No. _____

In the Supreme Court of the United States

STATE OF FLORIDA, *Petitioner,*

v.

CLAYTON HARRIS, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle?

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In the Supreme Court of the United States

STATE OF FLORIDA, *Petitioner,*

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CLAYTON HARRIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

The State of Florida respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at *Harris v. State*, 71 So. 3d 756 (Fla. 2011). (App. A, infra, A3-A52). The Florida Supreme Court denied rehearing, in an unpublished order, on September 22, 2011. (App. A, infra, A53-54). The decision of the intermediate appellate court, the District Court of Appeal, First District, is reported at *Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008). (App. A, infra, A1-A2).

STATEMENT OF JURISDICTION

The Supreme Court of Florida issued its revised opinion on April 21, 2011. The State filed a motion for rehearing. The Florida Supreme Court denied rehearing on September 22, 2011. *See* Sup. Ct. R. 13.3 (providing: ". . .if a petition for rehearing is timely filed in the lower court by any party . . ., the time to file the petition for a writ of certiorari for all parties. . . runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitutional provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. - This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th

Amendment to the United States Constitution.

STATEMENT OF THE CASE

On routine patrol Deputy Wheetley effectuated a valid stop of the defendant, Clayton Harris, for driving with an expired tag. Upon approaching Harris, the sole occupant of the vehicle, the deputy noticed Harris was visibly nervous, shaking and could not sit still. He further observed an open container of alcohol sitting inside the cup holder. Harris acknowledged his tag was expired and denied the deputy's request to search the vehicle. As the deputy returned to his patrol car to retrieve K-9 Aldo, a narcotics detection dog, he noticed the defendant was moving around the cab of his vehicle and talking on his cell phone. Aldo was deployed around the vehicle and alerted near the driver's door handle.

Harris was asked to exit the vehicle after being advised that the dog's positive alert to the odor of contraband provided the officer with probable cause to search his vehicle. Harris told the deputy that there was nothing illegal in his truck. A search of the vehicle revealed the precursors to making methamphetamine including 200 pseudo/ephedrine pills underneath the driver's seat contained inside a plastic Walgreen's bag

which was wrapped in a shirt. The pills had been dislodged from their foil packets and were loose inside the bag. Harris told the deputy the pills were ephedrine. Beneath the passenger seat the deputy located another plastic bag hidden under clothing which contained eight boxes of matches totaling 8,000 matches. Inside the toolbox the deputy discovered a bottle of muriatic acid, two bottles of antifreeze/water remover and a red Styrofoam plate inside of a green latex glove that contained iodine.

Post-*Miranda*, Harris stated he had driven to three different Walgreens stores and two grocery stores that day to purchase the pseudo/ephedrine pills. Prior to leaving Tallahassee he went to two other stores to buy 8,000 matches and 2 bottles of antifreeze. While driving home he stopped to buy two more boxes of pseudo/ephedrine pills. He admitted to throwing the blister packs from the pills out the window and explained that the coffee filter inside the Styrofoam plate contained iodine crystals. Harris told the officers he had been cooking meth for about one year and had recently made it at his house two weeks prior. He further confessed that he has a big problem with his addiction and he is unable to go more than a few days without using meth.

Harris was charged with unlawfully possessing the chemical pseudo/ephedrine with

reasonable cause to believe it would be used to unlawfully manufacture the controlled substance methamphetamine. At the suppression hearing, Deputy Wheetley testified he has been a canine officer for three years after having completed a 160 hour narcotics detection dog handling course with his previous canine partner through the Dothan Police Department. He had also attended an eight hour course with Florida Department of Law Enforcement (FDLE) on the making of methamphetamine, and was given a list of chemicals or substances used to cook meth. Upon receiving Aldo in 2005, the deputy and Aldo both completed another 40 hour narcotics detection training course. To ensure Aldo's proficiency in detecting narcotics Deputy Wheetley also continually trains with Aldo for four hours every week on various drugs in different environments such as vehicles, buildings and warehouses. The deputy explained that during training on vehicles they would choose multiple vehicles and hide narcotics in some with a few remaining blank (or without contraband). The dogs are taken by blank vehicles to ensure they were not falsely alerting to a vehicle that does not contain the odor of narcotics. Prior to being assigned to Deputy Wheetley, Aldo had also successfully completed a 120 hour narcotics detection course with the Apopka Police Department and had received his

drug certification through Drug Beat in 2004.[1] Deputy Wheetley and Aldo complete a 40 hour narcotics detection "refresher" course every year.

