No. 11-817

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2011

STATE OF FLORIDA,
Petitioner

v.

CLAYTON HARRIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FL 32301
ATTORNEY FOR RESPONDENT AND
COUNSEL OF RECORD

(COUNSEL OF RECORD IS A MEMBER OF THE BAR OF THIS COURT)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS PAGE(S)

STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case with the following qualifications. The "Question Presented" by the Petitioner assumes "a well-trained narcotics dog." The Florida Supreme Court explored that very question:

> When it comes to the use of drug-detection dogs, the United States Supreme Court has explained that "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." Caballes, 543 U.S. at 409, 125 S.Ct. 834 (citation omitted) (quoting Place, 462 U.S. at 707, 103 S.Ct. 2637). Caballes and Place considered the issue of whether the use of a "well-trained" drug-detection dog constitutes a search and not the circumstances of how the trial court determines whether the drug-detection dog is well-trained and when the dog's alert will constitute probable cause to believe that there are illegal substances within the vehicle.

Harris v. State, 71 So. 3d 756, 766 (Fla. 2011). Addressing those issues – whether a dog is well-trained and when its alert constitutes probable cause – the court relied on the following evidence bearing on an alert and vehicle search on June 24, 2006:

> Aldo had been trained to detect drugs since January 2004 and certified to detect drugs since February 2004; Officer Wheetley trains Aldo for approximately four hours per week, deploys Aldo approximately five times per month, and attends a forty-hour annual training

seminar; and Aldo's success rate during training is "really good." Aldo's weekly training records reveal that from November 2005 to June 2006, Aldo performed satisfactorily 100% of the time. However, there was no testimony as to whether a satisfactory performance includes any false alerts. The record is also scarce on the details of Aldo's training, including whether the trainer was aware of the locations of the drugs and whether the training simulated a variety of environments and distractions.

The State also did not introduce Aldo's field performance records so as to allow an analysis of the significance of the alerts where no contraband was found. In fact, Officer Wheetley testified that he does not keep records of Aldo's unverified alerts in the field; he documents only Aldo's successes. If an officer fails to keep records of his or her dog's performance in the field, the officer is lacking knowledge important to his or her belief that the dog is a reliable indicator of drugs. Cf. Florida v. J.L., 529 U.S. 266, 271, 273–74, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (concluding that police did not have reasonable suspicion based on an anonymous tip because the officers did not have sufficient information from the tip and were without means to test the informant's credibility and thus the tip's reliability, stating that "[t]he reasonableness of official suspicion must be measured by what the officers knew before they conducted their search").

. . .

Further, the State failed to present any evidence regarding the criteria necessary for Aldo to obtain certification through Drug Beat K–9 certifications. This case is unlike [State v.]Coleman, [911 So. 2d 259 (Fla. 5th DCA 2005)], where evidence was introduced outlining the details of the training program, the criteria for choosing which dogs to use as drug dogs, and the criteria necessary for the dog and handler to pass the course and obtain "certification." 911 So.2d at 260. By contrast, the only evidence regarding the criteria used in

> Aldo's certification is a document simply stating that Aldo successfully found twenty-eight grams of marijuana, five grams of methamphetamine, twenty-eight grams of cocaine, seven grams of heroin, seven grams of crack cocaine, and fifty grams of ecstasy. However, the record is silent on the circumstances of the certification, such as whether these drugs were hidden, whether the trainer was aware of the locations of the drugs, or whether the certification simulated the variety of environments and distractions found in the field. In the absence of uniform, standard criteria for certification, the State must do more than simply introduce evidence that the dog has been certified.

Id. at 772-74. The court also discussed the state's failure to present evidence on the dog's ability to detect residual odors and the significance of a "residual odor" alert. Id. at 773-74.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW MERELY APPLIES A "TOTALITY OF THE CIRCUMSTANCES" APPROACH TO THE DETERMINATION WHETHER A DRUG-DETECTOR DOG'S ALERT TO A VEHICLE CONSTITUTES PROBABLE CAUSE TO SEARCH, AND DOES NOT CONFLICT WITH THIS COURT'S HOLDINGS THAT A DRUG-DOG SNIFF IS NOT A FOURTH AMENDMENT SEARCH.

