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**Clayton Harris v. State of Florida**

**SC08-1871**

> >> PLEASE RISE.

HEAR YE HEAR YE HEAR YE.

THE SUPREME COURT OF FLORIDA IS

NOW IN SESSION.

ALL WHO HAVE CAUSE, TO PLEA,

DRAW NEAR, GIVE ATTENTION, AND

YOU SHALL BE HEARD.

GOD SAVE THIS UNITED STATES,

THIS GREAT STATE OF FLORIDA, AND

THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE

FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO

THE FLORIDA SUPREME COURT.

WE HAVE A DISTINGUISHED GROUP

WITH US HERE TODAY.

PRACTICING WITH PROFESSIONALISM

GROUP.

AND I NOTICE THE PRESIDENTS OF

OUR FORMER JUSTICE CHARLIE

WELLS, WELCOME BACK.

WE WILL DO OUR FIRST CASE ON THE

CALENDAR, WHICH IS HARRIS VERSUS

STATE, ARE THE PARTIES READY?

>> YES, YOUR HONOR.

>> MAY IT PLEASE THE COURT, GLEN  
GIFFORD FROM THE SECOND CIRCUIT  
PUBLIC DEFENDERS OFFICE.

AND THIS CASE IS BEFORE THE  
COURT ON DIRECT AND EXPRESS  
CONFLICT IN THE FIRST DISTRICT,  
CITED THE ... THE ISSUE IS  
WHETHER THE STATE MUST PRODUCE  
PERFORMANCE RECORDS OF DRUG  
DETECTING DOGS IN ORDER FOR IT  
TO... SEARCH A VEHICLE.

>> THIS CASE, MR. GIFFORD, THE  
-- ACCORDING TO THE TESTIMONY,  
THE PERFORMANCE RECORDS THAT  
WOULD INDICATE FALSE ALERTS WERE  
KEPT BECAUSE THE TRAINER SAYS  
THE ONLY TIME THEY KEPT THE  
RECORDS WAS WHEN THE ARREST WAS  
MADE SO, HOW WOULD THE -- IN  
THIS CASE, HOW WOULD THE FIELD  
PERFORMANCE RECORDS REALLY HELP  
IN DETERMINING THE DOG'S  
RELIABILITY? AND AS YOU ANSWER  
THAT, THAT IS A QUESTION I HAVE,  
IS IF WE ARE MAKING ONE TEST,  
THERE HAS TO BE THIS TYPE OF  
RECORD, ISN'T THAT KIND OF

RESTRICTIVE FOR THE DEFENDANT,  
AS WELL AS FOR THE TRIAL JUDGE?  
>> YOUR HONOR, THE VERY FACT THE  
RECORDS WERE NOT KEPT IN THE  
CASE AND AVAILABLE TO THE  
DEFENSE AND NOT PRODUCED BY THE  
STATE, MOST IMPORTANTLY, THAT  
MEANS THAT PROBABLY CAUSE CANNOT  
EXIST.

THE FIELD PERFORMANCE RECORDS  
ARE THE MOST IMPORTANT  
CRITERION.

>> BUT THEY KEPT THEM,  
APPARENTLY, THEY JUST KEPT THEM,  
ONLY WHEN AN ARREST WAS MADE.  
NOW, AS -- WOULD YOUR ARGUMENT  
BE THAT THAT IS NOT -- THAT  
COULD NOT EVEN CONSTITUTE PROPER  
FIELD PERFORMANCE RECORDS, IF  
THEY ARE INHERENTLY SKEWED?  
IF THE ONLY TIME THAT A REPORT  
IS MADE, IS WHEN THERE IS AN  
ARREST MEANING NOTHING IS FOUND.

>> IT SHOWS THE DOG'S SUCCESS  
RATE AND BATTING AVERAGE AND  
RECORD OF ALERTING WHEN DRUGS  
ARE FOUND AND WHEN THEY ARE NOT  
FOUND.

>> IS THAT REALLY A TRUE TEST OF

THE CAPABILITY OF THE PARTICULAR  
ANIMAL OR THING, BECAUSE  
CERTAINLY A DOG MAY ALERTED AND  
THERE MAY CERTAINLY BE THE SCENT  
OR ODOR BUT THE DRUG IS NOT  
PRESENT AND IT IS THE RESIDUAL  
THAT IS THERE, DO WE HAVE A  
PROBLEM IN TRYING TO SET THE  
PARAMETERS FOR WHAT THAT A FIELD  
PERFORMANCE REPORT, WHATEVER  
THAT MAY BE, SHOULD CONTAIN?

>> WELL, THE CASE LAW REFLECTS  
THAT THE PROBLEM OF RESIDUAL  
ODOR IS THIS DOG'S CAPACITY TO  
ALERT TO RESIDUAL ODORS CAN  
DETRACT FROM PROBABLE CAUSE AND  
ALL THE LOWER COURTS, MATHESON  
AND COLEMAN ACKNOWLEDGE IT IS  
RELEVANT EVIDENCE, A DOG'S FIELD  
PERFORMANCE RECORD AND THE  
QUESTION IS WHETHER IT IS THE  
STATE'S BURDEN OF PROOF OR NOT.

>> RIGHT NOW, THEY ARE NOT  
REQUIRED TO KEEP THESE KIND OF  
PERFORMANCE RECORDS, CORRECT.

>> IN THE SECOND DISTRICT, THEY  
ARE, YOUR HONOR.

>> OTHER PLACES THEY ARE THE

NOT.

SO YOU ARE ASKING US, THEN, TO  
REQUIRE THE POLICE TO KEEP THESE  
KINDS OF PERFORMANCE RECORDS.

>> THAT'S RIGHT, YOUR HONOR, ONE  
OF THE THREE COMPONENTS OF  
PROBABLE CAUSE, ONE OF THE THREE  
LEGS OF THE STOOL.

>> WHAT IS THIS SOURCE OF THAT  
REQUIREMENT?

>> THE SOURCE OF THAT  
REQUIREMENT WOULD BE THE  
TOTALITY OF THE CIRCUMSTANCES  
RULE OR THE REQUIREMENT OF THE  
STATE TO PROVIDE PROBABLE CAUSE  
FOR A --

>> BUT IS YOUR ARGUMENT -- IN  
THE ABSENCE OF THAT PARTICULAR  
EVIDENCE, THERE CAN NOT BE A  
FINDING OF PROBABLE CAUSE THAT  
RELIES ON THE DOG ALERTING TO...  
INTO THAT IS CORRECT, YOUR HONOR  
AND THE REASON.

>> IF WE DO NOT KNOW THAT THE  
DOG'S PERFORMANCE RECORD, THE  
DOG'S SUCCESS RATE, IN -- AND  
PAST PERFORMANCE, 4 TO 6 WEEKS  
OUT, 2 TO 3 MONTHS OUT, WE DON'T  
KNOW WHETHER THE DOG IS AN

ACCURATE PREDICTOR OF THE  
PRESENCE OF DRUGS, IF THE DOG IS  
ALERTING TO THE SCENT OF  
RESIDUAL ODOR, AS IT DID IN THIS  
CASE IN TWO INSTANCES, RATHER  
THAN THE PRESENCE OF DRUGS, AT  
THAT MOMENT.

>> WHAT IF WE -- WHAT IF IT IS  
THE CASE, THAT ALL DOGS ARE  
GOING TO AT LEAST IN SOME  
CIRCUMSTANCES, ALL DOGS THAT ARE  
TRAINED AS WELL AS THEY CAN BE  
TRAINED, AND HAVE THE BEST  
ABILITY ARE GOING TO ALERT THE  
RESIDUAL ODORS BECAUSE THE FACT  
OF THE MATTER IS, THE MOLECULES  
BOUNCING AROUND THE AIR,  
ASSOCIATED WITH A RESIDUAL ODOR,  
MAY BE THE SAME IN NUMBER AS THE  
MOLECULES BOUNCING AROUND IN THE  
AIR ASSOCIATED WITH A VERY  
TIGHTLY-WRAPPED CONTAINER WITH  
DRUGS.

AND SO THERE IS REALLY NO  
DIFFERENCE BETWEEN WHAT WILL BE  
DETECTED IN THE AIR FROM -- LEFT  
OVER FROM A CONTAINER THAT HAD  
BEEN THERE THAT WAS NOT TIGHTLY

WRAPPED, AND A CONTAINER THAT IS  
THERE THAT IS TIGHTLY WRAPPED,  
DOES THAT MAKE SENSE.