Aldo is a passive alert dog and is trained to sit when he detects the odor of contraband he has been trained to detect. According to the deputy, when Aldo initially gets in the scent cone of the odor of narcotics he gets excited, takes a long sniff, his heart rate will accelerate and his feet will start pattering and he then sits to alert. Aldo has been trained and certified to detect the odor of marijuana, methamphetamine, cocaine, heroin, crack cocaine and ecstasy. According to Deputy Wheetley Aldo's performance in training was "really good" and he was scheduled to be recertified in October 2006. Certification for a single purpose dog, such as Aldo, is not required by the state but the handlers routinely have their dogs certified every year in addition to training. Dual purpose dogs are certified by FDLE in felon

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[1] Aldo's certificate of successful completion of narcotics detection training in Cannabis, Cocaine, HCI, Cocaine Base, Ecstasy, Heroin and Methamphetamine; and his K-9 Drug Detection Certification in detecting Marijuana, Methamphetamine, Cocaine, Heroine, Crack Cocaine and Ecstasy were admitted into evidence by the State.

tracking or apprehension but there is no requirement that they be certified in narcotics.[2]

Deputy Wheetley also keeps a record of the positive responses Aldo makes in the field and when an arrest is made. Subsequent to his arrest on June 24th in this case, Harris was stopped a few weeks later in the same vehicle for a malfunctioning brake light. Aldo again alerted to the same driver's side area of Harris' vehicle. A search revealed an open bottle of liquor but no drugs. The deputy explained this was not a false alert because Aldo was trained to alert to the odor of narcotics and he will alert to the residual odor of contraband emanating from a vehicle, which he did when he alerted to the driver's side door during the second stop. He stated that Aldo's alert to Harris' vehicle during the second stop was consistent with Harris' previous admissions to often cooking meth at his home, being unable to go more than two days without using meth, his excessive nervousness during the first stop and the fact that his vehicle contained all of the precursors for making meth just a few weeks prior.

The trial court denied the motion to suppress and found there was probable cause to

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[2] The opinion in *Harris* incorrectly indicates that dual purpose dogs are certified by FDLE in narcotics detection. *Id.* at 767-68.

support a search of the vehicle. The First District Court of Appeal in *Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008), affirmed *per curiam* the trial court's order citing *State v. Laveroni*, 910 So. 2d 333 (Fla. Dist. Ct. App. 2005), and *State v. Coleman*, 911 So. 2d 259 (Fla. Dist. Ct. App. 2005), with approval and a contra citation to the opinion in *Gibson v. State*, 968 So. 2d 631 (Fla. Dist. Ct. App. 2007), and *Matheson v. State*, 870 So. 2d 8 (Fla. Dist. Ct. App. 2003).

The Supreme Court of Florida accepted jurisdiction, *Harris v. State*, 71 So. 3d 756 (Fla. 2011), and after briefing and oral argument reversed the opinion of the First District. The Florida Supreme Court held that evidence that a dog has been trained and certified to detect narcotics, standing alone, is insufficient to establish the dog's reliability for purposes of determining probable cause. The court relied heavily upon law review articles and an intermediate appellate court's decision in *Matheson*, *supra,* which concluded that an officer who knows that his dog is trained and certified can only suspect that a search based on a dog's alert will yield contraband, and mere suspicion cannot justify a search. By holding that a dog alerting to the residual odor of contraband may result in subjecting a person and vehicle to an invasive search when there are no drugs actually present, the *Harris* majority has rejected this Court's interpretation of the Fourth Amendment that a

dog sniff is not a search as it only reveals the presence of contraband. And by requiring the State to demonstrate a level of certainty that goes far beyond that required by the Fourth Amendment or this Court, the Florida Supreme Court has erroneously invalidated the narcotics detection dog as an important crime fighting tool for law enforcement and society.

REASONS FOR GRANTING THE WRIT

The decision of the Florida Supreme Court violates the established precedent of this Court that a canine sniff by a well-trained narcotics detection dog is unique and provides probable cause to search a vehicle because it "discloses only the presence or absence of narcotics, a contraband item." *United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

Almost 30 years ago, after the amendment to the Florida Constitution brought Florida's search and seizure laws into conformity with all decisions of the United States Supreme Court, that Court rendered its opinion in *Florida v. Royer*, 460 U.S. 491 (1983), observing that "courts are not strangers to the use of trained dogs to detect the presence of controlled substances," and concluded

that a positive alert by a dog constitutes probable cause. *Id.* at 506.

