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Perpetuating the myth of the precision and noninvasiveness of the "*sui generis*" dog sniff which informed the Supreme Court's decision in *United States v. Place*,1 in which the Court held that the brief detention of luggage located in a public place for purposes of exposing it to a dog sniff did not constitute a search within the meaning of the Fourth Amendment,2 the Court in *Illinois v. Caballes3* held that the employment of a dog sniff during a legitimate traffic stop does not constitute a constitutionally cognizable intrusion upon legitimate privacy interests.4 The purpose of this article is not to critique *Caballes*' myopic Fourth Amendment analysis, which has already been ably done in this publication and elsewhere,5 nor is it to explore the current state of the law regarding the legal significance of so-called positive canine "alerts" for reasonable suspicion, probable cause, stops, seizures, or searches. Instead, it has a more practical focus, one which concentrates on the litigation of motions to suppress in which the issue is whether a canine "alert" was sufficiently reliable to establish probable cause for the search. This article will explore various ways in which, through litigating motions to suppress the fruits of searches conducted as the result of a positive dog "alert," defense counsel can educate courts, which are all too apt to reflexively credit the accuracy of canine alerts, regarding the serious flaws in much of the existing jurisprudence regarding canine sniffs and regarding modes of inquiry which more accurately reflect the reality of the interaction between dog, handler, and target. Given the entrenched myth of the infallible canine, this will be a long, frequently thankless, process, often bringing little satisfaction in individual cases, but it is one which must be pursued if rationality is to assert itself in this area of the law. Just as repeated litigation has exposed the flaws of other firmly-accepted law enforcement techniques, so, too, may the canine alert come to be regarded in its proper perspective.

For present purposes, *Caballes* is most noteworthy not for its result, which was, unfortunately, all too predictable, but for Justice Souter's dissenting opinion, in which he sought to dispel the myth of the infallible canine, a crucial underpinning of the Court's opinion, which he rightly labeled "a creature of legal fiction:"6

At the heart of both *Place* and the Court's opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband. . . . Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the "sniff does not implicate legitimate privacy interests" and is not to be treated as a search. . . .

> The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to error by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. . . . Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows that dogs in artificial testing situations return false positives anywhere from 12.5 to 60 percent of the time, depending on the length of the search. . . . In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.7

Positive canine alerts are treated as virtually — if not completely — *per se* probable cause in virtually every circuit, at least if the canine is shown to be "trained" and "reliable".8 While those words appear with monotonous and unthinking regularity in judicial opinions relating to dog sniffs, handed down from opinion to opinion over the years, courts have, with a relative paucity of exceptions, demonstrated only an, at best, incomplete understanding of what these concepts actually mean in the real world and an entrenched disinclination to look much beyond the facts that the dog's handler testified to the occurrence of an alert and that the dog was trained and certified.

There are two primary deficiencies in this narrow focus.

First, it largely, if not entirely, ignores the role of the dog's handler, generally a law enforcement officer and typically a local police officer or sheriff.

Second, and relatedly, it assumes that an "alert" is an alert because the handler said it was. Most courts have failed to consider — or even recognize — the role of the dog's handler in the process. The handler is not simply someone who holds the leash while the dog walks around and sniffs. Instead,the dog and handler function as an integral team. The dog is the sensor, and the handler is the trainer and interpreter. The handler's performance in both roles is inseparably intertwined with the dog's overall reliability rate. . . . And since the net result is the product of the interaction between two living beings, both roles of the handler are highly subjective.9

Thus, the proper focus of the reliability inquiry is not simply upon the training and certification of the dog,10 but on the training and reliability of the dog/handler team.

Role Of The Handler

Dogs can be trained to distinguish various odors with some degree of accuracy, but they are far from infallible, and their responses are often only as reliable as the interpretations placed upon them by their handlers.11 In fact, one commentator has reported that on most occasions on which no drugs are found as the result of a search based on a canine alert, the fault is not that of the dog but rather that of the handler in misinterpreting the dog's behavior.12 While a dog can be initially trained in a few weeks, training the human handler requires more time and effort.13 In some circuits, an affidavit in support of an application for a search warrant based in whole or in part upon a positive canine alert need do no more to establish the dog's reliability than to state that the dog is "trained" and/or "certified."14 This is, however, only half the equation. The focus must be redirected to the reliability and integrity of the dog/handler *team*. The amount of training the handler has had and the length of time the handler and dog have worked together are important factors, and the reported cases indicate that handler training runs the gamut from two weeks to hundreds of hours.15

The amount of training and experience which the handler has had with the dog is a critical element, as, contrary to the way in which courts have tended to view the process, the dog does not announce to the handler that, if he searches, he will find drugs in a particular location. Rather, each dog behaves in a particular manner, which the handler then "interprets" as an "alert," indicating the presence of drugs. An alert is not the objective proof as which it has generally been regarded by the courts; instead, it has a large — and sometime *very* large — subjective component. Some courts have expressed an appreciation of the role which handler interpretation plays in the process, although, with rare exception, that appreciation has not led to any less deference to the handler's testimony that the dog alerted.16 Repeated stress upon the subjective and interpretive aspects of the canine inspection, bolstered by expert testimony should dislodge the unshakable faith which courts have placed in the objective veracity of canine alerts.

Alert

Another too-little examined aspect of alert-based searches is the question of just what is an "alert." Dogs are trained to give a particular response when they smell certain illegal drugs and, during training, are rewarded when they correctly give that response in the presence of drug odor.17 In general, dogs are trained to alert "aggressively" or "passively," responses which have very different physical manifestations.18 When the handler testifies that the dog alerted in something other than the manner in which it was trained to respond to the presence of drugs, there is cause to question whether the dog actually did alert, *i.e.*, give the final response which it was trained to make when it was certain that the odor it had been trained to detect was present and, concomitantly, reason to decline to base a finding of probable cause to search on the alert alone. As Dr. Daniel Craig, a noted expert in canine training and performance, who has on a number of occasions testified as a defense expert witness in dog-sniff cases, has explained:

Detector dog handlers have been known to say things like "I can read my dog," "My dog knows it's there," "My dog's behavior tells me it's in there," "I can read my dog's behavioral change and I know the odor is there," "I am the only one who can read my dog," "I know what my dog is thinking," "I know when he is in the scent cone," et cetera. Are they just repeating what they were taught? If not, where do they get this notion? In initial training and subsequent training the only time they reward (reinforce) their dog is when the dog makes the definitive defined final response. Then and only then can the trainer verify that the dog has detected and responded to a specific target odor. The dog is rewarded for that response and no other.

