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Pawing Their Way to the Supreme Court: The Evidence Required to Prove a Narcotic Detection Dog's Reliability

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Pawing Their Way to the Supreme Court: The Evidence Required to Prove a Narcotic Detection Dog’s Reliability

I.	INTRODUCTION.....	473
II.	A BRIEF HISTORY	475
	A. WHY DOGS ARE USED—SCENT RECEPTORS	476
	B. <i>UNITED STATES V. PLACE</i>	478
	C. <i>ILLINOIS V. CABALLES</i>	480
II.	ESTABLISHING RELIABILITY	481
	A. TRAINED AND CERTIFIED.....	482
	B. TOTALITY OF EVIDENCE	484
III.	EXAMINING THE TOTALITY OF EVIDENCE	486
	A. TRAINING STANDARDS.....	487
	B. ACCURACY RECORDS.....	491
	C. HANDLER ERRORS AND HANDLER CUING	493
	D. THE PURPOSE OF THE FOURTH AMENDMENT	498
	E. THE DOG’S INABILITY TO TESTIFY.....	500
IV.	CONCLUSION.....	503

I. INTRODUCTION

The relationship between man and dog, unlike most other relationships, is one abundant with mutual benefits.¹ From hunting partners to guides, from protectors to service dogs, the relationship between man and dog has grown for centuries.² More recently, however, man’s best friend has become more than a loyal companion; he has become an instrument in the war on drugs.³ Anatomically speaking, the canine’s heightened sense of smell leaves little doubt as to the value a dog’s nose plays in the fight of

1. Nicholas Wade, *From Wolf to Dog, Yes, But When?*, N.Y. TIMES, Nov. 22, 2002, <http://www.nytimes.com/2002/11/22/science/22DOGS.html?scp=1&sq=from%20wolf%20to%20dog,%20yes,%20but%20when&st=cse>; Mark Derr, *Dogs*, N.Y. TIMES, <http://topics.nytimes.com/top/news/science/topics/dogs/index.html?scp=1&sq=Dogs%20by%20Mark%20Derr&st=cse> (last visited Apr. 28, 2012).

2. Ed Grabianowski, *How Police Dogs Work*, HOW STUFF WORKS, <http://people.howstuffworks.com/police-dog.htm> (last visited Apr. 27, 2012) (“Modern training methods have led to dogs becoming an integral part of many people’s lives . . .”).

3. See *id.* (listing the tasks police forces use dogs for, including: “track[ing] criminals, sniff[ing] out illegal materials, search[ing] buildings, and do[ing] other jobs human police officers can’t do as well as a dog can”).

such an important war. Despite this, the dog's sniff reached the Supreme Court in 2005.⁴ In the landmark decision *Illinois v. Caballes*, the Court ruled that a dog's sniff did not constitute a search under the Fourth Amendment.⁵ With such authority, courts soon began admitting evidence of a drug detection dog's alert of narcotics to constitute the requisite probable cause for an officer's search.

In admitting such evidence, courts have been inconsistent when determining the amount of training and evidence needed to establish the dog's reliability.⁶ The federal appellate courts only require states to present proof of the detection dog's training and certification.⁷ Several state courts, conversely, require states to present other objective evidence including: training and certification records, an explanation of that certification, recertification records, field performance records, and evidence of the handler's training.⁸ As a result of this incongruity, the majority of courts overlook relevant evidence demonstrating whether a particular dog's alert to the scent of narcotics is credible enough to constitute probable cause allowing the officer to search an individual's person and property.

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

5. *Id.* at 410 ("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.").

6. See *State v. Nguyen*, 726 N.W.2d 871, 876 (S.D. 2007). Although the court refers to the divergent views held by a wide range of jurisdictions, the description of the three views is reflective of the current incongruity between federal appellate courts and state courts. As explained by the Supreme Court of South Dakota, the first view held by courts "deem[s] a dog reliable solely because the evidence shows that the dog was trained and certified to detect controlled substances." *Id.* (citing *United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999); *United States v. Kennedy*, 131 F.3d 1371, 1376-77 (10th Cir. 1997), *cert denied*, 525 U.S. 863 (1998); *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1996); *United States v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976); *United States v. Patty*, 96 F.Supp.2d 703, 707 (E.D. Mich. 2000)). The second view "consider[s] a dog's training and certification to be *prima facie* evidence that the dog is reliable." *Id.* (citing *United States v. Wood*, 915 F.Supp. 1126, 1134-35 (D. Kan. 1996), *rev'd on other grounds*, 106 F.3d 942 (10th Cir. 1997); *State v. Laveroni*, 910 So. 2d 333, 335 (Fla. Dist. Ct. App. 2005)). Finally, the third view "require[s] or allow[s] a dog's field activity reports, along with evidence that the dog is trained and certified, to be considered as factors in determining reliability." *Id.* (citing *United States v. Limares*, 269 F.3d 794, 797-98 (7th Cir. 2001); *United States v. Diaz*, 25 F.3d 392, 395-96 (6th Cir. 1994); *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993); *United States v. Outlaw*, 134 F. Supp. 2d 807, 810 (W.D. Tex. 2001); *State v. England*, 19 S.W.3d 762, 768-69 (Tenn. 2000)).

7. See, e.g., *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2010) (citing *United States v. Parada*, 557 F.3d 1275, 1283 (10th Cir. 2009)) ("[C]ourts typically rely on the dog's certification as proof of its reliability"). See also *United States v. Robinson*, 390 F.3d 853, 874 (6th Cir. 2004) (quoting *United States v. Boxley*, 373 F.3d 759, 762 (6th Cir. 2004)) ("[A]fter it is shown that the dog is certified, all other evidence relating to his accuracy goes only to the credibility of the testimony . . .").

8. See, e.g., *Limares*, 269 F.3d at 798; *Diaz*, 25 F.3d at 395.

This Comment examines the evidence needed to establish a detector dog's reliability, in turn establishing the officer's probable cause of an otherwise illegal search under the Fourth Amendment. Part II discusses a brief history of the drug detector dog, including a short analysis explaining how *United States v. Place* and *Illinois v. Caballes* paved the way for the discrepancy in recent courts' holdings.⁹ Part III reviews several prominent cases regarding this issue that explicitly illustrate the contrasting views of the courts.¹⁰ Part IV argues that courts risk an unnecessary invasion of an individual's privacy when overlooking relevant evidence of a dog's credibility and allowing mere claims of certification to suffice as prima facie evidence of reliability.¹¹ Finally, Part V concludes by refuting the suggestion that a "totality of the circumstances" approach goes far beyond what probable cause requires.¹²

II. A BRIEF HISTORY

In their first line of work, dogs were used to assist humans in hunting.¹³ After seeing the skills and abilities dogs possessed, foreign countries began using canines in their military activities.¹⁴ In Europe, dogs were used by police forces as early as the eighteenth century.¹⁵ Dogs were chosen to assist in military and police efforts because "[t]he extraordinary acuteness of his senses, his friendliness toward his owner, his watchfulness, his speed, and whenever necessary, his viciousness toward the enemy . . . made him valuable as an ally in war."¹⁶

Germany and Belgium began the canine's formalized training process during World War I when they started using dogs for tasks such as guard

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See *infra* Part V.

13. Wade, *supra* note 1 (explaining that as dogs evolved from wolves, those that adapted to following human cues were domesticated through natural selection because the co-evolution of traits allowed dogs and humans to function well together, and increase the likelihood of surviving since both sides benefited from the dog-human relationship). See Charles F. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 385, 385 (1955) ("[E]arly in this association, man learned that the dog, whose very life depended on hunting for his food, would assist man in hunting those animals that provided food for man and his family.").

14. See Sloane, *supra* note 13, at 385 ("The use of dogs in theatres of war extends back many thousands of years to the very beginning of recorded history . . . [when] the Egyptians, Assyrians, and Grecians made use of dogs in repelling the enemy.").

15. Grabianowski, *supra* note 2 (detailing the history of police dogs).

16. Sloane, *supra* note 13, at 385 (explaining why "[i]t is little wonder" that dogs were used in military activities).

duty.¹⁷ While Germany alone placed over 30,000 dogs in World War I,¹⁸ the United States did not begin using dogs in the military until after Pearl Harbor, when “the War Department finally recognized our four-footed canine friends as allies in our greatest war effort.”¹⁹ Additionally, the use of dogs in the police force took off much later in the United States than in other countries.²⁰

Although it is unknown when dogs were first used to track criminals, England began using dogs for this purpose as early as the fifteenth century,²¹ while the United States did not do so until the 1970s.²² Despite the late integration of the canine’s valuable nose into the United States police force, dogs are now recognized as a vital part of law enforcement.²³ This is partially because dogs often help officers find information they otherwise would not find since “[t]hese drug dogs are not lap dogs. They typically are large, and to many ordinary innocent people, fearsome animals.”²⁴ Moreover, “[i]njecting such an animal into a routine traffic stop changes the character of the encounter between the police and the motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer.”²⁵ Thus, a benefit of using canines in law enforcement is the extra element of intimidation and unique enhancement of the officer’s natural senses that the canine adds.

A. WHY DOGS ARE USED—SCENT RECEPTORS

Although the use of canines to locate drugs is a relatively new phenomenon, the canine’s unique sense of smell has long been acknowl-

17. Grabianowski, *supra* note 2 (explaining that this process began a long history of dogs in police work that continued through World War II and spread across Europe).

18. Sloane, *supra* note 13, at 386 (“It has been estimated that more than 7,000 dogs perished during the four terrible years of World War I, and at least one breed nearly became extinct because of the terrible losses sustained in battle.”).

19. Sloane, *supra* note 13, at 387.

20. See Grabianowski, *supra* note 2 (“The use of police dogs didn’t gain a foothold in the United States until the 1970s.”).

21. Sloane, *supra* note 13, at 388. Interestingly, “in the fifteenth century a tax was levied upon the English people for maintaining hounds used for tracking criminals, and a law was in existence at the time that whoever denied entrance to one of the dogs would be treated as an accessory to the crime.” *Id.*

22. Grabianowski, *supra* note 2.

23. *Id.* (explaining that the use of police dogs in the United States police force has “grown rapidly in the last five years”).

