No. 17-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two independent questions of significant practical importance over which the lower courts are deeply divided—one concerning the Fourth Amendment, and the other concerning the Sixth Amendment. The Court should grant review of either or both.

1. In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court held 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." *Id*. at 576. Four years earlier, in *United States* v. *Santana*, 427 U.S. 38 (1976), the Court held that a suspect who was standing inside of her home but at the open doorway had no reasonable expectation of privacy there, "as if she [were] standing completely outside her house." *Id*. at 42. The lower courts are intractably divided over how to reconcile *Payton* and *Santana* when officers, who lack a warrant but remain outside the home, arrest a suspect by show of authority when the suspect has come to the front door but remains inside the home.

The first question presented is whether a police officer who remains outside a suspect's home violates the Fourth Amendment by arresting the suspect by show of authority without a warrant when the suspect is at the front door but has not stepped outside.

2. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that, "[o]ther than the fact of a prior conviction, any fact that 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 490. In New York, a court has discretion to enhance the sentence of a persistent felony offender. Before exercising that dis-

cretion, the court must hold an evidentiary hearing under New York Criminal Procedure Law § 400.20(9) to determine not only whether petitioner had been convicted of certain prior crimes, but also to resolve by "a preponderance of the evidence" all "[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct" (§ 400.20(5)) necessary to decide whether "extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest" (§ 400.20(1)). Petitioner here was sentenced according to this scheme. Numerous lower courts have held that functionally identical statutory schemes are unconstitutional under *Apprendi*, but the New York Court of Appeals refused to do so in this case.

The second question presented is whether New York's persistent felony offender statute, which requires judicial fact-finding on the question whether an enhanced sentence will "best serve the public interest," violates the Sixth Amendment's jury-trial guarantee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Cases—continued

Cases—continued

Cases—continued

Statutes, Rules and Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sean Garvin respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals (App., *infra*, 1a-64a) is reported at 88 N.E.3d 319. The opinion of the Appellate Division (App., *infra*, 65a-68a) is reported at 13 N.Y.S.3d 215.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2017. On December 27, 2017, Justice Ginsburg extended the time to file a petition for a writ of certiorari to March 23, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in the appendix at 78a-83a.

STATEMENT

A. Statement respecting the Fourth Amendment question

1. Five New York City police officers knocked on petitioner's apartment door. App., *infra*, 1a. The officers had probable cause to arrest petitioner for his involvement in certain robberies (*id*. at 31a), but they did not have a warrant (*id*. at 1a).

Petitioner came to the door and engaged in a discussion with the officers, answering their questions. *Id*. at 1a-2a. The officers initially left, but they returned to petitioner's door a few minutes later. *Id*. at 2a. One of the officers knocked on the door again, and petitioner answered again. *Ibid*. It is undisputed that petitioner remained inside the doorway and did

not step into the hallway. *Ibid.* With petitioner standing at the front door to his apartment, the officer told him he was under arrest; petitioner submitted to the arrest without incident and soon thereafter made incriminating statements. *Ibid.*

2. Petitioner was indicted on several counts in connection with the robberies. App., *infra*, 1a. He moved to suppress the written and oral statements made after his arrest, arguing that the officers arrested him inside his home without a warrant and absent exigent circumstances, in violation of *Payton* v. *New York*, 445 U.S. 573 (1980). App., *infra*, 2a.

The trial court denied the motion to suppress, admitting petitioner's incriminating statements. App., *infra*, 3a. Petitioner was thereafter convicted of four counts of third-degree robbery and one count of attempted third-degree robbery. *Id.* at 1a.

3. The Appellate Division affirmed in a divided opinion. App., *infra*, 65a-68a. Concerning the Fourth Amendment question at issue here, the court found that "[o]ne of the officers knocked on the closed apartment door, the defendant opened it, and the officer effectuated the arrest in the doorway." *Id.* at 66a. Because "the arresting officer did not go inside the defendant's apartment or reach in to pull the defendant out," and because "the defendant was arrested at the threshold of his apartment, after he 'voluntarily emerged [and thereby] surrendered the enhanced constitutional protection of the home,' his warrantless arrest did not violate *Payton*." *Ibid.* (quoting *People* v. *Gonzales*, 111 A.D.3d 147, 152 (N.Y. App. Div. 2013) (discussing and applying *United States* v. *Santana*, 427 U.S. 38 (1976)).

Justice Hall dissented on a ground not relevant to the questions presented. See App., *infra*, 67a-68a.[1]

4.a. The Court of Appeals affirmed over three dissents. App., *infra*, 1a-64a. With respect to the Fourth Amendment question, the court eschewed the Appellate Division's expectation-of-privacy-at-the-door approach, holding instead that, under *Payton* v. *New York*, 445 U.S. 573 (1980), "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." *Id*. at 1a.

The majority began by reciting the essential facts: Petitioner "was arrested without a warrant inside the doorway of his home." App., *infra*, at 1a. More specifically, "[t]he arresting officer knocked on the door, and [petitioner] opened it," and "[w]hile [petitioner] was standing in the doorway of his apartment, the officer told him that he was under arrest." *Id*. at 2a.

Turning to the legality of the arrest, the majority took the position that *Payton* "prohibit[s] only 'the police crossing the threshold of a suspect's home to effect a warrantless arrest in the absence of exigent circumstances.'" (quoting *People* v. *Minley*, 502 N.E.2d 1002, 1003 (N.Y. 1986) (ellipsis omitted)). Thus *Payton* does not prohibit officers from arresting someone who voluntarily answers the door and stands "in the front doorway," as long as "the police [do not] enter[] the defendant['s] home[]" without a

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[1] In addition to the *Payton* issue, petitioner argued that the officers' entry into the common hall of petitioner's duplex home violated the Fourth Amendment. The lower court held that issue waived (App., *infra*, 17a n.10), and petitioner does not press it here.

warrant. *Id.* at 7a. On this reasoning, it is "irrelevant whether the defendant was actually standing outside his home or was standing 'in the doorway.'" *Ibid.*

The majority next rejected the Second Circuit's contrary reasoning in *United States* v. *Allen*, 813 F.3d 76 (2d Cir. 2016), which held that "*Payton* turns on the arrested person's location, not the location or conduct of the officers." App., *infra*, 9a-10a. It dismissed the Second Circuit's reasoning as inconsistent with New York precedents, noting succinctly that "we are not bound by *Allen*." *Id.* at 8a. Accord *id.* at 8a n.6. The majority also attempted to distinguish *Allen* on the ground that the defendant in *Allen* "remain[ed] inside the home's confines," whereas petitioner here was "in the doorway." *Id.* at 9a-10a (emphasis omitted). The majority thus reasoned that, while the exchange in *Allen* was "*across* the threshold," the exchange in this case was *at* the threshold. *Ibid.* (emphasis added).

b. Judges Rivera and Wilson dissented from the majority's *Payton* holding. App., *infra*, 30a-64a.

