of the Seventh Circuit in *United States v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991), that *Payton* does not prohibit an officer's voice from penetrating the walls of a house. Thus, defendant's efforts to raise the specter of the police with a bullhorn demanding that a cloistered defendant come to the door to be arrested does not apply here. Indeed, the Court of Appeals made clear that a defendant must voluntarily come to the door as a prerequisite to a lawful arrest. The court noted that "police may not compel a suspect to open a door by threatening to violate the Fourth Amendment," (Pet. App. 6a), and

repeatedly characterized defendant's conduct in answering the door as voluntary (Pet. App. 3a) (noting fact that lower court found defendant had "voluntarily emerged" from his apartment was "most critical[] here"); *see also* Pet. App. 5a ("there is nothing illegal about the police going to [a] defendant's apartment and requesting that he [or she] voluntarily come out"; citations and quotation marks omitted; brackets in original).

Moreover, the Court of Appeals' few broader statements of the law, not specifically tied to the facts here, are consistent with the notion that the defendant must "voluntarily" be "in the doorway" for a valid arrest, rather than authorizing an arrest where the defendant has never come to the door or is coerced to do so. *See* Pet. App. 1a (voluntary "in the threshold," rather than "across the threshold," arrests are permissible). And while the court points out that in this case, as well as others where it has upheld warrantless arrests, the police never crossed the threshold, before or after the arrest, thus avoiding *Payton*'s chief concern, the court did not state that this alone was enough to validate an arrest. Indeed, these statements refer to two requirements for a valid arrest: both the absence of police entry into the house and his voluntary presence in the doorway (Pet. App. 1a) (authorizing arrests where defendant is "in the threshold . . . voluntarily . . . *and* the police have not crossed the threshold"; emphasis added).

Here, of course, unlike defendant's hypothetical, his conduct was entirely voluntary: he voluntarily appeared at the door, knowing full well the police were on the other side, as he had just seen them there moments earlier. And his subsequent actions – turning around, placing his hands behind his back, and allowing the police to handcuff him – also demonstrate the voluntary nature of his conduct. The Court of Appeals thus did not expressly or by implication authorize the type of coercive conduct described in defendant's hypothetical.

Nor does amici's brief identify an issue worthy of review. The question amici present assumes that defendant was standing "inside" his home at the time of his arrest, Amicus Br. at i, but the Court of Appeals found that defendant had not remained inside the apartment and instead stood, at least partially, between the door jambs. And amici's insistence on an "in or out" rule makes little sense in the context of this case: this Court has already held that the area in the doorframe is "out" for constitutional purposes, and that is precisely where the Court of Appeals found defendant was. Indeed, this Court would have to overrule *Santana* to declare that area "in," and defendant has not asked this Court to do so.

Finally, even if this case did present the issue defendant seeks to raise – whether the police can arrest a defendant who remains entirely on the inside of the threshold of his premises without a warrant – his rule should be rejected.

Indeed, in such circumstances, the police do not commit the chief evil that the Fourth Amendment is directed against – the physical entry into the home – because they remain outside. *Payton v. New York*, 445 U.S. at 586. They have thus never crossed the "firm line" of the entrance to the home, *Id.* at 589-90, and never had the opportunity to search the home or enter it and recover contraband in plain view. Thus, the sanctity of defendant's home is not breached and the Fourth Amendment is not violated. As one judge considering the question has observed, "There is nothing in *Payton* which prohibits [a] person from surrendering at his doorway." *State v. Schlothauer*, 294 N.W.2d 382, 385 (Neb. 1980) (Clinton, concur).

The Ninth Circuit opinion adopting this view in *United States v. Vaneaton*, 49 F.3d 1423 (9th Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996), is persuasive. In that case, the police knocked on the door of the defendant's motel room. The defendant opened the

curtains of a window, saw the police, and opened the door. The police asked his name, and after ascertaining that the defendant was the suspect, the police arrested him. He was standing at the doorway but just inside the threshold. The police did not enter the room before the arrest. *Id*. at 1425.

