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Introduction

The ability of a properly trained drug detection canine to detect the odor of controlled substances is widely acknowledged in the scientific and legal communities. A canine will alert to the level of controlled substance consistent with its training. A canine's ability to locate controlled substances is dependent on its ability to locate a source for the scent. An overwhelming amount of controlled substance can frustrate the canine's ability to detect a source of scent. It is likewise believed that a canine's ability to detect very large quantities of controlled substances depends on the training the canine has received on larger quantities of controlled substances.

Historically, an alert by a drug canine has provided the probable cause necessary to search or arrest.¹ In recent years, however, while accepting the admissibility of the evidence, courts are challenging the weight to be afforded the canine's testimony.² Courts are generally reluctant to consider the fact of the canine's alert as conclusive proof of the guilt of the defendant or the forfeitability of property. In addition, a court is not likely to give the handler's testimony great weight unless the canine and its handler are certified as experts in detecting the odor of controlled substances. The courts will, therefore, allow the defendant/claimant wide latitude to cross-

¹Florida v. Royer, 103 S.Ct. 1319, at 1328 (1983); United States v. Ludwig, 10 F.3d 1523 (10th Cir. 1993); United States v. Sinclair, 983 F.2d 598, 601(4th Cir. 1993); United States v. Knox, 839 F.2d 285, 294 n.4 (6th Cir. 1988); United States v. Waltzer, 682 F.2d 370 (2nd Cir. 1982); United States v. Race, 529 F.2d 12 (1st Cir. 1976).

²See, e.g., United States v. \$5000 in U.S. Currency, 40 F.3d 846 (6th Cir. 1994) (drug canine alert determined to have 'minimal' evidentiary value); United States v. Ludwig, 10 F.3d 1523, 1538 (10th Cir. 1993) (canine alert might not give probable cause if canine has poor accuracy record); United States v. \$67,220, 957 F.2d 280, 285 (6th Cir. 1992) (training and reliability of canine must be established to support probable cause derived from alert); United States v. \$80,760.00 in U.S. Currency, 781 F. Supp. 462 (N.D. Tex. 1991); United States v. Bagley, 765 F.2d 836 (9th Cir. 1985).

examine the canine at his weakest link--the handler. An effective cross-examination of the canine's training, and the handler's technique and record-keeping can impact negatively on the reliability of the canine-- all factors which again go to the weight to be afforded the canine's testimony. It is crucial to sustain this testimony because in many cases, particularly where a search of a vehicle is involved, the court will be deciding the appropriateness of a subsequent warrantless search based primarily upon the canine's alert. Where the court determines the canine is not a reliable witness, the evidence will be suppressed.

This guide is designed to suggest ways the canine handler and prosecutor can strengthen the impact of canine alert "testimony" in court. Each time an alert is made, the handler should be prepared to document and describe that alert in court. The prosecutor, likewise, should expect a defense challenge to a positive canine alert and should be prepared to meet that challenge. The goal of this guide is to give the canine's "testimony" the greatest possible weight with respect to the ultimate issue--the presence of drugs or the forfeitability of the seized property. This guide is not a statement of standard operating procedures, mandates or requirements, nor is it to be inferred or implied that a canine handler has been deficient in any respect for not operating in a manner consistent with the suggestions set forth in this guide.

This guide is divided into four topic areas: [1] Training, certification and recertification; [2] Effective use of the drug canine; [3] Case law -- established parameters governing the use of the canine, and [4] Preparing for trial in which the canine testimony will be central.

1 Training

The tremendous success of the drug canine in the last ten years has prompted a demand for drug canines among agencies which had not previously employed a drug canine unit. The marketplace responded by providing canines which have been trained by a wide variety of methods and with varying degrees of success. Because of this assortment of training methods, some general comments with respect to the acquisition of the drug canine are in order. It is recommended that a canine be acquired which will be trained with the department handler as a team, instead of purchasing a "pre-trained" canine and pairing it with a handler. The advantage to training the canine and handler together is that the handler learns how to direct and "read" his canine, and the canine learns how to respond to the handler, and is not allowed to develop any bad habits in the training process. In addition,

the trained canine team should be certified by an organization which has no financial interest in the training process.

Departments which are inclined to develop a drug canine interdiction program should select a facility which trains canines to alert to the scent of controlled substances, rather than pseudo-narcotics. It has been demonstrated that an experienced canine will not alert to methylbenzoate, a commonly used "pseudo-cocaine." Training with the pseudo substances may train the canine away from the narcotics and onto the pseudo substances. Initial training should avoid training with masking agents in the same location as the controlled substances because of the risk of contamination and the creation of incorrect association in the canine with the masking agents.

The training program should also insure that the canine is significantly challenged by progressively increasing and decreasing the amount of controlled substance in the sample to be searched to expose the canine to various levels of controlled substances.

