IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC08-1871

(1ST DCA 1D06-6497)

CLAYTON HARRIS,

PETITIONER

V.

STATE OF FLORIDA,

RESPONDENT.

****

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEALS
RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Clayton Harris, was the defendant in the trial court and appellant in the First District Court of Appeal. Clayton Harris will be referred to in this brief as Petitioner, Defendant, or by proper name. Respondent, the State of Florida, was the prosecution below and appellee in the First District Court of Appeal. The State will be referred to in this brief as Respondent, the prosecution, or the State.

The record, as conveyed to the First District Court of Appeal, consists of two volumes, the record and the supplemental record. The record consists of both pleadings or filings and transcripts from sentencing and the motion to suppress. Pleadings and filings will be referenced as “R.” followed by any appropriate page number. The sentencing transcript will be referenced to as “S” and the motion transcript will be referenced as “M" followed by any appropriate page number. The supplement record consists of Petitioner’s written motion to suppress and will be referenced as “Supp. R.” followed by any appropriate page number.

"IB" will designate Petitioner's Initial Brief filed in this Court, followed by any appropriate page number.

“IB-1D” will designate Petitioner’s Initial Brief filed in the First District Court of Appeal, and “AB-1D” will designate the State’s Answer Brief filed in the First District Court of Appeal, followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

On June 24, 2006, the Petitioner, Clayton Harris, was pulled over for an expired tag by Officer William Wheetley, a deputy and K9 officer with the Liberty County Sheriff's Office. (M. 2 at 19; Supp. R. at 1). Upon approaching Petitioner's vehicle and advising Petitioner for the reason of the stop, Petitioner stated that he knew that his tag was expired. (M. 2 at 19-20). Petitioner was the driver and owner of the vehicle, a pick-up truck. (M. 2 at 34, 36).

While conducting the stop, Officer Wheetley noticed that Petitioner "was visibly nervous due to the fact that he is shaking and the rapid rise and fall of the chest." (M. 2 at 20; Supp. R. at 1). He also noticed that Petitioner had an open container of beer in the vehicle. Officer Wheetley then asked Petitioner for consent to search his vehicle. Petitioner refused. (M. 2 at 20; Supp. R. at 1).

Officer Wheetley then went to his patrol car and brought out Aldo, a drug-detector dog. Officer Wheetley allowed Aldo to do an open air sniff around the perimeter of Petitioner's vehicle. Aldo alerted positively to the odor of narcotics on Petitioner's driver-side door handle. (M. 2 at 20-21; Supp. R. at 1).

Officer Wheetley then searched Petitioner's vehicle. He started at the driver's side of the vehicle. Underneath the driver's seat, Officer Wheetley discovered a white plastic Walgreen's bag wrapped in a shirt which contained over 200

Psuedoephedrine pills which were loose (no longer in the blister packs). He then went to the passenger's side and found a white plastic bag underneath some clothes that contained eight 1000-count boxes of Publix brand matches, or 8,000 matches total. (M. 2 at 22).

At that point, Officer Wheetley placed Petitioner under arrest for possession of listed chemicals and read Petitioner his Miranda rights. Officer Wheetley then searched the passenger side of the toolbox and found muriatic acid. (M. 2 at 23). Iodine crystals were also found in the bed of Petitioner's truck. (M. 2 at 34). These various chemicals are the listed chemicals in or precursors to methamphetamine. (M. 2 at 23).

Petitioner then explained to Officer Wheetley the location of the different stores where he had purchased each of these chemicals. (M. 2 at 24). Petitioner admitted that he had been cooking methamphetamine ("meth") for about a year and that he had cooked meth about one week ago in Blountstown. Petitioner also admitted that he was addicted to meth and that he could not go for more than a few days without using meth. (M. 2 at 25).

Petitioner was charged by information filed July 5, 2006, with the unlawful possession of chemicals as follows:

> On or about June 24, 2006, [Petitioner] did unlawfully possess chemical Psuedo/Ephedrine knowing or having reasonable cause to believe that the listed chemical will be used to unlawfully manufacture a controlled substance, Methamphetamine, contrary to Section 893.149(1)(A), Florida Statutes.

(R. at 10).

Motion to Suppress

On October 9, 2006, Petitioner filed a motion to suppress evidence alleging that the search of Petitioner's vehicle on June 24, 2006, was illegal, because the arresting officer lacked probable cause. (Supp. R. at 1-11). Petitioner's motion to suppress specifically argued that a "[a] dog sniff only provides probable cause for a search if the dog alerts to an illegal substance **currently inside the vehicle**" and that the facts in this case show that this was a "false alert." (Supp. R. at 1-2)(emphasis added). Petitioner also pointed out a conflict in the law concerning the reliability of a dog's alert and the State's evidentiary burden, stating as follows:

> The State must make a prima facie showing that a canine alert constituted probable cause. There is a conflict between whether the State only has to show that the dog has been certified and trained at some time in the past, or whether the State must show additional evidence that the dog's training is up to date and the dog has the ability to produce results in the field. In State v. Matheson, 870 So. 2d 8 (Fla. 2d DCA 2003), the Court found that past certification alone is insufficient to prove that a particular dog is up to date in his training and able to actually conduct successful drug sniffs in the field. The Fourth and Fifth District courts have found that certification alone is sufficient to make a prima facie case and that whether the dog is up to date and has a good "track record" goes to the credibility of the canine witness but not to the admissibility of the evidence. Coleman v. State, 911 So. 2d 259 (Fla. 5th DCA 2005); State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005). Review of Matheson was denied by the Florida Supreme Court and the United States Supreme Court. Although conflict was certified in Coleman, counsel has been unable to find that it is pending review.

(Supp. R. at 3-4) (citations to attachments omitted).

Hearing on the Motion to Suppress – Evidence of Aldo's Training and Certification

At the hearing on the motion to suppress held October 12, 2006, the defense first presented the testimony of Officer Brian Bateman. (M. at 3). Officer Bateman witnessed a second stop of Petitioner by Officer Wheetley and Aldo in late August or early September of 2006, approximately 4 to 6 weeks before the hearing. (M. at 5-6). Officer Bateman testified that Petitioner was already pulled over at the time he arrived on the scene. Officer Bateman testified that he witnessed Officer Wheetely interview the Petitioner at the window of the vehicle and bring Aldo out to conduct an open air sniff around the perimeter of Petitioner's vehicle. Officer Bateman testified that Officer Wheetely told him that Aldo alerted to the driver's side door. (M. 2 at 9). However, a search of Petitioner's vehicle revealed only an open container of alcohol. (M. 2 at 6).

The trial court asked defense counsel how Officer Bateman's testimony was relevant to the stop on June 24, 2006. (M. at 7). Defense counsel argued that Officer Bateman's testimony went toward the issue of the reliability of the dog. (M. at 7). The State disagreed that Officer Bateman's testimony was relevant but stated that the defense could present what it wanted. (M. at 8).

The State then called Officer William Wheetley. Officer Wheetley testified that he is a K9 officer with the Liberty County Sheriff's Office and that he had been in law enforcement for three years. (M. at 11). He testified that he had undergone a 150 to 160-hour training course with the Dothan Police Department in 2004 with his first dog in which he learned to handle a basic narcotics dog. (M. at 12). He received Aldo in July, 2005. (M. at 12-13).

