

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FLORIDA, :

4 Petitioner : No. 11-817

5 v. :

6 CLAYTON HARRIS :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, October 31, 2012

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:06 a.m.

14 APPEARANCES:

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16 Petitioner.

17 JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.;
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20 Petitioner.

21 GLEN P. GIFFORD, ESQ., Assistant Public Defender,
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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: Mr. Garre, welcome
back.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONER

MR. GARRE: Thank you, Your Honor, and may
it please the Court:

The question in this case is when does a
trained drug detection dog's alert to a vehicle
establish probable cause to search the vehicle?

JUSTICE SCALIA: Are you for or against the
dog this time?

MR. GARRE: For it again, Your Honor.

JUSTICE SCALIA: For it.

MR. GARRE: The Florida Supreme Court
answered that question by erecting what we think is an
extraordinary set of evidentiary requirements, in
effect, puts the dog on trial in any suppression hearing
in which defendant chooses to challenge the reliability
of the dog.

I think, most fundamentally, the problem
with the court of appeals' -- the Supreme Court's
decision -- is that it misconceives what this Court's
cases conceive of the probable cause requirement,

1 converting probable cause, which this Court has referred
2 to as a substantial chance, or fair probability, of the
3 detection of contraband or evidence of a crime, into
4 what amounts to a continuously updated batting average
5 and a requirement that dogs be virtually infallible.

6 That -- that --

7 JUSTICE SOTOMAYOR: Mr. Garre --

8 JUSTICE GINSBURG: That -- that goes to the
9 field performance; but, the other requirements, that
10 the -- some showing that the test -- that the training
11 program is reputable, some showing that the handler, not
12 only the dog, has -- has had training, it seems to me
13 those two -- not -- there's nothing improper about that.

14 MR. GARRE: Well, and I think, Your Honor,
15 under our view of it, it's okay to inquire into whether
16 or not the dog has successfully completed a bona fide
17 training program, which -- which we think is a training
18 program in which the dog is going to be tested for
19 proficiency, including in a setting where some vehicles
20 have drugs and some vehicles don't.

21 And Aldo, the dog in this case, clearly was.
22 He'd received a 120-hour training program with the
23 police department in Apopka, Florida. He received a
24 40-hour refresher seminar by another police department
25 in Dothan, Alabama. And he was subjected to continuous

1 weekly training, in which part of that training
2 consisted of taking him out, walking him by some
3 vehicles that contained cars, some vehicles that didn't.

4 And the testimony of Officer Wheatley was
5 that Aldo's performance was really good. And what he
6 meant by that was that if there were eight cars with
7 drugs.

8 JUSTICE GINSBURG: Why didn't -- then why
9 didn't they get the dog recertified? By the time of the
10 search, the certification had expired 16 months.

11 MR. GARRE: It was a lapse, Your Honor. The
12 dog subsequently was recertified.

13 Our position is that the Fourth Amendment
14 doesn't impose an annual certification requirement.
15 Some states have it, some states don't.

16 I think, more important in this case was the
17 fact that the dog was continuously trained, continuously
18 evaluated in training.

19 JUSTICE GINSBURG: Well, what do you -- what
20 do you have to show to establish that the dog was well
21 trained.

22 MR. GARRE: Well, Your Honor, I think the
23 most important thing is successful completion of
24 proficiency testing.

25 I mean, what -- what our friends would like,

1 and what the Florida Supreme Court would like, would
2 really for the courts to delve into all aspects of the
3 training, what types of distracters were used, what type
4 of smell and printing was used and the like.

5 JUSTICE GINSBURG: Well, if it were just
6 that -- you have the show that the program was
7 reputable.

8 MR. GARRE: Well, certainly that it was
9 authentic, Your Honor. And here, the programs were --
10 were conducted by actual police departments in -- in
11 Alabama and Florida. And this Court ordinarily would
12 presume regularity in those sorts of training settings.

13 And there's no reason to approach the
14 training of a dog any differently, but --

15 JUSTICE SOTOMAYOR: I thought all of these
16 training facilities were private entities that
17 contracted with police departments.

18 MR. GARRE: No, Your Honor. The
19 certification. Certification usually is done by private
20 entities which are operated by former law enforcement
21 officers. But the training itself, it usually and here
22 was done by police departments themselves.

23 JUSTICE SOTOMAYOR: Could I go back to
24 Justice Ginsburg's question? There's no -- what I
25 hear -- read the Florida court saying is there's no

1 national standard for certification. That's correct?

2 MR. GARRE: Yes.

3 JUSTICE SOTOMAYOR: There's no national
4 standard that defines what's adequate training, correct.

5 MR. GARRE: That's right. There --

6 JUSTICE SOTOMAYOR: So -- let me just finish
7 my question. So assuming there's no national standards,
8 then how do you expect a judge, without asking questions
9 about the content of the certification process, the
10 content of the training process, and what the results
11 were and how they were measured, how do you expect a
12 judge to decide whether the certification and the
13 training are sufficiently adequate.

14 MR. GARRE: And I think that the central
15 inquiry that we would think the judge would undertake is
16 to determine whether or not the dog was performing
17 successfully in proficiency testing.

18 I mean -- after all, that's why we train the
19 dogs. And if --

20 JUSTICE SOTOMAYOR: But you still have to
21 ask what that training was, and the judge still has to
22 determine whether the judge believes it was adequate,
23 correct? That's what the totality of circumstances
24 requires.

25 MR. GARRE: Well, Your Honor, in our view,

1 we don't think it's -- it's an appropriate role for the
2 Court to delve into the contours of the training, what
3 specific methods were used to train or distract or --
4 you know, all the contours that they bring up in their
5 brief.

6 JUSTICE SOTOMAYOR: So what does a judge do,
7 just say, the police department says this is adequate,
8 so I have to accept it's adequate?

9 MR. GARRE: Not -- you would have to accept
10 it, Your Honor, on its face. I think you -- in a record
11 like this -- and I think this record is clearly
12 sufficient -- and, ultimately, that's what we're asking
13 this Court to hold -- what you have in the record
14 is evidence --

15 JUSTICE SOTOMAYOR: Mr. Garre, I -- I have
16 no problem that this record -- with this record. My
17 problem is how do we rule.

18 Because it seems the me that I'm not quite
19 understanding what -- how -- the legal rule you're
20 asking us to announce. I think the legal rule, you're
21 saying, if the dog has been tested for proficiency by a
22 police department's determination of what's adequate for
23 proficiency, that establishes probable cause. That's
24 what I think the rule you want us to -- to do.

25 I don't know what the role of the judge is

1 in that --

2 MR. GARRE: I think it would be close --

3 JUSTICE SOTOMAYOR: -- with that rule.

4 MR. GARRE: -- close to that. We would ask
5 whether or not the dog successfully treated -- completed
6 training by a bona fide organization. And here --

7 JUSTICE SOTOMAYOR: No certification, no
8 questioning of the handler and the handler's training?
9 The judge can't do any of that and shouldn't do any of
10 that.

11 MR. GARRE: Certification is not required.
12 It may be one way that the police department could
13 establish reliability a different way, but certification
14 itself is not required when you have a record of the
15 type of training that you have here.

16 We do think that you could put the handler
17 on the stand and ask about the reliability, certain
18 questions about reliability.

19 We don't think, in a record like this, the
20 judge would say, well, it says that he completed 120
21 hours in narcotics detection at the Apopka, Florida
22 police department, and 40 hours at the Dothan police
23 department, so --

24 JUSTICE SOTOMAYOR: So it's not enough for
25 you to win by us saying that a court can't insist on

1 performance in the field records, that it has to look at
2 the totality of the circumstances.

