No. 21-___

IN THE

Supreme Court of the United States

ERIC IBARGUEN,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Patricia Pazner
Tammy E. Linn
Benjamin Welikson
APPELLATE ADVOCATES
111 John Street, 9th Floor
New York, NY 10038

Kendall Turner
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, DC 20006

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

QUESTION PRESENTED

Whether, or under what circumstances, social guests are entitled to the Fourth Amendment's protection against unreasonable searches of the home that they are visiting.

RELATED PROCEEDINGS

People v. Ibarguen, No. 56 (N.Y. 2021)

People v. Ibarguen, No. 2017-06039, 173 A.D.3d 1207 (N.Y. App. Div. 2019)

People v. Ibarguen, Indictment No. 10191/15 (N.Y. Sup. Ct. 2015)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Ibarguen respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. 1a-32a) is published at 2021 WL 4777276. The opinion of the Appellate Division (Pet. App. 33a-35a) is published at 173 A.D.3d 1207.

JURISDICTION

The decision of the Court of Appeals issued on October 14, 2021. Pet. App. 1a. On December 22, 2021, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 14, 2022. No. 21A279. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the U.S. Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

INTRODUCTION

This Court has repeatedly made clear that the Fourth Amendment sometimes protects houseguests against unreasonable governmental intrusion. But the breadth of this protection remains unresolved. In particular, different jurisdictions currently accord disparate protections to social guests who do not stay the night. As a result, it is currently unclear whether

houseguests such as those at dinner parties, romantic partners, attendees of book clubs, and participants in in-home Bible studies have any constitutionally guaranteed right to privacy in the spaces of their hosts.

Two decisions from this Court frame this issue. In *Minnesota v. Olson*, 495 U.S. 91, 96 (1990), the Court established that "overnight guests" are entitled to Fourth Amendment protection in the homes of their hosts. But the Court subsequently held in *Minnesota v. Carter*, 525 U.S. 83 (1998), that houseguests "present for a business transaction" and nothing more do not enjoy constitutional protection. *Id.* at 90. In *Carter*, five Justices expressed the view that "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home." *Id.* at 99 (Kennedy, J., concurring); *see also id.* at 103 (Breyer, J. concurring in the judgment); *id.* at 108-09 (Ginsburg, J., dissenting). But the Court did not resolve whether social guests who do not stay the night may expect the same constitutional protection.

In the two decades since, lower courts have deeply divided over this oft-recurring issue. Some courts have followed the lead of the separate opinions in *Carter* and held, as a general rule, that short-term social guests have a reasonable expectation of privacy in the homes of their hosts. Other courts, including the New York courts in this case, have restricted the Fourth Amendment's protections largely to overnight guests.

This case provides an excellent opportunity to resolve this conflict. Petitioner Eric Ibarguen claims that he was having dinner with friends in their

apartment when police officers burst in without a warrant, ordered them all to step outside, and searched common areas of the apartment. Taking these assertions as true, the trial court rejected petitioner's Fourth Amendment claim on the ground that he "failed to sufficiently allege standing to challenge the search of the subject premises." Pet. App. 2a (quoting suppression court's ruling). The Appellate Division and a divided Court of Appeals each affirmed, deeming petitioner "merely a casual visitor [who] lacked standing to challenge the warrantless entry and subsequent search of the premises." *Id.* 34a (Appellate Division); *see also id.* 1a-2a (Court of Appeals).

This holding is untenable; at the very least, New York's rule should not stand without this Court's review. Millions of Americans regularly visit the homes of family and friends to engage in valuable social interactions. These visitors should not be stripped of constitutional protection in these private spaces to which they are invited. Nor should a homeowner's own solitude be imperiled "when she opens her home door to others," by a rule that "tempt[s] police to pry into private dwellings without warrant, to find evidence incriminating guests who do not rest there through the night." *Carter*, 525 U.S. at 107-08 (Ginsburg, J., dissenting). This Court should grant certiorari and clarify the Fourth Amendment's operation in this crucial sphere.

STATEMENT OF THE CASE

1. On a March evening in 2015, petitioner was having dinner with two friends in their basement-level apartment in Queens. Pet. App. 46a.[1] Petitioner lived just down the block but received his mail at his friends' home. *Id.* 52a. He had made this arrangement with his friends because he was "always at work," and mail left at his residence was frequently "tampered with" while he was away. *Id.*

While the group was eating together, several police officers suddenly crashed through the front door. Pet. App. 46a. They did not knock or provide any warning before entering the apartment. Nor did they have a warrant. The officers said they were pursuing a "short, fat, [B]lack" man "wearing a black hoody," who had allegedly sold drugs to an undercover officer and run away. *Id.* Petitioner, a slim Hispanic man, does not meet any element of the description the officers gave (nor, apparently, did either of his hosts). Nevertheless, the officers directed petitioner and his friends to stand outside the apartment and proceeded to conduct a search. *Id.*

While the officers did not find any Black man wearing a hoody sweatshirt in the apartment, their search uncovered a few glassines of heroin on a living room table. They accordingly arrested petitioner and his friends. Returning later with a warrant, the

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[1] The State offered a significantly different recitation of the relevant facts below. But because this case arises on the equivalent of a motion to dismiss, all of petitioner's allegations must be taken as true. *See* N.Y. Crim. Proc. Law § 710.60[3][b]; *People v. Burton*, 848 N.E.2d 454 (N.Y. 2006).

police recovered one of two marked $20 bills allegedly used in the "controlled buy" of heroin by the man the officers had been chasing, as well as a black jacket.

Police also later searched the cell phone they seized from petitioner when they arrested him. The phone's call log contained no evidence of the conversation that the police had initiated to arrange the controlled buy.

2. The State charged petitioner with criminal sale of a controlled substance. The prosecution's theory was that petitioner had sold four glassines of heroin to an undercover officer and that the police had chased him into his friends' apartment.

Petitioner moved to suppress the evidence obtained during the officers' warrantless searches of the apartment. He claimed that the initial, warrantless search violated the Fourth Amendment and that later-recovered evidence was fruit of the poisonous tree. In response, the State did not argue that the officers' initial search was justified by exigent circumstances or was otherwise legal. Instead, the State asked the trial court to deny petitioner's motion without an evidentiary hearing on the ground that his allegations failed to "establish that he has standing" to challenge the officers' search. Pet. App. 42a; *see also id.* 39a. In particular, the State argued that "having dinner" at a friend's residence and "receiv[ing] mail" there "does not confer upon the defendant a legitimate expectation of [privacy in the friend's] residence." *Id.* 42a.

The trial court summarily denied petitioner's motion. Agreeing with the State, the trial court reasoned that petitioner "failed to sufficiently allege standing to challenge the search of the subject

premises." Pet. App. 2a (quoting suppression court's ruling).

Petitioner continued to deny he participated in any drug sale on the night in question and insisted upon trial. Among other things, he stressed that he bore no resemblance to the personal description the officers gave when they burst into his friends' apartment. Petitioner also noted that the officer who made the controlled purchase had never met him and that his cell phone had not received the call that had been made to set up the controlled purchase. Petitioner acknowledged that his heart had been "racing" when arrested. Pet. App. 56a-57a. But as he had put it to the prosecutor in his grand jury testimony: "If you have people crashing into somewhere you are having dinner, I am sure your heart would be racing too, ma'am." *Id.* 57a.

The jury returned a guilty verdict. Petitioner was sentenced to eight and one-half years in prison, to be followed by three years of supervised release.

3. The Appellate Division affirmed. As relevant here, the panel held that petitioner "lacked standing" to challenge the entry or search of his friends' apartment. Pet. App. 34a. Relying on New York precedent interpreting this Court's treatment of guests under the Fourth Amendment, the panel characterized petitioner as "merely a casual visitor" whose status "failed to establish a reasonable expectation in the apartment." *Id.* (citing *People v. Ortiz*, 633 N.E.2d 1104 (N.Y. 1994)).

4. The New York Court of Appeals granted review and affirmed by a 5-2 vote. Like the Appellate Division, the majority concluded that the trial court rightly denied petitioner's motion to suppress without

an evidentiary hearing "because the allegations in the motion papers were insufficient to warrant a hearing." Pet. App. 2a. In the majority's view, petitioner "failed to sufficiently allege standing to challenge the search of the subject premises." *Id.* (quoting suppression court's ruling).

Judge Wilson, joined by Judge Rivera, penned a lengthy dissent. They maintained that petitioner should have been afforded an evidentiary hearing because his asserted status "as a dinner guest at his friends' apartment" established "a privacy interest that the New York police violated when they entered without a warrant." Pet. App. 22a. The dissenters acknowledged that this Court's decisions in "*Olson* and *Carter* left significant space on the spectrum of social guest privacy undefined." *Id.* 24a. But they believed that the holdings in those cases "support the conclusion that social guests invited to share a dinner have some reasonable expectation of privacy . . . in a private residence where host and guest alike expect to be able to share woes and dreams" in an intimate setting. *Id.*

The dissenters closed by opining that "[t]he United States Supreme Court will eventually define the scope of the privacy rights of various sorts of invitees." Pet. App. 31a. Indeed, the dissenters declared that "[a] clear articulation of the scope of social guest privacy is overdue." *Id.* 30a. "The stakes of privacy in a home," they explained, "are important not just to the personal lives of individuals, but to our democracy." *Id.* 26a. "[H]ome gatherings have always been a site of political debate and activism," "[p]articularly for dissenting groups for whom the public sphere is hostile." *Id.* But regardless of the

reason for a home gathering, Judges Wilson and Rivera asserted that "a guest who has been invited by the home's residents for something as consequential as a meal" should not be left wondering whether the Fourth Amendment protects his or her privacy in that sequestered setting. *Id.* 31a.

REASONS FOR GRANTING THE WRIT

I. Courts are deeply divided over how the Fourth Amendment applies to social guests in private homes.

In the twenty-plus years since the Court decided *Minnesota v. Olson*, 495 U.S. 91, 96 (1990), and *Minnesota v. Carter*, 525 U.S. 83, 90 (1998), federal and state courts have deeply divided over how the Fourth Amendment applies to fact patterns between those two bookends—specifically, how it applies to social guests who are not staying the night in the home of their hosts. Eight federal courts of appeals and state courts of last resort have held that such persons can claim the protections of the Fourth Amendment; five state courts of last resort disagree.

