OFF THE FOURTH AMENDMENT LEASH?: LAW ENFORCEMENT INCENTIVES TO USE UNRELIABLE DRUG-DETECTION DOGS

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Currently pending before the United States Supreme Court are two Fourth Amendment cases, Florida v. Jardines,¹ and Florida v. Harris,² that will likely have far-reaching consequences in determining the reasonableness of our expectations of privacy. Both cases involve canine drug-detection sniffs, but are anticipated to provide insight into the scope of the Fourth Amendment more generally. This Article focuses on Harris, a case that asks the Court to resolve a split of authority concerning what evidence trial courts may consider in determining canine reliability for purposes of establishing probable cause,³ and explores a line of questioning raised at oral argument before the U.S. Supreme Court: Does law enforcement lack incentives to deploy unreliable drug-detection dogs in the

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³ The issue of whether a positive canine alert by a well-trained detection dog, in and of itself, is sufficient to establish probable cause to search was not before the Court in Harris. Significantly, however, when questioned on this point at the Harris oral argument, the Assistant to the U.S. Solicitor General, arguing in support of Petitioner, said that it did. Transcript of Oral Argument at 19, Florida v. Harris, cert. granted, 132 S. Ct. 1796 (2012) (No. 11-817) (“[W]e believe that an alert by a trained dog is sufficient to establish probable cause.”). While some courts have assumed (without much analysis) that a positive canine alert, by itself, is sufficient to establish probable cause, other courts treat a positive canine alert as a factor in a totality-of-the-circumstances determination of probable cause. Compare United States v. Daniel, 982 F.2d 146, 151 & 152 n.7 (5th Cir. 1993) (finding probable cause where the affidavit “explained that the dog was trained to detect the presence of controlled substances”), with United States v. Olivas, No. 3:09-CR-1402-KC, 2009 U.S. Dist. LEXIS 62270, at *12 n.5 (W.D. Tex. July 17, 2009) (finding “merit to the argument that an alert from a detector dog, even when that dog is well-trained, cannot by itself constitute probable cause to search under any circumstance).
field? Put another way, are there circumstances in which a baseless positive canine alert would be either beneficial or desirable to law enforcement? If the answer to that question is “no,” as Florida asserted both in briefs filed in the U.S. Supreme Court and at oral argument, then accepting a drug-detection dog’s “training” or “certification” as establishing the dog’s reliability for purposes of probable cause becomes arguably more defensible.

This Article argues that clear incentives exist for law enforcement to use unreliable drug-detection dogs (or dogs with only marginal reliability) in the field: (1) financial self-interest, based on civil forfeiture statutes that authorize police to seize cash discovered during a physical search (which, pursuant to statute, may be placed into local, law-enforcement coffers to supplement law enforcement budgets) based on the money’s connection to a drug crime—which is often established by a positive canine alert to the cash, and (2) targeting of certain groups, such as racial or ethnic minorities, for police investigation. Therefore, trial court consideration of detection-dog field performance records as part of the court’s canine-reliability determination is an essential firewall to preventing police use of marginal, or even unreliable, drug-detection dogs.

I. THE WARRANT EXCEPTION FOR CANINE SNIFFS AND THE RELIABILITY OF A POSITIVE CANINE ALERT IN ESTABLISHING PROBABLE CAUSE TO SEARCH

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” A “search” for Fourth Amendment purposes occurs when the government intrudes on a person’s “constitutionally protected reasonable expectation of privacy.” Although the Fourth Amendment generally requires police to secure a warrant before conducting a search, the Court recognized an exception to the warrant requirement for a vehicle-
search, if the vehicle is readily mobile and probable cause exists to believe that it contains contraband. 9 In United States v. Place, the Court also concluded that a canine drug-detection sniff of luggage at an airport by a well-trained drug-detection dog was not a “search” for Fourth Amendment purposes, and therefore may be performed without a warrant. 10 With the “search” issue taken off the table in Place, determining whether a detection dog was “well-trained”11 (which courts equated with reliability for purposes of establishing probable cause) became the central concern. Therefore, an introduction to detection-dog qualifications (canine certification and training), as well as law-enforcement recordkeeping, is helpful.

Certification: Detection dogs often receive their initial training in contraband detection from private vendors, which train and “certify” the dog’s competency for drug detection. 12 The private certification process is controversial, however, because of the profit motive for private vendors to certify marginal dogs 13 and because no national or regulatory guidelines exist that establish best-practices standards for canine drug-detection certification. 14 Instead, detection dogs are certified in accordance

10. See 462 U.S. 696, 707 (1983) (explaining that a canine drug-detection sniff of luggage was not a search because the sniff was “much less intrusive than a typical search”—it did not require opening the luggage—and the information revealed was “limited” in that it “discloses only the presence or absence of narcotics, a contraband item.”).
11. See id. (explaining that a “canine sniff by a well-trained narcotics detection dog . . . did not constitute a search within the meaning of the Fourth Amendment.”) (internal quotation marks omitted).
12. See Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog, 85 Ky. L.J. 405, 410-15 (1996) (describing the training and certification of drug-detection dogs by federal and state law enforcement agencies). At the Harris oral argument, counsel for the State of Florida stated that canine certification for drug detection was usually performed by outside agencies, generally “private entities which are operated by former law enforcement officers.” See Transcript of Oral Argument, supra note 3, at 6.
13. Cf. Jeffrey Robb, Despite training for police work, dogs are still dogs, OMAHA WORLD HERALD, Jun. 4, 2002, at 1a (quoting the executive director of the United States Police Canine Association (“USPCA”) as saying, “no standards are generally accepted for certifying a dog for police work. In many cases, he said, qualifications are so minimal that they lack credibility.”).
14. See Leslie A. Shoebottom, Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home, 88 OR. L. REV. 829, 836 (2009); see also JOHN J. EMSMINGER, POLICE AND MILITARY DOGS 121-22 (2012) (describing the certification requirements for various
with each private vendor’s own internally-generated certification standards—which can differ significantly.\(^{15}\)

Although certification by an outside agency provides some objective assessment of the detection dog’s capabilities, to reduce costs some police agencies have proposed to dispense with outside certification by having one of their own officer’s obtain the necessary credentials to perform canine certifications in-house.\(^{16}\)

If this model were to gain widespread acceptance, then all information concerning the detection dog’s reliability, aside from field performance records, would be generated internally by the very law-enforcement agency that had deployed the dog. Additionally, the State of Florida argued in *Harris* that no certification whatsoever was required to establish a drug-detection dog’s reliability.\(^{17}\)

To explain, Florida does not require certification of so-called “single-purpose” detection dogs—those that are trained to locate drugs, but perform no other law-enforcement function such as apprehension.\(^{18}\) The State therefore took the position that a drug-detection dog is reliable for purposes of establishing probable cause if the dog is *either* certified or trained in contraband detection.\(^{19}\)

**Maintaining and Measuring Canine Reliability After a Drug-Detection Dog Has Been Acquired:** Once a drug-detection dog has been deployed, the police department must maintain and measure the dog’s reliability in order to ensure that it continues to meet the department’s standards and expectations.

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15. Brief of *Amici Curiae* Fourth Amendment Scholars in Support of Respondent at 22-24, *Florida v. Harris*, cert. granted, 132 S. Ct. 1796 (No. 11-817) (Mar. 26, 2012), 2012 WL 3864280 (No. 11-817) [hereinafter Fourth Amendment Scholars Brief]. For example, some private vendors, such as the USPCA, require that a detection dog attain only a 70% accuracy rate for certification. Kenneth G. Furton & Douglas P. Heller, *Advances In the Reliable Location of Forensic Specimens Through Research and Consensus*, 3 CANADIAN J. POLICE & SEC. SERVS. 97, 102 (2005). In comparison, the U.S. Customs Service requires 100% accuracy before it certifies a drug-detection dog for use in the field. *Id.*

16. See, e.g., Brennan David, *Sheriff moves toward local police dog training: Plan will cut costs, might add revenue*, COLUMBIA DAILY TRIB., Oct. 8, 2012, at A1 (describing that the fees generated from the program—both from savings within the department and through certification of other police agencies’ canines—“could allow the department to expand its unit from two to potentially four canines in the next few years”). The department was considering expanding its facilities “to provide not only certifications but also initial training for dogs and handlers.” *Id.*

17. See Transcript of Oral Argument, *supra* note 3, at 9 (“Certification is not required. It may be one way that the police department could establish reliability . . . but certification itself is not required when you have a record of the type of training that you have here.”).


