No. _____

In the Supreme Court of the United States

BRIAN GRIMM,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a defendant challenges the reliability of a dog's reported alert to the possible presence of drugs in a vehicle, in accordance with *Florida v. Harris*, 568 U.S. 237 (2013), and the trial court rules that the dog reliably alerted, which suffices to establish probable cause to search the vehicle, what standard of appellate review of the trial court's ruling that the dog reliably alerted does the Fourth Amendment require?

2. Did the dog reliably alert to the possible presence of drugs in the vehicle driven by Petitioner for purposes of establishing probable cause to search the vehicle?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Grimm, by counsel, Jeffrey M. Ross, Assistant Public Defender, Maryland Office of the Public Defender, requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINION BELOW

The opinions of the Court of Appeals of Maryland, *Grimm v. State*, 458 Md. 602, 183 A.3d 167 (2016), and the Court of Special Appeals of Maryland, *Grimm v. State*, 232 Md. App. 382, 158 A.3d 1037 (2015), are reproduced in the appendix to this petition. Pet. App. 1-93; Pet. App. 94-126. The transcript of the hearing at which the questions presented were first decided is also reproduced in the appendix, as is the written order regarding same. Pet. App. 127-147.

JURISDICTION

The Court of Appeals of Maryland issued its opinion affirming the judgment of the Court of Special Appeals of Maryland on April 20, 2018. Pet. App. 1. This petition is filed within 90 days of that opinion, as required by Rule 13 of The Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. *Factual Background*.

On April 19, 2014, Sergeant Christopher Lamb, Maryland Transportation Authority Police ("MTA Police"), conducted a traffic stop of a vehicle driven by Mr. Grimm. The previous day he received information from a detective with the High Intensity Drug Trafficking Area team regarding a subject who may be traveling northbound on Interstate 95 from Atlanta, Georgia to the area of Baltimore, Maryland with a large quantity of controlled dangerous substance. While on patrol on April 19, Sergeant Lamb received updated information on the vehicle, including that it was going to be in a particular area along Route 295 and that it was a maroon colored Honda, with Georgia registration

and multiple passengers. Sergeant Lamb located the vehicle and observed that none of the three occupants were wearing seatbelts. He stopped the vehicle, and the stop was recorded by his dashboard video camera. Pet. App. 6.

Mr. Grimm was in the driver's seat; his clothes were disheveled. He appeared "very calm." One passenger did not look at Sergeant Lamb, and the other appeared "overly polite." Mr. Grimm provided his driver's license and vehicle registration. The vehicle was registered to someone else. Mr. Grimm explained that he had just purchased the vehicle, had not yet changed the registration due to lack of funds, and that they had traveled to Atlanta to visit friends and pick up the vehicle. Sergeant Lamb subsequently received information from dispatch that the registration and Mr. Grimm's driver's license were both valid. Pet. App. 7-9.

Sergeant Lamb asked Mr. Grimm to exit the vehicle. He also requested a K-9 to respond to his location. Sergeant Lamb was in the process of issuing tickets to the occupants for failure to wear a seatbelt, when Officer Carl Keightley, MTA Police, arrived with his dog, Ace. Sergeant Lamb requested that Ace scan the vehicle. Officer Keightley reported a positive alert, prompting Sergeant Lamb to conduct a search of the vehicle. Located in the rear panel of the passenger door was a large amount of heroin and methamphetamine. Pet. App. 9.

2. *Trial Proceedings*.

Mr. Grimm was indicted in the Circuit Court for Anne Arundel County, Maryland, on charges of

possession of heroin and methamphetamine, possession with intent to distribute heroin and methamphetamine, conspiracy to distribute heroin and methamphetamine, and bringing into the State of Maryland heroin in an amount greater than 4 grams.

Prior to trial, Mr. Grimm moved to suppress the items seized from his vehicle. He argued that under *Florida v. Harris*, 568 U.S. 237 (2013), an officer, based on the totality of circumstances, could not have reasonably relied on Ace's alert to establish probable cause to search the vehicle. The suppression hearing was held on December 17, 2014, January 5 and 13, 2015, and March 17, 2015. The State presented the testimony of Sergeant Lamb, Officer Keightley, and Sergeant Mary Davis, Montgomery County Police Department. Mr. Grimm presented the testimony of Ted Cox and Senior Officer Michael McNerney, MTA Police. The dashboard video camera recording of the stop and scan of the vehicle was introduced into evidence. A substantial amount of documentation pertaining to Ace's certification, training and field performance was also introduced into evidence. Pet. App. 11.

