IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

    Petitioner,

                             FSC Case No. SC04-490

v.   2DCA Case No. 2D00-1611

GARY ALAN MATHESON,

    Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETITIONER'S BRIEF ON THE MERITS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief-Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 0238538

SUSAN M. SHANAHAN
Assistant Attorney General
Florida Bar No. 0976059
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

ISSUE

> **WHETHER THE SECOND DISTRICT ERRED IN DETERMINING THAT THE "TRACK RECORD," OR NUMBER OF "FALSE ALERTS" IN THE FIELD, BY A PROPERLY TRAINED AND CERTIFIED NARCOTICS DETECTION DOG IS PROBATIVE IN ESTABLISHING THE DOG'S RELIABILITY AND WHETHER THE ALERT BY A PROPERLY TRAINED AND CERTIFIED NARCOTICS DETECTION DOG, STANDING ALONE, IS SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE.**

iii

<u>OTHER AUTHORITIES</u>

STATEMENT OF THE CASE

Respondent was charged with three counts of possession of a controlled substance and one count of possession of drug paraphernalia. (V.I: R.12-16). He filed a motion to suppress the evidence and two supplements to that motion. (V.I: R.20-21, 24-26, 97-106). After a hearing on the matter the trial court denied the motion. (V.V: T.227). Respondent pled no contest to possession of methamphetamine, possession of hydrocodone, possession of morphine and possession of drug paraphernalia. (V.V: T.4-5).

On August 1, 2003, the Second District Court of Appeal reversed the denial of Respondent's motion to suppress and remanded with directions to discharge him. Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), reh'g denied March 5, 2004. (Exhibit 1). On March 5, 2004, Petitioner's motion for rehearing was denied by the Second District Court of Appeal. In its opinion the Second District determined that the narcotics detection dog's alert to Respondent's vehicle was insufficient to establish that the deputies had probable cause to search Respondent's car. Matheson, supra. The State filed its Notice to Invoke on March 18, 2004. The basis for the State seeking jurisdiction in this Honorable Court is the decision of the Second District which expressly and directly conflicts with the Third District's decision in Vetter v. State, 395 So. 2d 1199

(Fla. 3d DCA 1981), in that an alert by a properly trained and certified narcotics detection dog is insufficient to establish probable cause according to the Second District. The State's Motion to Stay the Mandate was denied on April 8, 2004. On August 17, 2004, this Court accepted jurisdiction of this case.

STATEMENT OF THE FACTS

At the suppression hearing held on March 8, 2000, Deputy Christopher Grecco, assigned to the Hillsborough County Sheriff's Office K-9 Unit (HCSO), testified that he and Razor, a German Shepard who is a trained and certified narcotics detection dog, responded on May 5, 1999, to a call from Deputy Valles who had stopped Respondent based on a traffic violation. (V.IV: T.8, 15-20). When the K-9 Unit arrived at the scene, Deputy Valles was in the process of completing a traffic citation and asked Deputy Grecco to walk Razor around Respondent's vehicle which had been driving erratically. (V.IV: T.21). Deputy Grecco went to his start point, normally the driver's side front door, and gave Razor the command to search. (V.IV: T.22). They started at the driver's side door and quickly worked their way around the front of the vehicle to the passenger side, and made a complete circle in a clockwise direction back to the start point to begin a second slower, more detailed pass around the car. (V.IV: T.22-23). The dog and handler typically circle a car the first time at the handler's pace as a cursory search and the second time around the car is when the dog goes at his own pace detailing the car. (V.I: R.122).

Razor and Deputy Greco began circling Respondent's car a

3

second time, much slower, allowing Razor to detail the seams of the vehicle where air would be escaping. (V.IV: T.23-24). On the second time around, Razor started at the passenger side, smelled the seams of the hood and door seams of the passenger side, then the rear door and the hatchback at which time he alerted, as an aggressive alert dog, by scratching and biting at the corner of the hatchback where he detected scent escaping. (V.IV: T.25, 36). As soon as Razor alerted to the back of Respondent's car, they terminated the exterior sniff of the vehicle and the officers began searching the car's interior. (V.IV: T.26). The officers found drug paraphernalia such as syringes, spoons and other obvious signs of drug use in the back of Respondent's car near the area where Razor had alerted. (V.IV: T.61). Respondent stipulated that the lab report came back positive for methamphetamine as to one of the narcotics found in his car. (V.IV: T.226). The officers also found hydrocodone and morphine in the glove compartment of Respondent's vehicle. (V.V: T.28).

Respondent's expert, Dr. Dan Craig, admitted that dogs do not alert to the exact area of the vehicle where drugs are located because the wind direction changes. (V.IV: T.167). Sergeant Mark Olive, Razor's trainer and Deputy Grecco's supervisor, stated in a pretrial deposition that the reason a dog may alert to the back of a car when drugs are located in the

4

front of the car is because the air flows from front to back when the car is traveling down the road. (V.I: R.142). When the car is traveling at 50-60 mph and there are drugs located in the front of the car, there's a good chance the dog may alert at the taillight or trunk once the vehicle has stopped and the air is escaping. (V.I: R.142). Sergeant Olive explained that dogs frequently alert on the trunk or taillight area because the air currents carry the odor to the back of the vehicle. (V.I R.142). Sergeant Olive stated that the dogs are **not** taught to alert on the drugs themselves, they are taught to alert on the odor of narcotics. (V.I: R.140)(emphasis added). Furthermore, drug paraphernalia was found in the back of the car where Razor alerted and the dogs can and often do detect residual odors. (V.I: R.117). Razor had alerted on residual odors of the narcotics which were recently removed and that is not considered a false positive to law enforcement. (V.IV: T.140).

