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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The parties agree that an alert by a drug-detection dog establishes probable cause to search a vehicle if the dog is reliable. Resp. Br. 60. The disagreement is over what is required to establish reliability. As the State has explained, the reliability of a drug-detection dog may be established in any number of ways. Pet. Br. 22. But as lower courts have widely recognized, the fact that a dog has completed a bona fide training program—and thus performed successfully in a controlled setting in which the accuracy of alerts may be definitively assessed—is a sufficient measure of reliability to support a finding of probable cause under this Court's precedents. *Id.* at 19–24 & n.3. That rule ensures a meaningful opportunity to gauge the reliability of a dog like Aldo—who has successfully completed extensive and continuous training—but also provides the officer in the field with a "clear and simple" baseline that can "be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

In stark contrast, respondent urges this Court to transform virtually every alert into an opportunity for defendants to put K-9 dogs on trial. Respondent vigorously defends the Florida Supreme Court's rule that the State's burden in establishing reliability—in every case—consists of presenting evidence of (1) training and certification records; (2) an explanation of the meaning of the dog's training and certification; (3) field performance records including any unverified alerts; (4) the experience and training of the canine officer; and (5) any other objective evidence about the

dog's reliability known to that officer. Pet. App A48. Indeed, respondent now goes even *further* than the Florida Supreme Court and also demands evidence that (6) the dog has been recertified on an annual basis; (7) the dog and officer have been certified as a unit; and (8) the training regimen included an array of different simulated environments. Resp. Br. 43–47, 57.

Respondent's position has no foundation in the "practical, common-sense" conception of probable cause established by this Court's precedents. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). It is profoundly out of step with the undisputed facts that dogs both have an extraordinary sense of smell and have served as a trusted partner in law enforcement and related activities for centuries. Pet. Br. 16–19. And, if adopted, it would have serious adverse consequences for vitally important law enforcement practices nationwide. The Court should reverse the judgment below, reject the Florida Supreme Court's extraordinary evidentiary requirements, and hold that an alert by a well-trained detection dog like Aldo establishes probable cause.

ARGUMENT

A. Respondent's Position Rests On A Misguided Conception Of Probable Cause

1. As the State has explained (Pet. Br. 11–15), 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. *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality) (citation omitted). The focus is on "'probabilities,'" not "'hard certainties.'" *Id.* (citation

omitted). All that is required is a "fair probability," *Gates*, 462 U.S. at 246, or a "substantial chance," *id.* at 243 n.13, that a search will reveal contraband.

Although respondent acknowledges (at 17) that a "fair probability" is enough to establish probable cause, he argues that a "*numerical* expression of pertinent information enhances . . . the probable cause determination," Resp. Br. 32 (emphasis added), and then suggests that probable cause requires something approaching statistical infallibility. For example, respondent suggests (at 14) that even a .900 batting average would be problematic because, if "10 percent of motorists subjected to a dog sniff possess drugs," "[f]or every 100 cars sniffed" a dog will "falsely" alert to "9 of the remaining 90 innocent motorists." Likewise, respondent points to a Florida narcotics-detection operation in which dogs alerted to 28 out of approximately 1450 vehicles that were sniffed, leading to one arrest. *Id.* at 15, 36 (relying on operation discussed in *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995)). Without even considering the possibility that officers missed hidden contraband or that dogs alerted to residual odors of contraband, this example at most shows a "false" alert rate under 2%.[1]

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[1] Respondent's amici likewise find it "alarming" that certain studies concluded that canine units had accuracy rates of 92%, 71%, and between 62–93%. *See, e.g.*, Rutherford Br. 10 (citing cases). Even accepting the accuracy of such studies (by no means a sound assumption), they hardly support respondent's claim that dog alerts are inherently *un*reliable. Respondent and his amici also rely on a newspaper article that reported that 44% of dog alerts over a three-year period in suburban Chicago to vehicles resulted in recoverable quantities of drugs. Resp. Br. 29 (citing