The Ninth Circuit held that Vaneaton's arrest did not violate the Fourth Amendment because he exposed himself in a public place by opening the door and the police did not use force or threats and did not enter the room until after the arrest. *United States v. Vaneaton*, 49 F.3d at 1427.[4] This holding is entirely consistent with this Court's decisions in *Payton* and *Santana.*

Nevertheless, defendant insists that allowing across the threshold arrests will lead to coercive police tactics, citing cases to support this conclusion. But such coercive tactics need not be tolerated. The use of coercion is incompatible with reasonableness – the "touchstone" of the Fourth Amendment. *See generally Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Indeed, cases allowing doorway arrests often emphasize the voluntary nature of defendant's compliance and the reasonableness of the police conduct. *See*, *e.g.*, *United States v. Vaneaton*, 49 F.3d at 1427; *McKinnon v. Carr*, 103 F.3d 934 (10th Cir. 1996) (per curiam); *United States v. Council*, 860 F.3d 604 (8th Cir. 2017) (arrest at doorway constitutional because defendant exposed to public and came to place voluntarily).

Still further, while defendant characterizes the Court of Appeals' ruling as a "no-win rule for citizens," because a suspect will either have to open the door and forfeit the sanctity of their home or refuse to open the door and risk that their conduct is interpreted as

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[4]*But see United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016), questioning *Vaneaton*, but declining to overrule it.

creating exigent circumstances, that is not the case (Petition: 20). There is a third option – the suspect could tell the police to get a warrant and close the door. This Court has stated that when the police knock on a door, the occupant is under no obligation to open the door or speak to the officer. And, even if the occupant chooses to open the door and speak with the police, he may refuse to answer questions at any time. *Kentucky v. King*, 563 U.S. at 469-70. Thus, a suspect ordinarily risks nothing by asserting his rights. *See People v. Gonzales*, 972 N.Y.S.2d at 643-47 (warrantless arrest invalid where defendant sought to close door).

In sum, defendant's Fourth Amendment claim does not merit review here. The resolution of this case rests on a factual determination of the Court of Appeals, making this case unworthy of certiorari. Further, this case does not present the issue regarding "across the threshold" arrests that defendant seeks to raise because the Court of Appeals did not rule on that issue.

II. Defendant's Sentencing As a Persistent Felony Offender Did Not Violate *Apprendi v. New Jersey*

The New York discretionary persistent felony offender statute, as interpreted by the New York State Court of Appeals is constitutional and does not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As the Court of Appeals has repeatedly ruled, prior felony convictions are the "sole determinant" of whether a defendant is subject to sentencing as a persistent felony offender and no further facts are required, and thus, the statute does not run afoul of *Apprendi*. *People v. Rivera*, 833 N.E.2d 194, 198 (N.Y. 2005), *cert. denied*, 546 U.S. 984 (2005). Moreover, New York State's highest court's interpretation of its own state's law is binding on defendant and this Court, *see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and review of defendant's Sixth Amendment claim is unwarranted.

A. ***Apprendi*** **and Related Cases**

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant challenged the constitutionality of a sentencing scheme that allowed the judge to increase a defendant's sentence beyond the statutory maximum for weapons possession based on the judge's finding by a preponderance of the evidence that the defendant committed the crime because of bias. *Id.* at 468-71. The Court held that the New Jersey law violated the Sixth Amendment because this sentencing scheme removed what amounted to an element of the greater offense that would normally be submitted to a jury and required to be proven beyond a reasonable doubt, and instead allowed the judge to decide the fact using the lesser standard of proof of preponderance of the evidence and, then increase the sentence beyond the maximum permissible range. The Court held that the Due Process Clause of the Fourteenth Amendment, taken together with the Sixth Amendment right to a jury trial, requires that any fact, other than the fact of a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 474-77. The Court, however, stated that "nothing. . . suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute." *Id.* at 481 (emphasis in original).

The Court's decision also reaffirmed its prior decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998), which held that judicial fact-finding of a defendant's prior conviction and consideration of the conviction at sentencing was not a violation of the Sixth Amendment.