19. See Brief for Petitioner, *supra* note 5, at 22.
been purchased by a police agency, then the dog’s canine handler is expected to implement a regular “training” program in order to maintain the dog’s proficiency for contraband detection. Training activities take place in a controlled environment—one that is created by the canine handler in order to perform detection “exercises” with the dog—with training records documenting such information as the “type and amount of drug used, number of searches, type of exercise done, location where the drug was hidden, time lapse of find, location of training environment, and whether the location of the drugs was known to the handler.” Importantly, no national standards exist for a judge to use in determining whether a drug-detection dog’s training is adequate. In addition to training, to maintain the dog’s status as a “certified” drug-detection dog, the dog must undergo yearly recertification. If the dog is not recertified, however, courts may nevertheless accept the dog as reliable if law enforcement conducted regular training with the dog during that period.

Field Performance Records and Documentation of a Drug-Detection Dog’s Deployment History: A drug-detection dog’s deployment history—which documents the dog’s accuracy in

20. See George S. Steffen & Samuel M. Candelaria, Drug Interdiction 78 (2003) (“The team should conduct daily training in the environments in which they will be deployed. . . . A minimum of 4 hours of weekly training should be conducted with the canine team.”).
21. Id.
22. See Transcript of Oral Argument, supra note 3, at 7 (counsel for the State of Florida agreeing with Justice Sotomayor’s understanding that “[t]here’s no national standard that defines what’s adequate training . . . .”).
23. See, e.g., Ensminger, supra note 14, at 122 (describing that certification is in fact for the detection dog and handler together as a team, and that certification remains “valid for 12 months”).
24. See, e.g., United States v. Ludwig, 641 F.3d 1243, 1251 n.3 (10th Cir. 2011) (stating that an uncertified drug-detection dog’s reliability could be established, “at least in theory”, by the dog’s training history and record of reliability). In Harris, the drug-detection dog involved, Aldo, had last been certified in February 2004, while the canine sniff of Harris’s truck occurred in June 2006. See Brief for Respondent at 45, Florida v. Harris, cert. granted, 132 S. Ct. 1796 (Mar. 26, 2012) (No. 11-817), 2012 WL 3716865. Therefore, Aldo’s recertification was overdue by some sixteen months. But because Florida required no certification whatsoever of single-purpose drug-detection dogs, like Aldo, see supra text accompanying note 18, the State argued that the lapse in certification did not render Aldo unreliable because the police agency had adequately maintained Aldo’s training during that period. See Transcript of Oral Argument, supra note 3, at 9; see also id., at 5 (“Our position is that the Fourth Amendment doesn’t impose an annual certification requirement. Some states have it, some states don’t.”).
uncovering contraband in the uncontrolled conditions of the field—is set out in the dog’s field performance records. 25 Although keeping and maintaining field performance records is the recommended practice, 26 not all police groups do so. Significantly, most courts do not require the government to produce field performance records, and refuse to draw an adverse inference on canine reliability if law enforcement does not have records of the detection dog’s performance in the field. 27 For these courts, field performance records do not provide meaningful information regarding a detection dog’s reliability because a positive canine alert that does not result in an officer’s recovery of contraband might, they conclude, have been produced by the dog’s detection of a residual odor of contraband, or perhaps, was due to the officer’s failure to uncover contraband that had been skillfully hidden. 28

A. Florida v. Harris: Background and Oral Argument

Harris involved a drug-detection sniff of the exterior of a lawfully-stopped vehicle, Harris’s truck. 29 The driver, Clayton Harris, was visibly nervous and had an open beer can in the cup holder. 30 The officer asked Harris for consent to search his truck,

25. See Richard A. Medema, Drug Enforcement Agency, A Guide to Canine Interdiction: Maximizing the Impact of Drug Scent Evidence 7 (1995) (“Each time the drug canine is called upon to screen vehicles, luggage, packages, or currency, the time, manner, place, and circumstances involving each instance where the canine alerted should be thoroughly documented by the canine handler.”).

26. See id.; see also ENSMINGER, supra note 14, at 126 (“Police should keep accurate records, including both training and field records, and police administrators should see that this is being done.”).

27. See, e.g., United States v. Olivera-Mendez, 484 F.3d 505, 512 (8th Cir. 2007) (“We have held that to establish a dog’s reliability . . . the affidavit need only state the dog has been trained and certified to detect drugs, and a detailed account of the dog’s track record or education is unnecessary.”); see also ENSMINGER, supra note 14, at 126 (“[D]epending on the court and the corroborating evidence, a failure to keep complete records may be overcome.”).

28. See, e.g., State v. Nguyen, 726 N.W.2d 871, 878 (S.D. 2007) (“With the training being conducted in controlled circumstances, a dog’s ability to find and signal the presence of drugs can be accurately measured. In the field, one simply cannot know whether the dog picked up the odor of an old drug scent or whether it mistakenly indicated where there was no drug scent.”). Cf. also Brief for Petitioner, supra note 5, at 26 (“[T]he dog may have detected the presence of drugs that the officer is simply unable to locate in the vehicle because of the amount of drugs or ingenuity of the suspect in hiding them.”).

29. State v. Harris, 71 So. 3d 756, 759-60 (Fla. 2011). Harris’s truck was stopped because of an expired tag. Id.

30. Id. at 760.
which Harris refused. The officer then deployed Aldo, a drug-detection dog, to conduct a "free air sniff" of the exterior of Harris’s truck. Aldo alerted positively to the driver’s-side door handle. A search of Harris’s truck revealed “over 200 pseudoephedrine pills”, as well as other precursor ingredients of methamphetamine. No methamphetamine was found, however. Significantly, Aldo was not trained to detect either alcohol or pseudoephedrine. At the scene, Harris admitted that he had been “cooking meth” for about a year and had cooked it as recently as two weeks earlier. Harris also admitted that he was “addicted to meth” and that he used it “at least every few days.”

Harris was charged with possession of pseudoephedrine with intent to use it to manufacture methamphetamine. Harris moved to suppress the pseudoephedrine, as well as other evidence found in his truck, on the basis that the evidence had been uncovered in an illegal search of the vehicle. Interestingly enough, to undermine Aldo’s reliability, Harris introduced evidence at the suppression hearing of a second encounter Harris had had with Aldo, one that occurred some two months after the original traffic stop that led to the discovery of the pseudoephedrine. During the second traffic stop, Aldo again alerted to the driver’s-side door handle, but this time only an open bottle of liquor was found upon search of Harris’s truck. The trial court denied Harris’s motion to suppress, but made no findings as to Aldo’s reliability. The Florida First Circuit Court of Appeal affirmed, and Harris sought discretionary review from the Florida Supreme Court.

