No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARSHON SIMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PROOF OF SERVICE

State of Illinois)
) ss
County of Champaign)

ELISABETH R. POLLOCK, being first duly sworn on oath, deposes and states as follows:

1. That on November 19, 2019, the original and ten copies of the petition for writ of certiorari and motion to proceed *in forma pauperis* in the above-entitled case were deposited with Federal Express in Urbana, Champaign County, Illinois,

properly addressed to the Clerk of the United States Supreme Court and within the time for filing said petition for writ of certiorari; and

2. That an additional copy of the petition for writ of certiorari and motion to proceed in forma pauperis was served upon the following counsel of record for Respondent:

Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

Mr. Greggory Walters
United States Attorney's Office
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Peoria, IL 61602

MARSHON SIMON, Petitioner

THOMAS W. PATTON
Federal Public Defender

/s/ Elisabeth R. Pollock
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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Now comes the Petitioner, Marshon Simon, by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A, and Rule 39.1 of this Court, respectfully requests leave to proceed *in forma pauperis* before this Court, and to file the attached Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent, was sentenced to a term of imprisonment in the United States Bureau of Prisons, and was

represented by the undersigned counsel pursuant to 18 U.S.C. § 3006A in the United States Court of Appeals for the Seventh Circuit.

MARSHON SIMON, Petitioner

THOMAS W. PATTON
Federal Public Defender

/s/ Elisabeth R. Pollock
ELISABETH R. POLLOCK
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Date: November 19, 2019

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Florida v. Harris* stand for the proposition that narcotics sniffing canines may be trained to alert to residual odor, i.e. the absence of narcotics, and still comply with the Constitutional protections of the Fourth Amendment?
2. Does an *attempted* offense meet the requirements of the elements clause of the Armed Career Criminal Act's definition of violent felony under 18 U.S.C. § 924(e)(2)(B)(i)?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Marshon Simon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 937 F.3d 820, and appears in Appendix A to this Petition.

JURISDICTION

The court of appeals entered its judgment on August 21, 2019. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In the present case, Mr. Simon was convicted of one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

18 U.S.C. § 922(g)(1) states that it is unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition…

The district court imposed an enhanced sentence of 180 months of imprisonment under the Armed Career Criminal Act, 18 U.S.C. § 924(e). At issue in the district court was one of Mr. Simon's predicate offenses, Illinois attempted armed robbery, under Section 924(e)(2)(B)(i), which states:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section

922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
(2) As used in this subsection--
(A) the term "serious drug offense" means--
(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
(i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . .

At the time of Mr. Simon's conviction (August 4, 2000), robbery was defined as taking "property . . . from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (2000). Illinois' attempt statute stated:

(a) Elements of the Offense.
A person commits the offense of attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

(b) Impossibility.
It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

720 ILCS 5/8-4 (2000).

STATEMENT OF THE CASE

This case presents an opportunity for the Court to clarify whether its opinion in *Florida v. Harris*, 586 U.S. 238, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013), allows a canine to be *trained* to detect the presence of residual odor (when no criminal activity is present), when such a training program violates the requirements of state law and the Fourth Amendment. This Court in *Harris* held that an alert by an adequately trained dog, unrebutted by opposing evidence, can support a finding of probable cause. *Harris*, 586 U.S. at 246, 133 S. Ct. at 1056-57. This Court, however, also expressly found that the defendant must have an opportunity to contest the adequacy of a training program, "perhaps asserting that its standards are too lax or its methods faulty." *Id.* at 247, 133 S. Ct. at 1057.

Harris simply acknowledged the ability of canines to detect residual odors. Mr. Simon is not arguing the question involved in *Harris*. Put another way, Mr. Simon is not arguing that the dog alerting on a residual odor indicates an error or cannot be used to establish probable cause. Rather, Mr. Simon's argument specifically addresses the canine's training program; an argument *Harris* encourages a defendant to raise when the training method is faulty.

Training a dog to detect a residual odor is in direct violation of Illinois law, which requires that all drug enforcement dogs be trained pursuant to the SWGDOG Guidelines. See 50 ILCS 705/10.12. Moreover, training dogs on residual odor

teaches them to alert in situations where no evidence of criminal activity exists, in violation of the Fourth Amendment. These types of challenges to canine reliability are what *Harris* envisioned.

The Seventh Circuit Court of Appeals concluded that the district judge conducted a proper *Harris* evaluation in finding that the canine in this case was properly trained. *Harris*, however, does not address training. The Seventh Circuit's conclusion that a dog trained to alert on residual odors generally yields a fair probability that drugs or evidence of drugs will be found is untenable. A dog trained to alert on residual odors, by its very nature, is trained to alert to the former presence of drugs. Rather, the dog is trained specifically to alert to drugs that are not present at the time of the sniff. This is inconsistent with the Fourth Amendment's requirement that a canine be trained to alert in situations where criminal activity exists. When "viewed through the lens of common sense," a reasonably prudent person would not believe that a search would reveal evidence or contraband when a dog had been trained to alert when contraband was not present.

Both the district Court and the Seventh Circuit have incorrectly applied *Harris* and extended its holding to situations where improperly trained dogs are being found reliable. The overwhelming majority of post-*Harris* cases deal with the argument that a dog sniff was not reliable because no drugs were ultimately found. See, e.g., *United States v. Green*, 740 F.3d 275, 282 (4th Cir. 2014). Despite what the Seventh Circuit suggests, that is not the question at issue in this case. This case

gives this Court the opportunity clarify *Harris* and hold that dogs must be trained to find actual contraband, and not trained to alert to the absence of drugs.

Moreover, this case presents this Court with the opportunity to reverse an erroneous Seventh Circuit decision which holds that the crime of attempt, which does not has an element the use, attempted use, or threated use of physical force, qualifies as a violent felony under the Armed Career Criminal Act's ("ACCA") elements clause. See *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017).

Pursuant to 18 U.S.C. § 924(e)(1), or ACCA, any person who violates Section 18 U.S.C. § 922(g) and has three previous convictions for a violent felony is subject to a mandatory minimum of fifteen years imprisonment. A "violent felony" as defined by the Act means "any crime punishable by imprisonment for a term exceeding one year . . . that (i) has an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). It is clear from the text of the act that the underlying "violent felony" for the purposes of Section 924(e) must have, as an element of that offense, the use, attempted use, or threated use of force.

This approach, which is used to determine whether a predicate offense qualifies as a "violent felony" under Section 924(e), is known as the "categorical approach." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *United States v. Johnson*, 743 F.3d 1110, 1111 (7th Cir. 2014). The "categorical approach" requires that courts "look only to the statutory definitions—i.e. the elements—of a

defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "violent felony." *Descamps*, 133 S. Ct. at 2283; *Johnson*, 743 F.3d at 1111.

The Seventh Circuit has completely abandoned that categorical approach in favor of their own analysis that does not have any basis in the law and ignores clear directives from this Court. In *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017), the Seventh Circuit held that "[w]hen a substantive offense would be a violent felony under [18 U.S.C.] § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony." This opinion, however, disregards the language of the statute in favor of judicial opinion as to what the statute should say. Focusing on the elements of 720 ILCS 5/8-4, as the Seventh Circuit should do, reveals that the Illinois attempt statute does not have as an element the use, attempted use, or threated use of physical force and therefore cannot be a predicate crime of violence to support a conviction under Section 924(e).

Hill's position that attempt can be a predicate crime of violence under Section 924(e) directly cuts against the categorical approach. It is clear that the elements of attempt under Illinois law allow a defendant to set out to commit a crime and take a substantial step towards committing that crime (and thus commit the offense of attempt) without ever using, attempting to use, or threating to use physical force. Thus, this Court should take the opportunity to clarify that, under the elements

approach, Illinois' attempt statue cannot constitute a predicate offense under the ACCA.

A. Factual Background

On the evening of August 21, 2016, DPD Officers Jason Danner and Jamie Hagemeyer (hereinafter "Danner" and "Hagemeyer") were working together as a bicycle patrol team on third shift. Officer Robert Hoecker (hereinafter "Hoecker") was their squad car partner and stop car. (Tr. 7/12/17 pp. 38-39).

Danner and Hagemeyer testified that as Mr. Simon approached the intersection of College and Green Streets he used his turn signal to make a turn onto Green street but he failed to turn the signal on more than 100 feet from the intersection thereby violating the Illinois Vehicle Code (625 ILCS 5/11-804(b)). After allegedly seeing the violation, Danner and Hagemeyer radioed to Hoecker, who pulled Mr. Simon over at 10:26 p.m. (Def. Exh. 63 at 22:26:40). After he was stopped, Simon provided his driver's license and proof of insurance at Hoecker's request. (Tr. 7/12/17, pg. 11; Def. Exh. 6 at 22:27:24).

Danner and Hagemeyer arrived on the scene at 10:29 p.m., three minutes later. (Def. Exh. 6 at 22:29:05). Hoecker told Danner that Mr. Simon had insurance and a valid license, and then stated he "didn't know if [Danner] wanted the dog or not," to which Danner responded, "[A]ny priors?" (Def. Exh. 6 at 22:29:16-22:29:18). Hoecker then ran a criminal history check and learned that Mr. Simon had prior drug and

weapons charges. When Hoecker passed the information on to Danner, Danner decided to call for the canine. (Tr. 7/12/17 pg. 18; Def. Exh. 6 at 22:30:16, 22:30:41).