Judge Rivera explained that "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." App., *infra*, 44a. In her view, "federal jurisprudence does not support the conclusion that every warrantless threshold arrest is constitutionally permissible." *Ibid.* On the contrary, those "federal circuit courts that have interpreted the Fourth Amendment to prohibit certain warrantless home arrests outside the home as *Payton* violations" better reflect "the purpose[] of the Fourth Amendment to protect the individual's right to be secure in the home." *Id.* at

46a. She accordingly would have held that "[t]he police violated defendant's constitutional rights against a warrantless home arrest." *Id*. at 47a.

Judge Wilson, who joined Judge Rivera's dissent, also wrote separately. He added that, because *Payton* "fail[ed] to grapple squarely with the legacy of *United States v. Santana*," it "raised numerous * * * vexing" questions, including "where is the threshold, and whose position relative to it is determinative?" App., *infra*, 48a-49a.

To answer those questions, Judge Wilson would have "adopt[ed] in full" the Second Circuit's opinion in *Allen*, including its holding 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 49a (quoting *Allen*, 813 F.3d at 88-89).

B. Statement respecting the Sixth Amendment question

1. Pursuant to New York Penal Law § 70.10, a court may sentence a "persistent felony offender" to an enhanced term of imprisonment if the court finds that the defendant has committed two prior felonies and that "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." N.Y. Penal Law § 70.10(2).

Before imposing such a sentence, the court must hold an evidentiary hearing under New York Criminal Procedure Law § 400.20(9). At the hearing, the court must enter findings of fact on two matters,

both of which are prerequisites to application of New York's persistent offender sentencing enhancement.

First, the court must find "beyond a reasonable doubt" that the defendant has committed two prior felonies as defined in Section 70.10(1). See N.Y. Crim. Proc. Law § 400.20(5).

Second, the court must resolve by "a preponderance of the evidence" all "[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct" (§ 400.20(5)) necessary to decide whether "extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest" (§ 400.20(1)). This requirement is a mandatory prerequisite to enhancing the offender's sentence:

> 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.

Id. § 400.20(9) (emphasis added).

Extensive fact-finding hearings are common under this scheme. The State routinely calls witnesses and introduces exhibits, and the defendant typically testifies and provides rebuttal evidence. See, *e.g.*, *People* v. *Locenitt*, 2013 WL 3722482, at *3 (N.Y. Sup. Ct. 2013); *People* v. *Prindle*, 2011 WL 3331375, at *2 (N.Y. Sup. Ct. 2011).[2]

2. The State moved to sentence petitioner, who had not been convicted of a felony since 1992, as a

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[2] A defendant can waive his right to a hearing. See N.Y. Crim. Proc. Law § 400.20(8). That exception is not relevant here.

"persistent felony offender." App., *infra*, 3a.

The trial court held a Section 400.20(9) hearing. App., *infra*, 3a. The court took evidence on the question of the public's interest, including tapes of jailhouse phone calls purportedly "reflecting on his character." A.681-686, A.691-692.

The trial court found that petitioner's enhanced incarceration would serve the public interest and sentenced petitioner as a persistent felony offender to a term of imprisonment of 15-years-to-life. App., *infra*, 3a, 67a. Absent the enhancement, petitioner would have faced an indeterminate term of two-to-20 years in prison. N.Y. Penal Law §§ 70.06(3)(d), (3)(e), (4)(b); 70.25.

3. The Appellate Division affirmed. App., *infra*, 65a-68a. It held, in relevant part, that the trial 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." *Id*. at 67a.

4.a. The New York Court of Appeals affirmed in a divided opinion. App., *infra*, 1a-64a. The court did not address petitioner's *Apprendi* arguments at any length, relying instead on its contemporaneous decision in *People* v. *Prindle*, 80 N.E.2d 1026 (N.Y. 2017), which also involved a challenge to New York's persistent offender sentencing enhancement law. The decision in *Prindle* is reproduced in the appendix to this petition at 69a-77a.

In *Prindle*, the lower court concluded that New York's persistent offender scheme is permissible under the Sixth Amendment because the fact of prior conviction is the "sole determinant of whether a defendant is subject to recidivist sentencing." App., *infra*, 71a (emphasis omitted) (quoting *People* v.

Rivera, 833 N.E.2d 194, 197 (N.Y. 2005)). The Court of Appeals thus portrayed the New York statute as creating a two-step process: "[I]n step one," the trial court must find that the defendant committed two prior felonies, which "expos[es] him to the sentencing range applicable to such offenders." *Id.* at 72a. "[I]n step two," the court "evaluates what sentence is warranted and sets forth an explanation of its opinion on that question." *Ibid.*

The court rejected Prindle's argument that an enhanced sentence is available only after factual findings made during step two. Instead, according to the Court of Appeals, step one alone authorizes an enhanced sentence and "the legislative command that sentencing 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." App., *infra*, 75a (quoting *Rivera*, 833 N.E.2d at 200).

b. Judge Fahey, who did not participate in the court's decision in *Prindle*, dissented from the affirmance of petitioner's sentence. App., *infra*, 18a-30a.

