No. 18-913

In the
Supreme Court of the United States

JOSHUA BRENNAN,
Petitioner,
v.

DEPUTY JAMES DAWSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SHERIFF JOHN WILSON, IN HIS OFFICIAL CAPACITY; CLARE COUNTY,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit correctly applied qualified immunity where: 1) Petitioner Brennan sought to construe the right involved at an extreme level of generality, 2) preexisting authority permitted a warrantless entry upon curtilage to contact a probationer, and 3) Petitioner failed to carry his burden to provide authority demonstrating that a right to be free from the intrusion was clearly established given the circumstances confronting the deputy including Brennan's agreement to submit to alcohol testing upon demand as a condition of probation to avoid jail for assault and battery, Brennan's avoidance of testing the previous night where deputies were informed by an occupant that he was home, Brennan's creation of a ruse by using others to report that he was not home (even though he was) to misdirect the deputy, and Brennan's instigation of the deputy's continued presence on the scene by summoning a friend to the property to interfere with Deputy Dawson's attempted contact with Brennan.

PARTIES TO THE PROCEEDING

Petitioner, Joshua Brennan, was the individual plaintiff and appellant below. 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 were defendants and appellees in the court below. Brennan filed a Petition for a Writ of Certiorari, and Deputy Dawson filed a Conditional Cross-Petition. While Petitioner identifies all defendants as respondents, the sole issue raised in the Petition is qualified immunity as to Deputy Dawson, only. As such, for ease of discussion, "Petitioner" will refer to plaintiff Brennan, and "Respondent," will refer to defendant Deputy Dawson.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

Brennan v. Dawson, et al., No. 16-10119 (ED Mich) (Opinion and Order and final Judgment in favor of Defendants entered September 7, 2017).

Brennan v. Dawson, et al., No. 17-2210 (6th Cir.) (Opinion affirming issued October 15, 2018; mandate issued November 8, 2018).

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The Opinion of the United States Court of Appeals for the Sixth Circuit is not published. See Petitioner's Appendix 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 defendants. (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's Appendix B at 32a-45a.

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.

Petitioner relies on 42 U.S.C. § 1983 as substantive authority. See Petition, pp. 1, 4; App. 46a. However, § 1983 does not create substantive rights, but acts as a procedural vehicle to pursue deprivations of rights secured elsewhere by the Constitution and laws of the United States. *Albright v. Oliver*, 510 U.S. 266, 271; 114 S. Ct. 807 (1994); *Baker v. McCollan*, 443 U.S. 137, 144 n3; 99 S. Ct. 2689 (1979).

STATEMENT OF THE CASE

Introduction

Petitioner Joshua Brennan was prohibited by an Order of Probation from possessing or consuming alcoholic beverages. (R.14, MSJ, Exhibit 3, Probation Order, PG ID 113.) As a condition of his probation, he was expressly ordered to submit to random Preliminary Breath Tests (PBT) upon demand. (Id.) On February 20, 2015, Clare County Sheriff's deputies appeared at Brennan's residence to administer a PBT. Despite the officers having information that he was inside, Brennan refused to address the deputies or exit the premises. (Id., Exhibit 2, Police Report, PG ID 109.)

The following evening, Respondent, Deputy James Dawson, was tasked with contacting Brennan and conducting a PBT. Despite repeated attempts by Deputy Dawson to gain Brennan's compliance with the test, and despite the fact that he was inside the home, Petitioner Brennan once again failed or refused to exit the premises for approximately 90 minutes. (Id., PG ID 108-111.) Eventually, Brennan exited, took the test with a .000 result, and was arrested for violating his probation by failing to submit to the PBT upon demand. (Id.) The charge was subsequently dismissed, and Brennan sued claiming that Respondent improperly intruded upon his curtilage in attempting to contact him for the test and unlawfully arrested him in violation of the Fourth Amendment. (R.1, Complaint, PG ID 1-12.) The district court properly dismissed Brennan's claims based on qualified immunity. The United States Court of Appeals for the Sixth Circuit affirmed where the law was not clearly

established at the time of the incident. Brennan petitioned this Honorable Court for a Writ of Certiorari, and Deputy Dawson filed a Conditional Cross-Petition. For the reasons detailed herein, Deputy Dawson did not violate the Fourth Amendment and was properly granted qualified immunity where the right involved was not clearly established under the circumstances confronting him.

