IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MERRIT ALONZO SIMS, Appellant,	)	Case No. SC04-1879
-vs-	)	Lower Tribunal No. F91-22048
STATE OF FLORIDA, Appellee.	)	On Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

SUPPLEMENTAL INITIAL AMENDED BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Pursuant to the Order of this Court dated April 3, 2006, the Circuit Court held an evidentiary hearing on July 24-27, 2006, relating to the deficient performance of Appellant's trial counsel in failing to challenge certain evidence at the guilt phase of Appellant's trial. References to the transcript of the evidentiary hearing and the related Supplemental Record of Appeal are as follows:

Evidentiary Hearing:	(Supp. T. __)
Supplemental Record of Appeal	(Supp. ROA __)

References to the trial and post-conviction records are the same as in the original briefing of this appeal, to wit:

Original Trial:	(Trial T. __)
Materials in record of direct appeal:	(ROA Dir. __)
Post-Conviction Record of Appeal (including transcript of February 2003 Evidentiary Hearing):	(ROA __)
Defendant's Exhibits from Feb. 2003 Hearing:	(DX __)

The transcript of the evidentiary hearing and the Supplemental Record of Appeal have been made part of the record on the instant appeal.

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STATEMENT OF CASE AND FACTS

Pursuant to this Court's Order dated April 3, 2006 (the "April 3 Order"), the Circuit Court (L. Schwartz, J.) conducted an evidentiary hearing over four days from July 24 to July 27, 2006, solely concerning "whether defense counsel's performance was deficient for not challenging the canine-alert testimony presented by [the police dog handler] and/or for not moving to strike that testimony" once defense counsel learned that the State was going to exploit it as the basis for introducing additional highly prejudicial testimony by Mr. Sims' parole officer. (*Id.* at 1.)[1] Thereafter, the lower court issued an Order dated August 8, 2006 (the "August 8 Order"), concluding that the performance of Mr. Sims' trial counsel was not deficient. (Supp. ROA at 706).

Contrary to the lower court's conclusion, the evidence presented at the July 2006 hearing – including the testimony of both of Mr. Sims' former trial counsel, Clinton Pitts and Arthur Carter, and Steven Potolsky, a noted expert on the prevailing standards of capital defense representation in Florida –

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[1] This Court already has held unanimously that the canine-alert testimony relied upon by the State at trial was "clearly prejudicial" to Mr. Sims, because it was "essential to the State's argument that Sims' motive for shooting Officer Stafford was to avoid being found in violation of the terms of his conditional release and returned to prison." (*Id.*) Thus, this Court already has held that the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984), has been met, and the April 3 Order directed the lower court to conduct an evidentiary hearing solely concerning the "deficient performance" prong of *Strickland.* The background facts relevant to this Supplemental Brief on Appeal are set forth at pages 9-11, and 54, of Appellant's Amended Initial Brief.

overwhelmingly demonstrated that the performance of Mr. Sims' trial counsel was deficient.[2] Both Pitts and Carter directly admitted that they had *no* strategic basis for failing to object to or move to strike the "clearly prejudicial" dog-alert testimony at trial, even though they knew full well that it had no probative value and was therefore irrelevant and inadmissible. (*See, e.g.*, Supp. T. 51-52, 56-58, 145-49.) Moreover, Pitts and Carter were not in a position to make a reasonable strategic choice regarding this issue, because they failed to do any investigation or discover the abundant additional evidence that would have cemented any challenge to the dog-alert testimony. The hearing record makes plain that Pitts and Carter repeatedly and inexcusably missed repeated opportunities to lodge an objection to this testimony and thereby either (i) bar the testimony from the trial or, (ii) if the trial court had erroneously admitted irrelevant and "clearly prejudicial" testimony over objection, preserve a meritorious issue for direct appeal.

SUMMARY OF ARGUMENT

I. In its August 8 Order, the lower court improperly attempts to excuse counsel's derelictions by ignoring the point-blank admissions of Mr. Sims' trial counsel at the July 2006 hearing. Although the lower court said it found Pitts

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[2] For the sake of brevity, this Supplemental Brief assumes familiarity with Mr. Sims' prior briefs on this appeal, including the Statement of Facts in Mr. Sims' Amended Initial Brief on Appeal, and the relevant record, other than the supplemental evidentiary record developed in connection with the July 24-27, 2006 evidentiary hearing.

to be generally "credible" and said nothing to discredit Carter, the August 8 Order completely fails even to acknowledge, much less address, any of these admissions, and fails to confront the multiple discrete instances in which Mr. Sims' counsel fell down on the job. Each of these instances alone is sufficient to establish trial counsel's deficient performance. Cumulatively, they are overwhelming.