Officer Keightley was accepted as an expert with respect to canine detection of controlled dangerous substances. Pet. App. 10-11. At all relevant times, Officer Keightley was a dog handler, not a dog trainer. Pet. App. 9. Officer Keightley and Ace were first certified in July 2012 and were certified once every six months thereafter, the last certification prior to April 19, 2014, occurring on January 22, 2014. Pet. App. 9. On May 16, 2014, Officer Keightley received notice that Ace was under the required 16 hours of monthly

training, resulting in Ace being decertified. In response, Officer Keightley put in additional training hours and he and Ace were subsequently re-certified. Pet. App. 13-14.

Officer Keightley testified that Ace had previously alerted to tobacco, air fresheners, a tennis ball, and the odor of "KONG" chew toys. He acknowledged that Senior Officer McNerney told him that he was "cueing" Ace—*i.e.*, giving Ace a cue to take certain actions. Officer Keightley testified that he did not cue Ace during the scan of the vehicle. Pet. App. 14.

Regarding field performance records, Officer Keightley testified that between July 6, 2012, and April 19, 2014, Ace alerted in the field on 51 vehicles and that in 19 of those vehicles no contraband was found. Occupants of those 19 vehicles were interviewed, and with respect to 10 of the vehicles statements were given indicating that drugs had recently been in the vehicle. Pet. App. 11-12.

Officer Keightley described the scan of the vehicle performed by Ace. Both vehicle's windows were rolled down. On the way to the front of the vehicle, as Officer Keightley and Ace passed the passenger door, where drugs were ultimately located, Officer Keightley did not notice any reaction by Ace. At that time, Officer Keightley had not yet commanded Ace to search. Pet. App. 12-13. As they went around the vehicle, Ace jumped up on the driver's side door, stuck his head in, sniffed, and then sat. Pet. App. 13. In Officer Keightley's opinion, Ace alerted during the scan of the vehicle and the final alert was displayed when Ace was sitting by the driver's door. Pet. App. 13.

Sergeant Davis was accepted as an expert in K-9 training and handling. Pet. App. 15. She testified that the MTA Police K-9 unit certification process generally comports with industry standards. Pet. App. 16. On August 19, 2014, Sergeant Davis served as one of the judges in the certification of Officer Keightley and Ace. The team passed, even though Officer Keightley was responsible for a "handler miss." Pet. App. 16-17.

With respect to the notice of inadequate training hours and resulting decertification of Ace, Sergeant Davis testified that she would not have decertified Ace for this reason. Pet. App. 18. Sergeant Davis testified that training records from 2013 indicated that in 209 training scenarios, Ace falsely alerted on 24 occasions. Pet. App. 18. Sergeant Davis testified that she did not find these false alerts significant and that Ace performed satisfactorily during training. Pet. App. 17-18.

Sergeant Davis testified regarding Ace's scan of the vehicle. Pet. App. 19-21. She did not see any evidence that Officer Keightley cued Ace during the scan of the vehicle or any evidence that Ace's alert was false. Pet. App. 21. Based on the "totality of the circumstances, [and] looking at all of the training records" and having observed Officer Keightley and Ace on three occasions, Sergeant Davis opined that Officer Keightley and Ace, on April 19, 2014, were "competent to be working the street and deploying, and making probable cause decisions on the street." Pet. App. 21.

Mr. Grimm called Ted Cox as a witness. Mr. Cox was accepted as an expert in K-9 handling and training. In 2007, Mr. Cox became the MTA Police's K–9 Unit's only trainer. In October 2012, he left the

MTA. Pet. App. 22. Mr. Cox testified that between April 15, 2013, and March 24, 2014, Ace performed 179 scans, falsely alerting 15 times to vehicles and 29 times in buildings, which put Ace approximately five to six times over what Mr. Cox deemed an acceptable false rate. Pet. App. 24. He also testified that Ace's records showed that Ace had alerted on plastic and "indicated on blanks which is possibly human odor." Pet. App. 25.

Like Sergeant Davis, Mr. Cox testified regarding Ace's scan of the vehicle. App. 25-27. He testified that, although there was evidence that Ace was trained to go to the source of an odor, he did not attempt to jump through the driver's door window. Pet. App. 26. Mr. Cox opined that Ace was not actively sniffing and that when he jumped onto the driver's door he was alerting to human scent left from Mr. Grimm's having leaned on the driver's door. Pet. App. 26. Mr. Cox opined that Ace was unreliable. Pet. App. 27. His opinion was based on deficiencies in Ace's training reflected in the number of false alerts, the types of odors on which Ace was falsely alerting, deficiencies in the training aids themselves, and the lack of trainer supervision. Pet. App. 27.

Senior Officer McNerney was accepted as an expert in canine training and handling. Pet. App. 29. In 2009, he was certified as a K-9 trainer by the MTA Police. In 2013, he became the head K-9 trainer with the MTA Police. Pet. App. 28-29. Senior Officer McNerney was responsible for Officer Keightley's training from September 2013 through March 2014. Senior Officer McNerney resigned on March 11, 2014, out of concern that the drug detection dogs were not proficient because they were not being trained; he was ordered back to the K-9 unit in May 2014. Pet. App. 28.

