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

PETITIONER'S REPLY BRIEF

PAUL SKIP LAISURE
TAMMY E. LINN
Appellate Advocates
111 John Street, 9th Floor
New York, NY 10038
(212) 693-0085

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL B. KIMBERLY
Counsel of Record
CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly
@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes

PETITIONER'S REPLY BRIEF

The State does not dispute the importance of the question whether officers may arrest a suspect in the doorway of his home without a warrant. Nor does the State deny that the federal courts of appeals and state courts of last resort are in conflict over the issue. The State instead attempts to kick up factual dust, asserting that this case is not a suitable vehicle for resolving the question. But the State's efforts on this score backfire; in the end, they only confirm that the opinion below conflicts with the holdings of several other courts and that the outcome in this case would have been different if it had arisen in any of those other jurisdictions. Because the Fourth Amendment question is outcome-determinative in this case and a great many other cases every year, review is warranted.

If the Court is disinclined to review the Fourth Amendment issue, it should grant review of the Sixth Amendment issue instead. On this front, the State focuses almost exclusively on the merits, arguing that New York's sentencing scheme is not unconstitutional under *Apprendi*. But its position turns on a plain misdescription of how New York's persistent felony offender scheme works in practice.

ARGUMENT

A. This case crisply presents the first question in the petition

We demonstrated (Pet. 12-18) that the lower courts are deeply and openly divided over the constitutionality of warrantless doorway arrests. *E.g.*, *McClish* v. *Nugent*, 483 F.3d 1231, 1253 (11th Cir. 2007) (Anderson, J., concurring specially) ("This is an issue with which courts have struggled, and on which there is a split of authority."). We also demonstrated (Pet. 18-20) that the issue is a matter of significant practical importance.

The State does not deny the existence of the conflict or its importance. See BIO 15. Focusing exclusively on the Second Circuit's decision in *United States* v. *Allen*, 813 F.3d 76 (2d Cir. 2016), the State instead asserts (BIO 11, 13) that this case does not present the question posed in the petition because, here, "the defendant stood in the doorway or doorframe itself," whereas in *Allen*, "the defendant remained entirely within the premises throughout the encounter."

As an initial matter, the State does not deny the conflict with cases other than *Allen*, including those involving arrests "in the doorway," as here. In *State* v. *Holeman*, 693 P.2d 89 (Wash. 1985), for example, the Washington Supreme Court held that "the police are prohibited from arresting a suspect [without a warrant] while the suspect is standing in the doorway of his house." *Id.* at 91. See also *id.* at 90 (the "arrest took place while [the defendant] was standing in the doorway of his house"). There is no doubting *Holeman*'s meaning: "In Washington, absent exigent circumstances, the police are prohibited from arresting a suspect while he or she is standing *within the doorway of the residence*." *State* v. *Solberg*, 861 P.2d 460, 465 (Wash. 1993) (emphasis added).

But more to the point, the distinction that the State attempts to draw is a red herring. In the State's view, the distinction between arrests *in* the doorway and arrests merely *near* the doorway makes a difference because someone standing "in the doorway" of the home "ha[s] not remained inside the home's confines" for purposes of the Fourth Amendment under *United States* v. *Santana*, 427 U.S. 38 (1976). BIO 8. As the State sees it, petitioner therefore "did not remain in-

side" his home *as a matter of law*. BIO 15.[1]

But in support of that position, the State relies entirely on its preferred reading of *Santana*. It asserts, in particular, that "the [lower] court's decision [is] squarely within this Court's ruling in *Santana* permitting warrantless arrests" when the defendant is "'in his doorway' at the moment of his arrest." BIO 9. Accord BIO 13. Thus, in the State's view, "this Court would have to overrule *Santana* to declare [the doorway] 'in' [the home]." BIO 17.

There are two problems with this line of reasoning. ***First***, not a single court that has upheld a warrantless doorway arrest under *Santana* has made the distinction that the State is trying to make here. Each has observed simply that the suspect answered the door and was then arrested; none has even hinted that it makes a difference whether the suspect was in the doorframe or one step back from the doorframe.

