IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No.SC07-2158
RANDY DEWAYNE GIBSON,	:	
Respondent.	:	
	:	

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

This case concerns a canine's alert to a vehicle trunk, where no contraband was found, and a second alert to the vehicle in general, which resulted in the police finding a trace amount of cocaine in a metal container in the glove compartment and an article for which the dog was not trained to alert, a firearm, in the back seat. (R33, 96-97, 106). The state contends that an alert by a trained and certified dog, should in all and every case suffice as probable cause for a search of any vehicle, person, home, or other place in which citizens otherwise hold a privacy interest. The state also urges this Court to accept the scant evidence in this record as establishing that Sirus, the detector dog used in this case, was properly trained and certified.

Randy Dewayne Gibson was charged in Sarasota County Circuit Court for the July 14, 2005 offenses of carrying a concealed firearm, possession of cocaine, and possession of drug paraphernalia. (R5-6). Mr. Gibson's attorney filed a motion to suppress on the grounds that the police illegally searched Mr. Gibson's car during a traffic stop for illegally tinted windows. (R31-34). The defense motion to suppress agreed that the search resulted in a firearm being found in the back seat of the vehicle, and that a trace amount of cocaine was found in a metal container found in the glove compartment.

On March 28, 2006, a hearing was held on the motion to

suppress before Judge Charles E. Roberts. (R72). At the hearing the state presented evidence from Sergeant Jernigan of the Sarasota County Sheriff's Office. (R75-76). Sgt. Jernigan testified that he stopped the vehicle Mr. Gibson drove because of its tinted windows at 6:15 p.m. on July 14, 2005. (R76-77). Through these tinted windows Sgt. Jernigan testified that when Mr. Gibson's vehicle stopped, the officer could see the following: "I was able to see suspicious movement in the vehicle, which consisted of the driver, basically, if he's sitting in the driver seat behind the wheel, I can see him lift up his entire body, and I can see shoulder movement that went from like the pelvis waist area and then relocated between the seats as the person who was either removing contraband or a weapon from the waist area. . . . And then placed into the rear back seat floorboard area of that vehicle." (R77-78). After seeing this, Jernigan decided to ask Appellant to get out of the car and walk towards the officer. (R78).

Sgt. Jernigan met Mr. Gibson in between the two cars, and the officer asked Appellant about his movements in the car. (R79). Sgt. Jernigan, who had stopped the car because of the tinted windows, continued to ask Mr. Gibson numerous other questions concerning where Appellant was going, whether he had any firearms, if he had any narcotics, why he was nervous, what he was doing inside his car, and why he was getting increasingly nervous. (R86). Jernigan further asked Appellant

if he needed any directions or was familiar with the area. Appellant said he was not looking for a particular location, but was driving and looking for a place to live in the general area. (R81).

The officer then went to speak to the female passenger, who told him they were returning some merchandise to a store. (R81-82). In the car was the woman's four or five year old daughter. (R86).

Sgt. Jernigan testified he began writing the citation after he returned to his car, after speaking with all the vehicle occupants. (R90). The written documents were being issued when the canine officer, Freeman, arrived. (R90). Appellant told Jernigan "he was going to defecate in his pants when he saw the K-9's arrival." (R91).

Sgt. Jernigan stated Appellant "was very nervous, abnormal nervous behavior over a general traffic stop." (R79). The nervous conduct Jernigan observed was the following: "His eye contact, he wouldn't make eye contact, he would be looking away. He'd ask for questions. [sic] Could you repeat it, which is a qualifier for a stalling tactic, and I could visibly see his nervousness and in his body as far as the shaking." (R81).

Records show that at 6:17 p.m. the officer ran a computer check of the vehicle tag. (R80, 109). Sgt. Jernigan testified that it took "probably five or six minutes" after the initial stop for him to run Appellant's personal information through

the computer system. (R82). After conducting the computer check, Jernigan asked if he could search Mr. Gibson's car, which Appellant agreed to allow and then declined permission. (R82-83).

At 6:30 p.m. Jernigan asked the Venice Police Department to send a canine unit to the scene. (R113). At 6:36 p.m., Officer Freeman arrived with his dog, Sirus, a German Shepherd. (R92-93). After asking to search the car and looking for the canine unit, Sgt. Jernigan started writing a written warning for the window tint violation and a citation for failing to display a valid driver's license. (R83). Jernigan had not finished writing these when Officer Freemen arrived at 6:36 p.m. (R83-84).

Officer Freeman testified that Sirus was imported to the United States from Hungary. (R93). Three days after arriving in this country, Freeman and Sirus attended a two and a half month training school held by the Sarasota County Sheriff's Department. (R93). The training and certification process were not described by the officer, and no standards for completion were described. (R93).

Additionally, the officer could not testify about what Sirus' track record is or was. (R104-105). When Officer Freeman was asked if Sirus were 100 accurate, the officer answered, "I can't answer." (R104). When asked if drugs were always found in a vehicle every time Sirus alerts, Officer Freeman answered, "No." (R105). Officer Freeman did not know

how many times Sirus had alerted and no drugs were found. (R105).

On redirect, Officer Freeman stated, over the defense objection based on speculation, that every time Sirus alerts, that means he detects an odor of illegal narcotics. (R105-106). Freeman testified that Sirus has been trained to detect cannabis, cocaine, heroin, and methamphetamines, but did not say what criteria were used in selecting dogs for this training or what criteria the dogs were required to meet to successfully complete training. (R106).

Deputy Hall, who arrived to assist Sgt. Jernigan, told Officer Freeman that Hall suspected there were illegal narcotics in the vehicle. (R100). Officer Freeman testified that he took the dog around the top of the vehicle, directing the dog to certain locations on the vehicle where the officer thought a scent may be escaping from the car's interior. (R95). During the first time around the car, Freeman directed Sirus to the taillight area, and Sirus started scratching at the car, and the trainer rewarded him. (R96). Scratching is the alert Sirus uses. (R96). During the first time around the car, Sirus only alerted to that one place. (R96). Officer Freeman then took Sirus around the car a second time, focusing on the bottom part of the car, and Sirus alerted on the bottom door seam of the passenger door. (R96). Officer Freeman noticed Appellant had been placed inside Jernigan's police car after the dog sniff had been completed. (R101-102). Somewhere

inside the vehicle a loaded firearm and a metal container with cocaine residue were located. (R103).