24. *United States v. Williams*, 356 F.3d 1268, 1276 (10th Cir. 2004) (McKay, J., dissenting) (explaining another benefit of using dogs for tasks on the police force).

25. *Illinois v. Caballes*, 543 U.S. 405, 421 (2005) (Ginsburg, J., dissenting) (explaining why “[a] drug-detection dog is an intimidating animal”).

edged.²⁶ In fact, it is the dog's keen sense of smell that makes canines so apt for narcotics detection.²⁷ The reason for the dog's heightened ability to detect the smallest traces of odors emerges from the dog's olfactory cells.²⁸ Located among large supports called turbinate bones, these receptors "form numerous cylindrical passages that allow air exposure to millions more cells than is possible with simple tubular nasal passages, such as those found in human beings."²⁹ Although the total number of olfactory cells varies with the dog's size, dogs possess potentially billions of these receptor cells.³⁰ This amount is far greater than any human possesses.³¹ To compare, "these cells cover an area in the dog's head that is about the size of the skin on his body, compared to humans, whose equivalent area of exposure of olfactory cells to air is the size of a postage stamp."³²

Researchers debate the effect this vast number of olfactory cells has on a dog's sense of smell.³³ Some researchers believe the cells augment the dog's ability to detect minute traces of odorous material,³⁴ while others believe the cells enhance the dog's ability to discriminate among odors.³⁵ What is certain, however, is the method in which dogs smell by distinguishing between scent groups.³⁶ This concept is illustrated by the following example:

26. Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15, 26 (1990) (demonstrating that the use of canines to locate criminal activity "is not an entirely new idea," as canines were once used for the similar function of tracking "moonshiners," people who made or sold illegal liquor, during the prohibition).

27. *See Matheson v. State*, 870 So. 2d 8, 12 (Fla. Dist. Ct. App. 2003) ("Law enforcement use of narcotics detection dogs has become commonplace The reason, of course, is the dog's keen sense of smell.").

28. *See Taslitz, supra* note 26, at 43 (detailing the anatomy of the canine's nasal structure and explaining why this structure enhances the dog's ability "to detect extremely small concentrations of odorous material").

29. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 408-09 (1997).

30. *Id.* (expanding on the dog's unique nasal structure).

31. Taslitz, *supra* note 26, at 43.

32. *Id.* (emphasizing how many more receptor cells dogs have than humans by providing the following example: "the German Sheep Dog has 220 million such cells compared to man's five million").

33. *Id.*

34. *Id.*

35. Bird, *supra* note 29. Although this debate has not yet been reconciled, "recent data suggest[s] that the truth is somewhere between the two extremes" Taslitz, *supra* note 26, at 43-44.

36. Taslitz, *supra* note 26, at 44 (detailing a study performed by a well-known researcher of canine scenting, which ultimately found that a dog could distinguish between different chemicals in a mixture, thereby demonstrating the concept of scent groups).

“Dogs smell like [humans] see.” For example: when presented with a bowl of stew, humans see each individual ingredient – i.e. potatoes, carrots, and onions – but can smell only one odor, that of delicious stew. A dog, however, cannot see very well; images are black and white with no depth perception. But they smell like we see, separating mixed odors, so they smell the potato, carrots, onion, pepper, salt, and even the container holding the stew!³⁷

Thus, the canine’s ability to distinguish between scents makes the attempt of masking odors futile, as the dog can identify, for example, both the scent of the towel and the scent of the drug hidden within the towel.³⁸ As everything has an odor that dogs can detect,³⁹ canines are often seen as “the most affordable and reliable solution to solving crimes that require scent detection”⁴⁰

B. *UNITED STATES V. PLACE*

United States v. Place, decided in 1983, is one of the leading cases involving drug detection dogs. In *Place*, the defendant’s suspicious behavior gained the attention of law enforcement officers as the defendant waited in line at Miami International Airport.⁴¹ The officers called and notified Drug Enforcement Administration (DEA) agents at LaGuardia Airport in New York of the defendant’s suspicious behavior.⁴² In New York, the DEA agents approached the defendant, and the defendant refused to consent to a search of his luggage.⁴³ The agents seized the luggage, took it to Kennedy Airport where a drug detector dog reacted positively to one of the bags, and retained the bags over the weekend until they could obtain a search warrant from a magistrate judge.⁴⁴ Once the search warrant was secured, the agents

37. Barry Cooper, *Never Get Busted: Understanding Police Drug Dogs*, CANNABIS CULTURE (Aug. 22, 2008), <http://www.cannabisculture.com/v2/node/8634> (presenting an example that demonstrates exactly how dogs can separate odors).

38. *See id.* (“Everything has an odor that dogs can pick up on, even when mixed with other smells. This is why masking odors does not work A cop dog can easily separate all these odors with a few sniffs”); *see also* Stephanie Chen, *Puppies Train to Smell Bombs, Narcotics and Missing People*, CNN (May 28, 2009) <http://edition.cnn.com/2009/CRIME/05/28/police.dogs.smell.detection/index.html> (“Trained dogs can track down cocaine camouflaged inside car seats.”).

39. Cooper, *supra* note 37.

40. Chen, *supra* note 38.

41. *United States v. Place*, 462 U.S. 696, 698 (1983).

42. *Id.*

43. *Id.* at 699.

44. *Id.*

discovered 1,125 grams of cocaine inside one of the bags, and the defendant was indicted for possession of cocaine with intent to distribute.⁴⁵

Upon appeal, the Court discussed the prolonged seizure of the defendant's bag and concluded it was impermissible because it exceeded the limitations set forth in *Terry v. Ohio*.⁴⁶ In reaching this conclusion, the Court addressed the canine sniff, stating:⁴⁷ "A 'canine sniff' by a well-trained narcotics detection dog, however, does not require opening the luggage Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search."⁴⁸ Furthering this reasoning, the Court labeled the dog's sniff *sui generis*⁴⁹ because it is so limited in how the information is obtained and in the content of the information revealed.⁵⁰ While the Court held the canine sniff in this particular case was not a "search,"⁵¹ the Court did not specifically address whether a canine's sniff constituted a search under the Fourth Amendment until *Illinois v. Caballes*.

45. *Id.*

46. *See Place*, 462 U.S. at 709. In explaining a "Terry stop," the court in *United States v. Outlaw* stated:

According to *Terry*, even in the absence of probable cause, law enforcement officers may stop persons and detain them briefly in order to investigate a reasonable suspicion that such persons are involved in criminal activity. In essence, this reasonableness standard requires that law enforcement agents "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

United States v. Outlaw, 134 F. Supp. 2d 807, 817 (W.D. Tex. 2001) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)) (citation omitted).

47. *Place*, 462 U.S. at 707.

48. *Id.* (reasoning that although "the sniff tells the authorities something about the contents of the luggage, the information obtained is limited").

49. *Id.* ("In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.")

50. *Id.* ("[T]he manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.")

51. *Id.* ("[W]e conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment.")

C. *ILLINOIS V. CABALLES*

In *Caballes*, the defendant was pulled over for speeding on an interstate highway.⁵² While stopped, an Illinois State Police Drug Interdiction officer heard the transmission, headed to the scene with his narcotics detection dog, and walked his dog around the defendant's car upon arrival.⁵³ The dog alerted to the defendant's trunk, and a subsequent search led the officers to find marijuana, leading to the defendant's arrest and eventual conviction of a narcotics offense.⁵⁴ The Supreme Court granted certiorari to determine "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."⁵⁵ In its groundbreaking decision, the Supreme Court reasoned that defendants have no legitimate privacy interest in possessing contraband.⁵⁶ Thus, the Court held, because the *sui generis* canine sniff reveals nothing more than the location of illegal, contraband substances, a dog's sniff during a lawful traffic stop does *not* violate the Fourth Amendment.⁵⁷

The combined effect of the *Place* and *Caballes* decisions, however, dangerously broadens the police officer's ability to search a vehicle without any suspicion other than the dog's alert.⁵⁸ The *sui generis* sniff, for instance, classified the dog as "infallible,"⁵⁹ suggesting to courts that because the trained narcotics detection dog does not err, the sniff only reveals illegal

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

53. *Id.*

54. *Id.*

55. *Id.* at 407 (quoting Petition for Writ of Certiorari, *Illinois v. Caballes*, 541 U.S. 972 (No. 03-923)). After stating this issue, the Court explained that it would proceed on the assumption that there was no other evidence constituting probable cause for the officer's search, aside from the lawful traffic stop, under which the officer was acting when he conducted the dog sniff. *Id.*

56. *Id.* at 408 ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'" (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984))).

57. *Caballes*, 543 U.S. at 410 (concluding that the Court's holding was consistent with previous cases that held a thermal-imaging device unlawful because the thermal-imaging device additionally detected lawful, intimate details in a home, whereas the dog's sniff "reveals no information other than the location of a substance that no individual has any right to possess").

58. *See id.* at 422 (Ginsburg, J., dissenting). The essence of Justice Ginsburg's dissent is that "the Court diminishes the Fourth Amendment's force . . ." by allowing "every traffic stop [to] become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population." *Id.* at 421-22.

59. *See id.* at 411 (Souter, J., dissenting) (discussing the Court's classification of the dog sniff as *sui generis* simply because it reveals only the presence of contraband and rejecting the idea that the dog is infallible).

items that the defendant has no privacy interest in possessing to begin with.⁶⁰ Contrary to this, recent state court decisions have recognized that the dog's "infallibility" has been disproved,⁶¹ and that the "infallible dog" is now recognized as "a creature of legal fiction."⁶² As such, these decisions allow the canine's sniff to search any vehicle for contraband without prior suspicion of such substances, thereby justifying suspicion-less, warrantless, unconsented, and otherwise unlawful Fourth Amendment searches.⁶³ If the law is to allow these otherwise unlawful Fourth Amendment searches, the dog that produces such an alert must be proven reliable in order to sustain the "constitutionality" of these intrusions, and moreover, this reliability can only be established by examining the totality of the dog's experiences.

II. ESTABLISHING RELIABILITY

Since *Place* and *Caballes*, it has become well established law that a dog's alert alone generally constitutes probable cause so long as that dog is reliable.⁶⁴ Despite this, the exact quality and quantity of evidence necessary to establish a dog's training and reliability has not yet been established,⁶⁵ forcing more recent courts to question what evidence is needed to prove a detection dog is, in fact, reliable.

