

# SUCH GOOD BOYS: THE DOGMATIC CASTING ALERT AND PROBABLE CAUSE FOR DRUG- SNIFFING DOGS

## ABSTRACT

*Nearly everyone either has a dog or at least knows someone with a dog. Canines have consistently been alongside mankind through thousands of years of evolution. It is no surprise that they serve a purpose in law enforcement due to their extreme ability to sniff substances that no human would ever be able to detect. Law enforcement canines are highly trained and contribute to thousands of drug convictions each year in the United States and more around the globe. However, dogs do not know what the Constitution is. They are primarily concerned with how they will be rewarded with a treat.*

*The Fourth Amendment protects individuals from unreasonable searches and seizures from the government, and consequently, the government must obtain a court-ordered warrant to search property. Yet, under the probable cause doctrine, law enforcement—under some circumstances—may search an individual’s property without a warrant. Specifically, the circumstances might allow a search of a vehicle after a police canine has alerted to the vehicle because the canine thinks there may be a controlled substance present. But dogs display many behaviors that could reasonably be interpreted as an alert. This Note addresses the circuit split between the Eleventh and Fifth Circuit Courts of Appeals on what kind of alert—a hard or casting alert—gives rise to probable cause and a subsequent warrantless search. This Note argues that hard alerts should be required for probable cause to search a vehicle.*

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## I. INTRODUCTION

Mankind’s best friend, as dogs are often referred to, have been through thousands of years of evolution right by mankind’s side.<sup>1</sup> Whether dogs are our furry best friends or work as service animals, they fulfill many functions for their human counterparts.<sup>2</sup> Given their intelligence, it is no surprise that over thousands of years dogs have been placed in increasingly specialized roles and have made their way into police departments across the globe to assist police in enforcing laws.<sup>3</sup> The Iowa State Patrol has had 29 narcotic detection dogs since the beginning of the program in 1992.<sup>4</sup> Whether the dogs know their purpose or not, they faithfully execute their tasks better than any (human) employee ever could.<sup>5</sup> Whatever job these animals have, they are experts in their field and should be trusted given they have proper training.

This Note will discuss the use of police canines and their use as drug detection tools. Specifically, this Note will address the circuit split between the Fifth and Eleventh Circuit Courts of Appeals concerning what kind of alert is required for an officer to have probable cause to search a vehicle that a canine has alerted to.<sup>6</sup> The discussion will highlight the problematic approach of trusting a

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1. Guillaume Convert, *The Human-Dog Relationship - A Historical Perspective*, BOEHRINGER INGELHEIM, <https://www.boehringer-ingelheim.com/our-responsibility/animal-health-news/human-dog-relationship-historical-perspective> [<https://perma.cc/LUH8-HYK7>].

2. There are emotional support dogs, guide dogs for the visually impaired, diabetic alert dogs, hunting dogs, and emergency response dogs to name some examples. See Emily E. Bray et al., *Enhancing the Selection and Performance of Working Dogs*, FRONTIERS VETERINARY SCI., May 2021, at 1, 1–2, <https://www.frontiersin.org/articles/10.3389/fvets.2021.644431/full> [<https://perma.cc/3Y3M-8XYJ>].

3. *Id.*

4. *Police Service Dog Unit*, IOWA DEP’T OF PUB. SAFETY, <https://dps.iowa.gov/divisions/iowa-state-patrol/canines> [<https://perma.cc/J6NV-DP9M>].

5. See *7 Drug Sniffing Dog Facts That Will Amaze You*, 3DK9 (Nov. 11, 2021), <https://www.3dk9detection.com/news/7-drug-sniffing-dog-facts-that-will-amaze-you> [<https://perma.cc/L3LF-UMRC>] (“The accuracy in [dogs’] smelling senses is 10,000 times more accurate than that of humans. The higher accuracy means their results when involved with security exercises are top-notch. The drug-detecting dogs, therefore, can search an area way faster compared to humans.”).

6. Compare *United States v. Braddy*, 11 F.4th 1298 (11th Cir. 2021), with *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998).

dog's casting alert as grounds for a warrantless vehicle search.<sup>7</sup> In short, casting alerts are vague indications from a dog that may or may not indicate the presence of controlled substances.<sup>8</sup> Because canine units are highly trained and their handlers know exactly what they are looking for in a hard alert, casting alerts should not be the basis of a warrantless search of a vehicle.<sup>9</sup> Part II of this Note discusses the Fourth Amendment, the probable cause doctrine, and the use of canines in police forces.<sup>10</sup> Part III investigates the Supreme Court's decision in *Florida v. Harris* and its implications on a probable cause analysis involving canines.<sup>11</sup> Parts IV and V address the Eleventh and Fifth Circuits' decisions involving hard positive alerts and casting alerts, respectively.<sup>12</sup> Part VI argues for the minority viewpoint, and Part VII concludes this Note.<sup>13</sup>

## II. THE FOURTH AMENDMENT, THE PROBABLE CAUSE DOCTRINE, AND THE USE OF CANINES IN LAW ENFORCEMENT

This Part explores the foundations needed to properly address why courts have split on the requirements for probable cause when police use canines to detect drug odors in vehicles.