The first thing one must do . . . is decide what specific response the dog must make in order to determine if it is responding correctly to a selected target odor. . . . The handler or trainer must be able to articulate that specific response to anyone not in the dog training profession. That specific response is the only response you reward with the selected primary reinforcement. . . .

If the dog does not make the defined final response sometime during a search, the target odor is either not present or the dog or handler made an error. Dogs do respond when no target odor is present. They also fail to respond when a target odor is present. The handler may assume any response other than the defined final response verifies the presence of the target odor. At this point the handler is guilty of interpretation, supposition, or speculation. The dog has the olfactory sensing system (nose) and the final decision as to the presence or absence of a target odor is up to the dog and not the handler. A well-trained detector dog will only respond to the target odor(s) it has been properly trained to detect. That dog will emit the defined final response it was trained to make to a target odor at a predetermined rate of accuracy.

Educated guesses based upon the handler's knowledge of their dog's training and past performance are nothing more than educated guesses when their dog fails to make the defined final response during a specific search. . . .19

Thus, it is not enough that the handler testifies at the suppression hearing that the dog "alerted," and defense counsel should hesitate before stipulating that the dog alerted and should refrain from conceding that an "alert" is a reliable indicator of anything. Instead, the handler should be examined at the suppression hearing or, where permitted, in pre-hearing deposition, to elicit a precise description of the definitive final response which the dog was trained to give upon identifying the odor of narcotics. If the dog gave any other response, then it was not doing what it was trained to do, and there is sound reason to question whether an alert did in fact take place.20 There may be videotapes of the dog's training exercises available to assist in this process,21 just as there may be a videotape of the stop during which the canine sniff was conducted,22 both of which may provide crucial evidence, at least if the "alert" appears on the videotape, which — unsurprisingly — it sometimes does not.23 Unfortunately, and incredibly, most courts have blindly credited testimony from handlers of the "I know it when I see it" variety. 24

A few courts have, however, wisely been skeptical of reliance upon canine behavior which differed from the dog's trained final response and depended entirely upon the handler's interpretation of equivocal behavior. In *United States v. Heir*,25 for example, the dog was trained to alert by scratching, but had not done so in this case. Instead, the dog sniffed intently around certain areas of the car, which the handler testified constituted an alert, acknowledging, however, that such alert behavior was "subtle" and might only be recognized by himself or another person familiar with the dog's tendencies. Defense experts testified that they saw nothing on the videotape of the stop to indicate that the dog had alerted. The court adopted the magistrate judge's conclusion that an alert had not occurred, as well as the conclusion that even if the alert behavior described by the handler occurred, it was too subjective a standard to establish probable cause. Instead, the court ruled, an "objectively observable 'indication' by the dog of the presence of drugs" was required.26

Then there is the problem of "cuing," conduct of the handler during the dog sniff which, consciously or unconsciously, influences the reaction of the dog and may prompt an "alert" reaction from the dog in response to the handler's cues rather than to the presence of drugs. One important aspect of handler training is the avoidance of such cues.27 While courts have recognized the potentially pernicious effects of cuing, the ability of defendants to establish that cuing occurred has proven elusive. For example, in *United States v. Trayer*,28 the defendant's expert testified that it is possible for the handler to compromise the dog's supposedly infallible objectivity through voice or physical cues and further testified that this sniff — along a train corridor outside the sleeping compartments — did not satisfy the best standards, as the dog was able to observe that the handler went only as far down the corridor as the defendant's compartment before returning to the dog and bringing the dog down the corridor.29

The court found this testimony "quite troubling" in light of the reliance which courts place on canine alerts in probable cause determinations, but, typically, ultimately upheld the search, as the defendant's expert was unwilling to say from the evidence that the handler actually cued the dog.30

The court did, however, express itself "mindful that less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing', may well jeopardize the reliability of dog sniffs." 31In *United States v. McLaughlin*, 32the defense expert testified, in essence, that the handler used his hunch that drugs were present to induce the dog to alert. The court agreed that "using a dog search as a sham in finding drugs

— essentially not allowing the dog to employ the skill for which he was trained — would significantly decrease the reliability of the search," but, as might be expected, concluded that the record did not support the contention that the dog sniff was simply a ruse. Lacking, the court said, was any evidence that the handler's conduct had an improper effect on the dog. 33In contrast, in *Heir*, in which the dog had responded by sniffing intently but did not give its trained final response, the defendant's experts testified that "the alert behavior described by [the handler] could easily be attributed to his 'cuing' of the animal, either intentionally or unintentionally, by changing the leash from one hand to the other, by stopping, by blocking the way, or by other actions."34

The court was unwilling to accept that an actual alert had occurred. 35Cases like this one are too rare. The Supreme Court should revisit this issue as soon as possible and restore the protections of the Fourth Amendment which have gone to the dogs.