1. To start with federal cases, the Tenth Circuit has "held that even social guests who do not stay the night have a reasonable expectation of privacy in the host's home and may therefore challenge a search of the home on Fourth Amendment grounds." *United States v. Thomas*, 372 F.3d 1173, 1176 (10th Cir. 2004); *see also United States v. Rhiger*, 315 F.3d 1283, 1286 (10th Cir. 2003). The Second Circuit likewise has held that "'overnight' status is not a precondition to a guest's ability to contest a search of his host's dwelling." *Figueroa v. Mazza*, 825 F.3d 89, 108 (2d Cir. 2016). At least those "social guests" with

a previous connection to the homeowner and who are visiting for a meaningful amount of time have Fourth Amendment rights in the dwelling. *Id.* at 109 (citing *United States v. Fields*, 113 F.3d 313, 320-21 (2d Cir. 1997)). The Sixth Circuit similarly held in a case with comparable facts that a homeowner's good friend who had occasionally stayed the night in the past and eaten meals with his host had a reasonable expectation of privacy in the premises. *United States v. Pollard*, 215 F.3d 643, 647-48 (6th Cir. 2000).[2]

Several decisions from state courts of last resort are in accord. *See State v. Dannebohm*, 421 P.3d 751, 754-57 (Kan. 2018) & *State v. Talkington*, 345 P.3d 258, 478-80 (Kan. 2015) (friends of hosts for several years who were not overnight guests); *In re Welfare of B.R.K.*, 658 N.W.2d 565, 572-77 (Minn. 2003) ("short-term social guest" in friend's home); *State v. Oien*, 717 N.W.2d 593, 597 (N.D. 2006) (reaffirming holding in *State v. Ackerman*, 499 N.W.2d 882, 884-85 (N.D. 1993), that "a guest generally has a reasonable expectation of privacy in a host's home"); *State v. Missouri*, 603 S.E.2d 594, 597-98 (S.C. 2004) (social guest who was "good friends" with the hosts). The reasoning of the Minnesota Supreme Court is typical: "The animating principle behind *Carter* is that an individual's expectation of privacy in commercial premises is less than an individual's expectation in a private residence, not that short-

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[2] Prior to *Carter*, the Fourth Circuit also held that a social guest visiting an elderly neighbor was entitled to constitutional protection despite not being an overnight guest. *See Bonner v. Anderson*, 81 F.3d 472, 475 (4th Cir. 1996).

term social guests do not have a reasonable expectation of privacy." *B.R.K.*, 658 N.W.2d at 575.

Finally, after a thorough consideration of *Olson* and *Carter*, the D.C. Court of Appeals has concluded that "social guests of the host generally have a legitimate expectation of privacy," regardless of whether they are staying the night. *Morton v. United States*, 734 A.2d 178, 182 (D.C. 1999). The court then held that a social guest who was a longtime friend of his host had Fourth Amendment rights in the premises while visiting. *Id.*

2. By contrast, five state courts of last resort—including the New York Court of Appeals here—have held that social guests generally lack standing to challenge searches of their hosts' homes. *See* Pet. App. 1a-2a; *State v. Filion*, 966 A.2d 405, 407-09 (Me. 2009) (longtime friend who had visited regularly over the years to "hang out" but had never stayed the night); *City of Champaign v. Torres*, 824 N.E.2d 624, 631-32 (Ill. 2005) (guest at a party hosted by co-worker and friend); *State v. Smith*, 97 P.3d 567, 570 (Mont. 2004) & *State v. Redlich*, 97 P.3d 1090, 1091 (Mont. 2004) (guests at social gatherings); *Gaylord v. State*, 127 S.W.3d 507, 514 (Ark. 2003) (friend visting friend's trailer home). These courts reason that social guests who do not stay overnight lack a reasonable expectation of privacy because they lack any possessory interest in the dwelling and are unable to come and go as they please. *See, e.g.*, *Gaylord*, 127 S.W.3d at 514.

3. This conflict has no hope of working itself out. Different courts simply treat cases falling in the gray area in between *Olson* and *Carter* differently. Only this Court can bring needed clarity to the law.

II. This case is an excellent vehicle for resolving the conflict over this important issue.

For two reasons, this case offers an ideal opportunity to address how the Fourth Amendment applies to social guests in private homes who are not staying overnight.

1. The case arises on the equivalent of a motion to dismiss, thus eliminating any potential debate over the operative facts. New York law allows a trial court to deny a motion to suppress "summarily"—that is, without an evidentiary hearing—"where the motion papers do not provide adequate sworn allegations of fact." Pet. App. 1a, 13a; *see* N.Y. Crim. Proc. Law § 710.60[3]. That is the basis on which the trial court ruled here. Petitioner asserts that he was having dinner at his friends' apartment (a place where he often received mail too) when the police entered without a warrant and searched the dwelling. Without questioning those factual allegations, the trial court summarily denied petitioner's motion, stating that he "failed to sufficiently allege standing to search the subject premises." Pet. App. 2a (quoting suppression court's ruling).

The question whether petitioner's allegations and status as a social guest are sufficient to make out a violation of Fourth Amendment is thus squarely and cleanly presented here. This Court frequently grants certiorari to decide whether factual allegations in a complaint or the like state a legal violation. *See, e.g.*, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168-69 (2021); *Nestlè USA, Inc. v. Doe*, 141 S. Ct. 1931, 1935-36 (2021); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 219 (2016). If so, then

the Court remands for further proceedings. The Court should follow the same course here.

2. Petitioner's status as a *dinner* guest makes him the quintessential social guest. Welcoming friends and family into our homes for meals is grounded in centuries of American tradition. For many, the activity carries religious significance (think, for example, of a Shabbat dinner or a Sunday brunch after church). For others, "breaking bread" around a table is a means of cementing friendships, deepening political and social associations, or exploring new relationships.

Our Founders themselves recognized the importance of shared meals. When they feared an impasse over whether the new national government would assume state debts incurred during the revolutionary war, Jefferson invited Madison and Hamilton to a private dinner at his home. *See* Thomas Jefferson, *The Complete Anas of Thomas Jefferson* 32-34 (Franklin B. Sawvel ed., 1903). Jefferson believed it "impossible that reasonable men, consulting together coolly, could fail, by some mutual sacrifice of opinion, to form a compromise which was to save the Union." *Id.* at 33-34. In the resulting "dinner table bargain," the men agreed that the federal government would indeed assume the debts, in exchange for locating the Nation's new capital in what became Washington, D.C. Norman K. Risjord, *The Compromise of 1790: New Evidence on*

the Dinner Table Bargain, 33 Wm. & Mary Q. 309 (1976).[3]

In short, this is the perfect case for sharpening where the dividing line lies, for Fourth Amendment purposes, between overnight guests and purely commercial visitors. This Court should take this opportunity to do so.

III. The decision of the New York Court of Appeals is wrong.

The widespread disagreement over how the Fourth Amendment applies in cases like this is reason alone to grant certiorari. The problems with the New York Court of Appeals' holding on the issue provide further reason for review.

1. While the Fourth Amendment protects against government intrusion in various places and contexts, "the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). At the "very core" of the Fourth Amendment is the right of people to be secure in their homes. *Lange v. California*, 141 S. Ct. 2011, 2018 (2021) (quoting *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018)); *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

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[3] These events are recounted in the musical *Hamilton*. *See* Lin-Manuel Miranda, *In the Room Where It Happens*, *on* Hamilton: An American Musical (Atlantic Records 2015) ("But decisions are happening over dinner. Two Virginians and an immigrant walk into a room. Diametrically opposed, foes. They emerge with a compromise. Having opened doors that were previously closed. Bros. . . . Then Jefferson approaches with a dinner and invite. And Madison responds with Virginian insight.").

This well-established tenet embodies longstanding values. From its founding, our Republic has accorded "overriding respect" to the home, *Payton*, 445 U.S. at 601, providing heightened constitutional protection to safeguard its position as the "center of [our] private lives," *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quoting *Carter*, 525 U.S. at 99 (Kennedy, J., concurring)); *see Wilson v. Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (abridgment of "the sanctity of a man's home and the privacies of life" affect "the very essence of constitutional liberty and security").

This special solicitude has "ancient and durable roots." *Jardines,* 569 U.S. at 6. Steeped in the English common law tradition, the Founders believed deeply in the maxim that a "man's house is his castle." *Randolph*, 547 U.S. at 115. Opposition to the Crown's unrestrained invasions into the colonists' homes was a central catalyst of the Revolution and an animating force behind the Fourth Amendment's passage. *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018); *Riley v. California*, 573 U.S. 373, 403 (2014); *see also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1249-50 (2016).

Indeed, trespass into the home was more than just a physical transgression. For the Founders, the home was a place of refuge, where individuals fostered intimacies with friends and family; a space where honest reflection and unguarded discourse could take place. Donohue, *supra*, at 1315. Accordingly, "[i]t [wa]s not the breaking of his doors,

and the rummaging of his drawers, that constitute[d] the essence of the offense; but it [wa]s the invasion of his indefeasible right of personal security, personal liberty." *Boyd*, 116 U.S. at 630. And the harm to be avoided covered not only homeowners themselves. No society could be free, the Founders reasoned, if the government could enter a person's home at will and seize papers and effects—impinging the privacy not just of householders, but that of their "friends and acquaintances" as well. Donahue, *supra*, at 1316 (quoting The Father of Candor, *A Letter Concerning Libels, Warrants, Seizure of Papers, and Security for the Peace, &c.* 54-55 (Almon 3d ed. 1765)).

2. In light of this tradition, as well as modern societal expectations, the five Justices who spoke to this issue in *Carter* were correct that social guests possess a reasonable expectation of privacy when visiting the home of another. *See Carter*, 525 U.S. at 99-101 (Kennedy, J., concurring); *id.* at 103 (Breyer, J. concurring in the judgment); *id.* at 108-09 (Ginsburg, J., dissenting); *see also* 6 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 11.3(b) (6th ed. 2021) (If the police "burst into *B*'s home and disrupt a dinner party at which *A* is present as a guest, then certainly *A* should be deemed to have standing to object.").

Many intimate and other social activities that are vital to our lives require a place where we may enjoy each other's company away from prying eyes. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984); *see also* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Cal. L. Rev. 1593, 1593 (1987) ("Much of what is important in human life takes place in a situation of

shared privacy."); Charles Fried, *Privacy*, 77 Yale L.J. 475, 477 (1968) (similar). Examples include religious worship, political advocacy, or the fostering of close ties, which often require a "private place" that is free from "intrusion," where we know we "will not be disturbed." *Olson*, 495 U.S. at 99; *see also Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (recognizing "the vital relationship between freedom to associate and privacy in one's associations" (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958))). Such activities are critical for our "emotional enrichment" and for "cultivating and transmitting shared ideals and beliefs." *Roberts*, 468 U.S. at 619.

The home has long served as the central setting to engage in these types of personal activities together. As a matter of "daily experience," our homes afford private space to get closer with our chosen intimates. *Jardines*, 569 U.S. at 7. Maintaining the home's status for these shared activities is thus not only "valuable to society," *Olson*, 495 U.S. at 98, but "indispensable" to the way we live, *Carpenter*, 138 S. Ct. at 2220. It cannot be that social guests have no more expectation of privacy than if they were out in public. And that expectation should at minimum be on par with the caller who speaks from a public telephone booth, *Katz v. United States*, 389 U.S. 347, 353 (1967), the executive who works in a shared office, *Mancusi v. DeForte*, 392 U.S. 364, 369-70 (1968), or the cellphone user whose movements are shared with a third-party service provider, *Carpenter*, 138 S. Ct. at 2220.

3. In light of these precepts, the New York Court of Appeals was wrong to foreclose petitioner's Fourth

Amendment claim. Petitioner was invited by friends who lived down the block from him to share an intimate meal in their home—a paradigmatic social custom, indicating his "acceptance into the household," *Carter*, 525 U.S. at 90. Eating together connotes a mutual bond; a practically universal social custom that transcends culture. In fact, each of us has memories of tastes, smells, and conversations over homecooked meals shared with friends and family together in their homes. And we reasonably expect that we "will not be disturbed" when gathered together at the dinner table alongside our host. *Olson*, 495 U.S. at 99.[4]

Furthermore, conditioning the Fourth Amendment's protections on staying overnight would produce arbitrary and illogical results. An out-of-town friend-of-a-friend who stays one night, for example, can hardly claim greater "acceptance into the household" than a close confidante or family member who lives down the street and visits regularly. *Carter*, 525 U.S. at 90. And romantic partners expect the similar degrees of privacy during the evening as they do in the wee hours of the night.