### A. *The Fourth Amendment*

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures from the government.<sup>14</sup> This means, as a general rule, police must get a warrant from a court of law in order to search or seize an individual's property.<sup>15</sup> But there are exceptions, and the most relevant exception for the purposes of this Note is the warrantless searches resulting from a traffic stop. Warrantless searches and seizures by law enforcement require an objective standard.<sup>16</sup> For example, a particular officer must have "reasonable suspicion" for a traffic stop which is "a particularized and objective

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7. *See infra* Part VI.

8. *See infra* Part II.C.

9. *See infra* Part II (comparing hard alerts and casting alerts).

10. *See infra* Part II.

11. *See infra* Part III; *Florida v. Harris*, 568 U.S. 237 (2013).

12. *See infra* Parts IV, V; *United States v. Braddy*, 11 F.4th 1298 (11th Cir. 2021); *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998).

13. *See infra* Parts VI, VII.

14. U.S. CONST. amend. IV.

15. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213 (1983).

16. *Heien v. North Carolina*, 574 U.S. 54, 60 (2014).

basis for suspecting the particular person stopped' of breaking the law."<sup>17</sup> Furthermore, courts will refuse to look at an officer's subjective understanding of the situation.<sup>18</sup> Because the Fourth Amendment places limitations on police officers' ability to search vehicles, courts have developed the probable cause doctrine in order to prevent unreasonable searches and seizures from police and to ensure the government is fulfilling its constitutional obligations.<sup>19</sup>

### B. *The Probable Cause Doctrine*

Due to the limitations on police provided by the Fourth Amendment, a police officer must satisfy the objective test that a stopped individual provided the officer a reasonable suspicion that the individual was breaking the law.<sup>20</sup> Furthermore, once an objective probable cause analysis is satisfied, a warrantless search of an individual's vehicle is permitted.<sup>21</sup>

"A police officer has probable cause to conduct a search of a vehicle when the facts available to [the police officer] would warrant a [person] of reasonable caution in the belief that contraband or evidence of a crime is present."<sup>22</sup> Accordingly, the test for determining whether an officer has probable cause to initiate a search is not simple and it cannot be reduced to "precise definition or quantification."<sup>23</sup> Courts will look to the totality of the circumstances in their objective analysis.<sup>24</sup> Under normal circumstances, a single fact standing by itself will not be dispositive of whether there was probable cause.<sup>25</sup> The U.S. Supreme Court has consistently "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."<sup>26</sup>

Because courts have created such an objective analysis, they hold great discretion in their determinations of whether probable cause existed under the circumstances.<sup>27</sup> The objective test was highlighted in the Supreme Court's decision in *Florida v. Harris*, with Justice Elena Kagan writing for the unanimous

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17. *Id.* (quoting *Navarette v. California*, 572 U.S. 393, 396 (2014)).

18. *Id.* at 66.

19. *See Terry v. Ohio*, 392 U.S. 1, 20 (1968).

20. *Heien*, 574 U.S. at 60.

21. *Whren v. United States*, 517 U.S. 806, 818–19 (1996).

22. *United States v. Braddy*, 11 F.4th 1298 (11th Cir. 2021) (quoting *Florida v. Harris*, 568 U.S. 237, 243 (2013) (internal quotations omitted)).

23. *Harris*, 568 U.S. at 243 (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

24. *Illinois v. Gates*, 462 U.S. 213, 231–32 (1983).

25. *Harris*, 568 U.S. at 248.

26. *Id.* at 244.

27. *See Braddy*, 11 F.4th at 1308.

court stating: “All [the Court] require[s] is the kind of ‘fair probability’ on which ‘reasonable and prudent [people,] not legal technicians, act.’”<sup>28</sup> The Court has characterized this test as a flexible, common-sense-based standard.<sup>29</sup>

### *C. The Use of Drug Sniffing Dogs in Law Enforcement*

Due to drug sniffing dogs’ incredible skill of alerting in the presence of drug odors, they are a favorite tool in law enforcement’s toolkit.<sup>30</sup> Of course, no dog will automatically alert in the presence of drug odors—they must be trained to do so for a particular odor.<sup>31</sup>

