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

REPLY BRIEF

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AMENDED 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. ***Additions are in bold and italicized font.***

1. Anderson, Howard C. – Assistant Federal Public Defender as trial counsel for Co-Defendant Joaquin Ramirez;

2. Devine, Jennifer L. – Assistant Federal Public Defender as trial counsel for Co-Defendant Joaquin Ramirez;

3. Bentley, A. Lee, III – Acting United States Attorney;

4. Burns, P.A. – Appellate counsel for Defendant-Appellant;

5. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;

6. Bjorn E. Brunvand, P.A. – Trial counsel for Defendant-Appellant;

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8. Cakmis, Rosemary – Assistant Federal Public Defender as appellate counsel for Co-Defendant Joaquin Ramirez in United States v. Ramirez, No. 13-14165 (11th Cir.);

9. Elm, Donna Lee – Federal Public Defender as trial counsel for Co-Defendant Joaquin Ramirez;

10. Jackson, Matthew T. – Assistant United States Attorney;

11. Jenkins, Honorable Elizabeth A. – United States Magistrate Judge;

12. Matassini Law Firm, P.A. – Trial counsel for Defendant-Appellant;

13. Matassini, Nicholas M. – Trial counsel for Defendant-Appellant;

14. Matassini, Nicholas Gianni – Trial counsel for Defendant-Appellant;

15. Merryday, Honorable Steven D. – United States District Judge;

16. O'Neill, Robert E. – United States Attorney;

17. Porcelli, Hon. Anthony E. – United States Magistrate Judge;

18. Ramirez, Joaquin – Co-Defendant;

19. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

20. Rothstein-Youakim, Susan H. – Assistant United States Attorney;

21. Ruddy, Joseph K. – Assistant United States Attorney;

22. Thresher Taylor, Michelle – Assistant United States Attorney;

23. Trejo, Thomas Lynne – Defendant-Appellant.

October 16, 2013

/s/ Thomas Burns
Thomas A. Burns

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IFRI	International Forensic Research Institute.
NFSTC	National Forensic Science Technology Center.

ARGUMENT AND CITATIONS OF AUTHORITY

Trooper Jordan and K-9 Barny are the worst dog-and-handler team any federal court has ever encountered in the entire United States. That is not hyperbole; it is fact. Research it. Rather than confront the Fourth Amendment implications of these abysmal field records head on, the Government instead asks this Court to apply an incorrect standard of review to a misguided legal interpretation of the undisputed facts. As for double-blind precautions, the Government misconceives this Court's precedent and this case's procedural posture when it incorrectly contends this case is one about error preservation rather than one about the correct interpretation of *Florida* v. *Harris*, 133 S. Ct. 1050 (2013). Indeed, the Government shirks its evidentiary probable cause burden altogether and points only to its desire that this Court apply plain error review and its speculation that K-9 Barny was so trained. Similarly, the Government seeks to avoid certification to the Florida Supreme Court by speculating how it might interpret its own Constitution. All this is incorrect. The Government's positions are mistaken and serve only to highlight why it is so necessary that this Court reverse or vacate and remand for further proceedings in light of *Harris*.

I. TROOPER JORDAN AND K-9 BARNY CONSTITUTE THE WORST DOG-AND-HANDLER TEAM ANY FEDERAL COURT HAS EVER ENCOUNTERED IN THE ENTIRE UNITED STATES

No federal appellate court in the entire United States has ever encountered a dog-and-handler team with more abysmal field records than those of Trooper Jordan and K-9 Barny. The undisputed facts show K-9 Barny alerts 97.4 percent of the time (which alone suggests Trooper Jordan is consciously or unconsciously cuing the alerts), and the ensuing search uncovers drugs only 41.3 percent of the time. No federal court has ever held the Fourth Amendment permits such laxity. Moreover, the Government marshaled no response to Trejo's persuasive demonstration of the incredible dangers presented by conscious or unconscious cuing when double-blind precautions are not taken, or his argument that the field records demonstrate Trooper Jordan was consciously or unconsciously cuing K-9 Barny's alerts. *See* Appellant's Br. at 21-32, 35-36. Finally, the Government's defense of these field records applies the wrong standard of review and misreads *Florida* v. *Harris*, 133 S. Ct. 1050, 1057 (2013).