Since *Apprendi* was decided, the Court has applied its holding in several cases addressing other sentencing provisions. *See Ring v. Arizona*, 536 U.S. 584 (2002) (applying *Apprendi* to Arizona's capital

sentencing scheme and holding that aggravating factors required for imposition of the death penalty must be found by the jury, not the trial judge, beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296 (2004) holding that statutory maximum for *Apprendi* purposes is the maximum sentence that may be imposed solely on the basis of the facts reflected in jury verdict or admitted by defendant and that judge's imposition of an enhanced sentence based on finding of an aggravating factor not admitted by defendant or found by a jury was improper); *United States v. Booker*, 543 U.S. 220 (2005) (applying *Apprendi* to Federal Sentencing Guidelines and holding that provisions for imposing an enhanced sentence based on judge's determination of additional factual findings were unconstitutional); *Cunningham v. California*, 549 U.S. 270 (2007) (applying *Apprendi* to California's determinate sentencing law creating three possible sentences for each crime and holding that because aggravating facts authorizing the upper term were found by a judge by a preponderance of the evidence, the scheme was unconstitutional); *Alleyne v. United States*, 570 U.S. 99, 103 (2013) (holding that any fact that increases mandatory minimum sentence is an "element" that must be submitted to jury and found beyond a reasonable doubt); *Descamps v. United States*, 570 U.S. 254 (2013) (lower courts erred in enhancing sentence under the Armed Career Criminal Act when they used the "modified categorical approach" to look behind defendant's conviction in search of evidence from the record to determine whether defendant actually committed the generic offense of burglary); *Hurst v. Florida*, 136 S. Ct. 616 (2016) (applying *Ring* and holding that Florida death penalty statute where trial court alone had to find the aggravating facts necessary to sentence defendant to death after advisory opinion of jury was unconstitutional).

B. New York's Discretionary Persistent Felony Offender Sentencing Scheme

New York Penal Law section 70.10(1) provides that a person is a persistent felony offender if he has been convicted of a felony after having been previously convicted of two or more felonies. Penal Law section 70.10(2) provides that, when a court has found a defendant to be a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and the circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court may sentence the defendant to a prison term within the range authorized for Class A-I felonies -- that is, an indeterminate prison sentence of at least 15 years to life and as much as 25 years to life. *See* N.Y. Penal Law §§ 70.10(2), 70.00(2)(a), 70.00(3)(a)(i)(A). The court, however, may also impose the lesser sentence authorized for a second felony offender convicted of the defendant's particular crime. *See* N.Y. Penal Law § 70.10(2). New York Criminal Procedure Law section 400.20 describes the procedure that the court must follow to impose a persistent felony offender sentence.

The New York Court of Appeals has analyzed the persistent felony offender sentencing scheme on several occasions. It has held that in order for a defendant to be sentenced as a persistent felony offender, the court must first determine that the defendant has been convicted of two or more felonies for which a sentence of over one year was imposed. After the felonies have been established, the court reviews "'matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct . . . established by any relevant evidence, not legally privileged" to determine whether to impose a non-persistent felony offender sentence. *See People v. Rosen*, 752 N.E.2d 844, 847 (N.Y. 2001), *cert. denied*, 534 U.S. 899 (2001), quoting C.P.L. § 400.20(5). According to the court, it is clear that the

prior felony convictions are the "sole determinant" of whether a defendant is subject to sentencing as a persistent felony offender and no further facts are required. *Id.*; *People v. Rivera*, 833 N.E.2d at 198. Indeed, the court has "unequivocal[ly]"stated that predicate felony convictions are "both necessary and sufficient conditions" for the imposition of a persistent felony offender sentence. *Rivera*, 833 N.E.2d at 199.