Their ability to detect odors comes from their incredible sense of smell.<sup>32</sup> Dogs’ sense of smell dwarfs that of humans, as dogs have up to 300 million olfactory receptors in their nose compared to humans who have about six million.<sup>33</sup> Moreover, the area of a dog’s brain that analyzes odors is about 40 times greater than that of humans.<sup>34</sup> This allows dogs to detect odors in concentrations as little as one part per trillion—for perspective, that is like detecting one drop of liquid that was placed in 20 Olympic-sized swimming pools.<sup>35</sup> German Shepherds are a favorite for law enforcement, as the breed has some of the best noses combined with their poise, trainability, and their ability to remain calm under pressure.<sup>36</sup>

In order to use their incredible noses for drug detection, dogs must be properly trained and obtain qualifications prior to working in the field with police.<sup>37</sup> Canine units have led to thousands of successful convictions of drug possession every year in the United States.<sup>38</sup> It would be difficult to argue their use

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28. *Harris*, 568 U.S. at 244 (quoting *Gates*, 462 U.S. at 238).

29. *Id.*

30. *See Police Service Dog Unit*, *supra* note 4.

31. *See id.*

32. *How Powerful Is a Dog’s Nose?*, PHX. VETERINARY CTR. (July 23, 2020), <https://phoenixvetcenter.com/blog/214731-how-powerful-is-a-dogs-nose> [<https://perma.cc/HP9C-HC5P>].

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* AKC Staff, *Why the German Shepherd Dog Excels as a Canine Cop and Soldier*, AM. KENNEL CLUB (Aug. 08, 2014), <https://www.akc.org/expert-advice/lifestyle/german-shepherd-canine-cop/> [<https://perma.cc/3YDY-LCBW>].

37. *See generally* NAT’L POLICE CANINE ASS’N, STANDARDS FOR TRAINING & CERTIFICATIONS MANUAL 6 (2014), [https://leerburg.com/NPCA\\_StandardsForTrainingAndCertificationsManual.pdf](https://leerburg.com/NPCA_StandardsForTrainingAndCertificationsManual.pdf) [<https://perma.cc/52JY-CV9N>].

38. *See, e.g., Florida v. Harris*, 568 U.S. 237 (2013).

has not taken drugs off the streets. To produce these convictions, expert dog handlers dedicate hundreds of hours to training drug sniffing dogs before they ever enter service.<sup>39</sup>

The National Police Canine Association's *Standards for Training and Certifications Manual* sets out general requirements for police canine training in the area of narcotic detection.<sup>40</sup> Narcotics detection dogs must complete both an indoor and outdoor qualification and score at least 75 percent accuracy during the exam.<sup>41</sup> Handlers and at least two Certified Detector Officials are required for certification.<sup>42</sup> In the organization's manual, it is noted that "alert[s] must be obvious to the Certifying Officials."<sup>43</sup> Otherwise, it would be difficult for the Certifying Officials, based upon their subjective interpretation of a dog's alert, to have an objective basis for what is and what is not a hard alert.

Handlers and canine candidates seeking certification must locate and alert to narcotic odors planted by the Detector Officials in three indoor rooms and four vehicles with a total of four successful finds, two in the indoor rooms and two in vehicles.<sup>44</sup> A canine candidate and their handler get 10 minutes to find the indoor plants and eight minutes for vehicular plants.<sup>45</sup> Without these stringent standards, it would hardly be feasible to trust a dog's nose in court.<sup>46</sup> Furthermore, these requirements are only for those canines that are seeking qualification—it does not include the six-to-eight-week course that many canine candidates take before seeking qualification.<sup>47</sup>

The use of police canines began gaining public attention in 1969 when the Los Angeles Police Department started training narcotics detection dogs.<sup>48</sup> After the U.S. Supreme Court's 1983 decision, *United States v. Place*, police dogs gained even more attention.<sup>49</sup> The Court held that luggage in a public place could be

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39. John J. Ensminger & L.E. Papet, *Walking Search Warrants: Canine Forensics and Police Culture After Florida v. Harris*, 10 J. ANIMAL & NAT. RES. L. 1, 4 (2014); *see also Harris*, 568 U.S. at 241 (highlighting that the canine received a 160-hour training course, a one-year certification, a 40-hour refresher course, and four hours per week of training).