Regarding Aldo's training, Officer Wheetely testified that Aldo was certified through an organization called "Drug Beat" in 2004 to detect marijuana, methamphetamine, cocaine, heroin, crack cocaine, and ecstasy. (M. at 13). By the time Officer Wheetley received Aldo, Aldo had also already undergone a 120-hour training course with the Apopka Police Department. (M. at 12). The State introduced into evidence Aldo's paper certificates reflecting his certification and training prior to being paired with Officer Wheetley. (M. at 26; see also R. at State's Exhibit following page 43).

Officer Wheetley and Aldo completed a 40-hour training course in narcotics detection with the Dothan Police Department in January and February, 2006. (M. at 13). This paper certificate was also introduced into evidence. (M. at 26; see also R. at State's Exhibit following page 43).

Officer Wheetley testified that he and Aldo do four (4) hours of continual training per week. (M. at 12, 15). Aldo's weekly

training took place either with the Dothan Police Department, a surrounding agency, or with the Marianna Police Department. The training exercises usually occurred in a wrecker yard where approximately ten vehicles are chosen. Six to eight of these vehicles would have "dope" placed into them. The others would be blanks. Officer Wheetely would then walk Aldo around each vehicle to ensure that Aldo "was not alerting or showing an odor response to a vehicle that did not have narcotics." (M. at 15). Aldo would be walked in a "W pattern, up, down, up, down." (M. at 16). Officer Wheetley testified that "[w]hen Aldo gets in the scent cone of the odor of narcotics, . . . there is a couple of different responses the dog will have. He will get excited. He will take a long sniff. His heart rate will accelerate. His feet with [sic.] start pattering. He will – also, the main thing is sit." (M. at 16). Officer Wheetely explained that Aldo is a passive responder. (M. at 16). Aldo is trained with a reward and becomes excited when he detects an odor because a reward is coming next. (M. at 17).

Officer Wheetely kept training records since November, 2005, and explained that the form had changed in January, 2006, to reflect training in houses and open areas as well. (M. at 17). Officer Wheetley described Aldo's performance in training as really good. Aldo would alert on the vehicles containing dope. (M. at 18).

Aldo's training records were admitted into evidence by the State. (R. at State's Exhibit following page 43).

Aldo was used in the field maybe five times per month. Thus, Aldo actually had more training time than field time. (M. at 18).

Officer Wheetley also testified that, as part of his experience and training, he had taken an eight-hour course on methamphetamine through the Florida Department of Law Enforcement (FDLE). He was permitted to testify that the chemicals found in Petitioner's vehicle – pseudoephedrine, matches, and muriatic acid - were the precursors to or listed chemical ingredients in methamphetamine. (M. at 23).

On cross-examination, Officer Wheetley was questioned concerning certification of drug dogs in Florida. Officer Wheetley testified that even though single purpose drug dogs are not required to be certified in Florida, Florida requires that the dogs continue to show proficiency in locating narcotics. Officer Wheetley further testified that, even though it's not required, Aldo is certified through Drug Beat, and Aldo had a certification coming up the following week. (M. at 27-28).

There was some discussion during the hearing concerning the scope of Petitioner's discovery request for Aldo's records; specifically, whether Petitioner's request for performance records meant performance in the field or performance during training. The State only provided training records in response

to Petitioner's motion to compel but offered to provide Petitioner with the records of Aldo's field performance at the hearing as they were on Officer Wheetley's laptop. Defense counsel continued questioning Officer Wheetley about Aldo's field records and did not re-raise this issue. Officer Wheetley explained that he only keeps records of arrests resulting from Aldo's sniff searches and, thus, did not keep a record of the subsequent stop and search of Petitioner in August or September. (M. at 28-31; see also R. at State's Exhibit following page 43).

Further during cross-examination, Officer Wheetely testified that Aldo is trained to show a response to the odor of meth. He testified that Aldo is not specifically trained to alert to the odor of pseudoephedrine, but pseudoephedrine is a chemical in meth. (M. at 33). He also testified that Aldo is not trained specifically to alert to the odor of matches, muriatic acid, or the iodine crystals found in the bed of Petitioner's truck. (M. at 34).

Officer Wheetely testified that when Aldo alerts, it tells him that someone who has touched or smoked narcotics has transferred the odor to the handle. He testified that it is a question for an expert as to how long ago someone may have touched the handle. (M. at 35). Officer Wheetely could not say whether someone other than the driver transferred the odor of narcotics to the door handle. (M. at 36).

In response to questioning on cross as to whether Aldo's alert on June 24 was a "false alert," Officer Wheetley testified that Petitioner is the owner of the vehicle; the precursors to meth were found in Petitioner's truck; and Petitioner admitted to not being able to go for more than two days without using meth. Thus, Officer Wheetely concluded that all of this placed the odor on the door handle. (M. at 36). Officer Wheetley further testified that "[Aldo] is trained to alert to the odor of narcotics, which he alerted to the odor of narcotics on the door handle." (M. at 37).[1]

The State argued Petitioner's motion to suppress should be denied, because the search of Petitioner's vehicle was conducted during a lawful traffic stop and pursuant to the alert of well-trained drug-detector dog:

> And then we have the additional evidence of a trained and certified canine dog that we have also shown, not only that, but that he has a track history of successful training as contained in the logs, which was provided to the Court for months and months worth of training in various situations.
>
> And I would submit that the officer, then, based upon the dog's reaction, had probable cause.

(M. at 40-41).

Defense counsel told the trial court that the issue is the reliability of the dog and argued that Aldo's alert to the door handle on June 24, 2006, was a "false alert." (M. at 7, 47).

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[1] The Petitioner began to testify in his own behalf that Aldo did not respond at all on June 24, 2006, but that testimony was ultimately stricken. (Tr. 2 at 37-39).

She argued that under Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), when the alert is a false alert or an old alert, it does not justify probable cause. (M. at 43).

The prosecutor responded to the characterization of Aldo's alert as false as follows:

> Just for the record, Judge, a false alert would show up in his training history when you have a vehicle or a place in which we know there are no drugs or drugs have not been found and the dog falsely alerts. That's not shown in any of those records. There is no false alert. This is an alert on the residual chemicals of an individual that used methamphetamine by his own admission on a regular basis. And so there is – the idea of using the term "false alert" is incorrect.

(M. at 47).

The trial court denied Petitioner's motion to suppress, finding that probable cause supported the search of Petitioner's vehicle and, thus, the evidence seized was admissible. (M. at 47). Petitioner then entered a straight up plea of no contest which the parties agreed was dispositive, and Petitioner reserved his right to appeal. (M. at 48). Sentencing was deferred. (M. at 53).

At sentencing on November 9, 2006, Petitioner requested that he be placed in a treatment facility for his very serious drug addiction. (S. at 4-6). Ultimately, the trial court found that the drug offender probation previously imposed had not been effective and sentenced Petitioner to 24 months incarceration with the Department of Corrections and recommended that he be placed in an institution where he can receive treatment for

substance abuse. (S. at 10). The court further sentenced Petitioner to 5 years probation, the first 3 years of which would be drug offender probation, and gave him credit for 23 days served. (S. at 10-11).

Direct Appeal

A direct appeal was filed in the First District Court of Appeal on December 5, 2006. (R. at 33). This appeal was designated as Harris v. State, 1D06-6497.