3 What other case have -- have we announced,
4 under a totality of the circumstance test, an absolute
5 flat rule like the one you're proposing? Where else
6 have we said that one thing alone establishes probable
7 cause --

8 MR. GARRE: Your Honor --

9 JUSTICE SOTOMAYOR: -- that one factor
10 alone.

11 MR. GARRE: -- I think one area where the
12 Court mentioned that was in the Lago Vista case, where
13 it talked about the importance of clear rules for police
14 officers and --

15 JUSTICE SCALIA: I suppose that if the
16 reasonableness of a search depended upon some evidence
17 given by a medical doctor, the Court would not go back
18 and examine how well that doctor was trained at Harvard
19 Medical School and, you know, what classes he took and
20 so forth, right.

21 MR. GARRE: Absolutely. And the same way
22 that when an officer provides evidence for a search
23 warrant, we don't demand the training of the officer,
24 what schools he went to or what specific courses he had
25 in probable cause.

1 JUSTICE GINSBURG: Mr. Garre, you said there
2 was the certification, training program, but you gave a
3 third. You said, or otherwise show proficiency in
4 locating narcotics.

5 So if there is no certification, no
6 training, how would the state establish that the dog was
7 reliable in detecting drugs?

8 MR. GARRE: Your Honor, I think that that
9 would be the unusual case, and it probably would be
10 captured by the other factors; but, what we meant by
11 including that is that there's no limit on the types of
12 evidence that the police could submit to show
13 reliability.

14 If you didn't have certification or a formal
15 training program, the fact that there was evidence that
16 a dog like Aldo successfully performed in weekly
17 training over the course of the year, and the police
18 submitted the records, like the records in the Joint
19 Appendix in this case at pages 106 and 116, that might
20 be another way of establishing reliability.

21 But the -- the central way would be showing
22 that the dog successfully completed training or that the
23 dog was certified.

24 JUSTICE GINSBURG: And I think you'll agree
25 that the handler, too, the handler would have to --

1 MR. GARRE: Well, Your Honor, we don't think
2 there is a Fourth Amendment requirement of certification
3 for handlers. Again, this is something that varies
4 among states.

5 JUSTICE GINSBURG: Not -- not certification,
6 but that the handler has been -- has been trained --

7 MR. GARRE: Yes.

8 JUSTICE GINSBURG: -- to work with drug
9 detection dogs.

10 MR. GARRE: That's correct. And Officer
11 Wheetley here, of course, had been trained. He had
12 gotten a 160-hour course in narcotics detection, and had
13 done training with Aldo in the Dothan, Alabama police
14 department, 40 hours there.

15 And these dog -- the dog, Aldo, and Officer
16 Wheetley had worked together for about a year before the
17 time of the search.

18 The handlers themselves are going to be in
19 the best position to know the dogs and evaluate their
20 reliability. And they have a strong incentive to ensure
21 the dogs are reliable. That's both because they don't
22 want to miss contraband when it's available -- when it
23 exists in the field; and, also, they don't want to be
24 put into harm's way.

25 The traffic stop, in particular, is one of

1 the most dangerous encounters police officers face.
2 They're not going to want to be working with a dog that
3 is consistently putting the officer in a position of
4 searching cars based on an alert when that dog is not
5 reliable in predicting the presence --

6 JUSTICE SOTOMAYOR: Counsel, I'm somewhat
7 troubled by all of the studies that have been presented
8 to the Court, particularly the Australian one where,
9 under a controlled setting, one dog alerted correctly
10 only 12 percent of the time.

11 How and when and who determines when a dog's
12 reliability in alerting has reached a critical failure
13 number? And what is -- what do you suggest that number
14 is, and how does a judge determine that that's being
15 monitored?

16 MR. GARRE: We don't think the
17 Fourth Amendment puts a number on it. This Court has
18 rejected a numerical conception of probable cause.

19 But with respect --

20 JUSTICE SOTOMAYOR: Well, I'm deeply
21 troubled by a dog that alerts only 12 percent of the
22 time. Whatever -- whether we have a fixed number or an
23 unfixed number, that seems like less than probability
24 for me.

25 MR. GARRE: But, but let me -- let me

1 address the, the South Wales study, Your Honor, which I
2 think is the one that you were referring to and that's
3 the primary one relied on by the other side. In that
4 case they reported that over the course of several years
5 the dogs' alerts resulted in discovery of drugs only 26
6 percent of the time.

7 But there is another part of that study
8 which doesn't come up in the amicus briefs, and that's
9 that in 60 percent of the other cases the individuals
10 admitted to using drugs or being in the proximity of
11 drugs. And if you include that in the universe of
12 accurate alerts, as you should, then the number becomes
13 70 percent of dogs accurately alerting. That 70 percent
14 based on the primary study that they rely upon --

15 JUSTICE SOTOMAYOR: That doesn't answer what
16 happens to the dogs who have -- dogs grow old. They are
17 taken out of service for a reason. So how -- how is a
18 court supposed to monitor whether or not a dog has
19 fallen out of --

20 MR. GARRE: Well, primarily by looking at
21 whether the dog has successfully completed training.
22 And you're right, dogs do go out of service when they
23 reach a certain age. Dogs, like humans, become old and
24 impaired over time. But -- but looking at weekly
25 training records, like are available in this case, dogs

1 that successfully perform week in and week out in
2 training are going to successfully perform in the -- in
3 the real world.

4 And, after all, I think the most problematic
5 aspect of the challenges to the reliability of these
6 dogs is that law enforcement agencies across the country
7 at the state and Federal level, law enforcement agencies
8 around the world, and law enforcement agencies that
9 protect this Court rely on detection dogs as reliable
10 predictors of the evidence of contraband, evidence
11 of the presence of explosives or likewise.

12 And this is an area where we think that a
13 page of logic and experience is worth a volume -- a page
14 of experience and history is worth a volume of logic.
15 These dogs have been used and are being used in many
16 settings across the country and across the world today.
17 And the reason they are being used is because the people
18 who work with them know that they are reliable and --
19 and know by experience that they are reliable.

20 And that's one of the central problems we
21 have with the argument on the other side, is that
22 ultimately this Court should distrust the reliability of
23 the dogs. And again --

24 JUSTICE KAGAN: Well, Mr. Garre, could I
25 understand your argument? Because -- suppose in a case

1 the government comes in, says this dog has been through
2 training and the handler has been through training. And
3 this is a case in which -- this is never going to come
4 up when the dog actually alerts to narcotics; it's not
5 worth anybody's time at that point.

6 It's only going to come up in a case like
7 this, where a dog alerts to narcotics, there is no --
8 there are no narcotics, but something else is found, and
9 so the person ends up being criminally prosecuted. So
10 it's, you know, a small universe of cases.

11 So the government comes in and says that the
12 dog has been trained. Can -- can the criminal defendant
13 at that point call the handler, say, how has the dog
14 been trained, what are the methods that -- that the dog
15 has -- was used, and how did the dog do in training?
16 Can the -- can the defendant do that.

17 MR. GARRE: Your Honor, I think that the
18 defendant can call the handler and can ask those sorts
19 of questions. I think the court would cut it off if you
20 got into questions like, well, did they use the
21 play-reward or the scent-imprinting method in training.
22 Well, what specifics -- because I think that delves too
23 far into the details.

