No. 12-15792-C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS LYNNE TREJO,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:12-cr-00055-SDM-EAJ, Judge Steven D. Merryday

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Anderson, Howard C. – Assistant Federal Public Defender as trial counsel for Co-Defendant Joaquin Ramirez;
2. Burns, P.A. – Appellate counsel for Defendant-Appellant;
3. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;
4. Elm, Donna Lee – Federal Public Defender as trial counsel for Co-Defendant Joaquin Ramirez;
5. Jackson, Matthew T. – Assistant United States Attorney;
6. Jenkins, Honorable Elizabeth A. – United States Magistrate Judge;
7. Merryday, Honorable Steven D. – United States District Judge;
8. O'Neill, Robert E. – United States Attorney;
9. Ramirez, Joaquin – Co-Defendant;
10. Ruddy, Joseph K. – Assistant United States Attorney;
11. Trejo, Thomas Lynne – Defendant-Appellant.

August 12, 2013

Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Thomas Trejo respectfully requests oral argument.

In *Florida* v. *Harris*, the Supreme Court held that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert" and thereby "provide[] probable cause to search." __ U.S. __, 133 S. Ct. 1050, 1057 (2013). Nevertheless, *Harris* also held "evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant." *Id.*

This appeal raises two issues left unanswered in *Harris*: (1) whether district courts can presume police dogs' sniffs to be reliable when the Government marshals no evidence or testimony that they were certified by a "bona fide organization" or had their drug-detection proficiency evaluated in a "controlled setting" or "training program" that included double-blind precautions; and (2) whether police dogs' sniffs, even if adequately trained or certified, may still be presumed reliable as a matter of law even when the ensuing searches detect narcotics only 41.3 percent of the time.

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TABLE OF ABBREVIATIONS

CJSTC	Criminal Justice Standards & Training Commission.
DE__	Docket entry number for document cited from the District Court's record.
IFRI	International Forensic Research Institute.
NFSTC	National Forensic Science Technology Center.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Defendant-Appellant Thomas Trejo was indicted (DE1) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered a final judgment (DE79), which Trejo timely appealed (DE81).

STATEMENT OF THE ISSUES

1. Dog sniffs are presumptively reliable when (1) "a bona fide organization has certified a dog after testing his reliability in a controlled setting," or (2) "the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs." The District Court presumed K-9 Barny's reliability although the Government introduced no evidence or testimony whether a "bona fide organization" certified him, or whether his "controlled setting" or "training program" included double-blind precautions. Should this Court vacate and remand so the District Court can determine in the first instance whether K-9 Barny was adequately trained and certified?

2. Even when police dogs are adequately trained and certified, their field records "may sometimes be relevant" to rebut their presump-

tion of reliability. K-9 Barny alerted 303 times out of 311 field opportunities (which by itself suggests conscious or unconscious handler cuing), but the ensuing search discovered drugs only 41.3 percent of the time (125 times). Did the District Court err when it presumed K-9 Barny's sniff was reliable despite his field records?

STATEMENT OF THE CASE

During a traffic stop, police found methamphetamines in Trejo's vehicle after K-9 Barny alerted to the presence of narcotics. This appeal raises significant issues in the wake of *Florida* v. *Harris*, __ U.S. __, 133 S. Ct. 1050 (2013), regarding the adequacy of police dog training and certification, and the relevancy of their field records.

A. Trejo Files A Motion To Suppress

Before trial, Trejo filed a Motion To Suppress (DE28), which asked the District Court to suppress all evidence seized from the traffic stop. In its Response, the Government argued that K-9 Barny's positive alert was sufficient to establish probable cause to search Trejo's vehicle. DE35 at 6-7. In that regard, the Government contended K-9 Barny's sniff was reliable as a matter of law because he had been trained and certified in drug detection. DE35 at 6. Although the Government at-

tached several certifications for K-9 Barny (DE35-2-4), only the September 2011 certification from the International Forensic Research Institute ("IFRI") / National Forensic Science Technology Center ("NFSTC") was still current (DE35-5).

B. The Magistrate Judge Convenes A Suppression Hearing

In response to Trejo's Motion To Suppress (DE28) and the Government's Response (DE35), the Magistrate Judge issued an Order (DE30) convening a suppression hearing. Two witnesses testified at the suppression hearing: State Trooper Jason Lemery (who initiated the traffic stop) and State Trooper Michael Jordan (who was K-9 Barny's handler). *See* DE104. After the suppression hearing, the Magistrate Judge convened a second hearing to receive into evidence K-9 Barny's "search and find" records (*i.e.*, his field records, as opposed to his training records) and to hear counsels' closing arguments. *See* DE107.

1. Trooper Lemery Stops Trejo For Traffic Infractions

Trooper Lemery testified that he was instructed to be on the lookout, or "BOLO" in police parlance, for Trejo's vehicle. DE104 at 17-20. This BOLO instruction advised Trooper Lemery that Trejo's vehicle was

suspected of transporting illegal narcotics. DE104 at 17. Nevertheless, as part of this BOLO instruction, and without regard to any suspicion that the vehicle might contain narcotics, Trooper Lemery was directed to develop his own probable cause to conduct a traffic stop. DE104 at 19. Shortly after receiving his BOLO instruction, Trooper Lemery requested K-9 support. DE104 at 18. When Trooper Lemery spotted Trejo's vehicle several hours later, he determined he had probable cause to initiate a traffic stop for traffic violations relating to tailgating and window tint. DE104 at 21-31.

