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YMCA NATIONWIDE JUDICIAL COMPETITION
2021 APPELLATE COURT CASE DOCUMENTS

State of Flamingo, Appellant
v.
Rufus Jacamar and Violet Sabrewing, Respondents.

Rufus Jacamar and Violet Sabrewing were charged by the State of Flamingo with conspiracy to manufacture and distribute marijuana and methamphetamine. The trial court denied their pre-trial motions to suppress evidence obtained as a result of two separate "sniffs" by a drug dog, and Jacamar and Sabrewing were later convicted at trial. They appealed their convictions to the Supreme Court for the State of Flamingo, which concluded that the drug-dog sniffs violated the Fourth Amendment. The State of Flamingo has appealed that decision to Supreme Court of the United States. You will be representing the State of Flamingo (the Appellant) or Jacamar and Sabrewing (the Respondents) in the argument before the Supreme Court.

The materials for this problem consist of (1) the Statement of the Case, which sets out the relevant facts; (2) the opinion of the Supreme Court for the State of Flamingo; (3) excerpts of the written briefs filed in the Supreme Court on behalf of the Appellant and the Respondents; and (3) selected Fourth Amendment opinions issued by the Supreme Court.

The Supreme Court briefs contain discussions of the relevant Fourth Amendment cases, and they provide a roadmap for structuring your argument before the Court. Do not memorize the arguments in briefs or read the briefs to the Justices during argument. You should read and understand the arguments made in the briefs, and use them to help you develop and present to the Court your own views on the issue. You are not required to follow the approaches set out in the briefs, and you are free to formulate your own arguments about the issues. Unless you are prepared to offer sound reasons for the Court to overrule a prior decision, however, you should be prepared to explain how your position is consistent with the existing Fourth Amendment case law, as set out in the briefs and court opinions.

THIS IS A CLOSED CASE - no other materials may be used and no outside research is permitted.

It is recommended that the first time you read the Supreme Court decisions provided to you, that you do so in the order in which the decisions were issued. Since each subsequent decision cites the previous opinions, it is easier to understand the relevant precedents if you review the decisions in this way.

The materials in this case packet contain discussion of the relevant events and legal issues – and they provide a roadmap for structuring your argument before the Court. Do not memorize the arguments in any of the case materials or read the Supreme Court opinions to the Justices during argument. You should read and understand the arguments made in the case materials and use them to help you develop and present to the Court your own views on the issue. You are not required to follow the approaches set out by either the majority or dissenting opinions, and you are free to formulate your own arguments about the issues. Unless you are prepared to offer sound reasons for the Court to overrule a prior decision, however, you should be prepared to explain how your position is consistent with the existing case law, as provided in the four previous Supreme Court decisions.

STATEMENT OF THE CASE

A.

On September 15, 2010, Officer Forrest Tramm, the "canine officer" of the Monteverde Police Department, and his drug-detection dog Randy, were on patrol. Officer Tramm drove up behind a truck being driven by Petitioner Rufus Jacamar. Officer Tramm conducted a traffic stop after noticing that Jacamar's tag was expired. When Officer Tramm approached the truck, he saw an open can of beer in the cup holder, and he noticed that Jacamar was shaking, breathing rapidly, and could not sit still. Officer Tramm asked Jacamar if he would consent to a search of the truck, which Jacamar declined to do. Officer Tramm then deployed Randy, who conducted a "free air sniff" of the exterior of the truck. Randy "alerted" to the door handle of the driver's side, indicating the presence controlled substances.

Believing that Randy's alert gave him probable cause, Officer Tramm began to search the truck. Officer Tramm found a large duffle bag behind the passenger seat that contained several boxes of matches, more than 200 pseudoephedrine pills, and jug of liquid labeled muriatic acid. Officer Tramm knew these chemicals were precursors of methamphetamine. Officer Tramm placed Jacamar under arrest, secured him in the patrol car, and then returned to continue searching the truck. In the glove box Officer Tramm found two zip-top plastic bags, each containing multiple small plastic bags filled with marijuana. Among the empty Starbucks cups and M&M bags stuffed under the driver's seat, Officer Tramm found an opened, crumpled-up envelope addressed to Jacamar and showing a local Monteverde return address.

Two days later, Officer Tramm and Randy, along with Monteverde Police Detective David Sibley and agents from the federal Drug Enforcement Agency and Department of Justice, staked out the house at the address shown on the envelope. The house was owned by Petitioner Violet

Sabrewing. There were no vehicles in the driveway, and the blinds were closed. Detective Sibley watched the house for more than fifteen minutes, but observed no activity. Officer Tramm then put Randy on a leash and walked him up the front stairs and onto the front porch of Sabrewing's house. After sniffing over and around the front door, Randy sat down in front of the door, thus alerting to the scent of contraband.

Based on Randy's alert, Detective Sibley later applied for and received a warrant authorizing a search of Sabrewing's house. Officers executing the search found a hydroponic marijuana growing operation in the front house of the house, and Sabrewing was arrested.

B.

Drug-dog Randy is a "single purpose" dog – he is trained only to detect drugs. (Other single purpose dogs could be trained, for example, only to apprehend.) "Dual-purpose" dogs -- for example, dogs trained in apprehension and drug detection -- must carry a certification from the Flamingo Department of Law Enforcement. Single-purpose dogs like Randy are not required by law to be certified, but instead must simply demonstrate proficiency. Flamingo does not have a set standard for certification for single-purpose drug dogs.

At the time of the searches, Officer Tramm had been a law enforcement officer for three years and a canine handler for more than two years. Officer Tramm and Randy became partners in January 2009. They completed a forty-hour training program conducted by a neighboring police department a few months later and since then have completed the training program annually. Under a previous handler, Randy completed a 120–hour drug detection training course and was certified by Drug Beat K–9 Certifications, a private credentialing organization. That certification had expired by the time of the events at issue in this case.

Officer Tramm trains Randy in detecting drugs for four hours every week, and the pair attends a 40-hour training seminar every year. According to Officer Tramm, Randy's success rate during training is "really good." Officer Tramm began keeping records of Randy's training in September 2009, using a form that provides for a performance rating of satisfactory or unsatisfactory. Officer Tramm's records show that Randy's performance was satisfactory 100% of the time, although the records do not indicate whether a satisfactory performance can include any false alerts. Officer Tramm deploys Randy in the field about five times a month. Officer Tramm keeps records of Randy's field performance only if he makes an arrest, and even then, he documents only Randy's successes – Officer Tramm keeps no records of Randy's alerts in the field when no contraband is found.

Randy is trained to detect cannabis, cocaine, ecstasy, heroin, and methamphetamine, but he is not trained to detect pseudoephedrine. Although Officer Tramm testified at the suppression that pseudoephedrine is a precursor of meth, there was no testimony as to whether a dog trained to detect and alert to meth would also detect and alert to pseudoephedrine. Officer Tramm testified that Randy can pick up residual odors of illegal drugs on an object when, for example, someone has the odor on his or her hand and touches a door handle. When asked how long a residual odor can remain on the handle, Officer Tramm stated that he was not qualified to answer that question.

Supreme Court of Flamingo

Rufus Jacamar and Violet Sabrewing, Petitioners,

v.

State of Flamingo, Respondent.

