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ARTICLE

TRAINED CANINES AT THE U.S.-MEXICO BORDER REGION: A REVIEW OF CURRENT FIFTH CIRCUIT LAW AND A CALL FOR CHANGE

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I. INTRODUCTION

The legitimacy of the drug-detecting canine (canine) was universally established by the Supreme Court in *United States v. Place*.[1] Although the decision in *Place* was reached on a different issue, the court approved law enforcement's use of the canine sniff.[2] The court reasoned that the sniffing of luggage by a canine did not constitute a search within the meaning of the Fourth Amendment.[3] *Place*, however, did not discuss the training of the canines or the mechanics of the canine's behavior which led the trainer to determine that contraband had been detected.

Since *Place*, the Supreme Court has not revisited the subject, leaving the lower courts to establish guidelines concerning the training and reliability of canines. Since then, a fair amount of case law has developed.

Today, the drug-detecting canine is the government's most powerful weapon in the escalating war against drugs along the Texas-Mexico border region (border region). No number of agents can equal a properly trained dog's effectiveness at detecting hidden contraband.[4] This effectiveness is probably why the courts along the border region, and the United States Court of Appeals for the Fifth Circuit, have lagged behind other courts in establishing guidelines that ensure both the adequate training and reliability of canines. It is important to note that while a dog alert may constitute, along with other observations and other evidence, one of perhaps several factors that are considered when establishing the justification of a search, the searches discussed in this article are supported only by a canine alert, as occurs in the border region in the overwhelming majority of cases.

The following is a brief overview of the origins of trained-canine law and its evolution into what is considered the majority training and reliability view. This view will be compared to current Fifth Circuit precedent, which the author considers deficient and in need of change. The author will then discuss the recently unearthed *Horton v. Goose Creek Indepen-*

1. 462 U.S. 696 (1983).
2. *See* United States v. Place, 462 U.S. 696, 698 (1983).
3. *Id.* at 707.
4. *See* Sandra Guerra, *Criminal Law: Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109, 1151-55 (1992).

dent School District[5] and its importance in eliminating the practice of using canines to perform the suspicionless, up-close sniffing of people at the border.

II. BASIC CONCEPTS

A. *The Alert*

An "alert" is a dog's "defined final response" to a given scent.[6] Normally, canines are either categorized as passive-alerters, noted by their sitting or laying down at the moment of detection, or as aggressive-alerters, marked by their scratching or biting at the source emitting the odor.[7] The mechanics of an alert was the controlling issue in *United States v. Rivas*.[8] After crossing into the United States from Mexico, a dog was used to detect the presence of contraband in a tractor-trailer at an international bridge.[9] At a suppression hearing, the government's evidence showed that the dog did not exhibit a strong, aggressive alert.[10] Rather, the evidence showed the dog temporarily stopped at the alleged moment of detection before continuing with his examination.[11] The bor-

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5. 690 F.2d 470 (5th Cir. 1982).

6. *See* Interview with Dan Craig, Doctor of Veterinary Medicine, in Laredo, Tex. (2001) [hereinafter Interview]. This definition is taken from that used by Dan Craig, Doctor of Veterinary Medicine. *See id.* Dr. Craig has testified numerous times as an expert on the training and reliability of canines. *See, e.g.,* United States v. Owens, 167 F.3d 739 (1st Cir. 1999); United States v. Outlaw, 134 F. Supp. 2d 807 (W.D. Tex. 2001); United States v. Kennedy, 955 F. Supp. 1331 (D.N.M. 1996), *rev'd*, 131 F.3d 1371 (10th Cir. 1997); United States v. Richard De Berry Miller, L-99-1004 (S.D. Tex. Feb. 10, 2000) (Motion to Suppress before Chief Judge George P. Kazen). A drug-sniffing canine can be trained to bark, paw, or sit upon detection of narcotics. *See* Andy G. Rickman, *Currency Contamination and Drug-Sniffing Canines: Should Any Evidentiary Value Be Attached to a Dog's Alert on Cash?*, 85 KY. L.J. 199, 209 (1997). Such behavior constitutes an "alert" used to support a claim of reasonable suspicion or evidentiary factor to validate searches. *Id.* at 209-10. Learning how his dog responds upon detection of narcotics, the handler requires longer and more extensive training in comparison to the dog. *See* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 413 (1996-97). Both the dog and its handler must pass periodic recertification exercises upon completion of their training. *Id.* The training of a narcotic dog directly impacts the reliability of the canine sniff. *Id.* at 421. Reliability is most commonly indicated by a dog's accuracy rate in detecting narcotics, which is usually recorded by the handlers and thus presentable in court. *Id.* at 425.

7. *See* Kenneth L. Pollack, *Stretching the Terry Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions, and the Reasonable Suspicion Standard*, 47 VAND. L. REV. 803, 805 n.11 (1994); Rickman, *supra* note 6, at 209-10.

8. 157 F.3d 364 (5th Cir. 1998).

9. *See* United States v. Rivas, 157 F.3d 364 (5th Cir. 1998).

10. *See id.* at 368.

11. *See id.*

der search doctrine[12] enables government agents to perform routine searches—those searches "that do not 'seriously invade a traveler's privacy'"[13]—at international borders or their functional equivalent without a warrant, probable cause, or any other justification for the search.[14] Thus, in order to pass constitutional muster, a non-routine stop and search like in *Rivas*, requires reasonable suspicion of wrongdoing.[15] In *Rivas*, the Fifth Circuit determined that drilling into a conveyance, in this case the trailer wall, amounted to a non-routine search, necessitating a predicate finding of reasonable suspicion.[16] The court held that the dog's alert lacked the defined response characteristics of an acceptable alert and thus did not support probable cause.[17] Further, the court held that the alert could not even support a finding of reasonable suspicion, thereby invalidating the search.[18]

Whether a canine has alerted at all is itself a question that has remained largely unexamined by our jurisprudence; other than *Rivas*, no other Fifth Circuit opinion has addressed the subject. What is clear is that at least as it concerns the border region, a canine handler's representations about how a canine alerts are as varied as the number of canines themselves. Consequently because virtually all handlers will represent that their canine alerted in connection with a contraband find, their conclusions continue to enjoy total deference by trial courts. Dr. Dan J. Craig, a noted expert in the field of canine instruction and performance shares the following:

> Detector dog handlers have been known to say things like 'I can read my dog,' 'My dog knows its there,' 'My dog's behavior tells me its in there: [sic]', 'I can read my dog's behavioral change and I know the odor is there,' 'I am the only one who can read my dog,' 'I know what my dog is thinking,' 'I know when he is in the scent cone [sic],' et cetera. Are they just repeating what they were taught? If not, where do they get this notion? In initial training and subsequent training the only time they reward (reinforce) their dog is when the dog makes the definitive defined final response. Then and only then

12. *See generally* Gregory T. Arnold, *Issues in the Third Circuit: Criminal Law – Bordering on Unreasonablesness?: The Third Circuit Again Expands the Border Search Exception in* United States v. Hyde, 40 VILL. L. REV. 835, 842-52 (1995) (discussing the history of the border search exception).

13. *Rivas*, 156 F.3d 364.

14. *See id.* at 367 (citing United States v. Cardenas, 9 F.3d 1139, 1147-48 (5th Cir. 1993)).

15. *See id.*

16. *See* United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998).

17. *See id.* at 368.

18. *See id.*

> can the trainer verify that the dog has detected and responded to a specific target odor. The dog is rewarded for that response and no other.
>
> The first thing one must do . . . is to decide what specifc response the dog must make in order to determine if it is responding correctly to a selected target odor. . . . The handler or trainer must be able to articulate that specific response to anyone not in the dog training profession. That specific response is the only response you reward with the selected primary reinforcement. . . .
>
> If the dog does not make the defined final response sometime during a search, the target odor is either not present or the dog or handler made an error. Dogs do respond when no target odor is present. They also fail to respond when a target odor is present. The handler may assume any response other than the defined final response verifies the presence of a target odor. A [sic] this point the handler is guilty of interpretation, supposition, or speculation. The dog has the olfactory sensing system (nose) and the final decision as to the presence or absence of a target odor is up to the dog and not the handler. A well- trained detector dog will only respond only to the target odor(s) it has been properly trained to detect. That dog will emit the defined final response it was trained to make to a target odor at a predetermined rate of accuracy.
>
> Educated guesses based upon 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. . . . When a dog makes the defined final response and no target odors are found on physical search one must rely on forensic chemical analysis to justify the accuracy of the dog.[19]

In light of the holding in *Rivas*, Dr. Craig's commentary underscores the need to cross-examine a handler regarding the specific manner in which the canine is trained to alert. Because the existence of an alert is an essential issue in a suppression hearing, a lawyer should never stipulate that a canine has alerted.

B. *Location*

In *United States v. Seals*,[20] the Fifth Circuit adopted the principle that a search cannot extend beyond the area to which the canine specifically

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19. Memorandum from Dr. Dan J. Craig, BS, DVM, MS, to Jorge G. Aristotelidis (Mar. 3, 2002) (on file with author).

