No._____

In the Supreme Court of the United States

JOSE JESUS CRUZ

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it reasonable for law enforcement to enter a suspect's home under the exigent circumstances (fear of imminent destruction of evidence) exception when there is no genuine exigency, i.e. "destruction of evidence is not likely," because officers only have a mere suspicion that evidence actually exists that the suspect might destroy?

LIST OF PARTIES

1. Jose Jesus Cruz, Petitioner

2. United States of America, Respondent

RELATED PROCEEDINGS

United States District Court (New Mexico):

United States v. Cruz, No. 1:18-CR-01105 (Feb. 27, 2019)

United States Court of Appeals (Tenth Circuit):

United States v. Cruz, No. 19-2127 (Oct. 09, 2020)

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[1] The relevant portion of the Memorandum Opinion and Order of the United States District Court, District of New Mexico has been attached due to the length of the complete opinion which numbers 97 pages, a total which created difficulty with printing and duplication of hard copies and electronic submission to the Court. Upon request, petitioner will provide the complete opinion. Should the court grant this petition, petitioner will also provide the complete opinion of the District Court.

TABLE OF AUTHORITIES

Cases:

Constitution, statute, and rule:

OPINION BELOW

The citation to the Tenth Circuit Opinion below is *United States v. Cruz*, 977 F.3d 998 (10th Cir. 2020).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The date on which the United States Court of Appeals for the Tenth Circuit decided Mr. Cruz' case was October 9, 2020. No petition for rehearing was filed.

This petition is timely filed pursuant to this Court's Order of March 15, 2020, ordering that in light of the ongoing public health concerns relating to COVID-19, "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing."

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

> The 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'

Payton v. New York, 445 U.S. 573, 585-86 (1980) (*quoting United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

Law enforcement unlawfully invaded the home of Mr. Cruz when they justified their warrantless intrusion on the ingenuine exigency of the fear of the imminent destruction of evidence – evidence that law enforcement only merely suspected may have been on Mr. Cruz' person or within his home. Absent a *genuine* exigency, the exigent circumstances exception to the warrant requirement of the Fourth Amendment is inapplicable. Law enforcement's intrusion into Mr. Cruz' home based on an *ingenuine* exigency violates Mr. Cruz' Fourth Amendment protections. Accordingly, all evidence recovered from the search of Mr. Cruz's residence and vehicle located at the residence subsequent to his arrest, as well as all statements made by Mr. Cruz, should be suppressed because they are the fruit of law enforcement's illegal entry into his home and subsequent illegal seizure of him. For these reasons, the Court must grant Mr. Cruz' petition for writ of certiorari.

Factual Background

On September 5, 2017, a Confidential Source (CS) cooperating in an investigation by Detective Gerald Koppman of the Bernalillo County Sherriff's Office ("BCSO"), allegedly ordered several ounces of methamphetamine from Mr. Cruz. Mr. Cruz agreed to make the drug sale to CS after Mr. Cruz left work on the same day. BSCO deputies drove to the area near Mr. Cruz's house to conduct

surveillance. Det. Koppman later testified that he did not plan for a drug transaction between Mr. Cruz and CS to actually occur and his intention in surveilling Mr. Cruz was to simply approach Mr. Cruz in a "low-key" manner and engage in a conversation with him. Det. Koppman also testified that that he did not obtain a search warrant prior to the "controlled buy" because he did not have probable cause to do so, and he did not believe that Mr. Cruz had narcotics stored at his house. Rather, Det. Koppman thought the officers might observe Mr. Cruz getting a supply of narcotics from another party.

Shortly after BCSO arrived at Mr. Cruz's residence, the CS conveyed to law enforcement that Mr. Cruz told him to meet at the intersection outside of Mr. Cruz's residence in fifteen minutes for the drug transaction. Mr. Cruz allegedly told the CS to meet him at the street intersection near his house, and he would come out. Around fifteen minutes later, Det. Koppman and the other law enforcement personnel allegedly observed Mr. Cruz leave his residence and walk outside as if looking around for someone.