After these two witnesses testified, the prosecutor noted that "I also have Deputy Hall who searched the car and found the gun and the drugs, but I think that goes beyond the scope of the motion, so at the moment I am not going to call any other witnesses. (R106-107). The trial court asked the defense lawyer, "is there any dispute as to where and what items were found and where they were found?" (R107). The defense lawyer replied, "Oh, no." The prosecutor then stated, "Then I will not call Deputy Hall." (R107).

The defense than called witnesses to establish when Sgt. Jernigan called in the traffic stop, (6:17 p.m.), when the vehicle tag was run, (6:17 p.m.), when back up officer Deputy Hall arrived (6:22 p.m.), when Jernigan requested the canine unit (6:30 p.m.), when the canine unit arrived at the scene (6:36 p.m.)(R110-113) and cleared the scene (7:31 p.m.), and when the officers were en route to the jail. (7:24 p.m.),.

The state urged the trial court to deny the motion on the grounds that the police had a reasonable suspicion that Mr. Gibson was committing or about to commit a crime and because the police took a reasonable amount of time to call for the canine unit and to write out the traffic citation. (R114-116). The defense argued that the police had no reasonable suspicion to believe Mr. Gibson was about to or was committing a crime prior to the illegal search. (R117). The defense

stated that the officer delayed the stop for the purposes of obtaining a canine unit, and did not limit the stop to the time it took to write the traffic citation. (R116-121). Additionally the defense argued that the state did not meet its burden of establishing the reliability of the canine in proving probable cause to search the vehicle. (R122).

The state was permitted to recall Sgt. Jernigan, who testified that the time he gave for the arrest, of 6:30 p.m. was an approximate time made when writing the arrest affidavit at the jail. (R125). The trial court then deferred ruling on the motion. (R131).

On March 29, 2006, the trial court entered an order denying the motion to suppress. (R39-41). In denying the motion, the trial court stated, "the time period between the stop of the vehicle and the canine search was not unreasonably long. From the stop to the beginning of the search, only nineteen minutes elapsed. During this time Sgt. Jernigan had to determine defendant's license status (complicated by defendant's failure to produce one), defendant's name, date of birth, and address, and had to go to his vehicle to run the checks and enter the information. The citation issued was still being written when the canine officer arrived. The Court finds no evidence that Sgt. Jernigan intentionally delayed issuing the citation to allow time for the canine officer to arrive. The nineteen-minute period, followed by the two-minute search was reasonable." (R39-41).

On April 10, 2006, Appellant entered no contest pleas to the charges and the trial court, Judge Andrew D. Owens, withheld adjudication. (R48-52;Supp:T1). The trial court sentenced Appellant to time served and twelve months probation, with the special condition that Appellant complete six months at Harvest House. (R48-52; Supp:T20-34). A timely direct appeal followed. (R55).

The Second District reversed the ruling of the trial court, on the basis of Matheson v. State, 870 So.2d 8 (Fla. 2d DCA 2003). Gibson v. State, 968 So.2d 631 (Fla. 2d DCA 2007). In its decision below, the Second District wrote, "Although the officer who handled the dog testified that the dog was certified and had completed 400 hours of training, the State failed to elicit any testimony from him regarding the dog's track record. The officer admitted that drugs are not always found when the dog alerts, but he could not quantify the percentage of false alerts." Id. at 632. The Second District rejected Mr. Gibson's argument that the police unreasonably delayed the traffic stop in order to permit a canine sniff of the vehicle. Id. at 631. The Second District certified conflict with State v. Coleman, 911 So.2d 259 (Fla. 5th DCA 2005), and State v. Laveroni, 910 So.2d 333 (Fla. 4th DCA 2005).

SUMMARY OF THE ARGUMENT

This case does not expressly and directly conflict with the decisions in State v. Coleman, 911 So.2d 259 (Fla. 5th DCA 2005), and State v. Laveroni, 910 So.2d 333 (Fla. 4th DCA 2005). Coleman and Laveroni are cases holding that the trial court improperly ruled to keep the state from presenting evidence of a police dog's track records. In this case, the canine officer was questioned about the track record, but could not provide it. Additionally, the dicta in those cases set forth a rule requiring that the state establish that a dog was properly trained and certified. The state failed to meet that evidentiary burden in this case. Because an express and direct conflict does not exist, this Court should decline to accept jurisdiction in this case.

The Second District has properly determined that a mere alert by a police dog does not in and of itself constitute probable cause to search. The Second District's decision in Matheson is in line with the greater body of Fourth Amendment case law which holds that probable cause is determined by a totality of the circumstances, and that no single factor automatically results in a finding or a negating of probable cause.

The State, as the proponent of the evidence of the canine alert, bears the burden of proving that the dog's alert is

relevant and reliable proof of a material fact. To meet this burden, the state must show that the dog has been properly trained and certified and has a reliable track record of performance in the field. Establishing this predicate is what gives the evidence of the alert behavior relevancy to the disputed issue of probable cause. Once this evidence has been shown, the defense can attack the dog's record and set forth any other evidence that supports a finding that the warrantless search was not based on probable cause.

In this case in which the state did not set forth the evidentiary predicate establishing that Sirus' behavior was relevant and reliable proof that there might be contraband in the vehicle, the trial judge erred in basing the finding of probable cause on such evidence. The state's evidence may have made the dog's behavior in alerting relevant, but failed to meet the standard of probable cause. The court did not have sufficient evidence before it to determine that a probability or substantial chance of criminal activity existed. Under these circumstances the totality of the circumstances in this case did not point to a finding of probable cause. The decision of the Second District should be affirmed and approved.