>> THAT DOES MAKE SENSE AND I  
DON'T KNOW OF ANY SCIENCE TO  
SUPPORT IT OR ANY SCIENCE THAT  
TELLS US THAT YOU'LL HAVE THE  
SAME AMOUNT OF MOLECULES  
BOUNCING AROUND IN THE AIR IN  
EITHER CIRCUMSTANCE, COMMON  
SENSE WOULD TELL US THAT DRUGS  
THAT ARE ACTUALLY PRESENT IN THE  
VEHICLE WILL GIVE OFF A SCENT, A  
FRESH SCENT AND DRUGS THAT ARE  
NOT VEHICLE AND PRESENT AT SOME  
POINT IN THE PAST WILL GIVE OFF  
WHAT IS REFERRED TO IN THE  
LITERATURE AND THE CASE LAW, A

--

>> IS THERE -- IS IT POSSIBLE  
FOR A DOG TO BE TRAINED TO KNOW  
THE DIFFERENCE HERE?  
BECAUSE IT SEEMS TO ME THAT WE  
ARE GETTING VERY PICKY ABOUT  
WHETHER OR NOT, YOU KNOW, IT'S  
REALLY A RESIDUAL ODOR OR  
WHETHER OR NOT IT REALLY IS A --  
YOU KNOW, A PRESENT ODOR,  
BECAUSE IN ANY -- EITHER WAY,

THE DOG THINKS -- SEEMS TO ME IS  
PERFORMING IN THE WAY THE DOG IS  
TRAINED TO PERFORM, AND THAT IS,  
TO DETECT THE ODOR OF NARCOTICS.

>> YES, YOUR HONOR AND THIS IS  
THE KEY, DOGS CAN BE CONDITIONED  
NOT TO ALERT TO RESIDUAL ODORS  
BELOW A CERTAIN THRESHOLD.

>> IS THERE EVIDENCE IN THE  
RECORD THAT WOULD SUPPORT THAT  
CONCLUSION.

>> NOT IN THE RECORD, IN THE  
CASE LAW, YOUR HONOR AND IT IS  
MATHESON, WHICH POINTS TO U.S.  
CUSTOMS SERVICE OFFICERS AND THE  
DOGS ARE TRAINED NOT TO ALERT  
THE RESIDUAL ODOR OF DRUGS.

>> SEEMS TO ME THAT IS ALMOST --  
AND SEEMS THAT IS ALMOST WHAT  
JUSTICE LEWIS WAS ASKING ABOUT  
AND SEEMS THE CASES HAVE TAKEN  
TWO VIEWS OF THIS, WHICH IS, I  
TEND TO AGREE WITH WHAT MATHESON  
IS SAYING WHICH IS IF A DOG  
CAN'T BE TRAINED TO ALERT  
BETWEEN WHAT MIGHT BE RESIDUAL  
ODORS WHICH YOU CAN'T  
SUBSTANTIATE AND SOMETHING THAT

IS REALLY IN THE VEHICLE, THEN,  
REALLY THEY MAY ALERT 100% OF  
THE TIME AND WE'LL NEVER KNOW IF  
IT IS FALSE OR NOT BUT ON THE  
OTHER HAND THERE ARE SOME COURTS  
THAT SEEM TO SAY IT IS GOOD THEY  
ALERT TO RESIDUAL ODORS, IN  
TERMS OF THIS AND I THINK THIS  
IS WHY THE COURT IS RELUCTANT TO  
TAKE ONE OF THESE CASES BECAUSE  
THE RECORDS SEEM TO BE VARYING,  
DEPENDING ON WHETHER THERE ARE  
EXPERT WITNESSES OR NOT, THAT TO  
ME IS A THRESHOLD ISSUE, IS  
THAT, IS IT -- WHAT JUSTICE  
QUINCE IS ASKING, IS, CAN --  
YOUR RECORDS RELY ON OTHER CASES  
TO SAY A DOG CAN BE TRAINED TO  
DISTINGUISH BETWEEN RESIDUAL  
ODORS AND ACTUAL DRUGS IN A  
VEHICLE AND YOU ARE BASING THAT  
ON OTHER CASES.

>> THAT'S RIGHT, I'M BASING IT  
ON MATHESON AND MATHESON CITE TO  
THE U.S. CUSTOM SERVICE AS WELL  
AS OTHER CASES IN THE BRIEF THAT  
SHOW EXTINCTION TRAINING, CAN BE  
PERFORMED AND IS NOT GENERALLY  
PERFORMED IN THE DOG'S -- DOG

WHOSE RECORDS WE HAVE BEEN ASKED  
TO DETERMINE.

BUT IT CAN BE --

>> SEEMS TO ME WHEN WE GO DOWN  
THE ROAD, I MEAN, YOU CAN HAVE A  
RESIDUAL ODOR THAT WAS, WHAT, I  
WEEK AGO?

A DOG COULD IN FACT SNIFF, A --  
THE DRUGS HAD BEEN IN THE CAR A  
WEEK AGO OR A DAY AGO.

>> THE OFFICER IN THIS CASE WAS  
ASKED, THE QUESTION ABOUT THAT,  
AND HE SAID, I CAN'T ANSWER THAT  
QUESTION, I'M NOT COMFORTABLE  
ANSWERING THAT QUESTION.

>> THEN THE ISSUE COMES BACK TO,  
AND THIS IS WHAT I THINK THE  
STATE HAS BEEN SAYING, IF IN A  
BEGIN SITUATION, EVEN AS THE  
OFFICER TESTS RECORDS IN THE  
FIELD, WE WOULDN'T KNOW -- AND,  
THE DOG ALERTED AND DRUGS WERE  
NOT FOUND, AND THERE ARE TWO  
OTHER POSSIBILITIES, THE  
POSSIBILITIES ARE THAT THE  
RESIDUAL ODOR, OR A FALSE ALERT.  
NOW, I GUESS, FOR THE TRIER OF  
FACT, THIS IS WHAT CONCERNS ME,

IS HOW DO WE KNOW WHICH OF THOSE  
TWO IT IS, AND WHAT THE STATE IS  
SAYING, IS, WELL, THEN YOU HAVE  
TO LOOK AT THE TRAINING RECORD,  
YOU LOOK AT RECORDS THAT ARE  
UNDER CONTROLLED CONDITIONS AND  
IS THAT THE ONLY WAY YOU KNOW  
WHETHER THEY ARE RESIDUAL ODORS  
OR FALSE ALERTS OR ACTUAL DRUGS,  
ISN'T THAT A REASON WHY THE  
FIELD PERFORMANCE RECORDS REALLY  
ARE NOT THE ONLY BASIS ON WHICH  
PROBABLE CAUSE CAN BE  
ESTABLISHED?

>> WELL, THEY ARE NOT THE ONLY  
BASIS.

>> I THOUGHT YOU WERE ARGUING  
FOR SORT OF A PER SE RULE.

>> PER SE RULE, UNLESS THE  
RECORDS ARE PRESENTED IN  
ADDITION TO THE TRAINING AND  
CERTIFICATION RECORDS.

>> SO YOU ARE SAYING A DOG OUT  
ON HIS INITIAL TRIP, HAS NO  
PERFORMANCE RECORD, THE EVIDENCE  
SHUNTS -- SHOULDN'T BE  
CONSIDERED ONCE HE ALERTS A  
POSITIVE.

>> ONCE THE COURT ANNOUNCES THE

RECORDS RELEVANT AND NECESSARY  
FOR THE STATE TO MEET THE BURDEN  
OF PROOF, IF THE STATE DOESN'T  
KEEP THE RECORDS, YES, THAT  
WOULD BE THE RULE.

>> BUT IF HE HAS NO PERFORMANCE  
RECORD.

>> NO PERFORMANCE RECORD.

>> HE'S ASKING ABOUT THE INITIAL  
TIME THE DOG GOES OUT.

>> OH, OH, AND IN THE ORAL  
ARGUMENT IN GIBSON, JUSTICE  
ANSTEAD ASKED ABOUT THE HONOR  
STUDENT'S DOG AND THE INITIAL  
TIME THE DOG GOES OUT AND THERE  
ARE TWO WAYS THE COURT COULD GO  
ON THAT AND ONE IS THE DOG COULD  
BE DEPLOYED BUT THE PERFORMANCE  
WOULDN'T BE RELIED UPON TO  
ESTABLISH PROBABLE CAUSE UNTIL  
THE DOG ESTABLISHED A FIELD  
RECORD OF 4 TO 6 WEEKS OR 10 TO  
20 ALERTS.

>> EVEN IF THE DOG ACTUALLY  
ALERTS AND THERE IT IS, YOU  
SHOULDN'T RELY ON IT.

>> WELL, THAT WOULD BE ONE  
DIRECTION THE COURT COULD GO IN,

AND WOULD BE IN EFFECT AN  
INTERNSHIP FOR THE HONORS  
STUDENT, ONE WAY YOU COULD LOOK  
AT THAT AND THE OTHER WAY TO  
LOOK AT IT IS IF THE DOG IS  
NEWLY CERTIFIED, THAT DOG IS  
PRESUMABLY A LITTLE MORE  
RELIABLE THAN A DOG WHO IS --  
WHOSE CERTIFICATION LAPSED,  
LAPSED 28 MONTHS IN THIS CASE,  
ACTUALLY.