Det. Koppman testified under oath at the hearing on Mr. Cruz's Motion to Suppress that while he expected such behavior from someone about to engage in a drug transaction, he did not see Mr. Cruz carrying anything or doing anything that could otherwise be viewed as criminal behavior. Almost immediately after seeing Mr. Cruz exit his house, Det. Koppman and other BCSO deputies, who all wore official BCSO clothing, approached Mr. Cruz and identified themselves as police. Mr. Cruz turned around and quickly returned inside his house. Det. Koppman

allegedly yelled at Mr. Cruz to stop his retreat into his house, but Mr. Cruz either did not hear that order and continued inside or simply did not comply. Det. Koppman and the other deputies followed Mr. Cruz into his house where officers arrested him and then searched his home.

Procedural Background

On April 10, 2018, Mr. Cruz was indicted for Felon in Possession of a Firearm and Ammunition (18 U.S.C. § 922(g)(1)); Possession with Intent to Distribute 50 Grams and More of a Mixture and Substance Containing Methamphetamine (21 U.S.C. §§ 841(a)(1) and (b)(1)(B)); Possession with Intent to Distribute 50 Grams and More of Methamphetamine (21 U.S.C. §§ 841(a)(1) and (b)(1)(A)); Possession with Intent to Distribute Heroin (21 U.S.C. §§ 841(a)(1) and (b)(1)(C)); Using and Carrying a Firearm in Relation to a Drug Trafficking Crime and Possessing a Firearm in Furtherance of Such Crime (18 U.S.C. § 924(c). After the indictment was issued, Mr. Cruz was arrested on April 19, 2018. He was ordered to pretrial detention on April 20, 2020.

On October 22, 2018, Mr. Cruz filed a Motion to Suppress Evidence and Statements. The Government filed its Response on November 13, 2018. Doc. 31. The District Court held a hearing on Mr. Cruz' Motion to Suppress on January 25, 2019. At the hearing, Deputy Gerald Koppman ("Det. Koppman") of the Bernalillo County Sheriff's Office ("BCSO"), the primary case agent, admitted the relevant facts identified *supra*, including, that he did not believe drugs were in Mr. Cruz's residence and that he did not have sufficient information giving rise to probable

cause when he arrived at the residence. The Court indicated at that time that it would likely deny the Motion and memorialized its ruling in its Memorandum Opinion and Order filed February 27, 2019.

Following the entry of that Order, Mr. Cruz entered into a conditional plea agreement with the Government on April 30, 2019, which preserved his right to appeal the denial of this Motion to Suppress. Mr. Cruz was sentenced on July 30, 2019, to 360 months in prison followed by three years of supervised release, the custodial portion of which he is currently serving.[2] A timely notice of appeal to the Tenth Circuit Court of Appeals followed.

Pursuant to 28 U.S.C. § 1291, the Tenth Circuit Court of Appeals court properly had jurisdiction of Mr. Cruz' appeal of the final judgment issued by the Honorable Judge Browning of the United States District Court for the District of New Mexico.

The Tenth Circuit ruled on Mr. Cruz' Appeal on October 9, 2020. *United States v. Cruz*, 977 F.3d 998 (10th Cir. 2020).

[2] Mr. Cruz is currently serving his sentence at FCI Florence in Florence, Colorado.

REASONS FOR GRANTING THE PETITION

Mere Suspicion or Possibility of the Existence of Evidence to Justify an Ingenuine "Exigency" That the Evidence Will Be Imminently Destroyed Does Not Justify Law Enforcement's Warrantless Intrusion into One's Private Home

> 'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'

Kyllo v. United States, 533 U.S. 27, 31 (2001) (*quoting Silverman* v. *United States*, 365 U.S. 505, 511 (1961)).

A man's retreat into the sanctity and protection of his own home cannot be intruded upon by law enforcement under the guise of "exigent circumstances" and the alleged fear of the imminent destruction of evidence when they possess only mere suspicion that an individual may be carrying contraband, they do not believe contraband is stored within the home, and they do not have probable cause to apply for a search warrant to enter the individual's home. Law enforcement's fear of the destruction of evidence that they only *suspect might* exist is an *ingenuine exigency* which does not support government's warrantless intrusion into an individual's home in violation of an individual's Fourth Amendment protections.

