APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 37

September Term, 2017

[Filed April 20, 2018]

BRIAN GRIMM)
)
v.)
)
STATE OF MARYLAND)
)

Circuit Court for Anne Arundel County
Case No. 02-K-14-001188
Argued: February 1, 2018

Barbera, C.J.
Greene
Adkins
McDonald
Watts
Hotten
Getty,
JJ.

Opinion by Watts, J.
Adkins, J., concurs.

It is undisputed that the ultimate question of probable cause to conduct a warrantless search is reviewed by an appellate court *de novo*; *i.e.*, the standard of review for the issue of probable cause is *de novo*, or without deference. "In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's application of the law to its findings of fact." Varriale v. State, 444 Md. 400, 410, 119 A.3d 824, 830 (2015) (citation omitted). It may be less clear, however, whether a particular determination by a trial court is a finding of fact, and thus subject to deference, or a conclusion of law, and thus subject to no deference. See Miller v. Fenton, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." (Citations omitted)).

This case requires us to determine whether, in the context of a probable cause determination, the issue of a drug detection dog's reliability is a factual question to be reviewed for clear error, or a legal one to be reviewed *de novo*. This is a matter of first impression, and our resolution of the issue will govern the standard of review of a trial court's determination as to whether a drug detection dog is, or is not, reliable.

We set the stage. In this case, Sergeant Christopher Lamb of the Maryland Transportation Authority Police initiated a traffic stop of a vehicle that Brian Grimm, Petitioner, had been driving. Officer Carl Keightley of the Maryland Transportation Authority Police, a K-9 handler, and Ace, his Belgian Malinois K-9 partner,

arrived at the scene of the traffic stop.[1] Ace scanned the vehicle and alerted to it. Sergeant Lamb searched the vehicle and found drugs inside.

In the Circuit Court for Anne Arundel County, the State, Respondent, charged Grimm with various drug-related crimes. Grimm moved to suppress the drugs, alleging that Sergeant Lamb lacked probable cause to search his vehicle. At a hearing on the motion to suppress, the circuit court admitted into evidence several documents, including Ace's training records, Ace's field reports,[2] and Officer Keightley's and Ace's certifications. The State called two expert witnesses: Officer Keightley and Sergeant Mary Davis, the Montgomery County Police Department's K-9 Unit's head trainer. Grimm also called two expert witnesses: Ted Cox, the former head trainer of the Baltimore Police Department's K-9 Unit and the Maryland Transportation Authority Police's K-9 Unit,[3] and Officer Michael McNerney, a trainer of the Maryland Transportation Authority Police's K-9 Unit. Sergeant Davis essentially testified that Ace was reliable, while Cox and Officer McNerney opined that Ace was unreliable. The circuit court denied the motion to

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[1] "[T]he Belgian Malinois is an alert, high-energy breed, popular as both a police and military working dog[.]" Brooks v. Anderson Police Dep't, City of Anderson, 975 N.E.2d 395, 397 n.4 (Ind. Ct. App. 2012) (cleaned up).

[2] Field reports are records that result from a drug detection dog's performance in the field—as opposed to a drug detection dog's performance during training, which result in training records.

[3] In the circuit court, at his request, Cox was not referred to as an officer, as he no longer worked for a law enforcement agency.

suppress, concluding that Sergeant Lamb had probable cause to search the vehicle. The circuit court found that Sergeant Davis was "the most credible witness[,]" and "accept[ed]" her opinion as to Ace's reliability.

Before us, as to the standard of review, Grimm contends that we must review without deference, as opposed to for clear error, the circuit court's determination that Ace was reliable. As to the merits, Grimm argues that, no matter which standard of review applies, the circuit court erred in determining that probable cause existed. The State responds that the standard of review is for clear error, and asserts that the circuit court did not clearly err in determining that Ace was reliable. Alternatively, the State maintains that, even if probable cause did not exist, the "good faith" exception to the exclusionary rule applies.

In Part I below, we conclude that the ultimate question of probable cause to conduct a warrantless search of a vehicle based on a drug detection dog's alert is reviewed *de novo*; *i.e.*, the standard of review as to the issue of probable cause to search based on a drug detection dog's alert is *de novo*. A determination of probable cause involves a two-step process. First, a court must identify all of the relevant historical facts that were known to the officer at the time of the search and, if necessary, any relevant or disputed background facts. Second, the court must determine whether those facts give rise to probable cause to search. We conclude that the issue of a drug detection dog's reliability is a factual question. Accordingly, an appellate court reviews for clear error a trial court's determination as to whether a drug detection dog is, or is not, reliable. In Miller, 474 U.S. at 114, the Supreme Court concluded

that, where an issue falls somewhere between a clear legal issue and a simple historical fact, the determination of the nature of the issue turns on an analysis of which judicial actor is better positioned to decide the question. As explained below, the issue of a drug detection dog's reliability is, in our view, a background fact that falls somewhere between a clear legal issue and a simple fact. A trial court is better positioned than an appellate court to determine the issue. An issue as to a drug detection dog's reliability requires a trial court to assess the credibility of lay and expert witnesses; to watch, when available, a recording of a drug detection dog's scan; to weigh and determine the weight to be given documentary evidence, such as the drug detection dog's training records, field reports, and certifications; to consider the qualifications of any experts, and their opinions about the evidence; and to determine whether, under the totality of the circumstances, the drug detection dog is reliable; and whether the drug detection dog's alert indicated that drugs were present. As such, a trial court is better positioned than an appellate court to determine a drug detection dog's reliability.

In Part II below, we hold that the circuit court did not clearly err in determining that Ace was reliable, as an abundance of evidence supports the circuit court's finding that Ace was reliable. We conclude that, under the totality of the circumstances, Sergeant Lamb had probable cause for the search, and we do not address the State's argument as to good faith.

BACKGROUND

Charges and Motion to Suppress

On April 19, 2014, in the circuit court, the State charged Grimm with possession of heroin with intent to distribute and other drug-related crimes. On May 23, 2014, Grimm filed a motion to suppress drugs that had been found in a vehicle that he had been driving. On multiple days, December 17, 2014, January 5 and 13, 2015, and March 17, 2015, the circuit court conducted a hearing on the motion to suppress.

Sergeant Lamb's Testimony Regarding the Traffic Stop

At the hearing, as a witness for the State, Sergeant Lamb testified that, on April 18, 2014, a detective with the High Intensity Drug Trafficking Area team provided him with a description of a man who was suspected to be driving north on Interstate 95 from Atlanta, Georgia to the Baltimore area with a large quantity of controlled dangerous substances. On April 19, 2014, Sergeant Lamb was informed that the man was driving a maroon Honda that was registered in Georgia, that there were multiple occupants in the Honda, and that the man was expected to drive from Maryland Route 100 onto the northbound side of Maryland Route 295. That same day, Sergeant Lamb saw the Honda travel from Maryland Route 100 onto Maryland Route 295, and saw that, including the driver, the Honda had three occupants who were not wearing seat belts. Sergeant Lamb initiated a traffic stop.

Sergeant Lamb testified that Grimm was in the Honda's driver's seat. According to Sergeant Lamb,

Grimm's "clothing looked disheveled," and "[h]is hair looked unkempt[,]" which indicated to Sergeant Lamb that "he had been driving for a long time . . . and had[not] been staying anywhere." Sergeant Lamb spoke with Grimm, who "was kind of mumbling" and "rambling a little bit." Grimm did not make eye contact when he was addressing Sergeant Lamb. Grimm, however, appeared to be "very calm."

Grimm provided Sergeant Lamb with his Maryland driver's license and the Honda's registration. Two days earlier, the Honda had been registered in Georgia to a man named Johnny Lee Oglesbee, Jr. Grimm told Sergeant Lamb that he had bought the Honda, but could not afford to register the Honda in his name. Grimm did not say who Oglesbee was. Grimm told Sergeant Lamb that he and three other people had traveled from Baltimore to Atlanta for approximately one week to visit friends and buy the Honda. Grimm said that he had paid for plane tickets from Baltimore to Atlanta for all four of them.

A woman named Davita Henry was in the front passenger seat. A man named Aaron Chase was in the backseat,[4] directly behind Grimm. During the traffic stop, Henry stared straight ahead, and never turned to look at Sergeant Lamb, who was standing on the Honda's passenger side while speaking to Grimm. Meanwhile, Chase, who "was leaning forward to engage [Sergeant Lamb] in conversation" while he was

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[4] In a separate case, the State charged Chase with drug-related crimes. Although Grimm and Chase were not codefendants, the hearing on the motion to suppress concerned both of their cases. Each defendant was represented by his own counsel.

speaking to Grimm, "was very open with the fact that he was[]" not wearing a seat belt, and was "overly polite[.]" Sergeant Lamb explained that people who are "overly polite" may be trying to distract law enforcement officers from "what[is] going on[.]" Grimm told Sergeant Lamb that there had been a fourth occupant in the Honda, who had been dropped off at an Element Hotel. Grimm told Sergeant Lamb that the fourth occupant and Henry were women whom he knew from a dance club, and that Chase was his friend.

At some point, Sergeant Lamb asked Grimm to exit the Honda and walk to the rear of the Honda. Grimm did so. And, after speaking to Sergeant Lamb, Grimm returned to the driver's seat. Grimm did not fully close the driver's door, and kept his left foot on the asphalt. Grimm also placed a pillow on the door's "windowsill[,]" then laid his head on the pillow. Sergeant Lamb became concerned that Grimm would try to run away.

Sergeant Lamb suspected that criminal activity was afoot, in light of the information he had received from Grimm that four individuals had flown from Baltimore to Atlanta to buy the Honda, and Grimm had paid for the airline tickets, yet, Grimm allegedly was not able to afford to register the Honda in his name, and the circumstance that Chase was overly polite while Henry stared straight ahead. Sergeant Lamb observed that the Honda was a dented, older model, two-door Accord with high mileage and faded paint. Sergeant Lamb testified that both Baltimore and Atlanta are "source cities for" controlled dangerous substances.

Sergeant Lamb used his radio to obtain information about Grimm's Maryland driver's license and the Honda's registration, and he learned that both were

valid. Based on his observations, Sergeant Lamb requested a K-9. While Sergeant Lamb was writing warnings for the failure to wear seat belts, Officer Keightley of the K-9 Unit arrived with Ace, a drug detection dog. Sergeant Lamb informed Officer Keightley of what he had observed, and requested a dog scan of the Honda. Officer Keightley told Sergeant Lamb that he wanted the Honda's occupants to exit the Honda before the dog scan occurred. After the Honda's occupants exited the Honda, Officer Keightley and Ace performed a dog scan, and Officer Keightley advised that Ace had alerted. Sergeant Lamb searched the Honda, and found a large amount of heroin and amphetamine in the "right rear panel[,]" which he described as the "plastic and vinyl armrest and side rail" behind the passenger's door.

Testimony of Officer Keightley, Ace's Handler and One of the State's Experts

As a witness for the State, Officer Keightley of the Maryland Transportation Authority Police testified that he had been a member of the K-9 Unit since February 2012. In April 2012, Officer Keightley started working with Ace. Officer Keightley testified about Ace's training and certification. For three months, from April 2012 to July 2012, Cox and Officers McNerney and McCarty provided Ace's initial training. During Ace's initial training, he was trained to recognize the odors of five drugs: marijuana, cocaine, heroin, methamphetamine, and methylenedioxy-methamphetamine.[5] After Ace's initial training, he was

[5] Methylenedioxy-methamphetamine is also known as "MDMA," "Molly," and "Ecstasy." National Institute on Drug Abuse, MDMA

trained once a week, for an average of seven hours a week, using "narcotic aids"—*i.e.*, substances that the crime laboratory had tested and determined to be drugs. The training is designed to mimic events that occur in the field. During Ace's training, usually, a trainer would set one or multiple narcotic aids in a given area, such as a vehicle or a building; the narcotic aids would sit for twenty to thirty minutes; and then, Officer Keightley and Ace would search the area. Ace's training was documented with a training record that listed dates, times, the narcotic aids that were used, the weights thereof (ranging from a gram to ten pounds), where they were hidden, and whether Ace found them.

The Maryland Transportation Authority Police certifies dogs and their handlers every six months. Like other drug detection dogs, to become certified, Ace was tested in "two or three" capacities from among "various areas[,]" including a building, a vehicle, luggage, and an outdoor area. Officer Keightley and Ace were first certified on July 6, 2012. Officer Keightley and Ace had been certified five times, and were certified as of April 19, 2014. At that time, Officer Keightley and Ace had most recently been certified on January 22, 2014. As of the date of the hearing, Ace had performed dog scans during approximately 100 traffic stops. The circuit court admitted Officer Keightley as an expert in the field of "K-9 police dog[s] and the detection of controlled dangerous substances"—specifically,

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(Ecstasy/Molly) (Oct. 2016), https:// www.drugabuse.gov/ publications/drugfacts/mdma-ecstasymolly [https://perma.cc/S4A7-ZSY3].

marijuana, cocaine, heroin, methamphetamine, and methylenedioxy-methamphetamine.

Without objection, the circuit court admitted into evidence: Ace's training records from April 2012 through April 2014; Ace's field reports—which Officer Keightley completed every time that he utilized Ace—from when Officer Keightley and Ace were first certified on July 6, 2012 until April 19, 2014; the Maryland Transportation Authority Police Narcotic/Explosive K-9 Certification Guidelines; and the Maryland Transportation Authority Police K-9 Standard Operating Procedures, which included guidelines for training dogs and handling explosive aids and narcotic aids. The circuit court also admitted into evidence: Officer Keightley's and Ace's July 6, 2012 certification, which was accompanied by score sheets that showed which narcotic aids were used, where they were hidden, and whether Ace found them; Officer Keightley's and Ace's December 10 and 14, 2012 certification, and Officer Keightley's and Ace's July 1, 2013 certification. The second-to-last certification was associated with two dates because, on December 10, 2012, Officer Keightley and Ace passed a test that involved a dog scan of a vehicle, but did not pass a test that involved a dog scan in a building; on December 14, 2012, Officer Keightley and Ace re-took, and passed, the test that involved a dog scan in a building, and Officer McNerney recertified Officer Keightley and Ace.

According to Ace's field reports, between July 6, 2012 and April 19, 2014, Ace had alerted to a vehicle on 51 occasions. Of those 51 occasions, no drugs were found in the vehicle on 19 occasions. Officer Keightley testified that a "non-productive response" occurs when

a drug detection dog alerts to a vehicle or building, and an officer searches the vehicle or building, but does not find any contraband.[6] Officer Keightley explained that Ace might alert where drugs used to be, but are no longer, inside a vehicle. Indeed, with regard to 10 of the 19 non-productive responses to vehicles, during interviews, at least one of the vehicle's occupants admitted that drugs had recently been in the vehicle. Thus, Ace had only 9 non-productive responses where there was no discovery of drugs, and no admission that drugs had recently been in the vehicle. In response to Ace's non-productive responses, Officer Keightley extended Ace's searching time during training. Between January 22, 2014—Officer Keightley's and Ace's most recent certification before the time of the traffic stop on April 19, 2014—and April 19, 2014, Officer Keightley did not receive any warnings that he was doing anything inappropriate.

Officer Keightley testified that, on April 19, 2014, he responded to a traffic stop that Sergeant Lamb had initiated. At the scene, Officer Keightley was asked to conduct a dog scan of the Honda with his K-9, Ace. At the time, both of the Honda's windows were rolled down. Officer Keightley brought Ace to the front of the Honda. On the way to the front of the Honda, Officer Keightley and Ace passed the passenger's door, where Sergeant Lamb ultimately found drugs. Officer Keightley did not notice any reaction by Ace while they passed the passenger's door. At that time, Officer

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[6] Officer Keightley testified that the term "non-productive response," like the term "false alert," indicates that a drug detection dog alerted to an area, and an officer searched the area, but did not find any contraband.

Keightley had not yet commanded Ace to search. Once in front of the Honda, Officer Keightley told Ace to "foot"—*i.e.*, to sit next to him. When Ace was quiet, Officer Keightley commanded Ace to search. Officer Keightley and Ace started walking around the Honda counter-clockwise. As Officer Keightley "was trying to present the passenger-side headlight[,]" Ace pulled toward the driver's side on two occasions. After Ace came around to the driver's side, he "bracketed"—*i.e.*, he moved his head in an attempt to locate an odor. Once Officer Keightley and Ace reached the driver's door, Ace stopped walking, put his forelegs on the driver's door, stuck his head into the Honda, and did a "focus sniff"—*i.e.*, closed his mouth and sniffed extremely rapidly. Then, Ace sat, which Officer Keightley testified was an alert that the Honda was contaminated with, or had recently been contaminated with, drugs. The dog scan took thirty-seven seconds. While drug detection dogs may be trained to alert by staring, scratching, or biting at the source of the odor, Ace was trained to alert by sitting.

On May 16, 2014, Officer Keightley received an e-mail from a member of the K-9 Unit with a recommendation by Officer McNerney concerning an issue as to the calculation of Ace's training hours. Before receiving the e-mail, Officer Keightley would indicate in Ace's training records that he was trained for seven hours on one day each week. In the e-mail, however, Officer Keightley was advised that there was a new method of calculating the number of hours of Ace's training, and that Officer Keightley should count only the time from when the first narcotic aid was set to when the last test was conducted. Under the new calculation method, Ace had not received the sixteen

hours of monthly training that was required for certification, and Officer Keightley and Ace were decertified. After Officer Keightley received the e-mail, he trained Ace on two additional days. On May 19, 2014, Officer McNerney recertified Officer Keightley and Ace. The circuit court admitted Officer Keightley's and Ace's May 19, 2014 recertification into evidence. Officer Keightley testified that, after Officer McNerney recertified Ace, he usually trained Ace at least four days a week, for a total of sixteen to twenty hours a month.

On cross-examination, Officer Keightley acknowledged that Ace had previously alerted to tobacco, air fresheners, a tennis ball, and the odor of "KONG" chew toys. Officer Keightley also acknowledged that, at some point, Officer McNerney told Officer Keightley that, by standing still behind Ace, Officer Keightley was "cueing" Ace—*i.e.*, giving Ace a cue to take certain actions. Officer Keightley testified that he did not cue Ace during the dog scan of the Honda.

Officer Keightley acknowledged that, in November 2013, Ace was trained only twice, for a total of three hours and fifteen minutes—calculated from when the first narcotic aid was set to when the last test was conducted. In February 2013, Ace was trained a total of eleven hours and nineteen minutes, calculated in the same way. According to a summary of Ace's training records that Grimm's counsel had prepared, using the new formula for calculating the number of hours that Ace had been trained, Ace had not received the required sixteen hours of training in any month from July 2012 through 2014. Officer Keightley testified that

this was so because the new formula for calculating the number of hours that Ace had been trained had not yet been implemented.

Testimony of Sergeant Davis, One of the State's Experts

As a witness for the State, Sergeant Davis testified that, in 1991, she became a handler with the K-9 Unit of the Montgomery County Police Department. Sergeant Davis testified that, initially as a handler, she managed five K-9 teams, and that throughout her career she managed both patrol K-9 teams and narcotics K-9 teams. In 1998 or 1999, Sergeant Davis became a K-9 trainer. In 2001, Sergeant Davis placed in the top twenty K-9 officers in the United States Police Canine Association's Patrol Dog Field Trials. In 2008, Sergeant Davis was assigned as the K-9 unit's head trainer. During that time, she developed the K-9 Unit's current mandatory certification processes for patrol K-9s and narcotics K-9s, and trained the K-9 Unit's first firearms detection K-9 teams. In 2009, Sergeant Davis began writing for Police K-9 Magazine. In that capacity, between 2009 and 2014, Sergeant Davis responded to questions about training dogs in Police K-9 Magazine. Sergeant Davis testified that she had run events at the United States Police Canine Association's national training seminar, and had given presentations at Police K-9 Magazine's conference. Sergeant Davis had trained a total of sixty-five K-9 patrol teams, and trained a total of thirty-six K-9 detection teams. The parties stipulated that Sergeant Davis was an expert in K-9 training and handling. Sergeant Davis testified that she was not being paid for

her testimony, apart from what she was paid for being on duty while testifying.

Sergeant Davis explained that Maryland law does not require drug detection dogs to be certified, and that there are no State-wide requirements for drug detection dog performance. Although Maryland law does not require that drug detection dogs be certified, Sergeant Davis developed a process for certifying drug detection dogs in the Montgomery County Police Department's K-9 Unit. Sergeant Davis testified that the K-9 Unit uses its best efforts to follow or exceed the standards that are recommended by the United States Police Canine Association. According to Sergeant Davis, the K-9 Unit trains drug detection dogs with both odor recognition tests and "environmental hides[,]" which are searches of buildings, vehicles, and parcels. Sergeant Davis described the process through which the Montgomery County Police Department's K-9 Unit trains drug detection dogs, to consist of: use of odors of controlled dangerous substances; distractions, such as dog food; and a reward, in the form of a ball on a rope. Sergeant Davis testified that the Maryland Transportation Authority Police's K-9 Unit's certification process generally comports with industry standards. Sergeant Davis advised that the Montgomery County Police Department's K-9 Unit trains approximately twelve other local K-9 Units—including, at one point, the Maryland Transportation Authority Police's K-9 Unit.

In August 2014, the Maryland Transportation Authority Police's K-9 Unit requested that members of the Montgomery County Police Department's K-9 Unit serve as judges in the Maryland Transportation

Authority Police's K-9 Unit's certification process. Sergeant Davis and two other members of the Montgomery County Police Department's K-9 Unit served as judges. The certification process took place on August 19, 2014, and included a search of a vehicle, then a search of a parcel, and then a search of an indoor area. Officer Keightley and Ace participated in, and were successful in, the certification process. According to Sergeant Davis, on one occasion during the certification process, Ace alerted to a vehicle containing a controlled dangerous substance, but Officer Keightley moved Ace so fast that they passed the vehicle that contained the controlled dangerous substance, and then moved to the next vehicle. At that time, Ace tried to get Officer Keightley to return to the original vehicle. Sergeant Davis referred to this situation as "a handler miss[,]" for which Ace was not responsible—*i.e.*, Officer Keightley missed Ace's alert. Sergeant Davis stated that Ace had been "correct in his work." Sergeant Davis opined that the handler miss was not a basis for failure because, in any certification, one handler miss is permissible.

