

a target substance? What performance standards was the dog expected to meet in certification and training? What was the duration, frequency, and intensity of the dog's certification and maintenance training?

#### Field Performance

What do the dog's field records say about its reliability? Are there cases in which the dog alerted to the odor of target substance, but no target substance was discovered? Were these alerts explained with evidence that the dog detected residual odors in the location where it alerted? Is the evidence that target substances or persons in contact with target substances were recently in the location circumstantial or attenuated?

#### The Alert in Question

What were the circumstances of the sniff at issue, including the time, date, location, area searched, weather, reasons for the sniff, and evidence recovered? What evidence supports the assertion that the handler cued the dog to alert? Did the handler suspect that there was a target substance in the area to which the dog alerted and a target substance was found? Did the dog behave in a way that deviated from its training? Did the handler behave in a way that deviated from his or her training?

#### The Harris Presumption in Maryland

In *Grimm v. State*, 456 Md. 54 (2017), the Court of Appeals will soon decide how *Harris* applies to the question of police dog reliability in Maryland, and the record in that case illustrates how suppression courts consider expert testimony about a police dog's certification, training, field performance, and alert in question.

On April 18, 2014, an MTA police officer got a tip that Grimm may be traveling north on I-95 from Atlanta to Baltimore with a large quantity of narcotics. The next day, he got a second tip that Grimm and others would be in a maroon Honda with Georgia registration traveling near the Arundel Mills shopping complex on Maryland Route 100 toward Route 295 toward Baltimore. The officer saw a matching vehicle driving toward Baltimore on Route 295, and initiated a traffic stop after observing that none of

its three occupants were wearing seatbelts. Grimm was driving the vehicle. The officer developed further reasonable suspicion that Grimm possessed narcotics, requested a drug detection dog, and Officer Carl Keightley arrived with Ace. After being led

He moved to suppress the evidence on the grounds that Ace's alert was not sufficiently reliable to provide probable cause to search the vehicle. The State presented testimony from Officer Keightley, Ace's handler since 2012, and from Sergeant Mary Davis, a Montgomery County Police head dog trainer since 2008 with twenty years of experience in that field who was familiar with the U.S. Police Canine Association's for police dog reliability.

Mr. Grimm presented testimony from Ted Cox, a retired police officer and chief dog trainer for the Baltimore Police Department for six years, and a dog trainer for the MTA from 2007 to 2012, and from Michael McNerney, a retired police officer and MTA dog trainer since 2009, and the head dog trainer for explosive and drug detection dogs in September of 2013. The witnesses each testified about various aspects of Ace's certification, training, field performance, and alert to Mr. Grimm's vehicle. The suppression court ruled that Ace's alert to Mr. Grimm's car provided probable cause to believe that a target substance would be discovered in a search of it. It found that Officer Keightley and Ace were certified to detect target substances during the April 19, 2014 sniff, that Officer Keightley was a credible witness, and that Sergeant Davis was the most credible witness, based on her "impeccable" qualifications, knowledge, training and experience.

The Court of Special Appeals affirmed the suppression court, holding that it did not err in finding that Ace was well-trained and reliable based on Davis's opinions and the validity of its alert to Grimm's vehicle. It also held that evidence of Officer Keightley's and Ace's recertification four months after the April 19, 2014 sniff was relevant to the question of whether Ace was well-trained or reliable during that sniff. The Court of Appeals granted *certiorari*, and is considering whether the suppression court erred in ruling that Ace's alert to his car provided probable cause to search it.

#### Conclusion

*Grimm v. State* will determine how *Harris* applies to future challenges to police dogs' reliability in suppression hearings. *Harris* still provides the roadmap for all such cases that occurred after February of 2013, however, and could or should have been applied in your case if the evidence presented against you was obtained because of a dog's alert. If you believe that your lawyer could or should have made a more aggressive challenge to the police dog that acted in your case, and you know that the police could not have obtained the evidence against you without its alert, contact the Post Conviction Defenders Division and provide all of the relevant facts of your case. It may be that your lawyer could have rebutted the *Harris* presumption against you. And while it would not make you best friends, doing so would at least put you and the police dog on better terms.