In reviewing Razor's K-9 Activity Detection Reports, which detail his performance or actions in the field, Sergeant Olive was questioned about a report dated November 28, 1998, in which Razor alerted to a vehicle but no drugs were found. (V.1: R.138-139). Sergeant Olive explained that this is not considered a "false alert" because cocaine had been found in the car by an officer before Razor performed a search around the vehicle and alerted. (V.1: R.139). Deputy Grecco had been

informed, prior to Razor's search, that the suspect had been observed trying to conceal cocaine in the vehicle and the drugs had already been removed from the car so the dog was called to search and make sure there were no more drugs in the vehicle. (V.1: R.139). Dr. Craig, Respondent's expert, who admitted he has never trained a narcotics dog, testified that no organization in the United States, including the military, certifies a dog on residual odors. (V.IV: T.108; V.V: T.172). Dr. Craig also admitted that without measurement, no one can determine if an alert is a false positive without knowing the dissipation rate of the narcotic. (V.IV: T.172). Sergeant Olive testified that it cannot be determined whether a dog has had any false alerts in the street. (V.IV: T.71).

Razor's trainer, Sergeant Mark Olive, has trained 17 narcotics dogs since 1985. (V.I: R.111-112). Sergeant Olive completed a 160 hour course in 1985 and a 240 hour course in 1995 dealing with narcotics dogs, and a 320 hour course in 1995 relating to dogs which detect explosives. (V.I: R.143). The Hillsborough County Sheriff's Office (HCSO) uses outside independent organizations to certify its dogs. (V.I: R.112). Razor, a four-year-old German Shepard, completed a K-9 course with HCSO and was certified with the United States Police Canine Association (USPCA) to detect marijuana, heroine, and cocaine. (V.I: R.113). Razor was certified in June 1998 by the USPCA and

6

in October 1997 by the HCSO. (V.I: R.152-153). Besides marijuana, cocaine and heroine, Razor was also trained to detect methamphetamine, which was one of the narcotics found in Respondent's vehicle. (V.IV: T.28, 30-31). Razor was trained to detect methamphetamine but was not certified in methamphetamine because there was no requirement that a dog be certified in methamphetamine. (V.IV: T.85-86). Razor's handler for three years, Deputy Christopher Greco, completed patrol handler's school and narcotics school. (V.IV: T.9-10). He also attended a 30-day course for state certification standards, a narcotics identification course, and attended several training schools and seminars, including a drug certification trial training session with Razor. (V.IV: T.11-12). The officer testified that Razor continuously trains with his handler. (V.IV: T.30).

In training and certification the dogs do "blank runs" in which there are no drugs hidden to ensure they are not alerting on cue from their handler. (V.I: R.136). Razor also received extinction training in which they put out common things such as coffee, cologne, etc., which drug smugglers use to hide scents, to ensure that the dog is not alerting to those items. (V.I: R.137). Sergeant Olive specifically testified in deposition that they refer to these odors as "masking odors" and put them out with the drugs and other times separate from the drugs to ensure

the dog is not alerting on such odors. (V.I: R.136). He testified that they use things such as cologne, fabric sheets, pepper, onions, coffee and other items that are used by smugglers who attempt to disguise the scent of the drug. (V.I: R.136). Sergeant Olive specifically testified that, "We'll put like a little bag, sandwich baggies, in the locker when we're testing to make sure the dog is not alerting just to plastic and that sort of thing. Gloves, like you're talking about." (V.I: R.137). As part of HCSO's standard operating procedure with all canines, Razor also completed 480 hours of basic canine training before being deployed for official law enforcement use. (V.III: R.399-402).

Sergeant Olive reviews all of the dogs paperwork, including Razor's, to determine if additional training is needed due to too may false positives, and Razor did not require any additional training. (V.I: R.109). In its opinion the Second District specifically found that, "The Hillsborough County Sheriff's Office maintained no record of Razor's performance, and his handler had not kept track." Matheson, 870 So. 2d at 14. A review of the record on appeal shows that extensive records were kept by the Hillsborough County Sheriff's Officer regarding Razor's training, certification, performance in the field and veterinary records, and were admitted into evidence at the suppression hearing by the trial court and are contained in

the record on appeal. (V.II: R.163-346; V.III: R.359-407). In particular, the record on appeal consists of Razor's Canine Training Records dated from November 6, 1997, through October 11, 1999, in which over 40 pages, beginning with Razor's first day of training, detail over 241 exercises including controlled hides of narcotics that Razor properly alerted to at various locations from training facilities, airports, impound lots, warehouses, schools, and various other locations. (V.II: R.168-212). These records set forth the types of drugs such as cocaine, heroin, marijuana, cocaine powder, crack cocaine, and methamphetamine in varying amounts that were hidden in a wide array of objects from tool chests, golf carts, riding lawn mowers, lockers, desk drawers, fences, luggage, in addition to at least 56 different vehicles and/or their compartments.

In addition, a review of these records shows approximately 25 blank vehicles and several blank objects were also used during these training exercises to ensure that Razor was not falsely alerting. Sergeant Olive testified that the Hillsborough County Sheriff's Office does conduct controlled negative testing using blank vehicles that did not contain narcotics, and where the handler did not know there were no drugs until after the testing, and that they had conducted such training with Razor. (V.IV: T.95-97). Besides considering Razor's training records, also before the trial court were 131

9

pages of Razor's Canine Activity/Detection reports dated from November 4, 1998, through August 31, 1999, which detail approximately 65 incidents in the field where Razor was called to a scene to perform a narcotics search. (V.II: R.215-346).