The *Harris* decision ignores the conclusion of this Court that a canine sniff by a well-trained narcotics detection dog is unique and provides probable cause to search a vehicle because only the presence or absence of narcotics, a contraband item, is disclosed. *United States v. Place*, 462 U.S. 696, 707 (1983). This Court further reaffirmed and explained in *Caballes*, that a dog sniff conducted during a lawful traffic stop that reveals no information other than the location of contraband that no individual has any right to possess, does not violate the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

The Florida Supreme Court's holding in *Harris* is contrary to binding United States Supreme Court precedent and, therefore, passes upon a question of federal law. By concluding that a trained and certified dog, standing alone, does not provide an officer with probable cause to search, and mandating that the State must present extensive evidence to support a probable cause basis for a narcotic detection dog's alert, the Florida Supreme Court in *Harris* ignores the clear precedent of this Court and Fourth Amendment jurisprudence. Courts are forbidden to order the exclusion of evidence as a remedy for an unreasonable search and seizure unless that

remedy is mandated by the federal Constitution as interpreted by the United States Supreme Court.[3]

Contrary to this long established precedent, the *Harris* majority determined that a trained and certified dog does not provide an officer with probable cause to search. "We conclude that when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause to search the interior of the vehicle and the person." *Harris*, 71 So. 3d 756 at 767. The Florida Supreme Court further ignored this Court's holding in *Place*, that a dog sniff is not a search because it only reveals the presence of contraband, by opining that a dog alerting to the residual odor of contraband may result in subjecting a person and vehicle to an invasive search when there are no drugs actually present. *Id.* *Harris* has misconstrued this Court's holding in *Place* by improperly declaring that an officer

[3] Article I, section 12, of the Florida Constitution requires that its 1982 amendment be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if they would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution. Therefore, it is clear the decision in *Harris* does not rest on independent and adequate state grounds but rather presents a question of federal law.

who knows only that his dog is trained and certified, and who has no other information, only has a mere suspicion of criminal activity which cannot justify a search. Such a premise is not only contrary to the holdings of this Court, but is also diametrically opposed to the majority of federal and state law and sets an illogical precedent for the trial courts within its jurisdiction to follow. In its complete disregard of this Court's consistent interpretation of the Fourth Amendment, the Florida Supreme Court has invalidated the usefulness of dogs to law enforcement and society as a crime fighting tool to sniff out illegal contraband. Moreover, the court has invited, and, indeed guaranteed, challenges to K-9's used to track felons and detect explosives.

The Fact That a Dog Has Been Trained and Certified is Sufficient Evidence to Establish Probable Cause to Search a Vehicle.

In addressing the issue of drug detection dog sniffs, this Court, in *United States v. Place*, 462 U.S. 696 (1983), found that a "canine sniff" by a well-trained narcotics detection dog is "sui generis," or unique, and is not a search under the Fourth Amendment because it does not unreasonably intrude upon a person's reasonable expectation of privacy, and because "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search." 462 U.S. at 706-07. The

majority opined that a sniff by a canine disclosed only the presence or absence of narcotics, a contraband item; and, therefore, the limited and discriminating nature of a canine sniff did "not constitute a 'search' within the meaning of the Fourth Amendment." *Plac*e, 462 U.S. at 707. Nor is there a Fourth Amendment requirement of a reasonable, articulable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop. *United States v. Castaneda*, 368 Fed. Appx. 859, 862 (10th Cir. 2010), citing *Illinois v. Caballes*, 543 U.S. 405, 410 (2005), in which this Court held that a sniff by a canine is not a search under the Fourth Amendment because it does not expose noncontraband items that would otherwise remain hidden from public view, and as such does not implicate legitimate privacy interests. *See also Indianapolis v. Edmond*, 531 U.S. 32 (2000) (officers walking narcotics detection dogs around exterior of vehicles at checkpoint did not transform seizure to a search). Additionally, pursuant to the "Carroll doctrine," codified in Section 933.19(1), Florida Statutes (1979), there is a lesser expectation of privacy associated with automobiles due to their mobility, and if a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more. *Carroll v. United States*, 267 U.S. 132 (1925).