20. 987 F.2d 1102 (5th Cir. 1993).

alerted.[21] In *Seals*, a canine alerted to an area between the front seats of a car, which resulted in the discovery of a glass pipe with cocaine residue.[22] The officer conducting the search then noticed that the rear seat area had been modified to allow access to the trunk.[23] The court reasoned that the discovery of the pipe, combined with the defendant's nervousness, his false answers, and the modification of the rear seat provided the officers with probable cause to believe that additional drugs were contained within the vehicle.[24] Since the officers did not know exactly where in the car the drugs were located, the court found that the officers had probable cause to search the entire vehicle.[25]

In reaching its decision in *Seals*, the Fifth Circuit relied on *United States v. Ross*,[26] a Supreme Court case distinguishing between probable cause to believe that drugs are in a particular section of the car and probable cause to believe that drugs are generally within the car.[27] The Court in *Ross* explained that having probable cause to believe that a container placed inside a taxi's trunk contained some evidence or contraband, does not justify searching the entire car.[28] The Supreme Court concluded that officers are limited to searching the area of a car in which they have probable cause to believe contraband is present.[29] Yet, the Court stated that when probable cause to search a vehicle exists, such probable cause can also justify searching all of the parts and contents in which the object of the search may be hidden.[30] Thus, the *Seals* court held that when officers have probable cause to believe contraband is located generally in a car, but are not sure of its particular location within the car, they may search the entire vehicle.[31] The *Seals* court noted that, upon its review of the record, it found no explanation with regard to whether the dog alerted to a particular section or the entire area of the car;[32] therefore, the court determined that the dog alerted only to the passenger compartment.[33] The court concluded, however, that once the officer discovered the glass

21. *See* United States v. Seals, 987 F.2d 1102, 1107 n.8 (5th Cir. 1993).
22. *See id.* at 1107.
23. *See id.*
24. *See id.*
25. *See id.*
26. 456 U.S. 798 (1982).
27. *See* United States v. Ross, 456 U.S. 798 (1982).
28. *See id.* at 824.
29. *See id.*
30. *See id.* at 825.
31. *See* United States v. Seals, 987 F.2d 1102, 1107 (5th Cir. 1993).
32. *See id.*
33. *See id.*

pipe containing cocaine residue, the officer had probable cause to search the entire car.[34]

Seals appears to be firm authority for challenging the discovery of contraband in a part of a vehicle separate from the area to which the dog specifically alerts. As in *Rivas*, the holding in *Seals* emphasizes the need to examine the specific conduct of a canine during an evidentiary hearing.

III. CANINE LAW

A. *The Majority View*

In *United States v. Diaz*,[35] the Sixth Circuit required an analysis of a dog's training and reliability before allowing a positive reaction by the dog to be an indication of probable cause.[36] While not among the first opinions to espouse the concept that a canine must be both trained and proven to be reliable, *Diaz* represents the most thorough analysis of what constitutes a dog's reliability, and therefore merits an in-depth discussion.

Diaz sought to suppress marijuana found in his car pursuant to an alert by "Dingo," a dog trained to detect contraband, contending that the dog's training and reliability had not been established.[37] The court recognized that other jurisdictions have yet to conclusively address the criteria, such as quantity or quality of evidence needed, for establishing a drug detection dog's training and reliability.[38] It added that, evidence presented to establish that a dog is certified to detect drugs generally opens the door to the introduction of evidence that may detract from the dog's reliability but may go to the dog's credibility. For example, testimony by the dog's trainer and records of the dog's training can establish that the dog is certified to detect contraband;[39] however, lack of such evidence, such as documentation of the exact course of training, may negatively affect the dog's reliability.[40] Expert testimony attacking the reliability of the dog's performance or the lack of additional evidence to support the dog's credibility and reliability may also negatively affect a dog's credibility and reliability.[41]

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34. *See id.* Probable cause was also based on the defendant's nervousness, false answers, and a modified rear seat. *See id.*

35. 25 F.3d 392 (6th Cir. 1994).

36. *See* United States v. Diaz, 25 F.3d 392, 394 (6th Cir. 1994).

37. *See id.* at 393.

38. *See id.* at 394.

39. *See id.*

40. *See id.*

41. *See id.*

At the evidentiary hearing on Diaz's motion to suppress, evidence establishing Dingo's training and reliability was introduced.[42] Through an expert witness, Diaz attempted to discredit the reliability of the dog by highlighting the fact, conceded by the dog handler, that the dog had on several occasions failed to alert to the presence of drugs, which is known as a false positive alert.[43] The dog's handler described one such instance at an airport search. Dennard explained that although drugs were not present, the owner of the suitcase Dingo identified, admitted to smoking marijuana the whole weekend and that the scent could have still been on her clothing in the suitcase.[44] The appellate court, finding that the single incident of a false positive alert was not so significant that it should detract from Dingo's reliability, upheld the district court's determination that Dingo was sufficiently reliable.[45] It further concluded that a very small percentage of error or false positives does not necessarily prove that a drug detecting canine is unreliable or diminishes the fact that the dog is properly trained and certified.[46]

In reaching its conclusion, the *Diaz* court referred to *United States v. Alvarado*[47] and *United States v. Spetz*.[48] These cases serve as empirical examples of what percentages are acceptable in looking at whether a drug detection dog is properly trained and certified.[49] With regard to the ab-

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42. Deputy Sheriff Kris Dennard, Dingo's trainer and handler, testified during the evidentiary hearing on Diaz's motion to suppress. She testified that both she and the dog had completed an eight-week training course. *Id.* at 394. Dingo underwent "live" search tests in which drugs were present and "dead" search tests in which drugs were not present. *Id.* In order to become certified, Dingo had to successfully indicate fourteen live targets, which he did. *Id.* Indications were noted by barking, biting, scratching, and at times by coming to a standstill in the presence of an intense scent. *Id.* at 394-95. Dennard testified that since their initial certification, she and Dingo had passed recertification tests every year. *Id.* By Diaz's evidentiary hearing, the team had searched for the presence of contraband approximately 1500 times. *Id.* Only once had Dingo indicated that illegal substances were present, and none were found although evidence of the presence of drugs existed. *Id.* Regarding Mr. Diaz, Dennard testified that she led Dingo around a test car before scenting Diaz's vehicle so there would not be any inappropriate suggestions. *Id.* Dingo went on to alert to Diaz's vehicle after not having alerted to the test car. Dennard's testimony was found to be credible by the district court. *Id.*

43. *See id.* at 395.

44. *See id.*

45. *See id.* at 395-96.

46. *See id.* at 396.

47. No. 90-6058, 1991 WL 119265 (6th Cir. July 1, 1991) (not designated for publication).

48. 721 F.2d 1457 (9th Cir. 1983).

49. *See* United States v. Alvarado, No. 90-6058, 1991 WL 119265, at *2 (6th Cir. July 1, 1991) (noting a 95% accuracy in detecting narcotics); United States v. Spetz, 721 F.2d 1457, 1464 (9th Cir. 1983) (identifying accuracy rates of fifty-six out of sixty-one and two out of six acceptable).

sence of training and performance records, the court found that testimony could more than adequately establish a dog's reliability concerning a valid dog sniff.[50] It added that training and performance documentation coupled with testimony of his trainer could adequately establish the dog's reliability.[51] The court recognized that the reliability of canine sniffs should be established by neutral criteria, rather than random, non-standardized procedures that invite unconscious cuing and undercut the reliability of the sniff.[52] The fact that Dennard was familiar with the suspected vehicle created the possibility for unconscious cuing; however, the *Diaz* court agreed that the possibility was reduced by the use of identical procedures on the test vehicle and Diaz's vehicle.[53]

Like *Diaz*, most of the other circuits have through their own formulations, embraced the concept that in addition to training, a satisfactory showing of reliability is necessary to uphold a search based on a canine alert.[54] The D.C. Circuit is one of the few circuits that has not explicitly stated a requirement that a canine be reliable.[55]

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50. *See* United States v. Diaz, 25 F.3d 392, 396.

51. *See id.*

52. *See id.* (citing *United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990)).

53. *See id.*

54. *See, e.g.*, United States v. Limares, 269 F.3d 794 (7th Cir. 2001) (finding affidavits to be sufficient support for a dog's reliability); United States v. Stanley, No. 00-4289, 2001 WL 98368 (4th Cir. 2001) (unpublished table decision) (determining that expert testimony regarding the dog and its training is sufficient to establish the dog's reliability); United States v. Owens, 167 F.3d 739 (1st Cir. 1999) (determining that the existence of probable cause based on an alert by a drug dog depends upon the dog's reliability); United States v. Lingenfelter, 997 F.2d 632 (9th Cir. 1993) (holding that sniff alone can supply probable cause for issuing a warrant when evidence of reliability is presented); United States v. Ludwig, 10 F.3d 1523 (10th Cir. 1993) (determining a dog alert might not establish probable cause if the particular dog had a poor accuracy record); United States v. Massac, 867 F.2d 164 (3d Cir. 1989) (finding an alert given by a dog trained to detect contraband is sufficient to establish probable cause); United States v. Waltzer, 682 F.2d 370 (2d Cir. 1982) (holding that a designation by a dog with a record of accuracy establishes probable cause); United States v. Klein, 626 F.2d 22 (7th Cir. 1980) (finding an affiant's representation to the magistrate that a dog graduated from training sufficient).