In addition to the voluminous documents in the record, Deputy Grecco testified that the Sheriff's Office maintains records which show how often a dog, including Razor, positively responds while he's in the field as they keep activity sheets everyday which are totaled monthly and which show where on a vehicle the dog alerted. (V.I: R.56). He also testified that Razor was certified on large quantities of narcotics down to .1 gram and has found a rock of methamphetamine that was .1 gram or less.   (V.I: R.58-59).   Deputy Grecco stated that the Hillsborough County Sheriff's Office also keeps records of the vehicles searched when there was no finding of drugs by the dog as this information is recorded in the daily activity report. (V.I: R.61).

The trial court was not convinced by Respondent's expert that Razor's training was inadequate to establish his reliability. The trial court held:

> . . . but I don't have any doubt that this
> dog was competent, was reliable, was trained
> and could -- could alert to, and obviously
> did alert to, since you stipulated to that
> fact, methamphetamine . . . This dog alerted
> to that drug.
> So I'm going to reject Dr. Craig's
> opinion for the record, because I frankly,

think his expectations are for
perfectionists; and we don't live in that
kind of world. Now the motion's denied . .
.

(V.V: T.225-227).

In <u>Matheson v. State</u>, 870 So. 2d 8 (Fla. 2d DCA 2003),
<u>reh'g denied</u> March 5, 2004, the Second District reversed the
trial court's decision finding that a narcotics detection dog's
alert to a suspect's vehicle is insufficient to establish that
the officer has probable cause to search the car.

SUMMARY OF THE ARGUMENT

The Second District's opinion, by essentially reweighing
the evidence, has invaded the province of the trial court, as
trier of fact, when the record shows the trial court did not
abuse its discretion in denying Appellant's motion to suppress.

Furthermore, the Second District has created an incorrect
standard for the qualifications which must be met by the State
in proving a narcotics detection dog is properly trained,
certified and reliable. This standard, which is now arguably
applicable to law enforcement agencies throughout the State of
Florida, incongruously places emphasis on the amount of "false
alerts" of the dog in the field, when such "false alerts" cannot
be calculated except in controlled environments such as

certification and training sessions. The court's opinion in Matheson improperly suggests that an officer who knows only that his dog is trained and certified, and who has no other information, only has a mere suspicion of criminal activity which cannot justify a search. Such a premise is contrary to the majority of Federal and state law and sets an illogical precedent for the trial courts within its jurisdiction to follow.

WHETHER THE SECOND DISTRICT ERRED IN DETERMINING THAT THE "TRACK RECORD," OR NUMBER OF "FALSE ALERTS" IN THE FIELD, BY A PROPERLY TRAINED AND CERTIFIED NARCOTICS DETECTION DOG IS PROBATIVE IN ESTABLISHING THE DOG'S RELIABILITY AND WHETHER THE ALERT BY A PROPERLY TRAINED AND CERTIFIED NARCOTICS DETECTION DOG, STANDING ALONE, IS SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE.

In May 1999, Razor, a certified and trained narcotics detection dog with the Hillsborough County Sheriff's Office, was called upon to sniff Respondent's car after deputies stopped him for a traffic infraction. Matheson refused a routine request for permission to search his car and the deputy called for Razor's assistance.

Razor alerted to the car where the officers found a bag containing drug paraphernalia, including syringes and spoons, as well as hydrocodone tablets, morphine tablets, and methamphetamine. The trial court, after an exhaustive hearing on Appellant's motion to suppress and after reviewing the voluminous documentation regarding Razor's training, certification and performance in the field, made very detailed and specific findings that Razor was a properly trained, certified and reliable narcotics detection dog, thereby providing the officers with probable cause to search Appellant's vehicle after Razor had alerted on it, and denied Appellant's

13

motion to suppress the illegal drugs found in the vehicle. However, in Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), the Second District reversed Respondent's convictions for possessing a controlled substance and one count of possessing drug paraphernalia. The Second District incorrectly found that Razor's alert to Respondent's vehicle was insufficient to provide the officers with probable cause and held that a narcotics detection dog that has been trained and certified, standing alone, is insufficient to give officers probable cause to search. The Second District ignored the evidence contained in the record on appeal and prior precedent in which the Third District in Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981), review denied (1981), held that the representation in the search warrant that the narcotics detection dog was properly trained conferred probable cause standing alone for the search.

The Second District in Matheson also inappropriately placed emphasis on a dog's "false alerts" in the field, when such "false alerts" can only be determined in a sterile environment and cannot be established, with any reasonable degree of certainty, when the dog alerts in the field. The State submits that the court's opinion in Matheson did not give proper deference to the trial court's findings and reliance on the substantial, competent evidence before the trial court which

14

rebuts any claim that Razor was not a reliable or properly trained and certified narcotics dog. The ruling by the trial court denying the motion to suppress evidence comes to the reviewing court clothed with a presumption of correctness; and here, the Second District failed to interpret the evidence and reasonable inferences in a manner consistent with the trial court's ruling.

The review of a motion to suppress is a mixed question of law and fact. State v. C.F., 798 So. 2d 751 (Fla. 4th DCA 2001). However, the standard of review for the trial court's application of the law to the factual findings is *de novo*. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Under *de novo* review, the reviewing court defers to the factual findings of the trial judge that are supported by competent, substantial evidence. Harris v. State, 761 So. 2d 1186 (Fla. 4th DCA 2000).