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[4] As the dissenting judges on the New York Court of Appeals observed, petitioner's expectation of privacy was confirmed by the fact that he received mail at his friends' residence. Pet. App. 17a, 24a. Keeping personal belongings in another person's home manifests trust and familiarity; it signifies connection to the home's residents, who have agreed to keep the belongings safe, and a sense of security about the dwelling itself. *See Olson*, 495 U.S. at 99 (guest's storage of belongings in host's home indicative of legitimate privacy expectation); *Jones v. United States*, 362 U.S. 257, 259-62 (1960) (same).

The privacy expectation in such circumstances arises from the nature of the relationship between the guest and the host and their shared intimacy; it should not be dictated by whether the encounter spans the hours on the clock that turn from one day to the next.

Refusing to recognize the legitimate privacy expectations of social guests also impairs the host's Fourth Amendment rights and erodes the home's value more broadly. As a homeowner, the home is more than a site of seclusion; it is a space we may hold open to those whom we choose to invite inside. That is, much of home's value derives from the "homeowner['s] right to expect privacy" not just for himself, but for "his family[] and his invitees" as well. *Alderman v. United States*, 394 U.S. 165, 179 n.11 (1969). Yet New York's rule vitiates this interest, "tempt[ing] police to pry into private dwellings without warrant" whenever social guests are present. *Carter*, 525 U.S. at 108 (Ginsburg, J., dissenting). Even if the fruits of such illegal searches cannot be used against homeowners, New York's rule allows them to form the basis of prosecutions against guests. Consequently, under New York's rule, the home is rendered vulnerable whenever friends and family are invited inside.

The Fourth Amendment does not countenance nor require this result. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Patricia Pazner
Tammy E. Linn
Benjamin Welikson
APPELLATE ADVOCATES
111 John Street, 9th Floor
New York, NY 10038

Kendall Turner
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, DC 20006

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

March 11, 2022

APPENDIX

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 56

The People &c.,

Respondent,

[October 14, 2021]

v.

Eric Ibarguen,

Appellant.

Benjamin Welikson, for appellant.
John M. Castellano, for respondent.
New York Civil Liberties Union, amicus curiae.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

CPL 710.60 (1) requires that a motion for suppression of physical evidence must state the ground or grounds of the motion and must contain sworn allegations of fact. CPL 710.60 (3) permits summary denial of a suppression motion where the motion papers do not provide adequate sworn allegations of fact (*see People v Mendoza*, 82 NY2d 415, 422 [1993]). The suppression court did not abuse its discretion in denying, without an evidentiary hearing, that branch of defendant's motion which was to suppress the physical evidence recovered upon the search of the apartment pursuant to a search warrant that had been executed after his arrest,

because the allegations in the motion papers were insufficient to warrant a hearing.

Contrary to the dissent's assertion, *LaFontaine* and its progeny do not forbid an affirmance here (*People v LaFontaine*, 92 NY2d 470 [1998]; *People v Nicholson*, 26 NY3d 813 [2016]). In denying defendant's motion, the suppression court stated that "defendant has failed to sufficiently allege standing to challenge the search of the subject premises," which is the gravamen of our holding today.[1] Defendant's remaining arguments addressed by the dissent, including the assertion that dinner guests have an expectation of privacy in the home of their hosts, are academic.

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[1] We note that the suppression court granted that branch of defendant's motion for a *Dunaway* hearing (*Dunaway v New York*, 442 US 200 [1979]) to determine whether law enforcement had probable cause to effect his arrest and the admissibility of his statements to police, after concluding that defendant "failed to . . . identify physical evidence recovered from his person."

WILSON, J. (dissenting):

> Ladies, a general welcome from his Grace
> Salutes you all. This night he dedicates
> To fair content and you. None here, he hopes,
> In all this noble bevy has brought with her
> One care abroad. He would have all as merry
> As, first, good company, good wine, good welcome
> Can make good people.

(William Shakespeare, *Henry VIII*, Act I, sc. 4).

Though our homes are not so grand as Hampton Court Palace, they are our sanctuaries. Most of us can readily imagine inviting friends to dine in our home, where we sit, in private, to enjoy their company and confidences. It is much harder to imagine the police bursting in without a warrant in the midst of your dinner, ransacking your home for evidence that might incriminate one of your guests, removing you and your guests from your home, securing it overnight, and, based on what they observed, obtaining a search warrant, which they subsequently use to seize evidence from your home. Even if the police have good reason to suspect one of your dinner guests – but not you – of criminal behavior, is this police behavior our society – our Constitution – should condone? More to the point in this appeal, if your dinner guest testifies under oath that the above happened, should that guest be entitled to an evidentiary hearing before a court decides that, although *you* would have been able to challenge the lawfulness of the search and seizure, your guest has no right to a hearing because it wasn't your guest's home?

Mr. Ibarguen swore, under oath, that this happened to him, with his additional testimony that he was innocent of all wrongdoing and the police had the wrong man. Certain inconsistent statements by the police tend to support his claim of innocence, though others contradict it. Instead of holding a hearing to determine what expectation of privacy he had when the police burst in and whether the evidence must be suppressed, the suppression court denied his motion on the ground that he had no right of privacy in any part of his friend's apartment while he was an invited dinner guest or, alternatively, because the police later acquired a warrant based on evidence they observed upon their warrantless entry. Because the Fourth Amendment protects individuals against such intrusions and our statutes entitle all of us to a hearing under like circumstances, I dissent.

I

On March 4, 2015, around 7:00 P.M, an undercover detective and Detective Joseph Fernandez conducted a "buy and bust" operation to purchase heroin from a person self-identified as "Spanky." Spanky and the undercover detective spoke by phone to set up the deal and a place to meet a few minutes later. When the undercover detective arrived at the designated location, he observed Spanky talking on a cellular phone. Meanwhile, Detective Fernandez sat in a nearby unmarked car while he observed Spanky and the undercover detective talk. His visibility was limited – it was dark, raining and Detective Fernandez could not see Spanky's face. All he could say was that Spanky was wearing an oversized black jacket. The undercover detective testified that during the conversation

Spanky sold him four small wax paper bags ("glassines") of heroin for two traceable, or pre-recorded, $20 bills. Detective Fernandez, seeing the undercover detective's signal that the buy was complete, exited his car with his badge visible to arrest Spanky, who ran.

Detective Fernandez chased the fleeing person, at a distance of 15 to 20 feet, to a short staircase leading to the basement of an apartment building, when the person slipped and looked back, allowing Detective Fernandez to see his face briefly in the basement lighting. The person entered the building and Detective Fernandez followed through two doors, the latter of which led into the apartment where defendant Eric Ibarguen was arrested. On the present record, we cannot tell in what part of the apartment the police apprehended Mr. Ibarguen. In his sworn grand jury testimony, Detective Fernandez testified to apprehending the man he was chasing just inside the door to the apartment. At trial, he said he chased the man into the living room of the apartment, where he placed him under arrest. Detective Fernandez testified that he identified Mr. Ibarguen as Spanky not by the jacket he was wearing (he was not), nor by finding the pre-recorded bills on his person (they were not), nor even from finding on Mr. Ibarguen's person the cell phone Spanky used minutes earlier (it was not), but rather from having seen his face in the stairwell and by his cold body temperature and racing heart.

Upon arresting Mr. Ibarguen and the two other occupants, the police "froze" the apartment—preventing the entry of any person into the apartment overnight—and sought a warrant to

return to search the home. To justify the warrant's issuance, Detective Fernandez relied not just on what transpired before he entered the apartment (*i.e.* the buy and bust operation and his pursuit of Spanky), but also his observations once inside the apartment, including his seeing several glassines of a substance he believed to be heroin. The court issued the warrant the next morning and the police searched the apartment, where they found one $20 pre-recorded bill inside the bathroom on the floor and an XXL-sized black jacket next to the bathroom. They did not find the cell phone Spanky had used to communicate with the police or the other pre-recorded bill. No fingerprint or DNA tests were ordered for the glassines recovered in the buy-and-bust to connect them to Mr. Ibarguen. The only other evidence linking Mr. Ibarguen to the buy-and-bust the night of his arrest was a show-up with the undercover detective, who identified Mr. Ibarguen as Spanky, and Detective Fernandez's testimony regarding the chase.

Mr. Ibarguen testified to the events differently. Mr. Ibarguen, an operations manager of nine years, had been invited by friends down the street from his home to dine with them that evening. A little after 7:00 PM, police officers in plain clothes broke down the two doors leading to the basement apartment in a "commotion". The officers asked Mr. Ibarguen—a Latino man—and his two hosts "where is he?" and explained that they were looking for "a short, fat [B]lack man wearing a black hoody". After the police first asked Mr. Ibarguen and his two hosts to leave the apartment and performed frisk searches on each of them, they asked the group to return inside. The

officers then arrested Mr. Ibarguen—throwing him to the bed, pinning him down with a knee on the small of his back, and hitting him in the face. Mr. Ibarguen concedes that the evening's events caused his heart to race.[1]

The People charged Mr. Ibarguen with the criminal sale of a controlled substance in the third degree. Before trial, Mr. Ibarguen moved to suppress the evidence obtained in the search of the apartment, averring that he was "present at the subject location" when police entered without the consent of the apartment owners. He denied all allegations, including having participated in the sale of heroin to the undercover officer. He further swore that he was "a lawful invitee" in the apartment and that he received his mail at his friends' apartment, granting him "[s]tanding to challenge the search of his person as well as the location therein". In his motion, he requested a hearing "to determine the constitutionality of the search and seizure" in the apartment. The People opposed the motion, arguing that Mr. Ibarguen's assertions failed to "establish standing" because "[s]imply receiving mail at a location or eating dinner at a friend's residence does not confer upon the defendant a legitimate expectation of privacy". Because the "allegations did

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[1] At the Grand Jury proceedings, the prosecutor asked the following:

> Ms. Jahn: And isn't it a fact that your heart was racing at that time?
>
> Mr. Ibarguen: My heart was racing, absolutely. If you have people crashing somewhere you are having dinner, I am sure your heart would be racing too, ma'am.

not establish a privacy interest in the area searched," the People argued Mr. Ibarguen lacked standing and had failed to allege sufficient facts for a hearing. The People affixed Mr. Ibarguen's grand jury testimony to their papers, in which he described eating dinner at the searched apartment and the intrusion of the police. The trial court summarily denied the motion for the *Mapp* hearing because (1) "probable cause was found by the court when the warrant was issued and (2) Mr. Ibarguen "failed to sufficiently allege standing to challenge the search of the subject premises."

Mr. Ibarguen was convicted after a jury trial in the Supreme Court of Queens County in May of 2017. He appealed. The Second Department affirmed his conviction, holding that he "failed to establish a reasonable expectation of privacy in the apartment at which he was merely a casual visitor, and thus, he lacked standing to challenge the warrantless entry and subsequent search of the premises."

II

The Fourth Amendment protects against unreasonable searches and seizures (U.S. Const. amend. IV). Searches of homes carried out without a warrant are presumptively unreasonable, unless they fall into one of the specific exceptions to the general warrant requirement (*Groh v Ramirez*, 540 US 551, 559 [2004] [quoting *Payton v New York*, 455 US 573, 586 (1980)]). Where the police have carried out a search of a home without a warrant, the People carry the burden of proving their actions met a particular exception (*People v Hodge*, 44 N.Y.2d 553, 558 [1978]). Here, the police entry into the apartment plainly violated the constitutional rights of the people

who lived in the apartment. The police did not possess a warrant when they entered the home and, since the intrusion, the People have never argued any exigency to justify the entry. Still, the question in this case is not the broad constitutionality of the entry, but rather whose rights, in addition to the apartment's residents', it may have violated.