FRANCISCO, Chief Judge:

The United States Supreme Court has held that a drug-detection dog's "sniff" of the exterior of a vehicle does not constitute a "search" within the meaning of the Fourth Amendment to the United States Constitution. In this case, we consider two different questions raised by the use of drug-detection dogs: First, when will a dog's alert to the exterior of a vehicle provide an officer with probable cause to conduct a warrantless search of the interior of the vehicle? Second, even if a "sniff" of a car is not a search, is a sniff by a drug-detection dog conducted at the front door of a private residence a search under the Fourth Amendment? These questions go to the heart of the constitutional right of all individuals in this state to be protected from unreasonable searches and seizures.

During a routine traffic stop, drug-dog Randy "alerted" on the door handle of Rufus Jacamar's truck. Officer Forrest Tramm searched the truck, found drugs, and arrested Jacamar. Based on information found in Jacamar's truck, Officer Tramm and Randy conducted a "sniff test" at the front door of Violet Sabrewing's house. Randy's positive alert lead to the issuance of a search warrant. Sabrewing was arrested after officers executing the warrant found marijuana being grown in the house. Sabrewing and Jacamar were eventually charged with conspiracy to manufacture and distribute methamphetamine and marijuana.

Prior to trial, Sabrewing and Jacamar filed a motion seeking to suppress grounds the evidence found in Jacamar's truck and Sabrewing's house as a result of Randy's positive alerts. Jacamar claimed that Randy's positive alert did not give Officer Tramm probable cause to believe drugs would be in the truck, and that the warrantless search therefore violated the Fourth Amendment. Sabrewing contended that even if dog sniffs of cars are not searches for Fourth Amendment purposes, the dog sniff at her house was a search and thus required a warrant. The trial court denied the motions to suppress. Sabrewing and Jacamar proceeded to trial, and the jury convicted them both of conspiracy to distribute marijuana and methamphetamine. This appeal followed.

I. Sabrewing's Appeal

Sabrewing argues on appeal that a drug-dog sniff at the front door of a private residence constitutes a search for Fourth Amendment purposes. Because Officer Tramm and Detective Sibley did not obtain a warrant before making their early morning visit to Sabrewing's house, Sabrewing argues that the search was per se unreasonable under the Fourth Amendment. We agree.

A.

The Fourth Amendment to the United States Constitution 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." U.S. Const. amend. IV. Generally speaking, a "search" for purposes of the Fourth Amendment occurs when the government infringes on a subjective expectation of privacy that society is prepared to recognize as reasonable. *See Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). A Fourth Amendment "search" also occurs if the government, for the purpose of obtaining information, trespasses upon any of the areas ("persons, houses, papers, and effects") about which the Fourth Amendment is "particular[ly] concern[ed]." *United States v. Jones*, 132 S. Ct. 945, 950 (2012).

The Supreme Court has consistently concluded that drug-dog sniffs are <u>not</u> searches within the meaning of the Fourth Amendment. In *United States v. Place*, the Court held that a drug-dog's sniff of the exterior of luggage that had been temporarily detained by airport police was not a search for Fourth Amendment purposes:

> The Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy. . . . A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> 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. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

United States v. Place, 462 U.S. 696, 706-07 (1983).

The Court reaffirmed that analysis in *Illinois v. Caballes*, 543 U.S. 405 (2005), where it held that drug-dog sniffs of the exterior of a vehicle during a lawful traffic stop do not violate the Fourth Amendment, even if the police officers had no reasonable basis to suspect that drugs would be in the vehicle. The Court explained that "[o]fficial conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment. . . . [A]ny interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest." *Id.* at 408. The Court therefore held that "the use of a well-trained narcotics-detection dog -- one that does not expose noncontraband items that otherwise would remain hidden from public view-- during a lawful traffic stop generally does not implicate legitimate privacy interests." *Id* at 408–09; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("[A]n exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. . . . [A] sniff by a dog that simply walks around a car is much less intrusive than a typical search.").

The *Caballes* Court reconciled its holding with the holding of *Kyllo v. United States*, 533 U.S. 27 (2001), where the Court held the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search, by noting that the device in *Kyllo* was capable of detecting lawful activity and intimate details of the residents' lives: "The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Caballes*, 543 U.S. at 409-10.

B.

We reject the State's argument that this case is controlled by the federal drug-sniff cases discussed above. Although the Court held that the sniffs in those cases were not searches, the Supreme Court was careful to tie its ruling to the particular facts of that case. *See Place*, 462 U.S. at 707 ("[W]e conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."); *Edmond*, 531 U.S. at 40 ("The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search."); *Caballes*, 543 U.S. at 409 ("In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."). The federal cases all involved minimally intrusive "sniffs" conducted in public in an impersonal manner on mere "objects" – luggage in the airport and cars on the roadside. This case, by contrast, involves a coordinated operation of multiple law enforcement agencies that was focused directly on -- and only on -- Sabrewing's home. As we explain, we believe that these facts take this case outside the rule established by the Supreme Court's dog-sniff cases.

"At the very core" of the rights guaranteed by the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). Indeed, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972). While police officers generally have the right, as would any citizen, to approach the front door of a private residence seeking to speak to its occupants, they do not have the right to walk up to the door for purposes of performing a sniff test.

One unfamiliar with nature of modern police practices might think that a "sniff test" conducted at a private residence would be a small, quiet affair, with a single officer and his dog quickly approaching the front door and the dog discreetly sniffing and alerting if drugs are detected. That image, however, is far from the reality of most such cases, as demonstrated by the facts of this case. The operation at Sabrewing's house involved members of Monteverde's Police Department and Narcotics Bureau, along with federal agents employed by the DEA and the United States Department of Justice. State officers established perimeter positions around the residence, with federal agents taking positions further away from the house. The "sniff" portion of the operation was itself vigorous and intensive, with Randy leading on the leash and pulling Officer Tramm around the porch "very dramatically," as Officer Tramm testified at trial. After the sniff test was completed and the state police officers left the scene, federal officers remained to maintain surveillance of the house. When Detective Sibley returned with warrant about an hour later, numerous officers from the various state and federal agencies entered through the front door of the house to perform the search.

The sniff test conducted in this case thus was a highly intrusive procedure; it was a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments. On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity, from the initial surveillance through the ultimate search, lasted for hours. The "sniff test" apparently took place in plain view of the general public. There was no anonymity for the resident.

Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, whether or not he or she is present at the time of the search, for such dramatic government activity in the eyes of many-neighbors, passers-by, and the public at large-will be viewed as an official accusation of crime. *Cf. Place*, 462 U.S. at 707 (explaining that the dog "sniff test" in that case was not a "search" within the meaning of the Fourth Amendment because it was limited in scope and was anonymous and did not subject the individual to "embarrassment and inconvenience"). And if the resident happens to be present at the time of the sniff test, the intrusion into the sanctity of his or her home will generally be a frightening and harrowing experience that could prompt a reflexive or unpredictable response.

The facts and circumstances that made the sniffs at issue in *Place*, *Edmonds*, and *Caballes* minimally intrusive therefore are entirely absent in this case. If government agents can conduct a dog "sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or

discriminatory manner, or based on whim and fancy, at the home of any citizen. *Cf. Camara v. Mun. Court of City & Cnty. of S. F.*, 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). Such an open-ended policy invites overbearing and harassing conduct.