SO THAT DOG'S INITIAL  
PERFORMANCE BASED UPON THE  
RECENT CERTIFICATION, AND RECENT  
TRAINING, WOULD BE SUFFICIENT.

>> YOU ARE SAYING THERE, THERE  
ARE CIRCUMSTANCES, WHERE THE  
FIELD EXPERIENCE AND THE RECORDS  
OF THE FIELD EXPERIENCE ARE NOT  
NECESSARY.

SO, KIND OF -- HOW DO YOU  
RECONCILE WHAT YOU ARE  
SUGGESTING?

THE BASIC RULE YOU ARE  
SUGGESTING FOR REQUIRING THESE  
RECORDS WITH THE TOTALITY OF THE  
CIRCUMSTANCES IN THEM?

THAT I MEAN, YOU WOULD ADMIT  
THAT WHENEVER WE'RE LOOKING AT

POSSIBLE CAUSE WE HAVE TO LOOK  
AT TOTALITY OF CIRCUMSTANCES,  
ISN'T THAT CORRECT?

>> THAT'S CORRECT.

>> HOW DOES THAT FIT IN WITH  
WHAT --

>> YOU DON'T HAVE FIELD  
PERFORMANCE RECORDS SHOWING HOW  
THE DOG PERFORMED IN THE RECENT  
PAST, IN ADDITION TO THE  
TRAINING AND CERTIFICATION  
RECORDS FROM THE MORE DISTANT  
PAST AND YOU DON'T HAVE A  
TOTALITY OF THE CIRCUMSTANCES.

WHAT YOU HAVE ARE NARROW  
CIRCUMSTANCES.

>> BUT, THE TOTALITY OF THE --  
THE FOCUS IS ON THE TOTALITY OF  
THE CIRCUMSTANCES THAT ARE KNOWN  
TO THE OFFICER.

AND -- ISN'T THAT CORRECT, WHAT  
THE FOCUS IS ON.

>> THAT'S CORRECT.

>> IN DETERMINING WHETHER THERE  
IS PROBABLE CAUSE.

>> RIGHT.

>> TOTALITY OF CIRCUMSTANCES  
KNOWN TO THE OFFICER, HOW DOES

WHAT YOU -- HOW IS WHAT YOU ARE  
SUGGESTING CONSISTENT WITH THAT  
CONCEPTUAL FRAMEWORK.

>> IT IS CONSISTENT IN THAT, THE  
TOTALITY OF THE CIRCUMSTANCES,  
THEY ARE KNOWN TO THE OFFICER, AND  
SHOULD INCLUDE THAT DOG'S FIELD  
PERFORMANCE RECORDS, THIS IS THE  
DOG'S HANDLER AND THE DOG'S --  
THE PERSON WHO TAKES THE DOG OUT  
EVERY DAY ON PATROL, AND DEPLOYS  
THE DOG --  
DEPLOYS THE DOG.

>> YOU ARE SAYING THE OFFICER --  
YOU ARE SAYING HE KNOWS IT'S A  
RELIABLE DOG UNLESS HE HAS THE  
RECORDS.

>> HAS REASON -- HAVE REASON TO  
BELIEVE THIS IS NOT A RELIABLE  
DOG AND THAT IS SUBJECT TO  
REVIEW BY THE MAGISTRATE ON A  
MOTION TO SUPPRESS AND KEEP IN  
MIND, IT IS THE STATE'S BURDEN  
TO PRODUCE EVIDENCE TO JUSTIFY  
WARRANTLESS SEARCH, AND IT IS  
THE STATE WHO KEEP THE DOGS,  
DEPLOYS THESE DOGS AND IS ONLY  
THE STATE THAT CAN IN THE  
NATURAL COURSE OF EVENTS, THE

STATE MUST BEAR THE BURDEN OF  
PRODUCING THIS EVIDENCE.  
AND REALLY NO DISAGREEMENT ABOUT  
WHETHER THE EVIDENCE IS  
RELEVANT.

>> LET'S TALK ABOUT, THE FACTS  
OF THIS CASE, I WAS INTERESTED  
THAT THIS DOG ALERTED TO A --  
THE DOOR HANDLE.

AND, DIDN'T ALERT ANYTHING IN  
THE VEHICLE.

AND I'M NOT SURE THAT YOU HAVE  
ACTUALLY RAISED THAT SPECIFIC  
POINT BUT SINCE THE HANDLE CAN  
BE ANYONE CAN TOUCH A HANDLE,  
HOW DOES THAT -- AND WILL BE A  
QUESTION FOR THE STATE, HOW DOES  
THAT ESTABLISH PROBABLE CAUSE IN  
THIS CASE, COUPLED WITH THE FACT  
THAT -- AND I DON'T KNOW IF  
THERE IS SIGNIFICANCE TO THIS,  
THAT HE IS TRAINED TO DETECT THE  
PSEUDOEPHEDRINE, IS THAT  
ESTABLISHED THAT THAT WOULD BE A  
SEPARATE DETECTION FROM THE  
ABILITY TO DETECT METH AND  
REALLY GOES TO WHAT WE ARE  
DEALING WITH NOW, THE REAL LIFE

-- THIS CASE, I'M CONCERNED ABOUT HIM ALERTING JUST TO A HANDLE WHICH ANYONE COULD TOUCH AND I'M ALSO CONCERNED ABOUT WHETHER HE ACTUALLY WAS CERTIFIED OR TRAINED, WHATEVER THAT MEANS, IN THIS PARTICULAR DRUG.

HE, THE DOG.

>> ON THE DOOR HANDLE, THE DOG ALERTED TWICE TO THE DOOR HANDLE, AND MR. HARRIS TESTIFIED IN THE SUPPRESSION HEARING HIS WINDOW WAS DOWN AND THAT SEEMS REASONABLE WITH THE TRAFFIC STOP.

THE PSEUDOEPHEDRINE WAS IN THE CAR, THE CAB OF THE TRUCK AND YET THE DOG ALERTED TO THE DOOR HANDLE AND THE OFFICER TESTIFIED THE DOG WAS ALERTING TO A RESIDUAL SCENT, NO QUESTION ABOUT THAT AND WE KNOW IN THE FIRST INSTANCE, THE FIRST -- THE ONE BEFORE THE COURT, THE DOG ALERTED WHEN THERE WERE NO DRUGS PRESENT.

>> THEREFORE, I MEAN, AGAIN, IN EACH CASE WE HAVE TO LOOK AT ON

ITS OWN FACTS, SHOULDN'T THAT CONCERN US, THAT IF WE KNOW A DOG HAS ONLY ALERTING AT THE MOST, RESIDUAL ODOR OR MAYBE A FALSE ALERT, HOW CAN THAT -- DID YOU MAKE THAT ARGUMENT, THAT THAT ITSELF WOULD NOT -- SHOW THERE WAS NO PROBABLE CAUSE.

>> WE DID MAKE THE ARGUMENT AND THAT WAS REALLY THE CORE OF THE ARGUMENT.

>> CAN I GET CLEAR ON WHEN THE -- IT'S ADMITTED THE DOG ALERTED TO A RESIDUAL SCENTS.

>> IT'S IN THE TRANSCRIPT.

>> AT WHAT POINT DOES THAT ALERT -- DID THAT ALERT OCCURRED.

>> THAT ALERT OCCURRED WHEN THE DOG WAS DEPLOYED TO THE VEHICLE, AT THE TRAFFIC STOP AND MR. HARRIS DENIED CONSENT FOR THE SEARCH AND THE OFFICER DEPLOYED THE DOG AND THE DOG ALERTED TO THE DRIVER'S SIDE DOOR HANDLE AND THE FIRST STOP IN JUNE WHEN THERE WAS PSEUDOEPHEDRINE IN THE CAR AND NO METHEMPHETAMINE WHICH THE DOG

WAS TRAINED TO ALERT TO AND AT  
SOME POINT BETWEEN JUNE AND  
OCTOBER THE DOG ALERTED AGAIN TO  
THE DOOR HANDLE, NO PSEUDO --  
>> WAS MR. HARRIS -- YOU SAY  
SUBSEQUENTLY I'M TRYING -- IS  
MR. HARRIS INVOLVED IN THE  
SUBSEQUENT.

>> SAME PARTY, SAME DOG, SAME  
HANDLER, SAME THING.

>> SAME CAR?

DIDN'T GET HIS CAR FIXED .

>> SAME TRUCK, EVIDENTLY HE WAS  
OUT ON BOND AND --

>> DIDN'T WASH THE CAR --

[LAUGHTER].

>> LET ME GET CLEAR, WHICH STOP  
-- ARE BOTH STOPS AT ISSUE IN  
THIS CASE?