What is more, at least one court on the other side of the conflict has expressly rejected the notion that it makes any difference that "the defendant [was] 'at,' or 'on,' the threshold of his apartment when he answered the door." *Commonwealth* v. *Marquez*, 749 N.E.2d 673, 678-679 & n.5 (Mass. 2001). To "mak[e] the analysis turn on precisely where the arrestee is standing when he or she opens the door to the home [would] cause unnecessary litigation and substitute a measure of uncertainty for a settled black letter rule of constitutional law." *Id*. at 679 n.5. We made this point in the petition (at 19, 23), but the State does not respond.

---

[1] Let there be no doubt that the disagreement here is legal, not factual: Petitioner concedes that, as a matter of fact, he "was arrested without a warrant *inside the doorway of his home*." Pet. App. 1a (emphasis added).

Second, the question whether the State's preferred interpretation of *Santana* is correct is a part of the Fourth Amendment question presented: Does *Santana* mean that the doorway to a suspect's home is a "public place" where *Payton* does not apply?

The State's effort to distinguish this case from *Allen* assumes that the answer to that question is *yes*. But courts are intractably divided over the issue. See Pet. 14-17 & n.4.

Indeed, many courts reject the State's view that a suspect "in the doorway" has no expectation of privacy and is thus subject to warrantless arrest there. In *Morse* v. *Cloutier*, 869 F.3d 16, 27 (1st Cir. 2017), for example, the First Circuit rejected the "expansive reading" of *Santana* according to which "any suspect who chooses to come to the door upon hearing a police officer's knock" forfeits his expectation of privacy in his home. The court in *Holeman* held the same: "A person does not forfeit his Fourth Amendment privacy interests by opening his door to police officers." 693 P.2d at 91. See also Pet. 13, 17 n.4 (collecting additional cases).

Courts on this side of the split recognize that *Santana* is distinguishable because the suspect in that case was already in the doorway when the police arrived, "and not because the police procured her appearance by knocking on her door." *State* v. *Morse*, 480 A.2d 183, 186 (N.H. 1984). While *Santana*'s expectation-of-privacy rationale may apply to those who are "musing about" in their open front doorways without having been called there by a visitor, in other words, it does not apply to those who merely open the door to greet a caller. *Marquez*, 749 N.E.2d at 678-679.

The State's (and other courts') contrary position is also at odds with *Payton*, which emphasized that the

Fourth Amendment's special protection of the home applies to the entire area "bounded by the unambiguous physical dimensions of an individual's home." *Payton* v. *New York*, 445 U.S. 573, 589 (1980). A suspect who has not stepped beyond the exterior plane of the exterior wall of the house remains within the "physical dimensions" of the house and is entitled to the enhanced protections applicable there. Thus, so far as *Payton* is concerned, there is no pertinent difference between a suspect "in the doorway" (as in this case, Pet. App. 2a) and a suspect "at the door" (as in *Allen*, 813 F.3d at 79). In either case, the suspect has answered a knock at the door without stepping outside the unambiguous physical dimensions of the home.

Indeed, that is a necessary premise of the question resolved by the lower court: If the State were correct that standing "within the doorway" were the legal equivalent of stepping outside the unambiguous physical dimensions of the home, the lower court never would have had to address *Payton* to begin with. Yet *Payton* was the focus of the Court of Appeals' analysis, as it was for other courts that have declined to base their approval of doorway arrests on *Santana*. *E.g.*, *United States* v. *Berkowitz*, 927 F.2d 1376, 1387-1388 (7th Cir. 1991).

The actual reason the lower court held that it is "irrelevant whether the defendant was actually standing outside his home or was standing 'in the doorway'" is not because *Santana* eschews the difference, but because the officers never physically entered petitioner's home, and *Payton* (according to the lower court) "prohibit[s] *only* 'the police . . . crossing the threshold.'" Pet. App. 6a-7a (emphasis added).