Before testifying, Sergeant Davis reviewed Officer Keightley's and Ace's certifications, as well as Ace's training records from his initial training in 2012 to July 2014. Sergeant Davis testified that she did not observe any major changes in the process of training Ace, including the training routine and the types of narcotic aids that were used, between April 19, 2014—when the traffic stop occurred—and July 2014. Sergeant Davis testified that Officer Keightley and Ace performed satisfactorily during training.

Sergeant Davis testified that she was aware that Officer Keightley and Ace had been decertified in May 2014 as a result of the issue with the calculation of the number of Ace's training hours. Sergeant Davis testified that she would not have decertified Officer Keightley and Ace, as Ace's "skills . . . were not affected one iota by the way" in which the Ace's training hours were calculated. Similarly, Sergeant Davis testified that the issue with regard to the calculation of the number of Ace's training hours did not affect Officer Keightley's and Ace's January 22, 2014 certification. Sergeant Davis explained: "Either [Ace] knows the odors[,] or he does[not]. And he can perform, or he cannot." Sergeant Davis testified that she did not know of any other K-9 Unit that had decertified a handler and a drug detection dog "based on training hours." Sergeant Davis testified that, when a drug detection dog has not been trained for enough time, there is usually "an opportunity for remediation[,]" which Ace received.

According to Sergeant Davis, in 2013, during Ace's training, he was placed in a total of 209 scenarios. Of those, Ace falsely alerted on 24 occasions. Sergeant Davis explained that she "expect[ed false alerts] to occur[,]" and that she did not think that any "particular amount" of false alerts was "acceptable or unacceptable." Sergeant Davis noted that there is no industry standard with regard to an unacceptable number of false alerts, and that the Montgomery County Police Department's K-9 Unit did not have such a standard. Sergeant Davis testified that she "would look at each scenario and ask [] what is the cause of the" false alert. Sergeant Davis testified that Ace's false alerts during training were not "[s]ignificant" in

light of the reasons for Ace's false alerts. According to Sergeant Davis, on multiple occasions, Ace falsely alerted when he was "asked to search for a very long time in an environment where there was no" controlled dangerous substance. Sergeant Davis opined that such environments were "counter-productive" because they simply provided Ace with "an opportunity to fail."

During Sergeant Davis's testimony, the recording of the traffic stop from the dashboard camera in Sergeant Lamb's vehicle was played. Addressing the circumstance that Ace did not alert as he passed by the passenger side, Sergeant Davis explained that Officer Keightley needed to ensure that Ace would pass by the Honda's occupants safely, and was probably tightly controlling Ace with his leash and with voice commands. Sergeant Davis opined that, although Ace "was clearly excited and [] wanted to work[,]" he appeared to be "in an obedient state" as he passed by the passenger side.

Sergeant Davis observed that, once Officer Keightley and Ace reached the front of the Honda, Ace was barking and "still a little bit excited." Officer Keightley calmed Ace, and had Ace sit near him. Sergeant Davis noted that, after Officer Keightley gave the command to search, Ace immediately moved toward the driver's door. With physical or verbal commands, Officer Keightley had Ace move toward the front right headlight. Ace briefly checked the front of the Honda, then moved toward the driver's door again. Again, Officer Keightley had Ace return to the front right headlight. Afterward, however, Ace moved toward the driver's door for a third time. According to Sergeant Davis, while Officer Keightley was trying to direct Ace

to the front right headlight, Ace independently insisted on moving to the driver's side. Sergeant Davis testified that Ace's behavior indicated that he had made an "independent discovery of" an odor of controlled dangerous substances, and was attempting to locate the source. Sergeant Davis testified that, while in front of the Honda, Ace engaged in "bracketing"—*i.e.*, whipping his head. Ace moved toward the driver's door and jumped on it "independently." Then, Ace lifted his head into the window, and engaged in "focus sniffing[.]"

Sergeant Davis observed that, for six minutes during the traffic stop, the driver's door was open. Sergeant Davis explained that the vehicles on Maryland Route 295 that were passing by the Honda "would create a vacuum and pull air[,]" as well as the odor of controlled dangerous substances, out of the driver's doorway. Sergeant Davis also noted that, because vehicles are climate-controlled, simply driving down a highway can "create odor pockets in places" that do not contain the source of the odor.

Addressing Ace's alert near the driver's door, Sergeant Davis testified that Ace "was very firm in[,]" and "very committed in[,] his sit. . . . [Ace] held it very nicely." Sergeant Davis testified that Ace was not "unsure of himself" when he alerted. Sergeant Davis testified that the dog scan "took a very little bit of [] time" because "there was a lot of odor" and it was not "difficult for" Ace to identify the odor. Sergeant Davis testified that the dog scan's length—thirty-seven seconds—was within Ace's "capacity to manage himself without" falsely alerting.

Sergeant Davis testified that the recording of the traffic stop from the dashboard camera in Sergeant

Lamb's vehicle contained no evidence that Ace's alert was false. Sergeant Davis explained that Ace's "work was very independent[,]" as evinced by the circumstance that Ace moved toward the driver's door on two occasions before Officer Keightley allowed him to go there. According to Sergeant Davis, Officer Keightley's "direction was more of a distraction than it was an influence on" Ace. Sergeant Davis testified that Ace "already had clear identification of" the odor of a controlled dangerous substance, and that, when Ace alerted, he was indicating "that he knew there was odor there." Sergeant Davis advised that Officer Keightley did not cause Ace's alert "in any way, shape, or form[.]" Sergeant Davis testified that she did not see any evidence of cueing by Officer Keightley. Sergeant Davis testified that, to a reasonable degree of certainty, based on her training, knowledge, and experience as a K-9 trainer, Officer Keightley and Ace were "competent to be working the street and deploying, and making probable cause decisions on the street." Sergeant Davis testified that her opinion was "[b]ased on the totality of the circumstances, [and] looking at all of the training records" and having observed Officer Keightley and Ace on three occasions.

On cross-examination, Sergeant Davis acknowledged that, before testifying, she had not reviewed Ace's field reports, which, according to her, did not have "as much bearing" as his training records, because Ace's training took place in environments that were more controlled than those in the field. Sergeant Davis explained that, in the field, "unintended cross-contamination" can occur. Addressing the circumstance that, according to his field reports, Ace alerted 9 times when there was no discovery of drugs, and no

admission that drugs had been in the vehicle, Sergeant Davis testified that that did not concern her "even in the least" and explained: "It[i]s like putting garbage in a garbage can. And you take the garbage out[,] and you try to clean it, . . . but you stick your head in that garbage can[,] and it still smells like garbage."

Testimony of Cox, One of Grimm's Experts

As a witness for Grimm, Cox—one of the people who provided Ace's initial training in 2012—testified that, in 1997, he joined the Baltimore Police Department's K-9 Unit as a handler. In 2000, Cox became the Baltimore Police Department's K-9 Unit's chief trainer. Cox trained a total of approximately eighty dogs. In 2006, Cox left the Baltimore Police Department. In 2007, Cox became the Maryland Transportation Authority Police's K-9 Unit's only trainer. In October 2012, Cox left the Maryland Transportation Authority Police. The parties stipulated that Cox was an expert in K-9 training and handling.

Cox acknowledged that he was compensated for his travel and, additionally, that he was paid $200 an hour, and that he had earned approximately between $4,000 and $5,000[7] working on this case. Cox testified

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[7] On cross-examination, after Cox testified that he was paid $200 an hour, the prosecutor asked Cox: "[H]ow many hours have you spent?" Cox responded: "I guess we're somewhere around, between reviewing documents, this whole book, and gathering things[,] probably about between four and five thousand." Given that 4,000 hours is equal to more than 166 entire days, it is evident that Cox was referring to the amount of money that he had earned while working on this case, not the number of hours that he had spent working on this case.

that, because he was being paid to testify, "apparently[, he] was not allowed to speak about the things that went on while [he] was employed [by] the State"—"[k]ind of like a gag order."

Before testifying, Cox reviewed, among other documents, Ace's training records, his field reports, the Maryland Transportation Authority Police Narcotic/Explosive K-9 Certification Guidelines, and the recording of the traffic stop from the dashboard camera in Sergeant Lamb's vehicle.

Similar to Sergeant Davis, Cox testified that Ace's training records were more important than his field reports. Cox testified that, in his opinion, after reviewing Ace's training records and the recording of the traffic stop, Ace was unreliable "at this point." According to Cox, the Maryland Transportation Authority Police's K-9 Unit had failed to maintain Ace's maintenance training for over a year. Cox testified that once a drug detection dog is certified "[i]t takes a keen eye in order for a trainer . . . to watch a dog perform and work and understand what the team is actually saying and doing. And in this case, it didn't happen." Cox testified that he felt that Officer Keightley was "basically, just like a rogue police." Cox opined that it was not Officer Keightley's fault, as the Maryland Transportation Authority Police's K-9 Unit did not "provide him a trainer to sit with him[,] because he's still green for a period of time[,] in order for him to gain the experience that was necessary."

After being asked whether he noticed that there was a training session for Ace on November 12, 2012 and there was no other training session until December 12, 2012, Cox testified that, due to "the gag order[,]" he

could not answer that. Cox indicated, however, that a drug detection dog should not go twenty or thirty days without being trained unless the officer is on extended leave. Cox noted that, when he went through the federal trainer certification, there was a distinction between "clock time" and "sniff time." According to Cox, sniff time is the time that a dog is actually engaged in performing scans. Cox testified that, even if a law enforcement officer were at a training facility for eight hours, a drug detection dog might spend only a small portion of that time performing scans.

Cox testified that he wanted to train his dogs to be as close to "100 percent as" he could. According to Cox, he "usually tr[ied] to hold [drug detection] dog[s] to a 95 percent ratio" and, if a dog dropped under 90 percent, he would "pull him off the road and find out why[.]" Cox indicated that, when a dog is being evaluated, he sets a standard to figure out if the dog "has a problem in falsing." Cox stated: "There's a percentage rate that I give, it's usually four percent." According to Cox, between April 15, 2013 and March 24, 2014, during Ace's training, he performed 179 scans. Of those, Ace falsely alerted to vehicles 15 times, and falsely alerted indoors 29 times, for a total of 44 false alerts. Cox calculated that 4% of 179 scans is approximately 7.16. Cox stated that Ace's number of false alerts—44—is "five times over, or six times over [Cox's] allotted falsing." Cox acknowledged that, as Sergeant Davis testified, there are no State-wide requirements for drug detection dog performance. Cox opined, however, that Maryland should have such requirements.

Cox testified that users of marijuana make blunts by sprinkling marijuana into tobacco leaves. Cox explained that this circumstance can condition drug detection dogs to alert to the odor of tobacco. Cox testified that Ace's records showed that Ace had alerted on plastic and "indicated on blanks which is possibly human odor." According to Cox, this was "a red flag" and someone should have investigated what may have been going on with Ace.

During Cox's testimony, the recording of the traffic stop from the dashboard camera in Sergeant Lamb's vehicle was played. Without specifically testifying that Ace was engaged in excessive barking, Cox asked that the video be paused and stated: "I usually don't like that excessive barking[.]" Cox testified that "excessive barking" "usually takes [] energy away from" a drug detection dog, and the dog then does not perform as well. Cox stated that he "would actually want the officer to just calm the dog down" so that the dog would not be "coming into the field already exhausted."

Cox testified that, according to the National Weather Service, on April 19, 2014, there was a four-mile-an-hour wind. Cox theorized that, "if we assume that, for argument's sake," the wind was "blowing from the bumper to the front bumper[,]" he would expect that, when he passed the passenger door, Ace would "whip his head around and catch some type of odor." According to Cox, if the wind were blowing in that direction, "there's enough that's going to plume out on the side," and Ace "should catch the odor when he passed the car passenger door."

Cox noted that, even though Ace always started scans by going counterclockwise, on this occasion, he

went in the other direction "on his own." Cox explained that Officer Keightley used a dog toy to motivate Ace to come to the headlight. Cox observed that, at that point, Officer Keightley was behind Ace. Cox observed that Officer McNerney had once told Officer Keightley that he was "cueing" Ace by standing still behind him.

Cox testified that he would not have "move[d Ace] unless he was . . . actually performing his task[,]" and that, when Ace came "running around" to the driver's side, he did not "actively sniff at all." Cox opined that Ace "just jumped into object search" and then jumped onto the driver's door. Cox opined that Ace alerted to a "human scent[,]" which resulted from Grimm leaning on the driver's door. According to Cox, Ace was "imprinted on" human scent because, during his training, the narcotic aids were not properly maintained. Cox testified that Ace's training records contained no evidence that human scent had been used as a distracter—a substance that a drug detection dog is "extincted" off of during training. Cox also opined that the narcotic aids were not replenished often enough to ensure that they were still "producing" a narcotics odor.

Cox 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's window. Grimm's counsel asked whether it was significant that, after alerting, Ace turned his head toward Officer Keightley. Cox responded that this indicated that Ace was getting "weak in his field[,]" and that he was essentially asking Officer Keightley: "[D]id I [do] right?" When asked whether he observed any evidence of Ace "bracketing[,]" Cox responded: "No[.]"

Cox opined that, based on his experience and expertise, "[t]here was no doubt in [his] mind that [Ace] was unreliable." As reasons for his opinion, Cox referenced "how many times [Ace had] falsed, what type of odors [Ace had] falsed on," "the human odor," "the lack of odor being produced by the narcotics [aids] that were set out," deficiencies in Ace's training, and the lack of "a certified trainer to . . . watch [Ace] and make sure . . . [that] the behavior that he[was] offering in training [was] stopped at the appropriate time[.]" Cox also opined that Officer Keightley and Ace should have failed the certification process on August 19, 2014.

On cross-examination, Cox acknowledged that the Maryland Transportation Authority Police Narcotic/Explosive K-9 Certification Guidelines do not set a maximum percentage of false alerts of 5%. Cox also acknowledged that the Maryland Transportation Authority Police K-9 Standard Operating Procedures did not require analysis of the purity of narcotic aids. Cox testified: "I wish [that] I could speak about the steps and measures that I took [] to try to clear this up, but I[am] not allowed to at this point. But if I could I would tell you what I tried to do."

Testimony of Officer McNerney, One of Grimm's Experts

As a witness for Grimm, Officer McNerney—one of the people who provided Ace's initial training in 2012—testified that, in 2006, he started working for the Transportation Security Administration's K-9 Unit. Officer McNerney became a handler for an explosive detection dog. In 2009, Officer McNerney joined the Maryland Transportation Authority Police's K-9 Unit

as a trainer. Initially, Officer McNerney trained dogs only in explosive detection. At that time, Cox was the head trainer, and Officers McNerney and McCarty were assistant trainers in explosive detection and drug detection, respectively. In October 2012, Cox left the Maryland Transportation Authority Police, leaving only Officers McNerney and McCarty as trainers. In September 2013, Officer McCarty went on medical leave, and Officer McNerney assumed responsibility for training dogs in both explosive detection and drug detection. Officer McNerney testified that "it was tough" to train dogs in both explosive detection and drug detection. Officer McNerney testified that he went to command and asked that training explosive and drug detection dogs be made a full-time position, but his request was denied. Officer McNerney testified that, "numerous times," he communicated to his command staff that he was available only ten of the twenty-six training days between September 2013 and March 2014, and that handlers did not show up for training on eight of the days when he was not present. On March 11, 2014, Officer McNerney stepped down as a trainer because he did not "want the liability" and because he was concerned that the drug detection and explosive detection dogs were not proficient because they were not being trained. In May 2014, however, Officer McNerney "was ordered back" to the K-9 Unit as part of "a full-time position." The circuit court admitted Officer McNerney as an expert in the field of K-9 training and handling.

Officer McNerney was responsible for Officer Keightley's training from September 2013 through March 2014. Officer McNerney testified that he determined that Ace had "a lot of [] issues" as to false

alerts, and that Ace was not trained for the required amount of time. According to Officer McNerney, Ace had a "pretty high" number of false alerts, and he extended to Officer Keightley an offer to train Ace, but Officer Keightley did not "show up to train on those days[.]" According to Officer McNerney, the purpose of such training would be to "proof" Ace off of such sources of odor as air fresheners and tobacco.

Contrary to Officer Keightley's testimony, Officer McNerney testified that, between September 2013 (when Officer McNerney assumed responsibility for training dogs in both explosive detection and drug detection) and April 19, 2014 (the date of the traffic stop), Ace was not trained seven hours a week, or sixteen hours a month. Officer McNerney testified that, between those dates, he trained Ace only ten times. Officer McNerney testified that, according to Ace's training records, between those dates, Ace was not trained the required sixteen hours a month that was required for certification. On May 17, 2014, pursuant to Officer McNerney's recommendation, Officer Keightley and Ace were decertified. Two days later, on May 19, 2014, Officer Keightley and Ace were recertified.

At some point during Ace's training, Officer McNerney noticed that Officer Keightley was cueing Ace. According to Officer McNerney, because Officer Keightley knew where the narcotic aids were, he cued Ace by subconsciously slowing down and walking behind him. Officer McNerney opined that it was a disfavored practice for handlers to set the narcotic aids, as that can lead to cueing. Officer McNerney also testified that he believed that the narcotic aids had not

been "switched out" since 2009. Officer McNerney opined that it was important to use fresh narcotic aids during training.

Officer McNerney opined that, as of March 11, 2014, when he resigned, Ace was unreliable "[b]ased on . . . the falsing issues compared to the training that was conducted from the previous -- the previous trainer had set the requirements of [90%] and [Ace] fell below that [90%] range where, if he wasn't reliable." Officer McNerney acknowledged that, to be certified by the K-9 Unit, a drug detection dog need only score 87.5%. Officer McNerney opined, however, that he held drug detection dogs to a higher standard in training because, unlike scans in the field, training takes place in controlled environments.

Officer McNerney agreed with Sergeant Davis that the "handler miss" was not a basis for failure of the August 19, 2014 certification process. On cross-examination, Officer McNerney acknowledged that, on January 22, 2014, he conducted a certification test, which Officer Keightley and Ace passed; and, on that date, he approved the certification. Officer McNerney acknowledged that Officer Keightley and Ace were not decertified before April 19, 2014—*i.e.*, that the certification was valid when the traffic stop occurred.

Circuit Court's Ruling and Findings

After hearing arguments by counsel, the circuit court denied the motion to suppress, finding as follows:

> Grimm was driving the [Honda]. It had the Georgia plates; it was here in Anne Arundel County. [] Chase was a passenger, as well as [Henry]. And[,] back on April 19[,] 2014,

Sergeant Lamb received some type of be[-]on[-]the[-]lookout, . . . from his contacts in [the Drug Enforcement Administration] and [the High Intensity Drug Trafficking Area].

* * *

[] Sergeant [Lamb stopped] the [Honda], and[,] unfortunately for [] Grimm and [] Chase and [Henry], none of them were wearing seat[ ]belts, which gave [] Sergeant [Lamb] th[e] reasonable suspicion that he needed to conduct the traffic stop[.]

* * *

At the [Honda], before [Ace] arrives[, t]here is the discussion about Atlanta and airline tickets[,] and [] Grimm puts his head on the pillow[,] and he leans with [his left] foot out of the [Honda], and the [back]seat passenger, [] Chase, is overly talkative, and [Henry] is not talkative. And all of those things go into [] Sergeant [Lamb]'s mind[,] and[,] in his mind[,] they are all indicia that he has someone who is a drug dealer, the nervousness and all that stuff.

* * *

[A]bsent [Ace's] alert, . . . I would not have found probable cause. I would not have found [] Atlanta being a source city, the nervousness, the airline[] tickets to be enough to get into the [Honda]. So, this case rightly turns on Officer Keightl[e]y and [] Ace.

Not surprisingly[,] we have a divergence of views and a difference of opinion as to what the Court should consider to be credible. It will spoil the ending when I tell you who[m] I find to be the most credible witness. But I cannot analyze this case without telling you who[m] I find to be the most credible witness. Because[,] when I discuss Officer Keightl[e]y, he [and Ace were] certified at the time of the [traffic] stop and the [dog] scan. And [Officer Keightley and Ace were] certified on January 22[], 2014, and it was[not] until about a month after that [when they] lost [their] certification, and it was[not] too long after that before the certification was restored to [them].

[Officer Keightley] used all the proper terminology[—]bracketing, focus sniffing, response, et cetera. And [Officer Keightley] was certified and qualified as an expert in this area. And **the Court has found [Officer Keightley] credible,** but that[is] not necessarily the ultimate finding because I have witnesses with expertise [that is] vastly superior to his. And I must analyze that before I can come back to Keightl[e]y to determine whether he did something [that] was proper or improper. I found [Officer Keightley] credible[,] and I found him [and Ace] to be certified[,] and I considered his training as to be in compliance or not in compliance with standard operating procedures. This is a fuzzy area.

Sergeant [] Davis and [] Cox and [] Officer McNerney presented different views of what the

standard operating procedures should be. Each department writes their own standard operating procedures. Each department prepares their own standard operating procedures. And each department decides what their standard operating procedures shall be so that their K-9 officers -- well, handlers, and the dogs and the trainers are certified.

Sergeant Davis has a different view than [] Cox does of what the ultimate standards should be, but there are standards in place. And [] Maryland has not ad[o]pted rigid standards. I think that[is] what Florida v[]. Harris[, 568 U.S. 237 (2013),] was telling us.

So, the question for the Court is, were those standards that were in place appropriate? And I think that they were. I find that there were. Was there compliance with those standards? That[is] the second part of that issue. We have to look at the hours, we have to look at the [narcotic] aids, and we have to look at whether or not the training was in compliance with the standard operating procedures, and was there a significant or serious enough deviation to say that [Ace] or [Officer Keightley] was not competent to provide the work in the field. And we can analyze the 51 alerts, the 19 [false alert]s. And we can analyze what it . . . was due to[,] and the reasons behind it. We can look at the extended time, the distance for the training exercises, the staleness of the [narcotic] aids, et cetera.