Canine handler Chris Snyder (hereinafter referred to as "Snyder") arrived at the scene at approximately 10:33 pm along with canine officer Rex. (Def. Exh. 6 at 22:33:17). Within a few seconds of walking around the vehicle Rex began to bark and then "downed," signaling an alert. (Tr. 7/12/2017 pp. 151, 161). It took less than twenty seconds for Snyder to prepare Rex, begin the search, and "confirm" the alert. (Tr. 7/12/2017 pg. 153). Danner then asked Mr. Simon to step out of the vehicle, at which point a search was conducted. No controlled substances were found in Mr. Simon's car, not even trace amounts such as shake, residue, or ash was discovered. (Tr. 7/12/2017 pp. 162-163) A gun was found, however.

B. Procedural Background

Because Mr. Simon was a felon, he was charged with being a felon in possession of a firearm under 18 U.S.C. Section 922. Mr. Simon moved to suppress the gun arguing, among other things, that the canine ("Rex") was improperly trained. The district court held an evidentiary hearings on three separate dates and heard the testimony of seven witnesses.

At the suppression hearing, Mr. Simon presented the testimony of Dr. Mary Cablk. Dr. Cablk testified that Macon County is bound by Illinois law, which requires that police dogs used by State and local law enforcement agencies for drug enforcement purposes be trained to meet the minimum certification requirements

set by the Illinois Law Enforcement Training and Standards Board (ILETSB). Illinois has adopted the standards for training and certification set forth in the Scientific Working Group on Dog and Orthogonal Detector Guidelines ("SWGDOG Guidelines"). (Tr. 7/10/17 pp. 15-16; Tr. 9/26/17 pg. 47); 50 ILCS 705/10.12.

One of the key SWGDOG guidelines is not to train dogs to alert on residual odors. *Id.* at 44. Residual odor is defined as "odor that persists from a target that may or may not be recoverable." *Id.* at 43. A dog trained to alert on trace amounts of drugs will alert on a location where there are not drugs currently based on residual odor from the drugs being present at some earlier time. Furthermore, there is no way to test how much residual odor is present, therefore, it is impossible to know if the dog really is alerting on residual odor or is just making a false alert to get the reward, i.e. a dog treat or toy, used train the dog to alert. *Id.* at 45-46. For those reasons SWGDOG recommends that dogs not be trained to alert on residual odor. (Tr. 7/10/17 pg. 44). Rather, SWGDOG recommends that at least 1 gram of controlled substance be used to train dogs. *Id.* at 45. That way if the dog alerts the trainers know there really is a controlled substance in the location searched.

Contradicting those Guidelines, the Macon County K-9 Academy purposefully trained its dogs to alert on cotton balls containing residual odors of controlled substances and material measuring less than 1 gram. (Tr. 7/10/17 pg. 45; Tr. 7/12/17 pp. 108-109; Def. Exh. 12).

Dr. Cablk testified that because Illinois had adopted the SWGDOG Guidelines, that indicated an intention for their law enforcement units to actually follow those Guidelines. SWGDOG outlines "best practices" and was designed to increase the defensibility of canine training programs in court. Residual odor training violates SWGDOG Guidelines (minimum for training is 1 gram, per Def. Exh. 17 § 3.5.2), and contradicts the goal of training a K-9 to find recoverable material. (Tr. 7/10/17 pg. 44). Rex was repeatedly and intentionally trained on scented cotton balls and material measuring less than 1 gram. (Tr. 7/10/17 pg. 45; Tr. 7/12/17 pp. 108-109; Def. Exh. 12).

Detective Chad Larner, the canine training director at Macon County, admitted that he knowingly and intentionally ignored the SWGDOG Guidelines, recommending that training quantities be in excess of one gram of material. (Def. Exh. 17; Tr. 9/26/17 pp. 37-40). The Academy does so because they want the dogs sniffing the smallest amount of narcotics possible and paying attention to small amounts. (Tr. 7/12/17 pp. 133-134). Snyder, the canine officer, explained how his dog Rex was trained using cotton balls. Accordingly, Rex was trained to alert to the presence of a controlled substance even when no actual controlled substance is present. (Tr. 7/12/17 pp. 133-134).

Larner also testified that whenever he disagrees with a SWGDOG recommendation, he "absolutely" made up his own rules, with no reference to any accepted national guideline or recommendation. (Tr. 9/26/17 pg. 54). In addition, the

Decatur Police Department also does not record "non-productive responses" in accordance with SWGDOG recommendations, in that their records routinely confirm canine alerts even when no drugs were recovered. (Tr. 9/26/17 pp. 51-52).

Larner also testified that the SWGDOG group was defunct and could no longer be reached by telephone. As such, he could not address the challenges that arose as a result of attempting to train under the SWGDOG SC-8 Guidelines. (Tr. 9/26/17 pp. 8-9, 15-16) This was, however, incorrect: the National Institute of Standards and Technology (NIST) incorporated the Scientific Working Groups (SWGs) under its federal umbrella, including SWGDOG. (R. 20, pp. 14-15).

Dr. Cablk testified that Rex could not have smelled the odor of residual marijuana under the circumstances present in this case. Cablk testified that even if there was an odor of marijuana inside Mr. Simon's wallet, it was residual only, which means the scent is weaker than if there were a measurable substance present. A dog would have to engage in focused sniffing with its mouth closed to be able to get to that odor. (Tr. 7/10/17 pp. 76-77). Rex was barely sniffing for a few seconds, on the passenger side of the vehicle, before the alleged alert and would never have been able to smell residual odor in such a short period of time. (Tr. 7/10/17 pg. 77; Def. Exh. 5). The only source of residual odor mentioned in the police report was the odor of marijuana in the wallet; to the extent that this was the only source identified, it was physically impossible for Rex to have smelled it. (Tr. 7/10/17 pp. 115-116).

Larner testified that he believed that Rex alerted to the presence of residual odor on the night in question. His opinion was based on Simon's history as a drug dealer and Snyder's "real-time observations" of Simon on that evening. (Tr. 9/26/17 pp. 4, 64). Larner admitted, "I'm not a scientist…when we're talking about…the capability of a dog's nose." (Tr. 9/26/17 pg. 58).

During her review of the training records, Cablk identified several areas in which she believed Rex was improperly trained beyond the training on residual odors. Those areas included the failure to properly utilize blind and double blind searches, and failure to conduct proficiency testing as recommended. (Tr. 7/10/17 pp. 43-44, 50-52). Despite these failures, the state of Illinois did certify Rex.

After all of the evidence was presented, both parties submitted Proposed Findings of Fact and Conclusions of Law to the district court. (R.19; R. 20). In an Order filed on November 6, 2017, the district court denied the Motion to Suppress. (R. 21). In the relevant portion of the Order, the district court found that Rex was a properly trained and certified canine whose alert can lead to a probable cause finding. (R. 21).

Following the denial of his Motion to Suppress, Mr. Simon entered a conditional plea of guilty, in which he preserved the right to appeal several issues, including the denial of his motion to suppress, as well as his qualification as an Armed Career

Criminal, arguing his prior conviction for attempted armed robbery in Illinois did not qualify as a violent felony.[1] The case then proceeded to sentencing.

During sentencing, The Presentence Report calculated Mr. Simon's base offense level to be 24 under U.S.S.G. § 2K2.1(a)(2), but increased that to 33 because he qualified as an Armed Career Criminal under the ACCA. (PSR ¶¶ 15-21). The three convictions which resulted in the application of the ACCA enhancement were: 1) attempted armed robbery in Illinois in 2000; 2) possession of a controlled substance with the intent to deliver in Illinois in 2006; and 3) possession of 5 or more grams of cocaine base in federal court in 2009. (PSR ¶¶ 27, 30, 32). With a credit for acceptance of responsibility, Mr. Simon's total offense level was 30, which combined with a Criminal History Category of V resulted in a sentencing range of 151 to 188 months. (PSR ¶¶ 24, 35, 65). The mandatory minimum sentence was 180 months. (PSR ¶ 64).

Mr. Simon objected to the application of the ACCA enhancement, arguing that his prior conviction for attempted armed robbery in the State of Illinois in 2000 did not qualify as a violent felony under the statute. (PSR Addendum). The allegations underlying the conviction were that Mr. Simon performed a substantial step towards taking property from a person while armed with a bludgeon. (PSR ¶ 27).

[1] Mr. Simon also appealed the district court's denial of his motion to supplement the record, as well the district court's denial of his motion to recuse United States District Judge Colin S. Bruce. The denial of these motions are not at issue in this Petition.

The parties appeared for the sentencing hearing on June 29, 2018. Mr. Simon persisted in his objection to the classification under the ACCA, but recognized that resolving the issue would be one for the appellate courts, not the district court. (Tr. 6/29/2018 pg. 5). The district court then proceeded to sentence Mr. Simon to the mandatory minimum 15 years of imprisonment, three years of supervised release, and a $100 special assessment. (Tr. 6/29/2018 pp. 10-13; R. 37; App. 1-6). A timely notice of appeal was filed on July 3, 2018. (R. 40).

The Seventh Circuit Court of Appeals affirmed the district court on all grounds. As to Rex's training, the court determined that it did not matter that Rex was not trained in accordance with the SWGDOG guidelines (which are a mandatory part of Illinois law) because "Illinois law does not control the Fourth Amendment." *United States v. Simon*, 937 F.3d 820, 834 (7th Cir. 2019). Thus, the Seventh Circuit gave no weight to the fact that Rex's training admittedly did not comport with the standards that the Illinois legislature has set forth for training canines. See 50 ILCS 705/10.12.

