IN THE SUPREME COURT OF FLORIDA

CLAYTON HARRIS,

Petitioner,

v.

CASE NO. SC08-1871

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The Court accepted this case to resolve express and direct interdistrict conflict on whether the state may establish probable cause to search a vehicle from a trained drug detector dog's positive alert on the vehicle's exterior without providing evidence of the dog's field performance history.

Herein, the record proper is cited as "R," the transcript of the October 12, 2006, suppression hearing as "T," and the transcript of the November 9, 2006, sentencing hearing as "S." A supplemental record is cited as "SR."

STATEMENT OF THE CASE AND FACTS

The state charged Harris with possession of pseudoephedrine for use in making methamphetamine, contrary to section 893.149(1)(a), Florida Statutes (2006). (R10) Defense counsel moved to suppress the physical evidence as the product of a search undertaken without either a warrant or probable case. (SR1-11) Counsel asserted that the search was prompted by a "false alert" by a drug-detection dog, and noted the interdistrict conflict on whether evidence of a dog's "track record" is necessary to the probable cause determination. (SR3-4)

Circuit Judge Ralph Smith, Jr., presided in an October 12, 2006, hearing on the motion to suppress. The state presented the testimony of William Wheetley, canine officer for the Liberty County Sheriff's Office. Wheetley, who had three years of law enforcement experience, gained custody of K9 Aldo in July 2005. (T11-12) Documents admitted at the hearing as Composite Exhibit 1 showed that Aldo completed a 120-hour course presented by the Apopka Police Department in January 2004 and obtained a K-9 drug certification from an organization named Drug Beat in February, 2004, both with a handler other than Wheetley. Aldo and Wheetley completed a 30-hour seminar presented by the Dothan Police Department in February, 2006. Aldo was trained and certified to detect cannabis, methamphetamine, cocaine, and heroin, and "[a]lso did some crack cocaine and some Ecstasy," according to Wheetley. (T14) Aldo was not trained to alert to

pseudoephedrine, an ingredient in methamphetamine. (T32-34) Wheetley testified that the Florida Department of Law Enforcement does not require certification of dogs such as Aldo who perform only a single function, in this instance drug detection. (T27-28).

Wheetley testified that he conducted four hours of in-house training with Aldo weekly. (T15) In a common exercise, drugs would be hidden inside some wrecked vehicles located at a wrecker yard but not others, to determine whether Aldo would alert only to the vehicles containing drugs. (T15-16) Wheetley testified that when Aldo smells narcotics, he gets excited and alerts passively by sitting down to receive a reward. (T16)

Wheetley deployed Aldo approximately five times per month "on the road." (T18) The state did not present any records of Aldo's field encounters. Wheetley testified that he kept records only of instances in which Aldo alerted and then suspects were arrested. (T28, 31) Consequently, Wheetley did not have a record of a stop of Harris' vehicle, in which Aldo alerted but no drugs were found, after the stop of Harris' vehicle in this case. (T31) Another officer testified that the second stop occurred four to six weeks before the October 12 hearing. (T5-8)

On June 24, 2006, Wheetley pulled Harris over for an expired tag. (T19) Wheetley refused consent for a search. (T2). Wheetley deployed Aldo, who alerted to the driver's door handle. (T21) In Wheetley's experience, when Aldo

alerts on a car door handle, it usually means someone who touched or smoked narcotics had then touched the handle, leaving a residual smell. (T35) Wheetley did not feel comfortable testifying how long after contact Aldo could detect the residual odor. (T35)

After the alert, Wheetley searched Harris' truck. (T22) The officer found 200 loose pseudoephedrine pills wrapped in a shirt under the driver's seat. (T23) Elsewhere in the truck, Wheetley found muriatic acid (T23) and eight boxes of matches (T35). Harris, who had been placed under arrest, told Wheetley he purchased the items to cook methamphetamine. (T23-25)