60. See *id.* at 410 ("In *United States v. Place*, we categorized the sniff of the narcotics-seeking dog as '*sui generis*' under the Fourth Amendment and held it was not a search. The classification rests not only upon the limited nature of the intrusion, but on a further premise that experience has shown to be untenable, the assumption that trained sniffing dogs do not err." (citation omitted)).

61. *Id.* ("In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times. Once the dog's fallibility is recognized, however, that ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment . . .").

62. *Caballes*, 543 U.S. at 411 (Souter, J., dissenting). In his dissent, Justice Souter explains that because the dog's fallibility has been recognized since the *Place* decision, the justification of that holding needs reconsideration. That is, the certainty *Place* assumed in the dog's sniff and alert disappears when the uniqueness of the dog's infallibility is discredited. *Id.* at 412-13.

63. See *id.* at 422 (Ginsburg, J., dissenting) (reasoning that the *Caballes* decision "clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots," thereby creating a danger that allows officers, who otherwise would have no cause to suspect the presence of narcotics, to search for contraband).

64. *United States v. Ludwig*, 641 F.3d 1243, 1250-51 (10th Cir. 2011) (citing *Caballes*, 543 U.S. 405) (stating explicitly that "a certified drug dog is generally enough, by itself, to give officers probable cause to search a vehicle"); *United States v. Diaz*, 25 F.3d 392, 393-94 (6th Cir. 1994) ("A positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled substance.").

65. *Diaz*, 25 F.3d at 394 (explaining that because courts have not definitively addressed this issue, this particular court looked at the laws of evidence for guidance on how to evaluate a dog's credibility).

A. TRAINED AND CERTIFIED

In interpreting *Place* and *Caballes*, the federal appellate courts have held that proof of a dog's training and certification is sufficient to prove the dog's reliability.⁶⁶ For instance, in *United States v. Ludwig*, the defendant was pulled over for speeding.⁶⁷ After becoming suspicious of the defendant's strange travel plans and nervous movements, the officer ran a drug detection dog around the defendant's car, during which time the dog alerted to a hidden compartment containing drugs.⁶⁸ In appealing his conviction, the defendant moved to suppress the evidence of drugs found in his car, arguing the drug dog was unreliable.⁶⁹ While recognizing that a drug dog's alert only constitutes probable cause if that dog is reliable, the Tenth Circuit Court of Appeals reasoned a dog's handler is better equipped to judge the dog's reliability than the court.⁷⁰ Most important from this case, however, is the court's holding that it is unnecessary for a trial court to "mount a full-scale statistical inquisition into each dog's history," but instead stated that it is sufficient to rely on the dog's certification as prima facie proof of its reliability.⁷¹ Thus, the court explained that the danger in using such statistics to scrutinize a dog's performance is that doing so would force courts to: (1) ignore relevant factors in the probable cause analysis, and (2) affix a quantity to the rule of probable cause.⁷²

Additionally, in *United States v. Sundby*, the defendant's mail package was exposed to a trained narcotics dog after a postal inspector became suspicious of the package.⁷³ The dog alerted to the package when it was mixed in with other parcels, and a magistrate judge subsequently issued a search warrant, leading to the discovery of methamphetamine inside the parcel.⁷⁴

66. See *Ludwig*, 641 F.3d at 1251 (citing *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997)); *United States v. Robinson*, 390 F.3d 853, 874 (6th Cir. 2004) (citing *Diaz*, 25 F.3d at 393-94); *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977); *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1996); *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001).

67. *Ludwig*, 641 F.3d at 1245.

68. *Id.* at 1246.

69. *Id.* at 1251.

70. *Id.* ("After all, it is safe to assume that canine professionals are better equipped than judges to say whether an individual dog is up to snuff.")

71. *Id.* (explaining that scrutinizing the performance of individual dogs would require probable cause to be defined by mathematical equations or single numbers, and further stating that doing this would change the idea that "percentages, precedent and common sense rules . . . ought to inform the probable cause analysis").

72. *Ludwig*, 641 F.3d at 1251 (reasoning that another problem when trying to affix a quantity to probable cause is that probable cause does not require absolute certainty or even that the suspicion be more than likely true).

73. *United States v. Sundby*, 186 F.3d 873, 874 (8th Cir. 1999).

74. *Id.*

In moving to suppress the methamphetamine, the defendant asserted that the State had not proven the dog's reliability as the affidavit contained no information regarding the dog's continued certification, reliability or error rates.⁷⁵ Although the district court granted the defendant's motion to suppress on this argument, the Eighth Circuit Court of Appeals reversed, holding, "the affidavit need only state the dog has been trained and certified to detect drugs" and "[it] need not give a detailed account of the dog's track record or education."⁷⁶

Ludwig and *Sundby* find support in virtually every circuit.⁷⁷ That is, the federal appellate courts believe probable cause only requires the State to prove the dog was trained and certified in order for that dog to be considered "reliable."⁷⁸ Despite this, the federal appellate courts concede that "[a]

75. *Id.*

76. *Id.* at 876.

77. See, e.g., *United States v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) ("[T]he magistrate could reasonably infer that the 'trained dog' had attained a high degree of proficiency in detecting the scent of narcotics."); *United States v. Bronstein*, 521 F.2d 459, 461-62 (2d Cir. 1975); *United States v. Koon Chung Wu*, 217 F. App'x. 240, 245 (4th Cir. 2007) (holding that an affidavit stating a canine is trained and certified is sufficient to establish probable cause on its face); *United States v. Robinson*, 707 F.2d 811, 815 (4th Cir. 1983) (concluding that a dog constituted probable cause when that dog was trained and certified to detect marijuana and cocaine, but was not trained to detect the substances found in possession of the defendant); *United States v. Daniel*, 982 F.2d 146, 151 (5th Cir. 1993); *United States v. Robinson*, 390 F.3d 853, 875 (6th Cir. 2004) (holding that general certification establishes probable cause and insisting that holding a mini-trial to determine the canine's training and performance would be inappropriate); *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1996) ("The affidavit's references to the dog as a 'drug sniffing or drug detecting dog' reasonably implied that the dog was a 'trained narcotics dog.'"); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980); *Sundby*, 186 F.3d at 876 (concluding that a detailed description of the dog's training and certification does not need to be presented in the affidavit to establish the canine's reliability); *United States v. Knepper*, 256 F. App'x. 982, 985 (9th Cir. 2007) (stating that because a magistrate construing the affidavit in this case in a common sense manner would conclude the dog was trained, the dog was thus reliable); *Ludwig*, 641 F.3d at 1251 ("[C]ourts typically rely on the dog's certification as proof of its reliability."); *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1997) (holding that the canine's education did not need to be described in detail in the affidavit); *United States v. Anderson*, 367 F. App'x. 30, 32 (11th Cir. 2010) (reciting from precedent that training alone establishes a canine's reliability); *United States v. Nelson*, 309 F. App'x. 373, 375 (11th Cir. 2009) ("Evidence of a dog's training is sufficient proof of reliability."); *United States v. Battista*, 876 F.2d 201, 206 (D.C. Cir. 1989) (holding that because the agent who performed the search called for a drug dog, that agent could rely on the dog because "[a]ny other holding would implicitly require officers in the field to make background and reliability checks on drug dogs . . . before forming and acting on their 'reasonable suspicions'"); see also Jeffrey S. Weiner, *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone To The Dogs!*, CHAMPION, Apr. 30, 2006, at 12, 13.

78. *Berry*, 90 F.3d at 153 ("[T]o establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog's training

dog alert might not give probable cause if the particular dog had a poor accuracy record.”⁷⁹ This admission is fatal to the courts’ holding, as the poor accuracy record is not presented when evidence of the dog’s training and certification is the only requisite for establishing the dog’s reliability. Thus, without requiring the totality of the dog’s experiences to be presented, the court has no way of investigating the dog’s poor accuracy records, leading the court to potentially allow an unreliable dog to give probable cause—a clear violation of the Fourth Amendment.⁸⁰

B. TOTALITY OF EVIDENCE

Despite the overarching support the federal appellate courts have for requiring the bare minimum of evidence in determining a detector dog’s reliability, several state courts have held in favor of a much more assiduous method that is based on other, more detailed, objective evidence.⁸¹ These state courts have held the more rigorous standard of establishing a dog’s reliability requires states to produce evidence including: training and certification records, an explanation of that certification, recertification records, field performance records, and evidence of the handler’s training.⁸²

in narcotics investigations was sufficient to establish the dog’s training and reliability.”). See *Robinson*, 390 F.3d at 875 (“Even if such a hearing might raise some doubt about the reliability of a particular alert, an officer surely is entitled to rely in good faith upon the existence of probable cause as determined by a neutral magistrate, so long as the dog in question has been generally certified as a drug detection dog.” (citation omitted)).

79. *Ludwig*, 10 F.3d at 1528.

80. See *Weiner*, *supra* note 77, at 15; see also *United States v. Outlaw*, 134 F. Supp. 2d 807, 813-14 (W.D. Tex. 2001) (“[I]t stretches the bounds of jurisprudential imagination to believe that a positive alert by an untrained dog or by a dog with an extensive history of false positive alerts could be relied upon to establish probable cause without raising Fourth Amendment concerns.”).

81. See *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) (holding that an affidavit merely stating a drug detection dog is trained and certified, when standing alone, is not sufficient to demonstrate the dog’s reliability); *Matheson v. State*, 870 So. 2d 8, 14 (Fla. Dist. Ct. App. 2003) (“[W]e conclude that the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog’s alert.”); *State v. Foster*, 252 P.3d 292, 298 (Or. 2011) (concluding that to determine whether a dog is reliable, it is necessary to inquire into the individualized circumstances of each dog); *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000) (rejecting the lower court’s per se rule that an alert by a drug detection dog constituted probable cause, and instead finding that lower courts should, “by an appropriate finding of fact,” determine probable cause based on the reliability of the canine).

82. *Harris*, 71 So. 3d at 775; *Matheson*, 870 So. 2d at 14; *Foster*, 252 P.3d at 298; *England*, 19 S.W.3d at 768.

