IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, **CASE NO: SC07-2158**

Petitioner, **2DCA CASE NO: 2D06-2106**

v.

RANDY DEWAYNE GIBSON,

Respondent,
_____/

BRIEF OF *AMICUS CURIAE* POLICE K-9 MAGAZINE AND CANINE DEVELOPMENT GROUP

ON PETITION FOR REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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AUTHORITY TO FILE

Pursuant to Florida Rule of Appellate Procedure 9.370, Police K-9 Magazine and Canine Development Group requested this Honorable Court for leave to file a joint brief of *amicus curiae* in support of the petitioner, The State of Florida. This Motion was filed with the clerk on January 28, 2008.

INTEREST OF AMICUS

Police K-9 Magazine ("The Magazine") is a national publication with over 10,000 canine handlers as subscribers. Many of those subscribers are canine handlers in the State of Florida who have a vested interest in the issue before the court. The Magazine seeks to advance the cause of the Petitioner due to the effect that this ruling potentially has on its readership, some of whom will be directly affected because they are Florida Police officer dog handlers.

Canine Development Group Inc.("The Group") is a Florida corporation dedicated to the sole purpose of training and consulting with law enforcement handlers only. The Group holds national canine seminars not only in the State of Florida but throughout the United States in order to train police officer-dog handlers on the proper and legal way to utilize their narcotics canine. The Group, providing training on a national basis, is aware

of the State and Federal law related to the issue before the Court. Their interest is to have the law in the State of Florida in congruence with the vast majority of the law across the country which holds that the State of Florida can make a *Prima Facie* showing of probable cause for a search based on a narcotics detection canine's alert by demonstrating that the canine has been properly trained and certified.

STATEMENT OF THE CASE

The Question presented in this case is as follows:

> **WHETHER THE STATE CAN MAKE A PRIMA FACIE SHOWING OF PROBABLE CAUSE FOR A SEARCH BASED ON A NARCOTICS DETECTION DOG'S ALERT BY DEMONSTRATING THAT THE DOG HAS BEEN PROPERLY TRAINED AND CERTIFIED.**

This cause is before the Court based upon certified conflict by the Second District Court of Appeal's decision in *Gibson v. State*, 968 So.2d 631 (Fla. 3d DCA 2007) with the Fifth District Court of Appeal's decision in *State v. Coleman,* 911 So.2d 259 (Fla. 5th DCA 2005) and the Fourth District Court of Appeal's decision in *State v. Laveroni,* 910 so.2d 333 (Fla. 4th DCA 2005).

STATEMENT OF THE FACT

The Magazine and the Group adopt the facts as set forth in the brief of the Petitioner, The State of Florida, filed on January 29th 2008.

SUMMARY OF THE ARGUMENT

The State can make a prima facie showing of probable cause for a warrantless search based on a narcotic dog's alert by establishing that the dog has been properly trained and certified. The dog's reliability can then be challenged by the defendant through performance records of the dog, or other evidence, such as expert testimony.

Because an alert by a trained and certified narcotics detection dog, standing alone, provides an officer with probable cause to search, this Court should reverse the decision in Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), and approve the holdings in State v. Coleman, 911 So. 2d 259, 261 (Fla. 5th DCA 2005), and State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005) and bring The State of Florida in line with the vast majority of the courts and jurisdictions across the country.

ARGUMENT

ISSUE

WHETHER THE STATE CAN MAKE A PRIMA FACIE SHOWING OF PROBABLE CAUSE FOR A SEARCH BASED ON A NARCOTICS DETECTION DOG'S ALERT BY DEMONSTRATING THAT THE DOG HAS BEEN PROPERLY TRAINED AND CERTIFIED.

The Second District Court of Appeal (hereinafter "2nd D.C.A.") relying exclusively on their 2003 opinion in *Matheson v. State,* 870 So.2d 8 (Fla. 2d D.C.A. 2003) reversed the trial court's ruling denying the motion to suppress in the case of *Gibson v. State,* 968 So.2d 631 (Fla. 2nd D.C.A. 2007). The court in *Gibson* certified conflict with The Fifth District Court of Appeal's (hereinafter "5th D.C.A.") decision in *State v. Coleman,* 911 So.2d 259 (Fla. 5th D.C.A. 2005) and The Fourth District Court of Appeal's (hereinafter "4th D.C.A.") decision in *State v. Laveroni*, 910 So.2d 333 (Fla. 4th D.C.A. 2005).