55. For example, in *United States v. Watson*, while discussing the qualifications of Max 25, a 1982 graduate of the Maryland Police Department's canine narcotics detection school, a district court wrote that although the judicial system had in the past been skeptical of canine narcotics detection, the technique is now common such that a formal recitation of the dog's training is unnecessary when applying for a warrant. *See* United States v. Watson, 551 F. Supp. 1123, 1127 (D.D.C. 1982). However, subsequent opinions have made it a point to note Max 25's success rate, which has earned him a celebrated reputation. *See, e.g.,* United States v. Trayer, 898 F.2d 805, 808 (D.C. Cir. 1990) (noting Max properly alerted finding drugs in fifty-eight out of sixty searches); United States v. Colyer, 878 F.2d 469, 471 (D.C. Cir. 1989) (describing Max 25 as "first in his class"); United States v. Rush, 673 F. Supp. 1097, 1099 (D.D.C. 1987) (citing Max 25 had found narcotics fifty-three times, and he has been correct better than ninety-six percent of the time); United States v.

An examination of holdings by each of the courts espousing the majority view reveals that in determining reliability, most federal circuit courts have accepted some margin of error in the dog's performance history when upholding a search.[56] It is necessary that certain standards be implemented prior to issuing a warrant based partly on a canine's positive alert. The magistrate should be advised of the exact training the detector dog has received, the criteria used in selecting dogs for drug detection training, the standards the dog was required to meet to successfully complete his training program, and the dog's "track record" prior to the search with the emphasis on the amount of false negatives or mistakes the dog has made. Only after this information has been furnished is a magistrate justified in issuing a warrant.[57] In order to establish this standard however, it is necessary to keep an accurate record of the dog's success and failure rate. Unfortunately, this practice is not required by the Fifth Circuit; consequently, it is not followed by the law enforcement agencies that fall under its jurisdiction.

B. *The Fifth Circuit*

In *United States v. Williams*,[58] the defendant's car was searched after a trained canine alerted to it.[59] Williams challenged the warrantless search by alleging that the sniff test by the dog could not be relied upon until the canine's training and reliability were first proven.[60] In its discussion, the

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Liberto, 660 F. Supp. 889, 890 (D.D.C.1987) (explaining that Max 25 had correctly identified narcotics ninety-five percent of the times he had had an opportunity to do so); *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(f), at 366 (3d ed. 1997). LaFave states:

> [i]n light of the careful training which [narcotic] dogs receive, an alert by a dog is deemed to constitute probable cause for an arrest or search if sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband.

Id.

56. LAFAVE, *supra* note 55, at 367 n.240. LaFave adds:

> Various methods of providing an index of the dog's reliability and credibility narrow down to some basic elements. The magistrate should be advised of the following: the exact training the detector dog has received, the standards or criteria employed in selecting dogs for [drug] detection training, the standards the dog was required to meet to successfully complete his training program, the 'track record' of the dog up until the search (emphasis must be placed on the amount of false negatives or mistakes the dog has furnished). Only after this information has been furnished is a magistrate justified in issuing a warrant.

Id. at 367 n.240.

57. *Id.*

58. 69 F.3d 27 (5th Cir. 1995).

59. *See* United States v. Williams, 69 F.3d 27 (5th Cir. 1995).

60. *See id.* at 28.

Fifth Circuit drew from *United States v. Daniel*,[61] which held that demonstrating a drug dog's reliability was not necessary to obtain a search warrant,[62] adding the theory that an affidavit that discussing a dog's history of reliability was without jurisprudential support in the circuit.[63] Williams invited the court to follow the training-and-reliability standard set out in *Diaz*, but the request was expressly rejected.[64] The Fifth Circuit concluded that since it is not necessary to prove a dog's reliability when obtaining a search warrant, *a fortiori*, proving the dog's reliability is not required if probable cause is developed as a result of a dog's alert on a vehicle.[65] *Williams* continues to represent the Fifth Circuit's flagship opinion on canines.[66]

1. *Williams* and Discovery

The first Fifth Circuit opinion to expose the limitations in *Williams* was *United States v. Hare*.[67] In *Hare*, a canine alert provided a deputy with probable cause to open Hare's trunk.[68] The *Hare* court took note of the fact that the *Williams* holding was silent regarding the discovery of a dog's training or certification.[69] The court recognized the *Williams* court's refusal to adopt the requirement for both training and reliability as set forth in *Diaz*,[70] and the court noted *Williams* did not help resolve whether a dog's training must be proven.[71] The *Hare* court, however, determined that case law favoring drug alert dogs consistently refers to "trained" dogs, and therefore, the court concluded, proof of a dog's training is required.[72] Thus, with regards to the request for discovery, the court found that although probable cause existed on the informant's information alone, the dog's alert merely served to corroborate the inform-

61. 982 F.2d 146 (5th Cir. 1993).

62. *See* United States v. Daniel, 982 F.2d 146, 151 n.7 (5th Cir. 1993).

63. *See Williams*, 69 F.3d at 28.

64. *See id.*

65. *See id.*

66. *See Williams*, 69 F.3d 27. Joining the Fifth Circuit, the Eighth and Eleventh Circuits support a finding of probable cause based on a dog alert simply by demonstrating the canine is trained, without any need to establish its reliability. *See* United States v. Sundby, 186 F.3d 873, 876 (8th Cir. 1999) (determining that a dog's positive indication alone is enough to establish probable cause for the presence of a controlled substance); United States v. Sentovich, 677 F.2d 834, 838 n.8 (11th Cir. 1982) (holding that proof of the reliability of the dog is not essential once there is a positive alert).

67. 932 F. Supp 852 (E.D. Tex. 1996).

68. *See* United States v. Hare, 932 F. Supp. 852 (E.D. Tex. 1996).

69. *See id.* at 853.

70. *See id.*

71. *See id.*

72. *See id.*

ant's story.[73] The court suggested that where a dog sniff is the only method used to obtain probable cause, then a court might require a higher standard of proving the dog's training.[74] Following *Hare*, when a canine alert is the sole source for probable cause, the defendant should make a discovery request for all evidence of the dog's training.

2. *United States v. Outlaw*: A Study of *Williams*

a. The Need for a Training and Reliability Standard

United States v. Outlaw[75] represents the first opinion from a court within the Fifth Circuit to squarely address *Williams'* refusal to require a showing of a canine's reliability. Outlaw raised several grounds in a motion to suppress, including an attack on the training and reliability of a canine whose alert resulted in the discovery of PCP in the defendant's suitcase.[76] With regard to the canine's training, its handler acknowledged that the dog, Gerri, was not certified to detect the presence of PCP.[77] The defendant argued that even the dog handler lacked training to detect the quantity of drugs the dog was trained to detect.[78] In addition, the dog handler was not aware of what distraction techniques were used during certification and training searches. Further, the agent was unaware of whether controlled negative testing was used to indicate any false positives Gerri had during training.[79]

The defendant went on to challenge the reliability of a the canine inspection team with expert witness testimony provided by Dr. Dan Craig, D.V.M.[80] A central theme of Dr. Craig's testimony was that only records demonstrating the canine's training and success and failure rates, including false alerts, would serve to establish its reliability.[81] Although the defendant requested such records prior to the evidentiary hearing, the request was denied.[82] At the evidentiary hearing, the dog handler testified that he did not keep Gerri's field records.[83] Since no training or field records existed, Dr. Craig believed that it was not possible to establish Gerri's reliability as a drug detection dog.[84] As a result of this testimony,

73. *See id.*
74. *See id.*
75. 134 F. Supp. 2d 807 (W.D. Tex. 2001).
76. See United States v. Outlaw, 134 F. Supp. 2d 807, 810 (W.D. Tex. 2001).
77. *See id.* at 811.
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.*

the defendant argued that the government's failure to produce such evidence precluded a determination that the canine's alert was reliable.[85] Thus, the dog's alert was not enough to establish probable cause to search the suitcase.[86]

The *Outlaw* court ruled that *Williams* did not preclude a challenge to a canine's reliability. Instead, the court concluded that canine alert reliability may be challenged in order to establish that agents do not have the probable cause to conduct a search and seizure.[87] Accordingly, the court declined to apply *Williams* and *Daniel* in establishing a per se rule that a canine alert always establishes probable cause.[88] Rather, the court found that "a canine alert by a properly trained dog is prima facie proof that the officer had probable cause for a search or seizure."[89] The opinion further elaborates that although a trained and certified canine is all the proof required to establish the reliability of a canine, the defendant carries the burden to challenge reliability through a showing that the totality of the circumstances rebuts the claim.[90] In another first for the circuit, Judge Furgeson then engaged in an examination of the literature and case law addressing canine alerts.[91] Among other observations, he accepted that even though canine inspections are highly accurate, they are not an infallible means for detecting the presence of contraband.[92] Since reliability depends on the human handler, it is susceptible to error because the subtle signals of the canine must be interpreted.[93] In fact, most erroneous alerts originate from misinterpretation by the handler, rather than the canine's signals.[94]