Harris v. State is one such case.⁸³ After stopping the defendant in *Harris* for having an expired tag and becoming suspicious of the defendant's nervous behavior, the officer allowed his drug detection dog to sniff the exterior of the vehicle.⁸⁴ The detection dog alerted to the door handle of the driver's side, leading the officer to find pseudoephedrine pills, matches, and muriatic acid (precursors of methamphetamine).⁸⁵ The defendant appealed his conviction, arguing the dog was not reliable and its alert should not have constituted probable cause.⁸⁶ In its reasoning, the Supreme Court of Florida discussed the flaws in only requiring the state to show a dog is trained and certified.⁸⁷ Specifically, the court stated, "[s]imply characterizing a dog as 'trained' and 'certified' imparts scant information about what the dog has been conditioned to do or not to do, or how successfully,"⁸⁸ and thus concluded that courts should evaluate the experiences of detection dogs on a case-by-case basis to determine whether or not that particular dog is reliable.⁸⁹

This holding is also supported by *State v. England*.⁹⁰ In *England*, the defendant was pulled over while driving his truck without a light to illuminate the rear license plate.⁹¹ He became visibly nervous when asked if he had marijuana in his car, and soon thereafter refused to consent to a search of his truck.⁹² A second deputy soon arrived at the scene with a narcotics dog.⁹³ The dog alerted to the doorjamb and further signaled to a blue denim jacket on the front seat, indicating the presence of drugs.⁹⁴ Upon finding a large amount of marijuana and drug paraphernalia, the officers arrested the defendant.⁹⁵ In referencing the federal courts' holding that probable cause is

83. *Harris*, 71 So. 3d at 775 (determining that canine reliability should be determined on a case-by-case basis in order to adequately make an objective evaluation of the particular dog in question).

84. *Id.* at 760.

85. *Id.*

86. *Id.* at 762.

87. *Id.* at 766-70 (explaining that a dog's reliability cannot be determined by a mere statement that it is trained and certified because dogs are conditioned rather than trained, dogs vary in their individual skills and abilities, and dogs cannot be cross examined as a human witness can).

88. *Harris*, 71 So. 3d 768 (quoting *Matheson v. State*, 870 So. 2d 8, 14 (Fla. Dist. Ct. App. 2003)) (indicating the need for dogs to be evaluated on a case-by-case basis).

89. *Id.* ("In the absence of a uniform [training] standard, the reliability of the dog cannot be established by demonstrating only that a canine is trained and certified In other words, whether a dog has been sufficiently trained and certified must be evaluated on a case-by-case basis.")

90. *See State v. England*, 19 S.W.3d 762 (Tenn. 2000).

91. *Id.* at 764.

92. *Id.* at 765.

93. *Id.*

94. *Id.*

95. *England*, 19 S.W.3d at 765.

established simply based on a positive alert by a trained narcotics dog, the *England* Court explicitly rejected this contention.⁹⁶ Instead, the court reasoned that probable cause “should turn on the reliability of the canine and that the trial court should ensure that the canine is reliable by an appropriate finding of fact.”⁹⁷ The court explained that reliability problems occur when such facts are not investigated, and thus, that a determination of reliability should consider all factors relevant to the canine’s training.⁹⁸ The dissenting judge took his opinion further than the majority, arguing the officer should have reasonable suspicion of criminal activity even before ordering a canine sweep.⁹⁹ That argument, however, had already been squashed by *Illinois v. Caballes*.

The cases examined *infra* illustrate the two paths courts have taken regarding the evidence needed to demonstrate a drug dog’s reliability. On one hand, virtually all federal courts support the holding that merely stating a dog is trained and reliable is enough to establish the dog’s credibility. On the other hand, several state courts require further, objective evidence that actually proves the dog’s capabilities.

III. EXAMINING THE TOTALITY OF EVIDENCE

As a result of the federal courts’ holdings explained above and the lack of evidence such federal courts require, drug detection dogs appearing in those courtrooms need not be very accurate to uphold the probable cause their sniffs constitute.¹⁰⁰ Part of the reason for allowing narcotics dogs to constitute probable cause without examining objective evidence that may demonstrate their unreliability is perhaps because many of the cases questioning the dog’s reliability are appealed in an effort to suppress unmistakable evidence of the crime.¹⁰¹ That is, most defendants move to suppress

96. *Id.* at 768 (“The Court of Criminal Appeals concluded that the weight of authority supports the finding of probable cause based on a positive alert by a trained narcotics detection dog. It is true that some federal courts have so held, but with little analysis. To the extent, however, that these holdings represent a per se rule, we reject it.” (citation omitted)).

97. *Id.*

98. *See id.* (listing the canine’s training, field performance records, and handler training as factors for lower courts to consider in determining whether a particular canine is reliable).

99. *Id.* at 769 (Birch, J., dissenting) (“[A]n officer must have reasonable suspicion of criminal activity before ordering a canine sweep during an otherwise lawful investigatory stop.”).

100. *See* Richard E. Myers II, *In the Wake of Caballes, Should We Let Sniffing Dogs Lie?*, 20 CRIM. JUST. 4, 7 (Winter 2006) (describing the case of *United States v. Owens*, in which even though the canine at issue in that case flunked out of dog school twice and had a success rate of less than 50%, the court still found him reliable).

101. *Id.* at 12 (explaining that because most cases regarding this issue move to suppress unmistakable evidence of the crime, judges are more inclined to find the dog at issue

evidence that the dog alerted to the scent of narcotics and, even more devastating to the State's case, to suppress evidence that narcotics were found at all, thereby allowing guilty defendants to go free.¹⁰² Although court decisions often do not favor the defense,¹⁰³ this is no reason for courts to run the unnecessary risk of invading an individual's privacy by allowing an unreliable drug dog to constitute probable cause. In support of this argument, several issues come into play: the lack of training standards drug dogs are required to meet, accuracy records, handler cuing, the purpose of the Fourth Amendment, a dog's inability to testify, and the dog's actions as an additional tool for officers.

A. TRAINING STANDARDS

In allowing a dog's reliability to be based on a simple statement in an affidavit claiming a dog is "reliable," some courts merely trust in the everyday meaning conveyed by the word "trained."¹⁰⁴ *United States v. Venema* details this issue.¹⁰⁵ In *Venema*, local drug agents were watching the defendant's residence after another resident, living at the same address, was arrested for possession of marijuana the previous October.¹⁰⁶ The agents observed the defendant carry a box from his truck into a building of storage lockers, back to his truck, and finally to his residence.¹⁰⁷ After watching this, the agents arrived at the storage company with a trained narcotics dog, who alerted to the locker the defendant had visited.¹⁰⁸ Upon obtaining search warrants, the agents searched the locker at the storage company and found LSD, marijuana and hashish.¹⁰⁹ The defendant was arrested and convicted of three narcotics counts.¹¹⁰ Although the court affirmed the defendant's conviction and was not persuaded that the dog's qualifications had to

reliable so that such evidence is not precluded from being admitted under the exclusionary rule).

102. *See id.* at 12-13 (emphasizing why case law on this issue is typically difficult for the defense).

103. *Id.* at 7 ("Even a cursory review of the case law demonstrates that court decisions do not favor the defense.").

104. *See United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977).

105. *See id.* (referencing the rejection of the argument laid out in *United States v. Meyer*, 536 F.2d 963 (1st Cir. 1976), that simply stating the dog was "trained" in an affidavit is not sufficient to establish the dog's reliability).

106. *Id.* at 1004.

107. *Id.*

108. *Id.* at 1005.

109. *Venema*, 563 F.2d at 1005.

110. *Id.*

be described in detail in the affidavit,¹¹¹ the court discussed its viewpoint on the word “trained.”¹¹² The court quoted *United States v. Meyer*, stating:

Furthermore, the word “trained,” when considered in the context of the affidavit, has a common and well understood meaning. Webster’s Third New International Dictionary . . . defines “train” as meaning “to instruct or drill in habits of thought or action” or, alternatively, “to teach (an animal) to obey a command.” Assuming, therefore, that the magistrate was a qualified official possessing ordinary and reasonable intelligence and prudence it does not in our view defy logic to conclude that the magistrate understood that the “trained dog” was endowed, by reason of experience and training, with the ability to sniff out cocaine.¹¹³

Thus, in agreeing with the reasoning set forth in *Meyer*, the *Venema* court simply took the word “trained” as stated in the affidavit to qualify the “reliability” of the drug dog without further inquiring as to how the dog was “trained,” how well the dog was trained, or even whether that dog’s training was kept up to date.¹¹⁴

Such a presumption inferred from the word “trained” in an affidavit allows for unreliable dogs to constitute probable cause, particularly because of the lack of training standards drug dogs are required to meet. More specifically, the actual methods and exercises by which dogs are trained vary greatly with each certification program.¹¹⁵ Nevertheless, the basic premise

111. *Id.* at 1007 (rejecting the defendant’s contention that merely stating the dog was trained was a conclusory statement that did not sufficiently establish the dog’s reliability, and holding that the canine’s educational background and general qualifications did not have to be detailed in the affidavit).

112. *See id.* (agreeing with the reasoning set forth in *United States v. Meyer*, 536 F.2d 963 (1st Cir. 1976), that an affidavit stating the dog is trained and certified is sufficient to establish its reliability).

113. *United States v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged 1965)).

114. *See Venema*, 563 F.2d at 1007 (determining that no detailed information about the dog’s narcotics detection history was required in the affidavit because a magistrate with reasonable intelligence is able to understand the meaning of a “trained dog,” yet failing to recognize the difficulty in doing so because of the discrepancy in training standards discussed *infra*).