In the alternative, this Court should affirm the reversal of the Second District, in accordance with the tipsy coachman doctrine, because the police unlawfully delayed the traffic stop for the purposes of having the dog sniff the car.

The first officer questioned Mr. Gibson and the passenger about matters not at all connected with the basis for the traffic stop, having tinted window. This delay caused the stop to last nineteen minutes before the dog alerted to the vehicle. Although the officer had thirteen minutes to write a single citation for driving without a license, he did not complete it in that time. Instead he spent part of it hunting down a canine to sniff the vehicle. This stop was unreasonably delayed for purposes beyond the original traffic violation grounds for the stop. Therefore this Court should affirm the decision below reversing the trial court's denial of the suppression motion.

ARGUMENT

ISSUE I.

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION WHEN NO EXPRESS AND DIRECT CONFLICT EXISTS WITH THE DECISIONS OF STATE V. COLEMAN, 911 So.2d 259 (FLA. 5th DCA 2005), AND STATE V. LAVERONI, 910 So.2d 333 (Fla. 4th DCA 2005)?

This Court may use it discretion to decline to exercise jurisdiction over this cause. Famiglietti v. State, 838 So.2d 528, 529 (Fla. 2003); Blevins v. State, 829 So.2d 872 (Fla. 2002). Because this case does not expressly and directly conflict with the decisions of the Fourth and Fifth District Court of Appeal, this court should dismiss review of this cause.

In State v. Laveroni, 910 So.2d 333 (Fla. 4th DCA 2005), the district court held that the trial court erred in not permitting the state to recall witnesses to testify about the narcotics dog's qualifications. Because the intermediary appellate court feared the issue might arise on remand, the district court explained in dicta why it did not agree with Matheson v. State, 870 So.2d 8 (Fla. 2d DCA 2003).

In State v. Coleman, 911 So.2d 259 (FLA. 5th DCA 2005), the district court held that the trial court had erred in excluding evidence of a narcotics dog's track records simply because the physical written records were no longer available. The district court did not direct the trial court to deny the motion to suppress. In remanding the case to the trial court,

the district court additionally explained that it was following the Fourth District's rationale in Laveroni. The Coleman court remanded the case to the trial court for additional evidence to be presented and to permit the state to present the testimony about the dog's track records.

Because Coleman and Laveroni are cases holding that the trial court improperly ruled to keep the state from presenting evidence of a police dog's track records, those case are not in direct and express conflict with Gibson. Here the canine officer was asked about the narcotic dog's track record, and the officer said he could not answer what percentage of time Sirius, the dog, was accurate. The state had the opportunity to present the evidence of the dog's reliability in the field, but the handler could not provide it. The handler did admit that drugs are not always found when the dog alerts. (R105). This case then presents a vastly different circumstance than the situations presented in Coleman and Laveroni. While the district courts in Coleman and Laveroni in dicta indicated disagreement with Matheson, the fourth and fifth district courts indicated the defense could present evidence to challenge the reliability of the canine. In this case, there was no evidence that could be presented by either party to prove what the dog's track record is.

Essentially the state in this case is seeking a ruling that once it presents some evidence of a dog's certification and training, probable cause is established, regardless of a

complete lack of evidence of a dog's track record. This case then presents a different circumstance from that in Coleman and Laveroni, in which the trial court restricted the state's presentation of otherwise available evidence about the dog's track record.

In addition, in this case the state failed to meet even the standard set forth in Coleman and Laveroni, in that this record does not establish that Sirus was properly trained and certified. In Coleman, the state proved that the handler officer had been trained and certified by an FDLE certified trainer. The training program details were outlined, and the criteria for selecting dogs was described. The state additionally proved the criteria that the handler and dog had to meet to satisfy certification. Additionally, the handler kept written records of the dog's performance in the field, but the officer was able to testify from personal knowledge about the dog's track record.

By contrast, the proof in this case only showed that training and certification and the issuance of a certificate occurred. There is no evidence, such as was proved in Coleman, of what had to be done during the training, or how dogs were selected for training, or what the dog and handler were required to do to obtain certification. Since the standards of Coleman were not met in Gibson, this case is not in express and direct conflict with it.

Laveroni concerned a trial court's ruling that prevented

the state from presenting evidence of the police dog's training and certification. The trial court, sua sponte, raised the question about the reliability of the detector dog, and then would not permit the state to cure a lack of evidence about the canine. In reversing, the Fourth District stated that it would not require the state to establish a dog's track record, as it read Matheson to require, but that it would require that the state establish that the dog is properly trained and certified, in order to permit a dog alert to amount to probable cause. The dog sniff in Laveroni was required because the police were able to verify some very specific facts given by a citizen informant. The citizen knew the detective to whom she gave the information that "the defendant would be selling narcotics at a certain bar between 8:00 p.m. and 10:00 p.m. on a particular night, and described him, his vehicle, the Tennessee license tag, and a name plate on the front of the car." State v. Laveroni, 910 So.2d at 334. The dog's alert, then did not alone provide probable cause, and the district court's language in Laveroni is dicta, not part of holding on the facts presented in that case. What the Fourth District would consider sufficient evidence of a properly trained and certified dog is not state, because the state was not permitted to prove those facts in the trial court.

From these differences, it is apparent that the Coleman and Laveroni are not in direct and express conflict with

Gibson. This being so, this Court should decline to exercise its discretionary jurisdiction over the certified conflict.

ISSUE II.

WHETHER THIS COURT SHOULD ESTABLISH A PER SE LINE RULE THAT TRAINED DOG BEHAVIOR ALONE ESTABLISHES PROBABLE CAUSE FOR A POLICE SEARCH FOR DRUG CONTRABAND, WITHOUT REQUIRING THE STATE TO ESTABLISH THE CANINE'S PROVEN RELIABILITY THROUGH EVIDENCE OF THE DOG'S TRAINING, CERTIFICATION, AND PERFORMANCE RECORD?