False alerts can even result from conscious and unconscious signals from the handler, essentially causing the canine to suspect contraband.[95] The D.C. Circuit in *United States v. Trayer*[96] realized this problem and noted that it was "mindful that less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing,' may well jeop-

85. *See id.*
86. *See id.*
87. *See id.* at 812.
88. *See id.*
89. *Id.*
90. *See id.*
91. *See id.*
92. *See id.* at 813; *see also* Bird, *supra* note 6, at 421-31 (noting some of the empirical evidence showing instances of low accuracy by canine inspections and examining the factors that cause such errors).
93. *See id.*
94. *See* Bird, *supra* note 6, at 422-23.
95. *Id.*
96. 898 F.2d 805 (D.C. Cir. 1990).

ardize the reliability of dog sniffs."[97] With this background, Judge Furgeson expressed his reluctance to create a holding that would prohibit defendants from raising the possibility of such errors or that would create the potential for a canine alert to be a means for suspicionless and warrantless searches and seizures.[98]

The court then referenced *Diaz* in examining the Sixth Circuit's requirement that both the training and reliability of the dog be proven.[99] Mindful of *Williams'* explicit rejection of the standard in *Diaz*, the *Outlaw* court did not interpret *Williams* to mean that a drug sniffing dog does not have to be "trained and reliable" in order for a signal to establish probable cause.[100] The court explained that the most logical interpretation of *Williams* sets forth the idea that the government does not have to be burdened with producing records for a canine's reliability when it has already proven that the canine inspection team had been trained to find contraband.[101] However, the defendant may set forth evidence of unreliability in order to challenge the reliability of the canine inspection team itself.[102]

The court agreed with the government's position that the canine team was trained for drug detection and was certified to detect a variety of drugs.[103] Therefore, the district court concluded that probable cause had been established due to the training and reliability of Gerri and Agent Navarro's canine team.[104]

Although the opinion in *Outlaw* is logical and promising, its message is ultimately cabined by the dictates of *Williams*. In *Diaz*, the government failed to produce documentation supporting the dog's training and reliability; nevertheless, the agent's detailed testimony was deemed sufficient for this purpose. Though it declares a defendant's right to challenge the reliability of the canine inspection with evidence of unreliability, the court in *Outlaw* ultimately relied only on evidence of training to determine that the dog was reliable.[105] Though Judge Furgeson's opinion suggests that he would have allowed access to and examination of this information by the defendant's expert if the information existed, the court's finding that the dog was reliable without this information effectively eliminated the possibility that the defense team could ever examine this evidence. Sadly, this reasoning only reinforces the incentive for law

97. United States v. Trayer, 898 F.2d 805, 809 (D.C. Cir. 1990).
98. *See* United States v. Outlaw, 134 F. Supp. 2d 807, 814 (W.D. Tex. 2001).
99. *See id.*
100. *See id.* (citing United States v. Williams, 69 F.3d 217, 218 (5th Cir. 1995)).
101. *See Outlaw*, 134 F. Supp. 2d at 814.
102. *See id.*
103. *See id.*
104. *See id.*
105. *See generally* United States v. Outlaw, 134 F. Supp. 2d 807 (W.D. Tex. 2001).

enforcement agencies to continue to fail in maintaining training and reliability records.

In the end, the court's attempt to reconcile *Williams* with *Diaz* represents more of an effort to salvage *Williams'* credibility as authority, rather than to devise a workable standard. On the positive side, *Outlaw* further exposes the legacy of *Williams*—the promotion of unaccountability by our law enforcement agencies at the border, as evidenced by their total lack of documentation on the canines' performance during training and on the field.

b. The Problem with False Alerts

The proposition that an alert will produce contraband that a canine is trained to detect is a straightforward concept. However, what should the court do when an alert results in the discovery of contraband that the dog is not trained to detect?

The opinion in *Outlaw* addressed this issue with very little success. The court wrote that even through Gerri was not trained to detect PCP, this by itself did not terminate probable cause.[106] The court assumed that the dog alerted to the scent of a drug that it was trained to detect, but was no longer present. To buttress this position, the court reasoned that the dogs are not trained to detect the presence of narcotics but rather their odor.[107] Therefore, an alert does not necessarily signal the essence of seizable amounts of any narcotic.[108] Rather, it could simply indicate a prior exposure to that narcotic.[109]

This theory, now a popular explanation offered by the government at suppression hearings, has logical but little empirical support. In fact, as the defense expert in *Outlaw* pointed out, the opposite is true. Dr. Craig observed that, while not trained to detect specific quantities of drugs, the dogs are only trained to detect and alert to amounts that are physically detectable.[110] He added that canines used by federal law enforcement

106. *See id.* at 814-15 (writing that a false alert does not by itself undermine probable cause). For a similar treatment of the same issue, see *United States v. Chronister*, 1995 WL 547815 (10th Cir.1995) (unpublished table opinion). *Outlaw's* reference to the *Chronister* opinion is of no consequence. Any attempt to formulate a system for grading the reliability of the canine with an accepted margin of error would still not be possible given the government's complete failure to keep such records.

107. *See Outlaw*, 134 F. Supp. 2d at 814-15; *see also* United States v. Kennedy, 131 F.3d 1371, 1375 n.6 (10th Cir.1997).

108. *See Outlaw*, 134 F. Supp. 2d at 814-15; *see also Kennedy*, 131 F.3d at 1375 n.6.

109. *See Outlaw*, 134 F. Supp. 2d at 814-15; *see also Kennedy*, 131 F.3d at 1375 n.6.

110. *See Outlaw*, 134 F. Supp. 2d at 811; *see also* Interview, *supra* note 6 (discussing a dog's ability to merely detect a certain quantity of contraband).

authorities are not trained to detect residual odors.[111] It is this factor in *Outlaw* that highlights the significance of the agent's inability to provide any information about the minimum quantity of drug the dog is trained to detect. Without this information, the court must either assume that the dog really did not alert or that the dog's behavior was the result of handler error. As it turns out, the court did not have to engage in a discussion about the dog's reliability *vis-à-vis Williams* to reach a proper resolution. Without evidentiary support of training to detect residual drug odors, under *Williams*, the fact that the substance discovered was not one that the canine was trained to detect required the suppression of the contraband found.

As further support for upholding the discovery of the PCP, the court then relied upon the Tenth Circuit's observation that it does not necessarily follow that a false alert indicates that no narcotic odor was detected.[112] Since the residue of narcotics can be detected on items that have been in contact with drugs,[113] the detection of this residue can occur without finding a sizable quantity of drugs.[114] By relying on the fact that trace amounts of drugs may be on virtually every person within the United States, the court only weakened any effort to establish the reliability of the canine, and ultimately, its decision to uphold the search.[115] Taken to its logical conclusion, the court's reasoning opens the door to inconsistent results. For example, a dog alert on a vehicle stopped at a secondary inspection area can be interpreted to mean that the dog alerted not only to the drug scent on the currency possessed by its passengers, but also to the scent remaining at the site of the detection the last time drugs were found on other vehicles previously searched.

The court in *Outlaw* then provides support for its position that the dog has alerted to the scent of a drug that is "no longer there" by adding that "it is likely, if not highly probable, that a person who smuggles in one

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111. *See* Interview, *supra* note 6. Residual odor is the odor remaining after a specific amount of a certain drug has been removed from a specific location. *See id.*

112. *See Outlaw*, 134 F. Supp. at 815 (citing *Kennedy*, 131 F.3d at 1375 n.6).

113. *See Outlaw*, 134 F. Supp. 2d at 815.

114. *See id.*

115. *See* Mark Curriden, *Courts Reject Drug-Tainted Evidence: Studies Find Cocaine-Soiled Cash so Prevalent That Even Janet Reno Had Some*, 79 A.B.A. J. 22 (Aug. 1993). For cases on tainted currency, *see* United States v. Carr, 25 F.3d 1194, 1214-18 (3d Cir. 1994); United States v. $5,000 in United States Currency, 40 F.3d 847, 849 (6th Cir. 1994); United States v. $53,082 in United States Currency, 985 F.2d 245, 250 n.5 (6th Cir. 1993); United States v. $639,588 in United States Currency, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992) (referencing expert testimony that 90% of all cash in the United States contains sufficient quantities of cocaine to alert a trained dog); and United States v. $80,760 in United States Currency, 781 F. Supp. 462, 475 n.32 (N.D. Tex. 1991) (indicating that residue from narcotics contaminates as much as 96% of the currency currently in circulation).

type of drug has had contact with other types of drugs so that a trained dog would detect its odor."[116] Again, assuming that canines were actually trained to detect the residual odor of drugs, the theory would have some support if it could be demonstrated that the vehicle in question was possessed for such a purpose. This theory crumbles when the vehicle is a rental, as is frequently the case when drugs are found in vehicles at the border.