On appeal, Petitioner raised a single issue and framed it as follows: "[t]he only issue before this Court is whether a dog alert to a residual odor on the driver's door handle, which was left by some unknown person at some unknown time, constituted probable cause to search the vehicle." (1D-I.B. at 14). Petitioner argued that "[t]here was no probable cause for a search, because in this case it is a certainty that the drug dog alerted to a residual/dead scent and not to any contraband which was present in the vehicle." (1D-I.B. at 14). Petitioner's argument relied upon the Second District Court of Appeal's decision in Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), which held that "the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert." Thus, Petitioner urged the First District to follow Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), and hold that Officer Wheetley did not have probable cause to search Petitioner's vehicle,

because the State did not affirmatively establish that Aldo was reliable, i.e., that Aldo could tell the difference between a residual and live scent, and that Aldo's alert could be reasonably relied upon by Officer Wheetely. (See generally 1D-I.B.).

The State restated the issue on appeal as follows:

> WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS BASED ON THE FINDING THAT THE ALERT BY A TRAINED AND CERTIFIED DRUG DOG WAS SUFFICIENTLY RELIABLE TO GIVE THE OFFICER PROBABLE CAUSE TO SEARCH PETITIONER'S VEHICLE (Restated).

(1D-A.B. at 12). In deciding the issue, the State advised the First District Court of Appeal that it must determine whether it will align itself with the Second District's decision in Matheson or with the Fourth and Fifth District's decisions Laveroni and Coleman, respectively. (1D-A.B. at 13). The State urged the First District to follow cases out of the Fourth and Fifth District, State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005), and State v. Coleman, 911 So. 3d 259 (Fla. 5th DCA 2005), which hold that, under Fourth Amendment precedent, all the State need establish is that a drug-detector dog is well-trained and a rebuttable presumption arises that the dog is reliable and that the officer may reasonably rely upon the dog's alert for probable cause to search a vehicle during a lawful traffic stop. The defendant may then raise the issue of the dog's reliability and challenge it or attempt to rebut this presumption in order

to show that the officer's reliance upon the dog was not reasonable. (See, e.g., ID-A.B. at 42).

The State argued that Matheson should be rejected, primarily because it runs afoul of binding Fourth Amendment precedent and jurisprudential principles by requiring certainty rather than probability. For this reason, as the State pointed out, Matheson has been universally rejected by every court in the country which has considered it. (1D-A.B. at 14, 24-42).

While Harris was pending before the First District, this Court accepted jurisdiction to review the Second District's decision in Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), in which the Second District again followed Matheson and certified conflict with Laveroni and Coleman. See Gibson v. State, 973 So. 2d 1123 (Fla. Jan 04, 2008).

Oral argument in Gibson was held June 10, 2008. See docket, SC07-2158. During that argument, parties were questioned as to whether a dog alert is like a confidential informant and about the need for field performance records and who, as a practical matter, must provide these records. This Court also indicated that it should, perhaps, wait for a case with a full record. See Tr. of June 10, 2008, oral argument in Gibson at http://wfsu.org/gavel2gavel/transcript/07-2158.html.

On July 3, 2008, this Court discharged Gibson stating that it had chosen not to exercise its jurisdiction. State v. Gibson, 985 So. 2d 1088 (Fla. 2008).

On September 4, 2008, the First District per curiam affirmed with citation in Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008), which cites and follows Laveroni and Coleman but includes a contra citation to the Second District's decision in Gibson, noting that Gibson had followed Matheson.

Review Proceedings in this Court

On September 29, 2008, Petitioner filed his notice invoking discretionary review in this Court, and on October 2, 2008, Petitioner filed his initial jurisdictional brief. On October 3, 2008, this Court dismissed the petition for discretionary review, noting that this Court did not have jurisdiction. Petitioner filed a motion for reinstatement on October 10, 2008, arguing that because Harris contains a contra citation, this provides a basis for jurisdiction under Florida Star v. B.F.J., 530 So. 2d 286, 288 n.3 (Fla. 1988). This Court reinstated the petition for review on October 17, 2008.

The State responded in its amended jurisdictional answer brief that because Harris merely cites to Gibson with a parenthetical that Gibson followed Matheson and does not explicitly establish the point of law or holding in Gibson with which it disagrees, this Court does not have jurisdiction under Florida Star. In the alternative, the State argued that, even if this Court had jurisdiction, because Harris cites to precisely the same conflict cases as Gibson but does so without an opinion, the State can offer no more compelling reason why this Court ought

to exercise its discretion and take jurisdiction to resolve the conflict in Harris than was already presented to this Court in Gibson.

On January 9, 2009, this Court accepted jurisdiction and ordered briefing in this case but deferred its decision on whether to grant oral argument.

SUMMARY OF ARGUMENT

ISSUE I. The State reframes the conflict issue presented to this Court for resolution as follows: whether an alert by a well-trained, certified drug dog is sufficiently reliable under the Fourth Amendment to give an officer probable cause to conduct a warrantless search of a vehicle during a lawful traffic stop, such that, the State's showing at a hearing on a motion to suppress that the dog is well-trained and/or certified raises a rebuttable presumption that the dog is reliable.

The Second District in Matheson answered this question in the negative and held that a dog alert only gives an officer reasonable suspicion since there is a possibility that the dog may be alerting to a residual odor, and the State must affirmatively establish that the dog is not only trained but that it is reliable based on several enumerated factors. Matheson v. State, 870 So. 2d 8, 14-15 (Fla. 2d DCA 2003), rev. dismissed, 896 So. 2d 748 (Fla. 2005), cert. denied, 546 U.S. 998 (2005). Matheson requires that a "well-trained dog" be so

vigorously trained that it can differentiate between residual odors and live odors of narcotics. See Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007)(following Matheson).

The Fourth and Fifth Districts in Laveroni and Coleman certified conflict with the Second District concerning the evidentiary burden the State was required to carry at the hearing on the motion to suppress in establishing that the dog's alert was reliable. The Fourth and Fifth Districts held that the State must establish that the dog is trained to detect drugs, and upon making this showing, a presumption that the dog is reliable arises which the defense may rebut by putting on evidence of the dog's track records. State v. Laveroni, 910 So. 2d 333, 335-36 (Fla. 4th DCA 2005); State v. Coleman, 911 So. 2d 259, 260-61 (Fla. 5th DCA 2005). The First District in Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008), cited these cases with approval with a contra citation to Gibson and Matheson.

There are two questions which must be answered in resolving this conflict: first, what does it mean for a drug-dog to be "reliable" under the Fourth Amendment. The Fourth Amendment standard of reliability is that the dog is so **well-trained** that it can detect the **odor** of narcotics in or on a vehicle during a lawful traffic stop and tell the officer that drugs are **probably** in the vehicle. By holding that a reliable drug-detector dog

must be able to tell the difference between a residual odor of drugs and the live scent of drugs, the Second District in Matheson has required that that dog be so well-trained that it is able to tell the officer that drugs are **certainly** within the vehicle and, thereby, turned a dog's sniff into a search. Because Matheson requires certainty that drugs will be found in the vehicle, Matheson's central rationale runs afoul of binding Fourth Amendment precedent and jurisprudence. Thus, the Second District's decision in Matheson has strayed far from the Fourth Amendment standard of reliability, and Matheson and Gibson must be disapproved.

The second question concerns the practical application of Matheson's central rationale; that is, in a warrantless search of a vehicle pursuant to a dog's alert during a lawful traffic stop, which party has the burden of raising the issue of whether a dog is reliable or "well-trained" at a hearing on a motion to suppress. In other words, must the State put on evidence to affirmatively establish the drug dog's reliability in every case as a condition precedent to admitting evidence seized during a search based on the dog's alert; or, where the State alleges that a dog is certified and/or well-trained, is there a rebuttable presumption that the dog is reliable which the defense may attack with the dog's "track record."