Senior Officer McNerney determined that Ace had issues with false alerts, and that Ace was not trained for the required amount of time. According to Senior Officer McNerney, he extended to Officer Keightley an offer to train Ace, but Officer Keightley did not show up to train on days set aside for him. Pet. App. 28-29. According to Senior Officer McNerney, the purpose of such training would have been to "proof" Ace off of odors such as air fresheners and tobacco. Pet. App. 29.

Senior Officer McNerney testified that between September 2013 and April 19, 2014, Ace was not trained the required 16 hours a month that was required for certification. Pet. App. 29. On May 17, 2014, pursuant to Senior Officer McNerney's recommendation, Officer Keightley and Ace were decertified. Two days later, on May 19, 2014, Officer Keightley and Ace were recertified. Pet. App. 29.

At some point during Ace's training, Senior Officer McNerney noticed that Officer Keightley was cueing Ace. According to Senior Officer McNerney, because Officer Keightley knew where the narcotic aids were, he cued Ace by subconsciously slowing down and walking behind him. Pet. App. 29. Senior Officer McNerney also testified that he believed that the narcotic aids had not been "switched out" since 2009 and that it was important to use fresh narcotic aids during training. Pet. App. 30. Senior Officer McNerney opined that, as of March 11, 2014, when he resigned, Ace was unreliable. Pet. App. 30.

In ruling, the trial court began, "I will tell you that absent the K-9 alert…I would not have found probable cause." Pet. App. 135. With regard to Mr. Cox and Senior Officer McNerney, the trial court observed that

there was "dissension in the ranks" and "that some of this was an airing of dirty laundry." Pet. App. 137. Nonetheless, the trial court found that both Mr. Cox and Senior Officer McNerney were credible and that they "presented credible testimony." Pet. App. 138. The trial court also found Officer Keightley credible and Sergeant Davis to be the "most credible" because she "has no ties to the case, [is] neutral and unbiased and has no issue with the handler or the dog." Pet. App. 138.

The trial court found Sergeant Davis's "analysis of the stop and the dog's actions to be credible" and that she "explained succinctly and carefully and expansively at times the issues with MPR [sic] or certification or protocols to the satisfaction of the Court…" Pet. App. 138.[1] Regarding Sergeant Davis's opinion, the trial court concluded, "in her opinion the competence of K-9 ace was that he was competent to make probable cause decision[s] based upon the training records, observing the team personally and reviewing the video," and that, the trial court added, is "the most credible evidence in the case." Pet. App. 141. "[A]nalyz[ing] Sergeant Lamb's observations, comments, the DEA tip with the K-9 dog," the trial court ruled that there was probable cause to search the vehicle. Pet. App. 139.

Mr. Grimm subsequently entered a conditional plea of guilty to possession with intent to distribute heroin. He was convicted and sentenced to a term of imprisonment of 15 years.

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[1] "MPR" is a reference to "NPR," or "non-productive response." Pet. App. 12.

3. *Appellate Review*.

The Court of Special Appeals, Maryland's intermediate appellate court, affirmed, holding that the reliability of a dog's alert "was a question of fact…best reviewed under a 'clearly erroneous' standard," that the trial court's finding that Ace was reliable was not clearly erroneous, and that there was probable cause for the search of the vehicle. Pet. App. 118, 124.

On September 12, 2017, the Court of Appeals of Maryland issued a writ of certiorari to review the judgment of the intermediate appellate court. As the Court of Appeals recognized, "Grimm maintains that, even if the circuit court had an advantage in weighing the evidence, to maintain control of the probable cause standard and satisfy the Fourth Amendment, an appellate court must still review without deference the circuit court's determination that Ace was reliable." Pet. App. 41. The Court of Appeals rejected Mr. Grimm's position, holding that "the issue of a drug detection dog's reliability is a factual question, specifically, a question involving a background fact that falls somewhere between a clear legal issue and a simple fact," and that, "[a]ccordingly, an appellate court reviews for clear error a trial court's finding as whether a drug detection dog is, or is not, reliable." Pet. App. 59.

Noting that the issue of the applicable standard of review was not before this Court in *Harris*, the Court of Appeals nonetheless read *Harris* as support for its holding: "For a myriad of reasons, the Supreme Court's holding in Harris informs our conclusion that a trial court's reliability determination is a finding of fact, and is subject to review for clear error." Pet. App. 50, 69-70.

The Court of Appeals applied the framework developed in *Miller v. Fenton*, 474 U.S. 104 (1985), and *Ornelas v. United States*, 517 U.S. 690 (1996), used to determine the proper standard of appellate review of mixed questions of constitutional law. Under this framework, the Court of Appeals concluded that "a trial court is better positioned than an appellate court to determine whether a drug detection dog is reliable" and that "Ornelas…does not support the proposition that an appellate court reviews without deference a trial court's reliability determination." Pet. App. 62, 70.

