

THE DOG ATE MY CONSTITUTION!

James E. Doyle Inn of Court
Thomas E. Fairchild Inn of Court
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What Do Dogs Smell?

- Many questions; few answers
 - Single v. multiple molecules
 - Controlled substance or chemical used to cut the controlled substance

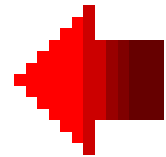
Where Is the Smell?

- Cadaver dog as example
 - Above the surface?
 - Permeating the surface?
 - Below the surface?
 - All three or some combination thereof?

How Do Dogs Smell?



Direction of Current



Dogs Are A Forensic Tool

- Analogous to a Wood's Lamp
 - An alert informs the investigator that additional investigation or testing is necessary
 - An alert is not substantive evidence and does not take the place of further testing, examination or investigation



Alerts

- Alerts fall into four categories
 - True Positive
 - False Positive
 - True Negative
 - False Negative

True (Correct) Alerts

- TRUE POSITIVE

- Alert; item of evidentiary value is found

- TRUE NEGATIVE

- Failure to alert; no evidence present

False (Wrong) Alerts

- FALSE POSITIVE
 - Alert; no evidence is present
- FALSE NEGATIVE
 - Failure to alert; evidence is present

An Alert Requires Corroboration

- Nat'l Fire Protection Assoc., Standard 921, GUIDE FOR FIRE & EXPLOSION INVESTIGATIONS (2004 Ed.)
 - Dog team must be properly trained & validated
 - Any alert not confirmed by laboratory analysis should not be considered validated
 - Proper objective of the use of dog team is to assist with the selection of samples that have higher probability of laboratory confirmation
 - Dog should be used in conjunction with, and not in place of fire investigation methods
 - Standard acknowledges dogs' limitations and possibility of false positives and false negatives

Alert Not Substantive Evidence

A dog's alert standing alone -- in the absence of corroborating evidence -- should not be admitted at trial as substantive evidence.

Jacobson v. \$55,900 in U.S. Currency,
728 N.W.2d 510 (Minn. 2007)

Alerts

HRD dog
searches
basement
crawlspace in
defendant's
home 30
years after
initial missing
person
investigation



Alerts

HRD dog searches cars at police garage, including car rented by defendant 5 months prior to date of search



Alerts

HRD dog searches storage locker rented by defendant between 2001 and 2005 (search performed in 2006)



Biting Back

- Regardless of legal theory, you need:
 - Training records
 - Videos of relevant searches
 - Work records
 - Veterinary records
 - Double blind testing
 - Records of cases worked on
 - Certifications
 - Qualifications of those certifying dogs

Biting Back

Videos of search by dogs are a must-have for

- Analysis by defense expert
- Dog's signals can be subtle
- Evidence of cuing
 - Conscious/unconscious signals by handler

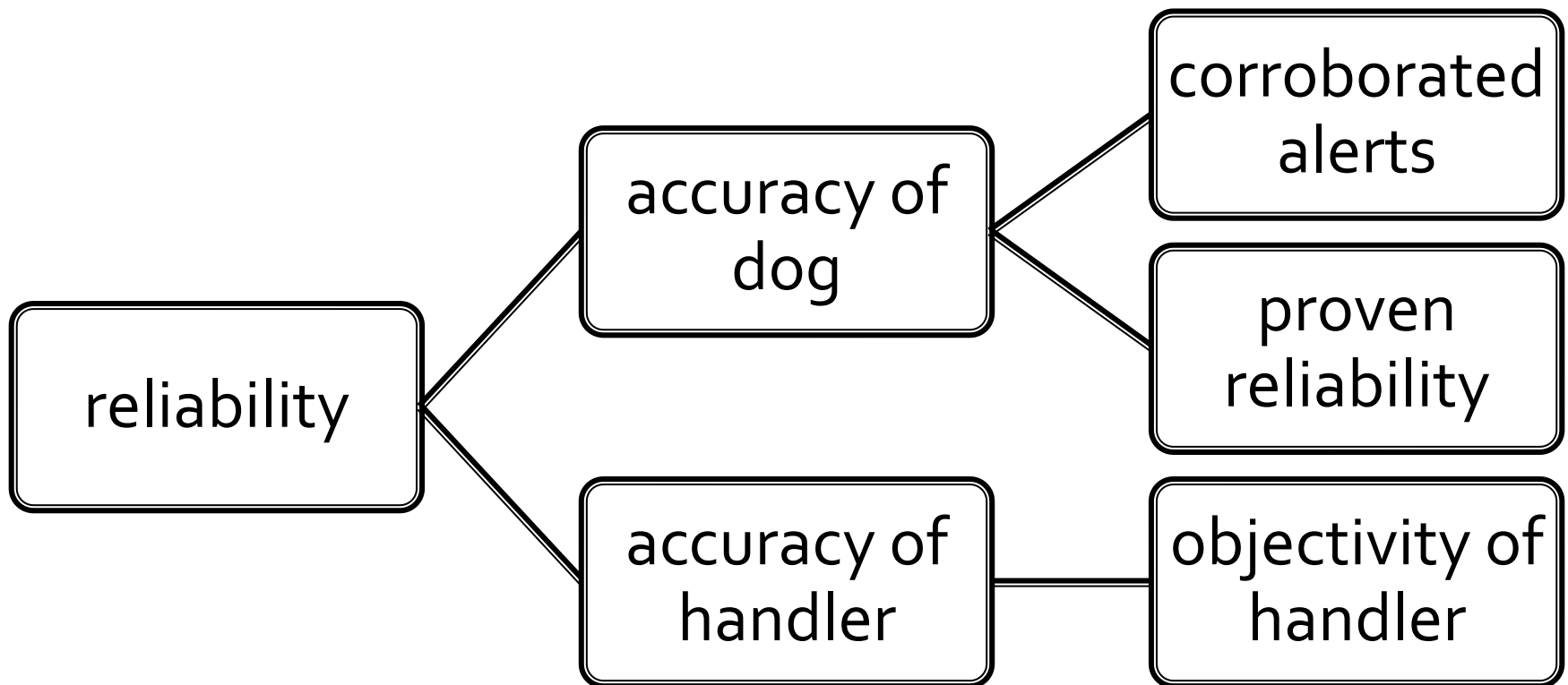
Biting Back

- Three prongs to challenge:
 - Relevance
 - Reliability
 - Competence
- *Frye* (general acceptance)
- *Daubert* (relevance & reliability)
- *Walstad*, 119Wis. 2d 483, 351 N.W.2d 469 (1984), unique to Wisconsin, reliability not an issue to admissibility

Model Admissibility Analysis



Model Admissibility Analysis



Conclusion

- The key to excluding testimony on dog searches is attacking the reliability of the evidence (lack of reliability of handler and dog).
 - In order to attack reliability, you need to obtain all pertinent records of the dog, its training and its handler.
 - And where, as in Wisconsin, reliability is not part of the admissibility equation, frame your reliability argument in terms of relevance and competence.



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