It has been long established that probable cause for a warrantless police search is not established or negated by any one particular fact, but instead is proved by the totality of the circumstances. As Justice Rehnquist of the United States Supreme Court stated,

> We have long held that the "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno,* 500 U.S. 248, 250, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991). Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.
>
> In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), we expressly disavowed any "litmus-paper test" or single "sentence or ... paragraph ... rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth Amendment. *Id.,* at 506, 103

> S.Ct., at 1329. Then, in ***Michigan v. Chesternut,*** 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988), when both parties urged "bright-line rule[s] applicable to all investigatory pursuits," we rejected both proposed rules as contrary to our "traditional contextual approach." ***Id.,*** at 572-573, 108 S.Ct., at 1978-1979. And again, in ***Florida v. Bostick,*** 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), when the Florida Supreme Court adopted a ***per se*** rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." ***Id.,*** at 439, 111 S.Ct., at 2389.

Despite this long established principle, the state asks this Court to create a per se and bright line rule or exception to the totality of the circumstances test. This per se rule is "an alert by a trained and certified narcotics detection dog, standing alone, provides an officer with probable cause to search." Petitioner's Initial Brief on the Merits at 6. The state also asserts that the standard should require the state to show that the dog is "properly" trained and certified. Petitioner's Initial Brief on the Merits at 6. This Court should reject either rule and approve the decision of the Second District.

As a preliminary consideration, evidence of a dog's training and certification are required to make a dog's behavior even relevant to the suppression hearing proceedings. The fact that a dog sits or barks or scratches has no relevance unless those behaviors indicate a fact that is relevant and material to the proceedings at hand. See Pedigo

v. Comm., 103 Ky. 41, 44 S.W. 143 (1898)(foundation must be laid showing bloodhound has "acuteness of scent and power of discrimination, [and] it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof."). There is a substantial difference between establishing an evidentiary foundation or predicate and meeting a burden of proof. The state's proposed rule eliminates the difference between these concepts in the instance of canine behavior.

The state's argument is wrong in two aspects. The state asserts 1) that a trained and certified dog's alert alone constitutes probable cause and 2) that the dog's success or failure in alerting accurately in the field can never be gauged or measured through false positives. Petitioner's Initial Brief on the Merits at 6, 20. These assertions rests essentially create a conclusive presumption that if the dog is trained and certified, its alert behavior in the field always indicates the presence of odor of contraband. The presumption is conclusive, because, according to the state, a dog's performance cannot be measured through false positives and no other performance measurement is given. Therefore training and certification conclusively prove reliability.

Such a conclusive presumption would violate the due process clauses of the state and federal constitutions. United

States Constitution, Amend V, XIV; Article I, §9, Fla. Const. This is because the presumed fact of reliability cannot be challenged or the evidence to challenge it is in the complete control of the party benefiting from the presumption. If the police are not required to keep performance records, then it is to their benefit not to do so, under the state's proposed rule.

This case illustrates this conclusive presumption. The evidence in this case establishes only that Sirus had some kind of 400 hours of training that lead to some kind of certification for detection of specified drugs. His trainer used a detection method in which the dog was not first taken to a test car, but in which the handler first showed the dog where to sniff on the suspect's car, with the dog receiving an reward for any alert. (R93, 95-97, 106).

From these facts the state asks the trier of fact to presume 1) the training and certification were reliable; 2)the fact that the dog had some kind of training and certification made the dog's performance in the field generally reliable; and 3) the methods used by the police handler were standard and acceptable methods. The police in this case knew of no evidence of Sirus' track record and therefore there was no evidence to produce to challenge the dog's proven and actual reliability.

The state fails to apply this per se rule to the facts in this case. The state, in arguing for this new bright line

test, does not explain why the record facts of this case require such a rule. There is no evidence that the training and certification Sirus received was "proper." The record only shows that Sirus had some kind of training and certification, but does not explain what that training and certification required, other than to state its length and the type of drugs involved. Since there is no uniform standard for canine detection training and certification, this omission is fatal to the state's argument in this case.

The Second District's decision in Matheson v. State, 870 So.2d 8, 12-13 (Fla. 2d DCA 2004), and thus implicitly this case, recognize the important contribution that dogs make to law enforcement investigations. The Second District's decisions do not discount that contribution or limit it. Instead, Matheson and the decision of the court below ensure merely that the type and caliber of training and certification as well as the actual performance for properly selected detection dogs be proved prior to a trial court relying solely on the dog's behavior as prima facie proof of probable cause. This holding hardly eliminates the use of dogs in law enforcement investigations, as the state's hyperbole asserts, Petitioners Initial Brief on the Merits at 19. The Second District merely sets forth what additionally the state must prove in order to go beyond merely meeting the evidentiary predicate and further establishing a prima facie case of probable cause. The Second District's decision only can be

read to eliminate the use of detector dogs that the police have not properly monitored for effectiveness and reliability as the sole means of proving probable cause. This result is laudable and reasonable for all concerned.

The state has no legitimate interest in wanting to use any evidence that lacks either a truthful or reliable foundation. Certainly evidence of an alert from a dog whose record in the field and in training has not been established or whose specific standards for certification are unknown cannot tell the police the same facts that an alert by a dog whose success is known and proved, whose certification standards are stated, and whose handler used acceptable detection methods. The state and the police can use a dog whose performance in the field and in training is not known, but it simply cannot use an alert by such a dog as the sole fact establishing probable cause to invade a person's privacy through a warrantless search.

The dog may have superior smell, but his or her ability to communicate to humans can be as good or as lousy as the human ability correctly to interpret canine behavior. A dog trained to detect drugs or other contraband is trained that a reward will be given when an alert to contraband is made. Bird, Robert C., "An Examination of the Training and Reliability of the Narcotics Detection Dog," 85 Ky. L. Rev. 405 (1996-1997).

A dog's behavior is being used to prove probable cause,

and that behavior and creature cannot be cross examined or subject to any other scrutiny. It is reasonable and logical then that the state should be required to set forth evidence showing that the dog's alert behavior, either of sitting, barking, scratching, etc., and the resulting reward reliably translate in human terms to showing that contraband is present. Adopting the standards set forth in Matheson and by the Third District in State v. Foster, 390 So.2d 469, 470 (Fla. 3d DCA 1980), is not confusing probable cause with any higher evidentiary burden. Such a requirement only asks that the state to meet a logical evidentiary predicate establishing the reliability of a detector dog before the trial court may consider or presume from the dog's alert behavior alone that the alert indicates probable cause for a search.