This Court has already rejected the "effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause.'" *Gates*, 462 U.S. at 235; *see also Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition *or quantification into percentages* . . . .") (emphasis added). And the level of certainty demanded by respondent and his amici is wildly out of step with this Court's precedent, which make clear that "'[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable cause] decision.'" *Pringle*, 540 U.S. at 371 (quoting *Gates*, 462 U.S. at 235) (final alteration in original). Instead, as noted, a "fair probability," *Gates*, 462 U.S. at 246, or a "substantial chance," *id.* at 243 n.13, is sufficient. That benchmark does not even demand that an officer's belief that contraband or evidence of a crime may be present be "more likely true than false." *Brown*, 460 U.S. at 742; *see also United States v. Ludwig*, 641 F.3d 1243, 1251–52 (10th Cir.) (discussing flaws with transforming probable cause into a "mathematical equation"), *cert. denied*, 132 S. Ct. 306 (2011).

McCray v. Illinois, 386 U.S. 300, 304 (1967), relied upon by respondent (at 32), is not to the contrary. There, the Court found probable cause where the officer had known the informant for "roughly two years," the informant had given narcotics tips "20 or 25 times," and the tips resulted in an unspecified number

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article). The article, however, does not describe the methodology or data base used to arrive at that figure in any detail. Nor does the figure account for the possibility that dogs alerted to residual odors, hidden contraband, or unrecoverable quantities of drugs.

of convictions. *Id.* at 304, 313. In other words, there was probable cause notwithstanding the near total lack of information about the informant's hits and misses.

2. Respondent argues (at 7) that the State's position is inconsistent with the requirement that probable cause be assessed in light of the "totality of the circumstances." Not so. The "totality-of-the-circumstances analysis" was adopted to ensure that the probable-cause determination was conducted in a "practical, common-sense" manner—simply calling on a court or magistrate to take account of "all the circumstances" that an officer faced when he made the decision to search. *Gates*, 462 U.S. at 238. The totality-of-the-circumstances analysis was never intended to be a sword for defendants, allowing defendants seeking suppression to zero in on any particular circumstance and pick it to pieces. Indeed, in articulating the proper inquiry, this Court has "required only that some facts bearing on [any] particular issue[] be provided," not a deep dive into "each and every fact which contributed to [the officer's] conclusions." *Id.* at 230 n.6.

This Court has recognized that the totality-of-the-circumstances approach is entirely consistent with certain evidence being sufficiently compelling that nothing else is needed for probable cause. In *Gates*, the Court held that "rigorous scrutiny" is unnecessary when "an unquestionably honest citizen comes forward with a report of criminal activity." 462 U.S. at 233–34; *see also United States v. Doyle*, 650 F.3d 460, 472–73 (4th Cir. 2011). In *United States v. Ventresca*, the Court likewise observed that tips from "fellow officers" are "plainly a reliable basis" for probable cause. 380 U.S. 102, 111 (1965). Holding that an alert by a trained

drug-detection dog establishes probable cause is perfectly consistent with that precedent. Pet. Br. 15.

3. Respondent's reliance (at 19–25) on cases involving anonymous informants is misplaced as well. There is neither a real world nor doctrinal reason to lump drug-detection dogs in with suspicious anonymous tipsters. To the contrary, respondent himself concedes that, whereas a "confidential informant . . . may be more likely to knowingly mislead police for personal gain," a dog lacks "the capacity to intentionally mislead." Resp. Br. 24. To say the least.

A trained drug-detection dog is far more akin to the honest citizen—with no motive to mislead. Pet. Br. 15. As respondent puts it (at 24), "[i]ts reasons for alerting are driven by scent," and—although many dogs emulate the best human traits (*e.g.*, friendliness, trustworthiness, and loyalty)—dogs lack the shortcomings of human nature, including unbecoming motives to be untruthful. It is true that a trained dog's alert is connected to a "reward" of positive reinforcement. Resp. Br. 24. But that is a far cry from the potentially nefarious purposes that courts have identified as the reason for more searching review of anonymous tips. *See, e.g.*, *Maryland v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004); *see also Gates*, 462 U.S. at 237 ("[T]he veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable."). And a trained dog learns that positive reinforcement is only associated with an accurate alert.