40. NAT'L POLICE CANINE ASS'N, *supra* note 37.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See id.*

47. *Id.*

48. Ensminger & Papet, *supra* note 39, at 1.

49. 462 U.S. 696 (1983).

searched if a drug-detecting dog alerted to it because the dog's sniff "did not constitute a 'search' within the meaning of the Fourth Amendment."<sup>50</sup>

Alarming, law enforcement has characterized narcotic detection dogs "as 'somewhat of a walking search warrant.'"<sup>51</sup> Moreover, police do not need any reasonable suspicion to run a dog around a car for an open-air sniff during a traffic stop.<sup>52</sup> This is an extension of *Place*, where the Court held that canine sniffs in airports do not constitute unreasonable searches.<sup>53</sup> The Court's reasoning was that a canine sniff "does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage."<sup>54</sup> An open-air sniff in an airport is "much less intrusive than a typical search" and the dog will detect only substances that no one is entitled to possess.<sup>55</sup> Thus, even though an open-air sniff tells law enforcement something about the contents of the luggage, the information obtained from the open-air sniff is limited, and "[t]his limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."<sup>56</sup> With respect to limited intrusion and information, a canine sniff is *sui generis* and does not constitute a search within the meaning of the Fourth Amendment.<sup>57</sup>

In *Illinois v. Caballes*, the defendant was stopped for a traffic violation and was subsequently arrested for drug trafficking when police dispatched a canine unit to the scene.<sup>58</sup> The dog, sent for an open-air sniff on the side of the road, alerted to the defendant's trunk, giving police probable cause to search his vehicle where police discovered a large amount of marijuana.<sup>59</sup> Justice John Paul Stevens, writing for the majority, concluded that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth

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50. *Id.* at 707. Ultimately, the evidence obtained from the search was inadmissible because law enforcement was in custody of the defendant's luggage for over 90 minutes, which exceeded the limits permitted by *Terry v. Ohio*, 392 U.S. 1 (1968). *Place*, 462 U.S. at 709.

51. Ensminger & Papet, *supra* note 39, at 1 (citation omitted).

52. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

53. *Place*, 462 U.S. at 707.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 543 U.S. 405, 406 (2005).

59. *Id.*

Amendment.”<sup>60</sup> Because drug sniffing dogs are like a “walking search warrant” for police, courts should be critical of the standards they employ to evaluate whether an alert by a canine unit is grounds for probable cause to search a vehicle without a warrant.<sup>61</sup>

But just like humans, dogs make mistakes too. Despite their training discussed above, drug sniffing dogs are not much better than a flip of a coin.<sup>62</sup> This is the dogma of law enforcement’s characterization of drug sniffing dogs being like “walking search warrants”—that is, law enforcement may search a vehicle without a warrant, even when the dog is no more accurate than if the law enforcement officer were to simply guess yes or no on whether there were narcotics in a vehicle.<sup>63</sup>

Adding to a dog’s reliability problems, their behaviors can be influenced by hundreds of factors.<sup>64</sup> Some common factors influencing behavior include: “age, physiological problems, medications, changes in work locations and assignments, reduced practice and training times, improper rewarding, or other reasons . . . .”<sup>65</sup> And in some malicious cases, the officer may train the dog to alert on command.<sup>66</sup>

There is a human side to the accuracy and performance of dogs as well—the handler. Records must be kept demonstrating that the canine is reliable, but recordkeeping may be lax or full of errors.<sup>67</sup> Moreover, “[i]f a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Field data thus may not capture a dog’s false negatives.”<sup>68</sup> On the other hand, “if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all” because it may have detected trace amounts of odor left over from drugs that may have been there in the past.<sup>69</sup>

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60. *Id.* at 410.

61. Ensminger & Papet, *supra* note 39, at 1.

62. Radley Balko, *The Supreme Court’s ‘Alternative Facts’ About Drug-Sniffing Dogs*, THE WASH. POST (Feb. 4, 2019, 9:35 PM), <https://www.washingtonpost.com/opinions/2019/02/05/supreme-courts-alternative-facts-about-drug-sniffing-dogs/> [<https://perma.cc/Z2SV-WNUA>].

63. Ensminger & Papet, *supra* note 39, at 1.

64. *See id.* at 8–9.

65. *Id.*

66. Balko, *supra* note 62.

67. *Florida v. Harris*, 568 U.S. 237, 245–46 (2013).

68. *Id.* at 245.

69. *Id.* at 245–46.