In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. Accordingly, we conclude that a sniff test at a private residence must be authorized by a warrant that can be issued only upon of a showing of probable cause.

In this case, the police failed to obtain a warrant being performing the sniff test, and the warrantless sniff of Sabrewing's house violated Sabrewing's Fourth Amendment. Because the sniff test served as the probable cause for the search warrant obtained by Detective Sibley, the evidence obtained during the execution of that warrant is tainted by the initial Fourth Amendment violation. *See Segura v. United States*, 468 U.S. 796, 804 (1984) ("The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality, i.e., "fruit of the poisonous tree."). The trial court therefore erred by denying Sabrewing's motion to suppress the evidence discovered during the execution of the search warrant.

II. Jacamar's Appeal

On appeal, Jacamar argues that the State failed to establish Randy's reliability as a drug-detecting dog and that Randy's positive alert therefore did not provide probable cause to search the truck. Without probable cause, the warrantless search of the truck was unreasonable, and Jacamar thus contends that the trial court erred by denying his motion to suppress the evidence found in the search of the truck. We agree.

A.

Subject to only a few, well-delineated exceptions, warrantless searches are presumptively unreasonable under the Fourth Amendment. *See Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One of the most important exceptions to the warrant requirement is the "automobile exception." In light of the inherent mobility of cars and the reduced expectation of privacy in cars and other vehicles, the Supreme Court has concluded that a warrant is not required for a search of car. A warrantless search of a readily mobile car is permitted by the Fourth Amendment as long as there is probable cause to believe the car contains contraband or evidence of a crime. *See California v. Carney,* 471 U.S. 386, 390-93, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985); *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

Probable cause is a "flexible, common-sense standard." *Texas v. Brown*, 460 U.S. 730, 742 (1983). "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 or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Id.* (internal quotation omitted). "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, 176 (1949).

In general, "[p]robable cause exists when there is 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). As this court has phrased the standard, probable cause for the warrantless search of vehicle exists if "the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Betz*, 815 So. 2d 627, 633 (Fla. 2002); *see also Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000) (probable cause for a search warrant exists "when there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that . . . fruits, instrumentalities, or evidence of crime" will be found at the location to be searched). Whether probable cause exists depends upon the reasonable conclusions to be drawn from the facts known to the officer at the time of the search. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

B.

In our view, whether a dog's alert provides probable cause for a search hinges on the dog's reliability as a detector of illegal substances within the vehicle. Like the informant whose information forms the basis for probable cause, where the dog's alert is the linchpin of the probable cause analysis, such as in this case, the reliability of the dog to alert to illegal substances within the vehicle is crucial to determining whether probable cause exists. If a dog is not a reliable detector of drugs, the dog's alert in a particular case, by itself, does not indicate that drugs are probably present in the vehicle. In fact, if the dog's ability to alert to the presence of illegal substances in the vehicle is questionable, the danger is that individuals will be subjected to searches of their vehicles and their persons without probable cause. Conversely, if a dog is a reliable detector of drugs, the dog's alert in a particular case can indicate that drugs are probably present in the vehicle. In those circumstances, the drug-detection dog's alert will indicate to the officer that there is a "fair probability that contraband" will be found. *Gates*, 462 U.S. at 238, 103 S.Ct. 2317.

Because the dog cannot be cross-examined like a police officer whose observations at the scene may provide the basis for probable cause, we believe the trial court must be able to assess the dog's reliability by evaluating the dog's training, certification, and performance, as well as the training and experience of the dog's handler. Similar to situations where probable cause to search is based on the information provided by informants, the trial court must be able to evaluate the reliability of the dog based on a totality of circumstances. *See Gates*, 462 U.S. at 230–31, 103 S.Ct. 2317. A critical part of the informant's reliability is the informant's track record of giving accurate information in the past. *See* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth*

Amendment § 3.3 (4th ed. 2004) ("When the police undertake to establish the credibility of an informant as a part of their task of establishing that probable cause exists for an arrest or search made or to be made exclusively or primarily upon that informant's story, they invariably do so by referring to the past performance of that informant."). Thus, to determine whether the officer has a reasonable basis for concluding that the dog's alert indicates a fair probability that contraband will be found, it seems to us that the trial court must be able to adequately make an objective evaluation of the reliability of the dog.

Some courts, however, have held that a positive alert is sufficient to establish probable cause as long as the state demonstrates that the dog was trained and certified to detect illegal drugs; evidence of the dog's reliability in past cases is unnecessary. *See United States v. Williams*, 69 F.3d 27, 28 (5th Cir.1995); *Dawson v. State*, 518 S.E.2d 547 (Ga. Ct. App. 1999); *State v. Laveroni*, 910 So. 2d 333, 336 (Fla. Ct. App. 2005) ("[T]he 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.").

In our view, the mere fact that the dog has been trained and certified is not enough to establish probable cause to search the interior of the vehicle and the person. We first note that there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs. In the absence of a uniform standard, the reliability of the dog cannot be established by demonstrating only that a canine is trained and certified. In other words, whether a dog has been sufficiently trained and certified must be evaluated on a case-by-case basis.

Moreover, drug-detecting dogs are not infallible. As one commentator has noted, "not all dogs are well-trained and well-handled, nor are all dogs temperamentally suited to the demands of being a working dog. Some dogs are distractible or suggestible, and may alert improperly. Many factors may lead to an unreliable alert." Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 4 (2006). To presume reliability simply because the dog has been trained and certified fails to acknowledge the fallibility of even well-trained dogs, and does not take into account the potential for false alerts or the potential for handler error. Residual odors can likewise affect the reliability of a drug sniff. Because of the sensitivity (or hypersensitivity) of a dog's nose, a dog may alert to a residual odor, which may not indicate the presence of drugs in the vehicle at the time of the sniff.

After consideration of these variables, we conclude that the reliability of the drug dog is a necessary part of the circumstances to be included in the court's probable-cause analysis. *See United States v. Aguirre*, 664 F.3d 606, 610 (5th Cir. 2011) ("Under the Fourth Amendment, a warrantless search of a person's home is presumptively unreasonable, and it is the government's burden to bring the search within an exception to the warrant requirement."). The fact that a drug-detection dog has been trained and certified to detect narcotics, standing alone, is not sufficient to demonstrate the reliability of the dog. To demonstrate that an officer has a reasonable basis for believing that an alert by a drug-detection dog is sufficiently reliable to provide probable cause to search, the State 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. The trial court must then assess the reliability of the dog's alert as a basis for probable cause to search the vehicle based on a totality of the circumstances.

In applying these standards to the case at bar, we hold that the trial court erred in concluding that the State presented sufficient evidence to establish probable cause to conduct a warrantless search of Jacamar's truck. The State provided little information about the nature of Randy's training, and the few records it kept of Randy's training provided little objective data. The State presented no evidence of the frequency of any false alerts, whether in training or in the field, and the State failed to present any qualified testimony regarding Randy's ability to detect residual odors.

Accordingly, we conclude that the State failed to establish that Officer Tramm had a reasonable basis for believing that Randy was reliable, as would be necessary for Officer Tramm to conclude that Randy's alert indicated a fair probability that drugs would be found in the vehicle. In the absence of a reliable alert, the other factors considered in the totality of circumstances analysis – the expired tag, the open beer can in the truck, and Jacamar's shaking, breathing rapidly, and inability to sit still -- do not rise to the level of probable cause that there were illegal drugs inside the vehicle. Because the State has failed to meet its burden of establishing probable cause, the search of the vehicle violated the Fourth Amendment's prohibition on unreasonable searches and seizures.