A. The Government Mistakenly Invites This Court To Apply An Incorrect Standard Of Review

Citing an unpublished decision,[1] the Government urges this Court to limit its review of the District Court's legal determination that K-9 Barny was reliable to clear error. U.S. Br. at 12 (citing *United States* v. *Smith*, 448 Fed. App'x 936 (11th Cir. 2011)). That is not the law.

First of all, the Government misreads *Smith*: its use of the phrase "clearly erred" referred to the district court's findings of fact that the dog "had completed a 450-hour patrol course and a 200-hour narcotics detection course, was certified by the National Police Canine Association in both areas . . . received an additional 6 to 10 hours of training each week," and had a "70% accuracy rate in the field." 448 Fed. App'x at 939. Contrary to the Government's mistaken interpretation of *Smith*, the correct standard of review is this: "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

[1] Unpublished Eleventh Circuit opinions are "not binding precedent." *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008).

Cir. 2010). Reliability based on undisputed facts is a quintessential "ruling of law reviewed de novo." *Id.* Were the Government correct, there would be no point in saying the standard of review is "mixed"; rather, it would just be "clear error." *Id.*

Indeed, there is no dispute here over the facts: the parties agree that K-9 Barny alerts 97.4 percent of the time in the field and that the ensuing search uncovers drugs 41.3 percent of the time, alleged but untested drug residue 35.3 percent of the time, and no drugs whatsoever 23.4 percent of the time. It is only those findings of fact that could be reviewed for clear error. In contrast, it is the legal interpretation of those facts that is in dispute. That is a pure question of law. *See United States* v. *Howard*, 855 F.2d 832, 835 (11th Cir. 1988) (when "facts are undisputed," the legal significance of those facts "is a question of law for the court to decide"). Moreover, the ultimate "question of what amounts to 'probable cause is purely a question of law and hence is subject to plenary review by this court.'" *United States* v. *Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991) (quoting *United States* v. *Hurtado*, 779 F.2d 1467, 1477 (11th Cir. 1985)). In sum, this Court's standard of review regarding K-9 Barny's reliability based on the undisputed facts is de novo.

B. Trooper Jordan's And K-9 Barny Are The Worst Dog-And-Handler Team In The Entire United States

Trooper Jordan and K-9 Barny are the worst dog-and handler team this Court or any other federal court has ever encountered in the entire United States.

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 [defendant's] view of the statistics, [the dog] had a 55% accuracy rate in finding measurable amounts of drugs"). In contrast, K-9 Barny's success rate is only 41.3 percent.

Moreover, Trooper Jordan and K-9 Barny also are the worst dog-and-handler team any federal court has ever encountered in the entire United States. Neither the Government nor Trejo has been able to identify any federal court that has ever found probable cause based on a drug-sniffing dog that successfully identified the presence of drugs only 41.3 percent of the time.[2] Previously, the honor for worst dog went to a

[2] *E.g.*, *United States* v. *Koon Chung Wu*, 217 Fed. App'x 240, 246 (4th Cir. 2007) ("accuracy rate of 60%"); *United States* v. *Davis*, 430 F.3d 345, 356 (6th Cir. 2005) ("over ninety percent"); *United States* v.

team with a success rate of "at least 50 percent." *United States* v. *Green*, 2012 U.S. Dist. LEXIS 99220, at *14 (W.D. Va. June 28, 2012).