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# POST CONVICTION DEFENDERS DIVISION

Maryland's Office of the Public Defender

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## Advice for your PIA Request from the Public Access Ombudsman

Public Access Ombudsman, Lisa Kershner, presented to OPD post-conviction, trial and appellate attorneys and staff at OPD's Return Class Training on Oct. 30, 2017, focusing on topics such as exemptions that may apply to a law enforcement agency's "investigatory files" or protected information within those files, fees and the remedies available to Public Information Act (PIA) requestors. Ms. Kershner, who took office as Maryland's first Public Access Ombudsman on March 30, 2016, has been working with agencies and advocates throughout the state to improve the operation of the PIA, and effective access to the PIA process by persons who are who are incarcerated.

### Making a Request for Records

First, any request should be clearly identified as a PIA request for records. Identify your request, with the words "MPIA Request" in the subject line, or at the very top of your letter where it will be clearly visible, and also, write "MPIA Request" on the outside of your envelope. Whenever possible, address your letter to the agency's designated MPIA coordinator. A list of agency PIA representatives is available from the Ombudsman on request. Second, make your requests simple and straight forward. If possible, be specific about the records you are seeking. Doing so will help the agency more easily determine whether or not it is the custodian of the records you seek. Also, when seeking records from a law enforcement agency such as a police/sheriff's department or a local State's Attorney's Office, include the case or incident number, if you know it. Finally, when seeking fee waivers due to indigency, or lack of money, be sure to include an Affidavit of Indigency with your request. The Office of the Attorney General has published a sample "Affidavit of Indigency", included as an Appendix to its 2015 PIA Manual. The Ombudsman will provide the sample Affidavit of Indigency on request.

### Making a Mediation Request to the Ombudsman

An agency is required to respond as quickly as possible to incoming PIA requests. If an agency cannot fulfill a request within 10 business days, it is required to issue a "10 day" letter, that explains when it expects to be able to fulfill the request, any exemptions that may apply to the requested records, or to information within such records, and provide an estimate of any expected fees or costs that it expects to charge in connection with gathering, reviewing and preparing the records for production to the requestor. The outside deadline for issuing a final written PIA response and producing requested records under the PIA generally is 30 calendar days from receipt of the request. If you do not receive a written response to your PIA request or the records you requested, a requestor has the option to ask for the Ombudsman's help in mediating the request, or in cases of fees exceeding \$350, to submit a complaint to the PIA Compliance Board. (These options which were created by the legislature in 2015, are in addition to judicial remedies, which remain in place.)

The Public Access Ombudsman's role is to serve as a "mediator". In this role, she attempts to achieve resolution based on compromise and alternative solutions that both parties can agree to. This is a completely voluntary process. The Ombudsman does not have authority to decide or compel any party to do anything. For example, the Ombudsman cannot compel an agency to produce a record it is withholding under claim of privilege. Rather, the Ombudsman tries to help the parties reach a voluntary agreement. All information provided to the Ombudsman as part of the mediation process is maintained in confidence, and can only be disclosed to another with advance written permission of the parties.



If you are seeking mediation assistance with a PIA request, please send your request to the Ombudsman and include with your correspondence: (1) a copy of your request and/or (2) a copy of the written response you received to your request. Also, if possible, provide the name and contact information for any person you wish the Ombudsman to contact or communicate with on your behalf about your PIA request.

If you are unable to provide the Ombudsman with the request you submitted or the response you received, you should provide the following information in your letter to the Ombudsman seeking mediation: 1) the date when you made the PIA request you are seeking to follow-up; 2) the agency, and contact person to whom you sent your PIA request; 3) the records you have asked the agency to produce to you; 4) the date(s) of any written response(s) you received from the agency and the substance of the response; 5) any additional pertinent information, e.g., your case # when seeking trial or investigative files; and finally, 6) if you requested a fee waiver, whether you have submitted an affidavit of indigency. *Note: under section 4-206 of the MPIA, an agency is obligated to consider a waiver request by an individual that is supported by an Affidavit of Indigency, but is allowed in all cases broad discretion to determine whether or not it is in the public interest to grant a fee waiver request.*

The Ombudsman is committed to working with all requestors and agencies to make the PIA work better. She has submitted comments regarding issues that present barriers to access by persons who are incarcerated to the Office of the Attorney General and to the PIA Compliance Board. The Ombudsman's published comments are available online at <http://news.maryland.gov/mpiaombuds/paoresources/>.