The principle is well-settled that decisions of a trial court on a motion to suppress evidence come to the appellate court clothed with a presumption of correctness; and the reviewing court must interpret the evidence and reasonable inferences in a manner consistent with the trial court's ruling. Murray v. State, 692 So. 2d 157, 159 (Fla. 1997), citing McNamara v. State, 357 So. 2d 410, 412 (Fla. 1978). Thus, on

15

appeal, the evidence presented at the trial level must be interpreted in the light most favorable to sustaining the trial court's ruling in favor of the state on a defendant's motion to suppress. <u>Hodges v. State</u>, 740 So. 2d 1204 (Fla. 4th DCA 1999), <u>citing</u> <u>Wasko v. State</u>, 505 So. 2d 1314, 1316 (Fla. 1987). A trial court's ruling should not be disturbed on appeal absent an abuse of discretion. <u>Hamilton v. State</u>, 703 So. 2d 1038, 1044 (Fla. 1997), <u>cert.</u> <u>denied</u>, 524 U.S. 956 (1998).

In the instant case, the trial court indicated that it listened to all of the testimony and reviewed the records regarding Razor's training, certification and experience and made a credibility determination in finding the officers testimony was believable and the documentation to be sufficient in establishing Razor was a properly trained, certified and reliable narcotics detection dog, while also rejecting the testimony of defense expert Dan Craig. However, the Second District failed to give deference to the trial court's assessment of credibility even though the trial court is in the best position to make such a determination. The Second District, by essentially reweighing the evidence, invaded the province of the trial court, as trier of fact, when the record shows the trial court did not abuse its discretion in denying Respondent's motion to suppress. Furthermore, the Second

District has created a new standard for the qualifications which must be met by the State in proving a narcotics detection dog is properly trained, certified and reliable. This new standard, which is now arguably applicable to law enforcement agencies throughout the State of Florida, improperly places emphasis on the amount of false alerts of the dog in the field, when such "false alerts" cannot be calculated except in controlled environments such as certification and training sessions. The court further failed to consider how a newly trained and certified narcotics detection dog, that does not yet have a "track record" of his performance in the field, can be considered reliable when the court requires that emphasis be placed on the dog's performance history.

The Second District's opinion in <u>Matheson</u> recognized the olfactory superiority of canines but is misled in its reasoning that this can also be a weakness as a narcotics detection dog may alert to residual odors of drugs that are no longer present. Defense witness, Dr. Craig testified that based on Razor's field activity reports he had a false alert rate which he opined was too high, however the State showed this was grossly inaccurate as Razor's accuracy in the field was approximately 96%, assuming the two instances in which he alerted and no drugs were found were actually false alerts. (V.IV: T.125-126). Dr. Craig

17

admitted that without knowing the dissipation rate of the drugs that were in the vehicle, if there were any, he could not determine whether a response was actually a false alert. (V.V: T.171-172). Therefore, Dr. Craig's testimony regarding Razor's accuracy in the field was merely improper conjecture and the trial court properly gave no weight to it.

A trained and certified narcotics dog is not unreliable because he has alerted to an area or vehicle where no drugs were found. As testified to by Sergeant Olive, and widely recognized by other organizations and courts, is the fact that dogs are not trained to detect the presence of narcotics but rather their odor. Therefore, an alert does not necessarily signal the presence of large amounts of a narcotics, but could simply indicate a prior exposure to that narcotic. Even defense expert Dr. Craig testified that he knows of no organization in the country that certifies a dog on residual odors, not even the military. This is because, as Dr. Craig stated, everything is speculation without measurement. A dog is not necessarily wrong or falsely alerting just because narcotics are not found or are no longer present in the area in which he has detected a residual odor.

It is possible that a drug delivery or buy was just made and the drugs were recently removed, thus the dog is not

18

incorrect as he is detecting and alerting to the residual odor of narcotics. As such, no one, not even Dr. Craig, can determine or accurately testify that a dog has falsely alerted by looking at the dog's field activity records because the vehicle or area the dog alerted to was never tested or measured to see if drugs had been there. Such a measurement is impossible without knowing the dissipation rates of a particular drug, the climate condition as well as other factors. Sergeant Olive testified that it cannot be determined whether a dog has had any false alerts in the street. (V.IV: T.71). Not even the Customs Service can determine if their dog has falsely alerted in the field. Only in certification and often times in training, when the conditions are completely controlled can a false alert be determined with any accuracy. As such, Dr. Craig's testimony regarding Razor's false alert rate in the field, is not deserving of any weight and is completely erroneous as he was only speculating on Razor's activity reports without any basis. A "false alert" can only be verified in a controlled environment when a drug dog positively and objectively indicates to the presence of the odor of drugs which law enforcement knows are not present in that area to a reasonable degree of scientific certainty. As such, the false alert hypothesis should be applied only to controlled settings.

19

In its opinion, the Second District properly stated that, "Little doubt exists that dogs have the ability to detect the smallest traces of odors and to perceive those scents much better than human beings. Matheson, 870 So. 2d at 13.

The State submits that controlled testing of the dog is the functional equivalent to calibration and testing of a breathalyser used by law enforcement. The Second District's decision is the reverse equivalent of throwing out a breathalyser result because a police officer testified that he did not smell intoxicants on the defendant, even though the defendant tested well over the legal limit on a properly calibrated and tested machine. In State v. Siluk, 567 So. 2d 26, (Fla. 5th DCA 1990), a narcotics detection dog at the Orlando airport failed to detect the presence of drugs in a suspect's suitcase, although a drug dog in Texas had earlier alerted to the suitcase and this knowledge was conveyed to the Orlando authorities. After the suspect refused to consent to a search of his luggage, the police seized the bag and obtained a search warrant, which then revealed 1,784 grams of marijuana. Id. The court held that the dog's failure to alert did not neutralize the probable cause where the Orlando officers could have properly assumed that the information concerning the earlier alert in Texas was "truthful and reliable." Id. at 28.