The prosecutor argued the search could be justified as an incident to arrest for driving with an expired tag or the open container violation, or in the alternative based on probable arising from Aldo's alert. (T40-41) The defense argued that the officer had authority to cite Harris for an open container and the tag violation but not to arrest and search. Counsel asserted that there was no probable cause to search because Wheetley testified that Aldo alerted to a residual odor, Aldo was not trained to detect any substance found in the vehicle, and, during a second search, Aldo again alerted to the same door handle on the same vehicle even though there was no contraband whatsoever in the vehicle. (T41-43). The trial court found probable cause to support the search and denied the motion to suppress. (T47)

Harris pled no contest, expressly reserving the right to appeal the denial of the motion to suppress, which the prosecutor agreed was dispositive of the case. (T48-54) The court adjudicated Harris guilty and sentenced him to two years in prison followed by five years on probation, including three years on drug offender probation. (R11-17, 28-32, S3-12)

In the direct appeal, Harris asserted Wheetley lacked probable case to search Harris' truck because Aldo alerted to a "dead scent" and because the absence of Aldo's field accuracy records rendered his alert an unreliable indicator of the presence of drugs. The First District Court of Appeal affirmed the conviction per curiam, as follows:

> AFFIRMED. See State v. Laveroni, 910 So.2d 333 (Fla. 4th DCA 2005); State v. Coleman, 911 So.2d 259 (Fla. 5th DCA 2005). Contra Gibson v. State, 968 So.2d 631 (Fla. 2d DCA 2007) (following Matheson v. State, 870 So.2d 8 (Fla. 2d DCA 2003)).

Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008). Now-Justice Polston was on the district court panel in this case.

This Court granted discretionary review. This brief follows.

SUMMARY OF THE ARGUMENT

I. As an instrument of probable cause, a drug-detector dog must be proven reliable. Because dogs can detect the odor of substances long gone, a dog is not a reliable gauge of the presence of drugs if it has a record of alerting when the ensuing search yields no contraband to which the dog was trained to alert. Therefore, in seeking to establish probable cause for a warrantless search of an automobile, the state must present the dog's record in the field so that the court can assess the likelihood that the dog has alerted to a residual odor in an individual case.

The state should be tasked with presenting field-performance records. A drug dog's handler is a law enforcement officer, an agent of the state. Further, the state has the burden of demonstrating probable cause for a warrantless search. Therefore, it only makes sense to require the state to present a dog's field performance records in order to create a prima facie case of probable cause. This will ensure such records are created, maintained, and retained.

II. Even if the state has no obligation to present field accuracy records to establish probable cause for the warrantless search of an automobile, the unique circumstances of this case overcame the prima facie showing of probable cause from introduction of the dog's certification and training records. There was no evidence that either in its certification training or weekly sessions with its handler

that the dog was trained to distinguish live or fresh odors from stale, dead, or residual scents. In fact, the dog alerted to a residual or dead scent on the driver's door handle of Harris' truck on two different days. Although Harris' truck contained pseudoephedrine on the first occasion, the state presented no evidence below that a dog trained to detect methamphetamine would also alert to the presence of its precursor, pseudoephedrine. On the second occasion, the truck did not even contain pseudoephedrine. The state produced no evidence how long after a scent is placed on an object such as a door handle it would remain detectable to a trained narcotics dog. Consequently, the trial court erred in denying the motion to suppress, and the First District erred in failing to overturn the trial court's ruling on the dispositive motion.

ARGUMENT

I. A POSITIVE ALERT TO THE EXTERIOR OF A VEHICLE BY AN EXPERIENCED DRUG-DETECTOR DOG DOES NOT ESTABLISH PROBABLE CAUSE TO SEARCH THE VEHICLE WITHOUT EVIDENCE THAT THE DOG'S PREVIOUS ALERTS IN THE FIELD RELIABLY RESULTED IN THE DISCOVERY OF CONTRABAND.

Conflict issue: The precedent cited in the First District's citation PCA frames the conflict issue: Does evidence that a trained, certified drug detector dog alerted to the exterior of a vehicle create probable cause to search the vehicle's interior, without additional evidence on whether the dog's other positive alerts in the field led to the discovery of contraband? In the decisions cited by the First District as authority for affirmance, the Fourth and Fifth districts concluded that field performance records were not essential to a probable cause determination. State v. Coleman, 911 So. 2d 259, 261 (Fla. 5th DCA 2005); State v. Laveroni, 910 So. 2d 333, 336 (Fla. 4th DCA 2005). In the decision cited "contra" by the First District, the Second District reaffirmed its holding in Matheson v. State, 870 So. 2d 8, 12 (Fla. 2d DCA 2003), rev. dismissed, 896 So. 2d 748 (Fla. 2003), that "[t]o demonstrate that an alert by a narcotics detection dog is sufficiently reliable to furnish probable cause to search, the State must introduce evidence of the dog's 'track record' or performance history." Gibson v. State, 968 So. 2d 631, 631 (Fla.