The department must exercise the utmost caution against taking any unorthodox action with respect to training or retraining in order to avoid handing the shrewd defense lawyer a ready-made means of casting doubt on the reliability of the canine's testimony. As an example, departments should be discouraged from trying to cross-train a patrol canine or a canine which has been trained to detect explosives or currency to become a drug canine. Even though it may cost less to cross-train a canine in that fashion, the risk of obtaining a confused or muddled result from such a canine and the damage to the canine's reputation outweighs the savings to the department. Since the canine cannot testify as to what it is alerting, a canine which is trained to detect anything in addition to controlled substances provides the opposing party the means of diminishing the reliability of the canine's alert. The same principle holds true with respect to the "type" of alert used by the canine -- a handler should never be in the position of trying to explain on the witness stand (particularly in a situation where the canine has found currency) how his canine has an "old" and "new" alert, and how the two totally unrelated actions could each tell the handler that drugs or drug residue is present.³

The canine should be trained to alert in one manner, and

³ United States v. Lambert, 834 F.Supp. 1318, 1324 (D. Kan., 1993).

that manner should remain consistent throughout the canine's career.

1.1 Canine and handler commitment to the program

A canine handler has a 24-hour a day responsibility. The handler should appreciate this responsibility before accepting this position.

1.2 Department commitment to the canine and handler

The department must support the team by providing the time, facilities, and equipment necessary for continuing canine education. The department must have in place policy and procedures governing the use of the canine. The department must also support the acquisition of controlled substances for continued canine training.

1.3 Post-training requirements

Technically speaking, the only "post-training" period the canine should experience is its retirement. The process of training should continue on a consistent basis following the initial certification of the drug canine. Continuing canine training may be disguised as playtime through the use of a terrycloth towel which has been contaminated with the odor of a controlled substance, or it may take the form of more complex forms of training, such as "proofing" (discussed infra). Whatever the form, training should be consistent, habitual, documented, and supported by the department.

1.4 Certification and Recertification

It is imperative that the canine be recertified on an annual basis at the facility which originally trained the canine, or a comparable facility which has a recertification program. The agency involved in the recertification should be a neutral, objective third party with no involvement in the continuing training of the canine. The recertifying official should be qualified to testify as an expert witness in the field of canine training. Voluntary state associations of law enforcement officers should consider establishing a recertification program for the benefit of their members who are canine handlers.

2 Effective Operation of the Drug Canine

The procedures described in the following section are suggested to insure that a properly trained narcotic detection canine and handler will provide the strongest testimony possible when called to testify.

2.1 Documentation

One of the greatest areas of attack of the canine's testi-

mony is over the lack of documentation of the canine's professional life, including records detailing training, certification, and operational history. The department which utilizes the drug canine must provide the administrative support to facilitate this record-keeping on the part of the handler, and should encourage the handler to maximize his record-keeping. Courts have ordered canine records produced to allow a defendant to prepare a cross-examination of canine handlers,⁴ and have suppressed drugs found by canine alert where the handler's inconsistent testimony and inadequate record-keeping destroyed the canine's reliability.⁵ Competent record-keeping is absolutely essential to maintaining an effective canine program.

Each time the drug canine is called upon to screen vehicles, luggage, packages, or currency, the time, manner, place, and circumstances involving each instance where the canine alerts should be thoroughly documented by the canine handler. This information, in addition to a short description of the particulars of a positive alert (i.e. in a vehicle screen, where the canine alerted, and what, if anything, was found at the source of the alert; in a luggage or package screen, any unusual aspects of the canine's alert. A current, concise, legible canine ledger will reinforce the handler's professionalism before the trier of fact, as well as serving as a testament to the canine and canine handler's success. In many cases, the presence of a properly-maintained log will spell the difference between winning or losing at trial.⁶ Appendix A contains a sample "Drug Canine

⁴United States v. Lambert, 834 F.Supp. 1318 (D. Kan.1993); contra United States v. Gonzalez-Acosta, 989 F.2d 384 (10th Cir. 1993) (denial of defendant's motion to produce training records upheld on appeal on grounds that defendant could not show that material sought was 'relevant'); United States v. Ollison, 1995 U.S. Dist. Lexis 207(N.D. Ill. 1995) (defendant required to show that canine training records are 'material' to the preparation of his defense before court will order production of records).

⁵United States v. Florez, No. 94-0222, slip op. at 29 (D.N.M., Oct. 17, 1994) ("...[W]here records are not kept or are insufficient to establish the dog's reliability, an alert by such a dog is much like hearsay from an anonymous informant..." at p.29).