The Court of Appeals held ultimately that "the circuit court's reliability determination was not clearly erroneous, and, upon *de novo* review, under the totality of circumstances, Sergeant Lamb had probable cause to search Grimm's vehicle." Pet. App. 82. In a concurring opinion, Judge Adkins, interpreting *Harris*, took the position that "a trial court's assessment of reliability should be reviewed without deference." Pet. App. 84. Under that standard of review, Judge Adkins concluded that Ace was reliable and that there was probable cause for the search. Pet. App. 92.

REASONS FOR GRANTING THE WRIT

This case squarely presents a novel Fourth Amendment question: What is the standard of appellate review when a defendant challenges a trial court's ruling that a dog reliably alerted for purposes of establishing probable cause?

In answer to this question, the Court of Appeals held that the issue of the dog's reliability is a background fact subject to clear error review. Since *Harris*, appellate courts around the country have applied conflicting standards of review to the reliability issue, with some appellate courts expressly adopting clear error or a similarly deferential standard of review and other courts following this Court's lead in *Harris* by omitting express reference to clear error review as the standard of review of reliability and deciding the reliability issue based on the totality of the circumstances.

This Court should grant certiorari to clarify *Harris* with respect to the standard of appellate review in a recurring type of probable-cause case.[2] The *Miller*/*Ornelas* framework is specifically designed for this purpose. Applying this framework, the correct conclusion, consistent with *Harris*, is that the standard of review required by the Fourth Amendment is *de*

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[2] In Maryland, a dog's alert accounted for approximately 12% of searches of person or property arising from traffic stops in 2015. *See* Governor's Office of Crime Control & Prevention, *Twelfth Report to the State of Maryland Under TR 25-113, 2015 Race-Based Traffic Stop Data Analysis* (August 31, 2016). Available at http://goccp.maryland.gov/reports-publications/law-enforcement-reports/traffic-stop-data/.

novo. Further, reviewing *de novo* the dog's reliability in this case provides this Court with a unique opportunity to give needed content to the rule of probable cause in the area of a drug-sniffing dog's reliability.

A. In *Harris*, this Court functionally applied *de novo* review to the issue of reliability.

The primary question in *Harris* focused on "how a court should determine if the 'alert' of a drug-detection dog during a traffic stop provides probable cause to search a vehicle." 568 U.S. at 240. This Court's short answer was that a "court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements." *Id*. at 248. An inflexible checklist is not "the way to prove reliability, and thus establish probable cause." *Id*. at 245. Rather, the proper inquiry, "similar to every inquiry into probable cause – is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id*. at 248.

Having established (or reestablished) the proper approach at the trial level to determining the reliability of a dog's alert for probable cause purposes, this Court proceeded to determine the reliability of the dog's (Aldo's) alert. This Court looked first at the certification and training records for Aldo. That Aldo's certification had lapsed prior to the scan of Harris's truck did not cause concern given Aldo's ongoing training and his unblemished training record. *Id*. at 248-49. The training records showed "that Aldo always found hidden drugs and that he performed

'satisfactorily' (the higher of two possible assessments) on each day of training." *Id*. at 242.

Regarding Aldo's field performance, this Court recognized that Officer Wheetley did not keep complete records, keeping only records of Aldo's alerts that resulted in arrest, but discounted the usefulness of field performance records generally. *Id*. at 245. This Court also rejected the argument that "because Wheetley did not find any of the substances Aldo was trained to detect, Aldo's two alerts must have been false," reasoning instead that "Aldo likely responded to odors that Harris had transferred [in his cooking and use of methamphetamine] to the driver's-side door handle of his truck" and that a "well-trained drug-detection dog *should* alert to such odors…." *Id*. (emphasis in original). "[M]ore fundamentally," this Court added, "we do not evaluate probable cause in hindsight, based on what a search does or does not turn up." *Id*. (citation omitted). This Court then concluded, "[f]or the reasons already stated, Wheetley had good cause to view Aldo as reliable." *Id*.

In short, this Court did precisely what it expects trial courts to do in Fourth Amendment dog-sniff cases - it reviewed the totality of circumstances regarding Aldo's alert and determined that those circumstances, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime in Harris's truck. By every indication, this Court engaged in a *de novo* review of the reliability of Aldo's alert.

