No. 11-817

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

CLAYTON HARRIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an alert by a trained drug-detection dog is sufficient to establish probable cause for a search of an automobile.

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INTEREST OF THE UNITED STATES

This case presents the question whether an alert by a trained drug-detection dog is sufficient to establish probable cause for a search of an automobile. Federal law enforcement officers and homeland security personnel routinely use dogs to detect illegal drugs, explosives, and other substances. See Paul B. Jennings, Jr., *Origins and History of Security and Detector Dogs*, in *Canine Sports Medicine and Surgery* 16, 18-19 (Mark S. Bloomberg et al. eds., 1998). In addition, the United States prosecutes cases in which state authorities obtain evidence using such detection dogs. Accordingly, the Court's resolution of the question presented in this case will affect federal investigations and prosecutions.

STATEMENT

1. On June 24, 2006, Officer William Wheetley of the Liberty County, Florida, Sheriff's Office conducted a traffic stop of respondent after noting that the license plate on respondent's truck was expired. J.A. 61. Officer Wheetley approached the driver's-side door of the truck and saw that respondent was shaking, unable to stay still, and "visibly nervous." J.A. 62. The officer also observed an open can of beer sitting in the cup holder. *Ibid.* Officer Wheetley asked respondent for consent to search his truck, but respondent refused. J.A. 63.

Officer Wheetley then retrieved his trained drug-detection dog, Aldo, from his patrol car. J.A. 63. While doing so, he noticed respondent "moving around" in the truck and talking on his cell phone. *Ibid.* Aldo conducted a "free air sniff" around respondent's truck and alerted at the driver's-side door handle. *Ibid.*[1]

Based on Aldo's alert to the odor of drugs, as well as respondent's nervous behavior, the expired tag, and the open container of alcohol, Officer Wheetley concluded he had probable cause to search respondent's truck for evidence of illegal drugs. J.A. 64-65. The search revealed approximately 200 loose pseudoephedrine pills, 8000 matches, a bottle of muriatic (hydrochloric) acid, two bottles of antifreeze, and iodine crystals. J.A. 21-22, 65. These are ingredients for making methamphetamine. J.A. 66.

After being arrested and receiving *Miranda* warnings, respondent told Officer Wheetley that he had pur-

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[1] When Aldo smells the odor of drugs, he takes a long sniff, becomes excited, and sits down. J.A. 57. Officer Wheetley understands that behavior as an alert. *Ibid.*

chased the methamphetamine ingredients from various stores in Tallahassee and acknowledged that he routinely "cooked" methamphetamine at his house. J.A. 67-68. Respondent stated that he could not go "more than a few days" without using methamphetamine and that his addiction was a "big problem." J.A. 68.

2. After respondent was charged in state court with possession of the listed chemical pseudoephedrine with intent to use it to manufacture methamphetamine, Pet. App. A7, he moved to suppress the evidence seized from his truck on the asserted ground that Aldo was insufficiently reliable to provide a basis for probable cause to search the vehicle, J.A. 15-18.

At a suppression hearing, Officer Wheetley testified about both his and Aldo's training in canine drug detection. J.A. 53-60. In 2004, Officer Wheetley (and a different dog) completed a 160-hour drug-detection course offered by the Dothan Police Department, and that same year, Aldo (and a different handler) completed a 120-hour drug-detection course offered by the Apopka Police Department. J.A. 53-54. Aldo was certified by Drug Beat, a national certification company, to detect marijuana, methamphetamine, heroin, ecstasy, and both crack and powder cocaine. J.A. 54-55, 70, 103-104. The Drug Beat certification in the record appears to have been valid through February 2005, J.A. 103-104, and the record does not indicate that Aldo was recertified.[2] But in early 2006 (after Officer Wheetley became Aldo's handler in July 2005), they successfully completed a 40-hour drug-detection course with the Dothan Police Department. J.A. 54-55, 105.

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[2] Florida does not require drug-detection dogs to be certified. See J.A. 70.

Officer Wheetley also testified that each week he did four hours of "continual training" with Aldo. J.A. 54, 56. During this training, which occurred variously in a building or with a number of vehicles, Officer Wheetley placed drugs in some locations and left others "[b]lank." J.A. 56-57. He would have Aldo sniff all of the locations to ensure the dog was not falsely alerting to those without drugs. J.A. 57. Aldo's performance during these training exercises was "really good." J.A. 60. Officer Wheetley also recorded instances when Aldo had alerted "in the field" and an arrest had followed. J.A. 60, 72, 74.

In addition, Officer Wheetley and another officer testified about a subsequent stop of respondent while he was driving the same truck. J.A. 44-50, 75-77. During that stop, which occurred approximately two months after the one described above, Officer Wheetley had Aldo conduct a sniff of the truck, and the dog again alerted to the driver's-side door handle. J.A. 75; Pet. App. A11. Officer Wheetley searched the truck, but he did not find drugs or drug-related evidence on that occasion. J.A. 76. Officer Wheetley explained that, given respondent's admitted frequent use and cooking of methamphetamine, he likely transferred the drug odor to the door handle from his hands after having made or used the drug, leaving a "residual odor." J.A. 80. Officer Wheetley explained that Aldo was "trained to alert to the odor of narcotics" and "alerted to the odor of narcotics on the door handle." J.A. 81.

The trial court concluded that there was probable cause to search respondent's truck and denied the suppression motion. J.A. 92. Respondent then entered a no-contest plea while reserving the right to appeal the denial of his suppression motion. Pet. App. A14. He was

sentenced to 24 months of imprisonment, to be followed by five years of probation. *Ibid.*

3. After an intermediate state appellate court summarily affirmed, Pet. App. A1-A2, the Florida Supreme Court reversed, holding that the evidence from respondent's truck should have been suppressed, *id.* at A3-A52.