### **Other Remedies – PIACB, excessive fees**

The Public Information Act Compliance Board hears complaints involving the imposition of fees under the Act. Specifically, a requester who is assessed a fee of more than \$350 may file a complaint with the Board if the requester believes that the fee is unreasonable.

The Board cannot decide complaints that involve fees of less than \$350 or that arise out of a records custodian's handling of a PIA request. Disputes involving these issues and other aspects of the PIA may be referred to the Public Access Ombudsman for mediation. To file a complaint with the Board, consult the information on the board's website at <http://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb.aspx#MeetingNotices> or email a complaint to the board at [piaopengov@oag.state.md.us](mailto:piaopengov@oag.state.md.us). ~Submitted by: Lisa Kershner, Public Access Ombudsman, December 2017. The Ombudsman can be reached by phone (410-576-6560), by email ([pia.ombuds@oag.state.md.us](mailto:pia.ombuds@oag.state.md.us)) or by regular mail by writing to: Lisa Kershner, Public Access Ombudsman, c/o Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21202.

## **Bring That (Police) Dog to Heel: Rebutting the *Harris* Presumption Against You**

by Brendan Costigan

Able to detect the slightest odors, dogs make natural detectives whose sniffing skills have long been credited by law enforcement and the courts. This article will help you decide whether a challenge could have or should have been made to a police dog whose alert led to the discovery of evidence that was used against you.

*Florida v. Harris* controls these cases, and shapes the debate on police dog reliability in suppression hearings. At this stage of a case, a dog's reliability is critical because the evidence obtained as a result of its alert may be necessary to the State's case. A search that depends on a dog that was unreliable or prompted to alert is an unlawful search. In such circumstances, the evidence against you should be suppressed.

The State has several advantages, however, that make it difficult to challenge a dog. Handlers and trainers provide expert-level testimony on the facts supporting a dog's reliability, facts which require a sophisticated understanding of drug detection dog capabilities. From these facts, you must identify several deficiencies to undermine a dog's alert. Before *Harris*, courts rarely found a dog to be unreliable. Little has changed since the decision, and you will not prove that a dog is unreliable if you cannot identify its deficiencies.

Fortunately, *Harris* provides a roadmap to follow when challenging police dogs. It outlines areas of factual investigation that inform questions for State witnesses and defense experts, as well as legal arguments in support of a motion to suppress evidence. This article will explain the *Harris* framework and propose a strategy addressing the relevant legal and factual issues.

If you were arrested and charged with evidence obtained because of a police dog's alert after February of 2013, the dog's reliability was subject to the rules set forth in *Harris*. If your lawyer was unaware of or did not apply the *Harris* framework in your case, you may have grounds to claim that he or she provided ineffective assistance in failing to properly challenge the dog whose alert led to the discovery of the evidence presented against you.

### **Detection Dogs and the Fourth Amendment**

A "search" is police exploration of a place in which a person has exhibited an expectation of privacy that society recognizes as being reasonable. Probable cause to search exists when the facts would warrant a person of reasonable caution in the belief that criminal evidence is present.

The State need only show a "fair probability" on which reasonable people act. Courts look to the "totality of the circumstances" in deciding whether this standard is met.

A dog's sniff is not a "search" because, while able to reveal a container's contents, it is less physically intrusive than an actual search and reveals only contraband, an item in which no person has a legitimate expectation of privacy. *Illinois v. Caballes*, 543 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983). An alert to a location by a reliable, or "properly trained", dog gives police probable cause to search that location for a target substance. *See State v. Wallace*, 372 Md. 137 (2003); *Gadson v. State*, 341 Md. 1 (1995), *cert. denied*, 517 U.S. 1203 (1996).