⁶United States v. \$67,220 in U.S. Currency, 957 F.2d 280,285 (6th Cir. 1992) (the impact of the canine alert substantially weakened by a lack of evidence of the reliability of the canine); United States v. \$30,060.00, 39 F.3d 1039 (9th Cir. 1994) (positive canine alert diminished by unrebutted testimony of wide-

Utilization Report", which should be used to document the performance of the canine on a monthly basis. The key to establishing the reliability of the canine is documentation of the canine's performance record.⁷

2.1.1 Training records

Documentation of training provided to the canine should include the date, location, and duration of training, accreditation of trainer, the identity and quantity of substances on which the canine has been trained, any specialty training given to the canine, i.e. proofing off masking odors, and the canine's performance in various search modes, i.e. vehicles, packages, and rooms.

2.1.2 Search and seizure records

For the same reason, the handler must maintain accurate records detailing the canine's search and seizure activities. The handler should keep a log in which is recorded the date and location of the search activity, the type and amount of controlled substance discovered, the presence of masking agents or other indicia of trafficking, and a search summary which describes the type of search conducted, who requested the search, and any other contraband seized. The goal is not to overburden the handler with paperwork, but to insure that he can, when called upon, testify convincingly concerning the canine's experience. Appendix B consists of a sample "Drug Canine Alert Report" which suggests a format to be used to document each instance in which the canine alerts.

2.1.3 Currency testing records

It is as important to document alerts as well as non-alerts to currency. Documenting those instances in which a canine alerts is essential in demonstrating that the canine can detect controlled substances. Conversely, documenting those instances in which currency is placed in a neutral location for the canine's examination, and where the canine does not alert, is

spread currency contamination).

⁷See, e.g., United States v. Nielsen, 9 F.3d 1487, 1491 (10th Cir. 1993) ["...if this were a case of an alert by a trained drug sniffing dog with a good record, we would not require corroboration to establish probable cause.(emphasis added)]; Florez, slip op. at p.27("In cases such as this, where documentation of a dog's daily field activities are not kept, it is impossible to rehabilitate a dog's apparently unreliable performance record, when it is the sole basis for probable cause, without corroboration").

especially critical to counter the popular and unsubstantiated theory that drug canines are actually alerting to the smell of the currency itself, or that the contamination of currency in general circulation with drug residue triggers a canine alert to all currency. The canine handler should conduct periodic canine examination of currency drawn from local banks as an additional tool in countering the contaminated currency myth. Appendix C contains a "Non-Seized Currency Screening Log" on which to document those canine inspections of currency drawn from local banks. The form also contains space in which to document any chemical analysis of the currency, which may be used to further corroborate the canine non-alert to currency in general circulation.

2.2 Corroboration of Canine Alert

2.2.1 Following seizure of currency

The report of even the most reliable canine may be discounted by the court which does not believe that a canine alert, standing alone, provides the drug connection necessary to establish probable cause for forfeiture⁸. An attempt should therefore be made to corroborate the canine alert through an Ion Scan or ISD (Illicit Substance Detector) sweeping of the area to which the canine alerted, the container in which the currency was carried, the pockets and hands of the courier, and the interior of any luggage carried by the courier and their companions. A plan is currently being developed to equip the Dallas-Ft. Worth Airport Task Force with the Ion Scan collectors so that evidence of drug residue contamination on areas **other than on the currency** will be available to corroborate the canine alert if the forfeiture matter is litigated.

2.2.2 Following non-seizure alert

The handler should be prepared to document instances in which an alert is made but no substance is located. An effort should be made to corroborate the canine alert, to counter any suggestion that the canine has made a false alert, by developing evidence that a controlled substance at one time was present in the vehicle, box or suitcase to which the canine alerted. This corroboration may be achieved by simply asking the traveller if they could explain why the canine alerted. If asked, the traveller may acknowledge prior drug usage by "friends" to explain the canine alert on their luggage.

The Ion Scan or ISD sweeping should also be used to corroborate

⁸United States v. \$5000; United States v. \$67,220; United States v. \$80,760; United States v. \$30,060.

rate the canine alert. Other methods of corroboration may include investigating the traveller by consulting the DEA's El Paso Intelligence Center (EPIC), NADDIS, or the NCIC data base for information which ties the traveller to drug trafficking. The "Canine Alert Report" contained in Appendix B contains space in which to validate the so-called "false positive" alert where no drugs or money are discovered. This form, or its equivalent, should be completed each time the canine alerts.⁹

2.3 Proofing.

The handler should also be open to the possibility that the canine is alerting to familiar non-drug scents which had recently been present in combination with drugs. "Proofing" is the term used to describe the periodic examination of masking odors and other substances to insure that they do not trigger an alert by the canine. These should include packaging materials, tape, plastic, dryer sheets, etc. It is likely that the court will not accept at face value the assertion that the drug canine does not make mistakes. The handler who identifies problem areas and documents the corrective action taken will likely find a more receptive audience on the bench.