Notably, this Court in *Harris* nowhere stated that it was reviewing only for clear error or referred to reliability as a historical or background fact, which

would have been expected, if the Court of Appeals were correct, given the admonition in *Ornelas* that "a reviewing court should take care…to review findings of historical fact only for clear error." 517 U.S. at 699. When an appellate court reviews for clear error, it takes care "'not to decide factual issues'" and to affirm "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969)). Adhering to clear error review, an appellate court does not, if it is being consistent, decide whether a trial court was correct or that it did not "err" or that the appellate court agrees with the trial court, as if it were completely free to substitute its judgment for that of the trial court. To avoid such confusion, what an appellate court does is determine only whether the trial court *clearly* erred or was *clearly* erroneous. *Anderson*, 470 U.S. at 577, 579. That is not what this Court did in *Harris*.

The Court of Appeals placed great weight on this Court's statement that "the record in this case amply supported the trial court's determination that Aldo's alert gave Wheetley probable cause to search Harris's truck." 568 U.S. at 248. According to the Court of Appeals, such language would have no meaning if this Court had been reviewing the reliability determination without deference. Pet. App. 67. Such language, however, is simply another way of saying that this Court, making its own determination of reliability, concluded that Aldo was reliable and, therefore, that it

agreed with the trial court that there was probable cause. *Id*. at 248. That is independent review.[3]

B. Since *Harris*, courts around the country have applied conflicting standards of review to the issue of reliability.

A review of decisions since *Harris* bearing on the applicable standard of review of a dog's reliability demonstrates that clarification is needed regarding the applicable standard of review in a recurring type of probable-cause case. The confusion is real and additional percolation by lower courts is unlikely to clarify matters, given the confusion that still exists generally with respect to the standards of appellate review for Fourth Amendment questions. *See* 6 LaFave, *Search & Seizure* § 11.7(c), at 554 (West 5th ed. 2012) ("it is somewhat surprising that the law regarding the proper standards of appellate review for Fourth Amendment questions is not entirely clear or complete"). The matter is fit for clarification by this Court now and it is of "considerable importance, for it has much to do with the real-life meaning of those

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[3] In a single instance, this Court referred to "substantial evidence": "The State, as earlier described, introduced substantial evidence of Aldo's training and his proficiency in finding drugs." *Id*. at 248. In the administrative context, for example, "substantial evidence" has a meaning distinct from "clearly erroneous," and nothing indicates that this Court was conflating the two standards or suggesting a more deferential standard than clear error review. *See Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) ("Traditionally, this court/court standard of review ["clearly erroneous"] has been considered somewhat stricter (*i.e.,* allowing somewhat closer judicial review) than the APA's court/agency standards ["unsupported by substantial evidence"].").

[Fourth Amendment] rights, and as well with the fairness and efficiency of the appellate process." *Id*. at 556.

Since *Harris*, it appears that at least four courts, in addition to Maryland's Court of Appeals, have expressly invoked clear error or some similarly deferential standard of review in cases challenging a dog's reliability. In *Jackson v. State*, 427 S.W.3d 607 (Ark. 2013), the Supreme Court of Arkansas stated:

> Although Jackson put forth some evidence regarding false alerts by K–9 Major, the circuit court, after hearing testimony about Corporal Behnke and K–9 Major's training, ruled the dog was reliable. In light of the ruling in *Harris,* —— U.S. ——, 133 S.Ct. 1050, we cannot say this was clearly erroneous.

Id. at 615.[4] In *People v. Litwhiler*, 12 N.E.3d 141 (Ill. App. Ct. 2014), the Illinois intermediate appellate court, discussing *Harris* and quoting pre-*Harris* Illinois Supreme Court precedent, stated:

> Our supreme court has noted that we "must review the trial court's factual determination that the police dog * * * was well trained and sufficiently reliable that his alert gave the police probable cause to search" as any other factual

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[4] In *McKinney v. State*, 755 S.E.2d 315 (Ga. App. 2014), the challenge was not to reliability *per se* but to whether the dog alerted. The Georgia intermediate appellate court stated, "Whether Simba in fact alerted on the car was a question of fact for the trial court, which we must accept unless clearly erroneous." *Id*. at 318.

> issue and, as such, "the ruling will not be disturbed on appeal unless it is manifestly erroneous."

Id. at 147 (quoting *People v. Caballes,* 851 N.E.2d 26, 31 (Ill. 2006)). In *State v. Smith*, 152 So. 3d 218 (La. App. 2 Cir. 2015), the Louisiana intermediate appellate court rejected a challenge to reliability, stating the "trial court obviously accepted the unrefuted testimony of Corporal Yarbrough" and finding "no manifest error in this factual finding." *Id*. at 228 n. 7. In *State v. Buck*, 317 P.3d 725 (Idaho Ct. App. 2014), the Idaho intermediate appellate court rejected a challenge to a dog's reliability based on alleged faulty training, holding, in accordance with its "substantial evidence" standard of review of factual findings, that "[j]udging by the fruits of this training method as established by substantial evidence at the suppression hearing, we cannot say the method is inadequate or flawed." *Id*. at 727.