III. Conclusion

For the reasons discussed above, the warrantless search of Jacamar's truck was not supported by probable cause as required by the Fourth Amendment, and that the warrantless sniff test conducted at Sabrewing's front door was a search within the meaning of the Fourth Amendment for which a warrant was required. Accordingly, we reverse the trial court's order denying the suppression motions, and we remand for the trial court to determine whether there remains sufficient untainted evidence to support the convictions of Jacamar and Sabrewing.

IT IS SO ORDERED.

General Instructions

The 2014 NJC Appeals problem focuses on the Fourth Amendment implications of "sniffs" by dogs trained to detect illegal drugs.

During a routine traffic stop, a Monteverde police officer used a drug-dog to sniff the exterior of Rufus Jacamar's truck. The dog "alerted" to the door handle, which the officer believed gave him probable cause to search the truck for controlled substances. The search of the truck uncovered evidence that Jacamar and Violet Sabrewing were involved in manufacturing methamphetamine. Monteverde officers subsequently conducted surveillance of Sabrewing's house and brought the drug-dog onto Sabrewing's front porch to sniff around the front door. The dog alerted, and the officers used the alert to obtain a search warrant. A search of the house revealed a hydroponic marijuana growing operation. Jacamar and Sabrewing were arrested and charged by the State of Flamingo with conspiracy to manufacture and distribute marijuana and methamphetamine. The trial court denied their pre-trial motions to suppress evidence obtained as

a result of the separate drug-dog sniffs, and Jacamar and Sabrewing were later convicted at trial. They appealed their convictions to the Supreme Court for the State of Flamingo, which concluded that: (1) the drug-dog sniff of Jacamar's truck was not reliable and therefore did not provide probable cause for the search; and (2) the drug-dog sniff of Sabrewing's house was a search that itself required a warrant. The Flamingo court therefore concluded that the police officers' actions violated Jacamar's and Sabrewing's rights under the Fourth Amendment, and the court suppressed all evidence recovered in the searches. The State of Flamingo has appealed that decision to Supreme Court of the United States. You will be representing the State of Flamingo (the Appellant) or Jacamar and Sabrewing (the Respondents) in the argument before the Supreme Court.

There are two issues on appeal: (1) whether the drug-dog sniff provided probable cause to search Jacamar's truck; and (2) whether the drug-dog sniff of Sabrewing's front door was a search. Attorneys representing the State of Flamingo will be arguing that the sniff of the exterior of the truck did provide probable cause and that the front-door sniff was not a search. Attorneys representing Jacamar and Sabrewing will be arguing that the truck sniff did not provide probable cause and that the front-door sniff was a search.

The materials for this problem consist of (1) the Statement of the Case, which sets out the relevant facts; (2) the opinion of the Supreme Court for the State of Flamingo; (3) excerpts of the written briefs filed in the Supreme Court on behalf of the Appellant and the Respondents; and (3) selected Fourth Amendment opinions issued by the United States Supreme Court, which set out the governing legal principles. Your argument to the Supreme Court as to why the drug-dog sniffs did or did not violate the Fourth Amendment should be based on the law as presented in this packet.

The Supreme Court briefs contain discussions of the relevant Fourth Amendment cases, and they provide a roadmap for structuring your argument before the Court. Do not memorize the arguments in briefs or read the briefs to the Justices during argument. You should read and understand the arguments made in the briefs, and use them to help you develop and present to the Court your own views on the issue. You are not required to follow the approaches set out in the briefs, and you are free to formulate your own arguments about the issues. Unless you are prepared to offer sound reasons for the Court to overrule a prior decision, however, you should be prepared to explain how your position is consistent with the existing Fourth Amendment case law, as set out in the briefs and court opinions.

Supreme Court of the United States

State of Flamingo, Appellant,
v.
Rufus Jacamar and Violet Sabrewing, Respondents

Brief of Respondents

I. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE ALERT BY A DRUG-DETECTOR DOG OF UNPROVEN RELIABILITY FAILED TO CREATE PROBABLE CAUSE TO SEARCH JACAMAR'S TRUCK

Probable cause exists when "there is 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)*. It is a "fluid concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules." *Id.; see also Brinegar v. United States, 338 U.S. 160, 176 (1949)* ("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.").

As this Court has made clear, determining whether probable cause exists requires consideration of the totality of the circumstances. See *Maryland v. Pringle, 540 U.S. 366, 371 (2003); Gates, 462 U.S. at 238.* "The principal components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount . . . to probable cause." *Ornelas v. United States, 517 U.S. 690, 696 (1996).* When a totality analysis is called for under the Fourth Amendment, the Court requires a case-by-case determination of the facts and circumstances relevant to that issue and has refused to permit states to use "blanket exceptions" that dispense with the totality analysis in specified categories of cases. See *Richards v. Wisconsin, 520 U.S. 385, 392, 394 (1997)* (requiring a case-by-case determination of whether reasonable suspicion exists to dispense with the Fourth Amendment's knock-and-announce requirement in felony drug cases).

A. The State's "Credentials Alone" Approach Is Contrary To The Totality-Of-The-Circumstances Analysis Required To Establish Probable Cause

Although the State declines to describe it as such, there can no doubt that the "credentials alone" canine-reliability test urged by the State is an exception to the totality-of-the-circumstances analysis. The State's proposed limitation would force courts to make probable-cause determinations based solely on evidence the State believes is helpful to its case (evidence of training or certification), without hearing the other side -- facts or circumstances that, when viewed in their totality, may call into question a particular dog's reliability for contraband detection in the

field. The State's proposed rule is therefore inconsistent with this Court's long established totality-of-the-circumstances standard.

B. Probable Cause From A Drug-Detector Dog Alert Turns On Whether The Dog Accurately and Reliably Alerts Only to Contraband

The State relies on Place and Caballes for its claim that proof of a drug-dog's training conclusively establishes the reliability of the dog's alert. The rule that it urges, however, contradicts the justifications for the Court's conclusion in those cases that canine sniffs of luggage and vehicles are not Fourth Amendment searches. Moreover, the court below properly analogized drug-dogs to anonymous tipsters whose reliability must be shown before their tip can give rise to probable cause.

1. The Rule of Place and Caballes

In *United States v. Place, 462 U.S. 696 (1983),* and *Illinois v. Caballes, 543 U.S. 405 (200*5), this Court held that sniffs of cars and luggage by "well-trained" drug dogs are not searches under the Fourth Amendment, a conclusion that was expressly based on the limited intrusiveness of a dog sniff and the accuracy of the sniff, which reveals "only the presence or absence of narcotics, a contraband item." Place, *462 U.S. at 707 (1983);* see also *Caballes, 543 U.S. at 409* (explaining that a canine sniff of a vehicle "reveals no information other than the location of [contraband]"). The Court continued its focus on the accuracy of an investigative technique in *United States v. Jacobsen, 466 U.S. 109 (1984).* In Jacobsen, Federal Express employees discovered a white powdery substance while examining a package damaged during shipping and turned it over to the U.S. Drug Enforcement Administration; field-testing conducted on the spot by the DEA established that the white powder was cocaine. *See id. at 111-12*. This Court held that the field-testing of the white powder was not a search because the field test could reveal only whether the white powder was cocaine. See *id. at 123* ("The field test at issue could disclose only one fact previously unknown to the agent -- whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder."). Because there can be no legitimate interest in "privately" possessing cocaine and the field-testing could not reveal any other arguably "private" fact, the Court held that the field-testing was not a search, a conclusion that the Court believed was "dictated" by its opinion in Place. See *Jacobsen, 466 U.S. at 123*.