24 JUSTICE KAGAN: But you can ask questions
25 like how did the dog do in training.

1 MR. GARRE: Yes, and that was done here.

2 JUSTICE KAGAN: And how about if you really,
3 if there were some articles that said, you know, that
4 there was a certain kind of method that, for example,
5 led to a lot of subconscious cueing by the handler.
6 Could the -- could the criminal defendant say, did you
7 use that method that leads to these problematic results?

8 MR. GARRE: I -- I don't think so, Your
9 Honor. First of all, cueing is not part of this case
10 because they haven't argued that the dog was cued. The
11 argument is the dog was just sort of inherently
12 reliable.

13 JUSTICE KAGAN: I'm using "cueing" not in
14 terms of any intentionality, but one thing that I
15 learned in reading all of this was that one difficulty
16 here is that dogs respond to subconscious cues and that
17 there are different ways of training that make that less
18 or more of a problem.

19 MR. GARRE: And our position is, is that you
20 can inquire into cueing during this hearing, that the
21 defendants can -- can argue that the dog was cued, and
22 in -- in the course of that argument you might be able
23 to get into those sorts of things. That's different
24 than the challenge that was made here. There wasn't a
25 cueing challenge made in this case.

1 I would like to just go back to one of the
2 premises of your question, which is that the dog in this
3 case didn't accurately alert. The dog in this case
4 accurately alerted to the odor of illegal narcotics.

5 JUSTICE KAGAN: Yes, I didn't mean to say
6 that. I just meant to say that there were -- there were
7 no drugs found.

8 MR. GARRE: Right. And, and I think that's
9 another central problem with the Florida supreme court's
10 decision, is this notion that alerts to so-called
11 residual odors aren't indicative of the dog's
12 reliability. A dog's alert to the lingering odor of
13 methamphetamine which was in the car, must have been in
14 the car in this case, is just as accurate as a dog's
15 alert to the presence of methamphetamine itself in the
16 car.

17 If I could reserve the remainder of my time
18 for rebuttal?

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. GARRE: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Palmore.

22 ORAL ARGUMENT OF JOSEPH R. PALMORE,
23 FOR UNITED STATES, AS AMICUS CURIAE,
24 SUPPORTING THE PETITIONER

25 MR. PALMORE: Mr. Chief Justice and may it

1 please the Court:

2 This Court has long recognized the ability
3 of trained dogs to reliably detect target odors and such
4 dogs every day perform critical life and death homeland
5 security and law --

6 JUSTICE SOTOMAYOR: Counsel, I have two
7 separate questions for you. Tying the earlier case a
8 little bit to this one, I am assuming that your position
9 is -- and you'll tell me what the legal standard is --
10 that a well-trained dog, if he alerts, or walks by a row
11 of apartments, a row of houses, and alerts to drugs,
12 that that simple alert is probable cause for the police
13 to get a search warrant.

14 MR. PALMORE: Yes, we believe that an alert
15 by a trained dog is sufficient to establish probable
16 cause.

17 JUSTICE SOTOMAYOR: So that, without any
18 other information about -- unlike the earlier case or
19 this one, where the police officer saw the individual
20 being nervous, et cetera, et cetera -- that all -- all
21 it takes is a dog alert, despite the fact that there is
22 no study that says the dogs reliably alert 100 percent
23 of the time?

24 MR. PALMORE: 100 percent of the time is of
25 course not required for probable cause.

1 JUSTICE SOTOMAYOR: No, I -- I understand.

2 MR. PALMORE: It's a fair probability
3 standard and certainty is not required, and I think that
4 was the principal and fundamental flaw of the Florida
5 Supreme Court. It demanded infallibility where
6 infallibility is not required.

7 In terms of studies, it is actually well
8 studied --

9 JUSTICE SOTOMAYOR: So -- so shouldn't we be
10 addressing the question whether a -- an alert,
11 especially outside a home in particular, should be,
12 standing by itself, enough?

13 MR. PALMORE: I think what the Court -- of
14 course reliability is important. The question is how
15 you determine reliability. This is a somewhat unique
16 setting where the law enforcement tool is actually
17 tested initially and on an ongoing basis in a controlled
18 setting to establish its reliability. Your Honor asked
19 what the standard for bona fide training is.

20 We think the -- the important point is the
21 outcome of the training: Is the dog proficient? Can
22 the dog reliably detect narcotics odor and only
23 narcotics odor in a controlled setting where false
24 positives and false negatives can accurately be
25 measured? That record is established here.

1 JUSTICE SOTOMAYOR: Well, only because the
2 officer said that he satisfactorily performed --

3 MR. PALMORE: Well --

4 JUSTICE SOTOMAYOR: -- and what the Florida
5 court said: But we don't know what that means.

6 MR. PALMORE: Well, we -- I think we do know
7 what it means, Your Honor. There are two different
8 showings that are made here. There is a formal training
9 and formal certification, both for the dog and the
10 handler separately, and then a separate training, formal
11 training together.

12 But then, just as important, you have
13 ongoing, but less formal, proficiency exercises
14 conducted by the handler in which the dog, in a
15 controlled setting where errors could reliably be
16 identified, performed quite strongly, including 2 days
17 before the arrest here. So that's JA 113 on June 22nd,
18 the dog performed perfectly in a controlled setting.

19 And we have -- there are records in this
20 case going back several months before the arrest and
21 several months after the arrest showing that -- that
22 this dog passed the test, this dog was reliable.

23 CHIEF JUSTICE ROBERTS: And you agree that
24 that's an appropriate area of inquiry?

25 MR. PALMORE: We think it is.

1 CHIEF JUSTICE ROBERTS: The judge,
2 presented with, here's Aldo, he was -- went to this
3 school, he was certified, the judge can say, when was he
4 last tested, right? When did he last go through some --

5 MR. PALMORE: Yes, I think the judge can ask
6 those kinds of questions.

7 CHIEF JUSTICE ROBERTS: The -- the only
8 thing really you say they can't ask about is what's --
9 what's his record.

10 MR. PALMORE: Well, there is a question --
11 there are a couple sub-issues here. The principal vice
12 of the Florida Supreme Court was in imposing an
13 unprecedented and inflexible set of evidentiary
14 obligations that are part of the government's
15 affirmative case that the government has to always
16 introduce any time it seeks to establish probable cause
17 based on a dog alert. We think that's fundamentally
18 misplaced for a -- for a variety of reasons.

19 The question of what the government -- what
20 are fair game questions for a defendant to ask once the
21 handler is on the stand is a -- is a different question.
22 And --

23 JUSTICE KENNEDY: And judges do this
24 thousands of times in thousands of cases. They ask:
25 Was the tip reliable? There are any number of

1 permutations. It's a question of whether or not the
2 trial judge was -- made a correct determination in
3 determining that there was or was not sufficient cause
4 for the police to proceed. It just happens every day.

5 MR. PALMORE: I think that's right, Your
6 Honor, but I think the -- the critical aspect of
7 reliability in this context is the dog's performance in
8 a controlled setting.

9 JUSTICE GINSBURG: Mr. Palmore, you
10 criticize the Florida Supreme Court for requiring
11 evidence of field performance; and, assuming that that
12 evidence is not required, if the defendant, in preparing
13 for the suppression motion, wants what information there
14 is, would it be proper to seek -- for the defendant --
15 would it be permissible for the defendant to speak -- to
16 seek through discovery whatever field performance
17 records there are?

18 MR. PALMORE: We don't think so, certainly
19 not as a routine basis. The kind of burden that that
20 might impose on law enforcement we don't think is
21 justified.

