IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-1133

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEPHEN ANDREW ARRIETA,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WORTH COUNTY
THE HONORABLE COLLEEN WEILAND (SUPPRESSION),
DEDRA SCHROEDER (TRIAL ON MINUTES),
& JAMES M. DREW (SENTENCING), JUDGES

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State disagrees that retention is appropriate or necessary. The defendant asserts this case involves the application of the trespass doctrine to cases involving K9 searches. *See* Appellant's Br. at p.12. But it is unlikely this Court would reach that issue because the K9 here gave alerts—instinctive behaviors in response to the trained odor of narcotics—*before* it made physical contact with the exterior of the defendant's commercial vehicle, and only the final response occurred after. A recently published decision by the Iowa Court of Appeals provides the law and analysis necessary to find that the K9's alerts were reliable and provided the officer with probable cause even absent a final response. *State v. Carson*, 968 N.W.2d 922 (Iowa 2021). And because probable cause was already formed, any subsequent search (including the K9's physical contact if that constitutes a search) was authorized by the automobile exception. Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Stephen Andrew Arrieta was charged with possession of a controlled substance, marijuana, and operating while intoxicated, in violation of Iowa Code sections 124.401(5) and 321J.2. Am. Trial Info.; App. 14–16. Arrieta moved to suppress evidence, and the district court granted his motion in part—suppressing evidence obtained after officers incorrectly invoked implied consent—and denied it in part. *See* Ruling on Supp.; App. 28–31. The State dismissed the operating while intoxicated charge, and Arrieta proceeded to a trial on the minutes of testimony for the possession charge. *See* Mot. Dismiss Count II; Waiver & Stipulation; App. 32, 35–39. Following the trial on the minutes, Arrieta was found guilty of possession of a controlled substance, and he was sentenced to a fine of $250 and two days in jail with both days suspended. Findings & Verdict; Sent. Order; App. 40–44, 47–49.

Arrieta now appeals arguing the district court erred by denying his suppression motion in part. The State disagrees and submits his claims are without merit.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On August 5, 2020, Arrieta was operating a commercial semi on Interstate 35 in Worth County, Iowa. *See* Supp. Tr. 8:2–:24; State's Ex. A (Waalkens Report) at p.3; App. 110. Upon approaching a weigh station, Arrieta's semi failed a "prepass" system because his registration was not on file, meaning he was required to stop at the weigh station. Supp. Tr. 8:8–:24; State's Ex. A (Waalkens Report) at p.3; App. 110. The weigh station was being operated by Iowa Department of Transportation (DOT) Motor Vehicle Enforcement (MVE) Officer Taran Waalkens. *See* Supp. Tr. 6:22–:23; State's Ex. A (Waalkens Report) at p.3; App. 110.

Waalkens decided to conduct a "Level III" inspection of Arrieta's commercial vehicle. Supp. Tr. 8:8–:24. A Level III inspection primarily consists of a review of the documentation for the commercial motor vehicle and trailer. *See* Supp. Tr. 16:9–17:1. During the inspection, Waalkens was alerted that the semi-tractor's vehicle identification number (VIN) was reported stolen (although late in the

inspection it was determined that the person who had reported the vehicle stolen had forgotten to report that it was later recovered). *See* Supp. Tr. 11:1–:20; State's Ex. A (Waalkens Report) at p.3; App. 110. He additionally discovered that Arrieta's logbook had significant discrepancies including instances where Arrieta would jump hundreds of miles with no logged driving time. *See* State's Ex. A (Waalkens Report) at p.3; App. 110. The logbook also indicated that the day before Arrieta had traveled a long distance (770 miles) seemingly with no stops. *See* Supp. Tr. 13:2–:5; State's Ex. A (Waalkens Report) at p.3; App. 110. Waalkens also noted it was unusual that Arrieta would be hauling only insulation from Minnesota to Texas, and he knew from his training and experience that Interstate 35 is a popular corridor for drug trafficking. *See* Supp. Tr. 12:1–13:11.

While Waalkens continued to investigate these matters as part of his inspection, shortly before 1:34 p.m. he radioed a request for a K9 officer to come to the weigh station. *See* Supp. Tr. 13:6–:21. Chief Deputy Jesse Luther and his K9, "Titan," arrived at the weigh station before Waalkens had completed his inspection. *See* Supp. Tr. 18:13–19:4, 33:2–:21. Waalkens took Arrieta inside the weigh station to

discuss his inspection and to further investigate the logbook irregularities. State's Ex. A (Waalkens Report) at p.3; App. 110. As this occurred, Luther and Titan performed a free-air sniff around Arrieta's semi.