And[,] to do that, the Court has to look to the experts. And the experts are Sergeant [] Davis and [] Cox. [] Cox is in a perilous position at times[,] and I do think [that] he walked that tightrope that he was presented appropriately. I do not find that he strayed over any line. And I think that his answers were credible in terms of what he said and how he said it.

[Cox] and [] Officer McNerney are very close in their views. They are good and fair in their analysis. And while [Cox] is retired and [Officer McNerney] is an active [law enforcement] officer, they presented to the Court what appeared to be their view of what the optimum standards should be. . . . I am convinced that **there is dissension in the ranks. And I think that some of this was an airing of dirty laundry. But there appears to be almost a["]they did[not] do it today as I did it then["] view from [] Cox. And there seemed to be from Officer McNerney, ["]you[are] not listening to me.["] Having said that, they[are] both credible. There is some bias, but they are credible and they have presented credible testimony.**

The Court will comment on Sergeant [] Davis. **I find [Sergeant Davis] to be the most credible witness . . . . I find [Sergeant Davis's] qualifications, her knowledge, [and] her training and experience to be impeccable.** Again, I[am] going to spoil the ending, but I find her to be the most credible witness[,] and it is she who[m] I rely upon the

most and find to be **the best and most objective observer.**

[Sergeant Davis's] comments, and I hope [that] I quote this correctly, have stuck with me ever since she said it. And when I went over and examined everything and everything over and over and over again, I could not get this comment out of my mind. ["Ace] knows the odor[,] or he does[not]. He can perform[,] or he can[not."] And[,] with that in mind, **I find [Sergeant Davis] to be a witness who has no ties to th[is] case, neutral and unbiased** and has -- I find she has no issue with [Officer Keightley] or [Ace]. And **I find [Sergeant Davis's] analysis of the [traffic] stop and [Ace]'s actions to be credible.**

[Sergeant Davis] explains, . . . succinctly and carefully and expansively at times[,] the issues with [false alerts] or certification or protocols to the satisfaction of the Court that I can find Officer Keightl[e]y and [] Ace to be credible and to be a certified [drug detection] dog that the Court can rely upon for assessing whether or not probable cause exist[ed]. When the Court analyzes Sergeant Lamb's observations, comments, the [Drug Enforcement Administration] tip with [Ace] or, which I find credible, I find probable cause . . . to believe that there is a reasonable probability and/or a fair probability that contraband [would] be found in [the Honda].

* * *

I disagree with [] Officer McNerney and [] Cox that there was no alert by [Ace]. I[am] not an expert. I must analyze it on the totality of the circumstances. And I must rely upon the expert testimony. And **I find the most credible expert to be Sergeant [] Davis.** When she broke the [traffic] stop down and she went, "[]lead is tight to prevent [Ace] go in window, shows dog [Ace] has independent intention from [Officer Keightley]'s [in]tention. [Ace] insists to go to driver's [] door not once, two time[s]. Indicates target odor, get[s] to source. [Officer Keightley] took control dog leash tight, not have contact with civilian's dog, excited, wants to work. [Ace] obedience, stay, lose heel, not expect indication."

Then[,] when [Sergeant Davis] goes through all of this[,] she concludes [that] there might have been a little odor, there might have been a lot of odor, but [Ace] alerted. And she concludes that [Ace] committed, sat, held it nicely[, that] there was no evidence of a false alert, [and] that [Ace] was independent. [Officer Keightley] was more of a distraction. [Ace] knew the odor, there was no [] interference[by Officer Keightley], no cueing from [Officer Keightley]. There was an obvious change of behavior, the head dip, the bracketing, the focused sniffing. That[,] in [Sergeant Davis's] opinion[,] **the competence of [] Ace was that he was competent to make [a] probable cause decision based upon the training records, observing the team personally[,] and reviewing the video.**

> **The Court accepts that[,] and the Court finds that to be the most credible evidence in the case.**

(Emphasis added).

Conviction and Opinion of the Court of Special Appeals

On July 7, 2015, Grimm pled guilty to possession of heroin with intent to distribute, on the condition that he could appeal the circuit court's denial of the motion to suppress. On August 4, 2015, Grimm noted an appeal.

On April 26, 2017, the Court of Special Appeals affirmed the conviction. See Grimm v. State, 232 Md. App. 382, 386, 158 A.3d 1037, 1039 (2017). The Court of Special Appeals held that an appellate court reviews for clear error a trial court's determination as to whether a drug detection dog is reliable. See id. at 403, 158 A.3d at 1050. The Court of Special Appeals explained:

> Whether Ace was—at the time of the [dog] scan of Grimm's vehicle—a well-trained or reliable [drug detection] dog, whose alerts could be relied upon by Officer Keightley as indicating that there was a fair probability that [Grimm's] vehicle contained one of illegal drugs [that] Ace had been trained to detect, was a question of fact [that was] properly committed to the adjudicatory skill of the [trial court that] heard the evidence [that was] presented at the hearing on the motion to suppress. An appellate court is ill-equipped to determine the proper amount of weight to be given to various pages of the

> extensive documentation in evidence regarding a [drug detection] dog's performance during training exercises, or to evaluate the credibility of witnesses, or weigh the conflicting testimony of experts. Such factual determinations are best left to the [trial court that] hears the evidence, and are best reviewed under a "clearly erroneous" standard that gives deference to [the trial court]'s superior opportunity to evaluate credibility and weigh the evidence.

Id. at 403-04, 158 A.3d at 1050 (citations omitted).

Addressing the merits, the Court of Special Appeals rejected Grimm's contention that the circuit court clearly erred in making certain findings of fact, such as the circuit court's finding that Sergeant Davis was the most credible witness. Id. at 404-05, 158 A.3d at 1050-51. The Court of Special Appeals also rejected Grimm's assertion that, in light of alleged evidence of deficiencies in Ace's training, the circuit court clearly erred in finding that Ace was reliable. See id. at 406-07, 158 A.3d at 1051-52. The Court of Special Appeals observed that Ace and Officer Keightley were decertified for only two days, and that Sergeant Davis testified that she would not have decertified Ace and Officer Keightley. See id. at 406-07, 158 A.3d at 1052. The Court of Special Appeals rejected Grimm's contention that Officer Keightley and Ace were not "meaningful[ly]" certified at the time of the dog scan of his vehicle in April 2014, noting that Officer Keightley and Ace had been certified in January 2014, and that certifications are valid for six months. See id. at 407, 158 A.3d at 1052. The Court of Special Appeals rejected Grimm's argument that the video of the dog scan

showed that Ace did not alert, as the circuit court credited Sergeant Davis's testimony that Ace alerted. See id. at 407, 158 A.3d at 1052. The Court of Special Appeals was unpersuaded by Grimm's reliance on Cox's testimony that Ace had 44 false alerts in 179 training scenarios, as Sergeant Davis analyzed a different time period, found a much lower rate of false alerts, and "testified that there was no particular amount of false alerts that she would find unacceptable." Id. at 407, 158 A.3d at 1052.[8]

Petition for Writ of *Certiorari* and Cross-Petition

On June 15, 2017, Grimm filed a petition for a writ of *certiorari*, raising the following two issues:

> 1. When a defendant challenges the reliability of a drug-sniffing dog overall and the reliability of the dog's purported alert to the possible presence of drugs in a vehicle driven by the defendant, in accordance with [] *Harris*, 568 U.S. 237[], and the trial court rules that the dog's alert established probable cause to search the vehicle, what is the applicable standard of appellate review?
>
> 2. Whatever standard of appellate review applies, did the [circuit] court err in ruling that [law enforcement] had probable cause to search the [Honda that was] driven by [Grimm]?

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[8] The Court of Special Appeals also held that the circuit court did not err in admitting evidence that, on August 19, 2014, Ace was recertified. See Grimm, 232 Md. App. at 410, 158 A.3d at 1054. That issue is not before us.

On June 30, 2017, the State filed a conditional cross-petition for a writ of *certiorari*, raising the following issue: "Even if [law enforcement officers] did not possess probable cause to search Grimm's [Honda], should this Court decline to apply the Fourth Amendment's exclusionary rule because the [law enforcement officers] relied on Ace's [] alert in objective good faith?" On September 12, 2017, this Court granted the petition and the conditional cross-petition. See Grimm v. State, 456 Md. 54, 170 A.3d 290 (2017).

DISCUSSION

I.

The Parties' Contentions

Grimm contends that the Court of Special Appeals erred in reviewing for clear error the circuit court's determination that Ace was reliable, and argues that the correct standard of review is *de novo—i.e.*, without deference. Grimm asserts that the appellate court must review without deference the issue of whether a drug detection dog is reliable because an appellate court reviews without deference the issue of whether probable cause existed. Grimm maintains that a trial court is not better positioned than an appellate court to determine whether a drug detection dog is reliable. Grimm contends that the circuit court did not have an advantage in assessing the expert testimony because the experts' credibility turned not on the experts' demeanor, but rather on the plausibility and coherence of the experts' explanations of the relevant documents and the recording of the traffic stop. Grimm argues that it would be inappropriate to defer to the circuit court's determination of the experts' credibility because

the experts' opinions essentially constituted opinions as to whether probable cause existed.

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. Grimm contends that, because there are no generally accepted standards in Maryland regarding the training and certification of drug detection dogs, appellate courts must provide guidance to law enforcement agencies on the issue, and review without deference would provide the opportunity for such guidance. Grimm asserts that, if appellate courts review trial courts' reliability determinations for clear error, then a drug detection dog might be considered reliable in one county or one courtroom, but not another. Grimm maintains that, in Harris, 568 U.S. 237, the Supreme Court analyzed the issue of whether a drug detection dog was reliable in a manner that was consistent with review without deference.

The State responds that an appellate court reviews a determination of probable cause in the same manner in all warrantless search cases, regardless of whether a law enforcement officer or a drug detection dog detected an odor of controlled dangerous substances. The State contends that an appellate court reviews for clear error a trial court's findings of fact, and reviews without deference the ultimate question of whether probable cause existed. The State argues that the relevant finding of fact is whether a drug detection dog detected an odor of controlled dangerous substances.

The State asserts that, just as an appellate court defers to a trial court's finding that a law enforcement officer was credible in testifying that he or she smelled marijuana emanating from a vehicle, an appellate court defers to a trial court's factual finding that a drug detection dog smelled drugs. The State maintains that the only difference in a case that involves a drug detection dog is that the State must prove that the drug detection dog smelled drugs through circumstantial evidence, such as the drug detection dog's training and performance in the field. The State argues that, in Harris, the Supreme Court applied the well-established standard of review of a determination of probable cause, and did not apply a different standard of review because a drug detection dog, rather than a law enforcement officer, detected drugs.

Law

In Miller, 474 U.S. at 105, 110, the Supreme Court held that the issue of whether a confession was voluntary was a legal question, not a factual question that was entitled to the presumption of correctness that was afforded to State court factual findings under what was then 28 U.S.C. § 2254(d). The Supreme Court concluded that there was no support for the position that the enactment of what was then 28 U.S.C. § 2254(d) in 1966 altered the Court's prior cases holding that the issue of voluntariness is a legal question. See id. at 111. In Miller, id. at 106-07, while interviewing a defendant, a law enforcement officer made false statements and "stated that he did not consider [the defendant] to be a criminal because the perpetrator of the [murder] had a 'mental problem[,]' and needed medical help rather than punishment." The

defendant confessed, and was convicted. See id. at 107-08. The defendant appealed, contending that his confession was involuntary. See id. at 108. A State supreme court determined that the defendant's confession was voluntary. See id.

Later, the defendant petitioned for a writ of habeas corpus. See id. The United States District Court for the District of New Jersey dismissed the petition, and the United States Court of Appeals for the Third Circuit affirmed, concluding that the District Court's dismissal of the petition was proper because the issue of whether a confession was voluntary was a factual question. See id. The Court of Appeals concluded that the habeas proceeding was governed by what was then 28 U.S.C. § 2254(d), which stated in pertinent part: "In any proceeding instituted in a Federal Court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction shall be presumed to be correct[.]" Id. at 108, 105 n.1.[9]

The Supreme Court reversed, explaining that its precedent established that "the ultimate issue of voluntariness is a legal question requiring independent federal determination." Id. at 109-10 (cleaned up). In other words, the Supreme Court "was not bound by a

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[9] 28 U.S.C. § 2254(d) is now codified at 28 U.S.C. § 2254(e)(1), which states, in pertinent part: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue [that is] made by a State court shall be presumed to be correct."

[S]tate-court voluntariness finding[,]" and had a "historic duty to make an independent evaluation of the record." Id. at 110 (cleaned up). The Court acknowledged that "subsidiary factual questions, such as whether a drug has the properties of a truth serum, or whether in fact [law enforcement officers] engaged in the intimidation tactics [that are] alleged by [a] defendant, are entitled to the [28 U.S.C.] § 2254(d) presumption." Id. at 112 (citations omitted). The Court, however, reiterated that "the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." Id. at 112.

The Court observed that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." Id. at 113 (citations omitted). The Court distinguished factual questions from legal questions as follows:

> Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. 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.** Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. . . .
>
> [By] contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. **When, for example, the issue involves the credibility of witnesses[,] and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight.**

Id. at 113-14 (emphasis added) (citations omitted). Significantly, the Court stated that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." Id. at 113 (citation omitted).

In Ornelas v. United States, 517 U.S. 690, 691 (1996), the Supreme Court held that the ultimate questions of reasonable suspicion and probable cause are to be reviewed *de novo*. The Supreme Court stated that the "principal components" of the inquiry are a determination of the events leading up to the stop or search, and a determination of whether these

"historical facts" viewed from the standpoint of an objectively reasonable officer give rise to reasonable suspicion or probable cause. Id. at 696. In Ornelas, id. at 691-92, a law enforcement officer observed a two-door General Motors vehicle with California license plates in the parking lot of a motel in Milwaukee. The vehicle "attracted [the officer]'s attention . . . because older model, two-door General Motors [vehicle]s are a favorite [among] drug couriers [as] it is easy to hide things in them; and because California is a 'source State' for drugs." Id. at 692. The officer radioed a dispatcher, and learned that the vehicle's registered owner was one of the two defendants. See id. The officer also learned that, at 4 a.m., the other defendant, accompanied by another man, had checked into the hotel without a reservation. See id.

The officer and his partner contacted the Drug Enforcement Administration, and learned that, according to the Narcotics and Dangerous Drugs Information System, one of the defendants was a heroin dealer from California, while the other defendant was a cocaine dealer from Arizona. See id. The officers summoned a drug detection dog and his handler; however, no dog scan of the vehicle occurred. See id. The defendants left the motel and entered the vehicle. See id. One of the officers approached the vehicle, identified himself, and asked whether the defendants had any drugs or other contraband. See id. The defendants responded: "No." Id. The officer asked for, and received, the defendants' identification. See id. at 692-93. The officer asked for permission to search the vehicle, and the defendants consented. See id. at 693. Another officer—who had searched approximately 2,000 vehicles for drugs—searched the vehicle, and

noticed that a panel above the passenger-side backseat armrest felt somewhat loose. See id. According to the officer, a screw in the doorjamb that was next to the panel was rusty, indicating that it had been removed at some point. See id. The officer dismantled the panel, and found cocaine inside. See id.

The defendants moved to suppress the cocaine, contending that the officers violated the Fourth Amendment by detaining them in the motel's parking lot and searching the vehicle's panel without a warrant. See id. The government conceded that the officers initiated an investigatory stop when they approached the defendants. See id. A magistrate judge determined that the officers had reasonable suspicion to initiate the investigatory stop, but lacked probable cause to search the vehicle. See id. at 694. The United States District Court for the Eastern District of Wisconsin determined that the officers had both reasonable suspicion to initiate the investigatory stop and probable cause to search the vehicle, and concluded that "reasonable suspicion became probable cause when [the officer] found the loose panel." See id. The United States Court of Appeals for the Seventh Circuit concluded that it would reverse "the District Court's determinations of reasonable suspicion and probable cause . . . only upon a finding of 'clear error.'" Id. (cleaned up). The Court of Appeals reasoned that the District Court's determination of reasonable suspicion was not clearly erroneous, but remanded for a determination of whether the officer was credible in testifying about the panel. See id. at 695. On remand, the magistrate judge expressly found the officer's testimony credible, and the District Court again determined that probable cause existed. See id. The

Court of Appeals affirmed, reasoning that the District Court's determination of probable cause was not clearly erroneous. See id.

Significantly, the Supreme Court reversed and remanded the case to the Court of Appeals with instructions to review the District Court's determinations of reasonable suspicion and probable cause without deference. See id. at 700. The Supreme Court distinguished factual questions from legal questions, in the context of determinations of probable cause and reasonable suspicion, as follows:

> The principal components of a determination of reasonable suspicion or probable cause will be the events [that] occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable [law enforcement] officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: The historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the relevant statutory or constitutional standard, or[,] to put it another way, whether the rule of law[,] as applied to the established facts[,] is or is not violated.

Id. at 696-97 (cleaned up). The Supreme Court also discussed "background facts" as follows:

> A trial [court] views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police

> officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee. That city is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. The 85-mile width of Lake Michigan blocks any further eastward progress. And while the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee's average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine is only 38 percent. It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business or to visit family or friends. The background facts, though rarely the subject of explicit findings, inform the [trial court]'s assessment of the historical facts.

Id. at 699.

The Supreme Court observed that it had never expressly deferred to a trial court's determination of reasonable suspicion or probable cause. See id. at 697. The Supreme Court stated that, "as a general matter[,] determinations of reasonable suspicion and probable

cause should be reviewed [without deference] on appeal." Id. at 699. The Supreme Court, however, "hasten[ed] to point out that a[n appellate] court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by [trial court]s and local law enforcement officers." Id. The Court directed that an appellate "court should give due weight to a trial court's finding that [an] officer was credible and [that] the inference was reasonable." Id. at 700.

In Harris, 568 U.S. at 250, the Supreme Court held that a law enforcement officer had probable cause to search a defendant's vehicle where "training records established [a drug detection dog]'s reliability in detecting drugs[,] and [the defendant] failed to undermine that showing[.]" Unlike in Ornelas, 517 U.S. at 691, in Harris, 568 U.S. 237, the Supreme Court was not required to address the applicable standard of review of a probable cause determination. Nor was the Supreme Court in Harris required to address whether the issue of a drug detection dog's reliability is a question of fact or law. In upholding the trial court's determination that a law enforcement officer had probable cause to search a defendant's truck, the Supreme Court explained that a law enforcement "officer has probable cause to conduct a search when the facts [that are] available to [the officer] would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." Id. at 243 (cleaned up). The Supreme Court stated that "evidence of a [drug detection] dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his [or her] alert." Id. at 246.

In Harris, id. at 240, a law enforcement officer was on a patrol with a drug detection dog who had been trained to detect marijuana, cocaine, heroin, ecstasy and methamphetamine. The officer initiated a traffic stop of the defendant's vehicle due to an expired license plate. See id. The officer observed that the defendant "was 'visibly nervous,' unable to sit still, shaking, and breathing rapidly." Id. The officer walked the drug detection dog around the defendant's vehicle, and the drug detection dog alerted to the driver's side door handle. See id. The officer searched the defendant's vehicle, and did not find any drugs; however, the officer found multiple ingredients for making methamphetamine, including pseudoephedrine pills. See id. at 240-41. The officer arrested the defendant, who admitted that he routinely made methamphetamine, and that he could not go for more than a few days without using methamphetamine. See id. at 241. After the defendant was released on bail, the officer initiated another traffic stop of the defendant's vehicle due to a broken brake light. See id. The drug detection dog performed another scan, and alerted to the driver's side door handle again; however, the officer did not find anything of interest while searching the defendant's vehicle. See id. The State of Florida charged the defendant with possession of pseudoephedrine for use in manufacturing methamphetamine. See id.

The defendant moved to suppress the evidence found in his vehicle, contending that the drug detection dog's alert did not provide the officer with probable cause to search the defendant's vehicle. See id. At the hearing on the motion to suppress, the officer testified that, approximately two years before the traffic stops

in Harris, the officer and a different drug detection dog completed a 160-hour course in drug detection. See id. With a different officer, the drug detection dog in Harris completed a 120-hour course in drug detection, and the drug detection dog received a certification—valid for one year—from a company that tested and certified drug detection dogs. See id. The following year, the drug detection dog and the officer became a team, and completed a 40-hour refresher course. See id. For four hours a week, the officer trained the drug detection dog by hiding drugs in certain vehicles or buildings, but not others, to determine whether the drug detection dog alerted to the drugs' locations. See id. The officer testified the drug detection dog's performance during training was "really good." Id. The drug detection dog's training records demonstrated that he always found hidden drugs, and that he performed satisfactorily on each day of training. See id. at 241-42. The officer testified that, although there were no drugs in the defendant's vehicle during either traffic stop, the drug detection dog alerted both times because the defendant had likely transferred a "residual odor" of methamphetamine to the driver's side door handle. See id. at 242.

While cross-examining the officer, the defendant's counsel did not challenge the officer's and the drug detection dog's training. See id. The officer acknowledged that the drug detection dog's certification had expired the year before the traffic stops, but noted that Florida law did not require drug detection dogs to be certified. See id. The officer acknowledged that he made field reports only when the drug detection dog's alert resulted in an arrest. See id.

The trial court denied the motion to suppress, determining that the officer had probable cause to search the defendant's truck. See id. The Florida First District Court of Appeal affirmed. See id. The Supreme Court of Florida reversed, reasoning that, when a drug detection dog alerts, "the fact that the [drug detection] dog has been trained and certified is simply not enough to establish probable cause." Id. (cleaned up). The Supreme Court of Florida concluded that the State of Florida needed to produce

> the [drug detection] dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the [drug detection] dog, as well as any other objective evidence known to the officer about the [drug detection] dog's reliability.

Id. at 242-43 (cleaned up).

