

No. _____

In the Supreme Court of the United States

DEPUTY JAMES DAWSON, individually and in his
official capacity; SHERIFF JOHN WILSON, in his
official capacity; CLARE COUNTY,
Cross-Petitioners,

v.

JOSHUA BRENNAN,
Cross-Respondent.

*On Conditional Cross-Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

**CONDITIONAL CROSS-PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the Sixth Circuit misapply this Court's authority and create a conflict among Circuits by holding that a law enforcement officer violates the Fourth Amendment by entering the rear curtilage of a home in attempting to gain the resident's compliance with his probation condition?

PARTIES TO THE PROCEEDING

Petitioner/Cross-Respondent, Joshua Brennan, was the individual plaintiff and appellant below. Cross-Petitioning the Court are James Dawson, an individual serving in his capacity as Deputy of Clare County, Michigan; John Wilson, in his Official Capacity as Sheriff of Clare County; and Clare County. Cross-Petitioners were defendants and appellees in the courts below. For ease of discussion, Cross-Petitioner will refer to Deputy Dawson.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is not published but can be found at WL 4961332 (6th Cir., Oct. 15, 2018). A copy of the Opinion is included in Petitioner/Cross-Respondent's Appendix A at 1a-31a.

By Opinion and Order dated September 7, 2017, the Hon. George Caram Steeh of the United States District Court for the Eastern District of Michigan granted summary judgment in favor of the Cross-Petitioners. (R.22, Opinion and Order, PG ID 222-237; R.23, Judgment, PG ID 238-239.) A copy of that Opinion is included in Petitioner/Cross-Respondent's Appendix B at 32a-45a.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106. The United States Court of Appeals for the Sixth Circuit issued its Opinion on October 15, 2008. A Petition for Writ of Certiorari was filed by Petitioner/Cross-Respondent on January 11, 2019 and docketed on January 15, 2019. This Cross-Petition for Writ of Certiorari is filed within 30 days of the latter date.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend IV

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.

STATEMENT OF THE CASE

On February 21, 2015, Cross-Petitioner, Deputy James Dawson of the Clare County Sheriff's Department (hereinafter "Deputy Dawson" or "Dawson"), initiated a call at 2184 Oakridge Drive in Farwell on a probation check. The events that transpired that evening, along with Deputy Dawson's knowledge of previous events, led him to have probable cause to arrest Cross-Respondent Joshua Brennan (hereinafter "Brennan") for a probation violation of failing to submit to a PBT on demand.

Deputy Dawson arrived at Brennan's mobile home at 8:18 p.m. tasked with administering a PBT on him as a probationer. (R.14, Exhibit 1, Dawson dep., p. 11, PG ID 100.) At his deposition, Deputy Dawson stated that his recollection was that Sgt. Miller assigned him to do the probation check. (Id., pp. 5-6, PG ID 99.) Deputy Dawson was aware of information from the prior night where Sgt. Miller and Deputy Piwowar had attempted to conduct a probation check on Brennan. (Id., Exhibit 2, PG ID 109.) Sgt. Miller spoke with an individual named Joshua Dishneau as he exited Brennan's residence. Mr. Dishneau indicated that Brennan was inside and awake. Sgt. Miller and Deputy Piwowar were at the residence for over a half hour knocking and announcing and attempting to make contact with Brennan but Brennan did not answer the door. (Id.)

The following night, on February 21, Deputy Dawson approached the residence and knocked on the front door. He stated that he could hear people in the residence moving around and talking. He then walked around to multiple windows and knocked loudly and announced. He got no answer and no one came to the door. He was still able to hear some whispers and an occasional thump. (Id., Exhibit 2, PG ID 109-110.)

Brennan was on supervised probation for the offense of assault and battery subject to a probation order dated August 11, 2014. Pursuant to paragraph 8 of the Order, Brennan was not to possess or consume alcoholic beverages nor enter any establishment which allows for the consumption of alcoholic beverages on its premises, nor be in the company of anyone consuming alcohol. **“You are subject to random PBT upon demand at your expense.”** (Id., Exhibit 3, Probation Order, PG ID 113.) Brennan, who has a history of incarcerations, in addition to parole and probation, was well aware of the procedure for conducting probation checks and the terms of his probation. (Id., Exhibit 4, Brennan’s dep., pp. 14-18, 58, 79, PG ID 116-117, 118, 121.) Brennan further understood that his refusal to take the PBT on demand was a violation of his probation. (Id., pp. 80-81, PG ID 121-122.)