4. Finally, it bears noting that neither respondent nor his amici challenge the settled proposition that an *officer's* own "plain smell" detection of contraband is sufficient to establish probable cause when an officer detects the odor of illegal drugs. *See* Pet. Br. 19–20;

United States v. Johns, 469 U.S. 478, 480 (1985); *Ventresca*, 380 U.S. at 111; *Johnson v. United States*, 333 U.S. 10, 13 (1948); *Taylor v. United States*, 286 U.S. 1, 6 (1932) ("[O]fficers may rely on a distinctive odor as a physical fact indicative of possible crime . . . ."). And yet—even though the human nose is far less sensitive than the canine snout, Pet. Br. 16—courts have never held that an officer's report that he smelled the presence of contraband is only sufficient when the officer's nose passes a far-reaching evidentiary review into the officer's reliability and past history. It is true that an officer may be cross-examined on *what* he smelled, but a drug-detection dog is trained to alert only to the presence of particular illegal substances.[2]

B. Respondent's Attempts To Impugn The Reliability Of Trained Drug-Detection Dogs Are Unfounded

Respondent does not dispute that dogs—thanks to nature—have an extraordinary sense of smell. He does not dispute that humans have relied on that superior sense of smell for centuries for law enforcement and analogous purposes. And he does not dispute that trained detection dogs have long served as vital

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[2] It is even possible that both the officer and his K-9 partner will detect contraband. In *Florida v. Jardines*, for example, Detective Pedraja himself smelled live marijuana plants when he went to the Jardines' front door to ask for permission to search. Joint Appendix at 50, *Jardines*, No. 11-564 (U.S. Apr. 26, 2012). There is no reason to treat a dog's alert to the presence of contraband as inherently less reliable than an officer's "plain smell" detection of contraband. Indeed, if anything, because a dog's sense of smell is so superior, a trained drug-detection dog's alert ought to be an even *stronger* proxy for probable cause.

partners in law enforcement at the local, state, federal, and, indeed, international levels. Pet. Br. 16–19. The historical role that dogs have served in such matters is significant. *Cf. eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (When it comes to "discerning and applying" standards, "'a page of history is worth a volume of logic.'") (Roberts, C.J., joined by Scalia and Ginsburg, JJ., concurring) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).

Nevertheless, respondent makes the broad-brush claim that, "[e]ven after training," dogs are inherently unreliable because they may "sometimes" alert to "other dogs," "lingering odor[s]," or "legal substances they mistake for drugs" (like perfume). Resp. Br. 7, 9; *see id.* at 24–25. That contention does not withstand scrutiny. Indeed, respondent himself seems to appreciate as much, because he eventually identifies *handlers* as "the source of 'almost all erroneous alerts,'" *id.* at 36 (citation omitted)—a concern not raised below as to the search here. *Infra* at 11.

1. Respondent's attempts to malign the reliability of trained drug-detection dogs pick up on trendy theories in law review commentary, but are unpersuasive when subjected to a real-world analysis:

Other dogs. Respondent's lead example underscores the lengths to which he had to go to try to create the impression that trained detection dogs are unreliable. Respondent points to a 30-year-old case in which a dog alerted to an individual who happened to have been playing on the morning of the search with a dog "in heat." Resp. Br. 25. But the remote possibility that a biological instinct could intervene in no way warrants calling into question the reliability of trained detection dogs as a general matter. Moreover,

respondent has pointed to nothing suggesting that the presence of "other dogs" is a genuine problem in the field—and the State is aware of no such evidence.

Residual odors. Respondent also points to the possibility of alerts to the "odor of drugs no longer present." Resp. Br. 9. A trained drug-detection dog's alert to the "lingering odor of drugs" (*id.* at 9) in no way calls into question its reliability. When you enter the kitchen and smell popcorn, the fact that someone has already eaten all the popcorn and put the bag outside in the trash takes nothing anyway from the fact that you accurately smelled popcorn in the kitchen. The same goes for drug-detection dogs that alert to the residual odors of drugs emanating from a vehicle.