2. K-9 Barny Sniffs And Alerts

During the traffic stop, Trooper Jordan arrived on the scene to walk K-9 Barny around Trejo's vehicle and perform a sniff. DE104 at 104. At this time, Trooper Jordan already knew that Trejo's vehicle was suspected of transporting illegal narcotics. DE104 at 130.

K-9 Barny is a shepherd who hales originally from Holland by way of Shallow Creek Kennels in Pennsylvania. DE104 at 94. K-9 Barny came to Trooper Jordan as a "pre-trained dog." DE104 at 93. Before Trooper Jordan became his handler in October 2009, K-9 Barny had patrol and narcotics work. DE104 at 96. The Criminal Justice Standards

& Training Commission ("CJSTC") previously certified K-9 Barny for that work. DE104 at 96. The record on appeal contains no other testimony or evidence about how K-9 Barny was trained before October 2009. Trooper Jordan and K-9 Barny train and certify together. DE104 at 117. K-9 Barny is dual certified in detecting people and drugs. DE104 at 120-21.

At any rate, at some point K-9 Barny had been trained to detect marijuana, crack cocaine, powder cocaine, heroin, methamphetamine, and MDMA. DE104 at 94. During his 800 training finds with Trooper Jordan, K-9 Barny has never falsely alerted (*i.e.*, no false positives in which he alerted when no narcotics were present), but approximately 3 of those times he has walked over an odor (*i.e.*, some false negatives in which he has failed to alert even though narcotics were present). DE104 at 100-03.

K-9 Barny is an "aggressive" alert dog, which means he alerts with his mouth or paws. DE104 at 104. In contrast, a "passive" alert dog would alert by sitting down. DE104 at 104-05. To initiate the search for narcotics, Trooper Jordan cued K-9 Barny with the oral command "find gifty." DE104 at 138-39.

While K-9 Barny sniffed Trejo's vehicle, he gave a noticeable difference, or "ND" in canine police parlance, at the rear of the vehicle and alerted to the driver's and passenger's door seam. DE104 at 105. Trejo's Co-Defendant Joaquin Ramirez was sitting in the front passenger seat during this sniff. DE104 at 135. Trooper Jordan gave K-9 Barny his reward for alerting before searching Trejo's vehicle and determining whether the alert was accurate. DE104 at 133-34. Although it was a "clearish" day, it was windy along I-75, which "can affect the amount of odor that's steadily available from an area." DE104 at 132.

3. Trooper Lemery And Trooper Jordan Search The Vehicle And Find Methamphetamines

After K-9 Barny's alert, Troopers Lemery and Jordan searched Trejo's vehicle and discovered three packages of methamphetamines in the center console of the front seat. DE104 at 111.

4. The Magistrate Judge Takes Into Evidence K-9 Barny's Field Records And Hears Closing Arguments

Immediately before closing arguments, Trejo moved into evidence K-9 Barny's field records. DE107 at 5-7. The field records show that out of 311 field sniffs, K-9 Barny alerted 303 times. DE107 at 105. The field records do not show whether Trooper Jordan was already aware in

those 311 sniffs that the vehicle was suspected of carrying illegal narcotics, and therefore whether Trooper Jordan consciously or unconsciously cued K-9 Barny to alert. Moreover, the field records do not catalog the sex, race, or socioeconomic status of the vehicles' occupants. Of those 303 alerts, the ensuing search uncovered narcotics 125 times, or 41.3 percent of the time. 107 times, or 35.3 percent of the time, the ensuing search uncovered alleged but untested drug residue. DE107 at 6. The record on appeal does not clarify what constitutes drug residue. Finally, 71 times, or 23.4 percent of the time, the ensuing search failed to uncover any drugs or residue at all. DE107 at 6.

During closing arguments, the Government contended K-9 Barny's field records were "relevant," but "not dispositive." DE107 at 7-8. Instead, the Government argued K-9 Barny had never falsely alerted in the field because he was "not trained in narcotics detection" but rather was "trained in detecting the odor of narcotics." DE107 at 15. As such, every time the ensuing search had failed to detect narcotics, the Government contended K-9 Barny had in fact properly "alerted to the odor of narcotics." DE107 at 16.

In contrast, Trejo argued that K-9 Barny's field records rendered his sniff unreliable.[1] DE107 at 20-21. Moreover, Trejo described the Government's impossible-to-falsify argument that all alerts are accurate as a "heads I win, tails you lose situation." DE107 at 20-21.

After hearing closing arguments, the Magistrate Judge explained that she planned to issue a written report and recommendation to the District Judge. DE107 at 29. With respect to probable cause for the initial traffic stop, the Magistrate Judge stated she would credit Trooper Lemery's testimony that Trejo was tailgating without resolving the dispute of fact over the window tint violation. DE107 at 29.

With respect to the dog sniff, the Magistrate Judge noted that K-9 Barny's "search records are most interesting." DE107 at 29. Nevertheless, the Magistrate Judge candidly explained her rationale for finding K-9 Barny's sniff reliable:

> But even if Barny missed 58 percent of the time, under the interpretation that [Trejo] gives him, we're still talking

[1] Trejo also argued that there was no record evidence or testimony that K-9 Barny's certification complied with the Florida Administrative Code. DE107 at 20. That argument was misguided, however, because the State of Florida has not codified any certification standards for narcotic-detection police dogs: "canines used by certified officers exclusively for tracking or specific detection" are "excluded from the certification process." Fla. Admin. Code § 11B-27.013(a)(1).