The court must accept this petition for writ of certiorari, because it is unreasonable and thus unlawful for law enforcement to enter a suspect's home under the exigent circumstances exception when there is no genuine exigency, i.e. when the destruction of evidence is *not* likely, because whether such endangered evidence actually exists is based on mere suspicion or possibility.

Applicable Law

The Fourth Amendment

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment requires that a warrant based on probable cause is required to enter a person's home. *Id.; see Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984) (*citing Johnson v. United States*, 333 U.S. 10, 13 (1948) ("[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest.").

Fourth Amendment rights are enforceable against state actors through the Fourteenth Amendment's Due Process Clause. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *United States v. Rodriguez-Rodriguez*, 550 F.3d 1223, 1225 n.1 (10th Cir. 2008).

The Sanctity of One's Home

Government's intrusion into the sanctity of one's home is the "chief evil" the Fourth Amendment was meant to protect. *Payton,* 445 U.S. at 585 (*quoting United States v. United States District Court*, 407 U.S. at 313).

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home

> and there be free from unreasonable governmental intrusion.' *Silverman* v. *United States*, 365 U.S. 505, 511 [1961]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 445 U.S. at 589-90.

Warrantless Entry to Search

A search is "an actual intrusion on a constitutionally protected area." *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41, 52 (1967). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo,* 533 U.S. at 31 (*citing Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Payton,* 445 U.S. at 586).

The Supreme Court has stated that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz,* 389 U.S. at 357 (footnote omitted). *See supra*, delineating exceptions.

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' [and] the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (1978) (*citing Flippo* v. *West Virginia,* 528 U.S. 11, 13 (1999) *(per curiam); Katz,* 389 U.S. at 357).

Warrantless Entry to Arrest

The Supreme Court has held that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. *Payton*, 445 U.S. at 583-590.

Exigent Circumstances Exception to the Warrant Requirement

To overcome the presumption of the unreasonableness of government's warrantless intrusion, the government carries the burden to show the application of "a few specifically established and well-delineated exceptions." *Arizona v. Gant,* 556 U.S. 332, 338 (2009) (*citing Katz,* 389 U.S. at 357); *see United States v. Cuaron*, 700 F.2d 582, 586 (10th Cir. 1983) (same). The government's burden "is especially heavy when the exception must justify the warrantless entry of a home." *U.S. v. Martinez*, 686 F.Supp.2d 1161, 1181 (D.N.M. 2009) (*quoting United States v. Najar,* 451 F.3d 710, 717 (10th Cir. 2006)).

One such exception to the warrant requirement is when "exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). A warrantless entry into the home requires *both* probable cause *and* exigent circumstances. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *Manzanares v. Higdon*, 575 F. 3d 1135, 1142-43 (10th Cir. 2009).

In determining whether the government has met its burden, the Tenth Circuit "evaluate[s] the circumstances as they would have appeared to prudent,

cautious, and trained officers." *United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998).

The Fear of Imminent Destruction of Evidence

"The need to protect the 'imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search." *Kentucky v. King*, 563 U.S. 452, 460 (2011) (*citing Brigham City*, 547 U.S. at 403; *Georgia v. Randolph*, 547 U.S. 103, 116, n. 6 (2006); *Minnesota* v. *Olson*, 495 U.S. 91, 100 (1990)).

The Tenth Circuit has recognized that the imminent destruction of evidence may be an exigent circumstance in some cases. When analyzing whether this exigent circumstance is genuine, the Tenth Circuit utilizes the following test:

1. the entry was pursuant to clear evidence of probable cause;
2. the exception is available only for serious crimes and in circumstances where destruction of evidence is likely;
3. the exception is limited in scope to the minimum intrusion necessary to prevent the destruction of evidence;
4. the use of the exception is supported by clearly defined indicators of exigency that are not subject to police manipulation and abuse.

United States v. Aquino, 836 F.2d 1268, 1272 (10th Cir. 1988). "The second element includes two components: (a) the exception is only available for serious crimes; and (b) the destruction of evidence must be likely." *United States v. Mongold*, 528 F. Appx. 944, 949 (10th Cir. 2013).