Factual Background

Pursuant to an Order of Probation, Petitioner, Joshua Brennan (hereinafter "Petitioner" or "Brennan"), was on supervised probation for assault and battery subject to a Probation Order dated August 11, 2014. Pursuant to paragraph 8 of the Order, Brennan was prohibited from possessing or consuming alcoholic beverages, from entering any establishment which allows for the consumption of alcoholic beverages on its premises, and from being in the company of anyone consuming alcohol. Petitioner Brennan's Probation Order further stated: "**You are subject to random PBT upon demand at your expense."** (Id., Exhibit 3, Probation Order, PG ID 113, emphasis added.) Brennan, who has a history of incarcerations, paroles, and probations, was well aware of the procedure for conducting probation checks and the conditions 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.)

On the evening of February 20, 2015, Sgt. Richard Miller and Deputy Jim Piwowar of the Clare County Sheriff's Department attempted to conduct a probation check on Brennan at his mobile home residence at 2184 Oakridge Drive in Farwell, Michigan. (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 half an hour knocking and announcing and attempting to make contact with Brennan to seek his compliance with his probation conditions, but Brennan failed or refused to answer the door. (Id.)

On the next day, February 21, 2015, Respondent, Deputy James Dawson of the Clare County Sheriff's Department (hereinafter "Deputy Dawson" or "Dawson"), was directed to Brennan's residence by Sgt. Miller to again attempt to make contact with Brennan to administer the PBT. (R.14, Exhibit 1, Dawson dep., pp. 5-6, 11, PG ID 99-100.) Deputy Dawson was aware of information from the night before where Sgt. Miller and Deputy Piwowar had attempted to conduct a probation check on Brennan, but – despite being home – the latter refused to answer the door. (Id., Exhibit 2, PG ID 109.)

Deputy Dawson's attempts to contact Brennan and administer the PBT were captured on video. (Id., Exhibit 5, DVD, filed in the lower courts.) Deputy Dawson arrived at Brennan's residence at 8:18 p.m. and knocked on the front door. (R.14, Exhibit 1, Dawson dep., pp. 5-6, 11, PG ID 99-100.) He heard

people moving around inside the mobile home and talking, but no one answered the door. The video depicts Deputy Dawson walking around the unit at 8:20 p.m., knocking on doors and windows, announcing his presence, and carrying the PBT machine. While no one came to the door, he could hear hushed talking inside and an occasional thump. (Id., Exhibit 2, PG ID 109-110.)

Thereafter, Dawson can be heard calling dispatch to attempt to obtain a telephone number for Brennan. At 8:25, he turned on his overhead lights and sounded a short burst of his siren to announce his presence and gain Brennan's attention for 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 Dawson's marked vehicle. A woman named Ashley Wright approached Deputy Dawson and claimed 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 advised, "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 Ms. Wright admitted that her brother was not called. She then changed her 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 between 9:08 and 9:29.

At 9:43, Petitioner 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, by then, registered 0.00. (Id., Exhibit 4, p. 59, PG ID 118.) Deputy Dawson decided to arrest Brennan for violating probation by failing to submit to a PBT on demand. 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 filed in the courts below.) 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. In addition to avoiding the PBT the night before, the time frames establish that he delayed testing again on the night in question and attempted to have Ashley Wright dissuade Deputy Dawson from seeking Brennan's compliance.

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

On January 14, 2016, Plaintiff filed a three-count Complaint in the United States District Court for the Eastern District of Michigan against Clare County, Sheriff John Wilson, and Deputy James Dawson purporting Fourth Amendment violations for an allegedly unlawful search of curtilage, search via a court-ordered preliminary breath test (PBT), and arrest for failure to submit to a PBT upon demand as required by his Probation Order. Plaintiff sought to impose liability upon the County and the Sheriff under a failure to train theory. 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 they were deliberately indifferent to a known or obvious training failure that caused Fourth Amendment

violations. On September 7, 2017, the Hon. George Caram Steeh, of the United States District Court for the Eastern District of Michigan, issued an Opinion and Order granting summary judgment to Defendants. (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 because 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.