> about probable cause, and I do not find anything to indicate that the Supreme Court or a published opinion of the 11th Circuit has dictated that courts have to engage in a microscopic analysis of field performance of the K-9s in order to determine to credit the testimony of the handler based on his observation of the dog.
>
> This is evolving, because I know the Florida Supreme Court either is going to decide it or has decided it. I know there's a case by the Second DCA. This is a topic which, like fingerprints, how many years ago was that, that certainly may well be at issue, and wiser people than me may decide that I'm wrong. However, based on my evaluation of the evidence, my review of the applicable authorities, I am persuaded that there is a preponderance of credible evidence to establish that it was a legal stop, a legal search, and that the evidence obtained should not be suppressed.

DE107 at 30.

C. The Magistrate Judge Issues A Report And Recommendation, Which The District Court Adopts After Overruling Trejo's Objections

After the suppression hearing, the Magistrate Judge issued a written Report And Recommendation (DE51) that recommended denial of Trejo's Motion To Suppress (DE28). In relevant part, the Report found the "preponderance of the evidence supports the conclusion that canine Barny is reliable." DE51 at 12-14.

More specifically, the Report noted K-9 Barny's 23.4 percent failure rate "is likely a better barometer" of his field reliability. DE51 at 12. The Report also stated "absolute certainty is not required" to search ve-

hicles because probable cause merely requires a "'fair probability.'" DE51 at 12. Finally, the Report cited this Court's pre-*Harris* decision in *United States* v. *Sentovich*, 677 F.2d 834 (11th Cir. 1982), for the proposition that "the training of a dog alone may be sufficient proof of reliability." DE51 at 14. The Report made no mention of the dog sniff standards set forth in *Florida* v. *Harris*, __ U.S. __, 133 S. Ct. 1050 (2013), because the Supreme Court had not yet decided that case.

Trejo objected to the Report. DE53. In particular, Trejo objected that K-9 Barny's "false alert rate was substantial enough to defeat a finding that any alert by Barny established a fair probability that contraband would be found within the Defendant's vehicle." DE53 at 4.

The District Court overruled Trejo's objections and adopted the Report in its entirety. DE60.

D. Trejo Stipulates The Facts For A Bench Trial, Is Found Guilty, Is Sentenced, And Timely Appeals

To preserve the suppression issue for appeal, Trejo stipulated the facts for a bench trial. DE63. Subsequently, Trejo was found guilty (DE70) and sentenced to nine years' imprisonment (DE79). Trejo timely appealed (DE81) and is currently incarcerated.

STANDARD OF REVIEW

When a defendant's vehicle is "subjected to a search without a warrant," the "burdens of production and persuasion" "shift[] to the government to justify the warrantless . . . search." *United States* v. *De la Fuente*, 548 F.2d 528, 533 (5th Cir. 1977). "A district court's denial of a motion to suppress evidence is reviewed as a mixed question of law and fact, with the rulings of law reviewed de novo and the findings of fact reviewed for clear error, in the light most favorable to the prevailing party." *United States* v. *De la Cruz Suarez*, 601 F.3d 1202, 1213 (11th Cir. 2010).

SUMMARY OF THE ARGUMENT

1. This Court must vacate and remand because the District Court failed to determine whether IFRI and NFSTC were "bona fide organization[s]" and whether the "controlled setting" or "training program that evaluated" K-9 Barny's "proficiency in locating drugs" utilized double-blind precautions. This narrow remand for the District Court to apply *Florida* v. *Harris*, __ U.S. __, 133 S. Ct. 1050 (2013), in the first instance is necessary for two reasons.

First, it is unclear from the record what kind of organizations IFRI and NFSTC are, aside from their officious sounding acronyms. As such, this Court cannot conclude on this record that IFRI and NFSTC are "bona fide organization[s]."

Second, this Court cannot conclude on this record that the "controlled setting" or "training program" that "evaluated" K-9 Barny's "proficiency in locating drugs" was adequate. Double-blind precautions are the bare minimum of any "controlled setting" or "training program," because they ensure that training finds are performed without the dog or the handler knowing where narcotics have or have not been hidden. Without double-blind precautions, canine handlers can manipulate training records through conscious or unconscious cuing, which would render any training or certification meaningless. On this record, this Court cannot conclude that K-9 Barny was trained or certified with double-blind precautions.

And even if this Court were to determine that the Fourth Amendment does not require double-blind protocols, that would beg the question whether the Florida Constitution does. At minimum, therefore,

this Court must certify that state law question to the Florida Supreme Court.

It is the Government's burden to demonstrate that K-9 Barny's alert was reliable. Absent any record evidence or testimony that shows IFRI and NFSTC were "bona fide organization[s]" or that K-9 Barny was trained or certified with double-blind precautions, the Government shirked this burden. As such, this Court must vacate and remand for the District Court to perform this inquiry in the first instance.

2. Even if K-9 Barny had been adequately trained and certified, this Court would still have to vacate and remand because the District Court erred when it found his sniff reliable despite his field records.

K-9 Barny's field records are astonishing. Virtually every time he performs a sniff in the field with Trooper Jordan, he alerts: 303 times out of 311 opportunities. This fact alone suggests Trooper Jordan is consciously or unconsciously cuing K-9 Barny's alerts. Of those 303 alerts, ensuing searches have uncovered narcotics only 125 times, for a success rate of 41.3 percent. Moreover, field records do not reveal the race, sex, or socioeconomic status of the vehicles' drivers or occupants, so it is possible that K-9 Barny's success rate is even lower for poor Hispanic or

African-American drivers; Trejo himself is a poor Hispanic young man. 35.3 percent of the time (107 times), the ensuing search turns up alleged but untested drug residue. The record on appeal does not clarify what, if anything, constitutes drug residue. Finally, the remaining 23.4 percent of the time (71 times), the search uncovers no drugs or residue whatsoever.