The Florida Supreme Court decision is not in conflict with United States v. Place, 462 U.S. 696 (1983), and Illinois v. Caballes, 543 U.S. 405 (2005), on whether "a canine sniff by a well-trained canine narcotics detection dog . . . provides probable cause to search a vehicle." Petiton at i. The petition's formulation of the first of its reasons for granting the writ confuses the premise in those decisions, that the dogs were "well-trained," with the holding that a sniff by such a dog is not a search under the Fourth Amendment. The Florida Supreme Court recognized and articulated the distinction:

> Caballes and Place considered the issue of whether the use of a "well-trained" drug-detection dog constitutes a search and not the circumstances of how the trial court determines whether the drug-detection dog is well-trained and when the dog's alert will constitute probable cause to believe that there are illegal substances within the vehicle.

Harris, 71 So. 3d at 766. The court then assessed whether, under the totality of the circumstances, the handler in this instance had good reason to believe that the

dog's alert to the door handle of Harris' truck created probable cause to believe illegal narcotics would be found within. Factors informing the court's determination included: (1) the dog was last certified as a reliable detector of narcotics in February, 2004, 28 months before the alert in this case; (2) the state presented no evidence "regarding the criteria necessary for [the dog] to obtain certification;" (3) there was no testimony on whether the dog's "100 % satisfactory" performance in ongoing training included any false alerts, "whether the trainer was aware of the locations of the drugs and whether the training simulated a variety of environments and distractions;" and (4) the state did not introduce the dog's field performance records "so as to allow an analysis of the significance of the alerts where no contraband was found." Id. at 772-73.

The absence of evidence on the fourth consideration corresponded to the state's position below that "the only relevant records are the training records – not field records." Id. at 773. The Petitioner now recognizes that, "[t]o be sure, field activity reports may be considered." Petition at 25. This is an important concession, for it validates the inclusion of the unavailability of field-performance records in the Florida Supreme Court's totality-of-the-circumstances assessment of probable cause for a warrantless search:

> [T]he reason that the State should keep records of the dog's performance both in training and in the field is so that the trial court may adequately evaluate the reasonableness of the officer's belief in the dog's

> reliability under the totality of the circumstances. Because the State bears the burden of establishing probable cause, if the courts are to make determinations of probable cause based on the alerts of dogs, who can neither be cross-examined nor otherwise independently assessed as to their reliability, it is appropriate to place the burden on the State to ensure uniformity in the way dogs are evaluated for reliability of their alerts.

Id. at 772.

Other courts throughout the country have factored field-performance records into probable cause determinations involving alerts by drug-detector dogs. See, e.g., State v. Foster, 252 P.3d 292, 301 (Or. 2011) (noting that 66 percent "find" rate in field performance records confirms that dog "can accurately detect the odor of drugs present in an environment, as he was trained to do"); United States v. Ludwig, 641 F.3d 1243, 1252 (10th Cir. 2011) (concluding that, if compelled to "affix[] figures to probable cause," court would find 58 % field success rate sufficient); State v. Laveroni, 910 So. 2d 333, 335 (Fla. 4th DCA 2005) (agreeing with conclusion of another state court that, "because these dogs are not always correct, their past performance records are relevant").

Despite the agreed-upon relevance of field performance records, the police agency in this case did not make or keep records of the results of searches prompted by the dog's alert. Harris, 71 So. 3d at 760. Cf. State v. Helzer, 252 P.3d 288, 290 (Or. 2011) (noting that although the state documented alerts in the

field over a several-month period, the dog's handler kept no record of deployments in which the dog did not alert). The Florida Supreme Court made a practical decision that, as the party that bears the burden of justifying a warrantless search and the entity which trains, handles, and deploys a drug-sniff dog, the government should produce field-performance records when challenged to demonstrate that a dog's alert in a particular case created probable cause for a search.

The decision is also consistent with this Court's recognition that "probable cause is a fluid concept" that "turn[s] on the assessment of probabilities in particular factual contexts." Illinois v. Gates, 462 U.S. 213, 232 (1983). Probable cause to search, like reasonable suspicion to detain, is "dependent upon both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U.S. 325, 330 (1990). In seeking to narrow the criteria for the probable cause determination to evidence of training and certification, the Petitioner would permit the prosecution to present only some of the information possessed by police that bears on the reliability of a drug-detector dog. Its perspective places undue emphasis on "isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." Gates, 462 U.S. at 235. The decision in this case employs totality-of-the-circumstances analysis required by Gates and White without contravening Place and Caballes. Certiorari review to vindicate this Court's Fourth Amendment precedent is unnecessary.