More fundamentally, probable cause rises and falls on the "fair probability that contraband *or evidence of a crime* will be found." *Gates*, 462 U.S. at 238 (emphasis added). Drug paraphernalia, clothing worn at "'a party where other people were using drugs,'" or "'a vehicle that had formerly been used to transport drugs'" all may be probative evidence of crime, just as evidence (like residual odors) that someone was using drugs in a vehicle may be evidence of a crime. Pet. App. A32 (citation omitted); Pet. Br. 30. Likewise, the possibility that a dog will alert to residual odors of a driver—like respondent here, Pet. Br. 4—that regularly "cooks" and uses methamphetamine or other listed drugs in no way calls into question the reliability of dogs.

Non-contraband. Last, respondent hypothesizes (at 9) that dogs will alert to the "smell of perfume." Here again, it is telling that the best example that respondent apparently can come up with to demonstrate this concern is a 30-year-old case in which a purse searched following a dog's alert contained "a

bottle of perfume" (Resp. Br. 25). And here again, everyday reality interferes with respondent's hypothesis. If trained drug-detection dogs really were likely to alert to perfume, then dog alerts would be a routine event for countless Americans traveling through airports like Miami International each day.

More to the point, as this Court has recognized, drug-detection dogs are trained to detect "substance[s] that no individual has any right to possess" (*i.e.*, contraband), not lawful substances. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). Amici speculate that some dogs may be trained using non-contraband and, by implication, may alert to substances like methyl benzoate rather than cocaine. *See* Fourth Amendment Scholars Br. 27–28. Although there is no record in this case that would allow the Court to consider that argument (*see Caballes*, 543 U.S. at 409), other research relied on by amici shows the opposite—that dogs do not alert to anything but drugs.[3] And as explained, the ballyhooed claim that dogs will alert to

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[3] *See, e.g.*, Kenneth G. Furton et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147, 154-55 (2002) (explaining that perfume odors containing methyl benzoate are "quite different" and can be "readily" distinguished by drug-detection dogs); *see also* Michael S. Macias et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-CG-MS*, 40 Am. Lab. 16, 19 (2008) ("None of the pseudo aids was reliably detected. This may stem from the fact that many of the commercial aids use components that do not create the same volatile odor compounds as the contraband parent compounds.").

U.S. currency that has come into contact with cocaine has been debunked as well. Pet. Br. 31 n.6.

2. In the end, even respondent seems to recognize the shortcomings of this line of argument, because he ultimately argues that "[h]andler misinterpretation of a dog's signals has been identified as the source of '*almost all* erroneous alerts.'" Resp. Br. 36 (emphasis added) (quoting law review article); *see also* Rutherford Br. 11 (suggesting "that a handler's errors [may] account for nearly every false alert"). This argument does not help respondent—and has been waived—because respondent argued that Aldo falsely alerted "either due to canine error or a residual odor." JA 16. He did not present "handler error" (Resp. Br. 7) as a third possibility. In any event, the possibility of "handler error" or "cueing" provides no reason for adopting the Florida Supreme Court's extreme rule.

Although respondent did not do so below, any defendant is free to argue handler error. But the Fourth Amendment does not presume that police act in bad faith, and there is no reason to credit the assumption that canine officers will handle their dogs improperly, much less that they will handle their dogs improperly—and lie about it under oath. *See Franks v. Delaware*, 438 U.S. 154, 165 (1978) (Fourth Amendment presumes that officers will be "'truthful' in the sense that information put forth is believed or appropriately accepted . . . as true"). Thus, the mere possibility of handler error, in the absence of evidence that cueing actually occurred, does not defeat the reliability of a well-trained dog. *See United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990) (acknowledging the general possibility of cueing but rejecting a reliability challenge where there was no

evidence "that the handler had actually cued the dog"); *see also Ludwig*, 641 F.3d at 1252–53 (rejecting argument that dog was cued); *United States v. Diaz*, 25 F.3d 392, 395–96 (6th Cir. 1994) (same).[4]