II. The lower court erred as a matter of law by failing to apply the well-established legal standard of *Strickland v. Washington*, *supra*, which requires counsel to have an *objectively reasonable, strategic* grounding for their decisions at trial. *See* 466 U.S. at 688. Moreover, the lower court compounded this legal error by mischaracterizing as an "issue for direct appeal" and consequently ignoring trial counsel's deficiency in failing to make a motion to strike after Mr. Sims' parole officer, Essie Lynn, was called to the stand. The August 8 Order relies upon erroneous findings concerning Pitts' subjective state of mind which, even if they were correct, would not identify an objectively reasonable strategic basis for counsel's egregious omissions. Far from applying the proper test under *Strickland*, the one-paragraph analysis in the August 8 Order does not support the lower court's legal conclusion, but merely coats counsel's failures with a misleading veneer of explanation that is neither reasonable nor strategic.

III. Even if Pitts and Carter had made a deliberate choice to forgo objection to this "clearly prejudicial" evidence – which they plainly did not do –

the failure to object or move to strike was objectively unreasonable and therefore deficient as a matter of law. It is beyond dispute that, under the Florida Rules of Evidence, the dog-alert testimony introduced by the prosecution at trial was irrelevant and therefore inadmissible. The lower court itself characterized the dog-alert evidence as utterly speculative, declaring that the dog could have alerted "to anything and everything," including the dog's handler merely "saying the sky is blue." (Supp. T. 419-20.) Nothing in Pitts' or Carter's testimony at the hearing could support a reasonable justification for not objecting here. Moreover, Pitts and Carter were oblivious to the additional evidence that prompted the lower court's finding of irrelevance, because they had failed to lift a finger to investigate or develop any challenge to the dog-alert evidence.

ARGUMENT

I. THE LOWER COURT TURNED A BLIND EYE TO MULTIPLE ADMISSIONS BY BOTH PITTS AND CARTER THAT THEY HAD NO STRATEGIC BASIS FOR FAILING TO CHALLENGE THE DOG-ALERT TESTIMONY.

The August 8 Order simply ignores the repeated admissions by both Pitts and Carter that they had *no* strategic basis for failing to object to or move to strike the dog-alert testimony at several distinct junctures in Mr. Sims' trial. *First*, the lower court ignores counsel's admissions that they failed, without reason, to object to or move to preclude the dog-alert testimony prior to trial, despite receiving clear advance notice of the State's purported motive theory and its

intention to introduce the dog handler's testimony at trial. On or before January 3, 1994, several days before trial commenced, the State filed an *in limine* motion (on a different issue) which explicitly provided Mr. Sims' counsel with a preview of the State's theory. (Trial T. 383; Supp. ROA 183-86.) At the 2006 hearing, Pitts admitted that he believed the dog-alert testimony was irrelevant and therefore inadmissible (Supp. T. 50-52), and he had no strategic reason for failing to object to or move to preclude it:

> Q.: Did you consider making a motion . . . to preclude the State from putting on the dog handler testimony?
>
> [Pitts]: No.
>
> Q.: Did you have any discussion with Mr. Carter about that?
>
> [Pitts]: No. . . .
>
> Q. **My question Mr. Pitts is, did you have any strategic reason for not making a motion to preclude the dog handler's testimony?**
>
> **[Pitts]: No.**

(*Id*. at 51-52.) Mr. Carter made the same admission. (*Id*. at 145-46.)

<u>*Second*</u>, both Pitts and Carter admitted having no strategic basis for sitting silent when the dog handler, Officer Silvia, was called to the stand and testified at trial: they failed to object to his testimony generally or to a single question posed to Silvia by the prosecution. (*Id*. at 57, 148.) In addition to believing that Silvia's testimony was irrelevant, Pitts acknowledged that any evidence associating a murder defendant such as Mr. Sims with illegal drugs would be prejudicial (*id*. at 57), and therefore could influence the jury. Furthermore, he

explicitly admitted that he had no reason for failing to object to such "clearly prejudicial" testimony when it was introduced:

> Q.: [Upon reviewing the transcript of Officer Silvia's testimony prior to this hearing], [d]id you note whether there were any objections made by you or by Mr. Carter in response to Officer Silva's testimony?
>
> **[Pitts]: That was surprising that there were none.**
>
> **Q.: And did you have any – at the time did you have any – did you or Mr. Carter have any strategic reason for not objecting to that testimony?**
>
> **[Pitts]: Not that I recall at this time.**
>
> Q.: And in your understanding at the time of Mr. Sims trial, were there professional standards of performance that you were expected to meet as a defense counsel in a capital case?
>
> [Pitts]: I am sure there was.
>
> Q.: Do you expect yourself to meet those standards?
>
> [Pitts]: Yes.
>
> Q.: And did those standards include making appropriate objections to adverse evidence against your client?
>
> [Pitts]: Yes.
>
> **Q.: Now, based upon your reviews of the transcript, not objecting to Officer Silva's testimony at trial, do you believe you met those standards?**
>
> [Pitts]: Looking back at it today?
>
> Q.: Yes[.]
>
> **[Pitts]: No.**

(*Id.* at 56-57.) Mr. Pitts further testified that "not objecting" to this testimony was "improper." (*Id.* at 58.)

