

No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Nathan Russell Cates,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

This case involves a circuit split over the materiality of a drug dog's training and performance records under Federal Rule of Criminal Procedure 16, following this Court's decision in *Florida v. Harris*, 568 U.S. 237 (2013).

In *Harris*, the Court set forth the appropriate framework for determining whether the "alert" of a drug-detection dog during a traffic stop provides probable cause to search a vehicle in accordance with the Fourth Amendment. It provided that, "if a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." 568 U.S. at 246-47. The Court emphasized, however, that the defense "must have an opportunity to challenge such evidence of a dog's reliability." *Id.* at 247. By way of example, the Court suggested that a defendant might challenge reliability by attacking (i) the methods employed in the dog's training program, (ii) the standards underlying the dog's certification program, (iii) the dog's performance in its training or certification programs, or (iv) the circumstances surrounding a particular alert, *e.g.*, if the officer appears to have cued the dog, or the team was working under unfamiliar conditions. *Id.* at 247. The question presented is:

When the government attempts to establish probable cause to search a vehicle during a traffic stop by relying on a certified drug dog's alert, does *Harris* establish the materiality of the dog's training and performance records under Rule 16 where the defendant contests the reliability of that alert in a motion to suppress evidence?

Related Proceedings

- *United States v. Cates*, No. 1:21-cr-00101-NDF-1, United States District Court for the District of Wyoming (judgment entered June 21, 2022).
- *United States v. Cates*, No. 22-8038, United States Court of Appeals for the Tenth Circuit (judgment entered July 10, 2023).

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Petition for Writ of Certiorari

Opinion Below

The decision of the United States Court of Appeals for the Tenth Circuit is reported at *United States v. Cates*, 73 F.4th 795 (10th Cir. 2023), and can be found in the Appendix at A18.

Basis for Jurisdiction

The Tenth Circuit issued its opinion affirming the district court on July 10, 2023. (A18.) On September 27, 2023, this Court extended the deadline to file the petition for certiorari from October 9, 2023, to November 8, 2023. (A53). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Rules Involved

U.S. Const., Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Rule of Criminal Procedure 16 (a)(1)(E)

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense[.]

Statement

In May 2021, Wyoming state troopers working a criminal interdiction detail initiated a traffic stop of Mr. Cates's car. A few minutes into the traffic stop, one of the troopers employed his drug dog to conduct an open-air sniff around the exterior of Mr. Cates's car. After the dog circled around the vehicle a few times, the handler tapped on the side of the car and directed the dog to "check here." In response, the dog placed her front paws onto to the side of the car, which the handler interpreted as an alert to the presence of illegal drugs. The troopers then searched the car, found drugs inside, and arrested Mr. Cates.

Mr. Cates was subsequently indicted for possession with intent to distribute the drugs recovered in his car. He filed a motion to suppress thereafter, arguing, *inter alia*, that the troopers lacked probable cause to search the car. In his motion, Mr. Cates noted that the defense had twice requested that the government produce the drug dog's training and performance records in discovery. In response to these requests, the government turned over only a one-page canine narcotics certificate bearing the same date as Mr. Cates's arrest—with no information about whether it was issued before or after the open-air sniff of his car.

The district court held an evidentiary hearing on the motion to suppress. During the hearing, Mr. Cates moved to compel the government to produce discovery of the dog's underlying training and performance records beyond the one-page certificate that was produced. Relying on this Court's decision in *Florida v. Harris*, 568 U.S. 237 (2013), Mr. Cates argued that the requested records were material to litigating

his suppression motion and challenging the dog's reliability in a meaningful way. The district court denied the motion, ruling that Mr. Cates was not entitled to discover the drug dog-history records because he failed to first make a "threshold showing" casting doubt on the "validity" or "reliability" of the dog's one-page certification. (A3-A4, A16.) Finding that the drug dog was certified to detect illegal drugs on the day in question, the district court concluded that the dog's alert gave the troopers probable cause to search Mr. Cates's car. (A15.) Mr. Cates entered a conditional guilty plea reserving his right to appeal his motion to suppress and his attendant motion to compel discovery.

Mr. Cates appealed, asserting that the district court's "threshold showing" requirement defied this Court's instruction in *Harris* that a defendant "must have an opportunity to challenge" the drug dog's reliability. He pointed out that *Harris's* "opportunity to challenge" dictate would be stripped of its value if a defendant were not entitled to discover the evidence on which he would base such a challenge. He argued that *Harris* establishes the materiality of the requested dog-history records under Federal Rule of Criminal Procedure 16, and thus the court should have compelled their production.

The Tenth Circuit affirmed, adopting the district court's fabricated "threshold showing" requirement. According to the Tenth Circuit, *Harris* entitles a defendant to challenge a certified drug dog's reliability through cross examination or witness testimony, but does not entitle him to discover the underlying documentary evidence pertaining to the dog's reliability. (A46-A47.) The Tenth Circuit ruled instead that a

certified drug dog's underlying training and performance records are not material to a suppression motion under Rule 16 unless the defendant first makes a threshold evidentiary showing that the dog's certification was invalid or unreliable. (A48-A52.) The Tenth Circuit concluded that because Mr. Cates had not met this showing, the district court had not erred in denying his motion to compel discovery. (A52.)

Reasons for Granting the Petition

Ten years after *Harris*, the circuit courts are divided as to whether *Harris* requires the government to produce the dog's training and performance records in discovery under Rule 16 when a defendant moves to compel those records in support of his motion to suppress. The Court should use this case to resolve that split.