In his view, "New York's persistent felony offender sentencing scheme is unconstitutional under *Apprendi*." App., *infra*, 18a. That is so because "[b]eing a 'persistent felony offender' is * * * only one of two necessary conditions for the imposition of an enhanced sentence under the pertinent sentencing statute, Penal Law § 70.10." *Ibid.* "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.'" *Id.* at 18a-19a (quoting N.Y. Penal Law § 70.10(2)). And "to reach the 'opinion' that enhanced sentencing is warranted," the trial court "'must . . . make such *findings of fact* as it deems relevant.'" *Id.* at 19a (quoting N.Y. Crim. Proc. Law § 400.20(9)). "If the first necessary condition is met, but not the second, a persistent felony offender may not be given enhanced sentencing." *Ibid.*

Judge Fahey went on, "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." App., *infra*, 26a. After surveying this Court's decisions at length, Judge Fahey observed that "[e]xposing 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 [both] to the Federal Constitution [and] to basic justice." *Id.* at 29a. He thus would have declared New York's persistent offender enhancement statute a violation of the Sixth Amendment.

REASONS FOR GRANTING THE PETITION

Rare is the case that cleanly presents an important issue over which there is an entrenched conflict among the lower courts. Rarer still is the case that presents two such issues, each independent of the other. This is such a case.

Both the Fourth Amendment and Sixth Amendment questions are cleanly presented here. Both implicate deep divisions of authority on issues of great practical importance. And as to each, the lower court erred. Both therefore warrant the Court's attention.

I. THE FOURTH AMENDMENT QUESTION WARRANTS REVIEW

The Fourth Amendment question in this case involves a ubiquitous fact pattern: Officers approach a suspect's front door and knock. The suspect answers the door, remains at the doorway, but does not step outside. The officers, who lack a warrant and who remain physically outside the home, inform the suspect that he is under arrest. The suspect submits and is taken away.

The lower courts are in deep disagreement about the constitutionality of this kind of arrest. Seven, in addition to the court below, hold that when a suspect comes to the front door, anything is fair game so long as the officers remain physically outside the home, because it is the officer's location that matters under *Payton*. Four other courts have held that what matters is the *suspect's* location—a citizen cannot be arrested without a warrant while inside her home, regardless where the officers are when the arrest occurs.

The conflict, which is widely acknowledged, is producing opposite results on identical facts. Given the split between the New York court and the Second Circuit, moreover, these divergent results are obtaining in overlapping locations, depending on whether the prosecution is state or federal. This kind of arbitrary variation in the enforcement of the Fourth Amendment is inimical to constitutional values.

The issue is also enormously important. Not only does this fact pattern arise all across the country every day, but the conflict has made murky what ought to be the clearest line of all under the Fourth Amendment: the threshold of the home.

For this reason, too, the decision below is wrong. Few rules are better settled than that a citizen may not be arrested without a warrant while inside her home. Yet that is exactly what the New York Court of Appeals has approved in this case.

A. There is widespread confusion over the Fourth Amendment question presented

The Court held in *Payton* v. *United States*, 445 U.S. 573 (1980), 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." *Id.* at 576. "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home," which is "too substantial an invasion to allow without a warrant." *Id.* at 588-589.

Around the same time, this Court suggested in *United States* v. *Santana*, 427 U.S. 38 (1976), that the threshold of the home may not be "a subject of Fourth Amendment protection" because someone who is already voluntarily standing in the front door is "exposed to public view, speech, hearing, and touch as if she [were] standing completely outside her house." *Id.* at 42. Put another way, a person at her front door has no "expectation of privacy." *Ibid.*

In light of these "contradictory cases" governing "[t]he law on arrests made in and around the threshold of the home" (*Parker-El* v. *Morales*, 2015 WL 5920031, at *4 (S.D.N.Y. 2015)), the lower courts are hopelessly confused about how the Fourth Amendment applies to warrantless doorway arrests. By our count, there are at least seven federal courts of appeals and state high courts that—like the court below—would have affirmed the denial of the motion to suppress in this case, although they would have

done so for differing reasons. In contrast, there are at least four such courts that would have reversed, directing the suppression of petitioner's statements.

The disagreement among the lower courts is longstanding and widely recognized. As the New Hampshire Supreme Court has noted, "[j]urisdictions are split on whether *Payton* invalidates warrantless arrests occurring immediately after the defendant open[s] a door in response to a police knock." *State* v. *Morse*, 480 A.2d 183, 186 (N.H. 1984). The Indiana Supreme Court likewise has recognized that "[t]he law in the area of threshold arrests is not entirely clear" because "[t]he Supreme Court has not directly addressed the subject and the several courts that have considered it do not paint a consistent picture." *Cox* v. *State*, 696 N.E.2d 853, 857 (Ind. 1998). And as the Second Circuit more recently summarized it, "[s]ome of our sister circuits have read *Payton* narrowly, and appear to conclude that there is no *Payton* violation unless police physically cross the threshold and enter the home," but "[o]ther circuits have eschewed that narrow reading." *United States* v. *Allen*, 813 F.3d 76, 81 (2d Cir. 2016).

Put simply, "[t]he issue of whether a suspect who opens his door in response to a law enforcement agent's knock may be arrested without a warrant, absent exigent circumstances, is in great dispute among the federal courts." *United States* v. *90-23 201st Street*, 775 F. Supp. 2d 545, 557 (E.D.N.Y. 2011). The split is mature and entrenched; this Court's review is therefore desperately needed.

1. Seven courts would reach the same result as the court below

a. The New York Court of Appeals held in this case that a warrantless arrest of a suspect who is at

the threshold of his home is lawful, so long as the officers do not physically cross the threshold themselves. App., *infra*, 7a. According to the lower court, *Payton* applies only when the officers physically enter the home. *Ibid.*

Some courts of appeals have reached the same result for the same reason. In *United States* v. *Berkowitz*, 927 F.2d 1376 (7th Cir. 1991), for example, the **Seventh Circuit** addressed the general fact pattern in which "the police go to a person's home without a warrant, knock on the door, announce from outside the home the person is under arrest when he opens the door to answer, and the person acquiesces to the arrest." *Id.* at 1386. The Seventh Circuit held that *Payton* did not apply in that case because, even though the suspect "was still standing inside his home when [the officer] told him he was under arrest[,] * * * *Payton* prohibits only a warrantless *entry* into the home, not a policeman's use of his voice to convey a message of arrest from outside the home." *Ibid.*

The court expressly rejected a *Santana*-based rationale, however, holding that "a person who merely answers a knock on his door" but "stays within the house" does not relinquish his reasonable expectation of privacy. *Berkowitz*, 927 F.2d at 1388. Rather, under *Payton*, "[w]hen the police assert from outside the home their authority to arrest a person, they have not breached the person's privacy interest in the home." *Id.* at 1387.