Despite the high incidence of mistakes by dogs and their handlers, “[a] drug detection dog’s alert can provide probable cause to conduct a search.”<sup>70</sup> While the law seems straightforward, it is not so simple. The Supreme Court agrees, writing there is no “strict evidentiary checklist” when assessing whether a dog’s alert is grounds for probable cause for a warrantless search of a vehicle.<sup>71</sup> Moreover, every dog has different behaviors and might not give a hard-positive alert, but a casting alert instead.<sup>72</sup> Hard-positive alerts occur when the canine sits and alerts to the officer through eye contact when the canine has detected drug odors.<sup>73</sup> Often, dogs will scratch or bite where they believe there might be narcotics.<sup>74</sup> Casting alerts, on the contrary, occur when “the dog maybe feels not a strong alert, but something that temporarily stops him and deters his attention . . . and continues with his duties by continuing his examination.”<sup>75</sup> While distinct from hard-positive alerts, casting alerts can be grounds for probable cause for a warrantless search.<sup>76</sup> This Note argues that because canine units are highly trained, and because canine units serve as law enforcement’s eyes as walking search warrants, casting alerts should not be grounds for probable cause for a warrantless search of a vehicle.<sup>77</sup> Setting this standard would afford society freedom from unreasonable search and seizure under the Fourth Amendment when it comes to drug sniffing dogs. Indeed, if law enforcement is given wide latitude in its definition of a positive alert (and the subjective analysis of officers examining the casting alerts) then law enforcement’s position “would render judicial review of searches and seizures all bark and no bite.”<sup>78</sup>

### III. THE SUPREME COURT’S GUIDANCE IN *FLORIDA V. HARRIS*

The Supreme Court’s 2013 decision in *Harris* serves as a guide on the use of police canines but leaves room for questions in a probable cause analysis.<sup>79</sup> This

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70. *United States v. Braddy*, 11 F.4th 1298, 1312 (11th Cir. 2021) (citing *Harris*, 568 U.S. at 246–48).

71. *Harris*, 568 U.S. at 244–45.

72. *See, e.g., United States v. Rivas*, 157 F.3d 364, 368 (5th Cir. 1998) (comparing aggressive or hard-positive alerts with casting alerts).

73. *Id.*

74. *Id.*

75. *Id.*

76. *See United States v. Braddy*, 11 F.4th 1298, 1312 (11th Cir. 2021).

77. *See infra* Part VI.

78. *Braddy*, 11 F.4th at 1316 (Rosenbaum, J., dissenting).

79. *See generally Florida v. Harris*, 568 U.S. 237 (2013).

Part will discuss *Harris* and its implications on a probable cause analysis with police canines.

The defendant, Clayton Harris, was stopped in Florida for driving with an expired license plate.<sup>80</sup> Harris had an open beer in the cup holder and was visibly nervous, according to canine officer William Wheatley.<sup>81</sup> Officer Wheatley, because of Harris's nervousness and the beer in the cup holder, asked for Harris's consent to search his vehicle.<sup>82</sup> Harris refused to consent to the search, and subsequently, Wheatley sent his canine, Aldo, around the car for an open-air sniff.<sup>83</sup> Aldo indicated a hard alert on the driver's side of the vehicle.<sup>84</sup> With probable cause, Wheatley searched the vehicle and found ingredients for manufacturing meth.<sup>85</sup>

The Florida Supreme Court held that because drug sniffing dogs cannot be cross-examined, evidence concerning the dog's reliability is required.<sup>86</sup> Due to the demands of introducing reliability of the drug sniffing dog, the Florida Supreme Court introduced a "strict evidentiary checklist" to satisfy the probable cause standard.<sup>87</sup> Under the Florida Supreme Court's interpretation, "the state must show that an officer has a reasonable basis for believing that his dog is reliable to establish probable cause."<sup>88</sup> Absent such a basis, there would be no probable cause to conduct a warrantless search.<sup>89</sup> The Florida Supreme Court went on to require the state to present evidence of "(1) the dog's training and certification, (2) the meaning of particular training and certification of the dog, (3) the dog's field performance records, (4) the experience and training of the officer handling the dog, and (5) any other objective evidence the state has related to the dog's reliability."<sup>90</sup>

The U.S. Supreme Court rejected the evidentiary checklist because it is "inconsistent with the flexible, common-sense standard of probable cause."<sup>91</sup>

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80. *Id.* at 240.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 240–41.

86. *Harris v. State*, 71 So. 3d 756, 758 (Fla. 2011).

87. *Id.* at 775; *Harris*, 568 U.S. at 239.

88. David J. Robinson, *Admissibility of Dog-Sniff Evidence: Evaluating Probable Cause After Florida v. Harris*, ILL. BAR J., Apr. 2013, at 194, 195.

89. *See Harris*, 71 So. 3d at 758.

90. Robinson, *supra* note 88, at 195.

91. *Harris*, 568 U.S. at 240 (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

*Harris* lays the foundation for canines and probable cause.<sup>92</sup> Hard alerts, like in *Harris*, are not at issue.<sup>93</sup> Hard alerts by drug detection dogs will nearly always be grounds for probable cause to conduct a warrantless search of a vehicle.<sup>94</sup> However, this decision highlights that there is discretion for reviewing courts when evaluating whether a canine's alert is objectively reasonable for a probable cause determination.<sup>95</sup> Casting alerts are at issue, and the following cases and discussion illustrate the problematic approach of allowing law enforcement officers' subjective interpretation of dog behavior to creep into our criminal courts.