This Court has never upheld the reliability of a dog sniff when the ensuing search leads to narcotics only 41.3 percent of the time. Ultimately, this is the precise circumstance in which *Harris* allows that field records "may sometimes be relevant" to rebut a trained or certified dog sniff's presumption of reliability. If not here, when?

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT FAILED TO DETERMINE IN THE FIRST INSTANCE WHETHER K-9 BARNY WAS ADEQUATELY TRAINED OR CERTIFIED

Dog sniffs are presumptively unreliable unless (1) "a bona fide organization has certified a dog after testing his reliability in a controlled setting," or (2) "the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs." *Florida* v. *Harris*, __ U.S. __, 133 S. Ct. 1050, 1057 (2013). The District Court,

however, failed to determine whether IFRI and NFSTC were "bona fide organization[s]" and whether the "controlled setting" or "training program that evaluated" K-9 Barny's "proficiency in locating drugs" utilized double-blind precautions. These evidentiary shortcomings require this Court to vacate and remand for the District Court to apply *Harris* in the first instance.

A. It Is The Government's Burden To Demonstrate That Any Search Is Supported By Probable Cause

At a suppression hearing, it is the Government's burden to demonstrate that a warrantless search of a readily moveable vehicle was supported by probable cause. *See United States* v. *Jeffers*, 342 U.S. 48, 51, 72 S. Ct. 93, 95 (1951) ("burden is on those seeking the exemption [to the warrant requirement] to show the need for it"); *United States* v. *McGough*, 412 F.3d 1232, 1237 n.4 (11th Cir. 2005) ("burden of proving an exception to the warrant requirement rests with the government").

Probable cause "looks to whether evidence will be found *when the search is conducted*," *United States* v. *Grubbs*, 547 U.S. 90, 95, 126 S. Ct. 1494, 1499 (2006) (emphasis in original), not whether contraband may formerly have been present in a particular location. For this rea-

son, a showing of probable cause can grow "'stale'" if it no longer establishes a sufficient probability that the items sought are currently present, even if that showing establishes that the items were present at some earlier time. *See id.* at 95 n.2, 126 S. Ct. at 1499 n.2 (collecting cases).

1. Long Before *Florida* v. *Harris*, This Court Stated Dog Sniffs Are Reliable Whenever They Are "Trained"

Before the Supreme Court issued its landmark decision in *Florida* v. *Harris*, this Court stated dog sniffs are reliable and create probable cause to search readily moveable vehicles when the drug-detection dog is "trained."

The Fourth Amendment prohibits all "unreasonable searches and seizures" and imposes a warrant requirement. U.S. Const. amend. IV. But "case law has carved out exceptions to the warrant requirement over time." *United States* v. *Laist*, 702 F.3d 608, 613 (11th Cir. 2012). For example, under the automobile exception, police can search a readily moveable vehicle without a warrant so long as they have probable cause to believe it contains contraband. *Pennsylvania* v. *Labron*, 518

U.S. 938, 940, 116 S. Ct. 2485, 2487 (1996); *United States* v. *Watts*, 329 F.3d 1282, 1286 (11th Cir. 2003).

Relevant here, "probable cause arises when a drug-trained canine alerts to drugs." *United States* v. *Banks*, 3 F.3d 399, 402 (11th Cir. 1993)). Although it is the Government's burden to show the dog sniff is reliable, this Court had stated long before *Harris* that the "training of a dog alone is sufficient proof of reliability." *United States* v. *Sentovich*, 677 F.2d 834, 838 n.8 (11th Cir. 1982).[2]

2. The Supreme Court's Watershed Decision In *Florida* v. *Harris* Displaced This Court's Prior Tests And Raised The Government's Threshold Reliability Showing

Florida v. *Harris* reconceptualized the entire landscape for dog sniffs, displaced this Court's prior *Sentovich* test that attributed reliability to any dog trained or certified in drug detection without inquiring into such training and certification, and ultimately increased the showing the Government must make to render dog sniffs reliable.

In *Harris*, the Florida Supreme Court had "held that the State must in every case present an exhaustive set of records, including a log

[2] This Court has previously noted *Sentovich*'s statement in this regard was mere dictum. *United States* v. *Anderson*, 367 Fed. App'x 30, 32 (11th Cir. 2010).

of the dog's performance in the field, to establish the dog's reliability." __ U.S. __, 133 S. Ct. 1050, 1053. Specifically, the Florida Supreme Court held that "when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause." *Id.* at __, 133 S. Ct. at 1055. Instead, the Florida Supreme Court held the State "needed to produce a wider array of evidence," including "'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.'" *Id.*

The Supreme Court reversed. *Id.* at __, 133 S. Ct. at 1059. In lieu of the "totality of the circumstances" on which probable cause normally turns, the *Harris* Court concluded the Florida Supreme Court had set forth "a strict evidentiary checklist, whose every item the State must tick off." *Id.* at __, 133 S. Ct. at 1056. In that regard, the *Harris* Court criticized the Florida Supreme Court for "treat[ing] records of a dog's field performance as the gold standard in evidence, when in most cases

they have relatively limited import" because "[e]rrors may abound in such records." *Id.*

Instead, the *Harris* Court held that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." *Id.* at __, 133 S. Ct. at 1057. With respect to certification, *Harris* held "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." *Id.* With respect to training, *Harris* held "[t]he same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs." *Id.*

Nevertheless, the Supreme Court also held defendants "must have an opportunity to challenge such evidence of a dog's reliability" in at least four ways. *Id.* First, defendants "may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty." *Id.* Second, defendants "may examine how the dog (or handler) performed in the assessments made in those settings." *Id.* Third, "evidence of the dog's (or handler's) history in

the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant." *Id.* Fourth, "even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions." *Id.* at __, 133 S. Ct. at 1057-58. Ultimately, the probable cause inquiry is therefore "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id.* at __, 133 S. Ct. at 1058

Applying those legal standards, *Harris* found the dog's alert reliable because he "had successfully completed two recent drug-detection courses and maintained his proficiency through weekly training exercises." *Id.* "Viewed alone, that training record—with or without the prior certification—sufficed to establish [the dog's] reliability." *Id.* The Supreme Court therefore reversed the Florida Supreme Court's judgment. *Id.* at __, 133 S. Ct. at 1059.

