

K9 OPERATIONS AND THE LAW

AMERICAN POLICE CANINE ASSOCIATION
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YOUR INSTRUCTOR



- Civil trial and appellate counsel for 35 years in the areas of police liability and constitutional law.
- Admitted to State Bar Of Michigan, U.S. District Courts in California, Michigan, Tennessee and Wisconsin, and the U.S. Court of Appeals for the 6th Circuit.
- Legal Author For *Police K9 Magazine*, *K9 Cop Magazine* and APCA.
- Conducts K9 legal seminars for K9 agencies and organizations across the United States.
- Experience in tracking, aggression and obedience through sport and as a decoy and helper at police K9 seminars and training.

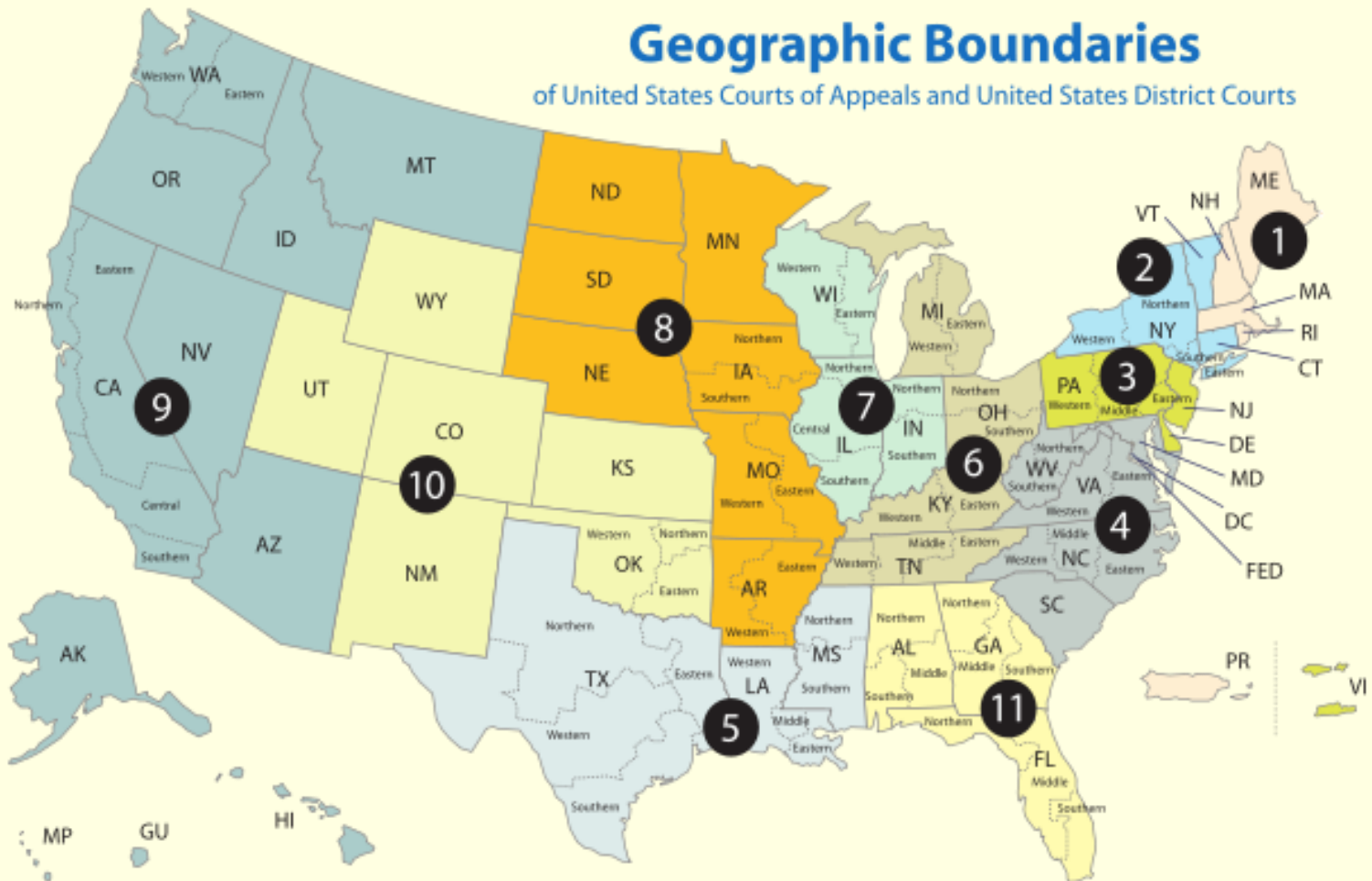
TOPICS OF DISCUSSION

- * SEARCH AND SEIZURE
- * TRACKING EVIDENCE
- * CIVIL LIABILITY/ USE OF FORCE
- * MUTUAL AID AGREEMENTS & K9
- * AVOIDING & DEFENDING CIVIL LITIGATION
- * F.L.S.A/GARCIA
- * K9 & PUBLIC RELATIONS – WHY IT MATTERS

LAW = POLITICS = POPULAR WILL

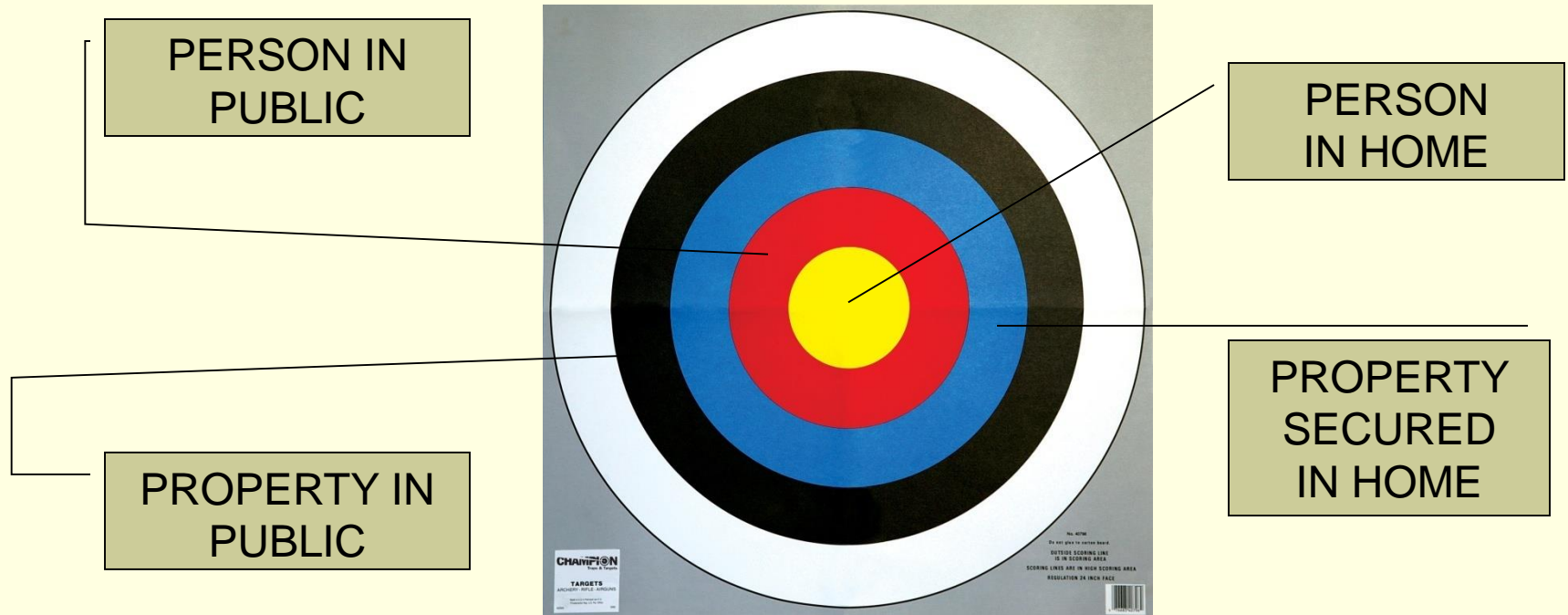
- All **law** is made by politicians.
- Congressmen and Senators (**statutory law**) are elected.
- Judges (**case law**) are either elected or appointed by politicians.
- Politicians campaign upon specific **ideologies** and promises to enact certain laws if elected.
- Judges are appointed by politicians based upon their **political views**.

