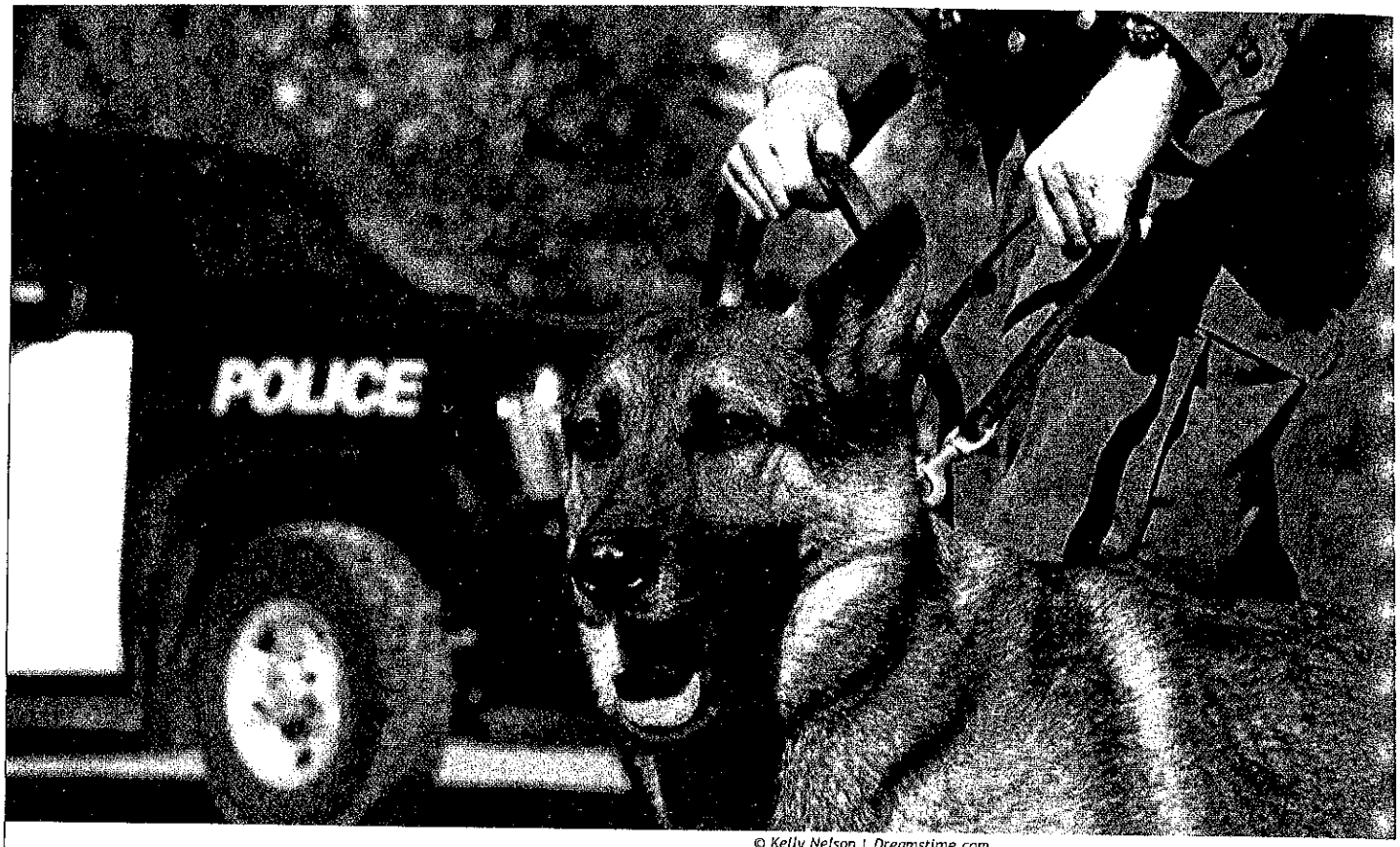

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Police K-9's and the Constitution: What Every Lawyer and Judge Should Know

In April 2006, *The Champion* published an article by Jeff Weiner and Kimberly Homan titled *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs!* The article discussed the sorry state of the law and many of the problems inherent in relying upon K-9 alerts to establish probable cause for warrantless searches.

Positive K-9 "alerts" are treated as *per se* probable cause in most states and in the federal courts, including the U.S. Supreme Court, when the K-9 is assumed to be "trained" and "reliable."[1] The terms "trained," "reliable," and "certified" appear repeatedly in judicial opinions handed down over the years relating to dog sniffs. Following *United States v. Place*,[2] the courts, with few exceptions, have demonstrated a lack of understanding of what these concepts actually mean in the real world, and an entrenched disinclination to look beyond the fact that the dog's handler testified to the occurrence of an alert and that the dog was "trained" and "certified."[3]

Judges and justices have been all too eager to blindly accept affidavits from officer/handlers stating that their dog was "trained" or "certified" and that their dog "alerted" to justify a warrantless search or a basis for the issuance of a search warrant. The reality is, much of the "training" is inadequate and the so-called "certifications" are meaningless.[4]

Fortunately, several courts in recent years — mostly state courts — have come to see the light. While these recent cases are excellent opinions, they do not go far enough, since they allow for the continued use of a K-9 alert to establish probable cause. Of particular significance are the beautifully written decisions of the Florida Supreme Court in *Jardines v. State of Florida* and *Harris v. State of Florida*.[5] The U.S. Supreme Court has granted certiorari in both of these cases and arguments will be heard in the October 2012 term. These two cases are discussed in this article, as are the important decisions from the Oregon Supreme Court in *State of Oregon v. Foster* and *State of Oregon v. Helzer*.[6] These cases are mandatory reading for practitioners who want to understand K-9 searches and the dangers for abuse inherent in allowing a K-9 alert to provide probable cause for a full-blown search.

The purpose of this article is not to discredit the use of trained dogs for law enforcement, emergency response, public safety and other vital purposes. Rather, it addresses a primary deficiency in the use of drug-detection dogs to establish "probable cause," focusing on the subjective role of the officer/handlers and the unreliability of dog "alerts" in general.