In addition, this process should include the use of uncirculated currency, which can be obtained in shredded form from the Federal Reserve Bank. A common defense argument is that the drug canine, by design or adaptation, is alerting to something in currency other than the drug scent (i.e. the ink, linen bond). The objective of the "proofing" is to insure that the canine, with the proper reinforcement, both positive and negative,

⁹United States v. Ornelas-Ledesma, 16 F.3d 714 (7th Cir. 1994) (inevitable discovery of drugs by drug canine struck down on appeal where "[N]o evidence was presented concerning the dog's capabilities. For all we know he is an infallible sniffer of two kilograms of cocaine...but we cannot take judicial notice of this fact." at 721. The Court of Appeals, on its own, researched the canine and located a "false" alert in a 1987 case); Florez, slip op. at p.24-25 ("The testimony elicited from Officer [L.] did little to establish [the canine's] reliability or clarify his record....The Court finds this testimony inconsistent and not sufficiently credible to establish [the canine's] reliabilityit demonstrates the vital importance of maintaining accurate records on each and every alert [the canine] makes--whether an accurate-positive alert which results in the seizure of drugs or a false-positive alert where no drugs are found....[w]ithout these records, the government was unable to explain the number of false alerts brought to the Court's attention.").

distinguishes the target scents from other scents, including the scent of currency. The handler should thoroughly document steps taken to "proof" the canine away from the non-drug scents.

2.4 Degradation analysis

Defense lawyers have introduced evidence of chemical analysis which suggests that some currency in general circulation may be contaminated to some degree with microscopic particles of controlled substances. This analysis has not established, however, that a canine will therefore alert to all currency. Many canine experts believe that the canine alerts to the scent of drugs, which will be present even though the drugs have been subsequently removed. Those factors which impact the canine alert include the length of time the currency has been packaged with or in proximity to the controlled substances, the amount of controlled substances, and the method of packaging. The length of time the scent will remain on currency is subject to many variables, including the environment.

One theory suggests that calculating the degradation of the drug scent on currency may refute the defense argument that a canine will alert to all currency (because all currency is contaminated). This test involves tainting currency (to which the canine has not previously alerted) with the **scent** of controlled substances for a period of 24 to 48 hours by sealing the currency in an airtight container with an amount of controlled substances. Following retrieval of the currency, it should be presented to the drug canine(s) at intervals to calculate the length of time the scent will remain detectable. It is especially critical to this test to document the point at which the canine no longer alerts. Proper record-keeping of this activity on the part of the handler may be persuasive at trial in a currency forfeiture matter.

3 Judicial Treatment of the Canine Alert

The use of a canine to examine the odors emanating from an inanimate object is not a search.¹⁰ The means of getting the canine into a position to sniff the object may be a search, though, depending the degree of law enforcement intrusion involved. The law with respect to canine interdiction operates from the basic premise that an increasing level of intrusion requires a greater level of "proof of criminal activity"--i.e.:

	Low	Medium	High
Consensual Encounter	No Suspicion Required		
Investigative Detention		Reasonable Suspicion	
Search or Arrest			Probable Cause

consensual encounter demands no articulable suspicion of criminal activity or presence of contraband;

investigative detention demands reasonable, articulable suspicion of criminal activity or presence of contraband;

search or arrest demands a determination of probable cause to believe that criminal activity has occurred or that contraband is present.

In most instances, the canine intervention will begin with a detention based upon a reasonable suspicion of criminal activity or the presence of contraband. As a judicially-crafted standard, the amount of detention which will be considered "reasonable" and will not necessitate the degree of probable cause required to justify an arrest or search varies from Circuit to Circuit, and depends to a certain extent on the location and circumstances of the initial investigatory stop. The objective is to keep the suspect in place long enough to employ the canine. The key is to accomplish that objective with the smallest degree of intrusion.

¹⁰ United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983).

First and foremost, a detention can easily be transformed into a search, notwithstanding the officer's intention, by the mere passage of time. According to Florida v. Royer, 460 U.S. 491, 500; 103 S.Ct. 1319 (1983), "An investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Detentions which last longer than is reasonable to complete the investigation have been deemed "seizures", for which probable cause is necessary.¹¹

An intrusion which is determined to be a seizure, and for which probable cause does not exist will likely result in the suppression of that evidence derived after the seizure, which in most cases will be the evidence of the canine alert, the drugs themselves, or inculpatory statements from the couriers. Where currency is discovered, all evidence relating to the canine alert, currency denominations, drug contamination, or source of the bills (drug ledgers) will be excluded from consideration by the court in the forfeiture proceedings.