In rejecting Mr. Simon's argument that a dog trained to detect residual odors is not properly trained, the Seventh Circuit relied entirely on this Court's opinion in *Harris*. The Seventh Circuit read *Harris* to say that because a well-trained dog can (and should) have the ability to detect residual odors, that his training program on residual odors is "up to snuff" under *Harris*. *Simon*, 937 F.3d at 835. Put another way, according to the Seventh Circuit, *Harris* stands for the proposition that

because a dog can detect residual odors, his training on residual odors must comport with the Fourth Amendment.

As to the argument that the crime of attempt does not qualifies as a violent felony under the ACCA's elements clause, Mr. Simon recognized that the Seventh Circuit's opinion in *Hill* foreclosed the argument and although Mr. Simon fully briefed the issue, Mr. Simon noted that the issue was briefed simply for the purposes of preservation for this Petition. The Seventh Circuit recognized the same, noting that its prior precedent foreclosed the argument and that the argument was made solely for the purpose of preservation. *Simon*, 937 F.3d at 836.

REASONS FOR GRANTING THE PETITION

Review is necessary to resolve and further clarify important issues of constitutional law regarding the training of police canines, and in particular whether the training of police canines to detect residual odor comports with the Fourth Amendment. Additionally, review is necessary to reverse an erroneous decision of the Seventh Circuit Court of Appeals which improperly rejects the categorical approach in finding that a conviction for attempt qualifies as a violent felony for the purposes of the ACCA. More particularly, review is necessary to clarify:

(1) Whether the Seventh Circuit Court of Appeals properly found that this Court's opinion in *Harris* stands for the proposition that a canine trained to alert when no narcotics are present has been properly trained; and

(2) Whether the crime of attempt, which does not has an element the use, attempted use, or threated use of physical force, qualifies as a violent felony under the ACCA's elements clause.

I. The Seventh Circuit incorrectly interpreted *Harris* in holding that a canine can be properly trained to alert to the presence of narcotics when no narcotics are present

The Seventh Circuit's decision incorrectly interprets this Court's opinion in *Florida v. Harris*. In upholding the district court's denial of Mr. Simon's motion to suppress, the Seventh Circuit incorrectly relied on *Harris* to find that a canine trained to detect residual odor has been trained properly. This Court in *Harris* merely recognized a canine's ability to detect residual odor. Mr. Simon does not challenge that premise. *Harris*, however, says nothing about training a canine on residual odor. In fact, all this Court said about training in *Harris* is that a defendant has the right to raise challenges to canine sniffs based on the canine being improperly trained. *Harris*, 586 U.S. at 247, 133 S. Ct. at 1057. Thus, the Seventh Circuit's holding that *Harris* allows canines to be trained on residual odor is erroneous.

Although canine Rex passed certification tests prescribed by the Illinois Law Enforcement Training and Standards Board (ILETSB), the training Rex received was improper and allows for constitutional violations under the Fourth Amendment. Specifically, Rex was trained on searching for residual odors, which is improper because it creates an unacceptable risk of false alerts. By increasing the

possibility of false alerts, the Decatur Police Department's canines are being utilized to "skirt constitutional protections." The Decatur Police Department's training violates existing protocols of SWGDOG and, by extension, the State of Illinois LETSB. Moreover, training canines to alert to "residual odor" is not recommended for many reasons, "not the least of which is that the alerts cannot be scientifically substantiated."

On the subject of canine reliability and certification, this Court in *Harris* wrote:

> For that reason, evidence 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. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.

Harris, 568 U.S. at 246-47, 133 S. Ct. at 1057.

The Court, however, expressly held that a defendant "may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty" and also that a "defendant may examine how the dog (or handler) performed in the assessments made in those settings." *Id.* at 247, 133 S. Ct. at 1057. Where the district court and Seventh Circuit both went

astray is holding that *Harris* stands for the proposition that *training* a canine to detect residual odors is proper.

Harris established that dogs have the ability to detect residual odors and that a dog alerting to a residual odor can constitute probable cause. *Harris*, 568 U.S. at 245-47, 133 S. Ct. 1056-58. Put another way, this Court held that a canine should be able to detect residual odor and just because the canine detects residual odor and drugs are not present, does not mean that the canine failed or is not reliable. What this Court did not hold is what Mr. Simon argued and the Seventh Circuit rejected: that a canine can be *trained* on residual odor and, in turn, *trained* to alert when drugs are not present. This misunderstanding of *Harris* is critical in cases such as this one where Macon County has admitted this is how they train their drug detection dogs. It is important for this Court to weigh in and find that training a dog to detect drugs when they are not present violates the Fourth Amendment.

In this case, the reason that Rex falsely alerted on Mr. Simon's vehicle is because he was not trained properly under Illinois law. 50 ILCS 705/10.12 clearly states that police dogs used by state and local law enforcement agencies for drug enforcement purposes shall be trained pursuant to the SWGDOG Guidelines. (Tr. 7/10/17 pp. 15-16; Tr. 9/26/17 pg. 47). Because it is an Illinois statute, Illinois rules of statutory construction govern. *Zahn v. N. Am. Power & Gas, LLC*, 815 F.3d 1082, 1089 (7th Cir. 2016) ("Because the question before us involves the interpretation of an Illinois statute, we apply Illinois's rules of statutory construction.") Illinois's

"primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *People v. Donoho*, 204 Ill.2d 159, 273 Ill. Dec. 116, 788 N.E.2d 707, 715 (2003). There is no better indicator of that intent than the "clear language of the statute." *People v. NL Indus.*, 152 Ill.2d 82, 178 Ill. Dec. 93, 604 N.E.2d 349, 355 (1992); see also *People v. Marshall*, 242 Ill.2d 285, 351 Ill. Dec. 172, 950 N.E.2d 668, 673 (2011) (same).

Furthermore, "[i]t is well established that, by employing the word 'shall,' the legislature evinces a clear intent to impose a mandatory obligation." *People v. Ramirez*, 214 Ill.2d 176, 291 Ill.Dec. 656, 824 N.E.2d 232, 236 (2005). As such, the Academy was bound, by law, to follow those Guidelines. By admission of Larner, he refused to do so because he believed that they were meant as guidance only, which he does not have to follow if he feels it is inappropriate. (Tr. 9/26/17 pp. 8-9, 54).

Dr. Cablk opined expertly as to why Larner's attitude is troublesome. During her review of the training records, Cablk identified several areas in which she believed Rex was improperly trained. Those areas included the use of residual odors, the failure to properly utilize blind and double blind searches, and failure to conduct proficiency testing as recommended. (Tr. 7/10/17 pp. 43-44, 50-52). Residual odor training violates SWGDOG Guidelines (minimum for training is 1 gram, per Def. Exh. 17 § 3.5.2), and contradicts the goal of training a canine to find recoverable material. (Tr. 7/10/17 pg. 44). Rex was repeatedly and intentionally

trained on scented cotton balls and material measuring less than 1 gram. (Tr. 7/10/17 pg. 45; Tr. 7/12/17 pp. 108-109; Def. Exh. 12).

The Seventh Circuit quickly dismissed Mr. Simon's claims that Rex was unreliable because he was not trained according to SWGDOG guidelines, finding that SWGDOG was irrelevant because Illinois law does not control the Fourth Amendment. *Simon*, 937 F.3d at 834. The Seventh Circuit misunderstands the importance of the SWGDOG guidelines to this analysis. Although Illinois law does not control the Fourth Amendment, it does control how Illinois police dogs are trained. Thus, it follows that a dog that is not trained according to the laws of its state is also not properly trained for the purpose of the Fourth Amendment. Put another way, although SWGDOG does not control the Fourth Amendment, the Seventh Circuit's position that a dog that is not properly trained under the laws of its own state can still be properly trained for the purposes of the Fourth Amendment is patently unreasonable. The Seventh Circuit's position in this case allows canines that are not properly trained in accordance with state law to be used to violate an individual's Fourth Amendment rights.

While the Seventh Circuit gives little by the way of explanation on this point, it is likely that the court reached this conclusion based on its overall misunderstanding of this Court's decision in *Harris*. The Seventh Circuit's opinion is entirely focused on whether a properly trained dog should alert to residual odors. *Simon*, 937 F.3d at 835. Had the Seventh Circuit focused on whether training a dog

on residual odors yielded a properly trained dog in the first place, the court may have understood the importance of SWGDOG and how a dog that is not trained in accordance with Illinois law is not reliable under the Fourth Amendment. This crucial misunderstanding requires intervention by this Court to ensure that canines are being trained to detect the actual presence of narcotics.

The residual odor training is particularly problematic because the Decatur Police Department's goal is to have the dogs sniffing the smallest amount of narcotics possible and paying attention to small amounts. (Tr. 7/12/17 pp. 133-134). But the goal of training should be to produce a canine that only alerts when there are target odors present; the goal of training is not to create an alert when there is nothing there to find. (Tr. 7/10/17 pg. 27). This approach increases the possibility of false alerts, which indicates that the Decatur Police Department's canines are being utilized to skirt constitutional protections which are sacred in our society and protected by the Fourth Amendment. In order to search a vehicle, there must be probable cause that the vehicle at that very moment contains evidence of criminal activity. *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009) (emphasis added). There is no dispute that a canine's alert can constitute probable cause, but if a canine is trained to alert in situations where no evidence of criminal activity exists, it violates the Fourth Amendment.

