NO. 11-817

In the Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,
v.
CLAYTON HARRIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that an alert by a well-trained narcotics-detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle?

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 71 So. 3d 756, and is reprinted at Pet. App. A1–47. The opinion of the District Court of Appeal, First District, is reported at 989 So. 2d 1214, and is reprinted at Pet. App. A1–2. The trial court's oral ruling denying respondent's motion to suppress is not reported but is reprinted at JA 92.

JURISDICTION

The Supreme Court of Florida issued a revised opinion on September 22, 2011. Pet. App. A3. On the same date, the Florida Supreme Court denied the State's motion for rehearing in an unpublished order. *Id.* at A53. On March 26, 2012, this Court granted the State of Florida's petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Although the Florida Supreme Court remanded the case for further proceedings, the court completely disposed of respondent's motion to suppress and, thus, finally decided the conclusive federal question presented. Pet. App. A48–49; *cf. Florida v. Thomas*, 532 U.S. 774, 777–80 (2001).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

1. On the afternoon of June 24, 2006, Officer William Wheetley, a K-9 Officer with the Liberty County, Florida Sheriff's Office, was out on a routine patrol with his K-9 partner Aldo, a German Shepherd and trained narcotics-detection dog. Traveling east of Bristol, Florida on State Road 20, he came upon a pickup truck with an expired tag. After running the tag to confirm that it was expired, he pulled the truck over. JA 20, 61. The truck belonged to respondent Clayton Harris. It was not going to be his day.

Upon approaching the truck, Officer Wheetley noticed that respondent—the vehicle's sole occupant—was visibly nervous, shaking, and could not sit still. His chest was rapidly rising and falling. Officer Wheetley also saw an open can of Bud Light inside the truck's cab. Respondent acknowledged that his tag was expired, then denied Officer Wheetley's request to search the vehicle. Officer Wheetley returned to his patrol car to deploy Aldo. As he returned to the truck,

respondent was moving around in the cab of the truck and talking on his cell phone. Officer Wheetley led Aldo around the truck for a "free air sniff" of the exterior of the vehicle. Aldo alerted near the driver's side door handle—becoming excited then sitting, as he had been training to do over the course of hundreds of hours in K-9 instruction for certain narcotics, including methamphetamine (or meth). JA 20–22, 60, 62–63.

Officer Wheetley put Aldo back in his patrol car. Then he advised respondent that he had probable cause to search the vehicle, removed respondent from the truck, patted him down, and asked him if there was anything illegal in the truck. Respondent said that he was not aware of anything illegal in the truck, and Officer Wheetley proceeded to search the cab of the truck. Respondent turned out to be wrong. The search revealed various ingredients for a homemade batch of methamphetamine—the fruits of a shopping spree respondent had conducted over the past day or so at various retail outlets in Tallahassee. JA 21–22, 65.

Under the driver's seat, Officer Wheetley found 200 pseudoephedrine pills inside a plastic bag, the bulk of which respondent had purchased from three different Walgreens that day. Under the passenger seat, Officer Wheetley found a plastic bag with eight boxes containing 8,000 or so matches, which respondent had bought from a Publix that day. Officer Wheetley placed respondent under arrest for possession of listed chemicals (pseudoephedrine) and read him his *Miranda* rights. He then searched the passenger side toolbox of the truck bed and found a bottle of muriatic acid. A search of the driver side toolbox uncovered two bottles of antifreeze/water remover—acquired earlier that day from an Advance Auto Parts—and a Styrofoam plate

inside of a latex glove, and a coffee filter with iodine crystals. JA 21–22, 65–68.

After being *Mirandized*, respondent admitted to Officer Wheetley that he had been "cooking methamphetamine for about a year," and that he could not go "more than a few days without using meth." JA 68. Another officer—who had arrived at the scene just before the search—took respondent to the Liberty County's Sheriff's Office, and respondent's truck was towed away and inventoried. JA 22, 45-46.

2. Respondent—who had a record of numerous prior drug offenses—was charged with unlawfully possessing pseudoephedrine, a listed chemical under Florida law because of its use in manufacturing methamphetamine. JA 13–14. He moved to suppress the evidence found during Officer Wheetley's search of his pickup truck before his arrest on the ground that Officer Wheetley lacked probable cause to conduct the search, notwithstanding Aldo's alert. JA 15–18.

At the suppression hearing, Officer Wheetley testified in detail about his own K-9 training as well as Aldo's. He explained that—at the time of the search—he had been a canine handler for three years. He had completed a 160-hour narcotics-detection dog handling course with his previous canine partner through the Dothan, Alabama Police Department. JA 53. He had also attended an eight-hour course with Florida Department of Law Enforcement (FDLE) on the making of methamphetamine, where he learned about the chemicals and substances used to cook methamphetamine. JA 66–67.

After partnering with Aldo in July 2005—about a year before the search at issue—Officer Wheetley and

Aldo had both completed another 40-hour narcotics-detection training course. They have continued to attend that 40-hour refresher course every year. To ensure Aldo's proficiency in detecting narcotics, Officer Wheetley continually trained with Aldo for four hours every week on various drugs in different environments such as vehicles, buildings, and warehouses. Officer Wheetley explained that during training on vehicles they would choose multiple vehicles and hide narcotics in some while leaving others "blank" (*i.e.*, without contraband). He would bring Aldo by blank vehicles to test whether he would alert to vehicles without drugs. If there were eight vehicles with drugs on them, Aldo would alert to eight. JA 53–57, 59–60, 105.

Before being assigned to Officer Wheetley, Aldo had successfully completed a 120-hour narcotics-detection course with the Apopka, Florida Police Department, and was certified in 2004 to detect various narcotics—including methamphetamine—by Drug Beat K-9 Certifications, a private organization that has certified dogs for some 20 years. JA 102–104; *see* http://www.drugbeat.com/ (last visited June 22, 2012).[1] Aldo is a passive alert dog trained to detect the odor of marijuana, methamphetamine, cocaine, heroin, crack cocaine, and ecstasy. He was not specifically trained to alert to the constituent ingredients of those drugs, such as pseudoephedrine. JA 77. When Aldo initially gets in the scent cone of the odor of those drugs, he exhibits specific passive behaviors. He takes a long sniff, his

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[1] At the time of the search at issue, that certification—dated February 13, 2004—had expired. JA 103.

heart rate accelerates, and his feet begin to patter. Then he sits to complete the alert. JA 57–58.