In contrast, other courts since *Harris* have reviewed the issue of the reliability of a dog's alert in a manner similar to that of this Court in *Harris*, omitting express reliance on clear error review and assessing reliability based on the totality of the circumstances. In *United States v. Green*, 740 F.3d 275 (4th Cir. 2014), the Fourth Circuit decided the question of reliability based on the totality of the circumstances:

> Applying this framework, we conclude that the district court correctly held that Bono was sufficiently reliable and that his positive alert provided probable cause for the search of Green's vehicle. . . .

> . . . .
>
> When considering Bono's field performance records in conjunction with his degree of training, his performance during training and recertification exercises, and his evaluations by Troopers Dillon and Settle, the totality of the circumstances establish Bono's reliability in detecting drugs. Because the government has established Bono's reliability and Green has failed to undermine that showing, we agree with the district court that Troopers Johnson and Dillon had probable cause to search Green's vehicle.

Id. at 283-84.

Similarly, in *United States v. Jackson*, 811 F.3d 1049 (8th Cir. 2016), the Eighth Circuit, invoking the "*Harris* standard," analyzed the issue of reliability as follows:

> The test is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Florida v. Harris,* 568 U.S. ——, 133 S.Ct. 1050, 1058, 185 L.Ed.2d 61 (2013). . . .
>
> The affidavit here gave sufficient facts about the dog's reliability. It stated that the dog was trained alongside her handler by an established company. Training lasted four weeks, including operations in buildings, lockers, luggage, automobiles, and open areas. The affidavit noted

> that the dog was certified, with a 97 percent accuracy rate in detecting illegal drugs.
>
> The facts here meet the *Harris* standard. The positive alert by a reliable dog alone established probable cause.

Id. at 1052. The Eighth Circuit did not list the "facts about the dog's reliability" and then conclude that the dog's reliability was itself a fact, like the fact that the dog's "[t]raining lasted four weeks" and that it had a "97 percent accuracy rate," *id*., subject to clear error review. Rather, following *Harris*, the Eighth Circuit treated reliability as the issue determined by the underlying facts and determinative of probable cause, the type of issue subject to *de novo* review.

Notably, in *Jackson*, the Eighth Circuit made no mention of its pre-*Harris* decision in *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010), in which it stated that reliability is a finding subject to clear error review. *Id.* at 967 ("Contrary evidence 'that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog,' a finding we review for clear error.") (quoting *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994)).[5] It is difficult not to see in this development in Eighth Circuit

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[5] Prior to *Harris*, several courts reviewed the reliability of a dog's alert as a finding subject to clear error. *E.g*., *United States v. Owens*, 167 F.3d 739, 749–50 (1st Cir. 1999); *United States v. Outlaw*, 319 F.3d 701, 704 (5th Cir. 2003); *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994); *United States v. Patterson*, 65 F.3d 68, 72 (7th Cir. 1995); *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010); *United States v. Ludwig*, 641 F.3d 1243, 1253 (10th Cir. 2011); *People v. Caballes,* 851 N.E.2d 26, 31 (Ill. 2006).

jurisprudence a reading of *Harris* as establishing that the proper standard of review is *de novo*.

In keeping with the Fourth and Eighth Circuits, the Seventh Circuit, in *United States v. Bentley*, 795 F.3d 630 (7th Cir. 2015), issued the following warning regarding the need for judicial oversight of the reliability issue:

> This should not become a race to the bottom, however. We hope and trust that the criminal justice establishment will work to improve the quality of training and the reliability of the animals they use, and we caution that a failure to do so can lead to suppression of evidence. We will look at all the circumstances in each case, as we must.

Id. at 636. The Seventh Circuit ultimately concluded:

> The district judge did not err when he found Lex to be reliable for purposes of contributing to a probable cause determination based on his training records, his 59.5% field rate, and CTI's curriculum. Lex's mixed record is a matter of concern, but under *Harris's* totality-of-the-circumstances test, we have no reason to override the district court's determination.

Id. at 637. The Seventh Circuit also noted that it is "typically very deferential" toward a "district court's choice between one version of the evidence and another" and that it was "given no reason to deviate from that approach here," *id*. at 636, a curious caveat, to say the least, if the court thought itself constrained by clear error review. Even if more nuanced than the

Fourth and Eighth Circuits, the thrust of the Seventh Circuit's analysis is consistent with *de novo* review.

The federal approach has parallels on the state level. In *Bennett v. State*, 111 So. 3d 983 (Fla. Dist. Ct. App. 2013), the Florida intermediate appellate court held "that under the totality of circumstances standard for probable case, Argos' sniff was up to snuff…." *Id.* at 986. In *State v. Brewer*, 305 P.3d 676 (Kan. App. 2013), the Kansas intermediate appellate court reviewed the evidence bearing on reliability and concluded that "the district court properly relied on the K-9 alert in finding that Carswell had probable cause to conduct a warrantless vehicle search." *Id*. at 683. In notable contrast, when the court reviewed the district court's finding regarding the defendant's nervousness, it concluded that the finding was "supported by substantial competent evidence," its standard of review for factual findings. *Id*. at 681, 684.

