

6-1-2017

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Megan Yentes, Note, Supply the Hand that Feeds: Narcotic Detection Dogs and the Fourth Amendment, 37 N. Ill. U. L. Rev. 461 (2017).

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Supply the Hand that Feeds: Narcotic Detection Dogs and the Fourth Amendment

MEGAN YENTES*

Police canines are highly valued by law enforcement agencies as they are capable of detecting the faintest scent of contraband. The Supreme Court has established that a canine sniff is not a “search” within the meaning of the Fourth Amendment, and as long as a canine has been formally trained by any “bona fide” organization, their positive alert provides law enforcement officials with the requisite probable cause to institute warrantless and invasive searches of automobiles. The Supreme Court’s flawed approach was best summed up by Justice Souter when he stated, “The infallible dog, however, is a creature of legal fiction.” The Supreme Court’s approach to canine sniffs has overlooked underwhelming canine accuracy rates, as well as the lack of federal or state standards imposed on training facilities. These underlying concerns surrounding canine sniffs have been unheeded by the Supreme Court, and thus, an individual’s Fourth Amendment protections have become further diluted. This Note addresses specific concerns of canine training and accuracy, examines the problematic lack of federal or state standards imposed on facilities, examines the most recent Supreme Court case concerning canine sniffs, and concludes by proposing training standards modeled after Illinois practices.

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* Juris Doctor Candidate, May 2018. I would like to extend my gratitude toward Professor McConkie for providing guidance and enthusiasm during the writing and revision process of this Note. I would also like to thank family and friends for the unconditional support they have given. I would like to especially thank my boyfriend for the endless encouragement and toleration of my efforts during this endeavor. Finally, I would like to thank the Northern Illinois University Law Review Board and Staff for their extensive editorial support during the publication process.

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Police canines have been drafted for the ongoing “war on drugs” since the 1970s.¹ They have been instrumental in sniffing out contraband and placing narcotics in the hands of law enforcement agencies across the country. However, use of these drug-detecting canines during searches of automobiles has unleashed doubts as to whether private citizens’ Fourth Amendment protections have been violated. These doubts arise from varying rates of accuracy in canine performance, as well as a lack of certification standards employed by the states and federal government. Because of such uncertainties, this Note highlights the problematic areas of canine sniffs and shows that a positive alert by a canine is insufficient to establish the probable cause required to search an automobile in the context of a lawful traffic stop. Without any standardized training programs set by individual states or at the federal level, there is no meaningful way to assess the reliability of a canine.

Part I will first briefly explain the history of the U.S. Supreme Court’s approach to the constitutionality of canine sniffs, and Part II will discuss the controversy of the *Illinois v. Caballes* decision. Part III will discuss varying rates of canine accuracy, provide a brief overview of canine training guidelines, and look to how federal and state court decisions examine canine reliability in the context of traffic stops. Finally, Part IV will highlight the most recent U.S. Supreme Court decision involving canine sniffs and attempts to reconcile that decision with the Court’s prior decisions. Part IV will also address the complications posed by the inexistence of national/state standards for certification and propose a solution modeled after Illinois practices. Finally, this Note will consider the growing legalization of marijuana in states such as Colorado and consider potential problematic areas considering the aforementioned uncertainties that surround narcotic-detecting canines.

1. *Police Canines in History*, DOGS FOR LAW ENFORCEMENT, <http://www.dogsfor-lawenforcement.org/police-canines-in-history.html> (last visited Mar. 10, 2017).

The keen sense of a canine's smell "is something deeply ingrained in our general culture."² A canine's unique ability to detect odors comes from their exceptional olfactory receptors—canines have about 25 times more receptors than humans do.³ Canines are also able to separate odors, which makes them an ideal tool in drug-detecting searches.⁴ Despite the unique abilities that canines possess to detect odors, which humans do not possess, it is impossible for a canine to know whether or not a particular odor comes from contraband or legal substances.⁵

For example, a prescription drug that was legally obtained can give off the odor of acetic acid, which is the same odor that is given off by heroin.⁶ There are thirty-two legal prescriptions that contain opioid compounds.⁷ Imagine driving down the highway when you're pulled over for travelling seven miles per hour over the speed limit by a state trooper. Tucked away in the bottom of your console out of plain sight, you have a legal and clearly labelled prescription bearing your name. The trooper initiates a traffic stop and you decline her request to search your vehicle. Without any indication of you being in possession of narcotics, the trooper walks her canine unit around your car, and the dog alerts to your legal prescription—giving the state trooper the probable cause required to search an automobile without a warrant. Because the canine is incapable of distinguishing a legal substance from contraband, you are the subject of a completely invasive, warrantless search of your automobile. There's no dispute as to the power of the canine's sense of smell, but the question is whether the use of the canine's sense of smell, without articulated facts to give rise to individualized suspicion of a person possessing contraband, should provide an officer probable cause to justify a warrantless search.

2. *Fitzgerald v. State*, 837 A.2d 989, 1037 (Md. Ct. Spec. App. 2003) (explaining both the nonfictional and fictional reliance on a canine's sense of smell, including a declaration by King Richard I, a passage from *Silver Blaze*, and a passage from *The Odyssey*).

3. Barry Cooper, *Never Get Busted: Understanding Police Drug Dogs*, CANNABIS CULTURE (Aug. 22, 2008), <http://www.cannabisculture.com/content/2008/08/22/never-get-busted-understanding-police-drug-dogs> (explaining why canines are preferred animals for detecting odors).

4. *Id.*

5. Lewis Katz & Aaron Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 755-56 (2007) ("Courts are split as to whether an alert to methyl benzoate—which is the tell-tale odor of cocaine but is found in many legal products—is actually an alert to cocaine." (footnote omitted)).

6. *Id.*

7. *Id.*

I. INTRODUCTION TO THE FOURTH AMENDMENT

The Fourth Amendment of the Constitution provides citizens with the right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁸ All evidence that is obtained by searches and seizures in violation of the Constitution is inadmissible, and this exclusionary rule also applies to the states.⁹ What the Fourth Amendment protects are “legitimate expectations of privacy,”¹⁰ and courts analyze whether or not the Fourth Amendment protections apply on a case-by-case basis.¹¹ This Note will primarily examine the use of narcotic-detection dogs in connection with automobiles. This section explores how the U.S. Supreme Court interpreted canine sniffs and then discusses how some state constitutions provide more protection than the United States Constitution surrounding canine sniffs. This explanation will lay the groundwork in order to focus on the importance of the *Illinois v. Caballes* decision where the U.S. Supreme Court determined that because a canine sniff only reveals the presence or absence of contraband contained within a vehicle, the minimally invasive investigative technique does not constitute a search as to run afoul of the protections of the Fourth Amendment.¹²

A. CANINES ARE NOT A “SEARCH” WITHIN THE MEANING OF THE FOURTH AMENDMENT

Generally, a warrant is required in order for a lawful search to occur,¹³ however the search of an automobile falls under one of the exception categories.¹⁴ An automobile may be searched without a warrant if the search is based on probable cause.¹⁵ Probable cause has been defined as “a fair probability that contraband or evidence of a crime will be found in a particular

8. U.S. CONST. amend. IV.

9. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

10. *United States v. Place*, 462 U.S. 696, 706-07 (1983).

11. *See, e.g., Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

12. *See Caballes*, 543 U.S. at 409.

13. U.S. CONST. amend. IV (“[A]nd 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.”).

14. *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (explaining that “[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view”).

15. *Ornelas v. United States*, 517 U.S. 690, 693 (1996).

place.”¹⁶ The foundation behind the exception to procuring a warrant before searching an automobile is due to the “inherent mobility” of the automobile.¹⁷ However, “[t]he word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.”¹⁸ The U.S. Supreme Court has held that a “search, even of an automobile, is a substantial invasion of privacy.”¹⁹

Law enforcement agencies have been utilizing narcotic-detecting canines in order to justify warrantless searches of homes,²⁰ vehicles,²¹ and luggage²² to recover contraband.