I. Post-*Harris*, the circuits are divided about whether a drug dog's training and performance records are material to a suppression motion, and thus discoverable, under Rule 16

At least three federal circuit courts appear to agree that *Harris* established a defendant's right to challenge a certified drug dog's reliability when the government attempts to rely on the dog's positive alert to establish probable cause to search a vehicle. Where the circuits diverge is in answering a related question of critical importance: whether *Harris* necessarily also established a defendant's attendant right to discover evidence bearing on the certified drug dog's reliability, *i.e.*, the dog's training and historical performance records.

The Second and Ninth Circuits stand together on one side of the split. These circuits read *Harris* as establishing the inherent materiality of a dog's training and performance records under Rule 16 when a defendant seeks to challenge the dog's

reliability in a suppression motion. The Second Circuit in *United States v. Foreste* reasoned: *Harris*'s "principle that a defendant 'must have an opportunity to challenge such evidence of a dog's reliability,' would be stripped of its value if the defendant were not entitled to discover the evidence on which he would base such a challenge." 780 F.3d 518, 529 (2d Cir. 2015) (quoting *Harris*, 568 U.S. at 247). The Second Circuit ultimately reversed the district court for denying the defendant's motion to compel the government to produce the drug dog's field-performance records. *Id.*

Similarly, in *United States v. Thomas*, the Ninth Circuit held that the government must produce a drug dog's training and performance records under Rule 16 whenever the defense puts the dog's alert at issue. 726 F.3d 1086, 1096 (9th Cir. 2013). Recognizing such records as inherently material under Rule 16, *Thomas* likewise relied on *Harris* in support of its conclusion that a dog's training and performance records are "crucial to the defendant's ability to assess the dog's reliability" and to "conduct an effective cross-examination of the dog's handler at the suppression hearing." *Thomas*, 726 F.3d at 1096.

In sum, when a defendant in the Second or Ninth Circuits requests a drug dog's training and performance records in support of his motion to suppress, the government must produce them under Rule 16.

On the other side of the split, the Tenth Circuit reads *Harris* as establishing, "[a]t most," that "a criminal defendant does *not* have an automatic right to historical canine records." (A48 (emphasis added).) According to the Tenth Circuit, *Harris* acknowledges the relevance of dog training and performance records to the issue of

reliability, but is silent as to the “case-by-case *materiality* of such records[.]” (A47.) As a result, when a defendant in the Tenth Circuit requests a drug dog’s training and performance records under Rule 16 in support of his motion to suppress, the government must produce them if and only if the defendant first puts forth evidence demonstrating the dog’s unreliability—all without access to any of the dog’s records pertaining to that specific issue.

Certiorari is accordingly warranted to resolve the division among the courts of appeal on this important and recurring question.

II. The Tenth Circuit’s approach conflicts with *Harris*

The Tenth Circuit’s interpretation of *Harris* is flatly incorrect. As the Second and Ninth Circuits rightly recognize, the *Harris* decision necessarily contemplates that a defendant exercising his right to challenge the drug dog’s reliability has access to the dog’s underlying training and performance records, as evidenced by the Court’s examples of permissible attacks on the dog’s reliability. *See* 568 U.S. at 247 (“The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings.”). It is difficult to imagine how a defendant could ever successfully contest the adequacy of a certification or training program, or the dog’s performance in such programs, without access to the underlying records documenting those details.

Worse still, the Tenth Circuit additionally imposes a heightened burden on the defendant to obtain dog records under Rule 16, requiring him to make a threshold showing that undermines the validity and reliability of the dog's certification. (A51-52.) But nothing in *Harris* even remotely suggests that a defendant must make an initial showing of unreliability before being entitled to access the very documents bearing on that question. Indeed, imposing such a rule renders hollow the portion of *Harris* that guarantees a defendant's right to challenge the drug dog's reliability. Under the Tenth Circuit's approach, so long as the government introduces a one-page certification proving that the dog in question was certified at the time of the alert, as the government did here, the defendant will never be entitled to access any materials that could conceivably help him refute reliability. His "opportunity" to challenge the dog's reliability thus exists in name only. This is not a legally permissible outcome after *Harris*.

This split has created and will continue to create disparities among defendants around the country. If Mr. Cates had been federally prosecuted in the Second or Ninth Circuits, he unquestionably would have received the dog records that he moved to compel. And he thus would have had a full and fair opportunity to challenge the drug dog's reliability, just as *Harris* contemplated. Not so in the Tenth. Certiorari is therefore warranted to ensure that, consistent with the reasoning of *Harris*, defendants in all federal circuits receive an equal opportunity to attack a drug dog's reliability and the government's corresponding justification for probable cause.

III. This case is a strong vehicle for resolving the question presented

This case presents a strong and proper vehicle to resolve this split in authority for two reasons.

First, the issue is squarely presented. Mr. Cates made a timely motion to compel the government to produce the drug dog's training and performance records, which bear directly on the dog's reliability. The Tenth Circuit panel unanimously agreed that Mr. Cates was not entitled to those records because he failed to put forth evidence undermining the validity or reliability of the drug dog's certification. This ruling contradicts *Harris* and conflicts with the approach of the Second and Ninth Circuits.

Second, resolving the question presented will determine the outcome of Mr. Cates's appeal. If Mr. Cates's interpretation of *Harris* is correct, then reversal would be required with instructions for the district court to grant Mr. Cates's motion to compel discovery and hold a new probable cause hearing that affords Mr. Cates a meaningful opportunity to contest the drug dog's reliability.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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