Reliability

"Reliability" is generally regarded by the courts as the measure of how likely an alert by the dog in question is to be an accurate indicator of the presence of drugs (or of whatever the dog has been trained to detect). Dogs are not scientific machines. A number of courts have recognized — or at least paid lip service to — the concept that a particular dog/handler team may be insufficiently reliable to support a finding of probable cause. As one court has stated:

[T]he possibility of error exists and, in limited circumstances, the error may be of such magnitude that a canine alert is not sufficient to establish probable cause. For instance, it stretches the bounds of jurisprudential imagination to believe that a positive alert by an untrained dog or by a dog with an extensive history of false positive alerts could be relied upon to establish probable cause without raising Fourth Amendment concerns.36

In challenging the reliability of the dog/handler team, access to the dog's training, certification, and field performance records is essential. Some courts have recognized the importance of discovery regarding the dog's training, certification, and performance records,37 but others continue to regard exploration of the documentary record of the dog's performance as largely a waste of time, holding that the government need only present the testimony of the handler and need not produce the underlying records.38 The more thoroughly courts can be persuaded to regard alerts by dogs which simply have been "trained" and "certified" as something less than automatic probable cause, the more likely courts will come to regard discovery requests for the historical records of the dog's training and field performance as an essential component of the litigation of motions to suppress where probable cause for the search was predicated in whole or in part on a canine alert.

Access to the records of the dog's performance in training and in the field is essential to challenging predictable handler testimony regarding the always "excellent reliability" of their dogs — as well as to convincing courts that handler testimony alone should not be considered sufficient to establish the reliability of the dog.39 For example, handlers will sometimes report very high — even perfect — accuracy rates, even where drugs have not been found following the dog's alert, based on the unprovable assumption that, if the dog alerted, it must mean that drugs had been present in the location to which the dog alerted.40 Only with the dog's training records can it potentially be determined how often this occurred. Unfortunately, courts have, by and large, been only too ready to accept the premise that "residual odor" provides a valid explanation for a false alert41 or to admit canine alert evidence as evidence that drugs were, at some time, present at the location to which the dog alerted. 42

The training and performance records are also the only way — assuming proper records have been kept (a major assumption) — to ascertain the dog's actual reliability rate, which courts generally regard as the percentage of times the dog's alerts have proven accurate.43 Such records are frequently the only means of establishing an accurate measure of just how often the dog has been right and how often it has been wrong.44

The records may be just as important for what they do not show as for what they do show. For example, it is not enough that a dog has been trained and certified; the dog needs frequent practice to maintain its training,45 and the keeping of careful records is a crucial part of this process.46 As one court has explained:

[The training and certification academy's] manual instructed [the handler] to keep proper records of [the dog's] activities and periodically field train [the dog] to ensure [the dog's] continued reliability. [The

academy's] continued assurance of [the dog's] accuracy depended on [the handler] following these instructions. Over time, if not properly monitored, a dog may fall out of its trained behavior and begin responding to a handler's cues rather than to actual detection of a narcotic odor. A drug dog will lose its effectiveness in the field and may revert to old, bad habits if not continually trained. Accurate recordkeeping is essential to ensure the dog's reliability until the dog is recertified.47

Given the fact that in many circuits, an affidavit seeking a search warrant based on a canine alert need say no more than that the dog was trained and/or certified, it is important to stress whenever possible, in cases involving searches with and without warrants, that the fact that the dog *was* trained and certified is no guarantee of continuing reliability. Perhaps, over time, courts will get the message, although why they have not done so yet is unfathomable in light of the manifest unsoundness of equating a handler's testimony that his dog alerted with automatic probable cause.48

Search Warrant Affidavits

So unquestioning is the faith of courts in the accuracy of the "trained" and "certified" dog that in some circuits, the affiant need say no more about the dog to support a finding of probable cause, not even a conclusory statement that the dog is reliable.49 In other circuits, it suffices that the affidavit merely says that the dog has proven reliable in the past.50 Such rulings are entirely inconsistent with the well-established proposition that the judicial officer is to make an *independent* assessment of the existence of probable cause before issuing a warrant and not simply ratify the conclusions of law enforcement officers. Unless the judicial officer is provided with information regarding the dog's performance during training and in the field, he or she cannot make the requisite independent assessment of the likelihood that drugs will be found in the location to which the dog alerted.51 Instead, the probable cause determination will remain solely in the hands of law enforcement officers, where it does not belong.

Even where data regarding the dog's past performance is set forth in the affidavit, affiants frequently mention only the dogs' successes.52 Such data, however, presents an incomplete, and potentially highly misleading, picture. For example, if the affidavit says that actual drugs (not residual odor) were found fifty times when the dog alerted, this would reflect a phenomenal success rate if it had alerted a total of fifty times. The case would be quite otherwise however, if the dog had alerted a hundred times. 53

If the information regarding the dog set forth in the affidavit is inaccurate or materially misleading, or if material information regarding the dog's reliability was omitted from the affidavit, then a challenge under *Franks v. Delaware*54 may be in order. It appears to be generally accepted that *Franks* applies — at least in theory — in the context of canine alert averments.55 A *Franks* challenge will be entertained, however, only if sufficient support for it is demonstrated — another reason why access to the dog's records is so important.

Notes

1. 462 U.S. 696, 707 (1983).
2. *Id.* The *Place* Court did go on to invalidate the seizure of the defendant's luggage as unreasonable, based upon its 90-minute duration while awaiting the arrival of the sniffer dog. *Id.* at 710.
3. 543 U.S. 405, 125 S.Ct. 834 (2005).
4. 125 S.Ct. at 838.
5. S*ee, e.g.,* M. Hirsch & D.O. Markus, *Fourth Amendment Forum*, 29-JUN Champion 48 (2005).
6. 125 S.Ct. at 839 (Souter, J., dissenting). Some courts have recognized that drug-sniffing dogs are not infallible, although this recognition has not, by and large, had any effect on the ultimate outcome of motions to suppress. *See, e.g.,* United States v. Rosario-Peralta, 199 F.3d 552, 562 (1st Cir. 1999)("Some of the facts elicited by defendants do demonstrate that dog sniff testimony is not a perfect indicator of a particular controlled substance in a particular, well-defined location at a particular time"), *cert. denied sub nom.* Antonio Javier v. United States, 531 U.S. 902 (2000); United States v. Outlaw, 134 F.Supp.2d 807, 813 (W.D.Tex. 2001)(canine inspections not an infallible means of detecting drugs), *aff'd*, 319 F.3d 701 (5th Cir. 2003).
7. *Id.* at 839-40 (citations omitted). As Justice Souter indicated, both *Caballes* and *Place* also rest upon the questionable premise that canine alerts are noninvasive and uniquely calibrated to reveal only the presence of contraband. This proposition is dubious and misguided for two separate reasons. First, the Court ignored the fact that drug-sniffing dogs are large, frequently intimidating, and sometimes quite frightening. *See, e.g., Caballes*, 125 S.Ct. at 845 (Ginsburg, J., dissenting)("A drug-detection dog is an intimidating animal"). Such dogs do, at least at times, invade what most people would regard as a zone of personal privacy. *See, e.g.,* United States v. Kelly, 128 F.Supp.2d 1021, 1024 (S.D.Tex. 2001)(during random canine sweep of persons entering country, dog put nose in defendant's groin), *aff'd* 302 F.3d 291 (5th Cir.), *cert. denied*, 537 U.S. 1094 (2002). Second, while the Court was literally correct that a positive dog alert does not by itself reveal