BY JEFF WEINER

The Truth About Dogs

Most dog owners know that a smart and motivated dog — a dog with drive or energy — can be trained to do just about anything. A dog owner can use subtle physical or audible cues to induce a dog to bark, sit, rollover, play dead, fetch and perform countless other behaviors. Often, dogs respond to cues that an owner/handler may give unintentionally. In law enforcement situations, this is a problem because virtually any behavior by a K-9 can be, and often is, interpreted by its law enforcement handler as an "alert."

Dogs are not motivated in the same way as humans. Dogs have no interest in ridding the world of illegal drugs. Dog trainers, including police K-9 trainers, use treats, toys and praise to reward dogs when they do what they have been conditioned to do. If a police K-9 alerts, it gets a reward. K-9 handler/trainers know this, and the dogs quickly learn that an alert results in a reward in most instances, even if nothing is found. If law enforcement or magistrate judges, who are presumed to be impartial, were to be similarly incentivized, it would constitute violations of the Fourth, Fifth and Fourteenth Amendments.[7]

Although dogs can be trained to react to certain odors with some degree of accuracy, dogs are not infallible; nor are they able to tell us what is causing them to react. So, K-9 responses are subject to interpretations claimed by their police handlers. The problem is clear and, for the most part, the courts have ignored it.

Dog Sniff Terminology

Police dogs, when properly trained, give a particular response when they detect certain odors (i.e., specific illegal drugs, explosives, etc.) that they are trained to detect. During training, they are rewarded when they correctly give that response in the presence of the substance that emits that odor.[8]

Generally, alerts are classified as either "passive" or "aggressive," and result in different physical manifestations.[9] Dogs trained to alert aggressively will attempt to contact the scent source (biting, pawing, scratching, penetrating, or attempting to retrieve).[10] Dogs trained to alert passively (such as bomb-detection dogs, agricultural and bedbug-detection dogs, and some drug-detection dogs) perform trained, silent behavior, usually sitting and intently focusing on the source, or clearly sniffing toward the source while walking around or near it (sometimes referred to as "bracketing").[11]

A "false alert," also known as a "false positive," is an alert by a detection dog in the absence of the substance it is trained to detect.[12] Police K-9 officers, attempting to bolster their dogs' credibility and justify their search, commonly attribute false alerts to "residual odors" or "trace odors" that purportedly linger on an object, even though in almost all instances of false alerts, no proof exists that the controlled substance was ever present where the dog alerted. This poses a major problem with using a K-9 alert to provide probable cause: even if the dog alert is valid, the alert is often to the *odor* of a narcotic that the dog was trained to detect, not necessarily to the presence of actual contraband. Possession of contraband is a crime. The possession of an alleged residual odor of contraband is not a crime and should not be the basis for a search.

In *United States v. Warren*,[13] the officer/handler credited his drug-detection dog with 100 percent accuracy. The evidence showed that when the dog was brought to a scene, it would alert to the suspected container, but usually only after some direction or coaching from its handler, and drugs might — or might not — be found in the container.[14] If no drugs were found, the handler did not record it as a "false positive alert" but instead noted "the dog must have smelled the residual odor of drugs, *which must have been present* at some time in the past."[15] In almost all instances of claimed "residual odor," no evidence exists that the contraband was ever present where the dog alerted.

A recent study presented to the American Chemical Society confirmed that approximately 90 percent of paper money circulating in the United States contains trace amounts or "residual odors" of narcotics, specifically cocaine.[16] Washington, D.C., ranked the highest in terms of contaminated currency, reporting drug residue on 95 percent of the bills tested.[17] Currency is often contaminated with drug residue through touching the bills at the time of a drug deal or when a user uses a bill to inhale powder cocaine. However, currency does not need to be used to consume drugs in order to become contaminated. Bills can become contaminated when intermingled with other bills in cash registers, wallets, vending machines and currency-counting machines at a bank.[18] "[W]hen the machine gets contaminated, it transfers the cocaine to the other bank notes."[19] A March 2012 article in *Harper's Magazine* cites a study that found that the chances are nine in 10 that diaper-changing tables in the United Kingdom carry trace amounts of cocaine.[20]

A "residual odor" can be transferred to almost any tangible object. In a world where drug and non-drug users share door handles, gas pumps, handrails, chairs, elevator buttons, telephones, computers, currency and myriad other objects, it is fair to conclude that residue from cocaine and other prohibited substances is everywhere. Therefore, alerts claimed to be based on the presence of residual odors are meaningless. If such alerts are sufficient to establish probable cause, no one is safe from being subjected to a search.

False alerts routinely occur when K-9 searches fail to reveal narcotics. The Florida Second District Court of Appeal reasoned that "[a]n officer who knows only that his dog is trained and certified, and who has no other information, at most, can only *suspect* that a search based on the dog's alert will yield contraband."[21] And, when police are honest in reporting the actual results of alerts, it is clear that many, if not a majority of alerts, are false alerts. The *Chicago Tribune* recently obtained and analyzed data from 2007-2009 collected by the Illinois Department of Transportation related to police K-9 searches.[22] Of all the police departments that participated in the study, the McHenry County Sheriff's Department had the highest number of alerts. Of the 103 searches where drug-detection dogs were used to obtain probable cause, drugs or paraphernalia were found only 32 percent of the time.[23]

Harris v. State of Florida

Clayton Harris was pulled over in Florida by Liberty County Sheriff's K-9 Officer William Wheetley because his vehicle tag had expired.[24] The officer testified that Harris was "breathing rapidly and could not stand still." The officer noticed an open beer can and reqnested consent to search the vehicle. Harris refused to give consent. Then (as is typical during traffic stops — often pre-textual — where consent to search is declined), Wheetley decided to deploy his drug-detection dog, Aldo, to perform a "free air sniff" of the exterior of Harris' truck. The officer testified that Aldo alerted to a door handle on Harris' vehicle, thus instantly providing him the probable cause necessary to conduct a non-consensual, warrantless search of the truck.