The **Eleventh Circuit** reached a similar result on the same reasoning in *Knight* v. *Jacobson*, 300 F.3d 1272 (11th Cir. 2002), where it upheld a warrantless doorway arrest on the ground that "*Payton* keeps the officer's body outside the threshold, not his voice" and therefore "does not prevent a law enforce-

ment officer from telling a suspect to step outside his home" to be arrested without a warrant. *Id.* at 1277.

b. Other courts have reached the same result, but by way of *Santana* rather than a narrow interpretation of *Payton*.

In *United States* v. *Vaneaton*, 49 F.3d 1423 (9th Cir. 1995), for example, the **Ninth Circuit** addressed "whether the police, acting with probable cause but without a warrant and while standing outside [a] motel room, could lawfully arrest [a suspect] while he was standing immediately inside the open doorway." *Id.* at 1425.[3] The court held that, under *Payton*, police ordinarily may not arrest a suspect while he remains inside his room. *Ibid.* But "the presumption created by *Payton* is overcome" by *Santana* and its progeny if the suspect "voluntarily expose[s] himself to warrantless arrest" by answering the front door. *Id.* at 1426. By "opening the door," a suspect "expose[s] himself in a public place," and a "warrantless arrest, therefore, does not offend the Fourth Amendment," even if the suspect remains inside the doorway. *Id.* at 1427. Accord *LaLonde* v. *County of Riverside*, 204 F.3d 947, 955 (9th Cir. 2000) ("The Fourth Amendment's prohibition on warrantless entry into an individual's home does not apply to arrests made at the doorway, because the doorway is considered a public place.").

At least four other courts have similarly interpreted *Santana* to override *Payton* with respect to warrantless arrests of suspects who come to the front door but remain inside:

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[3] "[A] motel room [is] the equivalent of [a] home for all relevant purposes." *State* v. *Morse*, 480 A.2d 183, 185 (N.H. 1984).

- **Tenth Circuit:** *McKinnon* v. *Carr*, 103 F.3d 934, 935 (10th Cir. 1996) (per curiam) (upholding the arrest because *Payton* "has no application to a doorway arrest" under *Santana*);
- **Kentucky Supreme Court:** *Talbott* v. *Commonwealth*, 968 S.W.2d 76, 81 (Ky. 1998) (rejecting the defendant's *Payton* argument because when the defendant was arrested she "was standing in the doorway of her home, a public place where she had no reasonable expectation of privacy");
- **Florida Supreme Court:** *Byrd* v. *State*, 481 So. 2d 468, 472 (Fla. 1985) (noting that "[a] significant question arises * * * when a warrantless arrest occurs at or just within the threshold of a residence" and holding that "an arrest at or in the threshold of a residence" is in a "public place" and therefore "does not implicate *Payton* considerations");
- **Minnesota Supreme Court:** *State* v. *Patricelli*, 324 N.W.2d 351, 352 (Minn. 1982) (holding that "nonexigent warrantless arrests initiated at the threshold of a suspect's house where the suspect voluntarily opens the door in response to knocking" are permissible under *Santana*, notwithstanding *Payton*).

Each of these courts would reach the same result as the court below because, in their view, *Santana* means that *Payton* does not apply at all to warrantless doorway arrests.

2. Four courts are in square conflict with the decision below

At least four other courts would hold that the warrantless doorway arrest in this case violated the

Fourth Amendment. These courts generally hold that *Payton*'s protections hinge on the location of the arrestee, not the officer; and not one has held that *Santana* overrides *Payton* in this context.

Most notable among the conflicting jurisdictions is the **Second Circuit**, which includes New York. In *Allen*, the defendant "opened the door to his apartment, and during the next five to six minutes that he spoke with the officers, he remained 'inside the threshold' while the officers stood on the sidewalk." 813 F.3d at 79. After this verbal exchange, the officers "told [the defendant] that he would need to come down to the police station" because "he was under arrest." *Ibid*. The defendant complied. *Ibid*.

On later review, the Second Circuit expressly rejected the decisions of other courts "conclud[ing] that there is no *Payton* violation unless police physically cross the threshold and enter the home." *Allen*, 813 F.3d at 81. Because "the rule must turn on the location of the defendant, not the officers, at the time of the arrest" (*id*. at 85), the Second Circuit concluded 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). And on its way to that conclusion, the Second Circuit considered and rejected the government's *Santana* argument. *Id*. at 83-84.

Three other courts have reached the same conclusion on similar facts. Like the lower court, each based its reasoning exclusively on *Payton*:

- **Sixth Circuit:** *United States* v. *Thomas*, 430 F.3d 274, 277 (6th Cir. 2005) (Sutton, J.) (holding that "a consensual encounter at the doorstep

may evolve into a 'constructive entry'" of the home in violation of *Payton* if the police, "while not entering the house [physically]," arrest the suspect inside his house by "show of authority");

- **Washington Supreme Court:** *State* v. *Holeman* 693 P.2d 89, 91 (Wash. 1985) (holding under *Payton* that, "without a warrant and absent exigent circumstances, the police are prohibited from arresting a suspect while the suspect is standing in the doorway of his house" and that "[i]t is no argument to say that the police never crossed the threshold" because "[i]t is not the location of the arresting officer that is important in determining whether an arrest occurred in the home for Fourth Amendment purposes.");
- **Nebraska Supreme Court:** *State* v. *George*, 317 N.W.2d 76, 80 (Neb. 1982) (holding that warrantless doorway arrests are unconstitutional under *Payton* because "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home").[4]

There is no doubt that this case would have come out differently if it had been litigated in the Second or

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[4] The First Circuit, Eighth Circuit, Idaho Supreme Court, and Massachusetts Supreme Judicial Court have rejected categorical application of *Santana* to doorway arrests, in conflict with the Tenth Circuit and state courts of Kentucky, Florida, and Minnesota. See *Morse* v. *Cloutier*, 869 F.3d 16, 26-27 (1st Cir. 2017); *Duncan* v. *Storie*, 869 F.2d 1100, 1102-1103 (8th Cir. 1989); *State* v. *Maland*, 103 P.3d 430, 435 (Idaho 2004); *Commonwealth* v. *Marquez*, 749 N.E.2d 673, 678-679 & n.5 (Mass. 2001). Those courts did not reach the subsequent *Payton* question, however, because each case involved a doorway encounter followed by physical entry or actual force.