The court acknowledged that a sniff of a vehicle by a trained drug-detection dog is not itself a search. See Pet. App. A25 (citing *Illinois* v. *Caballes*, 543 U.S. 405, 409 (2005), and *United States* v. *Place*, 462 U.S. 696, 707 (1983)). The court also recognized that an officer may search an automobile without a warrant if the officer has "probable cause to believe that the vehicle contains contraband," *id.* at A22, and that probable cause "is a fluid concept * * * not readily, or even usefully, reduced to a neat set of legal rules," *id.* at A23 (quoting *Maryland* v. *Pringle*, 540 U.S. 366, 370-371 (2003)). When a drug-detection dog positively alerts to a motor vehicle, however, the court held that probable cause may be established only when the government proves the dog's reliability through satisfaction of detailed requirements established by the court. *Id.* at A6.

In particular, the court said the government must present the dog's "training and certification records" and "an explanation of the meaning of the particular training and certification of that dog." Pet. App. A6. In addition, the court held that the government must introduce "field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle." *Ibid.* Evidence that the dog had been trained and

certified, "standing alone," would not be sufficient. *Id.* at A5.

The court said such a rigorous inquiry was necessary because "a dog may alert to a residual odor, which may not indicate the presence of drugs in the vehicle at the time of the sniff." Pet. App. A32. Based on that concern, the court held that "evidence of the dog's performance history in the field—and the significance of any incidents where the dog alerted without contraband being found—is part of a court's evaluation of the dog's reliability under a totality of the circumstances analysis." *Id.* at A33. In future cases, the court said, the government could attempt to show that prior alerts that did not lead to recovery of drugs were actually alerts to residual odors, but stressed that such a showing would not necessarily help the government because that explanation would "raise[] its own set of concerns" about whether the dog's alert was sufficient for probable cause. *Id.* at A34. In such cases, trial courts would be required "to evaluate how any inability to distinguish between residual odors and drugs that are actually present bears on the reliability of the alert in establishing probable cause," *ibid.*, and courts might conclude "that a dog's inability to distinguish between residual odors and actual drugs undermines a finding of probable cause," *id.* at A45-A46.

Applying its multi-factor test to the circumstances of this case, the court found the State's evidence insufficient to establish probable cause. Pet. App. A40-A48. In addition to finding the records of Aldo's training and certification insufficiently thorough, *id.* at A41, A44-A45, the court faulted the State for not "introduc[ing] Aldo's field performance records so as to allow an analysis of the significance of the alerts where no contraband was

found," *id.* at A42. The absence of such records deprived the court of "the benefit of quantifying Aldo's success rate in the field." *Id.* at A42, A42-A43 n.12.

The court also found that "the State ha[d] failed to explain why an alert to a residual odor on the door handle [of respondent's truck] would give rise to probable cause in this case." Pet. App. A46. Such residual odor, according to the court, "indicates only that someone who has come into contact with drugs touched the door handle at some point." *Id.* at A47. The court said this case itself "may have involved a false alert" because the search of respondent's truck found only methamphetamine ingredients (whose odor Aldo was not trained to detect), rather than actual methamphetamine (whose odor Aldo was trained to detect). *Ibid.*

Chief Justice Canady dissented. Pet. App. A49-A52. He stated that the "elaborate and inflexible evidentiary requirements" the majority had established "demand[] a level of certainty that goes beyond what is required" by probable cause, which is a "'practical, nontechnical conception.'" *Id.* at A50 (quoting *Pringle*, 540 U.S. at 370). Chief Justice Canady noted that Aldo's training and certification constituted "an objectively reasonable basis for crediting [his] alert" and that such an alert provides the required fair probability of finding evidence of a crime. *Id.* at A51-A52.

SUMMARY OF ARGUMENT

The alert of a trained drug-detection dog provides probable cause to search an automobile for contraband or evidence of a crime.

1. Probable cause to search exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*,

462 U.S. 213, 238 (1983). That standard does not require the degree of certainty that would be required to establish proof of guilt or even to establish a fact by a preponderance of the evidence. See *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003).

Probable cause to search is often based on an officer's sensory observations, including his sense of smell. See, *e.g.*, *United States* v. *Johns*, 469 U.S. 478, 482 (1985). That is so because the presence of a distinctive odor at a particular location makes it fairly probable that the substance producing it is present there. And because a dog's sense of smell is far superior to a human's, an alert by a dog trained to identify certain odors provides an even stronger basis for probable cause to search a location for the odor's source.

The Florida Supreme Court's concern that a drug-detection dog may alert to "residual odor," rather than a seizable quantity of drugs, Pet. App. A46-A47, was misplaced. The presence of the odor of drugs at a location provides a fair probability to search that location for drugs or evidence of drug crimes. A dog's superior sense of smell permits it to detect faint odors that are undetectable to humans. That ability is what makes the dog valuable to law enforcement: it enables the dog to alert to drugs that are well-hidden or whose odors are masked by other scents. A positive canine alert does not establish a certainty that contraband or evidence of a crime will be present. But certainty is not required for probable cause, and the possibility of a hypothetical innocent explanation for the presence of drug odor at a location does not undermine the existence of probable cause to search.

2. Testing a drug-detection dog in a controlled setting provides the only valid means of evaluating that

dog's reliability. In such a training or certification environment, it is known which locations have drug odor and which do not. Accordingly, a dog's alerts and non-alerts can be correlated to those known locations to assess the dog's overall reliability.