115. *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817). The court quoted Florida’s Second District Court of Appeals, stating that “conditioning and certification programs vary widely in their methods, elements, and tolerances of failure.” *Matheson v. State*, 870 So. 2d 8, 14 (Fla. Dist. Ct. App. 2003).

is this: trainers play with the dog in training using a towel.¹¹⁶ Once the dog learns to associate the towel as his toy, trainers wrap narcotics in the same towel and continue to utilize it as the dog's play toy, training the dog to associate the scent of the drug with his toy.¹¹⁷ Upon mastering this task, the trainer soon begins to hide the drug without the toy.¹¹⁸ Thus, when the dog begins searching for the scent of the drug, he is really searching for the toy he associates with the scent.¹¹⁹

Although training dogs is relatively easy,¹²⁰ this type of training regimen demonstrates that dogs are not, in fact, "trained" as humans are trained.¹²¹ Rather, they are conditioned to respond to particular stimuli—in this case, the scent of the drug.¹²² This conditioning prompts dogs to detect the scent of narcotics based on their motivation to find their toy, rather than, for instance, a human's motivation to detect narcotics for the sake of finding illegal contraband.¹²³ This difference in motivation is simply one reason why training standards are imperative to ensure the "trained" dog has actually learned what it was conditioned to do. Despite this importance, "dog teams are not held to any statutory standard . . . in . . . most . . . states."¹²⁴ In fact, there are only two states that require police dogs to meet certain criteria.¹²⁵ In having such divergent standards, certification programs, mostly

116. Bird, *supra* note 29, at 411 (describing the very basics of training a drug detection dog even though the specific methods by which individual canines are trained may vary depending on the training center it attends).

117. *Id.* at 412.

118. *Id.*

119. *Id.*

120. *See id.* at 412 ("Canine training is a relatively simple task, lasting only two to six weeks.").

121. Harris v. State, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) (quoting Matheson v. Florida, 870 So. 2d 8, 13-14 (Fla. Dist. Ct. App. 2003)) ("Although we commonly refer to the 'training' of dogs, manifestly they are not trained in the sense that human beings may be trained.").

122. *Id.* (quoting Matheson, 870 So. 2d at 13-14) ("[D]ogs are 'conditioned,' that is, they are induced to respond in particular ways to particular stimuli.").

123. *Id.* ("However much we dog lovers may tend to anthropomorphize their behavior, the fact is that dogs are not motivated to acquire skills that will assist them in their chosen profession of detecting contraband.").

124. Dan Hinkel & Joe Mahr, *Tribune analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB. (Jan. 6, 2011), available at, http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog. Even more disturbing is the fact that "police agencies are inconsistent about the level of training they require and few states mandate training or certification." *Id.*

125. Greg Beato, *The Man's Best Friend: Drug Dogs Sniff at the Fourth Amendment*, REASON MAGAZINE, Mar. 2011, at 16, available at, <http://reason.com/archives/2011/02/17/the-mans-best-friend> ("Certification is largely optional. 'There's only two states in this country that say if you want to have a police dog, these are the criteria you have to meet' . . .").

run by private organizations, train and certify dogs according to various criteria and requirements.¹²⁶ Thus, the absence of a uniform standard makes the words “trained” and “certified” equivocal at best, in turn making it fundamentally difficult for courts to discern whether a drug detection dog has been properly trained.¹²⁷ With this in mind, courts such as the *Venema* court mistakenly conclude that if an affidavit states a dog is “trained” and “certified,” a magistrate possessing ordinary and reasonable intelligence and prudence can infer a dog possesses the ability to sniff out drugs.¹²⁸ Without further inquiring into a dog’s training, however, those words imply nothing of the sort.

Additionally, it is important to remember that dogs, like humans, often differ in their individual skills and abilities.¹²⁹ A training program that works for one dog might not have the same effect on another dog.¹³⁰ Despite this, if both dogs pass the same training course, both are considered “trained.” Without uniform standards, it is difficult to know what skill level each dog has reached and, more importantly, whether an individual dog’s skill is comparable to others in the field.¹³¹ Moreover, without a detailed description of an individual dog’s training, the court has no way of knowing whether a dog’s training and certification has been kept up to date. As “a dog’s ability can change over a short period of time,”¹³² the dog may fall out of its trained behavior and lose its effectiveness in the field if not continually trained.¹³³ Accordingly, an affidavit merely stating a dog is “trained” and “certified” does not give enough insight into the dog’s training methods, individual skills, and recertification details. Rather, further objective evidence should be submitted to the court in order for the finder of fact to adequately determine, on a case-by-case basis, whether a drug dog is reliable.

126. *Harris*, 71 So. 3d at 764 (quoting *Matheson*, 870 So. 2d at 13-14).

127. *Id.* at 768 (quoting *Matheson*, 870 So. 2d at 14) (“In the absence of a uniform standard, the reliability of the dog cannot be established by demonstrating that a canine is trained and certified.”).

128. *See* *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977).

129. *Harris*, 71 So. 3d at 764 (quoting *Matheson*, 870 So. 2d at 13-14) (“[Florida’s] Second District [Court of Appeals] noted that dogs themselves ‘vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments.’”).

130. *See id.* (quoting *Matheson*, 870 So. 2d at 13-14).

131. *See id.*

132. *Bird*, *supra* note 29, at 415 (noting that the Rhode Island State Police only retains a narcotics detection dog’s history records for thirty to sixty days simply because the dog’s ability can change quickly, making their records less accurate).

133. *United States v. Kennedy*, 131 F.3d 1371, 1375 (10th Cir. 1997) (“Over time, if not properly monitored, a dog may fall out of its trained behavior and begin responding to a handler’s cues rather than to actual detection of a narcotic odor. A drug dog will lose its effectiveness in the field and may revert to old, bad habits if not continually trained. Accurate record keeping is essential to insure the dog’s reliability until the dog is recertified.”).

B. ACCURACY RECORDS

Although prominent cases regarding drug detection dogs have portrayed canines as animals with unique senses, state courts acknowledge that their infallibility has been dispelled, and they now recognize that “the infallible dog . . . is a creature of legal fiction.”¹³⁴ At the heart of this reality are judicial opinions describing imperfect accuracy records.¹³⁵ That is, even the federal courts that hold an affidavit need only state the dog is “trained” in order to establish its reliability acknowledge that “[a] dog alert might not give probable cause if the particular dog had a poor accuracy record.”¹³⁶ This is a major flaw in the majority’s argument that objective evidence does not need to be submitted to the court because without such evidence, the court has no way to examine a dog’s potentially poor accuracy record and, in turn, the court potentially allows an unreliable dog’s alert to give probable cause.

Accuracy records are a critical instrument in helping the finder of fact adequately determine whether a dog is reliable, as such records demonstrate how often the dog correctly alerts to drugs as opposed to how often the dog alerts to a false positive. Every dog alert can result in four potential outcomes: (1) a correct alert that leads to the discovery of drugs; (2) No alert when drugs are, in fact, not present; (3) a “false negative,” defined as the dog’s failure to alert when drugs are present; and (4) a “false positive,” an incorrect alert when drugs are not present.¹³⁷ The first two outcomes result in the dog correctly determining the presence or absence of narcotics, thus deeming those outcomes “correct.”¹³⁸ Conversely, the last two outcomes lead to incorrect findings and are labeled “errors.”¹³⁹ Despite this, some courts do not believe false positives should count as false alerts.¹⁴⁰ Often, false positives can occur because the canine detects an old scent, otherwise known as a “dead scent.”¹⁴¹ As such, these courts believe false positives

134. *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting); accord *Weiner*, *supra* note 77, at 12 (giving credit to Justice Souter for his dissenting opinion in *Illinois v. Caballes*, in which he “dispel[led] the myth of the infallible canine”). The author also emphasizes that although the canine’s “infallibility is belied by judicial opinions,” these dogs have less than perfect accuracy records. *Id.* at 13.

135. *Weiner*, *supra* note 77, at 12.

136. *Kennedy*, 131 F.3d at 1377 (quoting *United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993); *United States v. Diaz*, 25 F.3d 392, 393-94 (6th Cir. 1994).

137. *Bird*, *supra* note 29, at 427 (examining the statistical perspective of canine alerts).

138. *Id.*

139. *Id.*

140. *Matheson v. State*, 870 So. 2d 8, 11 (Fla. Dist. Ct. App. 2003).

141. *Id.* (quoting Max A. Hansen, *United States v. Solis: Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410, 417 (1976)) (“Many times the possibility of a false alert will be overlooked by

should be counted as correct alerts because the dog did what he was conditioned to do—alert to the odor of contraband.¹⁴² Although this is true, a canine can be trained to discriminate between dead scents (residual odors) and the actual presence of drugs.¹⁴³ With no uniform, standardized training methods in place, however, there is no other way to account for false positives.¹⁴⁴

While the correct aforementioned results demonstrate the usefulness of drug detection dogs and their abilities, the outcomes resulting in errors can be incredibly damaging.¹⁴⁵ For instance, a dog alert that results in a false negative fails to establish the requisite probable cause an officer needs in order to search a defendant's person or property.¹⁴⁶ Without probable cause, the officer cannot engage in a constitutional search and is forced to let the defendant, still in the possession of drugs, go free.¹⁴⁷ Although the drugs in a false negative alert are not confiscated, "[t]he cost of a false positive is more severe" because the officer wastes valuable and limited police resources without finding any narcotics.¹⁴⁸ More importantly, false positives become most dangerous when the dog shows, through its accuracy records, that it alerts to false positives often and/or has a low accuracy rate. In deciding *Harris v. State*, the Supreme Court of Florida eloquently described the concern of allowing a dog with such a record to give probable cause:

If a dog is not a reliable detector of drugs, the dog's alert in a particular case, by itself, does not indicate that drugs are probably present in the vehicle. In fact, if the dog's ability to alert to the presence of illegal substances in the vehicle is questionable, the danger is that individuals will be subjected to searches of their vehicles and their persons without probable cause.¹⁴⁹

a handler as will the dog's inability to differentiate between a 'live' scent and a 'dead' scent.").

142. *Id.*

143. Bird, *supra* note 29, at 414.

144. *See id.* at 415.

145. *Id.* (demonstrating the consequences of incorrect canine alerts).

146. *See id.*

147. *Id.* (explaining that the harm in allowing a defendant, still in possession of the narcotics, to go free is that those drugs are not removed from circulation of the general public).

148. Bird, *supra* note 29, at 427 (suggesting the canine's reliability should primarily be determined based on the canine's false positive record).

149. *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817). The most important concern in allowing unreliable drug dogs to constitute probable cause is that an individual's privacy may be unnecessarily invaded. Bird, *supra* note 29, at 427.