In its final analysis, the court upheld the discovery of contraband based on its conclusion that the contraband was discovered incident to a valid alert to other drugs that the canine was trained to detect, but that were no longer there.[117] Reasoning such as this will continue to surface as long as trial courts continue to rely on *Williams*, a decision that promotes a refusal to require specific technical data in the training of canines and in the measurement of their performance on the field. The opinion in *Outlaw* implicitly shows why *Williams* should be overruled and replaced with the *Diaz* standard.

On appeal, the Fifth Circuit's anticipated evaluation of Judge Furgeson's interpretation of *Williams* was not to be. In one brief sentence, the circuit wholly avoided this discussion, opting to simply affirm that, on the facts of the case before it, the trial court's conclusion that the canine employed was trained and reliable, would remain undisturbed.[118] It is at least arguable that by sidestepping the issue, the court has accepted *ab silencio* Judge Furgeson's interpretation of *Williams*. As it relates to the fact that the substance found in the suitcase was not the one the canine was trained to detect, the court of appeals simply reasoned that because the canine had been shown to satisfy border patrol standards, the alert satisfied a finding of probable cause to search it. By doing so, the panel is assuming that the canine truly alerted to the residual

116. *Id.* The court also mentions "[h]indsight may be twenty-twenty, but whether probable cause existed at the time of the search may not be determined by what the search actually yields. It is a basic tenet of the Fourth Amendment that 'a search is not to be made legal by what it turns up.'" *Id.* at 815 (citing United States v. Di Re, 332 U.S. 581, 595 (1948)). While true, this concept is based on the premise that sufficient probable cause exists to perform a search in the first place, something the author does not believe was established by the government in *Outlaw*. The court then mentions "[l]ikewise, a search is not made illegal by what it fails to turn up." *Id.* (citing *Di Re*, 332 U.S. at 595); *see also* United States v. Johnstone, 574 F.2d 1269, 1273 (5th Cir. 1978) (finding that "unconstitutional search based on unfounded suspicion was not made constitutional merely because the search revealed contraband items"). As it turns out, the author believes, because the government failed to validate the alert that led to the discovery of drugs that the canine was not trained to detect, the discovery of the unexpected contraband had the effect of turning a bad search into a good one.

117. *Outlaw*, 184 F. Supp. 2d, at 816.

118. United States v. Outlaw, 319 F.3d 701, 704-05 n.2 (5th Cir. 2003).

odor of a drug that it is trained to detect. It is troublesome enough that the court accepted that the canine's training under border patrol standards satisfies the accepted standards for the field, without allowing the defendant's expert the opportunity to subject them to a meaningful review. More troubling is the fact that, as mentioned, the border patrol agents in charge of the canine's training did not keep records of its performance in the field. Like all other tools used in law enforcement, the defense must be allowed the right to examine its inner workings, and then be allowed a meaningful challenge with expert opinion of its own. At least for the moment, the government continues to enjoy carte blanche to continue performing searches in the border region without having to demonstrate documentation supporting the training and reliability of its canines, which consequently denies the defense the right to challenge these claims.

IV. When a Dog Sniff Is a Search: The Use of Canines on People

The practice of using dogs to perform up-close sniffs on humans requires close scrutiny. Presently, canines used in this fashion are not muzzled, and the normal apprehension created on a person being sniffed, raises serious concerns about the safety of the practice. An approach by a dog could bring about a reaction in a person that itself could be perceived as a threat by the animal, possibly resulting in injury. At least one judge disapproves of the practice, observing that "[c]ertainly [*United States v.*] *Place* does not authorize the use by law enforcement officials of dogs to sniff persons."[119] Further, "such use of dogs is normally inconsistent with the concepts embodied in our Constitution."[120]

It was the Fifth Circuit that first recognized that the use of trained canines to sniff people brings the practice within the purview of the Fourth Amendment. In *Horton v. Goose Creek Independent School District*,[121] the Fifth Circuit was faced with resolving a suit brought by high school students who were subjected to a sniff by trained narcotics canines.[122] The court declared that Fourth Amendment protection should be strongest in situations where intentional bodily intrusions are involved, regardless of whether the intruder is a person or a dog.[123] The

119. United States v. Beale (Beale II), 731 F.2d 590, 596 n.1 (9th Cir. 1983) (Reinhardt, J., dissenting on other grounds).

120. *Id.*

121. 690 F.2d 470 (5th Cir. 1982).

122. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); *see also* H. Paul Honsinger, 44 La. L. Rev. 1093, 1097-99 (1984) (noting that *Horton* is one of the few cases which have addressed canine searches in the school setting).

123. *See Horton*, 690 F.2d 470.

court held that the up-close sniffing of the students constituted a search within the purview of the Fourth Amendment.[124] In addition, the court concluded that the use of the dog on a student at school required a predicate of reasonable particularized suspicion.[125] The holding in *Horton* was recently adopted also in a school setting, by the Ninth Circuit in *B.C. v. Plumas Unified School District.*[126] However, as we will see two decades later, the concerns expressed by the Fifth Circuit in *Horton* disappear when the practice occurs in the border region.

A. *As Pedestrians*

In *United States v. Kelly*,[127] decided twenty years after *Horton*, the District Court for the Laredo Division of the Southern District of Texas decided whether the up-close sniffing of persons coming from Mexico to the United States via a pedestrian walkway at an international bridge was a search.[128] Kelly was entering the United States through the walkway when a drug-sniffing dog, purposefully stationed in close proximity to the pedestrian traffic, approached him and sniffed him by pressing its snout

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124. *See id.* at 470. *Horton* recognized that an opposite view was espoused by the Seventh Circuit in *Doe v. Renfrow*, where "the school, with the assistance of the police, used dogs for general, exploratory sniffing of students." *Id.* at 475; *see also* Honsinger, *supra* note 122, at 1099. There, the court held that "the sniff of a dog is not a search, particularly in view of the diminished expectations of privacy inherent in a public school, the school's right and duty *in loco parentis* to supervise students and maintain an educationally sound environment, and the minimal intrusion involved." *Id. Horton* mentions its support for *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 236 (E.D. Tex. 1980), where the Latexo Independent School District used dogs to sniff both students and automobiles, which explicitly rejected *Doe v. Renfrow. See id. See also, e.g.*, Martin R. Gardner, *Sniffing for Drugs in the Classroom-Perspectives on Fourth Amendment Scope*, 74 Nw. U. L. REV. 803 (1980); Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980); Erica Tina Helfer, Comment, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U. L.J. 119, 131-33 (1979).

Besides *Doe v. Renfrow*, one other circuit has allowed the suspicionless sniff of a person's body by a canine. In *Romo v. Champion,* 46 F.3d 1013 (10th Cir. 1995), the Tenth Circuit upheld the discovery of drugs following the canine sniff of a vehicle and its passengers, by contact, at a roadblock leading to a prison parking lot, which resulted in the discovery of marijuana. The court stated that there was little doubt that the search was "executed pursuant to special needs independent of traditional criminal law enforcement. . .[t]he government's interest in the operation of a prison presents 'special needs' beyond law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Romo*, 46 F.3d at 1017 (citing *Dunn v. White*, 880 F.2d 1188 at 1194 (10th Cir.1989)). The "special needs" category of searches is discussed further below.

125. *Horton,* 690 F.2d at 481.

126. 192 F.3d 1260, 1266 (9th Cir. 1999).

127. 128 F. Supp. 2d 1021 (S.D. Tex. 2001).

128. *See* United States v. Kelly, 128 F. Supp. 2d 1021, 1021 (S.D. Tex. 2001).

on his groin. After what the dog's trainer described as an alert, Kelly was taken to a room and eventually ordered to remove his pants, revealing a bundle hidden in his groin containing Valium and Rohyphnol pills.

1. The Mechanics of a Search

Following *Horton*, Judge Keith P. Ellison held that "the up-close sniffing of people by trained canines 'offends reasonable expectations of privacy,'" and determined that the sniff on Kelly's body was a search under the Fourth Amendment.[129] He then discussed border-search precedent to determine the reasonableness of the search. He noted that "[w]hen [a] search occurs at the border, the balance is 'struck much more favorably to the Government' because of its strong interest in protecting its borders."[130] He further added that certain "routine border searches" are reasonable simply because they occur at the border.[131] These searches include "non-intrusive pat-downs, the removal of a suspect's outer clothing, and inspection of the contents of pockets, purses, and wallets."[132] A more intrusive border search requires a showing of reasonable suspicion.[133]

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129. *Id.* at 1023.

130. *Id.* at 1025 (citations omitted). In light of the tragic events of September 11th 2001, additional discussion of this language is warranted. In *United States v. Skipwith*, the Fifth Circuit, faced with the heightened problem of air piracy in the early 1970s, commented that "[b]itter experience has taught us that the physical dangers of mass kidnapping and extortion posed by air piracy are even greater than the dangers against which the usual border search is directed." United States v. Skipwith, 482 F.2d 1275 (5th Cir. 1973). The court then elaborated as follows:

> Determination of what is reasonable requires a weighing of the harm against the need. When the object of the search is simply the detection of past crime, probable cause to arrest is generally the appropriate test. When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

Skipwith, 482 F.2d at 1276 (citing *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972) (J. Friendly, concurring)).