"Any warrantless entry based on exigent circumstances must, of course, be supported by a *genuine exigency*." *King*, 563 U.S. at 470 (*citing Brigham City*, 547 U.S. at 406) (emphasis added).

Argument

The circumstances underlying the exigency on which government relies to justify its intrusion into one's home cannot be justified by mere suspicion or possibility. Rather, the exigent circumstance must be supported by probability. *See Wong Sun v. United States*, 371 U.S. at 498 (*citing Henry v. United States,* 361 U.S. 98, 104 (1959) (Probable cause to enter an individual's home without a warrant requires more than mere suspicion."). The exigency – here, the fear of the destruction of evidence -- must be imminent and probable, not just *possible* or *suspected*. In other words, an alleged exigent justification for such intrusion must be genuine. *King*, 563 U.S. at 470 (*citing Brigham City*, 547 U.S. at 406) ("Any warrantless entry based on exigent circumstances must, of course, be supported by a *genuine exigency*.") (emphasis added)).

The government argued in this case, and the Tenth Circuit affirmed, that the officers' fear of the imminent destruction of evidence plus the existence of probable cause to arrest Mr. Cruz *outside* his home satisfied the exigent circumstances test for law enforcement's warrantless intrusion into Mr. Cruz' home. The Tenth Circuit erred in finding that the destruction of evidence by Mr. Cruz was "likely" or probable, because law enforcement merely suspected that Mr. Crus had drugs on his person when he retreated to his home. Without *probability* that the exigency exists, the government's warrantless intrusion into Mr. Cruz' home was unlawful.

The Tenth Circuit's test for the existence of exigent circumstances comprises four parts. *See supra, United States v. Aquino*. "The second element includes two

components: (a) the [exigency] exception is only available for serious crimes[3]; and (b) the destruction of evidence must be likely." *Mongold*, 528 F. Appx. at 949. The Tenth Circuit outlined its analysis of the second component, the "likely destruction of evidence," as the following:

> In determining whether the destruction of evidence was likely, 'we are guided by the realities of the situation presented by the record' and 'evaluate the circumstances as they would have appeared to prudent, cautious, and trained officers.'

Id. (citing United States v. Wicks, 995 F.2d 964, 970 (10th Cir. 1993) (*citing United States v. Cuaron*, 700 F.2d 582, 586 (10th Cir. 1983); *and United States v. Creighton*, 639 F.3d 1281, 1288 (10th Cir. 2011)).

The Tenth Circuit erred when it found that "destruction of evidence was likely" (*United States v. Cruz*, 977 F.3d 998, 1007 (10th Cir. 2020)), because law enforcement only merely suspected that such evidence even existed. Mere suspicion of the existence of evidence that might possibly be destroyed is not enough to justify an exception to the warrant requirement of the Fourth Amendment.

Law enforcement's belief that Mr. Cruz possessed evidence that might possibly be destroyed after his retreat into his home is not supported by the facts and testimony of Det. Koppman, the lead agent on the case. During the hearing on Mr. Cruz' Motion to Suppress Evidence, Det. Koppman testified under oath to the following regarding the events of September 5, 2017, the day law enforcement surveilled Mr. Cruz and unlawfully entered his home:

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[3] Mr. Cruz did not dispute that trafficking of drugs is a "serious crime" for the purpose of the test. *United States v. Cruz*, 977 F.3d 998, 1007 (10th Cir. 2020).

- the CS informed Det. Koppman that the CS held Mr. Cruz' "stash," i.e. no drugs were held or stored at Mr. Cruz' home;
- he believed it to be common that a suspect that was on probation would store his contraband at a location besides his own home;
- he did not believe that any drugs were stored in Mr. Cruz' home;
- he set up surveillance at Mr. Cruz' home because he believed Mr. Cruz might lead him to a "stash house";
- his goal was to "flip" Mr. Cruz to get to a higher target;
- he believed that someone from the stash house might drop off a small amount of narcotics to Mr. Cruz, but he did not observe any such delivery of narcotics to Mr. Cruz;
- he did not intend for a drug transaction to occur on the day law enforcement was surveilling Mr. Cruz;
- he did not have probable cause to apply for a search warrant to search the home;
- he did not observe a transaction between Mr. Cruz and anyone else;
- Mr. Cruz did not have a gun;
- Mr. Cruz did not have a duffle;
- Mr. Cruz did not have any kind of object in his hands nor held any containers;
- Mr. Cruz was not observed to have any drugs in his possession;
- he only *believed that it was possible* that Mr. Cruz might have drugs on his person when he stepped outside his house.