>> SECOND STOP IS -- EVIDENCE  
PRESENTED IN THE TRIAL COURT AND  
NO DRUGS WERE FOUND DURING THE  
SECOND STOP AND NOTHING TO  
SUPPRESS.

>> WE DON'T KNOW HOW MANY TIMES  
ALDO ALERTED TO AND HAS PEOPLE'S  
VEHICLES SEARCHED, AND NO DRUGS  
WERE FOUND AND THAT IS MY  
CONCERN IN THESE CASES, WHERE

WE'RE GIVING THESE DOGS THIS  
SUPER HUMAN ABILITY, WITHOUT  
REALLY QUESTIONING HOW  
TRUSTWORTHY ARE THE DOGS AND  
THAT IS YOUR POINT.

>> THAT IS ME POINT, AND ANOTHER  
REASON, FEES FIELD PERFORMANCE  
RECORDS ARE SO IMPORTANT IS  
BECAUSE TRAINING AND  
CERTIFICATION MEANS DIFFERENT  
THINGS IN DIFFERENT CASES.

>> EXPLAIN A LITTLE BIT ON THAT,  
IS THIS RECORD, THOUGH,  
SUFFICIENT, TO MAKE THE -- TO  
COME TO COME CONCLUSION AS A  
MATTER OF LAW THE TRAINING AND  
CERTIFICATION PROCESS IS LACKING  
IN SOME WAY.

>> THIS PARTICULAR DOG, WE  
BELIEVE IT IS, YOUR HONOR, HE  
HAD 1 0 HOUR TRAINING PROGRAM  
WITH THE ACOSTA POLICE  
DEPARTMENT.

>> WENT TO ALABAMA.

>> JANUARY OF 2004, THE INITIAL  
TRAINING, AND THE HANDLER WAS A  
SEMINOLE COUNTY SHERIFF AND  
FEBRUARY OF '04 HE RECEIVED THE

CERTIFICATION FROM AN ORGANIZATION CALLED RUGBY, AND, THAT INVOLVED THE RECORD, HAS THE EXHIBIT OF THE CERTIFICATION AND THE FORM, AND THAT INVOLVED WHETHER HE SUCCESSFULLY FOUND DRUGS PRESENT, THE SIX DRUGS HE WAS TRAINED TO ALERT TO AND ALSO THE FORM THAT WAS USED SAID INSTRUCTIONS FOR OBTAINING YOUR ONE YEAR DRUG BEAT CERTIFICATION WHICH THE OFFICER ATTAINED IN FEBRUARY 2004.

AND THE SEARCH IN THE CASE WAS IN JUNE OF 2006, 28 MONTHS LATER.

AND AFTER THAT, IN JULY OF 2005, THE DEPUTY IN THIS CASE ACQUIRED THE DOG, THE NEXT SEMINAR, THE ONLY SUCCEEDING SEMINAR WAS IN FEBRUARY, 2006, 40 HOURS --

>> ISN'T THAT WHY THE TOTALITY OF THE CIRCUMSTANCES MAKES SENSE?

WE, PERHAPS, HAVE BEEN ALLOWING TOO MUCH EMPHASIS ON FIELD PERFORMANCE, AND IF SOMEBODY IS FRAMED, SAY THEY WENT TO THE U.S. CUSTOMS SERVICE SCREENING

FROM THE DESCRIPTION, IS  
TOP-NOTCH -- TRAINING WHICH FROM  
THE DESCRIPTION IS TOP-NOTCH  
TRAINING AND HAS THAT KIND OF  
FOLLOW-UP MAYBE THE TRAINING AND  
CERTIFICATION IN THAT CASE WILL  
SHOW THAT THERE IS RELIABILITY  
OF THAT DOG, BUT, WITHOUT  
UNIFORM STANDARDS IN THE CASE,  
ISN'T THAT -- ISN'T THAT WHY YOU  
ARE SAYING WE NEED TO RELY ON  
MOORE, BUT I'M STILL NOT SURE  
RELYING ON FIELD PERFORMANCE  
RECORDS IS GOING TO BE, YOU  
KNOW, THE WAY THE STATE CARRIES  
ITS BURDEN, IS THE FACT THE  
TRAINING AND CERTAIN FICTION IN  
THIS CASE NOT UNIFORM, ANOTHER  
CONCERN?

>> IT IS A CONCERN.

IN THE ABSENCE OF EX-STINGS  
TRAINING AS PART OF THE TRAINING  
REGIMENT AND THE ABSENCE OF  
UNIFORM STANDARDS THE TESTIMONY  
IS THAT FLORIDA HAS NO STANDARD,  
THAT THEY HAVE NO STANDARDS FOR  
DRUG DETECTOR DOGS AND IN THE  
ABSENCE OF THAT, A RENEWED

CERTIFICATION WITHIN A YEAR  
PREVIOUS TO THE ALERT IN THIS  
CASE, REALLY YOU HAVE VERY  
LITTLE TO GO BY TO SHOW THAT  
THIS DOG IS CURRENTLY AN  
ACCURATE PREDICTOR OF PROBABLE  
CAUSE.

THAT GAP COULD BE MADE UP WITH  
THE FIELD PERFORMANCE RECORDS,  
THE DOG'S SUCCESS RATE, THAT  
WASN'T DONE IN THIS CASE.

>> LET ME GO BACK TO THE STOP  
THAT OCCURRED AFTER THE STOP  
THAT IS REALLY AT ISSUE HERE,  
WHETHER THE DRUGS SHOULD HAVE  
BEEN SUPPRESS ORDER NOT AND WE  
CAN'T IN THE TOTALITY OF THE  
CIRCUMSTANCES, ANALYSIS OF  
PROBABLE CAUSE, CANNOT CONSIDER  
SOMETHING THAT HAPPENED AFTER  
THE OFFICER MADE THE PROBABLE  
CAUSE DETERMINATION, CAN WE?  
IN THE NORMAL COURSE OF EVENTS,  
NO.

>> IN WHAT COURSE OF EVENTS  
COULD WE POSSIBLY DO THAT?  
HOW CAN THE OFFICER BE CHARGED  
WITH KNOWLEDGE OF SOMETHING THAT  
HAPPENS IN THE FUTURE?

>> THAT EVIDENCE WAS PRESENTED  
BELOW THE STATE DID NOT OBJECT  
TO THAT EVIDENCE BELOW, THE  
TRIAL COURT CONSIDERED THAT  
EVIDENCE IN FINDING --

>> WOULDN'T THE TRIAL COURT  
PROPERLY REJECT -- AND WHEN WE  
ASSUME THE TRIAL COURT PROPERLY  
REJECTED EVIDENCE OF FUTURE  
CONDUCT, THE OFFICER COULD NOT  
POSSIBLY HAVE KNOWN ABOUT, AT  
THE TIME OF THE STOP.

>> THE MAGISTRATE AFTER THE FACT  
WAS DETERMINING WHETHER PROBABLE  
CAUSE EXISTED BASED UPON THE  
DOG'S PERFORMANCE.

IN AN AFTER-THE-FACT ANALYSIS  
THAT IS WHY IT WAS PRESENTED BUT  
I CAN'T STAND BEFORE YOU AND  
TELL YOU TODAY, THAT UNDER THE  
CASE LAW, THAT IS A RELEVANT  
CONSIDERATION.

>> WITH THAT, MR. GIFFORD, YOU  
HAVE USED MORE THAN YOUR TIME.  
IN ARGUMENT HERE TODAY.

>> THANK YOU, YOUR HONOR.

>> PLEASE THE COURT, SUSAN  
SHANAHAN FOR THE STATE OF

FLORIDA, HELP ME CLEAR SOMETHING  
UP, PLEASE.

>> TALK INTO THE MIC AND KEEP  
YOUR VOICE UP.

>> THAT BETTER?

DOGS ARE NOT TRAINED TO DETECT  
NARCOTICS.

DOGS ARE TRAINED TO DETECT THE  
ODOR OF NARCOTICS AND TRAINED TO  
DETECT RESIDUAL ODORS, THAT IS  
THEIR JOB AND THAT WHAT IS THE  
DOG DID IN THE CASE AND HE DID  
HIS JOB.

>> I THINK THAT IS A HUGE  
QUESTION.

BETWEEN WE KNOW FOR EXAMPLE THAT  
ON CURRENTS THERE ARE ODORS  
ON... IF A DOG IS NOT TRAINED TO  
DISTINGUISH BETWEEN DRUGS THAT  
ARE -- ODOR OF DRUGS THAT ARE IN  
A VEHICLE, VERSUS SOMETHING THAT  
MAY HAVE BEEN IN A VEHICLE TWO  
WEEKS BEFORE, HOW CAN THAT DOG  
BE A PREDICTOR OF THE PROBABLE  
CAUSE AT THAT TIME WHEN THEY  
ALERT, THEY ARE ALERTING TO  
DRUGS IN THE VEHICLE AND ISN'T  
THAT WHAT -- THE MATHESON CASE,  
THE CONCERN IS?

