



A184 Who Let the Dogs In? The Admissibility and Scope of Testimony of Dog Handlers

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The goal of this presentation is to explore the mistakes made in *U.S. vs. Hebshie* as examples of what defense counsel, law enforcement, and prosecutors can do in the future to avoid misuse of this valuable tool, also addressing these issues by reviewing both federal and state cases.

This presentation will impact the forensic science community by outlining the foundational requirements for allowing dog handlers to testify in court about the reactions of trained accelerant-detection dogs in detecting the presence of a fire accelerant in a criminal or civil arson cases, as well as the reactions of drug detection dogs.¹⁻³

In 2006, James Hebshie was convicted and sentenced to 15 years in prison for arson and mail fraud for setting a fire in a commercial building where he worked.⁴ In order to prove that the fire was arson, the Government elicited testimony from an accelerant-detection dog handler and a laboratory technician, who testified about the incendiary nature of the fire. Notwithstanding, the trial judges repeated suggestions to defense counsel to take time to consider the admissibility of this testimony, the defense counsel did not request a pre-trial hearing nor mount any meaningful challenge to the evidence at trial. In 2010, a motion was brought to vacate Mr. Hebshie's conviction, claiming that defense counsel's failure to mount a challenge to the "accelerant-detection dog" testimony constituted ineffective assistance of counsel.

Few people would challenge the principle that dogs generally possess an enhanced ability to detect certain odors such as food or specific substances such as marijuana, heroin, cocaine, methamphetamines, and, perhaps, even fire accelerants. However, utilizing that ability to assist law enforcement personnel to uncover such substances requires specialized training in order to alert their handlers when they have detected such a substance. The alert may be a bark or scratching at the location, or it may be an obvious turn of the head or tail movement, or by just passively sitting at the location. Since all of these actions are part of a dog's usual activities, training the dog to perform in a specific manner to alert the handler that it has detected the specific substance for which it is trained differs with each dog. But without maintaining accurate data on how proficient a particular dog is in making positive alerts as opposed to false positive alerts to drugs or fire accelerants, there is no objective way to judge the reliability of that particular dog.

While certificates attesting to the dog's training should be an initial factor, continuous proficiency testing should be maintained and documented to ascertain a particular dog's error rate in order to determine the reliability of any particular dog. The use of dogs as an investigative tool should be used appropriately. When the government seeks to introduce evidence regarding a dog's role in the investigation, the question is not whether dogs can generally detect certain odors, but how accurate and proficient that specific dog is in detecting that specific odor. Courts as "gatekeepers" of evidence have an obligation not only to consider the admissibility of the evidence, but what limitations, if any, should be placed on the testimony of dog handlers.⁵ Judge Nancy Gertner in the *Hebshie* case, stated "a certain patina attaches to an expert's testimony unlike any other witness; this is "science," a professional's judgment, the jury may think, and give more credence to the testimony than it may deserve."

This presentation will look at what judges and counsel should review in addressing the use of drug detection alert dogs and accelerant alert dogs as evidence in a trial and whether there are any differences. What are the parameters for the admissibility of this type of evidence? What underlying data should be required in order to allow the testimony of a dog handler in court? What can law enforcement do to improve the admissibility of such testimony? Finally, what obligation do the various participants in the criminal justice system have to assure that only reliable evidence is presented to the trier of fact?

While the judiciary has continued to struggle with how to address emerging technologies, courts are looking with a more critical eye toward the underlying principles, procedures, and methods employed by forensic specialists that were once assumed to be reliable and pondering whether to continue to admit such evidence into a trial without first knowing about its underlying validity.⁶

References:

1. *Frye v. United States*, 293 F. 1013 (1923)
2. *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993).
3. *Kumho Tire v. Carmichael*, 526 US 137 (1999).
4. *United States v. Hebshie*, 754 F. Supp. 2d. 89 (D. Mass 2010) quoting, *United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999).
5. *Florida v. Jardines*, ___ Sup. Ct. ___ (2012).
6. *Florida v. Harris*, ___ Sup. Ct. ___ (2012).

Dog Handler, Accelerant Detection, Admissibility