Plaintiff then petitioned this Honorable Court for a Writ of Certiorari based upon the lower courts' application of qualified immunity and the lack of

clearly established law given the circumstances confronting Deputy Dawson. Deputy Dawson filed a Conditional Cross-Petition for a Writ of Certiorari with respect to the Sixth Circuit's decision on the constitutional violation prong of qualified immunity.

ARGUMENT FOR DENYING WRIT

I. THE SIXTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT WHERE DEPUTY DAWSON'S ENTRY ONTO THE CURTILAGE WAS DIRECTED SOLELY AT CONTACTING BRENNAN TO SEEK COMPLIANCE WITH HIS AGREED-UPON AND COURT-ORDERED CONDITION OF PROBATION TO SUBMIT ON DEMAND TO A PRELIMINARY BREATH TEST AND HIS ACTIONS DID NOT VIOLATE CLEARLY ESTABLISHED LAW GIVEN THE CIRCUMSTANCES PRESENTED.

A. Petitioner Brennan's attack on Qualified Immunity should be rejected.

Petitioner seeks to dismantle qualified immunity and the manner it is implemented. In attempting to advance that goal, Petitioner suggests that some Justices have 'expressed concern' about the doctrine. To the contrary, while scholarly minds are bound to differ on a variety of issues, including factual or legal nuances in applying qualified immunity, this Court has repeatedly been united in embracing qualified immunity and defining the mechanics of its application.

In *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009), this Court reviewed the two-step approach in assessing qualified immunity and *unanimously* held that courts may examine the prongs in any order. The Court considered the impact of the preexisting rigid approach observed in *Saucier v. Katz,* 533 U.S. 194, 202, 121 S. Ct. 2151 (2001) of first deciding whether a constitutional violation occurred and then determining whether the right involved was clearly established. It held that the *Saucier* procedure came with a price. It resulted in substantial expenditure of scarce judicial resources on difficult questions that had no effect on the outcome of the case. Litigants asserted violations where it was not obvious that a right even existed, much less that it was clearly established. *Pearson* further recognized that "[u]nnecessary litigation of constitutional issues also wastes the parties' resources" because qualified immunity is "an immunity from suit rather than a mere defense to liability." *Saucier*'s two-step protocol "disserve[s] the purpose of qualified immunity" when it "forces the parties to endure additional burdens of suit – such as the costs of litigating constitutional questions and delays attributable to resolving them – when the suit otherwise could be disposed of more readily." *Id.*, at 237, citing Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 30.

This Court further noted that "although the first prong of the *Saucier* procedure is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development" where cases involving constitutional questions "are so

factbound that the decision provides little guidance for future cases." *Id.*, see *Scott v. Harris*, 550 U.S. 372, 388, 127 S. Ct. 1769 (2007) where Justice Breyer in a concurring opinion "counseled against the *Saucier* two-step protocol where the question is 'so fact dependent that the result will be confusion rather than clarity'").

In addition to other considerations militating against the strict two-step approach, this Court in *Pearson* noted that in many instances laboring over a constitutional question will have "scant value" when the question is pending before a higher court. *Id.*, at 237. Further, "there are circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking." *Pearson*, at 238-239. Lower courts "encounter cases in which the briefing of constitutional questions is woefully inadequate," tending to lead to ill-informed results where "constitutional questions may be prematurely and incorrectly decided" where they are not properly briefed. *Id.*

In rejecting the rigid sequential approach, the *Pearson* Court also opined that "the rule does not – and obviously cannot – specify the sequence in which judges reach their conclusions in their own internal thought processes." *Id.*, at 239. Consequently, some courts will decide relatively quickly and easily that "there was no violation of clearly established law before turning to the more difficult question" of whether a constitutional right was violated or even implicated. In those situations, courts may risk being "insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication." *Id.*, at 239-240,

citing *Horne v. Coughlin,* 191 F.3d 244, 247 (2nd Cir. 1999).