Thus, in failing to examine a drug dog's accuracy records, courts risk overlooking evidence that demonstrates the drug dog's alert improperly gave probable cause, in turn making the officer's search of the defendant's person and property altogether unconstitutional under the Fourth Amendment.¹⁵⁰ This risk becomes more troubling when people innocent of wrongdoing are searched because an unreliable dog improperly and falsely alerted against them.¹⁵¹ Courts can easily diminish this risk by requiring the State to submit a drug dog's accuracy records in order to establish the dog's reliability.

C. HANDLER ERRORS AND HANDLER CUING

The relationship between a detection dog and its handler is one of the most important elements in the field of drug detection by dogs.¹⁵² In fact, "[p]ractitioners in the field reveal that handler error accounts for almost all false detections."¹⁵³ Such errors refer to the handler's mistaken interpretation of a dog's signal.¹⁵⁴ The issue of handler error was examined in *United States v. Outlaw*.¹⁵⁵

In *Outlaw*, the defendant was a passenger on a Greyhound bus.¹⁵⁶ Border Patrol agents stopped the bus at a regular checkpoint, boarded the bus, and conducted an immigration inspection of its passengers.¹⁵⁷ During this inspection, a drug detection dog alerted to a suitcase located in the cargo area.¹⁵⁸ The defendant, the owner of the suitcase, was arrested after a search of the suitcase revealed two gallon-sized containers of PCP.¹⁵⁹ Upon ap-

150. See *Harris*, 71 So. 3d at 767.

151. See *id.*

152. *Id.* at 768 (quoting Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 757 (2007)).

"Coupled with the concern for false alerts is the potential for handler error and handler cuing. 'Handler error affects the accuracy of a dog. The relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior.'"

Id.

153. *Id.* at 768-69 (quoting Bird, *supra* note 29, at 425) (explaining that trial courts should examine the training of the handler as well because "[h]andlers interpret their dogs' signals, and the handler alone makes the final decision whether a dog has detected narcotics").

154. *United States v. Outlaw*, 134 F. Supp. 2d 807, 813 (W.D. Tex. 2001) (reasoning that the handler's ability determines the canine's reliability).

155. *Id.* at 809.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Outlaw*, 134 F. Supp. 2d at 809.

peal, the court determined that an alert by a properly trained canine is “prima facie proof that the officer had probable cause for a search or seizure.”¹⁶⁰ Despite this holding, the court also held that defendants have a right to challenge the reliability of canine inspections.¹⁶¹ If the defendant chooses to do so, however, he carries the burden to show the canine alert was insufficient to establish probable cause.¹⁶²

In refusing to adopt a rule that prohibited the defendant from challenging the canine’s reliability, the *Outlaw* court logically reasoned that “though highly accurate, canine inspections are not infallible . . .” and “[t]he reliability of the canine alert depends *significantly* on the ability and reliability of the human handler. As such, it is susceptible to human errors.”¹⁶³ In recognizing that human mistake can account for false detections, the court further explained that “a canine ‘alert’ is not always an objectively verifiable event” because an alert is merely the human handler’s interpretation of the dog’s signals and/or change in behavior.¹⁶⁴ Although the court ultimately concluded the canine team in *Outlaw* was sufficiently trained and reliable,¹⁶⁵ the recognition that canine alerts significantly depend on the ability of the human handler demonstrates the importance of handler training.

In addition to examining a drug detection dog’s credentials, the training of the canine’s handler, although frequently neglected by courts, should be scrutinized.¹⁶⁶ As the canine and handler are seen as an “integral team,”¹⁶⁷ “[t]he handler’s performance [as trainer and interpreter] is inseparably intertwined with the dog’s overall reliability rate . . . [a]nd since the net result is the product of the interaction between two living beings, both

160. *Id.* at 812 (rejecting the rule established in *United States v. Williams*, 356 F.3d 1276 (10th Cir. 2004) that a defendant cannot challenge a detection dog’s reliability).

161. *Id.*

162. *Id.* (differing from most of the state court decisions that place the burden on the State to prove the drug dog is reliable, the court in this case placed the burden on the defendant to show the dog was unreliable, a much more difficult task when the difficulty for the defendant to obtain the dog’s records is considered).

163. *Id.* at 813 (emphasis added) (explaining the importance of the handler’s ability to properly interpret the canine’s alerts, cues, and signals because conscious or unconscious signals from the handler can result in false alerts).

164. *Outlaw*, 134 F. Supp. 2d at 813 (“In some instances, an alert is simply an interpretation of a change in the dog’s behavior by a human handler.”).

165. *Id.* at 816.

166. Bird, *supra* note 29, at 422 (stating that the importance of examining the handler’s credentials is because the canine and the handler work closely together, and the handler’s job is far more difficult than simply “keep[ing] the dog on the leash . . .”); *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) (detailing the significance of the relationship between the canine and its handler, and in turn, the importance of the trial court to also examine the handler’s training).

167. Bird, *supra* note 29, at 422 (“Clearly, the dog and handler function as an integral team. The dog is the sensor, and the handler is the trainer and interpreter.”).

roles of the handler are highly subjective.”¹⁶⁸ That is, the handler must undergo her own training that teaches her how to properly interpret her canine’s signals, become familiar with the canine’s particular pattern of communicating an alert, and avoid mistaking her dog’s reaction to distractions as indications of narcotics.¹⁶⁹ Such training is an incredibly important part of the handler’s position, and without proof of the handler’s training and annual recertification, the court has no way to determine whether or not the handler is adequately qualified to make a final decision of whether the dog actually indicated to the scent of narcotics.

Closely related to handler error is the issue of handler cuing, the confusion about when a dog is indicating to their independent detection of drugs as opposed to the dog’s mere response to cues from its handler.¹⁷⁰ Consider the following experience many dog lovers can relate to:

For the first few years I had her, I was impressed by my late dog Harper’s uncanny ability to assess people’s character. She hated every crappy landlord and bad roommate. Barked at them. Snarled at them. Wouldn’t go near them. But if I brought home a date I liked, Harper, a Shar Pei/Labrador mix, would curl up right next to the woman and turn on the charm. It took me a few years to figure out that my dog wasn’t a good judge of character; she was just good at reading me. She liked the people I liked and disliked the people who rubbed me the wrong way.¹⁷¹

168. *Id.* (citing *United States v. Paulson*, 2 M.J. 326, 330 n.5 (A.F.C.M.R. 1976) *remanded by* 7 M.J. 43 (C.M.A.1979)).

169. *Id.* at 423 (explaining why handler training takes longer than the canine’s training, and specifically demonstrating the specific skills the handler should learn).

170. Radley Balko, *The Mind of a Police Dog: How Misconceptions About Dogs Can Lead to Abuse of Humans*, REASON MAGAZINE (Feb. 21, 2011), <http://reason.com/archives/2011/02/21/the-mind-of-a-police-dog> (outlining a study performed by a neurologist at the University of California-Davis that demonstrated the issue of handler cuing). The study found that only twenty-one of the 144 walk-throughs resulted in correct alerts by the canines; the rest resulted in false alerts. *Id.* More importantly, the study recognized an issue known as the “Clever Hans effect,” in which specific search points marked by red slips of paper were designed to trick the handlers. *Id.* These points were “twice as likely to trigger false alerts as the search points designed to trick the dogs . . .” demonstrating the dogs were reading cues from their handlers. *Id.*

171. *Id.* (providing an example from the author’s own experience that demonstrates how his dog read his body language).

Although a memory of his late dog, the author uses his reminiscence to make a further point: the canine's "urgent desire to please their masters, coupled with the ability to read their [masters'] cues."¹⁷²

The issue of handler cuing essentially developed over time as humans domesticated dogs.¹⁷³ Although researchers are confident that dogs evolved from wolves,¹⁷⁴ the point at which dogs became domesticated is unknown and often debated.¹⁷⁵ Nevertheless, the earliest known dog bones date back 14,000 years,¹⁷⁶ and as long ago as 12,000 years, the dog was already part of the cave-man's family.¹⁷⁷ These dates suggest wolves were domesticated by hunter-gatherers.¹⁷⁸ Specifically, "early in this association, man learned that the dog, whose very life depended upon hunting for his food, would assist man in hunting those animals that provided food for man and his family."¹⁷⁹ Thus, although domestication is an "arduous process" that takes place over several generations, "you could imagine dogs would be useful for giving warning signals, or tracking other animals, so you can see how both sides would benefit."¹⁸⁰ Whatever the reason for their domestication, "[d]ogs were probably the first animal to be domesticated and seem to have assumed considerable importance in early human societies."¹⁸¹ More importantly, the domestication process entails the selection of a particular trait.¹⁸² While it is hard to know for certain what traits domesticators sought in dogs, it has been suggested that dogs were selected for their ability to pick up on human cues.¹⁸³

172. *Id.* (identifying that his dog's ability to read his cues is similar to the issue of handler cuing in criminal investigations).

173. *See id.* ("[I]n the process of domesticating dogs, we have bred into them a trait that tends to trump most others: a desire to please us—and toward that end, an ability to read us and a tendency to rely on us to help them solve their problems.").

174. Wade, *supra* note 1; Derr, *supra* note 1.

175. Wade, *supra* note 1; Derr, *supra* note 1; *see* Sloane, *supra* note 13, at 385.

176. Wade, *supra* note 1; Derr, *supra* note 1.

177. Sloane, *supra* note 13, at 385.

178. Wade, *supra* note 1 (explaining that this has been suggested because of the dog's DNA).

179. Sloane, *supra* note 13, at 385 ("It has been said that the attachment of the first dogs to man, helped in the domestication of the human race.").

180. Wade, *supra* note 1 (explaining the difficulty hunter-gatherers would have had in understanding the benefits domesticated wolves would ultimately provide them).

181. *Id.*

182. *Id.*

183. *Id.* ("Wolves, though very smart, are much less adept than dogs at following human cues, suggesting that dogs may have been selected for this ability."); Derr, *supra* note 1 ("A study in the 2002 issue of [SCIENCE MAGAZINE] probed the psychology of dogs, showing that although chimpanzees may have brain power of far greater wattage, there is one task at which dogs excel, that of picking up cues from human behavior. This interpretive skill was perhaps the ability for which they were selected.").