The key factor in determining whether a seizure occurred is the extent to which the traveler's movement is disrupted by the investigatory intervention. The following section discusses the particular situations in which a detention may be necessary and the particular problems which may arise as the officer attempts to employ the drug canine without transforming the detention into a seizure.

3.1 Airline Passengers

Courts are very sensitive to the 'sanctity of the constitutional rights to freedom of movement and travel'.¹² The disruption of a passenger's travel is the paramount concern of courts which have evaluated the permissibility of canine inspection of luggage. The Supreme Court has determined in United States v. Place that the limitations on investigative detention of a person should also define the permissible scope of an investigative detention of the person's luggage.¹³ The reasoning behind such a rule is that detention of luggage can effectively restrain a person due to the disruption of their travel plans. For that reason, the detention of luggage taken from a passenger must be

¹¹United States v. \$191,000, 16 F.3d 1051 (9th Cir. 1994); United States v. Lovell, 849 F.2d 910 (5th Cir. 1988);

¹²Brower v. County of Inyo, 489 U.S. 593, 109 S.Ct. 1378 (1989); Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 106 S.Ct. 2317 (1986).

¹³Place, 103 S.Ct. at 2645.

for as brief a period as possible and with as little disruption to the passenger as possible. The Place Court has determined that a detention of a passenger's luggage for 90 minutes is sufficient to render the detention an unreasonable seizure.¹⁴ The Place Court also found that the seizure was exacerbated by the officers' failure to advise the passenger where they were taking his luggage, how long they anticipated the detention would last, and what arrangements would be made for the return of the luggage if the canine inspection was negative.¹⁵ A two-hour detention of a passenger's luggage at the destination, caused by a delay in obtaining the services of a drug canine, was held to be an unreasonable seizure, where the officers had not requested canine assistance until after the passenger's bags had been detained.¹⁶

Circuits vary on what amount of time constitutes an unreasonable detention,¹⁷ and the 90 minute-delay proscribed by the Place Court should by no means be viewed as the "outer limits" of permissible delay. It is fairly certain that a delay of 20 to 30 minutes will not be considered an unreasonable delay where the officers move with diligence to develop probable cause.¹⁸

Luggage which has been given to the airline for transportation is treated in an entirely different manner by courts. The canine inspection of luggage in transit between airplanes is held not to be a search, and no level of suspicion is required to

¹⁴Id., 103 S.Ct. at 2646.

¹⁵Id.

¹⁶United States v. \$191,910.00 In U.S. Currency, 16 F.3d 1051, 1061 (9th Cir. 1994).

¹⁷United States v. Frost, 999 F.2d 737 (3rd Cir. 1993) (80 minute delay reasonable); United States v. McFarley, 991 F.2d 1188, 1193 (4th Cir. 1993) cert. denied 114 S.Ct. 393 (38 minute delay reasonable); United States v. Hooper, 935 F.2d 484, 495 (2nd Cir. 1991) (30 minute delay reasonable); United States v. Mondello, 927 F.2d 1463, 1471 (9th Cir. 1991) (30 minute delay reasonable); United States v. Nurse, 916 F.2d 20, 24 (D.C. Cir. 1990) (20 to 30 minute delay reasonable); United States v. Sterling, 909 F.2d 1078 (7th Cir. 1990) (75 minute delay reasonable); United States v. Campbell, 627 F.Supp. 320, aff'd 810 F.2d 206 (D.Alaska, 1985).

¹⁸United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 1575 (1985).

conduct that activity.¹⁹ However, the removal of the bag for human or canine inspection must not delay the bag's timely arrival at the destination of the traveller.²⁰ In this regard, courts will look to the officers' options short of seizure in determining whether an unreasonable detention occurred. The money courier who waits until the last moment to check-in for the departing flight may be assured, if he has been profiled and his checked bag intercepted, that he will ultimately recover the money if the interdiction efforts result in his bag missing the departing flight. Where it is apparent that a canine inspection of the luggage would delay the bag's timely departure/arrival, consideration must be given to relaying the information to officers at the destination for their investigation, follow-up, and possible seizure. The time the courier is airborne can be effectively used to develop additional factors to support a detention at the destination and build the probable cause for the arrest or seizure. The El Paso Intelligence Center (EPIC) is specifically designed to provide "real time" intelligence support to the interdiction effort and should be utilized whenever possible.²¹

3.2 Vehicles

The utilization of a drug canine in a traffic setting presupposes that the driver or registered owner of the vehicle has either consented to the vehicle search, and the canine is to be used to augment the officer's search, or that the officer possesses a reasonable and articulable suspicion of criminal activity, and the driver/owner has refused to consent to a search, and the canine is to be used to determine if probable cause exists to search the interior of the vehicle. Either way,

¹⁹ Place, 103 S.Ct. at 2648; United States v. Johnson, 990 F.2d 1129 (9th Cir. 1993); United States v. Daniel, 982 F.2d 146 (5th Cir. 1993); United States v. Massac, 867 F.2d 174 (3rd Cir. 1989); Lovell.

