No. 11-817

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL POLICE CANINE ASSOCIATION AND POLICE K-9 MAGAZINE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION OF NATIONAL POLICE CANINE ASSOCIATION AND POLICE K-9 MAGAZINE FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

The National Police Canine Association and Police Canine Magazine ("amici") hereby move, pursuant to S. Ct. R. 37.2(b), for leave to file an *amici curiae* brief in support of the petition for writ of certiorari to the Supreme Court of Florida. *Amici* are filing this motion because after receiving consent[1] from the petitioner, we were denied consent from the Respondent. A copy of the proposed brief is attached.

As explained on page 1 of the attached brief under "Interest of *Amici Curiae*", the National Police Canine Association is a large organization consisting of police canine handlers from all across the country. The Association set the national standards for certification for its membership as related to drug detection dogs. Moreover, this case is of particular interests to the Association due to the fact that they seek to represent not only the national membership but also specifically their members located in the State of Florida which will be directly impacted by this Courts action.

[1] Request for consent was sought from both Petitioner and Respondent with formal notice of intent to file this brief to both parties given to counsel of record on Jan. 13, 2012. Petitioner consented and Respondent did not consent.

Police Canine Magazine is a national publication having a readership of over 20,000 police canine handlers that live and work in all fifty (50) states in the union. Police Canine Magazine has a training and consulting branch in which they organize national training seminars throughout the United States in efforts to better educate law enforcement on the proper use of drug dogs. They are the leader in the industry in the area of police canine usage providing invaluable information to federal, state and local canine law enforcement. Accordingly, *amici* have a unique interest in seeing that the legal standard set by this court of a canine team being well trained and certified be followed and enforced without the cumbersome extraneous requirements that have been improperly imposed on handlers, when it comes to the area of drug dog reliability, by the Florida Supreme Court.

This brief will assist the Court in determining whether to grant certiorari because amici are well positioned to point out the importance of this case to the police canine industry. The *amici* can bring to the for front and inform the Court of the broad implications of this case across the country in the areas of police dog vendors, police dog trainers, police dog handlers, police dog organizations and the multiple police agencies on the federal, state and local levels. *Amici* cannot emphasize enough the importance of uniformity in the application of this courts precedent as to the standard of well trained and certified police drug dogs.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief as *amici curiae.*

Respectfully submitted,

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January, 2012

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INTEREST OF AMICI CURIAE[2]

Police canine handlers, all across the United States, have an ardent interest in combating illegal narcotics. Drug detection dogs perform a crucial service for law enforcement related to these efforts. Police K-9 Magazine is a national publication with a 20,000 canine handler readership that covers every state in the union. Most of those law enforcement officers are canine handlers that have a vested interest in the issue before the court. The National Police Canine Association is an association that governs, sets standards and certifies police work dogs for their membership. Upon passing their independent certification, police dogs are certified that they are well trained and have the unique ability to locate the source of existing narcotic odor. The National Police Canine Association is headquartered out of Arizona. The amici have a substantial interest in this Court's determination of 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 the odor of illegal contraband is insufficient to establish probable cause for the search of a vehicle? The Magazine and all law enforcement officers and canine handlers in all fifty states along with the

[2] Pursuant to Supreme Court Rule 37, amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent was granted by the Petitioner and not by the Respondent. Therefore, attached with this brief is a motion for leave of court to file. This brief was authored by counsel for the amici and funded by the amici.

National Police Canine Association have a distinct interest in the correct disposition of this matter.

SUMMARY OF THE ARGUMENT

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

Because an alert by a well trained and certified narcotics detection dog, standing alone, provides an officer with probable cause to search, this Court should reverse the decision of the Florida Supreme Court in their decision *Harris v. State,* 71 So. 3d 756 (Fla. 2011) and thereby approve of the First District Court of Appeal's decision in *Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008), and in doing so, approve the holdings of two others Florida District Courts of Appeal in *State v. Coleman*, 911 So. 2d 259, (Fla.. Dist. Ct. App. 2005), and *State v. Laveroni*, 910 So. 2d 333 (Fla. Dist. Ct. App. 2005) and bring the State of Florida in line with the vast majority of the courts and jurisdictions across the country that properly follow this court's precedent of *Illinois v. Caballes*,

543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983).