Officer Wheetley described Aldo's performance in training as "really good." JA 60. Monthly training records bear that out. JA 106–116. Aldo's performance was "satisfactory"—on a scale of "satisfactory" or "unsatisfactory"—100% of the time from November 2005 to June 2006. *Id.* Although Officer Wheetley maintains records of arrests involving alerts by Aldo in the field (because he "keep[s] records of arrests"), he does not keep a record of instances where Aldo is deployed in the field and there is no arrest. JA 71–72, 74. Because field alerts—unlike training alerts—are not controlled events, it is not possible to ascertain the accuracy of such alerts when contraband is not found. In that situation, it is possible that the officer's search simply failed to uncover contraband that was hidden in the vehicle, or that the dog has alerted to the residual odor of contraband recently in the vehicle or on the presence of someone using the vehicle.

A few weeks after respondent's arrest on June 24, 2006, Officer Wheetley stopped respondent again while driving the same vehicle—this time for a malfunctioning brake light. Aldo again alerted to the same driver's side area of respondent's truck, and Officer Wheetley again searched the truck. This time, the search disclosed an open bottle of liquor but no drugs (or precursors for methamphetamine). JA 74–77.

The trial court held that there was probable cause to search the vehicle based on Aldo's alert and denied respondent's motion to suppress. JA 92. After entering a plea of nolo contendere that reserved his right to appeal the denial of his suppression motion, respondent was sentenced to 24 months in prison

followed by five years' probation. JA 93–96, 99, 131–32. The First District Court of Appeal affirmed the denial of respondent's motion to suppress. Pet. App. A1–2.

3. The Florida Supreme Court reversed. *Id.* at A48–49. That court held that evidence that a K-9 drug-detection dog has been trained and certified to detect narcotics, standing alone, is insufficient to establish the dog's reliability for purposes of establishing probable cause to search a vehicle, and that Officer Wheetley lacked probable cause to search the vehicle under the totality of the circumstances. In refusing to find that Aldo's alert to the vehicle established probable cause, the court attached significance to the fact that "there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs," *id.* at A29, and "the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors," *id.* at A30.

The Florida Supreme Court held that to demonstrate that a drug-detection dog's alert is sufficiently reliable to provide probable cause to search, the State must present: (1) evidence of the dog's training and certification records; (2) an explanation of the meaning of the particular training or certification; (3) field performance records (including any unverified alerts); (4) evidence concerning the experience and training of the officer handling the dog; and (5) any other objective evidence known to the officer about the dog's reliability. *Id.* at A48. Applying that standard, the court held that Aldo's alert failed to establish probable cause to search respondent's truck under the totality of the circumstances. *Id.* at A48–49.

Chief Justice Canady dissented. *Id.* at A49–52. He concluded that the court had imposed an unwarranted

evidentiary burden on the State, "based on a misconception of the federal constitutional requirement for probable cause." *Id.* at A49. As he explained, "[t]he process of determining whether a search was reasonable because it is based on probable cause 'does not deal with hard certainties, but with probabilities.'" *Id.* at A50 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality)). In his view, the court's decision contravened that central teaching because it establishes an evidentiary requirement that is tantamount to saying that police may "rely on drug detection dogs only when the dogs are shown to be virtually infallible." *Id.* at A51. Chief Justice Canady further concluded that the State had presented ample evidence to conclude that "the searching officer had an objectively reasonable basis for crediting the dog's alert" here, including evidence of Aldo's extensive training and "success rate during training." *Id.*

This Court granted certiorari.

SUMMARY OF ARGUMENT

Officer Wheetley reasonably concluded that Aldo's alert created a fair probability that respondent's truck contained contraband or evidence of a crime. The Florida Supreme Court erred in concluding that Officer Wheetley nevertheless lacked probable cause to search the truck. The judgment of the Florida Supreme Court should be reversed, and this Court should hold that an alert by a well-trained drug-detection dog like Aldo establishes probable cause to search a vehicle.

It is well-settled that the Fourth Amendment permits an officer to search a vehicle if there is probable cause to believe that the vehicle contains contraband or evidence of a crime. And this Court has

repeatedly admonished that probable cause is a flexible, common-sense standard that considers whether the objective facts known to the officer at the time create "a fair probability" that contraband is present. People have known for centuries that dogs not only make special companions but possess an extraordinary sense of smell. This Court has repeatedly recognized the invaluable role played by drug-detection dogs in law enforcement at all levels, and lower courts have consistently held that alerts by drug-detection dogs established probable cause. This Court's precedents compel the conclusion that a well-trained dog's alert to the presence of contraband establishes "a fair probability" that a search will reveal contraband—and thus probable cause. And that conclusion is unassailable on the record here.

To support a finding of probable cause, it must of course be reasonable for a K-9 officer to believe that his dog's alert is reliable. It is possible to establish reliability in any number of ways, and the Constitution does not impose any fixed requirement. But the fact that a drug-detection dog has been trained by canine professionals—and performed successfully in training—is sufficient to establish reliability, absent extraordinary circumstances showing otherwise. This Court has observed that a "well-trained narcotics-detection dog" alerts to the presence of drugs without "expos[ing] noncontraband items." *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). That is another way of saying that such a dog is reliable. And that is undoubtedly true for dogs that have successfully completed training programs, not to mention dogs—like Aldo—that are continuously trained. No one is in a better position to evaluate the reliability of a well-trained dog's alert

than the trained K-9 officer who has spent countless hours training and working with that dog.

The Florida Supreme Court erred in imposing a rigid and undue evidentiary burden on law enforcement authorities to establish the reliability of drug-detection dogs. Its decision invites full-blown trials over all aspects of a dog's training, certification, or performance any time a defendant seeks to suppress evidence seized following an alert—which will be frequent if the Florida Supreme Court's laundry list of requirements is allowed to stand. In particular, there is no basis for the court's requirement for evidence of a dog's field performance. Indeed, field performance is inherently a less accurate indicator of reliability than performance in controlled training sessions—in which an alert, or non-alert, can be accurately identified, and the possibility that the officer simply missed contraband hidden in a vehicle or that the dog alerted to residual odors of illegal drugs can be ruled out.

The Florida Supreme Court also erred in requiring evidence to negate the possibility that a dog may alert to the residual odors of contraband that the dog is trained to detect. The possibility of residual odors always exists; yet trained detection dogs have long been reliably used as invaluable law enforcement partners in the field. The fact that a vehicle occupant (like respondent) is a walking drug lab as far as a dog's sense of smell is concerned hardly negates an officer's probable cause to search a vehicle when a dog alerts to it. Nor do individuals have a reasonable expectation of privacy in the residual odors of illegal contraband or activity once they hit the streets. Moreover, the lawfulness of a search is determined based on what the officer knows *ex ante* (*i.e.*, the fact of the dog's alert)—

not on a *post hoc* assessment whether a dog in fact alerted to a residual odor of contraband.

If adopted by this Court, the Florida Supreme Court's understanding of what the Fourth Amendment requires in this vitally important law enforcement context would impose an inordinate evidentiary burden on law enforcement authorities at the state, local, and federal level across the country, exact major social costs, and destabilize a settled area of law. There is no reason for the Court to take that step.