²⁰ United States v. Cagle, 849 F.2d 924 (1988) (seizure occurred when prolonged detention of bag resulted in it not being loaded on passenger's flight).

²¹ But see United States v. Ornelas-Ledesma, 16 F.3d 714 (7th Cir. 1994). The Court held that information stored in NADDIS is no more reliable than that of an informant of unknown reliability. "Therefore, since an uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, Illinois v. Gates, 462 U.S. 213, 227... (1983), an unverified, uncorroborated entry in NADDIS cannot do so either." at 718.

the traffic officer must be cautious in conducting his investigation to avoid unnecessarily delaying the motorist.²² The officer should interview the motorist to determine if reasonable suspicion exists to justify detaining the motorist in order to run a canine on the vehicle prior to the issuance of a citation. Delaying the motorist following issuance of the citation could be deemed an impermissible seizure.²³

If the driver/owner does not consent, the drug canine may be run on the exterior of the vehicle. A canine alert on the exterior of the vehicle justifies the warrantless search of the interior of the vehicle, as well as the warrantless search of packages contained in the vehicle.²⁴ **Note**, however, that an alert to one portion of a vehicle may not always provide a justification to search all portions of the vehicle.²⁵

Where the officer possesses reasonable suspicion to detain the vehicle, courts have been reluctant to impose a definitive time limit beyond which the detention becomes a seizure. The determinative factors are the diligence on the part of the officers and the remoteness of the location of the traffic stop. Generally, a delay of approximately one hour has been determined

²²Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150 (1984) (traffic stop must be "reasonably related in scope to the justification" for the stop); United States v. Shebazz, 993 F.2d 431, 437 (5th Cir. 1993) (questioning did nothing to extend the duration of the initial, valid seizure); United States v. Morales Zamora, 914 F.2d 200 (10th Cir. 1990).

²³ Contrast United States v. Hardy, 855 F.2d 753 (11th Cir. 1988) cert. denied 489 U.S. 1019, 109 S.Ct. 1137 (1989) (reasonable suspicion justified 60 min. delay following the investigation of the traffic stop) with United States v. Doe, 801 F.Supp. 1562 (E.D. Tx, 1992).

²⁴California v. Acevado, 500 U.S. 565, 111 S.Ct. 1982 (1991); United States v. Bloomfield, 40 F.3d 910 (8th Cir. 1994).

²⁵United States v. Seals, 987 F.2d 1102, 1107 & n.8 (5th Cir.) cert. denied 114 S.Ct. 155 (1993) (search of entire vehicle not justified where officers saw contraband being loaded into the trunk); United States v. Nielsen, 9 F.3d 1487 (10th Cir. 1993) (odor of marijuana in passenger compartment does not justify search of trunk).

to be reasonable, given the circumstances in each case.²⁶

3.3 Packages

Use of a drug canine to sniff packages in transit, per Place, does not constitute a search and no level of suspicion is required. Detaining packages in order to subject them to canine sniff, however, requires a reasonable and articulable suspicion of criminal activity.²⁷ The limited intrusion in detaining a package in transit in order to inspect it with a drug canine is reflected in decisions which have found delays greater than 29 hours not per se unreasonable under the circumstances of each case, where the officers moved expeditiously to bring the packages before a canine for inspection.²⁸

3.4 Trains and Buses

Drug canines may be used in the passageway of the sleeper compartment of a train to sample the air flowing from the individual compartments.²⁹ In addition, officers are not required to have more than reasonable suspicion to examine bags within a roomette with a canine due to the reduced privacy interest in the roomette.³⁰ No distinction is to be drawn between the baggage area of a airport and a baggage car of a train -- neither is private in the sense of a dwelling, and therefore the canine

²⁶United States v. White, 1994 Lexis 34219 (8th Cir. 1994) (80 minute delay reasonable due to diligence of officers and the distance from the canine); Broomfield, id. (60 minute delay reasonable); United States v. Frost, 999 F.2d 737 (3rd Cir. 1993) cert. denied 114 S.Ct. 573 (1993) (wait of almost one hour for drug canine reasonable).

²⁷United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029 (1970).

²⁸Id., (allowing delay of 29 hours); United States v. Aldaz, 921 F.2d 227, 230 (9th Cir. 1990) cert. denied, 501 U.S. 1207 (1991) (extending Van Leeuwen to justify 72 hour delay); United States v. Mayomi, 873 F.2d 1049, 1054 (7th Cir. 1989) (two day delay); United States v. Martinez, 1994 U.S. Dist. Lexis 17095 (S.D. N.Y. 1994).