Although the Constitution is silent as to the enforcement of the Fourth Amendment, the "principal" remedy to deter Fourth Amendment violations is the exclusion of unlawfully procured evidence from use at trial (*James v Illinois,* 493 US 307, 311 [1990]; *see also* Utah *v Strieff*, 136 S. Ct. 2056, 2061 [2016] [Sotomayor, J., dissenting] [*citing Mapp v Ohio*, 367 US 643, 655 [1961]; *Weeks v United States*, 23 US 383 [1914]). In *Mapp*, the Supreme Court explained that to prohibit unreasonable searches and seizures but allow the admission of evidence procured through such actions would be to "grant the right but in reality to withhold its privilege and enjoyment" (*Mapp*, 367 US at 656). For that reason, courts do not allow the government to use against you evidence obtained in violation of your constitutional rights. However, to challenge evidence as unconstitutionally procured, a criminal defendant must show that the defendant's own constitutional rights were violated (*Rawlings v Kentucky*, 448 US 98, 106 [1980]); *Rakas v Illinois*, 438 US 128, 148 [1978]). Thus, to assert the protection of the Fourth Amendment, an individual must show a legitimate privacy interest in the place searched (*Rakas v Illinois*, 439 US 128, 148 [1978]). A privacy interest is legitimate when it is one "society is prepared to recognize as 'reasonable'" (*Katz v US*,

389 US 347, 361 [1967] [Harlan, J., concurring]; *Minnesota v Olson*, 495 US 91, 96 [1990]). Without such a privacy expectation, no search, and thus no constitutional violation, has occurred. Although it is undisputed that a person has a right to be free of warrantless searches and to suppress the evidence found in such a search in one's own home, Mr. Ibarguen's claim arises in the murky arena of house guests, or those against whom the state seeks to introduce evidence found in private places where a person is lawfully present but does not reside.

The privacy interest of social guests is an unsettled and evolving area of Fourth Amendment law. In earlier cases, the Supreme Court held any person "legitimately on premises where a search occurs may challenge its legality" (*US v Jones*, 362 US 257, 267 [1967]); *see also People v Wesley*, 73 NY2d 351, 355 [1989]; However, in subsequent decisions the Supreme Court "substantially reevaluated the nature of the interest that would give rise to Fourth Amendment standing" (*Wesley,* 73 NY2d at 356). Specifically, in *Rakas v Illinois*, the Supreme Court repudiated the approach in *Jones* – no longer would someone "legitimately on the premises" automatically be recognized as having a privacy interest in another's premises (438 US 128, 142 [1978] ["we believe that the phrase 'legitimately on premises' coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights"]). Rejecting the expanded view of standing at the heart of *Jones*, *Rakas* also clarified that a person's ability to challenge evidence procured by unlawful searches and seizures should not be considered to be one of "standing" (*id.* at 138). Rather,

the Court explained that the question "is more properly subsumed under substantive Fourth Amendment doctrine" (*id.* at 139). Thus, the only relevant inquiry is whether a person held a legitimate privacy interest. If so, and that interest was violated, evidence obtained through the violation of that privacy interest must be suppressed.

The Supreme Court's subsequent cases touching on the privacy interest of house guests have left many questions unanswered. In *Olson*, the Supreme Court held that overnight guests have a legitimate privacy interest in the residence where they sleep and so are protected against unreasonable searches and seizures in that home (*Minnesota v Olson*, 495 US 91, 98 [1990]). In *Carter*, nearly a decade later, the Court divided over the scope of the privacy interests of house guests who do not stay overnight (525 US 83 [1998]). The *Carter* majority held that two men who were in another's apartment for the sole purposes of completing a commercial drug operation did not have a privacy interest in the premises (*id.* at 90). Justice Kennedy concurred to emphasize the consistency of that holding with his view that "all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home" while four justices wrote separately to disagree on different grounds, arguing that even the commercial guests had a legitimate expectation of privacy in the premises (*id.* at 103, 107). The majority opinion itself acknowledged the inchoate nature of privacy rights as one moved across the spectrum from overnight guest to a momentary invitee: "If we regard the overnight guest in…*Olson* as typifying those who

may claim the protection of the Fourth Amendment in the home of another, and one merely 'legitimately on the premises' as typifying those who may not do so, the present case is obviously somewhere in between" (*id.* at 90).

The remaining gaps on the spectrum have not been clarified in the years after *Carter,* although since then numerous states have confronted the question of social guest privacy (*see e.g. State v Talkington*, 345 P3d 25, 276-77 (Kan. 2015); *State v Missouri*, 361 SC 107, 114 (SC 2004); *Morton v United States*, 734 A2d 178, 182 (DC 1999) ["social guests of the host generally have a legitimate expectation of privacy"]). In New York, few cases addressing the issue since *Olson* and *Carter* have reached our Court (*People v Jose*, 94 NY2d 844, 845 [1999]; *People v Ortiz*, 633 NY2d 840 [1994]). This appeal thus raises two important questions regarding the privacy rights of social guests and the implications of those rights for hosts and our communities more broadly. The first is: what must a defendant seeking to suppress evidence found in the search of another's home allege to obtain a suppression hearing? The second more directly addresses the contours of social guest privacy: after *Carter*, what protections does the Fourth Amendment provide against police intrusion for guests invited into another's home? The majority avoids both questions. I would answer them.

III

A

Mr. Ibarguen was entitled to a suppression hearing. Section 710.60 of the Criminal Procedure

Law governs entitlement to a suppression hearing before trial in New York. It requires motions to be "in writing, state the legal ground of the motion and 'contain sworn allegations of fact,' made by the defendant or 'another person'" (*People v Mendoza*, 82 NY2d 415, 422; CPL § 710.60). Then, "[b]ased on these papers, the court must decide whether to summarily grant or deny the motion[] or conduct a hearing" (*id.*). A court must summarily grant the motion when the defendant's papers satisfy the statutory requirements and the People do not dispute the defendant's alleged facts (CPL 710.60 [2]). A court may summarily deny the motion for one of two reasons only: (1) the defendant "does not allege a proper legal basis for suppression" or (2) the "sworn allegations of fact do not as a matter of law support the ground alleged" (*id.*; CPL 710.60 [3] [b]).

Although the statute's plain language mandates a hearing whenever the statutory requirements are met and there are no grounds to summarily deny or grant a motion, our Court has observed that "[h]earings are not automatic or generally available for the asking by boilerplate allegations" (*Mendoza*, 82 NY2d at 422). Rather, in a restrictive interpretation of CPL 710.60 (3) (b) (grounds for summary denial), we require defendants' sworn allegations to be sufficient, determined "with reference to the face of the pleadings, the context of the motion and defendant's access to information" (*id.*). For motions to suppress tangible evidence, defendants are "entitled to rely on the People's proof" (*People v Burton,* 6 NY3d 584, 588 [2006]), which means "necessary allegations of fact" can be found in police testimony and motion papers (*id.*; *see also*

People v Gonzalez, 68 NY2d 950, 950 [1986] ["evidence elicited during the People's direct case may be cited in support of a defendant's standing claim"]). However, compared to those seeking a hearing to suppress evidence obtained through an unlawful arrest, the burden needed for a hearing to suppress evidence obtained through an alleged unlawful search is higher under *Mendoza*'s third criterion—the defendant's access to information: "[I]t is after all the defendant alone who actually knows [the defendant's] connection with the searched area" (*Mendoza*, 82 NY2d at 429 [quoting *Wesley*, 73 NY2d at 358-359]).

Indeed, motions for a hearing to suppress evidence procured from unlawful searches meet an additional burden: on the face of the pleadings, they must show the search violated the defendant's rights, or (in a standard the Supreme Court has expressly rejected, *see infra*) that the defendant has "standing" to challenge the search (*Wesley*, 73 NY2d at 358 ["CPL 710.60…allocates to the defendant seeking suppression of evidence the initial burden of showing sufficient grounds for the motion based on sworn allegations of fact; such grounds necessarily include a showing of standing – that is, a legitimate expectation of privacy in the searched premises"]). As recently as 2006 we have held: "[t]here is no legal basis for suppression and, hence, no need for a hearing, unless the accused alleges facts that, if true, demonstrate standing to challenge the search or seizure" (*Burton*, 6 NY3d at 587).

Those cases, inasmuch as they focus on "standing" and not the privacy interests of criminal defendants seeking to suppress evidence, misapply

the law. In *Carter*, the Supreme Court offered a sharp rebuke of the Minnesota Supreme Court's continued reliance on the "rubric of [Fourth Amendment] 'standing doctrine, an analysis that this Court expressly rejected 20 years ago in *Rakas*" (*Carter*, 525 US 83 [1998]). The Court explained "[c]entral to [its] analysis was the idea that in determining whether a defendant is able to show the violation of [the defendant's] (and not someone else's) Fourth Amendment rights, the 'definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing'" (*id.* at 88 [quoting *Rakas*, 439 US at 140)]). Thus, "standing" is simply the wrong framework to apply in any Fourth Amendment suppression case, no less to read into a statute silent as to the issue.

Fortunately, our caselaw has at least attempted to distinguish the burden required to secure a hearing from what is needed to prove a legitimate privacy interest once a hearing is granted. For example, in *People v Jose*, the suppression court summarily denied a hearing after the defendant, in his motion papers, alleged that the police entered an apartment, seized items, and retrieved a key to the apartment in a search of the defendant's person (239 AD2d 172, 173 [1997]). The Appellate Division remitted for a *Mapp* hearing, finding the summary denial to be an abuse of discretion as the possession of a key to the apartment was sufficient factual assertion to warrant a hearing to further evaluate the defendant's legitimate expectation of privacy (*id.*). However, the Appellate Division disagreed with the suppression court's finding that the key alone was

sufficient to show a legitimate expectation of privacy, explaining "having made sufficient factual allegations to get a hearing, defendant still had the burden at that hearing of 'establishing standing by demonstrating a legitimate expectation of privacy'" (252 AD2d 401, 402 [1998] [quoting *People v Wesley*, 73 NY2d 351 (1989)]; *see also Ortiz*, 83 NY2d 840 [1994] [finding no privacy interest in the apartment even after an evidentiary hearing]; *People v Ponder*, 54 NY2d 160, 166 [1981] [finding no privacy interest in the defendant's grandmother's house after an evidentiary hearing]). We affirmed (94 NY2d 844, 845 [1999]).

The few cases in which we have affirmed summary denials of suppression hearings concerning warrantless searches of homes are extreme ones, in which the defendants proffered no information demonstrating a legitimate privacy interest. In *People v Reynolds*, for example, the defendant argued to suppress evidence found in a police search of a greenhouse located 150 feet from the defendant's home (71 NY2d 552, 556 [1998]). Because the defendant did not controvert the People's alleged facts (*e.g.* the location of the greenhouse to the house) but only and without further explanation asserted that the greenhouse was located in the house's curtilage, we affirmed (*id.* at 558). Similarly, in *People v Gomez*, a case predating both *Olson* and *Carter*, we affirmed the summary denial of a suppression hearing when the defendant moved for a hearing to suppress evidence found in an apartment but did not explain his relationship to the apartment (67 NY2d 843, 844 [1986]).