IS THAT EVERYBODY SINCE WE ARE GOING TO USE THESE DOGS, AT EVERY TRAFFIC STOP, PRESUMABLY AT SOME POINT AND SINCE, EVERY VEHICLE MAY HAVE A REASON THAT IT HAS SOME RESIDUAL ODOR, THAT WE ARE SUBJECTING INNOCENT CITIZENS TO SEARCHES OF THEIR VEHICLES, IF WE DON'T HAVE DOGS THAT CAN DISTINGUISH BETWEEN DRUGS THAT ARE IN THE VEHICLE AT THE TIME, OR SOMETHING THAT EITHER IS A FALSE ALERT, OR SOMETHING THAT HAD BEEN THERE IN THE PAST.

>> NO, IT'S LIKE A HUMAN OFFICER, WHO SMELLS MARIJUANA EMANATING FROM A VEHICLE. HE ABSOLUTELY HAS PROBABLE CAUSE TO SEARCH THE VEHICLE.

IF THERE IS NO MARIJUANA FOUND HE STILL HAD PROBABLE CAUSE TO SEARCH THE VEHICLE.

SAME WITH THE DOG.

IT DOESN'T MEAN HE DIDN'T HAVE PROBABLE CAUSE AND MATHESON IS EXPECTING ABSOLUTE CERTAINTY.

>> HOW DO WE KNOW, WHEN I'M

ASKING IN A RECORD, HOW DO WE  
KNOW WHETHER -- IF DRUGS --  
FIRST OF ALL, IF YOU DON'T KEEP  
TRACK OF THE ARRESTS -- I MEAN,  
THE STOPS WHERE ALDO ALERTS.  
AND NO DRUGS ARE FOUND, WE HAVE  
NO BASIS TO PREDICT AT LEAST IN  
THE FIELD HIS PERCENTAGE OF  
ACCURACY.

>> BECAUSE YOU CAN'T DETERMINE  
IN THE FIELD A DOG'S --  
>> ARE YOU TELLING ME ALL THE  
APPELLATE COURTS AROUND THE  
STATE -- THE COUNTRY THAT HAVE  
SAID THIS DOG IS 80% ACCURATE,  
WHEREAS THIS DOG IS 8% ACCURATE  
AND THEY LOOK AT ONE OF THE  
FACTORS, THE FIELD PERFORMANCE  
RECORDS, AND ALL OF THOSE  
JURISDICTIONS, WHICH KEEP THOSE  
RECORDS, ARE KEEPING THINGS THAT  
ARE MEANINGLESS.

>> I'M NOT SAYING THEY ARE NOT  
MEANINGLESS, I'M SAYING THEY ARE  
NOT PROBATIVE OR DETERMINATIVE  
TO PROBABLE CAUSE.

THE STATE DOESN'T HAVE TO BRING  
THEM INTO SHOW PROBABLE CAUSE.

>> WHY -- BUT, IT IS ONE THING

TO SAY THE STATE DOESN'T HAVE TO  
BRING THEM IN.

AND THE BURDEN IS NOT ON YOU TO  
KEEP THE RECORDS AND BRING THEM  
IN, BUT, IF THEY EXIST AND FOR  
WHAT HAVE REASON THEY HAVE BEEN  
KEPT, WHY ISN'T IT PROBATIVE, IF  
THE RECORDS SHOW THAT IT COULD  
BE INTERPRETED AS SHOWING THAT  
THE DOG IS UNRELIABLE, WHY  
SHOULDN'T THE DEFENSE AT LEAST  
BE ABLE TO BRING THOSE RECORDS  
IN, AND SAY, HEY, THIS -- THE  
OFFICER SHOULD HAVE KNOWN, THIS  
DOG WAS UNRELIABLE, BECAUSE OF  
WHAT THESE RECORDS SHOW.

>> THEY SHOULD BRING THEM IN,  
BUT THAT YOU WON'T SHOW THAT THE  
DOG IS RELIABLE OR NOT.

BECAUSE THE ONLY TIME YOU CAN  
DETERMINE A DOG'S RELIABILITY IS  
IN A CONTROLLED ENVIRONMENT.

AND THAT IS IN TRAINING AND  
CERTIFICATION.

>> IS THAT IN THE RECORD IN THIS  
CASE.

>> YES, IT IS.

>> FROM THE POLICE OFFICER.

>> YES, IT IS.

THE TRAINING RECORDS WERE PROVIDED AS WELL AS THE TESTIMONY FROM THE OFFICER, REGARDING THE DOG'S TRAINING AND HE NEVER FALSELY ALERTED IN TRAINING AND NEVER FALSELY ALERTED INSERT FICTION, THE DOG HAS A 100% RECORD IN TRAINING CERTIFICATION AND NEVER FALSELY ALERTED.

THE PROBLEM WITH THE FIELD WHEN YOU GET INTO THE FIELD ACTIVITY REPORTS AND SAYING THIS DOG HAS A TERRIBLE RECORD IN THE FIELD, IS THAT YOU DON'T KNOW, THAT HE MAY HAVE BEEN INTO RESIDUAL ODORS LIKE A HUMAN OFFICER AND IT DOESN'T MEAN DRUGS WERE JUST REMOVED FROM THE VEHICLE OR LIKE IN THIS INSTANCE WE HAVE A METH ADDICT, WHO SAID I USED METH EVERY OTHER DAY AND COOK IT IN MY HOME AND THE VEHICLE IS PROBABLY PERMEATED WITH THAT ODOR AND --

>> WITH IT THAT IN MIND WHY DID ALDO ONLY ALERT TO THE HANDLE, WHICH ANYBODY, THE -- COULD

HANDLE OUTSIDE OF THE VEHICLE  
AND USUALLY YOU SEE THEM  
ALERTING A TRUNK OR THE REAR  
PASSENGER SIDE AIN'T IS IMPRESS  
Y IF WHEN THEY GO SPECIFICALLY  
TO A SPOTTED OPTION AND WE'VE  
SEEN CASES WHERE THEY ALERT TO  
THE HOOD OF THE VEHICLE, AND THE  
ONLY PLACE THE DRUGS ARE FOUND  
ARE IN THE TRUNK AND YOU WONDER,  
WAIT A SECOND, HOW ACCURATE IS  
THIS DOG?

EVEN IN THAT CASE, THEY ARE NOT  
ALERTING TO WHERE THIS DRUGS ARE  
FOUND.

>> IT APPEARS IN THE RECORD THAT  
HE WAS SITTING IN THE VEHICLE AT  
THE TIME THAT THE SNIFF WAS  
MADE.

AND IT IS VERY POSSIBLE THAT THE  
-- HE STARTED AT THE DRIVER'S  
SIDE DOOR AND WHEN HE GOT TO THE  
SEAM OF THAT DOOR THE DOG  
ALERTED AND HE WAS ASKED ON  
CROSS-EXAMINATION WHY DID HE  
ALERT TO THE DOOR HANDLE AND  
THIS IS JUST THE OFFICER WITH --  
SURMISING THE DOG ALERTED TO THE

HANDLE, HE'S THE OWNER OF THE  
VEHICLE AND USED METH CONSTANTLY  
AND SMELLED IT ON THE DOOR  
HANDLE AND IT IS ALSO PERFECTLY  
POSSIBLE THAT HE SMELLED FROM  
THE SEAM COMING FROM THE INSIDE  
OF THE CAR, THE ODOR OF METH,  
EMANATING FROM THE VEHICLE  
BECAUSE AROUND THE DOOR HANDLE  
YOU WILL HAVE SEAMS AND THE ODOR  
COMING FROM THE INSIDE OF THE  
VEHICLE.

THE DOG MAY HAVE SNIFFED, RIGHT  
THEN, AND MAY BE WHERE THEY  
STARTED THE SNIFF SEARCH.

OR THE SNIFF AND HE ALERTED  
RIGHT AWAY.

>>... WINDOW.

>> NO, THE TESTIMONY WAS  
COMPLETELY STRICKEN FROM THE  
RECORD, THE DEFENDANT'S  
TESTIMONY AND IT WAS STRICKEN  
FROM THE RECORD AND WE DON'T  
KNOW WHETHER THE WINDOW WAS OPEN  
OR NOT.

>>... [INAUDIBLE] DRUGS THE DOG  
WAS TRAINED TO SNIFF.

>> HE WAS TRAINED TO SNIFF IN  
HIS CERTIFICATION AND ALSO THE

TESTIMONY FROM THE OFFICER S,  
INDICATES HE WAS TRAINED TO  
DETECT METHEMPHETAMINE, COCAINE,  
CRACK COCAINE, HEROIN AND  
MARIJUANA.