Under the Fourth Amendment standard of reliability, the State's allegation in each warrantless search case that the drug-detector dog is well-trained and/or certified is a sufficient predicate to establish the reliability of the dog. Accordingly, a rebuttable presumption arises that the dog is reliable and that the officer's reliance on the dog's alert during a lawful traffic stop was reasonable.

Further, under the Fourth Amendment, it is well-settled that it is the defendant who has the burden to raise issues at a hearing on a motion to suppress. Thus, the defendant may challenge whether the dog is reliable or "well-trained" and may use evidence of the dog's training records to impeach the dog's credibility. When the defendant raises this as an issue, the State must provide the defendant with these records.

This approach is in line with what is required to be alleged for purposes of obtaining a warrant, and this approach is proportionate with Florida's treatment of other investigatory tools in the Fourth Amendment context. [2] Accordingly, the State

[2] Petitioner raises a new argument before this Court and argues that a dog sniff is like a breathalyzer. Because a comparison between a dog sniff and a breathalyzer effectively demonstrates some of the problems with the Second District's holding in Matheson, the State will address this argument. The State will also address a question raised during the oral argument in Gibson as well as by Petitioner, as to whether the reliability of a dog is like that of a confidential informant.

respectfully requests that this Court approve Laveroni and Coleman and disapprove Matheson and Gibson.

Issue II: Although Petitioner raised only a single issue before the First District Court of Appeal, the State acknowledges that it addressed the second issue raised by Petitioner as part of its argument to the First District below. (A.B. at 42-46).

The record shows that the State established that Aldo was a well-trained drug dog and that Petitioner failed to rebut the presumption that Aldo, a well-trained and certified drug dog, was sufficiently reliable to establish probable cause.

ARGUMENT
ISSUE I

WHETHER AN ALERT BY A WELL-TRAINED, CERTIFIED DRUG DOG IS SUFFICIENTLY RELIABLE UNDER THE FOURTH AMENDMENT TO GIVE AN OFFICER PROBABLE CAUSE TO CONDUCT A WARRANTLESS VEHICLE SEARCH DURING A LAWFUL TRAFFIC STOP, SUCH THAT, THE STATE'S SHOWING AT HEARING THAT THE DOG IS CERTIFIED AND/OR WELL-TRAINED RAISES A REBUTTABLE PRESUMPTION THAT THE DOG IS RELIABLE (RESTATED).

A. JURISDICTION

This Court has jurisdiction to resolve a direct conflict of decisions among the district courts. The conflict issue, as restated by the State above, is whether an alert by a well-trained drug detector dog is sufficiently reliable under the Fourth Amendment to give an officer probable cause to conduct a warrantless search of a vehicle during a lawful traffic stop, such that, at a hearing on a motion to suppress, the State's

showing that the dog is certified and/or well-trained gives rise to the rebuttable presumption that the dog is reliable.

The Second District answered this question in the negative and held that an alert by a trained drug-detector dog only gives an officer reasonable suspicion since there is a possibility that the dog may be alerting to a residual odor rather than a live scent, and the State must affirmatively establish that the dog is not only certified and trained but that the dog is reliable based on several enumerated factors, including the dog's "track record." Matheson v. State, 870 So. 2d 8, 14-15 (Fla. 2d DCA 2003), rev. dismissed, 896 So. 2d 748 (Fla. 2005), cert. denied, 546 U.S. 998 (2005); see also Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007)(following Matheson).

The Fourth and Fifth Districts have certified conflict with the Second District concerning the evidentiary burden the State was required to carry at the hearing on the motion to suppress in establishing that the dog's alert was reliable. The Fourth and Fifth Districts have held that, under the Fourth Amendment, all the State must establish is that the dog is certified and trained to detect drugs, and upon making this showing, a presumption that the dog is reliable arises which the defense may rebut by putting on evidence of the dog's field performance records or expert testimony. State v. Laveroni, 910 So. 2d 333,

335-36 (Fla. 4th DCA 2005); State v. Coleman, 911 So. 2d 259, 260-61 (Fla. 5th DCA 2005). Under Laveroni and Coleman, whether a dog has alerted to a residual odor is not dispositive.

Although the Fourth District states that the State must show that the dog is trained and certified, the language is modified to "certified and/or well-trained" here for two reasons. First, Florida does not require that all drug dogs be certified. Houston v. State, 925 So. 2d 404, 409 (Fla. 5th DCA 2006)("There is no requirement that a dog be certified to detect narcotics."); Fla. Admin. Code R. 11B-27.013(a)(indicating that dogs used for tracking or specific detection are exempt from the Canine Team Certification). Second, the Fourth Amendment requires that a drug dog be "well-trained." See United States v. Place, 462 U.S. 696, 706-07 (1983)("A 'canine sniff' by a well-trained narcotics detection dog . . .did not constitute a 'search' within the meaning of the Fourth Amendment.").

In this case, there is no dispute that the vehicle stops of Petitioner on June 24, 2006, and in August or September, 2006, were lawful. Further, there is no dispute that Aldo is trained to alert to the odor of methamphetamine and that Aldo alerted to the residual, transferred odor of methamphetamine on the door handle of Petitioner's vehicle on June 24, 2006, and at the subsequent stop in August or September, 2006.

Rather, the issue is whether Aldo's alert was reliable since the June 24, 2006, search based on Aldo's alert did not recover drugs but, rather, resulted in the recovery of contraband that Aldo was not specifically trained to detect; that is, the listed chemicals in methamphetamine – 200 pseudoephedrine pills, 8,000 matches, and muriatic acid. The subsequent stop and search of Petitioner's vehicle in August or September pursuant to Aldo's alert also yielded no drugs. The First District resolved this case by citing Laveroni and Coleman with approval and contra citing Gibson and Matheson with disapproval. Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008).

B. DISCRETION

Resolution of the conflict issue in this case may be no more compelling than resolution in Gibson. Like Gibson, the record in is case does not include Aldo's field performance records, nor does it include expert testimony. See Tr. of June 10, 2008, oral argument in Gibson at http://wfsu.org/gavel2gavel/transcript/07-2158.html. However, an issue in this case was whether "track records," as stated in Matheson, meant the dog's training records, which were provided by the State, or field performance records, which were not initially provided by the State and which the defense declined to allow the State to

provide at the hearing on the motion to suppress. (M. at 28-31). This Court may agree with the State that, ultimately, under the Fourth Amendment standard of reliability, only training records are truly relevant in demonstrating a dog's "track record" or "performance record." Because the State submits that training records are the only truly relevant records, the record in this case is complete.

Thus, there are two questions which must be answered in resolving this conflict. The first question is what does it mean for a drug-dog to be "reliable" under the Fourth Amendment. The second concerns the practical application of this answer: that is, which party has the burden of raising the issue of whether a dog is reliable or "well-trained" at a hearing on a motion to suppress. As explained below, the State respectfully requests that this Court answer these questions in accordance with the approach of Laveroni and Coleman and disapprove Matheson and Gibson.

C. STANDARD OF REVIEW

A trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. Thus, appellate courts use a "two-step approach." Hilton v. State, 961 So.2d 284, 293 (Fla. 2007). The trial court's *factual findings* are reviewed for whether competent, substantial evidence supports

such findings, and the application of the *law* to the facts is reviewed de novo. Id.