According to the state, a trained and certified dog alert, is always sufficient to justify a police search and therefore will always show probable cause. There is no other fact that alone creates an evidentiary presumption of probable cause. The state in this record does not prove any facts that would justify replacing the totality of the circumstances test with a canine presumption.

Officer Freeman testified that Sirus was imported to the United States from Hungary. (R93). There was no evidence presented about why Sirus was selected as a detector dog. Three days after arriving in this country, Freeman and Sirus

attended a two and a half month training school held by the Sarasota County Sheriff's Department. (R93). The training and certification process were not described by the officer, and no standards for completion were described. (R93).

Additionally, the handler officer did not and therefore could not testify about what Sirus' track record is or was. (R93). When Officer Freeman was asked if Sirus were 100 accurate, the officer answered, "I can't answer." (R104). When asked if drugs were always found in a vehicle every time Sirus alerts, Officer Freeman answered, "No." (R105). On redirect, Officer Freeman stated that every time Sirus alerts, that means he detects an odor of illegal narcotics. (R105-106). Freeman testified that Sirus has been trained to detect cannabis, cocaine, heroin, and methamphetamines, but did not say what criteria were used in selecting dogs for this training or what criteria the dogs were required to meet to successfully complete training. (R106). There was no evidence presented showing that Sirus was trained or certified to detect firearms. There was no evidence that Sirus had ever successfully alerted to the presence of narcotics prior to this instance. There was no evidence that the handler method of showing the dog where to look and rewarding it for an alert was an acceptable practice. The evidence in this case does not then establish that the dog's behavior was probable cause, or "a probability or substantial chance of criminal activity." Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983).

Additionally, the state asserts that a dog alert is the one behavior in the world that need not because it cannot be measured and scrutinized by a dog's actual performance in the field. Petitioner's Initial Brief on the Merit at 19-20. The state bases this implication on the assertion that because a dog is alerting to odors and not the actual presence of the substance, its performance in the field cannot be measured. The state then wants this Court to allow a dog's behavior that cannot be measured in its actual performance to replace the totality of the circumstances test. This Court should decline to do so.

In contrast to the trial record found in Matheson, the scant record in this case has very little evidence regarding the particular dog in question and none concerning the reliability of canine training and certification in general as a means of detecting narcotic contraband. This court has then no factual evidence before it regarding the benefits or detriments of permitting dog behavior alone to decide whether probable cause for a crime exists. Additionally the record lacks proof of whether the method Office Freeman used in handling Sirus during this search was an acceptable method, consistent with generally accepted detector dog usage. Officer Freeman testified, "I direct him to put his nose at certain locations on the vehicle where I think a scent may be escaping the interior of the car or where he may pick up the scent of a transfer from someone's hands or something. . . ."

(R96). The officer directed Sirus to the trunk of the car, and Sirus alerted there, although no contraband was found in the trunk. (R33, 96, 106-107). There is no evidence that this kind of indicating where to look is an acceptable detector dog method of searching. See United States v. Diaz, 25 F.3d 392 (6th Cir. 1994) (handler had dog walk around a test vehicle prior to letting the detector dog sniff the exterior of the suspect's car; United States v. Sundby, 186 F.3d 873 (8th Cir. 1999)(detector dog had to search through a parcels mixed together and alerted on one parcel).

The state, as the appellant, is the proponent of the error and bears the burden of establishing record support for its arguments. Maslow v. Edwards, 886 So.2d 1027 (5th DCA 2004). The state has failed to set forth such record support, but instead relies on facts in other decisions and facts not proved in the trial court. There are no facts presented in this record to establish the residual odor argument made by the state (Petitioner's Initial Brief on the Merits at 19-20), and there are no such facts set forth in this record to support the unreliability of field record evidence or any other measurement of a trained dog's performance in the field. The canine officer testified that Sirus alerted to odors of illegal substances, but did not testify about a dog's inability to detect the substance itself or a trainer's ability to test a dog's performance in the field. (R105-106). The canine officer merely said that Sirus was not 100 per

cent accurate and that the officer did not know how many times Sirus alerted and no drugs were found. (R105). Officer Freeman did not testify that his handler method of showing the dog where to sniff is a generally accepted for handling detector dogs sniffing vehicles.

Since the state failed to establish in the trial court what can and cannot be measured regarding a police dog's performance, as well as the acceptability of the practices used by Officer Freeman, the state is limited to arguing with this scant record that a dog's reliability is sufficiently proved with mere evidence of the canine's training and certification. That the training and certification are "proper" need not be established, since none was proved in this case. Under the state's proposed rule, the handler need only recite the magic words that that dog was "properly trained and certified," and the trier of fact may then presume that the dog is reliable, and if that fact is not in some way disputed, the trial of fact must find probable cause is proved.

In this case the evidence of the dog's track record was not known by the handler, Officer Freeman. (R105). Therefore Sirus's ability to perform accurately in the field cannot be questioned or scrutinized by the defense in this case. Even when the police fail to record the dog's performance in the field or to establish his performance record in any stated fashion, according to the state, the dog's alert should still

equate with probable cause. Essentially then, according to the state's proposed rule, the dog's alert cannot be challenged as long as the police do not keep a record of the dog's track record or performance in the field.

Performance and results in reality in every other walk of life count for something, but according to the state, not when it comes to police dogs. The state wants to use a fact that it claims cannot be verified in its intended use by any established or recognized means to prove probable cause for a warrantless search. According to the state, the alert of a trained and certified dog will always provide probable cause, regardless of the dog's performance in the field, which cannot be measured. The state then wants this court to substitute a presumption of reliability that cannot practically be rebutted, for the totality of the circumstances test. This Court should decline to adopt such a rule.