The search of Harris' truck uncov-

ered pseudoephedrine pills (cold medicine), matches, and muriatic acid (used to clean swimming pools). These are common household products; however, they can also be used to produce methamphetamine. The State charged Harris with possession of pseudoephedrine with intent to use it to manufacture methamphetamine. Although the officer testified that Aldo was trained and certified to detect cannabis, cocaine, ecstasy, heroin, and methamphetamine, he *was not* trained to detect pseudoephedrine.[25] Therefore, the alert should have been invalidated *ab initio* because there was no contraband present and Aldo was not trained to alert to the items in the truck. In other words, Aldo's alert was a false alert.

Approximately two months after the initial incident, Officer Wheetley stopped Harris a second time.[26] Again, Aldo alerted to the same driver's side door handle of Harris' truck. And again, no drugs were found. Another false alert.

Courts must not lose sight of the fact that members of law enforcement, by trade, are engaged in the competitive enterprise of ferreting out crime.[27] In *Harris*, Officer Wheetley testified on cross-examination:

Officer Wheetley: [W]hen my dog alerts to a door handle, it usually means, in the cases which I have worked in the past, that somebody has either touched the narcotics or have smoked narcotics, the odor is on their hand when they touched the door handle is when the odor transfer occurs. And that's when my dog will pick up on the residual odor of the narcotics.

Defense Counsel: So you have no idea — do you know how long ago somebody might have touched that vehicle?

Officer Wheetley: Ma'am, you're asking me a question for an expert. I don't feel comfortable answering that.

Defense Counsel: Do you know whether it could have been someone other than the person driving the vehicle?

Officer Wheetley: I can't answer that question, ma'am.

. . .

Officer Wheetley: The residual odor is there. That's what caused my dog to show the response. So if it's there, my dog responded to the odor, so which — apparently the odor was there.

Defense Counsel: But you have no way of establishing in this case that this is not just a false alert by your dog?

. . .

Defense Counsel: The dog, however, did not alert to any of the things he's been trained to alert to as far as your knowledge?

Officer Wheetley: Ma'am, he was trained to alert to the odor of narcotics, which he alerted to the odor of narcotics on the door handle.[28]

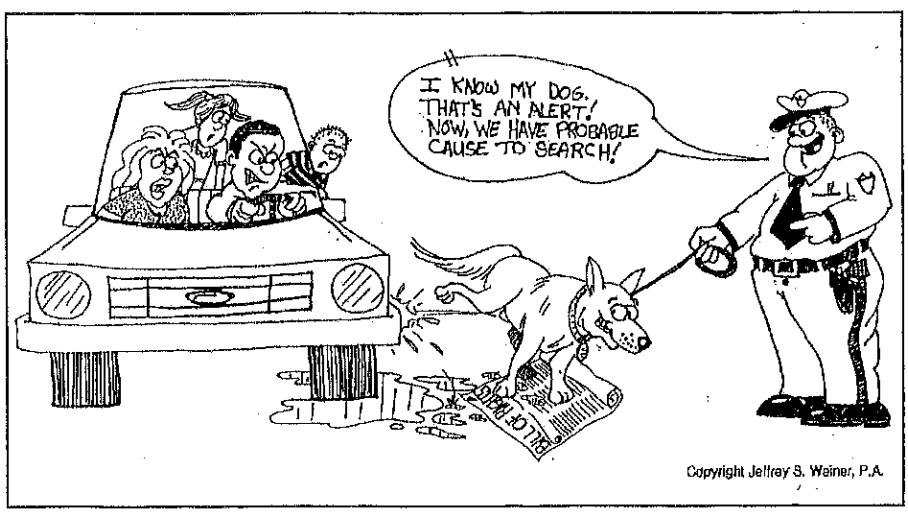
The dog in *Harris* was described by his handler as performing "satisfactory" 100 percent of the time, yet the handler failed to explain why a "satisfactory" performance included alerts where drugs were not found.[29] The officer/handler in *Harris* testified that he only kept records of his dog's positive alerts whenever an arrest was made; alerts where no contraband was found were not recorded. The officer/handler in *Harris* also testified that his dog was rewarded for positive alerts.[30] So, Aldo was rewarded each time after a false alert, thereby teaching Aldo that any alert results in a reward. An analysis of these typical facts raises an unanswerable question: Was the dog alerting to an odor he detected or merely wanted a treat and knew from prior experience that alerting would result in him getting a reward from his handler/admirer? The handler testified that Aldo was perfect in his alerts — which, clearly, was not the case.

The Florida Supreme Court in *Harris* stated: "[G]iven the level of sensitivity that many dogs possess, it is possible that if the person being searched had attended a party where other people were using drugs, the dog might alert because of the residue on clothing or fabric."[31] This could easily be the case when an individual has been in physical contact (such as a hug or a handshake) with someone who has recently handled drugs. Something as simple as parking one's car with a valet service whose attendant has handled drugs could easily subject the innocent owner or driver of the vehicle to a humiliating search because a police dog "alerted" (to a supposed residual odor on the door handle).

Harris is a realistic, thoughtful opinion. It addressed the issue of the evidence that must be introduced by the State in order for the trial court to adequately undertake an objective evaluation of the basis of the officer's belief in the dog's reliability as a predicate for determining probable cause.

> [W]e hold that evidence that the dog has been trained and certified to detect narcotics, standing alone, is not sufficient to estahlish the dog's reliability for purposes of determining probable cause — especially since training and certification in this state are not standardized and thus each training and certification program may differ with no meaningful way to assess them.
>
> *Harris v. State of Florida*[32]

Florida prosecutors must now present the training and certification records, an explanation of the training and certification of the particular dog[33] and *the officer* handling the dog, as well as other objective evidence known to the officer about the dog's reliability in being able to detect the presence of certain illegal substances within a vehicle.[34] The trial judge must consider the totality of circumstances when determining the dog's reliability.[35]



The *Harris* case is a major step forward in that Florida judges can no longer blindly accept a police officer's mere assertion that his/her dog is "trained" and "certified" and therefore reliable to establish probable cause for a search. It is an excellent case for all criminal defense lawyers to use when challenging K-9 alerts under the present state of the law. However, for reasons set forth in this article, a police dog's alert, regardless of its training and certification, should never be the sole basis to establish probable cause.