KNOW WHAT LAW APPLIES TO YOU.



SEARCH AND SEIZURE

4th Amendment creates 'zones' of privacy protection.



IS A K9 SNIFF A SEARCH?



GENERAL RULE

- 'NO', AS TO PROPERTY.

- FACTORS TO CONSIDER:

- 1) IS YOUR PRESENCE AT THE SCENE LAWFUL?
- 2) IS THE PROPERTY IN A PUBLIC PLACE OR HAS PERMISSION BEEN GIVEN TO CONDUCT THE 'SNIFF'?
- 3) IS THE LENGTH OF DETENTION TIME REASONABLE?

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

U.S. SUPREME COURT (6-2-1) UPHOLDS A K9 SNIFF DURING A ROUTINE TRAFFIC STOP WHICH LED TO A NARCOTICS FIND AND ARREST.

- 1) POLICE HAD THE RIGHT TO BE WHERE THEY WERE. (VALID TRAFFIC STOP)
- 2) THE OBJECT SNIFFED (EXTERIOR OF VEHICLE) WAS IN A PUBLIC PLACE (NO EXPECTATION OF PRIVACY).
- 3) LENGTH OF STOP WAS REASONABLE (5-10 MINUTES).

Traffic Sniffs Since *Caballes*

Whitfield v State of Florida, (Fla App 2010)

Rental car with father and son stopped for speeding. Canine sniff conducted after the purpose of the traffic stop was completed was unlawful and evidence of narcotics seized through search suppressed. Trooper did not call for K9 team until almost 19:55 into the stop. At 27:26 into the stop a written warning was issued. At 28:57 into the stop the canine sniff is initiated. "In Florida, when the purpose of the traffic stop has been completed, the right to delay the motorist for the conduct of a sniff search expires."

U.S. v Bell, 555 F 3d 535 (6th Cir 2009)

[Officers' actions must be reasonably related to the purpose of the stop and may not unreasonably delay the stop.] 12 ½ minutes from stop to alert. No reasonable suspicion of illegal activity, but seizure upheld because stop was not unreasonably delayed to permit K9 sniff.

Traffic Stop & Sniff By K9 Handler

U.S. v Peralez, 526 F 3d 1115 (8th Cir 2008)

Officer unreasonably delayed stop after informing motorist that he would receive a warning ticket for defective equipment, but evidence of contraband obtained through K9 sniff of vehicle exterior not suppressed because object of K9 search was not developed through the extended questioning.

'Nothing in the record indicates that the answers to the questions posed during the unlawful expansion of the traffic stop caused Trooper Schlueter to utilize Drake. The dog sniff was not the consequence of a constitutional violation.'"]

Traffic Stop & Sniff By K9 Handler

- *State v Sweeney*, 1CA-CR 08-0775 (Arizona App. 3-30-10)
- Motorist stopped for following too closely by Arizona State Trooper (K9 handler)
- As he arrives at passenger side of vehicle he determines it to be a rental car and smells air freshener. Driver produces rental agreement and a Canadian driver's license. He appears nervous.
- Trooper has driver step back to patrol car where **he issues a warning ticket** while questioning driver about his travels. (Driver states he drove to Arizona from New York in search of a Camaro to purchase.)
- As driver returns to vehicle, Trooper asks if he can search the vehicle and **consent to search is denied**. He then asks for **consent to conduct a K9 sniff of the vehicle which is also denied**.
- Trooper then takes driver by the arm and informs him he is being detained. When second officer arrives to secure driver, Trooper takes his dog around the vehicle. 5 kilos of cocaine are found in the trunk.
- Motion to suppress is denied, but Arizona Court of Appeals reverses because there was no reasonable suspicion to detain driver after consent was denied, and once he had been issued a warning ticket the time for conducting a canine sniff had expired.