The Seventh Circuit, much like the district court, relied on *Miller v. Vohue Liche Kennels, Inc.*, 600 Fed. Appx. 475 (7th Cir. 2015), an unpublished civil

opinion, to support its proposition that dogs can be trained on residual odor. The court's reliance on *Miller* is misplaced for a myriad of reasons. First, *Miller* involved Indiana state law, and the appeal concerned a summary judgment ruling in a civil case brought under 42 U.S.C. § 1983. In *Miller*, the plaintiff sued the defendant kennel for improperly training dogs to alert to residual odors. *Miller*, 600 Fed. Appx. at 476. The defendant filed for summary judgment, noting the decision in *Harris* that a dog's alert to residual odor does can constitute probable cause. *Id.* However, at no time did either party raise the issue of Indiana state law and whether or not Indiana had bound itself to follow the SWGDOG Guidelines, and the Seventh Circuit upheld the grant of summary judgment on the grounds that the defendants were not state actors as defined by Section 1983. *Id.* at 477.

Miller improperly relies on the same premise that the Seventh Circuit relied upon in this case: that *Harris* says a dog can be trained on residual odor. See *Miller*, 600 Fed. Appx. at 477 (citing *Harris*, 133 S. Ct. 1056 n.2). Once again, this is not what *Harris* says. The *Harris* footnote cited in *Miller* and followed in this case does not say that it is proper to *train* dogs to detect drugs that are not present; it says that if a "*well trained*" dog smells a residual odor, it does not mean the dog erred. *Harris*, 568 U.S. at 250, n.2 (emphasis added). *Harris* clearly shows that the dog's training must still be proper. Thus, the Seventh Circuit has misunderstood and misapplied *Harris* in both *Miller* and this case. It is unquestioned (and in fact

admitted) that Rex was not properly trained in according with Illinois mandated SWGDOG standards.

The Seventh Circuit's continual citation to the footnote in *Harris* that states that "[a] detection dog recognizes an odor, not a drug, and should alert whenever the scent is present, even if the substance is gone," shows that the Seventh Circuit misunderstands the training issue presented in this case. In *Harris*, the entire defense case was focused on the canine's certification and performance in the field, and did not address the quality of the training. *Harris*, 568 U.S. at 242. No one is arguing that just because a dog alerts on residual odor that it indicates an error. *Id.* at 245. But, a dog who is trained to alert to residual odor is another issue entirely. All the training in the world does not matter if that training is done incorrectly.

No case exists which approves of a law enforcement agency ignoring mandatory state law whenever it is convenient. The Academy's intentional disregard of national policy guidelines which are mandatory under Illinois law is the exact problem contemplated by this Court in *Harris* when it stated that a training program's faulty methods could be so inadequate as to render a dog's alert null and void under the Fourth Amendment. *Harris*, 568 U.S. at 247; 133 S. Ct. at 1057. The Court should grant the Petition so that it can step in and reverse the Seventh Circuit's position that allows improperly trained canines to establish probable cause.

II. The Seventh Circuit's decision in *Hill v. United States* incorrectly holds that the crime of attempt, which does not has an element the use, attempted use, or threated use of physical force, qualifies as a violent felony under the ACCA's elements clause

The Seventh Circuit has taken the incorrect position that attempt is a violent felony for in the purposes of the ACCA. As noted, Mr. Simon argued in the district court that his conviction for attempted armed robbery should not count as a predicate offense under Section 924(e), but realized that the issue would need to be addressed on appeal. Additionally, while the issue was fully briefed on appeal, both Mr. Simon and the Seventh Circuit recognized that the Seventh Circuit's decision in *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017) foreclosed Mr. Simon's argument and that the issue would need to be addressed by this Court. This Court now has the opportunity to overturn *Hill* and find that attempt does not constitute a violent felony under the ACCA.

Hill holds that "[w]hen a substantive offense would be a violent felony under [18 U.S.C.] § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony." *Hill*, 877 F.3d at 719. The opinion is an act of pure judicial legislation. It disregards the language of the statute in favor of judicial opinion as to what the statute should say. Additionally, *Hill* fails on its own terms. *Hill* says attempt offenses are violent felonies because to convict a defendant of an attempt offense a jury must find the defendant intended to commit every element of the offense attempted. *Id.* That is not the law and *Hill* cites to no case to support this

assertion regarding attempt offenses. Finally, the cases *Hill* cites in support of its holding do not say what the opinion claims they say.

Hill concedes, as it must, that attempt offenses have only two elements, intent to commit an offense and a substantial step towards commission of the offense. *Hill*, 877 F.3d at 718. *Hill* then concedes, as it must, that neither element necessarily requires even the attempted use of force. *Id.* That should have been the end of the opinion. Following *Johnson v. United States*, 135 S. Ct. 2551 (2015), an offense can only be a violent felony if it is an enumerated offense or has as an element the use, attempted use, or threatened use of physical force against the person or property of another. Since *Hill* admits attempt offenses have no such element, by the plain language of the statute attempt offenses are not crimes of violence. End of analysis.

Rather than relying on the actual language of § 924(e), *Hill* purports to discern what Congress *really* intended § 924(e) to cover and then holds that attempts to commit offenses that have as an element the use of force fall within Congress' unstated intent. As *Hill* put it, [w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, . . ., it makes sense to say that the attempt crime itself includes violence as an element. . . . ." *Id.* What does or does not *make sense* to a particular tribunal is irrelevant when interpreting plain, unambiguous statutory language. Section 924(e)(2)(B)(i) states an offense is a violent felony or crime of violence if it has *as an element* the actual use of force, the

attempted use of force, or the threatened use of force. The statute *does not* include offenses that have as an element the *intent* to use force.

This Court has time and again told inferior courts to apply the plain language of statutes. "The preeminent canon of statutory interpretation requires [this Court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593 (2004). A court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* When a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989) (*quoting Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194 (1917). *Hill* ignores these clear directives from this Court.

Hill rests its holding on Judge Hamilton's concurrence in *Morris v. United States*, 827 F.3d 696, 698-99 (7th Cir. 2016). In *Morris*, Judge Hamilton gave a "brief explanation of [his] thinking [to] help the parties develop the issues in this and similar cases that will proceed in the district court." *Id.* In a nutshell, Judge Hamilton contended:

> As a matter of statutory interpretation, an attempt to commit a crime should be treated as an attempt to carry out acts that satisfy each element of the completed crime. That's what is required, after all, to prove an attempt offense. If the completed crime has as an element the actual use, attempted use, or threatened use of physical force against the person or property of another, then attempt to commit the crime necessarily includes an attempt to use or to threaten use of physical force against the person of property of another.

Id. at 699 (emphasis in original). This argument is based upon a misstatement of Illinois attempt law.

An Illinois attempt conviction is not based on a finding that the defendant attempted to carry out acts that satisfy each element of the completed crime. Judge Hamilton did not cite any authority for his assertion to the contrary. As explained, the only two elements a jury has to find to convict for attempt is intent to commit a crime and a substantial step towards commission of the crime. 720 ILCS 5/18-1(a) (2000). What the jury in an attempt case finds, or what a defendant admits to if he pleads guilty, is that the defendant intended to commit a particular offense and he took a substantial step toward the commission of the offense. The jury does not find that the defendant attempted to commit each element of the offenses attempted.

An attempt conviction requires a finding that the defendant intended to commit a specific offense and took a substantial step towards committing that offense. The only way the jury can determine if a defendant intended to commit a specific offense and took a substantial step towards its commission is if the jury is told what offense the defendant intended to commit and what acts constitute that offense. Providing those elements in no way requires the jury to find the defendant attempted to commit each of those elements.

Judge Hamilton's reasoning is colored by another oversight. He states in his concurrence that an attempt to commit an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another

"surely fits within the intended scope of the Armed Career Criminal Act." *Id.* at 699. But the "intended scope of the [statute]" is not at issue; the actual language of the statute is at issue. Courts are not at liberty to rewrite a statute because they do not like the outcome of applying the statute's plain text.

Hill uncritically adopts Judge Hamilton's erroneous views as the law of the Seventh Circuit. Specifically, *Hill* found that "[g]iven the statutory specification that an element of attempted force operates the same as an element of completed force, and the rule that conviction of attempt requires proof of intent to commit all elements of the completed crime, we now adopt Judge Hamilton's analysis as the law of the circuit." *Hill*, 877 F.3d at 719. The problem is there is no "rule that conviction of attempt requires proof of intent to commit all elements of the completed crime." *Hill* provides no citations to support its claim that such a rule exists.

"Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction. At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (internal quotations and citations omitted). An intent to commit each element of the offense attempted *is not* an element of attempt offenses. *Hill's* holding rests on the false premise that

"conviction of attempt requires proof of intent to commit all elements of the completed crime." *Hill*, 877 F.3d at 719.

Hill cites three cases for the proposition that three other circuits have held attempt offenses are violent felonies "under the elements clauses of § 924(e) and similar federal recidivist laws, such as 18 U.S.C. § 16 and 18 U.S.C. § 924(c)." *Hill*, 877 F.3d at 718. None of the cited cases support that claim. *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016), does not even involve an attempt offense. *United States v. Mansur*, 375 Fed. Appx. 458 (6th Cir. 2010), states in dicta that that an attempted Ohio robbery conviction could be a violent felony under § 924(e) but goes on to hold the conviction was a violent felony under the residual clause. Additionally, the Sixth Circuit, in a subsequent published opinion rejected *Mansur's* interpretation of the Ohio robbery statute. Finally, *United States v. Wade*, 458 F.3d 1273 (11th Cir. 2006), which predates this Court's opinion in *Johnson*, holds that attempted residential burglary is a violent felony *under the residual clause*, not under the elements clause.