Evidence of a dog's performance in the field is of an entirely different nature. In the field, an alert that does not lead to discovery of a seizable quantity of drugs cannot be classified as a false alert; instead, it is merely an unconfirmed one. The drugs might have been too well hidden to be found, or the dog might have alerted to the presence of drug paraphernalia coated in drug residue or to residue left by recent drug use at the location. Those would all be accurate alerts, and the possibility of their having occurred does not undermine the reliability of the drug-detection dog. Accordingly, it should not be necessary to introduce evidence about unconfirmed alerts in the field to support probable cause at a suppression hearing. Indeed, such evidence is more likely to confuse, rather than illuminate, the reliability inquiry.

Nor should it be necessary to introduce evidence about the specifics of a particular dog's training or certification at a suppression hearing. Such hearings should not be transformed into mini-trials on technical issues of dog training. Instead, courts should generally defer to the expertise of the professionals who train drug-detection dogs and limit their inquiry to establishing that the relevant training program or certifying organization is bona fide. Such deference is particularly warranted because law enforcement has its own strong and independent interests in ensuring that such dogs are well trained so that they will accurately perform their assigned role.

A clear rule that an alert by a trained drug-detection dog provides probable cause to search gives law enforcement officers needed certainty in fluid field situations. See *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). By contrast, the Florida Supreme Court's rule, which would base a dog's reliability in significant part on an attempt to quantify its (ever-changing) field performance and a court's own assessment of training methods, would require officers "to guess whether the dog's performance will survive judicial scrutiny after the fact." *United States* v. *Ludwig*, 641 F.3d 1243, 1251 (10th Cir.), cert. denied, 132 S. Ct. 306 (2011).

3. The drug-detection dog's alert to the presence of drug odor provided probable cause to search respondent's truck. Both the dog and its handler had received extensive training, and they engaged in regular weekly maintenance training together. J.A. 53-60. Because the dog proved reliable in such controlled settings, evidence about any unconfirmed alerts it may have made in the field was unnecessary to establish probable cause.

ARGUMENT

I. A DOG'S DETECTION OF DRUG ODOR IT IS TRAINED TO IDENTIFY ESTABLISHES PROBABLE CAUSE TO SEARCH

Probable cause to search exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). Probable cause requires a "probability, and not a prima facie showing, of criminal activity." *Id.* at 235 (quoting *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969)). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in

the [probable cause] decision." *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) (brackets in original) (quoting *Gates*, 462 U.S. at 235); see *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (finding of probable cause "does not demand any showing that such a belief be correct or more likely true than false"). "[A]s the very name implies," "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 231, 232 (citation omitted).

The information providing the basis for probable cause to search may take the form of a sensory observation by a law enforcement officer, such as an observation that is visual, see, *e.g.*, *Brown*, 460 U.S. at 742-743 (plurality opinion) (officer observed balloon inside car that he thought likely contained drugs), aural, see, *e.g.*, *McDonald* v. *United States*, 335 U.S. 451, 454 (1948) (hypothesizing case in which "officers, passing by on the street, hear a shot and a cry for help"), or tactile, see, *e.g.*, *Minnesota* v. *Dickerson*, 508 U.S. 366, 375-377 (1993) (discussing "contraband plainly detected through the sense of touch"). Likewise, an officer's detection of a distinctive odor indicative of contraband at a location can provide a basis for probable cause to search it. See, *e.g.*, *United States* v. *Johns*, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband."); *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965) ("A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists."). This basis for probable cause rests on the commonsense understanding that when one encounters

an odor, there is a reasonable probability that its source is nearby.

An alert by a trained drug-detection dog operates on the same principle. Rather than relying on his own sense of smell to detect an odor indicative of the presence of contraband, the officer relies on the dog's superior ability to do so.[3] Each drug has a "scent signature,"

[3] Contrary to the Florida Supreme Court's view, the effectiveness of dogs in detecting the odor of drugs is not a "myth." Pet. App. A30 (quoting Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 Hastings L.J. 15, 22, 28 (1990)). The canine's effectiveness (because of both its extraordinary sensitivity to odors and its refined ability to discriminate among them) is well-established. See William S. Helton, *Overview of Scent Detection Work: Issues and Opportunities*, in *Canine Ergonomics: The Science of Working Dogs* 83, 93 (William S. Helton ed., 2009) (Helton) ("[D]etector dogs deserve their reputation as the gold standards of detection technology."); Norma Lorenzo et al., *Laboratory and Field Experiments Used to Identify* Canis Lupus *Var.* Familiaris *Active Odor Signature Chemicals from Drugs, Explosives, and Humans*, 376 Analytical & Bioanalytical Chemistry 1212, 1212 (2003) ("Even with technological advances in instruments, detector dogs still represent one of the most reliable real time detectors of contraband."); L. Paul Waggoner et al., *Canine Olfactory Sensitivity to Cocaine Hydrochloride and Methyl Benzoate*, in *Chemistry- and Biology-Based Technologies for Contraband Detection*, 2937 Proc. SPIE 216, 216 (Pierre Pilon & Steve Burmeister eds., 1997) ("The dog's olfactory detection capabilities rival or surpass that of analytical instruments, and the dog-handler detection team remains the most effective technology available to law enforcement for the detection of narcotics."). Humans have relied for centuries on dogs' superior abilities to detect odors and discriminate among them, see U.S. Br. at 18-19 & n.5, *Florida* v. *Jardines*, No. 11-564 (May 3, 2012), and in modern times dogs "have been trained to detect estrus in dairy cows, cancer, contamination in aquaculture tank water, compact discs and DVDs, invasive species, accelerants, explosives, narcotics, insect infestations, microbial growth, wood rot, gas leaks, toxins, and scat of a wide range of species," Helton 83.

a particular combination of molecules that a dog is trained to recognize. Sandy Bryson, *Police Dog Tactics* 256 (2d ed. 2000) (Bryson) (emphasis omitted). And "[d]epending on the scent density and rate of diffusion, the dog," unlike a human, "can detect drugs despite masking scents, intervening structures, vehicle bodies, or multiple layers of packaging." *Id.* at 243. When the dog indicates that the odor of drugs is present at a particular location, there is probable cause to search it.