Sixth Circuits or the state courts of Washington or Nebraska. In each of those jurisdictions, *Payton* is interpreted to forbid all non-exigent, warrantless doorway arrests when the suspect has not physically exited the home.

B. The Fourth Amendment issue is exceptionally important

The Fourth Amendment question is self-evidently important. To begin with, trial courts and intermediate appellate courts are routinely called upon to resolve the question presented, and, like the courts of appeals and state supreme courts, they are reaching constantly conflicting results.[5]

Beyond that, the confusion among the lower courts—and the fuzziness inherent in the approaches taken by the court below and those courts that would reach the same result—is making enforcement of the Fourth Amendment highly unpredictable.

This Court has long recognized the importance of providing clear constitutional rules to officers policing the Nation's streets. Because the Fourth Amendment "calls for consistent application from one police encounter to the next," it is essential that officers be able to "determine in advance whether the

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[5] For a very limited sampling, see *People* v. *Hammerlund*, 2017 WL 4654568, at *3 (Mich. Ct. App. 2017) (per curiam); *T.C.* v. *Town of Westville*, 2017 WL 2930499, at *4 (N.D. Ind. 2017); *Brenay* v. *Schartow*, 2016 WL 7385713, at *2 (E.D. Mich. 2016); *Goldberg* v. *Junion*, 208 F. Supp. 3d 977, 987 (S.D. Ind. 2016); *United States* v. *Soza*, 162 F. Supp. 3d 1137 (D.N.M. 2016); *Parker-El* v. *Morales*, 2015 WL 5920031, at *4 (S.D.N.Y. 2015); *State* v. *Thomas*, 2015 WL 2191107, at *5 (Ohio Ct. App. 2015); *Flores* v. *Lackage*, 938 F. Supp. 2d 759, 772 (N.D. Ill. 2013); *Morse* v. *Fitzgerald*, 2013 WL 1195036, at *7 (W.D.N.Y. 2013); *Stout* v. *State*, 2012 WL 3612530, at *38 (Tenn. Crim. App. 2012); *90-23 201st Street*, 775 F. Supp. 2d at 557.

conduct contemplated will implicate the Fourth Amendment." *Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988). Officers who understand their Fourth Amendment obligations are better able to take appropriate precautions to ensure that they respect a suspect's constitutional rights and that the evidence they gather is lawfully collected and admissible.

The division of authority, taken alone, is enough to undermine this needed clarity—especially in cities like New York, where one rule applies under state law and a different rule applies under federal law. But even apart from the split, the rule announced by the lower court in this case has turned the Fourth Amendment's clearest line—the threshold of the home—into a gray area.

According to some courts, if the suspect is "[i]n the doorway," *Santana* applies and a warrantless arrest is constitutional. See, *e.g.*, *McClish* v. *Nugent*, 483 F.3d 1231, 1245 (11th Cir. 2007) (citing *United States* v. *Quaempts*, 411 F.3d 1046, 1048 (9th Cir. 2005)). But if the suspect is on the "interior of the dwelling," albeit near the doorway and speaking to the police, *Payton* applies, and a warrantless arrest is unacceptable. *Ibid*. This mirrors the line that majority below attempted to draw: A suspect "in" the threshold but not outside his home is subject to warrantless arrest, whereas an arrest "across" the threshold requires a warrant. App., *infra*, 9a.

These distinctions are plainly unworkable; how is an officer supposed to know what differentiates a suspect standing "in" the doorway from one standing only "near" the doorway? "The people in their houses, as well as the police, deserve more precision." *Kyllo* v. *United States*, 533 U.S. 27, 39 (2001). Absent that precision, the Fourth Amendment will continue to be administered inconsistently across the Nation.

The lower court's decision also creates a no-win rule for citizens. When an officer comes knocking on the door, they may either open the door and unwittingly forfeit the sanctity of their home, or they may refuse to open their door, but risk that their conduct is interpreted as creating an exigency, inviting a forcible entry. This concern is not hypothetical. See, *e.g.*, *Morse* v. *Cloutier*, 869 F.3d 16, 26-27 (1st Cir. 2017); App., *infra*, 42a-43a (Rivera, J., dissenting) (collecting cases in which the suspect's refusal to open the door or subsequent closing of the door was met with forcible entry).

The rule adopted by the majority below thus "escalates the tension inherent in a visit from the police" (App., *infra*, 42a), both by encouraging citizens not to cooperate with officers and by making it impossible for officers to determine with any predictability when a warrantless arrest is permissible and when it is not. For the benefit of police officers who must conform their conduct to constitutional rules, of the courts that must administer those rules, and of citizens whose liberty is protected by them, this Court should grant review in order to clarify this frequently recurring constitutional issue.

C. Petitioner's warrantless doorway arrest violated the Fourth Amendment

Review is furthermore warranted because the New York court's answer to the Fourth Amendment question is wrong.

1. At the core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). Accord *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment,

the home is first among equals."). The right to be free from government intrusion in the home thus lies "at the center of the private lives of our people." *Georgia* v. *Randolph*, 547 U.S. 103, 115 (2006) (quotation omitted).

Crucially, this Court has said that "the Fourth Amendment has drawn a *firm line* at the entrance to the house." *Payton*, 445 U.S. at 590 (emphasis added). And in no other setting "is the zone of privacy more clearly defined than when bounded by the *unambiguous physical dimensions* of an individual's home." *Id*. at 589 (emphasis added).