ARGUMENT

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

STATE AUTHORITY

The First District Court of Appeal of Florida (hereinafter "1st D.C.A.") decided *Harris* relying on The Fifth District Court of Appeal's of Florida (hereinafter "5th D.C.A.") decision in *State v. Coleman,* 911 So.2d 259 (Fla. 5th D.C.A. 2005) and The Fourth District Court of Appeal's of Florida (hereinafter "4th D.C.A.") decision in *State v. Laveroni,* 910 So.2d 333 (Fla. 4th D.C.A. 2005) that the state can make a Prima Facie showing, of a narcotics dog reliability, by demonstrating that the dog has been properly trained and certified . Thereby, the three intermediate appellate courts of Florida have aligned themselves with this Honorable Court's established precedent in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983) by

holding that the state make a prima facie showing of a narcotics dog's reliability by merely demonstrating canine has been properly trained and certified.

For example, the Fourth District Court of Appeal wrote in *Laveroni,* "Our review of cases from around the country indicates that *Matheson*,[*Harris* is based upon *Matheson*] which held that the state must establish the reliability of the dog through performance records in order to show probable cause, ***is out of the mainstream***". (Emphasis added) The 4th D.C.A. researched extensively the issue that is before the Court relying on both State and Federal authority.

The Court of Appeals in and for the State of Georgia in *Dawson v. State,* 518 S.E. 2d 477 (Ga. Ct. App. 1999) on this specific issue held that evidence of certification as a narcotics detection dog constitutes prima facie evidence of reliability but that this presumption can be rebutted by the defendant with proof of the failure rate of the dog or through other evidence the defendant wished to present, with the final determination to be made by the trial court. The 4th D.C.A., in relying on *Dawson* and rejecting the *Harris* style of reasoning of the Florida Supreme Court, aligned itself with the mainstream legal philosophy all over this country.

The 5th D.C.A. found itself in a unique position in resolving this issue in their opinion *State v. Coleman,* 911 So.2d 259 (Fla. 5th D.C.A. 2005). The 5th D.C.A. rejected the *Harris* style of reasoning of the Florida Supreme Court as flawed and united itself with the 4th D.C.A. and the rest of the country in finding: "Having reviewed both decisions and the authorities upon which they rely, we align ourselves with the Fourth District Court and conclude: [T]hat the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony.... Whether probable cause has been established will then be resolved by the trial court." *Coleman at 261.* Thereby, aligning themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

Because of the Florida Supreme Court's *Harris* decision, the District Courts of Appeal are now not following this Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983) stating that a well-

trained and certified narcotics dog provides probable cause and instead are now applying the "[T]he State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer…" Joe v. State, 73 So.3d 791 (Fla. 5th DCA 2011)

State courts across the country have ruled on this issue following the authority of the United States Supreme Court. In *State v. Lopez,* 166 Ohio App.3d 337, 850 N.E. 2d 781 (2006) the Ohio Court of Appeals held that "…the majority hold that the state can establish reliability by presenting evidence of the dog's training and certification, which can be testimonial or documentary. Once the state establishes reliability, the defendant can attack the dog's "credibility" by evidence relating to training procedures, certification standards, and real-world reliability". Thus aligning themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

Ohio Courts have continued to dismiss defense arguments that the state cannot establish probable cause for a search by introducing evidence that the dog was trained and certified. The Ohio Court of Appeals, as recently as December 12, 2011, held that *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (holding a K–9 sniff by a "well-trained narcotics-detection dog" as " *sui generis* " because it "discloses only the presence or absence of narcotics, a contraband item"). *Ohio v. Simmons*, 2011 WL 6179577 (Ohio App. 11 Dist.) "[O]nce a trained drug dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband." "Ample evidence related to Rebel's training and certification was presented during the suppression hearing to establish that he is a "well-trained narcotics dog" under *Place,* supra. …Based on that information, we presume that Rebel is a reliable narcotics dog, and Mr. Simmons failed to put on any evidence to the contrary." *Simmons,* supra.