22 That's a separate question from whether the
23 defendant can ask the handler, if the handler is on the
24 stand, about field performance, and then the court can
25 give that answer whatever weight is appropriate.

1 We think, typically, an answer on field
2 performance is not going to be material. It's not going
3 to be helpful. Because the problem is in the field,
4 when a dog alerts, the dog is trained to alert to the
5 odor of drugs.

6 Your -- it's like a -- what the -- Florida
7 Supreme Court wanted a batting average, a batting
8 average that would be calculated when we know the number
9 of at bats, but we don't know in many cases whether
10 there was a hit or an out. So we had a fraction where
11 we know the denominator but not the numerator.

12 The answer to the Florida supreme court's
13 question and concern about reliability, again, is to go
14 back to the controlled setting, where we know what's a
15 hit and what's an out, and we can calculate a reliable
16 batting average. That needs to be where the focus
17 should be in determining the reliability of a dog.

18 And there should -- there's no reason to
19 constitutionalize the process or the training
20 methodologies that get you to that point. What matters
21 is, is this dog successful in a setting in which we can
22 measure success.

23 And I think that it's also important to
24 point out that the Florida court was basically alone in
25 establishing these unprecedented and inflexible sets of

1 evidentiary requirements.

2 There is a large body of case law in the
3 lower courts on the reliability of drug detection dogs
4 going back 30 or 40 years, and there are no other
5 courts, no other appellate courts to be sure, that have
6 imposed these kinds of requirements on law enforcement
7 when it seeks to establish probable cause for a
8 detection -- for after a detection dog alerts.

9 JUSTICE KAGAN: If you take out the Florida
10 Supreme Court and this one trial court in Massachusetts,
11 basically you think what courts have been doing is the
12 right thing?

13 MR. PALMORE: In general. There is some
14 diversity across the courts, but I think that if you
15 look at Judge Gorsuch's opinion in the Ludwig case from
16 the Tenth Circuit, or the Jones case from the Virginia
17 supreme court, you see approaches that are basically
18 sound, where courts have confidence that if law
19 enforcement comes in and says, this dog is trained and
20 has demonstrated proficiency in a training setting, that
21 that dog is generally reliable.

22 And I think, as Mr. Garre --

23 JUSTICE KAGAN: But where at the same time
24 they'll allow a defendant to question the handler about
25 that training, about how the dog has performed in that

1 training; is that right?

2 MR. PALMORE: Yes. Those questions can be
3 asked.

4 But I think it's critical, as Mr. Garre
5 pointed out, that the courts not constitutionalize dog
6 training methodologies or hold mini trials with expert
7 witnesses on what makes for a successful dog training
8 program. Because, as Mr. Garre said, the government has
9 critical interests, life and death interests, that it
10 stakes on the reliability of these dogs.

11 So the U.S. Marshals use dogs to protect
12 Federal judges. The Federal Protective Services use
13 dogs to keep bombs out of Federal buildings. The TSA
14 uses dogs to keep bombs off of airplanes. FEMA uses
15 dogs to find survivors after hurricanes.

16 There are 32 K-9 teams in the field right
17 now in New York and New Jersey looking for survivors of
18 Hurricane Sandy.

19 So, in situation after situation, the
20 government has in a sense put its money where its mouth
21 is, and it believes at an institutional level that these
22 dogs are quite reliable. And I think the courts --

23 CHIEF JUSTICE ROBERTS: Do you -- I'm not
24 sure it's relevant, but do dogs -- are their -- does
25 their ability -- is it even across the board? In other

1 words, if you have a dog that's trained and good at
2 sniffing out heroin, the same dog is going to be good at
3 detecting a bomb, or is there some difference?

4 MR. PALMORE: No, there -- well, I think any
5 dog could be trained in either discipline. And if you
6 look at the Scientific Working Group on Detection Dogs
7 report that we cite in our brief, the report explains
8 that the same general methodologies and the same
9 different -- same general approach is used to train each
10 kinds of dogs. But, typically, a drug detection dog
11 will not be cross-trained on explosives.

12 CHIEF JUSTICE ROBERTS: So you don't know
13 whether -- in other words, are dogs good at sniffing
14 things, or are they -- can they be good at bombs, but
15 not good at meth?

16 MR. PALMORE: Well, I don't know the
17 specific answer to that. I think once a dog kind of
18 chooses a major, that's what they stick with. But I
19 think the important point is that --

20 JUSTICE SCALIA: You don't want coon dogs
21 chasing squirrels.

22 MR. PALMORE: Right. But I think the
23 important point is that these dogs have to meet -- have
24 to pass proficiency in an initial training program, and
25 then they, as is shown in the record here in great

1 detail, they show proficiency on an ongoing basis,
2 including in this case two days before the arrest.

3 Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Gifford.

6 ORAL ARGUMENT OF GLEN P. GIFFORD

7 ON BEHALF OF THE RESPONDENT

8 MR. GIFFORD: Mr. Chief Justice, and may it
9 please the Court:

10 There is no canine exception to the totality
11 of the circumstances test for probable cause to conduct
12 a warrantless search. If that is true, as it must be,
13 any fact that bears on a dog's reliability as a detector
14 of the presence of drugs comes within the purview of the
15 courts. This can encompass evidence of initial
16 training, certification, maintenance training and
17 performance in the field.

18 JUSTICE KENNEDY: Do you understand the
19 government to disagree with that general position? In
20 other words, the trial court, if you have an attorney
21 that's really concerned about the training of this dog,
22 they can ask about it.

23 MR. GIFFORD: I do understand the government
24 to disagree about the relevance of field performance.
25 And where I specifically think the government disagrees

1 is on the level of detail that can be inquired into by
2 the trial court on any of these elements.

3 JUSTICE BREYER: I didn't think they
4 disagreed about what he may do; I thought they disagreed
5 about what he must do. That is, the Florida Supreme
6 Court said you must, da, da, da, da, da, and gave a
7 whole list. I thought that's what the case was about.

8 MR. GIFFORD: Well, the Florida Supreme
9 Court did have several passages in its opinion where it
10 talked about what the state must produce. And at first
11 glance, that looks rather didactic.

12 However, what I think the Florida Supreme
13 Court was saying there was that if this -- these records
14 exist, the state must produce them. And that is
15 consistent with the state's burden of proof to justify a
16 warrantless search.

17 JUSTICE BREYER: That's a totally different
18 matter. Of course, I agree with you that a trial judge
19 has control of the trial. He's likely to know what's
20 relevant. In different circumstances, different matters
21 will be, and he has first say on what you're going to go
22 into. It's the must.

23 And now you're on the point. Why is that
24 the right list? I mean, what in the Constitution
25 requires that list?

1 MR. GIFFORD: I don't believe the
2 Constitution requires it, and I don't believe --

3 JUSTICE BREYER: Didn't the Supreme Court
4 believe the Constitution required it?

5 MR. GIFFORD: No, I don't think so, even
6 though they used the word "must." I think that the
7 "must" concerns performance records and training records
8 that exist.

9 Farther down in the opinion, the court says
10 reasons why the -- why the state should keep and present
11 performance records --

12 JUSTICE SCALIA: But what --

13 JUSTICE GINSBURG: So -- so if the state
14 doesn't keep -- if the state doesn't keep any
15 performance records, then there would be no field
16 performance to show, but that doesn't mean the state
17 loses; is that what you're saying?

18 The state doesn't keep performance records.
19 The Florida Supreme Court seemed to say field
20 performance records are required.