In <u>McKay v. State</u>, 814 A.2d 592 (Md. App. 2002), the court also concluded that the failure of a drug dog to detect the presence of illegal drugs in a vehicle did not negate probable cause to search the car.

Additionally, Dr. Craig's testimony that Razor was not properly trained is erroneous as he also testified that he was unaware how many times a month Razor was trained. Here, Razor even met the qualifications demanded of a Custom's Service narcotic detection dog in that he never falsely alerted during training or certification. Therefore, the "track record" of the dog in the field, which the Second District places so much emphasis on in determining whether a dog is reliable, has no probative value. While the Second District relied heavily on defense expert Dan Craig's testimony in its opinion, it is important to note that the trial court expressly rejected Dr. Craig's testimony by finding:

> . . . but I don't have any doubt that this dog was competent, was reliable, was trained and could -- could alert to, and obviously did alert to, since you stipulated to that fact, methamphetamine . . . This dog alerted to that drug.
> So I'm going to reject Dr. Craig's opinion for the record, because I frankly, think his expectations are for perfectionists; and we don't live in that kind of world. Now the motion's denied . . .

(V.V: T.225-227). It is undisputed that it is the prerogative

of the trial judge, as the fact finder in a hearing on a motion to suppress, to assess the credibility of the witnesses and the weight given to their testimony. State v. Moore, 791 So. 2d 1246 (Fla. 1st DCA 2001); Nelson v. State, 850 So. 2d 514 (Fla. 2003). Because the trial court's findings are supported by the record, the Second District was not at liberty to disturb them. The trial court was not the first court to have found Dr. Dan Craig's testimony not to be credible. In $217,590.00 U.S. Currency v. State, 54 S.W. 3d 918 (Tex. App. 2001), the court heard testimony from Dr. Craig as an expert witness on the standards required for a narcotics detection dog to be properly trained; Dr. Craig testified that the methods used by the dog handler to maintain "Nemo's" proficiency were insufficient to eliminate false alerts and, they could have trained the dog to alert based not on the presence of narcotics, but rather on the presence of the handler and DPS trooper involved in the stop.

Dr. Craig also stated his belief that the record-maintenance of the dog-handler was inadequate. Id. at 922. The dog-handler testified that Nemo was trained to alert to the odor of narcotics and he did not record every search involving Nemo. Id. at 922. He also stated that because narcotics can leave a residue which is detectable only by a dog's sense of smell, the alerts where Nemo did not find drugs were not necessarily

erroneous. Id. at 922. The trial court found the search was conducted by a properly trained dog and handler, despite the testimony of Dr. Craig and the appellate court did not disturb this finding. Id. at 922.

DOCUMENTATION IN THE RECORD ON APPEAL ESTABLISHING RAZOR AS A PROPERLY TRAINED NARCOTICS DETECTION DOG

A review of the entire record relied on by the trial court shows the extensive and overwhelming documentation of Razor's certification, training and performance in the field, which the trial court considered in finding that Razor was a reliable, properly trained and certified narcotics dog. The record rebuts this Court's conclusion that the State did not present any evidence of Razor's track record and refutes this Court's statement that the Hillsborough County Sheriff's Office (HCSO) did not maintain records of Razor's performance. The Sheriff's Office kept detailed and specific records of Razor's training and field incident reports consisting of over 178 documents in the record on appeal. (V.II: R.168-346). It is critical to examine the instant record in its entirety as it is the lack of documentation that was partly the basis for this court's reversal of the trial court's ruling.

In its opinion, the Second District concluded that the State did not present any evidence of Razor's track record and that the Hillsborough County Sheriff's Office maintained no records

of Razor's performance, and that his handler had not kept track. However, contained in the record are Razor's Canine Training Records dated from November 6, 1997, through October 11, 1999, in which over 40 pages, beginning with Razor's first day of training, detail over 241 exercises including controlled hides of narcotics that Razor properly alerted to at various locations from training facilities, airports, impound lots, warehouses, schools, and various other locations. These records set forth the types of drugs such as cocaine, heroin, marijuana, cocaine powder, crack cocaine, and methamphetamine in varying amounts that were hidden in a wide array of objects from tool chests, golf carts, riding lawn mowers, lockers, desk drawers, fences, luggage, in addition to at least 56 different vehicles and/or their compartments.

In addition, approximately 25 blank vehicles and several blank objects were also used during these training exercises to ensure that Razor was not falsely alerting. Sergeant Olive testified that the Hillsborough County Sheriff's Office does conduct controlled negative testing using blank vehicles that did not contain narcotics, and where the handler did not know there were no drugs until after the testing, and that they had conducted such training with Razor. Therefore, Dr. Craig's testimony that Razor was not subject to controlled negative

testing, in which all objects or locations have no drugs, is completely unsupported by the record as Razor was exposed to multiple situations in training where the vehicle or object did not contain any narcotics. Additionally, Razor successfully completed all of the 241 hides or exercises during this twenty-two month period without a single false alert. He trained on amounts of narcotics equaling less than 1 gram on 11 occasions and less than two grams on four exercises. Dr. Craig was incorrect in stating that Razor was not tested on small amounts of drugs. However, this was a factual issue resolved by the trial court.

The Second District also relied on Dr. Craig's testimony that Razor was not exposed to extinction training in which dogs are discouraged from alerting to common items that are associated with drugs such as plastic baggies used for packaging or to novel odors. This factual dispute was also decided by the trial court in Razor's favor and is supported by the record. Sergeant Olive specifically testified in deposition that they refer to these odors as "masking odors" and put them out with the drugs and other times separate from the drugs to ensure the dog is not alerting on such odors. He testified that they use things such as cologne, fabric sheets, pepper, onions, coffee and other items that are used by smugglers who attempt to disguise the

25

scent of the drug. Sergeant Olive specifically testified that, "We'll put like a little bag, sandwich baggies, in the locker when we're testing to make sure the dog is not alerting just to plastic and that sort of thing. Gloves, like you're talking about."