the contents of the vehicle or container sniffed, except insofar as it indicates the possible presence of contraband at that time or at sometime in the past, this observation takes too narrow a view of the process, ignoring as it does the virtual certainty that a full-fledged search will follow the alert, a search which, if the dog, or the handler's interpretation of the dog's behavior, was wrong, *will* reveal innocent contents and invade privacy. *See Caballes*, 125 S.Ct. at 842 (Souter, J., dissenting)(after positive alert, "[t]he police will then open the container and discover whatever lies within, be it marijuana or the owner's private papers"). This should rightly be a matter of concern, since, in our post-*Whren,* post- September 11, world, law enforcement officers can — at borders, at airports, at train stations, at bus terminals, on the highways — expose almost anyone they choose, or their vehicles or their possessions, to drug-sniffing dogs, either randomly or in a more targeted fashion, knowing that an "alert" will provide all the justification they need for a full-scale search of the individual and his or her effects. These facets of the *Caballes/Place* fallacy should be stressed at every opportunity, until courts evidence a more nuanced comprehension of what all the fuss is about than they, for the most part, presently do.

8. *See, e.g.,* United States v. Sanchez, 417 F.3d 971, 976 (8th Cir. 2005); United States v. Williams, 403 F.3d 1203, 1207 (10th Cir. 2005); United States v. Robinson, 390 F.3d 853, 874 (6th Cir. 2004); United States v. Williams, 365 F.3d 399, 406 (5th Cir. 2004); United States v. Cedano-Arellano, 332 F.3d 568, 573 (9th Cir. 2003), *cert. denied*, 540 U.S. 1137 (2004); United States v. Carter, 300 F.3d 415, 422 (4th Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003); United States v. Ward, 144 F.3d 1024, 1031 (7th Cir. 1998); Karnes v. Skrutski, 62 F.3d 485, 498 (3d Cir. 1995); United States v. Banks, 3 F.3d 399, 402 (11th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994); United States v. Navedo-Colon, 996 F.2d 1337, 1339 (1st Cir. 1993); United States v. Glover, 957 F.2d 1004, 1013 (2d Cir. 1992). *But see* United States v. Trayer, 898 F.2d 805, 808 (D.C.Cir. 1990)(dog alert at door of train roomette did not by itself establish probable cause), *cert. denied*, 498 U.S. 839 (1990).

9. R.C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 422 (1997)(hereinafter "Bird"), quoting United States v. Paulson, 2 M.J. 326, 330 n.5 (A.F.C.M.R. 1976), *remanded by* 7 M.J. 43 (C.M.A. 1979). *See also Outlaw*, 134 F.Supp.2d at 813 ("The reliability of the canine alert depends significantly on the ability and reliability of the human handler").

10. So much for granted do some courts take the reliability of a canine alert that in cases involving warrantless searches in the Fifth Circuit, where "probable cause is developed on site as a result of a dog sniff of a vehicle," no showing of the dog's training and reliability is required. United States v. Sanchez-Pena, 336 F.3d 431, 444 (5th Cir. 2003); United States v. Williams, 69 F.3d 27, 28 (5th Cir. 1995), *cert. denied*, 516 U.S. 1182 (1996). This stands on its head the rule that the burden is on the government to establish the constitutionality of a warrantless search, which the Fifth Circuit has recognized in other cases. *See, e.g.*, United States v. Rivas, 157 F.3d 364, 368 (5th Cir. 1998)(invalidating search where evidence was that dog "cast", i.e., stopped and paid close attention, but did not give the aggressive final alert for which it was trained). The burden should remain on the government to establish real probable cause for the search, which in this context should require, at a minimum, a showing that the dog and the handler were trained, that the dog actually alerted, and that that alert is a reliable indicator of the presence of drugs. *See, e.g.*, United States v. Swanger, 2005 WL 2002441 at *5-*6 (E.D.Ky. August 18, 2005)(government bears the burden of establishing the dog's training and the reliability of the dog's positive reaction; refusing to consider dog alert as basis for probable cause to search car where government did not establish dog's qualifications).

11. In United States v. Scarborough, 128 F.3d 1373, 1378 (10th Cir. 1997), for example, the dog had an overall reliability rate of 92%, but the dog's reliability rate when working with postal inspectors was only 79%. The court rejected the defendant's argument that it should look to the reliability rate when working with postal inspectors, as it had been in that case, because no reason had been provided why the dog's abilities might be materially affected when working with postal inspectors. The lessened reliability when working with postal inspectors may well have been attributable to a lower level of handler training or experience with the reactions of that particular dog.