A trial court's ruling on a motion to suppress is clothed with a presumption of correctness on appeal, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. Id. at 292-93; Connor v. State, 803 So. 2d 598 (Fla. 2001); Johnson v. State, 608 So. 2d 4 (Fla. 1992); Walker v. State, 771 So. 2d 573 (Fla. 1st DCA 2000); State v. Gandy, 766 So. 2d 1234 (Fla. 1st DCA 2000). An appellate court will give great deference to a trial court's ruling on a motion to suppress. Johnson v. State, 438 So. 2d 774 (Fla. 1983); Sommer v. State, 465 So. 2d 1339 (Fla. 5th DCA 1985)(appellate court should not overturn order denying motion to suppress evidence if any legal basis to sustain the trial court exists). It is the lower court's decision, not its reasoning, that is presumed correct, and on appeal the decision will be affirmed if there is any basis in the record for doing so. Caso v. State, 524 So. 2d 422 (Fla. 1988).

"The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures." Hilton, 961 So. 2d at 293. In evaluating search and seizure issues, applicable United States Supreme Court Fourth Amendment

precedent controls. See Holland v. State, 696 So.2d 757, 759 (Fla. 1997); Art. I, § 12, Fla. Const.

D. MERITS

1. Under the Fourth Amendment, Reliability Means that the Dog is So Well-Trained to the Odor of Narcotics that his Alert Means that there are Probably Drugs in the Vehicle.

The Fourth Amendment standard of reliability is that the dog is so **well-trained** that it can detect the **odor** of narcotics in or on a vehicle during a lawful traffic stop and tell the officer that drugs are **probably** in the vehicle.

A warrantless search of a vehicle is permitted if there is probable cause to believe that the vehicle contains contraband. See Wyoming v. Houghton, 526 U.S. 295, 300 (1999); United States v. Ross, 456 U.S. 798, 799 (1982); Carroll v. United States, 267 U.S. 132, 155-56 (1925). Generally, the automobile exception to the warrant requirement is premised upon the exigencies associated with the mobility of a vehicle, Carroll, 267 U.S. at 153, and the diminished expectation of privacy with regard to a vehicle. California v. Carney, 471 U.S. 386, 390-93 (1985).

Probable cause means "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983); see United States v. Sokolow, 490 U.S. 1, 7 (1989)(emphasis added). Probable cause is not the same standard as beyond a reasonable doubt, and

"the facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based." Williams v. State, 731 So. 2d 48, 50 (Fla. 2d DCA 1999)(quoting State v. Heape, 369 So. 2d 386, 389 (Fla. 2d DCA 1979)). "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). Courts are required to apply a "totality of circumstances" analysis for determining whether probable cause existed as adopted in Gates.

Probable cause can be established by the alert of a well-trained drug dog. As the First District recognized in Cardwell v. State, 482 So. 2d 512 (Fla. 1st DCA 1986), "[t]he Supreme Court has said that the use of sniff dogs is **not a constitutionally prohibited search** under the Fourth Amendment and that a sniff dog's 'alert' can constitute probable cause to conduct a search." Id. at 515 (emphasis added) (citing United States v. Place, 462 U.S. 696 (1983)). See also Illinois v. Caballes, 543 U.S. 405 (2005)(describing "a canine sniff by a well-trained narcotics-detection dog as 'sui generis' because it 'discloses only the presence or absence of narcotics, a

contraband item.'".). "Once probable cause exists to search a motor vehicle, no warrant need be obtained prior to the search." Id. (citing United States v. Ross, 456 U.S. 798 (1982)).

"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." Id.; see also Holden v. State, 877 So. 2d 800, 802 (Fla. 5th DCA 2004)("A sniff dog's 'alert' can constitute probable cause to conduct a search. Once probable cause existed to search the vehicle, no warrant was needed to authorize the search. 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.")(quoting State v. Taswell, 560 So. 2d 257 (Fla. 3d DCA 1990)), rev. denied, 614 So. 2d 503 (Fla. 1993); Eldridge v. State, 817 So. 2d 884, 887 (Fla. 5th DCA 2002)(same); see also Flowers v. State, 755 So. 2d 708 (Fla. 4th DCA 1999); Saturnino-Boudet v. State, 682 So. 2d 188 (Fla. 3d DCA 1996), rev. dism., 689 So. 2d 1071 (Fla. 1997); Rogers v. State, 586 So. 2d 1148 (Fla. 2d DCA 1991).

A vehicle owner has no reasonable expectation of privacy in keeping illegal contraband in his vehicle, Caballes, 543 U.S. at 408-09, nor does a vehicle owner have a reasonable expectation of privacy in the odors emanating from his vehicle. State v.

Griffin, 949 So. 2d 309, 311 (Fla. 1st DCA 2007)(citing Hearn v. Bd. Of Pub. Educ., 191 F.3d 1329, 1332 (11th Cir. 1999).

By holding that a reliable drug-detector dog must be able to tell the difference between a residual odor of drugs and the live scent of drugs, the Second District in Matheson has required that that dog be so well-trained that it is able to tell the officer that drugs are **certainly** within the vehicle. Matheson has defined the meaning of "well-trained" so strictly that, in the Second District, an officer can only reasonably rely on a drug-detector dog's alert if the dog is so vigorously trained that it can differentiate between live and residual odors and tell the officer that drugs are **certainly** in the vehicle. Matheson goes even further to hold that, unless the dog can tell for a certainty that drugs are in the vehicle, the officer only has a reasonable suspicion based on the dog's alert and not probable cause that drugs are in the vehicle.

Because Matheson requires certainty that drugs will be found in the vehicle, Matheson's central rationale runs afoul of binding Fourth Amendment precedent and jurisprudence. Matheson runs afoul of binding United States Supreme Court precedent in Caballes,[3] which recognizes that an alert by a well-trained drug

[3] In Caballes, a majority of the United State's Supreme Court apparently rejected the arguments relied upon by the Second

dog gives an officer **probable cause** to search. By failing to follow Caballes, Matheson also runs afoul of article I, section 12 of the Florida Constitution, which provides that applicable United States Supreme Court Fourth Amendment precedent controls the analysis of search and seizure issues in Florida.

Matheson also runs afoul of Place and other Fourth Amendment jurisprudence, because it essentially saddles the State with the burden of establishing beyond a reasonable doubt that the dog's sniff was **certain** to recover contraband in the vehicle. However, as recognized in Place, a dog's alert is only meant to convey limited information to the officer – yes or no as to the

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District in Matheson, in part because it rejected the argument of the dissenting opinions by Justices Ginsberg and Souter which rely on much of the same reasoning relied upon in Matheson concerning the possibility that a dog may be detecting a residual odor and, thus, may not be reliable enough to establish probable cause. In addition, the majority considered and rejected similar arguments:

> Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. **Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information**, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

Id. (emphasis added).

odor of drugs. The dog's alert does not tell the officer that drugs are certainly in the car, nor can it, which is why a dog's alert is **NOT a search** under Place. A dog's alert only tells the officer that drugs are **probably** in the car. Matheson's result-driven analysis, which requires a dog's sniff to tell the officer that drugs are certainly in the vehicle, essentially transforms the dog's sniff into a search, a conclusion which is contrary to the binding holding in Place.