ARGUMENT

THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT AN ALERT BY A WELL-TRAINED DRUG-DETECTION DOG FAILS TO ESTABLISH PROBABLE CAUSE

A. Probable Cause Is A Flexible, Common-Sense Standard That Depends On Fair Probabilities And Not Hard Certainties

The Fourth Amendment to the Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." This Court has long recognized that due to the "ready mobility" of motor vehicles and diminished expectation of privacy resulting from the "pervasive regulation of vehicles capable of traveling on the public highways," probable cause suffices to justify the search of a vehicle even in the absence of a warrant. *California v. Carney*, 471 U.S. 386, 391–92 (1985); *see also*, *e.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

The constitutional requirement of probable cause "protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). This Court has struck this balance by holding that probable cause is "a flexible, common-sense standard" that "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief'" that contraband or evidence of a crime is present. *Brown*, 460 U.S. at 742 (quoting *Carroll*, 267 U.S. at 162).

That standard is not based on "hard certainties, but [on] probabilities." *Id.* Law enforcement officers need not establish their belief that a vehicle contains contraband is "more likely true than false." *Id.*; *see also Pringle*, 540 U.S. at 371 ("'Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision.'") (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). Probable cause is not a mathematical concept. And no specific probability is necessary to establish probable cause. As this Court has held, all that is required is "a fair probability," *Gates*, 462 U.S. at 246, or a "substantial chance," *id.* at 244 n.13, that a search will reveal contraband. *See also id.* at 235 (rejecting "an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause'"); *Pringle*, 540 U.S. at 371 ("The probable-cause standard is incapable of precise definition or quantification into percentages . . . .").

Probable cause is an objective inquiry based on what is known to the officer on the spot. The inquiry "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the [search]." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Whether the search turns up the contraband the officer expected is irrelevant, because "'[i]t is axiomatic that hindsight may not be employed in determining whether a prior arrest or search was made upon probable cause.'" *Arizona v. Evans*, 514 U.S. 1, 17 (1995) (O'Connor, J., concurring) (quoting 1 W. LaFave, Search and Seizure § 3.2(d) (2d ed. 1987 & Supp. 1995)); *cf. Hill v. California*, 401 U.S. 797, 804–05 (1971) (no Fourth Amendment violation by search subsequent to arrest when police have probable cause to arrest suspect, but arrest the wrong person). Probable cause, in other words, is based on an objective, *ex ante* assessment of the situation that the officer faces before deciding to search, not a Monday morning quarterback's view of what the officer should have done with the benefit with hindsight.

The determination whether there is a "fair probability" or "substantial chance" of finding evidence of a crime is based on the totality of the circumstances. *Gates*, 462 U.S. at 238, 244 n.13; *see also Pringle*, 540 U.S. at 371. Probable cause accordingly cannot be "readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. This Court has repeatedly rejected attempts to mechanize the probable cause inquiry by substituting rigid tests for "the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations." *Id.* at 238. Instead, the totality-of-the-circumstances analysis looks to all relevant factors

known to the officer, including the on-the-spot judgments that officers must make in the field based on their experience and instincts. Accordingly, this Court's cases "have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

The reliability of information on which an officer bases the decision to search naturally is an important consideration in totality-of-the-circumstances analysis. But because probable cause does not depend on any logical or statistical guarantee that contraband will be found, this Court has recognized that there is a difference between reliability and infallibility. In the context of tips gathered from human informants, the Court has held that information is reliable when it turns on "common-sense conclusions about human behavior," *Brown*, 460 U.S. at 742, and rejected the notion that informants must be "infallible," *Gates*, 462 U.S. at 246 n.14 ("We have never required that informants used by the police be infallible . . . ."). Those common-sense conclusions do not require scientific validation or lengthy track records, so long as they are grounded in a "'practical, nontechnical' probability that incriminating evidence is involved." *Brown*, 460 U.S. at 742 (quoting *Brinegar*, 338 U.S. at 176).

Given the flexibility that the Fourth Amendment demands, the Court has looked to various "indicia of reliability" to determine whether a source can provide probable cause. *Gates*, 462 U.S. at 233. For informants lacking inherent trustworthiness, stronger evidence of reliability may be necessary. *See, e.g.*, *McCray v. Illinois*, 386 U.S. 300 (1967) (informant's track record of accurate information supports probable cause);

United States v. Harris, 403 U.S. 573 (1971) (statements against penal interest support probable cause). Or officers may need to corroborate untrustworthy information first. *See, e.g.*, *Draper v. United States*, 358 U.S. 307 (1959). By contrast, information from those without a motivation to deceive police can support probable cause all by itself. *See, e.g.*, *Gates*, 462 U.S. at 233 (an "unquestionably honest citizen [who] comes forward with a report of criminal activity" supports probable cause). And information provided by other members of law enforcement based on personal knowledge is invariably reliable by its nature. *See, e.g.*, *United States v. Ventresca*, 380 U.S. 102, 111 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis" for probable cause).

These principles—hardened by decades' worth of precedent from both this Court and lower courts applying this Court's precedent—provide the analytical framework for resolving the question presented. Ultimately, they compel the conclusion that the Florida Supreme Court erred in erecting a rigid and far-reaching evidentiary requirement for proving the reliability of drug-detection dogs, and in holding that an alert by a well-trained drug-detection dog is insufficient to establish probable cause.

B. An Alert By A Well-Trained Drug-Detection Dog Establishes Probable Cause To Search

As Judge Gorsuch has observed, it "goes without saying that a drug dog's alert establishes probable cause only if that dog is reliable." *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2011). The

overriding question in this case is what evidence is necessary or sufficient to establish the reliability of a drug-detention dog's alert. A K-9 dog's reliability may be established in any number of ways. But evidence that a drug-detection dog is well-trained is itself sufficient to demonstrate reliability for purposes of establishing probable cause based on the dog's alert.

1. For Millennia, It Has Been Known That Dogs Have A Superior Sense Of Smell

There is a reason that law enforcement has turned to dogs to assist it in uncovering illegal contraband. Scientists estimate the olfactory prowess of canines to exceed that of humans by a factor of one to ten *thousand.* Stanley Coren, *How Dogs Think* 51 (2004). Dogs' noses are anatomically crafted to detect scents at extraordinarily low concentrations. Within the nasal cavity, dogs possess hundreds of millions of sensory receptor cells, dwarfing the six million in a human nose. Alexandra Horowitz, *Inside of a Dog: What Dogs See, Smell, and Know* 71 (2009). After scents are trapped and detected, the receptor cells transmit signals to the olfactory "bulb," the part of a dog's brain devoted to smell that occupies a staggering twenty percent of the dog's total brain mass. *Id.* The proportion of a dog's brain dedicated to olfaction is some forty times that of the human brain. Coren, *supra*, at 51.