2d DCA 2007), rev. dismissed, 985 So. 2d 1088 (Fla. 2008). The court in Gibson certified conflict with Coleman and Laveroni. The courts in Coleman and Laveroni certified direct conflict with Matheson. The First District's citation PCA in this case is in direct and express conflict with Gibson, and implicit conflict with Matheson and Tedder v. State, 33 Fla. L. Weekly D704 (Fla. 2d DCA Mar. 7, 2008), rev. denied, 996 So. 2d 213 (Fla. 2008),[1] in which the Second District (in an opinion by now-Justice Canady) followed Gibson and Matheson.

Standard of review: This Court "independently review[s] mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendments and, by extension, article I, section 9 of the Florida Constitution." Connor v. State, 803 So. 2d 598, 607-08 (Fla. 2001).

Discussion: As an instrument of probable cause, a drug-detector dog is subject to the same reliability requirements as any other hearsay source. When a drug dog has experience in alerting to cars in the world at large and not merely in training or controlled testing, a positive alert to a particular car creates probable cause to search the car's exterior only if the state establishes that previous alerts in analogous situations yielded contraband to which the dog is conditioned to alert.

1. This Court denied the state's petition to review the certified conflict with Coleman and Laveroni, citing its dismissal of review in Gibson. Tedder's separate petition for review on a different issue remains pending. Fla. Sup. Ct. No. SC08-1055.

Consequently, the state must, as part of its burden of production and proof for a warrantless automobile search, produce field-performance records of an experienced drug-detector dog as a measure of reliability.

The discussion that follows explores (1) the burden of proof for warrantless automobile searches, (2) the quantum of evidence necessary to satisfy the burden of proof when the state relies on a dog alert, and (3) analogous reliability requirements for searches based on tips from confidential informants and the presumption of impairment arising from breathalyzer tests, before explaining why evidence of performance in the field is necessary for a probable cause determination based on a dog alert.

"[I]f a car is readily mobile and probable cause exists to believes it contains contraband, the Fourth Amendment permits police to search the vehicle without more." State v. Green, 943 So. 2d 1004, 1005-06 (Fla. 2d DCA 2006)(citing Pennsylvania v. Labron, 518 U.S. 938, 940 (1996)). Probable cause to search the passenger compartment of a car means a "fair probability that contraband or evidence of a crime will be found" there. United States v. Sokolow, 490 U.S. 1, 7, (1989). The government has the burden to establish probable cause for a warrantless search. Doorbal v. State, 837 So. 2d 940, 952 (Fla. 2003); Doctor v. State, 596 So. 2d 442, 445 (Fla. 1992).

The courts in Matheson, Coleman, and Laveroni agreed that a drug dog's performance in the field is relevant to the trial court's probable cause determination. The Fourth and Fifth districts concluded, however,

> that the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony. Whether probable cause has been established will then be resolved by the trial court.

Laveroni, 910 So. 2d at 336 (cites omitted); see also Coleman, 911 So. 2d at 260 (adopting passage from Laveroni). The Second District disagrees:

> "Prima facie" means that the proponent has fulfilled his duty to produce evidence and there is sufficient evidence for the court to consider the issue. Charles W. Ehrhardt, Florida Evidence § 301.2 (2002). Thus, the proposition advanced by the State is that the fact that a dog has been trained and certified to detect narcotics, standing alone, justifies an officer's reliance on the dog's alert to establish probable cause to search. But our review of the record and of pertinent literature convinces us that this is not enough.

Matheson, 870 So. 2d at 13.