C. Respondent's Efforts To Defend The Florida Supreme Court's Extreme Evidentiary Requirements Fail

1. As the State has explained, evidence that a dog has successfully completed a bona fide training program provides sufficient evidence of reliability. The canine professionals who train K-9 dogs—the vast majority of whom are themselves active or retired law enforcement officers—are intimately familiar with the training methods that create effective drug-detection dogs. Moreover, any bona fide training program will require the successful completion of training exercises in a simulated environment in which the accuracy of a dog's alerts can be definitively assessed. It is no surprise, then, that the strong weight of the federal

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[4] The study cited by respondent (at 9, 35) and his amici that purports to show that unintentional handler error is common suffers from several fatal flaws. First, some handlers in the experiment confessed to *intentionally* cueing the dogs to the expected location of drugs. Lisa Lit et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 Animal Cognition 387, 392 (2011). Second, there was no control group to establish a performance baseline. *See* SWGDOG, *SWGDOG Membership Commentary on "Handler beliefs affect scent detection dog outcomes" by L. Lit, J.B. Schweitzer and A.M. Oberbauer*, Mar. 31, 2011, http://casgroup.fiu.edu/SWGDOG/news.php?id=2126 (last visited Sept. 19, 2012). And most egregiously, the organizers placed drugs in the examination area, threatening "contamination of the test area and test materials." *Id.*

courts that have addressed this issue have concluded that successful completion of a narcotics-detection training program suffices to establish a dog's reliability. *See* Pet. Br. 21 n.3 (citing cases).

Respondent objects to the absence of uniform standards governing drug-detection training and argues that the absence of such standards prevents defendants from "'challeng[ing] whether or not the particular detector dog and handling team complied with established procedures and requirements.'" Resp. Br. 46 (citation omitted). But experience establishes that no one set of procedures is necessary to train a reliable dog. And more important, the judicial role is properly limited to determining whether a "credentialing organization[] is a sham," rather than picking and choosing between different training procedures. *United States v. Ruiz*, 664 F.3d 833, 841 (10th Cir. 2012); *see also Ludwig*, 641 F.3d at 1251 ("[C]anine professionals are better equipped than judges to say whether an individual dog is up to snuff."). The Fourth Amendment does not establish a Constitutional Code of K-9 Training Procedures.

Although evidence that a dog has successfully completed such a training program is *sufficient* to establish reliability, the Fourth Amendment does not limit the type of evidence that may be submitted to establish reliability. For example, reliability may be demonstrated by the successful completion of a training program, the fact that a dog has been certified in drug-detection by a bona fide organization, or a showing of proficiency in less formal training, but it need not be demonstrated in *each* of these ways. The Florida Supreme Court's evidentiary requirements for establishing reliability go far beyond what the Fourth

Amendment requires. And not surprisingly, respondent's efforts to defend those requirements fail.

2. Respondent's arguments (at 25–27) that the Fourth Amendment requires the introduction of field performance records should be rejected. Field performance records are unnecessary because they are not the most accurate evidence of canine reliability. It is impossible to determine in many circumstances why an alert in the field does not lead to recoverable quantities of drugs. Field records cannot, for example, reveal whether experienced traffickers hid drugs too well or whether drugs had been recently removed (leaving only residual odors or unrecoverable quantities of drugs). These records will systematically understate the reliability of narcotics-detection dogs.

For that reason, it is no surprise that, as respondent recognizes, the federal courts of appeal have "not required evidence of field performance [records]." Resp. Br. 39. Indeed, although some courts have *permitted* the introduction of field performance records (which is not inconsistent with a rule that such evidence is not required to establish probable cause), only one other court of which we are aware has adopted a rule *requiring* the introduction of such records. *Commonwealth v. Santiago*, 30 Mass. L. Rptr. 81, 2012 WL 2913495 (Mass. Super. Ct. May 22, 2012). That court—a Massachusetts trial court—based its decision heavily on the decision in this case. Respondent identifies (at 41–42) three other state court decisions, but in those cases the courts simply pointed to the existence of field performance evidence in the record. They did not adopt a rule requiring field-performance records in every case. *See Nebraska v. Howard*, 803 N.W.2d 450, 465 (Neb. 2011); *Oregon v.*

Foster, 252 P.3d 292, 301–302 (Or. 2011); *Oregon v. Helzer*, 252 P.3d 288, 290–91 (Or. 2011).