C. Under this Court's approach to determining the standard of review for mixed questions of constitutional law, the requisite standard of review for the issue of reliability is *de novo*.

In *Miller*, this Court recognized that the decision whether to label an issue a "question of law" versus a "question of fact" is not always a matter of logical analysis but one of institutional allocation:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound

> administration of justice, one judicial actor is better positioned than another to decide the issue in question.

474 U.S. at 114 (holding that the voluntariness of a confession is a matter for independent federal determination).

In *Ornelas*, this Court held "that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*." 517 U.S. at 691. The reasons given for *de novo* review include the following. "[S]weeping deference would permit…varied results…inconsistent with the idea of a unitary system of law." *Id*. at 697. "[T]he legal rules for probable cause and reasonable suspicion acquire content only through application," and "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id*. A more unified and defined body of law of reasonable suspicion and probable cause makes it easier for law enforcement officers to make correct judgments in the field, a benefit to both civilians and officers. *Id*. at 697-98. And *de novo* review incentivizes reliance on warrants. *Id*. at 698-99.

Last term, this Court, citing *Miller* and *Ornelas*, among other of its decisions, did not hesitate in recommitting appellate courts to *de novo* review in the "constitutional realm," even when that "primarily involves plunging into a factual record":

> In the constitutional realm, for example, the calculus changes. There, we have often held that the role of appellate courts "in marking out the

> limits of [a] standard through the process of case-by-case adjudication" favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record. *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 503, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *see Ornelas v. United States,* 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (reasonable suspicion and probable cause under the Fourth Amendment); *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (expression under the First Amendment); *Miller v. Fenton,* 474 U.S. 104, 115–116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (voluntariness of confession under the Fourteenth Amendment's Due Process Clause).

U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, ___ U.S. ___, 138 S. Ct. 960, 967 n. 4 (2018).

If *Harris* alone does not suffice to establish the proper standard of review for the issue of a dog's reliability, which indisputably "falls somewhere between a pristine legal standard and a simple historical fact," *Miller*, 474 U.S. at 114, then the needed clarification comes from application of the allocation approach contained in *Miller* and *Ornelas*.

Under this approach, contrary to the conclusion of the Court of Appeals, the correct standard of review is *de novo*. The question of a dog's reliability is a fact-intensive, mixed question of constitutional law, for which "[i]ndependent review is…necessary if appellate

courts are to maintain control of, and to clarify" the rule of probable cause as applied in a recurring type of case and to give that rule content. *Ornelas*, 517 U.S. at 697. *De novo* review of reliability is thus required under the Fourth Amendment.

Clear error review is incompatible with securing the Fourth Amendment guarantee against unreasonable searches. In a given case, an appellate court might become convinced that the record more fully supports the conclusion that a dog is unreliable because it was not well-trained, calling into question a department's entire program. But, under clear error review, the dog and the department would get a pass. *See Cooper v. Harris*, ___ U.S. ___, 137 S. Ct. 1455, 1465 (2017) (under clear error review, "[a] finding that is plausible in light of the full record—even if another is equally or more so—must govern"). Bearing in mind that a reliable alert alone suffices to establish probable cause, this is a rather remarkable outcome: an appellate court disagrees with a trial court's conclusion that probable cause exists but is powerless to do anything to secure the Fourth Amendment's guarantee against unreasonable searches. The result is a fractured body of law, severely limited in its capacity to guide and incentivize law enforcement.

The Court of Appeals maintained that the lack of generally accepted training and certification standards in Maryland does not mean that "appellate courts must provide guidance to law enforcement agencies." Pet. App. 72. Guidance, however, is not an all-or-nothing proposition. While an appellate court cannot be expected to write an industry's standards, there is certainly precedent for appellate courts to engage with

technical standards to ensure that legal values are maintained. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). With respect to the need for incentive, this Court referred in *Harris* to law enforcement's "strong incentive to use effective training and certification programs…." 568 U.S. at 247. That premise, however, has recently been challenged. Lee Epstein et al., *Foreword: Testing the Constitution*, 90 N.Y.U. L. Rev. 1001, 1036–37 (2015) (discussing how handlers may cue dogs in an effort to justify a "hunch" and describing the "widespread abuse of forfeiture laws").