The Florida Supreme Court heard the case on the basis of a circuit split that then existed in Florida concerning the evidence

31. Id.
32. Id.
33. Id.
34. State v. Harris, 71 So. 3d 756, 760 (Fla. 2011).
35. Id.
36. Id.
37. Id.
38. Id. at 759.
39. State v. Harris, 71 So. 3d 756, 759 (Fla. 2011).
40. Id. at 761.
41. Id.
42. Id. at 762.
43. Id.
that the State was required to introduce to establish a drug-detection dog’s reliability.44 Consistent with earlier U.S. Supreme Court precedent,45 the Florida Supreme Court assumed that the canine sniff of the exterior of Harris’s vehicle was not a “search” for Fourth Amendment purposes,46 and instead limited its consideration to the question of what evidence the State must introduce in order for a trial court to perform “an objective evaluation of the officer’s belief in the dog’s reliability as a predicate for determining probable cause”.47

The disagreement in Harris turned on whether trial courts are required to accept the reliability of drug-detection dogs if the dog is either “trained” or “certified” in contraband detection (which the Fourth Amendment Scholars Brief described as a “credentials alone” canine-reliability test),48 or instead, whether courts may require additional, probative information regarding canine reliability, such as a detection dog’s field performance records, for consideration in a totality-of-the-circumstances determination of probable cause.49 The Florida Supreme Court adopted the totality-of-the-circumstances approach; concluding that police agencies should keep detection-dog field performance records and that those records be used in a trial court’s determination of canine reliability.50 As the Florida Supreme Court explained:

[T]he State should keep and present records of the dog’s performance in the field, including the dog’s successes (alerts where contraband that the dog was trained to detect was found) and failures (“unverified” alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog’s ability to detect or distinguish residual odors.51

44. State v. Harris, 71 So. 3d 756, 762 (Fla. 2011).
45. In Illinois v. Caballes, the Court concluded that a suspicionless drug-detection sniff of the exterior of a lawfully-stopped vehicle was not a “search,” at least where the sniff did not prolong the length of the traffic stop. 543 U.S. 405, 407-08 (2005).
46. See Harris, 71 So. 3d at 758 n.1.
47. Id. at 758-59.
48. Fourth Amendment Scholars Brief, supra note 15, at 5.
49. Harris, 71 So. 3d at 759.
50. See id. at 771.
51. Id. The Florida Supreme Court also required the State to introduce certain,
The U.S. Supreme Court granted the State of Florida’s petition for a writ of certiori. In the State’s merits brief filed in the U.S. Supreme Court, the State claimed that the Florida Supreme Court’s canine-reliability analysis was a burdensome per se test that was altogether unnecessary because law enforcement practicalities already adequately deterred law enforcement from using unreliable drug-detection dogs. At oral argument, the State’s counsel pressed Florida’s pragmatic theory of the case, asserting that there was no need for trial courts to examine field performance records in determining canine reliability because law enforcement lacks an incentive to deploy unreliable dogs in the field. And, further, oral argument made clear that the State sought more than a simple ruling that trial courts could not insist on examining field performance records as part of their totality determination of probable cause. Instead, the State sought to require trial courts to defer to law-

52. Florida v. Harris, 71 So. 3d 756 (Fla. 2011), cert. granted, 132 S. Ct. 1796 (2012) (No. 11-817). In its Question Presented, the State of Florida asked the Court to determine whether the Florida Supreme Court’s decision conflicted with decided U.S. Supreme Court precedent “by holding that an alert by a well-trained narcotics-detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle?” Id. The Question Presented implies that the Florida Supreme Court found that the canine sniff of Harris’s truck was a “search,” a conclusion that would have been contradictory to clear U.S. Supreme Court jurisprudence. See, supra note 45. Despite the confusing formulation of the Question Presented, the case was in fact briefed and argued on the issue of what evidence the State must introduce to establish that a drug-detection dog is “well-trained,” and therefore, reliable for purposes of establishing probable cause.

53. See, e.g., Brief for Petitioner, supra note 5, at 23 (“[N]o officer would want to rely on a dog that serially fails to detect contraband. Law enforcement interests, in other words, are naturally aligned with the interest of ensuring reliability”) (footnote omitted).

54. Transcript of Oral Argument, supra note 3, at 12 (“The handlers themselves are going to be in the best position to know the dogs and evaluate their reliability. And they have a strong incentive to ensure the dogs are reliable. That’s both because they don’t want to miss contraband when it’s available—when it exists in the field; and, also, they don’t want to be put into harm’s way.”); see also id. at 26 (“[T]he Government has critical interests, life and death interests, that it stakes on the reliability of these dogs.”); id. at 52 (“[A]ll the incentives in this area are aligned with ensuring the reliability of drug detection dogs. It’s not in the police interest to have a dog that is inaccurate in finding contraband or that is inaccurate and putting an officer in harm’s way.”).

55. See id. at 9-10 (Justice Sotomayor commenting to counsel for the State of Florida, “[s]o it’s not enough for you to win by us saying that a court can’t insist on [field performance records], that it has to look at the totality of the circumstances.”).
enforcement determinations of canine reliability, just as a court would assume the adequacy of a testifying-physician’s training without exploring the specifics of what that medical training entailed. Deference to law enforcement is warranted, the State’s counsel argued, because “all [law enforcement] incentives in this area are aligned with ensuring the reliability of drug detection dogs.”

Building on the State’s argument, Justice Scalia then asked Harris’s counsel to explain why law enforcement might deploy an unreliable drug-detection dog in the field: “[W]hat are the incentives here? Why would a police department want to use an incompetent dog? Is that any more likely than that a medical school would want to certify an incompetent doctor?” Justice Scalia’s question clearly implied that the Court would be hesitant to constitutionalize the Florida Supreme Court’s canine-reliability approach (i.e., that an adverse inference concerning canine reliability should arise if the State fails to produce field performance records) if law enforcement practicalities already adequately prevented police from using unreliable drug-detection dogs.

In response to Justice Scalia’s question, Harris’s counsel countered that law enforcement incentives to use unreliable drug-detection dogs did exist and pointed to civil forfeiture and a generalized law-enforcement motivation to search without probable cause in order to ferret out crime. Harris’s counsel developed neither point, however, and Justice Scalia clearly remained unpersuaded: “Willy-nilly. Officers just like to search.

56. See id. at 8 (Justice Sotomayor: “So what does a judge do, just say, the police department says this is adequate, so I have to accept it’s adequate.” Counsel for the State of Florida: “[Y]ou would have to accept it, Your Honor, on its face.”); see also id. at 9.

57. See id. at 10 (Justice Scalia observing that “I suppose that if the reasonableness of a search depended upon some evidence given by a medical doctor, the Court would not go back and examine how well that doctor was trained at Harvard Medical School and, you know, what classes he took and so forth, right.”).

58. See id. at 52 (argument by counsel for the State of Florida); see also id. at 13 (“The traffic stop, in particular, is one of the most dangerous encounters police officers face. They’re not going to want to be working with a dog that is consistently putting the officer in a position of searching cars based on an alert when that dog is not reliable in predicting the presence [of contraband].”).

59. See Transcript of Oral Argument, supra note 3, at 34.

60. See id. at 35 (“The incentive of the officer to be able to conduct a search when he doesn’t otherwise have probable cause is a powerful incentive. As the Court has said, ferreting out crime is a competitive enterprise.”).
They don’t particularly want to search where they’re likely to find something. They just like to search. So let’s get dogs that, you know, smell drugs when there are no drugs. You really think that that’s what’s going on here?\textsuperscript{61} Justice Scalia’s skepticism clearly captures the difficulty Harris faced in defending the Florida Supreme Court’s canine-reliability analysis if the Court were to conclude that a “credentials alone” test already adequately polices the police.

B. The State of Florida’s Pragmatic Incentives-Based Argument Necessitates Consideration of Non-Aligning Law Enforcement Interests

This Article responds to Justice Scalia’s question concerning law enforcement incentives and argues the critical importance of field performance records in weeding out marginal, or even unreliable, drug-detection dogs; dogs that might otherwise go undetected under a “credentials alone” canine-reliability test. The State’s argument notwithstanding, law enforcement interests are not necessarily “aligned” with ensuring the reliability of drug-detection dogs.\textsuperscript{62} The State’s pragmatic argument relies too much on law enforcement’s incentive to avoid using detection dogs that under-alert, or “miss” contraband in the field,\textsuperscript{63} as a basis to conclude that law enforcement will also seek to avoid deploying detection dogs that over-alert. At oral argument, Harris’s counsel responded to Justice Scalia’s incentives-question by offering civil forfeiture and the fact that “ferreting out crime is a competitive enterprise”\textsuperscript{64} as examples of circumstances where law enforcement lacks a clear incentive to deploy reliable drug-detection dogs in the field. But Harris’s counsel might have been

\textsuperscript{61} Id.

\textsuperscript{62} Cf. Transcript of Oral Argument, supra note 3, at 52; cf. also supra text accompanying note 58.

\textsuperscript{63} See Transcript of Oral Argument, supra note 3, at 12 (State’s counsel arguing, “[law enforcement officers] don’t want to miss contraband when it’s available—when it exists in the field . . . .”); see also MILITARY WORKING DOGS, DEPARTMENT OF THE ARMY, FIELD MANUAL D-7 (Jul. 6, 2005) (explaining that “[a] missed response is when the [drug-detection dog] fails to detect and respond to the presence of a training aid with a final response.”).