The Supreme Court of the United States reversed, concluding that the Florida Court's requirement of a particular set of records was "inconsistent with the flexible, common[]sense standard of probable cause." Id. at 250, 240 (cleaned up). The Supreme Court determined that the Florida Court had "flouted th[e] established approach to determining probable cause" by "creat[ing] a strict evidentiary checklist, whose every item the State must tick off." Id. at 244 (footnote omitted). The Supreme Court critiqued the Florida Court's creation of a checklist as follows:

> Most prominently, an alert cannot establish probable cause under the Florida [C]ourt's decision unless the State introduces comprehensive documentation of the [drug detection] dog's prior "hits" and "misses" in the field. (One wonders how the [Florida C]ourt would apply its test to a rookie [drug detection] dog.) No matter how much other proof the State offers of the [drug detection] dog's reliability, the absent field performance records will preclude a finding of probable cause. That is the antithesis of a totality-of-the-circumstances analysis.

Id. at 244-45.

The Supreme Court explained that the Florida Court's reasoning was also flawed because that Court had "treat[ed] records of a [drug detection] dog's field performance as the gold standard in evidence, when[,] in most cases[,] they have relatively limited import." Id. at 245. The Supreme Court noted that field reports usually do not reflect a drug detection dog's false negatives—*i.e.*, the drug detection dog's failure to alert where drugs are present—because, generally, a search does not ensue in such scenarios. See id. The Supreme Court observed that field reports "may markedly overstate a [drug detection] dog's" false alerts, given that, when a drug detection dog falsely alerts, the drug detection dog "may not have made a mistake at all" because the drug detection "dog may have detected substances that were too well[-]hidden[,] or present in quantities too small for [a law enforcement] officer to locate. Or the [drug detection] dog may have smelled the residual odor of drugs [that were] previously in the vehicle or on the driver's person." Id. at 245-46

(footnote omitted). The Supreme Court explained that, accordingly, in contrast to field reports, training records are "[t]he better measure of a [drug detection] dog's reliability" because they result from "controlled testing environments" in which it is known "where drugs are hidden and where they are not[.]" Id. at 246 (footnote omitted).

In this context, the Supreme Court stated that "evidence of a [drug detection] dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his [or her] alert." Id. The Court provided examples of such evidence of a drug detection dog's satisfactory performance as follows:

> If a bona fide organization has certified a [drug detection] dog after testing his [or her] reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the [drug detection] dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the [drug detection] dog has recently and successfully completed a training program that evaluated his [or her] proficiency in locating drugs.

Id. at 246-47.

The Supreme Court added, however, that a defendant "must have an opportunity to challenge such evidence of a [drug detection] dog's reliability, whether by cross-examining the testifying officer[,] or by introducing his [or her] own fact or expert witnesses." Id. at 247. The Supreme Court provided examples of

ways in which a defendant may challenge a drug detection dog's reliability as follows:

> The defendant . . . may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the [drug detection] dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the [drug detection] dog's (or handler's) history in the field, although susceptible to . . . misinterpretation . . . , may sometimes be relevant[.] . . . And even assuming [that] a [drug detection] dog is generally reliable, [the] circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the [drug detection] dog (consciously or not), or if the team was working under unfamiliar conditions.

Id.

In conclusion, the Supreme Court stated:

> **[A] probable[ ]cause hearing focusing on a [drug detection] dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a [drug detection] dog performs reliably in detecting drugs,**

> **and the defendant has not contested that showing, then the court should find probable cause. If, [by] contrast, the defendant has challenged the State's case (by disputing the reliability of the [drug detection] dog overall or of a particular alert), then the court should weigh the competing evidence.** In all events, the court should not prescribe, as the [] Supreme Court [of Florida] did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a [drug detection] 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. A sniff is up to snuff when it meets that test.

Id. at 247-48 (emphasis added).

Notably, in evaluating the case, the Supreme Court held that "**[t]he record in this case amply supported the trial court's determination that [the drug detection dog]'s alert gave [the officer] probable cause to search [the defendant]'s truck.**" Id. at 248 (emphasis added). Specifically, the Supreme Court observed that the State had produced "substantial evidence of [the drug detection dog]'s training and his proficiency in finding drugs." Id. And, the officer testified, and the drug detection dog's training "records confirmed, that [the drug detection dog] always performed at the highest level" during training. Id. The Supreme Court concluded that the drug detection dog's completion of two recent courses in

drug detection, as well as his weekly training, "sufficed to establish [the drug detection dog]'s reliability"—"with or without the prior certification[.]" Id. at 249. As to the ultimate issue of probable cause, the Supreme Court concluded that the officer "had good cause to view [the drug detection dog] as a reliable detector of drugs. And no special circumstance here gave [the officer] reason to discount [the drug detection dog]'s usual dependability[,] or distrust his response to [the defendant]'s truck." Id. at 249-50.

The Supreme Court noted that the defendant had not challenged the drug detection dog's training in the trial court, and thus could not do so for the first time on appeal. See id. at 248-49. The Supreme Court concluded that the defendant's cross-examination of the officer, "which focused on [the drug detection dog]'s field performance, failed to rebut the State's case." Id. at 249. The Supreme Court was unpersuaded by the defendant's reliance in the trial court on the drug detection dog's false alerts during the traffic stops in Harris. See id. The Supreme Court reiterated that it was inappropriate to "infer[] too much from" a false alert. Id. The Supreme Court further explained that the drug detection dog's false alerts were likely due to odors that the defendant had transferred to the driver's side door handle, as the defendant regularly made and used methamphetamine. See id. The Supreme Court stated: "A well-trained drug-detection dog *should* alert to such odors; his [or her] response to them might appear a mistake, but in fact is not. And still more fundamentally, we do not evaluate probable cause in hindsight, based on what a search does or does not turn up." Id. (emphasis in original) (citations omitted).

Analysis

Here, we conclude that the ultimate question of probable cause to conduct a warrantless search of a vehicle based on a drug detection dog's alert is reviewed *de novo*; *i.e.*, the standard of review as to the issue of probable cause to search based on a drug detection dog's alert is *de novo*. A determination of probable cause involves a two-step process. First, a court must identify all of the relevant historical facts that were known to the officer at the time of the search and, if necessary, any relevant or disputed background facts. Second, the court must determine whether those facts give rise to probable cause to search. We conclude 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. Accordingly, an appellate court reviews for clear error a trial court's finding as whether a drug detection dog is, or is not, reliable.

We begin by discussing how to distinguish factual questions from legal questions. Generally, where an issue falls between a pristine legal question and a factual matter, the issue is treated as a factual question where a trial court "is better positioned than [an appellate court] to decide the issue[.]" Miller, 474 U.S. at 114. And, an issue is a factual question where "the issue involves the credibility of witnesses[,] and therefore turns largely on an evaluation of demeanor[.]" Id. By contrast, generally, an issue is a legal question "where the relevant legal principle can be given meaning only through its application to the particular circumstances of a case[.]" Ornelas, 517 U.S.

at 697 (quoting Miller, 474 U.S. at 114) (internal quotation marks omitted).

Even where an issue is a legal question, the issue may involve "subsidiary factual questions[.]" Miller, 474 U.S. at 112. For example, although the issue of whether a defendant's confession was voluntary is a legal question, the issue involves the following "subsidiary factual questions": the interrogation's "length and circumstances"; "the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings"; whether the defendant took a drug that had "the properties of a truth serum"; and whether law enforcement officers "engaged in [] intimidation tactics[.]" Id. at 110, 112, 117 (citations omitted). Similarly, although the issue of whether probable cause for a search exists is a legal question, the issue may involve both "historical facts" and "background facts[.]" Ornelas, 517 U.S. at 691, 700. Historical facts are the events that give rise to a case—*e.g.*, the fact that a car with California license plates was parked in the parking lot of a motel in Milwaukee. See id. at 691-92. Meanwhile, background facts include generally-known circumstances that may be relevant to a case—for example, the fact that a person who is traveling from California to points east is "unlikely" to choose to stay overnight in Milwaukee. Id. at 699. In describing background facts, the Supreme Court stated that "a police officer views the facts through the lens of his police experience and expertise[,]" and "[t]he background facts provide a context for the historical facts[.]" Id.

Although the ultimate issue of whether probable cause existed is a legal question, resolution of the issue

may involve the determination of factual questions. We are convinced that an issue as to a drug detection dog's reliability is one such factual question. Much like whether a law enforcement officer has the experience and expertise to detect the odor of a controlled dangerous substance, the issue of whether a drug detection dog is reliable, *i.e.*, has the requisite training and experience to be reliable, is a factual question. The actual detection of an odor of a controlled dangerous substance by a law enforcement officer and a drug detection dog's alert to the odor of a controlled dangerous substance in a vehicle are historical facts, *i.e.*, events that occur leading up to a warrantless search. By contrast, the experience and expertise of a law enforcement officer and the training and field performance by a drug detection dog are background facts, *i.e.*, general "facts [that] provide a context for the historical facts, and when seen together yield inferences that deserve deference." Ornelas, 517 U.S. at 699. A background fact may range from a circumstance that is generally known, such as the weather on a particular day, to a fact involving a law enforcement officer's knowledge based on his experience and expertise. A drug detection dog's alert and reliability are critical facts in the probable cause determination. As such, it cannot be said that, when disputed, a drug detection dog's reliability is a simple background fact. Rather, it is a background fact, the determination of which largely informs the determination of probable cause based on a drug detection dog's alert. Both historical and background facts, including those that fall between a clear legal issue and simple fact, are reviewed for clear error.

Plainly, a trial court is better positioned than an appellate court to determine whether a drug detection dog is reliable. This is because the issue of a drug detection dog's reliability requires a trial court to, among things, assess the credibility of witnesses; to review, where available, a recording of the drug detection dog's scan; to determine the weight to be given documentary evidence, such as the drug detection dog's training records, field reports, and certifications; to consider the qualifications of any experts, and assess their credibility and opinions about the evidence; and to determine whether, under the totality of the circumstances, the drug detection dog is reliable.

The circumstances of this case demonstrate that a trial court is better-equipped than an appellate court to determine a drug detection dog's reliability. The circuit court admitted into evidence a recording of the traffic stop from the dashboard camera in Sergeant Lamb's vehicle. With the recording, both the circuit court and the expert witnesses were able to view the entirety of Ace's scan of the Honda. The recording was played during the testimony of both Sergeant Davis, one of the State's experts, and Cox, one of Grimm's experts. Sergeant Davis and Cox pointed out and explained various events in the recording, such as the circumstance that Ace was barking before Officer Keightley commanded him to search. Sergeant Davis testified that Ace's barking was simply a sign that he was "still a little bit excited[,]" and explained that Officer Keightley calmed Ace before commanding him to search. By contrast, Cox opined that a dog barking excessively may cause a loss of energy and affect the dog's performance. Although we have access to both the recording and a transcript of Sergeant Davis's and

Cox's testimony, we lack the circuit court's ability to view the recording simultaneously with Sergeant Davis and Cox, with them making observations about the recording while testifying.

The circuit court properly made determinations as to the expert witnesses' credibility. Just as the expert witnesses had conflicting interpretations of the events in the recording, so, too, did the expert witnesses have conflicting interpretations of other evidence. For example, the evidence showed that, on May 17, 2014—nearly a month after the traffic stop on April 19, 2014—pursuant to Officer McNerney's recommendation, Officer Keightley and Ace were decertified as a result of an issue with regard to the calculation of the number of Ace's training hours. As one of Grimm's experts, Officer McNerney testified that he recommended that Officer Keightley and Ace be decertified because, according to Ace's training records, he was not trained the sixteen hours a month that was required for certification. By contrast, Sergeant Davis testified that she would not have decertified Ace on that basis, as his "skills . . . were not affected one iota by the way" in which his training hours were calculated. Sergeant Davis testified that the issue with regard to how the number of hours of Ace's training was calculated did not affect Officer Keightley's and Ace's January 22, 2014 certification, explaining: "Either [Ace] knows the odors[,] or he does[not]. And he can perform, or he cannot." The circuit court expressly found credible Sergeant Davis's opinion about the issue of calculating the number of hours of Ace's training, stating: "[W]hen I went over and examined everything and everything over and over and over again, I could not get this comment out of my mind. ['Ace] knows the odor[,] or he

does[not]. He can perform[,] or he can[not.']" Although the record includes, among other things, documentary evidence and a transcript of the expert witnesses' testimony, we lack the circuit court's ability to consider the evidence with the benefit of observing the expert witnesses' demeanor and level of certainty while testifying.

The circuit court was better positioned to determine the expert witnesses' credibility and whether the expert witnesses displayed demeanors that were indicative of bias. Here, the circuit court expressly found Sergeant Davis "to be the most credible witness[,]" and found that she was "neutral and unbiased" and had "no ties to th[is] case[.]" By contrast, although the circuit court deemed Cox and Officer McNerney also credible, the circuit court found that they had "some bias"; that "there [was] dissension in the ranks"; and that, while testifying, Cox and Officer McNerney "air[ed] dirty laundry." In one instance, Officer McNerney testified that "it was tough" to train dogs in both explosive detection and drug detection, and that he "went to command and asked to make that a full-time position due to the fact that [he] was being detailed out[,]" but his request was denied. In a similar vein, Cox testified, with regard to the circumstance that the Maryland Transportation Authority Police K-9 Standard Operating Procedures did not require analysis of the purity of narcotic aids: "I wish [that] I could speak about the steps and measures that I took [] to try to clear this up, but I[am] not allowed to[.]" Cox also testified at one point that he thought Officer Keightley was "basically, just like a rogue police." Because an appellate court can only read a transcript, rather than see and hear testimony firsthand, the

appellate court lacks the circuit court's ability to assess the witness's attitude and demeanor, which may be indicative of bias and is relevant to a credibility determination.

Contrary to Grimm's assertions, a trial court may properly assess an expert witness's credibility, and make decisions based on its impression of an expert witness's credibility. In Smallwood v. State, 451 Md. 290, 309 n.15, 152 A.3d 776, 786 n.15 (2017), this Court rejected a defendant's contention that this Court should review a trial court's ruling on a petition for a writ of actual innocence under the *de novo* standard of review, as opposed to the abuse of discretion standard of review. This Court concluded that the correct standard of review was abuse of discretion because, "[u]nder well-established rules of appellate review, this Court is not a fact-finder, and we cannot set aside the [trial court]'s **credibility assessments** of [the defendant's psychiatric expert]'s and [the State's psychiatric expert]'s respective testimony." Id. at 309 n.15, 152 A.3d at 786 n.15 (emphasis added). Thus, in Smallwood, id. at 309 n.15, 152 A.3d at 786 n.15, this Court not only indicated that a trial court may assess an expert's credibility, but also determined that such a credibility assessment is entitled to deference.

Consistently, in various instances, this Court has referred to the "credibility" of expert witnesses. See, e.g., Falik v. Hornage, 413 Md. 163, 178, 991 A.2d 1234, 1243 (2010) ("Obviously, a party has a strong interest in the fact-finder's assessment of the credibility of its expert witnesses. . . . [T]he fact that an expert witness is being paid to testify may bear on his or her credibility and may be revealed through cross-

examination." (Citations omitted)); McGhie v. State, 449 Md. 494, 512, 144 A.3d 752, 763 (2016) ("[W]hen an expert is called to testify, it is conceivable that, based on the cumulative body of evidence [that is] presented at a given trial, falsity regarding the expert's credibility and qualifications might create a substantial or significant possibility that the result may have been different." (Cleaned up)); Derr v. State, 434 Md. 88, 134, 73 A.3d 254, 281 (2013) ("The [jury] instructions [that were] given sufficiently protected [the defendant]'s right to have the jury judge the credibility of all the evidence[,] including [the] testimony[of an expert in forensic serology and forensic DNA analysis].").

In addition to the circuit court being in a superior position to determine Ace's reliability, our conclusion is supported by the Supreme Court's holding in Harris, 568 U.S. at 248-50, in which the Supreme Court essentially followed the two-step process for appellate review of the issue of probable cause set forth in Ornelas, 517 U.S. at 696-97, 699-700—namely, (1) identifying all of the relevant historical facts that were known to the officer at the time of the search, and (2) determining whether those facts give rise to probable cause to search. In Harris, id. at 249, the Supreme Court determined that the drug detection dog's completion of two recent courses in drug detection, and his weekly training, sufficed to establish the drug detection dog's reliability. Next, the Court determined that the officer "had good cause to view" the drug detection dog as reliable, and that there were no circumstances that gave the officer reason to discount the drug detection dog's reliability. Id. at 249-50. The Supreme Court determined the factual

question of the drug detection dog's reliability, and then, under the totality of the circumstances, determined the issue of probable cause. See id.

Indeed, in Harris, id. at 248, the Supreme Court stated: "**The record in this case amply supported the trial court's determination** that [the drug detection dog]'s alert gave [the officer] probable cause to search [the defendant]'s truck." (Emphasis added). The Supreme Court's use of the language "[t]he record in this case amply supported the trial court's determination" would have had no meaning if the Court were reviewing the trial court's reliability determination without deference. To the contrary, this language indicates that the Supreme Court viewed the trial court's reliability determination as a finding of fact, which would be upheld if it were supported by the record. See Cooper v. Harris, ___ U.S. ___, 137 S. Ct. 1455, 1465 (2017) ("[F]indings of fact . . . are subject to review only for clear error. . . . A finding that is plausible in light of the full record—even if another is equally or more so—must govern." (Cleaned up)). The language in the Supreme Court's holding in Harris, 568 U.S. at 248, is telling. The Supreme Court's language is consistent with the conclusion that the trial court's reliability determination was not a conclusion of law, but instead was a finding of fact—*i.e.*, a resolution of one of the factual questions involved in the issue of determining whether probable cause existed.

Our conclusion that a trial court's reliability determination is a finding of fact is supported not only by manner in which the Supreme Court phrased its holding in Harris, but also by the manner in which the Supreme Court reviewed the trial court's

determinations. Instead of re-weighing the evidence or independently determining the credibility of the officer who handled the drug detection dog, the Supreme Court summarized the evidence of the drug detection dog's training and his proficiency in finding drugs. See id. at 248-49. The Supreme Court concluded that the drug detection dog's completion of two recent courses in drug detection, as well as his weekly training, "sufficed to establish [the drug detection dog]'s reliability." Id. at 249 (citation omitted). The Supreme Court stated that the defendant had not challenged the drug detection dog's training in the trial court, and determined that the defendant "failed to undermine" the circumstance that the drug detection dog's training records established his reliability. Id. at 249-50. The Supreme Court explained that "evidence of a [drug detection] dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his [or her] alert." Id. at 246. The Supreme Court specifically stated that, "[i]f a bona fide organization has certified a [drug detection] dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the [drug detection] dog's alert provides probable cause to search." Id. at 246-47. This analysis is a strong indication that the Supreme Court viewed the trial court's reliability determination as a factual determination, to be upheld as long as it was "plausible in light of the full record[.]" Cooper, 137 S. Ct. at 1465 (cleaned up).

It is also worth noting that, in critiquing the Florida Court's creation of "a strict evidentiary checklist," the Supreme Court stated that the Florida Court had done "the very thing" that the Supreme Court had "criticized

in" Illinois v. Gates, 462 U.S. 213, 233 (1983), in which the Supreme Court "overhauled [its] method for assessing the trustworthiness of an informant's tip." Harris, 568 U.S. at 244-45. In Harris, id. at 245, the Supreme Court explained: "No more for [drug detection] dogs than for human informants is [] an inflexible checklist the way to prove reliability, and thus establish probable cause." Given that the Supreme Court warned against distinguishing drug detection dogs from "human informants" for purposes of establishing reliability, id., it makes sense to also avoid distinguishing drug detection dogs from humans, whether informants or law enforcement officers, for purposes of the standard of review. For example, where a law enforcement officer testified that he or she smelled an odor of marijuana emanating from a vehicle, and a trial court determined that the officer's testimony was credible, the trial court's determination would obviously be a finding of fact, not a conclusion of law. Likewise, where a law enforcement officer receives information from an informant that gives rise to probable cause for a search, the issue of the informant's reliability would be a question of fact as opposed to an issue of law. Similarly, where a trial court determines that a drug detection dog is reliable, the trial court is essentially determining that the drug detection dog had the ability to accurately detect an odor of a controlled dangerous substance. It makes little sense to treat a trial court's reliability determination as a conclusion of law, rather than a finding of fact, because it was a drug detection dog, rather than a law enforcement officer, who detected the controlled dangerous substance.

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. We are unpersuaded by Grimm's reliance on the circumstance that, in Harris, the Supreme Court did not expressly raise any issue as to the circumstance that the Supreme Court of Florida engaged in review without deference. In Harris v. State, 71 So. 3d 756, 765 (Fla.), as revised on denial of reh'g (Sept. 22, 2011), the Florida Court stated:

> [T]he question presented concerns the showing that the State must make to establish probable cause for a warrantless search of a vehicle based on a drug[] detection dog's alert to the vehicle. This issue involves a trial court's determination of the legal issue of probable cause, which we review de novo.

(Citations omitted). The first case that the Florida Court relied upon in support of this proposition was Ornelas, 517 U.S. at 699. Respectfully, Ornelas, id., does not support the proposition that an appellate court reviews without deference a trial court's reliability determination. To the contrary, as discussed above, the Supreme Court's holding in Ornelas, id. at 699-700, indicates that, although the issue of whether probable cause exists is a legal question, the issue may involve underlying factual questions regarding both historical and background facts.

It is of no consequence that, in Harris, the Supreme Court did not expressly refer to the standard of review that the Florida Court had employed. There was no need for the Supreme Court to do so, as the standard of review that the Florida Court had employed was not the subject of the petition for writ of *certiorari—i.e.*, the standard of review was not the issue in the Supreme

Court's review of the Florida Court's decision. Rather, the issue was whether the Florida Court had erred in creating a strict evidentiary checklist, whose every item the State must tick off. See Harris, 568 U.S. at 244.

We are unpersuaded by Grimm's argument that non-deferential review of a trial court's reliability determination is necessary for appellate courts to maintain control of the probable cause standard. Our holding will not affect the well-established principle that an appellate court reviews without deference a trial court's probable cause determination. See Ornelas, 517 U.S. at 691. We simply hold that, within the probable cause analysis, the issue of whether a drug detection dog is reliable is a factual question. After 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.

We reject Grimm's contention that deferring to a trial court's determination of an expert witness's "credibility" is inappropriate where, as here, that determination is likely to be dispositive of the issue of whether probable cause existed. "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." Miller, 474 U.S. at 113 (citation omitted). The circumstance that an expert opinion may be dispositive does not furnish any basis for providing a defendant who failed to convince a trial court that a drug detection dog was unreliable with a second bite at the apple in an appellate court.

