No. _____

In the
SUPREME COURT OF THE UNITED STATES

BENJAMIN CAMARGO, JR., Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeal of the State of California,
Fourth Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether probable cause to believe a crime has been committed must exist prior to, and independently of, any exigent circumstances used to justify a warrantless entry of a home, or whether the officers' belief that exigent circumstances exist, standing alone, constitutes an exception to the warrant requirement.

2. Whether police may use uncorroborated informant tips to make a warrantless entry of a home based on exigent circumstances and search the resident, where the tips do not establish probable cause to believe a crime has been committed or do not provide specific facts regarding the resident to reasonably suspect he has committed a crime or is armed and dangerous.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The order of the Supreme Court of California summarily denying review appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was November 15, 2006. A copy of the decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Fourth Amendment

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment, section 1

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

California Penal Codes, section 1538.5, subdivision (a)(1)(A) Appendix D

> "A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
> (A) The search or seizure without a warrant was unreasonable."

California Health & Safety Code, section 11378 Appendix E

> ". . . [E]very person who possesses for sale any controlled substance . . .shall be punished by imprisonment in the state prison."

STATEMENT OF THE CASE

Police were looking for a parolee at large named Cox. Unknown informants supplied police with varying information that Cox was seen at or around petitioner's residence, or driving a truck in the area. Using this information police knocked on petitioner's door and, when he answered, pushed him backwards, entered the residence, spun him around and searched him. Drugs were found.

Petitioner sought to suppress the evidence found as a result of the search under California Penal Code section 1538.5. Appendix D. In denying the suppression motion, the trial court found that officers had no specific information that petitioner had committed any crime or was armed and therefore no reasonable suspicion to pat him down. However, the trial court held that consent given after the illegal frisk was not tainted by the initial illegality. Petitioner thereafter pled guilty to possession of methamphetamine for sale (Cal. Health & Saf., § 11378). Appendix E.

Petitioner appealed denial of the suppression motion. On August 8, 2006, the California Court of Appeal, Fourth District, Division Two, affirmed the trial court's denial of the motion to suppress, but not for the same reasons given by the trial court. With respect to the warrantless entry and search, the majority found the officers' actions justified by exigent circumstances.

Therefore, the initial patdown was legal and the ensuing consent valid. Appendix A, p. 18.

A petition for rehearing was filed. It was denied on August 29, 2006. Appendix B.

On November 15, 2006 the California Supreme Court summarily denied review, with Kennard, J., being of the opinion the petition should be granted. Appendix C.

REASONS FOR GRANTING THE PETITION

Petitioner had no criminal convictions before this case. He was alone in his home when police, acting on uncorroborated informant tips regarding a parolee at large, Cox, pushed petitioner backwards into his residence when he answered the door. Without speaking, they frisked him. Despite the lack of urgency for finding Cox (police had been looking for Cox for a while) and without reason to believe petitioner harbored or supported Cox, police violated petitioner's security and right to be free from unreasonable intrusion and search.

The trial court held the initial patdown illegal because police lacked reasonable suspicion petitioner was committing a crime. Thus, it had no occasion to consider the reliability of the informant tip pursuant to *Florida v. J.L.*, 529 U.S. 266, 146 L.Ed.2d 254, 120 S.Ct. 1375 (2000). The Court of Appeal, recognizing that the trial court's finding the initial patdown was illegal necessarily vitiated the consent obtained from petitioner after the frisk (*Wong Sun v. United States*, 445 U.S. 573, 586, 590, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980)), found the trial court erred in holding the patdown illegal. In so doing, the majority failed to evaluate the corroboration requirement set forth in *Florida v. J.L., supra*, 529 U.S. 266. The Court of Appeal held the entry and

frisk were justified by exigent circumstances and concerns for officer safety. Appendix A, pp. 12-15, 17.

Petitioner sought by petition for rehearing to have the Court of Appeal discuss the reliability of the informant tip under *Florida v. J.L.* and to have the matter remanded for a full and fair hearing on this matter under *Stone v. Powell*, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.C. 3037 (1976). The court denied rehearing. Appendix B.

This case raises important recurring questions regarding whether probable cause to believe a crime has been committed must exist first and independently of the exigent circumstances used to justify a warrantless entry, or whether exigent circumstances alone constitute an exception to the warrant requirement. Further, the case presents important questions regarding the requirement that officers corroborate anonymous tips prior to effecting a patdown search of a person, and whether such tips are ever sufficient to allow police to frisk someone thought to *associate* with the person who is the subject of the tips. Finally, it raises critical issues regarding the circumstances under which officers may rely solely on exigent circumstances to effect a warrantless entry and search, absent any probable cause to enter or reasonable suspicion to frisk the resident.