Moreover, it is simply unheard of that a drug-sniffing dog alerts 97.4 percent of the time. Indeed, no federal court has ever analyzed a situation remotely similar to K-9 Barny's alert-all-the-time record. When coupled with his miniscule 41.3 percent success rate, the fact that K-9 Barny alerts 97.4 percent of the time is probably the most important circumstance in this case because it suggests Trooper Jordan is consciously or unconsciously cuing K-9 Barny's alerts. *See* Appellant's Br. at 2, 22-30, 35-36. The Government marshaled no response to Trejo's arguments that K-9 Barny alerts all the time, that unconscious or conscious cuing inherently undermines a dog's reliability, or that the field records demonstrate Trooper Jordan was consciously or unconsciously cuing K-9 Barny.

Limares, 269 F.3d 794, 797-98 (7th Cir. 2001) ("62%"); *United States* v. *Donnelly*, 475 F.3d 946, 955 (8th Cir. 2007) ("fifty-four percent"); *United States* v. *Ludwig*, 641 F.3d 1243, 1252 (10th Cir. 2011) ("58%"); *United States* v. *Green*, 2012 U.S. Dist. LEXIS 99220, at *14 (W.D. Va. June 28, 2012) ("at least 50 percent"); *United States* v. *Page*, 154 F. Supp. 2d 1320, 1329 n.1 (M.D. Tenn. 2001) ("accuracy level of almost ninety percent"); *United States* v. *Huerta*, 247 F. Supp. 2d 902, 910 (S.D. Ohio 2002) ("success rate is approximately 65%"); *United States* v. *Scott*, 2009 U.S. Dist. LEXIS 9895, at *11 (S.D. Iowa Jan. 28, 2009) ("approximately eighty-five percent").

That is important here, because the typically erratic alerts from K-9 Barny cannot be said to add anything to totality of the circumstances on which probable cause determinations turn. *Tobin*, 923 F.2d at 1510 ("Probable cause exists when under the 'totality-of-the-circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" (quoting *Illinois* v. *Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983))). Rather, given K-9 Barny's proclivity to alert all the time, no "reasonably cautious person" would believe an alert by K-9 Barny added anything to the totality of the circumstances or would 'uncover evidence of a crime.'" *United States* v. *Burgos*, 720 F.2d 1520, 1525 (11th Cir. 1983) (citation omitted). Indeed, a reasonably cautious person would think a K-9 Barny alert is little more than a rote and perhaps inconvenient precondition to search.

C. The Government Misreads *Florida* v. *Harris*

Contrary to the Government's interpretation of *Harris*, Trejo properly focused the Court's attention on K-9 Barny's success rate. Success rates are inherently known to a certainty, and that is why this Court and sister circuits have focused their attention on success rates rather than false positives.

As an initial matter, the Government takes issue with Trejo's assertion that *Harris* indicates dog sniffs are presumptively unreliable unless the Government proves the dog was trained or certified. U.S. Br. at 15. Trejo does not understand why the Government considers this point controversial. Surely the Government does not mean to suggest that the *Harris* Court considered the alert of an untrained, uncertified house dog to be anything but presumptively unreliable.

At any rate, the Government's principal defense of K-9 Barny's field records is its claim that *Harris* indicates they are not as bad as they seem. U.S. Br. at 20-24. But the Government confuses the *Harris* Court's use of the subjunctive voice for the active voice. Specifically, *Harris* explained field records "*may* markedly overstate a dog's real false positives" because "if . . . the officer finds no narcotics, the dog *may* not have made a mistake at all" but rather "*may* have detected substances that were too well hidden or present in quantities too small for the officer to locate" or "*may* have smelled the residual odor of drugs previously in the vehicle or on the driver's person." *Harris*, 133 S. Ct. at 1056-57 (emphases added). The opposite could be said with equal support. Recognizing this, *Harris* intentionally used the subjunctive voice

because the meaning of the presence of drug residue or the absence of drugs is inherently speculative. *See* Appellant's Br. at 38-39. Given these imponderables, *Harris* was careful not to say field records *do* overstate true false positives. This is a subtle but critical distinction.