B

The majority eschews this prudent approach. Unlike the defendants in *Reynolds* and *Gomez*, who failed to proffer any facts supporting their privacy claims, Mr. Ibarguen's motion papers allege that he was a lawful invitee whose mail was delivered to that apartment and Mr. Ibarguen testified to having been at dinner at his friends' house "all night." Those facts support his claim that as a social guest, he held a legitimate expectation of privacy in at least some part of the searched apartment enabling him to challenge the legality of the warrantless search and suppress evidence recovered therein. Thus, unlike the defendants in *Reynolds* and *Gomez*, for whom summary denial was appropriate under CPL 470.50 (2), Mr. Ibarguen was entitled to a hearing in which to argue his privacy claim. Nonetheless, the suppression court held that he lacked "standing" to challenge the warrantless search of the apartment – the Appellate Division agreed. The majority affirms. Several problems riddle that holding.

First, the majority is affirming on a ground not adopted by the courts below. Instead of focusing on Mr. Ibarguen's threshold showing entitling him to a hearing, both the Appellate Division's rationale and the suppression court's second rationale go straight to the merits of whether—as a matter of law—a dinner guest can have an expectation of privacy. Neither lower court said that Mr. Ibarguen had failed to adduce sufficient evidence to entitle him to a hearing; both, instead, jumped straight to the legal question of whether Mr. Ibarguen had "standing" to challenge anything that occurred in his friends' apartment. The suppression court did not say that

Mr. Ibarguen's motion papers did "not provide adequate sworn allegations of fact" (majority op at 2) or cite *Mendoza*—the sole case on which the majority relies for its holding—or any other case setting out the standard for denial of a hearing on a suppression motion. Instead, the suppression court offered two different reasons for denying suppression: (1) "probable cause was found by the court when the warrant was issued"; and (2) "defendant has failed to sufficiently allege standing to challenge the search of the subject premises or identify physical evidence recovered from his person." The Appellate Division did not attempt to defend the suppression court's first ground,[2] but instead affirmed on the ground that

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[2] The suppression court's first ground is insupportable. Police cannot enter a home without a warrant, consent or exigency, observe evidence of law breaking, and then, based on those observations, procure a warrant to return to search the home. The Supreme Court explained in *Alderman v US*:

> "If the police make an unwarranted search of a house and seize tangible property…the homeowner may object to its use against [the homeowner]…because they were the fruits of an unauthorized search of [the homeowner's] house, which is itself expressly protected by the Fourth Amendment. Nothing seen or found on the premises may legally form the basis for an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation" (394 US 165, 177 [1960]).

Indeed, "[a]ny other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment" (*US v Griffin*, 502 F2d 959, 961 [6th Cir. 1974]).

We have upheld the validity of a warrant procured after police "secured" an apartment after a buy and bust, but only where the warrant was based "solely on information obtained by

because Mr. Ibarguen "was merely a casual visitor . . . he lacked standing to challenge the warrantless entry and subsequent search of the premises." The Appellate Division did not cite *Mendoza*, but instead cites only *Ortiz*, which concerns the scope of the expectation of privacy as a matter of law and has nothing to do with the sufficiency of evidence required to obtain a hearing. Both lower courts denied suppression on the ground that Mr. Ibarguen, as a social guest with these facts, had no expectation of privacy. Neither mentioned on what statutory grounds the summary denial of the suppression hearing might be proper.

Thus, despite the majority's protestations to the contrary, it is affirming Mr. Ibarguen's conviction on a different ground than that on which the lower courts denied suppression: the lower courts held that Mr. Ibarguen had no protectible privacy interest in his friends' home—here the majority holds that Mr. Ibarguen did not provide adequate sworn allegations of fact to obtain a hearing. Were the majority to reach the privacy issue on the merits, as the lower courts did, it would have to deal with the tension between *Ortiz* and *Carter*. Instead, the majority affirms on a

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the undercover officer prior to and independent of the illegal entry" and there was "not the slightest hint that the search warrant was in any way tainted by the illegal entry or that the police had exploited the entry in an effort to obtain evidence" (*People v Arnau*, 58 NY2d 27, 33 [1982]). Here, multiple paragraphs in the warrant application describe the glassines of heroin observed inside the apartment and Detective Fernandez's training and experience identifying drugs by their appearance—certainly more than the "slightest hint" of connection between the warrant and the police entry on March 4.

different ground that does not implicate the scope of privacy rights: Mr. Ibarguen failed to make a threshold showing sufficient to entitle him to a hearing on his suppression motion. We are not allowed to affirm a conviction on a ground not reached below (*People v LaFontaine*, 92 NY2d 470 [1998]; CPL 470.15 [1]).

Moreover, the majority's rule enacts a dangerous obstacle for social guests to obtain a hearing in the future. Social guest privacy is different from the type of more common issues that lead to motions to suppress evidence, such as searches incident to an alleged unlawful arrest or an overbroad warrant—areas of law with rich bodies of precedent on which to draw. By contrast, as the splintered opinion in *Carter* demonstrates, the circumstances under which a social guest in a private home will have an expectation of privacy—and over what portions of the dwelling that privacy interest may extend—are highly unsettled. Tellingly, the only two cases in which we have considered the issue after *Carter*—*Ortiz* and *Jose*—are cases in which the suppression court held an evidentiary hearing, so that the complex contours of the right to privacy could be determined on a full record. We have affirmed the summary denial of a suppression hearing in the social guest context only when the defendants proffered no facts at all to support their privacy claims (*Reynolds*, 71 NY2d 552, 556 [1998]; *Gomez*, 67 NY2d 843, 844 [1986]). When, as here, the underlying law is unsettled, the need for an evidentiary hearing is greater: the few and distant guideposts in this area cannot be clarified and

supplemented without a full factual record allowing courts to make thoughtful, well-informed decisions.

In a case both riddled with factual inconsistencies[3] and in which the applicable law is so unsettled, a hearing is the bare minimum that our statute requires. Mr. Ibarguen should be granted the opportunity to obtain a judicial determination, based on a full record, of the scope of his privacy expectation in the apartment on March 4, 2015.[4]

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[3] Police testimony as to Mr. Ibarguen's arrest raises numerous questions. If Detective Fernandez was 15-20 feet behind Mr. Ibarguen, but caught up to him enough to see which door Mr. Ibarguen entered in the basement of the apartment building, why wasn't Mr. Ibarguen wearing the black jacket the police observed or carrying the two $20 pre-recorded bills when he was apprehended? According to Detective Fernandez's grand jury testimony, he apprehended Mr. Ibarguen at the front door—if that is true, how could Mr. Ibarguen have had time to remove the jacket and bill and place them in and near a bathroom? Even if Detective Fernandez reached Mr. Ibarguen in the living room, he claims to have never lost eyesight of him, and yet Detective Fernandez does not report witnessing Mr. Ibarguen remove the coat or discard the bill or cell phone. Rather, Detective Fernandez denied seeing the person he was chasing discard any objects, raising yet another issue: one bill and the cell phone used to communicate with the police and that Spanky was seen holding as the buy began was never recovered. Perhaps most glaring: the police entered the apartment and asked Mr. Ibarguen for "a fat Black man" – Mr. Ibarguen is neither. Only after the police failed to locate such a person did they take Mr. Ibarguen in custody.

[4] The majority's footnote pointing out that Mr. Ibarguen was granted a *Dunaway* hearing has no bearing on whether he was entitled to a *Mapp* hearing. That footnote does suggest two things. First, the fact that the police found nothing on Mr. Ibarguen's person when he was searched upon arrest tends to suggest either that the Mr. Ibarguen was not "Spanky" (because

IV

A hearing might have allowed the People to demonstrate that Mr. Ibarguen lacked a protectible privacy interest for reasons not presently in the record. It might have permitted Mr. Ibarguen to strengthen his claim. Left with only Mr. Ibarguen's initial showing, I would hold that Mr. Ibarguen, as a dinner guest at his friends' apartment, had a privacy interest that the New York police violated when they entered without a warrant. The consequences of holding otherwise are frightening: the government could place cameras or bugging devices in your home, so long as the evidence was used only against your guests. It could enter your home at will, without a warrant, so long as whatever it found was used only against your guests, not your family.

A

Initially, I address the People's argument that Mr. Ibarguen has failed to preserve his claim. The People contend Mr. Ibarguen failed to preserve his challenge to the inclusion of evidence recovered in the apartment because he failed to raise the issue of his privacy rights as a social guest with the specificity that CPL 470.05 (2) requires. In particular, the People take issue with Mr. Ibarguen not having more clearly articulated his legal theory of social guest standing, including by citing to the controlling

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he had neither Spanky's phone nor the premarked buy money) and/or that the police account as to the closeness of their pursuit of Spanky is not accurate. Second, once the court granted a *Dunaway* hearing, the additional time needed to hold a joint *Mapp/Dunaway* hearing would have been modest, particularly given the identity of the witnesses on the two issues.

Supreme Court cases *Olson* and *Carter*. Indeed, the People contend that had the suppression court understood Mr. Ibarguen to have been arguing that his own privacy rights were violated because he was a social guest, and the court agreed, the court would have been "compelled" to order a hearing to determine the facts of his status. Without a hearing, the People note, this Court is deprived of a full record. In this, the People interpret the suppression court's explicit finding that Mr. Ibarguen lacked "standing to challenge the search of the premises" as nothing more than "a one sentence denial" not considering the possibility that standing could be conferred by social-guest status. Aside from sharing the People's regret at our limited record, I find this untenable—Mr. Ibarguen argued he was a "lawful invitee" whose rights were violated when the police entered the apartment "without the consent of the [apartment] owners." The suppression court responded to that contention by specifically denying it: "defendant has failed to sufficiently allege standing to challenge the search of the subject premises." The legal theory Mr. Ibarguen argues now is the same one he raised in both courts below: his status as an invited guest at the apartment who shared a meal and received mail at the premises entitled him to a privacy expectation the Constitution recognizes. My view of the People's argument notwithstanding, the majority—by reaching the merits of Mr. Ibarguen's claim that he was improperly denied a hearing—necessarily holds that his challenge was sufficiently preserved, otherwise it could not have affirmed on any ground other than lack of preservation.

B

Although *Olson* and *Carter* left significant space on the spectrum of social guest privacy undefined, their holdings support the conclusion that social guests invited to share dinner have some reasonable expectation of privacy. The Court in *Olson* emphasized that overnight guests have legitimate privacy expectations in their hosts' homes because of the centrality of spending the night in another's home to work, travel and family and the value society places on that time, as well as the particular vulnerability of sleep, noting that this combination of factors must elevate our privacy expectation in the homes we visit to at least the level of privacy we expect in a public phone booth (*Olson*, 495 US 91, 98-99 [1990]). In *Carter*, the Court held that short-term commercial guests are dissimilar and lack the same expectation of privacy but five Justices agreed with the principle that social guests have sufficient privacy interests in their hosts' homes to contest the illegal seizure of evidence therefrom (*Carter*, 525 US at 91). A person who attends a dinner at a friend's home for the evening—a friend who is trusted enough to receive the guest's mail at the host's home—is entitled to at least as much privacy as one would expect in a phone booth or public restroom (*Katz*, 389 US 359; *People v Mercado*, 68 NY2[d] 847, 876 [1986]). The relationship is noncommercial and a quintessential gathering among friends in a private residence where host and guest alike expect to be able to share woes and dreams in privacy.