The Florida Supreme Court believed that a drug-detection dog's reliability is undermined because its alert may be to "residual odor" rather than nearby drugs. Pet. App. A46-A47. The court's concern was misplaced. Drug-detection dogs are trained to recognize "drug scent," and "[i]n terms of physics and chemistry, the scent is not the drug," just as "human scent is not a person." Bryson 256. Accordingly, when a trained drug-detection dog alerts, it is indicating that an odor it is trained to recognize is present. That indication establishes a fair probability—all that is required for probable cause—of the presence of drugs or other evidence of a crime associated with drugs, such as drug paraphernalia, precursor chemicals, money,[4] guns, logs, or packag-

[4] The concern that drug-detection dogs might alert to trace amounts of cocaine residue reported to linger on much of the U.S. currency in circulation, see, *e.g.*, *Illinois* v. *Caballes*, 543 U.S. 405, 411-412 (2005) (Souter, J., dissenting), has been debunked. See *United States* v. *Funds in the Amount of $30,670*, 403 F.3d 448, 459 (7th Cir. 2005) (crediting study demonstrating that "circulated currency, innocently contaminated with [microgram] quantities of cocaine would not cause a properly trained detection canine to signal an alert even if very large numbers of bills are present") (brackets in original) (quoting Kenneth G. Furton et al., *Field and Laboratory Comparison of the Sensitivity and Reliability of Cocaine Detection on Currency Using Chemical Sensors, Humans, K-9s and SPME/GC/MS/MS Analysis*, in *Investiga-*

ing. See *State* v. *Foster*, 252 P.3d 292, 298-300 (Or. 2011); see also *Gates*, 462 U.S. at 238 (probable cause exists whenever "there is a fair probability that contraband or evidence of a crime will be found in a particular place"). Indeed, "drug residue" itself is "evidence of a crime." *United States* v. *Ludwig*, 641 F.3d 1243, 1252 n.5 (10th Cir.), cert. denied, 132 S. Ct. 306 (2011).

Certainty is not required for probable cause, so the mere possibility that a dog's alert may have been to residual odor of drugs no longer present is immaterial.[5]

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tion and Forensic Science Technologies, 3576 Proc. SPIE 41, 46 (Kathleen Higgins ed., 1999)); Richard A. Medema, Drug Enforcement Admin., U.S. Dep't of Justice, *Guide to Canine Interdiction* App. E (2000 ed.) ("[A] positive alert to U.S. currency by a trained narcotics detection canine indicates that the currency had recently, or just before packaging, been in close or actual proximity to a significant amount of narcotics, and is not the result of any alleged innocent environmental contamination of circulated U.S. currency by microscopic traces of cocaine.").

[5] See *Foster*, 252 P.3d at 299 ("[T]he possibility that a trained drug-detection dog will alert to a residual odor, rather than the actual presence of drugs, does not *ipso facto* render it unreasonable to believe that drugs or other seizable things are *probably* present."); *State* v. *Yeoumans*, 172 P.3d 1146, 1149-1150 (Idaho Ct. App. 2007) ("An alert by an otherwise reliable, certified drug detection dog is sufficient to demonstrate probable cause to believe contraband is present even if there exists a possibility that the dog has alerted to residual odors."); *State* v. *Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004) ("The possibility that the contraband may no longer be present in the vehicle does not compel the finding that there is no probable cause; for purposes of the probable cause analysis, we are concerned with probability, not certainty."); *State* v. *Carlson*, 657 N.E.2d 591, 601-602 (Ohio Ct. App. 1995) (rejecting "stale odor" objection to probable cause); see also *United States* v. *Johnson*, 660 F.2d 21, 22-23 (2d Cir. 1981) ("[A]ppellant's argument with respect to the problem of a dog detecting only the residual odors as opposed to the drugs themselves

Likewise, the possibility that drug odor may be present because "the person being searched had attended a party where other people were using drugs," Pet. App. A32 (quoting Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 4 (2006)), or for some other reason unconnected to wrongdoing by a car's occupant, does not undermine probable cause. See *Foster*, 252 P.3d at 299; cf. *Pennsylvania* v. *Dunlap*, 555 U.S. 964, 965-966 (2008) (Roberts, C.J., dissenting from denial of cert.) ("[A]n officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to make an arrest."). For example, an officer seeing white powder does not know without a chemical test that it is cocaine instead of baking soda, but probable cause exists if he sees it in a car next to small vials and balloons. See *Brown*, 460 U.S. at 734. "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Gates*, 462 U.S. at 244 n.13.