This difference is also why the Government's argument that K-9 Barny was not really as inaccurate as his field records that show he failed to find any drugs or residue 35.3 percent of the time (107 times) or failed to find anything but drug residue 23.4 percent of the time (71 times) fails. The field records do not indicate some minor quibbles on the margins; rather, these are huge numbers. Just how incompetent must Trooper Jordan be at searching cars for them to have no meaning? And why as a policy matter should this Court sanction such ineptitude?

More importantly, the Government sets up a straw man, because Trejo was careful not to focus on K-9 Barny's false positives. Instead, Trejo focused on K-9 Barny's success rate. Appellant's Br. at 2, 13-14, 36-37. The reason for that focus on the success rate is simple: unlike the speculative meaning of false positives, success rates are concrete and knowable. And that is why this Court, the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits, and many district courts, have focused pri-

marily on dogs' success rates rather than their false-positive rates. *See supra* note 2 (collecting cases). Moreover, as a policy matter this focus on success rates imposes upon law enforcement the correct incentive to use dogs that alert only when seizable quantities of drugs will be found. *Harris*, 133 S. Ct. at 1057 ("only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources"). This approach is faithful to *Harris*.

II. THE GOVERNMENT MISCONCEIVES THIS COURT'S PRECEDENT AND TREJO'S ARGUMENT WHEN IT INCORRECTLY INVITES THIS COURT TO HOLD THE *HARRIS* ISSUE WAS EITHER WAIVED OR SUBJECT ONLY TO PLAIN ERROR REVIEW

Trejo framed the *Harris* issue for this Court's review as "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?" Appellant's Br. at 1. In addressing this issue, Trejo argued per *Harris* that this Court should vacate and remand because it cannot be determined on this record whether the Government carried its burden of demonstrating that IFRI and NFSTC were "bona fide organization[s]" or whether the "controlled setting" or "training program" that "evaluated" K-9 Barny's "proficiency in locating drugs" ensured K-9 Barny's reliability by utilizing double-blind precautions. Appellant's Br. at 12.

The Government contends this *Harris* issue was either waived or is subject only to plain error review. U.S. Br. at 24, The Government's argument, however, misconceives this Court's error-preservation precedent. In reality, Trejo did all he needed to preserve this *Harris* issue for this Court's review because he repeatedly raised the adequacy of K-9 Barny's training and certification records below, and the Government cannot shirk the evidentiary burden that belongs to it alone to demonstrate probable cause in the first place.

A. Trejo Preserved His First Issue By Filing Written Objections To The Report And Recommendation

Relying on *United States* v. *Garcia-Sandobal*, 703 F.3d 1278 (11th Cir. 2013), and *United States* v. *Wilcox*, 415 F. App'x 990 (11th Cir. 2011), the Government contends Trejo waived any review of the *Harris* issue because he did not file specific written objections to the proposed findings and recommendations. U.S. Br. at 24-25. This assertion is inaccurate on both the facts and the law.

Garcia-Sandobal and *Wilcox* both involved defendants who failed altogether to file written objections to a report and recommendation. 703 F.3d at 1283. Their holdings are therefore beside the point here, because Trejo did file written objections. Doc. 54. Specifically, Trejo ob-

jected that K-9 Barny's training and certification was inadequate, and that his false alert rate rendered him unreliable. Doc. 54 at 3-4. The Government takes issue with the fact that Trejo relies on *Harris* to argue how K-9 Barny's training and certification were inadequate on this record. But the problem for the Government is that it cites no precedent that holds Federal Rule of Criminal Procedure 59 forbids defendants on appeal from framing their appellate arguments based on an intervening Supreme Court decision. And Trejo is not aware of any such precedent.