II. DRUG-DETECTOR DOGS REMAIN VIABLE INDICATORS OF PROBABLE CAUSE EVEN WHEN THEIR PERFORMANCE IN THE FIELD IS CONSIDERED.

The Petitioner and its Amici from Virginia, etc., assert that factoring field performance into the probable-cause determination from a drug-sniff dog's alert will severely curtail the use of dogs in interdicting drug possession and trafficking. Precedent belies this claim. The Florida Supreme Court pointed to numerous cases in which a dog's "batting average" established probable cause:

> Because the State did not introduce Aldo's field performance records, this Court does not have the benefit of quantifying Aldo's success rate in the field. See, e.g., United States v. Anderson, 367 Fed.Appx. 30, 32–33 (11th Cir.2010) (unpublished) (rejecting defendant's argument that probable cause was not established where dog could not distinguish between an odor and presence of narcotics because, even accepting the field performance statistics, the dog had a 55% accuracy rate in finding measurable amounts of drugs); United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir.1997) (finding that "a 70–80% success rate meets the liberal standard for probable cause" to issue a search warrant); United States v. Scarborough, 128 F.3d 1373, 1378 (10th Cir.1997) (holding that with an overall success rate of 92%, it was not clear error for the trial court to find that the dog was "a credible narcotics dog and that his alert adequately supports the finding of probable cause"); United States v. Huerta, 247 F.Supp.2d 902, 910 (S.D.Ohio 2002) (holding that a 65% accuracy rate, not counting instances involving trace amounts of narcotics or where handler assumed alert was to residual odor, was insufficient alone to justify probable cause determination based solely on the dog's alert); State v. Miller, 256 Wis.2d 80, 647

> N.W.2d 348, 353 (App.2002) (concluding that where the dog had accurately indicated presence of illegal contraband or substances on thirty-five of forty occasions (87.5%), the dog's alert created probable cause).

Harris, 71 So. 3d at 772 n.12. See also United States v. Limares, 269 F.3d 794, 797 (7th Cir.2001) (accepting as reliable a dog that gave false positives between 7 and 38% of the time); United States v. Koon Chung Wu, 217 Fed.Appx. 240, 246 (4th Cir.2007) (unpublished) ("[A]n accuracy rate of 60% is more than reliable enough for [the dog's] alert to have established probable cause"); Foster, 252 P.3d at 301 (concluding that officers could reasonably rely on alert by dog with 66 percent "find rate," combined with certification and certification); Ludwig, 641 F.3d at 1252 (10th Cir. 2011) (finding 58 % "enough" for probable cause from alert).

In this case, the state failed to provide field-performance records when they were requested in discovery. Harris, 71 So. 3d at 761 n.4. Testimony in the suppression hearing revealed that the dog's handler did not keep records showing when drugs were not found after a positive alert by the dog. Id. at 761. At its core, the decision below merely calls upon police agencies who use drug-detector dogs to keep field records so that judicial determinations of probable cause for a warrantless search prompted by a dog's alert rest on the totality of the circumstances, not merely facts the government chooses to document and present.

When these records are kept and made part of the probable cause determination, as in the cases cited above, courts nonetheless have had little difficulty finding probable cause in many instances . Demonstrably, the decision below neither "threatens to significantly undermine the use of canines for drug interdiction" (Amicus Brief of Virginia, etc., at 10) nor "virtually negate[s] the use of dogs as a valuable crime fighting tool to law enforcement and society." Petition at 35-36.

If and when a court bases a probable cause determination primarily on a dog's field performance records while dismissing other evidence of reliability, the Petitioner's concern for the ongoing use of drug-detector dugs may ripen to the level warranting this Court's attention. At this point, the concern remains speculative, and does not warrant the grant of certiorari in this case.

III. CERTIORARI REVIEW RISKS INVOLVING THIS COURT IN PROMULGATING STANDARDS FOR DRUG-DETECTOR DOG TRAINING AND CERTIFICATION.