To the extent that a rule that dinner guests have a reasonable expectation of privacy in their hosts' homes is an extension of *Olson,* longstanding care for

the privacy of the home and its ramifications for democracy would support that rule. "All great change in America begins at the dinner table" (Ronald Reagan, Farewell Address [Jan. 11, 1989] https://www.reaganfoundation.org/media/128652/farewell.pdf). Colonial outrage at the ransacking of homes by British soldiers "in an unrestrained search for evidence of criminal activity" was a driving force behind the Fourth Amendment (*Riley v California*, 573 US 373, 403 [2014]). Accordingly, the home is "ordinarily afforded the most stringent Fourth Amendment protection" (*US v Martinez-Fuerte*, 428 US 543 [1973]). Caselaw shows repeated efforts to safeguard the privacy of the home. Beyond the warrant requirement for physical entry, police are also prohibited from using thermal imaging technology to monitor the activities of those inside (*Kyllo v US*, 533 US 27, 35 [2001]). Privacy interests in the home are so strong that not just the home's internal structure is protected, but the surrounding adjacent areas, such as a front porch, as well (*Florida v Jardines*, 133 S Ct 1409, 1415 [2013]). In contrast to a public arrest, for which no warrant is needed, a warrant is required to arrest someone at home (*Payton v New York*, 445 US 573, 603 [1980], *revg People v Payton*, 45 NY2d 300 [1978]). Even where police are lawfully permitted to enter the home to perform an arrest, the area they may then search is sharply limited (*Chimel v California*, 395 US 752, 765 [1969]). Perhaps most germane to this case: to arrest a person in a third party's home, the police must first obtain a search warrant for that residence (*Steagald v United States*, 451 US 204, 222 [1981]).

The stakes of privacy in a home are important not just to the personal lives of individuals, but to our democracy. The Framers were concerned with the potential for abuse that granting broad discretion to law enforcement engendered (*Steagald*, 451 US at 220). Recent Supreme Court decisions have shown heightened concern over the threat of government surveillance in a new age of pervasive technology (*Carpenter v United States*, 138 S Ct 2206 [2018]; *Riley*, 573 US 373 [2014]; *Kyllo*, 533 US at 35). Even with safeguards, surveillance has meant a diminishment of spaces protected from the chilling effects of government snooping. The home remains as a site of important conversations, activities and relationships.

However, the continued vitality of the home as a gathering place depends on the privacy our law affords those inside. From the Suffolk Resolves to the underground railroad to grassroots political organizing in this century, home gatherings have always been a site of political debate and activism (*See* Eric Foner, Gateway to Freedom 66 [2015]). Particularly for dissenting groups for whom the public sphere is hostile, the home offers a place of retreat and discretion, without which many groups may choose not to meet. Indeed, the right to associate is closely linked the ability to keep one's associations private (*NAACP v Alabama*, 375 US 449, 462 [1958]). The Supreme Court recognized the link among democracy, privacy and association in *NAACP v Alabama*, when it held the State of Alabama could not seek discovery of NAACP membership lists, explaining the "freedom to engage in association for the advancement of beliefs and ideas is an

inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment" (*id.* at 460). Because "compelled disclosure of membership in an organization engaged in advocacy of particular beliefs" can chill association, "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs" (*id.* at 462). The Court emphasized that point again just five years later when Florida similarly attempted to gain access to NAACP membership lists, holding not only was the right to associate guaranteed by the Fourteenth Amendment, but so was the "protection of privacy of association in organizations" (*Gibson v Florida Legislative Investigation Committee*, 372 US 539, 544 [1963]). The home offers little privacy protection to groups, no less the homeowner, if the police may enter at any point in a gathering in the hopes of obtaining evidence with which to prosecute someone present.

To avoid such invasions, the Supreme Court has relied on the ability of criminal defendants to exclude evidence seized in violation of the Fourth Amendment. The Court imposed the exclusionary rule after alternative attempts to curb illegal police conduct failed (*Mapp,* 367 US at 642 ["(t)he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other states"]). The exclusionary rule has been chipped away at over the decades through a variety of exceptions—notably, a chorus of scholars concluded that the largest impediment to its utility

has been the "standing" doctrine.[5] Although *Rakas* properly ended the "standing" doctrine and relocated our analysis to the substance of privacy expectations, there remains a connection between the substance of Fourth Amendment privacy rules and police behavior. Thus, as with many Fourth Amendment questions, it is important to consider how the rule regarding social guest privacy relates to the "balance" at work in our law between effective law enforcement and individual privacy interests. The harder it is for invitees to a home to challenge warrantless police intrusions, the less the police will be deterred from warrantless entries where the target of their investigation steps into another's—even a family member's or a partner's—home.

The Supreme Court confirmed the dangers of excessive police discretion in *Steagald*, when it held police must obtain a search warrant before entering the home of one person to arrest another (451 US at 222). That case bears some resemblance to the one at

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[5] *See e.g.* David Gray, *Collective Standing under the Fourth Amendment*, 55 Am Crim L Rev 77, 89 (2018) ("The rules governing Fourth Amendment standing under *Katz* have dramatically diminished the security of the people against threats of unreasonable search and seizure."); Paul R. Joseph & Michael Hunter, *Circumventing the Exclusionary Rule through the Issue of Standing*, 10 J Contemp L 57, 63 (1984) ("The fourth amendment standing doctrine is the final and perhaps broadest means of circumventing the exclusionary rule"); Darlene Stosik, *The Death Knell of Automatic Standing – Another Blow to Fourth Amendment Privacy*, 35 U. Miami L Rev 361, 369 (1981) ("the Court's discontent with the exclusionary rule has firmed its determination to restrict access to the benefits of that rule by continuing to limit the invasions forbidden by the fourth amendment").

hand: looking for a fugitive and with only a warrant for the person's arrest, the police entered a home, frisked several people, and searched the premises, finding evidence of narcotics (*id.* at 206-207). Only after the initial entry and search did the officers send for a search warrant (*id.* at 207). One of the residents of the home challenged the search as unconstitutional and the Supreme Court agreed, explaining that "[a] contrary conclusion – that the police acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant – would create significant potential for abuse" (*id.* at 215). That concern with police discretion permeates the decision—the Court wrote: "armed solely with an arrest warrant for a single person, the police could search all of the homes of that individual's friends and acquaintances" (*id.*). This level of "unfettered discretion," is incompatible with the Framer's goals in drafting the Fourth Amendment (*id.* at 220). The Supreme Court's solution was simple: get a warrant.

Here, if we were to fail to recognize the privacy interests of social guests, police would possess similarly unfettered discretion to invade the homes of the friends and family members of police suspects who invite the person inside. Effective law enforcement does not require this type of entry. The officers, in circumstances like this, have options. If Detective Fernandez was only 15-20 feet behind Spanky, chasing him into an apartment because of concerns that he was a danger to himself or others (for example, if he were armed), or if the officers had a fear that evidence was being destroyed, then the

doctrine of hot pursuit would allow officers to enter the apartment without a warrant. But the People have never attempted to justify this particular warrantless entry in that manner, which suggests the People may have thought the pursuit, and concomitantly the legal basis, was not so hot. The officers could have knocked and asked for permission to enter, but they did not.[6] Or they could have surrounded the apartment (as they apparently did when securing it after removing the occupants), obtained a search warrant, or—even without a warrant—arrested and searched the person they identified as Spanky if he exited the apartment.

A clear articulation of the scope of social guest privacy is overdue. The controlling case in New York is *Ortiz*, which we decided after *Olson* but before *Carter* and, as previously discussed, affirmed on a limited procedural posture. Nonetheless, *Ortiz*'s holding that the defendant was merely a "casual visitor" appears to have become the standard in our lower courts. Since *Ortiz*, numerous Appellate Division opinions contain terse, conclusory findings that defendants who argued their privacy rights were violated in searches of premises aside from their own homes were "casual visitors" without legitimate privacy expectations (*see e.g. People v Harvey*, 170 AD3d 1675, 1677 [4th Dept 2019] [finding a defendant, "in as much as he did not live in…and was at most a casual visitor" in the house police searched

[6] It is not uncommon for the police, lacking a warrant, to ask permission to enter a home and for an occupant to grant it (*see e.g. People v Carter*, 30 NY2d 279, 282 [1972] [affirming the constitutionality of a search of an apartment to which the defendant's wife consented]).

lacked a legitimate expectation of privacy]; *People v Gray*, 151 AD3d 1470, 1471 [3rd Dept 2017] [finding that the defendant was a "casual visitor" in the apartment where his cousin and the cousin's mother resided]; *People v Santiago*, 765 NYS2d 853, 2003 NY Slip. Op. 13011 [1st Dept 2003] [finding a son's connection to his mother's apartment "tenuous" at best].

V

"If it were not for guests all houses would be graves" (Khalil Gibran, Sand and Foam 33 [1926]). Ultimately, I do not believe our "society is prepared to recognize as 'reasonable'" the warrantless entry into a private home to obtain evidence against a guest who has been invited by the home's residents for something as consequential as a meal or a meeting (*Katz*, 389 US at 361). Even those who would be happy to have the police enter their homes at will to seek evidence against their friends, however, should recognize the unreasonableness of denying those friends an evidentiary hearing to determine what degree of privacy they reasonably expected and whether the police conduct unlawfully intruded on that expectation. All I would do here is that bare minimum: remit this case for the hearing Mr. Ibarguen requested. The United States Supreme Court will eventually define the scope of the privacy rights of various sorts of invitees; in the interim, defendants who establish that their claim falls within the fog should be entitled to make the best case they can at an evidentiary hearing. Only in that way will the fog clear.

Order affirmed, in a memorandum. Chief Judge DiFiore and Judges Fahey, Garcia, Singas and Cannataro concur. Judge Wilson dissents in an opinion, in which Judge Rivera concurs.

Decided October 14, 2021

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

D59927
M/htr

___AD3d____ Argued – March 19, 2019

MARK C. DILLON, J.P.
RUTH C. BALKIN
LEONARD B. AUSTIN
BETSY BARROS, JJ.

2017-06039

The People, etc.,

respondent,

v.

Eric Ibarguen,

appellant.

(Ind. No. 10191/15)

DECISION & ORDER

[June 26, 2019]

Paul Skip Laisure (Benjamin Welikson of counsel), for appellant.

John M. Ryan, Acting District Attorney (John M. Castellano, Johnette Traill, and Kathryn E. Mullen of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Gene Lopez, J.), rendered May 9, 2017, convicting him of criminal sale of a controlled substance in the third degree, upon a

jury verdict, and imposing sentence. The appeal brings up for review the denial, without a hearing (Toko Serita, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence.

ORDERED that the judgment is affirmed.

We agree with the Supreme Court's determination to deny that branch of the defendant's omnibus motion which was to suppress physical evidence without conducting a hearing (*see* CPL 710.60[3][a]). The defendant failed to establish a reasonable expectation of privacy in the apartment at which he was merely a casual visitor, and thus, he lacked standing to challenge the warrantless entry and subsequent search of the premises (*see People v Ortiz*, 83 NY2d 840).

The Supreme Court should have granted the defendant's request to instruct the jury on cross-racial identification (*see People v Boone*, 30 NY3d 521; *People v Jordan*, 167 AD3d 1044). However, the failure to give the charge constituted harmless error, as there was overwhelming evidence of the defendant's guilt and no significant probability that the defendant would have been acquitted if not for the error (*see People v Jordan*, 167 AD3d at 1045).

The defendant's contention that he was deprived of a fair trial because the Supreme Court's charge regarding flight as consciousness of guilt lacked a factual predicate and was misleading is without merit, and any error in giving the charge was harmless (*see People v Crimmins*, 36 NY2d 230; *People v Redd*, 81 AD3d 751).

DILLON, J.P., BALKIN, AUSTIN and BARROS, JJ., concur.