Before the *Caballes* decision, which held a canine sniff of an automobile was not a search,²³ *United States v. Place*²⁴ was relied upon when analyzing canine sniffs under the Fourth Amendment. In *Place*, law enforcement agents conducted a canine sniff of the defendant’s luggage at an airport and the U.S. Supreme Court had to determine whether or not the canine sniff was a search under the Fourth Amendment.²⁵ The Court applied the *Terry v. Ohio* approach to justify the warrantless search of the luggage.²⁶ These principles allowed the agents to expose the defendant’s luggage, which was located in a public place, to a narcotic-detecting canine because the sniff could not reveal the entire contents of the suitcase.²⁷ The decision in *Place* is significant because the U.S. Supreme Court held that a canine sniff was *sui generis*²⁸ and not a search within the meaning of the Fourth Amendment.²⁹ Thus, because the canine sniff is minimally intrusive, combined with the fact that the

16. *United States v. Pinela-Hernandez*, 262 F.3d 974, 978 (9th Cir. 2001) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

17. *Cady v. Dombowski*, 413 U.S. 433, 441-42 (1973).

18. *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971).

19. *United States v. Ortiz*, 422 U.S. 891, 896 (1975).

20. *See Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

21. *See Illinois v. Caballes*, 543 U.S. 405, 406 (2005).

22. *See United States v. Bronstein*, 521 F.2d 459, 463 (2d Cir. 1975).

23. *Caballes*, 543 U.S. at 410.

24. *United States v. Place*, 462 U.S. 696 (1983); *see also* Hope Hall, *Sniffing Out the Fourth Amendment: United States v. Place—Dog Sniffs—Ten Years Later*, 46 ME. L. REV. 151, 173 (1995) (discussing how prior to *Caballes*, courts relied on *United States v. Place* to determine that canine sniffs were not searches under the Fourth Amendment).

25. *Place*, 462 U.S. at 699.

26. *Id.* at 702 (“Specifically, we are asked to apply the principles of *Terry v. Ohio* . . . to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime.”).

27. *Id.* at 707.

28. *Sui Generis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (*Sui Generis* is defined as “of its own kind or class; unique or peculiar.”).

29. *Place*, 462 U.S. at 707. However, the Court did determine that the ninety-minute detention of the defendant’s luggage was unreasonable, and therefore the initial seizure of the luggage violated the Fourth Amendment, and ultimately the subsequent “search” of the luggage was inadmissible. *Id.* at 709.

luggage was located in a public place, the investigation did not constitute a search as to violate the Fourth Amendment.³⁰

B. STATE APPLICATION OF SUPREME COURT APPROACHES: STATE CONSTITUTIONS CAN PROVIDE ADDITIONAL PROTECTIONS

Before *Caballes* was decided, courts relied on *Place* to analyze canine sniffs.³¹ Jurisdictions were split on whether or not a canine sniff was a search within the meaning of each state's constitution.³² For example, the highest tribunal in New Hampshire held that a sniff is a search within the meaning of the state constitution, however it can be justified with a "reasonable suspicion standard."³³ In *State v. Pellici*, a concurring Justice of the Supreme Court of New Hampshire said that "[t]he reasonable expectation of privacy concept enunciated in *Katz* has never been adopted by this court"³⁴ There, the court held that a canine sniff of an automobile did indeed constitute a search under New Hampshire's state constitution;³⁵ the court went on to say that "our Constitution may be more protective of individual rights than the Federal Constitution."³⁶ Thus, while the U.S. Supreme Court and circuit courts have held in some instances that canine sniffs did not violate the United States Constitution,³⁷ a few individual states responded by providing more protection to their citizens when analyzing whether or not a canine sniff violated an individual's rights under their state constitution.³⁸

30. *Id.*

31. *See generally* *United States v. Morales-Zamora*, 914 F.2d 200, 203 (10th Cir. 1990); *United States v. Burton*, 288 F.3d 91, 102 (3d Cir. 2002).

32. BARRY LATZER, *STATE CONSTITUTIONAL CRIMINAL LAW* § 3:5, 3-37 (Clark Boardman Callaghan, 1995).

33. *Id.*

34. *State v. Pellici*, 580 A.2d 710, 725 (N.H. 1990).

35. *Id.* at 716 ("Employing a trained canine to sniff a person's private vehicle in order to determine whether controlled substances are concealed inside is certainly a search in these terms.").

36. *Id.* at 715.

37. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 706-07 (1983); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir. 1991) (holding canine sniff on exterior of a vehicle that is within police custody is not a search within the Fourth Amendment); *United States v. Johnson*, 660 F.2d 21, 22 (2d Cir. 1981) (holding that canine that is "specially trained to detect the odor of controlled substances" is not a search).

38. *See generally* Marjorie Shields, *Use of Trained Dogs to Detect Narcotics or Drugs as Unreasonable in Violation of State Constitutions*, 117 A.L.R. 5th 407 (2004) (discussing instances where canine sniffs have been held to violate a state constitution).

The Minnesota Supreme Court in *State v. Wiegand* analyzed the textually-identical provision of Minnesota's constitution³⁹ to the U.S. Constitution,⁴⁰ and noted that they may "construe [the] provision of the Minnesota Constitution to extend greater rights than a comparable provision in the U.S. Constitution, but will not do so cavalierly."⁴¹ There, an officer stopped the driver, Wiegand, for having a burned out headlight.⁴² Another officer arrived on scene and was asked to write a warning ticket so the first officer could conduct a canine sniff of Wiegand's vehicle.⁴³ The dog was walked around the exterior of the vehicle and alerted multiple times to the same area, and a subsequent search revealed marijuana under the hood of the car.⁴⁴ The court concluded that despite the fact that the canine sniff is limited in nature and not a search, the court's analysis is one that must consider an individual's privacy interests.⁴⁵ The court looked to the principles enunciated in *Terry v. Ohio* and considered whether or not the canine sniff intruded on Wiegand's privacy interests.⁴⁶ The court determined that a canine sniff around a vehicle is "intrusive to some degree" when a vehicle is stopped for only a routine traffic violation.⁴⁷ Additionally, the court held that a canine sniff couldn't be conducted on a vehicle without some sort of suspicion that illegal activity is occurring; the court created a gray area (somewhere between probable cause and "mere whim") where an officer must find a justification for the canine sniff for a stop solely centered around a routine equipment violation.⁴⁸ In sum, although the court in *Wiegand* determined that a canine sniff is not a search within the meaning of the state's constitution, it simultaneously extended protections to citizens by requiring a reasonable level of an officer's suspicion that contraband is present.⁴⁹ This case illustrates how a state government can appropriately guard its citizens from invasive searches and seizures. While Montana also has fallen into this line of interpretation,⁵⁰ other

39. MINN. CONST. art. 1, §10 ("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 warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.").

40. U.S. CONST. amend. IV.

41. See *State v. Wiegand*, 645 N.W.2d 125, 132 (Minn. 2002).

42. *Id.* at 128.

43. *Id.* at 129.

44. *Id.*

45. *Id.* at 132-33.

46. *Wiegand*, 645 N.W.2d at 133 ("In [*Terry*], the Court held that officers, on less than probable cause, could conduct a limited search for weapons of persons suspected of criminal activity.").

47. *Id.* at 134.

48. *Id.*

49. See *id.*

50. See *State v. Carlson*, 15 P.3d 893, 897-98 (Mont. 2000).

states have declined to find that their state constitutions provide a more expansive protection than the U.S. Constitution.⁵¹ As courts grappled with analyzing canine sniffs as searches within the meaning of state and federal constitution, there was an increasing divide among the courts that *Illinois v. Caballes* had to solve: whether or not a canine sniff of a vehicle required a level of reasonable suspicion in order to begin the sniff of a vehicle.⁵²

II. *CABALLES*: UNLEASHING A DANGEROUS PRECEDENT

This section will focus on how the *Caballes* decision expanded police officers' discretion in conducting traffic stops, and argues that the dissent's position is how courts should treat canine sniffs; it will then examine how the Court first addressed evidentiary requirements for a canine's positive alert to be considered admissible in order to then consider the problematic issue of canine accuracy. The *Caballes* decision extended *Place* to allow canine sniffs of an automobile; *Caballes* rebuffed the argument that a "reasonable suspicion" is required before conducting a canine sniff.⁵³ In *Caballes*, the Court stated that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."⁵⁴

In *Caballes*, the defendant was stopped for speeding, and while receiving a warning ticket by the officer who pulled him over, a second trooper arrived with a canine unit and walked the dog around the car.⁵⁵ The dog alerted to the trunk of the vehicle, where the officers searched the trunk and recovered marijuana; the entire stop lasted less than ten minutes.⁵⁶ At the trial court level, *Caballes* was convicted and sentenced to twelve years imprisonment.⁵⁷ On appeal, the heart of his argument was that because canine investigatory sniffs during a traffic stop were Fourth Amendment searches, they should not be conducted without a "reasonable, articulable, individualized suspicion of wrongdoing that could be either sharpened or dispelled by the sniff."⁵⁸ In other words, *Caballes* argued that canine sniffs are intrusive to a

51. See *State v. McMillan*, 927 P.2d 949, 950 (Kan. Ct. App. 1996); *Gama v. State*, 920 P.2d 1010, 1013 (Nev. 1996).

52. Richard Meyers, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 24 (2006).

53. See *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

54. *Caballes*, 543 U.S. at 410.