The Second District gave three reasons for its conclusion. First, because the dog's detection of the odor does not mean that the substance itself is present, "[a]n officer who know that his dog is trained and certified, and who has no other information, at most can only suspect that a search based on the dog's alert will

yield contraband. Of course, mere suspicion cannot justify a search." Id. Second, because "conditioning and certification problems vary widely in their methods, elements, and tolerances for failure, . . . simply characterizing a dog as 'trained' and 'certified' imparts scant information about what the dog has been conditioned to do or not to do, or how successfully." Id. at 14. Third, "dogs themselves vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments and circumstances, . . . and a dog's ability can change over time." Id. These considerations led the Second District to conclude "that the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert." Id.

The Fourth District found Matheson "out of the mainstream" on its requirement of field performance records to demonstrate probable cause from a dog's alert. Laveroni, 910 So. 2d at 335. In reality, Matheson may have nudged the mainstream closer to recognizing that a drug dog's sensitivity to residual odors makes field performance records critical to the probable cause determination. See, e.g., State v. Williams, 967 So. 2d 941, 944 (Fla. 1st DCA 2007) (citing Matheson and quoting previous First District concurrence to observe that "the possibility of the detection of residual odors 'is a very good reason to hold that a dog alert does not justify a search of the driver or passengers,' "); State v. Gibson, 108 P.3d 424, 430 (Idaho App. Ct. 2005) (citing discussion in Matheson for observation that "the

dog's superior ability to detect odors is both a strength and weakness as to establishing probable cause").

Ultimately, however, Fourth Amendment questions should be answered not by following the current majority view, but by reasoning and analogy. On the question of what makes an alert reliable enough to create a fair probability that contraband will be found, the drug dog can be compared to two other instruments used to generate legal probabilities: confidential informants and breath-alcohol tests.

Hearsay information from a confidential informant can support a search warrant if, under the totality of the circumstances, the circumstances show that the information is reliable. State v. Peterson, 739 So. 2d 561, 564 (Fla. 1999); State v. Butler, 655 So. 2d 1123, 1126-29 (Fla. 1995). Pertinent factors include how the informant acquired the information, how much detail is included in the tip, whether the tip has been partially corroborated, and whether the informant has previously provided reliable information that proved accurate. Butler, 655 So. 2d at 1126-29. On the last of these factors, reliability, a search warrant affidavit will typically reflect that the source previously provided information regarding illegal activities a specific number of times, resulting in a specific number or percentage of arrests. See, e.g., Peterson, 739 So. 2d at 564; Butler, 655 So. 2d at 1130. From this

indicator of veracity, combined with other factors, the magistrate can assess whether the affidavit creates probable cause for issuance of a search warrant.

To some degree, a drug dog's alert is an out-of-court tip concerning possible criminal activity. Properly interpreted by its handler, the alert indicates the presence of one of the substances to which the dog is conditioned to alert. The dog acquired the information through its sense of smell and learned to communicate the information through conditioning. The alert provides the trainer no detail other than that the dog has detected an odors triggering the alert. Because the alert communicates no other information, the tip cannot be corroborated. Police may acquire different facts to aid in the probable cause determination, but these facts do not corroborate the dog's sensation of a particular odor. Of the factors discussed in Gates, Butler, and Peterson, the dog's past performance is the only possible measure of the alert's reliability.

In some ways, a drug dog is also like a breathalyzer. As noted above, the dog's alert means it has detected the odor of one of a number of substances, and is used to assess probable cause to search. A breathalyzer reading informs police of the driver's breath-alcohol level, and is used to presume impairment in a DUI prosecution if the state has complied with testing requirements prescribed by statute and administrative rules. See § 316.1934, Fla. Stat. (2008); Jenkins v. State, 855 So. 2d 1219, 1223 (Fla. 1st DCA 2003).