Over time, humans have further cultivated this ability to pick up on human cues into the dog's desire to please their masters, read human communication signals, and rely on their masters' problem solving skills.¹⁸⁴ The issue of handler cuing thus arises when this trait leads drug detection dogs to respond to handler cues in order to please their masters rather than to pick up on the actual scent of the narcotics.¹⁸⁵ In essence, handler cues can be either conscious or subconscious signals.¹⁸⁶ Both vocal and physical indications can incite a dog to pick up on its handler's suspicions and have "been recognized to compromise a dog's objectivity."¹⁸⁷ That is,

Even the best of dogs, with the best-intentioned handler, can respond to subconscious cuing from the handler. If the handler believes that contraband is present, they may unwittingly cue the dog to alert regardless of the actual presence or absence of any contraband. Finally, some handlers may consciously cue their dog to alert to ratify a search they already want to conduct.¹⁸⁸

Although the danger of handler cuing has been addressed by state courts, such as *Harris v. State*,¹⁸⁹ federal courts, such as the Northern District of Iowa in *United States v. Olivares-Rodriguez*, dismiss this issue by claiming that in order to cue the canine, the officer would need to know, in advance of the canine sniff, that drugs were present, and where those drugs were located—a seemingly impossible task during a lawful, ordinary traffic stop.¹⁹⁰ This task, however, becomes more plausible when it is recognized that officers are often aware of where drugs are most frequently hidden, thereby allowing the officer to consciously or subconsciously direct the

184. Balko, *supra* note 170 ("The problem is that a dog barking or sitting may be responding not to a smell but to his handler's hunch about a suspect's guilt. The reason we have a Fourth Amendment is precisely to prevent searches based on hunches.").

185. *Id.*

186. Bird, *supra* note 29, at 424.

187. *State v. Nguyen*, 2007 SD 4, ¶ 37, 726 N.W.2d 871, 883 (quoting *United States v. Heir*, 107 F. Supp. 2d 1088, 1096 (D. Neb. 2000)) (explaining that such cues are impermissible, as they lead the dog to alert to a specific item based on the officer's suspicions).

188. *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) (quoting Myers, *supra* note 100, at 7) (demonstrating that handler cuing to objects the officer is suspicious about before the dog sniff occurs can justify an officer's search based on his hunch, thereby possibly subjecting the individual to an invasion of his privacy if no drugs are present).

189. *See generally id.* at 769.

190. *United States v. Olivares-Rodriguez*, 729 F. Supp. 2d 1030, 1037 (N.D. Iowa 2010) ("[I]n order to cue [the drug detection dog] to indicate on the boot, [the officer] would have had to know in advance that the boot contained drugs . . .").

canine to those locations.¹⁹¹ Additionally, when an individual's nervous habits lead the officer to become suspicious that the individual may be carrying drugs on his person or property, detection dogs can become aware of the handler's suspicion, thus prompting the dog to alert in an attempt to please its master.¹⁹² Handler training should educate the handler on how to avoid handler cues that impermissibly lead a dog to alert to the suspected person or location.¹⁹³ Accordingly, in assessing the totality of the dog's credentials, courts should also require evidence of the handler's training and recertification to ensure both parts of the handler-canine team are reliable enough to establish probable cause based on the canine's alert.

D. THE PURPOSE OF THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁹⁴

As such, the Fourth Amendment does not forbid all searches and seizures, but instead prohibits only unreasonable ones.¹⁹⁵ Searches included in the scope of the Fourth Amendment include those based merely on hunch.¹⁹⁶ Moreover, “[i]nchoate suspicions and unparticularized hunches . . . do not provide reasonable suspicion” to justify a search.¹⁹⁷ The holdings of *United States v. Place* and *Illinois v. Caballes*, however, jointly established that as

191. Cooper, *supra* note 37.

192. *Id.*

193. Bird, *supra* note 29, at 424 (explaining that each dog has their own pattern for communicating and thus, handler training should teach the handler to learn the particular method by which his canine communicates).

194. U.S. CONST. amend. IV.

195. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)) (“For ‘what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.’”).

196. See Balko, *supra* note 170 (“The consequences of [false alerts] are profound [T]he U.S. Supreme Court says a dog sniff is not invasive enough to qualify as a ‘search’ under the Fourth Amendment”); *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) (quoting *Matheson v. State*, 870 So. 2d 8, 13 (Fla. Dist. Ct. App. 2003)) (“Of course, mere suspicion cannot justify a search.”).

197. *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (citing *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994)) (reasoning that reasonable suspicion is based on the totality of the circumstances and not on a single factor).

the dog's sniff is *sui generis*,¹⁹⁸ a dog sniff does not qualify as a search under the Fourth Amendment.¹⁹⁹ Despite this, the underlying implication of these holdings is that dog sniffs can be used to justify physical inspections that do, in fact, qualify as searches.²⁰⁰

Since *Place*, the fallibility of the canine's sniff has been recognized "[a]nd when that aura of uniqueness disappears, there is no basis in *Place*'s reasoning, and no good reason otherwise, to ignore the actual function that dog sniffs perform."²⁰¹ That is, the practical function of the canine sniff is to allow officers to obtain information about the contents of private spaces.²⁰² But for the drug detection dog's unique olfactory cells, the limited search the officer is permitted to conduct under the Fourth Amendment may or may not reveal undisclosed facts about private enclosures.²⁰³ Essentially, "[a] dog adds a new and previously unobtainable dimension to human perception"²⁰⁴ by allowing officers to decipher whether the scent of narcotics is present, a feat they are usually unable to perform using their natural senses. The use of dogs, therefore, becomes both a greater intrusion into an individual's privacy and allows officers to justify further and more complete searches that would otherwise be prohibited under the Fourth Amendment.²⁰⁵

198. *United States v. Place*, 462 U.S. 696, 707 (1983) (concluding that because the canine sniff is so limited in the information revealed and in the method by which the information is discovered, the canine sniff is unique in its own respect).

199. *See id.* (holding that a trained canine search, so limited in its procedure, is not a search under the Fourth Amendment); *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (holding that because an individual does not have an expectation of privacy in regards to contraband substances, a canine sniff is not a search under the Fourth Amendment, so long as the initial stop was lawful).

200. Jacob Sullum, *Four Legged Warrants*, REASON MAGAZINE (Apr. 2011), *available at*, <http://reason.com/archives/2011/02/18/four-legged-warrants>.

201. *Caballes*, 543 U.S. at 413 (Souter, J., dissenting) (arguing that because the canine sniff is no longer considered *sui generis*, the justification of *Place* should be reconsidered). Without the certainty that *Place* emphasized on the dog's sniff, the characterization of the canine's reliability can no longer be used to justify a search that is "conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced." *Id.*

202. *Id.* ("[I]n practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area.").

203. *Id.* (arguing that a dog's sniff should be treated as a similar search to that of the search performed by a thermal-imaging device).

204. *Place*, 462 U.S. at 719 (Brennan, J., concurring) ("Unlike the electronic 'beeper' in *Knotts*, however, a dog does more than merely allow the police to do more efficiently what they could do using only their own senses.").

205. *Caballes*, 543 U.S. at 413 (Souter, J., dissenting) (explaining that the canine sniff is the first step in justifying a search). Once the canine has alerted, the officer can conduct a search that may reveal intimate details of a person's life, rather than just revealing the presence of contraband. *Id.*

The right of privacy and the freedom from interference of others under the Fourth Amendment is one of the more carefully guarded rights by common law.²⁰⁶ In protecting individuals from searches based on hunches, the Fourth Amendment becomes meaningful only when courts are willing to evaluate the reasonableness of particular searches and protect the constitutionally guaranteed rights of individuals when those intrusions are unwarranted.²⁰⁷ The importance of determining a drug detection dog's reliability becomes crucial when such rights are violated. In examining the totality of the canine's objective evidence, courts have the opportunity to decipher between searches conducted after a reliable canine legitimately indicates to the scent of narcotics and searches based on signals the officer claims are indications but are, in actuality, searches based on the officer's suspicions. More specifically, "simple 'good faith on the part of the arresting officer is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects' only in the discretion of the police."²⁰⁸ Thus, in failing to assess objective evidence establishing a dog's reliability, courts risk trampling on an individual's Fourth Amendment rights by potentially allowing unreliable dogs to constitute probable cause. Without the canine being a reliable measure of probable cause, the officer conducts his search based on only suspicion, a clear violation of the Fourth Amendment.

E. THE DOG'S INABILITY TO TESTIFY

Although seemingly obvious, one of the most overlooked yet critical issues is the fact that a canine cannot testify. In discussing the testimony of a canine, courts have compared the detection dog's reliability to that of an expert witness.²⁰⁹ *United States v. Diaz* is one such case.²¹⁰ In *Diaz*, the

206. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)) ("For, as this Court has always recognized, 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'").

207. *Id.* at 21 (reasoning that an officer needs to be able to point to specific facts in order to justify his probable cause, since without such a requirement, searches would be conducted on mere hunches alone).

208. *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

209. *See United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994) (looking to the laws of evidence for guidance on this issue because courts have not yet definitively addressed it); *see also United States v. Robinson*, 390 F.3d 853, 874 (6th Cir. 2004) (reasoning that evidence relating to a canine's accuracy is dispositive of his credibility rather than his qualifications).