55. *Id.* at 406.

56. *Id.*

57. *Id.* at 407.

58. Brief for Respondent at 6, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 2097415, at *6.

degree, and because there was no indication by Caballes that he had contraband in his vehicle, the canine sniff should not have been conducted because the sniff would not reveal anything relevant to the traffic violation.⁵⁹ The Illinois Supreme Court reversed the conviction and held that the use of the canine during the lawful traffic stop violated the Fourth Amendment because there was no reasonable suspicion that the vehicle contained contraband.⁶⁰ But the U.S. Supreme Court vacated that judgment, holding Caballes had no legitimate privacy interest in the contraband contained in his trunk.⁶¹ The U.S. Supreme Court determined that because the traffic stop was not unreasonably delayed, and the dog sniff occurred on the exterior of his vehicle, the use of the canine only exposed the contraband that Caballes had no right to possess, and therefore there was no violation of the Fourth Amendment.⁶²

Justice Souter's strong dissenting opinion in *Caballes* provides a better interpretation of the Fourth Amendment protections, and emphasizes reasonable suspicion should be required to justify the use of a drug detection dog.⁶³ Extremely skeptical of the majority's decision, he wrote "[t]he infallible dog, however, is a creature of legal fiction."⁶⁴ He goes on to state that:

[The canine sniffs] are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced. The information is not provided by independent third parties beyond the reach of constitutional limitations, but gathered by the government's own officers in order to justify searches of the traditional sort, which may or may not reveal evidence of crime but will disclose anything meant to be kept private in the area searched.⁶⁵

Justice Souter emphasized that the canine sniff should have been treated as a search, and then analyzed to determine if the search was reasonable in accordance with case precedent.⁶⁶ However, the majority opinion relied upon *United States v. Place* that categorized the canine sniff as *sui generis* and not

59. *See id.*

60. *People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2005).

61. *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005).

62. *Caballes*, 543 U.S. at 409-10.

63. *See id.* at 410.

64. *Id.* at 411.

65. *Id.* at 413.

66. *Id.* at 414.

a “search” as interpreted under Fourth Amendment considerations.⁶⁷ Disagreeing, Justice Souter explained that because we must recognize the “dog’s fallibility,” a sniff cannot be recognized as *sui generis* because of the innate unreliability of the canine, which would not necessarily alert to hidden contraband or other evidence of crime.⁶⁸ Justice Ginsburg also joined in dissent, noting that Caballes was stopped solely for driving six miles over the speed limit, and by bringing the canine to the routine stop it changed the character of the encounter.⁶⁹ In other words, the dissent points out that the traffic stop in *Caballes* became broader and more confrontational once the canine arrived, and that Caballes became exposed to “the embarrassment and intimidation of being investigated, on a public thoroughfare, for drugs.”⁷⁰

The decision in *Caballes* created a dangerous precedent for Fourth Amendment protections. In *Caballes*, the first officer writing the warning ticket to Caballes did not even request for the second trooper to arrive with his canine unit; the second officer arrived only after overhearing the traffic stop over the radio transmission.⁷¹ The use of an unrequested canine unit to conduct a drug investigation subsequent to an offense of travelling six miles over the speed limit undeniably expanded the stop. In support for the defense, the American Civil Liberties Union and the ACLU of Illinois as *Amici Curiae* provided:

A drug-detection dog adds no value to the investigation of a simple traffic infraction. A trained dog cannot ascertain the speed at which a vehicle was traveling or the true state of an apparently broken tail-light Nor are the services of a drug-detection dog useful with respect to any of the other purposes for which a routine traffic stop may be made. What drug-detection dogs are used for is investigating the presence of drugs—a legitimate matter for investigation, to be sure, but not one with any reasonable connection to the class of infractions that result in a routine traffic stop. Thus, the use of such dogs necessarily extends the scope of a routine traffic stop . . . [t]he Fourth Amendment prohibits the police from crossing that line, absent independent

67. *Caballes*, 542 U.S. at 409.

68. *Id.* at 412-13.

69. *Id.* at 421-22 (“Even if the drug sniff is not characterized as a Fourth Amendment ‘search’ . . . the sniff surely broadened the scope of the traffic-violation-related seizure.” (citations omitted)).

70. *Id.* at 421.

71. *Id.* at 406.

probable cause, or at least individualized suspicion If individuals were subject to such arbitrary governmental treatment every time they violated a traffic ordinance, the security guaranteed by the Fourth Amendment would disappear.⁷²

Armed with the majority's decision, law enforcement agencies were given permission to treat anyone stopped for even a minor traffic violation as a criminal suspect in a drug investigation.

A. *FLORIDA V. HARRIS*: DETERMINING A CANINE'S EVIDENTIARY STANDARDS

In the wake of *Caballes*, one question remained unanswered: just how reliable does a canine have to be in order to consider the alert to be admissible? The *Caballes* decision clarified that a canine sniff was not an unlawful search within the meaning of the Fourth Amendment,⁷³ however it was *Florida v. Harris* that examined the exact issue of whether or not a canine alert provides probable cause to search an automobile in light of the canine's reliability.⁷⁴ There, the U.S. Supreme Court held that "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume . . . that the dog's alert provides probable cause to search."⁷⁵ Defendant Harris was pulled over for an expired license plate; the officer was on patrol with a canine unit and believed Harris to be "visibly nervous," and also noted that Harris had an open beer can in the console of the truck.⁷⁶ Aldo, the canine on patrol, was trained to detect specific narcotics such as "methamphetamine, marijuana, cocaine, heroin, and ecstasy."⁷⁷ The officer walked Aldo around the vehicle, and the dog alerted at the driver's side door handle.⁷⁸ Based on the alert, the officer searched Harris's vehicle and discovered ingredients used to make methamphetamine (pseudoephedrine pills, hydrochloric acid, antifreeze, etc.).⁷⁹ However, Aldo was not

72. Brief for the Am. Civil Liberties Union & the ACLU of Illinois as Amici Curiae Supporting Respondent at 9, *Illinois v. Caballes*, 543 U.S. 405 (No. 03-923), 2004 WL 2097416, at *9.

73. *Caballes*, 543 U.S. at 410.

74. See *Florida v. Harris*, 133 S. Ct. 1050, 1053 (2013).

75. *Harris*, 133 S. Ct. at 1057.

76. *Id.* at 1053.

77. *Id.* at 1053.

78. *Id.* at 1053-54.

79. *Id.*

trained to detect *any* of these substances.⁸⁰ After Harris was charged for possession and manufacturing of methamphetamine, he posted bail and again was pulled over by the same officer and canine unit.⁸¹ Again, Aldo was instructed to sniff the exterior of the vehicle where he alerted to the truck, but no contraband was discovered in the search.⁸² Harris claimed that there was no probable cause to search the vehicle, and filed a motion to suppress.⁸³ Despite the inaccuracy of Aldo's performance in the field, the trial court concluded that there was probable cause to search Harris's vehicle.⁸⁴ The Florida Supreme Court reversed, however, finding that looking at the "totality of the circumstances," there was no probable cause to search a vehicle because "the fact that the dog has been trained and certified is simply not enough to establish probable cause."⁸⁵

The Florida Supreme Court noted the problematic lack of uniform certification standards imposed by the state by voicing concerns over the fact that each program that certifies canines operates differently.⁸⁶ There, they determined that an alert by the canine alone does not establish probable cause; instead, the:

State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence⁸⁷

The rationale behind the court's decision was not to impede police investigations by creating a precedent for a "virtually infallible"⁸⁸ canine; the court reasoned that the totality of the circumstances approach means that to prove that probable cause existed, the State must present all of the canine's certification documentation.⁸⁹

80. *Harris*, 133 S. Ct. at 1054.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1055.