In his testimony Carter also stated that he believed the dog-alert evidence was irrelevant (and therefore inadmissible) (*id.* at 137-138), and

prejudicial (*id.* at 145), and he confirmed the absence of any strategic rationale for failing to object to Officer Silvia's testimony when it was introduced:

> Q.: And so – but you just indicated that based upon the record that you reviewed you didn't see any objection [to Officer Silvia's testimony] on the record, correct?
>
> [Carter]: Right.
>
> **Q.: And did you have any strategic reason for not placing an objection on the record at that point in time?**
>
> **[Carter]: Not that I can think of.**

(*Id*. at 148-49.) Carter further testified that Pitts never suggested any strategic rationale for not objecting to Silvia's testimony. (*Id.* at 149.) Moreover, he never discussed with his client, Mr. Sims, the question of whether to object to the dog-alert testimony, nor did Mr. Sims ever agree that such clearly prejudicial testimony would be allowed in without objection by his counsel. (*Id.*)

Third, both Pitts and Carter admitted at the 2006 hearing that they had no strategic basis for their failure to move to strike Officer Silvia's testimony when, immediately after Silvia testified, the State exploited that testimony as the predicate for introducing the testimony of Mr. Sims' parole officer, Essie Lynn, concerning his parole status. On direct appeal, this Court held that Lynn's otherwise inadmissible testimony only "became relevant and admissible" after the predicate dog-alert testimony was introduced by the State *without any objection by Sims. See Sims v. State*, 681 So.2d 1112, 1115 (Fla. 1996). During the trial, Carter orally argued to the trial court Mr. Sims' objection to Lynn's testimony, protesting

strenuously that Lynn's testimony would be "highly prejudicial" to Mr. Sims. (Trial T. at 1104.). At the 2006 hearing, Carter acknowledged that he understood that – as this Court subsequently confirmed – Lynn's testimony was inadmissible as a matter of law without the dog-alert testimony as a predicate. (Supp. T. 155.) As Carter understood at the time, and as this Court's holding on direct appeal logically dictates, a successful motion to strike the dog-alert would have barred the jury from considering or hearing both Silvia's *and* Lynn's testimony, thereby depriving the State of its only theory of motive at trial. (*Id*. at 155-56.)

At the hearing, Carter admitted that he had no explanation for failing to move to strike Officer Silvia's testimony, even though he considered it devoid of probative content and therefore irrelevant:

> Q.: And now in your understanding was the dog alert testimony of Officer Silv[i]a the predicate for the State's proffer of the Essie Lynn testimony?
>
> [Carter]: Yes.
>
> Q.: If the dog alert testimony was inadmissible, then the Essie Lynn testimony would be inadmissible?
>
> [Carter]: Reasonably, yes.
>
> Q.: . . . **Did you consider making a motion to strike the dog alert testimony at that point?**
>
> **[Carter]: No, I did not.**
>
> Q.: Did you discuss that with Mr. Pitts?
>
> [Carter]: I don't know if we did or not.
>
> **Q.: Did you have any strategic reason for not moving to strike the dog alert testimony?**
>
> **[Carter]: No.**

Q.: And you just missed that, didn't you?

[Carter]: Seems that way, yes.

(*Id*. at 155-56.) Similarly, Pitts admitted that he had no reason for failing to move to strike the dog-alert testimony after it became clear that the State would use it to pry open the door for Essie Lynn's "highly prejudicial" testimony:

> Q.: Do you recall in connection with your objection to Ms. Lynn's testimony, did you have any discussion with Mr. Carter regarding making a Motion to Strike the dog alert testimony that had just come in?
>
> [Pitts]: No.
>
> **Q.: Did you have any strategic reason at that point for not moving to strike the dog alert testimony?**
>
> **[Pitts]: No.**

(*Id*. at 62; *see also id*. at 108-09 (no recollection of any decision not to make motion to strike in this case).) Thus, Mr. Sims' trial counsel admitted that they failed for no reason to challenge the dog-alert evidence, even after it became obvious that the direct consequence of Silvia's testimony was – in Carter's own words at the time – "highly prejudicial" to Mr. Sims. (Trial T. 1104:14.)

Moreover, this failure to move to strike the dog-alert testimony did not result from a split-second oversight made in the heat of courtroom battle. To the contrary, after an objection to Lynn's testimony was raised on Friday, January 7, 1994, the trial judge adjourned the trial for the weekend and directed "both sides" to "brief me" on its admissibility. Thereafter, the State filed a written brief that the trial court reviewed (*see* ROA Dir. 456; T. 1103), but Mr. Sims' attorneys

failed to file anything. Even with a weekend to think and write about it, Mr. Sims' counsel never put pen to paper and never moved to strike the "clearly prejudicial" dog-alert testimony that they had incompetently allowed the jury to hear without objection. Not a single one of the admissions by Pitts and Carter set forth above is mentioned in the lower court's August 8 Order.

