

No. 17-1598

In The
Supreme Court of the United States

JULIE PEFFER and JESSE PEFFER,

Petitioners,

v.

MIKE STEPHENS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

SUPPLEMENTAL BRIEF OF PETITIONERS

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ARGUMENT

I. The Sixth Circuit Opinion addressed a question of first impression as to presumptions involving the search of a dwelling in a published opinion with no warning to the parties, no opportunity to brief the issue and no oral argument. The analysis behind the presumption is flawed and cases leading up to this conclusion are admittedly murky. Accordingly, the issue should have been addressed after notice to the parties, briefing on the specific issue, and oral argument.

A. Consideration of this issue by this Court.

In the instant case, the Sixth Circuit acknowledged that whether the nature of a computer “is such that its use in a crime is alone sufficient to justify an inference” that it will be present in a suspect’s home was an issue of first impression *Peffer v. Stephens*, 880 F.3d 256, 270 (6th Cir. 2018). The Sixth Circuit then concluded that computers are personal possessions which are subject to a presumption that a nexus exists between the computer and the suspect’s current residence *Id.* The decision was issued as a published opinion on January 17, 2018.

On June 26, 2018, the Sixth Circuit issued a published opinion in *United States v. Christian*, 893 F.3d

846 (6th Cir. 2018) in which the concept of nexus between criminal activity and the home of a suspect was applied consistently with holdings from this Court.

This Court should consider this issue pursuant to Rule 10(a) because the Christian panel’s analysis conflicts with the *Peffer* panel’s analysis on a fundamental Fourth Amendment concept. This Court should also consider this issue pursuant to Rule 10(c) because this Court has consistently rejected “rigid rules, bright-line tests, and mechanistic inquiries” as to the existence of probable cause. *Florida v. Harris*, 568 U.S. 237, 244, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013).

B. The Sixth Circuit’s erroneous conclusions in *Peffer*.

The Sixth Circuit acknowledges that an issue of first impression in the circuit was decided in *Peffer*. *Peffer, supra*, at 270. Yet, the panel also found that no violation of a clearly established constitutional provision had occurred. *Id.* at 264. The Peffers assert that if existing precedent concerning the nexus of a location to the existence of evidence of crime would have been applied that a violation would have been established. The Sixth Circuit then adopted a presumption that a person keeps his possessions where he resides – even possessions he has allegedly used to commit a crime. *Id.* at 270. The panel then asserts that the presumption is rebuttable. *Id.* As stated in the Petition, making a presumption rebuttable is of absolutely no use to a

citizen victimized by an unlawful search when he had no opportunity to have input into the warrant request that contained the presumption. There is simply no logic in suggesting that the affiant-officer will provide facts to steer the presumption away from his intended target.

C. Correct application of principles of nexus in *Christian*.

During a drug investigation in Grand Rapids, Michigan in September of 2015, an officer submitted an affidavit for a warrant to a state magistrate. The facts specific to the case included:

- Two search warrants at Christian’s residence in 2009 and 2011 as part of drug investigations targeting Christian. Arrests resulted from both searches (including the arrest of Christian’s wife for “maintaining a drug house”). Whether drugs were found is not stated in the opinion.
- Christian had been convicted of several drug-related crimes over a nineteen-year period: (1) possession of cocaine in 1996, (2) an unspecified second controlled-substance offense in 2002, (3) delivery/manufacture of marijuana and possession of a firearm by a felon in 2009, and (4) delivery/manufacture of cocaine in 2011.
- In December 2014, the affiant “had contact with a credible and reliable informant who provided information on several drug traffickers including Tyrone

Christian.” The affidavit states that the unnamed informant “provided names, nicknames, phone numbers, residences utilized by the drug traffickers and information regarding specific drug transactions,” and that the affiant was “able to confirm much of the information provided.”

- At the direction of affiant, the informant conducted a controlled purchase of drugs from Christian at the residence in January 2015, eight months before the warrant in question. The affidavit notes that the drugs purchased were field tested with positive results.

- “Within the last four months, [the affiant] had been involved in or received information from several debriefs of subjects who have stated that Tyrone Christian is a large scale drug dealer. These subjects further stated that they have purchased large quantities of heroin and crack cocaine from Christian at 618 Grandville Avenue [] in the last four to five months.”

- On September 3, 2015 – the date that the warrant was requested and issued – surveillance of the residence was established. A subject later identified as Rueben Thomas was seen “walk[ing] away from the area of 618 Grandville Avenue and leav[ing] the area in a vehicle.” Surveillance of the vehicle continued until officers conducted a traffic stop for a civil infraction. During the stop, officers seized approximately 20 grams of heroin from the vehicle. Thomas admitted to being on Grandville Avenue, but denied being at the

Residence, “contrary to observations of the law enforcement officers.” *Christian, supra*, at 851-852.

Based on this factual scenario, the *Christian* panel found that probable cause did not exist to search the residence. In doing so, that panel applied the following concepts related to nexus:

– “To establish probable cause adequate to justify issuance of a search warrant, the governmental entity or agent seeking the warrant must submit to the magistrate an affidavit that establishes ‘a fair probability that contraband or evidence of a crime will be found in a particular place.’” *United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010) (quoting *United States v. Berry*, 565 F.3d 332, 338 (6th Cir. 2009)). *Berry* quoted *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

– This requires “a nexus between the place to be searched and the evidence sought,” *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006), at the time the warrant is issued, *United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006). *McPhearson* cited to this Court for the proposition that the affidavit must establish “that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought” and not merely “that the owner of property is suspected of crime.” *McPhearson, supra*, at 524, citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) (emphasis added). *Hython* cited to this Court for the proposition that a warrant must be

supported by “facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time*.” *Hython, supra*, at 485 citing *Sgro v. United States*, 187 U.S. 206, 210, 53 S.Ct. 138, 77 L.Ed. 260 (1932) (emphasis added).

II. In deciding whether the law was clearly established for purposes of Defendant’s immunity, the Opinion decides whether Plaintiff’s conduct could have violated certain state laws and finds a lack of clear precedent. This is an incorrect use of the “clearly established law” requirement for qualified immunity and is inconsistent with established precedent from this Court.

The Peffers assert that the citations to authority from this Court found in the long-standing decisions from the Sixth Circuit relied on in *Christian* establish that the search in this case was a violation of clearly established law.



CONCLUSION

The Sixth Circuit’s decision creates a presumption as to searches of dwellings based on the mere connection to an electronic device with a suspect. There is no justification for creating a presumption based on the nature of the object allegedly used in the crime that differs from well-established precedent that provides

guidance on the appropriate nexus. The recent case of *United States v. Christian* creates a stark contrast between the correct and incorrect application of these principles and warrants this Court's intervention.

◆

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that this Honorable Court grant this petition, ultimately reverse the District Court's grant of summary judgment and remand this matter for jury trial.

Respectfully submitted,

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