B. The District Court Failed To Determine Whether IFRI And NFSTC Were "Bona Fide Organization[s]"

The record contains no testimony or evidence about what kind of organizations IFRI and NFSTC are, apart from their officious sounding acronyms. Moreover, for the reasons explained below, *see infra* Argument I.C, no "bona fide organization" could certify drug-detection dogs without utilizing double-blind protocols. At any rate, this absence of record testimony or evidence does not satisfy the *Harris* Court's requirement that the Government must show that a dog-and-handler team obtained drug-detection certification from "bona fide organization[s]." *Harris*, __ U.S. __, 133 S. Ct. at 1057. This omission from the record requires this Court to vacate and remand.

C. The District Court Failed To Determine Whether The "Controlled Setting" Or "Training Program That Evaluated" K-9 Barny's "Proficiency In Locating Drugs" Utilized Double-Blind Precautions

Additionally, the record contains no testimony or evidence whether the "controlled setting" or "training program that evaluated" K-9 Barny's "proficiency in locating drugs" utilized double-blind precau-

tions.[3] Again, this omission from the record requires this Court to vacate and remand.

1. Double-Blind Precautions Are The Bare Minimum Of Any Reliable "Controlled Setting" Or "Training Program"

The bare minimum of any "controlled setting" or "training program" that evaluates "proficiency in locating drugs" is the utilization of double-blind precautions. This is so because double-blind precautions are the only way to mitigate the insidious effect of conscious or unconscious handler cuing.

a. Conscious Or Unconscious Handler Cuing Causes False Alerts

Trained or certified dogs produce false alerts in real-world settings for several reasons, but mostly because of conscious or unconscious handler cuing.

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[3] English psychiatrist W.H.R. Rivers first developed double-blind experimental techniques while studying tea, coffee, alcohol, tobacco, and other drugs in an attempt to distinguish their psychological effects from their physical effects. *E.g.*, W.H.R. Rivers & H.N. Webber, *The Influence of Small Doses of Alcohol on the Capacity for Muscular Work*, 2 THE BRITISH JOURNAL OF PSYCHOLOGY 261 (1908). With few exceptions, double-blind precautions are now the bare minimum for all serious scientific experimental work. *E.g.*, J.M. Kendall, *Designing a Research Project: Randomised Controlled Trials and Their Principles*, 20 BRITISH MEDICAL JOURNAL 164 (2003), *at* http://emj.bmj.com/content/20/2/164.full#ref-8 (double-blinding is "essential if bias (intentional or otherwise) is to be avoided").

At the outset, it is important to recognize that a "drug detection dog is not a gas chromatograph-mass spectrometer" that "detect[s] molecules in the air" and "states with empirical reproducibility the chemical composition of the molecules." Richard E. Myers, II, *Detector Dogs and Probable Cause,* 14 GEO. MASON L. REV. 1, 5 (2006). Rather, it "is part of a team that depends on a complex interaction of animal psychology and human factors." *Id.*

As such, some false alerts are the dog's fault, because diet, sleep, exercise, stress, and contact with other dogs can all affect a dog's performance. Charles Mesloh *et al.*, *Scent as Forensic Evidence and Its Relationship to the Law Enforcement Canine,* 52 J. FORENSIC IDENTIFICATION 169, 178 (2002). Indeed, there is "an almost endless list of factors that can influence the performance of the dog." *Id.*

More frequently, however, false alerts derive from flawed interactions between dogs and their handlers. Specifically, dogs often alert not to odors they detected, but rather to conscious or unconscious handler cues. "Even the best of dogs, with the best-intentioned handler, can respond to subconscious cuing from the handler." Myers, II, *supra*, at 5. In

turn, handler cuing often results from flawed training or certification procedures.

This phenomenon of handler cuing is vividly illustrated by the famous investigation of a horse named "Clever Hans," or as he was known in his native Germany, "der Kluge Hans." Clever Hans supposedly could solve arithmetic problems by tapping the answer with his hoof. *See* OSKAR PFUNGST, CLEVER HANS: THE HORSE OF MR. VAN OSTEN 1 (Rosenthal ed., 1965). Experts scrutinized the process and concluded that questioners did not intentionally pass Clever Hans any signals. *Id.* at 5-6. But the ruse was up when psychologist Oskar Pfungst performed a series of rigorous tests, which crucially included double-blind protocols in which the questioner was unaware of the correct answer, and revealed that Clever Hans was in fact responding to unconscious cues from the questioner. For example, questioners tended to tilt their heads down when they expected Clever Hans to start tapping, and to lift their heads up slightly when they expected him to stop. *Id.* at 47-48. Although questioners made these movements unconsciously, Pfungst could duplicate them and thereby cause Clever Hans to tap at will. These findings led Pfungst to conclude that "Hans's accomplishments are founded first up-

on a one-sided development of the power of perceiving the slightest movements of the questioner." *Id.* at 240.