II. THE LOWER COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD UNDER *STRICKLAND*, AND ITS FINDINGS DO NOT ARTICULATE ANY STRATEGIC RATIONALE FOR COUNSEL'S REPEATED FAILURES TO OBJECT.

The trial court failed to apply the fundamental standard under the *Strickland* test requiring counsel to meet "'an *objective* standard of reasonableness' based on 'prevailing professional norms,'" *Ragsdale v. State*, 798 So.2d 713, 715 (Fla. 2001) (emphasis added) (quoting *Strickland*, 466 U.S. at 688), and failed to honor the principle that, although counsel may not be deemed ineffective for decisions made pursuant to a "sound trial strategy," *Asay v. State*, 769 So.2d 974, 984 (Fla. 2000), a purportedly 'strategic' decision cannot be held reasonable unless the attorney *both* adequately investigated his options *and* "'ma[d]e a reasonable choice between them.'" *Rose v. State*, 675 So. 2d 567, 573 (Fla. 1996) (quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)). Ignoring the constitutional requirement that counsel's decisions must be "objectively reasonable," the August 8 Order instead recites a handful of findings solely concerning Pitts' *subjective* state of mind. The lower court's analysis fails to identify any coherent strategic

choice by Pitts to forgo objection, and even under the circumstances found any such choice would have been objectively unreasonable.

A. The Lower Court's Finding That Pitts Thought the Trial Court Had "Already" Ruled On the Dog-Alert Evidence Is Unfounded and Erroneous as a Matter of Law.

To begin with, the lower court's reliance upon Pitts' purported subjective belief that "the trial judge had already rendered rulings on the presentation and admission of the 'dog sniff' testimony" (Supp. ROA 706), makes no sense and does not support the court's legal conclusion. The August 8 Order makes no attempt to identify at what point in the trial proceedings these "rulings" had supposedly "already" taken place. Certainly, no such ruling had been made when the State filed its motion *in limine* before trial and placed Pitts and Carter on notice of the prosecution's highly prejudicial motive theory. (Trial T. 383-87.) To the contrary, in ruling on the distinct issue raised by the *in limine* motion, the trial court expressly *declined* to rule on the State's motive theory and admonished the prosecutors: "I don't want you to be accusing somebody . . . of transporting drugs if there is no evidence there were drugs in the car." (Supp. T. 201; Trial T. 387.) At the 2006 hearing, the State itself characterized this statement as "the ruling given by the Court" at that time, and Pitts agreed. (Supp. T. 201.)[3] Hence, the lower

[3]Carter recalled at the July 2006 hearing that he thought at the time that the trial court had actually ruled in favor of Mr. Sims (*i.e.*, that the dog-alert testimony would *not* be admitted). (Supp. T. 148.) Highlighting the deficiency of counsel's (continued…)

court's vague finding is flatly refuted not only by Pitts' testimony but also by the State's explicit position that the trial court did *not* rule against Mr. Sims on this issue.

Thus, even if Pitts at some later point believed that such a ruling had been made, the trial court plainly had not made any such ruling at that juncture, nor did Pitts believe that it had. Since the issue was not raised again until after Officer Silvia had testified at trial – without any objection by Mr. Sims' counsel – this statement in the August 8 Order concerning Pitts' subjective understanding cannot justify trial counsel's failure to object to Silvia's testimony either before trial or when Silvia was called to the stand. As noted in Part I above, trial counsel expressly admitted at the hearing that they had no strategic reason for failing to object to the State's introduction of Silvia's testimony. (*Id.* at 56-56; 148-49.) The lower court's finding regarding Pitts' subjective belief at some unspecified point does nothing to diminish the glaring deficiency of trial counsel's performance.

B. Even If the Trial Court Had "Ruled," Trial Counsel's Failure to Object and Preserve the Record Was Objectively Unreasonable.

Furthermore, even assuming that Pitts at some point believed the trial court had "ruled" on this issue, Pitts and Carter were no less deficient for failing to

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performance here, Carter testified that consequently all he and Pitts had to do to keep Silvia off the stand was to "remind the judge of his prior ruling." (*Id.* at 193.)

object to the dog-alert testimony in order to preserve the issue for appeal.[4] Pitts himself admitted that "in a situation in a capital defense trial if you can preserve an objection to something and still carry out your strategy you would do that," and that he had no reason to believe that he had consciously "departed from that princip[le]" in Mr. Sims' case. (*Id.* at 113.) The August 8 Order does not identify a choice by counsel to abandon the option of seeking to exclude the dog-alert testimony entirely, nor would there have been any rational basis for such a choice.[5]

Indeed, under *Strickland* trial counsel are constitutionally deficient even when they make an affirmative decision not to object, where counsel makes an illusory choice by unreasonably abandoning one of two alternatives that were not mutually exclusive. For example, in *Medina v. DiGuglielmo*, 461 F.3d 417, 428-29 (3d Cir. 2006), counsel failed to object to testimony by a witness whose competency should have been challenged, purportedly because he wanted to

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[4] "Failure to properly preserve an issue for appellate review may constitute ineffective assistance of counsel." *Johnson v. State*, 888 So.2d 122, 125 (Fla. 4th DCA 2004); *accord Atkins v. Alabama*, 932 F.2d 1430, 1432 (11th Cir. 1991); *Jackson v. State*, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998); *Ross v. State*, 726 So.2d 317, 319 (Fla. 2d DCA 1998).