#### IV. *UNITED STATES V. BRADDY*

There is a current circuit split concerning casting alerts. One approach comes from the Eleventh Circuit's position in *United States v. Braddy*.<sup>96</sup> In *Braddy*, the defendant was charged and convicted, after waiving his right to a jury trial, for one count of possession with intent to distribute more than five kilograms of cocaine and one count of conspiracy to possess with intent to distribute more than five kilograms of cocaine in Alabama.<sup>97</sup> The Eleventh Circuit held that a casting alert by a drug sniffing dog was sufficient for probable cause under the circumstances.<sup>98</sup> The discussion below illustrates how casting alerts may violate the Fourth Amendment's freedom from unreasonable searches and seizures.<sup>99</sup>

##### A. *The Facts*

The defendant, James Braddy, was stopped by police for having two bicycles obstructing the view of his out-of-state license plate.<sup>100</sup> During the traffic stop, two canines sniffed the vehicle for narcotics.<sup>101</sup> Both canines allegedly alerted to the driver-side door of Braddy's vehicle, but one alert was missed by an officer.<sup>102</sup> The second canine "gave a 'canine alert' by leaning its body forward, closing its mouth, and changing its breathing and body posture, with the dog's tail becoming

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92. *See id.* at 237.

93. *See id.* at 240–41.

94. *See, e.g., id.* at 247–48; *United States v. Rivas*, 157 F.3d 364, 368 (5th Cir. 1998).

95. *See Harris*, 568 U.S. at 245–48.

96. 11 F.4th 1298 (11th Cir. 2021).

97. *Id.* at 1302, 1307.

98. *Id.* at 1313.

99. *See infra* Part IV; U.S. CONST. amend. IV.

100. *Braddy*, 11 F.4th at 1302.

101. *Id.*

102. *Id.* at 1304. This fact alone highlights factors that contribute to a canine's reliability, including human error. *See id.*

erect.”<sup>103</sup> This is a casting alert. Furthermore, the dog “was unable to go into its trained ‘final response,’ as it was not able to directly pinpoint the odor.”<sup>104</sup> The handling officer testified that the canine’s typical final response was an aggressive alert, which the dog was unable to do because of the wind.<sup>105</sup>

Braddy called his own dog handling expert to testify to the dogs’ handling during the traffic stop.<sup>106</sup> The expert “opined that the two officers made numerous errors while they walked their dogs around Braddy’s vehicle, including ‘overhandling’ their dogs by jerking on their chains, distracting them by giving extra commands, and confusing the dogs to do things not related to the ‘odor,’ and that better training needed to be conducted.”<sup>107</sup> Finally, the expert testified “that the dogs’ behaviors of wagging their tails or closing their mouths was not a valid indicator for smelling a narcotic odor.”<sup>108</sup>

### B. Analysis and Holding

The Eleventh Circuit relied on *Harris*, stating that a strict evidentiary checklist was not necessary and only considered

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. [E]vidence of a dog’s satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert.<sup>109</sup>

The court went on to discuss that, “‘circumstances surrounding a particular alert may undermine the case for probable cause,’ e.g., if the officer, consciously or not, cued the dog or if the team was working under unfamiliar conditions.”<sup>110</sup> Nevertheless, the court—over a dissent—held that the casting alert was sufficient under clear error review.<sup>111</sup> The district court was, therefore, within its discretion when assessing the officer’s subjective interpretation of his canine’s alert.<sup>112</sup>

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103. *Id.*

104. *Id.*

105. *Id.* at 1305.

106. *Id.* at 1305–06.

107. *Id.* at 1306.

108. *Id.*

109. *Id.* (quoting *Florida v. Harris*, 568 U.S. 237, 246–48 (2013) (internal quotations omitted)).

110. *Id.* (quoting *Harris*, 568 U.S. at 247).

111. *Id.* at 1313.

112. *Id.* at 1313–14.