On March 26, the State of Florida's petition for certiorari in *Harris* was granted by the U.S. Supreme Court to decide whether an alert by a "well-trained narcotics-detection dog" certified to detect illegal contraband is by itself sufficient to establish probable cause. Law enforcement agencies and interest groups such as the National Police Canine Association and *Police K-9 Magazine* filed amicus petitions because of their reluctance to provide details of their methods and to avoid subjecting their training and certification procedures to judicial scrutiny.

While the holding in *Harris* applies to law enforcement dog-sniff cases in general, the Florida Supreme Court's holding in the *Jardines* case is limited to private residences, which historically receive the highest constitutional protection in the nation's jurisprudence.[36]

Jardines v. State of Florida

In November 2006, police received an unverified "crime stoppers" tip that marijuana was being grown at the home of Joelis Jardines.[37] One month later, a detective went to the home of Mr. Jardines and conducted "surveillance" for 15 minutes and reported no observable activity. The detective testified that he became suspicious because the air conditioning had been running without recycling for 15 minutes, which the detective told the judge indicated to him that the home was being used to grow marijuana. That testimony was criticized by Justice Lewis in a specially concurring opinion.

> Prior to entering the private porch of Jardines, the only purported additional suspicious circumstance referenced by the investigating officer was that he observed the air conditioning unit running continuously for fifteen minutes without interruption. If a continuously running air conditioner is indicative of marijuana cultivation, then most Florida citizens and certainly all of my neighbors would be suspected drug dealers subject to intrusive searches by law enforcement. The elevation of such a ridiculous observation in the heat of Florida cannot serve as a basis for intrusion on the heightened expectation of privacy that one enjoys in one's home. Further, there was no evidence of any impending emergency or concern with regard to destruction of evidence.
>
> *Jardines v. State of Florida*[38]

Because of his claimed "reasonable suspicion," the detective called for a drug-detection K-9. The dog was placed on a short leash and led to the front door of the home. While there, the dog alerted. After the alert, the detective approached the door of Jardines's home and testified that he smelled the distinct odor of marijuana. He then prepared an affidavit for a search warrant, which was issued. A subsequent search confirmed that marijuana was being grown in the home.[39]

Jardines focused on two issues: (1) whether a "sniff test" by a drug-detection dog conducted at the front door of *a private residence* is a "search" under the Fourth Amendment and, if so, (2) whether the evidentiary showing of wrongdoing that the prosecution must make *prior* to conducting a residential sniff test requires "probable cause" or "reasonable suspicion."[40] *Jardines* held that a residential sniff test is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment.[41] The Florida Supreme Court also held that probable cause, not mere reasonable suspicion, is the proper evidentiary showing of wrongdoing that the State must make prior to conducting a dog sniff at a private residence.[42]

After analyzing each of the applicable U.S. Supreme Court "dog-sniff" cases, the Florida Supreme Court in *Jardines* stated that none of the three U.S. Supreme Court "K-9 cases" applied to a dog-sniff test conducted at a private residence.[43] The Florida Supreme Court referred to *Kyllo v. United States*,[44] a 5-4 decision with the majority opinion written by Justice Scalia, which discusses the use of sense enhancing technology (thermal imaging device) by law enforcement officials outside of a home. "Where, as

here, the government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[45] The dissent in *Jardines* claims the use of trained dogs is no different than officers seeing or smelling illegal contraband from a legal vantage point, applying what Justice Polston called the "plain smell doctrine."[46] However, the dissent did not mention the fact that drug-detection dogs are sense enhancing animals.[47]

The Florida Supreme Court in *Jardines* discussed the *Kyllo* case for two purposes: to analogize the enhanced ability of dogs to sniff to the thermal imaging device in *Kyllo*, and for the principles of law annunciated in *Kyllo* concerning the heightened expectation of privacy in the home.[48]

Anonymity and privacy are absent when police surround a home and have a K-9 dog perform sniffs. "Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, for such dramatic government activity in the eyes of many — neighbors, passersby, and the public at large — will be viewed as an official accusation of crime."[49] The U.S. Supreme Court in *United States v. Place*[50] emphasized that the K-9 luggage search was conducted in a non-public area of an airport. Public searches of individuals and searches of private residences cause comparable levels of public opprobrium and should not be permitted in light of well-established Fourth Amendment precedent.[51] After all, "[t]he Fourth Amendment knows no search but a full-blown search."[52]

The *Jardines* opinion is well written and reasoned; anyone interested in this subject should read the decision, including the excellent concurring opinion. *Jardines* is particularly helpful to criminal defense practitioners in states that are permitted to expand constitutional protections to their citizens beyond those authorized by the U.S. Supreme Court (unfortunately, Florida is not one of those states). Justice Lewis points out, however, that "it is also true that in the absence of a controlling U.S. Supreme Court decision, Florida courts are not prohibited from providing their citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution."[53]

In their petition for certiorari filed in the U.S. Supreme Court, Florida's Attorney General claimed that Florida courts are now alone in refusing to follow earlier U.S. Supreme Court opinions and that the state's ability to enforce drug laws will be hampered if the *Jardines* decision is allowed to stand. Nineteen Attorneys General signed the *amici curiae* in an eight-page brief, arguing that *Jardines* conflicts with prior U.S. Supreme Court K-9 case precedent as set forth in *Illinois v. Caballes*,[54] *City of Indianapolis v. Edmond*,[55] and *United States v. Place*. The State's petition ignores the detailed, logical analysis by the Florida Supreme Court, which clearly shows that a K-9 sniff at a home has never been dealt with or alluded to in U.S. Supreme Court decision involving K-9 dogs. The State's brief did not discuss training, certification, handler cueing, and other material and relevant factors that should be considered by the court before simply concluding that the dog was a "well trained narcotics-detection dog."