In spite of our country's growing concern over terrorism, the courts must not lose sight of the need, as best put into words by Judge Friendly, to distinguish between the use of a canine at an airport for the purpose of detecting narcotics and to detect explosives. While the use of canines trained to detect explosives and other detectable tools of the terrorist trade may allow for the suspicionless, albeit safe sniffing of a person's body, the courts must ensure that the canine used is trained only for that purpose.

131. *Kelly*, 128 F. Supp. 2d at 1023.

132. *Id.* (citing *United States v. Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981) (en banc)).

133. *Kelly*, 128 F. Supp. 2d at 1023.

In determining the intrusiveness of a canine sniff at the border, the court simply relied on *Horton's* comment that a dog's sniff of a person, particularly where the dog actually touches the person, may be analogous to a *Terry* stop.[134] Therefore, "the up-close sniffing by trained canines is, likewise, reasonably conducted at the border without any individualized suspicion."[135]

Judge Ellison's reliance on the analogy language in *Horton* to determine the intrusiveness of the sniff on Kelly is misplaced. *Horton's* comment was merely an introduction to a more complex analysis. In discussing the level of suspicion necessary to justify each practice, *Horton* analogized the dog sniff of a person by contact with a *Terry* frisk in the context of *Terry's* balancing test whereby the intrusiveness of a search is measured against society's interest in the information.[136] *Horton* clearly points out that its evaluation of the intrusiveness of the dog's sniff at the school *vis-à-vis* society's need for information is a study separate from other types of searches:

> Because the sniffing in this case occurred in a school environment, we need not address the question whether the sniffing of a person in a non-school setting is sufficiently intrusive to require the full panoply of fourth amendment protections—probable cause and a warrant—or whether such sniffing is less intrusive, requiring only reasonable suspicion. We leave that question for another day.[137]

Horton adds that the general requirements of the Fourth Amendment are usually modified to deal with special situations.[138] The *Horton* court further elaborated, that because reasonableness is dependant on circumstances, the public school system demands specific accommodations under the Fourth Amendment,[139] society must assume the duty to provide an environment conducive to education and to protect minors from

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134. *See id.* (citing Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 479 (5th Cir. 1982); *see also* Honsinger, *supra* note 122, at 1105-06. *Horton* did not cite authority for this proposition. It is possible that the panel may have adopted this language from Justice Brennan's concurring opinion in *Place*, in which he wrote that "a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion." United States v. Place, 462 U.S. 696, 762 (1983) (Brennan, J., concurring). However, as discussed, *Place* involved a canine sniff of luggage, not of people, and thus if considered, it may have been misinterpreted by the court in *Horton*.

135. United States v. Kelly, 128 F. Supp. 2d 1021, 1025 (S.D. Tex. 2001).

136. *See Horton*, 690 F.2d at 480.

137. *See id.* at 479.

138. *See id.*; *see also* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Terry v. Ohio, 392 U.S. 1, 19 (1968); Camara v. Municipal Court, 387 U.S. 523, 529 (1967); United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).

139. *See Horton*, 690 F.2d at 480-81.

the dangers of illegal substances and other anti-social activities because they are too young to be considered capable of restraint.[140] Therefore, school administrators and teachers merit broad discretion concerning disciplinary and supervisory powers.[141] Even so, students need their Fourth Amendment rights to be protected.[142] Young students today are the citizens of the future; therefore, their constitutional freedoms need protection so they do not become complacent with government principals.[143] *Horton* therefore establishes that given society's special need for information in a school setting, a simple showing of reasonable suspicion is sufficient.

In a similar fashion, given our country's need to protect its borders, border search precedent has developed its own special standard. As discussed, when a non-intrusive pat-down is the search in question, there is no requirement for a certain level of suspicion before conducting the pat-down.[144] Reasonable suspicion, however, is required to conduct pat-downs and other more intrusive searches.[145] Judge Ellison's conclusion that a canine sniff of a person is no worse than a non-intrusive pat-down is difficult to accept for several reasons. While both methods involve touching, there are major differences. A customs official performing a pat-down is constrained by his or her official duties.[146] More importantly, an officer has the ability to use guided discretion and to exercise it in a responsible manner, while a dog has the potential to react forcefully and without thought.[147] A human's discretion ensures not only that the contact will not exceed the necessary limits of decency, but that it will not result in injury. From the perspective of the person being searched, these constraints eliminate the natural and justified apprehension of exposure to an unfamiliar, unmuzzled, and unpredictable animal.

Accordingly, two very important factors in *Kelly* merited special consideration by the court but were ignored. First, the contact by the dog was unexpected and only heightened the degree of apprehension experienced by Kelly, which no doubt added to his appearing more suspicious.[148] Second, the canine sniff involved contact with Kelly's groin,

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140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See* United States v. Kelly, 128 F. Supp. 2d 1021, 1025 (S.D. Tex 2001) (excusing the lack of suspicion before searching an individual).

145. *See id.*

146. United States Customs, *Personal Search—What to Expect, at* http://www.customs.ustreas.gov/travel/personal.htm (last visited Feb. 8, 2002).

147. *See* Pollack, *supra* note 7, at 805.

148. Noting that dogs often "engender irrational fear," the court in *B.C. v. Plumas Unified Sch. Dist.* observed that the fact that the search on high school students was "sud-

which increased its offensiveness. The court in *Kelly* recognized that the canine's contact with the defendant's groin added to the intrusiveness of the preliminary sniff.[149] However, it still did not believe that the event was such that the reasonable suspicion requirement should be applied.[150] The manner in which Kelly was searched by the canine, however, clearly represented a "non-routine and offensive" touching, and thus required at least a predicate finding of reasonable suspicion.[151]

On appeal, Kelly again presented his concerns about the non-routine, and highly intrusive nature of the canine sniff of his groin.[152] However, in its opinion, the court did not mention anything regarding these concerns.[153] While it adopted *Horton* in accepting the trial court's finding that a sniff of a canine by contact is a search, it then evaluated its intrusiveness by comparing to a non-intrusive pat-down, which under *Sandler*,

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den and unannounced add[ed] to its potentially distressing, and thus invasive, character." B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1267 (9th Cir. 1999).

149. *See Kelly*, 128 F. Supp. 2d at 1026.

150. *See id.*

151. *See* United States v. Sandler, 644 F.2d 1163, 1167 (5th Cir. 1981). Even Judge Ellison concedes that the up-close sniffing of people by trained canines "offends reasonable expectations of privacy" and is therefore, a search under the Fourth Amendment. *Kelly,* 128 F. Supp. 2d at 1023. If a pat-down of defendant's groin area was conducted, it may have been sufficiently intrusive such that it would itself constitute a search requiring reasonable suspicion to support it. *Id.* at 1023 n.3. Without question, the discovery of the pills occurred after Kelly was ordered to drop his pants, which itself clearly constitutes a search meriting reasonable suspicion at the border. Therefore, whether an offensive pat-down occurred sometime between the alleged alert and the order to undress is of no significance since both required reasonable suspicion. Ultimately, the existence of reasonable suspicion depends on whether the canine actually alerted. Assuming the suspicionless dog sniff of Kelly passed muster, a valid alert would constitute reasonable suspicion to either order the offensive pat-down and/or order one to undress.

152. United States v. Kelly, 302 F.3d 291 (5th Cir. 2002), *cert. denied* 123 S. Ct. 707 (Dec. 16, 2002). In his brief, Kelly added that "large dogs such as the Labrador breed in the instant case" are "use[d]. . .to maintain an image of strength and ferocity." Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 482 (5th Cir. 1982). While the dog in this case apparently did not have a history of ferocious behavior, this fact does not diminish the "often. . .irrational fear" engendered by large dogs. *Id.* at 483. Indeed, a dog is not always a man's best friend. *See, e.g.*, Douglas U. Rosenthal, *When K-9's Cause Chaos – An Examination of Police Dog Policies and Their Liabilities*, 11 N.Y.L. SCH. J. HUM. RTS. 279 (1994). "[S]peaking from a trainer's point of view, '[w]e use police dogs for their sense of smell –to find people and things. The reason the dog is trying to find something is because he wants to bite it.'" *Id.* at 291. Arnold H. Loewy, *The Fourth Amendment As A Device For Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246-47 (1983). "Additionally, the very act of being subjected to a body sniff by a German Shepard may be offensive at best or harrowing at worst to the innocent snifee." *Id.*

153. *See generally* Kelly, 302 F.3d 291. In fact, during oral argument, appellate counsel for Kelly began her argument by expounding concerns about safety only to be cut off by one of the justices who inquired that if she lost on that argument, was there anything else that they should consider.

clearly does not necessitate any predicate of suspicion. However, in constructing its analogy, the appellate court erroneously relied on the mechanics of a *Terry* search. A *Terry* pat-down has been described as: "[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline, and back, the groin and area about the testicles, and entire surface of the legs down to the feet."[154]

This is not what *Sandler* envisioned as an ordinary pat-down in a border scenario. In fact, *Sandler* hypothesized that a more intrusive pat-down may require reasonable suspicion.[155] It is difficult to envision a more intrusive pat-down than one involving the "thorough search" of the groin and testicles. After *Sandler*, the panel in *Kelly* was required to abide by the language in *Sandler*, unless of course, the issue was considered en banc. In a clear disregard of the dictates of an en banc opinion, the panel in *Kelly* reasoned that a canine sniff of the groin was the equivalent of an ordinary Terry-type pat down, and therefore, does not require reasonable suspicion. As it will be discussed below, this flawed construct has now migrated into another recent Fifth Circuit opinion involving a canine sniff of a person.

