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Beware of the Diamond Dogs: Why a 'Credentials Alone' Conception of Probable Cause Violates the Compulsory Process Clause

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Is a positive alert by a certified narcotics-detection dog *per se* sufficient, in and of itself, to establish probable cause for the search of a vehicle? The Supreme Court is currently addressing this issue in *Florida v. Harris*.[1] This essay contends that this question might best be answered by considering its converse. Is a failure to alert by a certified narcotics-detection dog *per se* sufficient, in and of itself, to *vitiate* probable cause? Categorically, courts have answered this latter question in the negative.[2] By considering a defendant's right to compulsory process, this essay argues that this negative answer must apply with equal force to the proposition presently before the Court.

I. Compulsory Process and the Strength of One Party's Evidence

The Sixth Amendment's Compulsory Process Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right…to have compulsory process for obtaining witnesses in his favor…."[3] For nearly two centuries, courts interpreted this Clause "as merely conferring on criminal defendants the procedural right of being able to subpoena or otherwise secure the presence of witnesses at trial."[4] In 1967, however, the Supreme Court breathed new life into the Clause in *Washington v. Texas*, recognizing that it contains a substantive right for criminal defendants to be able to present evidence in contravention of arbitrary and discriminatory rules.[5]

The Court's most recent clarification of the Compulsory Process Clause is contained in its 2006 opinion in *Holmes v. South Carolina*,[6] the most relevant case for this essay. In *Holmes*, Bobby Lee Holmes was charged with murder, first-degree criminal sexual conduct, and related crimes after allegedly beating, raping, and robbing 86 year-old Mary Stewart in her home.[7] At trial, the prosecution presented strong forensic evidence of Holmes' guilt:

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[1] *See* Colin Miller, *Who Let The Dogs In?: Professor Leslie Shoebotham's Amici Brief For Harris v. State*, EvidenceProf Blog, Sept. 18, 2012; http://lawprofessors.typepad.com/evidenceprof/2012/09/back-in-july-i-postedan-entryabout-a-terrificamici-curiae-brief-2012-wl-2641847-2012-written-byleslie-shoebotham-an-ass.html.

[2] *See, e.g.,* State v. Anderson, No. 39187 2012 WL 4055342, at *4 (Idaho, Sept. 14, 2012) ("Other courts addressing the question have generally held that a drug dog's failure to alert is only one factor to be considered in the probable cause analysis.").

[3] U.S. Const. amend. VI.

[4] Colin Miller, *Dismissed With Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 898-99 (2009).

[5] 388 U.S. 14, 19 (1967).

[6] 547 U.S. 319 (2006).

[7] *Id*. at 321-22.

> "(1) [Petitioner's] palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by [petitioner] were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on [petitioner's] blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on [petitioner's] underwear; (5) [petitioner's] underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than [petitioner] and the victim were excluded as contributors to that mixture; and (6) [petitioner's] tank top was found to contain a mixture of [petitioner's] blood and the victim's blood."[8]

This forensic evidence was pretty damning and damning enough for the trial court to prevent Holmes from presenting evidence of an alternate suspect.[9] Holmes had several prospective witnesses who would have placed Jimmy McCaw White in Stewart's neighborhood on the morning of the assault and four prospective witnesses who could have testified that White made statements exonerating Holmes and/or incriminating himself.[10] According to one of these witnesses, "when he asked White about the 'word...on the street' that White was responsible for Stewart's murder, White 'put his head down and he raised his head back up and he said, well, you know I like older women.'"[11]

The jury never heard any of this testimony. As noted, the trial court deemed it inadmissible, and the Supreme Court of South Carolina later affirmed that decision, finding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.'"[12] In other words, because of the State's strong forensic evidence of Holmes' guilt, his evidence of Stewart's guilt was inadmissible because it was *per se* insufficient to create reasonable doubt.