In this case, law enforcement justified its intrusion into Mr. Cruz' home on the mere possibility or suspicion that evidence even existed on Mr. Cruz' person which he might imminently destroy once he entered his home. As demonstrated by Det, Koppman's testimony supra, however, this belief is not supported by the alleged facts. To wit, law enforcement observed Mr. Cruz – unarmed and empty-handed -- leave his home, walk to the street, and look around after a confidential source (CS) arranged to meet Mr. Cruz to buy drugs. The CS was not present nor did the officer observe any other suspicious activity other than Mr. Cruz exiting his home. When law enforcement announced themselves to Mr. Cruz, they observed Mr. Cruz retreat into his own home where no contraband was believed to be stored.

Officers followed Mr. Cruz into his home, constituting a warrantless intrusion. Det. Koppman testified under oath that prior to law enforcement's observations of Mr. Cruz on that day, Det. Koppman did not have probable cause to apply for a search warrant to enter Mr. Cruz' home.

The absence of *probability* that evidence exists that might be destroyed not only makes its destruction *unlikely,* but its destruction is literally impossible. Under these circumstances, law enforcement's justification for entry into Mr. Cruz' home was an *ingenuine* exigency based on mere suspicion and possibility rather than probability and imminence and was thus unlawful. The Court must grant Mr. Cruz' petition for writ of certiorari, because the mere possibility that evidence existed based simply on law enforcement's mere suspicion is not enough to justify law enforcement's warrantless entry into a person's home.

A. Probability Versus Mere Suspicion or Possibility

Probable cause to enter an individual's home without a warrant requires more than mere suspicion. *Wong Sun,* 371 U.S. at 498 (*citing Henry,* 361 U.S. at 104). Accordingly, the exigent circumstances which presumably justify law enforcement's warrantless entry into an individual's home must be based on more than mere suspicion or here, more than the mere possibility of the destruction of evidence. The destruction of evidence must be "imminent" (*King*, 563 U.S. at 460), "likely" (*Aquino*, 836 F.2d at 1272; *Mongold*, 528 F. Appx. at 949), or probable.

For destruction of evidence to be imminent, likely, or probable, it must be probable that evidence actually exists. Here, law enforcement only suspected that

Mr. Cruz might possess evidence on his person. Without the probability of the existence of evidence, its destruction cannot be "likely."

It is well-settled that government intrusions to search a person's home or seize a person require probable cause. Intrusions on individual liberties based on mere suspicion are limited in their scope in other contexts. Mere suspicion justifying a "stop and frisk" of an individual is limited to personal intrusions only to the extent of frisking a person for the purpose of securing an officer's safety. Further intrusions upon the person require more. *Terry v. Ohio*, 392 U.S. 1, 17 n.15 (1968) ("[T]he Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness."); *see also Florida v. Royer*, 460 U.S. 491, 502 (1983) (mere suspicion of drugs in a suspect's suitcase was not enough to detain suspect to search); *Payton*, 445 U.S. at 592 ("A study of the common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony -- as distinguished from an officer's right to arrest for a crime committed in his presence -- reveals a surprising lack of judicial decisions and a deep divergence among scholars."); *Carroll v. United States*, 267 U.S. 132, 168 (1925) (mere suspicion was not enough to justify the arrest of a man when the officer only saw a bottle presumably containing "intoxicating liquor" protruding from his jacket pocket).