²⁹United States v. Colver, 878 F.2d 469 (D.C. Cir. 1989). Unlike a residence or motel room, a canine sniff at a roomette vent is not a search due to the limited privacy interest in the roomette. The Court emphasized that this procedure did not subject the occupant to embarrassment and inconvenience.

³⁰United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988).

sniff of baggage without reasonable suspicion did not violate a Fourth Amendment right.³¹ In addition, the removal of luggage from an overhead rack on a bus for canine inspection does not constitute a seizure.³²

3.5 Buildings

The use of a drug canine to sniff the air outside of an apartment has been held to be a search, requiring probable cause, although that holding has been criticized.³³ In light of the opposition to this holding, it may not be considered persuasive outside of the Second Circuit.

The use of a drug canine to sniff the air outside of a commercial warehouse from an exterior door which abuts a public alley has been held not to be a search, requiring neither probable cause nor reasonable suspicion.³⁴

3.6 Persons

The canine sniff of a person where the canine's nose is "up against" the person it is investigating has been held so intrusive that it constitutes a search for which full probable cause

³¹United States v. Garcia, 1994 U.S. App. Lexis 34583 (10th Cir. 1994).

³²United States v. Graham, 982 F.2d 273 (8th Cir. 1992) (removal of suitcase from overhead luggage rack to aisle of bus to facilitate canine inspection was held to not be a seizure).

³³United States v. Thomas, 757 F.2d 1359 (2nd Cir.), cert. denied, 474 U.S. 819 (1985) and cert. denied, 479 U.S. 818 (1986), holds that a defendant has a reasonable expectation of privacy in the contents of his closed apartment, and the use of the drug canine impermissibly intrudes on that legitimate expectation. at 1367. The D.C. Circuit and the Ninth Circuit have criticized this holding, each citing United States v. Jacobsen, 466 U.S. 109, 123-24, 104 S.Ct. 1652 (1984) as support for their position that the detection of drugs by canine sniff outside a dwelling area does not compromise a legitimate privacy interest because the sniff could not reveal anything about noncontraband items within that area. See, e.g., Colyer, 878 F.2d at 475 (train sleeper compartment); United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir. 1993) (exterior of warehouse abutting an alley).

³⁴Lingenfelter.

is required.³⁵ Specifically left undecided in the Horton decision is whether using a canine to sniff a person **at a distance** is a search. In any situation other than that in which officers are authorized by law to examine persons by canine (at ports of entry, for example), the use of a canine to sniff a person at close proximity should generally be avoided.

³⁵ Horton v. Goose Creek School District, 690 F.2d 470, 479 (5th Cir. 1982).

4 Preparing The Canine Handler For Trial

The canine handler, having followed the proper procedures governing the use of the canine and having thoroughly documented the activities of the canine, must still be prepared to persuade a judge or jury that the canine is competent to detect the scent of drugs and that the handler is competent to interpret the canine's message. The government counsel, likewise, should be prepared to counter challenges to the canine's evidence, which often takes the form of evidence of currency contamination.

4.1 Predicate questions for direct examination of canine handler

The government attorney must be prepared to set out the qualifications of both the canine and the handler in a convincing manner at trial. The following is a sample of predicate questions which may assist the government attorney in doing this.

1. How long have you been employed in your present occupation and what is the nature of your duties and responsibilities?
2. What specialized training have you had in the handling of a drug canine? How long have you been paired with this canine?
3. What specialized training has the canine had in the detection of drugs? What was the canine required to do in order to successfully complete that training?
4. Has the canine been trained on controlled substances or "pseudo-narcotics"? Is it better to train a canine on controlled substances? What do you use when training your canine?
4. Describe the process by which the canine is certified to detect drugs and you are certified to handle the canine.
5. How often are you each recertified and describe that process?
6. How many hours per week do you train your canine? Describe the training activities and explain the importance of these activities to the canine's performance. Do you document this training?
7. Have you ever discovered that your canine was alerting to a scent other than a drug scent, and, if so, what steps have you taken to correct that behavior? Have you documented these instances?
8. Has the canine ever alerted and a subsequent search failed to reveal either drugs or money? In those instances, has your follow-up discovered evidence to suggest that drugs were in fact present at one time in that area? Have you documented these instances?
9. What quantity of drugs has your dog been trained on and what quantity do you use when training your dog?
10. How many times have you used your canine to examine currency? How many times has it alerted? Do you document those occasions when it has not?

11. Have you ever tested your canine with currency drawn from a bank to determine if your canine is mistakenly alerting just to the scent of currency in general circulation? Have you documented those instances?

12. Some people believe that most of the currency in general circulation is contaminated with drug residue, and that therefore a canine will always alert to currency, even currency in a bank. Based upon your tests with currency drawn from banks, is that a legitimate belief?