After the defendant's qualifying convictions are established, the upper limit of the sentencing range is increased to include sentences that would otherwise be available for a class A felony, but the minimum sentence available remains the same. P.L. § 70.10(2). The Court of Appeals directly addressed this aspect of the persistent felony offender statute in *People v. Prindle*, 80 N.E.3d 1026 (N.Y. 2017), *cert denied*, 138 S. Ct. 514 (2017). In that case, the defendant argued that the persistent felony offender sentencing scheme increased the mandatory minimum of the sentencing range, as in *Alleyne v. United States,* 570 U.S. 99 (2013). The Court of Appeals, however, rejected that argument, holding that the mandatory minimum was not increased because even after the court adjudicates a defendant to be a persistent felony offender, the court may also sentence the defendant as if no recidivism finding had been made. Thus, the Court reasoned, even though the defendant was adjudicated a persistent felony offender, the minimum sentence that he could have received never changed, and *Apprendi* was not offended. *People v. Prindle*, 80 N.E.3d at 1028.

In making the final determination as to where in the expanded sentencing range the defendant should fall, the sentencing court must then consider factors similar to those that generally inform a sentencing court's exercise of discretion. *Id.*; C.P.L. § 400.20(9). The sentencing court thus fulfills its "traditional role – giving due consideration to agreed-upon factors – in determining an appropriate sentence within the permissible statutory range." *Rosen,* 752 N.E.2d at 847. The requirement that the judge examine the

defendant's history and character is "merely another way of saying that the court should exercise its discretion." *Id*. Further it is only after the defendant has been adjudicated a persistent felony offender that the court has the discretion to choose the appropriate sentence within a sentencing range determined by statute. *People v. Quinones*, 906 N.E.2d 1033, 1040-41 (N.Y. 2009), *cert. denied*, 558 U.S. 821 (2009).

Notably, under New York law, the second prong does not present an issue of law but is a pure discretionary determination. Thus, the Court of Appeals, a court of law, cannot review that issue; only the Appellate Division, which has discretionary jurisdiction, can review the propriety of the trial court's imposition of a sentence in the expanded sentencing range. *People v. Rivera*, 833 N.E.2d at 199-200, citing C.P.L. § 470.20(6).

C. The New York Statute is Constitutional

The Court of Appeals has evaluated the persistent felony offender statute on a number of occasions and has ruled multiple times that prior felony convictions are the "sole determinant" of whether a defendant is subject to sentencing as a persistent felony offender, that no further facts are required, and thus, the statute does not violate *Apprendi*. *People v. Rivera*, 833 N.E.2d at 198. And, as this Court has held repeatedly, "state courts are the ultimate expositors of state law"and the Court is "bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *see also Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (noting that neither this Court nor any federal tribunal "has any authority to place a construction on a state statute different from the one rendered by the highest court of the state"); *Wainwright v. Goode*, 464

U.S. 78, 83-84 (1983).[5] And this Court has recognized that this general principle applies specifically in the context of the *Apprendi* analysis. *See Ring v. Arizona*, 536 U.S. 584, 603 (2002) (recognizing Arizona Supreme Court's construction of Arizona sentencing law as authoritative).

Likewise, here, this Court should recognize the Court of Appeals' interpretation of New York law as binding. The Court has explained how the statute works – that prior felony convictions are "necessary and sufficient conditions" to the upward expansion of the sentencing range and that the second prong is not a pre-requisite to the imposition of the higher sentences. Indeed, the Court of Appeals has interpreted the second prong as a traditional exercise of a sentencing court's discretion to find an appropriate sentence within the newly expanded range. *People v. Rivera*, 833 N.E.2d at 199-200.

Moreover, the Court of Appeals' interpretation of the statue comports with *Apprendi*. Indeed, as the court has repeatedly stated, the statute does not require an additional finding of fact by the sentencing judge beyond the fact of prior conviction, which distinguishes the New York statute from sentencing schemes which this Court has found unconstitutional. *See*, *e.g.*, *Ring v. Arizona*, 536 U.S. at 592-93 (required judicial finding of aggravating factor); *Blakely v. Washington*, 542 U.S. 296, 296 (2004) (judicial finding of "deliberate cruelty"); *United States v. Booker*, 543 U.S. 220, 226 (2005) (provisions of Federal Sentencing Guidelines that impose an enhanced sentence based on judge's determination of additional factual findings were unconstitutional); *Cunningham v. California*, 549 U.S. 270, 274 (2007) (aggravating facts authorizing the

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[5]The Court will re-examine a state court's interpretation of state law on the rare occasion when it appears to be an "obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945).

upper term sentence were found by a judge by a preponderance of the evidence); *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (judicial finding that defendant brandished firearm during robbery); *Hurst v. Florida*, 136 S. Ct. 616, 619-20 (2016) (judicial finding of aggravating factors for death penalty).