It follows from these settled principles that citizens may not be arrested without a warrant if they are standing anywhere within the "unambiguous physical dimensions" their homes. *Payton*, 445 U.S. at 589. That is so regardless whether the citizen is "at" or "in" the threshold, "near" the threshold, or 20 feet from the threshold. So long as an individual has not stepped *outside*, she is *inside*—and when she is inside, the police must have a warrant to effect a non-exigent arrest. *Id*. at 576.

2.a. The lower court's contrary reasoning, and that of the Seventh and Eleventh Circuits, is wholly unpersuasive. Those courts have reasoned that *Payton* forbids officers from physically entering a person's home to effectuate a warrantless arrest inside but does not prohibit a projection of authority inside the home to accomplish the same objective. On this reasoning, it is the location of the officers, and not the suspect, that determines whether the arrest takes place inside the home. App., *infra*, 7a.

That cannot be correct. According to that logic, officers could surround a house, declare over a bullhorn that the occupants are under arrest, and

demand that they come out with their hands up. When the occupants comply, in the lower court's view, they will not have been arrested inside their home because the officers all along remained physically outside. Every court to consider a situation like that has reached the opposite conclusion, holding that the arrest is completed inside the house and therefore requires a warrant under *Payton*. See *Sharrar* v. *Felsing*, 128 F.3d 810, 819 (3d Cir. 1997); *United States* v. *Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989); *United States* v. *Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985).

These courts rightly recognize that police may just as effectively enter a home by projecting their authority into it from outside. Cf. *Kyllo*, 533 U.S. at 34 (police can invade "the interior of the home" without "without physical intrusion"). *Payton*'s protection of the home's sanctity would mean little indeed if police could execute warrantless arrests of citizens in their homes by simply projecting a show of authority into the home across the threshold or through a window.

b. *Santana* does not call for a different result in the context of doorway arrests. As an initial matter, *Santana* is distinguishable on its facts. The defendant there did not answer a knock at her front door; rather, she was "standing in the doorway of the house" for a prolonged period of time. 427 U.S. at 40. The Court found that the defendant "had [no] expectation of privacy" in that case because her lingering in the doorway made her "not merely visible to the public," but also fully "exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." *Id*. at 42.

That does not remotely describe a typical answer to a knock at the front door. In such cases, a home's

occupant comes to the threshold for the limited purpose of recognizing and speaking with the visitor. Very often, the door is opened only partially, and even then only to a relatively private area, like the inside of an apartment building or a duplex or a relatively enclosed porch or portico. It is simply wrong to say that answering the front door is categorically akin to "standing completely outside [one's] house" (*Santana*, 427 U.S. at 42), where one has no expectation of privacy and relinquishes the protections of the Fourth Amendment.

To hold as other courts have held, that under *Santana* there is categorically no expectation of privacy at the front door of one's home, would transform "the entrance to the house" from a "firm line" (*Payton*, 445 U.S. at 590) into a gray area. Although officers would be forbidden from crossing the threshold themselves under *Payton*, citizens nevertheless would have no real Fourth Amendment protection at the front door; officers would be free to arrest or detain them by show of authority, even while they are concededly within the physical dimensions of the house. There is no basis in this Court's Fourth Amendment cases for that startling conclusion.

The Court should accordingly grant review of the first question presented and reverse the denial of petitioner's motion to suppress.

II. THE SIXTH AMENDMENT QUESTION WARRANTS REVIEW

In addition, or alternatively, the Court should grant review of the second question presented here, concerning the constitutionality of New York's "persistent felony offender" sentencing enhancement scheme.

Before a trial court may impose an enhanced sentence under New York's persistent offender statute, the judge must hold an evidentiary hearing and find facts by a preponderance of the evidence concerning the defendant's "history and character and the nature and circumstances of his criminal conduct." N.Y. Crim. Proc. Law § 400.20(5). The judge "must" make these findings (§ 400.20(9)), and an enhanced sentence "may not be imposed" without them (§ 400.20(1)).

The lower court held that this enhancement scheme does not violate *Apprendi* because the court must find those facts only as part of its exercise of discretion after the defendant is deemed eligible for enhanced sentencing based on prior convictions. In other words, the facts as found do not independently dictate the imposition of an enhanced sentence. But the trial court's discretion is a red herring. The lower court acknowledged that the prior convictions alone do not automatically result in a higher sentence, and *Apprendi* is crystal clear that "*any* fact" beyond a prior conviction that must be found as a prerequisite to "increas[ing] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). Under New York law, that includes facts concerning the defendant's "history and character and the nature and circumstances of his criminal conduct," even if those facts are used only in the court's subsequent exercise of discretion after identifying qualifying prior convictions.

As numerous other courts have held with respect to analytically indistinguishable sentencing schemes, New York's persistent offender scheme thus violates the rule of *Apprendi*.

Accordingly, if the Court does not grant review of the Fourth Amendment question and reverse on that basis, it should grant review of the Sixth Amendment question and remand for resentencing.

A. New York's persistent offender sentencing enhancement scheme violates *Apprendi*

1. *Apprendi* stands for a straightforward proposition: The Sixth Amendment requires that any fact-finding necessary to increase the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be done by a jury, beyond a reasonable doubt. 530 U.S. at 490.

New York's persistent offender sentencing enhancement plainly violates that simple rule. Before a trial judge may impose an enhanced sentence under Section 70.10(2), the judge must hold a hearing under New York Criminal Procedure Law § 400.20(5) to decide by "a preponderance of the evidence" all "[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct" (§ 400.20(5)) necessary to decide whether "extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest" (§ 400.20(1)). An enhanced sentence "may not be imposed" unless the court holds such a hearing and enters such findings. *Id.* 400.20(1).

As we noted in the Statement (*supra*, at 6), this requirement is not discretionary:

> 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.

N.Y. Crim. Proc. Law § 400.20(9) (emphasis added). Indeed, the New York Court of Appeals has expressly acknowledged that defendants have "a statutory right to present evidence" at the Section 400.20(5) hearing and to receive findings on that evidence. *Rivera*, 833 N.E.2d at 199. This step of the process is thus not optional.