Deputy Christopher Grecco was Razor's handler during all of these hides and an instructor was always present to supervise and help train. Additionally, Deputy Grecco's supervisor, Sergeant Olive, reviewed and signed off on every one of Razor's training records. As part of HCSO's standard operating procedure with all canines, Razor also completed 480 hours of basic canine training before being deployed for official law enforcement use. Prior to official assignment and use of K-9 teams, Razor had to demonstrate a proficiency in obedience, agility, search, attack, and training.

The Second District, in its opinion, stated that the testimony only disclosed that Razor and his handler had undergone just one initial thirty-day training course and one week-long recertification course. The court was correct in that the testimony itself does not paint a complete picture of Razor and his handler's comprehensive and in-depth training and field experience, but the records do complete the picture and substantiate the trial court's findings. The trial court

considered the voluminous records of Razor's training which demonstrate the extensive training Razor and his handler completed as it shows that Razor completed a 480 hour training course before he completed the 30-day, 100 hour-long K9 Narcotics Detection course with Deputy Grecco. Razor continuously trained with his handler over a twenty-two month period in which he successfully completed 241 training exercises, including controlled hides, and never falsely alerted. These training exercises were always conducted with the supervision or an instructor and then reviewed by Sergeant Olive. Razor also maintained a "perfect score" on his certification as he never falsely alerted.

Deputy Grecco scored a 95% on his Narcotics Detection Dog in Service Course Test. (V.III: R.396-398). Furthermore, Deputy Grecco completed patrol handler's school and narcotics school, attended a 30-day course for state certification standards, a narcotics identification course, and attended several training schools and seminars, including a drug certification trial session with Razor. The records kept by the Hillsborough County Sheriff's Office show that Deputy Grecco continually trained with Razor on a frequent and consistent basis over a twenty-two month period prior to and after Appellant's arrest. Sergeant Olive, Razor's trainer and instructor, has trained 17 narcotics

dogs since 1985, completed a 160 hour course in 1985, completed a 240 hour course in 1995 dealing with narcotics dogs and a 320 hour course in 1995 relating to dogs which detect explosives. Sergeant Olive attended and supervised many of Razor's training sessions, as indicated in the record, and reviewed all of the training records and field activity reports in order to keep track of Razor's performance. Therefore, the record rebuts this Court's conclusion that Razor and his handler were not properly trained and supports the trial court's conclusion that Razor was a properly trained and certified narcotics detection dog.

RAZOR'S SUCCESSFUL "TRACK RECORD" AND FIELD ACTIVITY REPORTS

Besides considering Razor's training records, the trial court assessed Razor's performance in the field by reviewing the 131 pages of Canine Activity/Detection Reports contained in the record and which are dated from November 4, 1998, through August 31, 1999, which detail approximately 65 incidents in the field where Razor was called to a scene to perform a narcotics search. (V.II: R.215-346). Appellee may have been remiss in not previously asserting that these documents are critical in as much as they establish Razor's performance outside of a training environment and show that he successfully conducted several searches in diverse environments. These reports are very detailed and contain the date of the search, where on the

28

vehicle Razor alerted, whether narcotics were found, and if so, the type and amount discovered by the officers. The State submits that this evidence affirmatively rebuts the Second District's conclusion that these records were not kept and that Razor's record in the field was unknown. The trial court had before it the aforementioned evidence of Razor's successful track record and performance in the field. Furthermore, everyone of these reports was reviewed by Sergeant Olive in case remedial training was indicated. Sergeant Olive testified that Razor's performance in the field indicated that there were no problems and he did not require any training other than the normal maintenance training to maintain the dog's performance level.

These searches in the field show that Razor alerted 15 times. On nine occasions drugs were found. On another four occasions there was observable evidence of the presence of drugs. As such, in 13 out of 15 alerts by Razor drugs were either found or there was clear evidence that drugs had been present. The remaining two alerts are not false alerts as it is impossible to determine false alerts in the field. However, even assuming they were false alerts, these are only two instances where drugs were not detected after an alert in over 56 searches. Which gives Razor a 96% accuracy rate in the field.

DOCUMENTATION IN THE RECORD ESTABLISHING RAZOR AS A PROPERLY CERTIFIED DRUG DETECTION DOG

The Second District's opinion does not portray an accurate or complete account of Razor's reliability as a canine narcotics dog as the court failed to consider Razor's extensive training records and field activity reports and has misconstrued his certification. Razor obtained certification from the United States Police Canine Association (USPCA) in June 1998, which was current up and through the time that Appellant was arrested. (V.II: R.166). In order to obtain this certification Razor had to successfully alert on drugs hidden in several vehicles and rooms within a specified time period. This testing included cars and rooms that were "blank" or did not contain narcotics to ensure he was not falsely alerting. Additionally, Razor was tested three different times on luggage in which four of the five pieces of luggage were blank in the first test and nineteen out of twenty did not contain drugs in tests three and four. Razor did not give one false alert and his scores for each test ranged from 91-99% giving him a total score of 96.67%. (V.III: R.360-368). This Court seems to take issue with the fact that the USPCA accepts a dog with a 70% proficiency, and the Customs Service will only certify dogs with a "perfect record" meaning no false alerts and no missed drugs.