>> WHY -- THEN HE WAS ASKED --

ASKED IF HE WAS TRAINED TO  
DETECT ALCOHOL, NO OR  
PSEUDOEPHEDRINE WHICH IS THE  
DRUG THAT WAS FOUND HERE.

IS THAT A TRICK QUESTION,  
BECAUSE THE PSEUDOEPHEDRINE IS  
THE NOT SEPARATELY CERTIFIED, IS  
THAT -- DID THE RECORD SHOW  
THAT?

THAT THREW ME OFF.

>> EVERYTHING FOUND IN THE  
VEHICLE WERE PRECURSORS FOR  
MAKING METH AND HE SAID I COOK  
METH AND I USE IT OFFER OTHER  
DAY AND METH WAS NOT ACTUALLY  
FOUND IN THE VEHICLE BUT HE DID  
ADMIT TO MAKING IT AND USING IT.  
AND THE DOG ALERTED TO THE ODOR  
OF METHEMPHETAMINE.

AND THE TOTALITY OF THE  
CIRCUMSTANCES, THE TRIAL COURT'S  
POINT OF VIEW WOULD BE

CERTAINLY, STATE HAD PROBABLE  
CAUSE TO SEARCH THE VEHICLE ONCE  
THE DOG ALERTED AND LOOKING AT  
EVERYTHING IN THE CASE.

>> IF THE DEFENSE -- THE FIELD  
PERFORMANCE RECORDS ARE NOT A  
RELIABLE INDICATOR OF THE DOG'S  
PERFORMANCE, THEN WHAT DO YOU  
SAY THE DEFENSE CAN BRING IN, TO  
DEMONSTRATE THAT THIS DOG IS NOT  
A RELIABLE DOG?

I MEAN, IF YOU ALREADY HAVE  
PROBABLE CAUSE BECAUSE HE  
ALERTED AND HIS PERFORMANCE IN  
THE PAST IS NOT REALLY RELEVANT,  
WHAT CAN THE DEFENDANT BRING IN.

>> THEY CAN STILL BRING IN THOSE  
RECORDS AND ARGUE THEM AND BRING  
IN THE VETERINARY RECORDS AND  
BRING IN AN EXPERT IF THEY WANT  
DO --

>> WHICH RECORDS.

>> VETERINARY RECORDS AND BRING  
IN AN EXPERT AND IT IS LIKE A  
CITIZEN INFORMANT AND THE DOG IS

--

>> YOU ARE NOT ARGUING THEN THAT  
THOSE FIELD RECORDS ARE NOT  
RELEVANT.

JUST IT'S YOUR POSITION YOU

THINK YOU WOULD ARGUE THEY ARE

THE NOT PROBATIVE.

>> THEY ARE NOT DETERMINATIVE OF

RELIABILITY, YES.

>> LET ME GO BACK TO THIS.

IF THE POLICE DEPARTMENT, THE

LAW THAT -- THE SECOND DISTRICT

NOW, THEY'VE BEEN KEEPING THEM

AND I DON'T KNOW WHAT HAS

HAPPENED DOWN THERE AND MAYBE

DOGS NOW ARE BETTER TRAINED

BECAUSE THEY ARE MORE CONCERNED

ABOUT IT BUT IF WE DON'T --

WOULD SAY THAT IT IS OKAY FOR

POLICE DEPARTMENTS NOT TO KEEP

RECORDS OF WHEN THERE HAS BEEN

AN ARREST OF AN INNOCENT

CITIZEN, WITH NOTHING FOUND,

THAT THE POLICE DEPARTMENT HAS

NO OBLIGATION TO KEEP THOSE

RECORDS, AND THEY CAN ONLY --

HAVE TO KEEP RECORDS OF WHEN

SOMETHING POSITIVE IS DONE, WE

WON'T HAVE A WAY FOR -- WHETHER

IT IS THE DEFENSE THAT BRINGS IT

IN OR THE STATE, TO AT LEAST

LOOK AT THAT FACTOR.

FIELD PERFORMANCE, AS ONE PART  
OF THIS TOTALITY OF  
CIRCUMSTANCES.

>> EVERY TIME AN OFFICER MAKES A  
CALL, A HUMAN OFFICER MAKES A  
CALL AND THERE'S NOTHING -- HE  
DOESN'T MAKE AN ARREST, A REPORT  
IS NOT MADE, TYPICALLY AN  
OFFICER --

>> I UNDERSTAND THAT, BUT WHAT  
-- SEE WE CAN CROSS EXAMINE THE  
OFFICER, WE CAN'T CROSS EXAMINE  
THE DOG.

>> BUT YOU CAN CROSS EXAMINE THE  
--

>> DON'T KNOW IF THE DOG HAD A  
COLD.

>> YOU CAN CROSS EXAMINE THE  
HANDLER AND LET ME CLEAR  
SOMETHING ELSE UP THE U.S.

CUSTOMS DOES NOT TRAIN DOGS OFF  
OF RESIDUAL ODORS, AND MATHESON  
IS INCORRECT IN SAYING THAT.

CUSTOMS DOES THEIR TRAINING LIKE  
OUR LAW ENFORCEMENT AGENCY DOGS  
AND THEY ARE NOT TRAINED TO  
IGNORE RESIDUAL ODORS, THEY ARE  
TRAINED TO DETECT THEM.

>> WHAT MATHESON RELIED ON FOR

MAKING THAT POINT WAS SOMETHING  
THAT WAS SAID THAT HAS GOTTEN --  
MATHESON HAS GOT NO BACKUP  
CITATION, OTHER THAN THIS WAS  
SOMETHING THAT WAS REPRESENTED  
IN A LAW REVIEW ARTICLE.

>> THAT'S CORRECT.

THAT'S CORRECT AND THE LAW  
REVIEW ARTICLE IS NOT EXACTLY  
WHAT IT SAYS.

DOGS ARE TRAINED TO DETECT  
RESIDUAL ODORS AND EXTINCTION  
TRAINING IS NOT TO TELL THE DOG  
NOT TO ALERT TO RESIDUAL ODORS,  
EXTINCTION TRAINING IS NOT TO  
ALERT TO COFFEE GROUNDS OR WHAT  
MASKING ODORS THAT MIGHT MASK  
THE ODOR.

>> IS IT THE STATE'S POSITION

THE THAT THE FIELD

PERFORMANCE-TYPE RECORDS ARE OF  
ABSOLUTELY NO USE AND DO NOT --  
WILL NOT ENHANCE OR LEVEL THE  
PLAYING FIELD OR GIVE US MORE  
INFORMATION THAT IS GOOD  
INFORMATION?

IS THAT THE STATE'S POSITION.

>> IT'S THE STATE'S POSITION

THAT FIELD ACTIVITY REPORTS MAY  
BE -- ARE NOT DETERMINATIVE.

>> I UNDERSTAND THAT.

THAT IS NO THE MY QUESTION.

>> MAY BE RELEVANT TO DETERMINE  
PROBABLE CAUSE THE STATE NEEDS  
TO COME IN AND NEEDS TO SHOW  
TRAINING, NOT JUST SAY IT, NEEDS  
TO SHOW TRAINING, NEEDS TO SHOW  
CERTIFICATION, AND AT THAT  
POINT, THEY HAVE -- ESTABLISHED  
PROBABLE CAUSE.

>> I'M NOT SURE YOU ANSWERED MY  
QUESTION.

>> I'M SORRY.

>> I'M ASKING SPECIFICALLY ABOUT  
THE FIELD PERFORMANCE RECORDS,  
THOSE TYPES OF THINGS, IS IT THE  
STATE'S POSITION THAT THEY ARE  
REALLY WORTHLESS AND DON'T  
REALLY ENHANCE WHAT IS GOING ON,  
THAT THIS IS NOT SOMETHING THAT  
IS REALLY RELIABLE, OR --

>> YES.

>> THE STATE'S POSITION.

>> YES.

REALLY, NOT THAT THEY CAN'T BE  
USED BUT --

>> I UNDERSTAND.

>> IN FACT --

>> DOESN'T SHOW US MUCH IS WHAT  
YOU ARE SAYING.