### **The *Harris* Presumption**

The U.S. Supreme Court considered how a court should determine if a dog's alert provides probable cause to search a vehicle. *Florida v. Harris*, 133 S.Ct. 1050 (2013). A dog trained to detect meth alerted to the driver's-side door handle of the defendant's truck. A search revealed meth ingredients, but not the drug. The defendant admitted to being a meth cook and user and was charged with possessing pseudoephedrine for use in its manufacture. A positive alert by the same dog to the same door handle revealed no contraband. The handler testified that the defendant probably transferred the odor of meth to the door handle, and the dog responded to that residual odor.

The defendant's challenge focused on the dog's field performance because its handler only recorded alerts resulting in arrests, and the two alerts to the truck did not produce any drugs that the dog was trained to detect. The Florida Supreme Court held for the defendant, and required the State to produce evidence of the dog's reliability, including: training and certification records; field performance records; the handler's experience and training with the dog; and "[a]ny other objective evidence known to the officer about the dog's reliability."

The court emphasized the importance of a dog's field performance, including how often its alerts did not lead to the discovery of contraband. This evidence could expose a handler's tendency to cue a dog to alert and a dog's inability to distinguish between residual odors and actual drugs.

The U.S. Supreme Court unanimously reversed the lower court, holding that it misinterpreted the Fourth Amendment in holding for the defendant. Probable cause is "a fluid concept ... not ... reduced to a neat set of legal rules." *Harris*, 133 S.Ct. at 1056. The lower court erred by creating a "strict evidentiary checklist, whose every item the State must tick off" in order to show that a dog's alert to drug odors is reliable to form probable cause. *Id.*

Instead, a dog's "satisfactory performance" in certification or training alone can be sufficient evidence of its reliability if not contested by the defendant. *Harris*, 133 S.Ct. at 1057.

A court can presume that an alert provides probable cause if the dog was certified by a "bona fide organization" that tested its reliability in a "controlled setting[.]" or if it "recently and successfully" finished a training program that measured its skill in locating target substances. *Id.*

If the State provides evidence that the dog reliably detects targeted substances in controlled settings which the defendant does not contest, the court should find probable cause. *Harris*, 133 S.Ct. at 1058. A defendant can contest the dog's reliability by cross-examining the testifying officer; introducing fact or expert witnesses; challenging the adequacy of a certification or training program; challenging the dog's or handler's performance in their assessments; challenging the dog's prior field performance; and arguing that the alert in question resulted from the handler cueing the dog or because they were working under unfamiliar conditions.

The court "should allow the parties to make their best case," and then assess the evidence to decide what the circumstances show. *Harris*, 133 S.Ct. at 1058. The ultimate question is whether a commonsense view of "all the facts surrounding a dog's alert" would lead "a reasonably prudent person" to believe that a search would reveal a target substance. *Id.*

### **A Pattern of Deficiency**

The ultimate question is whether a commonsense view of "all the facts surrounding a dog's alert" would lead a reasonable person to believe that a search would reveal contraband. *Harris*, 133 S.Ct. at 1058. Challenging a dog's reliability requires more than pointing out a single weakness. Any deficiency "may be compensated for . . . by a strong showing as to ... other indicia of reliability." *Harris*, 133 S.Ct. at 1056 (quoting *Gates*, 462 U.S. at 233). To bring an effective challenge to a dog, you must find several weaknesses to create an overall pattern of deficiency.

*Harris* outlines areas of factual investigation where your case begins, including the dog's certification, training, and field performance history, and the alert in question, all of which provide the totality of the circumstances surrounding the dog's reliability. The record and the alert in question demonstrate whether probable cause existed to search for drugs in the location where the dog alerted. *Gates*, 462 U.S. at 230.

### **Certification & Training**

Was the dog certified and trained during the alert in question? What target substance odors, weights/amounts, and other odors was the dog trained to detect? What other odors was the dog trained to detect or distinguish? Was the dog trained to distinguish between a target substance odor and residual odors of that substance? In what scenarios was the dog trained to perform? What organization or agency was used to certify and provide ongoing training to the dog and its handler? Was the dog trained to prevent cueing? What type of alert was the dog trained to perform when it detects