A NEW RULE FOR K9 HANDLERS

- *Rodriguez v U.S.*, 575 U.S.____(4-21-2015) 6-3 decision by U.S. Supreme Court prevents K9 handlers from interrupting the processing of a motorist during a traffic stop to conduct a sniff of the vehicle exterior, unless you have reasonable suspicion of criminal activity.
- *The critical question then, is not whether the dog sniff occurs before or after the ticket...but whether conducting the sniff 'prolongs' - i.e., adds time to – the stop.*" [Opinion, p 8]

WHAT OPTIONS EXIST?

(1) Have a back-up officer arrive **promptly** and take over the processing of the traffic stop while you conduct the exterior vehicle sniff.

(2) Find a way to conduct tasks directly related to processing the motorist for the traffic stop while conducting the exterior vehicle sniff. (*"...Officer Struble could have proceeded with the dog sniff while he was waiting for the results of the record check on Pollman and before the arrival of the second officer."*) [Alito **dissent**, p 3]

But, **majority held**: *"If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.' Caballes, 543 U.S. at 407."*
[Opinion, p 8]

IGNORE THE CLOCK



- Your window for conducting the sniff of a vehicle is measured by the time it should reasonably take you to process the motorist for the original purpose of the stop.
- Reasonable suspicion of criminal activity developed during the stop **extends the window** for conducting the sniff. (Mere suspicion will not be enough.)
- Probable cause or consent further extend the window for you to summon a K9 team to conduct a **search**. *You* must prove that consent was voluntary.

WHAT IF YOUR DOG ENTERS A VEHICLE DURING AN EXTERIOR SNIFF?



ELEMENTS TO CONSIDER

- 1) WAS THE DOOR, WINDOW OR HATCH LEFT OPEN BY THE VEHICLE OCCUPANT **OR** BY YOU **OR** AT YOUR INSTRUCTION?
- 2) WAS THE DOG'S MOVEMENT INSTINCTIVE OR ENCOURAGED BY YOU?
- 3) WAS CONSENT TO SEARCH THE INTERIOR GIVEN FREELY AND WITHOUT COERCION?

(BREAK)

WHERE IS THE 4th AMENDMENT LINE?

- *Florida v Jardines*, 569 U.S. ___ , 2013. (3-26-2013)
- U.S. Supreme Court (5-4) affirms the Florida Supreme Court's ruling that a warrantless canine sniff of the exterior curtilage of a private residence is unconstitutional.
- Majority holds that this procedure constitutes a trespass with no implied consent from homeowner.
- Concurring majority opinion holds that this procedure is a 'search' under the 4th Amendment using an enhanced detection capability from outside of the residence to search the inside of the residence.

Florida v Jardines, cont'd.

- Dissent argued that the presence of a police canine is no different than any other dog and owners give implied consent for others to bring their dogs onto the curtilage of a private residence.
- Dissent also argued that detection dogs have been around for centuries and therefore do not constitute a 'new' investigative tool. *Kyllo v U.S.*, 533 U.S. 27 (2001)

Jardines v State of Florida, SC08-2101 (Fla. 7-7-2011)

“We especially do not expect strangers to bring dogs onto or into our private front porches to sniff under our front doors or any of the cracks and crevices of our homes...To sanction turning the ‘dogs loose’ on the homes of Florida citizens is the antithesis of freedom of private property and the expectation of privacy as we have known it and contrary to who we are as a free people.” [p 44]

HOTELS, STORAGE FACILITIES AND SCHOOLS

- NOT TREATED LIKE A PRIVATE RESIDENCE.
- COMMON AREAS CAN BE SNIFFED BY K9.
- REQUIRES FACILITY OWNER'S CONSENT:
EXPRESS **OR IMPLIED**.
- K9 ALERT GIVES PROBABLE CAUSE **TO OBTAIN WARRANT** TO SEARCH INDIVIDUAL UNIT.