Grimm barks up the wrong tree in asserting that, because there are no generally accepted standards in Maryland regarding the training and certification of drug detection dogs, appellate courts must provide guidance to law enforcement agencies. The Fourth Amendment does not require such standards. Indeed, in Harris, 568 U.S. at 249, 242, the Supreme Court concluded that evidence of the drug detection dog's training "sufficed to establish [the drug detection dog]'s reliability[,]" even though the drug detection dog's certification expired the year before the traffic stop. Just as no constitutional provision requires set standards for the training and certification of drug detection dogs, no Maryland statute does, either.

We find no merit in Grimm's contention that, if appellate courts review trial courts' reliability determinations for clear error, a drug detection dog might be considered reliable in one county or one courtroom, but not another. Just as probable cause determinations are case-specific, so, too, are reliability determinations. See id. at 244, 247-48 ("In evaluating whether the State has met th[e] practical and common[sense] standard[of probable cause], we have consistently looked to the totality of the circumstances. . . . [T]he court should then evaluate the proffered evidence to decide what all the circumstances demonstrate."). When the issue is contested, whether a trial court will find a drug detection dog reliable in a particular case depends not only on the drug detection dog's training records, but also on all of the other evidence in the case, such as expert testimony, which may vary from case-to-case concerning the same dog, lay witness testimony, a recording (when available),

and a description of the circumstances of the drug detection dog's scan and alert.

In sum, we agree with the conclusion of the Court of Special Appeals that the question of whether a drug detection dog is reliable is a question of fact "best left to the [trial court that] hears the evidence, and [is] best reviewed under a 'clearly erroneous' standard that gives deference to [the trial court]'s superior opportunity to evaluate credibility and weigh the evidence." Grimm, 232 Md. App. at 403-04, 158 A.3d at 1050 (citations omitted).

II.

The Parties' Contentions

Grimm contends that, no matter which standard of review applies to the circuit court's reliability determination, the circuit court erred in determining that Sergeant Lamb had probable cause to search Grimm's vehicle. Grimm argues that, if the applicable standard of review is review for clear error, then the circuit court clearly erred in finding Sergeant Davis the most credible witness. Grimm asserts that the circuit court was wrong in finding that Sergeant Davis was not biased, as she certified Officer Keightley and Ace on August 19, 2014, and thus was invested in this case's outcome. Grimm maintains that the circuit court's finding that there was "dissension in the ranks" as to Cox and Officer McNerney was in the context of the circuit court's finding that they were credible and "good and fair in their analysis."

Grimm contends that Ace did not meet the minimum of sixteen hours of monthly training that was required for certification, and points out that, nearly a

month after the traffic stop, Officer Keightley and Ace were decertified as a result of the issue with regard to how the number of hours of Ace's training was calculated. Grimm argues that, because the issue of Ace's training hours predated the traffic stop, Officer Keightley and Ace were "not actually certified in any meaningful sense" when the traffic stop occurred. Grimm contends that Sergeant Davis's certification of Officer Keightley and Ace approximately four months after the traffic stop reveals little, if anything, about Ace's reliability at the time of the traffic stop. Grimm notes that, according to Cox, between April 15, 2013 and March 24, 2014, during Ace's training, he performed 179 scans, and falsely alerted 44 times—*i.e.*, 25% of the time. Grimm contends that the circumstances surrounding Ace's scan of the Honda showed that he was unreliable. Grimm observes that Ace alerted to the driver's door, even though the drugs were found near the passenger door. Grimm notes that, even though Ace would alert without being commanded to search, he did not alert when he walked by the open passenger-side window.

The State responds that the totality of the circumstances, including Ace's alert, established probable cause for the search. The State notes that the circuit court found that, in addition to Ace's alert, Sergeant Lamb considered the behavior of the Honda's occupants to be "indicia" that he was dealing with "a drug dealer[.]" The State contends that the circuit court did not clearly err in finding Sergeant Davis to be the most credible witness concerning Ace's reliability. The State argues that, as a member of the Montgomery County Police Department's K-9 Unit, Sergeant Davis was "the only outside observer[,]" and was not subject

to bias, as Cox and Officer McNerney were. The State asserts that Sergeant Davis was the only witness to have conducted a comprehensive review of all of Ace's training records from his initial training in 2012 to July 2014, and that she opined that Ace performed satisfactorily during his training.

The State points out that, in the field, Ace alerted 51 times, and falsely alerted 19 times, or 37% of the time; however, with regard to 10 of the 19 false alerts, one of the vehicle's occupants admitted that drugs had recently been in the vehicle. The State contends that, accordingly, in the field, Ace's percentage of false alerts was 18%, and his percentage of accuracy was 82%. The State observes that the circuit court found credible Sergeant Davis's opinion that Ace alerted on Grimm's vehicle, and that there was no evidence of a false alert.

Analysis

We hold that the circuit court did not clearly err in finding that Ace was reliable, and that the circuit court correctly concluded that Sergeant Lamb had probable cause to search Grimm's vehicle. In this case, the circuit court's assessment of the experts' credibility was critical to the circuit court's reliability determination. Indeed, the circuit court stated: "I[am] not an expert. . . . I must rely upon the expert testimony"; "I cannot analyze this case without telling you who[m] I find to be the most credible witness." After finding Sergeant Davis "to be the most credible witness[,]" the circuit court "accept[ed]" Sergeant Davis's opinion that Ace "was competent"—*i.e.*, reliable. In reviewing the circuit court's reliability determination, we must ascertain whether the circuit court clearly erred. We readily conclude that there was no such clear error.

"The appellate court views the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." Varriale, 444 Md. at 410, 119 A.3d at 830 (citation omitted). A trial court's finding of fact "is not clearly erroneous if the record shows that there is legally sufficient evidence to support it." Kusi v. State, 438 Md. 362, 380, 91 A.3d 1192, 1202 (2014) (cleaned up). And, an appellate court must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. R. 8-131(c).

Here, the circuit court's finding that Ace was reliable was not clearly erroneous. To begin, the evidence substantiates the circuit court's finding that Sergeant Davis was the most credible expert witness. Sergeant Davis's "qualifications, [] knowledge, [] training[,] and experience [were] impeccable[.]" At the time of the hearing, Sergeant Davis had approximately seven or eight years of experience as a K-9 handler and approximately fifteen or sixteen years of experience as a K-9 trainer, including approximately seven years as the Montgomery County Police Department's K-9 Unit's head trainer. During one of her years as a trainer, Sergeant Davis was one of the top twenty K-9 officers in the United States Police Canine Association's Patrol Dog Field Trials. For approximately five years, Sergeant Davis answered questions about training dogs in Police K-9 Magazine. Sergeant Davis had run events at the United States Police Canine Association's national training seminar, and had given presentations at Police K-9 Magazine's conference. Sergeant Davis had managed a total of five

K-9 teams, trained a total of sixty-five K-9 patrol teams, and trained a total of thirty-six K-9 detection teams.

The evidence substantiates the circuit court's finding that Sergeant Davis was "neutral and unbiased"; that she was "the best and most objective observer"; and that she "ha[d] no ties to th[is] case[.]" Sergeant Davis was not paid for her testimony, apart from what she was paid for being on duty while testifying. Sergeant Davis was the only expert witness who had never been a member of the Maryland Transportation Authority Police's K-9 Unit. As far as the record reveals, Sergeant Davis's only interaction with Officer Keightley and/or Ace occurred approximately four months after the dog scan in question. Specifically, on August 19, 2014, Sergeant Davis and two other members of the Montgomery County Police Department's K-9 Unit served as judges in the Maryland Transportation Authority Police's K-9 Unit's certification process, in which Officer Keightley and Ace were successful.

We reject Grimm's contention that Sergeant Davis was biased because she had previously certified Officer Keightley and Ace on August 19, 2014, after the dog scan in question. By certifying Officer Keightley and Ace, Sergeant Davis did not indicate that Ace had been reliable at all times prior to August 19, 2014; instead, Sergeant Davis simply determined that, on that particular date, Ace performed satisfactorily on the tests that were part of the certification process. Indeed, there is no evidence that Sergeant Davis reviewed any of Ace's training records or field reports on or before August 19, 2014. As far as the record reveals, Sergeant

Davis did not know Officer Keightley or Ace or review Ace's training records until she prepared for her testimony in this case, at which point she assessed, for the first time, whether Ace was reliable at the time of the dog scan on April 19, 2014.

The evidence of Sergeant Davis's credibility is even more pronounced upon comparing her circumstances to those of Grimm's experts, Cox and Officer McNerney. Despite labeling Cox and Officer McNerney credible,[10] the circuit court found that they had "some bias"; that "there [was] dissension in the ranks"; and that, while testifying, Cox and Officer McNerney "air[ed] dirty laundry." An example of this is Cox's testimony that he wished that he could testify, but was not permitted to speak, about "the steps and measures that [he] took [] to try to clear [] up" the circumstance that the Maryland Transportation Authority Police K-9 Standard Operating Procedures did not require analysis of the purity of narcotic aids. In the circuit court's words, Cox's view appeared to be that: "[T]hey did[not] do it today as I did it then[.]" It is also worth noting that Cox earned approximately between $4,000

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[10] At oral argument, in response to a question about what the circuit court meant when it found Cox and Officer McNerney credible while finding Sergeant Davis the most credible, the Assistant Attorney General responded that he thought that the circuit court did not believe that any of the witnesses were lying, and that the circuit court was "attempting to be polite" to Cox and Officer McNerney, who were "reputable" and "credentialed." Consistently, the Court of Special Appeals referred to the circuit court's finding that Cox and Officer McNerney were credible as a "judicious exercise of courtroom courtesy[.]" Grimm, 232 Md. App. at 404, 158 A.3d at 1050. We agree with the State and the Court of Special Appeals on this matter.

and $5,000 working on this case, unlike Sergeant Davis, who was not paid, apart from what she was paid for being on duty while testifying. With regard to Officer McNerney, the circuit court stated that his position appeared to be that: "[Y]ou[are] not listening to me." The record supports the circuit court's finding. Officer McNerney testified that command staff initially denied his request for his position to be made full-time, and that he stepped down as a trainer due to his concerns about the lack of training. Officer McNerney testified that, in the same month in which he was "was ordered back" to the K-9 Unit as a full-time trainer, he met with his superiors regarding training deficiencies within the K-9 Unit. Additionally, Officer Keightley and Ace were decertified pursuant to Officer McNerney's recommendation.

In addition to the findings with respect to Sergeant Davis's credibility and lack of bias, the record reflects that Sergeant Davis's qualifications were objectively superior to Cox's and Officer McNerney's. Cox had approximately three years of experience as a handler, and approximately twelve years of experience as a trainer. Officer McNerney had approximately three years of experience as a handler, and approximately five years of experience as a trainer. By contrast, Sergeant Davis had approximately seven or eight years of experience as a K-9 handler and approximately fifteen or sixteen years of experience as a K-9 trainer. Additionally, unlike Sergeant Davis, neither Cox nor Officer McNerney testified that he had participated in national training seminars and conferences, earned a distinction in a national police dog field trial, or been published in the field of training police dogs.

A drug detection dog's training records constitute the most probative evidence of his or her reliability. As the Supreme Court explained in Harris, 568 U.S. at 246, compared to a drug detection dog's field reports, his or her training records are "[t]he better measure of [his or her] reliability" because they result from "controlled testing environments." (Footnote omitted). Consistent with the Supreme Court's holding in Harris, Sergeant Davis testified that Ace's field reports did not have "as much bearing" as his training records, because Ace's training took place in environments that were more controlled than those in the field.

In this case, Ace's training records alone constituted more than enough evidence to support the circuit court's reliability determination. The Supreme Court concluded in Harris, 568 U.S. at 249, that a sufficient amount of training alone can "suffice[] to establish [a drug detection dog]'s reliability." (Citation omitted). As to Ace's training records, the record reveals that, in testifying about Ace's alleged false alerts, Sergeant Davis and Cox referenced training records from different time periods. Specifically, Sergeant Davis testified about Ace's training records from 2013, in which Ace was in a total of 209 scenarios, and falsely alerted on only 24 occasions. In other words, in 2013, Ace falsely alerted approximately just 11% of the time. In contrast, Cox testified about Ace's training records from April 15, 2013 to March 24, 2014, during which Cox calculated that Ace was in a total of 179 scenarios, and falsely alerted on 44 occasions. In other words, under Cox's calculation, between April 15, 2013 and March 24, 2014, Ace falsely alerted approximately 25% of the time. We need not determine which of these two time periods was more indicative of Ace's reliability, as

Sergeant Davis reviewed Ace's training records from his initial training in 2012 to July 2014, and testified that Officer Keightley and Ace performed satisfactorily during the course of training. Even if we considered Ace's percentage of false alerts of 25% during the time period that Cox referenced, that percentage is not dispositive in light of Sergeant Davis's opinion that she did not consider any "particular amount" of false alerts to be "acceptable or unacceptable." Moreover, as Sergeant Davis pointed out that there is no industry standard with regard to an unacceptable number of false alerts; and, as Cox acknowledged, there are no State-wide requirements for drug detection dogs.

Grimm fails to effectively undermine the circuit court's reliability finding by pointing to alleged flaws in Ace's training. The bottom line is that the circuit court considered all of the evidence, including the expert witness testimony, and found the most credible witness to be Sergeant Davis—who opined that Ace was competent, and that he performed satisfactorily during training. Although the evidence of Ace's training alone supports the circuit court's reliability finding, we observe that Officer Keightley's and Ace's certifications provide even more support for that finding. As the Supreme Court explained in Harris, 568 U.S. at 246-47, "[i]f a bona fide organization has certified a [drug detection] dog after testing his [or her] reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the [drug detection] dog's alert provides probable cause to search." Here, Officer Keightley and Ace were certified four times before the dog scan in question, and twice afterward. At the time of the dog scan on April 19, 2014, Officer McNerney had most recently certified Officer Keightley

and Ace on January 22, 2014. That certification was valid for six months, and thus was valid at the time of the dog scan, as Officer McNerney acknowledged. And, even though Officer McNerney caused Officer Keightley and Ace to be decertified approximately one month after the dog scan, Officer McNerney recertified Officer Keightley and Ace just two days later.

We acknowledge that a drug detection dog's field reports, "in most cases[,] have relatively limited import." Id. at 245. For what it is worth, however, we observe that, according to Ace's field reports, between July 6, 2012 and April 19, 2014, Ace alerted to vehicles 51 times. Of those 51 occasions, no drugs were found in the vehicle 19 times. That said, with regard to 10 of the 19 alerts to vehicles, one of the vehicle's occupants admitted that drugs had recently been in the vehicle. As the Supreme Court stated in Harris, a drug detection dog's percentage of false alerts in the field may be "markedly overstate[d]" due to the circumstance that "[t]he [drug detection] dog may have detected substances that were too well[-]hidden[,] or present in quantities [that were] too small for [a law enforcement] officer to locate. Or the [drug detection] dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person." Id. at 245-46 (footnote omitted). The whole of the evidence, including Ace's training records and field performance, established that Ace was reliable. For all of the above reasons, the circuit court's reliability determination was not clearly erroneous, and, upon *de novo* review, under the totality of the circumstances, Sergeant Lamb had probable cause to search Grimm's vehicle.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. PETITIONER TO PAY COSTS.

Concurring Opinion by Adkins, J.

Most respectfully, I write separately because while I concur that Ace was reliable, and probable cause was satisfied here, I reach a different conclusion regarding the appropriate standard of review for a drug-detecting dog's reliability. The Majority explains that while probable cause to search a vehicle based on a drug dog's alert is reviewed without deference, the question of whether the dog is reliable is one of fact and should therefore be reviewed for clear error. Maj. Slip Op. at 48. I disagree. *Florida v. Harris*, 568 U.S. 237, 247–48 (2013), has established that determining whether a dog is reliable requires an analysis of the totality of the circumstances, which this Court has always reviewed as a question of law. *State v. Wallace*, 372 Md. 137, 144 (2002). Therefore, a trial court's assessment of reliability should be reviewed without deference.

A law enforcement officer may search a vehicle without a warrant if the officer has probable cause. *See Robinson v. State*, 451 Md. 94, 108–109 (2017). Probable cause exists where, based on the available facts, a person of reasonable caution would believe that "contraband or evidence of a crime is present." *Harris*, 568 U.S. at 243. It is a "nontechnical common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible by the trial judge." *Wallace*, 372 Md. at 148. When a "properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless '*Carroll* [*v. United States*, 267 U.S. 132 (1925)]' search of the vehicle." *Id.* at 146.

In *Harris*, 568 U.S. at 240, the Supreme Court addressed how a court should decide if a dog's alert provides probable cause to search a vehicle. The Florida Supreme Court had held that to demonstrate whether a drug-detection dog is reliable, the State had to satisfy a list of specific evidence showing the dog's reliability. *Id.* at 242–43. The Court reversed, reiterating that evaluating whether the State has satisfied probable cause depends on the totality of the circumstances, and a checklist approach "flouted this established approach to determining probable cause." *Id.* at 244.

The Court drew parallels between *Harris* and *Illinois v. Gates*, 462 U.S. 213 (1983). In *Gates*, *id.* at 233, the Court concluded that an informant's veracity, historical reliability, and basis of knowledge are all "relevant considerations" in a totality of the circumstances analysis to determine the "overall reliability of a tip." A deficiency in one area may be compensated for by a strong showing of other areas proving general reliability. *Id. Harris* imported this analysis, explaining that "[n]o more for dogs than for human informants is such an inflexible checklist the way to **prove reliability, and thus establish probable cause**." 568 U.S. at 245 (emphasis added).

The Court established a procedure for suppression hearings addressing whether a dog's alert provided probable cause. If the dog has been certified by a "bona fide organization" after his reliability has been tested in a controlled setting, then a court may presume that the alert provides probable cause. *Id.* at 246–47. Even if the dog is not formally certified, if it has "recently and successfully completed a training program that

evaluated his proficiency in locating drugs," then the same presumption exists. *Id.* at 247. A defendant must have a chance to challenge this evidence of reliability, and the Court posited various avenues a defendant may use to refute that evidence. This procedure contemplated a totality of the circumstances analysis to find that a dog is reliable. "Even assuming a dog is generally reliable," the Court cautioned, "**circumstances surrounding a particular alert may undermine the case for probable cause**—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions." *Id.* (emphasis added).

In summarizing this procedure, the Court laid out the appropriate analysis and test:

> In short, **a probable-cause hearing focusing on a dog's alert should proceed much like any other**. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. **And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate**. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of

> evidentiary requirements. **The question—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. A sniff is up to snuff when it meets that test**.

Id. at 247–48 (emphasis added).

The Majority makes much of the Supreme Court's pronouncement that "[t]he record in this case amply supported the trial court's determination that [the drug detection dog]'s alert gave [the officer] probable cause to search Harris's truck." *Id.* at 248; *see also* Maj. Slip Op. at 55–56. The Majority insists that this language "would have had no meaning if the Court were reviewing the trial court's reliability determination without deference." Maj. Slip Op. at 56. I disagree with this interpretation. A totality of the circumstances analysis necessarily considers the record and defers to findings of fact while applying those facts to the law. *See Varriale v. State*, 444 Md. 400, 410 (2015).

Under the totality of the circumstances in *Harris*, it was reasonable to conclude that the dog was reliable. Florida had shown "substantial evidence" of the dog's training, past certification, and regular practice, the totality of which demonstrated that the dog was reliable. By contrast, Harris had not challenged the dog's training before the suppression court and had only cross-examined the officer about the dog's field record. *Harris*, 568 U.S. at 248–49. There were no circumstances that would suggest that the officer could

not trust the dog's alert. *Id.* at 249–50. The totality of the circumstances in the record before the Court demonstrated that the dog was sufficiently reliable to support probable cause. *Id.* at 250.

Other jurisdictions have reached the conclusion that the "totality of the circumstances" analysis is most appropriate for determining whether a dog is reliable. Two years before the Supreme Court decided *Harris*, the Supreme Court of Oregon considered the appropriate standard for assessing a drug-detecting dog's reliability in *State v. Foster*, 252 P.3d 292 (Or. 2011). It held that "an alert by a properly trained and reliable drug dog can provide probable cause to search." *Id.* at 301. In language like that used by the Supreme Court in *Harris*, the Court explained:

> Whether in any particular case an alert provides probable cause requires an individualized inquiry, one that will depend on the totality of the information available to the officers. In the usual case, that information likely will include the dog-handler team's training, certification, and performance. But it can also include any other information relevant to the dog's reliability or fallibility.

Id. "Based on the totality of the circumstances bearing on [the dog's] particular reliability in this case" the Court decided that there was probable cause to search the defendant's car. *Id.* at 302. *See also State v. Helzer*, 252 P.3d 288, 289 (Or. 2011).

Following *Harris*, both the Fourth and Seventh Circuits have applied a "totality of the circumstances" test to assessing canine reliability on review. In *United*

States v. Green, 740 F.3d 275, 281–82 (4th Cir. 2014), the Fourth Circuit applied *Harris* to decide whether a dog's record was sufficiently reliable to provide probable cause to search a vehicle. The State had presented substantial factual evidence about the dog's abilities to meet the presumption of reliability, and the defendant had not offered any evidence that undermined the showing. *Id.* at 283. The Fourth Circuit affirmed the district court's determination, concluding that based on the dog's "field performance records in conjunction with his degree of training, his performance during training and recertification exercises, and his evaluations by [State Troopers], the totality of the circumstances establish [the dog's] reliability in detecting drugs." *Id.* at 283–84.