It is therefore clear from this Court's opinions in Place, Jacobsen, and Caballes that the accuracy of the investigative technique was the foundation of the Court's determination that dog-sniff are not searches. The rule set out Place and Caballes thus depends on the dog's accuracy, but the State insists that it should not be required to prove the accuracy of the dog. Because the State's proposed standard "untether[s]" the sniff-is-not-a-search rule from the reasons that led the Court to create it, it should be rejected. *Cf. Arizona v. Gant, 556 U.S. 332, 343 (2009)* ("To read Belton as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the . . . exception").

2. A Drug-Dog's Alert Should Be Treated Like A Tip From An Informant.

When police officers use informants to justify a search, they must have reason to believe the information is accurate. See *Gates, 462 U.S. at 230* (noting importance of informant's

veracity, reliability and basis of knowledge to probable-cause inquiry). Like a tip from a human informant, a drug-dog's alert is a tip concerning possible criminal activity, and the same approach should be applied to cases involving alerts by drug-dogs. However, the reliability and basis of knowledge of a drug-dog are not as easy to evaluate as those of two-legged informants. The alert itself does not communicate the dog's basis of knowledge -- the dog cannot tell its handler whether the scent is strong or weak, fresh or stale, and the dog cannot later explain its actions in a suppression hearing.

Factual corroboration of the details of an anonymous tip may balance out an inadequate showing of reliability where human informants are involved. See *Gates, 462 U.S. at 233-34; United States v. Smith, 182 F.3d 473, 483 (6th Cir. 1999)* ("If the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required."). A drug-dog's alert, however, simply cannot be corroborated before a search is commenced. Police may gather different facts to aid in the probable cause determination, but these facts do not corroborate the information provided by the dog that it has detected one of its signal odors. Since probable cause must be based on reasonably trustworthy information and there is no way to corroborate a drug-dog alert before a search, the Supreme Court of Flamingo properly required the State to present evidence establishing the dog's reliability.

C. The Evidence Required By Was Necessary To Show Reliability And Is Consistent With The Totality-Of-The-Circumstances Approach

As argued above, reliability is critical to the probable cause determination, and the Supreme Court of Flamingo properly rejected the State's claims that evidence of training and certification conclusively establishes reliability. The State's "credentials alone" test is based on an overgeneralized assertion – that all trained or certified drug-detection dogs are reliable in the field. A simple recital that a drug-detection dog is "certified" does not on its own establish the dog's reliability for contraband detection in the field. Training and certification standards vary widely between private vendors that certify drug-detection dogs, and there are vast differences in the various agencies' training methodology. See *Matheson v. State, 870 So. 2d 8, 14 (Fla. Ct. App. 2003).* The State's argument was therefore properly rejected.

All of the categories of evidence required by the Flamingo court – 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 – are probative of the critical question of reliability. Specifying the categories of evidence to be presented is not inconsistent with the totality-of-the-circumstances test, but was instead necessary to ensure that the warrant exception for canine sniffs of luggage and vehicles remains tether to its justifications. The Supreme Court of Flamingo's ruling on Jacamar's appeal should therefore be affirmed.

II. A DOG SNIFF AT THE FRONT DOOR OF A HOME BY A NARCOTICS DETECTION DOG IS A FOURTH AMENDMENT SEARCH REQUIRING A WARRANT BASED UPON PROBABLE CAUSE BECAUSE THE DOG SNIFF VIOLATES THE HOMEOWNER'S REASONABLE EXPECTATION OF PRIVACY

A homeowner's reasonable expectation of privacy is violated where a police officer uses a narcotics detection dog to reveal any details within the interior of a home that could not be discovered by the officer's ordinary powers of perception without a physical intrusion into the home. The State of Flamingo, however, contends that Sabrewing had no reasonable expectation of privacy in the only thing that was revealed by the sniff – the presence of illegal drugs in her home. It is clear from this Court's Fourth Amendment jurisprudence; however, that government activity which reveals any detail that an individual seeks to keep private within the home constitutes a search under the Fourth Amendment.

A. Police Action That Reveals Any Detail An Individual Seeks To Keep Private Within The Home Is A Fourth Amendment Search.

Where no physical trespass on private property has taken place, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo, 533 U.S. at 32-33 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))*. The Court made it clear in Kyllo that the nature of the information obtained regarding the interior of the home is not relevant to the determination of whether a Fourth Amendment search has occurred: "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. . . . In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Id. at 37-38 (emphasis in original).*

That all details inside the home are protected by the Fourth Amendment is also supported by this Court's decision in *United States v. Karo, 468 U.S. 705 (1984)*. In Karo, agents placed a tracking device in a can of ether (used to extract cocaine from clothing imported into the United States) and left the device in place for five months as the can was transported between different locations. The Court held that activating the beeper while the can was inside the garage attached to the house was a search. Although the monitoring was less intrusive than a full search, the Court held the monitoring was a search because it "reveal[s] a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant*." Id. at 715*.

The beeper in Karo disclosed nothing more than the presence of narcotics paraphernalia, but this Court held that the use of the beeper to disclose the presence of that object inside a home is a Fourth Amendment search. That being the case, a dog sniff by a trained drug detection dog which does nothing more than reveal the presence of contraband inside the home constitutes a search under the Fourth Amendment because all details in the home are intimate details safe from prying government eyes. Accordingly, a police officer's use of a trained narcotics detection dog at the front door of a home to obtain information about what is inside that home is a Fourth Amendment search requiring a warrant based upon probable cause.

B. The Decisions Of This Court In Place, Edmond, And Caballes Do Not Establish That A Dog Sniff At The Front Door Of A Home Is Not A Fourth Amendment Search.

The State of Flamingo contends that the decisions of this Court in *United States v. Place, 462 U.S. 696 (1983), City of Indianapolis v. Edmond, 531 U.S. 32 (2000), and Illinois v. Caballes, 543 U.S. 405 (2005),* establish that the use of a narcotics detection dog to reveal the details of the interior of a home is not a Fourth Amendment search. The State argues that because a narcotics detection dog only reveals the presence of contraband, the use of a detection dog, or any other tool

which law enforcement officials might conceivably develop to reveal only the presence of contraband, cannot be considered a search under the Fourth Amendment no matter the circumstances under which the contraband is revealed. This argument should be rejected for several reasons.

As previously discussed, this Court in Place, Edmond, and Caballes held that sniffs of cars and luggage by "well-trained" drug dogs are not searches under the Fourth Amendment because a dog sniff is not intrusive and because the sniff reveals only the presence of narcotics, a contraband item in which there was legitimate privacy interest. These cases, however, do not involve the historical foundations of the Fourth Amendment that are such a critical factor in considering whether government actions to determine what is inside a home constitute a Fourth Amendment search. See *Wilson v. Layne, 526 U.S. 603, 609–10 (1999)* ("The Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home reflected in the "now-famous observation that 'the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose.'"). Accordingly, those decisions do not establish that the use of a trained drug detection dog at the front door of a home to obtain information about what is inside the home does not constitute a Fourth Amendment search. Because the use of a narcotics detection dog to reveal what is inside a home does involve the historical special status afforded to a home, it constitutes a Fourth Amendment search, even if the only details revealed are illegal activity.