85. *Harris*, 133 S. Ct. at 1055 (quoting *Harris v. State*, 71 So. 3d 756, 767 (Fla. 2011)).

86. *Harris v. State*, 71 So. 3d 756, 759 (Fla. 2011).

87. *Id.*

88. *Id.* at 772.

89. *Id.* ("Just as it would be entirely relevant to know how many times an informant's tip resulted in contraband being discovered, the reason that the State should keep records of the dog's performance both in training and in the field is so that the trial court may adequately evaluate the reasonableness of the officer's belief in the dog's reliability under the totality of the circumstances.").

The Supreme Court established the totality of the circumstance approach in *Illinois v. Gates*, where it determined that probable cause was a “fluid concept”, and by its nature involved a standard that is a “practical, nontechnical conception.”⁹⁰ In *Harris*, the Supreme Court determined that the Florida Supreme Court misconstrued the meaning of the “totality of the circumstances” approach by creating an “evidentiary checklist”, which is the opposite of the fluidity of the probable cause standard.⁹¹ The U.S. Supreme Court held that instead of mandating the State to turn over all evidence detailing a canine’s training, evidence of the canine’s “satisfactory performance” provides reason to trust in the alert.⁹² This approach, according to the Supreme Court, is more appropriate because the field reports may contain errors.⁹³ A dog’s reliability is best measured in a controlled testing environment because the designers of the program know where contraband is hidden and where it is not, whereas in the field, a dog may alert to a car and the officer finds no narcotics because either they are too well hidden, the scent came from a residual odor, or they could be on the driver’s person.⁹⁴ Thus, the U.S. Supreme Court determined that the finding of probable cause cannot depend on a multitude of independent requirements.⁹⁵ Instead, as long as a “bona fide organization” has certified a dog after its training in a controlled setting, a court can presume the alert is reliable.⁹⁶ The U.S. Supreme Court held that if the state provides proof that the dog was certified in a controlled setting, and the defendant has not contested that showing, then the court should determine probable cause existed.⁹⁷ On the other hand, if the defendant disputes the reliability of the alert, then the court should weigh the competing evidence.⁹⁸ According to the Supreme Court, a court should not demand “an inflexible set of evidentiary requirements” that the Florida Supreme Court attempted to prescribe.⁹⁹

The Florida Supreme Court attempted to assess the quality of the canine by examining the entirety of a canine’s performance record, while the U.S. Supreme Court supported a “common sense” standard.¹⁰⁰ With this decision, the “totality of the circumstances” approach, it seems, shifted from the lower court’s careful consideration of all relevant and available evidence concern-

90. *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983).

91. *Florida v. Harris*, 133 S. Ct. 1050, 1056 (2013).

92. *Id.* at 1057.

93. *Id.* at 1056.

94. *Id.*

95. *Id.* at 1056-57.

96. *Harris*, 133 S. Ct. at 1056-57.

97. *Id.* at 1058.

98. *Id.*

99. *Id.*

100. *Id.*

ing a dog's reliability to a vague, overbroad "who's-a-good-boy" scratch behind the ear upon the mere completion of a training program. The "common sense" standard glossed over "the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors."¹⁰¹ From a practical standpoint, defendants will continue to face challenges of canine accuracy as long as there is the approval of subpar certification facilities because there's little accountability and explanation of the significance of a canine's accuracy rates.¹⁰²

III. CANINE ACCURACY

This section will give an overview of how some circuits have analyzed the canine accuracy rates that were presented and challenged by defendants, and will then look to specific organization standards that certify canines and highlight how such standards lack uniformity. This Note emphasizes that a canine with a substandard accuracy record should not conduct a canine sniff of a vehicle because an officer should not be permitted to conduct a full-blown search of a vehicle after relying on an untrustworthy alert. The reliability of the narcotic-detecting canine must be scrutinized because probable cause exists once a canine alerts his handler—however, the canine is unable to be cross-examined to explain its behavior. There can be two types of errors that occur during a canine sniff; a dog can fail to alert when drugs are present ("false negative"), and a dog can alert when drugs are not present ("false positive").¹⁰³ In *Caballes*, Justice Souter alerted the majority to the threats of canine fallibility; he cited varying percentages of canine accuracy rates found in federal and state court decisions.¹⁰⁴ For example, he pointed out in *United States v. Kennedy*, the handler of the canine ("Bobo") failed to keep records of his canine's field work as instructed by the training facility.¹⁰⁵ The court there emphasized the importance of continuous training and field monitoring, and further noted that a dog may lose its effectiveness and revert from its trained behavior.¹⁰⁶ Bobo's success rate was determined to be an alarmingly low 71.4%.¹⁰⁷ Despite the careless recordkeeping of the canine, the court nevertheless determined that this accuracy rate meets the probable cause

101. See *Harris v. State*, 71 So. 3d 756, 768 (Fla. 2011).

102. See Taylor Phipps, *Probable Cause on a Leash*, 23 B.U. PUB. INT. L.J. 57, 70-81 (2014).

103. Robert Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 K.Y. L.J. 405, 427 (1997).

104. *Illinois v. Caballes*, 543 U.S. 405, 412 (2005).

105. *United States v. Kennedy*, 131 F.3d 1371, 1374 (10th Cir. 1997).

106. *Id.*

107. *Id.* at 1375.

threshold.¹⁰⁸ Other cases noted by Justice Souter included an examination of a canine's 79% success while on a specific assignment with a postal service,¹⁰⁹ and another instance where the handler was aware his canine had been inaccurate between ten and fifty times.¹¹⁰

Additionally, in a recent Seventh Circuit decision, Justice Wood delivered the opinion of the court examining the alert rates of Lex, a canine who was prone to signaling for false positives.¹¹¹ In *U.S. v. Bentley*, Lex's overall accuracy rate was determined by the number of times he alerted and the number of times his handler found drugs; the result is a disappointing 59.5%.¹¹² Lex also alerted 93% of the time he is commanded to initiate an open-air sniff of a vehicle.¹¹³ The head of the facility where Lex completed his training testified that indicating at that high of a rate in the field is not favorable.¹¹⁴ The dog's 93% rate is high because it is embedded in the innate bias of the canine; Lex is called when police officers already suspect drugs may be present.¹¹⁵ Lex's handler testified that Lex will receive a special reward, a rubber hose stuffed with a sock, each time that Lex alerts.¹¹⁶ The typical behavior of a dog to be motivated by a reward is a concern, and Lex's reward is a policy which the court believed to be "a terrible way to promote accurate detection" ¹¹⁷

The court in *Bentley* noted other district decisions where the canine's accuracy rates range from 43%-62%, and these rates are enough to prevail because probable cause has been determined to be something less than a preponderance.¹¹⁸ Despite the acceptance of the underwhelming success rate of the handful of canines discussed in *Bentley*, the court cautioned that these low accuracy rates should not be "a race to the bottom", and the justice system should improve the quality and reliability of the canines; otherwise, a failure to do so will result in the suppression of evidence obtained from the search.¹¹⁹ The problem with canine sniffs lies in the resulting search; even though the accuracy of a canine's alert could be determined by a toss of a

108. *Id.* at 1378.

109. *United States v. Scarborough*, 128 F.3d 1373, 1378 (10th Cir. 1997).

110. *Laimé v. State*, 60 S.W.3d 464, 476 (Ark. 2001); *see also United States v. Holleman*, 743 F.3d 1152, 1157 (8th Cir. 2014) (examining the reliability of a canine named Henri; Henri's accuracy rate was 57% and the court there followed case precedent that held a prior accuracy rate of 54% was sufficient to support the denial of a motion to suppress).

111. *United States v. Bentley*, 795 F.3d 630, 635 (7th Cir. 2015).

112. *Id.*

113. *Id.*

114. *Id.* at 636.

115. *Id.*

116. *Bentley*, 795 F.3d at 636.

117. *Id.*

118. *Id.*

119. *Id.*

coin, the harm to an individual's Fourth Amendment protections have already been sustained when their belongings become subject to an invasive search as a product of an unreliable canine alert.