>> OHIO, THE SUPREME COURT IN  
OHIO FOUND THEY ARE NOT  
DISCOVERABLE AND IF YOU LOOK AT  
THE FOOTNOTES FROM A LOT OF  
THESE CASES THEY SAY WE  
UNDERSTAND THE FIELD ACTIVITY  
REPORTS REALLY DON'T -- ARE THE  
NOT AS MUCH VALUE BECAUSE THEY  
DON'T TELL US FALSE --

>> THIS IS ME PROBLEM, I THINK  
WE HAVE GONE, LIKE WHEN YOU NOW  
REALIZE THERE ARE SO MANY  
FORENSIC TESTS THAT TEN YEARS  
AGO WE THOUGHT WERE RELIABLE AND  
NOW WE ARE FINDING THEY ARE NOT,  
THE FBI WOULD GET ON TALK ABOUT  
COMPARATIVE BULLET ANALYSIS AND  
WE MADE DETERMINATIONS AND, YOU  
KNOW, CONVICTIONS ENTER BASED ON  
EVIDENCE THAT SEEMED GOOD AND I  
THINK THAT WHAT HAS EVOLVED HERE  
IS THAT THE USE OF THE DOG, THE  
IDEA OF THE TRAINED DOG, SAYS  
THAT THERE IS -- IN A WAY, THERE  
IS MINIMUM INTRUSION IF THE DOG

DOESN'T ALERT, THE CITIZEN CAN  
GO ON HIS OR HER WAY AND IF THE  
DOG ALERTS THERE IS THIS  
INTRUSION AND SO, IT IS UNIQUE  
IN THE SORT OF THE ANNALS OF  
FOURTH AMENDMENT LAW AND MY  
CONCERN IS WE HAVE BEEN HAVING  
THESE CASES -- DOG CASES FOR A  
TEN-YEAR PERIOD AND THE COURT  
DISCHARGED JURISDICTION TWICE  
AND I THINK WHAT WE WERE HOPING  
FOR IS THAT IN ONE CASE, MAYBE  
WHERE THE STAKES WERE REALLY  
HIGH, IN TERMS OF THERE BEING,  
YOU KNOW, A LOT OF DRUGS FOUND  
OR WHATEVER, WE'D HAVE THE WHOLE  
RECORD OUT THERE.  
YOU'D HAVE THE STATE REALLY  
PUTTING IT -- PUTTING ON ALL OF  
THIS, SO THAT WE COULD HAVE A  
RECORD TO BE ABLE TO GIVE  
GUIDANCE RATHER THAN SAYING NO,  
NOW, WE DON'T KNOW, ARE THE  
PERFORMANCE RECORDS HELPFUL OR  
NOT HELPFUL, ARE THEY IMPORTANT  
OR NOT IMPORTANT AND I FEEL LIKE  
WE ARE BACKWARD -- I HAVEN'T  
WATCHED THE GIBSON ORAL ARGUMENT  
WHERE WE HAVE BEEN AND WE ARE

JUST NOT SURE AND SINCE WE ARE  
TALKING ABOUT SUCH AN IMPORTANT  
THING, EVERYONE SEEMS TO AGREE,  
IF THE SNIFF -- THE DOG SNIFFS  
AND IT IS POSITIVE, THAT -- AND  
THE DOG IS RELIABLE THAT IS  
PROBABLE CAUSE TO SEARCH AND  
THAT IS A VERY SIGNIFICANT  
INTRUSION AND WE WANT TO BE SURE  
ABOUT THIS AND YOU ARE TELLING  
US, NO, THE FIELD PERFORMANCE  
RECORDS ARE NOT RELIABLE.  
AND I'M JUST CONCERNED THAT WE  
DON'T HAVE A RECORD HERE, TO BE  
ABLE TO EVALUATE THAT STATEMENT  
AND YOU SAY, YEAH, THE POLICE  
OFFICER SAID IT, SO WE SHOULD  
ACCEPT THAT.

>> BUT YOU DO HAVE A RECORD, YOU  
HAVE THE DOG'S TRAINING RECORDS

--

>> WHAT TRAINING RECORDS WERE  
THESE.

>> THESE ARE -- HE TRAINED FOUR  
HOURS A WEEK WITH HIS HANDLER ON  
DIFFERENT DRUGS AND THIS WAS  
FROM NOVEMBER '05 TO JULY '06.  
FOUR HOURS A WEEK WITH THE

HANDLER ON ALL OF THESE  
DIFFERENT DRUGS AND WOULD HIDE  
THEM IN EIGHT VEHICLES AND TWO  
WOULD BE BLANK AND SIX WOULD  
HAVE DRUGS.

>> IS THAT REALLY THE KIND OF  
TRAINING AND CERTIFICATION THAT  
WE OUGHT TO BE LOOKING TO, WHEN  
TALKING ABOUT THE FUNDAMENTAL  
RIGHT OF PRIVACY.

>> YES --

>> SEEMS TO ME WE OUGHT TO BE  
TALK ABOUT THE CERTIFICATION OF  
SOME INDEPENDENT NATURE RATHER  
THAN SOMEONE WHO HAS AN INTEREST  
IN THIS BECAUSE THE DOG  
INTERACTS WITH ITS HANDLER AND  
TRAINER AND IT IS THE -- YOU  
KNOW, AN OFFICER'S STOP, LET'S  
BE REALISTIC HERE, I MEAN, THE  
-- I'M NOT SURE YOU WOULD CALL A  
POLICE OFFICER WITH A DRUG DOG  
AN INDEPENDENT SOURCE WHEN IT IS  
OUT IN THE MIDDLE OF THE STOP  
SOMEPLACE.  
THAT IS WHAT CONCERNS ME.  
IS WHETHER WE HAVE SUFFICIENT  
CERTIFICATION, AND TRAINING  
PROCEDURES.

THAT HAVE BEEN ESTABLISHED, AND  
THAT ARE UNIFORM IN SOME WAY,  
AND CONSISTENT.

I AM A LITTLE LEERY OF JUST -- I  
GO OUT AND TRAIN MY DOG DURING  
THE WEEK AND I'M THE ONE WHO IS  
TESTIFYING.

>> RIGHT, BUT HE HAS THE  
TRAINING RECORDS, AND HE TRAINS  
WITH DIFFERENT -- TRAINING  
RECORDS AND TRAINS WITH  
DIFFERENT AGENCIES AND HE TRAINS  
WITH INDEPENDENT AGENCIES.

>> IS THERE ENOUGH UNIFORMITY  
WITH THAT, WE HAVE A SUFFICIENT  
CONFIDENCE WE HAVE THOSE KINDS  
OF ORGANIZATIONS THERE, WE TRULY  
EVENT ON A PROPER INTERVAL AND  
THOSE KINDS OF THINGS.

>> YES.  
THERE ARE THREE OR FOUR NATIONAL  
INDEPENDENT CERTIFICATION  
AGENCIES THAT GO TO THESE  
DIFFERENT LAW ENFORCEMENT  
AGENCIES AND CERTIFY THEIR DOGS  
FOR THEM, JUST TO BE SURE AND  
THEY DON'T HAVE TO DO IT.  
THEY DO IT ANYWAY AND WANTED TO

BE SURE THEIR DOGS ARE  
PERFORMING ACCURATELY.

>> WHERE -- ONE OF MR. GIFFORD'S  
ARGUMENT SEEMS TO BE THERE IS NO  
REAL STANDARD FOR THIS IN THE  
THE STATE OF FLORIDA, AND THAT,  
YOU KNOW, THE PINELLAS POLICE  
DEPARTMENT CAN GO TO XYZ AGENCY  
AND LEON COUNTY SHERIFFS OFFICE  
CAN GO TO SOME OTHER PLACE, AND  
THAT WE DON'T KNOW IF THESE DOGS  
ARE ACTUALLY GETTING THE KINDS  
OF TRAINING AT ALL OF THESE  
DIFFERENT PLACES THEY NEED TO --  
IN ORDER TO BE RELIABLE.

>> ISN'T THAT BEGAN A TRIAL -- A  
DETERMINATION FOR THE TRIAL  
COURT?

>> WELL, WHO -- HOW DOES THE  
TRIAL COURT GET TO THAT POINT.

>> IT IS YOUR BURDEN.

>> IT IS OUR BURDEN.

>> OR IS IT THE -- THE  
DEFENDANT'S BURDEN.

>> IS THE STATE'S BURDEN TO  
ESTABLISH PROBABLE CAUSE AND  
AGAIN WE'D DO THAT THROUGH THIS  
TRAINING AND CERTIFICATIONS.  
AND THAT GOES TO CREDIBILITY OF

THE DOG AND IF THE TRIAL COURT DOESN'T FIND THERE IS SUFFICIENT CERTIFICATION, OR SUFFICIENT TRAINING, THEN WE HAVEN'T REACHED OUR BURDEN.

>> THE TRAINING THAT HE GOT FROM ALDO COMPLETED THE 120 NARCOTICS DETECTION COURSES WITH OPPAGA, THE OPPAGA POLICE DEPARTMENT IN 2004, DO WE HAVE THOSE RECORDS.

>> YES, WE DO AND SHOWS, HIS SUCCESS -- WHAT WAS THE SUCCESS RATE, IN THAT.

>> THE INITIAL -- THE 120 HOURS OF INITIAL TRAINING, HE FINISHED THE TRAINING TO BECOME A DRUG DETECTION DOG AND HE PASSED THAT.

>> WHAT RECORDS ARE THERE THAT WOULD SHOW WHETHER HE WAS AN 80% DOG, 90% DOG, 8% DOG.