II. A DRUG-DETECTION DOG'S RELIABILITY IS ESTABLISHED BY ITS TRAINING

Because a drug-detection dog is trained to alert to the odor of drugs, the only way to evaluate the dog's reliability is in a controlled setting where it can be definitively determined whether or not the dog's alert occurred in the presence of such an odor. Evidence of unconfirmed alerts from the field, where such controls are not possible, is thus not necessary to a proper reliability

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misconstrues the probable cause requirement. Absolute certainty is not required by the Fourth Amendment.").

inquiry. To the contrary, such evidence will typically confuse, not inform, the inquiry into a dog's reliability.

A. A Drug-Detection Dog's Reliability Is Established By Its Performance In Controlled Settings

1. Although canine drug-detection training programs vary in their particulars, most are generally based on principles developed by U.S. Customs and Border Protection. See Bryson 261; see also U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., *History of CBP Canine Centers* (2010), http://www.cbp.gov/xp/cgov/border_security/canine/history_3.xml. These programs rely on the understanding that a "dog can be trained to respond consistently to certain sensory stimuli (odors, scents, and so forth) to alert the handler." U.S. Dep't of the Army, Pamphlet No. 190-12, *Military Working Dog Program* 2 (1993) (*Military Working Dog Program*). "If the dog's reaction to selected stimuli is always rewarded by the handler, the reward reinforces the dog's behavior, motivating the dog to repeat the actions." *Ibid.* In training dogs to alert to drug odor, for example, the handler might give the dog a reward or reward object and put the dog in a sitting position every time it smells the target odor. See Edward E. Dean, Southwest Research Inst., *Training Dogs for Narcotic Detection* 2 (1972) (Dean). If the handler fails to provide the reward when it sits to other odors, it will learn to discriminate between drug odors, which are followed by rewards, and all other odors, which are not. See *ibid.*

A controlled environment presents the only effective means of determining whether a dog that has undergone such training will reliably alert to drug odor (and only to such odor). Those who design evaluation exercises for contraband-detection dogs know where contraband is

hidden. They thus know the locations where the odor of the contraband will be present, as well as those locations where that odor should not be present. By correlating a dog's alerts and non-alerts to those known locations, the dog's reliability in detecting drug odors can be accurately assessed. See Bryson 256 ("Reliability means the dog will alert if he detects narcotic scent, not otherwise."); Kenneth G. Furton et al., Florida Int'l Univ., *The Scientific Working Group on Dog and Orthogonal Detector Guidelines* 55 (2010) (*Scientific Working Group*) (defining reliability as "[l]ow probability of alerting to anything other than a target odor and a high probability of alerting to a target odor").

By contrast, the handlers undergoing such evaluation exercises do not typically know where contraband is hidden, so they cannot inadvertently cue their dog. See, *e.g.*, *Scientific Working Group* 42, 58, 64. A dog's record in controlled certification and training settings is thus the best response to the Florida Supreme Court's concern about handler cuing. See Pet. App. A32.

2. In the field, the situation is markedly different, and it is not possible to assess a dog's reliability in this way. If a dog fails to alert to a car or other location that in reality includes contraband, that failure may never be discovered because the location may not be searched. On the other hand, if a dog alerts to a location in which contraband is not ultimately found, "[i]t is impossible to know * * * whether [the dog] detected the residual odor of an illegal drug (a correct alert, but not one that led to the successful recovery of evidence of drugs)" or whether the dog alerted in the absence of any drug odor at all. *Foster*, 252 P.3d at 301.

An alert in the field can fail to lead to recovery of drugs for a variety of reasons. The drugs could be so

well hidden that the searching officer does not find them. See *Scientific Working Group* 66. Drugs could have recently been in the location before being removed. See Bryson 257 ("Four skiers toke up in the parking lot before going up the mountain. Five minutes later a narcotic detector dog alerts to the car. There is no dope inside. However, the dog has performed correctly."); *Military Working Dog Program* 30 ("The odor of a substance may be present in enough concentration to cause the dog to respond even after the substance has been removed. Therefore, when a detector dog responds and no drug or explosive is found, do not assume the dog has made an error."). Individuals or items in the location might have recently been in close proximity to drugs. See *United States* v. *Diaz*, 25 F.3d 392, 395 (6th Cir. 1994) (dog alerted to suitcase where no drugs were found, but "the owner of the suitcase on which [the dog] had alerted admitted that she had been smoking 'weed' all weekend and that the scent could have remained in her clothing found in the suitcase"). Or the dog might have alerted in the absence of any drug odor.

Only the last situation amounts to a false positive; each of the others is an accurate alert. See Bryson 256 (a "false-positive alert" is when "the dog alerts where there is no drug *scent*") (emphasis added). And when a dog alerts in the field but no drugs are found, it is typically not possible to definitively determine which of these explanations applies. See *Foster*, 252 P.3d at 301. Accordingly, an alert in the field that does not lead to recovery of drugs is not a false alert, but rather merely an "unconfirmed" one. *Scientific Working Group* 61-62 ("In a certification procedure you should know whether you have a false positive. You may not know whether you have a false positive in most operational situations.

An unconfirmed alert may also be an error—a false positive—but these outcomes cannot be distinguished in an operational environment."); see *Ludwig*, 641 F.3d at 1252 n.5 ("[A]lerts in the field that ultimately reveal no discernible drugs are not necessarily false alerts.") (brackets in original) (citation omitted); *Foster*, 252 P.3d at 296 ("On deployments in the field, when a dog alerts to a location and a subsequent search of that location does not result in the seizure of drugs or drug paraphernalia, there is no way to determine whether the dog alerted to a residual odor or whether the alert was a result of dog or handler error."); see also *id.* at 301.