Even further, a dissenting justice in a Colorado Supreme Court decision wrote that the majority rejected the "possibility 'that the alert of a trained narcotics detection dog can indicate anything more than the presence or absence of contraband.'"¹²⁰ In *People v. Esparza*, the justice cited a study completed by the *Chicago Tribune* in 2011.¹²¹ The *Chicago Tribune's* study revealed a troubling analysis of Illinois traffic stops in the years 2007-2009.¹²² Of the canine sniffs that were conducted, only 44% of alerts by canines led to the discovery of drugs or paraphernalia; for Hispanic drivers, drugs were only found 27% of the times that the canine alerted, suggesting that the canines are being used in conjunction with racial profiling in order to recover contraband.¹²³ The study revealed that these low accuracy rates could have been a result of either 1) walking the canine around the vehicle too many times, or 2) the problem that residual odor poses; both of these instances can result in a dog alerting to drugs without the actual presence of drugs.¹²⁴ In the Colorado decision, Justice Hobbs also criticized the majority which held that there were no privacy interests in the possession of contraband, but this ignores the possibilities of false positives that canines provide,¹²⁵ as indicated by the *Chicago Tribune*. Hobbs explained, "it is not merely the 'privacy interest in the possession of contraband,' but the full privacy interest against search without *adequate justification*—against 'unreasonable searches'" is the proper analysis under the language of the state's constitution and Colorado precedent.¹²⁶ In other words, the justification of the search does not rest solely on an individual's lack of privacy interest in illegal substances, but we should instead consider the individual's privacy interests in the context of searches that lack reasonable suspicion.¹²⁷

Dogs do not have the ability to motivate themselves to improve or acquire skills, but rather they are conditioned to respond to specific stimuli.¹²⁸

120. *People v. Esparza*, 272 P.3d 367, 372 (Colo. 2012) (holding that because narcotic detection dogs can only communicate the presence or absence of contraband, there was no intrusion of defendant's reasonable privacy interests during a canine's sniff of a truck parked in a motel parking lot).

121. *Id.*

122. Dan Hinkel & Joe Mahr, *Drug Dogs Often Wrong: Police Canines Can Fall Short, but Observers Cite Residue and Poor Training as Factors*, CHI. TRIB., Jan. 6, 2011, at 1,10.

123. *See id.*

124. *Id.*

125. *Esparza*, 272 P.3d at 372.

126. *Id.* (emphasis added).

127. *See id.*

128. *Matheson v. State*, 870 So.2d 8, 13 (Fla. 2003).

As noted *supra*, canines are not capable of distinguishing contraband from otherwise legal substances.¹²⁹ This also presents a problem for any residual odors that may be present within the vehicle. Recall that in *Harris*, the canine Aldo alerted to the driver's side handle but no contraband was found; the explanation was that the odor of methamphetamine that Aldo was trained to detect transferred to the door handle.¹³⁰ Dismissing the defendant's assertion that a dog's field performance must be considered, Justice Kagan in *Harris* discussed that field records are not necessarily accurate due to record-keeping by the handlers; the dog could have smelled residual odors that were present at one time, but are not present any longer.¹³¹ Training programs may either encourage false alerts to residual odors or fail to train canines to ignore them; it is possible to train the canines to discern present drugs from residual odors, however, typical canine-training programs do not train canines to distinguish between the two.¹³² The problem with the lack of exclusionary training arises when the citizens' constitutional protections become threatened if a canine alerts to a residual odor that may have been present at some time in the past, but there is no current illegal activity occurring. Most concerning, this inability to differentiate between the presence of contraband and residual odors has not barred a determination of probable cause among the circuits.¹³³ This is where the U.S. Supreme Court's decision in *Harris* becomes problematic; as long as a canine is certified from a "bona fide" organization, then the alert is considered reliable and a probable cause finding is warranted,¹³⁴ however, an individual's privacy interests are trampled when the canine is incapable of determining whether or not illegal substances are present at the

129. See Katz & Golembiewski, *supra* note 5, at 755.

130. Florida v. Harris, 133 S. Ct. 1050, 1054 (2013).

131. *Id.* at 1056-57; see also United States v. Warren, 997 F. Supp. 1188, 1192 (E.D. Wis. 1998) (discussing a handler's record keeping of his canine; if the canine alerts to a container and no contraband is found, the handler does not record it as a false positive, but instead believes the dog must have smelled "residual odor" that must have been present in the past, accrediting the canine with a 100% accuracy rate).

132. Brief for The Nat'l Ass'n of Criminal Def. Lawyers et al. as Amicus Curiae Supporting Respondent at 20, Florida v. Harris, 133 S. Ct. 1050 (2013) (No. 11-817), 2012 WL 3875241, at *20. However, canines employed by U.S. Customs are trained not to alert to residual odors. *Id.*

133. See United States v. Johnson, 660 F.2d 21, 22-23 (2d Cir. 1981) (holding that the appellant's argument with respect to the canine's inability to distinguish residual odors from the actual presence of drugs misconstrues the probable cause requirement because "absolute certainty" is not required, only a reasonable belief that a crime is being committed is necessary); United States v. Chartier, 772 F.3d 539, 546 (8th Cir. 2014) (noting that the results of a search incident to arrest do not justify the search, but here probable cause existed before the search because the canine alerted to the vehicle; even though no drugs were found in the vehicle, other materials of interest were).

134. *Harris*, 133 S. Ct. at 1057.

moment of the search. Our privacy rights vary because the criminal justice system assesses facts differently using varying legal standards.¹³⁵

A. CANINE TRAINING

There are no prescribed regulation standards for canine certification and training for narcotics detection, but each canine training facility offers programs based on each facility's own standards.¹³⁶ These standards vary greatly across the board.¹³⁷ As the Florida Supreme Court in *Harris* pointed out, without some sort of standardized certification and training program (either nation-wide or prescribed by the states), a canine's reliability cannot be established by the mere completion of a training program alone because there is no way to uniformly assess the training and certification that the canine receives.¹³⁸ As it stands today, standards are set by few individual states, private organizations, federal agencies, and the military.¹³⁹

1. Federal Agencies & Military

The United States Customs Border Patrol employs a rigorous twelve-week course where only half of the canines successfully complete the training,¹⁴⁰ and the agency demands a near-perfect record of 96%.¹⁴¹ The Customs Border Patrol Canine Program teaches canines to detect marijuana, cocaine, heroin, methamphetamine, hashish, and ecstasy.¹⁴² To maintain the canine's training, four-hours per week are spent practicing with each dog, and an annual recertification test is required.¹⁴³ The United States Army requires a minimum training course for canines that includes four-hours of training per

135. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 792-93 (2013) (discussing the unquantifiable value of probable cause—some judges and scholars would assign the “fair probability” percentage to fall anywhere between 30 and 60 percent).

136. Leslie Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniff of the Home*, 88 OR. L. REV. 829, 835-36 (2009).

137. Brief for Fourth Amendment Scholars as Amicus Curiae Supporting Respondent at 22, *Florida v. Harris*, 133 S. Ct. 1050 (2013) (No. 11-817), 2012 WL 3864280, at * 22 (citing *Matheson v. State*, 870 So. 2d 8, 14 (Fla. Dist. Ct. App. 2003)).

138. See *Harris v. State*, 71 So. 3d 756, 759 (Fla. 2011).

139. Meyers, *supra* note 52, at 27.

140. Bird, *supra* note 103, at 414.

141. Bird, *supra* note 103, at n.81.

142. U.S. Customs & Border Protection, *Canine Disciplines*, DEP'T OF HOMELAND SEC., <https://www.cbp.gov/border-security/along-us-borders/canine-program/disciplines-2> (last updated May 23, 2016).