In *United States v. Bentley*, 795 F.3d 630, 635 (7th Cir. 2015), the Seventh Circuit considered whether Bentley had shown that a drug-detecting dog was not adequately trained or reliable. It reasoned that *Harris* required a suppression court to hold a probable cause hearing to assess whether a dog's training was adequate, a procedure that the lower court had "dutifully followed." *Id.* at 635–36. The hearing judge heard testimony about the dog's performance, "weighed all the evidence, decided to credit the government's experts over Bentley's, and decided that [the dog's] alert was reliable enough to support probable cause." *Id.* at 636. The Seventh Circuit considered the evidence presented below adding to or detracting from the dog's reliability, and concluded that while the dog's record was problematic, it was sufficient for probable cause. Thus, the lower court did not err in finding the dog to be reliable based on "his training records, his 59.5% field rate, and [the] C[anine] T[raining] I[nstitute]'s

curriculum." *Id.* at 637. While the dog's "mixed record" was less than ideal, "under *Harris*'s totality-of-the-circumstances test" there was no reason to reverse the lower court. *Id.* Although the Seventh Circuit acknowledged that a lower court's choice between "version[s] of the evidence" is entitled to deference, it accorded that deference to the hearing judge's assessment of various witnesses' explanations and credibility. *Id.* at 636.

Other jurisdictions have followed a similar approach, treating the *Harris* analysis of reliability as one that considers the totality of the circumstances.[1] *See, e.g.*, *United States v. Foreste*, 780 F.3d 518, 527–28 (2d Cir. 2015); *United States v. Holleman*, 743 F.3d 1152, 1157 (8th Cir. 2014); *United States v. Gadson*, 763 F.3d 1189, 1203 (9th Cir. 2014); *United States v. Brown*, 179 F. Supp. 3d 595, 603 (E.D. Va. 2016); *Bennett v. State*, 111 So. 3d 983, 985–86 (Fla. App. 2013); *see also Phippen v. State*, 297 P.3d 104, 109

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[1] At least two jurisdictions have taken the position that reliability is a question of fact. In *Jackson v. State*, 427 S.W.3d 607, 615 (Ark. 2013), the Supreme Court of Arkansas concluded that a trial court's ruling that a dog was reliable was not "clearly erroneous." Likewise, in *People v. Caballes*, 851 N.E.2d 26, 31 (Ill. 2006), the Illinois Supreme Court explained that the determination that the police dog was "well trained and sufficiently reliable" was a factual one, subject to clear error review. *Caballes*, however, came some years before *Florida v. Harris*, 538 U.S. 237 (2013). And *Jackson*, although acknowledging *Harris*, did not fully consider the analysis established by that case. 427 S.W.3d at 615. Special Justice Gregory Jones concurred in judgment, providing a more nuanced analysis of the of the test set forth in *Harris*, an analysis that bore greater resemblance to a probable cause determination based on the totality of the circumstances, rather than a purely factual one. *Id.* at 625–26 (Gregory, J., concurring).

(Wyo. 2013); *McKinney v. State*, 755 S.E.2d 315, 318 (Ga. App. 2014).

The Majority reasons that a trial court is "better positioned" than an appellate court to decide reliability. Maj. Slip Op. at 51. But the kind of evidence the Majority cites—training records, field records, videos of the scan, expert qualifications, and factual testimony—are materials this Court regularly considers in appellate review. This Court can review these materials while according the appropriate deference to a hearing judge's assessment of witness credibility when determining whether a lower court correctly applied the law. An expert witness's credibility in assessing and explaining evidence relating to canine training and behavior does not automatically correlate to a dog's reliability, particularly when other circumstances indicate the dog's performance may have been unreliable during a stop.

According to *Harris*, a court must consider all the circumstances surrounding the dog's alert—training, certification, reliable performance—and decide whether, under the totality of those circumstances, a dog's alert is reliable. 568 U.S. at 247–48. Whether a dog **alerted** is undoubtedly a question of fact, particularly if the alert appears ambiguous. *See, e.g.*, *Phippen*, 297 P.3d at 109 (lower court resolved conflicting testimony and concluded that dog alerted); *McKinney*, 755 S.E.2d at 318. But the alert itself is meaningless unless the alert is reliable. An alert does not establish probable cause without reliability. And reliability necessitates consideration of the circumstances of dog's training, certification, history, and experience—or lack thereof.

The hearing judge found that Ace completed an initial training course, continued training with his handler regularly, and was certified at the time that he detected the drugs in Grimm's vehicle. While Ace had some false alerts, his error rate was not so high that he was obviously unreliable. The hearing judge found Sergeant Davis's testimony explaining Ace's training and reliability to be more credible, and we should defer to that credibility assessment. Grimm offered evidence that undermined Ace's reliability. Weighing all the facts surrounding Ace's alert—his training, certification, and experience, viewed "through the lens of common sense" it is reasonable to find that when he alerted, a reasonable officer would believe that Ace was reliable and therefore "a search would reveal contraband or evidence of a crime." *Harris*, 568 U.S. 247–48. Under the totality of the circumstances test set forth in *Harris*, *id.*, I conclude that Ace was sufficiently reliable, and therefore probable cause was met.

The lack of generally accepted standards in Maryland for training and assessing drug detection dogs is troubling. I agree with the Majority that this Court should not wade into the fray by creating our own standards. Maj. Slip Op. at 60. That is a matter best left to the Legislature, rather than an appellate court.

As Chief Judge Wood observed in *Bentley*, 795 F.3d at 637, "[w]e hope and trust that the criminal justice establishment will work to improve the quality of training and the reliability of the animals they use . . . ." I have no doubt that Maryland officers work hard to train their canine companions to be accurate and reliable. But this Court should not abdicate its

responsibility to make an independent review of probable cause, which in this case, relied entirely on a canine alert. *See Wallace*, 372 Md. at 144 (court makes an independent constitutional evaluation of probable cause when a party challenges a search or seizure).

APPENDIX B

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1172

September Term, 2015

[Filed April 26, 2017]

BRIAN GRIMM)
)
v.)
)
STATE OF MARYLAND)
)

In the Circuit Court for Anne Arundel County
Case No. 02-K-14-001188

Meredith,
Graeff,
Friedman,
JJ.

Opinion by Meredith, J.

Filed: April 26, 2017

Brian Grimm, appellant, urges us to hold that the Circuit Court for Anne Arundel County erred in denying his motion to suppress evidence, namely, the heroin that was found in his automobile during a search conducted after an alert by a drug-sniffing dog. Grimm argues that the suppression court erred in concluding that the dog was reliable and that the dog's alert provided probable cause for the police officer to search the vehicle. Grimm entered a conditional guilty plea (to possession of heroin with intent to distribute), reserving the right to challenge the denial of his motion to suppress. After he was convicted and sentenced, he noted this direct appeal.

QUESTIONS PRESENTED

Grimm presents three questions for our review:

I. Did the circuit court err in finding that there was probable cause to search Appellant's vehicle without a search warrant?

II. Does the good faith exception to the warrant requirement apply?

III. Did the lower court err in admitting testimony and documents pertaining to the certification of the canine that scanned Appellant's vehicle, where the certification occurred four months after the scan occurred?

We answer "no" to Questions I and III, which obviates the need for us to address Question II. We will affirm the judgment of the Circuit Court for Anne Arundel County.

FACTUAL & PROCEDURAL BACKGROUND

On April 18, 2014 -- one day prior to the traffic stop of Grimm's vehicle -- Sergeant Christopher Lamb, of the Maryland Transportation Authority Police, received a tip from a federal drug enforcement program referred to as "HIDTA," advising that a suspect named Brian Grimm "may be traveling northbound on Interstate 95 from Atlanta, Georgia to the area of Baltimore, Maryland . . . with a large quantity of CDS."[1] Sgt. Lamb's contact at HIDTA provided descriptive information about Grimm, including his race and approximate age. The following day, while Sgt. Lamb was on patrol, he received telephone calls from HIDTA providing additional information about the suspect: the vehicle of interest was a maroon Honda with Georgia registration, carrying multiple occupants, and it was traveling in Anne Arundel County in the vicinity of the Arundel Mills shopping complex, on Maryland Route 100, about to turn onto Route 295 North, toward Baltimore.

Sgt. Lamb spotted a vehicle matching the description provided by HIDTA, *i.e.*, a maroon Honda with Georgia tags traveling northbound toward Baltimore on Route 295. When Sgt. Lamb observed that none of the occupants of the Honda were wearing

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[1] "HIDTA" stands for High Intensity Drug Trafficking Area. The HIDTA Program is "a federal grant program administered by the White House Office of National Drug Control Policy, which provides resources to assist federal, state, local and tribal agencies coordinate activities that address drug trafficking in specially designated areas of the United States." Office of National Drug Control Policy, *HIDTA*, http://www.hidta.org/ (last visited April 24, 2017).

seatbelts, he initiated a traffic stop of the vehicle. Grimm was driving the maroon Honda at the time of the stop; there was one passenger in the front seat, and a second passenger in the back seat. After stopping the vehicle, Sgt. Lamb noted that the front seat passenger would not look at him, and she stared straight ahead throughout the traffic stop. But the back seat passenger seemed "overly polite" throughout the stop.

When Sgt. Lamb asked the driver about his travel itinerary, Grimm explained that he had just purchased the Honda in Atlanta, and that he had flown from Baltimore to Atlanta to pick up the vehicle and also to visit friends in the Atlanta area. Grimm further explained that he had been driving all night to return to the Baltimore area. Grimm possessed a Maryland driver's license, and the vehicle had been registered two days earlier, but it was not registered in Grimm's name. Grimm explained that he did not have enough money to register the vehicle in his own name because he had purchased four airline tickets from Baltimore to Atlanta in order to pick up the vehicle.

Sgt. Lamb testified at the suppression hearing that he asked Grimm to exit the vehicle because he had detected several indicia of possible criminal activity:

> The rear seat passenger was over-polite. The front seat passenger was staring forward, she wouldn't speak with me, she wouldn't make eye contact with me. The driver was traveling from source city to source city for drugs ---- meaning Atlanta, Georgia, which is a source city of drugs to Baltimore City which is a source city of drugs. The fact that they had flown down four individuals from Baltimore, Maryland to

> Atlanta, Georgia, purchased a vehicle, but then the operator Mr. Grimm who stated [he was] to be the owner was not able to afford to put that vehicle in his name, register that vehicle in his name when he drove it back. And the totality of those things . . . .

While speaking with Grimm, Sgt. Lamb observed that Grimm looked "disheveled" and "unkempt like he had been on the road and hadn't been staying anywhere." Sgt. Lamb felt that Grimm was "mumbling" and "rambling" when answering questions, and would "look away, and then look back" at Lamb throughout their conversation. Grimm did not, however, appear to be nervous. Sgt. Lamb eventually instructed Grimm to reenter his vehicle. While Sgt. Lamb was writing the seat-belt warnings to be issued to the occupants of the Honda, he noticed that Grimm "never fully closed his door when he got into his vehicle," and he "maintained his left foot out of the vehicle and on the asphalt." Sgt. Lamb considered Grimm's conduct "very unusual," and thought that it indicated that Grimm might be a "flight risk." Nevertheless, Sgt. Lamb testified that he did not believe he had probable cause to search Grimm's vehicle at that point.

While Sgt. Lamb was still in the process of writing out the warnings, Maryland Transportation Authority Police Officer Carl Keightley arrived with his drug-detection dog, a Malinois named "Ace." Officer Keightley had been Ace's handler since 2012. They had gone through an initial three-month training period, and Ace had been trained to detect heroin, methamphetamine, MDMA, marijuana, and cocaine. Both the dog and the handler had been certified by the

Maryland Transportation Authority Police through testing in various situations, including searches of buildings, luggage, vehicles, and open areas. Officer Keightley and Ace held current certifications when they were called to scan Grimm's vehicle on April 19, 2014, having been most recently recertified by the Maryland Transportation Authority Police on January 22, 2014.

Officer Keightley and Ace conducted an exterior scan of Grimm's vehicle, and Ace gave a positive alert to the presence of narcotics. Officer Keightley testified that, while he was leading Ace around the vehicle, Ace jumped up and stuck his head inside of the driver's side window, sniffed, and sat, which was Ace's "final alert" to the presence of narcotics. Sgt. Lamb then searched Grimm's vehicle, and discovered a "large quantity of heroin and amphetamine" hidden in the rear panel of the passenger side door. Grimm was arrested and charged with possession with intent to distribute heroin (and other related offenses that are not material to this appeal).

In the circuit court, Grimm moved to suppress the evidence discovered during the search, and contended that Sgt. Lamb lacked probable cause to search his vehicle. The court held a lengthy evidentiary hearing on the motion. Both sides argued that their respective positions were supported by the Supreme Court's opinion in *Florida v. Harris*, ___ U.S. ___, 133 S.Ct. 1050 (2013), in which the Court held that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert," but also said that a defendant "must have an opportunity to challenge such evidence of a

dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses." *Id*., 133 S.Ct. at 1057. Grimm urged the suppression court to find that Ace was not a reliable drug-detection dog, that his training was deficient, and that his purported alert therefore did not provide support for Sgt. Lamb's belief that he had probable cause to search the vehicle.

During the suppression hearing, each side called two expert witnesses. Officer Keightley (Ace's handler) was accepted by the court as an expert in the field of K-9 police dogs and the detection of heroin, marijuana, cocaine, MDMA, and methamphetamine. Officer Keightley explained that he generally trains with Ace one day each week in various scenarios designed to mimic situations they might encounter in the field. The State introduced in evidence written records of training conducted with Ace during 2012, 2013, and 2014. During Officer Keightley's testimony, the State also introduced the field reports that had been completed by Officer Keightley after each drug scan performed by Ace. Officer Keightley explained that the Maryland Transportation Authority Police has generated K-9 certification guidelines, and that Ace had first been certified in 2012, and was thereafter recertified every six months. The initial certification of Ace was performed by Officer Michael McNerney (who would later be called by Grimm as an expert witness at the suppression hearing). After reviewing with the court the dash-cam video recording of the scan of Grimm's Honda, Officer Keightley reiterated that Ace gave an alert indicating that he had detected the odor of narcotics in the vehicle.

During cross-examination of Officer Keightley, Grimm's counsel reviewed with the officer the fact that the field reports reflected that Ace had given positive alerts to vehicles during 51 scans, but no contraband was found in 19 of those vehicles. Officer Keightley had interviewed the occupants of those 19 vehicles and had been told by occupants of ten of the vehicles that, in fact, drugs had recently been present in those vehicles. On redirect examination, Officer Keightley said that there were several possible explanations other than error on the part of the dog that might explain why no drugs were found on the nine other occasions on which Ace had alerted:

> [S]omething might have [actually] been in the vehicle and it might not have been located [during the search]. Somebody might have used narcotics recently in the vehicle or used narcotics and touched the vehicle, contaminated the vehicle. Any of those things.

Officer Keightley conceded on cross-examination that, although he generally conducted weekly training with Ace, because of the manner in which he had routinely logged training time before his supervisor mandated a change, the hours he had spent each month had not met the organization's standard until some point in time after the scan of Grimm's vehicle. He acknowledged that he had not spent 16 hours of actual "sniff time" training with Ace in any of the six months leading up to April 19, 2014.

The State also presented testimony from Sergeant Mary Davis, who was a police supervisor and narcotics-detection dog trainer for the Montgomery County Police Department. She had been working in that police

department's canine unit for over twenty years, and had been the head trainer since 2008. She indicated that, although the State of Maryland does not mandate any particular standards for the performance of drug-detection dogs, she was very familiar with the standards recommended by the United States Police Canine Association and other similar organizations. Defense counsel stipulated that Sgt. Davis "is an expert in K-9 training and K-9 handling."

Sgt. Davis testified that the State of Maryland does not require certification of police dogs, but both the Montgomery County Police Department and the Maryland Transportation Authority Police had adopted requirements for certification and periodic recertification. She confirmed that the certification protocol adopted by the Maryland Transportation Authority Police does "generally comport with industry standards." In August 2014, Sgt. Davis and two other officers from the Montgomery County Police Department had conducted an evaluation of the canine teams at the Maryland Transportation Authority Police. Officer Keightley and Ace were tested on that occasion, and they passed the testing conducted by the officers from Montgomery County.

Sgt. Davis further testified that she had reviewed all of the training records that Officer Keightley had maintained for Ace, covering training exercises during 2012 through July of 2014. She saw that, during 2013, Ace had participated in 209 training scenarios in which drugs had been hidden, and during those exercises, Ace had had 24 non-productive responses (sometimes referred to as "NPRs" by dog trainers, and referred to as false alerts by defense counsel). Sgt. Davis said that

she would not characterize "any one particular amount [of NPRs] as acceptable or unacceptable."

With respect to the 51 field scans that had been performed by Ace, Sgt. Davis testified that the fact that no drugs were discovered in nine vehicles (for which the follow-up interviews provided no explanation) would not concern her, "Not even in the least bit." In her view, even though there was no admission of the prior presence of drugs in those vehicles, the vehicles could have been previously used to transport drugs. She said: "So I would not be shocked that we didn't [get] an admission and we weren't able to find target odor. That can occur very easily." Furthermore, Sgt. Davis considers a dog's training records more useful than the field records because training typically occurs in a more controlled environment.

Based upon her review of the dash cam video recording of the scan of Grimm's vehicle conducted by Officer Keightley and Ace, Sgt. Davis expressed an opinion that Ace clearly alerted to the presence of drug odor, and she saw no evidence that the handler cued the dog to alert. Sgt. Davis rejected defense counsel's suggestion that Ace may have exhibited a false alert at Grimm's driver-side door simply to get a reward. She explained: "It looked to me that the dog was working independently to odor. And once he got into the odor he gave the indication." She agreed that, in her experience, she had observed some dogs give a false alert just for a reward, but, she said: "I don't see that that's what occurred here."

When asked directly if she had an opinion regarding the "overall competence of the team of Officer Carl Keightley and K-9 Ace," Sgt. Davis testified that,

"[b]ased on the totality of the circumstances, looking at all of the training records in their totality, and having observed the team personally on three separate occasions," she believed that "they are competent to be working the street and deploying, and making probable cause decisions on the street." When asked, on cross-examination, to comment upon the strength of Ace's abilities, Sgt. Davis said: "He has a tremendous skill set. He's got a lot of drive. He has a huge work ethic."

The defense likewise called two canine experts as witnesses. Ted Cox was a retired police officer who had extensive experience as a K-9 trainer for the Baltimore City Police Department, including six years as chief trainer. He had also been employed as the K-9 trainer for the Maryland Transportation Authority Police from 2007 to 2012. The State stipulated that he was an expert in K-9 training and handling.

Mr. Cox had analyzed Ace's training records for the period covering April 15, 2013, through March 24, 2014, and concluded that, by his count, Ace had been put through 179 scenarios, and had made 44 false alerts, which Mr. Cox viewed as unacceptable. He also criticized Ace for "excessive barking" during the approach to Grimm's vehicle. Mr. Cox expressed opinions that were critical of Ace's training as reflected in the training records, and he believed that Ace should not have been recertified on August 19, 2014, because of a false alert the dog gave during that testing.

He concluded that Ace's hours of training, as recorded prior to the scan of Grimm's vehicle, did not meet "the industry standard," and he said, "after reviewing the records and the dash cam video, it's my opinion that the dog is unreliable at this point." In his

opinion, Ace did not alert to the odor of the drugs that were later found in the car, but instead alerted to the "human scent" of the occupants of the car, in particular, Grimm, who had been resting upon the driver-side door for several minutes prior to the scan. Mr. Cox reiterated: "There is no doubt in my mind that the dog is unreliable."

The second dog expert called by the defense was Senior Officer Michael McNerney, who had been a trainer for the Maryland Transportation Authority Police since 2009, and had worked under Ted Cox until the end of 2012. Officer McNerney then became the head trainer for explosives-detection dogs, and in September 2013, Officer McNerney assumed the additional responsibility for training of narcotics-detection dogs as well. He was accepted by the court as an expert in the field of canine training and handling.

Officer McNerney explained that, in March 2014, when he reviewed the training records for Officer Keightley and Ace, the records did not reflect that that team had met the Transportation Security Administration's standard requiring 240 minutes of "sniff time" in training each month. As a consequence of that discovery and other concerns Officer McNerney had communicated to his superiors regarding training deficiencies in the canine unit, Officer McNerney "stepped down" from his position as head trainer on March 11, 2014. But he was ordered back to the position in May 2014.

When Officer McNerney resumed the position of head trainer in May 2014, he "decertified" Ace and Officer Keightley because of the manner in which Officer Keightley (and other officers in the K-9 unit)

had been recording their training hours. Nevetheless, Ace and Officer Keightley were recertified by Officer McNerney just two days later. Despite acknowledging that he had recertified Officer Keightley and Ace in May 2014, Officer McNerney testified that he had observed several problems with the manner in which Officer Keightley trained with Ace, including "cuing," "object focusing," and "a lot of falsing issues," in addition to inadequate sniff time. He also reported that he was concerned that the drug samples that were being hidden as training aids for the dogs to find had become stale, and he had replaced several of the samples during the summer of 2014 after a chemist's analysis confirmed that the sample drugs being used for training contained "significant impurities."

On cross-examination, Officer McNerney acknowledged that, after he became head trainer (in September 2013), he had personally conducted recertification testing of Officer Keightley and Ace in January 2014, and he had certified that they passed the test on January 22, 2014. Pursuant to Maryland Transportation Authority Police standard operating procedures, recertification is supposed to occur every six months. Consequently, the January 22, 2014, certification would have been current and "in effect" at the time of the scan of Grimm's vehicle on April 19, 2014. Officer McNerney also acknowledged that he had been "involved with" the initial certification of Officer Keightley and Ace back in 2012, and that they passed the initial certification test on the first try.

After the close of evidence at the suppression hearing, defense counsel argued that, based upon the training records and field performance records for Ace

and Officer Keightley, the court should find that Ace was not a reliable drug-detection dog on April 19, 2014, and that his alert to narcotics therefore did not provide probable cause to conduct a warrantless search of Grimm's vehicle. Grimm also disputed whether Ace actually alerted to contraband at all during the stop. The State countered that the evidence established that Ace was well-trained and certified, and was therefore reliable, which meant that, under *Florida v. Harris*, Sgt. Lamb had probable cause to search Grimm's vehicle based upon Ace's alert to the presence of contraband.