13. When seized currency is to be tested by canine, how is the testing area prepared and how is the currency handled to insure that the canine is not alerting to a scent other than the scent of drugs?

4.2 Challenging currency contamination evidence

The challenge to the canine alert which does not focus on the canine itself may take the form of an attack on the substance of the canine's "testimony", particularly where the canine alerts to currency. The most popular attack consists of a witness or publication whose central thrust is that the canine alert is meaningless because the majority of currency in general circulation is contaminated with drug residue. Support for this proposition comes in the form of newspaper, magazine, and law review articles citing "tests" and "studies" which "prove" that a huge percentage of currency in circulation is contaminated with drug residue. The most disturbing aspect of this matter is that courts are accepting this information into evidence and are relying on it to strike down forfeitures. How is the government counsel to counter this program? The following section sets out challenges which may be raised both to the admissibility of this evidence and the weight to be afforded it.

The weak link in the contamination proponent's argument is the presupposition that a direct correlation exists between the presence of micrograms of narcotics on currency and the drug canine's reaction, and therefore, the mere presence of minute contamination on a dollar bill will trigger a canine alert. Many canine experts believe that this presupposition ignores the scent factor-- that canines alert to the scent generated by narcotics, and that scent generation is governed by level of contamination, placement, temperature, humidity, and the air currents surrounding the sample. Until the correlation between scent and contamination is conclusively proven, an objection should be raised to the introduction of evidence of currency contamination as not relevant in a forfeiture proceeding. Key to the objection is the demonstration, by testimony of the canine handler, that the canine is routinely tested on currency drawn from banks without alert.

In the event counsel seeks the introduction of the results of tests on currency, the best evidence rule (Federal Rule of Evidence 1002) may be effective in excluding all but the original report of the tests from being admitted into evidence. In addition, all writings, including reports of test results, which are introduced by anyone other than the author to prove the truth of the matter asserted may be objected to as violative of the hearsay rule.

Finally, the report of tests on currency may be attacked as invalid due to an inadequate quantity of tests performed.³⁶ A sampling of the whole, in order to be statistically significant, must be representative of the sample pool. In light of the fact that there is approximately \$449,589,400,000. in currency in circulation, an analysis of 100 bills for evidence of contamination still is a sample of only 0.00002224251728355% of the currency in circulation.

5 Conclusion

The author's primary objective in writing this guide has been to stimulate the discussion regarding the impact of drug canine evidence in the courtroom, thereby challenging the canine handler and trial team to develop ways of strengthening that impact. Consequently, your comments are encouraged.

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³⁶See, e.g., Imwinkelried, The Methods of Attacking Scientific Evidence, §§10-6(A); 13-9 (2nd ed. 1992); Robert Knabe, Esq., The Contaminated Money Theory: Does It Really Diminish The Significance Of A Dog Alert In A Forfeiture Case, Metro Dade Police Department, Florida.

YEAR	MONTH
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CANINE _____

DRUG CANINE BUILDING PERIOD

HANDLER _____

	Total Alerts	Drug Seizures		Paraphernalia		Cocaine		Heroin		Marijuana		Morphine		MARIJUANA		Cocaine		Other		Notes
		Find	Amount / Pcs	Find	Amount / Pcs	Find	Amount / Pcs	Find	Amount / Pcs	Find	Amount / Pcs	Find	Amount / Pcs	Find	Amount / Pcs	Find	Amount / Pcs	Find	Amount / Pcs	
Automobiles																				
Trucks																				
Trains																				
Buses																				
Aircraft																				
Vessels																				
Luggage																				
Packages																				
Residences																				
Warehouses																				

* - For each alert where no drugs / currency are found, validation of that alert should be set out in the Drug Canine Alert Report.

DRUG CANINE ALERT REPORT

DATE
TIME
HANDLER
CANINE

AREA OF SEARCH

☐ VEHICLE

License No. _____

Make/Model : _____

Found In : _____

☐ LUGGAGE

Location : _____

Owner : _____

How Wrapped : _____

☐ PACKAGE

Address : _____

Sender : _____

Location : _____

Packaging : _____

☐ HOME

Address : _____

Found In : _____

☐ OTHER

Location : _____

Meeting Agents Encountered : _____

☐ FOUND

☐ Cocaine

☐ Marijuana / Hashish

☐ Heroin

☐ Other _____

☐ Currency \$ _____

Narrative : _____

Disposition : _____

☐ QUANTITY

lbs

lbs

lbs

\$

If no Drugs / Currency were found, has laboratory analysis been done of search area to validate alert? ☐ Yes ☐ No

Result : _____

Result of NADDIS / NCIC / EPIC screen of owner/operator : _____

Other contribution for canine alert : _____

[illegible]