[5] Trial counsel's lack of any affirmative "strategy" not to object is confirmed not only by Pitts' and Carter's multiple admissions in that regard, but also by Pitts' reaction upon reading the transcript and finding no objection: "I just couldn't believe it . . . ." (Supp. T. 59; *id.* at 57.) Pitts weakly speculated that the issue of Silvia's testimony might have been discussed off the record, but he admitted that it was his obligation to preserve any objection *on the record*, and that "the record speaks for itself." (*Id.*) *Cf. Mathis v. State*, -- So.2d ----, 2006 WL 3017251 (Fla. 1st DCA October 25, 2006) (failure to ensure preservation by objecting on record was objectively unreasonable).

challenge the witness's testimony on cross examination. *Id.* at 428. Relying upon pre-1994 Pennsylvania Supreme Court precedent, the Third Circuit held that the failure to object on these grounds was objectively unreasonable:

> This was not a case where counsel had two alternatives that were contradictory or mutually exclusive. In such a case counsel must necessarily choose one or the other alternative. This case presents, instead, the situation where counsel had two alternatives, both of which are available to him. . . . If he succeeded in disqualifying the witness [through objection], there would be no need to pursue *the less certain method of discrediting the witness on cross. . . . There is no reasonable basis under these circumstances, for . . . deliberately eschewing one weapon (out of two available) when both can be used.*

Id. at 429 (quoting *Commonwealth v. Mangini,* 493 Pa. 203, 425 A.2d 734, 737 (1981) (internal quotation marks and brackets omitted) (emphasis added)). Here, neither Pitts nor Carter identified any reason why they had to forgo the more certain method of objection and exclusion – which would have been far more beneficial to Mr. Sims – nor did the lower court point to any rational foundation for such a choice.

C. The Lower Court Erred By Failing to Address Trial Counsel's Deficient Performance With Respect to Lynn's Testimony.

The lower court's finding that Pitts thought "any added attention who [*sic*] place emphasis where no emphasis was due," (Supp. ROA 706), does not answer this point. Mr. Sims' counsel plainly could have lodged a proper objection outside the presence of the jury at numerous points before or during trial, including – as Pitts unequivocally acknowledged – a motion to strike in connection with

counsel's challenge to Essie Lynn's testimony. (Supp. T. 114; *see also id.* at 235 (Potolsky).) Even if Pitts and Carter had had some subjective impulse to forgo such a motion – which they admittedly did not, *see* Part I above – their failure to do so lacked any objectively rational strategic justification.

Equally nonsensical is the lower court's reliance upon the finding that Pitts was subjectively "not concerned" because the dog-alert testimony was weak. (Supp. ROA 706.) The weakness of this evidence (and Pitts' disastrously complacent attitude) are beside the point: The evidence was – as this Court unanimously has held – "clearly prejudicial," and it therefore behooved Mr. Sims' counsel to make diligent efforts to exclude it from the trial. Pitts himself testified that, when faced with the strategic choice either "to deny the State the ability to prove motive entirely or to allow the State to prove a motive with evidence that you think is weak," "the basic practice, *fundamental* practice is . . . *to try to get it stricken and not allow it to happen*." (Supp. T. 109 (emphasis added).) Although Pitts at one point illogically suggested that somehow his "hands are tied" when the judge has ruled (*id*. at 112), he expressly admitted that it was his obligation, as trial counsel, to ensure that a valid objection was placed "on the record in order to preserve the issue for appeal" (*id.* at. 60). If he failed to apprehend the clear

prejudice that the irrelevant dog-alert testimony would cause to his client, that failure only highlights the grave deficiency of his performance.[6]

Moreover, any suggestion that Pitts and Carter were unconcerned about the impact of the dog-alert testimony is plainly belied by their vehement objection to the State's subsequent introduction of Essie Lynn's "highly prejudicial" testimony, which became admissible only on the basis of the dog-alert testimony. (Trial T. at 1103-04.) At the hearing, Carter testified that he understood Lynn's testimony could not be introduced without the dog-alert testimony as a predicate (Supp T. 155), and the exclusion of the dog-alert testimony therefore would have barred the door to Lynn's testimony as well.[7] Mr. Sims' counsel had no strategic rationale for failing to move to strike Silvia's testimony in order to keep Lynn off the stand.