THE RELIABILITY OF YOU AND YOUR K9 WILL BE AN ISSUE

U.S. v Cedano-Arellano, 332 F3d 568, 573 (9th Cir 2003), citing: ***United States v Lingenfelter***, 997 F2d 632, 639 (9th Cir. 1993)

"[a] canine sniff alone can supply the probable cause necessary for issuing a search warrant *if the application for the warrant establishes the dog's reliability.*"

U.S. v Ludwig, 10 F3d 1523, 1528 (10th Cir 1993)

"A dog alert might not give probable cause *if the particular dog had a poor accuracy record*, but the evidence shows that the dog in this case has never falsely alerted."

Training and records are essential.

Florida v Harris,

568 U.S. ____ (2013) (2-19-2013)

No New Rule for Reliability Testing In Court.

- Florida Supreme Court could not require proof of a canine team's field proficiency records as a **requirement** for making a probable cause showing.
- Trial courts are entitled to weigh **all evidence** of a canine team's reliability in determining whether there is a sufficient basis for probable cause based upon the particular canine's alert.

Florida v Harris, cont'd.

- Defendants will still be permitted to challenge the field performance of a police canine and its handler.
- *“Indeed, evidence of the dog’s (or handler’s) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant, as the Solicitor General acknowledged at oral argument...And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause – if, say, the officer cued the dog (consciously or not) or if the team was working under unfamiliar conditions.”* (Justice Kagan)

Florida v Harris, cont'd.

- Supreme Court found that the results of controlled testing for narcotics detection are superior to field deployment results as a test of the dog's reliability.
- Supreme Court also clarified the concept of a 'false positive.' "*A detection dog recognizes an odor, not a drug, and should alert whenever the scent is present, even if the substance is gone.*" (Justice Kagan)

TRACKING EVIDENCE



IS IT ADMISSIBLE?

General Rule: Not without corroborating evidence.

WHY?

- K9 is not subject to cross examination under oath (hearsay).
- Substantial variables among the training, experience and qualifications of K9s and their handlers.

REQUIRED EVIDENTIARY FOUNDATION:

- **1.** Handler is properly qualified to handle K9 in such situations;
- **2.** K9 has been adequately trained AND has proven accurate in tracking humans;
- **3.** K9 was placed upon a trail where circumstances demonstrate suspect was located, and
- **4.** Trail had not become stale due to lapse of time or other contamination.
- **Barred completely in the courts of 4 states: Illinois, Indiana, Montana and Nebraska**

Training and records are essential.

ANATOMY OF A TRACKING CASE

A (home invasion)



B (track lost)



C (stop & arrest)

CIVIL LIABILITY

MOST COMMON CAUSES:

- 1) NEGLIGENCE OR THE INABILITY TO CONTROL YOUR K9.
- 2) USING EXCESSIVE FORCE, INCLUDING A FAILURE TO WARN BEFORE DEPLOYING YOUR DOG TO APPREHEND BY FORCE.
- 3) ACTING WITHOUT PROBABLE CAUSE.

MOST COMMON LEGAL THEORIES

- **ASSAULT AND BATTERY:** Will arise from a claim of excessive force.
- **NEGLIGENCE:** Acting contrary to a duty of care imposed by law.
■ (A reasonable police officer under similar circumstances.)
- **42 USC § 1983:** Federal statute authorizing civil damages, punitive damages and actual attorney fees for violation of individual's federal constitutional rights by one acting 'under color of state law.' Municipalities are not immune from this claim, as they are under state law. Will most often arise in context of false arrest, excessive force or unlawful search and seizure.
- **FALSE ARREST/FALSE IMPRISONMENT:** Any arrest or confinement without probable cause.