There is clear cut, long-standing authority from the federal courts supporting this premise that an alert by a trained narcotics detection dog provides probable cause, not "mere suspicion." In conformity with this Court's precedent and the Fourth Amendment, every jurisdiction in the country, with the exception of the Florida Supreme Court, has held that an alert by a well-trained and, certified narcotics detection dog provides an officer with probable cause to search. The Eleventh Circuit in *United States v. Sentovich*, 677 F.2d 834 (11th Cir. 1982), found that a showing that a narcotics detection dog is trained satisfies the requirement that drug dogs need to be reliable. The Sixth Circuit in *United States v. Robinson*, 390 F.3d 853 (6th Cir. 2004), held that a positive indication by a certified drug detection canine establishes probable cause, and all other evidence goes to credibility. "A trained narcotic dog's detection of the odor of an illegal substance emanating from a vehicle creates a 'fair probability' that there is contraband in that vehicle." *United States v. Parada*, 577 F.3d 1275, 1282 (10th Cir. 2009).[4] In the Fifth Circuit the

[4] *See United States v. Diaz*, 25 F.3d 392 (6th Cir. 1994)(court held training and certification was sufficient but evidence of reliability of dog's performance was admissible and went to "credibility" of dog). In *United States v. Daniel*, 982 F.2d 146 (5th Cir. 1993), the court rejected the argument that an affidavit must show how reliable a drug-detecting dog has been in the past in order to establish probable cause, and in (Continued…)

court stated, "We have repeatedly affirmed that an alert by a drug-detection dog provides probable cause to search. Moreover, in *United States v. Williams*, we held that a showing of the dog's training and reliability is not required if probable cause is developed on site as a result of a dog sniff of a vehicle." *United States v. Sanchez-Pena*, 336 F.3d 431, 444 (5th Cir. 2003).

Nor, does the Florida Supreme Court's opinion that an alert by a trained and certified drug dog only provides an officer with mere suspicion, which is insufficient to establish probable cause, find support among other state jurisdictions. The *Harris* decision is primarily based upon, *Matheson v. State*, 870 So. 2d 8 (Fla. Dist. Ct. App. 2003), an intermediate appellate court opinion which pre-dates *Caballes* and has been expressly disapproved by three other intermediate appellate courts within Florida, as well as several courts in other states. In *State v.*

United States v. Williams, 69 F.3d 27 (5th Cir. 1994), the court found a dog's alert to luggage, without more, gives probable cause for arrest. *See also United States v. Outlaw*, 319 F.3d 701 (5th Cir. 2003); *United States v. Alvarado*, 936 F.2d 573 (6th Cir. 1991)(the dog's accuracy rate, and therefore its reliability, was considered by the court in the context of a controlled test setting); *United States v. Sundby*, 186 F.3d 873 (8th Cir. 1999); *United States v. Gonzalez-Acosta*, 989 F.2d 384 (10th Cir. 1993); *United States v. Banks*, 3 F.3d 399 (11th Cir. 1993).

Nguyen, 811 N.E.2d 1180 (Ohio Ct. App. 2004), the court specifically rejected the holding in *Matheson* that the track record of the dog, with an emphasis on the dog's performance history or amount of "false alerts", must be known in order to conclude that an alert by the dog is sufficiently reliable to furnish probable cause to search. In *State v. Yeoumans*, 172 P.3d 1146 (Idaho App. 2007), the court declined to follow *Matheson* and noted that the Florida appellate court was the only jurisdiction indicating that evidence that a drug dog's alerts to residual odors will preclude the finding of probable cause based on the dog's alert. The Georgia Court of Appeal in *Dawson v. State*, 518 S.E.2d 477 (Ga. Ct. App. 1999), held that evidence of a narcotics detection dog's certification constitutes prima facie evidence of reliability, but that this could be challenged by a defendant with proof of the failure rate of the dog, or other evidence, with the ultimate determination to be made by the trial court. *See also People v.* Clark, 559 N.W.2d 78 (Mich. Ct. App. 1996)(holding canine's alert provided probable cause for warrantless search of vehicle's trunk); *Alverez v. Commonwealth*, 485 S.E.2d 646 (Va. Ct. App. 1997)(court found probable cause based on positive canine sniff of defendant's package).

An Alert to the Residual Odor of Contraband Does Not Undermine the Reliability of a Narcotics Detection Dog or Negate Probable Cause to Search.

In determining reliability, the Florida Supreme Court erroneously focuses on the dog's performance history and how often a dog has alerted in the field without illegal contraband having been found. The majority's premise that in order for a trial court to determine the reliability of an alert it must be able to evaluate a dog's inability to distinguish between residual odor and drugs that are actually present is inherently flawed and demonstrates the *Harris* court's misunderstanding of a well-trained drug dog and the definition of probable cause. "Reliability is generally present if the dog is 'well-trained.'" *United States v. Nelson*, 309 F. Appx. 373, 375 (11th Cir. 2009)(quoting *Caballes*, 543 U.S. at 409).