Although the science confirming dogs' superior sense of smell has become more developed over time, the fact of that superiority has been recognized as long as dogs have been man's best friend. For millennia, dogs' superior sense of smell has been an recognized as an invaluable asset in the canine-human partnership. Dogs like Odysseus's faithful hound Argos were valued

in ancient times for their ability to track game. Homer, *The Odyssey* 197 (W.H.D. Rouse trans. 1999) ("Never a beast could escape him in the deep forest when he was on the track, for he was a prime tracker."). Reports of dogs being used to recall and track human scents for law enforcements purposes date back at least to the classical era, with the earliest known report of a dog recognizing his master's murderers recorded in the third century B.C. Estelle Ross, *The Book of Noble Dogs* 34 (1922). The value of the canine "power of scent" for law enforcement was so well-known in the 1800s that in *The Sign of Four* (1890), Sir Arthur Conan Doyle paired Sherlock Holmes with a dog, Toby, to track a villain, and had the great detective remark that he "would rather have Toby's help than that of the whole detective force of London." *Id.* at 98, 109. *See also Blair v. Kentucky*, 204 S.W. 67 (Ky. 1918) (discussing longstanding use of bloodhound evidence).[2]

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[2] The *Blair* court recounted the following scene from the Sir Walter Scott novel *The Talisman*, which involved the joint crusade of Richard I of England and Phillip II of France. When a hound pulled the Marquis of Montserrat from the saddle—"thus mutely accusing him of the theft of the banner of England"—Phillip came to the Marquis' defense saying, "Surely the word of a knight and a prince should bear him out against the barking of a cur." 204 S.W. at 68. To which Richard replied:

> "Royal brother, recollect that the Almighty, who gave the dog to be companion of our pleasures and our toils, both invested him with a nature noble and incapable of deceit. He forgets neither friend nor foe—remembers, and with accuracy, both benefit and injury. He has a share of man's intelligence, but no share of man's falsehood. You may bribe a soldier to slay a man with his sword, or a witness to take life by false accusation; but you cannot make a hound tear his benefactor; he is the friend of man save when man justly incurs his enmity. Dress yonder

Dogs' superior sense of smell have advanced military needs as well, something that did not escape the attention of our nation's founders. During the French and Indian Wars, colonists around Boston were harried by elusive marauders. Benjamin Franklin suggested a clever response: arming search parties with dogs, and when "the Party come near thick Woods and suspicious Places, they should turn out a Dog or two to search them." Letter to James Read (Nov. 2, 1755) *in* I *Memoirs of Benjamin Franklin* xviii (1840). Contemporary dogs accompany our armed forces overseas not only for tracking, but to detect the improvised explosives that have become a ubiquitous threat to American troops. One canine even accompanied Navy SEAL Team 6 on the mission that successfully killed Osama Bin Laden. Elisabeth Bumiller, *Beloved New Warriors on the Modern Battlefield*, N.Y. Times, May 12, 2011, at A12.

In this country—and the world over—trained detection dogs are entrusted with missions of the utmost sensitivity and consequence. Among other things, dogs are trained to search for explosives that remain an ever-present threat in airports. Stephanie Stoughton, *Tougher Screening Causes Few Hitches at Airports*, Boston Globe, Jan. 19, 2002, at A1. They investigate deadly fires and help put those responsible

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> marquis in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide himself amidst a hundred men; I will yet pawn my scepter that the hound detects him, and expresses his resentment, as you have this day beheld."

Id. Although a fictional account, it nevertheless says a great about how the capabilities of dogs have been viewed for centuries.

behind bars. Jessica Anderson, *Four-Footed Arson Detectives Work Across the State*, Balt. Sun, Dec. 27, 2010, at 2A. Dogs also lead the search for survivors and the departed in the wake of tragic events or atrocities. *The Search-and-Rescue Dogs of 9/11*, N.Y. Times Magazine, Aug. 11, 2011, at 50.

And thousands of trained K-9 dogs—like Aldo—are used to carry out critically important law enforcement tasks, including drug detection, by officers at the state, local, and federal level across America every day. These dogs—like their human handlers—are not infallible. But the use of trained dogs for law enforcement purposes has been a remarkable success story. Indeed, the fact that drug-detection dogs have become such an ingrained part of law enforcement across the country—and around the world—speaks volumes about how well they have performed. *See, e.g.*, U.S. Customs and Border Patrol, *Detector Dogs: CBP's "Secret Weapons,"* www.cbp.gov/xp/cgov/newsroom/highlights/border_sec_news/canines.xml (last visited June 22, 2012) ("They may not make the news, but everyone on the frontlines know the value of a well-meshed team of dog and handler. The bad guys fear them and the good guys praise them . . . .").

2. An Alert By A Well-Trained Drug-Detection Dog Creates At Least A Fair Probability That Contraband Exists

Even the human nose—with its comparatively scant 6 million receptor cells—can sometimes detect the smell of drugs wafting from a vehicle. And where an officer believes that he has smelled drugs, this Court has unsurprisingly recognized that there is likely probable cause to search the vehicle from which the

smell emanates. In *United States v. Johns*, officers observed two trucks that were being surveilled parked next to a small aircraft. 469 U.S. 478, 480 (1985). "After the officers came closer and detected the distinct odor of marihuana," this Court held, "they had probable cause to believe that the vehicles contained contraband." *Id.* at 482; *see also Ventresca*, 380 U.S. at 111 (noting a "qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists").

So it is not at all surprising that this Court has recognized that the alert of an officer's well-trained canine partner can also establish probable cause to search. In *Florida v. Royer*, a plurality noted that "[t]he courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage." 460 U.S. 491, 505–06 (1983). A trained dog was not used to sniff the luggage search in that case. But significantly, the Court observed that—had the officers employed such a dog—"a positive result would have resulted in his justifiable arrest on probable cause." *Id.* at 506. The Court again recognized the common practice of using drug-detection dogs in *United States v. Place*, 462 U.S. 696, 707 (1983), and *Illinois v. Caballes*, 543 U.S. at 409–10, where the Court held that a "'canine sniff' by a well-trained narcotics-detection dog" is not a search.