C. Use Of A Drug Dog To Reveal Details Of The Home Constitutes A Fourth Amendment Search Even Though The Dog Does Not Physically Enter The Home.

The fact that the narcotics detection dog reveals the details of the home without physically intruding inside the home does not establish that the use of the dog at the front door of the home is not a Fourth Amendment search requiring a warrant. In Karo, the Court held that while the monitoring of a beeper is less intrusive than a full search, the monitoring nonetheless constitutes a Fourth Amendment search because "it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." *Karo, 468 U.S. at 715 (emphasis added).* Likewise, this Court in Likewise, this Court in Kyllo held that use of the thermal imager was a search even though there had been "no 'significant' compromise of the homeowner's privacy*." Kyllo, 533 U.S. at 29.*

In this case, a police officer used a trained narcotics detection dog to obtain information regarding the interior of Ms. Sabrewing's home that the officer was otherwise unable to obtain using his ordinary powers of perception without a physical intrusion into the constitutionally protected area of the home. Pursuant to Karo and Kyllo, this use of the trained narcotics detection dog to obtain the information from the interior of the home that would have been unknowable without physical intrusion is a Fourth Amendment search and is presumptively unreasonable without a warrant based upon probable cause.

III. A DOG SNIFF AT THE FRONT DOOR OF A HOME BY A DRUG DOG IS A FOURTH AMENDMENT SEARCH BECAUSE A POLICE OFFICER TAKING THE DOG TO THE FRONT DOOR OF THE HOUSE IS A COMMON LAW TRESPASS

Aside from a police officer's use of the narcotics detection dog to reveal details inside the home, the actions of a police officer in taking a narcotics dog to the front door of a home also constitute a Fourth Amendment search. This Court held in Jones that a Fourth Amendment search

occurs when the Government physically trespasses upon the areas enumerated in the Fourth Amendment for the purpose of obtaining information. *Jones, 132 S. Ct. at 950 n.3*. The curtilage of a home -- which clearly includes the front door and the area immediately adjacent to the front door, see *Oliver v. United States, 466 U.S. 170, 178, 180 (1984)* – is one of the protected areas enumerated in the Fourth Amendment. *Jones, 132 S. Ct. at 953*.

In this case, Officer Tramm and drug-dog Randy set foot upon Sabrewing's property without her consent. While other members of the public have an implied invitation by custom to approach the front door, as do police officers under other circumstances, no such implied invitation by custom exists for an officer to approach the front door of a house with a narcotics detection dog for the purpose of searching for otherwise undiscoverable evidence. See Restatement (Second) of the Law of Torts § 167, cmt. d ("Consent to enter on land in the possession of another may be derived from the relationship of the parties, as in the case of intimate friends or social or business visitors. Unless the possessor manifests otherwise, a general or local custom [likewise] may confer consent."). Officer Tramm therefore trespassed on Sabrewing's property. And because the trespass was coupled with "an attempt to find something or to obtain information," Officer Tramm's actions constituted a search. *Jones, 132 S. Ct. at 953 n.5* ("Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.").

See Supreme Court documents that are an added piece to this document.

Supreme Court of the United States

State of Flamingo, Appellant,

v.

Rufus Jacamar and Violet Sabrewing, Respondents

Brief of Appellant

I. THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT AN ALERT BY A WELL-TRAINED DRUG-DETECTION DOG FAILS TO ESTABLISH PROBABLE CAUSE

A. Probable Cause Is A Flexible, Common-Sense Standard That Depends On Fair Proba-bilities And Not Hard Certainties

This Court has long recognized that because of the "ready mobility" of motor vehicles and diminished expectation of privacy resulting from the "pervasive regulation of vehicles capable of traveling on the public highways," probable cause suffices to justify the search of a vehicle even in the absence of a warrant. *California v. Carney, 471 U.S. 386, 391-92 (1985).* Broadly speaking, probable cause exists if, in light of the totality of the circumstances, "there is 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).* Whether the search turns up the contraband the officer expected is irrelevant, because "'[i]t is axiomatic that hindsight may not be employed in determining whether a prior arrest or search was made upon probable cause.'" *Arizona v. Evans, 514 U.S. 1, 17 (1995) (O'Connor, J., concurring) (quoting 1 W. LaFave, Search and Seizure § 3.2(d) (2d ed. 1987 & Supp. 1995)).* This Court has repeatedly rejected attempts to mechanize the probable cause inquiry by substituting rigid tests for "the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations." *Id. at 238.* Instead, the totality-of-the-circumstances analysis looks to all relevant factors known to the officer, including the on-the-spot judgments that officers must make in the field based on their experience and instincts. As this Court has recognized, "a police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas v. United States, 517 U.S. 690, 700 (1996).*

While the reliability of information on which an officer bases the decision to search is an important consideration in totality-of-the-circumstances analysis, this Court has recognized that there is a difference between reliability and infallibility. In the context of tips gathered from human informants, the Court has rejected the notion that informants must be "infallible*," Gates, 462 U.S. at 246 n.14,* instead holding that information is reliable when it turns on "common-sense conclusions about human behavior." *Texas v. Brown, 460 U.S. 730, 742 (1983).* Those com-mon-sense conclusions do not require scientific validation or lengthy track records, so long as they are

grounded in a "'practical, nontechnical' probability that incriminating evidence is involved." *Brown, 460 U.S. at 742 (quoting Brinegar, 338 U.S. at 176).*

B. An Alert By A Well-Trained Drug-Dog Establishes Probable Cause To Search

The State of Flamingo concedes that it must establish the reliability of a drug-dog before the dog's positive alert can be used to establish probable cause. *See United States v. Ludwig, 641 F.3d 1243, 1251 (10th Cir. 2011)* ("It goes without saying that a drug dog's alert establishes probable cause only if that dog is reliable."). The reliability of drug-dog may be established in any number of ways, but evidence that a drug-detection dog is well-trained is, in and of itself, sufficient to demonstrate reliability for purposes of establishing probable cause based on the dog's alert.

For millennia, dogs' superior sense of smell has been an recognized as an invaluable asset in the canine-human partnership. Dogs like Odysseus's faithful hound Argos were valued in ancient times for their ability to track game, see. *Homer, The Odyssey 197 (W.H.D. Rouse trans. 1999)* ("Never a beast could escape him in the deep forest when he was on the track, for he was a prime tracker."), and reports of dogs being used to recall and track human scents for law enforcements purposes date back at least to the classical era. There is a reason that law enforcement has turned to dogs to assist it in uncovering illegal contraband. Scientists estimate the olfactory prowess of canines to exceed that of humans by a factor of one to ten thousand. *Stanley Coren, How Dogs Think 51 (2004).* Since a human being's detection of the odor of drugs can provide probable cause, see *United States v. Johns, 469 U.S. 478, 482 (1985)* ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband."), it would be illogical to conclude that a dog's sniff cannot. *Cf. Florida v. Royer, 460 U.S. 491, 505-06 (1983)* (noting, in case where a drug-dog was not used, that if drug-dog had been used, "a positive result would have resulted in his justifiable arrest on probable cause"); *United States v. Kitchell, 653 F.3d 1206, 1223 (10th Cir. 2011*) ("[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.") (quotation omitted).