A dog's superior sense of smell allows it to detect trace amounts and residual odors of a drug that may remain after the odor-emanating drug is no longer present, or that may be carried by any object or a person who had contact with drugs in another location. In the field, when a dog alerts and drugs are not located, there is no way to determine whether the dog alerted to a residual odor or the alert was due to handler error. *State v. Foster*, 252 P.3d 292, 296 (Or. 2011). Only in a controlled environment such as training and

certification can a dog's alert rate be truly gauged. This is not to say the dog's performance records are not useful to a court in determining the dog's reliability but they should not be the sole or main factor in making such a judgment.

Contrary to the assertion of the *Harris* majority, the power of a well-trained narcotics detection dog to alert to the residual odor of contraband increases the possibility that a car contains illegal drugs. *State v. Cabral*, 159 Md.App. 354, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004)(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 United States 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."). Because a person has no reasonable expectation of privacy in odors that emanate from a car in a public place, *Hearn v. Bd. of Pub. Educ.*, 191 F.3d 1329, 1332 (11th Cir. 1999), once a dog alerts to a car probable cause exists to search the car. *Id.* at 1333.

By relying heavily on the misguided opinion in *Matheson* and law review articles for its rationale that due to false alerts in the field and

handler cuing, an alert may not mean drugs were ever present in the vehicle or on the person, the *Harris* majority misunderstands the function of a drug dog. The Fourth Amendment does not require the certainty of success to justify a search for illegal contraband. Contrary to the majority's opinion, even the drug detection dogs used by federal agencies are trained to detect the odor of narcotics and not the presence of contraband. In *State v. Cabral*, 859 A.2d 285 (Md. App. 2004), the court expressly rejected *Matheson* and by implication the conclusions reached by the Florida Supreme Court as follows:

> These cases lead us to conclude that Cabral is "barking up the wrong tree." He has confused probable cause with proof beyond a reasonable doubt. If a trained drug dog has the ability to detect the presence of drugs that are no longer physically present in the vehicle or container, but were present perhaps as long as 72 hours prior to the alert, such an ability serves to strengthen the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause. The possibility that the contraband may no longer be present in the vehicle does not compel the finding that there is no probable cause; for purposes of the probable

cause analysis, we are concerned with probability, not certainty. The issue of a possible alert to a residual odor is a factor to be considered by the trial court, but it is not dispositive.

We are reminded of what Judge Moylan wrote in Fitzgerald, recognizing the reliability of a trained drug dog.

> "[T]he instant court sees a positive alert from a law enforcement dog trained and certified to detect narcotics as inherently more reliable than an informant's tip. Unlike an informant, the canine is trained and certified to perform what is best described as a physical skill. The personal and financial reasons and interest typically behind an informant's decision to cooperate can hardly be equated with what drives a canine to perform for its trainer. The reliability of an informant is really a matter of forming an opinion on the informant's credibility either from past experience or from independent corroboration. With a canine,

> the reliability should come from the fact that the dog is trained and annually certified to perform a physical skill." *Fitzgerald*, 153 Md. App. at 637, 837 A.2d 989 (quoting *United States v. Wood*, 915 F. Supp. 1126, 1136 n.2 (D. Kan. 1996)(italics omitted).

State v. Cabral, 859 A.2d 285, 380-381 (Md. App. 2004).

The Oregon Supreme Court also considered the question of whether probable cause to search a vehicle is undermined because of the possibility that a narcotics detection dog could alert to residual odor. In *State v. Foster*, *supra*, the defendant claimed that because the dog was unable to determine the difference between a residual odor and the presence of the actual narcotic the dog was inherently too unreliable. Foster relied on the same misleading law review article cited by the *Harris* majority in which the author, based on a phone interview of a single federal agent, inaccurately described the training of federal customs dogs to include differentiating between residual odor and contraband. *See Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog*, 65 Ky.

L.J. 405, 414 (1996); *Matheson v. State*, 870 So. 2d 8 (Fla. 2003).[5] The Oregon Supreme Court found no rational basis for the theory that a drug dog's reliability hinged on its ability to distinguish residual odors from actual narcotics and expressly disagreed with the author's observations. *State v. Foster*, 252 P.3d at 298 n.7.