Although the Court's holdings in those cases do not directly address the question presented by this case, the rationale and results in *Royer*, *Place*, and *Caballes* lend strong support to the conclusion that an alert by a well-trained drug-detection gives rise to probable cause to search a vehicle. The force of those decisions—which have been relied upon by law

enforcement officers for decades (at least in the case of *Royer* and *Place*)—would be significantly eroded if an alert did not then give rise to probable cause to conduct a search. Indeed, following this Court's lead, lower courts have widely recognized that a well-trained dog's alert established probable cause to search.[3]

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[3] *See, e.g.*, *United States v. Robinson*, 707 F.2d 811, 815 (4th Cir. 1983) ("The detection of narcotics by a trained dog is generally sufficient to establish probable cause."); *United States v. Daniel*, 982 F.2d 146, 151 & 152 n.7 (5th Cir. 1993) (finding probable cause where affidavit "explained that the dog was trained to detect the presence of controlled substances" and rejecting requirement that affidavit "show how reliable a drug-detecting dog has been in the past"); *United States v. Olivera–Mendez*, 484 F.3d 505, 512 (8th Cir. 2007) ("We have held that to establish a dog's reliability . . . the affidavit need only state the dog has been trained and certified to detect drugs, and a detailed account of the dog's track record or education is unnecessary."); *United States v. Kennedy*, 131 F.3d 1371, 1376–77 (10th Cir. 1997) ("As a general rule, a search warrant based on a narcotics canine alert will be sufficient on its face if the affidavit states that the dog is trained and certified to detect narcotics."); *United States v. Sentovich*, 677 F.2d 834, 838 n.8 (11th Cir. 1982) ("[O]ther circuits have held that training of a dog alone is sufficient proof of reliability. We endorse the views of those circuits.") (citing *United States v. Venema*, 563 F.2d 1003, 1005 (10th Cir. 1977) and *United States v. Meyer*, 536 F.2d 963, 965–66 (1st Cir. 1976)); *Maryland v. Wallace*, 812 A.2d 291, 297 (Md. 2002) ("[T]he law is settled that when a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless 'Carroll' search of the vehicle.") (unless otherwise noted, all citations and internal quotation marks omitted); *see also Oregon v. Foster*, 252 P.3d 292, 298 n.4 (Ore. 2011) (observing that the cases recognizing that a well-trained dog's alert may establish probable cause "are too numerous for citation").

This Court previously has referred to a "well-trained narcotics-detection dog" as one that can alert to the presence of drugs without "'expos[ing] noncontraband items that otherwise would remain hidden from public view.'" *Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707). In other words, a well-trained dog is reliable. That makes sense. A canine Barney Fife that regularly fails to detect contraband—or routinely alerts when contraband is absent—will be quickly identified during any genuine training regime and ferreted out. A dog's successful completion of a narcotics-detection training program conducted by canine professionals—whether private or formally part of law enforcement—is therefore a strong "ind[ex] of reliability." *Gates*, 462 U.S. at 233.

Although training alone is sufficient to establish a dog's reliability, reliability may be demonstrated in any number of other ways as well. For example, the fact that a dog has been certified by a narcotics-detection training organization also demonstrates reliability. *See Ludwig*, 641 F.3d at 1250–51. And even if a dog has not been certified or trained as part of a standardized program, the dog's performance in a less formal exercises or events may demonstrate reliability too. *See id.* at 1251 n.3. When an officer knows that a drug-detection dog has been trained or certified, or has otherwise exhibited reliable performance in detecting contraband, he may reasonably conclude that the dog's alert creates at least a "fair probability" that a vehicle contains illegal drugs. *Gates*, 462 U.S. at 238.

A dog's K-9 handler—who often will have spent scores or hundreds of hours with the dog in training or certification, in addition to time spent together in the field—is in the best position to evaluate the dog's

reliability, both as a general matter and in the particular circumstances at hand. K-9 officers like Officer Wheetley are themselves trained to interpret their dog's behavior. Moreover, every K-9 officer has a strong incentive to ensure that his dog is well-trained—and thus reliable. False alerts will only waste an officer's time and, worse, put him at risk in the field. Searching a vehicle that has been stopped on a roadside is one of the most dangerous encounters police routinely face. *Cf. Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (observing that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers"). Officers are not going to want to be put at risk by a dog that is unreliable. At the same time, no officer would want to rely on a dog that serially fails to detect contraband. Law enforcement interests, in other words, are naturally aligned with the interests of ensuring reliability.[4]

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[4] The Florida Supreme Court, relying largely on law review commentary, speculated that handler error (including cuing) could cast doubt on the reliability of a well-trained dog's alerts. Pet. App. A31–32, A40–41 (citing Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason. L. Rev. 1 (2006) and Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405 (1997)). That speculation ignores that a well-trained dog by definition would be trained to alert to the presence of contraband, not the handler's expectation of contraband, and that K-9 officers are themselves trained not to cue dogs. And the Florida Supreme Court's reliance on those articles here was especially misplaced. First, respondent never argued that Officer Wheetley cued Aldo to alert to respondent's truck. JA 15-18. And second, one of the articles cited by the Florida Supreme Court itself recognizes that handler training—including a "formal training course" like the extensive 160- and

Although the State has the burden to establish probable cause, that showing will be met when the State introduces evidence that the dog was trained, or has been certified or otherwise has shown proficiency in detecting narcotics. The canine professionals—including K-9 officers—that train or certify dogs are in a far better position than the courts to determine the legitimacy of such training or certification. If a training or credentialing organization proved to be a "sham," then the fact of training or certification no longer would "serve as proof of reliability." *Ludwig*, 641 F.3d at 1251. But in the absence of extraordinary circumstances, the fact that a dog has successfully completed a training program—or has been certified or otherwise has demonstrated reliability in detecting drugs—"would 'warrant a man of reasonable caution in the belief'" that drugs will be found in a vehicle when the dog has alerted to that vehicle. *Brown*, 460 U.S. at 742 (quoting *Carroll*, 267 U.S. at 162); *cf. Ludwig*, 641 F.3d at 1251 (holding that "the judicial task" is "limited . . . to assessing the reliability of the credentialing organization, not individual dogs").[5]

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annual 40-hour sessions Officer Wheetley completed (JA 53–55)—addresses this concern. *See* Bird, *supra*, at 424–25.

[5] Although an alert by a well-trained dog without more gives rise to probable cause, other circumstances known to the officer may negate probable cause, such as when a dog is injured or unable to perform as trained due to external factors.

C. None Of The Factors Relied Upon By The Florida Supreme Court Warrant Any Different Rule

The Florida Supreme Court held that a dog's completion of a training or certification program did not justify an officer's reliance on an alert, even when, as here, the State has produced evidence that the dog was well-trained. Pet. App. A40–41. Instead, the Florida Supreme Court held that the State is not only required to introduce detailed evidence of the dog's training and certification, but evidence of the dog's performance in the field. *See id.* at A42, 44. In addition, the court further held that the State is required to introduce evidence of the dog's alerts to residual odors on the theory that the risk of residual odor alerts negates probable cause. *Id.* at A33–34. The upshot is that the Florida Supreme Court's decision requires a mini-trial over all details of a dog's training, certification, and performance in any case in which the defendant decides to challenge probable cause—which will be many if its decision is affirmed. The specific factors that the Florida Supreme Court singled out as supporting this approach are unfounded.