The "Clever Hans" phenomenon also affects drug-detection dogs, which are well known to be keen observers of human behavior: "When we think dogs are using their well-honed noses to sniff out drugs or criminal suspects, they may actually be displaying a more recently evolved trait: an urgent desire to please their masters, coupled with the ability to read their cues." Radley Balko, *The Mind of a Police Dog: How Misconceptions about Dogs Can Lead to Abuse of Humans,* REASON (Feb. 21, 2011), http://reason.com/archives/2011/02/21/the-mind-of-a-police-dog. Indeed, the "relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior." Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog,* 85 NEB. L. REV. 735, 762 (2007). As such, handlers can, with great ease, consciously or unconsciously cue dogs to falsely alert. *Cf. United States* v. *Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990).

The list of conscious or unconscious cues that may prompt dogs to falsely alert is virtually endless. For example, handlers may:

> cue dogs by changes in their voices (pitch, timing, volume); distracting a dog by talking continuously; praising a dog too much or too soon; reaching for a reward too soon; making movements that appeared to signal a dog, including circling back to previously sniffed locations, changing pace, staring at a place where an item may be hidden, tapping surfaces repeatedly, increasing tension on the leash, making various hand movements, suddenly stopping or standing still, and standing a long time in the vicinity of a possible target.

John J. Ensminger & L.E. Papet, *Cueing and Probable Cause* (2011), *at* http://www.animallaw.info/articles/arusensminger_papet2011.htm.

b. Handler Cuing Is Most Problematic In Single-Blind Situations In Which Handlers Already Have Subjective Expectations That Narcotics Are Present

The problem of handler cuing is most problematic and leads to extraordinary numbers of false alerts when the handler already has a subjective expectation that narcotics are present.

For example, a recent landmark study at the University of California, Davis confirmed that handler cuing causes dogs to falsely alert. *See* Lisa Lit *et al.*, *Handler Beliefs Affect Scent Detection Dog Outcomes,* 14 ANIMAL COGNITION 387, 387 (2011). The study included eighteen dog-and-handler teams, all of which had been certified by a law-enforcement agency. *Id.* at 388-389. On average, the handlers had approximately five years of detection experience, and the dogs had three.

Id. at 389 tbl. 1. The dog-and-handler teams were instructed to detect target scents in four rooms. Handlers were told that each room might contain up to three targets. In fact, however, none of the rooms contained any target scents. Each team conducted two runs through the four rooms. All told, they gave a total of 225 false alerts. *Id.* at 390.

In some rooms, handlers were falsely told that scents had been placed at particular marked locations. Dogs were far more likely to give false alerts at marked locations than at other locations, and were more likely to give false alerts in rooms with marked locations than in rooms without one. *Id.* at 391, 393 tbl. 2. In other words, the handler's belief that the target scent was present in a marked location significantly increased the likelihood that the dog would falsely alert in that location.

Moreover, the dog-and-handler teams varied substantially in their accuracy. Only one team gave no false alerts; the worst-performing team gave anywhere from two to five false alerts in each room. *Id.* at 390 fig. 1.

After the test, "three handlers admitted to overtly cueing their dogs to alert at the marked locations." *Id.* at 392. Unconscious cuing likely caused most of the other false alerts at the marked locations. Re-

gardless whether the cuing was intentional or unintentional, these results demonstrate "that handler beliefs affect outcomes of scent detection dog deployments." *Id.* at 387.

The potential for handler cuing is obviously problematic in the context of real-world police stops, in which handlers often have subjective expectations whether narcotics are likely to be found. "If the handler believes that contraband is present, they may unwittingly cue the dog to alert regardless of the actual presence or absence of any contraband." Myers, II, *supra*, at 5. More troubling, "some handlers may consciously cue their dog to alert to ratify a search they already want to conduct." *Id.* In such circumstances, the handler's expectations may well influence the dog's behavior via conscious or unconscious cuing and therefore create the possibility of false alerts. *E.g.*, *United States* v. *Christy*, 2008 U.S. Dist. LEXIS 21885, at *11 (D. Neb. Mar. 19, 2008) (handler cued alert after driver declined consent to search vehicle); *State* v. *Lockstedt*, 695 N.W.2d 718, 726-27 (S.D. 2005) (same).

c. Single-Blind Training And Certification Exacerbates Handler Cuing Problems

Flawed single-blind training and certification procedures exacerbate handler-cuing problems.

Dogs are often trained or "certified in closed situations where the handler is aware of the location of drugs." Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog,* 85 KY. L.J. 405, 424 (1997). But this scenario defeats the purpose of training and certification, because it causes handler cuing to be "more pronounced." *Id.*; *see also Trayer*, 898 F.2d at 809 ("less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing', may well jeopardize the reliability of dog sniffs"). Indeed, "handler error accounts for almost all false detections." Bird, *supra*, at 425.

Moreover, such training methods may reinforce rather than inhibit dogs' natural willingness to respond to handler cues. For example, some training programs may use "overt" handler cuing, such as "verbal commands" and "physical prompting," to help teach dogs how to detect and alert to drugs, thereby making narcotics-detection dogs even more responsive to handler cuing. Lit *et al.*, *supra*, at 392.

In sum, single-blind training and certification is tantamount to taking a test with a cheat sheet. And sniffs from dog-and-handler teams that consciously or unconsciously circumvented the very purpose of

training and certification in such compromised circumstances cannot be accorded the judicial imprimatur of reliability.

d. Double-Blind Training And Certification Can Mitigate Handler Cuing Problems

In contrast, double-blind training and certification, in which neither the dog nor the handler knows where the drugs have been hidden, mitigates the handler-cuing problem. *See* Bird, *supra*, at 424.