A. The Warrantless Entry and Patdown of Petitioner.

As noted in the dissent, it is important to understand the facts preceding the warrantless entry of petitioner's trailer and the patdown search of petitioner. Appendix A., diss. op. of Gaut, J., p. 1. On the evening of December 5, 2003, Deputy Marc Cloutier of the Riverside County Sheriff's Department and his partner knocked on the door to petitioner's trailer home. They had received anonymous tips that a parolee-at-large, Roy Cox, might be in the home or in the "area." No one answered the door. The deputies went to a house located on the property and asked the owner if he had seen Cox. The owner said he had not seen Cox.

The deputies then looked around the outside of petitioner's trailer. They saw a red "quad" vehicle parked near the trailer. The deputies had received anonymous information that Cox had been seen driving two vehicles, a red quad and a forest service truck. Deputy Cloutier did not know whether it was the same red quad that Cox had allegedly been seen driving and did not try to determine whether it was the same vehicle. The deputies then departed.

About an hour later, the deputies returned to petitioner's trailer. When Deputy Cloutier knocked on the door, he heard a scuffling sound; seconds later, petitioner opened the door. Petitioner looked confused and nervous. He turned his head and looked to the right.

Believing that petitioner might be alerting Cox to the deputies' presence, Deputy Cloutier forcibly entered the trailer, shoving petitioner backwards two to three feet and turning him around. Deputy Cloutier immediately conducted a patdown search of petitioner, while his partner entered the trailer and did a visual search. No one else was present in the 16-foot-long trailer. The deputies had not yet spoken to petitioner.

During the patdown search, Deputy Cloutier felt a small cylindrical object in petitioner's pants pocket. He asked petitioner, "Are there any weapons or drugs in the trailer or on your person?" Petitioner responded, "No." The deputy asked, "Do you mind if I look?" and petitioner said, "Sure."

Deputy Cloutier pulled the cylindrical container out of petitioner's pocket and opened it. Inside, he found what he suspected was methamphetamine. The deputies searched the trailer and a shed attached to it. Deputy Cloutier believed that, during the search, while Cloutier was not present, petitioner objected to the search or was confused about why the deputies were there.

Petitioner was asked by Deputy Cloutier where the drugs were. Petitioner said there were drugs under the stairs. Cloutier's partner looked under the stairs and found roughly one-half ounce of marijuana. Deputy

Cloutier asked petitioner where the methamphetamine was located and petitioner pointed to some cupboards and said, "It's in a container."

Deputy Cloutier conducted the immediate patdown search because, according to one of the anonymous tips, petitioner was associated with Cox, whom the deputy considered a dangerous parolee. The officer assumed that anyone who would shelter Cox was capable of "almost anything to avoid [Cox's] detection and escape." The deputy thought that, for safety reasons, he must ensure that petitioner was not armed.

Petitioner testified at the motion to suppress that he knew Cox, but not very well. He said that Cox had been to his trailer in the past, but that it had been more than two years prior to the search.

B. The Decision Of The Court Of Appeals Is Erroneous And In Conflict With Binding Precedent From This Court.

The appellate court majority, relying on this Court's decision in *Maryland v. Buie*, 494 U.S. 325, 108 L.Ed.2d 276, 110 S.Ct. 1093, (1990) found that petitioner's *association* with Cox gave officers reason to believe petitioner might be armed, creating an exigent circumstance and justifying the warrantless entry and patdown search. Appendix A, p. 14. However, the majority never discussed the reliability of the information received from the anonymous informants and how the lack of reliability undermined a finding of exigent circumstances supporting a warrantless entry.

By allowing officers to forcibly enter petitioner's house based on anonymous informant tips which did not even concern petitioner, the Court of Appeal has disregarded this Court's precedent in *Welsh v. Wisconsin* 466 U.S. 740, 748, 80 L.Ed.2d 732, 104 S.Ct. 2091(1984), *Payton v. New York*, 445 U.S. 573, 586, 589-590, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) and *Florida v. J.L., supra*, 529 U.S. 266. Police here had no warrant and no reliable information that parolee Cox was in petitioner's trailer home. "The unidentified tips from unidentified individuals relied upon by the officers did not satisfy the requirement of reliable information." Appendix A, diss. opn. Gaut, J., p. 4.

The Court of Appeal's decision allows entry into a home based solely on reasonable suspicion. It sanctions an in-home frisk based on unreliable information about someone other than the person searched. The majority's opinion does not specify any facts regarding petitioner which justified the illegal entry and frisk. The majority cites no valid basis either for a *Terry* stop or for a frisk, each of which must be independently justified. Thus, the majority's holding that the *frisk* prong of *Terry* was valid based on exigent circumstances to enter should not have been reached because no valid antecedent probable cause or reasonable suspicion was shown.