Titan immediately showed signs that he was in the presence of a trained odor of narcotics. *See* Supp. Tr. 34:4–:6. He exhibited heavy nasal sniffing, head snaps, and he walked underneath the semi-trailer looking up trying to locate the source of the odor. Supp. Tr. 34:2–:16; State's Ex. F (Luther Report) at p.1; App. 111. After a first pass around the semi, however, Titan had not entered his final response of sitting, meaning he had not yet located the source of the odor. *See* Supp. Tr. 35:17–36:8. Luther took Titan on a second pass around the semi, this time directing Titan to smell specific areas of the semi in a method termed "detailing." *See* Supp. Tr. 43:18–44:4.

As the detailing continued, Luther directed Titan to smell a seam on the exterior of the semi that is adjacent to the inner sleeper compartment. *See* Supp. Tr. 34:2–:23, 45:2–:19; State's Ex. F (Luther Report); at p.1; App. 111. Titan placed his front paws on the exterior of the semi, smelled the seam, and then sat down in his final response indicating this was the source of the odor. *See* Supp. Tr. 45:2–19;

State's Ex. F (Luther Report) at p.1; App. 111. Luther informed Waalkens of his findings, and Waalkens subsequently discovered a small bag containing marijuana inside the sleeper compartment of the semi-tractor. Supp. Tr. 14:12–15:7.

ARGUMENT

I. The District Court did Not Err by Denying Arrieta's Motion to Suppress the Discovery of Marijuana Following K9 Titan's Free-Air Sniff of the Commercial Vehicle.

Preservation of Error

The State does not dispute error preservation. The same arguments in favor of suppression—and a trial brief that was a nearly identical copy of Arrieta's brief on appeal—were presented to the district court, and the district court denied his motion. *See* Am. Mot. Supp.; Def.'s Brief in Support of Supp.;[1] Order Denying Supp.; App. 26–31.

Standard of Review

The Court reviews de novo when a defendant alleges a constitutional error occurred. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004) (citing *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa

[1] Not designated for inclusion in the appendix pursuant to Iowa Rule of Appellate Procedure 6.905(10)(a).

2001)). "The court makes an 'independent evaluation of the totality of the circumstances as shown by the entire record.' " *Id.* (quoting *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). The court grants "considerable deference to the trial court's findings regarding the credibility of the witnesses, but [is] not bound by them." *Id.* (citing *Turner*, 630 N.W.2d at 606; *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994)).

Merits

On appeal, Arrieta asserts the district court erred by denying his suppression motion's arguments that the search of his commercial vehicle was unlawful. Specifically, he asserts the district court erred by rejecting three arguments: (1) MVE Officer Waalkens lacked reasonable suspicion to extend the stop of his commercial vehicle, (2) during the free-air sniff there was contact made by the officer and the K9 which was constituted an unlawful search, and (3) the K9 was unreliable, not well trained, and was cued to alert by the officer. The State submits each of these claims is without merit. This Court should affirm the denial of his suppression motion.

A. The commercial vehicle inspection, and follow-up investigation, was on-going prior to and during K9 Titan's free-air sniff. There was no impermissible extension of the seizure.

Arrieta begins by asserting there was an unconstitutional prolongment of his seizure to wait for a K9 to arrive and conduct a free-air sniff of his commercial vehicle. *See* Appellant's Br. at pp.13–22. The State submits his argument relies on a misreading of the record that is fatal to his claim. There was no extension of the stop and Arrieta's claim must fail.

The State does not dispute that a traffic stop may not be prolonged for the purpose of conducting unrelated investigations without an officer first forming adequate suspicions of criminal activity apart from the original traffic purpose of the stop. *E.g.*, *State v. Salcedo*, 935 N.W.2d 572, 578–80 (Iowa 2019). Nor does the State dispute that an officer may not prolong a seizure solely to have a K9 conduct a free-air sniff absent reasonable suspicion. *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). Instead, the State submits there was no prolongment of the commercial vehicle inspection, and that Arrieta's assertions otherwise are premised on a flawed reading of the record.