While the dog was ultimately correct in its alert on Braddy's vehicle, the evidence should have not been admitted because of a possible Fourth Amendment violation.<sup>113</sup> A dog's casting alert should not be sufficient for probable cause to conduct a warrantless search. Moreover, the officer's subjective interpretation was used in evaluating whether the alert was sufficient—the officer testified to the dog's change in breathing and body posture, all of which seem to be normal behavior for any dog.<sup>114</sup>

#### V. *UNITED STATES V. RIVAS*

The other side of the split concerning casting alerts follows the Fifth Circuit Court of Appeals' holding in *United States v. Rivas*.<sup>115</sup> In *Rivas*, the defendants were subject to search at the United States–Mexico border resulting in Carlos Rivas' conviction of conspiracy to possess with the intent to distribute and possession with intent to distribute more than five kilograms of cocaine.<sup>116</sup> The conviction was reversed after the Fifth Circuit held that casting alerts were too distant from a hard alert to create probable cause for the search.<sup>117</sup>

##### A. *The Facts*

Rivas and another defendant were crossing into the United States from Mexico.<sup>118</sup> Border officials conducted an open-air sniff on Rivas's vehicle using their drug detection dogs.<sup>119</sup> No canine alerted or indicated toward Rivas's vehicle during the inspection; however, border patrol officers testified that the dogs made "casting" gestures.<sup>120</sup> The officer described the alerts as an instance where the dog stops temporarily, gives a couple of sniffs, then continues on with the

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113. *See id.* at 1304; U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); *see also* *Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress.").

114. *Braddy*, 11 F.4th at 1313–14.

115. *See* *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998); *see also* *United States v. Heir*, 107 F. Supp. 2d 1088 (D. Neb. 2000); *United States v. Wilson*, 995 F. Supp. 2d 455 (W.D.N.C. 2014).

116. *Rivas*, 157 F.3d at 366.

117. *Id.* at 368.

118. *Id.* at 366.

119. *Id.* at 367.

120. *Id.* at 367–68.

examination.<sup>121</sup> After the casting gestures, officers drilled into the vehicle's frame and found narcotics in Rivas's tractor-trailer.<sup>122</sup>

### B. Analysis and Holding

The Fifth Circuit Court of Appeals began their analysis by acknowledging "a drug-dog's alert is sufficient to create probable cause for a search."<sup>123</sup> However, the Fifth Circuit reversed Rivas's conviction because "casting is too distantly related to an alert to create reasonable suspicion on its own as a matter of law."<sup>124</sup> The Fifth Circuit observed that "no federal court has ever confronted a situation where a dog's cast is used to justify a search, nor a situation where a 'weak alert' on its own triggers a search."<sup>125</sup> The court went on to conclude that "the government has not satisfied its burden of proving it had a reasonable suspicion when the dog's cast at Rivas' vehicle."<sup>126</sup> After all, the government has the "ultimate burden of proof when it searches without a warrant."<sup>127</sup>

Because casting alerts are distinct and different from hard alerts, and because casting alerts are subjectively interpreted by the dog's handler, they alone are not sufficient to survive a probable cause analysis.<sup>128</sup> Casting alerts, often described as a weak alert, contrast with hard alerts because they are not a part of the dog's training.<sup>129</sup> The final form for alerting on narcotics is often a sit, or some other alert where the dog's tail becomes erect, indicating to the handler that the odor of narcotics is in the air.<sup>130</sup>

Adding more complexity to this analysis is the issue of introducing an officer's subjective interpretation of a dog's casting alerts. Probable cause cannot be based on an "officer's subjective interpretations of a dog's ambiguous behavior."<sup>131</sup> Moreover, "[a] court cannot accept a handler's subjective determination that a dog has made some otherwise undetectable alert, which

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121. *Id.* at 368.

122. *Id.* at 366.

123. *Id.* at 368 (citing *United States v. Williams*, 69 F.3d 27, 28 (5th Cir. 1995)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* (citing *United States v. Roch*, 5 F.3d 894, 897 (5th Cir. 1993)).

128. *See id.* at 368–69.

129. *Id.*

130. *See United States v. Braddy*, 11 F.4th 1298, 1302 (11th Cir. 2021) (indicating the dog's tail became erect); *Rivas*, 157 F.3d at 368–69 (discussing biting and scratching at an object as a hard alert).

131. *United States v. Heir*, 107 F. Supp. 2d 1088, 1097 (D. Neb. 2000).

conclusion would be, for all practical purposes, immune from review.”<sup>132</sup> The Supreme Court has refused to recognize an officer’s subjective interpretation in a probable cause analysis because probable cause is based on an objective standard under all the circumstances.<sup>133</sup>

Allowing an officer’s subjective interpretation of dog behavior is problematic, and the dissent in *Braddy* argues that “placing our blind faith in the officers’ subjective interpretations of common dog behavior—especially when the same behavior occurs routinely in dogs who are not drug-sniffing canines—would effectively insulate law enforcement from judicial scrutiny.”<sup>134</sup> The main issue is that without objective evidence, there is no way to assess the reasonableness of a search and seizure.<sup>135</sup>

