NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ROLAND KAILIHIWA
Petitioner-Appellant-Defendant

- vs -

UNITED STATES OF AMERICA
Respondent-Appellee-Plaintiff

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

&

PETITION FOR WRIT OF CERTIORARI

PETER C. WOLFF, JR.
Federal Public Defender
District of Hawaii
300 Ala Moana Boulevard, Suite 7104
Honolulu, Hawaii 96850
Telephone: (808) 541-2521
Facsimile: (808) 541-3545
Counsel of Record for Petitioner
ROLAND KAILIHIWA

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ROLAND KAILIHIWA

QUESTION PRESENTED

Police trained Mervin, a drug-detection canine, to alert on minimal residual odor. In accord with that training, Mervin often alerted on parcels containing no contraband drugs, which police officers, testifying as experts, opined was most likely explained by the parcels having been contaminated by residual drug odor on their way to Hawaii. Such proximity, this Court has held in other contexts, does not give rise to probable cause. The question presented here is whether Mervin's positive alert on a parcel shipped to Hawaii, given his unsophisticated training and the possibility of contamination, suffices to establish probable cause to issue a warrant to search the parcel.

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PETITION FOR WRIT OF CERTIORARI

Roland Kailihiwa respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the United States District Court for the District of Hawaii's oral ruling denying his Fourth Amendment suppression motion.

OPINIONS BELOW

The Ninth Circuit's unpublished order is appended to this petition at App. at 1 and can be found at 755 Fed.Appx. 689 (Mem) (CA9 Feb. 28, 2019). The district court's oral ruling is appended to this petition at App. at 3.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. The district court had jurisdiction pursuant to 18 U.S.C. §3231.

CONSTITUTIONAL, STATUORY, & GUIDELINE PROVISIONS

"[N]o Warrants shall issue, but upon probable cause …." U.S. Const., amend. IV.

STATEMENT OF THE CASE

The government accused Kailihiwa of attempting to possess methamphetamine that had been in a parcel agents interdicted and, in a second count, of possessing more methamphetamine that agents found in his home when they delivered the parcel. In the district court, Kailihiwa moved to suppress the drugs. He argued that the warrant agents had obtained to search the parcel was

invalid because agents had omitted material information about Mervin, a drug-detecting canine, whose positive alert on the parcel provided the basis for probable cause to issue the warrant. One of his contentions in the district court was that agents did not tell the magistrate that Mervin had a history of "false" alerts—positive alerts on parcels that did not end up containing any contraband—and that, once that history was factored into the totality of the circumstances, a positive alert from Mervin was not reliable enough to establish probable cause to search a parcel for drugs.

The district court rejected that contention. Invoking testimony from government agents, the district court agreed that Mervin's unproductive alerts were likely the result of the parcels having been contaminated with residual odor. App. at 21–22. The district court nonetheless ruled that, even had the agents included the omitted information about Mervin's history of unproductive alerts and their opinions that such alerts were the product of contamination, Mervin's positive alert on the parcel at issue here established probable cause to issue the warrant. App. at 24.

On direct appeal, Kailihiwa pursued his claim that the warrant had not issued upon probable cause because Mervin's alert did not suffice to establish probable cause, due to the possibility of parcel contamination en route to Hawaii and Mervin's history of alerting on possibly contaminated parcels. The Ninth Circuit held that the framework articulated in *Franks v. Delaware*, 438 U.S. 154 (1978), allowed it to not reach the issue. In so ruling, the Ninth Circuit misapprehended Kailihiwa's claim. His claim fits within the *Franks* framework because he argues that an affidavit that

contained the omitted information about Mervin's history of alerting on contaminated parcels would not have established probable cause to issue the warrant. See, e.g., *United States v. Ippolito*, 774 F.2d 1482, 1486–1487 n. 1 (CA9 1985) (acknowledging *Franks*' application to omissions (citing *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (CA9 1980)); *Olson v. Tyler*, 771 F.2d 277, 281 n. 5 (CA7 1985) (same); *United States v. Ferguson*, 758 F.2d 843, 848 (CA2 1985); *United States v. Johnson*, 696 F.2d 115, 118 (CA DC 1982); *United States v. House*, 604 F.2d 1135, 1151 (CA8 1979). The Ninth Circuit failed to perceive, that is, that the district court essentially ruled that information about contamination and Mervin's history of alerting on contaminated parcels was not material to finding probable cause, and Kailihiwa challenged that *Franks* determination on appeal, contending that such omissions were material because they precluded finding probable cause to issue the warrant.