\textsuperscript{64} See Transcript of Oral Argument, supra note 3, at 35. Harris’s counsel’s second point is a clear reference to Justice Jackson’s famous observation in Johnson v. United States that the Fourth Amendment requires “a neutral and detached magistrate” to weigh the evidence in determining whether a search warrant should issue “instead of [the evidence] being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” See 333 U.S. 10, 13-14 (1948).
better served if he had, instead, tied these two examples together. Ordinary law-enforcement incentives to use reliable drug-detection dogs in investigating drug crimes\textsuperscript{65} will not deter law enforcement from using marginally reliable, or even unreliable, detection dogs in civil forfeitures. A search on the basis of a positive canine alert—one that uncovers cash—is a “success” even if no contraband is found. A goal of police searches therefore includes finding money, not just evidence of a crime; thereby creating abuses of the sort that the Court has frankly acknowledged—in another context—cannot be effectively deterred by the Fourth Amendment’s Exclusionary Rule.\textsuperscript{66}  

A positive canine alert cloaks an officer’s decision to search with both a suspicion of criminal activity and an appearance-of-impartiality that can cover for other, more insidious human motivations: financial gain, and in some cases, racial bias. Even assuming that most police officers are high-minded individuals who serve their communities in good faith, drug-detection dogs react to subtle, or even subconscious, messages from their canine handlers.\textsuperscript{67} Examination of field performance records (as part of a totality-of-the-circumstances determination of probable cause) provides as an essential check on law enforcement by revealing problems that may only become discernable over time, including an individual dog’s limitations in the field, subconscious bias or messaging that a canine-handler may be telegraphing to his or her canine partner, and even intentional cuing of a drug-detection dog (although only the pattern and not the subjective motivation of the officer would be detectable through examination of field

\begin{thebibliography}
\item \textsuperscript{65} See Transcript of Oral Argument, supra note 3, at 12-13; see also supra notes 54 & 58 and accompanying text.
\item \textsuperscript{66} See Terry v. Ohio, 392 U.S. 1, 14 (1968) (“Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”) (footnote omitted).
\item \textsuperscript{67} See, e.g., Lisa Lit, et al., Handler beliefs affect scent detection dog outcomes, 14 ANIMAL COGNITION 387, 392 (2011), available at http://link.springer.com/article/10.1007/s10071-010-0373-2/fulltext.html (finding that a canine-handler’s belief that contraband had been hidden at a particular location influenced whether his or her drug-detection dog alerted at that location). See also Brief of Amici Curiae the National Association of Criminal Defense Lawyers, the Florida Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the American Civil Liberties Union of Florida in Support of Respondent at 10-14, Florida v. Harris, cert. granted, 132 S. Ct. 1796 (No. 11-817) (Mar. 26, 2012), 2012 WL 3875241.
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III. CIVIL FORFEITURE: LAW ENFORCEMENT’S ANSWER TO BUDGETARY SHORTFALLS

We continue to be enormously troubled by the government’s increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.68

Civil forfeiture proceedings are actions in which the government seeks forfeiture of cash (as well as other property) based on the money’s connection to a drug crime.69 The cash is subject to seizure upon a minimal showing of suspicion—probable cause to believe the funds are connected to a drug crime—and, unlike criminal proceedings, the owner bears the burden of establishing that the money comes from a lawful source in order to recover it in a judicial forfeiture proceeding.70 Importantly, modern state and federal civil forfeiture statutes allow law enforcement agencies to retain much, and under some statutory schemes, all, of the forfeiture proceeds that the agency is responsible for seizing,71 thereby creating “a perverse financial

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68. United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992).

69. See, e.g., 21 U.S.C. § 881(a)(6) (providing for forfeiture of funds that were “furnished or intended to be furnished . . . in exchange for a controlled substance, . . . proceeds traceable to such an exchange, and all moneys . . . used or intended to be used to facilitate [a drug crime].”) In addition to the seizure of cash, Section 881(a) also provides for forfeiture of any conveyance—such as a vehicle—as well as real property, used or intended to be used, in a drug crime. See 21 U.S.C. §§ 881(a)(4) and 881(a)(7).

70. See, e.g., United States v. $22,474.00 in U.S. Currency, 246 F.3d 1212, 1215 & 1217 (9th Cir. 2010) (explaining that in a civil forfeiture proceeding, once the government meets its “initial burden” of establishing probable cause to believe the money is related to criminal drug activities, the burden then shifts to the claimant “to prove the money had an independent innocent source and had not been used illegally.”) (internal quotation marks and citation omitted).

71. See generally MARIAN R. WILLIAMS, PH.D., JEFFERSON E. HOLCOMB, PH.D., TOMISLAV V. KOVANDZIC, PH.D. & SCOTT BULLOCK, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 43-104 (Mar. 2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf [hereinafter POLICING FOR PROFIT] (reporting the percentage of revenue that each state, as well as the federal government, retains under applicable civil forfeiture statutes).
incentive” to seize property.\(^{72}\) In this era of budgetary shortfalls, police agencies are increasingly dependent on forfeiture proceeds to make ends meet.\(^{73}\) Ironically enough, forfeited assets often bankroll local detection-dog programs, programs that municipalities would have trouble affording in the absence of forfeiture proceeds.\(^{74}\)

In the reported civil forfeiture cases (i.e., those cases in which the claimant disputes the government’s seizure of the

\(^{72}\) Brief of Amicus Curiae Institute for Justice in Support of Respondent, at 21, Florida v. Harris, cert. granted 132 S. Ct. 1796 (Mar. 26, 2012) (No. 11-817), 2012 WL 3836938; see also POLICEING FOR PROFIT, supra note 71, at 17 & 17, Table 1 (“Criminologists, economists and legal scholars who have studied forfeiture behavior have found evidence indicating that police departments are taking advantage of lenient forfeiture statutes to ‘pad their budgets.’”).

\(^{73}\) U.S. Gov’t Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 15 (July 2012), available at http://www.gao.gov/assets/600/592349.pdf (according to state and local law-enforcement officials interviewed by the U.S. Government Accountability Office, “the equitable sharing program [which involves sharing of forfeited assets between the state and federal authorities based upon the state’s referral of civil forfeiture cases to federal authorities] is extremely important because it helps fund equipment, training and other programs that they may otherwise not be able to afford.”). See also Michael Smothers, A nose for contraband; Drug money proves a windfall for area police, Pekin Daily Times, Sep. 29, 2012, at A1 (describing that “[b]etween August 2011 and last July [2012], those three Pekin based law enforcement agencies [identified in the article] received funding windfalls as their shares of proceeds from forfeitures through civil court of monies and property seized in drug-related arrests.”); Sam Enriquez, Seized in Raids; Police Seek Bigger Share of Drug Cash, L.A. TIMES, Apr. 20, 1986, at 1 (quoting a supervising police officer as saying, “[i]t was just like Christmas,” when describing the equipment purchased with seized funds); POLICEING FOR PROFITS, supra note 71, at 12 (“[A] substantial number of law enforcement agencies are now dependent on civil forfeiture proceeds and view civil forfeiture as a necessary source of income.”).