12. Bird, *supra* note 9, at 422.

13. Bird, *supra* note 9, at 412, 422-23.

14. *See, e.g.,* United States v. Sundby, 186 F.3d 873, 876 (8th Cir. 1999); United States v. Kennedy, 131 F.3d 1371, 1376-77 (10th Cir. 1997), cert. denied, 525 U.S. 863 (1998); see also United States v. Berry, 90 F.3d 148, 153 (6th Cir.)(affidavit sufficient where it referred to dog as a "drug sniffing" or "drug detecting" dog trained and qualified to conduct narcotics investigations), *cert. denied*, 519 U.S. 999 (1996); United States v. Daniel, 982 F.2d 146 (5th Cir. 1993)(affidavit sufficient where it said only that the dog was trained to detect the presence of controlled substances); United States v. Sentovich, 677 F.2d 834, 838 n.8 (11th Cir. 1982) (affidavit sufficient where it merely said that dog was trained in drug detection; rejecting argument that affidavit was insufficient because it did not also say that an experienced handler was with the dog); United States v. Meyer, 536 F.2d 963, 966 & n.4 (1st Cir. 1976)(affidavit sufficient where it said only that dog was trained and used by DEA agents in drug investigations); *but see* United States v. Cuevas, 1995 WL 382346

at *2 (N.D.Cal. June 19, 1995)(where affidavit contained no information regarding the dog's reliability, the alert information was "of little, if any, value in determining probable cause").
15. At one end of the spectrum is United States v. Outlaw, 319 F.3d 701, 704 & n.1 (5th Cir. 2003), in which the dog had four weeks training and then the dog and the handler had two more weeks training, and the alert occurred little more than a month after the dog was certified. The subsequent search produced a drug that the dog was not trained to detect, and it is clear from the underlying district court opinion — although one would never know it from the Fifth Circuit's decision — that the handler displayed at the evidentiary hearing a marked level of ignorance regarding the training process. *See Outlaw*, 134 F.Supp.2d at 811. *See also* United States v. Delaney, 52 F.3d 182, 188 (8th Cir.)(handler had 76 hours of training), *cert. denied*, 516 U.S. 878 (1995). At the other end are cases such as United States v. Navarro-Camacho, 186 F.3d 701, 704 (6th Cir. 1999), in which the dog and handler had trained together for 1,500 - 2,000 hours over the course of many years. *See also* United States v. Diaz, 25 F.3d 392, 394 (6th Cir. 1994)(dog and handler attended eight-week training course); United States v. Lingenfelter, 997 F.2d 632, 639 (9th Cir. 1993)(dog and handler had participated in 300 hours of training searches).
16. *See, e.g., Rosario-Peralta*, 199 F.3d at 562 (noting testimony that the handler must interpret the signal from the canine); *Outlaw*, 134 F.Supp.2d at 813 ("an alert is simply an interpretation of a change in the dog's behavior by a human handler"); *see also* United States v. Bartz, 2004 WL 1465780 at *5 (S.D. Ind. June 25, 2004)(handler's training includes learning how to recognize the changes in dog's behavior signaling the detection of narcotics). In United States v. Johnson, 323 F.3d 566 (7th Cir. 2003), the Court concluded that the district court had erred in disregarding the canine alert in assessing the existence of probable cause on the ground that the dog's handler had not testified at the suppression hearing, although another officer, who had observed the sniff from a distance, testified that the dog alerted. *Id.* at 567-68. The handler, the Court stated, "was not the only officer capable of interpreting [the dog's] behavior as alerting to the presence of drugs or drug-infested currency." *Id.* In fact, the dog's trained handler *is* often the only person capable of reliably interpreting whether or not there had, in fact, been an alert.
17. For a description of the canine training process, see Bird, *supra* note___, at 410-15.
18. Not only do dogs trained to alert aggressively respond differently from dogs trained to alert passively, but there also may be a range of different responses within each category:

> The dog trained to alert aggressively tries to contact the scent source (biting, scratching, penetrating, attempting to retrieve), while the dog that alerts passively does not try to contact the scent source but instead performs trained behavior (sitting, looking at the source, sniffing toward the source, looking at the handler).

Johnson, 323 F.3d at 567, quoting Sandy Bryson, **Police Dog Tactics** 257 (2d ed. 2000).
19. J.G. Aristotelidis, *Trained Canines at the U.S.-Mexico Border Region: A Review of Current Fifth Circuit Law and a Call for Change*, 5 **Scholar** 227, 230-31 (2003).
20. *Id.*
21. In *United States v. Walton*, 2004 WL 3460842 at *7 (M.D.Tenn. November 12, 2004), the defendant argued that the dog had not given its trained final response to the package before it was opened by law enforcement officers. The handler testified that the dog had done so, and the defendant offered videotapes of the dog alerting during training exercises, presumably obtained through a discovery request, to contradict the handler's testimony. The court compared the videotape of the stop to the training videotapes and concluded that the dog had in fact given at least one trained final response.
22. *See, e.g., Navarro-Camacho*, 186 F.3d at 706-07; United States v. McLaughlin, 2005 WL 2087853 at *3 (D.Utah August 22, 2005); United States v. Hbaiu, 202 F.Supp.2d 1177, 1180 (D.Kan. 2002); United States v. Heir, 107 F.Supp.2d 1088, 1091 (D.Neb. 2000). Canine sniffs are not, however, typically filmed or recorded.
23. For example, in *Hbaiu*, the handler testified that the dog was a passive alerter, meaning that it would sit down when it detected drugs. The defendant contended that the handler had ordered the dog to sit, although the handler and other officers at the scene denied this. While the videotape captured the dog sitting down at the rear corner of the trailer, the audio portion had, the officers testified, "malfunctioned" at this point during the encounter. 202 F.Supp.2d at 1180.
24. For example, in United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir. 1993), the handler testified that he knew how his dog alerted and that the dog had done so on the challenged occasion. In *Diaz*, 25 F.3d at 394-95, the dog's handler testified that the dog alerted by barking, biting, and scratching, but occasionally would alert by coming to a standstill in order to scent more intently. This latter behavior is likely not a true alert. Similarly, in United States v. Trayer, 898 F.2d 805, 808 (D.C.Cir.), *cert. denied*, 498 U.S. 839 (1990), the handler testified that the dog had been trained as an aggressive alerter, but that, on this occasion, it froze