In contrast, a drug dog does not undergo testing or certification under state-level standards. Wheetley testified that the Florida Department of Law Enforcement does not have certification standards for drug dogs, (S27) and petitioner is aware of no statutes or administrative rules governing drug dog reliability. Aldo's training history illustrates the lack of uniform standards: he received training certificates from the police departments of two small cities and a private organization. Aldo also trained four hours weekly. Wheetley testified that during training, drugs would be placed in some wrecked vehicles but not others and Aldo would be led around the cars to determine whether he could tell which ones had drugs—an olfactory Easter egg hunt. (S15) There was no testimony that either Aldo's certification testing or his weekly training focused on his ability to discern fresh from residual or "stale" odors. Cf. Matheson, 870 So. 2d at 14 (noting that in neither in training nor recertification course was dog "conditioned to refrain from alerting to residual odors"). Further, as noted in Matheson, a dog cannot "be calibrated to achieve mechanically consistent results." Id. at 14. Because of the absence of uniform standards for either training or certification and the lack of attention to residual odors in the training and testing that does occur, an alert by a dog with Aldo's training and certification record should not simply be presumed reliable.

Reliability necessitates residual odor testing, which occurs in the field -- and judging from the evidence in this case, only in the field. In fact, Wheetley testified that Aldo alerted to a residual odor in this case. (S36) The dog's alert to the driver's door handle of Harris' truck meant the handle had been touched by someone who had handled one of the substances to which Aldo was trained to alert. (T35) Asked how long beforehand this contact might have occurred, Wheetley could not say, calling it a "question for an expert." (T35) The ensuing search yielded none of those substances, only pseudoephedrine pills, which are sold in pharmacies and used in the manufacture of methamphetamine. Aldo was not trained to detect pseudoephedrine. (S33)[2] When questioned, Harris, who was stopped just east of Bristol, told Wheetley he had purchased the pseudoephedrine and other material to cook methamphetamine in Tallahassee, that he last made methamphetamine for personal use two weeks earlier, and that he could not go more than two days without using the drug. (S25) This stop occurred June 24, 2006. (S25) In another stop of Harris' vehicle after June 24 and four to six weeks before the October 12, 2006, suppression hearing, Aldo again alerted to the truck's driver-side door but the search yielded nothing but an open container of alcohol.

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2. The literature reflects controversy in the courts over a dog's ability to distinguish legal substances that are similar to, or found in, illegal drugs from the illegal drugs themselves. See Lewis R. Katz and Aaron P. Golembiowski, Curbing the Dog: Extending the Protection of the Fourth American to Police Drug Dogs, 85 Neb. L. Rev. 735, 755-56 (2007).

(S5-9, 31-32) That makes two alerts to Harris' driver-side door handle in a matter of weeks.

Because the possibility that a stale or residual odor will cause a dog to alert inheres in the use of drug-detection dogs, it should be a threshold consideration whenever a defendant seeks to suppress the fruits of an automobile search resting on an alert. This can be accomplished only by requiring the state to produce evidence that the dog does not often alert to stale odors, also known as "dead scents." Matheson, 870 So. 2d at 13. With a dog experienced in real-world deployments, such evidence consists of field performance history, with an "emphasis on the amount of false alerts or mistakes the dog has furnished." Id. at 14 (quoting State v. Foster, 390 So. 2d 469, 470 (Fla. 3d DCA 1980)).

The state is peculiarly situated to bring this essential information to the table in a suppression hearing. Only the state, in the form of the law enforcement agency that deploys a drug-detector dog, can compile and maintain records of the dog's field performance history. Only the state has the burden of establishing probable cause for a warrantless search. See Lewis v. State, 979 So. 2d 1197, 1200 (Fla. 4th DCA 2008) (noting that a warrantless search "constitutes a prima facie showing which shifts to the state the burden of showing the search's legality," and that the court could find no case law "holding that the burden ever shifts back to the defendant to show that the search is illegal"). Therefore, it only makes sense to

require the state to present these records in order to create a prima facie case of probable cause. Including field performance history in the state's burden of proof of probable cause will ensure such records are created, maintained, and retained. If the onus is placed on the defense, failure to generate performance records, as in this case, (S28-31) and loss of the records, as in Coleman, 911 So. 2d at 260, are more likely. Placing the burden on the state generates more information relevant to the probable cause determination, improving judicial decision making.

For these reasons, Petitioner urges this Court to hold that, to establish that an alert to the exterior of a vehicle by a drug-detector dog creates probable cause for a warrantless search of the car's interior, the state must present, in addition to evidence of the dog's training and certification, evidence of the dog's field-performance record, with a focus on whether positive alerts preceded the discovery of contraband the dog was trained to detect. The Court should approve the Second District's decisions in Matheson, Gibson, and Tedder, disapprove the decisions in Laveroni and Coleman, and quash the First District's decision in this case.