Arrieta was operating a commercial vehicle and he was subject to a commercial vehicle inspection by DOT MVE Officer Waalkens. *See State v. Steward*, Nos. 0-801 & 00-89, 2001 WL 98397, at *2 (Iowa Ct. App. Feb. 7, 2001) (discussing stops and searches of commercial trucks which are within a closely regulated industry). This is what occurred. Arrieta was required to stop his commercial vehicle at a DOT weigh station. *See* Supp. Tr. 8:8–:24 (explaining Arrieta was required to stop at the weigh station). Officer Waalkens decided to conduct a Level III inspection, which consists of checking and verifying numerous papers including vehicle registration, insurance, fuel tax proof, the bill of lading, mileage logbooks, and information for the trailer. Supp. Tr. 8:8–10:15, 16:9–17:1. When Chief Deputy Luther and K9 Titan were summoned to the weigh station, and more importantly when they arrived and conducted the free-air sniff a short time later, the commercial vehicle inspection and follow-up investigation was still on-going:

> When we went to the [semi] tractor, [we] had the driver get out, Officer Waalkens explained that he was going to take [Arrieta] to the scale house to finish his paperwork. ...
>
> ... Officer Waalkens was still on his—I guess if you want to consider it traffic stop, I guess. He

> was still doing his business…his business hadn't been con[cluded] yet.

Supp. Tr. 33:2–:21. Officer Waalkens explained that when Chief Deputy Luther arrived, he had yet to complete the commercial vehicle inspection because he still needed to conduct a review with Arrieta to go over the commercial vehicle inspection and infractions. *See* Supp. Tr. 18:13–19:4. "Chief Deputy Luther advised A[rrieta] he was going to conduct an external sniff. I had A[rrieta] come into the scale building to go over the inspection and log book issues." State's Ex. A (Waalkens Report) at p.3; App. 110. As the district court found, "Waalkens had not conducted the final review with Defendant before the K-9 concluded the sniff." Order Denying Supp. at p.2; App. 29. Because the inspection was not complete when the dog sniff occurred, Arrieta's seizure was not impermissibly prolonged.

Arrieta attempts to argue that the commercial vehicle inspection was, or should have been, completed prior to the arrival of the K9 by attempting to compare the inspection to a routine traffic stop and by noting that a routine review of paperwork should not take a long period of time. *See* Appellant's Br. at pp.20–22. But Arrieta's assertions do not accurately account for what occurred. This was neither a routine traffic stop, nor was it a routine inspection.

Arrieta was first required to stop at the weigh station because the "prepass" system flagged his vehicle for vehicle registration issues. *See* Supp. Tr. 8:13–:24. Once Waalkens began to examine Arrieta's paperwork, discrepancies emerged that required additional investigation and follow-up. The VIN number for the semi-tractor that Arrieta was operating came back stolen, and it took a significant amount of time to verify whether the vehicle was in fact stolen:

> The truck [registration] has a bar code on it as well so I scanned it. Once I scan it, it automatically runs a warrant and makes sure it's valid on registration and all that. … So I further looked into it, and the truck came back stolen, according to the VIN.
>
> Q. What do you do then? A. I ran the license plate through [dispatch]. They came back and they did not receive the hit for the stolen vehicle, but then they progressed to run the VIN and it came back stolen, according to the VIN. And then I requested [dispatch] to check with the originating agency to make sure that it was valid.
>
> Q. And do you get that response shortly thereafter or does that come later? A. It depends on kind of a case-by-case. Sometimes I have it back within five minutes. Sometimes it takes a while. *This particular case, it did take quite a while for the exact actual information to come back.*

Supp. 11:1–:20 (emphasis added). In fact, it was not until after 1:34 p.m. that Waalkens heard back from the originating agency. At 1:34

p.m., dispatch asked Waalkens to call in. *See* State's Ex. A (Waalkens Report) at p.3; App. 110. He called in shortly thereafter, and he was advised that the detective from the originating agency had cleared him to not hold the vehicle on the stolen status because it had been registered for so long. "An Arlington P[olice]D[epartment] Detective thinks the tractor was probably sold…since…the tractor [was] currently registered, and it was never officially recovered." State's Ex. A (Waalkens Report) at p.3; App. 110. A short time later, as Waalkens was going over the inspection with Arrieta—as the K9 sniff was already occurring—dispatch confirmed to Waalkens "that Arlington PD talked with the party who reported the tractor stolen. The party did recover the tractor but forgot to advise the PD." State's Ex. A (Waalkens Report) at p.3; App. 110. The delays investigating the stolen status of the vehicle alone extended the stop to at least shortly after 1:34 p.m. And even then, the status of the vehicle was not entirely confirmed as *not* stolen until the dog sniff was already occurring as Waalkens was going over his inspection with Arrieta. *See* State's Ex. A (Waalkens Report) at p.3; App. 110.