The Oregon court further recognized this argument had been made and rejected by other courts around the country and concluded it was based on a misconception of what probable cause requires, and stated that:

> In this context, the possibility that a trained drug-detection dog will alert to a residual odor, rather than the actual presence of drugs, does not *ipso facto* render it unreasonable to believe that drugs or other seizable things are probably present. First, if the dog is properly trained and handled, the likelihood that the dog's alert indicates the presence of an illegal drug remains a substantial one. Second, and significantly, even if the

[5] Based upon questions raised during oral argument in *Harris* the Florida Supreme Court was provided with the U.S. Customs training manual indicating their narcotics detection dogs are trained to detect the odor of contraband and not to the presence of the drug.

> odor is a residual one only, there is no substantial—let alone equal or greater—likelihood of a purely innocent explanation for the presence of the odor of drugs. Either illegal drugs are present, or something that was in contact with illegal drugs and carries the odor is present. Thus, even when actual drugs are not present, something that carries the odor of the drug (such as drug paraphernalia, a receipt for drug sales, or another item associated with drug use or drug distribution) likely is present and may be seizable, even if it is not the drug itself. For those reasons, we conclude that probable cause to search may arise from the alert of a trained drug-detection dog despite the *possibility* that the alert is to a residual odor of an illegal drug rather than an odor emanating from the actual drug.

State v. Foster, 252 P.3d. at 299-300.

For example, California courts do not require evidence of a dog's success rate in the field to establish probable cause. *See People v. Stillwell*, 129 Cal. Rptr. 3d 233 (Cal. Ct. App. 2011). In declining to follow the flawed reasoning in *Matheson* and *Harris* the *Stillwell* court held that, "California authority does not support the

notion that more than an alert from a trained narcotics detection dog is needed to establish probable cause." *Id.* at 239. The court likewise disagreed with the assertion made in *Harris* and *Matheson* that the alert of even a well-trained detection dog, standing alone, cannot establish probable cause for a search, as "[p]robable cause is established where 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v. Stillwell*, 129 Cal. Rptr. 3d at 240, *quoting Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983). "[A] dog alert usually is at least as reliable as many other sources of probable cause and is certainly reliable enough to create a 'fair probability' that there is contraband." *United States v. Kitchell*, 653 F.3d 1206, 1223 (10th Cir. 2011), *quoting United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993).

To be sure, field activity reports may be considered, but relying on them "solely or excessively" to determine the reliability of a narcotics detection dog belies the entire concept of training dogs to use their superior sense of smell. Field activity reports should not be the full measure or even the most meaningful gauge of a dog's reliability. *State v. Nguyen*, 726 N.W.2d 871 (S.D. 2007). Dogs are not trained to detect the actual presence of contraband but to detect the odor of narcotics. Because odor travels with wind and air currents the details regarding the location

of the cocaine compared to the alert is not telling. The smell of drugs located in a center console might result in the dog alerting to the trunk if the vehicle had just been traveling down the highway with the odor circulating from the front of the car to the rear. *See United States v. Byle*, 2011 WL 1983359, *7 (M.D. Fla. Apr. 15, 2011)(finding that defendant's speculation as to area that emitted strongest odor does not discredit the drug dog's correct response). *But cf. Harris*, 71 So. 3d at 774 (Aldo's alert to the door handle standing alone, provides no basis for an objective probable cause determination that drugs were present inside the vehicle).

The correct probable cause standard was applied to drug dogs in *State v. Carlson*, 657 N.E.2d 591, 600 (Ohio Ct. App. 1995), as the court observed that:

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

(quoting *United States v. Johnson*, 660 F.2d 21, 22-23 (2d Cir. 1981).

In essence, the *Harris* majority has created a standard that cannot be met by any properly trained and certified canine. To require a drug dog to distinguish between the odor of narcotics and the actual drug is likely impossible, and goes against the very foundation of the probable cause standard. Very likely, a canine's human officer cannot be trained to tell whether the odor of marijuana he smells upon approaching a vehicle is from a blunt still burning or one smoked hours ago. Whether smelled by a human or canine officer, the odor of illegal drugs emanating from a vehicle provides law enforcement with probable cause to search and any failure to locate actual narcotics inside the vehicle does not negate the search or the probable cause from which it originated. *See United States v. Diaz*, 25 F.3d 392 (6th Cir. 1994)(holding it unnecessary to provide drug dog's training and performance records, just as it is similarly unnecessary to qualify a human expert this way in admitting evidence of dog's alert to smell of contraband).