\(^{74}\) See, e.g., Smothers, supra note 73 (noting that forfeiture proceeds “paid for a new police [drug-detection] dog worth $8000 and for squad car cameras and equipment that cost even more.”); Steve Virkler, Dog May Join Lewis Sheriff’s Team; County Lacks K9, Watertown Daily Times, Mar. 9, 2012, at B5 (noting that a drug-detection dog could be purchased using forfeiture money and quoting a committee member as observing, “[a] good dog would earn its pay and [f]ind its own vehicle.”); Douglas Clark, Asset Seizures Drop Off; Foundation Takes Steps to Generate Police Funds, Daily News of L.A., Jul. 12, 1997, at 1 (observing ironically that a reduction in local crime had also produced “a significant loss of money” flowing into the local law enforcement budget; “[i]n the past, the forfeiture funds helped pay for up to 10 new police positions . . . . Funds were also earmarked for the Police Department’s D.A.R.E. and K-9 programs.”); POLICEING FOR PROFIT, supra note 71, at 17 (“Financial incentives may be particularly powerful for state and local law enforcement agencies that have limited resources and are susceptible to changes in budget allocations.”).
claimant’s funds), the seizure of the claimant’s cash was often set in motion, and ultimately was supported by, a positive canine alert. A canine drug-detection sniff is generally involved in one of two ways: the positive canine alert either (1) provides the requisite suspicion to perform a warrantless physical search of a vehicle and that physical search uncovers cash, but no contraband; or (2) the investigating officer’s physical search—often based on consent—turns up cash (but, again, no drugs), and the officer then subjects the cash to a canine drug-detection sniff and obtains a positive canine alert to the cash. In either case, law enforcement may seize the cash; taking the position that the positive canine alert establishes probable cause to believe that

75. See United States v. $80,760.00 in U.S. Currency, 781 F. Supp. 462, 473-74 (N.D. Tex. 1991) (dividing civil forfeiture cases into three “categories,” including “close proximity cases where the officers find the [cash] with illegal drugs or determine through investigation that it is very closely related to illegal drug dealing . . . .”). Close-proximity cases represent the “most compelling case for forfeiture,” id. at 473, and therefore the government’s seizure of the money is not challenged by the money’s owner and no reported decision results. In contrast, this Article considers only those civil forfeiture cases in which no illegal drugs or clear evidence of drug trafficking were found with or near the claimant’s cash. The government’s seizure of the cash is therefore based in its entirety on a positive canine alert, or alternatively, on a positive canine alert plus other suspicion-producing circumstances, such as the large amount of cash found, the manner in which the cash was being transported, the claimant’s prior history of a drug conviction, or inconsistent stories about the cash. Cf. id. at 473-74.

76. See, e.g., $130,510.00 in U.S. Lawful Currency v. Texas, 266 S.W.3d 169, 172-73 (Tex. App. 2008) (after claimant’s pickup truck was stopped for speeding, a drug-detection dog alerted to the exterior of the truck and to “wrappings” on bundles of cash hidden under the carpet in the truck’s cab; no drugs were found, however, and the currency was seized even though the claimants explained that the cash was related to a large personal injury settlement from the death of a child); Utah v. Seventy-Three Thousand One Hundred Thirty Dollars ($73,130) U.S. Currency, 31 P.3d 514, 515 (Utah 2001) (reversing the trial court’s judgment that currency discovered inside a Christmas-wrapped package was properly seized after a drug-detection dog positively alerted to the package’s wrappings some two days after the money was unwrapped from the package, removed, and deposited in a bank); Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698, 719-21 (M.D. Tenn. 1993) (officers seized currency carried by an African-American airline passenger and subjected the cash to a drug-detection sniff; cash seized on the basis of a positive canine alert, even though the claimant had no arrest record, the officers found no drugs on the claimant, the officers did not arrest the claimant for any crime, and the officers ignored the claimant’s explanation that he was carrying the cash to purchase supplies in Houston for his gardening business).

77. See, supra note 45 (discussing Illinois v. Caballes, 543 U.S. 405, 407-08 (2005)).

78. See, supra note 76.
the money had been in recent contact with street drugs, even if no drugs were found on the claimant and the claimant is not arrested for any crime. To recover the seized cash, the money’s owner must hire an attorney (at his or her own expense), post a bond, prove in the forfeiture proceedings that the cash is not connected to criminal drug activities, and, perhaps, even to incur the cost of appealing an adverse trial court judgment.

Recovery of Forfeited Assets Becomes More Difficult as Courts Reject the Currency-Contamination Defense: While there are reported decisions that track what many assume is the typical (and therefore, perhaps, more defensible) triggering scenario for civil forfeiture—seizure of a large amount of cash for which the possessor provides little or no plausible explanation to account for the money—in fact, most forfeitures involve relatively small sums of money or property with little intrinsic value. Further, it

79. See, e.g., United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars ($30,670.00), 403 F.3d 448, 460-62 (7th Cir. 2005) (rejecting the claimant’s currency-contamination argument and finding that the drug-detection dog at issue there, Bax, was sufficiently reliable to establish probable cause on the basis of the dog’s ordinary drug-detection training, even though Bax was not specifically trained to alert to currency that had recently been in contact with illegal drugs).

80. Significantly, some estimate that in as many as “80 percent” of civil forfeiture cases, the property owner is never charged with a crime, but police nonetheless seize assets discovered during the physical search “and usually do keep the seized property.” HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? 6 (1995); see also Andrew Schneider & Mary Pat Flaherty, Drug law leaves trail of innocents; In 80% of seizures, no charges, CHI. TRIB., Aug. 11, 1991, at 1, Zone C (reporting that police never charged 80% of people whose property was seized, and that seized “goods generated $2 billion for the police departments that took [the property].”).

81. HYDE, supra note 80, at 8-9; see also United States v. $12,390.00, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting in part) (expressing concern that “the current allocation of burdens and standards of proof requires that the claimant prove a negative, that the property was not used in or to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of an erroneous, irreversible deprivation.”).

82. See, e.g., United States v. Currency, U.S. $42,500.00, 283 F.3d 977, 981-82 (9th Cir. 2002) (upholding the seizure of cellophane-wrapped currency at an airport on the basis of a positive canine alert to the money, where the claimant told the officers she was given possession of the money for delivery to another person in connection with an adult film business, but refused to identify the person who gave her the money, the person to whom the money was to be delivered, or the business owner whom she claimed owned the money).

83. See, e.g., HYDE, supra note 80, at 32-33 (describing, for example, that based upon information obtained under a Freedom of Information Act request, “[i]n 1992, Michigan law enforcement agencies used civil forfeiture in 9,770 instances and
is extraordinarily difficult for claimants to recover their money in forfeiture proceedings, even when no drugs are found and the claimant is not arrested for any crime.\textsuperscript{84} In some of these early drug-related civil forfeiture cases—those in which the claimant was able to prevail and recover his or her money—the courts’ then-accepted assumptions about currency contamination were instrumental to these claimants’ defense that their money was not connected to a drug crime.\textsuperscript{85} In more recent years, however, modern courts have increasingly rejected the currency-contamination argument, accepting instead that drug-detection dogs alert to a break-down product of cocaine, methyl benzoate, that remains present only for short periods of time on bills that were recently in contact with illegal drugs, and that therefore

\textsuperscript{84} See, e.g., In re Forfeiture of $18,000, 471 N.W.2d 628 (Mich. App. 1991) (seizing bail money that the claimant brought to the police station as bond for her future brother-in-law after police subjected the money to a canine drug-detection sniff and obtained a positive alert; reversing the trial court’s judgment upholding the seizure because the claimant had established that she withdrew the cash from a bank immediately prior to posting it and explained that this large sum of money was in her bank account because of a $40,000 recovery in a wrongful death action). In Utah v. $73,130, after stopping the claimant’s car for speeding, the officer performed a consent-based search of the passenger compartment but found no incriminating evidence, opened the trunk (without consent), seized a Christmas-wrapped package, and placed the package (without protective covering such as an evidence envelope) into the trunk of the officer’s squad car. See 31 P.3d 514, 514-15 (Utah 2001). The officer opened the package (without a warrant), found no detectable contraband inside the package, but did find a large amount of cash, which the officer then deposited into a bank account. See id. at 515. Two days later, the package’s wrappings were subjected to a canine drug-detection sniff, and the detection dog’s positive alert to those wrappings formed the basis for law enforcement’s continued seizure of the deposited cash. See id. To recover the money, the claimant was required to appeal to the Utah Supreme Court, which reversed the trial court’s judgment that probable cause existed to connect the money to a drug crime because the investigating officer had failed to maintain evidentiary security over the claimant’s Christmas-wrapped package. See id. at 516.