210. *See Diaz*, 25 F.3d at 394.

defendant's car was located in a motel parking lot.²¹¹ A dog's alert on the defendant's car prompted drug agents to search the vehicle, leading them to find one hundred pounds of marijuana in the trunk.²¹² Prior to the dog's alert, the agents had no probable cause for the search of the defendant's vehicle.²¹³ Thus, while appealing his conviction of possession, the defendant argued the government failed to establish the dog's reliability, and consequently lacked probable cause to search his vehicle.²¹⁴ In declining to reverse the district court's factual findings, the Sixth Circuit Court of Appeals held that although the government did not produce additional objective evidence, the testimony of the handler in this particular case sufficiently established the dog's reliability.²¹⁵

Specifically, the court's reasoning explicitly compared evidence of the drug dog to evidence of an expert witness, explaining that the principles used to determine whether expert evidence should be admitted guides the court in evaluating the training and reliability of a drug detection dog.²¹⁶ The court explained that judges consider the expert's education, practical skill, and experience while concluding whether a particular expert is qualified.²¹⁷ Moreover, when other evidence contradicts or undermines the testimony of the expert in question, such evidence "affects that expert's credibility, not his qualifications to testify."²¹⁸ The court further explained that similar to evidence affecting the expert's credibility, evidence "that may detract from the reliability of the dog's performance properly goes to the 'credibility' of the dog. Lack of additional evidence, such as documentation of the exact course of training, similarly would affect the dog's reliability."²¹⁹

Federal Rule of Evidence 702 requires an expert to be qualified in order to testify.²²⁰ The dog, essentially, is a witness that is physically unable to do so. His testimony is that of his indication, despite the fact that he can-

211. *Id.* at 393.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Diaz*, 25 F.3d at 396 (holding that the testimony in this particular case established that the canine had a low percentage of false positives and was properly trained). Moreover, the Sixth Circuit Court of Appeals noted that other objective evidence "would be useful in evaluating a dog's reliability," but was unnecessary in this case because the reliability was sufficiently established through testimony regarding similar information. *Id.*

216. *Id.* at 394 (comparing the dog to an expert witness, the court reasoned that it is up to the judge's discretion to determine whether or not an expert is qualified).

217. *Id.* (citing *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 919 (6th Cir. 1984)).

218. *Id.*

219. *Id.*; accord *United States v. Koon Chung Wu*, 217 F. App'x. 240, 246 (4th Cir. 2007) (citing *United States v. Robinson*, 390 F.3d 853, 874 (6th Cir. 2004)); *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010).

220. FED. R. EVID. 702.

not explain his reasoning for alerting to the vehicle. As such, there is no reason a dog's "testimony" should be any different than a humans; the dog's qualifications should also be determined and established in order to be considered "credible." Thus,

[b]ecause the dog cannot be cross-examined like a police officer whose observations at the scene may provide the basis for probable cause, the trial court must be able to assess the dog's reliability by evaluating the dog's training, certification, and performance, as well as the training and experience of the dog's handler.²²¹

The canine's "testimony" is often told by its handler. The problem arises because the canine cannot be cross-examined and cannot corroborate other facts to support his testimony. Instead, the testimony becomes subjective as it is now based on the personal interpretation and belief of the officer.²²² Some courts credit the handler's testimony, explaining that "it is safe to assume that canine professionals are better equipped than judges to say whether an individual dog is up to snuff."²²³ In furtherance, these courts believe there is a "bright-line rule" guiding handlers to decipher when they can rely on the drug detection dog's alert and when they cannot.²²⁴ It has already been demonstrated, however, that no such "bright-line rule" exists, as there are no uniform training standards in place, and the final decision of whether an indication was given is essentially up to the subjective determination of the handler.²²⁵ Thus, "[a]ny drug dog response observed by the officer could constitute probable cause as long as the officer testified that he believes that the 'new' untrained response, barely visible to anyone but the

221. *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) ("Similar to situations where probable cause to search is based on the information provided by informants . . . [a] critical part of the informant's reliability is the informant's track record of giving accurate information in the past.")

222. *See State v. Nguyen*, 2007 SD 4, ¶ 55, 726 N.W.2d 871, 887 (Meierhenry, J., dissenting) ("To approve probable cause under the facts of this case turns the standard from the objective standard of a reasonable and prudent person to a subjective standard based upon the personal interpretation and belief of the officer.")

223. *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2010); *accord United States v. Olivares-Rodriguez*, 729 F. Supp. 2d 1030, 1037 (N.D. Iowa 2010) (arguing that the canine's alert should be judged from the handler's perspective and not the perspective of an objective observer such as a judge).

224. *Ludwig*, 641 F.3d at 1251 (attempting to explain that the canine's credentials should create a "bright-line rule" for when the dog is reliable enough to establish probable cause).

225. *See supra* Part III.A.

officer, meant the dog had indicated.”²²⁶ To avoid such problems, states should be required to produce evidence of the dog’s reliability to demonstrate why his “opinion” should be given any probative value.

IV. CONCLUSION

Courts in favor of the less rigid standard required to establish the drug detection dog’s reliability believe that requiring objective evidence, such as the dog’s training and certification, recertification, performance records and handler training goes far beyond what probable cause requires.²²⁷ As has been well established, “[p]robable cause depends on whether an incriminating explanation remains a probable one, when all of the pertinent facts are considered.”²²⁸ After all, probable cause does not require certainty,²²⁹ and “whether probable cause existed at the time of the search may not be determined by what the search actually yields ‘[A] search is not to be made legal by what it turns up.’ Likewise, a search is not made illegal by what fails to turn up.”²³⁰ Thus, although hindsight is twenty-twenty,²³¹ courts should ensure that the officer who conducted the search had probable cause before the search actually occurred. This is not a matter of making searches unconstitutional based on their failure to yield contraband. Rather, it is a matter of ensuring the canine was reliable enough to act as a measure of probable cause prior to the officer even conducting his search. If a canine has a low accuracy rate or falsely alerts consistently, that canine should provide no probable cause to begin with, thereby making the officer’s search unconstitutional. This, however, cannot be determined by the court unless the totality of the canine’s experience is presented.

Moreover, it has been noted by courts in favor of the less rigid standard that “it would be particularly inappropriate to insist that a mini-trial be held on a drug dog’s training and performance before a law enforcement

226. *Nguyen*, 2007 SD 4, ¶ 55, 726 N.W.2d at 887 (Meierhenry, J., dissenting) (explaining why the reliability of a drug detection dog should constitute probable cause from an objective standard rather than the officer’s subjective standard).

227. *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) (Canady, C.J., dissenting) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)) (“[T]he majority demands a level of certainty that goes beyond what is required by the governing probable cause standard. The process of determining whether a search was reasonable because it is based on probable cause ‘does not deal with hard certainties, but with probabilities.’”).

228. *State v. Foster*, 252 P.3d 292, 299 (Or. 2011) (describing the probable cause standard).

229. *Id.* (“The test is one of probability, which requires more than mere suspicion or a mere possibility But it does not require certainty.”).

230. *States v. Outlaw*, 134 F. Supp. 2d 807, 815 (W.D. Tex. 2001) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

231. *Id.*

officer could cite a positive alert as a basis for obtaining a warrant.”²³² This, however, is not what the more rigid standard requires. Although the Fourth Amendment does not demand certainty of success to justify a search,²³³ “the most telling indicator of what the dog’s behavior means is the dog’s past performance in the field.”²³⁴ Furthermore, it has been well established that while a dog’s sniff outside a vehicle is not a search under the Fourth Amendment, a search within the vehicle constitutes a search for which probable cause has always been the minimum requirement in order to make it constitutional.²³⁵ Thus, the danger in failing to examine the objective evidence of a canine’s records is that if the dog’s reliability cannot be established and the officer had no other probable cause under which he conducted the search, the officer has violated the individual’s Fourth Amendment rights and that individual has been subjected to an unreasonable invasion of privacy. Regardless of whether or not the individual is carrying contraband on his person or property, he should be free from governmental intrusion wherever he has a reasonable expectation of privacy.²³⁶

Although the Supreme Court and most lower courts have granted particular deference to the olfactory abilities of police drug detection dogs, the evidence is clear that the canine is anything but infallible, incorrectly alerting dozens of times out of hundreds of alerts.²³⁷ The call for more objective evidence, however, is not requiring drug detection dogs to be shown virtually infallible.²³⁸ Rather, presenting evidence that a canine is properly trained and certified should not be the end of the analysis, but the beginning.²³⁹ As there is no uniform training standard and no meaningful, stan-

232. *United States v. Robinson*, 390 F.3d 853, 875 (6th Cir. 2004).

233. *Illinois v. Caballes*, 543 U.S. 405, 413 (2005) (Souter, J., dissenting) (clarifying that while certainty of success is not necessary, the certainty that was once placed in the faith of the canine sniff has dissolved).

234. *Harris v. State*, 71 So. 3d 756, 764 (Fla. 2011), *cert. granted*, 132 S. Ct. 1796 (U.S. Mar. 26, 2012) (No. 11-817) (quoting *Matheson v. State*, 870 So. 2d 8, 15 (Fla. Dist. Ct. App. 2003)).

235. *United States v. Ludwig*, 641 F.3d 1243, 1250 (10th Cir. 2010) (citing *Caballes*, 543 U.S. at 409); *see also Harris*, 71 So. 3d at 765 (citing *United States v. Ortiz*, 422 U.S. 891, 896 (1975)) (explaining that even though individuals have a reduced expectation of privacy in an automobile, the risk for a substantial invasion of privacy is still present, thereby requiring “probable cause as the minimum requirement for a lawful search”).

236. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)) (stating the purpose and protections at the core of the Fourth Amendment).

237. *Caballes*, 543 U.S. at 412 (Souter, J., dissenting) (demonstrating that the canine’s fallibility has been recognized).

238. *Harris*, 71 So. 3d at 772 (“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.”).

239. *Id.*

standardized way to access drug detection dogs, the State should explain to the court how the dog was certified.²⁴⁰ With each dog's individual skill level varying, the State should be able to produce accuracy records detailing their particular dog's success rates.²⁴¹ And, finally, because handlers are humans that inevitably make mistakes, conscious or subconscious, the State should demonstrate that the canine's handler has also been properly trained and certified.²⁴² Eloquently stated, "[t]he reliability of a dog as a detector of illegal substances is subject to a totality of the circumstances analysis. Thus, the trial court must be presented with the evidence necessary to make an adequate determination as to the dog's reliability."²⁴³ A court can only make this adequate determination by looking into the whole of the canine's history and experiences on a case-by-case basis. Without doing so, a slippery slope diminishing a citizen's protection against unreasonable searches emerges.²⁴⁴

MONICA FAZEKAS

240. *See id.*

241. *See id.*

242. *See id.*

243. *Harris*, 71 So. 3d at 772, 759.

244. *See State v. Nguyen*, 2007 SD 4, ¶ 49, 726 N.W.2d 871, 885 (Meierhenry, J., dissenting) ("This is another questionable drug dog case leading down a slippery slope towards diminishing a citizen's protection against unreasonable search and seizure guaranteed under the United States . . . Constitution.").

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