Deputy Dawson’s attempts to contact Brennan and administer the PBT were captured on video. (Id., Exhibit 5, DVD, filed in the lower court and provided to this Court on appeal.) The video depicts Deputy Dawson walking around the mobile home at 8:20 p.m., knocking on doors and windows and carrying the PBT machine. He can be heard calling dispatch to attempt to obtain a telephone number for Brennan. At 8:25,

Deputy Dawson turned on his overhead lights and sounded his siren outside the mobile home in an attempt to announce his presence and gain Brennan's compliance with the court-ordered PBT. He also called Brennan's Probation Officer, Nola Hopkins, and advised that he had knocked on all the doors and windows and turned on his overheads and siren, and that he heard talking inside but no one would answer the door. At 8:26 p.m., he again turned on his overheads and sounded the siren. At 9:08, Deputy Dawson used caution tape to cover a surveillance camera at the door. At 9:09, a car pulled behind Deputy Dawson's vehicle in the driveway. A woman named Ashley Wright approached Deputy Dawson and claimed that she was called and told that the people who lived at the premises were on vacation, that there was a police car in the driveway, and that they needed to find out if there was anything wrong. When Deputy Dawson confronted her about the fact that there were people in the house and asked for a telephone number of the person who called her, she stated that she did not have a telephone. She stated, "I swear officer he called me and told me he was on vacation." She then changed her story and stated that she was not called, but her brother was called. Deputy Dawson attempted to follow-up on that statement but then she admitted that her brother was not called. Ms. Wright then changed the story again and stated that, in fact, her father was called. Deputy Dawson then called Ms. Wright's father who contradicted her statement. These events transpired over approximately 20 minutes, between 9:08 and 9:29.

At 9:43, Brennan finally exited the residence, approximately an hour and 25 minutes after Deputy Dawson first attempted to make contact with him. Brennan voluntarily submitted to the PBT which registered 0.00. (Id., Exhibit 4, p. 59, PG ID 118.) Deputy Dawson decided to arrest Brennan for a probation violation of failing to submit to a PBT on demand for delaying taking the test for over an hour and a half. Although not relevant to Dawson's determination of whether he had cause to arrest Brennan, the latter subsequently admitted to an investigator, Tom George, that he heard the officer knock on the front door and then knock on windows all around the mobile home. (Id., Exhibit 6, DVD, MISSION team interview with Brennan.) In the tenth minute of the interview, he admitted to having heard the sirens yet failed to submit to the PBT for another hour. (Id.) Brennan never told the investigator that he was sleeping and submitted to the test as soon as he awoke. The timeframes establish that he delayed opening the door to submit to the PBT and attempted to have Ashley Wright dissuade Deputy Dawson from administering the test.

Brennan was lodged overnight at the Clare County Jail, was arraigned with bond set at \$1,000.00, 10% cash or surety, by Magistrate Willig, and was released on the morning of February 22, 2015. (Id., Exhibit 7, State of Michigan Bond Form, PG ID 126.) He returned to court on February 24, 2015 and although the Magistrate did not have authority to do so, she dismissed the charge. Only Brennan and Magistrate Willig were present in court and no reason was given for the dismissal.

PROCEDURAL HISTORY

Deputy Dawson, Sheriff Wilson, and Clare County filed a Motion for Summary Judgment. Deputy Dawson argued that summary judgment was warranted based upon qualified immunity where he did not violate Brennan's constitutional rights and where the law was not clearly established that his conduct was prohibited. Sheriff Wilson and the County argued that municipal liability was unsustainable where Plaintiff failed to show that they were deliberately indifferent to a known or obvious training failure that caused Fourth Amendment violations. (R.14, MSJ, PG ID 72-139; R.19, DVDs filed in traditional manner in support of MSJ.) On September 7, 2017, Judge Steeh issued an Opinion and Order granting summary judgment to Cross-Petitioners. (R.22, Order, PG ID 222-237.) On October 3, 2017, Brennan filed a Notice of Appeal.

On appeal, the Sixth Circuit opined that as this Court's decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013) was subsequently applied, Deputy Dawson violated the Fourth Amendment by repeatedly entering the curtilage of Brennan's home without a warrant in an attempt to make contact with him pursuant to his conditions of probation. App. 2a-3a. The Court, however, found Deputy Dawson entitled to qualified immunity where, at the time of the occurrence, the law was not clearly established to prohibit the challenged conduct where case law within the Sixth Circuit, as well as the Third, Fourth, and Eighth Circuits, recognized special circumstances under which a police officer may travel to the rear of the home without a warrant during a "knock and talk" investigation. App.

10a-19a. The Court further held that Deputy Dawson had probable cause to arrest Brennan for violating his probation by failing to submit to a PBT on demand, App. 19a-21a, and concluded that Brennan's claim against the Sheriff and County failed. App. 21a-25a. The Hon. Karen Nelson Moore dissented with respect to the clearly established component of qualified immunity. App. 25a-31a.

For the reasons detailed herein, this conditional Cross-Petition for Writ of Certiorari should be granted where the Sixth Circuit's finding of a constitutional violation misapplied this Court's decisions and conflicts with other circuits.

ARGUMENT FOR GRANTING WRIT

I. THE SIXTH CIRCUIT MISAPPLIED THIS COURT'S DECISIONS AND CREATED A CONFLICT AMONG CIRCUITS BY HOLDING THAT A LAW ENFORCEMENT OFFICER VIOLATES THE FOURTH AMENDMENT BY ENTERING THE REAR CURTILAGE OF A HOME IN ATTEMPTING TO GAIN THE RESIDENT'S COMPLIANCE WITH A CONDITION OF HIS PROBATION.