This Court went on to delineate a host of additional thoughtful reasons for rejecting the rigid adherence to a sequential approach, not the least of which included the longstanding principle of avoiding constitutional questions, particularly where a body of law has not been sufficiently developed in lower courts to render informed decisions. *Pearson*, *supra* at 240-242.

A *per curiam* decision issued earlier this year, further undermines Petitioner's dubious portrayal of resentment toward qualified immunity and the analysis applied. In *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503–04, 202 L. Ed. 2d 455 (2019), this Court reiterated the importance of properly applying qualified immunity, particularly when analyzing the Fourth Amendment, and warned against construing the right too generally:

> As we have explained many times: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."
>
> Under our cases, the clearly established right must be defined with specificity. "This Court has repeatedly told courts ... not to define clearly established law at a high level of generality." …
>
> "Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal

doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue....

"[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.*, at ——, 138 S.Ct., at 1153 (quotation altered).

In this case, the Court of Appeals contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. **Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the "right to be free of excessive force" was clearly established.** With the right defined at that high level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial. 716 Fed. Appx., at 726.

Under our precedents, the Court of Appeals' formulation of the clearly established right was far too general. To be sure, the Court of Appeals cited the *Gravelet–Blondin* case from that Circuit, which described a right to be "free from the application of non-trivial force for engaging in mere passive resistance...." 728 F.3d, at 1093. Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity, see *City and County of San Francisco v. Sheehan,* 575 U.S. ——, ——, 135 S.Ct. 1765, 1776, 191 L.Ed.2d 856 (2015), the Ninth Circuit's *Gravelet–Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in *504 this case. That is a problem under our precedents:

"[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment.... While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate.... Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.... But a body of relevant case law is usually necessary to clearly establish the

> answer...." *Wesby,* 583 U.S., at ——, 138 S.Ct., at 581 (internal quotation marks omitted).
>
> The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment. Therefore, we remand the case for the Court of Appeals to conduct the analysis required by our precedents with respect to whether Officer Craig is entitled to qualified immunity.

Emmons, at 503-504, citations omitted, emphasis added.

Canvassing the Court's decisions over the last decade (and many years before) fails to reveal the type of hostility toward qualified immunity that Petitioner suggests. Although members of the bench, as well as practitioners, naturally will not always agree on an outcome, there has been no movement to dispense with immunity altogether or overhaul it as Brennan suggests.

B. The Sixth Circuit properly granted immunity but erroneously decided the constitutional issue.

Petitioner apparently does not challenge the lower courts' conclusion that Deputy Dawson had sufficient cause to arrest Brennan for failing to submit to the

PBT on demand.[1] Rather, he focuses solely on Dawson's intrusion onto his curtilage to make contact to perform the test. The Sixth Circuit properly applied the clearly established component of qualified immunity, but erred in concluding that Dawson's presence on the curtilage violated the Fourth Amendment.

A probationer 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). In *Griffin*, where the probationer's apartment was searched, this Court observed that supervision of probationers is a "special need" of the state, permitting a diminished right of privacy that would be inapplicable to the general citizenry. *Id.*, at 875. This diminished right to 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.*

This Court further opined that "a State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a

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[1] In Michigan, a "peace officer," without a warrant, may arrest a person where the officer has reasonable cause to believe that the person has violated one or more conditions of a probation order imposed by a court of this state, another state, an Indian Tribe, or United States territory. MCL 764.15(1)(g). In addition, MCL 791.229 renders various probation records confidential but expressly exempts law enforcement agencies and authorizes law enforcement access to records, reports, and case histories.

regulated industry, likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements. Probation, like incarceration, is "a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." *Id.*, at 874, citing G. Killinger, H. Kerper, & P. Cromwell, Probation and Parole in the Criminal Justice System 14 (1976). "Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. A number of different options lie between those extremes." *Griffin*, at 874.