Further, in reviewing the New York statute, the Second Circuit, held that the statute, as interpreted by the New York Court of Appeals, creates a recidivist sentencing scheme where the only factual predicates necessary for the court to impose an enhanced sentence relate to the defendant's criminal history, further demonstrating that the persistent felony offender statute does not require judicial fact-finding, and, thus, does not violate *Apprendi*. *Portalatin v. Graham*, 624 F.3d 69, 93-94 (2d Cir. 2010). And, this Court has given "'great deference' to "reasonable" interpretations and applications of state law by lower federal courts," and should defer to the Second Circuit's interpretation here. Stephen M. Shapiro, Supreme Court Practice, § 3.1(e) (10th ed. 2013); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985).[6]

Defendant, nevertheless, claims that New York's persistent felony offender statute is unconstitutional because judge-made findings regarding a defendant's history and character are required for an enhanced sentence (Petition: 26-27). But, the "ultimate expositor" of New York law – the New York Court of Appeals – has already determined that that is not the case. Indeed, defendant's complaint is that the court's interpretation of the statute is not consistent with the language of the statute, but defendant's claim has been raised and rejected in the Court of Appeals several

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[6]The Court will defer to a lower federal court's interpretation of state law unless it amounts to plain error. *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992), citing *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

times, and has been rejected as a matter of state law.

Moreover, contrary to defendant's claims, this Court's decisions in *Cunningham v. California*, 549 U.S. 270 (2007), *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013), do not warrant a different result (Petition: 27-28). Indeed, the statutes in both *Cunningham* and *Hurst* required the judicial finding of aggravating factors before the imposition of an enhanced sentence, which has proved constitutionally fatal under *Apprendi*. In *Cunningham*, the court found that the defendant, who had been convicted of sexually abusing a child, had six aggravating factors, including the vulnerability of the victim and the violent conduct of the defendant, and sentenced him to an upper level sentence instead of a mid-level sentence. *Cunningham v. California*, 549 U.S. at 275-76. And, in *Hurst*, the judge imposed the death penalty based on aggravating factors and the jury rendered only a non-binding advisory opinion. *Hurst v. Florida*, 136 S. Ct. at 620. Thus, both of the statutes in question involved judge-made findings that ran afoul of *Apprendi*.

Further, while defendant points to language in *Cunningham* stating that broad discretion to determine whether an enhanced sentence is warranted does not shield a sentencing scheme from *Apprendi* analysis (Petition: 27), discretion is not why the New York statute survives constitutional review. It survives because it does not require an additional factual finding and the broad discretion only refers to discretion that any sentencing court possesses. Thus, defendant's reliance on *Cunningham* is misplaced.

Nor does *Hurst* support defendant's claims because it is merely a reiteration of *Ring*, which struck down a similar death penalty statute in Arizona that required the judge to find aggravating factors before imposing a death sentence. *Hurst v. Florida*, 136 S. Ct. at 621-22. Thus, *Hurst* does not change *Apprendi*

jurisprudence but only applies the well-established prohibition against enhanced sentences based on judge-made findings to another death penalty statute.

Nor does this Court's decision in *Descamps* warrant a different conclusion. In *Descamps*, the district court found that the defendant's California burglary conviction was a "violent felony" under the Armed Career Criminal Act (ACCA), which resulted in an enhanced sentence. The Ninth Circuit affirmed, but this Court reversed, holding that the lower courts erred when they used the "modified categorical approach" to look behind the defendant's conviction in search of evidence from the record to determine whether the defendant actually committed the generic offense of burglary. *Descamps*, 570 U.S. at 257-60.