1. Records Of A Well-Trained Dog's Field Performance Are Not Required

Field performance records are not necessary to establish that a well-trained dog's alert provided probable cause. For starters, the training records of the dog's alerts in the controlled training environment will more accurately reflect the dog's reliability, as will records establishing the dog and handler successfully completed a certification regime for particular narcotics. Field activity reports are by no means the

full measure—nor even the most meaningful gauge—of a dog's reliability. Unlike training, in the uncontrolled field environment it is impossible to tell whether an alert that does not result in an officer's recovery of drugs is a true "false" positive. For example, the dog may have detected the presence of drugs that the officer is simply unable to locate in a vehicle because of the amount of drugs or ingenuity of the suspect in hiding them. Or the dog may have alerted to the residual odor of contraband, which generally indicates that drugs were recently in that location.

Training and certification settings can replicate field conditions but can control for the latter types of alerts, which makes their results inherently more reliable than field records. *See South Dakota v. Nguyen*, 726 N.W.2d 871, 878 (S.D. 2007) ("With the training being conducted in controlled circumstances, a dog's ability to find and signal the presence of drugs can be accurately measured. In the field, one simply cannot know whether the dog picked up the odor of an old drug scent or whether it mistakenly indicated where there was no drug scent."); *see also* Kenneth G. Furton et al., *Scientific Working Group on Dog and Orthogonal Detector Guidelines* 51, Research Report for the U.S. Dep't of Justice (Sept. 2010) ("In a certification procedure you will know whether you have a false positive. You cannot know whether you have a false positive in most operational situations.").

The requirement of detailed field performance records depends not only on faulty factual assumptions about the probative value of such evidence, but on a flawed legal theory as well. The Florida Supreme Court invoked an analogy between narcotics-detection dogs and anonymous police informants, and suggested

that evidence of a track record of success is necessary to establish the reliability of each. *See* Pet. App. A26–28, 37–38. To be sure, prior success is one way to bolster the credibility of an anonymous informant. *See, e.g.*, *Gates*, 462 U.S. at 233; *Florida v. J.L.*, 529 U.S. 266, 275 (2000) (Kennedy, J., concurring). But a track record certainly is not the only way to establish reliability. *See, e.g.*, *Alabama v. White*, 496 U.S. 325, 331 (1990) (partially corroborated statements are reliable); *Draper v. United States*, 358 U.S. 307, 313 (1959) (statements with highly detailed information are reliable). And the Court has rejected the idea that probable cause depends on information that satisfies rigid necessary conditions for reliability. *See Gates*, 462 U.S. at 230 (rejecting "separate and independent requirements to be rigidly exacted in every case").

More important, well-trained dogs are entirely unlike anonymous informants. Indeed, they lack the trait that arguably makes informant tips susceptible to manipulation—an incentive to lie or twist the truth for ulterior objectives. *See, e.g.*, *Maryland v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004) ("The personal and financial reasons and interest typically behind an informant's decision to cooperate can hardly be equated with what drives a canine to perform for its trainer.") (quotation omitted). An anonymous tipster's hidden motivation or perceived immunity from punishment make him a less trustworthy character. Furthermore, a court usually cannot assess the basis of an informant's knowledge, or motive to lie, with certainty. This Court has recognized that these flaws in turn require some additional "indicia of reliability" before an anonymous tip will create probable cause. *Gates*, 462 U.S. at 233.

By contrast, this Court has recognized that "an unquestionably honest citizen [who] comes forward with a report of criminal activity" presents no such problems, and that "rigorous scrutiny" is unnecessary even without a track record of successful tips. *Gates*, 463 U.S. at 233. Likewise, the Court has held that law enforcement officers are presumptively reliable. *See Ventresca*, 380 U.S. at 111 ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."). A well-trained dog is analogous to an "unquestionably honest citizen" and law enforcement informant in both respects. A dog prosecutes no secret vendettas or hidden rivalries, and is indeed a trained member of the police force. *See, e.g.*, *United States v. Funds in the Amount of $242,484*, 389 F.3d 1149, 1165 (11th Cir. 2004) (describing a narcotics-detection dog as "a highly trained and credentialed professional whose integrity and objectivity are beyond reproach"). Accordingly, this Court's informant cases in no way support the sort of scrutiny that the Florida Supreme Court has demanded concerning a well-trained dog's track record of success. *See United States v. Kitchell*, 653 F.3d 1206, 1223 (10th Cir. 2011) ("[A] dog alert usually is at least as reliable as many other sources of probable cause and is certainly reliable enough to create a 'fair probability' that there is contraband.") (quotation omitted).

Moreover, the Florida Supreme Court's requirement of demonstrating a dog's past performance in the field is simply another way of attempting to create a quantified measure of probable cause. *See* Pet. App. A42–43 n.12 ("Because the State did not introduce Aldo's field performance records, this

Court does not have the benefit of quantifying Aldo's success rate in the field."). Such an approach would substitute the flexible totality-of-the-circumstances analysis with a mechanical comparison of the dog's success rate based on a "one-size-fits-all mathematical equation." *Ludwig*, 641 F.3d at 1251; *see also* Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, *in The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* 143 (Michael Klarman et al. ed. 2012) ("If probable cause were quantified, cognitive biases would make the numbers . . . seem far more important than they are."). But this Court has squarely rejected that mathematical approach. *See Pringle*, 540 U.S. at 371 ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."). That approach should be rejected.

2. The Possibility Of Alerts To Residual Odors Does Not Negate Probable Cause

The Florida Supreme Court also demanded an inquiry into whether the dog has previously alerted to "residual odor, which may not indicate the presence of drugs in the vehicle at the time of the sniff." Pet. App. A32. But the possibility that a well-trained dog may alert to residual odors cannot defeat probable cause.

Probable cause does not demand a 100% correlation between alerts and the presence of seizable quantities of drugs or evidence of a crime of drug use. It "does not deal with hard certainties, but with probabilities." *Brown*, 460 U.S. at 742. The standard does not even demand that the belief that there are drugs present be "more likely true than false." *Id.* This Court has

already recognized that narcotics-detection dogs are extremely effective in their trained role. *See Caballes*, 543 U.S. at 409; *Place*, 462 U.S. at 707. Even if it is possible that trained dogs will alert to residual odors, "the likelihood that the dog's alert indicates the presence of an illegal drug remains a substantial one." *Foster*, 252 P.3d at 299; *cf. Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (the fact that conduct may be "ambiguous and susceptible of an innocent explanation" does not defeat reasonable suspicion).