QUALIFIED IMMUNITY

- BEST DEFENSE AVAILABLE TO POLICE OFFICERS IN CIVIL SUITS.
- REQUIRES A SHOWING THAT (1) A FEDERAL CONSTITUTIONAL RIGHT WAS NOT “CLEARLY ESTABLISHED” AT THE TIME OF THE INCIDENT OR (2) A REASONABLE POLICE OFFICER WOULD HAVE ACTED IN THE SAME MANNER WHEN FACED WITH THE SAME CIRCUMSTANCES.
- DEFENSE **APPLIES EVEN IF THE OFFICER’S CONDUCT WAS WRONG IN RETROSPECT**. CONDUCT WILL ONLY BE EVALUATED FROM THE STANDPOINT OF AN OFFICER AT THE TIME HE/SHE WAS FACED WITH THE CIRCUMSTANCES.
- DENIAL OF A MOTION TO DISMISS BASED UPON QUALIFIED IMMUNITY GIVES OFFICER AN AUTOMATIC AND IMMEDIATE RIGHT OF APPEAL.

(BREAK)

CAN K9 USE = DEADLY FORCE?



Deadly Force: *force which carries a substantial risk of causing death or serious bodily harm.*



GENERAL RULE: NO

Robinette v Barnes, 854 F2d 909 (6th Cir 1988)

- FACTS: B&E suspect hiding beneath car in auto dealership repair bay. Warnings given – no response – K9's sent in to search and apprehend. K9 grabbed suspect by neck severing main artery resulting in death.
- Family sued for excessive and deadly force use.
- HELD: Use of police K9 does not constitute 'deadly force' IF the K9 is properly trained, the handler is properly qualified, and the K9 is properly deployed. No evidence that police intended to kill suspect or departed from established procedure in use of K9.
- *Robinette*'s reasoning is almost always adopted by other jurisdictions.

DO NOT IGNORE THE IF'S

- **BE PREPARED TO DEFEND YOUR TRAINING.**
(pre-service training, prior deployments and results, in-service training, objectivity)
- **BE PREPARED TO DEFEND YOUR K9's TRAINING.**
(especially obedience)
- **BE PREPARED TO DEFEND YOUR DEPLOYMENT DECISION AND PROCEDURE.**
(nature of crime involved, threat to officers or others, risk of flight or escape, warnings given, etc.)
- THE FAILURE TO SUCCESSFULLY ESTABLISH ANY ONE OF THESE COULD CONVERT THE INCIDENT TO A DEADLY FORCE ISSUE.
- [*"an officer's intent in using a police dog, or the use of an improperly trained dog, could transform the use of the dog into deadly force..."*]
Robinette at 913.

THE DOOR REMAINS OPEN

Smith v City of Hemet, 394 F 3d 689, 707 (9th Cir 2005)

"while we have not in any of our prior cases found that the use of police dogs constituted deadly force, we have never stated that the use of such dogs cannot constitute such force."

Thomson v Salt Lake County, 584 F 3d 1304, 1315
(10th Cir 2009)

"we leave open the question of whether the use of a police dog could constitute deadly force in other circumstances."

TRACKING BITES

Szabla v City of Brooklyn Park, 429 F3d 1168 (8th Cir 2005)

Homeless man sleeping in public park bitten by K9 during an on-lead search. (23 punctures in legs and hip) K9 given command to “track” (bite-and hold) versus “search” (locate but do not seize) Brooklyn Park’s K9 policy did not require a warning before the K9 is released with a “track” command. Individual officers and City of Crystal held not liable.

- Citing IACP National Law Enforcement Policy Center: Law Enforcement Canines, *“It is essential that a verbal warning be issued prior to releasing the canine...The warning should be repeated and a reasonable time given for the suspect to surrender before the canine is released.”*
- **HOLDING:** The deployment of a K9 to bite-and-hold without a prior warning *may* constitute a 4th Amendment violation for excessive force and unreasonable seizure. **Why ‘may?’**

PRE-DEPLOYMENT WARNINGS

- Required any time you deploy your canine to apprehend an individual **by biting**.
- Must announce: (1) your authority, (2) what the suspect is being required to do, (3) the presence of your canine and the fact that the suspect **will be bitten** if they do not comply.
- Must be given in a manner likely to be heard **and** understood.
- Must be **repeated**, with **adequate time for compliance**, before your canine is deployed.
- Not required where officer safety is at risk.