\textsuperscript{85} See, e.g., United States v. U.S. Currency, $30,060.00, 39 F.3d 1039, 1043 (9th Cir. 1994) (“If greater than seventy-five percent of all circulated currency in Los Angeles is contaminated with drug residue, it is extremely likely a narcotics detection dog will positively alert when presented with a large sum of currency from that area.”); Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698, 721 (M.D. Tenn. 1993) (relying on a Drug Enforcement Agency experiment that found that “one-third of the bills in a randomly selected sample were contaminated with between 2.4 and 12.3 nanograms of cocaine per bill”, id. at 720; the court found that “the continued reliance of courts and law enforcement officers on dog sniffs to separate ‘legitimate’ currency from ‘drug-connected’ currency is logically indefensible.”).
detection dogs do not alert to the trace amounts of cocaine that are typically found on circulated currency.86

IV. LAW ENFORCEMENT’S INTEREST IN REJECTING CANINES THAT UNDER-ALERT, OR “MISS” CONTRABAND IN THE FIELD, PROVIDES LITTLE INCENTIVE TO AVOID USING CANINE THAT OVER-ALERT

The undoubted fact that all dogs go to heaven does not mean that all are inerrant while here on earth.87

If police limit their seizures to relatively small amounts of money and target individuals for searches whom police assume are more likely to have criminal records, most police seizures of cash will fly below the radar of either the public or the judiciary. The dispute in the reported civil forfeiture cases arises because no drugs were found (and, therefore, the positive canine alert is said to have been due to a residual odor of contraband) and the funds seized were large enough in amount to justify the money-owner’s expense and hassle of attempting to recover them. The State of Florida’s assertion at the Harris oral argument that a positive canine alert, in and of itself, establishes probable cause sets the stage for civil forfeitures of cash based on a positive canine alert and little or nothing else. In the past, courts have attempted to avoid such outcomes in civil forfeiture cases by requiring more than a positive canine alert in order for the government to establish probable cause to seize currency (in cases where money, but no illegal drugs were found).88 Much of these courts’

86. See, e.g., United States v. $30,670.00, 403 F.3d 448, 459 (7th Cir. 2005) (crediting scientific research that found, “overall, the scientific results indicate that circulated currency, innocently contaminated with [microgram] quantities of cocaine would not cause a properly trained detection canine to signal an alert even if very large numbers of bills are present.”) (alteration in original) (internal quotation marks and citation omitted). The court therefore concluded, “it is likely that trained cocaine detection dogs will alert to currency only if it has been exposed to large amounts of illicit cocaine within the very recent past.” Id. Because of methyl benzoate’s high volatility—rapid evaporation rate—“[a] single cocaine-tainted bill will lose 90% of the odor of highly volatile methyl benzoate through evaporation within two hours of its removal from the presence of cocaine . . . .” See id. at 458 (emphasis added).


88. See Transcript of Oral Argument, supra note 3, at 19; see also supra note 3.

89. See, e.g., United States v. $30,060.00, 39 F.3d 1039, 1043 (9th Cir. 1994)
reasoning could be attributed to the now-discredited currency contamination defense, however, which makes increasingly likely the government’s reliance on a positive canine alert, alone, as a basis for establishing probable cause to seize cash.

Law enforcement’s admitted incentive to ensure that drug-detection dogs do not under-alert, or “miss” contraband in the field, says nothing about law enforcement’s interests in avoiding detection dog over-alerts. A canine over-alert becomes a “false positive” canine alert only if neither drugs nor money is found upon physical search. Law enforcement’s financial interests in civil forfeiture cannot be ignored; civil forfeiture is big business for law enforcement. A positive canine alert—which may provide the suspicion necessary to conduct a warrantless vehicle-search and which States may also argue establishes probable cause to seize any currency found—suggests that over-alerts benefit law enforcement, while canine misses do not. Although an over-alert may “waste” an officer’s time if neither drugs nor money are uncovered, civil forfeitures often involve small sums of money, decreasing the odds that a search will be entirely fruitless. Based

("[W]e have upheld probable cause findings in cases involving a positive dog alert only when the dog alert was combined with other credible evidence clearly connecting the money to drugs.") (emphasis in original); United States v. $80,760.00, 781 F. Supp. 462, 478 (N.D. Tex. 1991) (requiring that the government “must do more than recite the drug-courier profile and subject the currency to a narcotics detection dog’s sniff test” in order to establish probable cause to seize currency).

90. See, supra note 85 and accompanying text.

91. See, e.g., Commonwealth v. One 1999 Honda Accord Auto., 2009 Mass. Super. LEXIS 234, *1-2 (Mass. Super. Ct. 2009) (seizing bail money that was brought to the police station by the arrestee’s employer—the arrestee was in custody on drug charges—after subjecting the cash to a canine drug-detection sniff and obtaining a positive alert; returning the bail money to the claimant because the government introduced no expert testimony or scientific literature concerning what weight, if any, should be given to a canine alert to currency); see also sources cited supra note 84 (seizing currency based on positive canine alerts in other civil forfeiture cases).

92. See Brief for Petitioner, supra note 5, at 23; Transcript of Oral Argument, supra note 3, at 12; see also supra note 54 and accompanying text.

93. See HYDE, supra note 80, at 32-33; see also supra note 83 and accompanying text; HYDE, supra note 80, at 38-40 (describing the practices of the sheriff of Volusia County, Florida concerning civil forfeitures involving drivers on Interstate 95 as “engaging in what can charitably be called highway robbery” in that “[a]ny person stopped who possessed $100 or more in cash was to be assumed a drug trafficker under the sheriff’s rules.”) (citing Jeff Brazil & Steve Berry, Tainted Cash or Easy Money?, ORLANDO SENTINEL, June 14-17, 1992); POLICING FOR PROFIT, supra note 71, at 34-35 & 35, Table 9 (although data from most states was not available, “[o]ne-half of all Virginia currency forfeitures were for less than $614 to $1,288, depending on the year under examination.”) (emphasis in original).
on law enforcement’s direct financial interest in the money seized, civil forfeiture places law enforcement in a clear conflict position with a money-owner’s due process rights. In the civil forfeiture context, the “competitive enterprise” that Harris’s counsel referenced at oral argument better describes law enforcement’s competing interest in the claimant’s property rights, rather than reflecting Justice Jackson’s assumption that police are understandably (and therefore, sometimes, unduly) motivated to close cases.94

On a separate issue, the State of Florida’s proposal in Harris that courts are required to accept a drug-detection dog’s reliability based upon the dog’s training or certification would seemingly prohibit trial courts from considering the specifics of the individual dog’s training and field performance in currency detection. For seizures of cash (where illegal drugs were not also found), courts have often required a strong showing of the individual drug-detection dog’s reliability for alerting only to recently-contaminated currency, as contrasted with bills contaminated with the background level of cocaine found on circulated currency.96 This strong showing routinely included trial court examination of the detection dog’s field performance records to determine whether the dog had a reliable track record for currency detection.97 For example, in United States v. $80,760.00, the trial court found the government’s evidence of canine reliability was lacking because it had failed to introduce evidence of the drug-detection dog’s “training and success in past searches” and “verification” of the positive canine alert “by conducting a ‘sterile run,’ placing the currency in a different location, substituting a different material (preferably used cash withdrawn from a banking institution) or conducting a second

95. See Transcript of Oral Argument, supra note 3, at 8; see also supra note 56 and accompanying text.
96. See, e.g., United States v. $80,760.00, 781 F. Supp. 462, 478 (N.D. Tex. 1991) (explaining that “[v]erification, supported by testimony of the dog’s handler, is an essential prerequisite to consideration of the [canine reliability] evidence.”).
97. See, e.g., United States v. $30,670.00, 403 F.3d 448, 461-62 (7th Cir. 2005) (emphasizing the importance of a drug-detection dog’s field performance records in determining the dog’s reliability for currency detection; “there is no need to ‘proof’ a dog off currency [i.e., specifically train the dog to alert only to recently-contaminated currency] when there is ample evidence to illustrate the dog’s reliability in the field.”).
search with a different dog." The State of Florida’s proposal to bar trial courts from using field performance records would effectively overrule carefully-considered canine-reliability determinations, like $80,760.00, making the trial court little more than a rubberstamp for the government’s decision to seize assets.