Respondent argues (at 37) that "[l]aw enforcement agencies already generate, maintain, and disclose field performance data." As this case illustrates, that certainly is not true for all jurisdictions or police departments, and this Court should not take lightly the consequences of burdening officers in the field with additional recordkeeping requirements. But more fundamentally, the agencies that do maintain such records do not keep them so that they can be fodder for an evidentiary battle in suppression hearings over the reliability of trained drug-detection dogs. And while "field performance recordkeeping" (Resp. Br. 38) may be useful in evaluating procedures as a general matter, such recordkeeping is inherently *un*helpful in assessing the reliability of dogs in the field because of the fact that there is no way to assess the accuracy of a field alert that does not result in the recovery of drugs (because of the possibility of residual odors or hidden drugs that an officer simply did not find).

3. Respondent also errs in arguing that a finding of reliability depends on a judicial examination of the dog's initial certification records. Resp. Br. 43–47. Although a State may choose to present evidence that a dog has been certified to establish reliability, the Fourth Amendment does not impose the certification—and annual-recertification—requirement erected by the Florida Supreme Court and advanced by respondent here. Any jurisdiction may adopt such a requirement (and a few have), but the Fourth Amendment simply does not impose it. The same goes for respondent's proposed *team* certification requirement for a dog and its handler. *Id.* at 43.

An officer like Officer Wheetley—who has received extensive training of his own on K-9 handling, gone through formal training with a dog, and engaged in continuous weekly training with that dog—will be exceedingly familiar with that dog's "'individual pattern for communicating an alert.'" *Id.* (citation omitted). Such an officer will have no problem identifying that pattern as specific and articulable facts justifying the search. A certificate is wholly unnecessary to develop—or establish—the ability to note the tell-tale signs of a trained dog's alert.

4. One thing should be clear: if this Court follows the Florida Supreme Court down the path of constitutionalizing the training procedures or certifications necessary to establish a dog's reliability, the courts will immediately be required to fashion—and superintend—a whole new field of Canine Constitutional Procedure as defendants file one challenge after another to the particulars of the training or certifications received by the trained drug-detection dog who alerted to their vehicle.

To take just one example, respondent objects that the State did not prove that Aldo's training "simulated different environments and distractions." *Id.* at 57. Thus, under respondent's view, the courts apparently would have to establish constitutional rules determining the number of "different environments" or "distractions" that training would have to address. Would that include testing to ensure that a dog will not be distracted by another dog "in heat" (*id.* at 25)? The same goes, apparently, for rules governing how drugs are "hidden" (*id.* at 57) in training. The list is potentially endless. *See, e.g.*, *Foster*, 252 P.3d at 300 (defendant challenged adequacy of training on the

ground that, *inter alia*, the "imprint method of drug-detection" is better than the "play-reward method").

Respondent makes the implausible claim that requiring the State to keep—and produce—records of "the dog's success rate in training, the criteria used for certification, and field performance records" will make it "*un*likely" that defendants will "seek suppression of evidence seized in a search following a dog alert." Resp. Br. 50 (emphasis added). But for defendants with nothing to lose by seeking the suppression of seized drugs, the production of such materials will just be the first stage in a full-blown inquisition into all aspects of a dog's training and performance.

D. The Record Amply Supports Officer Wheetley's Decision To Search The Vehicle

The record in this case was more than sufficient to demonstrate that Aldo's alert established probable cause. The evidence showed that Aldo successfully completed hundreds of hours of narcotics-detection training, including formal training with the Apopka Police Department. In addition, Aldo engaged in weekly training exercises with Officer Wheetley that tested and honed his ability to detect drugs in vehicles. Officer Wheetley testified that Aldo's performance in those sessions was "really good," explaining that if there were eight vehicles with drugs in them, Aldo would alert to the eight vehicles. Pet. Br. 37–38.