143. Bird, *supra* note 103, at 421.

week after completion of the initial training.¹⁴⁴ Narcotic-detecting canines must maintain a proficiency rate of 90% or higher.¹⁴⁵ Most notably, there is even a designated “Probable Cause” folder that contains an array of forms and records to prove the reliability of the MWD (military working dog).¹⁴⁶

2. *State Standards*

Only a handful of state legislatures have explicitly prescribed certain standards that canines must meet in order to be deemed certified. For example, New York State’s Division of Criminal Justice Services has minimal standards set in place concerning narcotic detecting canines.¹⁴⁷ If a canine and handler have not been previously trained, then they are required to complete a 160-hour training program.¹⁴⁸ However, the minimal standard for performance of the canine and handler is recorded as either “pass or fail,” with no guidelines to assess what a passing score is.¹⁴⁹

Illinois is one of the few states in the U.S. to enact a statute that requires canines to meet any sort of certification standards. Under Illinois’s Police Training Act, “all police dogs used by State and local law enforcement agencies for drug enforcement purposes . . . shall be trained by programs that meet the minimum certification requirements set by the Board.”¹⁵⁰ The Illinois Law Enforcement Training and Standards Board determined that there were thirty-eight training entities that meet the “minimum certification requirements.”¹⁵¹ One of the training facilities employs a 90% passage rate requirement in order for a canine to be deemed to have met the certification requirements.¹⁵² Details of these requirements will be discussed in detail below, as this Note argues that states should model their certification requirements for narcotic canine training after Illinois.

144. *Military Working Dogs*, HEADQUARTERS, DEP’T OF THE ARMY 2-4 (July 6, 2005), <https://fas.org/irp/doddir/army/fm3-19-17.pdf>.

145. *Id.*

146. *Id.* at 2-9.

147. *See Police Canine Training Standard*, BUREAU FOR N.Y. MUN. POLICE (June 5, 1991), http://www.policek9.com/html/new_york.html.

148. *Id.*

149. *Id.*

150. 50 ILL. COMP. STAT. 705/10.12 (2016).

151. *Narcotic Detection Canines Compliance Program: Minimum Certification Requirements*, ILL. LAW ENF’T TRAINING & STANDARD BD., <http://www.ptb.state.il.us/media/1243/narcoticdetectioncaninerequirements.pdf> (last updated Mar. 2017) [hereinafter *Narcotic Detection Canines Compliance Program*].

152. *Narcotic Detection Canine Minimum Certification Requirements*, ILL. LAW ENF’T TRAINING & STANDARD BD., <http://directives.chicagopolice.org/lt2015/forms/NARC-2012.pdf> (last visited Mar. 10, 2017) [hereinafter *Narcotic Detection Canine Minimum Certification Requirements*].

3. *Private Organizations*

Private organizations such as the United States Police K9 Association (hereinafter “USPCA”) employ their own certification standards. According to USPCA, as long as a canine receives a 70% passing score the canine is deemed to be certified.¹⁵³ Canines are instructed to complete a vehicle search area and an indoor search area, and are tested to locate marijuana, hashish, cocaine, heroin, and methamphetamine.¹⁵⁴ Another organization, the North American Police Work Dog Association (hereinafter “NAPWDA”), also creates their own certification standards.¹⁵⁵ NAPWDA requires that the canine passes the test with a minimum of 91.66%.¹⁵⁶ This organization requires the canines to search vehicles, buildings, luggage, and lockers, and “conflict odors” are present while the canine is being tested.¹⁵⁷

As you can see, there are multiple private organizations across the nation that have varying passing rates, ranging from 75 percent¹⁵⁸ to 90 percent.¹⁵⁹ Further, because some organizations train canines to detect certain narcotics, while other organizations may train canines to detect other substances, “certified” canines in the field are able to detect a variety of narcotics that another canine is not trained to detect.¹⁶⁰ The problem this presents, coupled with the varying success rate percentages that canines must meet in order to become certified, means that there’s no uniform standard to assess any given canine’s reliability in the field. Because a majority of the states have

153. *General Rules and Definitions Governing Certifications: Detection Canines*, <http://www.uspcak9.com/wp-content/uploads/2015/11/NARCOTIC-CERTIFICATION-RULES-2016.pdf> (last visited Mar. 10, 2017).

154. *Id.*

155. *See Bylaws and Certification Rules*, N. AM. POLICE WORK DOG ASS’N (June 18, 2016), <http://www.napwda.com/uploads/bylaws-cert-rules-june-18-2016.pdf>.

156. *Id.*

157. *Id.*

158. *Standards for Training & Certifications Manual*, NAT’L POLICE CANINE ASS’N 10 (Oct. 27, 2015), <https://npcaforms.files.wordpress.com/2016/04/standards.pdf>.

159. *Certification Standards*, NAT’L TACTICAL POLICE DOG ASS’N (2008), <http://www.tacticalcanine.com/certification-standards/>.

160. *See generally Narcotic Detection Standards*, NAT’L NARCOTIC DETECTOR DOG ASS’N, <http://www.nndda.org/docs/NarcoticsStandard14.pdf> (last visited Mar. 10, 2017) (canines must find only marijuana and cocaine in order to be certified); *Narcotics Detection*, USK9 UNLIMITED, <http://www.usk9.com/narcotics.php> (last visited Mar. 10, 2017) (canines are trained to detect Marijuana, Hashish, Powder Cocaine, Crack, Methamphetamine, Ecstasy, Heroin, LSD).

not enacted legislation explicitly defining minimum certification requirements, these private organizations are responsible for determining which sniffs are “up to snuff”¹⁶¹ when it comes to certifying canines.

When there’s no objective standard in place to assess a canine’s reliability, there’s no way to meaningfully critique a canine’s performance.¹⁶² The *Harris* court provided that a dog that completes a certified program from a bona fide organization is reliable;¹⁶³ this has the effect that the canine that can only detect marijuana or cocaine with a 70% success rate is just as reliable as the canine that is able to detect six illegal substances that completed the rigorous course with a requisite of a 98% success rate. In theory, both canines have differing levels of accuracy and can detect different substances, so the question becomes how to measure their reliability with no uniform standard. A defendant must be afforded the opportunity to challenge a canine’s reliability,¹⁶⁴ but with such varying certification standards existing across the board, challenging such reliability records becomes difficult. Recall that the nontechnical probable cause standard already affords law enforcement officers wide flexibility in determining which facts are present to establish probable cause; however, when you add the uncertainties surrounding canine performance and reliability to the unquantifiable probable cause standard, a defendant is faced with challenging a gray area of the law. Thus, the lack of an individualized, articulable suspicion requirement dismissed by the *Caballes* decision,¹⁶⁵ coupled with the lack of standardized certification standards both nationwide and statewide, illustrate how citizens’ Fourth Amendment protections have been diluted by the Supreme Court.

IV. WHAT HAPPENS NOW: *RODRIGUEZ* AND MOVING FORWARD

2013 was the year of the dog; the U.S. Supreme Court rendered two decisions concerning the constitutionality of canine sniffs.¹⁶⁶ *Harris*, discussed earlier, determined that a canine’s alert is reliable and serves as probable cause as long as the canine was trained and certified from a “bona fide organization.”¹⁶⁷ In the other decision, *Florida v. Jardines*, the U.S. Supreme Court diverted from its previous decision concerning drug-detection dogs,

161. See generally *Florida v. Harris*, 133 S. Ct. 1050, 1058 (2013) (explaining that the question is “whether all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test”).

162. See *Harris v. State*, 71 So. 3d 756, 759 (Fla. 2011).

163. *Harris*, 133 S. Ct. at 1057.

164. *Id.* at 1052.

165. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

166. See *Florida v. Harris*, 133 S. Ct. 1050 (2013); *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

167. *Harris*, 133 S. Ct. at 1056-57.

and held that the use of a canine sniff is considered a search when the sniff is conducted on the front porch of a person's home because the officer's physical intrusion on the persons' property to gather evidence with the use of a trained dog to detect evidence of wrongdoing violates the Fourth Amendment.¹⁶⁸ So, while the U.S. Supreme Court may have determined individual's privacy rights are subject to a lesser standard in terms of automobiles, they determined that a person's privacy rights in the context of a search of their home warrants a stricter standard. As you can see, the Supreme Court remains vigilant in the protection of an individual's home, but with the *Caballes* and *Harris* decisions, it seemed as if the Court was willing to give law enforcement officers a little slack on the proverbial leash when it comes to searching for drugs on America's public roadways.