The State's certiorari petition incorrectly states that the Florida Supreme Court in *Jardines* created a "public spectacle" test because the opinion discussed in detail how a K-9 sniff at a residence door (with numerous police officers and agents attendant at the home) would expose the residents to public opprobrium, humiliation and embarrassment. The Florida Supreme Court contrasted the K-9 sniffing at the front door of the Jardines's home with the U.S. Supreme Court cases in which the K-9 sniffs were conducted in a "minimally intrusive manner" upon objects, such as luggage at an airport in *Place*, or vehicles on the roadside in *Edmond* and *Caballes*.

On Jan. 6, 2012, the U.S. Supreme Court granted Florida's petition for certiorari in *Jardines*, agreeing to decide whether a dog sniff at the front door of a suspected grow house *by a trained narcotics-detection dog* is a Fourth Amendment search requiring probable cause. Again, the concept of a "trained narcotics-detection dog" is assumed and not questioned. Among other obvious issues, the U.S. Supreme Court may discuss the concepts of curtilage and physical trespass while deciding the *Jardines* case.[56]

In the past, the Supreme Court has ignored a key issue emphasized by Justice Souter in his dissent in *Caballes*: that is, the incredibly high canine sniff error rates, coupled with the contamination of drug residue, essentially renders a K-9's reaction meaningless.[57] Hopefully, the Supreme Court will not, as they have in the past, summarily accept the words "trained narcotics dog" as proof of reliability of the K-9, before reaching the issue of whether a K-9 sniff test is a search. The threshold question should not be the search issue pertaining to a residence, but rather, whether Fourth Amendment protections should be entrusted to a dog.

The U.S. Supreme Court has ruled that anonymous tips cannot be a stand-alone basis for providing reasonable suspicion, much less probable cause.[58] If a

Clever Hans

Photo is reprinted from the book "Clever Hans (The Horse of Mr. Von Osten): A Contribution to Experimental Animal and Human Psychology," Author: Oskar Pfungst, Translator: Carl L. Rahn. Copyright 1911 by Henry Hold & Co., which is now in the public domain.

The threshold question should be whether Fourth Amendment protections should be entrusted to a dog.

police officer is presented with an anonymous tip, the officer "must observe *additional* suspicious circumstances as a result of ... independent investigation" before acting on that tip.[59] So, under the law, mere suspicion (by a human being) does not rise to the level of "probable cause" and does not justify a warrantless search. Yet, an "alert" by a K-9 dog does, even though the alert is, at best, nothing more than an indication of suspicion by the dog, the handler, or both.

Handler Cueing: The Alert

Most judges readily credit the testimony of a police K-9 officer that the officer's police dog "alerted" to the presence of actual narcotics.[60] Judges trust the testimony because they typically fail to consider — or even recognize — the subjective role, motive, interest and bias of the police K-9 officer/handler in the process.[61] Although the lack of standardized training and meaningful certification programs for detection dogs and their handlers[62] is a critical challenge to the fallacies relied upon in decision after decision, it is important to note that even the most professional and thorough training cannot entirely eliminate the possibility of handler cueing. Due to the social cognitive abilities of domestic dogs, even highly trained dogs respond to subtle cues from their officer/handler.[63]

Handler cueing between animals and humans is not a recent phenomenon. A famous case in the 1890s involved a German math teacher, Wilhelm Von Osten, who purportedly trained his horse, Clever Hans, to solve mathematical problems.[64] When asked, "What is the sum of two plus four?" the horse would tap his hoof six times. Hans was also believed to spell out basic words. One tap equaled "A," two taps "B," and so on. Clever Hans appeared to respond to human language and to grasp mathematical concepts. Thousands of people traveled from all over Europe to watch him perform. More than a dozen scientists and animal experts studied Clever Hans and concluded that no tricks or prompting were involved.

However, in 1904, psychologist Oskar Pfungst discovered that the accuracy of Clever Hans was greatly diminished when the questioner was positioned at a distance from him. Also, if the questioner did not know the answer to the problem, the accuracy of the horse's responses decreased markedly. Through observation, Pfungst realized that the posture, breathing, and facial expressions of each questioner changed involuntarily each time the hoof tapped, showing minute increases in tension. Once the correct number of taps had been reached, the tension disappeared, giving Hans the cue he was looking for to stop tapping.

Dogs, even more than horses, are very skilled at reading signals from their owners/handlers, regardless of whether those signals are given intentionally.

Handler "cueing," in this context, is the subtle, *conscious or unconscious* conduct of the officer/handler during the sniff that influences the reaction of the dog and can easily prompt an "alert" stemming from the handler's cues rather than the presence of illegal contraband.[65] Cueing need not be verbal. It can be conveyed by various methods, many of which are very subtle. Slightly manipulating a leash, moving hands in a certain way, blocking a dog's path, holding the dog at a sniff site longer than normal (even a second or two), making certain sounds or saying words, a change in the handler's breathing pattern or tone of voice, even looking at a dog a certain way, making "facial expressions," or reaching for a particular object (such as an edible treat, ball, tug toy, or other inducement) will typically elicit a response that can easily be labeled an alert.[66]

> [E]ven the best of dogs, with the best-intentioned handler, can respond to subconscious cueing from the handler. If the handler believes that contraband is present, they may unwittingly cue the dog to alert.
>
> *Harris v. State of Florida*[67]

This is especially true when the officer has a "hunch" that contraband is present and wants to conduct a search without a warrant or consent.