United States v. Fogg, 836 F.3d 951 (8th Cir. 2016), did not address the attempt issue. The prior conviction at issue in *Fogg* was a Minnesota conviction for drive by shooting in violation of Minn. Stat. § 609.66 subd. 1e. *Id.* at 953. That section, titled "Felony; drive-by shooting," states "(a) whoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building is guilty of a felony and may be sentenced to imprisonment for not

more than three years or to payment of a fine of not more than $6,000, or both." If a person violates section 1e(a) by "firing at or toward a person, or an occupied building or motor vehicle," the maximum penalty jumps to ten years of imprisonment and a fine of not more than $20,000. 609.661e(b). *Id.* at 954.

The defendant in *Fogg* had been convicted of violating 609.66 subd.1e(b), and the Eighth Circuit found that offense had as an element the attempted use of force as it required the jury to find the defendant fired a gun "at or toward a person, or an occupied building or motor vehicle." *Fogg*, 836 F.3d at 955. While the parties and the Eighth Circuit colloquially referred to the offense as attempted drive by shooting (apparently because no one was actually shot), the opinion has nothing to do with attempt offenses.

United States v. Mansur, 375 Fed. Appx. 458 (6th Cir. 2010), was decided before the Supreme Court invalidated ACCA's residual clause in *Johnson*. *Mansur's* discussion of attempted robbery having as an element the attempted use of force is *dicta* as the Sixth Circuit ultimately held attempted robbery presented a serious potential risk of physical injury to another and therefore qualified as a violent felony under the residual clause. *Id.* at 464-65 n.9. And, in *United States v. Yates*, 866 F.3d 723, 727-29 (6th Cir. 2017), the Sixth Circuit rejected Mansur's reading of Ohio's robbery statute. An unpublished opinion issued before *Johnson* which ultimately rests its holding on the unconstitutionally vague residual clause and which has been rejected by the Sixth Circuit itself is hardly persuasive authority.

Hill's citation to *United States v. Wade*, 458 F.3d 1273 (11th Cir. 2006), is misleading. *Hill* cites to *Wade* in support of the proposition that the Eleventh Circuit "appears to agree" that attempt offenses can qualify as violent felonies under "the elements clauses of § 924(e) and similar federal recidivist laws, such as 18 U.S.C. § 16 and 18 U.S.C. § 924(c)." What *Wade* actually held was that Georgia attempted residential burglary was a violent felony *under the residual clause*. *Wade*, 458 F.3d at 1278. *Wade* based its holding on *James v. United States*, 430 F.3d 1150 (11th Cir. 2005), and *United States v. Rainey*, 362 F.3d 733 (11th Cir. 2004) which held, respectively, that Florida attempted burglary and Florida attempted arson were violent felonies *under the residual clause*. *Wade*, 458 F.3d at 1277-78.

To put it mildly, relying on a case holding attempt convictions are violent felonies under the unconstitutional residual clause to support a holding that attempt offenses have as an element the use, attempted use, or threatened use of physical force against the person of another is not persuasive. Accordingly, this Court should grant the Petition for Certiorari to correct the Seventh Circuit's erroneous position, which ignores the plain language of the ACCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 19, 2019

In the

United States Court of Appeals

For the Seventh Circuit

No. 18-2442

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARSHON SIMON,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 16-CR-20077 — **Colin S. Bruce**, *Judge*.

ARGUED MAY 30, 2019 — DECIDED AUGUST 21, 2019

Before FLAUM, MANION, and BARRETT, *Circuit Judges*.

MANION, *Circuit Judge*. Police officers pulled Marshon Simon over for failing to signal sufficiently ahead of turning. A drug-sniffing dog alerted on Simon's car so officers searched it. They did not find drugs, but they found a gun. The government charged Simon with being a felon-in-possession. The district judge denied Simon's motions for recusal, suppression, and supplementation. Simon entered a conditional guilty plea and received a sentence of 15 years. He raises a

litany of issues on appeal. He argues the judge should have recused himself because before he was a judge he supervised a prior prosecution of Simon. He argues the judge should have suppressed the gun because the officers lacked probable cause to initiate the traffic stop and because they prolonged the stop to allow for the dog sniff. He argues the dog's alert was false and the dog was unreliable because he was improperly trained. He argues the judge should have allowed him to supplement the evidence after denial of suppression. Finally, he argues one of his prior felonies should not have counted as a predicate for purposes of the Armed Career Criminal Act. Concluding the judge committed no reversible error in denying Simon's motions, we affirm.

I. Facts

On the night of August 21, 2016, three police officers in a "bike patrol unit" surveyed a particular section of Decatur, Illinois. Officers Jason Danner and Jamie Hagemeyer rode bicycles. They sat behind a propane tank 145 yards from the intersection of College and Green Streets. Officer Robert Hoecker drove a squad car nearby.

The bicycle officers saw a vehicle driven by Marshon Simon leave the 1100 block of North College Street (five blocks away) and drive toward them. As Simon approached the intersection of College and Green Streets, he failed to signal at least 100 feet before turning left from College onto Green. This was according to the bicyclists' testimony at the suppression hearing, which the district judge credited. At the bicyclists' request, Hoecker pulled Simon over at 10:26 p.m.

Hoecker approached Simon's car and made contact. Hoecker introduced himself and told Simon the basic reason

for the stop. Hoecker explained bicycle officers would arrive and provide details. Simon questioned the basis for the stop. Simon gave his driver's license and proof of insurance to Hoecker. According to Hoecker, Simon was cooperative and polite, behaved normally, and was no more nervous than the normal level of traffic-stop nervousness. Hoecker ran Simon through the LEADS computer system and found he was validly licensed and insured. Hoecker finished this check in less than 2 minutes, before Danner and Hagemeyer arrived on scene at about 10:29 p.m.

Once Danner and Hagemeyer arrived they took over "processing the ticket," including some double-checking. Hoecker's role was to assist. Hoecker told Danner that Simon had insurance and a valid license. Hoecker said he "didn't know if [Danner] wanted the dog or not." (Appellant Br. at 8, quoting Hoecker's dashcam video.) Danner asked if Simon had any criminal history. Hoecker then ran a criminal-history check and found Simon had prior drug and weapon charges.

Danner made contact with Simon. Danner testified Simon appeared abnormally nervous. Danner testified Simon asked about the violation and insisted he used his turn signal. Danner testified, "I observed him to pull his hand away from his lap, and he was shaking pretty good, indicating to me that he appeared nervous." But Danner did not note this in the police report and he did not mention this when discussing whether to call a dog.

Hagemeyer testified that while speaking briefly with Hoecker he handed her Simon's materials. She then went to another squad car that had arrived on scene "to begin the written warning." Both Danner and Hagemeyer testified about the various steps and processes a bike patrol unit

completes as part of the mission instigated by a traffic violation, including monitoring and securing the scene, making contacts with the driver, running computer checks, and writing out the warning or ticket.

Danner decided to call a dog. He testified he decided to call a dog at about 22:30:38 (10:30:38 p.m.) on the clock of Hoecker's dashcam, about 1 minute after Danner and Hagemeyer arrived at the traffic stop. An officer called for the canine unit less than 4 minutes into the stop, when the ticket was still being processed, according to the officers' testimony.

Canine handler Snyder arrived with Rex at the scene at about 10:33 p.m. At that time, the traffic violation was still being processed, according to the officers' testimony.[1] Within a

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[1] Here are excerpts on point from the bicycle patrol unit's testimony:

Q: And when Officer Snyder arrived, was the traffic violation still being processed?
Hoecker: Yes.
(Tr. Continuation of Suppression Hr'g, July 12, 2017, DE 44 at 19:1–19:3.)

Q: And do you recall approximately how long into the traffic stop it would have been that [Officer Snyder, with Rex] arrived?
Danner: I believe it was around six or seven minutes.
Q: And were you still processing the traffic ticket at that time?
A: That's correct.
(*Id.* at 50:19–50:24.)

Hagemeyer: From the time we arrived to the time Officer Snyder arrived was three or four minutes.
Q: So a very short period of time?
A: Very short period of time.
Q: Were you still working on the traffic ticket at that time?
A: Yes.
Q: And still working on it diligently, correct?
A: [Nodding head up and down.]

few seconds of walking around Simon's car, Rex alerted. Snyder took less than 20 seconds to prepare Rex, begin the search, and confirm the alert. The time period from the beginning of the stop to the alert was about 7 minutes. Hagemeyer testified she had no part in conducting the actual dog sniff. She testified she "was writing the warning." She confirmed on cross-examination that she filled out the traffic warning, and that Danner issued it to Simon. Defense counsel asked, "So you were the one who filled out the date, time, name, address, and birth date?" Hagemeyer answered, "I filled out the majority of it. I believe [Danner] signed it, though."

After the alert, Simon became angry and insisted there were no drugs in his car. Danner asked Simon to step out of his car. The police searched it. They did not find drugs, but they found a gun. An officer drove Simon to the police station. Danner handed Simon a traffic citation as he was released from the station. Danner testified he filled out the citation.

II. Procedural posture

Since Simon was a felon, the government charged him with being a felon in possession of a firearm. The case was assigned to Judge Bruce. Simon moved Judge Bruce to recuse himself because he had served as the First Assistant United States Attorney for the Central District of Illinois with supervisory authority over a prior case against Simon culminating in conviction. Judge Bruce denied the recusal motion.

Simon moved to suppress the gun, arguing there was no probable cause to stop his car, the police impermissibly extended the stop to get a dog on scene, and the dog was unreliable and improperly trained. Judge Bruce held an

(*Id.* at 87:24–88:7.)

evidentiary hearing over parts of three days and heard testimony from seven witnesses. He found the officers credible, even if at times confused. He found the officers had probable cause to think Simon committed a traffic violation, the officers did not unreasonably prolong the stop, and Rex was a properly trained and certified canine whose alert can lead to probable cause. The judge denied the motion to suppress.