The lower court closed its eyes to the overwhelming evidence on this point only by erroneously dismissing any errors by counsel "dealing with" the testimony of Essie Lynn, on the grounds that these were "issues for direct appeal."

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[6] The State cannot seriously contend that trial counsel can form an "objectively reasonable" strategy based upon a subjective failure to recognize "clearly prejudicial" evidence for what it is. (*See* Supp. T. at 243 (Potolsky).) In any event, Pitts himself acknowledged that any evidence associating a murder defendant with narcotics possession was inherently prejudicial. (*Id.* at 111.)

[7] Pitts had no recollection of the argument on Essie Lynn's testimony and admitted, as did Carter, that he had no strategic reason for failing to move to strike. Carter, who argued the motion and recalled the arguments in detail, stated that he and Pitts "just missed" the opportunity to move to strike the dog alert.

(Supp. ROA 706.) This Court's April 3 Order plainly precludes that legal ruling, expressly instructing the lower court to consider whether Pitts and Carter's performance was deficient for failing to move to strike the dog-alert testimony *after* it became clear that it had opened the door to Lynn's testimony. On direct appeal, the State relied upon the undisputed absence of objection to the dog-alert testimony as a basis to justify the admission of Lynn's testimony.[8] This Court's decision on direct appeal did not consider the impropriety of allowing the predicate dog-alert testimony expressly *because* Mr. Sims' counsel had failed to object to it. *See Sims*, 681 So.2d at 1115. Consequently, counsel's failure to move to strike the predicate dog-alert evidence when faced with the disastrous prospect of Lynn's testimony forms a valid component of trial counsel's ineffective assistance claim here. By improperly excluding from consideration this key aspect of Mr. Sims' claim, the lower court erred as a matter of law.

D. The Quality of Pitts' Closing Argument Is Irrelevant to the Determination of Whether Trial Counsel's Failure to Challenge the Dog-Alert Evidence Was Objectively Unreasonable.

The lower court's reliance on Pitts' subjective opinion in 2006 that his closing argument was "brilliant" is also illogical and has no legal bearing upon the

[8] *See* Brief of the State of Florida, *Sims v. State*, No 83,612 (filed with Florida Supreme Court, September 8, 1995 (available 1995 WL 17016475)) at 7 ("It should be noted that all of the foregoing testimony regarding the dog's detection of the scent of drugs was admitted into evidence *without any objection from the defense*.") (emphasis added). Having taken and benefited from that position on direct appeal, the State is barred from taking a different position here.

objective reasonableness of trial counsel's performance. The critical question under *Strickland* is whether trial counsel made an informed, reasonable choice not to object to the evidence. Contrary to the lower court's conclusion, Pitts' failure to object is no less incompetent merely because he tried – unsuccessfully – in closing argument to undo the prejudice which his and Carter's own abject failure to exclude the State's motive theory had caused. Had the dog-alert testimony been excluded, the prosecution would have been absolutely barred from even mentioning its clearly prejudicial motive theory in its closing argument. (*See* Supp. ROA 239; *see also id*. at 281.) Instead, the prosecutor seized the unhindered opportunity to turn its narcotics-based motive theory into the central theme of his summation, hammering the point at length no fewer than five separate times.[9]

No matter how "brilliant" Pitts today may think his closing argument turned out to be, that belief could not justify the failure to oppose irrelevant, clearly prejudicial evidence that could be (and *was*) used by the prosecution to prejudice and inflame the jury. Nor could it justify counsel's failure to preserve the record for appeal in the event that Mr. Sims was convicted. Mr. Sims' counsel did not have to choose between seeking to exclude the dog-alert testimony and making a

[9] The prosecutor's repeated lengthy references to the dog-alert and Mr. Sims' purported drug possession fill well over a page of the trial transcript and are quoted in Mr. Sims' Prehearing Memorandum, (Supp. ROA 148-49), and in Mr. Sims' Amended Initial Brief on Appeal, at 54.

"brilliant" closing argument, nor does the August 8 Order identify any coherent basis for Pitts' failure to put an objection on the record.

The lower court ignored not only myriad explicit admissions by Pitts and Carter that they had no strategic basis for failing to object, but also extensive, substantively uncontradicted testimony by Mr. Sims' expert, Steven Potolsky, that in numerous respects Pitts' and Carter's performance fell far below minimal professional standards and clearly violated the professional norms prevailing among capital defense counsel at the time of Mr. Sims' trial in 1994. (*See, e.g.*, Supp. T. 223, 385-87; *see also* Supp. ROA 188-404 (applicable NLADA Standards and ABA Guidelines).) The lower court admitted Mr. Potolsky's testimony over the State's objection and qualified him as an expert on the prevailing professional standards and norms applicable to capital defenders. (*Id.* at 220). The State failed to call any rebuttal expert or present any evidence whatsoever controverting Mr. Potolsky's conclusion that at numerous points trial counsel failed to comply with prevailing professional standards. Mr. Potolsky's uncontradicted expert opinions provide additional support for reversal of the lower court's ruling.