Shifting gears, the Government then cites Federal Rule of Criminal Procedure 12(b)(3)(C) & (e) and *United States* v. *Ledezma-Dominguez*, 471 Fed. App'x 880 (11th Cir. 2012), for the proposition that defendants waive suppression "arguments" that are not raised before trial. That is not quite what those authorities say. *Ledezma-Dominguez* involved a defendant who failed altogether to file a suppression motion in the district court. 471 Fed. App'x at 880. In contrast, Trejo did file a motion to suppress. Doc. 28. And Rule 12 does not refer to "arguments." Rather, it refers to a "defense, objection, or request." Fed. R. Crim. P. 12(e).

In this regard, the Government attempts to mend the disconnect between Rule 12's text and the Government's desired proposition by citing *United States* v. *Joseph* to contend that Rule 12 requires a defendant seeking to suppress evidence to "make the same argument in the District Court that he makes on appeal." 2013 U.S. App. LEXIS 19315, at *12 (3d Cir. Sept. 19, 2013). *Joseph* did say that, but the Government tells only part of the story. That is because *Joseph* had first explained that arguments are the "same" whenever they (1) "depend on the same legal rule or standard," and (2) "depend on the same facts." *Id.* at *16-17. Applying this standard, *Joseph* held a defendant did not raise the "same" argument on appeal because he challenged an actus reus element in the district court yet raised a mens rea argument on appeal.

The Government makes no argument why this Court should adopt *Joseph* as a textual matter, a policy matter, or a Circuit precedent matter. To be sure, as a textual matter Rule 12 does not refer to any distinction between "issues" or "arguments," the concern to which *Joseph* was addressed. Rather, as already mentioned, Rule 12 addresses waiver of any suppression "defense, objection, or request." Fed. R. Crim. P. 12(e). Moreover, it is difficult to see what policy interest *Joseph* serves,

because it appears to consign defendants pursuing appellate remedies to a cut-and-paste bin when the art and science of appellate advocacy permits and requires more. *In re Harris*, 64 Fed. App'x 540, 542 (7th Cir. 2003) (dismissing appeal where appellant submitted "virtually the same brief as the one she submitted to the district court"); *In re Bagdade*, 2003 U.S. App. LEXIS 12613, at *20 (7th Cir. Jan. 13, 2003) (sanctioning attorney whose appellant's brief was "substantially the same as" his district court motion). And Trejo is not aware of any precedent in this Circuit that has sought to distinguish issues from arguments. In sum, it appears *Joseph* is best understood as an attempt by the Third Circuit to systematically order its house in light of its own disorganized prior panel precedents regarding criminal procedure and error preservation, which long ago became unmoored from Rule 12's text and policy.

At any rate, even if this Court were to adopt the Third Circuit's interpretation of Rule 12, Trejo's appellate argument is compatible with *Joseph*. First, in both the District Court and in this Court, Trejo has argued that the Government did not marshal sufficient evidence of adequate training and certification. Second, Trejo's appellate argument de-

pends on the same facts because they both turn on the sufficiency of the Government's evidence regarding adequacy of training and certification.

As a final error preservation point, the Government contends this Court may review Trejo's argument that the Government did not marshal sufficient evidence that K-9 Barny's training and certification was adequate for plain error only. U.S. Br. at 27. The Government cites no authority for the proposition that plain error review is appropriate when a defendant frames the same argument he raised in the district court through the language of an intervening Supreme Court decision. Once again, Trejo is not aware of any such precedent. And as already explained, the Government's contention is factually incorrect.

B. The Government Misunderstands How Plain-Error Analysis Works

Even if the Government were correct that plain error review applied, it misconceives how plain error analysis works.

The parties agree that under a plain error review, the defendant would have "the burden of demonstrating that (1) there is an error; (2) that is plain or obvious; (3) affecting [his] substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings."

United States v. *Beckles*, 565 F.3d 832, 842 (11th Cir. 2009). But the parties disagree about everything else.