In *Laveroni*, the 4th D.C.A. wrote "Our review of cases from around the country indicates that *Matheson*, which held that the state must establish the reliability of the dog through performance records in order to show probable cause, ***is out of the mainstream***". (Emphasis added) The 4th D.C.A. researched extensively the issue that is before the Court relying on both State and Federal authority. The Court of Appeals in and for the State of Georgia in *Dawson v. State,* 238 Ga.App. 263, 518 S.E. 2d 477 (1999) on this specific issue held that evidence of certification as a

narcotics detection dog constitutes prima facie evidence of reliability but that this presumption can be rebutted by the defendant with proof of the failure rate of the dog or through other evidence the defendant wished to present, with the final determination to be made by the trial court. The 4th D.C.A., in relying on *Dawson* and rejecting *Matheson*, aligned itself with the mainstream legal philosophy all over this country.

The 5th D.C.A. found itself in a unique position in resolving this issue in their opinion *State v. Coleman*, 911 So.2d 259 (Fla. 5th D.C.A. 2005) because they had both the *Laveroni* and *Matheson* decisions for review. The 5th D.C.A. rejected the *Matheson* reasoning as flawed and united itself with the 4th D.C.A. and the rest of the country in finding: "Having reviewed both decisions and the authorities upon which they rely, we align ourselves with the Fourth District Court and conclude: [T]hat the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony.... Whether probable cause has been established will then be resolved by the trial court." *Coleman at 261*.

STATE AUTHORITY

Since *Laveroni* and *Coleman*, State courts across the country have ruled on this issue. In *State v. Lopez*, 166 Ohio App.3d 337, 850 N.E. 2d 781 (2006) the Ohio Court of Appeals held that "…the majority hold that the state can establish reliability by presenting evidence of the dog's training and certification, which can be testimonial or documentary. Once the state establishes reliability, the defendant can attack the dog's "credibility" by evidence relating to training procedures, certification standards, and real-world reliability". The Court of Appeals of Idaho in *State v. Yeoumans*, 172 P.3d 1146 (Ct.App.2007) was aware of the *Matheson* decision along with *Laveroni* and *Coleman.* The Idaho court noted the isolated legal reasoning of the *Matheson* case in its written opinion. They choose to follow the 4th and 5th D.C.A.(s).

The Supreme Court of the Commonwealth of Kentucky, in a dog tracking case (a dog that smells and follows human scent), held in *Debruler v. Commonwealth*, 231 S.W.3d 752 (Ky.2007) that the Commonwealth provided sufficient foundation for admission at trial of the dog's tracking ability. As to the issue of the dog's training and qualifications, the Kentucky Supreme Court found "…Officers Howard and Morgan provided evidence that the dogs had been trained at an Indiana dog-training facility. According to Officer Howard's testimony about

Denise [the 1st dog], she had been certified in tracking by the Owensboro Police Department and is recertified every year following thirty-two hours of additional training. Furthermore, she completes practice runs every week. Officer Morgan testified that Bady [the 2nd dog] has been certified by the United States Police Canine Association and competes twice a year to maintain this certification. Like Bady, she completes practice runs on a weekly basis". *Debruler at 758.* The Magazine and The Group wish to point out to this Honorable Court the rationale that if evidence of a dog's unique olfactory ability meets the admissibility standard at trial by the officer's testimony related to training and certification, then certainly it should be sufficient to establish a *prima facie* presumption of reliability at a motion to suppress which may be rebutted by the defense.

In what was labeled as an issue of first impression, The Supreme Court of South Dakota tackled the same issue before this Honorable Court in their decision *State v. Nguyen,* 726 N.W.2d 871 (S.D. 2007). The Supreme Court of South Dakota held that a drug detection canine was deemed reliable based upon the presentation of its certification and training. The South Dakota Supreme court was aware and considered both *Matheson* and *Laveroni* along with a host of other opinions and rejected the legal principles that are the foundation for the 2nd D.C.A.'s opinion in *Matheson*. They accepted the logic propounded by the 4th D.C.A. in *Laveroni* and cited it as authority for their reasoning.

FEDERAL AUTHORITY

Federal Courts have repeatedly held that appropriate certification by an organization is sufficient to show reliability of a dog. See *United States v. Robinson*, 390 F.3d 853 (6th Cir. 2004) reh'g en banc denied, Feb. 5, 2005 (testimony of handler that dog was reliable was sufficient to show reliability of purposes of probable cause); *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004), cert. denied, 543 U.S. 1074, 125 S.Ct. 924, 160 L.Ed.2d 812 (2005) (handler's testimony that dog was certified on day of sniff and had never given false indication sufficient to show reliability); *United States v. Boxley*, 373 F.3d 759 (6th Cir.), cert. denied, 543 U.S. 972, 125 S.Ct. 435, 160 L.Ed.2d 345 (2004); *United States v. Outlaw*, 319 F.3d 701 (5th Cir. 2003) (reliability acceptable when handler and dog have completed all standard training procedures for drug detecting teams); *United States v. Hill*, 195 F.3d 258 (6th Cir. 1999), cert. denied, 528 U.S. 1176, 120 S.Ct. 1207, 145 L.Ed.2d 1110 (2000) (handler's inability to state with precision what in-service training should be conducted; reliability nonetheless established); *United States v. Sundby*, 186 F.3d 873 (8th Cir. 1999) (training records were not required to show reliability).