However, the USPCA proficiency rating is not just false

alerts but depends on many factors that are judged, including

the handler, therefore a proficiency rating of 70% does not mean

that the dog is only accurate 70% of the time. Furthermore, the

USPCA's acceptance of a 70% proficiency is of no moment in this

case as Razor achieved over a 96% proficiency rating and

obtained a "perfect record" by Custom's standards in that he

never gave a false alert and never missed any drugs. (V.III:

R.360-368). See also United States v. Cantrall, 762 F. Supp.

875, 882 (D. Kan. 1991)(finding dogs with an accuracy rate of

over 50% are sufficiently reliable). Even if a narcotics dog

did not have 100% rate of accuracy, probable cause requires only

that there is a "fair probability" that the evidence of a crime

will be found. Additionally, the USPCA tested on several

factors not just whether drugs were located, therefore Razor

scored 100% accuracy in detecting drugs. Here, the standards

used for Razor's certification by the USPCA are set out in the

their General Rules on Narcotics Detection and are contained in

the record on appeal. (V.II: R.163-165).[1] Besides being

certified with the USPCA, Razor also received certification from

the North American Police Work Dog Association on February 18,

---

[1]Although Dr. Craig testified that the USPCA, was in his
opinion, inadequate. He also said he has never reviewed a
national or local organization that has met his standards,
including what the military is using now. (V.V: T.165-166).

2000, for the detection of marijuana, cocaine, heroine and methamphetamine. (V.III: R.359). Although Razor was not certified to alert to methamphetamine prior to Appellant's arrest, he extensively trained to detect and alert to this substance and did so reliably as he never falsely alerted during training or in the field.

In addition to this documentation, Deputy Grecco testified that the Sheriff's Office maintains records which show how often a dog, including Razor, positively responds while he's in the field as they keep activity sheets everyday which are totaled monthly and which show where on a vehicle the dog alerted. (V.I: R.56). He also testified that Razor was certified on large quantities of narcotics down to .1 gram and has found a rock of methamphetamine that was .1 gram or less. (V.I: R.58-59). Deputy Grecco stated that the Hillsborough County Sheriff's Office also keeps records of the vehicles searched when there was no finding of drugs by the dog as this information is recorded in the daily activity report. (V.I: R.61).

The public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit and it is undisputed that a properly trained canine is highly reliable as a detection tool for law enforcement. "Just

as no police officer need close his eyes to contraband in plain view, no police officer armed with a sniff dog need ignore the olfactory essence of illegality." Bain v. State, 839 So. 2d 739 (Fla. 4th DCA 2003), quoting Cardwell v. State, 482 So. 2d 512 (Fla. 1st DCA 1986). The court's opinion in Matheson suggests that an officer who knows only that his dog is trained and certified, and who has no other information only has a mere suspicion of criminal activity which cannot justify a search. However, because the Second District appears to have failed to consider the voluminous documents in the record and testimony which prove Razor was properly trained, certified and reliable, the court has only muddied the waters on what establishes a reliable narcotics detection dog.

The State submits that the Second District's opinion seems to abrogate the value a narcotics dog is to the citizens it serves because it can not "be calibrated to achieve mechanically consistent results." The court relied on the factors set out in State v. Foster, 390 So. 2d 469 (Fla. 3d DCA 1980), in determining whether a dog is sufficiently reliable to furnish probably cause and places great emphasis on whether a dog has a high false alert rate even though such a rate is impossible to determine in the field.

Recently in State v. Nguyen, 811 N.E.2d 1180 (Ohio Ct. App.

2004), the appellate court of Ohio determined that a drug dog's training and certification in the detection of narcotics were all that were necessary in establishing he dog's reliability, for the purposes of determining whether a police officer had probable cause to search a defendant's vehicle based solely on the dog's positive alert to the vehicle. The court found that the narcotics detection dog's real world records, or "track record" as the Second District in Matheson referred to the dog's experience in the field, were not material to the finding of probable cause and were not even discoverable by the defense. Id. The Ohio court declined to accept the Second District's opinion in Matheson that the track record of the dog, with an emphasis on the dog's performance history or amount of false alerts, must be known in order to conclude that an alert by the dog is sufficiently reliable to furnish probable cause to search. Id. See also, State v. Kazazi, 2004 WL 1765404 (Ohio Ct. App. 2004)(court held that once the trooper performed the "walk around" with her dog and the dog alerted, probable cause existed to search the vehicle's trunk). The Second District reasoned that, "Given the 'language barrier' between humans and canines -- thus, for example, preventing the officer from questioning the dog further for corroborative details, as he might a human informant -- the most telling indicator of what

34

the dog's behavior means is the dog's past performance in the

field." Matheson, 870 So. 2d at 15.

In State v. Carlson, 657 N.E.2d 591 (Ohio Ct. App. 1995),

the court held:

> Appellant's argument with respect to the
> problem of a dog detecting only the residual
> odors as opposed to the drugs themselves
> misconstrues the probable cause requirement.
> Absolute certainty is not required by the
> Fourth Amendment. What is required is a
> reasonable belief that a crime has been or
> is being committed.

Id. at 600 (quoting United States v. Johnson, 660 F.2d 21, 22-23

(2d Cir. 1981).