Florida's Second District Court Judge Altenbernd aptly observed in *Wiggs v. State*, 72 So. 3d 154 (Fla. Dist. Ct. App. 2011) that:

> …in fairness to Zuul, his strength is also his weakness. It seems obvious that Zuul is alerting on residual drugs that do not lead to the discovery of arrestable quantities of drugs. It is

> not that Zuul is alerting when there are no drugs to smell; he is alerting to molecules of drugs left behind in vehicles where drugs have been used or transported. Thus, in *Harris*, the court is requiring that law enforcement train dogs to distinguish between the odor of minute quantities of drugs and larger quantities of drugs. If that cannot be done for a particular drug, it seems we will need to abandon dogs as a method of obtaining probable cause for that drug.

In the present case there is no indication that Aldo gave a false indication for the presence of narcotics when he alerted in the present stop. And on any occasion in which he was deployed in the field, there were only instances of "unverified alerts" in which narcotics were not located. The record supports a finding Aldo was well-trained pursuant to *Place* and *Caballes*. As previously explained, a failure to find narcotics does not negate the alert or the probable cause it provided because narcotics detection dogs are trained to detect the odor of narcotics and can detect residual amounts of contraband. Therefore, a drug dog's alert provides probable cause in multiple situations in which no drugs are found but the

odor of contraband is detected by the dog.[6] Using the construct of the Florida Supreme Court, a well-trained narcotics detection dog would be considered unreliable even though the dog properly alerted to the odor of illegal drugs.

Disregarding United States Supreme Court precedent and a reasonable interpretation of probable cause, the Florida Supreme Court has created an impossible standard for probable cause by requiring absolute certainty drugs will be found, and by directing that a narcotics detection dog be able to distinguish between residual odor and actual drugs. The Florida Supreme Court also failed to acknowledge or distinguish recent well-reasoned decisions from several intermediate appellate courts within Florida and other state and federal jurisdictions throughout the country which have clearly rejected these impossible and unnecessary additions to a "probable cause analysis." As held in *State v. Nguyen*, 811 N.E.2d 1180, 1188 (Ohio Ct. App. 2004), "Federal courts

[6] Often, passengers of a vehicle have been in the presence of illegal drugs or where narcotics had been used at some point in or around a vehicle and the odor remains. There is also the possibility the driver has contraband on his person but after the dog alerts and the driver exits the vehicle for purposes of the search no drugs are discovered because the driver cannot be searched. Drugs may also be so cleverly hidden within on a vehicle that after an alert the officers are unable to locate the contraband.

tend to follow the national trend, which states that a drug dog's training and certification records can be used to uphold a finding of probable cause to search and can be used to show reliability, if required, but that canine reliability does not always need to be shown by real world records."

The Florida Supreme Court has improperly expanded this Court's definition of a well-trained drug dog and misinterpreted the Fourth Amendment's probable cause requirement by placing an excessive evidentiary burden on the State.

While the *Harris* majority, in a footnote, acknowledged this Court has already provided a definition for a "well-trained" drug dog in *Place* and *Caballes* as one that does not alert to non-contraband items, the Florida Supreme Court ignored this Court's holding that probable cause is provided by the alert of a well-trained dog. *Harris*, 71 So. 3d 766, n.6. The majority not only disregarded this Court's holding that probable cause is provided by the alert of a well-trained dog, it twisted probable cause into an impractical and inflexible concept by requiring the State's burden of proof to include an elaborate set of factors. Today, in Florida, the Florida Supreme Court has rewritten the governing probable cause standard and elevated the level of proof far beyond that demanded by any authoritative decision. Today, the State, in order to demonstrate that an officer

has a reasonable basis for believing that an alert by a narcotics detection dog is reliable to provide probable cause to search, must present evidence of the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability, regardless of whether any questions are raised as to the dog's abilities.

In *Harris*, Justice Canady succinctly articulated his disapproval of the majority's handiwork in his dissenting opinion finding that, "[i]n establishing requirements for determining the lawfulness of a search based on the alert of a drug detection dog, the majority demands a level of certainty that goes beyond what is required by the governing probable cause standard." *Harris*, 71 So. 3d at 775 (Canady, C.J., dissenting). In order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by a police officer conducting a search under an exception to the warrant requirement - is not that they always be correct, but that they always be reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). "Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the

officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband…; it does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983), *quoting Carroll v. United States*, 267 U.S. 132, 162 (1925).