Further, because neither the trial court nor the Court of Appeal ever considered the reliability of the unknown informant tips, petitioner was denied a full and fair hearing of his claim under *Stone v. Powell, supra*, 428 U.S. 465. The trial court had found that the information was unreliable and that it did not support a reasonable suspicion to search petitioner. The Court of Appeal majority overturned this portion of the trial court's finding but in doing so neglected to consider the fact the informant tips were not corroborated. This completely undermines the reasonableness of finding an exception to the warrant requirement based on exigent circumstances.

The Court of Appeal's decision is in conflict with this Court's decisions in *Ybarra v. Illinois*, 444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 (1979), and *Maryland v. Buie, supra*, 494 U.S. 325, because it interprets those cases to sanction a warrantless "protective sweep" search in circumstances where the officers have no probable cause to believe a crime has been committed, but only believe in the existence of exigent circumstances. Under the Court of Appeal's opinion, police may form reasonable suspicion based on unreliable tips and use this "suspicion" to create exigent circumstances to forcibly enter a home and conduct a "reasonable suspicion" frisk under *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). This never has been the law and is in direct conflict with cases requiring both exigent circumstances and

probable cause to establish an exception to the warrant requirement. See, e.g., *Payton v. New York*, 445 U.S. 573, 586, 62 L.Ed.2d 639, 100 S.Ct. 1371 (1980); *Terry v. Ohio, supra*, 392 U.S. 1, 20.

The warrantless entry of a home is presumptively unreasonable. *Payton v. New York, supra,* 445 U.S. at p. 586; U.S. Const., 4th, 14th Amends. This Court held in *Payton* that entry into a home based on exigent circumstances requires probable cause to believe the entry is justified by some factor, such as the need to prevent a suspect's escape or the imminent destruction of evidence. The Court of Appeal's opinion here allows a warrantless entry based solely on exigent circumstances. Based on the majority's reasoning, questions regarding the reliability of anonymous informants would be irrelevant in determining whether probable cause exists independently of exigent circumstances. It would allow police to make probable cause determinations based solely on a belief exigent circumstances exist and would circumvent the warrant requirement altogether.

In the present case, as the dissent notes, the unsupported belief Cox was present in petitioner's home, combined with the improperly extrapolated belief that anyone who harbored Cox was dangerous, was based on anonymous tips. This constitutes insufficient circumstances to create either probable cause or exigent circumstances. Appendix A, diss. op. Gaut, J., p. 4. By failing to

address the reliability of the information leading to the warrantless entry, the Court of Appeal majority erroneously concluded that officer safety concerns alone justified the entry. This put the cart before the horse, because the reliability of the informant data was critical to determine whether probable cause for entry or reasonable suspicion for the search existed. The majority has failed to evaluate the reasonableness of the officers' suspicions measured by what they knew before they conducted the search. *Florida v. J.L., supra*, 529 U.S. 266, 271. The informant tips in petitioner's case did not provide reasonable suspicion to detain petitioner, much less probable cause to enter his home because there was no assertion of illegality, only a tendency to place Cox at petitioner's house. Nor did the tips provide a reasonable belief in exigent circumstances, as there was no information petitioner was armed or dangerous. Thus, the totality of the circumstances did not support a finding of probable cause. *Illinois v. Gates*, 462 U.S. 213, 227, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983).

A timely petition for rehearing in the Court of Appeal was filed by petitioner, arguing the absence of any corroboration of the anonymous tips that Cox might be located at petitioner's residence rendered the warrantless entry and search illegal pursuant to *Florida v. J.L., supra*, 529 U.S. 266. The dissenting justice found the warrantless entry illegal not only because the

officers failed to corroborate the anonymous tips, but also because the tips did not even apply to petitioner. Thus they could not be relied upon to establish exigent circumstances. App. A, dissenting op. Of Gaut, J., p. 4. Rehearing was denied. Appendix B.

Petitioner's timely petition for review by the California Supreme Court was denied without opinion on November 15, 2006. Justice Kennard was of the opinion review should be granted. App. C, *infra*.

A grant of certiorari is necessary to settle the conflict. Without such review and application of binding precedent regarding formation of exigent circumstances and corroboration of informant data, petitioner will not have been afforded a full and fair opportunity to have litigated his Fourth Amendment claim. *Stone v. Powell, supra*, 428 U.S. 465, 469.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Carmela Simoncini

Cynthia M. Sorman
Appellate Defenders, Inc.
Counsel for Benjamin Camargo

Date: February 5, 2007

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SUPREME COURT OF THE UNITED STATES

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BENJAMIN CAMARGO – PETITIONER
vs.
PEOPLE OF THE STATE OF CALIFORNIA – RESPONDENT

CERTIFICATE OF SERVICE

I, Carmela F. Simoncini, a member of the Bar of this Court, hereby certify that on February 5, 2007, a copy of the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI was served on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the Untied States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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