Simon moved to supplement the record with additional, unrelated traffic citations issued by Danner (to show the differences in the officers' handwriting to address the issue of which officer wrote Simon's citation) and a video made by a defense investigator (to contradict the officers' version of events leading up to the traffic stop). The judge denied this motion.

Simon pleaded guilty conditioned on preserving his right to appeal. He received an enhancement as an Armed Career Criminal. The judge sentenced him to 15 years in prison, the mandatory minimum.

Simon appeals the denials of his motions to recuse, suppress, and supplement. He also appeals his qualification as an Armed Career Criminal, arguing his prior conviction for attempted armed robbery in Illinois in 2000 did not qualify as a violent felony.

III. Analysis

A. Recusal

Simon seeks remand because he claims Judge Bruce's handling of this case conveys the appearance of impropriety. Simon does not claim Judge Bruce actually had or acted on any unfair bias against Simon.

Simon argues Judge Bruce should have recused himself under 28 U.S.C. § 455(a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Below, Simon also sought recusal under 28 U.S.C. § 455(b)(3), but he no longer presses that on appeal.

As the government agrees, we review a preserved § 455(a) claim *de novo*. *Cf. Fowler v. Butts*, 829 F.3d 788, 793 (7th Cir. 2016) (holding § 455(a) can be vindicated on appeal); *United States v. Dorsey*, 829 F.3d 831, 835 (7th Cir. 2016) (a preserved § 455(b) claim is reviewed *de novo*).

To win recusal under § 455(a), a party must show a reasonable, well-informed observer might question the judge's impartiality. *United States v. Herrera-Valdez*, 826 F.3d 912, 917 (7th Cir. 2016). In other words, the party must show an objective, disinterested observer fully informed of the reasons for seeking recusal would "entertain a significant doubt that justice would be done in the case." *Id.*

Simon sought recusal early in the case on the ground that Bruce served as First Assistant United States Attorney for the Central District of Illinois from 2010 through 2013. During that time, the government charged Simon with violating 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Bruce supervised the AUSA assigned to that case. Simon pleaded guilty and was sentenced in 2012 and again (after a successful appeal) in March 2013. This prior criminal case involved occurrence facts separate from those in the present case. But the prior case is directly relevant to this case because the conviction in the prior case enhanced Simon's sentence in this case as an Armed Career Criminal.

Judge Bruce denied the recusal motion. He noted he could not remember any participation in past prosecutions of Simon. Judge Bruce observed that even if he did participate in a past prosecution, he did not participate in the current prosecution, "which consists of new charges, wholly unrelated to those brought against [Simon] in the past." (Text Order, Dec. 6, 2016.)

Simon likens this case to *United States v. Herrera-Valdez*. There, the government prosecuted a defendant for illegal reentry after deportation. Before trial on the illegal-reentry charge, defendant moved to disqualify Judge Der-Yeghiayan because he had served as the District Counsel for the Immigration and Naturalization Service when defendant was deported. District Counsel Der-Yeghiayan's name was listed in several places in INS's briefing supporting deporting. Judge Der-Yeghiayan denied the motion to disqualify and defendant appealed. We observed that 28 U.S.C. § 455(a) requires a judge to "'disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'" *Herrera-Valdez*, 826 F.3d at 917. We reversed the denial of disqualification, concluding "a reasonable, disinterested observer could assume bias from the fact that the judge presiding over the defendant's prosecution for illegal reentry was the same person who ran the office that pursued, and succeeded in obtaining, the removal order that is the source of his current prosecution." *Id.* at 919. We noted this was particularly true given that the linchpin of defendant's case against the illegal-reentry charge was a collateral attack against the removal order. The judge need not have been actually involved in the prior case or be actually biased in the subsequent case to trigger the requirement to recuse under § 455(a).

But here, the prior case does not directly give rise to or underly the present case. And here, Simon attempts no collateral attack against the prior conviction. Simon's 2011 conviction was not, and could not have been, the linchpin to his defense in this subsequent case. A defendant in a federal sentencing proceeding may not collaterally attack a prior conviction used to enhance his sentence, with an exception not relevant here. *See Daniels v. United States*, 532 U.S. 374, 382–83 (2001); *Custis v. United States*, 511 U.S. 485, 487 (1994). Any collateral attack against the prior conviction under 28 U.S.C. § 2255 would have been time-barred. So there was no possibility of Judge Bruce adjudicating the merits of a collateral attack against Simon's 2011 conviction here. And consequently there was no reason to think Simon might have declined to launch a collateral attack against the 2011 conviction because he feared Judge Bruce would not be receptive to such an attack, or would punish him in the present case for making such an attack.

The prior and subsequent cases at issue in *Herrera-Valdez* are directly related in a way the prior and subsequent cases at issue here are not. A closer analogy to *Herrera-Valdez* is Simon's prior conviction under the supervision of First AUSA Bruce and the proceedings for revocation of supervised release involving that prior conviction and the gun possession on August 21, 2016. Simon's prior conviction directly gives rise to and underlies the revocation proceedings. So Judge Bruce recused himself from them.[2] As this relationship is not

[2] Simon asserts Judge Bruce recused himself from the revocation proceedings (2:11-cr-20002). The government does not contest this assertion. The docket for that case neither confirms nor denies the recusal. We take Simon's word for it.

present between Simon's prior case and the current felon-in-possession case, there was no need for Judge Bruce to recuse himself here.

True, the prior conviction enhanced the sentence for the present conviction under the ACCA. But this is mere happenstance. It is not the same kind of direct connection we found problematic in *Herrera-Valdez*. Another distinction between *Herrera-Valdez* and this case is that there, the future judge's name was on the briefs against the defendant, but here the future judge's name was not on the briefs. This is a relevant consideration because it bears on public perception. We do not consider this to be a controlling factor by itself, but it is relevant.

Judge Bruce did not err in refusing to recuse.

B. Suppression

Simon raises a series of potential errors regarding the denial of suppression. He argues there was no probable cause to believe a traffic violation occurred, and therefore initiating the stop was unconstitutional. He argues the officers unconstitutionally prolonged the traffic stop. And he argues Rex's alert was false and Rex was improperly trained. "We employ a mixed standard of review on motions to suppress, reviewing the district court's factual determinations for clear error and *de novo* its ultimate determination about whether the police had sufficient grounds to stop or search the individual." *United States v. Rodriguez-Escalera*, 884 F.3d 661, 667 (7th Cir. 2018) (internal quotation marks omitted).

1. Initiating the stop

Simon argues the officers lacked probable cause to believe he committed a traffic violation, so they had no probable

cause to stop him. If Simon were right, then the court should have suppressed the gun as fruit of the poisonous tree. The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Whenever police stop a car, the stop must satisfy the Fourth Amendment's reasonableness requirement. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). If a search or seizure violates the Fourth Amendment, a court will generally exclude resulting evidence. *United States v. Wilbourn*, 799 F.3d 900, 910 (7th Cir. 2015).

Simon goes so far as to assert he did not commit a traffic violation. He argues the government did not meet its burden of proof to establish he actually committed a traffic violation. But the government had no such burden. Whether Simon committed a traffic violation is irrelevant for Fourth Amendment purposes so long as the officers had probable cause to think he did. *United States v. Lewis*, 920 F.3d 483, 489 (7th Cir. 2019) ("The officer is not the judge. Whether the driver actually committed a traffic infraction is irrelevant for Fourth Amendment purposes so long as there was an objective basis for a reasonable belief he did.").

Generally, the decision to stop a car is reasonable, and comports with the Fourth Amendment, "where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996). Probable cause exists when "the circumstances confronting a police officer support the reasonable belief that a driver has committed even a minor traffic offense." *United States v. Cashman*, 216 F.3d 582, 586 (7th Cir. 2000). Probable cause is an objective standard, based on the totality of the circumstances. *Lewis*, 920 F.3d at 489. If an officer reasonably thinks he sees a driver commit a traffic infraction, that is a sufficient basis to pull him

over without violating the Constitution. *United States v. Muriel*, 418 F.3d 720, 724 (7th Cir. 2005).

Here, Simon acknowledges the probable cause determination depends entirely on the credibility of the two officers on bicycles who testified they saw him turn without signaling at least 100 feet ahead. Simon levies many attacks on their credibility, urging us to reverse under the clear error standard. Simon admits the clear error standard is very demanding. Under this standard, we only reverse when, after reviewing the record as a whole, we have a "definite and firm conviction" a mistake has been made. *United States v. Whitley*, 249 F.3d 614, 621 (7th Cir. 2001). The district judge, after all, listened to the testimony directly and observed the demeanor of the witnesses. *United States v. Garrett*, 757 F.3d 560, 568 (7th Cir. 2014). The district judge is in a much better position to evaluate credibility than we are. His credibility determinations are entitled to special deference. We take Simon's credibility attacks in turn.

i. Phantom stop sign

First, Simon argues Hagemeyer swore at the suppression hearing that there was a stop sign at the corner of College and Green, but she was demonstrably and indisputably wrong. Simon argues this impugns her claim she saw the traffic violation.