That has been the reality in practice, too. New York's intermediate appellate courts regularly reverse for resentencing if the trial judge does not hold the required evidentiary hearing. See *People* v. *Brown*, 963 N.Y.S.2d 732, 734 (N.Y. App. Div. 2013) (reversing trial court for failing to enter public interest findings); *People* v. *Rivera*, 875 N.Y.S.2d 173, 176-177 (N.Y. App. Div. 2009) (same); *People* v. *Bazemore*, 52 A.D.3d 727, 728 (N.Y. App. Div. 2008) (same); *People* v. *Murdaugh*, 833 N.Y.S.2d 557, 559 (N.Y. App. Div. 2007) (same); *People* v. *Ruffins*, 776 N.Y.S.2d 405, 407 (N.Y. App. Div. 2004) (same). There is therefore no denying that the trial judge must take evidence and make findings of fact about the offender's character and history before imposing an enhanced sentence.

2. The lower court's efforts to square its scheme with *Apprendi* are fundamentally flawed. The lower court's reasoning, in a nutshell, is that there is no *Apprendi* violation in cases like petitioner's because the evidentiary hearing and fact-finding concerning the history and character of the defendant bear only on the trial court's exercise of discretion, after it has determined that the defendant is a repeat offender. App., *infra*, 75a. Thus, "the legislative command that sentencing 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." *Ibid*.

But that misses the point. Without the judge-made findings under Section 400.20(5), petitioner could only have been sentenced between two-to-four and 10-to-20 years in prison. N.Y. Penal Law §§ 70.06(3)(d), (3)(e), (4)(b); 70.25. With the enhancement, he has been sentenced to 15-years-to-life. App., *infra*, 3a. That higher sentence was not statutorily authorized by the mere fact of petitioner's prior convictions; no, the trial court *had* to make additional findings of fact concerning the nature of the crime and petitioner's character. No matter what role those findings may have played in the subsequent analysis—and no matter whether that analysis was discretionary or mandatory—the judge-made findings were a statutory prerequisite to the enhanced sentence.

This Court's decision in *Cunningham* v. *California*, 549 U.S. 270 (2007), thus puts to rest the unconstitutionality of New York's scheme. In *Cunningham*, the California Supreme Court had held that California's sentencing enhancement scheme was consistent with *Apprendi* because the statute merely authorized judges to engage in ordinary discretionary sentencing. *Id.* at 289. This Court disagreed, noting that "broad discretion" is beside the point; if "the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Id.* at 290.

As the Court later reaffirmed in *Descamps* v. *United States*, 570 U.S. 254 (2013), moreover, the prior-convictions exception to *Apprendi* does not permit a court to increase an offender's sentence based

on a qualitative assessment of his criminal history or character, beyond the statutory elements and nature of the offense, as reflected in the relevant *Shepard* documents. *Id*. at 262-263. New York cannot skirt these requirements by mischaracterizing its own sentencing procedures; as the Court held two Terms ago, a State can "fail[] to appreciate the central and singular role the judge plays" in sentencing under its own state law. *Hurst* v. *Florida*, 136 S. Ct. 616, 622 (2016).[6]

These holdings resolve this case—and they require invalidation of New York's sentencing law.

B. The lower courts are divided over the constitutionality of schemes like New York's

In light of the plain unconstitutionality of New York's persistent offender law, it should come as no surprise that numerous jurisdictions faced with analytically similar "public interest" fact-finding requirements have invalidated them on the grounds that we urge here.

The **Ninth Circuit** and, soon thereafter, the **Supreme Court of Hawaii** both invalidated a sentencing enhancement law indistinguishable from New York's. See *Kaua* v. *Frank*, 436 F.3d 1057 (9th Cir. 2006); *State* v. *Maugaotega*, 168 P.3d 562 (Haw. 2007). Just like the scheme at issue here, Hawaii's

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[6] The Court is bound by the lower court's interpretation of the statutory language but not by its pronouncement of the actual "operative effect" of the statute. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 483-484 (1993). Prior to *Apprendi*, the lower court had made clear that New York's persistent offender statute, unlike statutes "concerned solely with" prior convictions, turns also on the defendant's character and history (*People* v. *Sailor*, 480 N.E.2d 701, 707-708 (1985)), and that undeniably continues to be the case.

enhancement law called for a "two-step process." *Kaua*, 436 F.3d at 1059. *First*, the trial court would determine whether the defendant is a "multiple offender" eligible for "an extended sentence," and *second*, it would "determine whether an extended sentence is necessary for the protection of the public." *Ibid*. The second step "require[d] the court to find facts outside of those found by the jury," including facts about the defendant's history and the nature of the crime committed. *Id*. at 1060.[7]

Like the lower court's holding in this case, the State argued in *Kaua* that the second step of Hawaii's scheme did not run afoul of *Apprendi* because "the public protection finding of step two is discretionary." 436 F.3d at 1060. But the Ninth Circuit rejected that argument: "[B]oth steps of the process '*must* be followed' when the prosecution seeks an extended sentence," including judge-made findings of fact on the public-interest issue. *Id*. at 1061 (emphasis added). It thus held that Hawaii's nearly identical recidivist enhancement scheme violated the Sixth Amendment and granted the defendant's petition for habeas corpus. *Id*. at 1062. The Hawaii Supreme Court followed suit shortly thereafter, striking the statute down. *Maugaotega*, 168 P.3d at 575-577.

Another stark example comes from **Connecticut**, which invalidated an almost identical sentencing enhancement scheme as the one at issue here. See

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[7] See *Mara* v. *State*, 391 P.3d 1236, 1241 n.6 (Haw. Ct. App. 2017) (noting that the New York law and invalidated Hawaii law are "very similar"). See also Douglas A. Berman, *Conceptualizing* Booker, 38 Ariz. St. L.J. 387, 420 n.152 (2006) (alluding to the tension between the lower court's approach and *Kaua*).