Nor does the presence of residual odors of contraband imply innocence. As the Oregon Supreme Court has observed, "even when actual drugs are not present, something that carries the odor of the drug (such as drug paraphernalia, a receipt for drug sales, or another item associated with drug use or drug distribution) likely is present and may be seizable, even if it is not the drug itself." *Foster*, 252 P.3d at 299–300; *see also United States v. Boxley*, 373 F.3d 759, 761 (6th Cir. 2004) (a well-trained dog alert "indicates that narcotics are present in the item being sniffed or have been present in such a way as to leave a detectable odor"). When officers recover seizable evidence other than the drugs themselves, it can hardly be maintained that the alert was a false positive. In this case, Aldo may well have alerted to the residual odors of methamphetamine that respondent himself produced, since respondent—who admitted to both cooking methamphetamine and using it every "few days," JA 68—was a traveling meth lab as far as his scent was concerned. Aldo's alert to the presence of such odors can hardly be viewed as a "false" positive. The possibility that dogs will alert to vehicles driven by those involved in the heavy use, manufacture, or

distribution of drugs provides no basis for ratcheting up the standard for probable cause.

Further, the Florida Supreme Court's premise that more evidence is needed because of the possibility of "false" alerts due to residual odors is at odds with the universally accepted law enforcement practice of using trained drug-detection dogs. *See, e.g.*, *Bond v. United States*, 529 U.S. 334, 341 (2000) (Breyer, J., dissenting) (noting "the accepted police practice of using dogs to sniff for drugs hidden inside luggage"). The possibility that a dog could alert to a residual odor always exists in theory, and can never truly be eliminated. Yet, drug-detection dogs have been certified, trained, and reliably used by law enforcement for decades.

In the end, the Florida Supreme Court's demand for evidence negating the possibility of an alert to residual odors rather than contraband stems from its mistaken belief that probable cause requires a mathematical certainty rather than fair probability of contraband.[6]

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[6] Some have speculated that, because a large percentage of U.S. currency reportedly has come into contact with cocaine at one time or another, residual odors emanating from currency may trigger false alerts. That theory, however, has been debunked "by studies showing that the particular chemical from cocaine that dogs detect does not remain in currency for an extended time under normal circumstances." *Foster*, 252 P.3d at 300 n.8 (citing, *e.g.*, *United States v. Funds in the Amount of $30,670*, 403 F.3d 448, 461 (7th Cir. 2005) (explaining that "rigorous empirical testing" supports the conclusion that "it is likely that trained cocaine detection dogs will alert to currency only if it has been exposed to large amounts of illicit cocaine within the very recent past") (citing studies); *see also* Kenneth G. Furton et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-*

3. The Absence Of Uniform Standards For Training Or Certification Provides No Reason To Require Courts To Conduct Mini-Trials On Dog Training

As the Florida Supreme Court noted, "there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs." Pet. App. A29. Given the absence of a uniform standard, the court reasoned that "the State must explain the training and certification so that *the trial court* can evaluate how well the dog is trained." *Id.* at A39 (emphasis added). That was error. As the Tenth Circuit has observed, "canine professionals are better equipped than judges to say whether an individual dog is up to snuff." *Ludwig*, 641 F.3d at 1251. Both public and private training and certification organizations staff experienced dog trainers who are familiar with the detection abilities of dogs and the needs of law enforcement. The Fourth Amendment does not require the adoption of a uniform set of training or certification standards. Nor does it saddle the courts with the task of superintending the professionals who train, certify, or handle dogs for a living. Accordingly, evidence that a dog has been trained or certified by canine professionals should be deemed conclusive—rather than merely a target for

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Dog Response to Isolated Compounds Spiked on U.S. Paper Currency, 40 J. Chromatographic Sci. 147, 155 (2002) ("[I]t is not plausible that innocently contaminated U.S. currency contains sufficient enough quantities of cocaine and associated volatile chemicals to signal an alert from a properly trained drug detector dog.").

defendants to shoot at under the type of judicial inquiry conceived by the Florida Supreme Court.[7]

D. The Florida Supreme Court's Rigid And Burdensome Rule Would Impose Substantial and Unjustifiable Costs

As Chief Justice Canady recognized, the rule adopted by the Florida Supreme Court places an undue evidentiary burden on the State. Pet. App. A49. Probable cause requires only that a vehicle search be justified by "'reasonably trustworthy information.'" *Brinegar*, 338 U.S. at 175 (quoting *Carroll*, 267 U.S. at 162). The Florida Supreme Court disregarded that teaching and demanded a litany of documentation far in excess of what is necessary to make a well-trained dog's alert "reasonably trustworthy." *See* Part C, *supra*. As the dissent recognized below, that demand "imposes evidentiary requirements which can readily be employed to ensure that the police rely on drug detection dogs only when the dogs are shown to be virtually infallible." Pet. App. A51. Not only is the Florida Supreme Court's multi-faceted evidentiary test for establishing reliability legally unsound, it would impose substantial and unjustifiable costs on important societal and law enforcement interests.

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[7] Training and certification organizations are generally affiliated or at least familiar with the needs of law enforcement. There is accordingly no reason to think that such organization would not provide appropriate service for narcotics-detection dogs. In the unlikely event that a "sham organization" trained or certified a dog, such training or certification, alone, would not constitute sufficient evidence of reliability. *See Ludwig*, 641 F.3d at 1251.

Adopting the Florida Supreme Court's rule would upend settled law across the nation. Law enforcement officers in the numerous jurisdictions that have recognized that a well-trained dog's alert is sufficient may have reasonably relied on existing law by choosing not to craft the sort of novel, sniff-by-sniff records demanded by the Florida Supreme Court. And going forward, the task of compiling and maintaining such records would be an arduous given the existing demands of canine units, and invites any defendant to put trained drug-detection dogs—and their handlers—on trial every time an alert leads to the discovery of evidence that a defendant wishes to suppress. *See* Part C.1, *supra*; *see also Colorado v. Unruh*, 713 P.2d 370, 382 (Colo. 1986) ("Requiring a formal recitation of a police dog's *curriculum vitae* could lead to endless challenges to the facial sufficiency of affidavits based on the failure to include in minute detail information of dubious value about the background of the dog involved.") (quotation omitted). There is no reason to subject already over-burdened law enforcement officials to such impractical demands.

Needless to say, the loss of crucial tangible evidence found by well-trained narcotics-detection dogs also would have "'substantial social costs.'" *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)). These dogs are critically important to the nationwide efforts to identify and prosecute drug criminals. Among other things, drug-detection dogs "annually keep billions of U.S. dollars (street value) worth of drugs off the streets," and in 2001 their work resulted in nearly 8,000 arrests. Brian Handwerk, "*Detector Dogs" Sniff Out Smugglers for U.S. Customs*, National Geographic

News, July 12, 2002, http://news.national geographic.com/news/2002/07/0712_020712_drugdogs.html (last visited June 22, 2012) (describing the "stunning" success of these dogs). This Court has recognized that "letting guilty and possibly dangerous defendants go free" not only imposes heavy costs on society and law enforcement, but indeed "'offends basic concepts of the criminal justice system.'" *Herring v. United States*, 555 U.S. 135, 141 (2009) (quoting *Leon*, 468 U.S. at 908)). So too here, where adopting the Florida Supreme Court's rigid evidentiary requirements for establishing reliability almost certainly will result in the exclusion of evidence seized as a result of dog alerts.