The stolen status of the tractor was not the only complicating factor that delayed completion of the inspection. In addition to

investigating and following up on the potentially stolen status of the semi-tractor, Waalkens continued with the inspection and examination of the other paperwork. *See* Supp. Tr. 11:21–:25. But this examination was also not routine. During Waalkens examination of the mileage logbook, he discovered irregularities. *See* Supp. Tr. 12:15–13:5. He noted the type of logbook Arrieta was using was not "an official electronic log," and that it was "highly editable. [Arrieta could] go back and change locations and change miles and change times." Supp. Tr. 12:15–:24. Waalkens's examination of that logbook unveiled "multiple instances" where Arrieta would "change locations in Texas, sometimes over 100 miles." Supp. Tr. 12:25–13:2. And Arrieta had not listed in the logbook what he brought to Minnesota before returning directly back to Texas. *See* Supp. Tr. 13:2–:5. Waalkens elaborated more on the logbook's discrepancies in his report, which was admitted as an exhibit:

> I inspected A[rrieta]'s log book which I observed multiple inconsistencies. A[rrieta] had a few instances where there would be location changes in Texas between change of duty status. Some of these location changes would be over 250 miles with no driving time. On 08/04/2020, [the day before the inspection in this matter,] A[rrieta]'s log showed him making a trip from Edmond, OK to Minneapolis, MN. A[rrieta] logged 770 miles in

> exactly 11 hours of driving time. This means he would have averaged 77 mph during this entire trip.

State's Ex. A (Waalkens Report) at p.3; App. 110. Waalkens's calculation that Arrieta would have had to have been averaging 77 miles per hour also assumes Arrieta made no stops at all during that 11-hour period. *See* State's Ex. F (Luther Report) at p.1 (noting Waalkens had mentioned there were trips in the logbook with very little stops); App. 111.

The time it took to examine and investigate the logbook's discrepancies and the stolen status of the vehicle cause the inspection to be delayed. Significantly, by the time Luther and K9 Titan arrived, Waalkens still needed to interview Arrieta about the irregularities and to go over the inspection with him: "I had A[rrieta] come into the scale building to go over the inspection and log book issues." State's Ex. A (Waalkens Report) at p.3; App. 110.

> Q. Okay. So it would be fair to say that the Level III inspection was completed by the time that you called state radio for a K-9. A. No.
>
> Q. What remained to be completed? A. I needed to further investigate the log book and talk with Mr. Arrieta.
>
> Q. Now, at some point early on you discovered that there were discrepancies in the log book. A. Yes, I did.

> Q. So at that point, you had enough to write Mr. Arrieta for a log book violation. A. Yes, I do.
>
> Q. And so in addition to discussing with him log book issues, is there any other thing that was not yet completed by the time you contacted state radio for a K-9? A. Just reviewing the information with the driver.
>
> Q. Kind of a courtesy review? A. Well, sometimes we're dealing with technology so sometimes things can be incorrect or the driver might have a specific reason that wasn't noted that might cause the violation to be invalid at that point.
>
> Q. And how long do these reviews take with the driver? A. It varies [c]ase to [c]ase. Sometimes a lot of drivers have a lot of reasons. Sometimes they might just say, yeah, I did that, I was wrong; and go on from there.

Supp. Tr. 17:25–18:25. The inspection had not been completed and Arrieta's assertions otherwise are not supported by the record.

Because the commercial vehicle inspection was not completed when K9 Titan was summoned and conducted his free-air sniff of the vehicle, there was no impermissible prolongment of the seizure. This Court should reject Arrieta's claim and affirm.

In the alternative, even if this Court were to determine that Officer Waalkens's inspection should have concluded sooner, the State submits Waalkens had adequate cause to prolong the traffic

stop to wait for a K9 sniff to occur. In order to prolong a seizure to conduct unrelated checks, such as a dog sniff, an officer must have reasonable suspicion of other criminal activity justifying those checks. *See In re Pardee*, 872 N.W.2d 384, 393 (Iowa 2015). Here, Waalkens had observed that Arrieta made suspicious entries in his highly editable logbook. The logbook indicated there were unexplained times where Arrieta had jumped hundreds of miles in Texas, and only the day prior Arrieta had somehow traveled 770 miles, from Oklahoma to Minnesota, at high-speeds and without stops. *See* State's Ex. A (Waalkens Report) at p.3; App. 1101. Then, on his rapid return trip from Minnesota, Arrieta was only carrying insulation, which Waalkens noted was strange and not commercially reasonable for such a long trip. *See* Supp. Tr. 12:7–:14. Additionally, although it was later confirmed as an error (fully confirmed *after* the K9 arrived), Waalkens knew the semi-tractor had at least been reported stolen even though the accuracy of that was unclear given the current registration. *See* State's Ex. A (Waalkens Report) at p.3; App. 110. All of these unusual circumstances were compounded by the fact that Arrieta was traveling on a "very popular corridor for drug trafficking." Supp. Tr. 13:6–:10. Specifically, Waalkens knew that I-35 "is a

popular drug trafficking route from Texas to Minnesota." State's Ex. A (Waalkens Report) at p.3; App. 110.