State v. Nguyen, 157 Ohio App.3d 482, 2004–Ohio–2879, engaged in a substantial survey of federal and state law related to the matter of establishing K–9 reliability and the evidence required to do so.

The *Nguyen* court recognized that the national trend stated "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 canine reliability does not always need to be shown by real world records." *Id.* at ¶ 46. In conclusion, the Sixth District held that "proof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable." *Simmons*, supra.

The Court of Appeals of Idaho in *State v. Yeoumans,* 172 P.3d 1146 (Ct.App.2007) The Idaho court noted the isolated legal *Harris* style of reasoning used by the Florida Supreme Court as flawed. In so doing, once again a state court, aligned themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

The Supreme Court of the Commonwealth of Kentucky, in a dog tracking case (a dog that smells and follows human scent), held in *Debruler v. Commonwealth,* 231 S.W.3d 752 (Ky.2007) that the Commonwealth provided sufficient foundation for admission at trial of the dog's tracking ability. As to the issue of the dog's training and qualifications, the Kentucky Supreme Court found

"…Officers Howard and Morgan provided evidence that the dogs had been trained at an Indiana dog-training facility. According to Officer Howard's testimony about Denise [the 1st dog], she had been certified in tracking by the Owensboro Police Department and is recertified every year following thirty-two hours of additional training. Furthermore, she completes practice runs every week. Officer Morgan testified that Bady [the 2nd dog] has been certified by the United States Police Canine Association and competes twice a year to maintain this certification. Like Bady, she completes practice runs on a weekly basis". *Debruler at 758.*

The Amici notes the rationale above, that if evidence of a dog's unique olfactory ability meets the admissibility standard at trial by the officer's testimony related to training and certification, then certainly it should be sufficient to establish a *prima facie* presumption of reliability at a motion to suppress which may be rebutted by the defense.

The Supreme Court of South Dakota tackled the similar issue before this Honorable Court in their decision *State v. Nguyen,* 726 N.W.2d 871 (S.D. 2007). The Supreme Court of South Dakota held that a drug detection canine was deemed reliable based upon the presentation of its certification and training.

The South Dakota Supreme Court was aware and rejected the *Harris* style of reasoning used by the Florida Supreme Court as flawed. Through this finding, once again a state court, aligned themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

FEDERAL AUTHORITY

Federal Courts have repeatedly held that appropriate certification by an organization is sufficient to show reliability of a dog. See *United States v. Robinson,* 390 F.3d 853 (6th Cir. 2004) reh'g en banc denied, Feb. 5, 2005 (testimony by the handler that dog was trained and certified was sufficient to show reliability for purposes of probable cause); *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004), cert. denied, 543 U.S. 1074, 125 S.Ct. 924, 160 L.Ed.2d 812 (2005) (handler's testimony that the dog was certified on the day of the sniff and had never given a false indication was sufficient to show reliability); *United States v. Boxley*, 373 F.3d 759 (6th Cir.), cert. denied, 543 U.S. 972, 125 S.Ct. 435, 160 L.Ed.2d 345 (2004); *United States v. Outlaw*, 319 F.3d 701 (5th Cir. 2003) (reliability acceptable when handler and dog have completed all standard training procedures for drug detecting teams); *United*

States v. Hill, 195 F.3d 258 (6th Cir. 1999), cert. denied, 528 U.S. 1176, 120 S.Ct. 1207, 145 L.Ed.2d 1110 (2000) (handler's inability to state with precision what in-service training should be conducted; reliability nonetheless established); *United States v. Sundby*, 186 F.3d 873 (8th Cir. 1999) (training records were not required to show reliability).