QUALIFIED IMMUNITY AND TRACKING BITES

- * *Dawe v Rogers*, (US Dist Ct MD Fla 2010)
Upholding qualified immunity challenge to plaintiff's claim of excessive force in use of K9 which bit and held Plaintiff during a search incident to an auto burglary. **No warning given. On lead track.**
- * *Melgar v Greene*, 593 F 3d 348 (4th Cir 2010)
Upholding qualified immunity in favor of officer whose dog bit a teenager who was being searched for as a missing person and was located passed out in the bushes of a residence. **No warning given. On lead track.**
- * *Hooper v San Diego*, 629 F 3d 1127 (9th Cir 2011)
Reversing district court and **denying** qualified immunity to K9 handler whose dog bit and severely disfigured female suspect during arrest. Evidence that suspect was compliant at point of bite, including re-attack.

MUTUAL AID AGREEMENTS

Pitfalls to the agency providing K9 services:

- Lack of command and control at scene.
- Crime scene not properly secured or preserved for K9.
- Inconsistencies in use of force policies or no K9 use of force policy in host jurisdiction.
- Bad PR based upon mistake by host department.
- Direct and indirect costs to lending agency.
- Liability exposure based upon error by host department.
- Little or no asset forfeiture sharing.

ARE YOU TARGET PREY?



AVOID BECOMING A DEFENDANT

- REGULAR AND CONSISTENT **TRAINING** ESPECIALLY OBEDIENCE. (WHAT IS YOUR **STANDARD OF EXCELLENCE?**)
- UNDERSTAND AND RESPECT THE LIMITATIONS OF YOURSELF AND YOUR K9.
- KEEP DETAILED AND ACCURATE **RECORDS.** (INCIDENT REPORT DETAILS WITH *GRAHAM* ELEMENTS, DIAGRAMS, ETC.
- HAVE A CLEAR K9 USE POLICY. **TEACH IT AND TEST ON IT.**

PUTTING UP THE BEST DEFENSE

IF YOU ARE NAMED AS A DEFENDANT:

- EDUCATE YOUR COUNSEL ABOUT K9.
- PROMPTLY ASSEMBLE, ORGANIZE & REVIEW YOUR RECORDS WITH YOUR ATTORNEY.
- PRESENT AS A PROFESSIONAL AND BE PREPARED. (TESTIMONY IS 1 TAKE ONLY.)
- BRING YOUR DOG TO COURT IF ALLOWED.

FAIR LABOR STANDARDS ACT

- REQUIRES PAYMENT OF OVERTIME AT **NO LESS THAN 1.5 TIMES REGULAR PAY.**
- FOR LAW ENFORCEMENT OVERTIME IS MORE THAN **43 HOURS PER WORK WEEK** OR **171 HOURS PER 28 DAYS.**
- NO REQUIREMENT FOR DAILY OR HOLIDAY OVERTIME.
- NO REQUIREMENT TO COUNT HOURS PAID AS HOURS WORKED.
- PORTAL-TO-PORTAL ACT EXCLUDES TIME SPENT **COMMUTING** TO AND FROM WORK UNLESS SUBSTANTIAL K9 SERVICES ARE PERFORMED AS PART OF COMMUTE.
- **'ON CALL'** TIME MAY BE COMPENSABLE.
- 2 YEAR STATUTE OF LIMITATIONS UNLESS FAILURE TO PAY IS **'WILLFUL'** – THEN 3 YEARS. (**2 x PENALTY** ALSO.)

Brock v City of Cincinnati, 236 F3d 793 (6th Cir 2001)

Established a 3 point test to be utilized in resolving K9 handler claims for compensation for their time spent taking care of their K9s off-shift, under the Fair Labor Standards Act, 29 USC § 201.