The State submits that these factors known to Waalkens provided reasonable suspicion that drug trafficking may have been occurring. Prolongment of the traffic stop to have a dog sniff occur was justified and permissible. Arrieta's argument should be rejected.

B. K9 Titan's sniff was up to snuff. The training records established he was well trained and reliable, and the assertion of improper cuing by his handler is without foundation.

Second, Arrieta attempts to challenge the training, reliability, and performance of K9 Titan.[2] *See* Appellant's Br. at pp.28–30. The State disagrees.

The Iowa Court of Appeals recently issued a published opinion in *State v. Carson* that is instructive on the question of how to determine if a dog is reliable and well trained. There, the Court of Appeals recognized that:

> "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide a sufficient reason to trust his alert," and "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled

[2] The State addresses this argument out of order because it aides the later discussion of the trespass issue.

> setting, a court can presume…that the dog's alert provides probable cause to search."

968 N.W.2d 922, 927 (Iowa 2021) (alterations in original) (quoting *Florida v. Harris*, 568 U.S. 237, 246–47 (2013)).

K9 Titan's training and certification records were submitted as an exhibit at the suppression hearing. *See* State's Ex. 101 (Training Records); App. 52–107. Included in those records is a certification test report which indicates that Titan was tested prior to certification, and that Titan passed every test. *See* State's Ex. 101 (Training Records) at p.54; App. 105. Specifically, the report shows that Titan was tested on, and passed, recognition of marijuana as well as vehicle searches. *See* State's Ex. 101 (Training Records) at p.54; App. 105. That same day, Titan was certified in narcotics detection. *See* State's Ex. 101 (Training Records) at p.45; App. 96.

Arrieta did not, and does not now on appeal, challenge the credentials of the certifying organization or process. Thus, a court would be free to presume that an alert from Titan provided probable cause to search. *Carson*, 968 N.W.2d at 927.

Instead of challenging Titan's certification, Arrieta instead scours the training records to identify instances where Titan did not perform perfectly. But to be reliable it is not necessary that the

trained dog perform identically and perfectly every time. K9 Odin in *Carson* provides an illustrative example on this point. There, the Court of Appeals examined the training records and found there were instances where Odin's behavior varied, and he sometimes had not entered his final trained response. *Id.* at 929 ("He was unable to find the heroin, he alerted on cocaine but did not enter final response, and he entered final response on marijuana and ecstasy."). Additionally, Odin's success rate was not perfect, with a 95.83% accuracy. *Id.* at 925. Despite all of this, the Court found his "sniff was up to snuff," and that Odin's alerts were reliable. *Id.* at 930. The same is true here. Arrieta's complaints that Titan did not always enter his final trained response of sitting does not undermine Titan's reliability. In fact, as is discussed in more detail below, these examples undermine Arrieta's assertion that without a final response no probable cause was established. And infrequent, limited mistakes in training do not undermine the presumption that a certified dog is reliable.

Arrieta asserts that Titan's rapid breathing and head snap or whip is not an alert and they "do not establish probable cause." Appellant's Br. at p.28. He is mistaken. Titan's instinctual reactions to the trained odor of narcotics is precisely what an alert is, and those

alerts can be sufficient to establish probable cause even when they occur without the trained behavior of a final response. That is exactly what happened in *Carson*. In *Carson*, the evidence showed that "[a]n alert is the untrained response that the dog gives," and the Court recognized the alerts included heavy nasal sniffing and head snaps, whereas the "final response is the trained response to that odor," which in the case of both Odin and Titan they are trained to sit when they have located the source of the odor. *Carson*, 968 N.W.2d at 925–30; Supp. Tr. 35:17–36:5 ("Q. Your dog is in the presence of narcotics and is not sitting as it's trained to do to alert; that that's not a problem? A. No. There is other variations that go into the—the indication. *The sitting is the final thing*. … Q. And it sits at the closest area to the source of that odor[?] A. Yes."), 46:14–:25 ("[T]he dog was in odor prior to him actually smelling the source, which the source was the compartment. … The dog is in odor when I see—well, I hear a breathing change. I think we talked about this once before, but there's also a head snap or a head whip. I had seen those prior to the source being found."). In *Carson*, these alerts were found to be consistent with the behavior observed during training. *Id.* at 929–30. The alerts—the natural, untrained responses from the dog in response to

the trained odor of narcotics—were sufficient to establish probable cause.