21 MR. GIFFORD: If the state does not keep
22 field performance records, that is a fact, that is a
23 lack of evidence that could be held against the state in
24 the suppression hearing. And it shifts the focus onto
25 providing evidence of the initial training, the

1 certification, and the maintenance training that can
2 show to the trial court that this is a reliable dog.

3 JUSTICE SCALIA: Now I thought the
4 court said -- held against the state. I thought what
5 the Florida court was saying is that if you didn't
6 produce it, the dog's evidence would -- would not be
7 allowed -- it's --

8 MR. GIFFORD: They did use --

9 JUSTICE SCALIA: -- the search is invalid.

10 MR. GIFFORD: The court did use the word
11 must --

12 JUSTICE SCALIA: Yes.

13 MR. GIFFORD: -- but it's not -- it's not a
14 specific recipe that can't be deviated from. Because,
15 in addition to listing the records that must be
16 produced, the Florida Supreme Court also said, and all
17 other evidence that bears on the reliability of the dog.

18 JUSTICE SCALIA: Even worse.

19 MR. GIFFORD: So it's not a specific recipe,
20 and it's talking about what -- if these records exist,
21 they must be produced.

22 JUSTICE GINSBURG: Are you conceding that
23 the Florida Supreme Court, at least with respect to the
24 field performance records, was wrong, that they -- it is
25 not a Fourth Amendment requirement?

1 MR. GIFFORD: I don't think they -- I don't
2 think they require field performance records to
3 establish --

4 JUSTICE GINSBURG: But they said it was part
5 -- but they outline what the government must prove, and
6 that was one of them.

7 MR. GIFFORD: They said what the government
8 must produce if those records exist. But when you go
9 down to the part of the opinion where the court applies
10 the law to the facts, the court didn't just say, because
11 there were no field performance records, no probable
12 cause, we close up shop, conviction reversed.

13 What the court did was take into
14 consideration the lack of field performance records, the
15 lack of any records about initial training and
16 certification aside from the fact that this dog had a
17 certificate.

18 And we have to remember that this
19 certificate, not only was it 16 months out of date, it
20 wasn't a certificate for Aldo. It was a certificate for
21 Aldo and a Seminole County deputy together as a team.

22 This dog was never certified as part of a
23 team with Officer Wheetley in this case. And the
24 certifications in this area are team certifications, not
25 individual certifications.

1 JUSTICE SCALIA: Is that a requirement too?
2 That's a constitutional requirement, that the dog
3 training doesn't count unless it's training with the
4 officer who is using the dog?

5 MR. GIFFORD: No, but that's an indicator of
6 reliability, which is the ultimate test here, has this
7 team been trained and certified together --

8 JUSTICE SCALIA: Well, fine. Counsel can
9 bring that up. Counsel can bring that up at the hearing
10 before the judge. But -- but I understood this to be
11 a -- a requirement. You never even get to that hearing,
12 because there's no evidence that this dog was ever
13 trained with this policeman.

14 MR. GIFFORD: That's correct, there is no
15 such evidence.

16 JUSTICE SCALIA: Yes, and therefore end of
17 case, right?

18 MR. GIFFORD: No, not end of case. The fact
19 that the dog wasn't trained with this policeman means
20 that you need to look for evidence -- other evidence of
21 reliability, which also doesn't exist in this case.

22 JUSTICE SCALIA: Well --

23 JUSTICE GINSBURG: Doesn't this -- this
24 officer has been working with this dog for many months.
25 They have training periods every week. So why isn't

1 that enough to show that this handler and this dog
2 worked effectively as a team?

3 MR. GIFFORD: Well, first, this weekly
4 training is maintenance training. It's to maintain the
5 dog at a level of proficiency that has previously been
6 established. That level of proficiency hadn't been
7 established with this team of Wheetley and Aldo. The
8 level of proficiency that had been established was with
9 Wheetley and with another Seminole County deputy.

10 JUSTICE SCALIA: What -- what -- what are
11 the -- what are the incentives here? Why would a police
12 department want to use an incompetent dog? Is that any
13 more likely than that a medical school would want to
14 certify an incompetent doctor? What -- what incentive
15 is there for a police department?

16 MR. GIFFORD: The incentive is to acquire
17 probable cause to search when it wouldn't otherwise --
18 otherwise be available.

19 JUSTICE SCALIA: And that's a good thing?

20 MR. GIFFORD: Is that a good thing?

21 JUSTICE SCALIA: I mean, you acquire
22 probable cause, you go in and there's nothing there.
23 You've wasted the time of your police officers, you've
24 wasted a lot of time.

25 MR. GIFFORD: And -- and you've invaded the

1 privacy of an individual motorist who was innocent.

2 JUSTICE SCALIA: Well, maybe the police
3 department doesn't care about that, but it certainly
4 cares about wasting the time of its police officers in
5 fruitless searches.

6 MR. GIFFORD: The incentive of the officer
7 to be able to conduct a search when he doesn't otherwise
8 have probable cause is a powerful incentive. As the
9 Court has said, ferreting out crime is a competitive
10 enterprise. And also, these --

11 JUSTICE SCALIA: Willy-nilly. Officers just
12 like to search. They don't particularly want to search
13 where they're likely to find something. They just like
14 to search. So let's get dogs that, you know, smell
15 drugs when there are no drugs. You really think that
16 that's what's going on here?

17 MR. GIFFORD: Officers like -- officers like
18 to search so that they can get probable cause so that
19 they can advance their career. Forfeiture is also an
20 issue in this --

21 JUSTICE SCALIA: They like to search where
22 they're likely to find something, and that only exists
23 when the dog is well trained. It seems to me they have
24 every incentive to train the dog well.

25 MR. GIFFORD: But the question goes back to

1 the dog's reliability, what the officer knows
2 objectively, and what that officer can demonstrate on
3 the stand to the trial court to determine by the
4 totality of the circumstances that that dog is well
5 trained.

6 CHIEF JUSTICE ROBERTS: I'm -- getting back
7 to -- I'm confused about the difference between must and
8 is required. What if the judge has before him or her a
9 record, this is where the dog went to school and it's a
10 bona fide school, this is where the dog was certified,
11 he's trained every -- every, you know, couple of weeks
12 or whatever it is, and the judge says, do you have any
13 field records, and the officer says, no, and the
14 drug says -- the judge says, well, then no probable
15 cause. That's reversible error, right?

16 MR. GIFFORD: It is reversible error if we
17 know what went into the training and certification. Was
18 that training and certification sufficient to prove the
19 dog was reliable? Did it include the use of blanks and
20 did the --

21 CHIEF JUSTICE ROBERTS: You have, I guess,
22 experts testify about whether -- what constitutes a good
23 training program.

24 MR. GIFFORD: No, not necessarily experts,
25 but simply the -- the officer who participated with the

1 dog can testify as to what he and the dog went through
2 to obtain the training certificate and the -- and the
3 certification.

4 JUSTICE SCALIA: Oh, I assure you that if we
5 agree with you there will be a whole body of experts
6 that will spring into being about dog training. I
7 assure you that that will be the case.

8 MR. GIFFORD: Those experts already exist.
9 They -- they are prevalent in the case law already.

10 JUSTICE SOTOMAYOR: I understood the Florida
11 Supreme Court, counselor, to say that the deficit in the
12 training records here was because there was no evidence
13 of false positives, that the reports didn't say, the
14 training reports didn't say, if the dog was alerting
15 falsely.