Respondent's efforts to poke holes in Aldo's record should be rejected. Respondent objects that there was no "testimony whether Aldo's weekly training with Wheetley included any false alerts." Resp. Br. 58. But that is not right. Officer Wheetley testified that he took Aldo to vehicles without drugs during training "to

ensure that the dog was not alerting or showing an odor response to a vehicle that did *not* have narcotics." JA 57 (emphasis added). In addition, the State explained during the suppression hearing that "a false alert would show up in [Aldo's] training history when you have a vehicle or a place in which we know there are no drugs," and that "[t]hat's not shown in any of those records." JA 92. So there is no serious question that Aldo's training tested for "false" alerts as well.

Respondent also emphasizes (at 1, 11, 47) that Aldo's initial certification had lapsed by the time of the search at issue. But neither Florida law (as respondent concedes (at 45)) nor the Fourth Amendment imposes an annual recertification requirement. Moreover, the implication that Aldo was rusty or ineffective because his initial certification had expired is belied by the extensive—and *continuous*—training that Aldo received and successfully completed. Although certification may also be sufficient to establish a dog's reliability, the evidence of Aldo's training was more than sufficient to establish his reliability here.

Nor is there any basis to second-guess Officer Wheetley's decision to search the vehicle after Aldo's alert. Respondent argues that the fact that Aldo alerted—*i.e.*, got "excited and . . . sat," JA 63—in front of the "door handle" on the driver's side door made it unreasonable for Officer Wheetley to believe that there were drugs "within" the vehicle. Resp. Br. 28. But Aldo was trained to detect the odor of drugs, including methamphetamine. So when he alerted to respondent's vehicle, it meant—given his training—either that the "odor of narcotics" was "in th[e] vehicle" (and thus emanating from it at the door area), JA 64; or that someone who had "touched . . . or smoked narcotics"

had recently used the door handle, JA 80. And as it turned out, Aldo was 100% right. Respondent—who later admitted to using methamphetamine every "few days" and "cooking methamphetamine for about a year," JA 68—was *Breaking Bad* on wheels.[5]

Respondent hypothesizes (at 58) that Aldo's alert could have resulted from a "desperate" "drug user" checking for unlocked vehicles at a "mall[]" or "shopping center." But it is well-settled that "an officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to [act]." *Pennsylvania v. Dunlap*, 555 U.S. 964, 965–66 (2008) (Roberts, C.J., joined by Kennedy, J., dissenting from the denial of cert.); *see United States v. Arvizu*, 534 U.S. 266, 275–76 (2002). In any event, respondent—who was driving around with an expired tag and an open beer can in the passenger compartment, and who was "visibly nervous" and "shaking" when Officer Wheetley approached him, JA 62—hardly fit the bill of someone who was just on his way home from an innocent trip to JCPenney's.

Finally, respondent tries to attach significance to the fact that Aldo subsequently alerted to respondent's vehicle and that a search of respondent's vehicle the second time also produced no drugs. Resp. Br. 1. But *subsequent* events could in no way undermine whether

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[5] *See, e.g.*, *United States v. Barry*, 394 F.3d 1070, 1078 (8th Cir. 2005) (dog's alert to door-handle area created "fair probability that contraband or evidence of crime would be found in [defendant's] vehicle") (internal quotation marks and citation omitted); Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 22 (2006) (noting that "odors could be expected to emerge from inside the vehicle" at door seams).

probable cause existed when Officer Wheetley chose to conduct the search at issue—which must be evaluated based on the circumstances that Officer Wheetley faced at the time of *that* search. Pet. Br. 13–14. And, in any event, given respondent's admitted history of cooking and using methamphetamine (*id.* at 4), the fact that the search did not uncover drugs is hardly evidence that Aldo did not accurately detect the odor of drugs.

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In the real world in which they work, police officers have to make prompt, on-the-spot judgments about whether probable cause exists to conduct a search based on the circumstances at hand. In the situation he faced, Officer Wheetley made a common-sense decision to search respondent's vehicle after Aldo alerted to it. Given his knowledge of Aldo's successful training, he reasonably relied on Aldo's alert as signaling the presence of illegal drugs. Aldo's alert indicated at least a "fair probability" or "substantial chance" of the presence of drugs. The search at issue was therefore entirely consistent with the Fourth Amendment.

CONCLUSION

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

Respectfully submitted,

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