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 REPLY BRIEF OF APPELLANT

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INTRODUCTION

In its Answer Brief ("AB"), the State does not dispute, and it thereby concedes, several fundamental errors by the lower court identified in Mr. Sims' Supplemental Initial Brief ("Init. Br."), including but not limited to the following:

- The State does not dispute that the lower court (i) failed to apply the correct standard under *Strickland v. Washington*, 466 U.S. 668 (1984), by ignoring the requirement that counsel have an "objectively reasonable" strategic basis for their choices, and (ii) erroneously relied solely upon findings concerning one of Mr. Sims' trial lawyers' subjective state of mind (Init. Br. at 10-11);
- The State does not dispute that the lower court also erred as a matter of law by holding that trial counsel's failures in "dealing with" the introduction of the parole officer's testimony were "issues for direct appeal," and consequently failed to recognize trial counsel's deficiency in not moving to strike the dog-alert testimony (*id*. at 16-17);
- The State does not dispute that the lower court's August 8, 2006 Order (the "August 8 Order") totally ignores the multiple point-blank admissions of Mr. Sims' trial counsel that they had no strategic basis for not objecting to or moving to strike the dog-alert testimony at trial (*id*. at 4-10).

Moreover, the State offers no coherent response to Mr. Sims' argument, *see id.* at 12-14, that the lower court's factually-unfounded explanation for trial counsel's conduct does not identify any objectively reasonable choice of trial "strategy," but merely highlights counsel's deficiencies in failing to take basic, mandatory steps to protect Mr. Sims. Instead, the State tries to sidestep the overwhelming record of trial counsel's dereliction by improperly re-arguing the prejudice prong of *Strickland* and adding to the lower court's fundamental errors a host of errors and mischaracterizations of its own. None of the State's arguments has any merit.

ARGUMENT

I. The State Fails to Identify Any Objectively Reasonable Basis for Trial Counsel's Failure to Object to or Move to Strike the Dog-Alert Testimony.

While conceding the errors by the lower court noted above, the State barely even responds to the specific points in Mr. Sims' Supplemental Initial Brief demonstrating (i) the fundamental flaws in the lower court's findings, and (ii) trial counsel's lack of any objectively reasonable strategic justification for not objecting to or moving to strike the dog-alert testimony. The few contentions mustered by the State in its Supplemental Answer Brief have no substance.

First, there is no basis for the State's suggestion that Mr. Sims' trial counsel did not move to strike to avoid "highlight[ing]" the dog-alert testimony and "making it more prejudicial." (AB at 7, 11.) Both Pitts and Carter flatly admitted that they had no such strategy in this case. (*See* Init. Br. at 8-9.) Moreover, both acknowledged that they could have moved to strike outside the jury's presence, thereby eliminating the possibility that the jury could be influenced. (*See* Init. Br. at 14-15; Supp T. at 196-97 (admission by Carter that "there wo[uld]n't be any down side" in making such a motion outside the jury's presence).) The purported risk of "undue emphasis" is a mere illusion.[1]

[1] The State's assertion that Carter "saw no point" in moving to strike after Silvia testified, *see* AB at 7, has no merit because Carter expressly acknowledged and agreed on re-direct that "preserving the record for appeal" would "[o]f course" have been a good "reason to move to strike at that point." (Supp. T. 195.)

Second, the State's reliance on the perceived "weakness" of the dog-alert evidence is unfounded, because it fails to identify any reasonable basis for not objecting to and attempting to prevent "clearly prejudicial" testimony that was "essential" to the prosecution's motive theory, April 3 Order at 1. Pitts himself admitted that prevailing norms required him to object *even though it was weak*:

> Q: Which is better in your view as a defense lawyer – 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?
>
> **[Mr. Pitts]**: Well, I would say **the basic practice, fundamental practice is to be – to try to get it stricken and not allow it to happen.** (Supp. T. 109 (emphases added), quoted at Init. Br. 15.)

The State also offers no response to the authority cited by Mr. Sims that illusory "choices" between non-mutually exclusive alternatives cannot be objectively reasonable. (*See* Init. Br. at 12-14.) Pitts and Carter both believed that the dog-alert testimony was not just weak but "irrelevant," and therefore legally *inadmissible*. (*See id.* at 5; Supp. T. 50-52 (Pitts); 137-38 (Carter).) Neither had – nor could have had – any rational strategic basis to *prefer* admission of the testimony over exclusion. The State's argument cannot excuse trial counsel's purblind abandonment of "the basic practice, fundamental practice" of objecting to and seeking to prevent the prosecution's use of irrelevant, prejudicial evidence.