16 Assume that the record, as your adversary
17 claimed, shows the opposite, that a satisfactory
18 completion means that the dog detected drugs where they
19 were. What -- why wouldn't the training records here be
20 adequate in that circumstance?

21 MR. GIFFORD: That would be one of several
22 showings that would make the training records adequate.
23 Also, you would want to know whether there were
24 distractors used in the field. However, I don't believe
25 that the record supports, except -- and this is

1 arguable; the parties dispute this -- for the
2 maintenance training.

3 All the state had for the initial training
4 with Deputy Morris, not with Deputy Wheatley, was a
5 certificate: One certificate that said this dog was
6 trained by the Apopka Police Department for 120 hours
7 with Deputy Morris; another certificate saying that this
8 dog was certified by Drug Beat narcotics certifications,
9 again with Deputy Morris, for 1 year.

10 JUSTICE SOTOMAYOR: I -- I guess what I'm
11 asking you is, as a matter of law you want us to hold
12 that training records are inadequate unless what?
13 Unless -- you're going to specify now a list of things
14 they have to include?

15 MR. GIFFORD: No. This Court in -- in a
16 number of circumstances has provided examples that can
17 guide a court in probable cause determinations. In
18 Illinois v. Gates, under the old Aguilar-Spinelli test,
19 the Court specified where evidence on one prong can be
20 so strong that it substitutes for evidence on another
21 prong. In Ornelas, the Court pointed to local knowledge
22 that can be relied upon, such as the winter climate in
23 Milwaukee.

24 JUSTICE SCALIA: Yes, but -- but counsel,
25 you're defending a Florida Supreme Court opinion which

1 says "must." You can't just say, you know, I'm not
2 asserting any particular thing is necessary, just, you
3 know, totality of the circumstances. You have an
4 opinion here in which the Florida Supreme Court says
5 "must." It must include the, you know, the field
6 training. Now, do -- do you disavow that or -- or do
7 you want us the ignore it? What?

8 MR. GIFFORD: That is -- that is not the
9 holding on which I'm relying here. The holding on which
10 I'm relying is that training and certification alone,
11 the mere fact of training and certification alone, is
12 not sufficient to establish the dog's reliability.

13 And as to the language about "must,"
14 remember, the Florida Supreme Court didn't just say that
15 the failure to produce one of these elements
16 necessitated reversal.

17 It then went and engaged in a totality of
18 the circumstances test. And several lower courts
19 applying that case, applying Harris, have reached the
20 same conclusion. In two of those cases --

21 JUSTICE SCALIA: If -- if this is absent in
22 the totality of the circumstances and you nonetheless
23 hold that there was probable cause, then "must" does not
24 mean "must," right?

25 MR. GIFFORD: "Must" means "must" if the

1 state has the records. If the records exist, then the
2 state must produce them because it bears the --

3 JUSTICE GINSBURG: That's not what the
4 Florida Supreme Court said? It listed, along with
5 training, that the -- the provision of records of field
6 performance.

7 MR. GIFFORD: I read that as: If those
8 records exist, the state must produce them, because not
9 only does it bear the burden of proof; it's the only
10 party that can produce these records because it keeps
11 the dog.

12 JUSTICE GINSBURG: Suppose it's -- it's a
13 dog that's just completed the training, training course,
14 top-performing dog in the training program, but there's
15 no field record.

16 MR. GIFFORD: If that -- if the training is
17 sufficient, if it has those elements that demonstrate
18 that the dog is reliable, those are the circumstances.
19 You have the totality of the circumstances there and
20 those circumstances don't include any field performance.
21 And, yes, under that circumstance, a trial court can
22 find the dog to be reliable.

23 JUSTICE ALITO: What is wrong with the
24 state's argument that field performance records are not
25 very probative because dogs detect odors, they don't

1 detect the physical presence of the substance that
2 created the odor, and therefore so-called false alerts,
3 cases in which a search was performed and no contraband
4 was found are not really cases of false alerts. What's
5 wrong with that?

6 MR. GIFFORD: Well, you don't know whether
7 they're cases of false alerts or not, because the state
8 will always point to the possibility of residual odor as
9 a reason. And we know from the studies that have been
10 cited in the briefs that there are other reasons that
11 dogs alert when that alert cannot be verified. Handler
12 cueing is identified as the chief one. And simply dogs
13 make mistakes. Dogs err. Dogs get excited and will
14 alert to things like tennis balls in trunks or animals,
15 that sort of thing.

16 JUSTICE ALITO: Well, that may all be true,
17 but then what -- what can one infer from the fact that a
18 dog alerted a number of times when no contraband was
19 found?

20 I think what you just said was the
21 explanation could be the dog detected an odor, but the
22 substance wasn't there, or it could be that the dog was
23 cued or the dog was confused or the dog is not very
24 competent. So what can one infer from these field
25 performance records?

1 MR. GIFFORD: Well, what you can infer is
2 this dog is not a very accurate indicator of probable
3 cause, because probable cause tests whether drugs are
4 likely to be found in a search that follows an alert.
5 If the dog's --

6 JUSTICE SCALIA: But they are likely to be
7 found if there is a residual odor of drugs, even though
8 the drugs are no longer there. So it's not an
9 incompetent dog when he alerts because of the residual
10 odor.

11 MR. GIFFORD: But if a dog has -- but if a
12 dog has previously alerted and no drugs have been found
13 because the dog's hyperacuity causes him to smell drugs
14 that were there two days or two weeks ago, then the next
15 time that dog alerts, it's less likely, the probability
16 declines that drugs will be found.

17 It goes to what probable cause measures,
18 rather than what the dog training and certification
19 community measure, and that is, the likelihood, the
20 reasonable probability, that drugs will be found
21 following the search.

22 JUSTICE SOTOMAYOR: Counsel, how is that any
23 different than a police officer who comes to a car and
24 smells marijuana? He's never going to know whether
25 there is any more in the car or not. It could have been

1 smoked up an hour before. I don't know how long
2 marijuana lingers for, but -- I'm not sure why residual
3 odor affects the reliability of the dog, which was
4 Justice Scalia's point. It's no different than an
5 officer who smells something.

6 He doesn't actually know whether it's
7 physically still present or not, but we're talking about
8 probabilities.

9 MR. GIFFORD: That's correct. And -- and
10 the difference is that -- that the police officer can
11 describe what he has smelled and can say, I smell
12 marijuana. All the dog tells the police officer is, I
13 smell something I was trained to detect, perhaps, if I'm
14 operating correctly.

15 But getting to this -- this issue of
16 residual odor, our position is that an alert where no
17 drugs are found means that the dog -- that -- it
18 detracts from probable cause in that instance.

19 But that's not the only rule available to
20 the court. Residual odor, whether an alert was to
21 residual odor and is therefore correct and accurate, is
22 something that can be litigated.

23 In one of the lower courts that decided the
24 case after the Florida Supreme Court, the court looked
25 to the field performance records, and it found several

1 of them well supported on the issue of whether the alert
2 was probably to the odor of drugs; several it didn't
3 find. So that is an issue that can be litigated.

4 Another possibility is --

5 JUSTICE ALITO: Well, excuse me.

6 Where -- when nothing is found, how can you tell whether
7 the dog alerted to a residual odor or simply made a
8 mistake?

9 Now, there may be cases where there is other
10 evidence that suggests that drugs were present in that
11 location, and, therefore, that is something from which
12 you could infer that the dog was alerting to residual
13 odor; but, the fact that you don't have evidence of that
14 doesn't mean that there wasn't residual odor.