The judge directly confronted Hagemeyer's mistake. He noted Hagemeyer "was wrong about that detail." (Order, DE 21 at 4.) The judge said he would take the mistake into account in assessing Hagemeyer's credibility. But the judge concluded the mistake does not weigh heavily against her credibility because the detail "is not greatly important regarding the traffic

offense for which Defendant was pulled over" and because "[i]t would not have factored in to [sic] determining whether or not to issue Defendant a ticket for failing to signal his turn within not less than 100 feet of the intersection." (*Id.*) Hagemeyer's determination at the scene that Simon failed to signal at least 100 feet before the turn was not informed by the presence or absence of a stop sign at the corner. In other words, there were other reasons independent of the presence or absence of a stop sign for Hagemeyer to think Simon failed to signal at least 100 feet ahead of turning. Indeed, the presence or absence of a stop sign is irrelevant to estimating distances or to the requirement to signal. The judge simply did not find this mistake about a stop sign to be very important. So the mistake did not significantly undermine the reliability of Hagemeyer to perceive other facts that night. Moreover, her mistake about the stop sign has no bearing on Danner's testimony that he saw Simon fail to signal sufficiently ahead of turning.

And as for the possibilities Hagemeyer lied about the stop sign, and this lie undermines her credibility about everything else, Simon does not go quite so far. In his opening appellate brief, he does not directly, unequivocally accuse Hagemeyer of intentionally lying about the stop sign. And Simon offers no explanation for why Hagemeyer would have had any reason to lie about it. We see no clear error here.

ii. Distances

Second, Simon argues Hagemeyer and Danner were wrong about the distance between their location and the intersection of College and Green. They both testified the distance was 75 yards. But the distance was actually 145 yards. The officers' testimony was demonstrably and indisputably

wrong by a wide margin. Simon argues the officers' ability to judge distance was the key to their claim Simon committed a traffic violation. He argues their failure to estimate the distance between their location and the intersection correctly makes their claims about the distance between the location of Simon's car when he activated his turn signal and the intersection wholly incredible.

Again, the judge directly confronted the mistaken testimony. The judge decided the miscalculation was "of little import when it comes to credibility." (Order, DE 21 at 3.) The judge reasoned that the fact that both officers estimated the distance at 75 yards does not indicate collusion because if they wanted to connive it is much more likely they would have used a number closer to the actual distance. They were too wrong to be conspiring to lie.

And as for the argument that the officers' mistake about this distance undermines the credibility of their estimate about Simon's signaling distance, the officers had other, specific indicia of the signaling distance beyond a raw estimate of the distance from A to B. The time between signaling and turning, the car lengths between signaling and turning, and the lengths of the headlight beams bolstered the probable cause to think Simon signaled too late and too close. The judge concluded the mistake about the distance between the bicyclists' location and the intersection shows nothing more than that both bicyclists were wrong about that distance. We see no clear error here.

iii. Photographs

Third, Simon argues photographs introduced into evidence show the unbelievability of the officers' claims. Danner

and Hagemeyer both testified they saw Simon's car leave the 1100 block of North College, five blocks from their position. But, Simon argues, the photographs speak for themselves, and there is no way someone could see the make, model, or color of a vehicle at that distance.

The judge simply disagreed. He examined the photographs and listened to the testimony and concluded "it is possible for an average person, with good vision who is used to working at night, such as Danner and Hagemeyer, to see a car, in the dark, turn onto a street with its headlights on." (Order, DE 21 at 4.) We also examined the photographs and read the testimony, and we do not have anything close to a definite and firm conviction the judge made a mistake in this regard. Sometimes a photograph is not worth a thousand words.

iv. Ghost writer

Fourth, Simon argues the judge ignored the officers' misstatements about who prepared the traffic ticket. Hagemeyer testified "I was writing the warning." She answered "yes" to the question: "[Y]ou said that you filled out the traffic warning in this case?" When asked if she was the one who filled out the date, time, name, address, and birth date, she testified she "filled out the majority of" the ticket herself, but she believed Danner signed it. But other evidence showed she filled out none of it. Danner filled out both the traffic citation (later voided) and the warning (Simon received hours later).

Simon accuses the judge of tying himself "into a pretzel to avoid finding that the police officers could possibly have lied or misrepresented facts … ." (Appellant Br. at 33.) But the judge committed no such contortions. Rather, he addressed the discrepancies directly. He combed through the testimony

about the various steps in the process leading to handing a driver a written ticket or warning. He noted there appeared to be confusion and possibly contradiction between the officers about who actually wrote the ticket. One source of confusion seemed to be the word "processing." The judge observed Hagemeyer, Snyder, and Hoecker all testified Hagemeyer began "processing" the ticket, but "processing" a ticket involves much more than just physically writing the ticket. The judge also observed Hagemeyer's testimony on this issue was more specific. She testified, "I was writing the warning." When asked, "So you were the one who filled out the date, time, name, address, and birth date?" she responded, "I filled out the majority of it. I believe [Danner] signed it, though."[3]

The judge compared the warning Simon received—purportedly filled out by Hagemeyer and signed by Danner—to a different warning definitely filled out and signed by Hagemeyer on a different date. The judge concluded the handwriting on the two warnings is different and they likely were not filled in by the same officer.

But the judge noted Simon did not show the exemplar warning to Danner or Hagemeyer during the hearing to cross-examine them on who wrote Simon's warning. The judge also

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[3] In his order denying suppression, the judge characterized Hagemeyer's testimony on this point slightly incorrectly, and in favor of Simon's arguments. The judge wrote "Hagemeyer answered 'yes' to whether she filled in the name, date, etc., but she stated that Danner signed it." (Order, DE 21 at 10.) Actually (according to the transcript) she did not say "yes" in response to this question. She said, "I filled out the majority of it. I believe [Danner] signed it, though." But even giving Simon the benefit of this characterization, the judge still did not find a significant credibility problem.

noted the testimony indicated Danner or Hagemeyer would often start writing a ticket the other would finish. The judge observed: "There are numerous possibilities as to why the discrepancy exists, and without the officers being given the chance to explain the discrepancy, the court cannot impute improper conduct on their part." (Order, DE 21 at 11.) The judge considered the totality of the officers' testimony, and their demeanor and appearance. He concluded any discrepancy on this issue was due to mere confusion on the part of the officers, and not to fabrication. And he concluded the officers were credible.

We see no clear error regarding the judge's decisions on any of these issues, nor regarding his decision to find the officers credible. Given the two bicycle officers testified they saw Simon commit a traffic infraction, and given the judge believed them, we see no reason to reverse the decision that probable cause justified starting the stop.

2. Conducting the stop

Simon argues even if the officers did not violate the Constitution by initiating the stop, they violated it by impermissibly prolonging the stop. An officer who reasonably starts a traffic stop might violate the Constitution if he exceeds the scope of the stop or unreasonably prolongs it. *Lewis*, 920 F.3d at 491. A traffic stop "'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614–15 (2015) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

A dog sniff of a car's exterior only for illegal drugs *during* a lawful stop for a traffic violation does not violate the Fourth

Amendment, even absent reasonable suspicion of drugs. *Caballes*, 543 U.S. at 410. But a stop justified only by a traffic violation becomes unconstitutional if the officers prolong it beyond the time reasonably required to complete the stop's original mission. *Rodriguez*, 135 S. Ct. at 1612. "An officer may conduct certain unrelated checks—including a dog sniff—during a lawful traffic stop, but he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Lewis*, 920 F.3d at 491 (internal quotation marks omitted). As Simon concedes, "calling a K-9 unit does not unlawfully extend a traffic stop as long as the normal process for pursuing a traffic ticket is ongoing." (Appellant Br. at 36.)

Without independent reasonable suspicion to justify the sniff, the critical question is not whether the dog sniffed before or after the officer issued the warning, "but whether conducting the sniff prolongs—*i.e.*, adds time to—the stop." *Lewis*, 920 F.3d at 491 (internal quotation marks omitted). With independent reasonable suspicion, however, the officer may constitutionally detain the suspect for the sniff even if it adds time to the total stop. *Id.*

Here, the judge continued to credit the officers' testimony. Based on that testimony, the judge concluded the stop was not improperly prolonged to allow Rex to sniff. The judge noted the time period from the beginning of the stop to the canine alert was about 7 minutes, as Simon conceded. The judge determined the officers acted quickly. Hoecker made the stop, exited his car, told Simon the reason for the stop, and gathered his information. The bicyclists arrived at the stop only a couple minutes after Hoecker pulled Simon over. The bicyclists "diligently began processing the ticket." (Order, DE 21 at 15.)

Crucially, the judge found no indication the officers engaged in any activity other than securing the scene and processing the warning during the time between the bicyclists' arrival and Rex's arrival. Specifically, the officers surveyed the scene, Danner spoke with Simon, and Hagemeyer testified she went to the squad car to begin processing the written warning. The video indicated that about 2.5 minutes into the stop, Danner was speaking to Hoecker about the traffic violation. About 3 minutes into the stop, Danner left the squad car to speak with Simon. Danner told Simon the reasons for the stop and gathered information. Hoecker returned to Simon's car at about the 5-minute mark to speak with him about the traffic infraction. Less than 7 minutes into the stop, Rex arrived and very quickly alerted. At that time, the bicycle officers were still processing the ticket.

In sum, the judge concluded the officers were processing the ticket when Rex arrived and alerted, so they had not yet completed the initial mission of the stop, and the stop was not improperly prolonged to allow Rex to sniff.

Simon argues the police report and testimony contain the "misrepresentation" Hagemeyer was writing the warning while the officers waited for Rex because the officers knew calling a canine unit does not unlawfully extend a stop so long as the normal process for pursuing a traffic ticket is ongoing. Simon continues to challenge the credibility of the officers. He argues that at no point did any officer on the scene begin effectuating the purpose of the stop by dutifully and diligently filling out a warning or ticket. He claims Danner filled out both the traffic citation and the warning Simon received hours after the stop. But again we see no reversible error in the judge's conclusions on this point.