Here, during the first pass of the commercial vehicle, Titan exhibited natural responses—or alerts—consistent with his training that he was in the presence of the trained odor of narcotics. As soon as Titan was given the command to begin searching for narcotics when he was by the semi, "he immediately showed signed of a breathing change." Supp. Tr. 34:3–:6. "On approach K9 Titan demonstrated a breathing change that is common when he is working a narcotic that he is trained to detect. This breathing change is best described as a more intense, close mouth breathing which is primarily through the nose." State's Ex. F (Luther Report) p.1; App. 111. On the first pass of the semi, as they went around to the driver's side of the trailer, Titan "showed more signs that he was in odor and that he was really trying to find it." Supp. Tr. 34:6–:9. "As K9 Titan got to about the middle of the semi trailer I could tell he was in odor but trying to locate it." State's Ex. F (Luther Report) p.1; App. 111. Titan even walked underneath the vehicle looking upwards "trying to smell where it's coming from." Supp. Tr. 34:9–:12. On the second pass Titan "was still in odor," until he ultimately gave a final response of

sitting after smelling the seam by the sleeper compartment (where the marijuana was later located). Supp. Tr. 34:13–:-20. Titan's handler explained that he could tell Titan was in odor because of the changes in his breathing and his head snap or whip. Supp. Tr. 46:20–:25. And these indications were present before Titan was directed to smell the seam near the sleeper (which is when Titan gave the final response of sitting after locating the source of the odor). Supp. Tr. 46:13–:25; *see* State's Ex. F (Luther Report) at p.1; App. 111.

Comparing Titan's behavior to the training records, it is clear Titan was behaving in a manner that constituted an alert, even before the final response after he located the source of the odor. Arrieta complains Titan was "in odor," but he did not initially sit. However, Arrieta fails to appreciate that this behavior is consistent with numerous entries in the training records. *See* State's Ex. 101 (Training Records) at pp.17–26; App. 68–77. On September 24, 2019, there are multiple entries that "Dog was in odor," but he "didn't sit." State's Ex. 101 (Training Records) at p.25; App. 76. Three times on the next day, he was "in odor," but "didn't sit." State's Ex. 101 (Training Records) at p.25; App. 76. On September 26, 2019, the handler noted Titan's "head snap." State's Ex. 101 (Training Records) at p.24; App. 75. Later

the same day, Titan showed a "[b]reathing change" on three lockers, but he "didn't sit." State's Ex. 101 (Training Records) at p.24; App. 75. On September 27, 2019, Titan "[d]idn't sit but was in odor." State's Ex. 101 (Training Records) at p.23; App. 74. Later the same day, Titan "was in odor[, but] had hard [time] locating where it was coming from," and the source was "located after detailing." State's Ex. 101 (Training Records) at p.23; App. 74. On September 30, 2019, Titan "was in odor but didn't sit until PR was in box." State's Ex. 101 (Training Records) at p.22; App. 73. On October 2, 2019, "Dog couldn't get to source but alerted." State's Ex. 101 (Training Records) at p.20; App. 71. On October 10, 2019, Titan "could tell the source was high [up], he jumped on the counter but didn't sit." State's Ex. 101 (Training Records) at p.19; App. 70. On October 16, 2019, "Dog was in odor by rear…wheel well, dog went into final on back door." State's Ex. 101 (Training Records) at p.19; App. 70. On November 1, 2019, Titan "wouldn't go into final because of location." State's Ex. 101 (Training Records) at p.17; App. 68. These records all show that Titan had reliable alerts when he was in odor—i.e., when he exhibited breathing changes and head snaps—even absent a final response. His

consistent alerts on the exterior of Arrieta's commercial vehicle established probable cause to search.

Also notable was the fact that Titan went "underneath the trailer with his head up in the air trying to smell where [the odor was] coming from." Supp. Tr. 34:9–:12; *see* Defense Ex. B (Luther Body Camera Video) at 2:01:00–2:01:45. This behavior also constitutes an alert that is consistent with the training records. On October 1, 2019, Titan "crawled under" a mini van where methamphetamine had been planted and he later "crawled under" a truck where marijuana had been planted. State's Ex. 101 (Training Records) at p.22; App. 73. On October 14, 2019, Titan "tried going underneath" a car where heroin had been planted. State's Ex. 101 (Training Records) at p.19; App. 70. Thus, because this behavior was consistent with his responses during training, this adds support to the finding of probable cause.