The courts which have expressly rejected Matheson have also done so on the basis that Matheson's reasoning concerning residual odors is overly-technical and requires certainty, a showing considerably greater than probable cause. See State v. Nguyen, 811 N.E. 2d 1180, 1190 (Ohio App. 2004); Maryland v. Cabral, 859 A.2d 285 (Md. App. 2004); State v. Yeoumans, 172 P.3d 1146 (Idaho App. 2007); Fitzgerald v. State, 837 A.2d 989, 1011, n.1 (Md. App. 2003). But see State v. England, 19 S.W.3d 762, 764 (Tenn. 2000)(holding that a trained drug dog is not per se reliable but that reliability must be proven under the totality of the circumstances). In State v. Griffin, 949 So. 2d 29 309, 311-13 (Fla. 1st DCA 2007), although considering a different Fourth Amendment issue, the First District thoroughly discussed and criticized the Second District's certainty

requirement and rationale concerning residual odors and noted that the Second District faults a dog for being too reliable:

> In both Cady and Bryant, the Second District was concerned that a defendant should not be subjected to a search if it is possible that the narcotics odor is residual and does not necessarily belong to the defendant. In our view, however, that possibility does not detract from the possibility that the car or the passengers possess contraband. Quite the contrary; as one court has noted, **the power of a well-trained narcotics-detection dog to alert the residue of contraband only increases the possibility that the car contains contraband**. State v. Cabral, 159 Md. App. 354, 859 A.2d 285, 300 (2004) (stating that the fact that a trained dog is capable of detecting odors up to 72 hours after contraband is present in the vehicle only strengthens the probable cause finding due to the dog's superior sense of smell); accord U.S. v. Johnson, 660 F.2d 21, 23 (2d Cir.1981) (**noting the fact that a dog can alert to residual odors "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."**). Here, the fact that the dog alert may have been in response to contraband no longer present in the car does not mean that law enforcement failed to rely on a reasonable probability that contraband was present on Respondent's person or in her car.

Id. at 311-13 (emphasis added).

In sum, under binding Fourth Amendment precedent and jurisprudence, an officer's reliance on a drug-detector dog is reasonable if the dog is so well-trained that it can tell the officer that drugs are **probably**, not certainly, in the vehicle. By requiring that a dog be able to tell the officer that drugs are certainly in the vehicle and by holding that if those drugs are not found then the officer only had a reasonable suspicion

rather than probable cause, Matheson turns the totality of the circumstances requirement of the Fourth Amendment on its ear and makes the result of the search dispositive. As a result, Matheson runs afoul of both binding Fourth Amendment precedent and jurisprudence.

2. Under the Fourth Amendment Standard of Reliability, the State's Allegation in each Warrantless Search Case that the Drug-Detector Dog is Well-trained and/or Certified is a Sufficient Predicate to Establish a Rebuttable Presumption of the Dog's Reliability.

As a practical matter, Matheson's overly strict requirement that a drug-detector dog must be able to differentiate between residual and live odors led the Matheson court to impose an overly strict reliability requirement on the State to present evidence of the following enumerated factors as a condition precedent to finding the dog reliable:

> the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; the "track record" of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has furnished).

870 So. 2d at 14-15 (quoting Max A. Hansen, *United States v. Solis: Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 San Diego L. Rev. 410, 417 (1976); accord State v. Foster, 390 So. 2d 469, 470 (Fla. 3d DCA 1980)).

However, under the Fourth Amendment standard of reliability, the State's allegation in each warrantless search case that the drug-detector dog is well-trained and/or certified is a sufficient predicate to establish the reliability of the dog. Accordingly, a rebuttable presumption arises that the dog is reliable and that the officer's reliance on the dog's alert during a lawful traffic stop was reasonable.

Further, under the Fourth Amendment, it is well-settled that it is the defendant who has the burden to raise issues at a hearing on a motion to suppress. It is well-settled that where a motion to suppress an illegal search is at issue, the burden is on the moving party to make an initial showing that the search was invalid and only when that showing is made does the burden shift to the state to prove its search is valid. Black v. State, 383 So. 2d 295 (Fla. 1st DCA 1980). Thus, "[t]he burden of persuasion is properly and permanently placed upon the shoulders of the moving party [in a motion to suppress]. When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case." Rogers v. United States, 330 F.2d 535, 542-43 (5th Cir. 1964)(prior to creation of 11th Circuit, Florida under the Fifth at this time)(citing Nardone v. United States, 308 U.S. 338 (1939))(other citations omitted). "In the areas of coerced

confessions and illegal searches and seizures this rule is reinforced by the usual presumption of proper police conduct." Id. (citing 1 Wharton's Criminal Evidence 238 (1955); 22A C.J.S. Criminal Law 589(1), p. 355).

"The moving party must also bear the burden of producing evidence." Id. "It is true, however, that in asserting an illegal arrest the defendant must satisfy this burden by showing that the arrest was made without a warrant." Id. "[T]he prosecutor should be forced to come forward with evidence of probable cause in the absence of a warrant." Id. (citations omitted). "The evidence comprising probable cause is particularly within the knowledge and control of the arresting agencies." Id.

Thus, the defendant may challenge whether the dog is reliable or "well-trained" and may use evidence of the dog's training records to impeach the dog's credibility. When the defendant raises this as an issue, the State must provide the defendant with these records. According to Officer Wheetley, the State is required to maintain a dog's training records and can produce these records.

As noted by the Fourth District in Laveroni, the foregoing is the approach of majority of state and federal courts, including the Eleventh Circuit, which "held that training and

certification of a dog, without more, is sufficient proof of the reliability of the dog in order to make a prima facie showing of probable cause." Id. at 335-36.[4] As explained in Laveroni,

> 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. . . .
>
> Although we do not agree with the holding of Matheson, Judge Northcutt's opinion in Matheson does persuade us that, because these dogs are not always correct, their past performance records are relevant. See also United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir.1997) (describing a dog that has a 71% accuracy rate); United States v. Scarborough, 128 F.3d 1373, 1378, n. 3 (10th Cir.1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal services and 8% of the time over its entire career); United States v. Limares, 269 F.3d 794, 797 (7th Cir.2001) (accepting as reliable a dog that gave false positives between 7 and 38% of the time); United States v. $242,484.00, 351 F.3d 499, 511 (11th Cir.2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value").

Id. at 335. Specifically, the Fourth District relied on the Sixth Circuit's reasoning in Diaz, as follows:

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[4] Citing United States v. Sentovich, 677 F.2d 834 (11th Cir.1982) (evidence dog trained in drug detection enough to establish reliability); United States v. Robinson, 390 F.3d 853 (6th Cir.2004) (positive indication by dog certified as drug detection canine establishes probable cause, all other evidence goes to credibility); United States v. Souza, 223 F.3d 1197 (10th Cir.2000) (certified narcotics dog's alert to box which is sufficient for probable cause); United States v. Williams, 69 F.3d 27 (5th Cir.1995) (dog alert to luggage, without more, gives probable cause for arrest); United States v. Diaz, 25 F.3d 392, 394 (6th Cir.1994)

In United States v. Diaz, 25 F.3d 392, 394 (6th Cir. 1994), the court held that training and certification was sufficient but that evidence of the reliability of the dog's performance was admissible, explaining:

> When the evidence presented, whether testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog. Lack of additional evidence, such as documentation of the exact course of training, similarly would affect the dog's reliability. As with the admissibility of evidence generally, the admissibility of evidence regarding a dog's training and reliability is committed to the trial court's sound discretion.

Id.