For these reasons, evidence about unconfirmed alerts in the field will typically hinder, not advance, the inquiry into a canine team's reliability. For example, those field records may demonstrate that 58% of a particular dog's alerts in the field lead to recovery of a seizable quantity of drugs, see *Ludwig*, 641 F.3d at 1252, but they likely will not be able to establish what happened in the remaining 42% of alerts. It is possible that most or all of those unconfirmed alerts were accurate, and their existence thus does not undermine the reliability of the dog. See *id.* at 1252 n.5. If, in contrast, the dog has a very low success rate in a controlled training or certification setting, in which all other explanations for a non-seizure alert can be eliminated, then the dog's lack of reliability can be accurately established.

Accordingly, leading canine professionals do not consider unconfirmed alerts relevant to a dog's reliability. The Scientific Working Group on Dog and Orthogonal Detector Guidelines (SWGDOG) is "a partnership of local, state, federal and international" law enforcement and other agencies formed to develop "best practices for

detection teams." *Scientific Working Group* 3-4.[6] SWGDOG has issued guidelines expressly providing that the "[r]eliability of the canine/handler team shall be based upon the results of certification and proficiency assessments." *Id.* at 66. Those guidelines further provide that, while "[c]onfirmed operational outcomes can be used to determine capability," "[u]nconfirmed operational outcomes shall *not* be used to determine capability in that they do not correctly evaluate a canine/handler team's performance (i.e. residual odor can be present or concealment may preclude discovery)." *Ibid.* (emphasis added); see *id.* at 106-107, 139.

Because training and certification are generally "the only evidence material to a determination that a particular dog is reliable," testimony or records about the dog's unconfirmed alerts in the field need not be produced to establish probable cause (and a defendant's request for such records to support a suppression motion should typically be denied). *State* v. *Nguyen*, 811 N.E.2d 1180, 1194-1195 (Ohio Ct. App. 2004) (because "proof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable," trial court erred by "ordering the state to produce [the dog's] real world reports"); see *People* v. *Stillwell*, 129 Cal. Rptr. 3d 233, 239 (Ct. App. 2011) ("California cases * * * have not required evi-

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[6] The National Institute of Justice, the Federal Bureau of Investigation, and the Department of Homeland Security provided funding to establish the working group in 2005. See *SWGDOG Update* 5-6 (Mar. 2010), http://casgroup.fiu.edu/pages/docs/1060/1306436244_History_&_Goals_of_SWGDOG.pdf. SWGDOG is one of more than a dozen similar scientific working groups "established to improve discipline practices and build consensus with federal, state, and local forensic community partners." *Scientific Working Group* 9.

dence of a dog's success rate to establish probable cause.") (emphasis omitted); *Perkins* v. *State*, 685 S.E.2d 300, 304 (Ga. Ct. App. 2009) ("[W]e have rejected the argument that records of a drug dog's reliability are required to establish probable cause based on a dog's alert."); *Jones* v. *Commonwealth*, 670 S.E.2d 727, 733 & n.3 (Va. 2009) ("[T]he trial court properly held that the police department's failure to conduct back checks did not negate the dog's reliability"; such checks "are not necessarily a helpful way of determining whether a narcotics detection dog is reliable because the dogs alert to the *odor* of narcotics, not the presence of narcotics.").

The Florida Supreme Court thus erred by suppressing evidence on the ground that the State "did not introduce Aldo's field performance records so as to allow an analysis of the significance of the alerts where no contraband was found" and a "quantif[ication] [by the court of] Aldo's success rate in the field." Pet. App. A42, A42-A43 n.12.

3. The Florida Supreme Court incorrectly analogized detection dogs to human informants for purposes of establishing reliability. See Pet. App. A26-A28, A39-A40. The court reasoned that, just as the human informant's track record of success may be relevant to determining whether his tip will provide a basis for probable cause, the dog's track record in the field should be considered when evaluating whether its alert provides probable cause. *Id.* at A26 & n.7.

The analogy is flawed. Dogs are conditioned to respond automatically to a given stimulus and are not subject to human motivations and emotions. Cf. *Gates*, 462 U.S. at 234 (discussing probable cause inquiry when there is "doubt as to an informant's motives"). While an anonymous informant "has not placed his credibility at

risk" and thus may be able to "lie with impunity," *Florida* v. *J.L.*, 529 U.S. 266, 275 (2000) (Kennedy, J., concurring), or may be "motivated by revenge," *United States* v. *Marvin*, 720 F.2d 12, 13 (8th Cir. 1983), a dog does not engage in such decision-making calculus before it acts. Indeed, in *United States* v. *Jacobsen*, 466 U.S. 109 (1984), this Court compared detection dogs to a chemical field test for cocaine—an undisputedly scientific and reliable method of detection—and determined that neither constituted a search because both detect "only the presence or absence of narcotics." *Id.* at 124 (quoting *United States* v. *Place*, 426 U.S. 696, 707 (1983)). "[A] positive alert from a law enforcement dog trained and certified to detect narcotics [is thus] inherently more reliable than an informant's tip." *State* v. *Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004) (citation omitted); see *United States* v. *Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) (Because "a canine, when trained, reacts mechanically to certain cues in his environment," "[t]he same concerns that would be present in a human informant are simply not relevant here."). Thus, while an informant's track record may be relevant to determining his credibility, the same is not true for a dog.[7]

4. The logical flaw in the Florida Supreme Court's focus on field alerts in which drugs are not found is well

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[7] The Sixth Circuit has distinguished between a dog's "reliability," which the court said is conclusively established by its training and certification, and its "credibility," which, in the court's view, can be attacked by the dog's field performance records and expert testimony. *Diaz*, 25 F.3d at 394. Application of a human concept like credibility to a dog is misplaced, and, for the reasons provided above, a dog's field performance (no matter how denominated) is not necessarily probative of the dog's abilities.