For now, the standard that the government must show to seize currency is probable cause to believe that the money bears a connection or nexus to a drug crime, although the U.S. Circuit Courts of Appeals disagree on whether the government must show probable cause of a “connection or nexus,” or instead, probable cause of a “substantial connection or nexus,” or even whether the different formulations are anything other than “semantic[ ]”. Significantly, however, a seizure of cash on the basis of probable cause is simply more intrusive than, for example, a probable cause-based search of a vehicle. To explain, although a warrantless vehicle-search on the basis of probable cause is intrusive, the interference with the vehicle-owner’s possessory interest in the vehicle and its contents (as well as the disruption to the vehicle-owner’s itinerary) are temporary—assuming no evidence of a crime is uncovered. For civil forfeitures of cash, on the other hand, the owner’s possessory interest in the cash is terminated. Further, law enforcement’s decision to seize currency is reviewable by a court only if the money’s owner manages to file the proper paperwork with the proper agency within the proper period of time.

Therefore, even accepting arguendo the State of Florida’s proposition that a positive canine sniff equals probable cause, it does not establish probable cause to seize currency where neither

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98. 781 F. Supp. at 478.
99. See Transcript of Oral Argument, supra note 3, at 8; see also supra note 56 and accompanying text.
100. See United States v. Ten Thousand Seven Hundred Dollars and No Cents ($10,700.00) in U.S. Currency, 258 F.3d 215, 222 n.4 (3d Cir. 2001) (emphasis added) (citation omitted).
101. See United States v. $80,760.00, 781 F. Supp. 462, 465-66 (N.D. Tex. 1991) (explaining the difference between “summary forfeiture” and “judicial forfeiture”; that in order to obtain a judicial forfeiture proceeding, the property’s owner must first preserve his or her right to the judicial proceeding by filing a claim and bond with the agency, which terminates the summary forfeiture).
102. See id. at 466 (describing summary forfeiture: “If the agency does not receive a claim [within twenty days from the date of the first publication of the notice of seizure] it immediately declares a binding forfeiture and sells or disposes of the property.”) (citation to statutes omitted).
contraband nor clear evidence of drug trafficking is found in close proximity to the cash. To ensure that the probable-cause requirement for civil forfeiture of assets does not erode into a probable-cause showing that would support a warrantless vehicle-search, courts should require a “substantial connection or nexus” between the cash and a drug crime, 103 and afford substantive weight to that formulation of the probable-cause requirement in civil forfeiture cases. Requiring a substantial connection does not necessarily mean that modern courts must impose a higher, or even a different, canine-reliability showing for positive alerts to currency than did courts like $80,760.00. 104 Instead, by emphasizing the substantial connection to a drug crime required to permanently terminate a money-owner’s rights in his or her currency, courts establish an appropriate basis for examining the specifics of a detection dog’s reliability for currency detection. Equally important, by distinguishing civil forfeitures from traditional probable-cause showings, courts thereby retain the authority to review field performance records and to require validation of canine alerts to currency even if the Court were to adopt the State of Florida’s “credentials alone” canine-reliability proposal in Harris.

A. Civil Forfeiture’s Disproportionate Impact on Racial Minorities

The isolated voluntary questioning of a citizen belonging to a racial minority does not amount to a Constitutional violation, but the discriminatory investigation of citizens on the basis of race certainly violates the Equal Protection Clause of the Fourteenth Amendment, engenders distrust of law enforcement officials, and perpetuates the perception among minority citizens that they are second-class citizens, and are likely to be suspected of wrongdoing solely because of their race or ancestry. 105

The unfortunate fact remains, even now, that some police officers select vehicles for traffic stops on the basis of the vehicles’ occupants’ race. 106 The Court permits such race-based ulterior

103. Cf. $10,700.00, 258 F.3d at 222 n.4 (emphasis added).
104. See 781 F. Supp. at 478; see also supra notes 96-98 and accompanying text.
106. A number of commentators have described these sorts of targeted traffic stops as “Driving While Black”. See, e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: the Supreme Court and Pretextual Traffic Stops, 87 J. CRIM L.
motives in targeting a vehicle for a traffic stop, so long as probable cause for a traffic violation exists and the officer’s conduct does not amount to an Equal Protection violation.\textsuperscript{107} Further, in the context of on-the-street confrontations between an officer and an individual, the Court has acknowledged that some police officers initiate such encounters for non-lawful purposes, including the harassment of people of color.\textsuperscript{108} Consistent with the Court’s observations in \textit{Ohio v. Terry},\textsuperscript{109} search-targets in civil forfeiture cases are often racial minorities\textsuperscript{110}—individuals whom

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\item 107. See \textit{Whren v. United States}, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").
\item 108. See \textit{Terry v. Ohio}, 392 U.S. 1, 14-15 (1968) ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.") (footnote omitted); \textit{see also supra} note 66 and accompanying text.
\item 109. See \textit{Terry}, 392 U.S. at 15 (reminding that courts “still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.”).
\item 110. See Andrew Schneider & Mary Pat Flaherty, \textit{Drug Agents Far More Likely to Stop Minorities}, \textit{Pittsburgh Press}, Aug. 12, 1991, available at http://www.fear.org/guilty2.html ("A 10-month Pittsburgh Press investigation of drug seizures and forfeiture included an examination of court records on 121 ‘drug courier’ stops where money was seized and no drugs were discovered. Black, Hispanic and Asian people accounted for 77 percent of the cases."); \textit{see also HYDE, supra} note 80, at
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the police may assume are less likely to complain or contest police seizure of their assets.

Any number of police assumptions may contribute to or explain the fact that racial minorities are often the target of civil forfeiture: (1) police bias that minorities are more likely to
commit crime, which produces a police investigation-pattern that disproportionately targets minorities;111 (2) an assumption that minorities are more likely to have a criminal record and will therefore be less likely to recover any assets seized;112 (3) an assumption that some minority cultures do not trust either banks or the government and may therefore carry cash rather than “risk” depositing it in a bank, making them a more profitable target for investigation;113 or (4) an assumption that minorities are more likely to lack the funds necessary—and, perhaps, the sophistication—to hire a lawyer and post the bond required to pursue recovery of the seized money.114

38 (describing that the investigation pattern of the sheriff of Volusia County, Florida focused on minority drivers; “[o]f more than 500 auto searches, 80 percent had racial-minority drivers”; “Ninety percent of the drivers from whom cash was confiscated without arrest were black or Hispanic.”); id. at 38-41 & 43-45 (discussing other instances of targeting of racial minorities for civil forfeiture); POLICING FOR PROFIT, supra note 71, at 16 (describing a federal lawsuit filed in July 2008 that alleged that law enforcement officials in Tenaha, Texas “target[ed] minorities driving rental cars or vehicles with out-of state-plates” for civil forfeiture).

111. See, supra note 106 and accompanying text.

112. Courts are not of one mind in the level of suspicion they attribute to a claimant’s prior drug conviction in civil forfeiture cases. Compare United States v. $10,700.00, 258 F.3d 215, 233 (3d Cir. 2001) (finding that the claimants’ prior drug convictions, although probative, “did not provide a sufficient temporal link to the drug trade to support the forfeiture of claimants’ currency”); United States v. $5000 in U.S. Currency, 40 F.3d 846, 850 (6th Cir. 1994) (observing that “a man’s debt to society cannot be of infinite duration.”), with United States v. $22,474.00, 246 F.3d 1212, 1214 & 1216-17 (9th Cir. 2001) (relying on the claimant’s admission to the investigating officer at the airport that he had been convicted of cocaine trafficking ten years earlier, the government’s evidence that the drug-detection dog involved would not alert to cocaine residue ordinarily found on circulating currency, and the claimant’s conflicting stories about the money he was carrying to support the government’s seizure of the claimant’s cash).

113. Cf. United States v. One Lot of U.S. Currency Totalling $14,665, 33 F. Supp. 2d 47, 53-54 (D. Mass. 1998) (“Many immigrants and Americans with limited means—hard working and law abiding—prefer to use cash in lieu of bank accounts and credit cards . . . . Indeed, the whole notion that carrying cash is indicative of illegal conduct reflects class and cultural biases that are profoundly troubling.”).