More recently, the United States Court of Appeals for the Eight Circuit in their opinion *Untied States v. Olivera-Mendez*, 484 F.3d 505, 512 (8th Cir.2007) noted

"We have held that to establish a dog's reliability for the purpose of a search warrant application, the affidavit need only state the dog has been trained and certified to detect drug and a detailed account of the dog's track record or education is unnecessary." If the canine's reliability in a search warrant affidavit is established by merely stating that the dog is trained and certified allowing for a finding of probable cause to issue the warrant to enter into someone's property, then it goes without saying that establishing the canine's training and certification through testimony at a motion to suppress should surely be sufficient to establish a *prima facie* finding of reliability that the defendant may rebut at the hearing. See; *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980) (finding the affiant's representation to the magistrate that the dog "graduated from a training class in drug detection in October 1978" and "has proven reliable in detecting drug and narcotics on prior occasions." sufficient.) and *United States v. Berry*, 90 F.3d 148 (6th Cir. 1996) (finding contrary to defendant's suggestion, to establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability.)

Drawing an analogy to Florida search warrant law, the State's search warrant is presumed valid at a motion to suppress hearing. When the defendant is challenging

the validity of a search warrant, the State of Florida of is afforded a presumption that the issuing magistrate acted properly in determining probable cause prior to signing the warrant. The presumption may be rebutted by the defendant but, the burden is on the defendant to attack the foundation of the warrant. Therefore, the legal philosophy of the request of the petitioner is already well established in Florida Criminal law. The petitioner merely is requesting that this Honorable Court treat the issue of a dog's training and certification in the same fashion.

The Magazine and The Group wish to emphasize that in reversing the 2nd D.C.A. and establishing this presumption in no way deprives the defendant of his right to confront the officer regarding his canine partner's reliability. The training records and certification documentation are discoverable. They can be reviewed by the defendant and challenged in court. The trial court, at the close of all the evidence at the motion to suppress, is still free to determine the reliability of the dog. Enabling the State to make this *prima facie* showing merely puts the proverbial ball in the defendant's court and deprives him of nothing.

CLOSING SUMMARY

It is common knowledge that dogs have an ability much greater than humans to detect scents. This heightened ability allows dogs to detect scents that are not detectable by humans. This ability also allows dogs to detect scents that were once

detectable by humans but are no longer detectable. It is also common knowledge dogs can detect the scent of things hours after the thing has passed by or has been removed. Dogs alert to the odor of drugs not drugs themselves. There is little doubt dogs possess olfactory capabilities far superior to humans and are uniquely equipped for the task of detecting and distinguishing between minute levels of a given scent. This special sense of smell is refined through long hours of training before the canine is even put into public service. After the dog has passed the rigorous training, then, and only then, is the dog offered up for outside inspection and independent certification. The officer and his canine partner thereafter train and recertify on a regular basis. This effort should stand for something. That something should be, at a bare minimum, the judicial determination that their efforts can establish a *prima facie* showing of reliability in a court of law.

CONCLUSION

The Magazine and The Group has found no other authored opinion state or federal that as chosen to follow the 2nd D.C.A. The *Matheson* case is on a legal island all by itself. The Respondent, as in Greek mythology, is trying to lure this Honorable Court close with its siren song only to have this court crash into the unseen rocks surrounding the island. The Magazine and The Group urge this court

to sail past this island to the shore of mainstream American jurist prudence and reverse the Second District Court Appeal.

CERTIFICATE OF SERVICE

I certify that on this ____ day of February, 2008, I served a copy of the foregoing brief by U.S. Mail on Susan M. Shanahan, Assistant Attorney General, Attorney General's Office Tampa, Concourse Center 4 3507 Frontage Road Suite 200 Tampa, Florida 33607 and Carol J.Y. Wilson, Assistant Public Defender, Public Defender's Office Bartow, Drawer PD P.O. Box 9000 Bartow, Florida 33831-9000.

CERTIFICATE OF COMPLIANCE

I certify that this request is composed in Times New Roman, 14 point.

Respectfully submitted,

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