But *Descamps* has no relevance to New York's persistent felony offender sentencing provisions because it is a case about what information courts can rely on in determining whether certain convictions can serve as predicate felony offenses under a federal statute. And here, application of the New York statute required no resort to the underlying record: defendant's prior qualifying convictions were easily identified by the judgments of conviction themselves, and, indeed, defendant does not now dispute that those prior convictions fell within the statute.

Nevertheless, defendant claims that *Descamps* stands for the proposition that the prior-convictions exception to *Apprendi* does not allow a court to increase a sentence based on a qualitative assessment of the defendant's criminal history or character beyond the nature of the offense and the statutory elements (Petition: 27-28).

But defendant overstates *Descamps*' holding, which merely provides a rule for determining whether a prior conviction may qualify as a predicate felony offense under the ACCA and render a defendant eligible to receive an enhanced mandatory minimum

sentence. To the extent that it implicates *Apprendi*, the Court in *Descamps* stated that the Ninth Circuit's approach of looking behind the conviction to the accusatory instrument and jury charge raised serious Sixth Amendment concerns because "it went beyond merely identifying a prior conviction." *Descamps*, 570 U.S. at 267. Thus, *Descamps* merely applies *Apprendi*'s holding that other than a fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.

Furthermore, while defendant cites recidivist sentencing statutes from Hawaii and Connecticut with language that is similar to the New York statute (Petition: 28-30), those states' courts have interpreted their statutes differently than the New York Court of Appeals has interpreted New York law. For example, regarding Hawaii's recidivist statute, that state's highest court has interpreted the statute to require a two-step process, with the mandatory second step being an evaluation of whether extending the defendant's sentence is necessary for the protection of the public. *See Kaua v. Frank*, 436 F.3d 1057 (9th Cir. 2006); *State v. Maugaotega*, 168 P.3d 562 (Haw. 2007). In contrast, the New York Court of Appeals has repeatedly held that prior convictions are the sole determinant of whether a defendant is adjudicated a persistent felony offender.

And the Connecticut recidivist sentencing statute, as interpreted by the Connecticut Supreme Court, requires two factual predicates before the imposition of an enhanced sentence – the jury's determination that the defendant is a persistent offender because of his prior convictions and the judge's finding that the defendant's history and character and the nature and circumstances of his criminal conduct indicate that an extended incarceration will best serve the public interest – unlike the New York statute, where prior convictions are the only necessary and sufficient conditions for

enhanced sentencing. *See State v. Bell*, 931 A.2d 198, 228, 231 (Conn. 2007). Indeed, the Connecticut Supreme Court addressed *Rivera* in *Bell*, and noted that the New York Court of Appeals' interpretation of the New York statute "places it squarely outside the *Apprendi* proscription." *Id.* at 234.

Finally, this Court has repeatedly denied petitions for a writ of certiorari challenging New York's persistent felony offender statute, most recently in *Prindle*. *See Prindle v. New York*, 80 N.E.3d 1026 (N.Y. 2017), *cert. denied*, 138 S. Ct. 514 (2017); *Giles v. New York*, 25 N.E.3d 943 (N.Y. 2014), *cert. denied*, 136 S. Ct. 32 (2015); *Quinones v. New York*, 906 N.E.2d 1033 (N.Y. 2009), *cert. denied*, 558 U.S. 821 (2009); *People v. Rivera*, 833 N.E.2d 194 (N.Y. 2005), *cert. denied*, 546 U.S. 984 (2005); *Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010), *cert. denied*, 562 U.S. 1304 (2011), *cert. denied sub nom. Phillips v. Artus*, 562 U.S. 1304 (2011), *cert. denied sub nom. Morris v. Artus*, 562 U.S. 1303 (2011). Defendant offers no legitimate reason why certiorari would be appropriate in this case but not in all of the other cases in which the precise same issue has been deemed unworthy of review.

CONCLUSION

Because defendant's first claim presents an issue of fact rather than the legal question he seeks to raise, and because his second claim is without merit and he provides no valid reason why certiorari should be granted here but in none of the other cases in which that issue has been raised, his petition should be denied.

Respectfully submitted,

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