Double-blind training and certification reduces the likelihood of cuing because if "the handler does not know the location of the controlled substance, it is less likely that the handler will exhibit any behavioral changes that could cue the dog." Mark E. Smith, *Going to the Dogs,* 46 HOUS. L. REV. 103, 129 (2009). As such, double-blind "[t]raining methods can and should eliminate th[e] problem" of handler cuing. *Id.* "Handler cues can be corrected in training by conducting practice sniffs where both the dog and handler do not know where the drugs are located." Bird, *supra*, at 424. For this reason, double-blind protocols constitute the bare minimum for reliable training and certification of detection dogs.

In that regard, the Scientific Working Group on Dog and Orthogonal Detector Guidelines, a coalition of local, state, and federal agencies

working to establish best practices for detection dogs, submitted a report to the Department of Justice in 2010 emphasized that training and certification programs should use double-blind testing. *See* Kenneth G. Furton *et al.*, *The Scientific Working Group on Dog and Orthogonal Detector Guidelines* 12, 136 (2010), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/231952.pdf. But "few agencies undertake such rigorous testing because of the lack of judicial oversight." Katz & Golembiewski, *supra*, at 763-64.

2. The Government Marshaled No Testimony Or Evidence That K-9 Barny's Training And Certification Programs Utilized Double-Blind Precautions

Because double-blind training and certification is the bare minimum for any "controlled setting" or "training program," it is easy to see what is the problem here: the Government marshaled no testimony or evidence that K-9 Barny's training and certification utilized such double-blind protocols. Instead, the Government marshaled testimony and evidence that K-9 Barny was merely trained and certified. But what do those vague assertions even mean after *Harris*? Trooper Jordan described some of the particulars of K-9 Barny's training and certification (*e.g.*, hours, numbers of training searches, results of training searches,

etc.), but he never answered the central question presented here: whether that training and certification used double-blind protocols.

D. This Court Should Vacate And Remand So The District Court Can Determine In The First Instance Whether K-9 Barny Was Adequately Trained And Certified

Absent any record testimony or evidence that K-9 Barny's training and certification was adequate, this Court should vacate and remand so the District Court can develop the record in light of *Harris* and determine those facts in the first instance.

It may well be the case that, on remand, the Government could establish K-9 Barny was certified by "bona fide organization[s]" and that the "controlled setting" or "training program that evaluated" K-9 Barny's "proficiency in locating drugs" utilized double-blind precautions. But until it makes that showing, the Government has not yet carried its burden of proving probable cause. *See United States* v. *De la Fuente*, 548 F.2d 528, 533 (5th Cir. 1977). This Court must therefore vacate and remand.

E. Even If The Fourth Amendment Did Not Require Double-Blind Precautions, This Court Would Still Have To Certify The State Constitutional Issue To The Florida Supreme Court

Even if this Court were to determine the Fourth Amendment does not require dog training or certification to utilize double-blind precautions, that begs the question whether article I, section 12 of the Florida Constitution requires them. In that regard, this Court is "compelled to apply the facts of this case to Florida constitutional law as interpreted by the Florida Supreme Court, and, absent a contrary ruling by the Florida Supreme Court, Florida's intermediate appellate courts." *Johnston* v. *Tampa Sports Auth.*, 530 F.3d 1320, 1325 (11th Cir. 2008).

As amended in 1982, article I, section 12 of the Florida Constitution now states:

> Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admis-

> sible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Fla. Const. art. I, § 12. But "in the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution.'" *Soca* v. *State*, 673 So. 2d 24, 26-27 (Fla. 1996) (quoting *State* v. *Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983), and citing *Traylor* v. *State*, 596 So. 2d 957, 961 (Fla. 1992)).

Neither the Supreme Court nor any Florida appellate court has answered whether drug-detection dogs must be trained and certified with double-blind precautions. Where, as here, "no controlling Florida . . . authority seems to exist on [a state law] question," at minimum this Court must "certify the issue to the Florida Supreme Court." *Neumont* v. *Florida*, 451 F.3d 1284, 1285-86 (11th Cir. 2006); *see also Johnston*, 530 F.3d at 1325 (certifying state constitutional law question regarding article I, section 12 of the Florida Constitution to the Florida Supreme Court). As such, even if this Court were to determine that the Fourth Amendment does not require double-blind protocols, this Court would

still have to certify the Florida Constitution question to the Florida Supreme Court.

II. THE DISTRICT COURT ERRED WHEN IT PRESUMED K-9 BARNY'S SNIFF WAS RELIABLE DESPITE HIS FIELD RECORDS

K-9 Barny's field records rendered his sniff unreliable, contrary to the District Court's presumption.

A. K-9 Barny's Field Records Are Astonishing

It cannot be overemphasized how astonishing K-9 Barny's field records truly are.

1. The Field Records Suggest Trooper Jordan Consciously Or Unconsciously Cued K-9 Barny

Virtually every time K-9 Barny performs a sniff in the field with Trooper Jordan, he alerts: 303 times out of 311 opportunities. This fact alone suggests Trooper Jordan is consciously or unconsciously cuing K-9 Barny's alerts. *Cf. Christy*, 2008 U.S. Dist. LEXIS 21885, at *11 (handler cued alert after driver declined consent to search vehicle); *Lockstedt*, 695 N.W.2d at 726-27 (same); *see also Trayer*, 898 F.2d at 809 ("less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing', may well jeopardize the reliability of dog sniffs").

Relevant here, Trooper Jordan already knew that Trejo's vehicle was suspected of transporting narcotics when he had K-9 Barny perform his sniff. This was therefore a single-blind situation during which the risk of conscious or unconscious handler cuing was greatest. Moreover, this risk was exacerbated when Trooper Jordan overtly cued K-9 Barny, a dual-certified dog, to search for narcotics with the oral command "find gifty" and also rewarded him immediately after alerting without first determining whether his alert was accurate.