Probation restrictions "are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed." *Id.*, at 875. As observed by this Court in *Griffin*, "research suggests that more intensive supervision can reduce recidivism, and the importance of supervision has grown as probation has become an increasingly common sentence for those convicted of serious crimes." *Id.*, citations omitted. **As such, probation supervision is deemed 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.*

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

> 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 120.

Based on the foregoing, a "warrant requirement would interfere to an appreciable degree with the probation system" and, particularly in this case, "would reduce the deterrent effect that the possibility of expeditious searches" or court-ordered testing on demand would otherwise create. *Griffin*, at 876. The delay inherent in obtaining a warrant would make it more difficult to enforce probation conditions like that at issue here where testing on demand is already ordered and is time sensitive. Putting a probationer in control of when he wishes to be subject to conditions would defeat the purpose of probation. *People v. Cruz*, 34 Cal. App. 5th 764, 768-769 (2019).

In *U.S. v. Keith*, 375 F.3d 346 (5th Cir. 2004), the Fifth Circuit rebuffed the defendant's argument that a written search provision or an explicit regulation was necessary to permit the search of a probationer's home on reasonable suspicion. However, as this Court noted

in *Knights*, the regulation that authorized the search in *Griffin* was not even promulgated until after Griffin had been sentenced. *Id.*, at 117. The Fifth Circuit concluded that the needs of the probation system in ensuring compliance with probation restrictions outweigh the privacy rights of the probationers who inherently do not enjoy the absolute liberty afforded to citizens in general. *See accord*, *United States v. Mathews*, 928 F.3d 968 (10th Cir. 2019) ("given that the very assumption of the institution of probation is that the probationer is more likely than the ordinary citizen to violate the law, the government may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen").

Likewise, the present case does not involve an express provision allowing the search of a residence, nor did Deputy Dawson enter the mobile home. He limited his efforts to attempting to make contact with Brennan to perform the PBT pursuant to the Probation Order. In order to submit to testing upon demand, Brennan implicitly consented to an officer entering his curtilage and diligently attempting to make contact with him to ensure compliance with his probation conditions.

It is beyond cavil that consent can be implicit through a person's actions. *King v. Handorf*, 821 F.3d 650, 654 (5th Cir. 2016). It is also well established that consent to search need not be express but may be fairly inferred from context. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). Brennan's agreement to submit to the random PBT on demand satisfies the concept that he implicitly consented to attempts to

physically contact him for the test. That is exactly what Dawson did as he approached Brennan's residence, carrying the PBT machine.

Reliance on this Court's decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013) in condemning Deputy Dawson's entry onto the curtilage was woefully misplaced. In *Jardines*, entering onto curtilage with a trained police dog to explore the area around a home in hopes of discovering incriminating evidence constituted an unlawful search. An implied license did not extend to a "canine forensic investigation." *Id*., at 1416. However, *Jardines* did not address a probationer who agreed to a PBT on demand in his Order of Probation, like Petitioner Brennan did here, to avoid jail time for assaultive conduct. Nor did Deputy Dawson enter Brennan's home or employ trained dogs or forensic techniques to search the curtilage for evidence. To the contrary, Dawson's activities focused solely on diligently attempting to contact Petitioner 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 confirmation of Brennan's presence there the night before and his refusal to respond to the officers or submit to the test, Dawson's detection of voices and movement inside the home on the day in question but lack of a response at the door, and Ms. Wright's obvious attempts to thwart Dawson from making contact with Brennan.

Deputy Dawson's conduct in knocking on doors and windows, briefly activating his emergency equipment, and obscuring the video camera to frustrate

Petitioner's avoidance, was centered on making contact with Brennan to conduct the court-ordered testing. Brennan continuously ignored the officers and claimed he was unaware of the attempts to administer the PBT. He successfully avoided testing the previous night. ***Dawson made his presence clearly known to Brennan such that it became apparent that Brennan was delaying or avoiding the test, refusing to submit on demand as required***.[2]

In the context of this case and the circumstances confronting Deputy Dawson, *Jardines* did not clearly prohibit Dawson's conduct in attempting to administer the PBT. Petitioner bears the burden to provide authority demonstrating that the right was clearly established in the circumstances confronting Deputy Dawson, which Brennan failed to do. *Chappell v. City Of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009).