Although that conclusion is consistent with the reasoning of some courts (Pet. 13-15), it cannot be reconciled with *Allen*, *Holeman*, or *State* v. *George*, 317

N.W.2d 76 (Neb. 1982). See *Allen*, 813 F.3d at 85 ("[T]he rule must turn on the location of the defendant, not the officers, at the time of the arrest."); *Holeman*, 693 P.2d at 91 (same); *George*, 317 N.W.2d at 80 (same). That is why the lower court emphasized first and foremost that "we are not bound by *Allen*." Pet. App. 8a.[2]

There is therefore no doubting that this case cleanly presents an issue over which the lower courts are hopelessly divided. This Court's intervention is desperately needed.

B. The lower court's ruling is logically flawed and will raise tensions in encounters with police at the front door

We explained in the petition (at 20-23) that the lower court's approach to the Fourth Amendment question is inconsistent with this Court's precedents and will escalate tensions in many police-citizen encounters at citizens' front doors.

1. The State insists without elaboration (BIO 17) that "the sanctity of [a person]'s home is not breached and the Fourth Amendment is not violated" so long as the police "never [physically] cross[] the 'firm line' of the entrance to the home." But as we explained in the petition (at 21-22), if that were correct, there would be no logical basis for distinguishing between an officer at the front door and one on a bullhorn in the front yard. In either case, the police would be procuring an arrest by assertion of authority without physically crossing

---

[2] The State asserts (BIO 14) that the Court of Appeals has found Fourth Amendment violations in cases where the defendant was arrested near the front door, but not "in the doorway." Not so. The State cites just one intermediate state appellate case for that proposition, and there the police physically crossed the threshold. See *People* v. *Gonzales*, 972 N.Y.S.2d 642, 643 (App. Div. 2013).

the threshold—which is apparently all that matters to the State.

True, the Court of Appeals held that a suspect must come to the door voluntarily (as did petitioner in this case) before its *Payton* holding will apply. Pet. App. 6a. See BIO 16. That too is a premise of the question presented, for if a suspect is compelled to the front door by an officer's assertion of authority, the suspect will have been seized *before* he appears in the doorway. Our point is only that the New York Court of Appeals' reading of *Payton*, taken to its logical conclusion, does not compel that result, and "arresting officers could avoid illegal 'entry' into a home simply by remaining outside the doorway and controlling the movements of suspects" through assertion of authority. *United States* v. *Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), affirmed on unrelated grounds, 457 U.S. 537 (1982).

2. The State asserts (BIO 18-19) that the lower court's rule will not raise tensions between citizens and police because "the suspect could [simply] tell the police to get a warrant and close the door." Yet that is exactly what the suspects did in the cases that we cited in the petition and that Judge Rivera cited in her dissent—and those suspects' attempts were met with forcible entry. See, *e.g.*, *Morse*, 869 F.3d at 20; *People* v. *Riffas*, 994 N.Y.S.2d 136, 137 (App. Div. 2014). Indeed, that was the outcome even in *People* v. *Gonzales*, 972 N.Y.S.2d 642, 643 (App. Div. 2013), cited approvingly by the State at page 14 of its opposition—when the suspect "tried to close the door" after having voluntarily answered, "the police pushed their way inside and handcuffed him."

There is thus no question that the rule adopted below, if allowed to stand, will turn the front door into a legal no-man's-land fraught with tension when the police come knocking without a warrant.

C. The second question presented warrants review

1. Alternatively, the Court should grant review of the second question presented. The State's response reduces to one central contention: that "prior felony convictions are the 'sole determinant' of whether a defendant is subject to sentencing as a persistent felony offender" under New York's sentencing scheme. BIO 19, 23-24. That is incorrect.

In New York, for an enhanced sentence to be imposed, not only must the court find that the offender has two or more qualifying convictions, but it must find—by a preponderance of the evidence and after holding an evidentiary hearing—that an "extended incarceration and lifetime supervision of the defendant [is] warranted to best serve the public interest" based upon the facts found. N.Y. Crim. Proc. Law §§ 400.20-(1), 400.20(5).