First of all, as to the first two elements, there is little need to rehash the parties' extensive dispute whether the Government's evidence regarding K-9 Barny's training and certification was sufficient under *Harris*. *Compare* Appellant's Br. at 14-32, *and infra* Argument I.C, *with* U.S. Br. at 24-31. Simply put, the parties disagree.

The only new thing the Government adds is that Trejo "necessarily cannot satisfy the third and fourth prongs of the plain error analysis" because he made a rhetorical point in his appellant's brief. U.S. Br. at 27. That is not how plain error review works. If the Government were correct, there would be no such thing as plain error review, because it would always be theoretically possible, however incredibly unlikely, that the Government might present new evidence in the district court to remedy an otherwise plain error. Here, if, as Trejo fully expects, the Government were unable to introduce evidence that K-9 Barny was trained and certified with double-blind precautions, the District Court would have to suppress the evidence. The Government's concern (U.S. Br. at 29) that plain error must be "clear under current law," *United*

States v. *Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999), is likewise misplaced because *Harris* is the current law, and Trejo frames the *Harris* issue in its own language.

C. The Government's Speculation That K-9 Barny Was Trained And Certified With Double-Blind Precautions Has No Record Support

Moving finally to the merits, the Government speculates that the record "seems to suggest" K-9 Barny was in fact trained and certified with double-blind precautions. U.S. Br. at 29 n.6 (citing Doc. 104 at 101-02, 116-17). But these record citations do not support the inference the Government wants this Court to draw. Rather, Trooper Jordan's references to "blank[s]" just refers to the absence of odor, not that Trooper Jordan did not know the odors' locations. *See* Doc. 104 at 99, 101-02.

D. The Government Misconceives Trejo's Argument When It Attempts To Shirk Its Burden To Demonstrate Probable Cause

Finally, the Government misunderstands Trejo's argument when it tries to shift to him the burden of proving the absence of probable cause when it is always the Government's burden to demonstrate it.

The Government contends it was Trejo's obligation to "question below whether [IFRI and NFSTC] were 'bona fide' [organizations]." U.S.

Br. at 28. Similarly, the Government contends Trejo "never established that Barny's training did not involve double-blind precautions." U.S. Br. at 29. Both of these arguments misunderstand the appellant's brief and misconceive which party carries the burdens of production and persuasion in probable cause analysis.

As Trejo previously argued, it is always the Government's burden to demonstrate probable cause. Appellant's Br. at 11, 15-16, 32. It is never a defendant's burden to prove a negative, to wit, that probable cause does not exist. *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"); *United States* v. *De la Fuente*, 548 F.2d 528, 533 (5th Cir. 1977) ("burdens of production and persuasion" "shift[] to the government to justify the warrantless . . . search").

Here, *Harris* held dog sniffs are presumptively reliable only if the Government establishes they were certified by "bona fide organization[s]" in "controlled setting[s]," or "recently and successfully complet-

ed a training program that evaluated his proficiency in locating drugs." 133 S. Ct. at 1057. Under this Court's precedent, it is therefore compliance with *Harris*'s requirements that the Government must demonstrate, not that Trejo must disprove.

To be clear, the Government is asking this Court to discard and disobey its longstanding prior precedents and hold for the first time that it is a defendant's obligation to prove probable cause did not exist. That is not the law. Moreover, the Government's rule would make for terrible policy. If this Court excused the Government from its burdens of production and persuasion to justify warrantless searches, it would invite extraordinary law enforcement abuses and leave the Fourth Amendment in shambles.

It is for this reason that the Government misdirects this Court's attention when it contends Trejo "is not entitled to a remand for a second chance to challenge Barny's training or certification." U.S. Br. at 24. The point is not that Trejo deserves a second chance. Rather, the point is that the Government deserves a second chance to do that which it failed to do the first time around: that is, to demonstrate that K-9 Barny was certified by "bona fide organization[s]" in "controlled set-

ting[s]" or "recently and successfully completed a training program that evaluated his proficiency in locating drugs" that ensured the dog's reliability by using the double-blind protocols. *Harris*, 133 S. Ct. at 1057.