and pointed to the defendant's train compartment "like a bird dog," which was the way it alerted on the majority of occasions. This, too, was a dog which was not doing what it had been trained to do. In *Bartz*, 2004 WL 1465780 at *5, the handler testified that, under controlled circumstances, the dog would alert by sitting and staring, but that it had "intermediate behaviors" on the "path to final response;" *i.e.*, the dog would stretch up on his hind legs and stare if the drug were concealed in a high place or lie down if the drugs were concealed in a low place, and that the handler's training included learning to recognize the changes in the dog's behavior that signaled the presence of drugs. The court concluded that the dog had alerted by stretching on his hind legs and "locking up" at the minivan's rear bumper. This was, however, not a trained final alert; it was an "intermediate behavior." The court also found that the dog had alerted two other times, during neither of which the dog gave his trained final response. *See also* United States v. Gregory, 302 F.3d 805, 811 (8th Cir. 2002) (defendant's passenger testified that the dog did not alert; on appeal, Court concluded that district court had not clearly erred in crediting handler's testimony that dog had alerted), cert. denied, 538 U.S. 992 (2003); United States v. Pore, 328 F.Supp.2d 591, 595 (D.Md. 2004)(court finds it unlikely that handler would misinterpret dog's behavior because handler and dog had worked together for a year).
25. 107 F.Supp.2d 1088 (D.Neb. 2000).
26. *Id.* at 1091. *See also* United States v. $67,220.00 in United States Currency, 957 F.2d 280, 285-86 (6th Cir. 1992)(Court found little probative evidence that dog had alerted to currency where two officers who were at the scene testified that they did not know that the dog had alerted until the handler told them so). *But see Outlaw*, 134 F.Supp.2d at 813 ("a canine alert is not always an objectively verifiable event").
In United States v. Jacobs, 986 F.2d 1231, 1233-35 (8th Cir. 1993), the search warrant affidavit stated that the dog had showed interest in the package, but omitted the fact that the dog had not actually alerted to the package. The Court concluded that this omission was in reckless disregard of the truth and refused to apply the *Leon* good faith exception.
27. *See* Bird, *supra* note 9, at 424. One court has noted that "[a] false alert can result from the handler's conscious or unconscious signals given by the handler that lead a dog to where the handler suspects contraband items to be located." *Outlaw*, 134 F.Supp.2d at 813. Such an alert can be "false" in two entirely different ways. First, it could be a false positive alert because no drugs were actually present. Second, it could be a false alert even if drugs were present, if what the dog was reacting to was the handler's cues rather than the odor of drugs. In the latter case, the alert was "false" because the dog was reacting to something other than that to which it was trained to react. A cued alert is not a reliable indicator of the presence of drugs because it is not a manifestation of the dog's trained response.
28. 898 F.2d 805 (D.C.Cir. 1990)
29. *Id.* at 809.
30. *Id.*
31. *Id. See also Diaz*, 25 F.3d at 396.
32. 2005 WL 2087853 (D.Utah August 22, 2005).
33. *Id.* at *3. The defense expert testified that the handler was very suggestive in soliciting a response; the government's expert testified that the handler had not induced the alert because he had used the same behavior all around the vehicle. The court simply assumed that if the handler's overly-suggestive conduct had influenced the dog, it would have falsely alerted at other areas of the car before alerting to the location where the drugs were found. *Id. See also* United States v. Limares, 269 F.3d 794, 797-98 (7th Cir. 2001) ("We can't exclude the possibility that [the dog's] success is just a mirror of the agent's ability to find drug-laden packages to put under her nose; maybe she would not fare as well on a randomly selected sample, but that possibility was not pursued at the hearing").
In United States v. Burnett, 240 F.Supp.2d 1183, 1193 (D.Kan. 2002), the defendant contended that the handler jerked on the dog's chain to cause it to alert after the dog initially showed no response; the handler denied that he had, and the court, as usual, credited the testimony of the handler. Similarly, in *Hbaiu*, the defendant contended that the handler directed the dog with a hand signal; the handler denied that he had, and no hand signal was visible on the videotape of the encounter. 202 F.Supp.2d at 1180.
34 107 F.Supp.2d at 1091. *See also* United States v. Stephenson, 274 F.Supp.2d 819, 824 n.1 (S.D.Tex. 2002)(noting that dogs may be entirely without bias, but their handlers may not be), *aff'd* 95 Fed. Appx. 604 (5th Cir.), *cert. denied*, 125 S.Ct. 139 (2004).
35. *Id.*
36 *Outlaw*, 134 F.Supp.2d at 813. *See, e.g.,* United States v. Brock, 417 F.3d 692, 696 (7th Cir. 2005("[T]he dog's error rate might affect whether a warrant issued in reliance on the dog sniff was supported by probable cause"); *Kennedy*, 131 F.3d at 1377 ("A dog alert might not give probable cause if the particular dog had a poor accuracy record"); *Ludwig*, 10 F.3d at 1528 (same); *McLaughlin*, 2005 WL 2087853 at *2 ("Although there may be circumstances that would bring the reliability of a specific narcotics dog or a specific dog search into question, those appear to be limited and rare). *See also Diaz*, 25 F.3d at 396 (a *very low*

percentage of false positives is not necessarily fatal to a finding that a drug detection dog is properly trained and certified" (emphasis added)).
37. The Ninth Circuit, for example, has held that discovery of the dog's "qualifications," which appears to include, at a minimum, training and certification records, is mandatory. *Cedano-Arellano*, 332 F.3d at 571, 573. *See, e.g.,* United States v. Lambert, 351 F.Supp.2d 1154, 1162 (D.Kan. 2004)(granting defendant's motion for the dog's training and certification records for the year prior to the search); United States v. Schwandt, 2004 WL 1846126 at *4-*5 (D.Kan. May 7, 2004)(government agreed to provide training, testing, and performance records, but other requests denied by court); United States v. Wood, 915 F.Supp. 1126, 1133, 1136 (D.Kan. 1996)(in response to defendant's discovery motion, government agreed to furnish records of the dog's certification and recertification and records of its structured training over a reasonable period of time, but court declined to order any of the additional discovery sought by defendant), *rev'd on other grounds*, 106 F.3d 942 (10th Cir.1997). *See also Robinson*, 390 F.3d at 874 (court reviewed performance statistics and other documentation regarding dog); United States v. Owens, 167 F.3d 739, 749 (1st Cir.)(defense expert reviewed dog's training and performance records), *cert. denied*, 528 U.S. 894 (1999); *Kennedy*, 131 F.3d at 1374-75 (court discusses what the "discovery process" revealed about the dog and its trainer)
38. A dismal example of such misguided myopia is United States v. Gonzalez-Acosta, 989 F.2d 384, 388 (10th Cir. 1993), in which the defendant sought, by way of a Fed. R. Crim. P. 17(c) motion rather than a motion for discovery, discovery of the dog's training and veterinary records, false-positive/false-negative alert records, and "all other records establishing the dog's ability to smell." The Court, extraordinarily, essentially ruled that because the dog had been right in the instance before it, the records were not relevant:

> [W]e do not believe the documents were relevant because the dog was certified on the day in question and because the dog properly alerted to the presence of contraband. . . . Indeed, had the dog's records indicated it had false alerted in the past, defendant's ability to cross-examine would not have been enhanced because there is no doubt it correctly alerted in this instance.

Id. at 389. *See also McLaughlin*, 2005 WL 2087853 at *3 (past failure would not detract from the accuracy of the dog in this case). Whether drugs were found after the dog alerted in the case before the court is, of course, fundamentally irrelevant to the question whether the canine alert provided probable cause for the search. In the canine alert context, as in every other search context, probable cause is to be determined by the facts and circumstances as they existed *before* the search, not retroactively validated by the results of the search. *See, e.g., Pore*, 328 F.Supp.2d at 594 (must look at facts as they existed before drugs were found); *Outlaw*, 134 F.Supp.2d at 815 (whether there was probable cause at the time of the search may not be determined by what the search turns up).
The Sixth Circuit has repeatedly held that in order to prove the dog's reliability, the government need not provide the dog's training and performance records and that the testimony of the dog's handler will suffice for this purpose. *See, e.g.,* United States v. Boxley, 373 F.3d 759, 761 (6th Cir.), *cert. denied*, 125 S.Ct. 435 (2004); United States v. Hill, 195 F.3d 258, 273 (6th Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000); *Diaz*, 25 F.3d at 394. It has acknowledged, however, that "[l]ack of additional evidence, such as documentation of the exact course of training, . . . would affect the dog's reliability." *Id.* The converse may also be true in any given case: examination of the underlying documentation may demonstrate that the dog is not in fact as reliable as its handler would have it. Moreover, as will be discussed in the text, *supra*, discovering that documentation does not exist may also be of significance.
39. A ridiculous example of this insistence that handler testimony is sufficient to establish the dog's reliability is found in *Hill*, 195 F.3d at 273-74. In that case, the defendant argued, based in part on the handler's admitted failure to keep a record of the dog's false alerts, that the district court's finding that the dog was properly trained and reliable was clearly erroneous. The Court disagreed, noting that the dog's trainer had reviewed the dog's training and performance records and had opined, based on those records — which did not include records of the dog's false alerts — that the dog was reliable. *See also Diaz*, 25 F.3d at 395-96 (rejecting defendant's argument that reliability was not demonstrated because dog's training and performance records were not produced, and handler was unable to answer precisely questions regarding how many searches dog had done and how many times drugs were and were not present).
40. In United States v. Warren, 997 F.Supp. 1188 (E.D.Wis. 1998), the handler credited the dog with 100% accuracy. However, other evidence showed that when the dog was brought to a scene, the dog would alert to the suspected container, but generally only after some direction or coaching, and drugs might or might not be found in the container. If no drugs were found, the handler did not record it as a false positive alert but instead "note[d] that the dog must have smelled the residual odor of drugs which must have been present at some time in the past." *Id.* at 1192. *See also Gregory*, 302 F.3d at 811 n.1 (handler testified that on

occasions when no drugs were found after dog alerted, there was evidence that drugs had been in the location a short time before the dog alerted); United States v. Martin, 2004 WL 2011456 at *3 & n.1 (D.Kan. August 19, 2004)(handler testified that dog had never falsely alerted, but this testimony was based only on training searches because, the handler said, only in such a controlled environment could he be sure that the odor of drugs was not present); United States v. Page, 154 F.Supp.2d 1320, 1325 (M.D.Tenn. 2001)(handler testified that, while there had been occasions when no drugs were found after the dog alerted, alerts to lingering odor of drugs are considered accurate alerts).

41. For example, in *Pore*, the defense presented the court with the dog's field reports, which counsel argued showed that drugs were found on only half the occasions when the dog alerted. The court found that, because there had been no testimony concerning the reports and no explanation of how they should be read or interpreted, they had "scant evidentiary value, particularly when a trained dog's sense of smell is powerful enough to detect a lingering odor of narcotics, even when the drugs are gone or there is no visible residue." 328 F.Supp.2d at 594 n.7. In United Sates v. Arreola-Delgado, 137 F.Supp.2d 1240, 1244-45 (D.Kan. 2001), the dog aggressively alerted to a suitcase which had been removed from the trunk of a vehicle, but no drugs were found in the suitcase. Upon further exploration, cocaine, some of which had leaked from its packaging, was found in the gas tank. The Court bought the handler's explanation that the alert could be explained by the wind's having blown over the gas tank, carrying the odor from underneath the car, and bouncing it off the nearby suitcase. *See also Page*, 154 F.Supp.2d at 1325 & n.1; *Outlaw*, 134 F.Supp.2d at 815; United States v. Fisher, 2002 WL 563581 at *8 (E.D.Pa. April 15, 2002).