The United States Supreme Court found that the application of this *per se* proscription violated Holmes' right to compulsory process because, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."[13] Indeed, according to the Court,

> The rule applied in this case is no more logical than its converse would be, *i.e.,* a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing,

[8] *Id*. at 322.
[9] *Id*. at 323.
[10] *Id*.
[11] *Id*.
[12] *Id*. at 324.
[13] *Id*. at 331.

> evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of petitioner's guilt.[14]

II. The Failure to Alert and the Totality of the Circumstances

The United States Supreme Court would commit the same fallacy that the Supreme Court of South Carolina committed if it were to find in *Florida v. Harris* that a positive alert by a certified narcotics-detection dog is *per se* sufficient, in and of itself, to establish probable cause for the search of a vehicle. In *Harris v. State*, the Supreme Court of Florida recognized that an amalgam of factors can cause even a certified narcotics-detection dog to give a false alert or a positive alert to a residual odor.[15] Therefore, it rejected the State's arguments that probable cause can be established by a dog's "credentials alone" and "that records of field performance are meaningless…."[16] Instead, it found that

> a necessary part of the totality of the circumstances analysis in a given case regarding the dog's reliability is an evaluation of the evidence concerning whether the dog in the past has falsely alerted, indicating that the dog is not well-trained, or whether the alerts indicate a dog who is alerting on a consistent basis to residual odors, which do not indicate that drugs are present in the vehicle.[17]

Under the State's "credentials alone" conception of probable cause, based solely on an evaluation of the strength of the prosecution's case, a defendant at a suppression hearing would be precluded from challenging the constitutionality of an officer's search. Because the right to compulsory process applies to the same extent at a suppression hearing as it does at trial,[18] such a rule would violate the Sixth Amendment to the same extent as the South Carolina rule in *Holmes*.

Indeed, the violation would ostensibly be of an even greater magnitude. While the defendant in *Holmes* was precluded from presenting evidence of an alternate suspect, he was allowed to call witnesses who placed the State's forensic evidence under the microscope. A few of his "expert witnesses criticized the procedures used by the police in handling the fiber and DNA evidence and in collecting the fingerprint evidence" while

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[14] *Id*. at 330.
[15] 71 So.3d 756, 768-69 (Fla. 2011).
[16] *Id*. at 769.
[17] *Id*.
[18] *See, e.g.,* United States v. Gray, 491 F.3d 138, 161 (4th Cir. 2007) ("Considering facts from the trial record in a suppression appeal makes some sense because the full measure of constitutional and procedural protections governing the development of evidence (for example, confrontation, cross-examination, and compulsory process) are still available to the defendant.").

"[a]nother defense expert provided testimony that [the defendant] cited as supporting his claim that the palm print had been planted by the police."[19]

A "credentials alone" conception of probable cause in the narcotics-detection dog context would render irrelevant evidence that the dog's handler cued the dog into a false alert or incorrectly interpreted the dog's alert, both problems recognized by the Supreme Court of Florida.[20] Moreover, under this conception, evidence of the dog's "credentials alone" would support a finding of probable cause even if there were evidence that the dog was, for example, (1) on medication after an attack at the kennel, (2) less accurate than usual based upon weather conditions, or (3) simply incompetent.

These are the types of arguments made by prosecutors in cases in which narcotics-detection dogs fail to alert and officers proceed with automobile searches. For instance, in *State v. McKay*, an informant told Detective Tom Moreland that Jacquelyn Thompson was distributing cocaine hydrochloride from her workplace and that her son, Mark McKay, was her drug source.[21] Moreland thereafter set up three undercover hand-to-hand purchases with Thompson, and Thompson admitted after the third purchase that McKay was her drug supplier and agreed to work with the police.[22] Police then had Thompson instruct McKay to deliver cocaine hydrochloride to her job, with officers then following McKay as he put a black book bag in his car and drove to his mother's workplace.[23] Sergeant Michael Lewis subsequently conducted a traffic stop and called for a narcotics-detection dog, which "failed to alert during the scan."[24] Lewis nonetheless searched the car and uncovered cocaine hydrochloride as well as marijuana and several thousand dollars.[25]