Simon presses that even if the judge's credibility determinations here are correct, his ruling is still flawed. First, Simon argues the judge improperly allowed a *de minimis* delay to be constitutional, even though *any* delay to allow a dog to sniff is unconstitutional absent independent reasonable suspicion. We disagree with Simon about what the judge did. He specifically found there was *no* improper delay. (Order, DE 21 at 14 ("the stop was not purposefully prolonged to allow for the canine unit's arrival").) True, the judge added in a footnote that even if he found the ticket-writing process had not begun when Rex arrived, still the sequence of events was so short and condensed that the stop was not prolonged in any "meaningful" way. But we need not review this dictum.

Second, Simon argues that instead of effectuating the purpose of the traffic stop, the officers decided to run a criminal-history check. Simon argues this was unrelated to the mission of the stop and delayed processing the traffic violation. Simon cites no supporting Seventh Circuit case. We said last year that when police conduct a stop, "they are entitled to demand the driver's identification, of course, and it is routine to check the driver's record for active warrants, driving history, and criminal history. Those checks are done for important reasons, including officer safety." *Swanigan v. City of Chicago*, 881 F.3d 577, 586 (7th Cir. 2018); *see also United States v. Sanford*, 806 F.3d 954, 956 (7th Cir. 2015) ("The trooper checked the occupants' criminal histories on the computer in his car—a procedure permissible even without reasonable suspicion … .").

We considered all Simon's arguments, but we see no reason to reverse the judge's conclusions that the officers were in the process of completing the traffic warning when Rex

arrived, and the officers did not improperly prolong the traffic stop to allow the sniff to occur.

3. *Bona Fido*?

Simon argues even if the officers had probable cause to pull him over, and even if they did not prolong the traffic stop to wait for Rex, still the judge should have suppressed the gun because Rex's alert was false, Rex was improperly trained, and the alert did not provide probable cause to justify searching Simon's car.

Probable cause to conduct a search is not among the highest standards. "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." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (internal quotation marks and brackets omitted). Probable cause is less than preponderance of the evidence. *Id.* "All we have required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* (internal quotation marks and brackets omitted). Probable cause is a practical, common-sense standard, involving the totality of the circumstances. *Id.*

A dog's alert on a car can give probable cause to search the entire car. Indeed, a good dog's alert can provide a rebuttable presumption of probable cause to search:

> 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.

Id. at 1057. The ultimate question 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.

Simon concedes Rex passed certification tests. But Simon challenges the alert itself and the adequacy of Rex's training.

"First and foremost," Simon argues Rex did *not* alert on Simon's car. (Appellant Br. at 42.) This perplexes. Simon cites nothing to support this claim. The record belies it. Given the context of this claim, Simon seems simply to mean the alert was false.[4] It is true that following the alert the officers searched the car and found no evidence of drugs in it. But Simon does not explain why that, in itself, matters here. Probable cause is not a retrospective, outcome-based standard.

[4] Defense expert Dr. Mary Cablk said in her report she could not determine if Rex alerted or what Rex alerted to. She confirmed this on cross-examination at the suppression hearing. During direct examination she watched videos from Hoecker's and Snyder's dashcams. She testified she could not see the alert, could not tell exactly where on the car the dog alerted, and did not know whether the alert was barking or something else. But in her testimony she seems to accept Rex alerted. She characterized it as a false alert because no drugs were found, and she criticized Snyder for rewarding Rex for falsely alerting: "In this instance, there's no drugs found; so he's reinforcing the dog for false alerting here." In any event, Snyder testified that Rex alerted and that Snyder confirmed the alert. And the judge throughout his order accepted Rex alerted. He found the officers' testimony, in its totality, credible. We see no reason to upend the determination Rex alerted.

Bridewell v. Eberle, 730 F.3d 672, 675 (7th Cir. 2013). If an officer randomly breaks into a house on only a wild hunch and stumbles into a meth lab, the discovery does not provide probable cause for the search. And if 20 reliable informants tell an officer a particular house contains a meth lab, so he stands in the street outside the house and sees through an open window the apparent apparatus and accoutrements of a meth lab, so he obtains a warrant to search the house based on probable cause to think it contains a meth lab, but he finds only an innocent and intricate chemistry set, still probable cause supported the warrant. So the mere absence of drugs in Simon's car does not undermine the probable cause to search it for drugs, provided there was probable cause in the first place.

Simon's other argument is the officers did not have probable cause to search his vehicle in the first place because Rex was unreliable. This argument proceeds in two waves.

The first wave is quickly quelled. Simon argues Rex was unreliable because he was not trained properly under Illinois law, which requires police dogs be trained according to certain guidelines. Simon argues Detective Larner (the Macon County canine-training director) admitted he did not always follow these guidelines. But we need not address what Illinois law requires or whether Rex satisfies it because Illinois law does not control the Fourth Amendment. *See Virginia v. Moore*, 553 U.S. 164, 172 (2008) ("[T]he Fourth Amendment's meaning [does] not change with local law enforcement practices—even practices set by rule."); *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("We have never intimated … that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.").

The second wave holds out longer, but ultimately succumbs. Simon argues, apart from Illinois law, if a dog is trained to alert when no evidence of criminal activity exists, this violates the Fourth Amendment. The problem, as Simon sees it, is Rex was trained with scented cotton balls to alert to residual odors. But to search a car, there must be probable cause to think it presently contains evidence of criminal activity. So if Rex is trained to alert to mere residue even when no drugs are present, then his alert is not a reliable indicator drugs are present, and therefore his alert does not provide probable cause to justify a search.

The main problem with this argument is the Supreme Court already rejected its premise. In *Florida v. Harris*, a dog named Aldo alerted on a truck. A subsequent search did not reveal any of the drugs Aldo was trained to detect, but it did discover meth ingredients. The defendant moved to suppress the ingredients on the ground that Aldo's alert had not given probable cause to search. The defendant "principally contended" in the trial court that because the officer did not find any of the drugs Aldo was trained to detect, Aldo's alerts must have been false. *Harris*, 133 S. Ct. at 1058. But the Supreme Court patted Aldo on the head and called him a good boy: "A well-trained drug-detection dog *should* alert to [residual] odors; his response to them might appear a mistake, but in fact is not." *Id.* at 1059; *see also Miller v. Vohne Liche Kennels, Inc.*, 600 F. App'x 475, 477 (7th Cir. 2015) (Plaintiff's "only developed legal theory is untenable. [His] premise—that an alert by a drug-sniffing dog trained to detect residual odors does not establish probable cause to search—was rejected in *Harris* … ."). If a well-trained dog, trained to alert even to residual odors, alerts, there is generally a fair probability that drugs or evidence of drugs will be found, absent contradictory factors.

And that is all the Fourth Amendment requires. If somehow a dog were trained to alert *only* to residual odors, then we might have a problem. But that is not this case.

Our review of the record and the order denying suppression satisfies us the judge conducted the proper *Harris* evaluation and committed no error in concluding Rex's satisfactory certification and training provide sufficient reason to trust his alert or in concluding Rex's training on residual odors is acceptable. The judge heard testimony from Simon's expert Dr. Cablk challenging Rex's qualifications and the sniff itself, testimony from Officer Snyder supporting Rex's qualifications and the sniff itself, and testimony from Detective Larner supporting Rex's qualifications and the sniff itself. The judge also entertained arguments from both sides in the form of the motion to suppress, supporting memorandum, the government's response, and post-hearing briefs filed by both sides. The judge considered the totality of the circumstances, addressed *Harris*'s ultimate question, and found Rex's sniff up to snuff.

C. Supplementation

After the judge denied the motion to suppress, Simon moved to supplement the record and for leave to seek reconsideration. He wanted to reopen the evidence to introduce further, unrelated citations prepared by Danner in August 2016 "which further emphasize the differences in the officers' handwriting … ." (Mot. Supp., DE 23 at 4.) Simon also wanted to introduce a video he[5] took when he returned to the scene one night. The video shows a vehicle leaving the 1100 block of College Street and approaching the intersection of College

[5] The motion says Simon created the video. On appeal, Simon asserts his investigator took the video. This nuance is immaterial here.

and Green. The judge denied this motion. On appeal, Simon only presses the video. He does not mention the additional handwriting exemplars in his opening appellate brief. Simon acknowledges we review the denial of supplementation for abuse of discretion.

The judge did not abuse his discretion. He explained there was no reason Simon could not have taken a nighttime video and presented it during the suppression hearing. The judge discussed the danger of allowing supplementation here and setting a bad precedent leading to a never-ending cycle of parties waiting for rulings and then coming up with "new" evidence to challenge them. Most importantly, the judge explained that even with the proposed evidence, his ruling would not change. The nighttime video would not capture the actual visual capabilities of the officers, who credibly testified about how close Simon was to the intersection when he signaled. The judge reasoned a video of the scene taken months later, when conditions might differ, would not impact their credibility. Besides, the judge noted, the probable cause standard does not need evidence to support a conviction beyond a reasonable doubt. He did not abuse his discretion.

D. ACCA

Simon argues his prior conviction under Illinois law for attempted armed robbery should not have counted as a predicate offense under the Armed Career Criminal Act. He recognizes our decisions foreclose his argument on this point, but he wants to preserve it for the Supreme Court.

IV. Conclusion

We considered all Simon's arguments. Finding no reversible error, we AFFIRM.