This Court previously has referred to a "well-trained narcotics-detection dog" as one that can alert to the presence of drugs without " 'expos [ing] noncontraband items that otherwise would remain hidden from public view.' " *Caballes, 543 U.S. at 409 (quoting Place, 462 U.S. at 707)*. In other words, a well-trained dog is reliable. That makes sense. A canine Barney Fife that regularly fails to detect contraband - or routinely alerts when contraband is absent - will be quickly identified during any genuine training regime and ferreted out. A dog's successful completion of a narcotics-detection training program conducted by canine professionals - whether private or formally part of law enforcement - is therefore a strong indication of reliability.

Although training alone is sufficient to establish a dog's reliability, reliability may be demonstrated in any number of other ways as well. For example, the fact that a dog has been certified by a narcotics-detection training organization also demonstrates reliability. See *Ludwig, 641 F.3d at 1250-51.* And even if a dog has not been certified or trained as part of a standardized program, the dog's performance in a less formal exercises or events may demonstrate reliability too. *See id. at 1251 n.3.* When an officer knows that a drug-detection dog has been trained or certified, or has otherwise exhibited reliable performance in detecting contraband, he may reasonably conclude that the dog's alert creates at least a "fair probability" that a vehicle contains illegal drugs. *Gates, 462 U.S. at 238.*

The State of Flamingo recognizes that it bears the burden of establishing probable cause. That burden may be satisfied, however, by the introduction of evidence that the dog was trained, or has been certified or otherwise has shown proficiency in detecting narcotics. The canine professionals - including K-9 officers - that train or certify dogs are in a far better position than the courts to determine the legitimacy of such training or certification. If a training or credentialing organization proved to be a "sham," then the fact of training or certification no longer would "serve as proof of reliability." *Ludwig, 641 F.3d at 1251*. But in the absence of extraordinary circumstances, the fact that a dog has successfully completed a training program - or has been certified or otherwise has demonstrated reliability in detecting drugs - "would 'warrant a man of reasonable caution in the belief" that drugs will be found in a vehicle when the dog has alerted to that vehicle. *Brown, 460 U.S. at 742 (quoting Carroll, 267 U.S. at 162).*

C. None Of The Factors Relied Upon By The Flamingo Supreme Court Warrant Any Different Rule

The Supreme Court of Flamingo held that in addition to evidence of the dog's training and certification, the State must also present detailed evidence about the dog's performance in the field and of the dog's alerts to residual odors. The reasons the court gave for this approach do not withstand scrutiny.

First of all, field activity reports are not the most accurate measure of a dog's reliability. In the uncontrolled field environment it is impossible to tell whether an alert that does not result in an officer's recovery of drugs is a true "false" positive. Training and certification settings can replicate field conditions but can control for the latter types of alerts, which makes their results inherently more reliable than field records. See *South Dakota v. Nguyen, 726 N.W.2d 871, 878 (S.D. 2007)* ("With the training being conducted in controlled circumstances, a dog's ability to find and signal the presence of drugs can be accurately measured. In the field, one simply cannot know whether the dog picked up the odor of an old drug scent or whether it mistakenly indicated where there was no drug scent."). The court below justified its requirement for field performance records in part by comparing drug-detection dogs to anonymous police informants, suggesting that evidence of a track record of success is necessary to establish the reliability of each. Well-trained drug-dogs, however, are entirely unlike anonymous informants. While information provided to the police by human informants who were not inherently trustworthy under the circumstances of the case might not establish probable cause without additional "indicia of reliability," information from those without a motivation to deceive police can support probable cause all by itself. Gates, 462 U.S. at 233. Moreover, information provided by other members of law enforcement based on personal knowledge is invariably reliable by its nature. See, e.g., *United States v. Ventresca, 380 U.S. 102, 111 (1965)* ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis" for probable cause). A well-trained dog is analogous to an "unquestionably honest citizen" and law enforcement informant in both respects -- a dog has no secret vendettas or hidden rivalries, and the dog is, effectively, a trained member of the police force. This Court's informant cases thus do not support the ruling of the court below.

Moreover, the possibility that a well-trained dog may alert to residual odors cannot defeat probable cause. Probable cause does not demand a 100% correlation between alerts and the presence of seizable quantities of drugs or evidence of a crime of drug use, nor does it even demand that the belief that there are drugs present be "more likely true than false." *Brown, 460 U.S. at*

742. Even if it is possible that trained dogs will alert to residual odors, "the likelihood that the dog's alert indicates the presence of an illegal drug remains a substantial one." *Foster, 252 P.3d at 299; cf. Illinois v. Wardlow, 528 U.S. 119, 125 (2000)* (the fact that conduct may be "ambiguous and susceptible of an innocent explanation" does not defeat reasonable suspicion). Nor does the presence of residual odors of contraband imply innocence. Even if actual drugs are not present, objects that carry the odor of the drug (such as drug paraphernalia) may well be sizable evidence of a crime; an alert to such an object can hardly be considered a false alert.

Finally, the absence of uniform training or certification standards provides no basis for altering well-established rules of probable cause. As the Tenth Circuit has observed, "canine professionals are better equipped than judges to say whether an individual dog is up to snuff." *Ludwig, 641 F.3d at 1251*. Both public and private training and certification organizations staff experienced dog trainers who are familiar with the detection abilities of dogs and the needs of law enforcement. The Fourth Amendment does not require the adoption of a uniform set of training or certification standards, nor does it saddle the courts with the task of superintending the professionals who train, certify, or handle dogs for a living. Evidence that a dog has been trained or certified by canine professionals should be deemed conclusive.

D. Probable Cause Exists In This Case

Probable cause asks only whether Officer Tramm was justified under the circumstances in believing that there was there was a "fair probability" that Jacamar's truck contained drugs at the time Randy alerted. *Gates, 462 U.S. at 238.* The State presented evidence well beyond that required by the Fourth Amendment, and that evidence established that Randy is a well-trained dog. Because Randy is a well-trained dog, Randy's alert created a fair probability that respondent's truck contained drugs.

Once Randy alerted to the truck, Officer Tramm made a reasonable and common-sense decision to search the truck for illegal drugs or evidence of a crime. Under the Fourth Amendment, not to mention this Court's precedents, he had probable cause to do so. He and his partner, Randy, performed exactly the way law enforcement should, and their actions were completely consistent with the requirements of the Fourth Amendment. The Supreme Court of Flamingo erred by concluding otherwise.

II. A DOG SNIFF IS NOT A FOURTH AMENDMENT SEARCH

This Court has repeatedly said that a sniff by a trained drug-detection dog is not a Fourth Amendment search. In *United States v. Place, 462 U.S. 696, 707 (1983)*, the Court held that a dog sniff of luggage at the airport was not a search because it is "much less intrusive than a typical search" and "discloses only the presence or absence of narcotics." *462 U.S. at 707*. Characterizing dog sniffs as "sui generis," the Court said they are "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." Id. In *City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000)*, the Court again noted that a dog sniff of a car is not a search because the sniff does not "disclose any information other than the presence or absence of narcotics."