#### VI. THE DOGMA OF CASTING ALERTS

A casting alert in the Eleventh Circuit and a casting alert in the Fifth Circuit now have two different outcomes for the same kind of dog behaviors.<sup>136</sup> In the Eleventh Circuit, casting alerts are grounds for probable cause to search a vehicle.<sup>137</sup> In the Fifth Circuit, casting alerts are not grounds for probable cause to search a vehicle.<sup>138</sup> However, the Supreme Court in *Harris* has laid out a common-sense based test for determining whether an officer has probable cause for a warrantless search.<sup>139</sup> A closer examination of the common-sense, objective analysis reveals the issue: if we want to trust a dog’s nose in a way that is objective, would not the best course of action be to remove any subjective interpretations of dog behavior? The Supreme Court has already held that a law enforcement officer’s subjective analysis is not a part of the probable cause analysis and removing any remnant subjectivity would only make the determination more objective.<sup>140</sup> Furthermore, if a dog’s training records are reliable, like in *Braddy*,<sup>141</sup> then courts should only trust a dog’s final alert response which they were trained

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132. *United States v. Wilson*, 995 F. Supp. 2d 455, 475 (W.D.N.C. 2014).

133. *Whren v. United States*, 517 U.S. 806, 813 (1996).

134. *Braddy*, 11 F.4th at 1316 (Rosenbaum, J., dissenting).

135. *Id.* at 1316.

136. *Compare id.*, with *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998).

137. *Braddy*, 11 F.4th 1298.

138. *Rivas*, 157 F.3d at 364.

139. *Florida v. Harris*, 568 U.S. 237, 243–48 (2013).

140. *Whren v. United States*, 517 U.S. 806, 813 (1996).

141. *Braddy*, 11 F.4th at 1312–13.

to do, rather than an alert response the dog was not trained to do like in *Rivas* where the evidence of a casting alert was excluded.<sup>142</sup>

Police canines are highly trained, and courts consistently hold their training records are sufficient to trust their hard alerts.<sup>143</sup> Removing casting alerts from the probable cause equation makes not only a court's job easier, but law enforcement's job easier.<sup>144</sup> Law enforcement would have a more objective checklist to run through when determining whether probable cause exists.<sup>145</sup> If their canines go into a final response, then they may conduct a warrantless search because the dog was trained for that purpose.<sup>146</sup> If their canines do not go into a final response, then they may not conduct a warrantless search because the dog was not trained for that behavior.<sup>147</sup> Moreover, if the training standards are high, and if courts must investigate reliable records for the dog, then accepting casting alerts as sufficient for a warrantless search makes training standards and recordkeeping largely superfluous because any untrained dog may exhibit those casting behaviors. From a policy perspective, there will be more certainty as to what is required of drug-sniffing dogs when they are working in the field with their police counterparts. Lastly, the National Police Canine Association's standards require dogs to display obvious alerts, so the certifying official can objectively identify whether a substance was detected.<sup>148</sup> If this standard is imposed on dogs intending to qualify as a drug detection dog, then the standard should apply in our criminal courts.

## VII. CONCLUSION

Because an officer's subjective interpretation of a drug-sniffing dog's casting alert erodes the Fourth Amendment—and because Supreme Court precedent demands that subjective interpretation be irrelevant under probable cause analysis<sup>149</sup>—casting alerts should not be sufficient for probable cause to conduct a warrantless search on vehicles during a routine traffic stop, absent some other factual circumstance indicating the presence of contraband or narcotics. Allowing an officer's subjective interpretation of dog behavior to determine whether there was probable cause will lead to the continued use of canines as

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142. *Rivas*, 157 F.3d at 368.

143. *See, e.g., Braddy*, 11 F.4th at 1312–13.

144. *See id.* at 1316–17 (Rosenbaum, J., dissenting).

145. *See Florida v. Harris*, 568 U.S. 237, 243–48 (2013).

146. *See Braddy*, 11 F.4th at 1303–04.

147. *See Rivas*, 157 F.3d at 368.

148. NAT'L POLICE CANINE ASS'N, *supra* note 37.

149. *Whren v. United States*, 517 U.S. 806, 813 (1996).



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“walking search warrants.”<sup>150</sup> The objective standard for probable cause analysis should exclude an officer’s subjective interpretations and a hard alert of a drug-sniffing canine should be required to resolve the circuit split between the Eleventh and Fifth Circuits.<sup>151</sup>

Police canines are very smart and highly trained—but just like humans, they make mistakes.<sup>152</sup> As a matter of constitutional principle, it would be better to err on the side of caution and require a hard alert as opposed to a casting alert by a drug-sniffing dog—especially when someone’s liberty and freedom are at stake.

*Bryce Tish\**

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150. See Ensminger & Papet, *supra* note 39, at 1.

151. Compare *Braddy*, 11 F.4th at 1298, with *Rivas*, 157 F.3d at 364.

152. See discussion *supra* Part II.

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