Several of the case relied upon by the state do not stand for the proposition that a trained and certified dog's alert alone equates with probable cause for a warrantless search. Florida v. Royer, 460 U.S. 491 (1983), does not, as the Petitioner states, (Petitioner's Initial Brief on the Merits at 9), even deal with the issue presented in this case, but defines the line between a citizen encounter and an investigative stop. Royer mentions briefly that trained dogs could have been but were not used in that police investigation of Royer, and in a footnote explains the case law regarding

whether a trained dog sniff constitutes a search. Id. at 505-506, n.10. Royer is not precedent for the state's arguments to this Court.

The United States Supreme Court in Illinois v. Caballes, 543 U.S. 405 (2005), held that when a trained police dog sniffs a lawfully stopped vehicle a search does not occur. The high court did not decide whether the dog's alert per se establishes probable cause for a warrantless search.

State v. Griffin, 949 So. 2d 309 (Fla. 1st DCA 2007), and State v. Williams, 967 So. 2d 941, 943 (Fla. 1st DCA 2007) dealt with the issue of whether probable cause to search a vehicle translates to probable cause to arrest and search the occupants. In United States v. Sentovich, 677 F.2d 834 (11th Cir. 1982) the appellate court decided probable cause existed when a detective smelled marijuana inside luggage, and merely stated as dicta, without fully considering the issue, that a trained dog's alert was sufficient to prove the canine's reliability. Id. at 836 n.6. In United States v. Robinson, 390 F.3d 853 (6th Cir. 2004), the district court had reviewed the performance record of the scrutinized dogs before finding them and their handlers reliable. Id. at 874.

In United States v. Diaz, 25 F.3d 392 (6th Cir. 1994), the Sixth Circuit found the dog Dingo had been proved reliable when the state presented the kind of very specific testimony regarding Dingo's reliability that is lacking in this record about Sirus' reliability. In Diaz the deputy sheriff described

in detail the tests Dingo underwent in training, gave a track record for the dog, as well as the number of total searches Dingo had undertaken, and had run the dog around a test car prior to having Dingo sniff the accused's vehicle, with Dingo not alerting to the test car, but alerting on the accused's. Id. at 394-395.

While some of the cases cited by the state do differ with Matheson, because those cases require less proof of the dog's training and certification for a prima facie probable cause finding, the vast majority of the cases require proof that the dog has been properly trained and certified. The evidence in this record does not establish that Sirus was properly trained and certified. Therefore it is the state that makes an argument, for which, on this record, little or no precedent exists. This record lacks facts explaining what his training consisted of, what was required for certification, what are acceptable methods for performing a canine search of a vehicle's exterior, and how Sirus previously had performed in the field. The state in this case seeks a ruling that an officer's mere recitation that the dog has been trained for a number of hours and then certified to detect certain narcotics should suffice as prima facie proof of his ability to detect narcotics. Since there is no standard training and certification for detector dogs, such a holding would allow law enforcement to use unreliable dogs to justify otherwise unreasonable searches.

United States v. Williams,69 F.3d 27 (5th Cir. 1995), holding that a dog's reliability need not be proved to establish probable cause for a search, does not make any sense from an evidentiary point of view as well as from a Fourth Amendment view. Any dog cannot provide probable cause for a search; thus a complete lack of proof of the dog's reliability on some level means the evidence lacks relevancy to the proceeding. Any dog can bark or sniff, but only those behaviors by a properly trained and reliable canine have any meaning as evidence toward proving probable cause. A reasonable reading of Williams then is that proof of reliability may not be required, but proper training and certification is. Under even this minimal standard, the record in this case fails.

United States v. Outlaw, 319 F.3d 701 (5th Cir. 2003), decided that the trial court properly concluded that evidence of an alert by a trained and certified canine was sufficient to provide reasonable suspicion to extend a detention. Id. at 704 n.2.; United States v. Alvarado, 936 F.3d 573 (6th Cir. 1991) (handler testified that he tested his dog each week and the his test performance showed 95% accuracy); United States v. Gonzalez-Acosta, 989 F.2d 384 (10th Cir. 1993)(defendant consented to dog search and subsequent search of vehicle); United States v. Banks, 3 F.3d 399 (11th Cir. 1993)(delivery notice provided by reliable CI permitted police to detain package that detector dog subsequently alerted to, all of which

provide probable cause for opening the package).

The cases relied upon by the state for the proposition that reciting that a dog is certified and trained suffices for showing the dog is reliable are wrongly decided for either one or both of the two following reasons: 1) The cases are premised on the assumption that all trained and certified dogs are equally infallible or at least highly reliable, despite no uniform standards for training or certification of dogs; See Fitzgerald v. State., 837 A.2d 989 (Md. App. 2003), aff'd 864 A.2d 1006 (Md. 2004); 2) Such cases create a canine exception to the totality of circumstances standard for determining probable cause. See United States v. Williams,69 F.3d 27 (5th Cir. 1995).

The fallacy of the state's position and of the reasoning of the cases on which it relies has been recognized by numerous authorities. As Justice Souter in his dissent in Illinois v. Caballes, 543 U.S. at 412 stated:

> The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. See, *e.g., United States v. Kennedy,* 131 F.3d 1371, 1378 (C.A.10 1997) (describing a dog that had a 71% accuracy rate); *United States v. Scarborough,* 128 F.3d 1373, 1378, n. 3 (C.A.10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); *United States v. Limares,* 269 F.3d 794, 797 (C.A.7 2001) (accepting as

> reliable a dog that gave false positives between 7% and 38% of the time); *Laime v. State,* 347 Ark. 142, 159, 60 S.W.3d 464, 476 (2001) (speaking of a dog that made between 10 and 50 errors); *United States v. $242,484.00,* 351 F.3d 499, 511 (C.A.11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), vacated on other grounds by rehearing en banc, 357 F.3d 1225 (C.A.11 2004); *United States v. Carr,* 25 F.3d 1194, 1214-1217 (C.A.3 1994) (Becker, J., concurring in part and dissenting in part) ("[A] substantial portion of United States currency ... is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence"). Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. See Reply Brief for Petitioner 13; Federal Aviation Admin., K. Garner et al., Duty Cycle of the Detector Dog: A Baseline Study 12 (Apr.2001) (prepared by Auburn U. Inst. for Biological Detection Systems). In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.