More recently in *Illinois v. Caballes, 543 U.S. 405 (2005)*, the Court held that that reasonable suspicion was not required before a dog sniff and that sniff during a routine traffic stop

was not a search. The Court again noted that dog sniffs are "sui generis" and reaffirmed that a sniff "does not compromise any legitimate interest in privacy [and] is not a search." *Id. at 408*. The Court explained that its decision was consistent with *Kyllo v. United States, 533 U.S. 27 (2001)*, which had held that thermal imaging of a the outside of a grow house was a search, based on the nature of the information obtained by the police -- a drug-dog sniff discloses only the presence of contraband, while the device in Kyllo was capable of detecting lawful activity in which there was a legitimate expectation of privacy. See *Caballes, 543 U.S. at 409-10.* The Caballes Court thus did not distinguish Kyllo because Kyllo involved a home, it distinguished Kyllo because Caballes involved a dog. It was the nature of the information detected by the dog's nose, not the area being searched, that mattered.

These cases apply a contraband "exception" of sorts -- conduct that might otherwise involve a search under Katz's reasonable expectation of privacy standard is not a search if contraband is all that is revealed. Under this exception, any test, including a dog sniff, which merely reveals contraband, and no other private fact, compromises no legitimate privacy interest and, therefore, is not a search. While a drug-detection dog may smell many different odors emanating from the house, the dog conveys only information regarding the presence of drugs. When a drug-detection dog alerts, he conveys only the public fact that the house contains drugs. Anything else that the dog smells remains private. See *Orin S. Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 512-15 (2007).* As Professor Kerr explains, "the dog sniff will never reveal a private fact: either the dog won't alert, revealing nothing, or the dog will alert to the presence of narcotics, revealing only information deemed not deserving of privacy protection in Caballes." *Id. at 535.* "Caballes thus leads to a simple rule: the Fourth Amendment does not regulate dog sniffs." Id.

As in Caballes, the sniff in this case was non-intrusive and involved an alert only to contraband. The sniff did not violate reasonable expectations of privacy, intrude into private spaces, or reveal any private information. The sniff therefore comports with others permitted by this Court in Place, Edmond, and Caballes and does not implicate the Fourth Amendment just because it occurred outside a house.

II. A DOG SNIFF DOES NOT BECOME AN UNLAWFUL FOURTH AMENDMENT SEARCH SIMPLY BECAUSE IT OCCURS OUTSIDE A HOUSE

The court below erroneously extended Kyllo and failed to follow this Court's well-settled dog sniff cases because it considered the context of a house to be "qualitatively different." But the sniff in this case did not offend the sanctity of Sabrewing's house or transform the fundamentally limited nature of Randy's sniff into an advanced, technology-laden threat akin to Kyllo.

A. Like Members of the Public, Police May Approach a Private Residence and Knock on the Front Door

No serious argument can be made that the Fourth Amendment proscribes officers from approaching the front door of a home. See *United States v. Santana, 427 U.S. 38, 42 (1976)* (defendant standing in the doorway of her home was in a public place where she had no expectation of privacy for Fourth Amendment purposes*); United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990) (Breyer, C.J.)* ("A policeman may lawfully go to a person's home to interview him."). And, as this Court recently observed, when "law enforcement officers who are not armed with a warrant

knock on a door, they do no more than any private citizen might do." *Kentucky v. King, 131 S. Ct 1849, 1862 (2011).* Thus, the police in this case, just like any other member of the public, had the right to approach Sabrewing's front door and observe what was observable.

Physical entry into the home may well be the "chief evil" against which the Fourth Amendment is directed, *Michigan v. Summers, 452 U.S. 692, 701, n.13 (1981),* but there simply was no warrantless entry in this case, because neither Randy nor any of the law enforcement officers entered Sabrewing's house during the sniff. Randy merely sniffed along the ordinary route to the front door that visitors, delivery-persons, the mailman, Halloween trick-or-treaters, Girl Scout cookie-sellers, and police officers alike would have been expected to use. Once Randy alerted at the outside the front door, he and Officer Tramm promptly left the property without ever entering the house. Although federal officers remained on the scene, no law enforcement officer entered the house before Detective Sibley obtained the warrant authorizing the search.

Although the police would not have been able to smell the marijuana themselves, the use of a dog's nose instead of an officer's nose "did not transform [the] observations into an unreasonable search within the meaning of the Fourth Amendment." *United States v. Dunn, 480 U.S. 294, 305 (1987).* Officers routinely use tools such as field glasses, flashlights, and dogs as aids to their senses. "The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal." *Fitzgerald v. State, 837 A.2d 989, 1029 (Md. Ct. Spec. App. 2003), affirmed, Fitzgerald v. State, 864 A.2d 1006 (Md. 2004); United States v. Reed, 141 F.3d 644, 649 (6th Cir. 1998)).*

B. Dog Sniffs are not Prohibited by Kyllo

Nothing in this Court's analysis in Kyllo that supports the conclusion reached by the court below. First, Kyllo is distinguishable from the Court's dog sniff cases because each case involves law enforcement tools of a fundamentally different nature. A thermal imager reveals private facts; a dog does not. Kyllo is distinguishable from the Court's dog sniff cases because each case involves law enforcement tools of a fundamentally different nature. A thermal imager reveals private facts; a dog does not. The "raison d'etre for treating a dog sniff as a non-search" is the "binary nature of its inquiry." *Fitzgerald, 837 A.2d at 1030.*

Second, this Court's primary concern in Kyllo was the government's use of high-tech devices eroding traditional protections embodied in the Fourth Amendment. The Court was concerned that technology has the ability "to shrink the realm of guaranteed privacy" and to leave a "homeowner at the mercy of advancing technology." *Kyllo, 533 U.S. at 34-35, 28.* Similar concerns regarding technology were evident in *United States v. Jones, 132 S. Ct. 945 (2012),* with respect to GPS tracking devices. This case, however, involves the opposite end of the spectrum of law enforcement tools. Unlike the high-tech devices in Kyllo and Jones, or even the low-tech flashlight in *United States v. Dunn, 480 U.S. 294, 305 (1987),* dogs are not high-tech or "advancing" devices that threaten privacy. Indeed the investigative use of the animal sense of smell, human or canine, cannot even be defined as a technology. *Fitzgerald, 837 A.2d at 1037.* Because a dog sniff does not represent rapid technological change and does not invade traditionally protected areas, the rationale of Kyllo and concerns of Jones are simply inapplicable.

Dogs have been used by law enforcement for over a century, see e.g. *Hodge v. State, 13 So. 385 (Ala. 1893),* and used for drug detection for over forty years, see *People v. Furman, 106*

Cal. Rptr. 366, 368 (Cal. Ct. App. 1973). Dogs are an irreplaceable tool for detecting those who grow marijuana in their bathrooms; construct meth labs in their kitchens; or hide bodies in their basements. Dogs can detect all these criminal activities merely by breathing the air outside a house just as Randy did here. The Kyllo Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search.' " *Kyllo, 533 U.S. at 40.* Kyllo did not and does not apply to dogs. For all these reasons, this Court should adhere to its well-settled precedents by holding that a dog sniff outside the front door of a house is not a Fourth Amendment search requiring probable cause.

See Supreme Court cases that is another document to this case.