114. Even in cases where the claimant is represented by counsel, the procedural labyrinth of civil forfeiture proceedings proves difficult for some lawyers to navigate. See, e.g., United States v. $80,760.00, 781 F. Supp. 462, 470 (N.D. Tex. 1991) (“Claimants do not proceed pro se in this litigation; nevertheless, they have
Although civil forfeiture is not a criminal proceeding, courts nevertheless apply the Fourth Amendment’s Exclusionary Rule. Therefore, only legally-obtained evidence may be used to establish probable cause to seize assets. Yet, Terry acknowledged that the Exclusionary Rule is “powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.” In the civil forfeiture context, the fact that eighty percent of property owners were never charged with a crime suggests that prosecution was never the goal in these police investigations. And since most assets are forfeited by way of summary forfeiture, not judicial proceedings, Fourth Amendment violations go largely unobserved. Therefore, the Exclusionary Rule provides little, if any, deterrence value to law enforcement in civil forfeiture cases.

Civil forfeiture represents an unprecedented intersection between police power, racial bias and law enforcement greed, creating an “obviously dangerous potentiality for abuse . . . .” Terry invited courts to use “other remedies” in cases where the Exclusionary Rule does not adequately deter violations of the

repeatedly stumbled in their attempts to protect their interest in the defendant currency.

116. See $53,082.00, 985 F.2d at 250.
118. See HYDE, supra note 80, at 6; see also supra note 80 and accompanying text.
119. See, e.g., HYDE, supra note 80, at 32 (describing, for example, forfeiture documents obtained under Michigan’s Freedom of Information Act: “An examination of records showed seizures were often uncontested because the value of the cash or property confiscated in most cases was too low to justify the $5,000 to $10,000 in attorney fees and court costs such a challenge would require.”).
120. See Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698, 724 (M.D. Tenn. 1993) (“The previous history in this country of an analogous kind of financial interest on the part of law enforcement officers—i.e., salaries of constables, sheriffs, magistrates, etc., based on fees or fines—is an unsavory and embarrassing scar on the administration of justice.”); see also JEFF BROADWATER, GEORGE MASON: FORGOTTEN FOUNDER 153 (2006) (quoting George Mason as stating, “when the same Man, or set of men, holds both the sword and the purse, there is an end of liberty.”) (George Mason, Fairfax County Freeholders’ Address and Instructions to Their General Assembly Delegates (May 30, 1783)).
Fourth Amendment. Although not a “remedy” per se, trial court examination of field performance records and requiring meaningful validation of detection dogs’ alerts to currency—i.e., by showing that the detection dog would not alert to “legitimate” circulated bills—provide a critical check on the reliability of the evidence used to support this law-enforcement profit-making tool.

Even if the Court were to adopt the State of Florida’s proposed “credentials alone” canine-reliability test in Harris, trial courts retain the discretion to review field performance records in civil forfeiture cases. An investigatory strategy that is premised on the reliability of the dog’s detection of a residual odor of contraband on circulated currency, as contrasted with the dog’s reliability in detecting recoverable amounts of the contraband itself, suggests that extending the State’s rigid canine-reliability limitation to currency-sniffs simply goes too far. When this practical consideration is viewed in the context of the special concerns that civil forfeiture raises and the limited opportunity for the Exclusionary Rule to deter police violations of the Fourth Amendment, the need to examine detection-dog track records in civil forfeiture cases is brought into proper focus. Importantly, trial court examination of field performance records in civil forfeiture cases and requiring meaningful validation of positive alerts to currency will incentivize law enforcement to avoid using detection dogs that over-alert in the field—which will result in a beneficial spill-over effect in criminal drug investigations, regardless of the outcome in Harris.

B. Law Enforcement Practicalities Cannot Be Relied Upon to Police the Police

Contrary to the State of Florida’s argument in Harris, law enforcement practicalities are not necessarily “aligned” with

121. See Terry, 392 U.S. at 15 (explaining that the Court’s recognition of the authority to stop and frisk an individual on the basis of reasonable suspicion “should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.”).


123. See Transcript of Oral Argument, supra note 3, at 8 (arguing to prohibit trial judges from insisting on an examination of field performance records in determining canine reliability); Brief for Petitioner, supra note 5, at 22 (arguing that a drug-detection dog is well-trained, and therefore reliable, if the dog is either certified or trained in contraband detection); see also supra notes 12-24 (explaining detection dog certification and training for contraband detection).
ensuring detection-dog reliability.\textsuperscript{124} The State’s pragmatic, incentives-argument uses law enforcement’s clear interest in rejecting detection dogs that under-alert, or “miss” contraband in the field, to claim that law enforcement also has an interest in avoiding detection dogs that over-alert. Instead, canine over-alerts provide power to law enforcement—power to investigate, or even to hassle, an individual on the basis of the officer’s preconceived notions about race or ethnicity. Over-alerts provide a basis to seize assets, even in the absence of contraband or other evidence of drug trafficking. And canine alerts to currency “cover” for what would otherwise be false-positive alerts in the field when no drugs or drug paraphernalia are uncovered during physical searches. Canine over-alerts therefore benefit law enforcement by providing power, an “objective” justification for police action, and an opportunity for law enforcement enrichment, while canine under-alerts do not.

Further, the State’s argument that law enforcement is deterred from using unreliable drug-detection dogs because “inaccurate” dogs “put[] an officer in harm’s way”\textsuperscript{125} is a red herring. While traffic stops are dangerous encounters for law enforcement, those dangers are produced by the officer’s decision to stop a particular vehicle—presumably on the basis of probable cause for a traffic violation or other criminal wrongdoing—not a driver’s apprehension upon being stopped that his or her vehicle might eventually be subjected to a canine drug-detection sniff. The State provided no indication as to how often law-abiding individuals—those who have no contraband hidden in their vehicles and are not wanted by law enforcement for some other crime—unexpectedly become violent during a vehicle-search. Most search situations that evolve into violence are likely produced by the vehicle-owner’s realization that the contraband that is hidden in his or her vehicle is about to be uncovered or that his or her criminal history is about to be revealed. At the \textit{Harris} oral argument, however, the State of Florida used the overall danger of traffic stops\textsuperscript{126} to distract from the fact that

\begin{footnotes}
\item[124] Cf. Transcript of Oral Argument, \textit{supra} note 3, at 52; \textit{cf. also supra} note 58 and accompanying text; Brief for Petitioner, \textit{supra} note 5, at 23.
\item[125] See Transcript of Oral Argument, \textit{supra} note 3, at 52; \textit{see also supra} note 54.
\item[126] See Transcript of Oral Argument, \textit{supra} note 3, at 13 (“The traffic stop, in particular, is one of the most dangerous encounters police officers face. They’re not going to want to be working with a dog that is consistently putting the officer in a position of searching cars based on an alert when that dog is not reliable in predicting the presence [of contraband].”).
\end{footnotes}
vehicle-searches of law-abiding individuals likely produce little risk to law enforcement; the State went to this emotion-tugging magic lamp again and again.127

The State’s approach in Harris was clever because it both evoked our natural concern regarding the dangers law enforcement officers face in conducting traffic stops and, importantly, stifled any consideration of whether vehicle-searches (on the basis of positive canine alerts) of law-abiding individuals present anywhere near the same risk. In response to Justice Scalia’s incentives-question,128 this Article therefore argues that clear incentives exist for law enforcement to use unreliable drug-detection dogs, or dogs with only marginal reliability. The State’s incentives-argument notwithstanding, trial court consideration of detection-dog field performance records as part of the court’s canine-reliability determination is an essential firewall to preventing police use of marginal, or even unreliable, drug-detection dogs.

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127. Cf. id. at 12 (arguing that law enforcement has “a strong incentive to ensure [drug-detection] dogs are reliable . . . [because] they don’t want to be put into harm’s way.”); id. at 26 (“[T]he Government has critical interests, life and death interests, that it stakes on the reliability of these dogs.”); id. at 52 (arguing that “[i]t’s not in the police interest to have a dog that is inaccurate in finding contraband or that is inaccurate and putting an officer in harm’s way.”).

128. See id. at 34 (“[W]hat are the incentives here? Why would a police department want to use an incompetent dog? Is that any more likely than that a medical school would want to certify an incompetent doctor?”).