The circuit court denied Grimm's motion to suppress the evidence discovered during the search of his vehicle. The court observed that there was no dispute that Sgt. Lamb had a reasonable basis to conduct a *Whren* stop of the vehicle because none of the occupants were wearing seatbelts. *See Whren v. United States*, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). And, the court noted, there was no suggestion that the traffic stop was unreasonably extended for the purpose of conducting the dog scan. *Cf. Wilkes v. State*, 364 Md. 554, 583 (2001) (K-9 scan was conducted prior to officer's completion of tasks incident to the initial purpose of the traffic stop). The suppression court noted that "the State concedes[,] as I think it rightly should[,] that there is no probable cause absent the K-9 alert." And, the court added: "I will tell you that[,] absent the K-9 alert, if this had been litigated solely on those issues [*i.e.*, what the officers knew prior to the K-9 alert], I would not have found probable cause."

But the court concluded that, after Ace scanned the vehicle and gave an alert for the presence of narcotics, Sgt. Lamb had probable cause to search Grimm's vehicle. The court found that Ace and Officer Keightley were certified at the time of the stop and the scan. The court expressly found Sgt. Davis to be the most credible witness who testified in the case. The court elaborated: "I find her qualifications, her knowledge, her training and experience to be impeccable. . . . I find her to be the most credible witness and it is she who I rely upon the most and find to be the best and most objective observer." The court also said: "I find her analysis of the stop and the dog's actions to be credible." The court further commented: "She explains, . . . to the satisfaction of the Court that I can find Officer Keightley and K-9 Ace to be credible and to be a certified dog that the Court can rely upon for assessing whether or not probable cause exists." The court therefore concluded that there was probable cause in this case for the officers to believe that there was a "fair probability" that one of the drugs that Ace was trained to detect would be found in the vehicle.

Pursuant to Maryland Rule 4-242(d)(2), Grimm entered a conditional plea of guilty to possession of heroin with intent to distribute; he was sentenced to a 15-year term of imprisonment. This direct appeal followed.

DISCUSSION

A. Standard of Review of Motions to Suppress Evidence

When we review a ruling from the circuit court concerning a motion to suppress evidence, "we must

rely solely upon the record developed at the suppression hearing." *Briscoe v. State*, 422 Md. 384, 396 (2011). "We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion," which was the State in this case. *Id*. *Accord Robinson v. State*, 451 Md. 94, 108 (2017) ("'The appellate court views the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress.'" (Quoting *Varriale v. State*, 444 Md. 400, 410 (2015)); *Hailes v. State*, 442 Md. 488, 499 (2015) ("The appellate court views the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." (Internal quotation marks, citations, and alteration marks omitted.)). As an appellate court, when we review the denial of a motion to dismiss, "[w]e review the findings of fact for clear error and do not engage in *de novo* fact-finding." *Haley v. State*, 398 Md. 106, 131 (2007) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). *Accord Robinson*, *supra*, 451 Md. at 108 ("'In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews for clear error the trial court's findings of fact . . . .'" (Quoting *Varriale*, *supra*, 444 Md. at 410.)); *Raynor v. State*, 440 Md. 71, 81 (2014) ("We accept the suppression court's factual findings unless they are shown to be clearly erroneous."); *see also Ornelas*, *supra*, 517 U.S. at 699 ("[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences

drawn from those facts by resident judges and local law enforcement officers.").

The Court of Appeals has made plain that "[f]indings of fact and credibility are to be made by trial courts, not appellate courts." *Longshore v. State*, 399 Md. 486, 520–21 (2007); *accord Barnes v. State*, 437 Md. 375, 398 (2014) ("The credibility of the witnesses and the weight to be given to the evidence fall within the province of the suppression court."). "'If there is any competent evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous.'" *Goff v. State*, 387 Md. 327, 338 (2005) (quoting *Solomon v. Solomon*, 383 Md. 176, 202 (2004)).

When reviewing the suppression court's interpretation of the applicable law, however, the appellate court "'reviews without deference the trial court's application of the law to its findings of fact.'" *Robinson*, *supra*, 451 Md. at 108 (quoting *Varriale*, *supra*, 444 Md. at 410). We "'undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case.'" *Prioleau v. State*, 411 Md. 629, 638 (2009) (quoting *State v. Tolbert*, 381 Md. 539, 548 (2004)).

B. Drug-Detection Dog Alerts

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures." U.S. CONST. amend. IV. "'[W]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a

judicial warrant.'" *Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473, 2482 (2014) (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)).

But, in *Carroll v. United States*, 267 U.S. 132, 149 (1925), the Supreme Court of the United States recognized an "automobile exception" to the general requirement for a search warrant. The automobile exception, or *Carroll* doctrine, "allows vehicles to be searched without a warrant provided that the officer has probable cause to believe that a crime-connected item is within the car." *State v. Wallace*, 372 Md. 137, 146 (2002).

In *Florida v. Harris*, the Supreme Court further explained that "[a] police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present." 133 S.Ct. at 1055 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (alterations added in *Harris*)). The *Harris* Court observed: "All we have required is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *Florida v. Harris*, *supra*, 133 S.Ct. at 1055 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 and 231 (1983); alteration added in *Harris*). In other words, probable cause requires only a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, *supra*, 462 U.S. at 238. *Accord Robinson*, *supra*, 451 Md. at 109–10. We look to the "totality of the circumstances" in any given situation in "evaluating whether the State has met this practical and common-sensical standard." *Florida v. Harris*, *supra*, 133 S.Ct. at 1055; *see also Johnson v. State*, ___

Md. ___, ___ No. 2465, September Term, 2015, slip op. at 2 (filed March 29, 2017) (suppression court erred by concluding that officers had probable cause to conduct a warrantless search of the *trunk* of a car under the *Carroll* Doctrine based solely on the discovery of drugs found in the waistband and on the breath of the front-seat passenger).

In *Florida v. Harris*, the Supreme Court noted that a drug-sniffing dog's alert, without more, suffices to establish probable cause for a search: "[A] well-trained dog's alert establishes a fair probability—all that is required for probable cause—that either drugs or evidence of a drug crime . . . will be found." 133 S.Ct. at 1056 n.2. Similarly, the Maryland Court of Appeals has held "that **when a properly trained canine alerts to a vehicle** indicating the likelihood of contraband, **sufficient probable cause exists to conduct a warrantless '*Carroll*' search of the vehicle**." *Wallace*, *supra*, 372 Md. at 146 (emphasis added). *Accord Wilkes*, *supra*, 364 Md. at 586–87 ("once a drug dog has alerted a trooper 'to the presence of illegal drugs in a vehicle, sufficient probable cause exist[s] to support a warrantless search of [a vehicle],'" quoting *Gadson v. State*, 341 Md. 1, 8 (1995)); *Bowling v. State*, 227 Md. App. 460, 469, 476 (2016) ("the Maryland appellate courts consistently have held that the detection of the odor of marijuana by a trained drug dog establishes probable cause to conduct a warrantless *Carroll* doctrine search of a vehicle," and the partial decriminalization of possession of small quantities of marijuana "does not change the established precedent that a drug dog's alert to the odor of marijuana, without more, provides the police with probable cause to authorize a search of a vehicle");

Jackson v. State, 190 Md. App. 497, 504 (2010) ("[A] trained drug-sniffing dog made a positive alert on the vehicle, thereby signaling the likely presence of narcotic drugs somewhere inside the vehicle. Once such a positive alert takes place, there is, *ipso facto*, probable cause for a *Carroll*–Doctrine search of the automobile." (Footnote omitted.)); *see also Robinson, supra*, 451 Md. at 118 n.7.

In *Florida v. Harris*, the Supreme Court emphasized that the prosecutor could establish the reliability of a drug-detection dog by presenting evidence of the dog's certification or training:

> **[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs.**

133 S.Ct. at 1057 (emphasis added).

But the Supreme Court in *Florida v. Harris* further explained that, notwithstanding a dog's certification and training, a defendant must have the opportunity to contest the reliability of a drug-detection dog, noting:

> A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant . . . . And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.

Id. at 1057–58.

The *Harris* Court expressly rejected "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach" for a suppression court to apply when assessing whether a drug-detection dog was sufficiently reliable for its alert to be used in establishing probable cause to conduct a warrantless search. *Id*. at 1056. The Court observed that, as with any other probable cause analysis, "[a] gap as to any one matter . . . should not sink the State's case; rather, that 'deficiency . . . may be compensated for'" with additional evidence rebutting any deficiency.

Id. at 1056 (quoting *Illinois v. Gates*, *supra*, 462 U.S. at 233).

In reversing the Supreme Court of Florida, the *Harris* Court criticized the Florida court for adopting an "inflexible set of evidentiary requirements" for that state's judges to utilize when assessing the reliability of a drug-detection dog for purposes of establishing probable cause:

> To assess the reliability of a drug-detection dog, the [Florida Supreme C]ourt created a strict evidentiary checklist, whose every item the State must tick off. Most prominently, an alert cannot establish probable cause under the Florida court's decision unless the State introduces comprehensive documentation of the dog's prior "hits" and "misses" in the field. (One wonders how the court would apply its test to a rookie dog.) No matter how much other proof the State offers of the dog's reliability, the absent field performance records will preclude a finding of probable cause. That is the antithesis of a totality-of-the-circumstances analysis.

Id.

The Supreme Court summarized the proper approach to be followed by the court hearing a motion to suppress a warrantless search for which the State claims probable cause was provided by an alert by a drug-detection dog:

> In short, **a probable-cause hearing focusing on a dog's alert should proceed much like any other**. The court should allow the parties to make their best case, consistent

> with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then **the court should weigh the competing evidence**. In all events, the court should not prescribe, as the Florida Supreme Court did [in *Harris v. State*, 71 So. 3d 756, 759 (Fla. 2011)], an inflexible set of evidentiary requirements. **The question**—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.** A sniff is up to snuff when it meets that test.

Id. at 1058 (emphasis added).

C. Ace's Reliability

In Grimm's briefs in this Court, he urges us to review *de novo* the question of whether Ace was a "well-trained dog." He asserts: "Specifically, the question of whether Ace is well-trained or otherwise reliable for purposes of establishing probable cause is a mixed question of law and fact subject to *de novo* review." Citing *Ornelas, supra*, 517 U.S. at 696–98, Grimm argues that appellate courts are obligated to

conduct *de novo* review of probable cause determinations. But he neglects to take sufficient notice of the point that, although the *Ornelas* Court held that, "as a general matter[,] determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal," *id*. at 699, the Court also emphasized, in the very next sentence, that findings of fact are reviewed for clear error, with deference to the trial-level court: "Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id*.

Grimm's request for us to conduct *de novo* review of the evidence presented regarding Ace's ability (or lack of ability) to detect drugs invites us to commit an error similar to the one that ensnared the Florida Supreme Court in *Harris v. State*, 71 So. 3d 756, 772–75 (2011), wherein that appellate court was highly critical of the quality and quantity of evidence the State of Florida had presented at the suppression hearing regarding the drug dog's successes and failures during training sessions and scans in the field. But, after the United States Supreme Court reversed and remanded that case, the Florida Supreme Court abandoned its list of evidentiary hurdles the prosecution was required to overcome, and summarily affirmed the suppression court's denial of Harris's motion to suppress. *Harris v. State*, 123 So. 3d 1144 (Fla. 2013) (per curiam).

Whether Ace was -- at the time of the scan of Grimm's vehicle -- a well-trained or reliable dog, whose alerts could be relied upon by Officer Keightley as

indicating that there was a fair probability that the vehicle contained one of illegal drugs Ace had been trained to detect, was a question of fact properly committed to the adjudicatory skill of the judge who heard the evidence presented at the hearing on the motion to suppress. An appellate court is ill-equipped to determine the proper amount of weight to be given to various pages of the extensive documentation in evidence regarding a dog's performance during training exercises, or to evaluate the credibility of witnesses, or weigh the conflicting testimony of experts. Such factual determinations are best left to the suppression court judge who hears the evidence, and are best reviewed under a "clearly erroneous" standard that gives deference to that judge's superior opportunity to evaluate credibility and weigh the evidence. *See Longshore*, *supra*, 399 Md. at 520–21 (stating that "[f]indings of fact and credibility are to be made by trial courts, not appellate courts"); *Haley*, *supra*, 398 Md. at 131 (explaining that appellate courts "do not engage in *de novo* fact-finding."). As an appellate court, we are obligated to "give deference to the first-level factual findings made by the suppression court, and we accept those findings unless shown to be clearly erroneous," *Briscoe*, *supra*, 422 Md. at 396, while giving "due regard to the [suppression] court's opportunity to assess the credibility of witnesses." *Gorman v. State*, 168 Md. App. 412, 421 (2006). As the Supreme Court stated in *Florida v. Harris*, "a probable-cause hearing focusing on a dog's alert should proceed much like any other. . . . [If] the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence." 133 S.Ct. at 1058. Clearly, the court that "should weigh the competing evidence" is the

suppression court, not the appellate court reviewing a challenge to the suppression court's finding on the issue of the reliability of the dog.

Here, the circuit court evaluated all the evidence and expert testimony, and determined that Sgt. Mary Davis was the most credible of the experts who testified. Although the court, in the judicious exercise of courtroom courtesy, commented that the experts called by the defense were "both credible," the court also expressed concern that their testimony was colored by some "dissension in the ranks" regarding management at the Maryland Transportation Authority Police, and "some of this [testimony by Mr. Cox and Officer McNerney] was an airing of dirty laundry." The weighing of testimony and evaluation of which experts' opinions to credit are functions quintessentially best performed by the judge who hears the witnesses testify.

Although Grimm urges us to review *de novo* the question of whether Ace was a well-trained dog, he argues, in the alternative, that, even "if the lower court's findings bearing on whether Ace was well-trained or reliable are not themselves subject to *de novo* review, they are clearly erroneous . . . ." In support of this argument, Grimm points to several aspects of the suppression court's ruling with which he disagrees. He asserts that the court's conclusion that Sgt. Davis was "the most credible expert" was clearly erroneous because the court also commented: "I find her to be a witness who has no ties to the case, neutral and unbiased and has – I find that she has no issue with the handler or the dog." Grimm asserts that, because Sgt. Davis had performed a recertification of

Ace in August 2014, "her [own] professional reputation was also challenged" and she "had a direct investment in the outcome of this suppression hearing—her reputation." This argument addresses the suppression court's weighing of the evidence, and does not support a claim that the court made a clearly erroneous finding of material fact.

In *United States v. Ludwig*, 641 F.3d 1243 (10th Cir. 2011), the suppression court had resolved in favor of the prosecution conflicting testimony of dog experts. The appellate court found no clear error, and explained:

> [A]t the end of this battle of the experts, the district court chose to credit [the government's expert] rather than [the defendant's] expert. On appeal, we may not revisit the site of this battle, recreate it in our imaginations, and resolve it for ourselves anew. Neither is it enough for [the defendant] to ask us (as he does) simply to credit his expert's conclusions rather than the government's. Instead, it is incumbent on [the defendant] to show that the district court's resolution of the experts' credibility contest was not just wrong but clearly or pellucidly (and so reversibly) wrong. And this he has not done.

Id. at 1253.

So, too, in this case, the suppression court chose to credit the testimony of the State's expert rather than the defendant's experts. We detect no clear error in the suppression court's decision to accept the expert opinions offered by Sgt. Davis regarding the reliability of Ace, the adequacy of his training, and the validity of his alert to Grimm's vehicle.

Grimm also urges us to conclude that the court's finding that Ace was a reliable dog was clearly erroneous in the face of evidence of training deficiencies. Grimm states: "Perhaps the most obvious flaw in Ace's training is the fact that Keightley [personally] placed Ace's training aids, with cuing being the result." A double-blind training regimen would have been preferable, according to the Scientific Working Group on Dog and Orthogonal Detector Guidelines. Further, according to Grimm, Ace's training records did not reflect adequate training efforts to address the dog's "false alerts." Mr. Cox opined that too little effort was documented to satisfy him that Officer Keightley had conducted training exercises sufficient to "extinct" Ace from alerting to non-target odors. And, according to Grimm, Sgt. Davis's testimony as to why she was not overly concerned about Ace's false alerts was not supported by the training records.

Grimm further urges us to conclude that the suppression court was clearly erroneous in finding Ace to be reliable because there was evidence presented at the suppression hearing to show that the drug samples used as training aids had become contaminated with impurities, which may have led to Ace responding to odors other than the five target narcotics. In addition, Grimm contends that the training conducted by Officer Keightley had "inadequate trainer supervision," which was a problem for all of the dog handlers at the Maryland Transportation Authority Police due to inadequate staffing—part of the "dirty laundry" to which the suppression court made reference. Grimm states in his brief: "McNerney eventually resigned over

the dysfunction surrounding the training of Ace and other MTA K-9s."

As noted above, Officer McNerney decertified Ace and Officer Keightley in May 2014 because of the manner in which the handlers logged training time. But Officer McNerney also recertified Ace and Officer Keightley just two days after decertifying them, and presumably, they could not have completed much compensatory training during those two days. Sgt. Davis said she would not have "decertified" Ace and Officer Keightley, and she saw no issue with the manner in which Officer Keightley had been logging training hours; she said that, in her experience, she had seen handlers typically record training hours in the same manner as Officer Keightley.

Grimm nevertheless argues that the fact that Ace was decertified in May 2014 proved that "Ace was not actually certified in any meaningful sense at the time of the scan" of his vehicle. He makes this argument in spite of the fact that his expert witness was the trainer who conducted Ace's recertification in January 2014 and testified that certifications are valid for six months.

Grimm asserts that Mr. Cox's analysis of the dash-cam video recording of the scan should have been accepted by the suppression court as proof that Ace did not actually alert to an odor of narcotics. But Sgt. Davis presented a different analysis, putting a stamp of approval on the scan and the alert; and the suppression court found her to be the more credible witness.

Grimm also urges us to focus on Mr. Cox's testimony regarding his analysis of Ace's training

records that showed 44 "false alerts" in 179 training scenarios. Mr. Cox considered that unacceptable. But, in contrast to Mr. Cox's analysis, Sgt. Davis had analyzed a different period of time and found a much lower rate of false alerts during training scenarios. And she testified that there was no particular amount of false alerts that she would find unacceptable. Instead, she said, "I would always be wondering why they are occurring. . . . And I would make a plan to address them if I thought they were problematic."

After pointing out evidence that was favorable to the defense, Grimm argues, "there was overwhelming evidence that Ace was not well-trained and not reliable when he scanned Appellant's vehicle." Grimm urges us to conclude: "Even under a clearly erroneous standard, when this Court reviews the 'entire evidence' on its own it will be 'left with the definite and firm conviction that a mistake has been committed,' i.e., that Ace was neither well-trained, nor reliable. *Kusi* [*v. State*], 438 Md. [362,] 383 [(2014)]."

The State takes issue with most of Grimm's characterizations of the evidence, and devotes a portion of its brief to a countering review of Ace's training records. The State asserts that the records from 2012 through July 2014 reflect that "Ace was tested 679 times in his training history," and it appears that, during those tests, "Ace gave false positive alerts 16 times. . . . That equates to a mere 2 percent false-positive rate." And, the State argues, "Ace failed to alert to the presence of drugs 32 times, . . . which equates to a false-negative rate of 4.7 percent." Grimm disagrees with the State's analysis of how well Ace performed during his training classes.

But, because our standard of appellate review requires us to view "the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the [prevailing] party," *Robinson, supra*, 451 Md. at 108, we need not respond to each item of evidence that Grimm highlights. It is sufficient for us to say that there was competent evidence in the record that, when viewed in the light most favorable to the prevailing party, supported the suppression court's finding that Ace was a sufficiently well-trained drug-sniffing dog that it was appropriate for Officer Keightley and Sgt. Lamb to rely on Ace's alert as an indication that there was a fair probability they would find narcotics in Grimm's vehicle.

D. Admission of Ace's Post-Scan Certification

Grimm's final argument as to why we should reverse the ruling of the suppression court is based upon the admission of evidence regarding the recertification of Ace four months after the scan of his vehicle. Grimm asserts: "Whether Ace passes a certification four months after the scan of Appellant's vehicle is not relevant to an assessment of his reliability on the day of the scan . . . ." Grimm argues that the court committed reversible error in admitting irrelevant evidence.

The issue arose during the direct examination of Sgt. Davis, who testified that she and other officers from the Montgomery County Police had participated in an evaluation and certification of the Maryland Transportation Authority Police's canine unit during August 2014 (*i.e.*, approximately four months after the scan of Grimm's vehicle). When the prosecutor offered

documents relative to the August visit, defense counsel objected, and the following colloquy transpired:

> [Counsel for Grimm]: Objection.
>
> THE COURT: Grounds?
>
> [Counsel for Grimm]: Relevance, Your Honor. These documents are all from August of 2014. The incident in question here happened on April 19th, 2014. So this is months after the fact. So it's just a question of relevance.
>
> THE COURT: I understand that, but it still relates to the overall training of the dog . . . . I'm going to overrule. I think it's relevant. I mean, I think that the field performance and the training that they do after can be just as important as before. It confirms whether or not the dog still can do what the dog was trained to do or the dog can't do what the dog was trained to do. So I think it can come in a couple different ways.
>
> [Counsel for Grimm]: Oh, I understand, Your Honor –
>
> THE COURT: I don't know how much weight I'm going to give it . . . but in terms of admissibility I think it's admissible for a couple of reasons.

We review a question of whether evidence is legally relevant for legal error. *State v. Simms*, 420 Md. 705, 725 (2011); *Parker v. State*, 408 Md. 428, 437 (2009).

