

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

-v-

ARTHUR JAMES PIERRE,
Defendant/Appellant/Petitioner,

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Under FED. R. EVID. 402/403, whether a prosecutor can introduce evidence of a drug-sniffing dogs' false alert (i.e., no drugs) as evidence of drug possession.

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INTRODUCTION

When may the Government introduce evidence of a dog's alert when no drugs were found that the dog supposedly 'alerted' to?

After persuading the District Court to reverse the pretrial order *excluding* this evidence, the officer who handled the dog, Bartje, testified:

Q: What was [Bartke, the dog] altering to?

A: The presence of narcotics.

Q: What drugs was Bartje trained to alter to?

A: Marijuana, cocaine, meth, and heroin.

A. The trial evidence contained no recordings with Mr. Pierre, no drug seizures from Mr. Pierre, no videos showing Mr. Pierre engaged in illegal activity, no ledgers with Mr. Pierre's name on it, and no phone records with Mr. Pierre's phone number.

Certiorari could give guidance to Appeals Courts across the country in determining whether the Government will be permitted to alchemize a no-drug/narcotics prosecution into a drug possession case on this form of quasi-evidence.

OPINIONS BELOW

The September 28, 2017, opinion of the U.S. Court of Appeals for the Fifth Circuit appears in Appendix "A". *United States v. Kiekow*, 872 F.3d 236 (5th Cir. 2017). The Fifth Circuit's October 30, 2017 order denying rehearing and rehearing *en banc* is unpublished.

JURISDICTION

The Fifth Circuit its decision on September 18, 2017, and denied a timely rehearing petition on October 30, 2017. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE FACTS

In the summer of 2013, the United States Attorney's Office in Plano realized it had a

twofold problem on its hands typical of its no-drug/narcotics prosecutions. A large and complex drug case had dragged on for several years and one reset on the eve of trial in January of that year. The Government tried to streamline the case by dismissing the Third Superseding Indictment's second count, Conspiracy to Commit Money Laundering in violation of 18 USC §1956(h), and proceeding to trial on a single 21 USC §846 narcotics conspiracy count.

But the problem was this: the alleged ringleader, Arthur Pierre, lived in New Orleans and Mississippi, hundreds of miles away from the narcotics activities in the Southern District of Texas. Worse still for the Government, Pierre gave a consent search of his New Orleans house when confronted in July 2010, but no drugs were found in the house or anywhere near it. The Government had cut plea deals with nine cooperators who ultimately testified against Pierre, but their version of the events was not corroborated by any physical evidence of drug trafficking: no recordings with Mr. Pierre, no drug seizures from Mr. Pierre, no videos showing Mr. Pierre engaged in illegal activity, no ledgers with Mr. Pierre's name on it, and no phone records with Mr. Pierre's phone number.

Ultimately, the jury saw most of the Government's problems for what they were: even though multiple government witnesses testified that they provided Mr. Pierre with hundreds of pounds of marijuana, the jury acquitted Mr. Pierre of having any involvement in a conspiracy to distribute marijuana.

To fill the remaining hole in its case, the Government came up with a solution. After Pierre gave his consent to search his home, but no drugs or even drug residue was found, a dog named Bartje alerted to something he supposedly smelled. Pierre had successfully made a pretrial motion *in limine* to exclude this quasi/non-evidence of the absence of any located drugs, and the Magistrate Judge agreed:

Because the alert cannot define the who, what or when – and because there is no possibility of examining or cross-examining Bartje as to the who, what or when of the alert – any testimony about it would confuse the issues and unduly prejudice Defendant.

ROA.18452 (report and recommendation soon thereafter adopted by District Judge).

Rather than appeal the Magistrate’s R&R to the District Judge, the Prosecutor sat on this issue until the end of trial, when Pierre had already constructed his defense around this evidentiary parameter. And Pierre’s defense was no idle one; after presenting a passel of character witnesses, Pierre testified in his own defense.

After persuading the District Court to reverse the pretrial order, the officer who handled Bartje testified:

Q: What was [Bartke, the dog] altering to?

A: The presence of narcotics.

Q: What drugs was Bartje trained to alter to?