REASON FOR GRANTING THE WRIT

Dogs can be trained in an unsophisticated way to alert on minimal residual odor. Dogs can also be trained in a sophisticated way to ignore minimal residual odor. See, e.g., *United States v. $22,474.00 in U.S. Currency*, 246 F.3d 1212 (CA9 2001). Mervin's training was unsophisticated; he was trained to alert on minimal residual odor; and he frequently *did* alert on parcels that did *not* contain contraband (including one such unproductive alert that he made contemporaneously with the alert at issue in this case). App. at 13–14, 21–23. Agents testifying as experts (credibly so, according to the district court), opined that such unproductive alerts were

explained by the parcels having been contaminated with residual odor, due to being near some other, drug-laden, parcel en route to Hawaii (App. at 21–22).

In *Florida v. Harris*, 568 U.S. 237, 247 (2013), this Court noted that probable cause usually arises from a trained dog's positive alert. This Court, however, provided the caveat that the "circumstances surrounding a particular alert may undermine the case for probable cause." *Id.* And this Court emphasized that, ultimately, the "question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband." *Id.* This Court made these remarks in the context of a dog that appears to have been trained in a more sophisticated way than was Mervin, insofar as this Court noted that the *Harris* dog was "trained to detect certain narcotics," as opposed to merely their residual odor no matter how faint those odors may be.

This case provides this Court with the opportunity to provide further guidance on what circumstances suffice to undermine the case for probable cause from a dog's alert. In particular, this case allows this Court to clarify that, where government agents admit the possibility of contamination explains a dog's history of unproductive alerts, probable cause requires something more than that dog's positive alert standing alone. Evidence of more sophisticated remedial training might suffice, as might some other indicia of drug trafficking. But an unsophisticated dog's positive alert, against a history of unproductive alerts and a training record that evinces he

was trained to alert on minimal residual odor, should not suffice standing alone to establish probable cause under *Harris*.

Common sense provides the reason for that. An unsophisticated dog's alert amounts to merely an assertion that a parcel smells like contraband, but does not provide any further support for inferring why the parcel smells like contraband. Standing alone, the alert does not attest that drugs are actually in the parcel. All the alert attests is that the parcel may contain drugs or, instead, may merely have been near drugs or something else that contained drugs at some point in the past. Moreover, unlike a sophisticated dog's alert, an unsophisticated dog's alert does not speak to how recently that proximity may have occurred. And this is where the unsophisticated dog's alert flounders on the shoals of *Ybarra v. Illinois*, 44 U.S. 85, 91–93 & n. 4 (1979), in which this Court held that probable cause does not arise from "mere propinquity" to someone else's criminal activity, and *Illinois v. Wardlaw*, 528 U.S. 119, 123–124 (2000), in which this Court acknowledged that hunches do not establish probable cause (or even reasonable suspicion). From Mervin's unsophisticated alert on a parcel shipped to Hawaii, it takes a hunch to infer that actual contraband will be found in that parcel, given the admitted possibility of contamination from the parcel's possible propinquity to some other parcel that contained contraband and Mervin's history of alerting on contaminated parcels.

CONCLUSION

This Court should grant this petition to provide guidance on what circumstances suffice to undermine the case for probable cause under *Harris*.

Specifically, this Court should use this case to clarify that circumstances that include an unsophisticated dog's history of unproductive alerts on parcels agents believe were contaminated with residual drug odor rebuts the *Harris* presumption that probable arises from a drug-detection dog's positive alert in the ordinary case.

DATED: Honolulu, Hawaii, April 24, 2019.

PETER C. WOLFF, JR.
Federal Public Defender, District of Hawaii
300 Ala Moana Boulevard, Suite 7104
Honolulu, Hawaii 96850-5269
Telephone: (808) 541-2521
Facsimile: (808) 541-3545
Counsel of Record for Petitioner
ROLAND KAILIHIWA