Notably, in *United States v. Brignoni-Ponce,* Justice Douglas raised the same concern borne out in this case regarding the "suspicion test":

> The fears I voiced in *Terry* about the weakening of the Fourth Amendment have regrettably been borne out by subsequent events. Hopes that the suspicion test might be employed only in the pursuit of violent crime -- a limitation endorsed by some of its proponents -- have now been dashed, as it has been applied in narcotics investigations, in apprehension of 'illegal' aliens, and indeed has come to be viewed as a legal construct for the regulation of a general investigatory police power. The suspicion test has been warmly embraced by law enforcement forces and vigorously employed in the cause of crime detection. In criminal cases we see those for whom the initial intrusion led to the discovery of some wrongdoing. But the nature of the test permits the police to interfere as well with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude.

United States v. Brignoni-Ponce, 422 U.S. 873, 888-89 (1975) (J. Douglas concurring in the judgment).

While Mr. Cruz does not concede that law enforcement had probable cause to arrest Mr. Cruz outside of his home, the alleged exigence presumably relied upon by law enforcement to follow Mr. Cruz into his home as he retreated inside must be determined by the heavier standard of probability rather than simply mere suspicion that an exigency exists. *See Dunaway v. New York,* 442 U.S. 200, 213 (1979) (*quoting Henry*, 361 U.S. at 101) ("Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that common rumor or report, *suspicion, or even strong reason to suspect* was not adequate to support a warrant for arrest." (footnotes and quotations omitted) (emphasis added)).

Law enforcement's mere suspicion that Mr. Cruz *possibly* possessed evidence that might be imminently be destroyed does not support a *genuine* exigency to justify their intrusion into Mr. Cruz' home under the exigent circumstances exception to the Fourth Amendment's warrant requirement.

B. The Existence of Evidence (That Might Be Imminently Destroyed) Must Be Supported by More Than Mere Suspicion or Possibility.

The government cannot claim an exigency based on a fear of the destruction of evidence when there exists only the possibility or suspicion that such evidence even exists that might be destroyed. Det. Koppman clearly testified that there was scant *belief* that Mr. Cruz had any contraband on his person or that any evidence at all was stored within Mr. Cruz' home. To wit, Det. Koppman testified that he only "believed it was possible" that Mr. Cruz might have drugs on his person. This "belief in a possibility" that evidence existed does not rise to the requisite standard of imminent, likely, or probable to justify law enforcement's warrantless intrusion into Mr. Cruz' home.

There simply is no evidence of an exigency regarding the imminent or likely destruction of evidence. Without such probability of the existence of evidence, there is *no likelihood* that evidence will be destroyed. The Fourth Amendment cannot and does not justify law enforcement's entry into Mr. Cruz's or any individual's home under such scant circumstances to support an *ingenuine* exigency.

The relevant exception to the Fourth Amendment warrant requirement allows that the existence of exigent circumstances, and as specifically relevant here, the fear of the imminent destruction of evidence, would justify a warrantless

intrusion into one's home by law enforcement. *See Mincey*, 437 U.S. at 393–94 (1978) (warrantless searches are allowed when "exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment"). A warrantless entry into the home requires *both* probable cause *and* exigent circumstances. *Kirk*, 536 U.S. at 638; *Manzanares,* 575 F. 3d at 1142-43.

When employing the first part of the exigent circumstances analysis, i.e. whether law enforcement had probable cause, the Tenth Circuit found that the officers had probable cause to arrest Mr. Cruz *outside* of his home.[4] This finding was the basis for the Tenth Circuit to move to its analysis of the existence of exigent circumstances that, if found, would support law enforcement's warrantless entry into Mr. Cruz' home.

Notably, regarding Mr. Cruz' argument that Det. Koppman testified that he did not have probable cause to enter Mr. Cruz' home to search, the Tenth Circuit stated:

> Whether there was probable cause to arrest Mr. Cruz and whether there was probable cause to search his home for drugs are two separate inquiries, and here, officers did not search Mr. Cruz's home until they obtained his consent to do so. *See United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998) ("Probable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime."). Regardless, in addition to having probable cause to arrest Mr. Cruz in his home, the officers had probable cause to believe that Mr. Cruz had transported drugs into his home after witnessing his flight.

[4] *See supra,* n. 3.