Maryland Rule 5-401 defines "relevant evidence" to mean "evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, a primary issue for the suppression court to decide was whether Ace was a well-trained, reliable dog on the date of the scan of Grimm's vehicle. There was no dispute in the testimony that Ace had been certified by the Maryland Transportation Authority Police, and had been recertified many times, to be well-trained in the detection of heroin and other narcotics. Yet, although Ace had been recertified in January 2014, Grimm was arguing at the suppression hearing that Ace was no longer reliable in April 2014. Grimm's attack upon Ace's reliability—despite the fact that his own expert had previously certified him as reliable—was tantamount to arguing that Ace had somehow lost his ability to reliably detect the odor of narcotics. Although, as the suppression court noted, the recertification in August 2014 might be of limited weight in establishing whether Ace had lost the ability to detect narcotics as of April 19, 2014, it was evidence that had some tendency to make it improbable that Ace had suffered a loss of his olfactory sense, and consequently, this evidence would rule out one potential argument or possible explanation as to why Ace might have been less reliable on April 19, 2014, than he had been in January 2014. The evidence was, therefore, not irrelevant as a matter of law, and the suppression court did not err in admitting the evidence.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX C

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

Criminal Docket
CASE NO. 02-K-14-001188

[Dated March 17, 2015]

STATE OF MARYLAND	)
	)
vs.	)
	)
BRIAN ALEXANDER GARDNER GRIMM	)
Defendant.	)
	)

OFFICIAL TRANSCRIPT OF PROCEEDINGS
HEARING

Annapolis, Maryland

Tuesday, March 17, 2015

BEFORE:

THE HONORABLE WILLIAM C. MULFORD, II, Judge

APPEARANCES:

For the State:

Jason A. Steinhardt, Esquire, Assistant State's Attorney

For the Defendant:

Richard C. Woods, Esquire

Transcribed from electronic recording by:

Carol Vasques
CV Court Reporting
410-382-0437

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P R O C E E D I N G S

MR. STEINHARDT: Call the case of State v. Aaron Chase, K-14-1183 and State v. Brian Grimm, K-14-1188. Jason Steinhardt on behalf of the State, STEINHARDT.

MR. WOODS: Good afternoon, Your Honor, Richard Woods on behalf of Brian Grimm who is present at trial table.

MS. DRENNAN: Good afternoon, Your Honor, Elizabeth Drennan, DRENNAN, on behalf of Mr. Chase who is not present. I have been unsuccessful --

THE COURT: How about the -- wait a minute --

MS. DRENNAN: -- in contacting --

THE COURT: the Grimm case -- Grimm? Well, the Court is prepared to put an opinion on the record regarding the -- oh, he may have his handcuffs removed, but his leg irons must remain on, okay?

MR. WOODS: Your Honor, I'm not familiar with the Court's schedule today, but if it would help to wait half an hour I would be happy to do so.

THE COURT: This is actually my last two cases. And I have been recently appointed a family law DCM Judge and I have been signing multiple family law orders and I'm trying to catch up in family law. And I'm also the criminal Judge today and Judge Kiessling, the new Administrative Judge, wants to meet with me. So, I got a lot on my plate,

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okay?

MR. WOODS: I understand.

THE COURT: You may have a seat, sir, all right?

THE DEFENDANT: Yes, sir.

THE COURT: Now, what the Court will be doing is as following. I'll be providing an opinion on the record regarding Mr. Grimm and Mr. Chase's motion to suppress. And then I will have to decide what, if anything, we do regarding Mr. Chase's failure to appear.

In looking at the file I do note that there is an April 7th trial date and that is still outstanding from what I can tell. So, no matter what I do with Mr. Chase, Mr. Grimm is still going to trial on the seventh because we have access for the individual.

I have to be candid, I had absolutely no idea what really went into the K-9 world, or goes on in the K-9 world in terms of the knowledge, the training and the experience that you have when you deal with the dogs. And this has been most enlightening and I have actually watched with interest as the K-9 dogs here in the Circuit Court for Anne Arundel County come in and

go through the courtrooms in the morning. And I watch the dog differently than I ever did before. I also watch the handler differently than I ever did before.

And I've been introduced to a language which I

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really didn't know was -- well, it's sort of their internal language, just like we have our internal language. One of the Judges who was just recently appointed asked me if we have a real training manual, not what is provided by the Administrative Office of the Courts, but all the secret and the inside tips, and I said no. You just learn that as you go along.

And I was actually showing that Judge how to read files perhaps different than they would tell you. And it's sort of interesting because things that I take for granted that I just sort of know as a Judge, this new Judge is coming in and that new Judge is saying, tell me about these things. Well, in listening and watching and analyzing all the records, I found it interesting to find out a number of different things. In preparation for today's hearing I went back and I re-reviewed the entire binder with everything that was in there.

I read the defendant's memorandum, the State's memorandum, and the State had a supplemental response, which really didn't have a whole lot in there. I reread Florida vs. Harris and I also looked, again, at Brendlin vs. California, which Ms. Drennan had provided me. And I just sort of looked at and bounced through, for lack of a better word, some of the appellate cases that deal with probable cause and search and seizure and suppression of evidence.

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All parties seem to agree in this case, and -- and I do want to indicate for the record that it was a most interesting motion hearing and I -- I actually learned a lot.

All parties agree in this case that Mr. Grimm was driving the vehicle. It had the Georgia plates; it was here in Anne Arundel County. Mr. Chase was a passenger, as well as the lady in the car. And that back on April 19th of 2014, Sergeant Lamb received some type of be on the lookout, commonly referred to as the BOLO, from his contacts in DEA and HIDTA. I'm not naïve enough to think that it was just that he fell upon that car by happenstance. I think he knew exactly where it was and where it was going.

And defense counsel alludes to, and there really wasn't a whole lot of discussion about, but it seems to me that car was probably being tracked electronically by the cell phones in question, whether it's the Stingrays that have been in discussion up in Baltimore City or whether it was just a good old-fashioned pinging from the cell towers, it's really irrelevant. But, again, I'm -- I'm sure they were tracking the vehicle in some electronic fashion.

The Sergeant seized the car, and unfortunately for Mr. Grimm and Mr. Chase and the female passenger, none of them were wearing seatbelts, which gave the Sergeant that reasonable suspicion that he needed to conduct the traffic stop in this case. He did not need probable cause to

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conduct the traffic stop, but he simply needed a reasonable suspicion and the traffic stop flows from the whole Terry vs. Ohio, the Delaware vs. -- the Delaware case, Delaware vs. Prouse where it can't be random.

And it really was for all intents and purposes a Whren stop. And Whren stops are accepted and that is a stop, Mr. Grimm, which is for the purpose of really looking and trying to figure out if there are drugs in your car, and the traffic violation is used to stop the vehicle.

The traffic stop was proper as no one had seatbelts. And at some point in time, Sergeant Lamb called for K-9 and K-9 Ace and Officer Keightly responded to the scene. While they were doing that, the Sergeant was making the warrant checks. And I watched the video and I think defense counsel is wise to concede that this is not a situation where there was an unconstitutional delay.

At the car, before the K-9 arrives there is the conversation. There is the discussion about Atlanta and airline tickets and Mr. Grimm puts his head on the pillow and he leans with the foot out of the car, and the rear seat passenger, Mr. Chase, is overly talkative, and the woman is not talkative. And all of those things go into the Sergeant's mind and in his mind they are all indicia that he has someone who is a drug dealer, the nervousness and all that stuff.

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I usually pay very little attention to some of those things. They mean a whole lot more to the officers in

the field than they do to a Judge. One of the most interesting ones we heard recently was the officer describing a person as being nervous and sweaty and his hands were tightly gripped on the steering wheel. And when defense counsel asked, well, do you think some of that had to do with the fact you had your weapon pointed at his head, the officer did respond yes. That wasn't my case, but I found it amusing. We don't have that here.

There's no issue on the reasonable suspicion for the stop. There's no issue on the delay to process the tickets. I was hoping to hear a little bit more about the E-tickets. Here in the Circuit Court we know next to nothing about them. I haven't been stopped, so I don't know how they do it. And the Sergeant said he had to process it by hand, the good old-fashioned way.

Having read many, many tickets and reviewed them from, you know, when I was representing people or prosecuting cases years ago, I'm aware how much they have to put down and all the little codes they put down and how they have to call in and soundex numbers and all that. So, I don't think the Sergeant in any way was anything other than truthful about processing the tickets by hand. It would have been very easy to see if he had an E-ticket processor

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in his car, which he didn't.

So, legally, the Court can conclude reasonable suspicion to stop. The Whren stop is not really in the background, but it's there and no issue as to unconstitutional delay, which would trigger a whole separate analysis.

Now, we face before us two paths and those two paths go in wildly divergent directions. This is the proverbial fork in the road. According to the State's Attorney, A, the warrantless search of the car is constitutionally valid and the warrantless seizure of the drugs is constitutionally valid as probable cause exists pursuant to a K-9 alert, which is a good K-9 alert for lack of a better description. And the totality of the circumstances support the search -- excuse me -- and the seizure. And the State's Attorney says, B, Grimm has standing and, C, Chase has no standing.

The defense takes that second path. And the defense for Mr. Chase argues, A, that Mr. Chase has standing. And then both counsel argue that, B, the search is unconstitutional. It violates the Fourth Amendment. It is unreasonable and there is no probable cause to search and the Fourth Amendment has been violated. And the defense, whether it is a simple probable cause looking at the K-9 alert or the totality of the circumstances argues that this

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is an unconstitutional search and seizure.

Neither party has any great difference in the case law that you have presented to me. All parties agree upon the constitutional standard, what probable cause is, what reasonable suspicion is, Florida vs. Harris. There's really no dispute in terms of any of the constitutional issues. There are some cases that are cited in both memorandum, but more in support or against one or the other's position.

But from the Court's perspective it is not necessarily the case law and the constitutional

standards that apply. It's a question of what are the facts and what facts does the Court find and what conclusions does the Court draw in terms of credibility of witnesses and assessment of witness testimony? And then, you know, basically what is in the Court's mind more true than less true, more convincing in the Court minds of a truth of the fact than not.

We have no issue with Sergeant Lamb's conduct. I don't give a lot of emphasis to the nervous and all of that, all people have it. But the DEA information is important. And the DEA information, when coupled with the Sergeant's observations, takes us to what I will call step three. Step one is the stop, step two is the Sergeant's observations, et cetera, and then step three is the K-9. And the defense concedes -- or, excuse me, the State concedes as I think it

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rightly should that there is no probable cause absent the K- 9 alert.

I will tell you that absent the K-9 alert, if this had been litigated solely on those issues, I would not have found probable cause. I would not have found the -- Atlanta being a source city, the nervousness, the airlines tickets to be enough to get into the vehicle. So, this case rightly turns on Officer Keightly and K-9 Ace.

Not surprisingly we have a divergence of views and a difference of opinion as to what the Court should consider to be credible. It will spoil the ending when I tell you who I find to be the most credible witness. But I cannot analyze this case without telling you who I find to be the most credible witness. Because when I discuss Officer Keightly, he was certified at the time of

the stop and the scan. And he was certified on January 22nd, 2014, and it wasn't until about a month after that he lost his certification, and it wasn't too long after that before the certification was restored to him.

He used all the proper terminology, bracketing, focus sniffing, response, et cetera. And he was certified and qualified as an expert in this area. And the Court has found him credible, but that's not necessarily the ultimate finding because I have witnesses with expertise vastly superior to his. And I must analyze that before I can come

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back to Keightly to determine whether he did something which was proper or improper. I found him credible and I found him to be certified and I considered his training as to be in compliance or not in compliance with standard operating procedures. This is a fuzzy area.

Sergeant Mary Davis and Mr. Ted Cox and Senior Officer McNerney presented different views of what the standard operating procedures should be. Each department writes their own standard operating procedures. Each department prepares their own standard operating procedures. And each department decides what their standard operating procedures shall be so that their K-9 officers -- well, handlers, and the dogs and the trainers are certified.

Sergeant Davis has a different view than Mr. Cox does of what the ultimate standards should be, but there are standards in place. And the State of Maryland has not adapted rigid standards. I think that's what Florida vs. Harris was telling us.

So, the question for the Court is, were those standards that were in place appropriate? And I think that they were. I find that there were. Was there compliance with those standards? That's the second part of that issue. We have to look at the hours, we have to look at the training aids, and we have to look at whether or not the training was in compliance with the standard operating

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procedures, and was there a significant or serious enough deviation to say that the dog or the handler was not competent to provide the work in the field. And we can analyze the 51 alerts, the 19 no-alerts, the nonproductive responses. And we can analyze what it -- what it was due to and the reasons behind it. We can look at the extended time, the distance for the training exercises, the staleness of the aids, et cetera.

And to do that, the Court has to look to the experts. And the experts are Sergeant Mary Davis and Ted Cox. Ted Cox is in a perilous position at times and I do think he walked that tightrope that he was presented appropriately. I do not find that he strayed over any line. And I think that his answers were credible in terms of what he said and how he said it.

He and Senior Officer McNerney are very close in their views. They are good and fair in their analysis. And while one is retired and one is an active police officer, they presented to the Court what appeared to be their view of what the optimum standards should be. I said this at the hearing and I am convinced that there is dissension in the ranks. And I think that some of this was an airing of dirty laundry. But there

appears to be almost a, they didn't do it today as I did it then, view from Mr. Cox. And there seemed to be from Officer McNerney, you're not listening to

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me. Having said that, they're both credible. There is some bias, but they are credible and they have presented credible testimony.

The Court will comment on Sergeant Mary Davis. I find her to be the most credible witness that I heard in this case. I find her qualifications, her knowledge, her training and experience to be impeccable. Again, I'm going to spoil the ending, but I find her to be the most credible witness and it is she who I rely upon the most and find to be the best and most objective observer.

Her comments, and I hope I quote this correctly, have stuck with me ever since she said it. And when I went over and examined everything and everything over and over and over again, I could not get this comment out of my mind. The dog knows the odor or he doesn't. He can perform or he can't. And with that in mind, I find her to be a witness who has no ties to the case, neutral and unbiased and has -- I find she has no issue with the handler or the dog. And I find her analysis of the stop and the dog's actions to be credible.

She explains, in the Court's opinion, succinctly and carefully and expansively at times the issues with MPR or certification or protocols to the satisfaction of the Court that I can find Officer Keightly and K-9 Ace to be credible and to be a certified dog that the Court can rely

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upon for assessing whether or not probable cause exists. When the Court analyzes Sergeant Lamb's observations, comments, the DEA tip with the K-9 dog or, which I find credible, I find probable cause in this case to believe that there is a reasonable probability and/or a fair probability that contraband will be found in a particular place which was in this vehicle.

Phrased another way, is there probable cause that heroin, one of the odors that this dog was certified to detect, would be found in the vehicle? We can go and analyze the door open, the trucks going by -- I'm reading directly from this. We can analyze the dog walking past the car and not being told or given the command to search. We can analyze all of that, but the bottom line is, is there a fair probability that there would be one of these drugs in the car based upon the four odors that this dog was trained to sniff for? And the Court finds that there is a fair probability and, therefore, I will deny the motion to suppress. And I will indicate that probable cause exists.

I must comment on two additional subjects. One is Mr. Chase. I find he has standing. An Appellate Court may disagree with me, but I do not see how when you have spent 10 to 15 hours in a vehicle, you're traveling, there is no indication that he did anything but leave Atlanta and come to Maryland in that car. You're ensconced in the car.

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You're curled up in the car. You're driving in the car. You're pulled out of the car, that he does not have

standing to object to both the stop and the search of the vehicle.

An Appellate Court may see it differently, but I believe he has standing. I believe he has, whether he analyze it under the post-Scalia, the new cases which Justice Scalia is now writing, which seem to go a little bit against Katz and more based upon -- well, I don't want to venture into an improper area, but let's just say Katz teaches us and you all should know Katz, telephone booth, gambler, is there a reasonable expectation of privacy in the area where you are? The fact that it's a public place didn't matter in Katz.

I always say when I teach my students, do you think that just because it's a public bathroom you lose your reasonable expectation of privacy? I don't see that different from a phone booth. So, I think under Katz there's a reasonable expectation of privacy and I find Chase has standing.

But I disagree with Senior Officer McNerney and Ted Cox that there was no alert by the dog. I'm not an expert. I must analyze it on the totality of the circumstances. And I must rely upon the expert testimony. And I find the most credible expert to be Sergeant Mary Davis. When she broke the stop down and she went,

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"13:13:23, lead is tight to prevent dog go in window, shows dog has independent intention from handler's attention. Dog insists to go to driver's side door not once, two time. Indicates target odor, get to source. Handler took control dog leash tight, not have contact

with civilian's dog, excited, wants to work. Dog obedience, stay, lose heel, not expect indication."

Then when she goes through all of this she concludes there might have been a little odor, there might have been a lot of odor, but the dog alerted. And she concludes that the dog committed, sat, held it nicely and there was no evidence of a false alert, that the dog was independent. The handler was more of a distraction. The dog knew the odor, there was no handler interference, no cueing from the handler. There was an obvious change of behavior, the head dip, the bracketing, the focused sniffing. That in her opinion the competence of K-9 Ace was that he was competent to make probable cause decision based upon the training records, observing the team personally and reviewing the video.

The Court accepts that and the Court finds that to be the most credible evidence in the case. And, therefore, I deny the motion to suppress and I find that the case shall proceed to trial. Any questions from the State?

MR. STEINHARDT: No questions from the State, Your

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Honor.

THE COURT: Mr. Woods, I will tell you this was one of the -- and, Ms. Drennan, best presented motion hearings I've ever had. I heard an attorney one time brag that he never lost a case, and I said to that attorney, then, A, you don't try cases or B, you don't take tough cases. I have never equated winning or

losing with performance. Nobody likes to lose, but I commend the two of you for your performance in this case.

Having said that, I'm sure it is not solace, but the record is, in my opinion, impeccably preserved. Any questions?

MR. WOODS: First, Your Honor, I want to thank you and your staff for the courtesy you extended us in this hearing. It was an absolute delight to appear before you. And although I might respectfully disagree with your decision --

THE COURT: You can do that.

MR. WOODS: -- I certainly appreciate the skill with which you reached it. And the other thing is, I think there's an extra book floating around your chambers. Not the one that's in evidence -- that's right, I owed that to Cox. I said I'd mail it to him.

THE COURT: And I will tell you I only left two stickies in, but trust me, I went through every single --

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MR. WOODS: Well, Your Honor, this is the first time I ever appeared before Your Honor. I really do want to compliment you. I -- I -- I know there's often a difference between the ability of Judges to get things done and the perception of the attorneys and public who appear before them, but I found this entire experience to be delightful and I thank you for that.

THE COURT: I'm -- I'm trying to conspicuously avoid reading daily Rule 4 -- or 5-403 and 5-611(a). And 5-403 allows me to curtail relevant testimony if it's a

waste of time and 5-611(a) allows me to curtail testimony if it's a needless consumption of time. And I am beating back every instinct that I have to constantly rush things. And co-counsel and the State were in front of me on Friday and I was just not as patient on Friday as I was in this case. Trust me, I push them pretty hard at times. Any questions?

MR. WOODS: No, Your Honor.

THE COURT: Ms. Drennan?

MS. DRENNAN: I don't know what you are -- in terms of Mr. Chase --

THE COURT: We're just not going to do anything.

MS. DRENNAN: Okay, great.

THE COURT: I delivered an opinion on the record, he chose not to be here. He voluntarily absented himself from the proceeding, but he didn't have to be here. But he

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has to be here at trial.

MS. DRENNAN: He -- yes, I understand.

THE COURT: And if he's not here on trial on April 7th, then he's in trouble.

Now, these were courtesy copies that you gave me and I don't need the -- well, I'm going to give the courtesy copies to my Clerk and he's going to hang onto them.

Madam Clerk, here's an order. The order says, "Upon consideration the motion to suppress the opposition is ordered that the motion to suppress is denied." That is dated 3/17/15, so you can put a copy of that in both files. Here are the two files for you. You may have this back.

MR. WOODS: Thank you, Your Honor.

THE COURT: Counsel, you are well aware of your options. A, on April 7th you can enter conditional guilty pleas under the new Maryland Rules, which allow you to enter a conditional guilty plea. I certify, basically, what issues you're preserving for appeal. B, you can plead not guilty on a statement of facts and preserve all rights to appeal. C, you can try it and argue that nobody knows anything that's in the car because it's hidden and secreted, how could they know? And I don't really have anymore options.

MR. WOODS: We could all leave for Mexico, Your Honor.

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THE COURT: No. Good faith. Good faith was tossed around, I don't need to ever get to that. By finding of probable cause, I don't need to, okay? I will tell you that it's going to be -- well, let's just say that this Judge will tread very, very warily before I ever find good faith in a warrantless search.

And I've got a search warrant case on my desk where one of the Judges in Anne Arundel County was reversed. And in that case the Court of Special Appeals refused to even consider good faith in a warrantless

situation. So, tread very, very warily in that area so I don't even need to get there.

So, you've got three options -- well, your fourth option is to postpone. Guilty plea -- five options, not guilty, statement of facts, conditional guilty plea, full blown trial or postpone or bench warrant, six options. Ms. Drennan, sorry you client is not here.

MS. DRENNAN: That's okay.

THE COURT: But I'm not doing anything because he didn't have to be here for the opinion on the record.

MS. DRENNAN: He knows the trial date.

THE COURT: But he does have to be here for the trial.

MS. DRENNAN: He knows the trial date.

THE COURT: Okay. Thank you all.

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MR. STEINHARDT: Thank you, Your Honor.

MR. WOODS: Thank you so much, Your Honor.

THE COURT: Yes, the -- the defendant needs to be produced for his hearing. If you're going to try that on the 7th, his family members must bring clothes for him and we can provide blue notes for him to change clothes. Okay? Court's in recess.

(At 2:43 p.m., hearing concluded.)

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CERTIFICATE OF TRANSCRIPTIONIST

I hereby certify that the proceedings in the matter of State of Maryland vs. Brian Alexander Gardner Grimm, Case No. 02-14-001188, heard in the Circuit Court for Anne Arundel County, Maryland, on Tuesday, March 17, 2015, before the Honorable William C. Mulford, II, were recorded by means of digital recording.

I further certify that, to the best of my knowledge and belief, the preceding constitute a complete and accurate transcript of the proceedings transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In Witness Whereof, I have affixed my signature this 28th day of December, 2015.

/s/ Carol Vasques
Carol Vasques, Transcriptionist

APPENDIX D

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

Case Nos: K-14-1188
and K-14-1183

[Filed March 17, 2015]

STATE OF MARYLAND	)
	)
vs.	)
	)
BRIAN GRIMM	)
and	)
AARON CHASE	)
	)

PROPOSED ORDER

Upon Consideration of the Defendants' Motion to Suppress and the Opposition filed by the State, and the arguments of counsel, it is hereby by this Honorable Court

ORDERED, the Motion to Suppress is **DENIED**.

/s/ William C. Mulford, II 3/17/15
Honorable William C. Mulford, II