Additionally the lack of uniformity and the use of dog for establishing probable cause has been widely scrutinized and criticized. Katz & Goembiewski, "Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs," 85 Neb. L. Rev. 735 (2007); Myers, II, Richard E., "Detector Dogs and Probable Cause," 14 Geo. Mason L. Rev. 1 (2006); Simmons, Ric, "The Two Unanswered Questions of Illinois v. Caballes: How to Make the World Safe for Binary Searches," 80 Tulane L. Rev. 411 (2005); Comment, "Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways,: 57 Fla. L. Rev. 963 (2005); Sniffing out the Fourth

Amendment: United States v. Place – Dog Sniffs Ten Years Later, 46 Maine L. Rev. 151 (1994).

The police have used detector dogs in dubious ways in various instances. Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995) (roadblock stopping over 1400 cars for detection of DUIs and narcotic lead to full searches of 28 cars and only one arrest); Doe v. Renfrow, 475 F.Supp. 1012, 1017 (N.D. Ind. 1979)(thirteen year old strip searched in school after dog alerted to the presence of drugs on her and it was later discovered that she had no drugs and had played with her dog who was in heat). The state now wants to permit the police to use dubious dogs, or dogs that are not proved to be reliable.

Even human confidential informants must establish reliability with facts, and machines, like the breathalyzer, must be proved to be reliable. There is no logical reason for exempting detector dogs from proving reliability. Dogs are not more reliable than all other creatures or machines. Certainly the dog bite cases show that dogs can disobey a handler. See, e.g., Kerr v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989)(dog bit people despite a handler order to release and police ordered dog to bite people without probable cause for an arrest). In the dog bite context, however, the canine mistake or disobedience or police abuse is evident. In the drug search context, mistakes, disobedience and unreliability can only be measured through the dog's tested

and proved training, certification and actual performance.

The problem with the cases that permit the dog sniff to bypass the analysis applied to all other types of searches and seizures, is that these cases always rely on the presumption that the dog can only detect contraband. See United States v. Place, 472 U.S. 592 (1983). The problem and fallacy behind that presumption is well demonstrated in this case in which the dog alerted to the trunk area and the only contraband found even remotely in that area was a firearm found in the back seat. The dog Sirus was not trained to detect gun powder or firearms; nor would the smell of those items in a car provide probable cause to search a car under a traffic stop circumstance. Therefore in this case the trained and certified dog did alert to an item that was not contraband. See Doe v. Renfrow, 475 F.Supp. 1012, 1017(N.D. Ind. 1979)(thirteen year old strip searched in school after dog alerted to the presence of drugs on her and it was later discovered that she had no drugs and had played with her dog who was in heat).

The question posed by the dog sniff question is to what degree can any technique or technology permit a bypass of the standard tried and true totality of the circumstances requirement for warrantless searches and seizures? Should a dog's behavior alone should be sufficient proof to allow the police to raid a person's home? If so, then what kind of dog, with what proven reliability must the state show in order to

justify such an extraordinary exception? Can any detector dog walk through the street and randomly alert, permitting the police to stop and search any person to whom the dog alerts? Can citizen encounters routinely permit dog encounters as well? Can the police randomly go from home to home with dogs and search any home where the dog alerts outside simply because there is then probable cause to obtain a search warrant based solely on the dog alert? If so, what must the state show in order to justify such huge intrusions on our privacy? If a dog alert is not a search, as Place and Caballes indicate, then does any trained and certified dog alert suffice for establishing probable cause to search a place that is normally considered private?

The extension of Place to the home, which the Fourth District confronted in State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006), rev. denied, 933 522 (Fla. 2006), cert. denied, 127 S.Ct. 665 (2006), shows that if a blank check for dogs is given, there will then be no boundaries for the police use of canines to invade what were once private and safe places. Since considering Fourth Amendment issues traditionally has required determining where to draw a line in a given instance, does this Court want to establish a per se rule defining probable cause in every instance where a the police handler testifies the dog has been trained and certified? Is it reasonable to interpret the Fourth Amendment to mean that the police and their dogs should be permitted to search our

vehicles, persons and homes, because the possibility of possessing drug contraband is more abhorrent than the real loss of privacy and liberty we otherwise enjoy?

While probable cause does not require perfection or proof beyond a reasonable doubt, it does require something more than a handler's testimony that a dog has been generally trained and certified. To prove that the dog's behavior must mean narcotics might be present, the state must show the level and type of training, the dog's performance in training and in the field, the requirements for achieving certification, and the use of commonly acceptable handler methods of directing the dog.

While our state constitution is bound to follow the rulings of the United States Supreme Court regarding Fourth Amendment issues, it is instructive to note that various states, relying on the state constitution, have disregarded the Place and Caballes holding that a dog sniff of a vehicle is not a search, and found that such an intrusion is indeed a search. State v. Carter, 697 N.W.2d 199 (Minn. 2005); Comm. v. Johnston, 530 A.2d 74, 78-79 (Pa. 1987); McGahan v. State, 807 P.2d 506, 510 (Ala. App. 1991)(dog sniff of an outdoor storage shed is a search under the state constitution). In such an instances, at least the police must have a reasonable suspicion before using the police dog. Other factors then always would indicate criminal activity, and the dog's alert alone would not constitution the sole fact providing probable

cause. In jurisdictions such as ours, however, where a dog sniff of a vehicle is not considered a search, if the sole fact for establishing probable cause is to be a dog's behavior, the state must be required to prove the dog's reliability with more evidence of training, certification and actual performance than was shown in this record.

This Court ultimately should follow the tried and true standards set forth in the rules of evidence and the totality of the circumstances test for probable cause. Using these tests in this case supports approving the district court decision below.

ISSUE III.