2. The Alerts Are Troubling

The alerts themselves are even more troubling. Of those 303 alerts, ensuing searches have uncovered narcotics only 125 times, for a success rate of 41.3 percent. It is true that probable cause is a fluid concept that merely requires a fair probability, as opposed to a preponderance of evidence, that contraband will be present. *Harris*, __ U.S. at __, 133 S. Ct. at 1055. But this Court has never upheld the reliability of a dog sniff when the ensuing search leads to narcotics only 41.3 percent of the time. At worst, this Court has tolerated dog sniffs that led to measurable amounts of narcotics 55 percent of the time. *United States* v. *Anderson*, 367 Fed. App'x 30, 33 (11th Cir. 2010) ("assuming [defend-

ant's] view of the statistics, [the dog] had a 55% accuracy rate in finding measurable amounts of drugs"); *see also United States* v. *Smith*, 448 Fed. App'x 936, 939 (11th Cir. 2011) ("district court did not clearly err in concluding that this dog was sufficiently reliable to establish probable cause" despite "'false alert' rate of nearly 30% in the field").[4] And even those cases did not involve the danger of conscious or unconscious handler cuing inherent in a dog that alerts 97.4 percent of the time in the field (303 alerts out of 311 opportunities).

Additionally, the field records do not reveal the race, sex, or socio-economic status of the vehicles' drivers or occupants, so it is possible that K-9 Barny's success rate is even lower for poor Hispanic or African-American drivers. In that regard, it is notable that the Chicago Tribune found in an analysis of three years of data from suburban police departments that only 27 percent of alerts with Hispanic drivers led to the discovery of drugs or paraphernalia. Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-sniffing dogs in traffic stops often wrong,* Chicago Tribune, January 6, 2011. But searches and seizures cannot be based on

[4] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

characteristics like race or socioeconomic status. *E.g.*, *United States* v. *Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999) ("this appears to be yet another case in which a driver, once stopped, is unreasonably detained because of his/her race or national origin (Pena and Garrido are both Hispanic), or because the driver is from out-of-state (Pena's van had California license plates)"); *United States* v. *Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990) ("Being Mexican, having few pieces of luggage, being visibly nervous or shaken during a confrontation with a state trooper, or traveling on the interstate with Texas license plates (not yet a crime in Alabama) . . . fail to suggest that appellant . . . [was] engaged in any criminal activity other than speeding on the highway."). Trejo himself is a poor Hispanic young man.

3. Police Reports Regarding Drug Residue Are Speculation

35.3 percent of the time (107 times), the ensuing search turned up alleged but untested drug residue, and the remaining 23.4 percent of the time (71 times), the search uncovered no drugs or residue whatsoever. The record on appeal does not clarify what, if anything, constitutes drug residue.

In this regard, it is important to understand that police reports regarding drug residue are not subject to oversight or testing by another agency, so there is no check and balance against improper police designation of material as "drug residue" that is not actually drug residue. In the final analysis, therefore, attributing alerts to residual odors is nothing more than speculation, because typically there is "no objective evidence on which to base" a conclusion that a particular false alert was prompted by a residual odor. Myers, II, *supra*, at 22. Law-enforcement officials have an obvious incentive to attribute errors to whatever cause they deem least offensive to their dogs' reliability, but courts should be careful not accept such speculation as fact. *Id.* at 26-27 ("The incentive for law enforcement is to get the most hypersensitive dog that passes constitutional muster.").

B. This Is The Precise Circumstance In Which *Florida* v. *Harris* Allows That Field Records "May Sometimes Be Relevant" To Rebut A Trained Or Certified Dog Sniff's Presumption Of Reliability

Ultimately, this is the precise circumstance in which *Harris* allows that field records "may sometimes be relevant" to rebut a trained or certified dog sniff's presumption of reliability. Otherwise, a parade of horribles will ensue. *E.g.*, *United States* v. *$80,760.00*, 781 F. Supp.

462, 478 (N.D. Tex. 1991) ("reliability problems arise when the dog receives poor training, has an inconsistent record, searches for narcotics in conditions without reliability controls, or receives cues from its handler"), *aff'd*, 978 F.2d 709 (5th Cir. 1992).

Remember that dog sniffs and the automobile exception are departures from the default rule that police must obtain warrants before conducting searches. If police wish to manufacture probable cause to search all suspicious travelers, they could hardly breed, train, and certify a more dangerous dog-and-handler team than Trooper Jordan and K-9 Barny. If this Court does not draw a line in the sand between reliable dog-and-handler teams and unreliable dog-and-handler teams, police may trample on the Fourth Amendment rights of many innocent travelers, most of whom will likely be poor African-Americans and Hispanics. *See* Hinkel & Mahr, *supra*. If not here, when? Just how bad must a dog-and-handler team be in the field before its sniff is not up to snuff?

CONCLUSION

For the foregoing reasons, the Court should vacate the District Court's denial of the Motion To Suppress and remand for further proceedings in light of *Florida* v. *Harris*, __ U.S. __, 133 S. Ct. 1050 (2013).

August 12, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 7,904 words.

This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

August 12, 2013

Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing Appellant's Brief and Appellant's Record Excerpts with the Clerk of Court via U.S. mail on this 12th day of August, 2013, to:

John Ley, Clerk of Court
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ELEVENTH CIRCUIT
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing Appellant's Brief and Appellant's Record Excerpts via U.S. mail on this 12th day of August, 2013, to:

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