III. BOTH THE STATE AND THE TRIAL COURT ACKNOWLEDGED ON THE RECORD THAT THE DOG-ALERT TESTIMONY WAS IRRELEVANT, AND IT THEREFORE MUST HAVE BEEN EXCLUDED IF TRIAL COUNSEL HAD OBJECTED.

At the July 2006 evidentiary hearing, the State did not seriously attempt to defend the admissibility or probative value of the dog-alert testimony.

To the contrary, the State's attorneys repeatedly echoed and adopted the position taken by both Pitts and Carter that the dog-alert testimony was irrelevant. (*See, e.g.*, Supp. T. 302-03, 402-03, 411-12, 455-56, 467, 474.) Even more significantly, the lower court itself acknowledged the non-probative nature of this testimony, opining that the dog in this case could have alerted to "anything and everything," including his handler "saying the sky is blue." (*Id.* at. 420.) The lower court found this proposition so clear that it refused to permit Mr. Sims' canine-detection expert to testify on this (or any other) issue. In short, everyone in the courtroom – including Judge Schwartz – repeatedly emphasized the patent irrelevance of the "essential" evidence supporting the State's motive theory at trial.

The dog-alert testimony offered by the State failed to meet the threshold standard of relevance under Florida Rule of Evidence 401, much less survive the balancing test of Rule 403. The prosecution urged the jury to climb a speculative ladder of prejudicial inferences, solely on the basis of Silvia's testimony that a dog had "alerted" to the car two days after the homicide, unsupported by any actual drugs or by any evidence tying Mr. Sims to such drugs two days earlier (or even establishing a clear chain of custody over the vehicle). Moreover, at the July 2006 hearing the trial court also heard and credited extensive evidence, introduced through Mr. Potolsky, which further demonstrated the absence of any rational evidentiary foundation to support the State's motive theory.

In support of his opinion that trial counsel failed adequately to investigate and develop any substantive challenge to the dog-alert evidence, Potolsky identified a wealth of additional evidence – available to, but undiscovered by, trial counsel – further demonstrating the alert's unreliability, including, *inter alia*, evidence that: (1) Jake's performance records prior to June 1991 indicated that the dog habitually alerted to currency when no drugs were found (Supp. ROA 277-78); (2) sandwich remains were removed from the car at precisely the location of the purported "alert" (Supp. ROA 250); and the interior of the car was subjected to noxious cyanoacrylate "superglue fuming" that could have impaired the dog's olfactory sense (Supp. ROA 248-49). Because Pitts and Carter had failed to do any investigation concerning the dog's unreliability and the specific alert in this case, none of this evidence was known to trial counsel or presented to the trial court.

At the 2006 hearing, Judge Schwartz expressly relied upon the testimony of Mr. Potolsky in acknowledging the speculative, non-probative nature of the dog-alert evidence and in barring the proffered testimony of Mr. Sims' canine scent-detection expert. At the hearing, Mr. Sims proffered Dr. I. Lehr Brisbin, a renowned expert in canine training and scent detection, to demonstrate the absence of any scientific basis to support a rational inference that the dog in this case even alerted to an odor of narcotics (let alone that drugs were in the car when Officer Stafford stopped Mr. Sims). Judge Schwartz refused to allow Dr.

Brisbin to testify, declaring that the court did not need an expert to explain "that this dog could have alerted to anything and everything" (Supp. T. 419) [10]:

> MR. DUKE: . . . [T]here is no reason to believe that this dog did not alert to the food or the [S]ubway sandwiches that were stuck in the front seat of the car before this car was found for two days.
>
> THE COURT: Why do you think I need an expert to tell me that? Why do you think that this court – or that I am not smart enough to know that **this dog could have alerted to anything and everything** based upon the testimony that has been presented to me already. . . .
>
> I understand **from the testimony elicited from Mr. Potolsky** that this dog could have alerted to any number of things. **Even his handler saying the sky is blue** and I don't need an expert to tell me those things. Those same things.

(Supp. T. 419-20.) Thus, the trial court itself in this case characterized the dog-alert evidence as utterly speculative, a possible arbitrary result of the dog's handler merely "saying the sky is blue."[11]

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[10] The lower court also narrowly restricted Mr. Sims' examinations of Officers Silvia and Nichols, who conducted the "superglue fuming" on the interior of the vehicle. (Supp. T. 318-27.) The court permitted Officer Silvia to authenticate, but not to testify about, the dog's performance records, and admitted them into evidence. (Supp. ROA 426.) Mr. Potolsky's testimony concerning the significance of these records is therefore uncontroverted.

[11] The trial court appeared fixated on the incorrect question, namely, whether the expert could categorically rule out any possibility that the dog alerted to an odor of narcotics. (*See, e.g.,* Supp. T. at 422.) The pertinent point is that the evidence did not colorably "tend to prove" the factual assertion for which it was offered and therefore could not meet the threshold standard of relevance under Florida Rule of Evidence 401, F.S.A. § 90.401, much less satisfy the prejudicial/probative balancing test under Rule 403, *id.* § 90.403. Dr. Brisbin's expert testimony would have provided scientific confirmation that, as Judge Schwartz recognized, the State's motive theory at trial had no competent evidentiary support.