Indeed, the Government overlooks this appeal's procedural posture altogether. There is nothing unusual about a limited remand to permit a district court to apply a new legal standard in the first instance. *E.g.*, *Turner* v. *Burnside*, 541 F.3d 1077, 1086 (11th Cir. 2008).

III. Contrary To The Government's Argument, Federalism Forbids This Court From Speculating How The Florida Supreme Court Might Interpret Its Own Constitution

As a final backstop, the Government argues this Court cannot certify the state constitutional question to the Florida Supreme Court because (1) Trejo "never relied on the Florida constitution below," (2) Trejo "never established that Barny's training did not involve double-blind precautions," and (3) it "would be contrary to the Supreme Court's holding in *Harris*." U.S. Br. at 29-30. These arguments are incorrect.

First, the Government cites no authority that permits this Court to avoid certifying a state constitutional issue when it was not expressly relied on at the district court level. Indeed, that is not how constitutional rights work. Rather, because "waiver is ordinarily an intentional re-

linquishment or abandonment of a known right or privilege," "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938). Trejo never waived his rights under the Florida Constitution.

Second, the Government's burden-shifting argument is also incorrect, as previously explained. *See supra* Argument II.D.

Third, the Government commits the cardinal sin of federalism when it asks this Court to aggrandize itself to a power committed to the State of Florida by speculating how the Florida Supreme Court would interpret its own Constitution. Even if this Court were to determine *Harris* does not require the Government to establish training programs or bona fide organizations used double-blind precautions, that would not resolve the state constitutional issue. That is because article I, section 12 is tethered only to Supreme Court decisions, not to all federal appellate decisions. Fla. Const. art. I, § 12. Put otherwise, "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 Consti-

tution.'" *Soca* v. *State*, 673 So. 2d 24, 26-27 (Fla. 1996) (citations omitted). Federalism commands that this is not a question about which this Court may speculate, but rather is a question exclusively for the Florida Supreme Court to answer in construing its own Constitution.

IV. THE IMPORTANT AND NOVEL ISSUES PRESENTED IN THIS APPEAL SHOULD BE RESOLVED ON THIS COURT'S ORAL ARGUMENT CALENDAR

This appeal presents important and novel issues of first impression, which the Government and Trejo have comprehensively briefed. Specifically, no federal appellate court has ever analyzed the Fourth Amendment implications of probable-cause determinations based on a dog that alerts 97.4 percent of the time and successfully finds seizable quantities of drugs only 41.3 percent of the time. Nor has any federal appellate court considered whether *Harris* permits supposedly bona fide organizations, training programs, or certification programs to forego use of double-blind precautions. Indeed, to date this Court has not even cited *Harris*, much less attempted to explain its implications for dog sniffs as a general matter.

This case therefore presents the perfect vehicle for this Court to clarify what *Harris* means for police dog training and certification, and

what requirements *Harris* imposes with respect to field records. Accordingly, these important and novel issues merit consideration on this Court's oral argument calendar.

CONCLUSION

For the foregoing reasons, the Court should class this appeal for oral argument and (1) reverse the judgment outright due to conscious or unconscious cuing or lack of reliability as demonstrated by field records, (2) vacate the judgment and remand for further proceedings in light of *Florida* v. *Harris*, 133 S. Ct. 1050 (2013), or (3) certify the state constitutional issue to the Florida Supreme Court.

October 16, 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 4,649 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.

October 16, 2013

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via U.S. mail on this 16th day of October, 2013, to:

John Ley, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via U.S. mail on this 16th day of October, 2013, to:

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October 16, 2013

/s/ Thomas Burns
Thomas A. Burns