A: Marijuana, cocaine, meth, and heroin.

ROA.3801.

The jury was confused, just as the Magistrate Judge had prophesied in his Report and Recommendation. Pierre was convicted.

STATEMENT OF THE CASE

A. Indictment

On September 12, 2012, Pierre and six others were charged in a Third Superseding Indictment with one count of Conspiracy to Distribute or Possess With Intent to Distribute Cocaine Methamphetamine; Marijuana, or 3,4 Methylenedioxymethamphetamine (“Ecstasy”) in violation of 21 USC §846. ROA.18-20, Doc. No. 566.

Count Two alleged Conspiracy to Commit Money Laundering in violation of 18 USC §1956(h). ROA.20-27. However, on January 9, 2013, the Government filed a motion to dismiss

the second count of this Third Superseding Indictment, ROA.158, Doc. No. 636, which the District Court granted the following day. ROA.161, Doc. No. 638.

Forfeiture contentions are presented at ROA.27-30, with property owned by Pierre specified at Paragraphs 4-8, ROA.28-29.

B. Motions Regarding the Dog Sniff When No Drugs Were Found That the Dog Apparently ‘Smelled’ Their Absence Notwithstanding

When Pierre was arrested on July 1, 2010 at his house, a dog named Bartje alerted, even though no drugs were found.

On August 12, 2011, Pierre filed a motion in limine, of which Paragraph 5 reads:

When Arthur Pierre was arrested, agents searched his home and the adjacent property. During the search of his home, a K-9 alerted to a dresser in the bedroom. (Bond Hearing p. 21-22). However, no drugs were discovered anywhere. By itself this alert means nothing. As Officer John Gottlob conceded during the bond hearing, the government has no idea whether the dog was trained to alert to a specific drug or to gun powder. (Bond Hearing p. 48-49). Even if the K-9 was trained to detect the presence of a particular controlled substance, the government has not provided any discovery to the defense concerning the dog’s training, history, experience, reliability. Nor can the government exclude the possibility that the K-9 alerted to what would have been a trace or personal use quantity of some substance.

ROA.17926 (Doc. No, 381).

On March 6, 2012, Pierre also filed a motion to suppress the dog alert. (ROA.18313-18331, Doc. No. 520).

After a hearing, Magistrate Judge Bush denied the suppression aspect but granted the *limine* motion on confusion/prejudice grounds. ROA.18433-18453.

Here, the Court finds that any testimony about Bartje’s alert on the dresser would confuse the issues and cause Defendant undue prejudice. In this case, the Government must prove that Defendant was involved in the distribution – not merely personal use – of cocaine and marijuana. Based on the testimony presented at the hearing, although Bartje’s alert may have been reliable as an indicator that drugs were once present near the dresser, there is nothing about the alert that would show the amount of drugs that once were there, the amount of time that had passed since they were there, or the kind of drugs present. Any probative value Bartje’s alert might have is outweighed by the risk that the alert was

to an amount or type of drug not a part of the charged conspiracy and for a time period not within the charging indictment. Because the alert cannot define the who, what or when – and because there is no possibility of examining or cross-examining Bartje as to the who, what or when of the alert – any testimony about it would confuse the issues and unduly prejudice Defendant.

ROA.18452.

On May 31, 2012, Judge Schell entered an order adopting Judge Bush's Report and Recommendation. ROA.18454-18455.

After two weeks of trial, on July 3, 2013, the Government made an oral motion to revisit this order. Judge Schell granted the Government permission to introduce evidence of the sniff that found no drugs present:

The Court: To clarify, I'm going to allow the Government to call Officer Dominguez to put on evidence that a certified, trained, drug-sniffing dog alerted to a dresser in Mr. Pierre's home in Picayune, Mississippi, and the dog was trained to alert for the drugs that these defendants are accused of trafficking, although no drugs were found. I think it's still probative of whether Mr. Pierre is involved in drug trafficking and it's not substantially outweighed by the danger of unfair prejudice.

ROA.3653.

Officer Dominguez testified that Bartje alerted even though no drugs, or even drug residue, were found:

Q: What was [Bartje, the dog] alerting to?
A: The presence of narcotics.
Q: What drugs was Bartje trained to alert to?
A: Marijuana, cocaine, meth, and heroin.