The lower court's recognition of the irrelevance and inadmissibility of the dog-alert evidence was squarely commanded by Florida law, which Mr. Sims extensively briefed for the lower court in his Prehearing Memorandum of Law dated July 20, 2006. (*See* Supp. ROA 130-54.) "Relevant" evidence is "evidence tending to prove or disprove a material fact," F.S.A. § 90.401; irrelevant evidence is inadmissible and therefore must be excluded upon timely objection. Although trial courts have discretion in determining whether evidence is relevant, the relevance requirement has real teeth: courts' erroneous admission of irrelevant evidence provides well-established grounds to vacate or reverse a defendant's conviction. *See, e.g., Richardson v. State*, 528 So. 2d 981 (Fla. 1st DCA 1988); *Garrette v. State*, 501 So. 2d 1376 (Fla. 1st DCA 1987). Evidence that is too remote or inconclusive, or that depends upon an attenuated chain of inference, is irrelevant to any material fact or issue and therefore must not be presented to the jury. *See*, *e.g.*, *State v. Norris*, 168 So.2d 541, 543 (Fla. 1964); *State v. Lee*, 531 So.2d 133, 135-36 (Fla. 1988). Similarly, isolated evidence unsupported by other corroborating proof that the asserted bad act actually occurred has no probative value and is therefore irrelevant. *See Delgado v. State*, 573 So.2d 83, 85 (Fla. 2d DCA 1990); *United States v. Fortenberry*, 860 F.2d 628, 632-33 (5th Cir. 1988).

No Florida case has ever approved the State's reliance upon a dog alert, by itself and without any seizure of actual drugs, as the basis for a theory of

motive or other affirmative proof of guilt. (*See* Prehearing Mem., Supp. ROA at 142-44.) Indeed, at the time of Mr. Sims' trial, at least one Florida court had already observed that "trace amounts of drug 'lint' or 'dust' . . . now adhere to almost everything in South Florida." *Jones v. State*, 589 So.2d 1001, 1002 (3d DCA 1992); *see also id*. at 1003 (Ferguson, J., dissenting) (approving majority's "accurate observation that trace amounts of cocaine may be found, innocently, on 'almost everything in South Florida'"). Here, the dog-alert testimony plainly had no legitimate place in Mr. Sims' trial and cried out for objection by Mr. Sims' trial counsel.[12] Instead, with no strategic rationale to justify their conduct, Mr. Sims' trial counsel repeatedly failed to protect their client.

The State therefore cannot rescue its flawed conviction of Mr. Sims by arguing that the trial court would have allowed the dog-alert testimony to come in even if trial counsel had objected. As noted above, Pitts and Carter completely failed to investigate or develop the factual and legal basis for a competent challenge to the dog-alert evidence, as the law and prevailing professional norms clearly required them to do. (*See* Prehearing Mem., Supp. ROA at 150-54; Supp. T. 245.) Mr. Potolsky testified concerning the additional evidence of unreliability that that Pitts and Carter never bothered to obtain, including the dog's prior

[12] For a more complete explication of the governing law, Mr. Sims respectfully refers this Court to the detailed analysis at pp. 5 through 20 of his Prehearing Memorandum. (*See* Supp. ROA 134-49.)

performance records; the food residue remaining in the car at the time of the search; and the "superglue fuming" conducted on the car's interior prior to the canine search. Had the lower court allowed Mr. Sims to present the testimony of Dr. Brisbin and not narrowly restricted Mr. Sims' examinations of Officers Silvia and Nichols, the evidentiary record in this regard would have been even more overwhelming. Yet, because Pitts and Carter incompetently failed to investigate or develop any challenge to the dog-alert evidence, none of the above evidence was before the trial court in 1994.

CONCLUSION

Faced with the overwhelming evidence of counsel's deficient performance, the trial court ruled against Mr. Sims only by failing to apply the standard mandated by *Strickland*, and by closing its eyes to critical instances of trial counsel's *admitted* failure. The lower court's ruling is fundamentally flawed as a matter of law and clearly erroneous and insufficient on the facts. This Court should reject the lower court's conclusion and hold that the performance of Mr. Sims' counsel was deficient under *Strickland.* Because this Court has already held that the admission of the "clearly prejudicial" dog-alert testimony satisfied the prejudice prong of *Strickland* in this case, Mr. Sims received ineffective assistance of counsel at his trial. Accordingly, Mr. Sims respectfully submits that the Court should vacate his conviction and sentence and remand the case for a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Supplemental Initial Amended Brief has been furnished by Federal Express this 29th day of November 2006 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Supplemental Initial Amended Brief of Appellant is written in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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