The idea that sensory information is subconsciously transmitted from the officer/handler to the dog may seem questionable to someone with limited knowledge of dogs. However, experienced dog owners and trainers agree that there is non-verbal communication that occurs between hnmans and dogs in everyday life. In his short story *Master and Dog*, Thomas Mann gives a wonderful description of non-verbal, sensory communication between man and animal:

> Whatever the master planned to do — as long as it had the slightest bearing on the interests of the dog — the dog knew it right away. When, for example, the master wanted to sneak out of the house because he didn't want the dog along on his walk, he left the room as nonchalantly as possible, acting as if he were just going to get something from another room. But it was to no avail: the dog jumped up with excitement. There was something that revealed his master's plan to the dog.[68]

In *State of Oregon v. Foster*,[69] the Oregon Supreme Court addressed the issue of subconscious cueing, citing changes in the handler's heart rate or breathing patterns as a common example. The main issue in *Foster* was whether, and under what circumstances, an alert by a drug-detection dog provides probable cause to search.[70] Similar to *Harris*, *Foster* held that an alert by a properly trained and reliable drug-detection dog can be a basis for probable cause to search. However, Oregon trial conrts must now perform an individualized inquiry in each case, based on the totality of the circumstances known to police, which typically will include considerations such as training, certification, and performance of the dogs and their handlers.[71]

Officer/handlers may intentionally cue their dogs in order to justify a warrantless search or to obtain a search warrant. Video recordings are rarely introduced into evidence at motions to suppress in cases involving purported K-9 alerts and, as a result, it often comes down to the officer's word against the defendant's. To hinder the soon-to-be defendant's ability to become a witness, he will often be intentionally placed

Man and His Dog

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where his view of the dog sniff is obstructed (such as sitting in the back of a police car or behind an officer who is standing between the arrestee and the police K-9, blocking the video camera if there is one).

Barry Cooper is a former Texas police officer who worked with police drug-detection dogs for over eight years.[72] He has launched a nationwide crusade in which he criticizes the use of canines in law enforcement. Cooper states: "[T]hey're using dogs as an excuse to search cars when people refuse consent. The reason it's like this is because the dogs aren't always really alerting; it's actually the cops using those dogs to trample our rights as citizens."[73]

Anyone who doubts that the use of drug-detection dogs in law enforcement is open to manipulation and abuse by officer/handlers should watch videos of false K-9 alerts presented by Cooper and others on YouTube.[74] Also, particularly noteworthy is a comedy routine featuring comedian Ron White entitled *Behavioral Problems*.[75] After conducting a sniff test of White's luggage, an officer told White that the police K-9 alerted to drugs on the plane. White replied to the officer, "No he didn't. That dog didn't do anything. I was staring straight at him, he didn't wink, blink, move a paw. ... What's the signal? A blank stare?"[76]

Oregon v. Helzer,[77] a recent Oregon Supreme Court case requiring a valid basis for concluding that the police K-9 alert was legitimate, focused on the officer/handler's training and the use of conscious and subconscious cueing by the handler. In holding that the state failed to establish that the dog's alert was sufficiently reliable to establish probable cause, the court focused on the lack of evidence of "training the officer received to avoid handler cues or other errors that can cause a dog to alert falsely."[78]

Although the Oregon Supreme Court wisely recognized the deficiencies associated with using drug-detection canines to establish probable cause, this heightened standard of proof of the reliability of the K-9 alert is simply not enough to protect the public. A K-9 officer's subjective assertion that a dog has "alerted" to the presence of a prohibited substance or contraband should not suffice as a basis to invalidate the protections guaranteed under the Fourth Amendment. An actual K-9 alert might be triggered by a residual odor. It might also be in reaction to another odor of interest to the dog (food, the scent of a female dog in heat, etc.). Or, it may have nothing to do with odor at all, but with a learned behavior by the dog to perform a certain act (such as sitting, pawing, barking, "bracketing", etc.) in order to receive a reward. In *Harris*, the Florida Supreme Court noted that "[h]andlers interpret their dogs' signals, and the handler alone makes the final decision whether a dog has detected narcotics."[79] This presents an obvious problem, since the officer/handler is hardly objective. As long as K-9 officers are permitted to determine what constitutes an "alert" and are thus able to establish probable cause on their own, the public is at risk of being subjected to humiliating searches at the whim of a police officer.

Unfortunately, most courts are all too apt to automatically credit testimony from officer/handlers of the "I know an alert when I see it" variety.[80]

Dr. Daniel Craig, a noted expert in canine training and performance, stated that detector dog handlers have been known to say things such as "I can read my dog," "I can read my dog's behavioral change and I know the odor is in there," "I know my dog; that's an alert," "I am the only one who can read my dog," "I know what my dog is thinking," and other self-serving, non-verifiable claims that stretch credibility. "Guesses based on the handler's knowledge of their dog's training and past performance are nothing more than educated guesses when their dog fails to make the defined final response during a specific search."[81]

A dog alert should never suffice to establish probable cause. Allowing a dog alert to constitute probable cause essentially reduces the Fourth Amendment to meaningless rhetoric. Although there are many cases in which police dogs have detected the presence of illegal contraband and have properly alerted to contraband that was seized, there are an unknowable number of instances in which individuals have been subjected to invasive and humiliating searches — often involving the destruction of personal property — where no contraband or drugs were present.

The uncertainty of whether a K-9 alert is based on a residual odor, any odor, or the presence of a prohibited substance (assuming a proper "alert" took place), and the potential for handler cueing, are fatal flaws in a system that allows police officers to determine what constitutes a K-9 alert, and then use those subjective interpretations as justification for warrantless searches.

It is preferable to rely upon the criteria of human judges, however imperfect, rather than dogs, when it comes to establishing probable cause. Simply put, the Fourth Amendment is much too important to be left to the dogs! Searches based on K-9 "alerts" are subjective and unreliable, and are often used as a means of circumventing the sanctity of the Fourth Amendment. Warrantless, non-consensual searches require real, solid probable cause and nothing less.

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Truths

- Drug residue is everywhere.
- Police K-9 dogs often "alert" simply to get a reward regardless of whether a substance the dog has been trained to detect is present.
- K-9 alerts can be based on a residual odor and not the presence of a prohibited substance.
- K-9 alerts are unreliable.
- K-9 alerts are often not alerts.
- Police K-9 handlers may wittingly or unwittingly cause their dogs to alert.
- Fourth Amendment protections should not be forfeited or surrendered based on a supposed K-9 alert or an officer's interpretation that the dog alerted.
- Courts should never conclude that a K-9 alert equals probable cause.

Notes

1. Citing United States v. Sanchez, 417 F.3d 971, 976 (8th Cir. 2005); United States v. Williams, 403 F.3d 1203, 1207 (10th Cir. 2005); United States v. Robinson, 390 F.3d 853, 874 (6th Cir. 2004); United States v. Williams, 365 F.3d 399, 406 (5th Cir. 2004); United States v. Banks, 3 F.3d 399, 402 (11th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994). *But see* United States v. Trayer, 898 F.2d 805, 808 (D.C.Cir. 1990) (dog alert at door of train roomette did not by itself establish probable cause), *cert. denied*, 498 U.S. 839 (1990).