Disregarding precedent and a reasonable interpretation of probable cause, the majority has created a new standard for probable cause by determining that the fact that a dog has been trained and certified, standing alone, provides the officer only with mere suspicion which cannot justify a search. The *Harris* majority further misconstrues the probable cause analysis by imposing "evidentiary requirements which can readily be employed to ensure that the police rely on drug detection dogs only when the dogs are shown to be virtually infallible." *Harris*, 71 So. 3d at 775 (Canady, C.J., dissenting).

The Florida Supreme Court has established that it is the State's burden to prove the dog's reliability and it must introduce extensive evidence for the trial court to adequately undertake an objective evaluation of the officer's belief in the dog's reliability as a predicate for determining probable cause. The trial court would in essence be required to conduct a mini-trial regarding a dog's qualifications in every drug case in which probable cause was based on an alert,

even if reliability of the dog went unchallenged by the defense. This impractical approach also requires the judiciary to determine a particular dog's prowess as a detector of narcotics. However, as noted in *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2011):

> … it is safe to assume that canine professionals are better equipped than judges to say whether an individual dog is up to snuff. And beyond this, a dog's credentials provide a bright-line rule for when officers may rely on the dog's alerts – a far improvement over requiring them to guess whether the dog's performance will survive judicial scrutiny after the fact.

It reasons then that canine handlers and professionals are better qualified than law journalists who speculate on the criteria necessary to establish the reliability of drug detection dogs.

The state supreme court of Oregon was urged to adopt a four factor probable cause test similar to the one set forth by the *Harris* majority which required evidence of the dog handler team's (1) training regimen; (2) certification program; (3) maintenance regimen; and (4) field performance records. *State v. Foster*, 252 P.3d 292 (Or. 2011). In declining to impose such a hypertechnical standard, the Oregon Supreme

Court noted that, "as for any other probable cause analysis, the assessment is not limited to a fixed list of factors, but instead turns on the information known to officers in relying on a drug-detection dog's alert, and that, "articulating a static list of factors is unnecessary; the existing probable cause analysis provides ample structure to guide the inquiry." *Id.* at 298, n.4.

The overly rigid test set forth by the *Harris* majority and expressly rejected by the State of Oregon is inconsistent with the totality of the circumstances approach it claims to have imposed, and misconstrues a reasonable interpretation of probable cause correctly rejected by other courts. "In its effort to manage the conduct of law enforcement, the majority strays beyond what is necessary to determine if the Fourth Amendment's proscription of 'unreasonable searches and seizures' has been violated." *Harris*, 71 So. 3d at 775 (Canady, C.J., dissenting).

By placing an excessive evidentiary burden on the State, the Florida Supreme Court has misinterpreted the Fourth Amendment's probable cause requirement and improperly expanded this Court's long-established precedent regarding the definition of a well-trained drug dog. The *Harris* majority has also contorted "probable cause" into an impractical and inflexible concept requiring the State to satisfy a "virtually infallible" burden of

proof to include an elaborate and almost unobtainable set of factors.

The use of a narcotics detection dog is predicated upon the dog's unique sense of smell and enhanced ability to detect the odor of contraband. Through its misinterpretation of the Fourth Amendment's probable cause requirement and by improperly expanding the definition of a well-trained drug dog, as set forth in *Place* and *Caballes*, the Florida Supreme Court has failed to follow controlling United States Supreme Court decisions articulating the criteria needed to assess whether probable cause exists.

Moreover, the expanded interpretation found herein violates the proper understanding of probable cause as a "'practical, non-technical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003).

Whether law enforcement uses a dog for narcotics detection, explosives detection, victim location or suspect tracking, its use is predicated upon a dogs' enhanced ability to detect odor. By misconstruing the rationale behind this Court's controlling precedent in *Place* and *Caballes*, the Florida Supreme Court has virtually negated the use of dogs as a valuable crime fighting tool to law

enforcement and to society. The opinion in *Harris* improperly abrogates the value a narcotics detection dog is to the citizens it serves. In order to prevent this conflict from further eroding this Honorable Court's decisions, that an alert by a well-trained drug detection dog provides probable cause to search a vehicle, this Court should grant certiorari and reverse the decision of the Supreme Court of Florida.

CONCLUSION

For the foregoing reasons, the State of Florida respectfully requests this Court to grant the Petition for Writ of Certiorari and summarily reverse the findings of the Florida Supreme Court due to contrary and compelling precedent established by this Court in *Caballes* and *Place* or, in the alternative, grant the Petition for Writ of Certiorari.

Respectfully submitted,

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