United States v. Cruz, 977 F.3d 998, 1006 n.2 (10th Cir. 2020). The Tenth Circuit, however, did not engage in a probable cause analysis regarding the basis for belief that Mr. Cruz had transported drugs into his home. The Tenth Circuit, instead, made its conclusory statement of the existence of probable cause to enter Mr. Cruz' home without justification or analysis.

The officers did *not* have probable cause to enter Mr. Cruz' home. Prior to law enforcement entering his home, there was no evidence – only *mere suspicion* -- to support the officer's belief that Mr. Cruz possessed any contraband on his person or in his home that would be imminently destroyed. As shown, mere suspicion or possibility that a suspect possesses evidence that he might imminently destroy, rather than a probability that the evidence is possessed, is not enough to support the exigency of imminent, likely, or probable destruction of evidence to justify law enforcement's warrantless intrusion into Mr. Cruz' home.

Det. Koppman testified that he did not have probable cause to *enter* Mr. Cruz home to search. Since the Fourth Amendment requires the existence of probable cause for government to intrude into an individual's home, the *"chief evil"* against which the Fourth Amendment was meant to protect, the requisite exigent circumstances for warrantless intrusion into a person's home necessarily requires that the exigency rise to the same standard of probability. In other words, the relied upon exigency – here the fear of the imminent destruction of evidence -- must be *probable* and *likely*. It is not enough that the fear of the destruction of evidence is

merely possible or based on mere suspicion. The Tenth Circuit failed to engage in this analysis.

The Sixth Circuit has held,

> The mere possibility of loss or destruction of evidence is insufficient justification. Affirmative proof of the likelihood of the destruction of evidence, along with the necessity for warrantless entry are required.

United States v. Radka, 904 F.2d 357, 362 (6th Cir. 1990) (*citing United States v. Hayes*, 518 F.2d 675, 677-678 (6th Cir. 1975)).

Accordingly, evidence must actually or at least probably exist for such evidence to be imminently destroyed. The government cannot claim a fear of imminent destruction of evidence when they do not observe any evidence and instead only believe in the *possibility* of the existence of evidence. *See supra, enumerated testimony of Det. Koppman.* In fact, law enforcement here suspected that the contraband was stored in another location and one of the purposes of the surveillance was the possibility that Mr. Cruz would lead law enforcement to the stash house.

Under these circumstances, an allegedly exigent circumstance based on the possibility that evidence exists to be destroyed is simply a legal fallacy when there is no belief or information to support that the allegedly endangered evidence exists either on Mr. Cruz' person or in his home. The officer's warrantless intrusion into Mr. Cruz' home was unlawful and in violation of Mr. Cruz' Fourth Amendment protections against unreasonable searches and seizures.

CONCLUSION

The erosion of Fourth Amendment protections against unreasonable search and seizure due to law enforcement's warrantless intrusions justified by mere suspicion and possibility rather than probability is untenable.

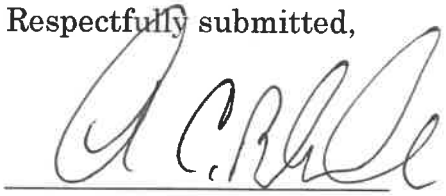
The "suspicion test" has become a rabid departure from the intentions of the Fourth Amendment's language which is to protect against government's intrusion into the sanctity of an individual's home, the "chief evil" the Fourth Amendment's language was designed to protect. This petition for writ of certiorari must be granted. To reiterate Justice Douglas' warning, the "suspicion test"

> has been applied in narcotics investigations, in apprehension of 'illegal' aliens, and indeed has come to be viewed as a legal construct for the regulation of a general investigatory police power. The suspicion test has been warmly embraced by law enforcement forces and vigorously employed in the cause of crime detection. In criminal cases we see those for whom the initial intrusion led to the discovery of some wrongdoing.

Brignoni-Ponce, 422 U.S. at 888-89 (J. Douglas concurring in the judgment).

The petition for writ of certiorari must be granted, because the mere possibility that evidence existed based simply on law enforcement's mere suspicion is not enough to justify law enforcement's warrantless entry into a person's home.

Respectfully submitted,



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