42. In *Rosario-Peralta*, for example, no drugs were found on the vessel after the dog positively alerted to the deck; the defendants denied having been in the possession of cocaine and contested the testimony of law enforcement officers to having observed the vessel dumping bales of cocaine. The Court found the canine alert evidence admissible against a Rule 403 challenge because "the positive canine alert corroborated the officers' testimony by demonstrating that an allegedly unbiased canine indicated that a controlled substance contaminated defendants' vessel." 199 F.3d at 562. *See also Boxley*, 373 F.3d at 761 (dog alerted to defendant's pocket, but no drugs found; evidence admitted to connect defendant to drugs found nearby on theory that "an alert in the context of a canine narcotics sniff indicates that narcotics are present in the item being sniffed or have been present in such a way as to leave a detectable odor").

43. *See, e.g.,* United States v. Funds in Amount of $30,670.00, 403 F.3d 448, 460 (7th Cir. 2005)(noting that drugs or currency were found after 97.6% of the dog's alerts); *Limares*, 269 F.3d at 797 (62% of alerts followed by discovery of drugs, 31% followed by discovery of currency, 7% were unambiguous false positives); *Navarro-Camacho*, 186 F.3d at 704 (90-97% accuracy rate); *Scarborough*, 128 F.3d at 1378 (overall reliability rate of 92%); United States v. Hephner, 260 F.Supp.2d 763, 770 (N.D.Iowa 2003)(80% accuracy rate), *aff'd* 103 Fed. Appx. 41 (8th Cir. 2004). Unfortunately, even demonstrating that the dog has an abysmal accuracy rate frequently does not lead to a finding of no probable cause. *See, e.g., Limares*, 269 F.3d at 798 (62% accuracy rate suffices to demonstrate probable cause); *Kennedy*, 131 F.3d at 1378 (70-80% accuracy rate suffices to demonstrate probable cause). And such statistics may not in fact mean what the courts think they do. See R.E. Myers II, *In The Wake of Caballes, Should We Let Sleeping Dogs Lie*?: 20 **WTR Crim. Just** 4, 10-11 (2006)

44. In United States v. Cruz-Roman, 312 F.Supp.2d 1355, 1361 (W.D.Wash. 2004), for example, the court concluded that the dog/handler team was insufficiently reliable to be the basis for a finding of probable cause because "[r]ecords of training exercises and actual narcotics investigations indicate that the team often made mistakes and had no history showing a strong percentage of correct search results."

45. Bird, *supra* note 9, at 421-22. *See* United States v. Race, 529 F.2d 12, 14 (1st Cir. 1976)(dog had four hours per week follow-up training).

46. *See Gregory*, 302 F.3d at 811 (noting that handler kept daily records of the dog's performance in ongoing training and in the field).

47. *Kennedy*, 131 F.3d at 1374-75. The handler in *Kennedy* ignored these directives, did not keep records of the dog's field work, and only field trained the dog sporadically. What records there were indicated an accuracy rate of 71.4%, but the handler's sloppy recordkeeping precluded assessment of the dog's actual accuracy rate based upon all its alerts. Unfortunately, the Court, referring to its general rule that search warrant affidavits are sufficient if they merely state that the dog was trained and certified and "declin[ing] to encumber the affidavit process by requiring affiants to include a complete history of a drug dog's reliability," *id.* at 1376-77, concluded that, even had all the information revealed at the suppression hearing regarding the dog's reliability and the handler's "sloppy conduct" been included in the affidavit, a reasonable magistrate judge would still have issued the warrant. In a case involving the same dog/handler team and a warrantless search, the court reached the right result, concluding that because of the inadequacy of the documentation of the dog's activities, the government had not demonstrated the dog's reliability and, hence, there was no probable cause for the search of the defendant's luggage. United States v. Florez, 871 F.Supp. 1411, 1422-23 (D.N.M. 1994).

48. They have not, with few exceptions, done so yet. In *Hill*, for example, the dog's handler testified that he did not know what ongoing training he was supposed to perform with his dog and that he did not keep records of false alerts. The Court, following circuit precedent, rejected the defendant's challenge to the government's failure to produce records to establish the dog's reliability. 195 F.3d at 273. In the earlier case, however, the Court, while concluding that the testimony of the dog's handler sufficed to establish the dog's reliability, did note that "training and performance documentation would be useful in evaluating a dog's reliability." *Diaz*, 25 F.3d at 396. *See Outlaw*, 134 F.Supp.2d at 811 (defense expert testified that the reliability of a particular dog can be determined only if records of both the dog's training and success and failure rate in the field are kept). *See also* note ___, *supra.*
49. *See* note 14, *supra.*
50. *See, e.g., Limares*, 269 F.3d at 798; *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980).
51. In United States v. Martinez, 78 F.3d 399 (8th Cir. 1996), the affidavit said nothing about the dog other than that it had alerted to the vehicle sought to be searched. It omitted to mention that the dog had been wrong in eleven of its prior twelve alerts. *See id.* at 401. The majority did not address the issue, concluding that the affidavit established probable cause without the alert. In dissent, Judge Arnold, addressing the issue because he disagreed that probable cause existed without the alert, stated flatly: "authorities do emphatically have a duty to inform the magistrate if a drug dog is unreliable." *Id.* at 403 (Arnold, J., dissenting). Omitting the dog's abysmal track record, he continued, constituted reckless disregard for the truth, and the good faith exception would not apply, because knowledge of the dog's unreliability made it objectively unreasonable for the officers to rely on the warrant. *Id. See also* United States v. Jackson, 2004 WL 1784756 at *3 n.1 (S.D.Ind. February 2, 2004)(questioning whether incomplete report about the dog's reliability was sufficient to support probable cause, but indicating that good faith exception would apply).
52. *See, e.g., Delaney*, 52 F.3d at188; United States v. Williams, 2000 WL 979997 at *7 (S.D.Ohio June 5, 2005); United States v. Cortez, 1995 WL 422029 at *3 (S.D.N.Y. July 18, 1995).
53. *See* Bird, *supra* note 9, at 425-26.
54. 438 U.S. 154 (1978).
55. *See, e.g., Limares*, 269 F.3d at 797-98; *Sundby*, 186 F.3d at 876; *Kennedy*, 131 F.3d at 1377; *Lingenfelter*, 997 F.2d at 640; *Jacobs*, 986 F.2d at 1234. n

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