illustrated by *Wiggs* v. *State*, 72 So. 3d 154 (Fla. Dist. Ct. App. 2011). Applying the Florida Supreme Court's decision in this case, the intermediate appellate court in *Wiggs* ordered the suppression of cocaine found in the defendant's car after concluding that the dog whose alert led to the seizure was not reliable. See *id.* at 159-160. The dog in question had been trained and certified by the National Police Canine Association, meaning that it had achieved at least a 75% accuracy rate in detecting drug odor in controlled settings. See *id.* at 155-156. Yet the appellate court still conducted a searching review of the dog's field performance and deemed it unreliable. The dog had positively alerted in 14 out of 17 automobile stops, but drugs were found in only four of those cases. See *id.* at 157. Testimony and record evidence demonstrated that the dog's handler "had documented some type of narcotics history associated with each vehicle on which [the dog] alerted but in which no drugs were found," but the court dispatched that evidence as inadequate and ordered suppression. *Id.* at 159; see *id.* at 156-157 (describing evidence of episodes in which no drugs were recovered after an alert, such as a "passenger['s] admitt[ing] using cocaine," a "driver['s] admitt-[ing] to smoking marijuana," and the officer's own detection of "the odor of burnt marijuana").

Judge Altenbernd specially concurred, agreeing that suppression was dictated by the Florida Supreme Court's decision in this case but emphasizing that "[i]t seems obvious that [the dog] is alerting on residual drugs that do not lead to the discovery of arrestable quantities of drugs." *Wiggs*, 72 So. 3d at 161. As the concurring judge explained, "[i]t is not that [the dog] is alerting when there are no drugs to smell; he is alerting

to molecules of drugs left behind in vehicles where drugs have been used or transported." *Ibid.*

> Thus, in *Harris*, the court is requiring that law enforcement train dogs to distinguish between the odor of minute quantities of drugs and larger quantities of drugs. If that cannot be done for a particular drug, it seems we will need to abandon dogs as a method of obtaining probable cause for that drug.

Ibid.[8]

B. Courts Should Not Constitutionalize Canine Training Or Certification Standards

If a dog successfully completed a bona fide training program or it was certified by a bona fide certifying organization, see p. 16, *supra*, and it alerts in accordance with its training, a court should find its alert reliable. Courts can presume that a trained or certified dog that is used by law enforcement reliably alerts to the presence of odors it is trained to recognize and need not ex-

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[8] As Judge Altenbernd observed, the Florida Supreme Court's analysis of residual odor suggests that drug-detection dogs should be trained to disregard weak drug odors. See *Wiggs*, 72 So. 3d at 161. But any attempt to train a dog to ignore weak odors in the hope of eliminating alerts to residual odor would defeat the purpose of using such dogs, which is to take advantage of their superior sense of smell to detect minute quantities of target substances that may be skillfully hidden and masked. See Dean 28-29; see also J.M. Johnston, Institute for Biological Detection Sys., Auburn Univ., *Canine Detection Capabilities: Operational Implications of Recent R&D Findings* 2 (June 1999) ("All detection tasks require that dogs respond to the lowest detectable concentrations of the target odor because it is such initial samples that can then prompt them to move in directions that lead to higher concentrations. * * * It is * * * important that all dogs are trained to pay attention to a range of concentrations, including even the faintest whiff of target odors, regardless of differences in search scenarios.").

amine the technical adequacy of training or certification standards as part of a probable cause inquiry. See *United States* v. *Sanchez-Pena*, 336 F.3d 431, 444 & n.62 (5th Cir. 2003). The Florida Supreme Court's apparent requirement that such an examination be undertaken, see, *e.g.*, Pet. App. A41, is unnecessary, would inappropriately constitutionalize dog training methodology, and would have adverse consequences.

First, law enforcement has a strong interest in ensuring the accuracy of contraband-detection dogs and thus has its own independent incentives to establish and maintain effective training and certification programs. See Bryson 261 ("Since high quality proficiency training is critical to performance reliability, its importance cannot be overemphasized.") (emphasis omitted). A dog that fails to alert to the presence of an odor it is trained to detect could lead to the failure to recover drugs or to detect explosives. Likewise, a dog that alerts in the absence of target odors will squander limited law enforcement resources by triggering searches unlikely to yield evidence of illegal activity. Courts can themselves presume that law enforcement would not rely on a dog unless the dog's certification or training renders it a reliable source of information.

Second, the Florida Supreme Court's approach would inappropriately turn suppression hearings involving dog alerts into lengthy "mini-trial[s]" on technical training methods and undermine certainty for officers in the field who reasonably rely on the fact of successful training as establishing their dogs' reliability. *United States* v. *Robinson*, 390 F.3d 853, 874-875 (6th Cir. 2004). While a court conducting a suppression hearing may consider whether the program or organization through which a detection dog was trained or certified

is bona fide, see *Ludwig*, 641 F.3d at 1251 (courts should accept training absent a showing that it was conducted by a "sham" organization), such an inquiry should not extend beyond determining whether the program or organization is one upon which law enforcement officers generally rely.[9]

Third, while the basic reward-response principles underlying the training of detection dogs are well-understood, see p. 16, *supra*, canine professionals use a variety of methods both to apply those principles in training and to measure the success of those methods. See, *e.g.*, *Scientific Working Group* 19-20 (summarizing different organizations' certification standards).[10] Contrary to the Florida Supreme Court's view (Pet. App. A45), the lack of complete uniformity does not undermine the reliability of trained drug-detection dogs. Moreover, courts are not well-equipped to evaluate the

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[9] Similarly, an affidavit supporting a search warrant based on a drug-detection dog's alert need not include background information about a program or organization that conducted the training or certification. See *United States* v. *Berry*, 90 F.3d 148, 153 (6th Cir.) (affidavit referred to "drug sniffing or drug detecting dog"; court concluded that phrase "reasonably implied that the dog was a 'trained narcotics dog' " and found the affidavit sufficient), cert. denied, 519 U.S. 999 (1996); *Meyer*, 536 F.2d at 965-966 (affidavit describing detection dog as "trained" was sufficient).