A right is clearly established when it would be clear to a reasonable officer that his conduct was unlawful in

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[2] Plaintiff engaged in delays (the night before and then for 90 minutes on the night in question) which could easily alter test 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.

the situation he confronted. *Saucier*, *supra* at 202. For qualified immunity to be surrendered, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir. 1997). This Court has admonished that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Brosseau v. Haugen*, 543 U.S. 194, 198-200 (2004).

In *White v. Pauly*, 580 U.S. __, 137 S. Ct. 548 (2017), this Court reversed a denial of qualified immunity because the lower court "failed to identify a case where an officer under similar circumstances ... was held to have violated the Fourth Amendment." This Court cautioned:

> "[C]learly established law" should not be defined "at a high level of generality." As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*., at 551-552.

In other words, while a *generalized* right to be free from "unlawful searches or intrusions upon curtilage" might be clearly established, a more particularized inquiry is required, probing whether it would be clear to a reasonable officer that his conduct was unlawful *in*

the situation he confronted. Brennan argued only the generalized right pertaining to an officer's ability to "knock and announce," without regard to the particularized circumstances where Petitioner implicitly consented to a more expanded presence on the curtilage to obtain his compliance with the testing. Unlike *Jardines*, the probation-search cases rest on the premise that the probationer, in accepting a search condition, consents to the resulting diminution of Fourth Amendment rights.

When conduct is within the 'hazy border' of a constitutional right, it cannot be said that a government officer violated a 'clearly established' right. *Brosseau*, *supra* at 198. Existing precedent must have placed the constitutional question confronting the officer *beyond debate. Plumhoff v. Rickard,* 134 S. Ct. 2012, 2023 (2014), emphasis added.

By immunizing officers from suit against actions taken on behalf of the public, they are able to pursue their duties with the zeal and decisiveness required by the public good. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012).

Here, the authority Petitioner cited is so dissimilar in significant respects that it makes a mockery of the "particularized sense" standard. As noted above, *Jardines* considered an intrusion onto curtilage for a "knock and announce," not for agreed-upon, court-ordered compliance with a breathalyzer test upon demand. Nor did *Jardines* contemplate a probationer's reasonable expectation of privacy in his curtilage when under supervision and subject to such testing. "Probation is not a right, but a privilege." *Cruz*, *supra*

at 770. In agreeing to the probation conditions, Brennan implicitly consented to entry upon his curtilage to make contact and administer the testing. Indeed, a probationer who has been granted the privilege of probation on condition that he submit to various restrictions may have no reasonable expectation of traditional Fourth Amendment protection. *Id.* If the offender finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation and simply choose to serve the sentence. *Id.* A probationer's waiver of the traditional Fourth Amendment rights is no less voluntary "than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain." *Id.*

In *Cruz*, *supra*, the probationer agreed to submit to a chemical test of his blood if he was again arrested for drunk driving. When that arrest came to fruition, he refused the blood draw. The court there held that the warrantless forced blood draw did not violate the Fourth Amendment in light of the defendant's probation condition. Although the terms did not expressly provide for the draw upon refusal, it was implicit in his probation order.

By parity of reasoning, Brennan agreed to submit to testing upon demand. While his probation order did not expressly state that an officer may enter his curtilage to administer the PBT, such entry was certainly implied in the order.

Petitioner's reliance below on the unpublished decision of *Nyilas v. Steinaway*, 686 Fed. Appx. 355 (6th Cir. 2017) is also unavailing. 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, without success. 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. *Nyilas* could not have informed Deputy Dawson where the within matter 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.

Petitioner Brennan agreed to his conditions of probation to refrain from consuming alcohol and to submit to a breathalyzer on demand in order to avoid jail, but then refused to comply. He further instigated the deputy's continued presence at the property by involving others, such as Ashley Wright, to interfere with Dawson's attempt to make contact to satisfy the probation requirement.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that Petitioner be denied review.

Respectfully submitted,

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