B. *In Vehicles*

It is well settled law that a canine alert on a vehicle constitutes probable cause to search the vehicle.[156] However, is that probable cause finite? Does the probable cause extend to the occupants of the vehicle, allowing a search of their body?

The use of dogs at a pedestrian walkway on an international bridge is not the only indiscriminate means used to search for illegal drugs. Recently, a border patrol canine handler admitted to routinely boarding occupied commercial buses at immigration checkpoints with his canine.[157] In *United States v. Garcia-Garcia*,[158] the defendant was a passenger on a Greyhound bus that made a stop for a routine immigration check at the IH-35 border patrol checkpoint north of Laredo, Texas.[159] While sniffing the interior of the luggage compartment located in the lower half of the bus, a canine reportedly alerted to the presence of drugs in the bathroom

154. Terry v. Ohio, 392 U.S. 1, 17, n.13 (1968) (citations omitted).

155. *See Sandler*, 644 F.2d, at 1167, n.5.

156. *See* United States v. Williams , 69 F.3d 27, 28 (5th Cir. 1995).

157. *See* United States v. Garcia-Garcia, Memorandum and Order, No. L-01-727 (S.D. Tex.-Laredo Div. Oct. 17, 2001) (on file with author).

158. Memorandum and Order, No. L-01-727 (S.D. Tex.-Laredo Div. Oct. 17, 2001) (on file with author).

159. *Id.* at 1.

area, located at the rear of the bus.[160] While the bus was still occupied by passengers, the handler walked his dog onto the bus.[161] As it was pulling ahead of him, making its way through the middle aisle in the direction of the bathroom, the dog entered the defendant's seating area, and sniffed at his lower leg, making contact in the process.[162] The dog alerted to the presence of drugs on the defendant's body, resulting in the discovery of marijuana.[163]

1. Scope of the Search

Armed with probable cause as a result of the canine's alert on the bottom half of the bus, Garcia-Garcia conceded that the agent was entitled to search it. Garcia-Garcia then argued that by allowing the dog to walk through the middle walkway on its way to the bathroom, the handler also subjected the passengers of the bus to being sniffed by the canine, resulting in a search separate from the one justified by the initial alert. In order to limit the search of the bus to the bathroom area without violating the passengers' right to privacy, Garcia-Garcia argued that the agent should have allowed them to exit the bus prior to the handler's insertion of the canine.[164]

In the trial court's opinion, Chief Judge George P. Kazen observed that it is reasonable to assume that a commercial bus traveling on an interstate highway and arriving at a permanent border checkpoint will stop, and the passengers will be subjected to an immigration inspection.[165] Judge Kazen concluded that because the canine alerted to the interior of the bus, the agents had sufficient probable cause to search inside.[166] This alert he added, provided sufficient probable cause "to believe that some person or persons on the bus were in possession of illegal narcotics."[167] Therefore, it was not unreasonable to lead the canine inside the bus in an attempt to discover the location of the narcotics.[168] Judge Kazen concluded that leading the canine towards the bathroom was "as reasonable, if not more so," than *Garcia-Garcia's* request to evacuate all persons on the bus.[169]

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160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 3.
165. *Id.* at 4.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

The Supreme Court first addressed this issue in *United States v. Di Re*.[170] In *Di Re*, the government asked the court to extend the right to search a vehicle to include a person in instances where the contraband sought is a small article easily concealable on the person.[171] The court responded that there was reasonable cause to search the car, but asked whether that conferred an incidental right to search Di Re.[172] The Supreme Court resolved the issue by stating that it was not convinced that a person's mere presence in a vehicle suspected of containing contraband, loses his or her immunities from a search to which everyone is entitled.[173]

Years later in *Ybarra v Illinois*,[174] the court again revisited the issue, holding that probable cause to search a bar for narcotics did not translate into probable cause to search the patrons inside.[175]

It is important to note that when evaluating whether the valid search of a vehicle extends to its passengers, the court in *Di Re* gave little importance to the possibility that a passenger in the vehicle could well be involved in the illegal activity in question.[176] Thus, the opinion clearly rejects the notion that an alert to the interior of the bus necessarily means that agents have probable cause to believe that a person or persons inside the bus were in possession of illegal narcotics. The soundness of this position is further compromised when, as in *Garcia-Garcia*, the vehicle is a commercial passenger bus that transports many more people who ordinarily have minimal, if any, association with each other.

On appeal, the Fifth Circuit rejected the trial court's reasoning, finding that "[w]hile the sniff alert to the undercarriage of the bus provided probable cause to search the vehicle, it did *not* automatically also provide probable cause to search the individuals in the vehicle."[177] Quoting from *Ybarra*, the court stated:

> [W]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments

170. 332 U.S. 581 (1948).

171. *See* United States v. Di Re, 332 U.S. 581, 586 (1948).

172. *Id.*

173. *Id.* at 87.

174. 444 U.S. 85 (1979).

175. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

176. *See* Di Re, 332 U.S. at 586-87.

177. United States v. Garcia-Garcia, 319 F.3d 726, 730 (5th Cir. 2003).

protect the 'legitimate expectations of privacy of persons, not places.'[178]

2. Insertion of the Canine in the Bus

Unlike the trial court in *Kelly*, which relied directly on *Horton* to find that the canine sniff of a person at the border is a search, Chief Judge Kazen limited *Horton* to its own facts and ignored the court's finding in *Kelly*.[179] Besides *Kelly* and *Horton*, other decisions support Garcia-Garcia's conclusion that the dog's entrance into the passenger compartment of the bus and its subsequent alert on his leg was a search. These opinions actually focus on the propriety of the practice of using canines on people.

While canine sniffs have been upheld in areas such as a train's sleeper compartment aisle[180] and a hotel corridor,[181] these holdings are distinguishable because they involved canine alerts on things rather than persons. More importantly, *United States v. Colyer*[182] considers it significant that in *Place*, the luggage searched was completely removed from the suspect's presence.[183] *Colyer* also notes that a similar concern was addressed by *United States v. Beale* (*Beale III*),[184] where the Ninth Circuit deemed it important that in both *United States v. Jacobsen*[185] and *United States v. Place*,[186] the Supreme Court approved investigative techniques that did not require contact with the owner of the items being searched.[187] The *Colyer* court elaborated and determined that the fact that the items in *Jacobsen* and *Place* were completely removed from their owners' posses-

178. *Id.* at 730 (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)); *see* United States v. Munoz, 957 F.2d 171, 173 (5th Cir. 1992). "Officers executing a search warrant of a particular premises may not search a person found on the premises absent individualized probable cause." *Id.*

179. *Compare* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), *with* United States v. Garcia-Garcia, Memorandum and Order, No. L-01-727, at 3-4 (S.D. Tex. Oct. 17, 2001) (on file with author).

180. *See* United States v. Colyer, 878 F.2d 469, 472 (D.C. Cir. 1989).

181. *See* United States v. Roby, 122 F.3d 1120, 1124-25 (8th Cir. 1997).

182. 878 F.2d 469 (D.C. Cir. 1989).

183. *See Colyer*, 878 F.2d at 476; *see also* LAFAVE, *supra* note 55, at 373 (noting *Place* addresses only the situation of exposure of luggage to the dog in the suspect's absence).

184. 736 F.2d 1289 (9th Cir. 1984) (*en banc*).

185. 466 U.S. 109 (1984).

186. 462 U.S. 696 (1983).

187. *See* United States v. Beale (Beale III), 736 F.2d 1289 (9th Cir. 1984) (en banc); *see also* United States v. Jacobsen, 466 U.S. 109, 121-22 (1984); United States v. Place, 462 U.S. 696, 707 (1983). For a complete examination of *Beale*, see Williams F. Timmons, *Re-examining the Use of Drug-Detecting Dogs Without Probable Cause*, 71 GEO. L.J. 1233 (1983).

sion is subsumed by compelling concerns regarding overbearing and harassing investigative procedures.[188] The court refrained from confronting the scenario set forth in Justice Brennan's dissent in *Jacobsen* wherein officers allowed a trained dog to randomly roam the streets and alert them to people carrying drugs.[189] The *Colyer* court declined to address whether in-person confrontations by a canine would constitute a search and seizure, and likewise reserved a determination of whether other problems inherent in such a practice exist for "another day."[190]

Unlike the scenarios in *Colyer* and *Roby*, where each court found no risk that the dog would come in contact with people, the canine's mere presence on the bus walkway, given its design (similar to the pedestrian walkway in *Kelly*), was itself overbearing, annoying, harassing, and dangerous. Moreover, allowing the canine to roam between aisles of occupied seats gave it the discretion to stick its nose on whomever and in whatever manner it pleased, which it promptly did.[191] The "another day" contemplated in *Colyer* is now upon us.