- (1) Is it 'work'? ("physical or mental exertion **controlled or required** by the employer.")
- (2) Is it being performed **necessarily and primarily** for the benefit of the employer?
- (3) Is the work an **indispensable and integral** part of the principal activities of the employment?

THE *BROCK* FAIRNESS TEST

- (1) Was the agreement unilaterally adopted –vs – fairly negotiated? (If not fairly negotiated, Court will default to statutory pay requirements.)
- (2) Does the agreement set a compensation formula which is at odds with work which is known or required by employer?
- (3) All **benefits to handlers** will be considered – not only pay, e.g., installation of kennels at handler's home, paid attendance at competitions and seminars, food and veterinary care, and having a highly trained family pet. *Brock's* 'fairness test' has been relied upon by most other courts addressing this question.

PUBLIC IMAGE OF POLICE



THE WARRIOR COP

- “Since the 1960s, in response to a range of perceived threats, law-enforcement agencies across the U.S., at every level of government, have been blurring the line between police officer and soldier. Driven by martial rhetoric and the availability of military-style equipment—from bayonets and M-16 rifles to armored personnel carriers—American police forces have often adopted a mind-set previously reserved for the battlefield. The war on drugs and, more recently, post-9/11 antiterrorism efforts have created a new figure on the U.S. scene: the warrior cop—armed to the teeth, ready to deal harshly with targeted wrongdoers, and a growing threat to familiar American liberties.”

Radley Balko. *Rise of the Warrior Cop*, Wall Street Journal, August 7, 2013

SWAT STATS

Departments with SWAT Teams in towns
between 25,000-50,000 population:

1983 (13%)

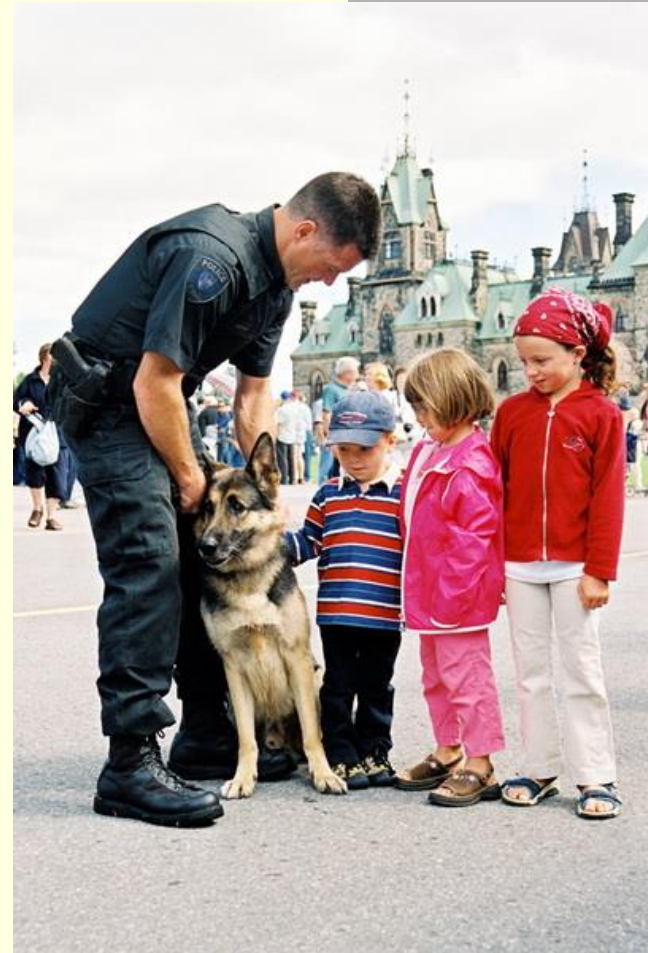
2005 (80%)

No-Knock Raids in the U.S. annually:

1970 (<3,000)

2010 (68,000)

K9 & PUBLIC RELATIONS



YOUR DOG WILL NOT CARE HOW MUCH YOU
KNOW UNTIL HE KNOWS HOW MUCH YOU
CARE.



THE END

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(photos courtesy of ACE K9 /www.acek9.com)