Arrieta asserts that it was improper for Titan to have a second pass around the vehicle that this indicated he was not well trained. *See* Appellant's Br. at p.29. But this argument ignores the identical conduct in the training records. State's Ex. 101 (Training Records) at p.22 ("Worked good while detailing."), p.23 ("[L]ocated after detailing." "Located afte[r] detailing."), p.24 ("Detailing bottom of

chair to finalize." "Hard time locating source[,] went back to finalize."); App. 73–75. Thus, detailing or a "second pass" does not undermine Titan's training and reliability because it is precisely consistent with how Titan was trained.

Finally, Arrieta asserts Titan was cued to alert. The record does not support his assertion. The State first notes that, as discussed above, Titan gave alerts on Arrieta's vehicle before he even alleges the cuing occurred. This entirely undermines the assertion that Titan's alerts were unreliable. It also undermines Arrieta's incorrect assertion that Titan showed no interest in the vehicle until the alleged cuing occurred. *See* Appellant's Br. at p.29. In any event, Arrieta asserts Chief Deputy Luther cued Titan to alert by directing Titan to smell the seam neat the sleeper compartment. *See* Appellant's Br. at p.29. However, Chief Deputy Luther explained that on the second pass he was "detailing" the semi by directing Titan to smell multiple areas of the vehicle. *See* Supp. Tr. 43:18–45:9. Notably, Titan was directed to smell other parts of the semi in the same manner, but he did not enter his trained final response until he smelled the area near the sleeper compartment. *See* Defense Ex. B (Luther Body Camera Video) at 2:02:10–2:02:40. This undermines Arrieta's assertion that Titan

only entered a final response because he was directed to do so by Luther. The district court came to the same conclusion, making the factual determination that there was no evidence to indicate that Titan had been "cued to give a final alert." Order Denying Supp. at p.3; App. 30. Arrieta's claim is without merit and should be rejected.

As a certified narcotics detection K9, Titan's alerts were presumed to be reliable. Arrieta has failed to overcome this presumption by quibbling over Titan's training records. Titan was well trained, reliable, and he was not cued to alert. Even excluding his final response of sitting, there was probable cause to search the commercial vehicle based on the other alerts that were observed by his handler. This Court should affirm.

C. Probable cause to search the commercial vehicle existed prior to any physical contact by Luther or K9 Titan. The search of the vehicle was authorized by the automobile exception.

Arrieta asserts that Titan's alerts were the product of an illegal search because he asserts both Chief Deputy Luther and Titan impermissibly trespassed on his commercial vehicle by making physical contact with it prior to Titan's final response. But Arrieta's arguments fail to consider that probable cause existed prior to the touching of the commercial vehicle. Thus, even assuming the physical

touching by Luther or Titan was a constitutional search, that search was permissible under the automobile exception.

There does not appear to be any dispute that a free-air sniff by a K9 does not constitute a search. *E.g.*, *Illinois v. Caballes*, 543 U.S. 405, 408–10 (2005). Instead, Arrieta asserts that Luther and/or Titan's touching of the commercial vehicle constituted a trespass which turned the sniff into a constitutional search. *See* Appellant's Br. at pp.23–25.

The United States Supreme Court in *United States v. Jones* recognized that a physical intrusion on a vehicle by police could constitute a constitutional search based on the theory that a trespass had occurred. 565 U.S. 400, 404–11 (2012). Later, the Court in *Florida v. Jardines*, recognized that a police K9 sniffing within the curtilage of a home would be an unlicensed physical intrusion constituting an impermissible search. 569 U.S. 1, 7–10 (2013). Relying on these two cases, the Iowa Supreme Court has recently stated that "A constitutional search occurs whenever the government commits a physical trespass against property, even where de minimis, conjoined with 'an attempt to find something or to obtain

information.'" *State v. Wright*, 961 N.W.2d 396, 413 (Iowa 2021) (quoting *Jones*, 565 U.S. at 408 n.5).

Arrieta asserts that Luther[3] and/or Titan's physical contact with his commercial vehicle constituted a search because it was a trespass combined with the intent to find something or obtain information. *See* Appellant's Br. at pp.23–25. But the State submits Arrieta's argument fails to recognize that even assuming he is correct, and the physical contact constituted a constitutional search, the search was authorized by the automobile exception because of the existence of probable cause prior to the physical contact.