DID THE DISTRICT COURT PROPERLY REVERSE THE TRIAL COURT, UNDER THE TIPSY COACHMAN DOCTRINE, WHERE THE POLICE UNREASONABLY DELAYED THE TRAFFIC STOP IN ORDER TO PERFORM A CANINE SNIFF OF THE VEHICLE?

Absent reasonable suspicion of criminal activity, a person who has been stopped for a traffic violation may not be detained for a period longer than is necessary to write the traffic citation. Cresswell v. State, 564 So.2d 480 (Fla.1990); Marshall v. State, 864 So.2d 1139 (Fla. 1st DCA 2003); Nulph v. State, 838 So.2d 1244 (Fla. 2d DCA 2003); Eldridge v. State, 817 So.2d 884 (Fla. 5th DCA 2002); Summerall v. State, 777 So.2d 1060 (Fla. 2d DCA 2001); Maxwell v. State,

785 So.2d 1277 (Fla. 5th DCA 2001). Although the police in the present case had no basis for suspecting criminal activity, Mr. Gibson was detained while the police obtained a police dog for an exterior vehicle search. Where the police had no lawful grounds for holding Mr. Gibson for the canine search the police illegally searched the vehicle and obtained the evidence sought to be suppressed. Id. The district court's decision reversing the trial court's denial of the motion to suppress should be affirmed, albeit not on the grounds stated by the Second District.

Under the tipsy coachman doctrine, a reviewing court may affirm the lower court's ruling by agreeing that the result is right, but for a different reason than the lower court used. Dade School School Bd. V. Radio Station WQBA, 731 So.2d 638 (Fla. 1999); Castella v. State, 959 So.2d 1285 (4th DCA 2007). In this case this Court should approve the district court's decision because the police unreasonably detained Respondent in order to conduct a dog sniff of his vehicle

Sgt. Jernigan stopped the vehicle because of dark tinted windows. Inside the vehicle were Mr. Gibson and a woman with their four or five year old daughter. (R86). The officer saw Mr. Gibson move as if he were taking something from his waist and placing it in the back seat area. (R77-78). Jernigan then ordered Mr. Gibson to come back to the police car. (R78). Mr. Gibson went back to the officer and told him he did not have a driver's license, so the officer wrote down Mr. Gibson's name,

date of birth and address before running the information in the computer about five or six minutes after the stop. (R78-82). The police officer asked Mr. Gibson why he was in the area and whether he needed directions and if he knew where he was going. (R81). Mr. Gibson said he was looking for a place to rent, but not in any particular area. (R81). Because Mr. Gibson did not look him in the eye and asked the officer to repeat questions and was shaking, Sgt. Jernigan concluded Mr. Gibson exhibited "abnormal nervous behavior over a general traffic stop. (R80-81). Part of the police questioning of Mr. Gibson involved asking him if he had any firearms or narcotics, why he was so nervous, and what he had been doing inside the car. (R86).

The sergeant then went up to the car where the woman was still seated and spoke to her. She gave him the vehicle registration. (R86-87). The sergeant asked the woman why she was in the area as well, and she stated that they were going to return an item to a store. (R81).

The officer returned to Mr. Gibson and asked him if he could search the car, and at first Mr. Gibson agreed, but then he declined. (R83).

The sergeant then returned to his police vehicle. After running a computer check on Mr. Gibson, Sgt. Jernigan tried to find a canine unit to respond to the stop. (R83). His department did not have a dog available, but he was able to find a canine unit at the Venice Police Department. (R83). By

the time the canine unit had arrived, Sgt. Jernigan had not finished writing the citation for failing to carry a driver's license and the warning for the tinted windows. (R83-84). Officer Freeman arrived to conduct the canine search. At that time Sgt. Jernigan was in the process of issuing the traffic citation and warning. (R90).

Sgt. Jernigan candidly stated that he "felt something else was taking place," and therefore asked to have the canine unit further investigate. Because he did not have any specific grounds for believing criminal activity was occurring, the officer was lawfully required to write the traffic citation and let Mr. Gibson go. Instead of detaining Mr. Gibson long enough to write the traffic citation, the officer spent time talking with Mr. Gibson and the passenger about matters having nothing to do with the traffic citation for not carrying a drivers license. Moreover, according to the officer, he had returned to his police car to run the drivers' license around five or six minutes after the 6:17 p.m. stop, but did not ask for the Venice canine unit to respond until 6:30 p.m. (R82, 109, 113). This means the officer had the necessary information he needed to write the single citation as of 6:23 p.m.(six minutes later he returned to the car to start writing the citations), but had not completed that one citation and a warning by 6:36, thirteen minutes later when the police dog arrived with Officer Freeman. Nothing in the record proves why the officer needed this additional time to

write this citation and a warning. Since Jernigan was hunting down a canine unit and waiting six minutes for the unit's arrival, the only record explanation for the delay in issuing the citation and warning is for the canine unit investigation. This being so, the delay was not lawful, since a person can only be detained for the length of time needed to issue a traffic citation. In this case, however, the delay was lengthened to accommodate a search for a canine unit, and the writing of the citation was put off until that unit could be found. This delay and detention for the purpose of conducting a criminal investigation with a canine unit was not lawfully permitted and resulted in the unlawful seizure of the items from the car. Cresswell v. State, 564 So.2d 480 (Fla.1990); Marshall v. State, 864 So.2d 1139 (Fla. 1st DCA 2003); Nulph v. State, 838 So.2d 1244 (Fla. 2d DCA 2003); Eldridge v. State, 817 So.2d 884 (Fla. 5th DCA 2002); Summerall v. State, 777 So.2d 1060 (Fla. 2d DCA 2001); Maxwell v. State, 785 So.2d 1277 (Fla. 5th DCA 2001). Accordingly, this Court should approve the Second District's opinion below on this ground.

CONCLUSION

Based on the arguments and authorities presented herein, the Respondent respectfully requests that this Court decline to exercise jurisdiction in this case. Should the Court assume jurisdiction in this case, Respondent respectfully requests that this Court affirm the decision of the Second District.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan Shanahan, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2008.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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