In denying McKay's motion to suppress the drugs and money, the Court of Special Appeals of Maryland relied upon precedent from other jurisdictions to conclude "that a drug sniffing dog's failure to detect drugs does not automatically negate probable cause. It is, instead, but one factor to be considered in the probable cause determination."[26] In one of the cases cited by the court, some of the other factors considered by the court were that narcotics-detection dogs "are not foolproof" and "are less accurate on hot muggy days…."[27] In *McKay*, the relevant factor was "that the dog was on medication as a result of an attack at the kennel a few days prior and should not have been working that day."[28] The lower court credited testimony relating to the dog failing to alert based on the medication, "as reflected by the court's comment that

[19] Holmes v. South Carolina, 547 U.S. 319, 322-23 (2006).
[20] *Harris*, 71 So.3d at 768-69.
[21] 814 A.2d 592, 594 (Md.App. 2002).
[22] *Id*.
[23] *Id*. at 595.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 599.
[27] United States v. Jodoin, 672 F.2d 232, 236 (1st Cir. 1982).
[28] *McKay*, 814 A.2d at 595.

'sometimes you just have incompetent dogs.'"[29] In affirming, the Court of Special Appeals "treat[ed] that determination as fact."[30]

This, of course, makes sense. As the Supreme Court has indicated on numerous occasions, the probable cause determination depends on a totality of the circumstances.[31] If a court were to find that a dog's failure to alert *per se* vitiated probable cause based upon a factual context like the one presented in *McKay*, it would be doing exactly what the Supreme Court deemed unconstitutional in *Holmes*: reaching a conclusion "by evaluating the strength of only one party's evidence…."[32]

If the Supreme Court were to adopt the State's "credentials alone" conception of probable cause in *Harris*, it would be forgetting its lesson from *Holmes* that strong evidence by either the prosecution or the defense cannot foreclose a court from considering the other side's arguments.[33] To put in in the words of the Court in *Holmes*, such a conclusion "would be no more logical" than a rule that a dog's failure to alert *per se* vitiates probable cause.

A "credentials alone" conception of probable cause is illogical because the conclusion that a failure to alert does not vitiate probable cause is dependent upon the conclusion that narcotics-detection dogs "are not foolproof…."[34] As Professor Shoebotham ably points out in her *amici* brief, narcotics-detection dogs alert to volatile chemicals that are present in drugs but also present in other items such as soap, food additives, and perfume.[35] This point explains why the name "drug sniffing dog" is a misnomer and how there can be cases such as *Horton v. Goose Creek Independent School Dist.*, in which a narcotics-detection dog falsely alerted to a bottle of perfume.[36]

Asking that a positive alert by a certified narcotics-detection dog be only part of the totality of the circumstances analysis for probable cause is asking no more than that defendants be treated the same as police officers who proceed with a search despite a dog's failure to alert. It is asking no more than that the defendant be able to present evidence that a dog's positive alert was tainted by the dog being medicated, confused by weather conditions, or even incompetent. It also is asking for no more than the Constitution requires.

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[29] *Id*. at 599.
[30] *Id.*
[31] *See, e.g.,* Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.").
[32] Holmes v. South Carolina, 547 U.S. 319, 331 (2006).
[33] An analogy can drawn to the failed attempt to recreate the Staff of Ra from the markings on only one side of its headpiece in "Raiders of the Lost Ark." Raiders of the Lost Ark (Paramount Pictures 1981).
[34] United States v. Jodoin, 672 F.2d 232, 236 (1st Cir. 1982).
[35] Brief of Amici Curiae Fourth Amendment Scholars in Support of Respondent, Florida v. Harris, 2012 WL 3864280, at 25-26 (2012).
[36] 690 F.2d 470, 474 (5th Cir. 1982).