[10] Law enforcement at all levels has collaborated in a scientific working group to develop and promote a set of training and certification guidelines for drug-detection dogs. See generally *Scientific Working Group* 1-23, 134-139; see also pp. 19-20 & n.6, *supra*. Those involved in that endeavor "anticipate that SWGDOG will have a broad and positive impact on policy and practice" with respect to canine training and certification nationally. *Scientific Working Group* 22. Although SWGDOG anticipates increasing uniformity in training and certification standards as a result of its efforts, see *ibid.*, differences remain, see *id.* at 19-20.

technical validity of these varying standards, see *Ludwig*, 641 F.3d at 1251, and they should not use the Fourth Amendment as a vehicle for freezing any of them into place.

C. Officers Need A Clear Rule To Guide Decisions In The Field

Law enforcement agents conducting automobile searches, often on the side of a busy highway, operate in a dynamic environment in which "the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and [thus] the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). Such circumstances call for "clear and unequivocal guidelines to the law enforcement profession." *California* v. *Acevedo*, 500 U.S. 565, 577 (1991) (internal quotation marks and citation omitted).

That principle is fully applicable here. "[A] dog's credentials provide a bright-line rule for when officers may rely on the dog's alerts—a far improvement over requiring them to guess whether the dog's performance will survive judicial scrutiny after the fact." *Ludwig*, 641 F.3d at 1251. It is exactly the type of "readily administrable rule[]" this Court has repeatedly endorsed in the Fourth Amendment context. *Virginia* v. *Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater*, 532 U.S. at 347). By contrast, relying on a detection dog's field performance would seemingly require police to conduct a calculation each time they deploy a particular dog in order to "quantify[] [the dog's] success rate in the field"

and determine whether the resulting figure is adequate for probable cause. Pet. App. A42 & n.12; see *Wiggs*, 72 So. 3d at 161 (Altenbernd, J., specially concurring) (expressing concern about "uncertainty" for law enforcement officers caused by the Florida Supreme Court's decision in this case). Any such shifting standards for particular dogs would be wholly unworkable.

A rule that a detection dog's reliability should be evaluated based on its successful completion of training, rather than its quantified field performance, does not mean that an officer's testimony that a trained dog alerted will invariably establish probable cause. A court weighing suppression may consider testimony that the handler cued the dog to alert in the particular case before it, *e.g.*, *Phelps* v. *State*, No. S-11-0215, 2012 WL 2306407, at *10-*11 (Wyo. June 19, 2012), or that the dog did not in fact alert, *e.g.*, *United States* v. *Parada*, 577 F.3d 1275, 1281 (10th Cir. 2009), cert. denied, 130 S. Ct. 3321 (2010); *State* v. *Nguyen*, 726 N.W.2d 871, 878-884 (S.D. 2007). A court may also consider evidence that "the alerting dog has some sort of ailment or impairment" that would have hindered its ability to detect drug odor. *United States* v. *Howard*, 621 F.3d 433, 448 (6th Cir. 2010), cert. denied, 131 S. Ct. 1623 (2011); see *Foster*, 252 P.3d at 301-302 n.12 ("[O]n a proper record, a handler's awareness of a medical condition or other infirmity that could affect the dog's reliability would be relevant to the probable cause analysis."). Those case-specific inquires go to the particular circumstances of the alert, not to the general capacity of the dog to reliably detect the odor of contraband.

III. THE DRUG-DETECTION DOG'S ALERT PROVIDED PROBABLE CAUSE TO SEARCH RESPONDENT'S TRUCK

Aldo's alert provided Officer Wheetley probable cause to search respondent's truck. Officer Wheetley and Aldo had both completed extensive courses before they began working together in 2005, and they completed another week-long course thereafter. J.A. 53-55. In addition, Aldo had been certified for successfully detecting marijuana, methamphetamine, heroin, ecstasy, and both crack and powder cocaine, indicating that he is capable of so doing with a high degree of accuracy. J.A. 55, 70, 103-104. Respondent has not contended that any of the relevant training or certification programs was not bona fide. In addition, Officer Wheetley also conducted weekly maintenance training with Aldo in various settings. J.A. 56-60.

Aldo's success in controlled training settings established his reliability, and there was no need to introduce records of his field performance. And the later episode in which Aldo alerted to respondent's door handle but no drugs were discovered, J.A. 44-50, 75-77, was likely not a false alert, given respondent's admissions of frequent drug preparation and use. In any event, "[t]he crucial question for reliability is not whether a dog is actually correct in the specific instance at hand—no dog is infallible—but rather whether the dog is likely enough to be right so that a positive alert 'is sufficient to establish probable cause for the presence of a controlled substance.'" *United States* v. *Stubblefield*, No. 10-3587, 2012 WL 2290870, at *4 (6th Cir. June 19, 2012) (quoting *Diaz*, 25 F.3d at 394). That standard was met in this case.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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JULY 2012