Respondent agreed to the conditions of his probation in order to avoid jail but then refused to comply. Brennan further instigated the deputy's continued presence at the property by involving others, such as Ashley Wright, to interfere with Deputy Dawson's attempt to make contact to satisfy Respondent's probation requirement. This issue implicates important state and federal constitutional interests which necessitate review.

The Sixth Circuit misapplied *Florida v. Jardines*, 133 S. Ct. 1409 (2013). In that case, this Court held that introducing a trained police dog to explore the area around a home – the curtilage – in hopes of discovering incriminating evidence constituted an unlawful search. An implied license did not extend to a “canine forensic investigation.” *Id.*, at 1416. Here, Deputy Dawson did not employ trained dogs or forensic techniques to search for evidence on the premises. To the contrary, Deputy Dawson’s activities focused solely on attempting to contact Plaintiff to administer the PBT pursuant to the court-ordered conditions of his probation. Dawson had a reasonable belief that Brennan was in the residence based upon Mr. Dishneau’s representation of Brennan’s presence there the night before and his refusal to respond to the officers and submit to the test, Dawson’s detection of voices and movement inside the home, and Ms. Wright’s obvious attempts to thwart Dawson from contacting Brennan. The Sixth Circuit had previously long held that “where knocking at the front door is unsuccessful in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage.” *Hardesty v. Hamburg Twp.*, 461 F.3d 646 (6th Cir. 2006).

Neither *Jardines* nor *Hardesty* addressed a probationer who does “not enjoy the ‘absolute liberty to which every citizen is entitled, but only ... conditional liberty properly dependent on observance of special [probation] restrictions.’” *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987), quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). This Court in *Griffin* observed that

supervision of probationers is a special need of the state, “permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.” *Id.*, at 875. This diminished right of privacy is meant to ensure that probation “restrictions are in fact observed” and that “the community is not harmed by the probationer’s being at large.” *Id.*

In *U.S. v. Knights*, 534 U.S. 112 (2001), this Court discussed significant the governmental interests in monitoring probationers:

Probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.

Knights, at 20.

Here, the special probation restrictions ordered by the court included that Brennan refrain from consuming alcohol and submit to a PBT upon demand. Deputy Dawson’s conduct in knocking on doors and windows, briefly activating his emergency equipment, and obscuring the video camera to frustrate Brennan’s avoidance, was centered on ensuring that the probation restrictions were observed. Otherwise, Brennan could have continuously ignored the officers and claimed that he was unaware of the attempts to administer the PBT. He had already successfully avoided the PBT the

previous night. Dawson made his presence clearly known so it became apparent that Brennan was delaying the test and refusing to submit to it upon demand, as required.¹

The Sixth Circuit's reliance on *Nyilas v. Steinaway*, 686 Fed. App'x 355 (6th Cir. 2017) is also misplaced. There, Robert Nyilas threatened his girlfriend, took her phone so that she could not call the police, and then fled to his parents' home. The defendant officers spent over ninety minutes knocking on the front door, ringing the doorbell, and walking around the house attempting to make contact with the Nyilases inside the home, to no avail. In an Opinion dated May 29, 2016, the district court determined that, while the defendant officers' extended stay on the Nyilases' property exceeded the bounds of the knock-and-talk exception and the implicit license to be on the property, there was no controlling case law at the time of the events to inform the officers that they had violated a constitutional right. However, *Nyilas* could not have informed Deputy Dawson where the within matter

¹ Plaintiff engaged in delays (the night before and for 90 minutes on the night in question) that could easily alter the PBT results. The average man will break down alcohol at the rate of 0.015 BAC per hour. Thus, if his BAC is 0.030, it would take only 2 hours to have all the alcohol leave his system. <https://thelawdictionary.org/article/how-long-do-breathalyzers-detect-alcohol/>.

Similarly, a blood alcohol level of 0.08, the legal limit for driving, takes 5.5 hours to leave the system. <https://americanaddictioncenters.org/alcoholism-treatment/how-long-in-system>.

Accordingly, if Plaintiff had been consuming alcohol the night of February 20, 2015 or the day of February 21, 2015, he delayed taking the PBT long enough to conceal such consumption.

occurred on February 21, 2015 and *Nyilas* was decided long *after* that on May 29, 2016. Furthermore, *Nyilas* is wholly distinct where the plaintiff there was not a probationer with diminished rights to privacy who, in lieu of incarceration, consented to various court-ordered restrictions and provisions, one being submission to a PBT upon demand.

“Knock and talk” is recognized as a proper investigative tool. In this case, it was utilized simply in an attempt to make contact with Brennan, not to conduct a search of the premises or curtilage. Brennan agreed to be tested upon demand as a probation condition to escape going to jail. Further, Deputy Dawson was not present on the “curtilage” for the entire time, as the Sixth Circuit Opinion might suggest. Although he made repeated attempts to contact Brennan, those attempts were brief and supported by sounds he heard within the mobile home and the appearance of Ashley Wright, clearly designed to thwart Deputy Dawson’s attempt to contact Brennan to ensure compliance with his agreed-upon probation conditions.

CONCLUSION

For all of the foregoing reasons, Cross-Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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