On appeal, the Fifth Circuit made no comment whatsoever regarding the border patrol agent's practice of allowing his canine to roam the interior of the occupied bus. It assumed that the unmuuzzled canine could be allowed to *lead its handler* down the walkway of the interior of an occupied bus. The panel was content to note that "Garcia admits that the dog did not hurt him in anyway, either by scratching him, knocking him over, or biting him."[192] Beginning with *Kelly*, the Fifth Circuit is currently assuming a wait and see approach, where it will allow law enforcement full authority to employ canines on people, and perhaps will evaluate the intrusiveness of a canine sniff only when a person—of any age—is scratched, knocked over or bitten in the process. This is far from the cautionary tone expressed in *Horton*.[193] As the protector of the people's right not to be subjected to warrantless and unreasonable searches, the court has demonstrated a reckless disregard for the safety of large numbers of pedestrians who enter our borders, and an equally large number of people who travel in the border region.

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188. *See* United States v. Colyer, 878 F.2d 469, 476 (D.C. Cir. 1989).

189. *See id.*; *see also Jacobsen*, 466 U.S. at 138.

190. *Colyer*, 878 F.2d at 476 n.6.

191. *See id.* at 476 (implying that it is the degree of proximity to, and not the actual contact with a person, that determines whether the dog's conduct constitutes a search) (citing United States v. Jacobsen, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting)).

192. United States v. Garcia-Garcia, 319 F.3d 726, 728 (5th Cir. 2003).

193. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 479-80 (5th Cir. 1982) (describing the high degree of intrusiveness and subsequent fear inherent in a canine sniff upon a person and concluding that the sniff was a search under the Fourth Amendment).

3. Was Garcia-Garcia Searched?

But even assuming that law enforcement agencies could eventually devise a safe and unintimidating manner for sniffing people with canines,[194] what degree of suspicion must be demonstrated by law enforcement authorities to support its use at a checkpoint?

Relying on *Kelly* and *Horton*, the appellate panel assumed, "'without deciding,' that a dog sniff of an individual is a search when the dog also makes contact with the individual's body," and therefore, "such a search is analogous to a frisk or pat-down of the type envisioned by the Supreme Court in *Terry v. Ohio*."[195] In evaluating the reasonableness of the search of Garcia-Garcia's body, the court stated "[w]hile the dog's initial alert in the luggage bin did not provide individualized reasonable suspicion to search Garcia, the dog's subsequent alert in the aisle of the bus did provide reasonable suspicion that Garcia possessed the drugs that the dog sensed."[196] The court added:

> [w]hen the dog then indicated to Garcia by crawling under his seat, sniffing him more closely and touching its nose to Garcia's shoes and lower leg, that sniff-and-contact search was reasonable given that, as we stated in *Horton* and reiterated in *Kelly*, the sniff-and-contact is the fundamental equivalent of a Terry stop.[197]

So while the court found that the canine's actions in this case constituted a search, with one wipe, it also reduced the government's burden in performing the search of a person at a checkpoint[198] from probable cause, to reasonable suspicion. For the reasons given in this portion of this article dealing with *Kelly*, the author believes that a canine sniff of a person, especially by contact, is more intrusive than a Terry search—more commonly known as a Terry pat-down search. While it is one thing to analogize the level of intrusiveness of a full Terry search with the sniff-and-contact search of a person, it is quite another to employ this similarity as a justification for requiring the same reasonable suspicion predicate for each.

The court's reliance on *Horton* to reach its conclusion is erroneous. As previously discussed, while *Horton* required only a showing of particular-

194. In *Garcia-Garcia*, the canine handler acknowledged that he does not allow his canine to come too close to people because of concerns about "liability." United States v. Garcia-Garcia, Memorandum and Order, No. L-01-727 (S.D. Tex.-Laredo Div. Oct. 17, 2001) (on file with author).

195. *Garcia-Garcia*, 319 F.3d at 730 (citations omitted).

196. *Id.* at 731.

197. *Id.*

198. *See* United States v. Portillo-Aguirre, 311 F.3d 647, 652 (5th Cir. 2002); United States v. Martinez-Fuerte, 428 U.S. 543, 558, 567 (1976).

ized suspicion to justify the up-close search of students, the court did so only after it determined that they were confronted with a special need to protect children from a drug environment. Recently, the Supreme Court in *City of Indianapolis v. Edmond*[199] provided a list of those circumstances that require less than probable cause to allow a search.[200] Those involve certain regimes that demand suspicionless searches to meet special needs, which reach "beyond the normal need for law enforcement."[201] Our case involved a search for the purpose of uncovering general crime at an immigration checkpoint. In *Garcia-Garcia*, the Fifth Circuit fails to acknowledge that probable cause is presumed to be required before Garcia was searched by the canine. The court's reliance on *Kelly* is also mistaken. Unlike the case at an immigration checkpoint, border-search precedent recognizes the concept of a pat-down search for the purpose of finding all types of contraband.

The court's simplistic approach also ignores the fact that a *Terry* pat-down search is unique in the world of the Fourth Amendment jurisprudence. In creating the *Terry* search, the Supreme Court focused on the officer's objectively reasonable fear for his or her safety, not the officer's simple desire to discover contraband, such as drugs (or even weapons), which was the sole purpose of the search of Garcia-Garcia's body.[202] In fact, the Supreme Court has refused to accept anything less than probable cause when evaluating the "touch and feel" search of a person's clothing.[203] And most recently, in a case arising out of the Fifth Circuit, the

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199. 531 U.S. 32 (2000).

200. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000); *see also, e.g.*, Vernonia School Dist. v. Acton, 515 U.S. 646 (1995) (allowing for random drug testing of student-athletes); Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (mandating drug tests for United States Customs Service employees seeking transfer or promotion to certain positions); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (providing for drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations).

201. *Edmond*, 531 U.S. at 37.

202. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968). The Supreme Court also distinguished between the two principal government interests behind the Terry stop. The Court noted that the governmental interest in crime prevention alone was not enough to justify the Terry stop. Instead, it relied on the "more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23.

203. *See* Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (invalidating a Terry search based on the fact that the illegal character of the object was not readily identifiable based on the Terry pat-down alone and because the officer lacked probable cause to conduct a further search). In his concurring opinion, Justice Scalia wrote: "I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning. . . . As a policy matter, it may be desirable to permit 'frisks' for weapons, but not to encourage 'frisks' for drugs by admitting evidence other than weapons." *Id.* at 381-82 (Scalia, J., concurring).

"touch and squeeze" of a person's luggage, coincidentally, also took place inside a commercial bus at an immigration checkpoint.[204] Despite the holdings in *Dickerson* and *Bond*, both of which involved searches of a clearly less-intrusive nature, the Fifth Circuit continues to look the other way. Failing to pay heed to the concerns of other circuits and judges who question whether canines should even be allowed into the close proximity of humans, the Fifth Circuit has opted to allow sniff-and-contact searches of people for the purpose of detecting general crime with only a simple finding of reasonable suspicion.

In sum, while the panel recognized the Supreme Court's holding in *Ybarra*, and held that probable cause to search a vehicle does not translate into probable cause to search its passengers, its later reasoning rendered the acknowledgment meaningless. After *Garcia-Garcia*, there is nothing to stop law enforcement authorities from introducing canines to sniff the interior of an occupied vehicle, which will *at the very least* result in highly intrusive contact with its passengers. As it did in *Outlaw* and *Kelly*, the Fifth Circuit in *Garcia-Garcia* has again taken the easy road by failing to address the complexities of these issues of first impression.

V. CONCLUSION

It is undisputed that a properly trained canine is highly reliable as a detection tool for law enforcement. However, in order for the practice to pass Fourth Amendment muster, it is necessary for the courts to require that the government demonstrate accountability by producing proper documentation. This documentation should demonstrate that a canine is properly trained to detect the substance the handler claims the canine alerted to. Further, the documentation should also demonstrate the reliability of the canine. For this to occur, the Fifth Circuit must overrule *Williams* in favor of the training-reliability majority view. Only then will the respective law enforcement agencies begin to require the creation and maintenance of this documentation.

Despite a disappointing end to a promising start in *Outlaw*, Judge Furgeson has again exposed *Williams*' deficiencies as the Fifth Circuit's controlling precedent on whether a canine's reliability will be subjected to meaningful testing. In the meantime, via discovery and suppression hearings, lawyers must continue to inquire whether the canine in question is trained and re-certified by accepted standards other than the untested, and largely unknown methods presently claimed to be in use by law enforcement agencies. Lawyers must also continue to inquire whether the canine meets the minimum standards of reliability.

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204. Bond v. United States, 529 U.S. 334, 338-39 (2000).

With *Kelly* and *Garcia-Garcia*, the United States Court of Appeals for the Fifth Circuit has left many questions unanswered about the search standards used to govern canine sniffs. Hopefully, with the help of a more active defense bar, these issues will soon be resolved in a proper and workable manner.