In the end, the Court of Appeals fails to appreciate the consequences of clear error review. It reasoned, "[a]fter a trial court has made a reliability determination, the trial court – and, ultimately, an appellate court – must conclude, as a matter of law, under the totality of the circumstances, whether probable cause existed." Pet. App. 71. But this ignores the fact that the reliability determination suffices as the probable cause determination – an appellate court's control over the latter rises and falls with its control over the former. The Court of Appeals sidesteps this piece of logic by quoting *Miller*, where this Court observed, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." 474 U.S. at 113 (citation omitted); Pet. App. 71. But if an appellate court loses control over the rule of probable cause in relation to a recurring issue, as it does here, and there is no compelling justification for leaving the issue in the control of trial courts, then the issue does lose its factual character for purposes of determining the applicable standard of review.

There is no compelling justification for deferring to the trial court on the issue of reliability. The issue is adjudicated primarily on the basis of certification and training documents. While often the subject of expert testimony, as it was here, the reliability issue does not "turn[] largely on the evaluation of demeanor," *Miller*, 474 U.S. at 114, the way the question of an officer's purported smell of drugs would. Nor should it. The experts opined on Ace's reliability as the basis for probable cause, with Sergeant Davis's opinion that Ace was competent to be "making probable cause decisions on the street" carrying the day. Pet. App. 21. Such inherently legal opinions must be measured by their substance, against the record, and, for the sake of a "unitary system" of Fourth Amendment law, *Ornelas*, 517 U.S. at 697, must not be allowed to be "insulate[d]…from review by denominating them credibility determinations." *Anderson*, 470 U.S. at 575.

D. This case is an ideal vehicle for this Court to provide needed content to the rule of probable cause in the area of a drug-sniffing dog's reliability.

Just as there are no generally accepted drug-dog training and certification standards in Maryland, there are no such generally accepted national standards. *See* Epstein, *supra* at 1028 ("At present, there are more than fifty different K-9 associations, with many different standards for certification."). The lack of a uniform national industry standard undermines the uniformity of the Fourth Amendment. There is a need for more appellate guidance, and Mr. Grimm's case provides this Court with an ideal opportunity to provide such guidance now.

The dog in *Harris* presented very little for this Court to consider with respect to that facet of reliability that is of the utmost importance, namely the dog's training. Where Harris "declined to challenge in the trial court any aspect of Aldo's training," 568 U.S. at 248, Mr. Grimm challenged at length Ace's training, among other facets of reliability. While Aldo might not serve as the benchmark for reliability, and while Ace might not serve as the floor, this Court's review of both dogs, taken together, would undoubtedly provide needed content to the meaning of reliability, giving judges at least a spectrum of reliability. As this Court stated in *Ornelas*, "the two decisions when viewed together may usefully add to the body of law on the subject." 517 U.S. at 698.

As indicated, the reasons for discounting the reliability of Ace's alert were extensively briefed and argued in the Court of Appeals. The reasons include the following: Ace alerted in training to common non-contraband odors; Senior Officer McNerney observed handling problems in training, including that Officer Keightley cued Ace; Senior Officer McNerney attempted unsuccessfully to arrange training sessions with Officer Keightley and Ace for the purpose of addressing these training problems; Ace was decertified for non-compliance with training requirements during the period leading up to and including Ace's scan of the vehicle driven by Mr. Grimm; the manner in which training aids were maintained, stored, and handled created the possibility that Ace was alerting to human scent and/or plastic; the "success" rate numbers in training and in the field are unreliable given the numerous unresolved problems with Ace's training; and the circumstances

surrounding Ace's scan of the vehicle driven by Mr. Grimm show that there was no reliable alert.

The Court of Appeals devoted the bulk of its analysis of the reliability issue to identifying reasons for finding Sergeant Davis the "most credible" of the experts, which reasons had little if anything to do directly with the substance of her opinion or Ace's reliability. Pet. App. 75-79. Beyond a cursory discussion of Ace's training and field numbers, and an attempt to salvage Ace's status as a certified drug-sniffing dog at the time of the scan, the Court of Appeals largely ignored the many reasons for discounting Ace's scan as a reliable alert. Pet. App. 80-82. Properly reviewed, these reasons establish that Ace did not reliably alert to the possible presence of drugs in the vehicle and that there was not probable cause to search the vehicle. In short, Ace was neither reliable in general nor in the particular scan of the vehicle driven by Mr. Grimm.

In the end, Ace's record raises several questions about the meaning of reliability, which the Court of Appeals did not answer, but which must be answered in order to give the rule of probable cause needed content. During oral argument in *Harris*, counsel for petitioner acknowledged the lack of national training standards but added that he did not think it was "an appropriate role for the Court to delve into the contours of the training," eventually prompting Justice Sotomayor to say, "My problem is how do we rule." Transcript of Oral Argument at 8, *Florida v. Harris*, 568 U.S. 237 (2013) (No. 11-817). As Mr. Grimm's case illustrates, that problem, on both the appellate and

trial court levels, requires further attention from this Court.

CONCLUSION

For the foregoing reasons, Mr. Grimm respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully Submitted,

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