A free-air sniff by a K9 does not constitute a search. *Caballes*, 543 U.S. at 408–10. And as discussed above, during his free-air sniff Titan provided alerts on the commercial vehicle *before* Luther

[3] Arrieta asserts Chief Deputy Luther also made physical contact with the vehicle by "touching" the seams. Appellant's Br. at pp.10–11 & n.3. However, it appears more likely that Luther was being inarticulate when he told Waalkens he touches the seams of the vehicle. *See* Defense Ex. A (Waalkens Car Video) at 17:18:00–17:19:15. Luther explained in more detail at the suppression hearing that he does not actually make physical contact with his hand: "I wouldn't say I touch it. I just run my hand close to it. … I normally don't touch the seam. I basically just run my hands up and down where I want him to search." Supp. Tr. 44:3–:19.

directed[4] Titan to touch the vehicle and smell the seam near the sleeper compartment. As Luther explained, Titan "was in odor prior to him actually smelling the source, which the source was the compartment." Supp. Tr. 46:13–:15. This means Luther observed Titan's changes in breathing, head snap or whip, and Titan walking underneath the vehicle trying to locate the source of the odor even before the physical contact occurred. *See* Supp. Tr. 34:2–:16 ("[H]e immediately showed signed of a breathing change.... [H]e showed more signs that he was in odor and that he was really trying to find it. At one point, he actually...was walking underneath the trailer with his head up in the air trying to smell where it's coming from. ... He was still in odor."), 46:20–:25. These alerts from Titan, a certified narcotics detection K9, provided probable cause to search. The search of the vehicle, including the physical contact and sniff to locate the source of the odor, was authorized by the automobile exception. *See State v. Storm*, 898 N.W.2d 140, 145 (Iowa 2017) (discussing automobile exception). Just as the later search inside the commercial

[4] The State does not dispute that K9 Titan's actions were in response to commands made by Chief Deputy Luther. *See* Supp. Tr. 43:21–45:13. Thus, the State does not argue that the physical contact was the result of instinctive actions. *See State v. George*, No. 15-1736, 2016 WL 6636750, at *5–6 (Iowa Ct. App. Nov. 9, 2016).

vehicle was authorized, so too would be a search of the exterior of the vehicle to narrow down where the narcotics are located. Arrieta's claim fails, and this Court should affirm.

Even if this Court disagrees that probable cause was established prior to the physical contact, the State would submit that mere, "de minimis," physical contact on the exterior of a vehicle does not constitute a trespass. *See* Appellant's Br. at p.25 (conceding the contact is at most "de minimis"). The distinction between the intrusive contact in *Jones* and that present in this case is striking.[5] In *Jones*, officers installed a GPS device that enabled officers to track the vehicle's movements. 565 U.S. at 404. The Court in *Jones* characterized the placement of the GPS device as essentially "occup[ying]" the vehicle. *Id*. In stark contrast is the situation here, where Titan's paws—and possibly Luther's finger—merely made brief physical contact with the exterior of Arrieta's commercial vehicle.

[5] It is also noteworthy that *Jardines* and *Wright* both involved homes, which have a greater privacy interest. The opposite is true of a vehicle, and especially of a commercial vehicle which is subject to regulatory inspections at practically any place and time. *See Steward*, 2001 WL 98397, at *2 (discussing commercial vehicle inspections). This too would seem to undermine the notion that a trespass occurred merely by an officer physically touching the exterior of a commercial vehicle stopped for inspection.

Similar incidental contact has previously been found to not be an infringement, and this Court should decline to conclude that after *Jones* every minor physical contact constitutes a trespass. *See United States v. Sharpe*, 470 U.S. 605, 687 (1985) (stepping on bumper of vehicle to verify it was overloaded viewed simply as investigation pursued in a "diligent and reasonable manner," that supported subsequent arrest and search); *United States v. Olivera-Mendez*, 484 F.3d 505, 511–12 (10th Cir. 2007) (finding K9 "jump[ing] and plac[ing] his front paws on the body of [a] car in several places during a walk-around sniff" to be "minimal and incidental contact," "not ris[ing] to the level of a constitutionally cognizable infringement," and contrasting the contact with a "tactile inspection of the automobile"). Such a result would seem to serve no practical purpose. For example, if Titan had been a taller dog, perhaps he could have located the source of the odor (and entered his trained final response) earlier without first touching Arrieta's vehicle. There is no reason why the behavior of a taller dog should not constitute a search while Titan's behavior would merely because of the brief, minimal physical contact.

Because probable cause existed prior to the physical contact of the commercial vehicle by Luther and/or Titan, their subsequent search was authorized by the automobile exception. The physical contact was not an unlawful search. In the alternative, this Court should decline Arrieta's invitation to find that mere physical contact with the exterior of a vehicle constitutes a trespass. In either event, Arrieta's argument should be rejected.

* * *

Arrieta has failed to show that his motion to suppress was improperly denied. This Court should affirm.

CONCLUSION

This Court should affirm Stephen Andrew Arrieta's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

Oral submission is unnecessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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