This is not a mere formality of law that New York sentencing courts ignore in practice. On the contrary—as we demonstrated in the petition (at 26), and as the National Association of Criminal Defense Lawyers (NACDL) confirms in its amicus brief (at 16-18)—the Appellate Division routinely reverses the imposition of enhanced sentences in cases where trial judges fail to make the required factual findings.

The State does not disagree with our reading of the plain text of the statutes or with our description of New York sentencing practices. It instead hides behind the lower court's opinion, asserting (BIO 25) that the fact of a prior felony conviction, without more, is both "necessary and sufficient" for the imposition of an enhanced sentence. That is simply wrong. The trial judge must also comply with the fact-finding requirements of N.Y. Crim. Proc. Law §§ 400.20(1), 400.20(5). That

being so, the conflict with the other cases cited at pages 28 to 31 of the petition is real and undeniable.

2. The State suggests (BIO 25-26 & n.5) that this Court should defer to the Court of Appeals as the "ultimate expositor" of New York state law and thus should not "re-examine" the lower court's interpretation of state law. There are two things to say about that.

First, although it is true that this Court is ordinarily "bound by a state court's construction of a state statute," the Court of Appeals has not resolved any "ambiguities as to the meaning of the statute" in this case or its prior cases; rather, it has "merely characterized the 'practical effect' of the statute for [Sixth] Amendment purposes." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 483-484 (1993). That is, the lower court has purported to describe the effect, in practice, of New York penal law. Unlike a statutory construction, the lower court's assessment of effect "does not bind [this Court]," which "may form [its] own judgment as to [the] operative effect" of the New York sentencing scheme. *Id*. at 484. That was essentially the underpinning of the Court's more recent decision in *Hurst* v. *Florida*, 136 S. Ct. 616, 622 (2016), where the Court explained that the State had "fail[ed] to appreciate the central and singular role the judge plays" in sentencing under its own state law. Just so here.

The bottom line is that trial judges *must* engage in judicial factfinding as a prerequisite to imposing enhanced sentences under New York law. Both we and NACDL have substantiated this point (Pet. 26, 28 & n.6; NACDL Br. 16-18), but the State talks past it.

Second, as the State recognizes (BIO 25 n.5), even if the Court of Appeals had truly engaged in statutory construction to which this Court ordinarily would

defer, such deference is unwarranted when the state court's interpretation "is an obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 129 (1945). The lower court's counterfactual description of the New York recidivism scheme cannot be understood as anything other than such an effort.

3. Finally, the State asserts that the second prong of the sentencing enhancement scheme entails merely the "traditional exercise of a sentencing court's discretion to find an appropriate sentence within the newly expanded range." BIO 25. Perhaps. But as the Court recently held, "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in a particular case, does not shield a sentencing system from the force of this Court's decisions" following *Apprendi*. *Cunningham* v. *California*, 549 U.S. 270, 272 (2007).

The State replies (BIO 27) that our reliance on *Cunningham* is "misplaced" because New York's persistent felony offender sentencing scheme "does not require an additional factual finding and the broad discretion only refers to discretion that any sentencing court possesses." We have just shown that not to be true.[3]

---

[3] The State observes (BIO 30) that the Sixth Amendment question is oft denied. But *Portalatin* v. *Graham*, 624 F.3d 69 (2d Cir. 2010), involved a federal habeas petition and therefore did not squarely present the Sixth Amendment issue. And all but one of the other cases—*People* v. *Giles*, 25 N.E.3d 943 (N.Y. 2014)—were disposed of without the benefit of an opposition brief. Although the Court called for a response in *Giles*, the lower court's opinion in that case summarily rejected the Sixth Amendment claim without addressing this Court's more recent cases.

CONCLUSION

Both the Fourth Amendment and Sixth Amendment issues are squarely presented, important, and implicate acknowledged divisions of authority. Further review of either or both is warranted.

Respectfully submitted.

PAUL SKIP LAISURE
TAMMY E. LINN
Appellate Advocates
111 John Street, 9th Floor
New York, NY 10038
(212) 693-0085

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL B. KIMBERLY
Counsel of Record
CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly
@mayerbrown.com

Counsel for Petitioner

JUNE 2018