The Petitioner seeks to have this Court hold that "[t]he fact that a dog has been trained and certified is sufficient evidence to establish probable cause to search a vehicle." Petition at 13. However, neither the Petitioner nor its Amici have explained what they mean by trained and certified. Elevating these two criteria over others in a probable-cause determination could draw the Court into the task of setting thresholds sufficient to render a drug-detector dog a reliable source of probable cause.

Precedent shows that many organizations train and certify drug-detector dogs. There is no indication in case law that methods, standards, and criteria within the industry are uniform. The significance of certification appears particularly elusive. See Harris, 71 So. 3d at 760-61 ("Florida does not have a set standard for certification for single-purpose dogs such as Aldo."); Foster, 352 P.3d at 294-95 (certification by Oregon Police Canine Association is "purely private; no Oregon statutes or regulations set standards for or otherwise governing drug-detection dog training and certification or record-keeping"). The diversity in this area makes creation of a baseline for training and certification adequate to assure a dog's reliability difficult if not impossible. As this case demonstrates, evidence

concerning methods, standards, and frequency can differ vastly for both training and certification, even in the same jurisdiction:

> This case is unlike [State v.]Coleman, [911 So. 2d 259 (Fla. 5th DCA 2005)], where evidence was introduced outlining the details of the training program, the criteria for choosing which dogs to use as drug dogs, and the criteria necessary for the dog and handler to pass the course and obtain "certification." 911 So.2d at 260. By contrast, the only evidence regarding the criteria used in Aldo's certification is a document simply stating that Aldo successfully found twenty-eight grams of marijuana, five grams of methamphetamine, twenty-eight grams of cocaine, seven grams of heroin, seven grams of crack cocaine, and fifty grams of ecstasy. However, the record is silent on the circumstances of the certification, such as whether these drugs were hidden, whether the trainer was aware of the locations of the drugs, or whether the certification simulated the variety of environments and distractions found in the field.

Harris, 71 So. 3d at 773. Decisions issued the same day by the Oregon Supreme Court in State v. Helzer, 252 P.3d 288 (Or. 2011), and State v. Foster, 252 P.3d 292 (Or. 2011), also illustrate this point:

> The state in this case, however, established little beyond the bare fact that Babe and Stokoe had been certified by OPCA. A comparison to the record made in Foster reveals the voids. See [Foster], 252 P.3d 292 (describing record). The drug-detection dog and its handler in Foster went through their initial formal training with OPCA and continued training with the assistance of an OPCA "master trainer." The record in Foster is significantly more developed on the particular training they received initially, as well as their continued training afterwards. The record is also significantly more developed on the

> OPCA certification test that they took, and the standards to which they were held in order to pass it. See id. (describing same). No similar record was made in this case. In particular, the nature of Babe's initial training by Code Three Canine—the kind of training, its length, and the standards used—was not established by the state. Likewise, the record provides no description of or details about Stokoe and Babe's team training with Code Three Canine after Stokoe purchased Babe. Unlike in Foster, the record does not reveal what training Stokoe received to avoid handler cues or other errors that can cause a dog to alert falsely. Stokoe testified vaguely to his use of blanks and food distractions in his own training, but he provided no information beyond that to explain how his training builds accuracy and reliability in both Babe's abilities and his handling of Babe.

Helzer, 252 P.3d at 291 (footnote and state reporter citation omitted).

The concern over variable standards and methods led the Florida Supreme Court in this case to look toward additional factors, including field performance, in assessing whether a dog alert creates probable cause in an individual case. See Harris, 71 So. 3d at 773 ("In the absence of uniform, standard criteria for certification, the State must do more than simply introduce evidence that the dog has been certified.") In seeking to have this Court hold that field performance is not a component of the probable cause determination, the Petitioner would cast this Court as the ultimate regulator of drug dog training and certification standards for police agencies through the nation. This is a role best left declined.

CONCLUSION

The Respondent respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
glen.gifford@flpd2.com

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari in Florida v. Harris has been furnished by U.S. Mail to Robert J. Krauss, Chief Assistant Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; E. Duncan Getchell, Solicitor General of Virginia, 900 E. Main St., Richmond, VA 23219; and Arthur T. Daus III, 2417 N.E. 22nd Terrace, For Lauderdale, FL 33305, this ____ day of February, 2012

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 664261
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500