15 MR. GIFFORD: No, it doesn't mean that there
16 wasn't residual odor. But, again, you go back to what
17 probable cause measures, I believe.

18 And the Florida Supreme Court didn't demand
19 evidence of residual odor. What it did is it said that
20 if field performance records exist, then the state can
21 explain unverified alerts in the field as residual odor,
22 and then a court can then evaluate that.

23 CHIEF JUSTICE ROBERTS: What's the magic
24 number? What percentage of accurate alerts or
25 inaccurate is enough for probable cause?

1 MR. GIFFORD: Well, this Court has always
2 hesitated to assign percentages to probable cause; but,
3 in the lower courts, once you get below 50 percent,
4 probable cause is much less likely to be found, assuming
5 that there is no other corroborative evidence, no other
6 reasonable suspicion factors.

7 I'd like to talk briefly about the Oregon
8 supreme court and what that court did in several cases.

9 Helzer and Foster decided in 2011,
10 independently of the Florida Supreme Court decision,
11 doesn't cite Harris; in Foster, the Oregon supreme court
12 had a dog that trained initially with the same handler,
13 unlike here, where the evidence was very strong as to
14 the features of the training and certification program,
15 and where that dog had, I believe, a 66 percent field
16 performance record.

17 Now, the court in Foster said that the dog's
18 reliability can be established by training,
19 certification, and performance in the field. The court
20 added that it didn't think that performance in the field
21 was the most reliable measure, but it's relevant, and
22 the court considered that 66 percent percentage.

23 But then, on the same day, in Helzer, there
24 was a dog that trained initially with a different
25 handler, that the handler ultimately testified to very

1 few details of the ongoing training and the
2 certification.

3 In Foster, the certification was with an
4 organization that required a 90 percent success rate.
5 In Helzer, there was no such testimony.

6 And this officer, like the officer here,
7 didn't keep field performance records when the dog
8 alerted and no drugs were found.

9 In Helzer, the court found that there was
10 insufficient evidence of reliability. And I believe
11 that those two cases demonstrate what is a -- what is a
12 correct line to draw in navigating what is reliable.

13 On several arguments made by the state, the
14 argument was that the maintenance training included
15 blanks, and that the dog did not alert to blanks. The
16 record, we believe, supports the Florida supreme court's
17 conclusion that blanks were tested -- the dog was tested
18 on blanks, but there was no testimony as to whether the
19 dog didn't alert on those blanks.

20 The state has said that the dog was
21 subsequently recertified. I don't find support in the
22 record for that. At a suppression hearing, the state
23 argued -- the officer testified that the dog was
24 scheduled for another certification, but we don't know
25 whether the dog was ever recertified.

1 The Court can affirm the Florida Supreme
2 Court simply on the failure to produce adequate
3 documentation of certification and initial training, and
4 on the fact that this dog was never certified with this
5 trainer -- with this handler and didn't initially work
6 with this handler.

7 You don't have a dog here who was reliable
8 enough to demonstrate probable cause. The Florida
9 Supreme Court so concluded. I believe its conclusion
10 was correct. And unless there are additional
11 questions...

12 JUSTICE GINSBURG: The alert -- the alert
13 here could have been to residual odor, or it could have
14 been to drugs inside the pickup truck. If it's --
15 because the alert was in front of the -- a front door
16 handle, is that -- so it -- it's equally likely that
17 it -- that it was just residual odor or that there were
18 drugs inside the pickup truck.

19 Can the police establish probable cause
20 when what the dog alerted to may well have been residual
21 odor and nothing inside? The dog didn't alert anyplace
22 other than the door handle, is that...

23 MR. GIFFORD: It can constitute probable
24 cause. What Officer Wheatley testified to in this case
25 was he believed that this alert was to residual odor

1 on the door handle --

2 JUSTICE KENNEDY: Excuse me. Did you say it
3 can or it can't?

4 MR. GIFFORD: It may. It may. It can
5 constitute probable cause in this case.

6 Officer Wheatley testified that this dog
7 alerted to the door handle. And in his prior
8 experience, when the dog alerts to the door handle, it
9 means that someone who had smoked or consumed drugs or
10 handled drugs had touched the door handle.

11 Now, if Officer Wheatley had testified that
12 in his experience when he'd seen such alerts and
13 conducted a search, drugs were found inside the vehicle,
14 then that residual odor alert would support probable
15 cause.

16 Officer Wheatley did not so testify. There
17 was insufficient evidence that this residual odor
18 alert -- that a residual odor alert of this nature,
19 without finding drugs afterward, supports probable
20 cause.

21 JUSTICE SCALIA: But at least we don't have
22 to worry about mothballs in this case; is that right?
23 There are no mothballs?

24 (Laughter.)

25 MR. GIFFORD: No. No mothballs to my

1 knowledge. No, Your Honor.

2 JUSTICE ALITO: Was that the holding in the
3 Florida Supreme Court, that there was no probable cause
4 because the dog alerted to the wrong part of the truck?

5 MR. GIFFORD: No, Your Honor.

6 JUSTICE ALITO: Was it any part of their
7 reasoning?

8 MR. GIFFORD: They were concerned about
9 residual odor alerting without any explanation by the
10 state as to how residual odor alerting supports probable
11 cause.

12 But the primary basis for its decision was
13 the lack of performance records and the lack of records
14 supporting initial training and certification to show
15 that this dog was reliable.

16 JUSTICE GINSBURG: And if we think they were
17 wrong in that respect, I suppose that you would say the
18 Court shouldn't reverse, but should vacate and remand
19 because the question did alert him to the door handle,
20 was that enough? Was that enough to establish probable
21 cause that there were drugs in the vehicle?

22 MR. GIFFORD: Well, I don't think the door
23 handle itself is -- is dispositive. I think it's the
24 door handle plus the lack of evidence that we have a
25 reliable dog.

1 And, again, the reason you need a reliable
2 dog, evidence on what training and certification means,
3 is that there are no standards, no standards whatsoever
4 for initial training.

5 Some states do have standards for training
6 and certification. Florida does not. And no standards
7 for -- for maintenance training as well.

8 In order to have probable cause, you have to
9 know what that certification, what that training means,
10 if you don't have standards that will tell that for you.

11 If there are no additional questions, I'll
12 conclude.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Garre, you have 3 minutes.

15 REBUTTAL ARGUMENT OF GREGORY G. GARRE

16 ON BEHALF OF THE PETITIONER

17 MR. GARRE: Thank you, Your Honor.

18 First, probable cause in this Court's
19 precedents looks not only to the likelihood that
20 contraband would be present, but the likelihood that
21 there would be evidence of a crime. And that would
22 include the so-called residual odor, evidence that drug
23 paraphernalia, someone had recently smoked illegal
24 narcotics in the vehicle, or the like.

25 So the alert to the so-called residual odor

1 of drugs is just as probative to the question of
2 probable cause as an alert to drugs themselves.

3 The fact that Aldo alerted to the door
4 handle area of the car doesn't negate in any way the
5 probable cause that Officer Wheetley had to search.
6 What it means is that the door handle area was where the
7 scent of the illegal narcotics was the strongest. It
8 could have been narcotics coming out of that area, or
9 coming out of the door seam, or could have been the fact
10 that someone who had used narcotics was using the door
11 handle to get in and out of the car.

12 Second, courts can determine reliability in
13 this context. They would look to the performance in the
14 controlled training environment. There is a real danger
15 with suggesting that field performance records are --
16 are a permissible foray for defendants in suppression
17 hearings to challenge the reliability of dogs because,
18 one, as Justice Alito pointed out, it's not a controlled
19 setting.