Warrant Context. This approach is also consistent with the approach in the search warrant context, where the State's allegation that a drug dog is trained is a sufficient predicate upon which to establish probable cause. As stated United States v. Olivera-Mendez, 484 F.3d 505, 512 (8th Cir. 2007):

> We have held that to establish a dog's reliability for purposes of a search warrant application, **"the affidavit need only state the dog has been trained and certified to detect drugs," and "a detailed account of the dog's track record or education" is unnecessary**. Sundby, 186 F.3d at 876 (internal citations omitted). **The standard is no more demanding where police search an automobile based on probable cause without a warrant.** It is undisputed that Ajax was trained and certified in drug detection, (R. Doc. 101, at 7-9), and Ajax's trainer testified that Ajax "certainly doesn't have an issue with false indications." (H. Tr. at 419, 460). Based on this record, the district court did not clearly err in finding that Ajax was reliable, and police had probable cause to search the car after he alerted.

Id. (emphasis added).[5] Florida courts have generally held that the dog's training is a sufficient predicate for a search warrant as well. See Houston v. State, 925 So. 2d 404, 409 (Fla. 5th DCA 2006) ("Characterizing a dog as properly trained, as was done in this case, is a sufficient predicate upon which to issue the warrant.") (citing Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981)(other citations omitted).

To clarify, the only relevant past performance records would be the dog's training records, because the dog's training is the only controlled environment in which a dog's alerts can be verified. If the dog's training records show that the dog has falsely alerted in a controlled environment to a car that did not contain contraband, the defense is entitled to impeach the dog's creditability with that information. Otherwise, the fact

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[5] See also United States v. Berry, 90 F.3d 148, 153 (6th Cir. 1996) ("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.")(citing United States v. Daniel, 982 F.2d 146, 151 n. 7 (5th Cir.1993) with parenthetical stating "rejecting defendant's argument that an affidavit must show how reliable a drug-detecting dog has been in the past in order to establish probable cause"; and United States v. Venema, 563 F.2d 1003, 1007 (10th Cir.1977) with parenthetic stating ". . . that an affidavit in support of a search warrant need not describe the drug-detecting dog's educational background and general qualifications with specificity to establish probable cause").

that drugs are not found in a vehicle in the field does not render a dog's alert false. Where a dog consistently and correctly alerts to the odor of narcotics in training, there is **no reason for the officer to doubt that the dog** is alerting to the odor of narcotics in the field. Under these circumstances, the alert should be characterized as unverified, not false. A false alert, on the other hand, is one in which the dog is alerting to a vehicle in which there never were any drugs. A false alert should show up in the dog's **training records**.

The approach of the Fourth and Fifth Districts, as well as the majority of State and Federal Courts, is also proportionate with Florida's treatment of other investigatory tools in the Fourth Amendment context. The questions of reliability and presumptive credibility as to a particular investigatory tool turns on several interrelated factors: the level of intrusiveness in utilizing that tool; the quality of information yielded; the quality of evidence yielded; the level of police control; the inherent trustworthiness of that tool, and the context. A comparison of a dog sniff to a breathalyzer, as well as to a confidential informant and a sniff by a human officer based on these factors demonstrates that Matheson's reliability and presumptive credibility requirement for a dog sniff is overly

strict and is not proportionate to the requirements of the Fourth Amendment and of Florida law.

Breathalyzer. A breathalyzer is highly intrusive. The United State Supreme Court has held that the use of a breathalyzer is a **search** under the Fourth Amendment, because it "infringes an expectation of privacy that society is prepared to recognize as reasonable." Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 616-17 (1989), ("[A] breathalyzer test, which generally requires the production of ... 'deep lung' breath for chemical analysis ... implicates similar concerns about bodily integrity and, like the blood-alcohol test ... should also be deemed a search."); Blore v. Fierro, 636 So. 2d 1329, 1331 (Fla. 1994)("In accordance with Skinner, we find that a breathalyzer test is a search.").

A breathalyzer is controlled by police. It is more than an investigative tool because of the quality of the information it conveys. A breathalyzer tells police information about the contents of the human body: whether that person is impaired beyond the legal limit. From an evidentiary perspective, the quality of evidence yielded by a breathalyzer can be conclusive to establish that a person is impaired beyond the legal limit and, thus, guilty of a crime. For this reason, the admissibility requirement of a breathalyzer is necessarily

heightened. State v. Bender, 382 So. 2d 697, 699-700 (Fla. 1980) ("results of blood alcohol tests are admissible into evidence without compliance with the administrative rules if the traditional predicate is laid which establishes the reliability of the test, the qualifications of the operator, and the meaning of the test results by expert testimony."). The only meaningful challenge a defendant can make to the results of a breathalyzer itself is that it is not reliable or not properly calibrated. Otherwise, if a breathalyzer is in proper working order, it does not and cannot lie. It is inherently trustworthy, and a defendant is not able to challenge its credibility.

However, in the context of a vehicle stop, as recognized by this Court in Bender, due to the statutory implied consent provision by a driver, a rebuttable presumption arises that the breathalyzer is reliable if the State complies with certain statutory provisions and administrative rules. Id. at 699-700.

Dog Sniff. Like a breathalyzer, a well-trained drug detector dog is within the control of the police, and the police ensure that the dog trains and remains proficient in the detection of narcotics. Thus, knowing the dog's training and experience, it is particularly within an officer's knowledge that the dog is trained and certified and, in the warrant context, the officer may attest to this in order to establish probable cause.

A breathalyzer is often utilized in the context of a lawful vehicle stop. Just as a driver has no right to drink while they are impaired and may be subject to a breathalyzer test, a driver has no expectation of privacy in the odor of illegality emanating from his vehicle and may be subject to a search.

However, unlike a breathalzyer, the United States Supreme Court has held that a dog sniff is **NOT a search**. Place, 462 U.S. at 706-07. This is because the quality of the information gained by the dog's sniff is limited in that it discloses only the presence or absence of the **odor** of narcotics. Id. at 707. "In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." Id. In Caballes, 543 U.S. 405, the United States Supreme Court extended this principal to the use of drug-detector dogs in during a lawful traffic stop, holding that one does not have a reasonable expectation of privacy in transporting contraband in one's vehicle; and noting that in Place, "we treated a canine sniff by a well-trained narcotics-detection dog as "*sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item." Id. 408-09.

Thus, from an investigatory perspective, a dog sniff is not a search but it *sui generis*, an investigative tool which tells police limited information; that is, yes or no as to the presence of the **odor** of narcotics or other illegal contraband. Unlike a breathalzyer, a dog sniff does not necessarily tell the police whether contraband is certainly or currently present, such that evidence of the dog's alert alone is sufficient to conclusively establish guilt or possession of drugs. Rather, all a dog sniff tells a police officer, and all that it is meant to tell a police officer, is that the odor of contraband is present and, thus, that there is a fair probability that contraband is in the vehicle.

Likewise, from an evidentiary perspective, the admissibility of the results of the dog alert are not subject to the heightened foundational requirement like a breathalyzer, because a dog's alert does not necessarily tell the officer anything conclusive or incriminating about the contents of the vehicle. Rather, much like a human police officer's own sense of smell, a dog's alert only tells the officer that there is probably contraband in the vehicle based on the odor of contraband.

Confidential Informants. Unlike a breathalyzer and a drug dog, a human confidential informant is not within the control of the police. A human confidential informant may not be perfectly

calibrated like a breathalyzer or well-trained like a drug dog. Rather, a human confidential informant may intentionally lie. For this very reason, because the "veracity" or truthfulness of a confidential informant may not necessarily be known to police, there must be a sufficient indicia of reliability in order to establish a reasonable suspicion to conduct a stop of a vehicle, Alabama v. White, 496 U.S. 325, 329-330 (1990), or to establish probable cause for a search. Gates, 462 U.S. 213. In other words, the tip must be sufficiently corroborated by independent details or the tipster must have a proven track record.