State v. *Bell*, 931 A.2d 198, 233 (Conn. 2007) (observing that "the New York persistent offender scheme is, for purposes of the issue before us, substantially similar" to the Connecticut law). The court there severed the language permitting judge-made findings on the issue of the public's interest, holding it "unconstitutional" under *Apprendi*. *Id*. at 235.[8]

At least four other courts have reached the same conclusion as the Ninth Circuit and state courts of Connecticut and Hawaii with respect to materially indistinguishable requirements:

- **Minnesota:** *State* v. *Kendell*, 723 N.W.2d 597, 604 n.4, 610 (Minn. 2006) (recognizing that the finding that the repeat offender is "a danger to public safety" had to be made by the jury and not a judge);
- **Ohio:** *State* v. *Foster*, 845 N.E.2d 470, 493 (Ohio 2009) (striking down a recidivism enhancement law that required a judicial finding that an enhanced sentence was necessary to "protect the public from future crime");
- **Arizona:** *State* v. *Price*, 171 P.3d 1223, 1226 (Ariz. 2007) (holding under *Apprendi* that a finding that the offender is a "danger to the community" "cannot expose [him] to an increased sentence unless it is submitted to a jury and proved beyond a reasonable doubt")

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[8] The Connecticut Supreme Court considered the New York Court of Appeals' decision in *Rivera* but found it distinguishable on the ground that the New York court had held that "predicate felonies were the sole determinant as to whether the defendant's sentence could be enhanced" in New York. *Id*. at 234 (quoting *Rivera*). But as we have just demonstrated, that is not true in practice, either in this case or more broadly.

- **New Jersey:** *State* v. *Pierce*, 902 A.2d 1195, 1199-1208 (N.J. 2006) (holding that "judicial fact-finding related to the 'need for protection of the public'" would violate *Apprendi* if it were "a precondition to a defendant's eligibility" for an enhanced sentence, and therefore holding that, although courts "may consider the protection of the public," a "protection of the public" finding "is not a precondition" for an enhanced sentence).

In each of these other jurisdictions, New York's sentencing enhancement law would have been deemed unconstitutional under *Apprendi*, and petitioner would be subject to a lesser sentence.[9]

2. On the other side of the ledger, the **Second Circuit** has joined the lower court in upholding New York's persistent offender law—though it had to take the issue en banc in four consolidated cases to do so, a rarity for that court and an indication of the importance of the issue. See *Portalatin* v. *Graham*, 624 F.3d 69, 73 (2d Cir. 2010) (en banc).

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[9] The New York court's reasoning is also in significant tension with the reasoning of several other state courts rejecting similar judicial fact-finding in other sentencing enhancements. See *People* v. *Swift*, 781 N.E.2d 292, 300 (Ill. 2002) (invalidating a sentencing enhancement based on a judicial finding that the crime was "brutal and heinous"); *Smylie* v. *State*, 823 N.E.2d 679, 684 (Ind. 2005) (invalidating sentencing enhancements based on judicially found aggravating factors); *State* v. *Schofield*, 895 A.2d 927, 933 (Me. 2005) (invalidating a sentencing enhancement based on a judicial finding that a crime was "among the most heinous crimes committed against a person"); *State* v. *Gomez*, 239 S.W.3d 733, 740 (Tenn. 2007) (holding that a trial court's use of sentencing enhancement factors besides the fact of prior conviction is an *Apprendi* violation).

A unanimous original three-judge panel—along with two of the four district court judges in the underlying consolidated cases—had held not just that New York's persistent felony offender law was unconstitutional, but that the state courts' contrary conclusion was an unreasonable application of this Court's clearly established law within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996. See *Besser* v. *Walsh*, 601 F.3d 163 (2d Cir. 2010); *Portalatin* v. *Graham*, 478 F. Supp. 2d 385 (E.D.N.Y. 2007); *Washington* v. *Poole*, 507 F. Supp. 2d 342 (S.D.N.Y. 2007).

In reversing the panel decision, the en banc majority held that, assuming "that petitioners are correct in reading New York law to require a sentencing judge to consider subsidiary facts respecting a defendant's criminal history before imposing [an enhanced] sentence, we are not persuaded that such consideration equates to judicial 'factfinding' in violation of *Blakely*." *Portalatin,* 624 F.3d at 92. The majority thus concluded that, while "[t]he Supreme Court may answer [the] question at some future time," it could not declare New York's law a violation of clearly established law in light of the "lack of guidance [from this Court] as to the precise scope of the recidivism exception" and the lack of "uniform application among appellate courts" of this Court's cases on the issue presented here. *Id*. at 93.

Having said this, there is no indication that the en banc Second Circuit, unencumbered by AEDPA and reviewing the matter de novo, would not have struck down New York's persistent felony offender statute.

C. The Sixth Amendment question is tremendously important

Like the Fourth Amendment question, the Sixth Amendment question presented here is manifestly important. New York's persistent felony offender enhancement scheme is not unique, and this Court's determination of its legality would have substantial implications for similar recidivist enhancement statutes all throughout the country.

The number of convictions being affected by just New York's approach to the question presented are, moreover, staggering: The State's own statistics suggest that more than two thousand inmates are currently serving enhanced sentences under Section 70.10(2). See N.Y. State Corr. & Cmty. Supervision, *Under Custody Report: Profile of Under Custody Population As of January 1, 2016*, at 18 (Apr. 2016), perma.cc/T9FG-MDDK.

If we are right that New York's persistent offender scheme violates *Apprendi*, each inmate will have been sentenced in violation of the Sixth Amendment. A constitutional matter of this magnitude calls out for this Court's immediate resolution.[10]

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[10] To be sure, the Court recently denied certiorari in *Prindle* v. *New York*. See 138 S. Ct. 514 (2017). But that case lacked the benefit of a reasoned dissent; the defendant presented two distinct questions that were closely related to, but ultimately different from, the single Sixth Amendment question presented here; and the petition was denied without the benefit of a brief in opposition. Older cases in which this Court denied review of Sixth Amendment challenges to New York's scheme preceded recent developments in the *Apprendi* line of cases, including the Court's decision in *Descamps* in 2013. See *Quinones* v. *New York*, 558 U.S. 821 (2009); *Rivera* v. *New York*, 546 U.S. 984 (2005); *Rosen* v. *New York*, 534 U.S. 899 (2001).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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[11] Representation by a clinic affiliated with the Yale Law School does not reflect the institutional views of the Yale Law School or Yale University.