>> AGAIN THE TRAINING RECORDS FROM NOVEMBER 2005 TO JULY 2006, TRAINED EVERY WEEK FOR FOUR HOURS AND --

>> WHEN -- AND WENT OUT BY HIMSELF WITH THE DOG.

>> NO, HE GOES TO DIFFERENT LAW

ENFORCEMENT AGENCIES, AND HE SAID SOMETIMES, THREE OR FOR YOU DIFFERENT AGENCIES HE GOES TO AND HE GOES WITH OTHER OFFICERS, AND GOES TO DIFFERENT VEHICLES, AND I THINK ONE OFFICER WOULD HIDE THE DRUGS IN THE VEHICLE AND HE AND HIS DOG WOULD GO TO THESE VEHICLES.

>> HE'S TRAINED TO DO -- I MEAN, IT SEEMS TO ME THAT, YOU KNOW, THE REGULAR OFFICER WHO IS JUST A HANDLER OF THE DOG, YOU ARE SAYING THAT THAT OFFICER IS TRAINED TO TRAIN THE DOG?

>> NO, HE AND THE -- NO, THE DOG WAS TRAINED BY ANOTHER AGENCY.

>> I MEAN, SOME TIME AGO, BUT, NOW, YOU ARE SAYING THAT OFFICIAL --

>> TRAINED TOGETHER.

>> THE HANDLER NOW CAN THEN TAKE OVER THE TRAINING.

THAT IS WHAT IT SOUNDS LIKE.

>> YES.

ABSOLUTELY.

>> AND UNDER WHAT -- I MEAN, WAS HE TRAINED TO BE A TRAINER.

>> YES.

HE'S A HANDLER.

HE HAS SPECIAL TRAINING AND WENT THROUGH A 160 HOUR COURSE TO BE A CANINE HANDLER AND NOT A POLICE OFFICER THAT CAME OFF THE STREET TO BE WITH THE DOGS, HE HAS SPECIAL TRAINING AS WELL.

>> AND THOSE RECORDS OF THE FOUR HOURS A WEEK SHOW HE IS 100% ACCURATE DOG.

>> YES, NEVER FALSELY ALERTED IN TRAINING OR IN CERTIFICATION.

>> THEY PUT DRUGS IN 8 OUT OF THE TEN BUILDINGS.

>> AND USED BUILDINGS AND WEAR HOUSES, BEGINNING IN JANUARY '06 THE RECORD BEGAN TO SHOW BUILDINGS AND WEAR HOUSES AND WOULD MAKE HIDES AND NEVER FALSELY ALERTED IN THOSE AS WELL, AND WANTED TO USE DIFFERENT TYPES OF LOCATIONS WITH HIM.

>> DURING THE TRAINING, DO THEY TAKE THEM TO PLACES OR PUT THEM INTO SITUATIONS WHERE LIKE IN THE FIELD, THERE MIGHT BE RESIDUAL DRUGS ON ANYBODY'S

VEHICLES.

>> NO, AND THE WHOLE POINT IS TO HAVE A CONTROLLED ENVIRONMENT, SO THEY KNOW WHETHER THEIR DOG IS FALSELY ALERTING OR NOT, BECAUSE, IF HE IS, THEN THEY CAN CORRECT THAT PROBLEM AND THEY WANT TO KNOW IF THEIR DOG IS FALSELY ALERTING AND DON'T WANT THEIR DOGS TO ALERT FALSELY ON AN INNOCENT PERSON'S VEHICLE AND WANT THEM TO BE TRAINED CORRECTLY.

SO THEY GO INTO THESE CONTROLLED ENVIRONMENTS AND TRAIN THEM PROPERLY AND THAT IS WHY TRAINING RECORDS ARE SO IMPORTANT, AND FIELD ACTIVITY REPORTS DON'T REALLY TELL YOU ANYTHING ABOUT THE DOGS.

FALSE ALERTS IN THE FIELD ARE NOT POSSIBLE TO DETERMINE.

IT IS OWN TRAINING CERTIFICATION WHERE YOU CAN TELL WHETHER THE DOG IS RELIABLE OR NOT.

>> AND THE PREMISE IS THAT A DOG CANNOT BE TRAINED TO DISTINGUISH BETWEEN LIVE SCENTS, RESIDUAL SCENTS OR...

>> IT CAN'T BE DONE, IN THE  
CUSTOMS SERVICE WORKBOOK IT SAYS  
IF YOU TRY TO DO THAT THE DOG  
WILL JUST BE CONFUSED.

SO IT'S IMPORTANT IF THE DOG  
MAKES AN ALERT AND YOU DON'T  
FIND ANYTHING THAT YOU GIVE HIM  
HIS REWARD BECAUSE HE'S ALERTING  
TO RESIDUAL ODOR.

AND TO DO OTHERWISE HE'LL BECOME  
CONFUSED AND WILL NO LONGER BE A  
GOOD DOG TO WORK.

>> AND WITH THAT YOU HAVE USED  
YOUR TIME, MR. GIFFORD, I WILL  
GIVE YOU ONE MINUTE FOR  
REBUTTAL.

>> I WASN'T RELYING ON MATHESON  
ABOUT THE EXTINCTION TRAINING  
AND I DON'T KNOW WHAT IS THE  
CUSTOMS SERVICE WORKBOOK.

>> MATHESON IS ONE TO READ  
BECAUSE IT IS A REFERENCE TO A  
LAW REVIEW ARTICLE WITHOUT ANY  
FURTHER REFERENCE TO EMPIRICAL,  
IT IS JUST --

>> MY CERTAINLY SENSE FROM THE  
OTHER LITERATURE AND I CANNOT  
CITE YOU ANYTHING NOW, THE

EXTINCTION TRAINING IS POSSIBLE,  
I DON'T KNOW THE TRUTH OR  
FALSENESS OF THAT.

>> IF WE ENDED UP SAYING, NOT  
WHAT YOU ARE -- YOU KNOW, YOU  
NEED TO PUT IN FIELD PERFORMANCE  
RECORDS, BUT THAT WHAT HAS BEEN  
STATED IN I THINK FOSTER FROM  
THE THIRD DISTRICT AND THE  
TENNESSEE SUPREME COURT SAID THE  
-- JUST SAYING SOMEONE HAS  
TRAINING AND CERTIFICATION IS  
NOT ENOUGH, AND THIS IS THE TYPE  
OF EVIDENCE THAT WE WOULD EXPECT  
THE STATE PUTS IN TO ESTABLISH  
PROBABLE CAUSE, BUT, DOESN'T THE  
STATE MAKE A GOOD POINT, THOUGH,  
ABOUT THE SKILL PERFORMANCE  
ISSUE AND THE FACT THAT WE DON'T  
KNOW IF THEY WERE FALSELY  
ALERTING OR IF IT WAS JUST A  
RESIDUAL ODOR -- TIME IS UP, BUT  
THAT CONCERNS ME, A GREAT DEAL.  
THAT THE FIELD PERFORMANCE  
RECORDS MAY NOT THEMSELVES BE  
ALL THAT RELIABLE.  
BECAUSE OF THAT.

>> I THINK THE STATE IS -- IN  
ONE RESPECT WE DON'T KNOW

WHETHER IT IS A FALSE ALERT OR  
NOT BECAUSE OF THE PROBLEM OF --  
[INAUDIBLE], WE KNOW IT IS --  
THE DOG ALERTS AND DRUGS ARE NOT  
FOUND IT IS A VERIFIABLE ALERT  
AND IS THE DOG AN ACCURATE  
PREDICTOR OF THE PRESENCE OF  
NARCOTICS AND IF THE DOG HAS A  
RECORD, HALF, A THIRD OF THE  
TIME, 2/3 OF THE TIME THE DOG  
ALERTS AND NO NARCOTICS ARE  
FOUND AND THE HANDLER KNOWS  
THAT, THEN THE DOG, IS A LESS  
ACCURATE PREDICTOR OF DRUGS AND  
CANNOT MEET THAT BAR, FOR  
PROBABLE CAUSE.

>> LET'S TAKE THIS CASE WHERE  
THE OTHER FACTORS OTHER THAN THE  
DOG ALERTS, [INAUDIBLE]  
ESTABLISH PROBABLE CAUSE.

>> THE NERVOUSNESS OF THE  
DEFENDANT, NOTHING MORE.

I SEE I'VE EXHAUSTED MY TIME AND  
WOULD LIKE TO CONCLUDE BY SAYING  
UNLIKE MATHESON AND GIBSON WE  
BELIEVE THE CASE HAS THE PROPER  
PEDIGREE TO REACH THE DECISION  
ON THE MERITS.

>> THANK YOU VERY MUCH.

[LAUGHTER].

>> AROUND THANK BOTH OF YOU FOR  
YOUR ARGUMENTS HERE TODAY.