The Second District's opinion that a narcotics detection

dog is not sufficiently trained and reliable if the number of

false alerts in the field is high, is not logical. As many

Federal and State courts have recognized, and as the testimony

at the trial court showed, a drug dog is trained to detect

"residual odors" meaning that a properly trained narcotics

detection dog can smell or detect the scent of drugs that were

recently present even though the drugs are no longer physically

present in the vehicle and cannot be collected by the officers

at the time of the alert. Nguyen, supra. "Federal courts tend

to follow the national trend, which states that a drug dog's

training and certification records can be used to uphold a

finding of probable cause to search and can be used to show

reliability, if required, but that canine reliability does not always need to be shown by real world records." Nguyen, at 1188. Additionally, the Eleventh Circuit in United States v. Sentovich, 677 F.2d 834 (11th Cir. 1982), found that a showing that a narcotics detection dog is trained satisfies the requirement that drug dogs need to be reliable.[2]

Also, in Maryland v. Cabral, 2004 WL 1696069, the Maryland Court of Special Appeals held that the motions court erred in ruling that the alert by a trained and certified drug dog did not provide probable cause to search the defendant's vehicle. The court concluded:

> When a canine has been certified in contraband detection, it is not within the magistrate's responsibility or training to re-analyze the statistical record for each canine whose sniff is presented as support for the issuance of a search and seizure warrant, how the canine signals to its

---

[2]See also, United States v. Place, 462 U.S. 696, 707 (1983)(Generally, a canine inspection by a properly trained dog and handler is one of the most accurate methods of detecting concealed contraband items); Florida v. Royer, 460 U.S. 491 (1983)(A positive reaction by a properly trained drug dog constitutes probable cause to search); United States v. Daniel, 962 F.2d 146 (5th Cir. 1993)(rejecting argument that an affidavit must show how reliable a drug-detecting dog has been in the past in order to establish probable cause); United States v. Outlaw, 319 F.3d 701 (5th Cir. 2003); United States v. Alvarado, 936 F.2d 573 (6th Cir. 1991)(the dog's accuracy rate, and therefore its reliability, was considered by the court in the context of a controlled test setting); United States v. Sundby, 186 F.3d 873 (8th Cir. 1999), United States v. Gonzalez-Acosta, 989 F.2d 384 (10th Cir. 1993); United States v. Banks, 3 F.3d 399 (11th Cir. 1993).

handler or how long is appropriate for a response to be made. As in the [*Emory v. State*, 101 Md. App. 585 (1994)] and [United States v. Meyer, 536 F.2d 963 (1st Cir. 1976)] discussion s*upra*, a magistrate must be able to defer generally to the skill of a trained handler and the certifying agency unless there is a clear example of abuse. ...

Id. at 13.

Additionally, in Fitzgerald v. State, 837 A.2d 989, 1011 (Md. App. 2003), the court, in a footnote, stated:

If it had been necessary for us to examine the merits of Alex's "track record" as it was developed at the suppression hearing, several interesting questions would have arisen. In the caselaw generally, a dog's "track record" is established at the training academy at the time of the dog's initial certification or at subsequent recertifications. The circumstances of each "alert" are known to and controlled by the trainer. Successes and failures are easy to measure.

Is it similarly possible, however, to measure the "track record" on the job? Is the absence of drugs in the place searched, for instance, to be counted as a "failure" if the search follows the dog's "alert" by days or even by weeks and the possibility exists that the drugs were once present but have been removed? Will corroborative evidence that drugs were earlier present transform a "failure" into a "success?" Is the absence of such corroboration dispositive of the fact that a "failure" occurred? Apparently, the Westminster Kennel Club Rule Book has yet to be written as to how investigative batting averages are compiled. This would seem to make it a particularly inappropriate subject for a

37

> judge's ex parte review of a warrant
> application.
>
> Another curiosity in the caselaw is the
> lofty batting average that seems to be taken
> for granted as a relevancy requirement. An
> "alert" for drugs by a dog with a 95%
> accuracy record would seem, at first glance,
> to be sufficient at trial to establish a
> defendant's guilt for possession beyond a
> reasonable doubt, even without a
> confirmatory follow-up search. Is it
> illogical to suggest that a dog's likelihood
> of being accurate should correspond to the
> burden of persuasion at issue? If probable
> cause, for instance, could be quantified as
> a 35% likelihood that drugs were present,
> would not an "alert" by a dog that was
> accurate 35% of the time ipso facto satisfy
> that degree of likelihood? There are some
> very interesting questions, but they are not
> before us in this case.

In Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981),

drug dog, Ringo, was characterized in the affidavit for search

warrant as "trained." The court, in relying on United States v.

Meyer, 536 F.2d 963 (1st Cir. 1976); United States v. Painter,

480 F. Supp 282 (W.D. Mo. 1979); Brisoe v. State, 388 A.2d 153

(Ct. Spec. App. 1978); United States v. Klein, 626 F.2d 22 (7th

Cir. 1980), held that the representation that a narcotics

detection dog was properly trained, conferred probable cause for

issuance of a search warrant. But see, State v. Foster, 390 So.

2d 469 (Fla. 3d DCA 1980), in which the court held that the

"track record" of the dog up until the search (emphasis placed

on the amount of false alerts or mistakes the dog has

38

furnished), should be considered in assessing the dog's reliability.

The State respectfully submits that due to the Second District's misapplication of the term "false alerts" and its conflict with the language set forth in <u>Vetter</u> that guidance on this issue from this Court is greatly needed. Furthermore, the State respectfully requests that this Court follow the majority view of Federal and state courts that an alert by a properly trained and certified narcotics detection dog to a suspect's vehicle, is sufficient to establish probable cause to search the vehicle, and that a dog's "track record" or performance in the field has no probative value in the determination of whether the dog is reliable.

CONCLUSION

Petitioner respectfully requests that the Second District Court's opinion be reversed and Respondent's convictions and sentences be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been furnished by U.S. mail to Celene Humphries, Special Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 13 day of September, 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT J. KRAUSS
Chief-Assistant Attorney General

Bureau Chief, Tampa Criminal
Appeals

Florida Bar No. 0238538

_____
SUSAN M. SHANAHAN
Assistant Attorney General
Florida Bar No. 0976059

40

Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500
COUNSEL FOR PETITIONER