The Supreme Court has repeatedly held that a drug dog sniff is not a search under the Fourth Amendment and a reliable dog alert provides probable cause that illegal drugs are present. *Illinois v. Caballes,* 543 U.S. 405 (2005). Moreover, the United States Fourth Circuit Court of Appeal recently held "We have rejected a requirement that "dog alert testimony must satisfy the requirements for expert scientific testimony ... [because] the dog's alert ... would serve not as actual evidence of drugs, but simply to establish probable cause to obtain a warrant to search for such substantive evidence." *United States v. Allen,* 159 F.3d 832, 839–40 (4th Cir.1998)." *U.S. v. Age*, Slip Copy, 2011 WL 4495307 C.A.4 (Md.2011). "Assuming, without deciding, that we would require specific evidence of a dog's reliability before permitting his alert to provide probable cause, we find sufficient evidence in this case. The Government provided evidence regarding the dog's detailed training and continuing certification." *Age*, supra.

Notably, the United States Court of Appeals for the Eight Circuit in their opinion *Untied States v. Olivera-Mendez,* 484 F.3d 505, 512 (8th Cir. 2007) wrote "We have held that to establish a dog's reliability for the purpose of a search warrant application, the affidavit need only state the dog has been trained and certified to detect drug and a detailed account of the dog's track record or education is unnecessary." If the canine's reliability in a search warrant affidavit is established by merely stating that the dog is trained and certified allowing for a finding of probable cause to issue the warrant to enter into someone's property, then it goes without saying that establishing the canine's training and certification through testimony at a motion to suppress should surely be sufficient to establish a *prima facie* finding of reliability that the defendant may rebut at the hearing. See; *United States v. Klein,* 626 F.2d 22 (7th Cir. 1980) (finding the affiant's representation to the magistrate that the dog "graduated from a training class in drug detection in October 1978" and "has proven reliable in detecting drug and narcotics on prior occasions" sufficient.) and *United States v. Berry,* 90 F.3d 148 (6th Cir. 1996) (finding contrary to defendant's suggestion, to establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances

and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability.)

Drawing an analogy to search warrant law, the State's search warrant is presumed valid at a motion to suppress hearing. When the defendant is challenging the validity of a search warrant, the prosecution is afforded a presumption that the issuing magistrate acted properly in determining probable cause prior to signing the warrant. The presumption may be rebutted by the defendant but, the burden is on the defendant to attack the foundation of the warrant.

Therefore, the legal philosophy of the request of the petitioner is already well established in United States criminal law. The petitioner merely is requesting that this Honorable Court treat the issue of a dog's training and certification in the same fashion. The *Amici* wish to emphasize that in reversing the Florida Supreme Court and establishing this presumption, in no way deprives the defendant of his right to confront the officer regarding his canine partner's reliability. The training records and certification documentation are discoverable. They can be reviewed by the defendant and challenged in court. The trial court, at the close of all the evidence at the motion to suppress, is still free to determine the reliability of the dog. Enabling the State to make this ***prima***

facie showing merely puts the proverbial ball in the defendant's court and deprives him of nothing.

The significant flaw in the Florida Supreme Court's *Harris* analysis is their focus on their requirement that the state be mandated to present to the trial court the dog's field performance records, along with concentrating on the issue of residual odor. The Florida Supreme Court's mistake is losing focus of the basic premises that dogs do not find drugs but instead locate drug odor. Which is why the rigorous standards set by the independent national governing bodies for dog certification for determining reliability , that are being basically ignored in the *Harris* reasoning, need to be given their due deference in court.

This case is uniquely suited for a granting of certiorari in light of this court granting review of *Florida v. Jardines,* Case No. 11-564 (Jan. 6, 2012). These cases go hand in hand with each other because once an officer uses the narcotics dog, with or without a search warrant for the front door sniff of a house, the Florida Supreme Court has set forth the wrong standard of review for the reliability of the dog.

This Honorable Court needs to address this critical issue and bring the State of Florida back in line with this Court's precedent by reversing the Florida Supreme Court.

Conclusion

The Court should grant the petition for a writ of certiorari, set the case for briefing and oral argument with the eventual outcome being that of reversal of the Florida Supreme Court because allowing the ruling to stand would threaten a widely used drug-fighting tactic due to the fact that the Florida Supreme Courts decision conflicts with this high court's precedents in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

Respectfully submitted,

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