ROA.3801.

On cross-examination, Pierre was left in the impossible position of trying to disprove a negative:

A: He was alerting to the dresser.

Q: And to be clear, you didn't find any kind of drug residue, did you?
A: No, sir.

Q: You didn't find any specks of any kind of drug paraphernalia, did you?
A: I didn't find any drug paraphernalia, no, sir.

ROA.3811.

REASONS FOR GRANTING THE WRIT

This petition for certiorari should be granted because, if this Court does not grant cert, prosecutors across the country will be able to alchemize 'dry' drug cases into 'wet' possession cases by use of a drug sniffing dog regardless of what the dog does, or does not, find.

As an initial matter, even the Government acknowledges that there is no evidence that Pierre's home was contaminated. Second, the canine alert years after the Government's witnesses claim to have delivered drugs to the property. *See, e.g., Gov't of V.I. v. Pinney*, 967 F.2d 912, 918 (3d Cir. 1992) (in trial for rape of 7-year old girl, error to admit evidence by another girl that she had been raped six years earlier, which was marginally relevant but highly inflammatory) (reversing for new trial).

Third, dog sniffs have tremendous potential, to mislead. Pierre recognizes that field-detection rates as low as 43% have passed federal muster in the Fourth Amendment context. *United States v. Green*, 740 F.3d 275, 283 (4th Cir.2014) (43%); *United States v. Holleman*, 743 F.3d 1152, 1157 (8th Cir.2014) (57%).

However, the Seventh Circuit has warned:

This should not become a race to the bottom, however. We hope and trust that the criminal justice establishment will work to improve the quality of training and the reliability of the animals they use, and we caution that a failure to do so can lead to suppression of evidence.

United States v. Bentley, 795 F.3d 630, 636 (7th Cir. 2015).

Pierre's situation presents the next dimension of this question in the context of trial evidence, "How close to 'the bottom' can a dog's false alert be before it pierces the outer limit of

relevance and unfair prejudice?”

A neat contrast is seen between the facts of Pierre’s trial and that found not to require reversal under 403:

Some of the facts elicited by defendants do demonstrate that dog sniff testimony is not a perfect indicator of a particular controlled substance in a particular, well-defined location at a particular time. After all, it is at least possible that Gator alerted to the presence of a different controlled substance than the cocaine found to have been dumped in the ocean that day. Also, it is possible that Gator alerted to a contamination that occurred well before the bales of cocaine were alleged to have been aboard. And, due to Gator’s less-than-perfect communicative abilities, it is possible that Gator alerted to an area that was not precisely identified by his handler.

However, these facts do not substantially diminish the probative value of this testimony. Agent Ocasio-Cruz testified that Gator gave a positive alert to the presence of a controlled substance on the deck of defendants’ vessel. Despite defendants’ attempts to demonstrate the contrary, Agent Ocasio-Cruz specifically testified that Gator alerted to a contaminated area that was larger than merely the fiberglass container. While this testimony is not perfect, it is extremely probative in a case in which defendants claim that they were never in possession of the cocaine.

United States v. Rosario-Peralta, 199 F.3d 552, 562 (1st Cir. 1999).

CONCLUSION

Pierre respectfully asks the Court to grant a writ of certiorari.

Respectfully submitted this 29th day of January, 2018.

By: 

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CERTIFICATE OF SERVICE BY MAILING

I hereby certify that, on the 29th day of January, 2018, eleven (11) copies of the foregoing Petition and its Appendix, as well as the Motion to Proceed *In Forma Pauperis*, were sent to the Court by overnight mail.

I also certify that on the same day, one copy of both the Petition and its Appendix were sent to Arthur Pierre, 15550-043, at:

Oakdale I
P.O. BOX 5000
Oakdale, LA 71463

Lastly, I hereby certify that, on the same day, a true and correct copy of this petition and appendix was sent by overnight mail, as well as email, to:

Solicitor General of the United States
950 Pennsylvania Ave., N.W.; Room 5616
Washington, DC 20530-0001



Seth Kretzer