However, even in the context of confidential informants, Florida recognizes an exception. The citizen informant is considered to be at the high end of the credibility scale for purposes of relying on her hearsay tip in an affidavit for a warrant based on probable cause, because "[a] citizen-informant is one who is 'motivated not by pecuniary gain, but by the desire to further justice.' " State v. Maynard, 783 So. 2d 226, 230 (Fla. 2001)(quoting State v. Talbott, 425 So.2d 600, 602 n.1 (Fla. 4th DCA 1982), accord Barfield v. State, 396 So.2d 793, 796 (Fla. 1st DCA 1981)). For this reason, a citizen-informant, as opposed to an informant who likely participated in the criminal activity, is deserving of a **presumption of reliability**. Id. (quoting Wayne R. LaFave, Search and Seizure § 3.3 (3d ed.

1996)). Of course, the citizen informant's credibility may still be challenged at a motion to suppress by the defendant.

Unlike the confidential informant who was likely involved in the criminal activity reported, a well-trained drug dog is under police control and cannot lie, nor does it have any motivation to lie. Thus, a dog's reliability does not depend upon a proven track record of "tips" or alerts leading to arrests in the field. Rather, a dog is more like the citizen informant who is fully cooperating with police and has no motive to lie. Thus, a well-trained drug dog is also deserving of a presumption of reliability.

Human Smell. The best analogy is a human police officer's own sense of smell. Like a dog's sniff, a human officer's sniff of a vehicle is not a search, because a person does not have a legitimate expectation of privacy in odors of illegal contraband emanating from their vehicle. Griffin, 949 So. 2d at 311 (citing Hearn, 191 F.3d at 1332). Where a human officer smells burning contraband coming from a vehicle, he has probable cause to conduct a warrantless search of a vehicle during a lawful traffic stop. See State v. Williams, 967 So. 2d 941, 944 (Fla. 1st DCA 2007); State v. Betz, 815 So. 2d 627, 633 (Fla. 2002). This is so because there is a presumption in favor of proper police conduct and, thus, a court is prepared to accept that an

experienced police officer, who knows what burning contraband smells like, may reasonably rely on his own sense of smell. "'[T]o a trained and experienced police officer, the smell of cannabis emanating from a person or a vehicle gives the police officer probable cause to search the person or the vehicle.'" Betz, 815 So. 2d at 633 (quoting State v. Reed, 712 So. 2d 458, 460 (Fla. 5th DCA 1998)). While a human officer's credibility could certainly be challenged, generally, the human officer's statement that he is trained and experienced with cannabis and knows what it smells like when it is burning is sufficient to establish the reliability of the officer's sniff.

Probable cause is not negated if the human police officer does not find drugs in the vehicle during the search. The drugs may have been recently used up (or burned up) or thrown out of the vehicle somewhere down the road prior to the stop. Rather, the human officer's olfactory senses merely tell him that there is a fair probability that drugs are in the vehicle, and a human officer may reasonably rely on his own olfactory senses to conduct a search. Further, during such a legal search, the officer is not required to ignore evidence of another crime found in the vehicle.

Accordingly, just as the sniff of an experienced, trained officer may be presumed reliable, so should the sniff of a well-

trained drug dog be presumed to be reliable. The difference between a dog and a human officer, both of which have experience with the odor of narcotics, is that the dog's olfactory senses are much more acute. Id. Not only can a dog smell recently burned drugs, a dog can also smell drugs that are packaged. A dog can even smell trace amounts of drug residue in the vehicle as well as odors transferred onto the vehicle. Thus, a dog is a very useful investigatory tool to law enforcement, particularly in the context of vehicle stops where drugs are easily moveable and destructible, see Carroll, and where drug use by a driver poses a serious safety hazard.

It is particularly within the officer's knowledge whether his drug-detector dog is well-trained, and it is the officer's testimony which will generally establish this fact. Thus, if the officer knows that his drug-detector dog is well-trained, then the officer may reasonably rely on the dog's sniff and alert to the same extent that he may rely on his own sense of smell to believe that drugs are probably in the vehicle. "'Just as evidence in the plain view of officers may be searched without a warrant, . . . evidence in the plain smell [of a dog] may be detected without a warrant.'" State v. Jardines, 33 Fla.

L. Weekly D2455, 2008 WL 4643082, *4 (Fla. 3d DCA 2008)(citations omitted).[6]

Thus, a drug dog which is alleged to be well-trained should be presumed reliable, and the defendant should be permitted to rebut this presumption using the dog's training records, which the State bears the burden of producing. Not only is this approach proportionate to other investigative tools, it is consistent with the requirements for a warrant and with binding Fourth Amendment precedent concerning dog sniffs. See Caballes; Place. Accordingly, this court should resolve this conflict by approving the approach of the Fourth and Fifth Districts in Laveroni and Coleman and by disapproving the Second District's decisions in Matheson and Gibson.

ISSUE II

PETITIONER FAILED TO REBUT THE PRESUMPTION THAT ALDO, A TRAINED AND CERTIFIED DRUG DOG WITH A GOOD TRACK RECORD IN TRAINING, WAS RELIABLE ON JUNE 24, 2006 (RESTATED).

The record shows that Aldo is trained and certified in the detection of certain narcotics, including methamphetamine. Under Laveroni and Coleman, Aldo is, therefore, presumed reliable. Thus, Petitioner bore the burden at the hearing on the motion to suppress to rebut the presumption of Aldo's reliability.

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[6] Westlaw citation included for ease of reference.

Petitioner failed to rebut the presumption that Aldo is reliable. Petitioner raised the issue and the State brought forward Aldo's certification and training records. The record shows that Aldo was certified at the time through an independent organization called Drug Beat. Aldo was not certified by the State of Florida only because no such certification existed. See Houston, 925 So. 2d at 409; Fla. Admin. Code R. 11B-27.013(a). Further, the record shows that the State of Florida required drug dogs to demonstrate their continuing proficiency for narcotics detection. The record shows that Aldo demonstrated his continuing proficiency through his extensive training and good performance during training. Because Aldo spends much more time training than in the field, his training is more indicative of his continuing proficiency. Further, Aldo's performance during training is nearly perfect, and Aldo's training records demonstrate that he is reliable to detect the odor of narcotics.

Moreover, Aldo's alerts in the field were not false. Aldo's alert to the odor of meth on the door handle on June 24 was corroborated both by the recovery of the listed chemicals in meth in the vehicle and by Petitioner's own admission to being so addicted to meth that he cooks it and cannot go for more than a few days without using it. Thus, it was essentially certain

that Petitioner transferred the odor of narcotics to the door handle of his vehicle on June 24. Aldo's second alert cannot be characterized as false, either, because Aldo alerted to the odor of drugs on the door handle of a known meth user by Petitioner's own admission. Accordingly, Petitioner has failed to rebut the presumption that Aldo, a well-trained drug-detector dog, was sufficiently reliable and, thus, that Officer Wheetely reasonably relied upon Aldo's alert.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court resolve this conflict by disapproving Matheson and Gibson and adopting the approach of Laveroni and Coleman.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Glen Gifford, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on March 11th, 2009.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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