A. *RODRIGUEZ*: TIGHTENING THE LEASH ON "WALKING SEARCH WARRANTS"¹⁶⁹

The dissent in *Caballes* cautioned against prolonging a traffic stop for any amount of time without reasonable suspicion,¹⁷⁰ but in 2015, the Supreme Court in *Rodriguez v. United States*¹⁷¹ showed its concern with the flexibility that officers had in conducting their canine sniffs. There, a bright-line rule was announced concerning canine sniffs and traffic stops; where no reasonable suspicion exists beyond that which was necessary to justify the stop itself, a traffic stop may not be prolonged in order to conduct a canine investigation.¹⁷² Before *Rodriguez*, law enforcement officers were operating under a broader scope of searching individuals during routine traffic stops because *Caballes* determined that canine sniffs are not searches, and do not violate the Fourth Amendment.¹⁷³ In *Rodriguez*, an officer pulled over the driver, Dennys Rodriguez, for driving on the shoulder of the road.¹⁷⁴ While conducting the traffic stop, the officer asked for another unit to arrive with a canine.¹⁷⁵ After the officer completed the traffic stop by issuing and explaining the warning, the officer asked Rodriguez if he could walk the canine around the car, and Rodriguez declined.¹⁷⁶ Moments later, the canine unit arrived, alerted to the presence of narcotics, and after the alert by the canine

168. *Jardines*, 133 S. Ct. at 1417-18.

169. John Ensminger, *Walking Search Warrants: Canine Forensics and Police Culture After Florida v. Harris*, 10 J. ANIMAL & NAT. RESOURCE L. 1 (2014) (discussing where an Ohio sheriff described his narcotic-detecting canine as a "walking search warrant").

170. *See Caballes*, 543 U.S. at 420-21.

171. *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

172. *Id.* at 1616.

173. *See Caballes*, 543 U.S. at 420-21.

174. *Rodriguez*, 135 S. Ct. at 1612.

175. *Id.* at 1613.

176. *Id.*

the officers found methamphetamine.¹⁷⁷ Approximately seven or eight minutes passed from the time the warning was issued until the time the canine alerted.¹⁷⁸

The Eighth Circuit held that the several minutes that had passed did not equate to an unreasonable delay, and the sniff was a minor intrusion on Rodriguez's constitutional protections.¹⁷⁹ However, the U.S. Supreme Court disagreed, resolving a circuit split concerning whether or not police, absent reasonable suspicion, can extend a completed traffic stop in order to conduct a canine sniff.¹⁸⁰ The U.S. Supreme Court tightened the leash on law enforcement agencies conducting narcotics investigations by holding that investigations unrelated to the initial lawful traffic stop are permitted, however, the investigation cannot be done in such a way as to prolong the stop, even for a minimal delay.¹⁸¹ As these cases keep nipping at the heels of the Supreme Court, it remains to be seen how it will continue to balance an individual's privacy rights against the government's interest in the war on drugs.

Significantly, *Rodriguez* shows us that the Supreme Court seems to be reconsidering its precedent in the context of canine sniffs.¹⁸² This decision is extremely important when analyzing canine sniffs because the Supreme Court is carving out the actual purpose of the traffic stop while also defining how much time officers have while making the traffic stop when utilizing drug-detecting canines.¹⁸³ When Justice Ginsberg, who dissented in the *Caballes* opinion, wrote that a stop that is unreasonably prolonged is unlawful,¹⁸⁴ the Court unambiguously made *Rodriguez* a key player in protecting citizens' rights under the Fourth Amendment. When considering these protections from a policy perspective, the courts must always balance an individual's privacy right against the government's interest in keeping drugs off the streets. This decision is important because many officers initiate traffic stops for one reason, and transform it into an investigation for narcotics or other crimes.¹⁸⁵

177. *Id.*

178. *Id.*

179. *Rodriguez*, 135 S. Ct. at 1613-14.

180. *Id.* at 1614.

181. *Id.* at 1616-17.

182. Rory Little, *Opinion Analysis: Traffic Stops Can't Last Too Long or Go Too Far, and No Extra Dog Sniffs!*, SCOTUSBLOG (Apr. 21, 2015, 7:55 PM), <http://www.scotusblog.com/2015/04/opinion-analysis-traffic-stops-cant-last-too-long-or-go-too-far-and-no-extra-dog-sniffs/>.

183. Jeffrey Rosen, Orin Kerr & Christopher Slobogin, *Podcast: The Fourth Amendment and Police Dog Searches*, CONST. DAILY (Apr. 23, 2015), <http://blog.constitution-center.org/2015/04/podcast-the-fourth-amendment-and-police-dog-searches/>.

184. *Rodriguez*, 135 S. Ct. at 1612.

185. Rosen et al., *supra* note 183.

Rodriguez is a necessary limitation on this police practice because traffic laws are broken routinely by drivers who are otherwise law-abiding citizens.¹⁸⁶ Even though a dog's keen sense of smell has been instrumental in removing drugs from individuals and putting them in the hands of law enforcement, use of these dogs also intimidates drivers.¹⁸⁷ Employing the drug-detecting canines without reasonable suspicion is a form of harassment, especially when a disproportionate amount of drivers are people of color.¹⁸⁸ Ultimately, *Rodriguez* imposes limits on law enforcement officers' ability to change the nature of otherwise routine traffic stops by stating that these routine traffic stops cannot be prolonged just to conduct a canine sniff absent individualized and reasonable suspicion. If this sounds familiar, recall the *Caballes* decision where both the defendant and the dissent argued that an individualized, articulable suspicion should be present before an officer can even employ the use of a canine sniff on an automobile.¹⁸⁹ Because of the uncertainties surrounding canine reliability, this Note stresses that a reasonable, individualized suspicion should be articulated and present in order for an officer to conduct a canine sniff around an automobile.

B. ESTABLISHING STANDARDS MODELED AFTER ILLINOIS

The U.S. Supreme Court's next step in resolving problematic issues with canine detection should be establishing a nationwide standard that organizations must meet in order to determine that a canine performing a sniff is certified. While the Supreme Court in *Harris* told us that a dog's alert provides probable cause pursuant to receiving training from a "bona fide organization", it offers no guidance as to what criteria facilities should model their programs after.¹⁹⁰ However, in *Harris*, the U.S. Supreme Court sidestepped the opportunity to prescribe certain evidentiary standards when they overturned the Florida Supreme Court's decision.¹⁹¹ Thus, uniform certification requirements nationwide are unlikely to be imposed by the Supreme Court, but the individual states could seek to establish uniformity within their own state lines by following Illinois's response to problematic canine searches.

Illinois has not statutorily prescribed precise standards for narcotic detecting canines. However, under the Illinois Police Training Act (hereinafter "the Act"), "police dogs used by State and local law enforcement agencies

186. See Rosen et al., *supra* note 183. ("Every one of us violates multiple traffic laws every time we drive . . . police know this, and use it to their advantage especially if it means they're trying to discover drug crime.").

187. See Rosen et al., *supra* note 183.

188. See Rosen et al., *supra* note 183.

189. See *Illinois v. Caballes*, 543 U.S. 405, 410-12 (2005).

190. *Florida v. Harris*, 133 S. Ct. 1050, 1057 (2013).

191. *Id.* at 1056.

for drug enforcement purposes . . . shall be trained by programs that meet the minimum certification requirements set by the Board.”¹⁹² “The Board” refers to the Illinois Law Enforcement Training and Standards Board (hereinafter “ILETSB”).¹⁹³ Not only has the statute explicitly provided that the ILETSB has the authority to determine the specific requirements that canines must meet in order to be certified but the statute goes on to prescribe specific requirements that the canine *handler* must meet.¹⁹⁴ The Illinois legislature has determined that in order to be qualified, a canine handler must complete: 1) one-hundred hours of basic training, 2) eighty-hours devoted to the specific canine discipline, and 3) a practical qualification course and written exam.¹⁹⁵ Thus, the Illinois legislature is able to determine what makes a canine handler qualified, as well as encourage the ILETSB to establish uniformity within state boundaries when it comes to canine training.