ENTER:

/s/ Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

APPENDIX C*

[A6]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM,
PART TAP-A

THE PEOPLE OF THE STATE OF NEW YORK - against – ERIC IBARGUEN, Defendant	AFFIRMATION IN SUPPORT OF DEFENDANT'S OMNIBUS MOTION Ind. # QN10191/2015

* * *

[A10]

MOTION TO SUPPRESS PHYSICAL EVIDENCE

1. The People have indicated in their response to defendant's Bill and Demand that certain property, to wit: U. S. Currency, U. S. mail, articles of defendant's clothing, heroin, alprozalam pills and Pre-recorded buy money were recovered from the defendant at the time of his arrest.

2. Upon information and belief, as indicated above, the defendant was present at the subject location when the police entered same without the consent of the owner thereof. The police handcuffed and searched the defendant without his consent as well as the other persons inside the subject location.

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* Embedded pagination in Appendices C and D are to Defendant-Appellant's Appendix in the New York Court of Appeals.

The defendant denies the allegations against him and maintains that he did not sell heroin to an undercover police officer on March 4, 2015. Furthermore, as testified to by the defendant in the Grand Jury, he was a lawful invitee of the subject location and receives his mail there. As a result, the defendant has Standing to challenge the search of his person as well as the location therein.

3. Based upon the forgoing the defendant respectfully submits that the law enforcement officials involved in this case lacked probable cause to effect this arrest, (*Dunaway v. New York*, 439 U.S. 979, 99 Sup. Ct. 563) and that said property was obtained as a direct result of this illegal arrest. (*People v. Howard*, 50 NY2d. 583, (1980)).

4. In the event the People's answering affirmation raises issues of fact, the defendant requests that a **DUNAWAY/MAPP** hearing be conducted to determine the constitutionality of the search and seizure herein. In the event that no issues of fact are raised by the People's answer, the defendant moves for summary suppression of all physical evidence. *People v. Gruden*, 42 NY2d. 214 (1977).

* * *

APPENDIX D

[A13]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM,
PART TAP-A

THE PEOPLE OF THE STATE OF NEW YORK - against – ERIC IBARGUEN Defendant	**People's Response to Defendant's Omnibus Motion** Ind. No. QN10191/2015

* * *

[A15]

MOTION TO SUPPRESS PHYSICAL EVIDENCE

The People respectfully urge that this Court deny the defense motion for the suppression of physical evidence or a Mapp hearing.

The Defendant Has Failed to Demonstrate Standing to Contest the Execution Search Warrant.

On March 14, 2015, Officers assigned to Brooklyn North Gang Squad executed a search warrant (#Q00242-15) at [ ] 75th Avenue, Queens County, (hereinafter "the subject location"). The search warrant was signed by the Honorable David Hawkins, Judge of the Criminal Court. The defendant moves to suppress all evidence seized upon the execution this search warrant. As a threshold

issue, a defendant must have standing to contest a search warrant. The defendant has no standing to challenge the legality of the seizure of the physical evidence recovered from the search warrant and is not an aggrieved person within the meaning of *People v. Ponder*, 54 N.Y.2d 160 (1981), and Section 710.20 of the Criminal Procedure Law. In *Burton*, the Court of Appeals held that "standing exists where a defendant was aggrieved by a search of a place or object in which he or she had a legitimate expectation of privacy." *People v. Burton*, 6 N.Y.3d 584.588 (20061. The Burton court further held that this burden is on the defendant. *Id*. *See also People v. Ramirez-Portoreal*, 88 N.Y.2d 99, 108 (1996) (Defendant has the burden of showing that he has a "legitimate expectation of privacy in the premises .... searched."). A defendant must allege specific facts in his motion papers, including a present, possessory interest in the area searched, as well as an expectation of privacy. Conclusory assertions are not sufficient. *People v. Gomez*, 67 N.Y.2d 843 (1986). Additionally, a defendant cannot attack a search warrant on the ground that it was obtained as a result of an illegal search of a third party's premises or property where he cannot demonstrate an expectation of privacy in those premises or that property. *US v. Sanchez*, 719 F. Supp. 128. EDNY 1989.

Here, the defendant does not have standing to challenge the search warrant. First, the defendant's moving papers fail to allege facts sufficient to warrant a hearing. *People v. Mendoza*, 82 N.Y.2d 415, 432-433 (1993). The defendants moving papers simply state "as testified to by the defendant in the

Grand Jury, he was a lawful invitee of the subject location and received his mail there, (Defendant's papers pg. 5 para. 3). However, before the Grand Jury when the defendant was asked if told the arresting officer that his address was [ ] 75th Avenue Queens the defendant testified: "Yes ma'am. That was an error. That was an error. I live at [ ] on the same block. [ ] I use as my mailing address." Additionally the [A16] defendant testified that he was having dinner with his friends, "in their apartment" (Grand Jury page 34 line 14 **see attached).** These assertions by the defendant fail to establishing standing. The defendant has failed to show a legitimate expectation of privacy or possessory interest in the subject location. Simply receiving mail at a location or eating dinner at a friend's residence does not confer upon the defendant a legitimate expectation of privacy. Specifically, the defendant fails to demonstrate facts that show his connection to the location and the property recovered from the target location. The defendant's allegations did not establish a privacy interest in the area searched and property searched, failing to confer upon him standing to move to suppress. See *People v. Barshai*, 100 A.D.2d 253 (1984). Therefore, the defendant has not alleged facts sufficient to warrant a hearing. *Id.*

Under the Fourth Amendment, only a person who has a legitimate expectation of privacy in the place where the search occurred can challenge the constitutionality of that search. *Rakas v Illinois*, 439 U.S. 128 (1978). The defendant must demonstrate a legitimate expectation of privacy in the area searched. *People v. Ramirez-Portoreal*, 88 N.Y.2d 99,

108 (1996); *see also*, *People v. Kennedy*, 284 A.D.2d 346 (2d. Dept. 2001). Again, the burden of proving that the defendant has an expectation of privacy in a place searched is on the defendant. *Rakas*, 439 U.S. at 132; *People v. Rodriguez*, 69 N.Y.2d. 159 (1987). In order to establish a claim of privacy in a residence, a person may demonstrate his status as "an overnight guest." *See Minnesota v. Olson*, 495 U.S. 91 (1990). Courts have denied standing where the defendant fails to demonstrate that he was an "overnight guest" in a residence. *See People v. Cesar Perez*, 185 A.D.2d 330 (1992). Additionally, Courts have denied standing where the defendant had no connection to the residence and used the residence for illicit purposes. *People v. Rodriguez*, 69 N.Y.2d 159, 161 (1987). Most importantly, courts have held that "a casual visitor" has no expectation of privacy in another person's residence. *See People v. Ortiz*, 83 N.Y.2d 840, 843 (1994). Courts have also considered several factors to determine whether a defendant has an "indicia of connectedness" to the residence. *People v. Rodriguez*, 69 N.Y.2d 159, 163 (1987). Such factors include "The number of times a person stays in a particular place, the length and nature of the stay, the indicia of connectedness and privacy, like change of clothes or sharing expenses or household burdens," *People v. Rodriguez*, 69 N.Y.2d. 159, 163 (1987). Courts have also considered factors such as "familial relationship or other socially or lawfully recognized relationships" to the owner of the premises. *Id.* at 165. A mere visitor has no standing. *People v. Rodriguez*, 69 N.Y.2d 159, 513 N.Y.S.2d 75, 505 N.E.2d 586 (1987). Further, in *People v. Bandera*, the Court held that a defendant lacked standing where "by his own admission," he was a guest in the

apartment "and he failed to allege facts which otherwise demonstrated a legitimate expectation of privacy in the searched premises." 166 A.D.2d 657 (1990). The defendant clearly does not meet this burden.

The defendant has failed to establish that he has standing to contest the search warrant executed at the residence of his friend's residence which was the subject location. First, the defendant identified that Jose Paredes and Laurie Schwartz resided in the subject location (Grand Jury page 34 line 14, **see attached)** and denied that he himself lived there. In fact he stated that he lived at another location on the same block. The defendant also indicated he was having dinner at the subject location. At no point did the defendant state that he resided at the subject location, or even that he had spent the night there at any point. He simply stated that he received his mail at the subject location. A simple invitation to dinner by the people who lived at the subject location and the fact that a person receives mail [A17] at a location does not confer upon the defendant a legitimate expectation of another person's residence.

Accordingly, the defendant's motion to suppress the physical evidence should be denied in its entirety due to failure to assert standing.

* * *

[EXCERPT OF APPENDIX TO PEOPLE'S RESPONSE]

[A22] ERIC IBARGUEN,

appearing as a witness, on his own behalf, accompanied by his attorney, Paul Franzese, was questioned as follows:

BY MS. JAHN:

Q. All right. So, I show you this document entitled Wavier of Immunity deemed Grand Jury Exhibit No. 3 for identification, all right. You will be requested to swear to this waiver before testifying and giving evidence in this Grand Jury.

A. Yes, ma'am.

Q. You have the right to consult with your lawyer before deciding whether you will comply with that request.

A. Yes, ma'am.

Q. If you wish to consult with your lawyer, you will be given a reasonable time to confer with your lawyer.

A. Yes, ma'am.

Q. Is Paul Franzese here present?

A. Yes, ma'am.

Q. And he is your lawyer?

A. Yes, ma'am.

Q. Have you consulted with him about executing this waiver?

A. No, ma'am. [A23]

Q. Has he spoken with you about it?

A. Yes, ma'am.

Q. Has he explained to you what it means to swear to this document?

A. Yes, ma'am.

Q. Which is Grand Jury Exhibit No. 3 for identification?

A. Yes, ma'am.

Q. And do you acknowledge that you have read it, that you understand it, and that the statements you have made in it are true?

A. Yes, ma'am.

Q. Do you understand that once you execute the Waiver of Immunity, anything you say can be used against you?

A. Yes, ma'am.

Q. And do you acknowledge that your signature is what's on that paper?

A. Yes, ma'am.

Q. Now, please stand and face the Foreperson.

FOREPERSON: Do you, Eric Ibarguen, solemnly swear that you have read the document Waiver of Immunity and that you understand it? [A24]

WITNESS: Yes, ma'am.

FOREPERSON: Do you further swear that you have signed and executed the waiver and that the statements you have made in it are true?

WITNESS: Yes, ma'am.

MS. JAHN: At this point, I will move Grand Jury Exhibit No. 3 for identification into evidence as Grand Jury Exhibit 3.

(Whereupon, the Foreperson signed the Waiver of Immunity.)

MS. JAHN: I will now read what's in evidence as Grand Jury Exhibit 3 in evidence entitled the Waiver of Immunity before the Grand Jury. Grand Jury number QN10191 of 2015. The People of the State of New York against Eric Ibarguen, residing at [ ] 75 Street, Ozone Park, New York 11416, being a person about to become a witness in the above-captioned Grand Jury proceeding do hereby waive all immunities and privileges from self-incrimination that I might otherwise be entitled to receive as a result of testifying in said Grand Jury proceeding. In witness hereof, I have subscribed my name, Eric Ibarguen.

Q. Over which your signature is?

A. Yes, ma'am.

[A25]

MS. JAHN: And this is sworn to me on the 27th day of May 2015. Now, there is handwriting on this which is indicates [sic] the type-written address is [ ] 57 Street and above that initials is a correction that you made of [ ].

WITNESS: Yes, ma'am.

Q. And your initials are present after that?

A. Yes, ma'am.

Q. Now you have an opportunity to give a statement concerning the facts and circumstances surrounding an incident that occurred at [ ] 57 Street in the County of Queens on March 4, 2015 at approximately 7:10 p.m. As long as you limit your statement to the relevant and complete evidence concerning the matter under consideration, I, as the legal advisor to the Grand Jury, will not interrupt you. Do you understand?