II. EVIDENCE THAT ON TWO DIFFERENT OCCASIONS, THE DRUG-DETECTOR DOG ALERTED TO PETITIONER'S TRUCK WHEN IT DID NOT CONTAIN DRUGS TO WHICH THE DOG WAS CONDITIONED TO ALERT REBUTTED THE STATE'S PRIMA FACIE SHOWING OF PROBABLE CAUSE.

On June 24, 2006, Aldo alerted to the driver's door handle of Harris' truck. The truck contained pseudoephedrine, an ingredient in methamphetamine, but Aldo was not trained to alert to pseudoephedrine. On a later date four to six weeks before the October 12, 2006, suppression hearing, Aldo again alerted to the driver's door handle. That time, the truck contained no pseudoephedrine and none of the other drugs to which he was conditioned to alert. Aldo's handler explained the June 24 alert as the product of Aldo's recognition of the residual odor of methamphetamine left by someone who, at some point, had touched the handle after touching or smoking methamphetamine. Presumably, this explanation covers the subsequent alert as well.

Even if the state has no obligation to present field accuracy records to establish probable cause for the warrantless search of an automobile, Aldo nonetheless gave two alerts to two odors that did not result in the discovery of contraband to alert. This evidence overcame the prima facie showing of probable cause from introduction of Aldo's certification and training records. Consequently, the trial court erred in denying the motion to suppress, and the First

District erred in failing to overturn the trial court's ruling on the dispositive motion.

Standard of review: This Court "independently review[s] mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendments and, by extension, article I, section 9 of the Florida Constitution." Connor v. State, 803 So.2d 598, 607-08 (Fla. 2001).

Discussion: The Second, Fourth, and Fifth districts agree that evidence of a drug-detector dog's performance history—whether alerts led to the discovery of contraband to which the dog was trained to alert—is at the very least relevant to the court's probable cause determination. See Laveroni, 911 So. 2d at 259 (stating the handler's testimony concerning dog's performance in the field "was clearly relevant because it tended to show that the police reasonably relied upon the dog's alert"); Coleman, 910 So. 2d at 335 ("[B]ecause these dogs are not always correct, their past performance records are relevant."); Matheson, 870 So. 2d at 15 ("[T]he most telling indicator of what the dog's behavior means is the dog's past performance in the field.").

Under the totality of the unusual and perhaps unique circumstances in this case, Aldo's alert did not create probable cause for the warrantless search of Harris' truck on June 24, 2006. The record shows that Aldo completed 120 hours of training in narcotics detection by the Apopka Police Department with a previous

handler, Morris, in January, 2004, earned another certification with Morris by "Dug Beat" in February 2004, completed a 20-hour course by the Dothan Police Department with Wheetley in February 2006, and performed well in weekly training sessions with Wheetley. However, there was no evidence that, either in his certification training or weekly training with Wheetley, Aldo was trained to distinguish live or fresh odors from stale, dead, or residual scents. In fact, Aldo alerted twice to a residual or dead scent on the driver's door handle of Harris' truck, first on June 24, 2006, and again four to six weeks before the October 12, 2006, hearing. Although Harris' truck contained pseudoephedrine on June 24, the state presented no evidence that a dog trained to detect methamphetamine, such as Aldo, would also alert to the presence of its precursor, pseudoephedrine. On the second occasion, the truck did not even contain pseudoephedrine. The state also produced no evidence how long after a scent is placed on an object such as a door handle it would remain detectable to a trained narcotics dog.

Considering all these circumstances, this Court should conclude that Aldo's alert to Harris' driver's door handle on June 24, 2006, did not create a fair probability that contraband or evidence of a crime would be found in the passenger compartment. The First District's decision affirming Harris' conviction should be quashed and the case remanded with directions to discharge him.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Petitioner requests that this Court quash the decision of the First District Court of Appeal and remand with directions to reverse Harris' conviction and remand for discharge.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Natalie D. Kirk, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this ____ day of February, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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APPENDIX

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