Even though Illinois law does not explicitly prescribe in the statute a canine’s minimum hours like it does for the handler, the programs have some leniency in their own certification requirements. As stated, ILETSB establishes the minimum certification requirements.¹⁹⁶ ILETSB has explicitly determined thirty-eight facilities that meet the requirements;¹⁹⁷ thus, as long as a canine has completed training from one of these facilities, the canine has met the requirements within the meaning of the statute. These facilities must employ training programs modeled after the Scientific Working Group on Dog and Orthogonal detector Guidelines (hereinafter “SWGDOG”).¹⁹⁸ SWGDOG is a partnership of multiple federal and state agencies that was created to address the need to improve canine performance and reliability.¹⁹⁹

Illinois encourages training facilities to certify and recertify accurate and reliable canines for narcotics detection with uniformity in mind; there are only a few other states besides Illinois that have enacted legislation that concerns police canine training.²⁰⁰ In Illinois, Macon County’s training facility

192. 50 ILL. COMP. STAT. 705/10.12 (2016).

193. 50 ILL. COMP. STAT. 705/2 (2016).

194. 225 ILL. COMP. STAT. 447/35-42 (2016).

195. 225 ILL. COMP. STAT. 447/35-42 (basic training involves safety procedures, basic veterinary health, canine conditioning, obedience, search techniques, and “legal guidelines affecting canine odor detection operations”).

196. See 50 ILL. COMP. STAT. 705/10.12 (2016). To view the “minimum certification requirements,” see *Narcotic Detection Canine Minimum Certification Requirements*, *supra* note 152.

197. *Narcotic Detection Canines Compliance Program*, *supra* note 151.

198. *Narcotic Detection Canines Compliance Program*, *supra* note 151. See generally SWGDOG: SCIENTIFIC WORKING GROUP ON DOG AND ORTHOGONAL DETECTOR GUIDELINES, FLA. INT’L UNIV., <http://swgdog.fiu.edu/> (last visited May 2, 2017).

199. *Id.*

200. Telephone Interview with Chad Lerner, Training Director, Macon County Sheriff’s Office (Jan. 24, 2017). See, e.g., S.C. CODE ANN. § 23-23-140 (2017) (providing that the

follows the guidelines modeled after SWGDOG and it must meet the requirements as established by the ILETSEB.²⁰¹ Not all canines are allowed to participate in the training program; they go through a special screening process in order to determine if they are capable of passing the program with a high success rate.²⁰² Once they have gone through the initial screening process, they are then subjected to a training program that requires them to detect “marijuana/hashish, cocaine, heroin/opiate derivatives and methamphetamine.”²⁰³ In order to pass the certification requirements to satisfy the Act, the canine must demonstrate a 90% accuracy rate, according to the training facility that comports with ILETSEB’s requirements.²⁰⁴ The guidelines also mandate a “maintenance training” standard, which requires that the canines complete sixteen-hours of training per month; however the Macon County training facility doubles that standard—they require that their canines undergo routine training thirty-two-hours per month to maintain canine accuracy.²⁰⁵

The Illinois legislature has set standards for narcotic detection canines at a respectable 90% accuracy rate by mandating minimal requirements modeled after SWGDOG; the end result shows that agencies can always seek to improve their police dogs while simultaneously striving to achieve a uniform standard. As the U.S. Supreme Court narrowed the scope of canine sniffs of automobiles by imposing a “reasonable suspicion” requirement in order to prolong a stop,²⁰⁶ the States should also seek to safeguard their citizens’ Fourth Amendment protections by imposing minimal standards, similar to Illinois’s requirements, that canines must meet in order to be considered certified. This will help increase uniformity within state lines, as well as provide a mechanism as to how each canine can be assessed in terms of training and accuracy rates.

South Carolina Justice Academy shall verify that police canines were certified from a “nationally recognized” police dog association); OKLA. STAT. ANN. tit. 70 § 3311 (West, Westlaw through Ch. 244 of the First Reg. Sess. of the 56th Legis. (2017)) (providing that the Council on Law Enforcement Education and Training is authorized and directed to certify teams—the statute does not prescribe the requirements canines must meet).

201. Telephone Interview with Chad Lerner, *supra* note 200.

202. Telephone Interview with Chad Lerner, *supra* note 200.

203. *Narcotic Detection Canine Minimum Certification Requirements*, *supra* note 152, at 1.

204. *Narcotic Detection Canine Minimum Certification Requirements*, *supra* note 152, at 1.

205. Telephone Interview with Chad Lerner, *supra* note 200.

206. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015).

C. LEGALIZATION OF MARIJUANA AND NARCOTIC DETECTION DOGS

As if the uncertainties surrounding canine sniffs combined with the immense flexibility officers are awarded with the probable cause standard were not enough, the U.S. is now faced with an additional mystery: How can a narcotic-detecting canine that has been trained to detect marijuana alert to illegal narcotics with the growing legalization of marijuana across the states? Remember, even the most perfectly trained canine with a 100% accuracy rate is unable to indicate to its handler which substance they have detected.²⁰⁷ The problem lies in the scenario where a person is in possession of a legal amount of marijuana, one ounce for example, and the canine that is instructed to sniff the vehicle gives an alert to its handler. But the canine is unable to signal to the handler that he is either alerting to a) the legal amount of marijuana, b) an illegal amount of marijuana in the car, or c) another illegal substance. Colorado seemed to tackle this very issue in a decision where the Colorado Supreme Court held that the odor of marijuana is relevant to a probable cause determination even though the possession of one ounce or less of marijuana is legal under Colorado law.²⁰⁸

In *People v. Zuniga*, a Colorado State Trooper with a canine unit stopped a vehicle, and immediately upon approaching the vehicle smelled a heavy odor of unburnt marijuana.²⁰⁹ He noted the extreme nervousness of the two occupants, and then walked his canine around the outside of the vehicle and the canine alerted near the trunk, where one pound of marijuana was found, along with 12.6 ounces of marijuana concentrate.²¹⁰ The Colorado Supreme Court reasoned that although one ounce of marijuana is legal under Colorado law, there is a substantial amount of marijuana-related activities that are criminal.²¹¹ Thus, the odor of marijuana plays an important role in the “totality of the circumstances” approach when assessing probable cause.²¹² Dissenting Justice Hood expressed his concerns with the decision on the basis that allowing the odor of marijuana in conjunction with its legality in certain amounts would open the door to searches based on legal and innocent activity.²¹³ There, he wrote the majority’s conclusion that “the alert ‘suggested that illegal drugs were present in the vehicle’ goes too far . . . the alert was consistent with the presence of illegal drugs just as it was consistent with their absence.”²¹⁴ In other words, the alert could have been consistent

207. See Katz & Golembiewski, *supra* note 5.

208. *People v. Zuniga*, 372 P.3d 1052, 1054 (Colo. 2016).

209. *Id.* at 1054.

210. *Id.* at 1055.

211. *Id.* at 1059.

212. *Id.*

213. See *Zuniga*, 372 P.3d at 1063-64.

214. *Id.*

with the presence of illegal drugs (perhaps a pound of cocaine), just as it would have been consistent with the absence of illegal drugs (had the canine only alerted to a legal amount of marijuana).

Since canines cannot be trained to distinguish between the scent of an ounce of marijuana and 1.25 ounces of marijuana, the solution to this canine conundrum is elusive. Police agencies may be able to only train canines to detect substances other than marijuana, like cocaine, methamphetamine, etc., but that would eliminate the possibility for detecting *illegal* amounts of marijuana. Teaching an old dog the new trick of ignoring the scent of marijuana may prove to be just as difficult, if not impossible. As the underlying law surrounding illegal substance will continue to change, so will police practice.²¹⁵

V. CONCLUSION

As the law currently stands, canines are allowed to sniff an automobile without the driver's consent, and if the canine alerts to his handler that contraband is present, officers have probable cause to search the vehicle.²¹⁶ But the varying rates of canine accuracy and a lack of certification standards prescribed by the states and federal government gives rise to the doubts casted upon a canine's infallibility. A remedy for this problem can be found in requiring police officers to have an articulable, individualized suspicion that a vehicle contains contraband prior to instructing a canine to sniff a vehicle. Additionally, states can also seek to establish uniformity in canine certification by enacting legislation that explicitly mandates an accuracy rate of 90% or higher, like Illinois, for example. This would create a meaningful way to assess a canine's reliability in a way where the current practice is lacking.

215. See generally Jennifer Oldham, *Colorado K-9s Need New Tricks as Pot Law Muzzles Sniffers*, BLOOMBERG (Aug. 13, 2013, 11:01 PM), <https://www.bloomberg.com/news/articles/2013-08-14/colorado-k-9s-need-new-tricks-as-pot-law-muzzles-sniffers>.

216. See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).