20 We don't know whether the dog did alert to
21 residual odors of narcotics that had been in the car,
22 drugs that were hidden and simply not found during
23 the relatively --

24 JUSTICE SCALIA: Would you -- would you
25 allow counsel to ask about that?

1 MR. GARRE: I think they could ask about it,
2 Your Honor. I don't think they could demand the
3 performance records themselves. And that would be a
4 huge deterrent to law enforcement, even maintaining
5 those records.

6 Third, Officer Wheatley and Aldo did train
7 together for nearly a year before the search in
8 question. They did complete the 40-hour drug detection
9 seminar at the Dothan, Alabama, police department. And
10 that certificate's at page 105 of the record.

11 And second, as Justice Scalia pointed out,
12 all the incentives in this area are aligned with
13 ensuring the reliability of drug detection dogs. It's
14 not in the police interest to have a dog that is
15 inaccurate in finding contraband or that is inaccurate
16 and putting an officer in harm's way.

17 Humans have relied upon dogs for law
18 enforcement-related purposes, due to their extraordinary
19 sense of smell, for centuries. Dogs, trained drug
20 detection dogs and explosive detection dogs, are
21 invaluable members of the law enforcement community
22 today.

23 We would ask the Court to reverse the
24 decision below, which would act as a serious detriment
25 to the use of that valuable tool.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. GARRE: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: The case is
4 submitted.

5 (Whereupon, at 12:01 p.m., the case in the
6 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>ability 19:2 26:25</p> <p>able 17:22 35:7</p> <p>above-entitled 1:11 53:6</p> <p>absent 39:21</p> <p>absolute 10:4</p> <p>Absolutely 10:21</p> <p>accept 8:8,9</p> <p>accurate 14:12 18:14 42:2 43:21 44:24</p> <p>accurately 14:13 18:3,4 20:24</p> <p>acquire 34:16 34:21</p> <p>act 52:24</p> <p>actual 6:10</p> <p>added 45:20</p> <p>addition 31:15</p> <p>additional 47:10 50:11</p> <p>address 14:1</p> <p>addressing 20:10</p> <p>adequate 7:4,13 7:22 8:7,8,22 37:20,22 47:2</p> <p>admitted 14:10</p> <p>advance 35:19</p> <p>adversary 37:16</p> <p>affirm 47:1</p> <p>affirmative 22:15</p> <p>afterward 48:19</p> <p>age 14:23</p> <p>agencies 15:6,7 15:8</p> <p>ago 42:14</p> <p>agree 11:24 21:23 29:18 37:5</p> <p>Aguilar-Spinelli 38:18</p>	<p>airplanes 26:14</p> <p>Alabama 4:25 6:11 12:13 52:9</p> <p>Aldo 4:21 11:16 12:13,15 22:2 32:20,21 34:7 51:3 52:6</p> <p>Aldo's 5:5</p> <p>alert 3:10 13:4 18:3,12,15 19:12,14,21,22 20:10 22:17 24:4 41:11,11 41:14 42:4 43:16,20 44:1 46:15,19 47:12 47:12,15,21,25 48:14,18,18 49:19 50:25 51:2,20</p> <p>alerted 13:9 18:4 41:18 42:12 44:7 46:8 47:20 48:7 49:4 51:3</p> <p>alerting 13:12 14:13 37:14 44:12 49:9,10</p> <p>alerts 13:21 14:5 14:12 16:4,7 18:10 19:10,11 24:4 25:8 41:2 41:4,7 42:9,15 44:21,24 48:8 48:12</p> <p>aligned 52:12</p> <p>Alito 40:23 41:16 44:5 49:2,6 51:18</p> <p>allow 25:24 51:25</p> <p>allowed 31:7</p> <p>Amendment 5:13 12:2 13:17 31:25</p> <p>amicus 1:19 2:7 14:8 18:23</p> <p>amounts 4:4</p> <p>animals 41:14</p> <p>announce 8:20</p> <p>announced 10:3</p> <p>annual 5:14</p> <p>answer 14:15 23:25 24:1,12 27:17</p> <p>answered 3:17</p> <p>anybody's 16:5</p> <p>anyplace 47:21</p> <p>apartments 19:11</p> <p>Apopka 4:23 9:21 38:6</p> <p>appeals 3:23</p> <p>APPEARAN... 1:14</p> <p>appellate 25:5</p> <p>Appendix 11:19</p> <p>applies 32:9</p> <p>applying 39:19 39:19</p> <p>approach 6:13 27:9</p> <p>approaches 25:17</p> <p>appropriate 8:1 21:24 23:25</p> <p>area 10:11 15:12 21:24 32:24 51:4,6,8 52:12</p> <p>arguable 38:1</p> <p>argue 17:21</p> <p>argued 17:10 46:23</p> <p>argument 1:12 2:2,5,9,12 3:5 15:21,25 17:11 17:22 18:22 28:6 40:24 46:14 50:15</p> <p>arguments 46:13</p> <p>arrest 21:17,20 21:21 28:2</p>	<p>articles 17:3</p> <p>aside 32:16</p> <p>asked 20:18 26:3</p> <p>asking 7:8 8:12 8:20 38:11</p> <p>aspect 15:5 23:6</p> <p>aspects 6:2</p> <p>asserting 39:2</p> <p>assign 45:2</p> <p>Assistant 1:17 1:21</p> <p>Assume 37:16</p> <p>assuming 7:7 19:8 23:11 45:4</p> <p>assure 37:4,7</p> <p>attorney 28:20</p> <p>Australian 13:8</p> <p>authentic 6:9</p> <p>available 12:22 14:25 34:18 43:19</p> <p>average 4:4 24:7 24:8,16</p> <p>a.m 1:13 3:2</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 3:4 6:23 10:17 18:1 21:20 24:14 25:4 35:25 36:6 44:16</p> <p>balls 41:14</p> <p>based 13:4 14:14 22:17</p> <p>basically 24:24 25:11,17</p> <p>basis 20:17 23:19 28:1 49:12</p> <p>bats 24:9</p> <p>batting 4:4 24:7 24:7,16</p> <p>bear 40:9</p> <p>bears 28:13 31:17 40:2</p>	<p>Beat 38:8</p> <p>behalf 1:15,22 2:4,11,14 3:6 28:7 50:16</p> <p>believe 19:14 30:1,2,4 37:24 44:17 45:15 46:10,16 47:9</p> <p>believed 47:25</p> <p>believes 7:22 26:21</p> <p>best 12:19</p> <p>bit 19:8</p> <p>blanks 36:19 46:15,15,17,18 46:19</p> <p>board 26:25</p> <p>body 25:2 37:5</p> <p>bomb 27:3</p> <p>bombs 26:13,14 27:14</p> <p>bona 4:16 9:6 20:19 36:10</p> <p>BREYER 29:3 29:17 30:3</p> <p>brief 8:5 27:7</p> <p>briefly 45:7</p> <p>briefs 14:8 41:10</p> <p>bring 8:4 33:9,9</p> <p>buildings 26:13</p> <p>burden 23:19 29:15 40:9</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1</p> <p>calculate 24:15</p> <p>calculated 24:8</p> <p>call 16:13,18</p> <p>canine 28:10</p> <p>captured 11:10</p> <p>car 18:13,14,16 42:23,25 51:4 51:11,21</p> <p>care 35:3</p> <p>career 35:19</p> <p>cares 35:4</p>
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