2. *United States v. Place*, 462 U.S. 696

(1983).

3. *See id.*

4. Jeffrey S. Weiner, *Canines and the Constitution*, 23, no.3 FLORIDA DEFENDER 42, at 46 (Winter 2011) (discussing the lack of standardized training and certification programs for drug detection K-9 dogs).

5. *Jardines v. State of Florida*, 73 So. 3d 34 (Fla. 2011); *Harris v. State of Florida*, 71 So. 3d 756 (Fla. 2011).

6. *State of Oregon v. Foster*, 252 P.3d 292 (Or. 2011); *State of Oregon v. Helzer*, 252 P.3d 288 (Or. 2011).

7. Connaly v. Georgia, 429 U.S. 245 (1977) (a magistrate who was being paid five dollars for each search warrant issued was not being fair and impartial).

8. *See* Jeffrey S. Weiner & Kimberly Homan, *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs*, THE CHAMPION, April 2006 at 13 (citing Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 410-15 (1997)).

9. *Id.*

10. *Id.*

11. *Id.*

12. Harris v. State of Florida, 71 So. 3d 756, 768 (Fla. 2011) (citing Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 12)).

13. *United States v. Warren*, 997 F. Supp. 1188 (E.D. Wis. 1998).

14. United States v. Warren, 997 F. Supp. 1188, 1192 (E.D.Wis. 1998).

15. *Id.* (emphasis added).

16. Madison Park, *90 Percent of U.S. Bills Carry Traces of Cocaine*, CNN, Aug. 14, 2009, *available at* http://articles.cnn.com/2009-08-14/health/cocaine.traces.money_1_cocaine-dollar-bills-paper-bills?_s=PM:HEALTH; *see also* David Biello, *Cocaine Contaminates Majority of U.S. Currency*, SCIENTIFIC AMERICAN, Aug. 16, 2009, *available at* http://www.scientificamerican.com/article.cfm?id=cocaine-contaminates-majority-of-american-currency.

17. *See id.*

18. Tiffany O'Callaghan, *Nearly 90% of U.S. Money Has Traces of Cocaine*, TIME HEALTHLAND, Aug. 16, 2009, *available at* http://healthland.time.com/2009/08/16/nearly-90-of-u-s-money-has-traces-of-cocaine/.

19. *See* Park, *supra* note 16, at 1 (quoting researcher Yuegang Zuo, professor of chemistry and biochemistry at the University of Massachusetts/Dartmouth).

20. HARPER'S INDEX, March 2012, (Magazine) (According to a 2011 Guardian Media study, there is 90 percent chance that a diaper changing table in the U.K. carries trace amounts of cocaine.).

21. Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003) (emphasis added). *Matheson* expressly and directly conflicted with the decision of the First District Court of Appeal in Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008) and was ultimately relied upon by the court in Harris v. State, 71 So. 3d 756 (Fla. 2011).

22. Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB., Jan. 06, 2011, *available at* http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog.

23. *Id.*

24. *Harris*, 71 So. 3d at 759-60.

25. *Id.* (emphasis added).

26. *Id.* at 761.

27. *See* Aguilar v. Texas, 378 U.S. 108 (1964).

28. *Harris*, at 761-62.

29. *Id.* at 760.

30. *Id.*

31. *Id.* at 769 (quoting Myers, *supra* note 12, at 4-5).

32. *Harris*, at 759 and 764.

33. *See generally id.* (An explanation of the training and certification of the particular dog should include details of the training program, criteria for choosing which dogs are selected to be K-9 dogs, length of the training program, what specific drugs were used in training, how the training drugs were packaged, where and how drugs were hidden during training, whether the trainer was aware of the drug's location while testing the dog, details of handler training to avoid false alerts, whether the handlers and their dogs were trained to avoid handler cues or whether the training simulated the variety of environments and distractions typically present in the streets, in addition to field performance records when attempting to establish the reliability of the police dog.).

34. *Id.* (emphasis added).

35. *Id.*

36. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

37. Jardines v. State of Florida, 73 So. 3d 34, 37 (Fla. 2011).

38. *Id.* at 57 (Lewis, J., specially concurring).

39. *Id.* at 37.

40. *Id.* (emphasis added).

41. *Id.* at 36.

42. *Id.* at 37.

43. *See id.* at 40-43 (citing United States v. Place, 462 U.S. 696 (1983) (whether police, based on reasonable suspicion, could temporarily seize a piece of luggage at an airport and then subject the luggage to a "sniff-test" by a drug detection dog); City of Indianapolis v. Edmond, 531 U.S. 32 (2000), (whether police could stop a vehicle at a drug interdiction checkpoint and subject the exterior of the vehicle to a "sniff-test" by a drug detection dog); Illinois v. Caballes, 543 U.S. 405 (2005) (whether police, during the course of a lawful traffic stop, could subject the exterior of a vehicle to a "sniff-test" by a drug detection dog).

44. *Kyllo v. United States*, 533 U.S. 27 (2001).

45. *Jardines*, at 44-45 (citing *Kyllo v. United States*, 533 U.S. 27, at 34-40 (2001)).

46. *Id.* at 64 (Polston, J., dissenting).

47. *See id.*

48. *See* Respondent's Amended Brief in Opposition at 12, Jardines v. State of Florida, 73 So. 3d 34 (Fla. 2011).

49. *Jardines*, at 48-49.

50. *United States v. Place*, 462 U.S. 696 (1983).

51. *See, e.g.*, U.S. CONST. amend. IV.

52. Arizona v. Hicks, 480 U.S. 321 (1987).

53. *Jardines*, 73 So. 3d at 59 (Lewis, J., specially concurring) (citing Soca v. State of Florida, 673 So. 2d 24, 26-27 (Fla. 1996)).

54. *Illinois v. Caballes*, 543 U.S. 405 (2005).

55. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

56. *See generally* Max Stul Oppenheimer, *Cybertrash*, 90 OR. L. REV. 1 (2011) (citing United States v. Karo, 468 U.S. 705 (1984)). *But see* United States v. Knotts, 460 U.S. 276, (1983); United States v. Jones, No. 10-1259, slip op. (U.S. Jan. 23, 2012).

57. *Caballes*, 543 U.S. at 411-413 (Souter, J., dissenting).

58. Florida v. J.L., 529 U.S. 266 (2000).

59. *Jardines*, at 56-57 (Lewis, J., specially concurring) (citing Florida v. J.L., 529 U.S. 266 (2000)) (citing Alabama v. White, 496 U.S. 325, 329 (1990)) (emphasis in original).

60. *See* Weiner & Homan, *supra* note 8, at 13. (citing United States v. Sanchez, 417 F.3d 971, 976 (8th Cir. 2005); United States v. Williams, 403 F.3d 1203, 1207 (10th Cir. 2005); United States v. Robinson, 390 F.3d 853, 874 (6th Cir. 2004); United States v. Williams, 365 F.3d 399, 406 (5th Cir. 2004); United States v. Banks, F.3d 399, 402 (11th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994). *But see* United States v. Trayer, 898 F.2d 805, 808 (D.C. Cir. 1990) (dog alert at door of train roomette did not by itself establish probable cause), *cert. denied*, 498 U.S. 839 (1990)).

61. *See id.*

62. *Harris*, 71 So. 3d at 767 ("We first note that there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs.").

63. Lisa Lit, Julia B. Sceweitzer & Anita M. Oberbauer, *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION 3 (2011) at 387-394 *available at* http://www.springerlink.com/content/?k=HANDLER+BELIEFS+AFFECT+SCENT; *see also* Steven D. Nicely, *The Clever Hans Effect on the Judicial*

System, (June 26, 2010) *available at* www.k9consultantsofamerica.com.

64. *Id.*

65. *See* Weiner & Homan, *supra* note 8, at 14.

66. *See id.* at 14 (citing United States v. Heir, 107 F. Supp. 2d 1088, 1091 (D. Neb. 2000); United States v. Stephenson, 274 F. Supp. 2d 819, 824 n.1 (S.D.Tex. 2002) (noting that dogs may be entirely without bias, but their handlers may not be)).

67. *Harris*, at 769 (citing Myers, *supra* note 12, at 5).

68. Bernt Spiegel, THE UPPER HALF OF THE MOTORCYCLE — ON THE UNITY OF RIDER AND MACHINE, 105 (Meredith Hassal trans., Whitehorse Press 2010) (1998) (the author would like to thank Whitehorse Press for permission to republish this excerpt as well as the photograph of a man with his dog).

69. *State of Oregon v. Foster*, 252 P.3d 292 (Or. 2011).

70. *Id.*

71. *Id.*

72. *See* http://nevergetbusted.com/2010/about.

73. Daniel Tencer, *'False Positives' Suggest Police Exploit Canines to Justify Searches*, RAW STORY, Jan. 6, 2011, *available at* http://www.rawstory.com/rs/2011/01/06/false-positives-police-canines-searches/.

74. *See* False K-9 Alert — Liberty Hill Police — Williamson County, Texas *available at* http://www.youtube.com/watch?v=Hkw8KgZ_LhU (uploaded Jan. 30, 2009). Racist Police Dogs?! *available at* http://www.youtube.com/watch?v=uM62JdJZ_Rk (uploaded Jan. 7, 2011). *But see* Barry Cooper — A Drug Dog's True Alert, *available at* http://www.youtube.com/watch?v=VsNnd1cUe5o&feature=related (uploaded Aug. 4, 2007).

75. RON WHITE, *Got in a Little Trouble, on* BEHAVIORAL PROBLEMS (Comedy Central 2009).

76. *Id.*

77. *Oregon v. Helzer*, 252 P.3d 288 (Or. 2011).

78. *State of Oregon v. Helzer*, 252 P.3d 288 (Or. 2011).

79. *Harris*, at 768-69 (quoting Bird, *supra* note 8 at 425).

80. *See* Weiner & Homan, *supra* note 8, at 14 (citing United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir. 1993), where handler testified that he knew how his dog alerted and that the dog had done so on the challenged occasion. In United States v. Diaz, 25 F.3d 392, 394-95, the dog's handler testified that the dog alerted by barking, biting, and scratching, but occasionally would alert by coming to a standstill in order to scent more intently. This latter behavior is likely not a true alert. Similarly, in United States v. Trayer, 898 F.2d 805, 808 (D.C.Cir.), *cert. denied*, 498 U.S. 839 (1990), the handler testified that the dog had been trained as an aggressive alerter, but that, on this occasion, it froze and pointed to the defendant's train compartment "like a bird dog," which was the way it alerted on the majority of occasions. In United States v. Bartz, 2004 WL 1465780 at *5 (S.D. Ind. June 25, 2004), the handler testified that, under controlled circumstances, the dog would alert by sitting and staring, but that it had "intermediate behaviors" on the "path to final response;" *i.e.*, the dog would stretch up on his hind legs and stare if the drug were concealed in a high place or lie down if the drugs were concealed in a low place, and that the handler's training included learning to recognize the changes in the dog's behavior that signaled the presence of drugs. The court concluded that the dog had alerted by stretching up on his hind legs and "locking up" at the minivan's rear bumper. This was, however not a trained final alert; it was an "intermediate behavior." The court also found that the dog had alerted two other times, during neither of which the dog gave his trained final response. *See also* United States v. Gregory, 302 F.3d 805,811 (8th Cir. 2002) (defendant's passenger testified that the dog did not alert; on appeal, court concluded that district court had not clearly erred in crediting handler's testimony that the dog had alerted), *cert. denied*, 538 U.S. 992 (2003)).

81. *See id.* at 13-14 (citing J.G. Aristotelidis, *Trained Canines at the U.S.-Mexico Border Region: A Review of Current Fifth Circuit Law and a Call for Change*, 5 SCHOLAR 227, 230-31 (2003)).

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