Moreover, the requirements created by the Florida Supreme Court would create the perverse incentive of discouraging the use of a partner who is critically important to law enforcement in the field. Trained dogs are enormously important for the detection and interruption of drug supply chains. Law enforcement's ability to prevent the importation and distribution of illegal drugs into Florida, or other States, would be materially diminished if the use of drug-detection dogs was curbed. In Florida alone, there are over 1,000 K-9 units. And in 2011 alone, Florida officers made over 130,000 drug arrests. *See* FDLE, *Total Arrests by County 2011*, http://www.fdle.state.fl.us/Content/FSAC/Menu/Data---Statistics-(1)/UCR-Arrest-Data.aspx (last visited June 22, 2012). Likewise, the U.S. Customs and Border Protection has more than 1,200 trained detection dogs. *Detector Dogs, CPB's "Secret Weapons," supra.* Numerous other federal agencies as well as law enforcement officials in all 50 States rely daily on such dogs as well.

But illegal drugs of course are not the only contraband that dogs are trained to detect. Dogs have been trained to alert to everything from illegal fruits and vegetables, to pirated DVDs, to human remains. *See* Part B, *supra*; Mike Lee, *Detection Dogs Guard Against Pests in Agricultural Contraband*, San Diego Union Trib., Aug. 30, 2010, at A1; Jennifer Lee, *Dogs and Discriminating Noses Are Following New Career Paths*, N.Y. Times, June 13, 2006, at A1. And as any airport traveler or those who frequent government buildings including courthouses can appreciate, well-trained explosives-detection dogs may be the most important of all. But whatever they are trained to detect, K-9 dogs serve a vitally important law enforcement role. The Florida Supreme Court's decision in this case could severely compromise that role. The potentially enormous societal costs of the Florida Supreme Court's rule cannot be justified.

E. Probable Cause Existed To Search Respondent's Vehicle

The Florida Supreme Court erred in concluding that Officer Wheetley lacked probable cause to search respondent's vehicle after Aldo's alert. The fact that Aldo is a well-trained dog alone establishes that Office Wheetley reasonably determined that his alert created a fair probability that respondent's truck contained contraband or evidence of a crime. And the evidence that the State submitted at the suppression hearing to show that Aldo was well-trained went far beyond that necessary to satisfy the Fourth Amendment.

The evidence showed that Aldo received hundreds of hours of narcotics-detection training. He successfully completed his first training course in 2004,

a 120-hour narcotics-detection training course with the City of Apopka, Florida Police Department. That course included methamphetamine detection, in addition to cannabis, cocaine, ecstasy, and heroin. JA 102. Aldo also successfully completed a certification exam administered by Drug Beat K-9 Certifications. JA 104. That certification further confirms Aldo's ability to reliably detect methamphetamine, among other drugs. JA 105.[8] In early 2006, Aldo and Officer Wheetley also completed a 40-hour training seminar with multiple canine trainers at the Dothan, Alabama Police Department. JA 54. In addition, as discussed, Officer Wheetley—who made the decision to search the truck—was himself a well-trained K-9 handler. JA 53.

Aldo also continued to be tested—and performed well—in weekly training exercises with Officer Wheetley. To maintain and develop Aldo's talents, a typical session involved Officer Wheetley hiding drugs in eight or so abandoned vehicles and allowing Aldo to detect the drugs. Officer Wheatley left multiple "blanks" (*i.e.*, vehicles without any drugs) "to ensure that the dog was not alerting or showing an odor response to a vehicle that did not have narcotics." JA 57. Officer Wheetley continued this training method every week for four hours. JA 56. This

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[8] This certification lapsed during the time Aldo was already engaged in continuous weekly training with Officer Wheetley. But that does not diminish the significance of the fact that Aldo was certified. Indeed, in light of the regular and extensive training that Aldo received after certification, the fact that the certification had expired by the time of the search has little probative value. Moreover, there is no requirement that a well-trained dog be "certified" at all to establish reliability.

training regime far exceeded the amount of time that Aldo was actively deployed in the field. JA 60.

Officer Wheetley described Aldo's performance in these training sessions as "good. It was really good." *Id.* He elaborated that, if there were eight vehicles with drugs in them, Aldo would alert to eight. JA 60. Good indeed. That testimony is highly probative because not only was Officer Wheetley himself trained in K-9 drug detection, but he knows Aldo better than anyone given the hundreds of hours they have spent training—and working—together. And neither respondent nor the Florida Supreme Court identified any basis to discount or discredit that testimony. Aldo's training records—and 100% "satisfactory" performance in training—overwhelmingly support Officer Wheetley's testimony as well. JA 106–116.

Aldo had been on every patrol with Officer Wheetley for almost a year by the time they conducted the search at issue. When Officer Wheetley retrieved Aldo to sniff respondent's truck, Aldo's extensive training took over and he alerted to the odor of contraband. JA 63. Officer Wheetley described Aldo's alert to the presence of drugs as follows:

> He will get excited. He will take a long sniff. His heart rate will accelerate. His feet will start pattering. He will—also, the main thing is [he will] sit.

JA 57. Aldo's alert—based on behavior honed in hundreds of hours of narcotics-detection training, mostly with Officer Wheetley himself—told Officer Wheetley that there was at least a "fair probability" that respondent's truck contained contraband, and thus established probable cause to search the vehicle.

As this Court's cases make clear, probable cause in no way depends on hindsight. *Devenpeck*, 543 U.S. at 152. Contraband found during a search does not retroactively establish that probable cause existed beforehand. And the fact that a search does not uncover contraband hardly negates probable cause that existed before the search. The fact that Officer Wheetley discovered only the precursors to methamphetamine, rather than methamphetamine itself, is therefore of no moment. *See, e.g.*, *Robinson*, 707 F.2d at 815 (once a dog trained to detect certain substances alerts, "the fact that a different controlled substance was actually discovered does not vitiate the legality of the search"). Probable cause asks only whether Officer Wheetley was justified under the circumstances in believing that there was there was a "fair probability" respondent's car contained drugs at the time Aldo alerted. *Gates*, 462 U.S. at 238. Because Aldo was a well-trained dog, a fair probability—at least—existed at the time of the alert.

Once Aldo alerted to respondent's vehicle, Officer Wheetley made a reasonable and common-sense decision to search the truck for illegal drugs or evidence of a crime. Under the Fourth Amendment, not to mention this Court's precedents, he had probable cause to do so. He and his partner, Aldo, had not only performed well within the Constitution's demands, they had performed exactly the way law enforcement should. In the circumstances, no reasonable police officer would have allowed respondent simply to go on his way without searching his vehicle first.

CONCLUSION

For foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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