A. Yes, ma'am.

Q. If at any time during the proceeding you wish to speak to your attorney, please raise your hand and indicate your wish. You will then be permitted to speak to him out of earshot of me or the Grand Jury. Do you [A26] understand everything I have just said to you?

A. Yes, ma'am.

Q. You may now begin your statement.

A. On March 4, 2014 I was having dinner with friends and a commotion was heard.

MR. FRANZESE: You mean 2015. Take a deep breath.

A. A commotion was heard and officers came into my friend's apartment. They were questioning where is he? Where is he? They were looking for a short, fat, black wearing a black hoody and then they asked us to exit the apartment. Along them searching, something came up and an officer, he cuffed me, and then I was assaulted. I was thrown on the bed, cuffed. His lower knee was placed on my lower back and I was being punched on the right side of my face. To my understanding, they ran into my friend's

apartment without a warrant. Firsthand and foremost, no black hoody was recovered from there and, also, they have my phone in evidence thinking that it was me that they spoke to for the controlled substance sale. And I have my phone call records. I only made one phone call that day. It was at 11:33 a.m., an outgoing call. That was my activity for the whole day. I [A27] had no incoming calls whatsoever.

Q. Is that your complete statement?

A. Yes, ma'am.

Q. That's all you have to say? Would you like to talk to your lawyer before I ask you questions or the Grand Jury?

A. No, you can ask questions.

Q. Can you tell us your name?

A. My name is Eric Ibarguen.

Q. Now, you are here for the Grand Jury?

A. Yes, ma'am.

Q. And you expect them – you would like to believe what you are saying, right?

A. Yes, ma'am very much. I fell was wronged [sic] for this. I wouldn't be here gambling for my life in front of the Grand Jury. So, I understand I have a past criminal history. I have done my time. I paid my debt to society. I am not proud of anything I have done in my past. I have been working very hard since then in my life, for the past nine years, since I have been home. I wish to have my life back.

Q. My first question is your name Eric Ibarguen? Is that correct?

A. Yes, ma'am.

Q. And that was the name that you gave to the police [A28] on this occasion; is that correct.

A. Yes.

Q. But isn't it true that you have given the police different names?

A. Never.

Q. On different instances?

A. That's not true. During one of my past arrests I used an A.K.A.

Q. So, at that point, you used a fake name?

A. I never used a fake name, just at that time.

Q. But you just told us your name is Eric Ibarguen; is that correct?

A. Yes.

Q. Your name is not Raymond Rivera?

A. No, it's not.

Q. But you used that name when you were speaking to the police on a previous incident; is that correct?

A. No, that's on the past record.

Q. Previous is in the past.

A. Yes, ma'am.

Q. Okay. You used a different name when you were dealing with the police; is that right?

A. Yes, ma'am.

Q. So, you weren't entirely honest with the police at that point; is that correct? [A29]

A. No, ma'am.

Q. Is it fair to say that Raymond Rivera is not the only other name that you have used in dealing with the police?

A. No, ma'am.

Q. Have you used any other names?

A. No, ma'am.

Q. So, if I tell you that you used the name Eric Perez in a different instance when you were dealing with the police, would that be accurate?

A. Ma'am, these are all of my past criminal history, something I did my time for, ma'am.

Q. I am asking you about whether or not you gave your name, which you gave here today, during previous instances. You used the name Eric Perez?

A. Eric Perez was the name given to me by my father when we came from Colombia, when my father was in the witness protection program, and that was my name.

Q. So, you used a different name on that day?

A. Yes, ma'am.

Q. Right?

A. That was my name at the time.

Q. That was your assigned name at that time. But Ramond [sic] Rivera was not a name that was assigned to you at any point? [A30]

A. No, ma'am.

Q. Not only that but on different occasions you gave birth dates to the police; is that also correct?

A. Not that I recall.

Q. What is your actual date of birth —

A. It was nine years ago with the police officers, so I wouldn't recall.

Q. What's your actual birth date?

A. [ ].

Q. [ ].

A. That's correct.

Q. So, when you informed the police that your birthday was [ ], that also wasn't accurate, was it?

A. I don't recall when t hat was.

Q. Hold on. I'll pull it.

A. No, it was – I know it was not recent.

Q. When you gave the name of Raymond Rivera, isn't it true that you gave the birth date of August 18, 1982? You don't recall any of that?

A. Ma'am, it's been too long. It's over nine years since the incident. It has been over nine years ago, ma'am. I wouldn't recall details. I apologize for that. I couldn't recall. [A31]

Q. You are telling me you don't recall giving an incorrect birth date to the police?

A. That's correct, ma'am.

Q. Now, you had been referring to previous incidents that you had. Isn't it a fact that on March

28 of 2000 you wee convicted of a plea of guilty to Robbery in the Second degree which is physical injury, displaying a firearm?

A. What year was that, ma'am?

Q. March 28 of 2000.

A. March 28, 2000, that was one of my past criminal history. Yes, ma'am.

Q. And this is because you plead guilty to that, correct?

A. Yes, ma'am.

Q. Isn't it true that on September 24, 1991 you plead guilty to Attempted Robbery in the Second Degree, which is aided by another?

A. Yes, ma'am.

Q. Isn't that true?

A. Yes, ma'am.

Q. And to that you were – that was the incident where you were using the name Raymond Rivera, right?

A. Yes.

Q. Isn't it also true that on March 26, 1990 you [A32] plead guilty to Attempted Criminal Possession of a Weapon in the Third Degree?

A. Yes, ma'am.

Q. And in that incident you used the name Eric Perez, correct?

A. Correct, ma'am.

Q. All right. So, on March 4 of 2015, where did you say you were?

A. I was having dinner with friends, ma'am.

Q. Where?

A. In their apartment.

Q. What was the address of that residence?

A. [ ] 75 Street.

Q. And who were you at the residence with?

A. Friends.

Q. Their names?

A. Jose Paredes and Lauire [sic] Schwartz.

Q. And they live there?

A. Yes, ma'am.

Q. And on that date, isn't it true when you were arrested for that case, isn't it true that you gave your address as [ ] 75 Queens, New York to the police?

[A33]

A. Yes, ma'am.

Q. It was an error when you told them on that date that you lived in that location?

A. Yes, ma'am. That was an error. That was an error. I live at [ ] on the same block. [ ] I use as my mailing address because I am always at work and my mail is always being tampered with. I use my mailing address as [ ].

Q. You gave the police, what you are saying is, your mailing address, correct?

A. Yes.

Q. So, on that date you were inside the whole night?

A. Correct.

Q. You at no point were outside the apartment?

A. I had to walk from my building to their house, yes, ma'am.

Q. But before the police came, you weren't outside?

A. No, I was not.

Q. So, when the officer testified that he saw you in a narcotics related transaction?

A. He stated that he saw me? He stated that he was looking for someone short, black, and fat, ma'am.

Q. And he stated that to you when he came in there?

A. Yes, ma'am.

Q. He stated that to you? [A34]

A. All of us.

Q. How did he get into the apartment?

A. He broken in by forceful entry. He broke both doors leading into both apartments.

Q. So, isn't it a fact on that date in front of this location, [ ] 75 Street you, in fact, engaged in a narcotics transaction with an undercover officer; isn't that a fact?

A. Absolutely not, ma'am.

Q. Isn't it a fact on that date that other officers were identifying themselves as police officers and approached you?

A. Absolutely not.

Q. And after those officers came, because you ran away, came through that door in the apartment and went into the apartment, where you were located; isn't that true?

A. Absolutely not.

Q. They came running into the door?

A. They were looking for someone short, fat, and black with a black hoody. I have phone records indicating that it's not me that shows that March 4 there is no indication of me speaking with a policeman. There are records here. The telephone records do not lie. [A35]

> MR. JAHN: At this point, I would like to advise the Grand Jury that this is a document that for numerous evidentiary reasons can't come in.
>
> MR. FRANZESE: He can refer to it. He didn't ask that it be introduced. He has his phone records. I know, Mr. Gitin, what I can and cannot do.

Q. Mr. Ibarguen, what is the phone number associated with the document that you are referring to right now?

A. My phone number is 718 [ ], ma'am. And that is the phone that they have in as evidence indicating that it is my phone for alleged sale.

Q. Now, isn't it true that, if you know, isn't it true that narcotic dealers can have multiple phones?

A. Yes, it is true. I only have one phone. I only have one phone. Apparently, I am hard working guy. I have one phone.

Q. You would agree with me even if someone is not a narcotics dealer, they could have multiple phones?

A. Yes. I am not a narcotics dealer.

Q. You would agree that they could have a few. And you agree with me at the apartment that you were in. They found a large quantity of drugs? Would you agree that the drugs were found in that apartment? [A36]

A. I don't agree.

Q. You agree you were in that apartment?

A. I agree that they didn't find who they were looking for. They were upset and I became someone short, fat, and black.

Q. Isn't it true, Mr. Ibarguen, that this address, [ ] 75 Street was not just the address that you used as a mailing address, but was, in fact, an area that you used to hold and store drugs, as you were dealing drugs in that area?

A. Absolutely not, ma'am. I have always first and foremost – let me explain to you, ma'am. Whatever I have done in my past, as I said before, I'm not proud of it. I am not proud of nothing I done in my past. I feel I paid my debt to society. I work hard everyday for the past nine years since being home, I held it together and I am also an operations manager. I have

been working as the operations manager for the past nine years. I came home October 24 of 2006. I found a job November 29, 2006. I found a job. I held down. I am busy, working hard, very hard, and I have nothing of drugs in my past crimes.

> MS. JAHN: Grand Jury, I am going to instruct you to disregard that statement, as it's nonresponsive to the question that I was asking, [A37] which was is this house at [ ] 75 Street the house that you used to store narcotics for narcotics transactions?

A. Absolutely not, ma'am.

Q. That was the question that I had. And isn't it a fact that the reason that you were running into that apartment that night was to go in to where these narcotics were stored so that you could destroy them before the officers came in and found them?

A. Ma'am, I never ran anywhere. I was always in the apartment. I was in the apartment. I never ran anywhere.

Q. Now, isn't it a fact on the night which was in March when the officer was arresting you, that your skin was cold to the touch?

A. Cold to the touch? I don't understand. What do you mean, cold to the touch?

Q. As if you have been outside?

A. No, ma'am. May I say something.

Q. No. And isn't it a fact that your heart was racing at that time?

A. My heart was racing, absolutely. If you have people crashing into somewhere you are having dinner, I am sure your heart would be racing too, ma'am.

MS. JAHN: I am going to instruct the Grand Jury to disregard the end part of the defendant's [A38] statement, as it is nonresponsive to the question that I asked.

At this point I don't have any further questions for Mr. Ibarguen, but I will ask if you have any questions now? Let the record reflect that I don't see a response. I see no hands and I hear no questions.

WITNESS: And, at this point, can I leave this for the Grand Jury. This is their history.

(Whereupon the witness held up a news paper article.)

MS. JAHN: Again, I am going to instruct the grand jury to disregard that statement that Mr. Ibarguen made at the end of questioning. I am going to have you disregard it as well as I am going to ask you not to consider that during your deliberations on this case.

So, I know that you have had some experience on the charge and vote and I am going to be doing a similar thing you just had happen. I am going to have you vote on some of the charges and not all of them and we are going to leave one of the charges on the finding slip open. There is a charge for 220.39(1), which is Criminal Sale of a Narcotic Drug. That is the last listed charge and

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