Third, the State cannot explain away trial counsel's deficiency by claiming that counsel merely "did not recall a strategic decision" and that "a failure

to recall does not establish that such a decision was not in fact made," (AB at 14.) Trial counsel admitted they had no strategic basis for failing to object or move to strike – not merely that they did not recall one. (*See* Init. Br. at 5-10.) With respect to the failure to move to strike, Pitts could not recall the legal nexus between the predicate dog-alert and the admission of Lynn's parole-status testimony. (Supp. T. 107-08.) But the July 2006 hearing transcript shows that Pitts erroneously believed this testimony was independently admissible without the dog-alert.[2] Pitts was ignorant of the law barring the parole-status evidence absent the dog-alert predicate, and therefore could not see the full value to Mr. Sims of excluding the dog alert. Pitts' defective legal knowledge confirms his deficient performance. *See Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003) ("a tactical or strategic decision is unreasonable if it is based on a failure to understand the law").[3]

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[2] *See* Supp. T. 107. When asked whether the parole officer's testimony could "only come in if there is a basis showing that he had drugs," Pitts testified, "[N]o. Not to me. I think the parol[e] officer testimony could have come in on the fact that he was arrested. That's enough." (*Id.*)

[3] *Accord Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (finding deficient performance and rejecting justifications offered by trial counsel that revealed "startling ignorance of the law"); *Thomas v. Varner*, 428 F.3d 491, 499-502 (3d Cir. 2005); *Everett v. Beard*, 290 F.3d 500, 509 (3d Cir.2002) ("A reasonably competent attorney patently is required to know the state of the applicable law."), *abrogated on other grounds*, *Priester v. Vaughn*, 382 F.3d 394 (3d Cir.2004); *Young v. Zant*, 677 F.2d 792, 798-800 (11th Cir. 1982). Moreover, Carter, who argued the objection to Lynn's testimony, admitted that he "just missed" the obligation to move to strike the predicate dog-alert testimony. (Init. Br. at 8-9.) It would be irrational to excuse trial counsel's failure by imputing to Pitts some unrecalled strategy that Pitts never communicated to Carter, *see* Supp. T. 51-52 & 148-49, and that Carter admittedly was not following during oral argument.

II. The State's Claim That Trial Counsel "Challenged" the Dog-Alert Testimony, "Albeit Not by Contemporaneous Objection," Is Frivolous.

Equally meritless is the State's contention that trial counsel adequately "challenged" the dog-alert evidence, "albeit not by contemporaneous objection." (AB at 16.) Would the State exonerate a driver who "saw" the stop light, "albeit without stopping"? The State's unsupported notion that trial counsel are not deficient when they merely reveal their "position" on (*see* AB at 13), without objecting to, "clearly prejudicial" testimony that they believe to be irrelevant, is refuted by Pitts' and Carter's own admissions (Supp. T. 109 & 155-56), by Potolsky's uncontradicted testimony, and by ample Florida authority holding counsel deficient for failing to preserve *by objection* the record for appeal.[4]

Moreover, the State's contention is premised on the same flagrant misstatement of the trial court's purported "ruling," on which the August 8 Order also is founded, *see* Init. Br. at 11-12. Pitts and Carter admittedly understood that, as the State acknowledges, the trial court expressly (i) did *not* rule prior to trial on the State's use of the dog alert and (ii) warned the prosecutors *not* to "accus[e] [Mr. Sims] . . . of transporting drugs," (Trial T. 387), if "the evidence would not

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[4] *See* Init. Br. at 13 n.4. This Court had already considered the transcript of Pitts' cross-examination of Silvia when it issued the April 3 Order. In issuing the Order, this Court necessarily rejected the State's improper attempt to re-argue prejudice by asserting now that Pitts' perfunctory and ill-prepared cross-examination somehow undid the damage caused by the unopposed admission of this evidence. In any event, this assertion has no substantive merit. (Supp. T. 280-281.)

establish [it]," (AB at 2-3; *cf.* Initial Br. At 11-12 & n.3). Thus, the trial commenced with defense counsel holding an open invitation to move against the dog alert and deprive the State of its motive theory.[5]

Furthermore, when the State called Officer Silvia to the stand at trial, Pitts and Carter did *nothing*. It is no wonder, then, that Pitts himself testified that his failure to object was "improper" under prevailing norms, (Init. Br. at 6 (quoting Supp. T. at 58)), and that his reaction upon reviewing the transcript was one of disbelief ("surprising" absence of objection; "I just couldn't believe it . . . ."), (*id*. at 6, 13 n.5 (quoting Supp. T. 56-57, 59)). Counsel's failure to move to strike the dog-alert testimony after the State called Lynn to testify was similarly deficient.[6]

III. The State Flouts the April 3 Order By Re-Arguing Prejudice and Mischaracterizes Mr. Sims' Evidentiary Presentation Below.

Unable to counter the overwhelming record of trial counsel's deficiency, the State instead attempts to change the subject by re-arguing the prejudice prong of *Strickland* and telling this Court that its unanimous April 3

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[5] At the hearing, Pitts and Carter both admitted unequivocally that they had no strategic basis for not moving to preclude the State's introduction of the dog-alert testimony. (*See* Initial Br. at 5 (quoting Supp. Tr. at 51-52).)

[6] The State echoes Pitts' ignorance of the law by contending – erroneously – that "Defendant's prior convictions and parole status would have been admissible during [Mr. Sims'] cross examination," and trial counsel knew "early on" that Mr. Sims would testify in his own defense. (AB at 19.) This contention is incorrect as a matter of law: Mr. Sims' parole status would have been off limits on cross-examination – a point that trial counsel themselves argued to the trial court. (*See* Trial T. 1253:13-1254:25.) Had the dog-alert testimony been stricken, the jury would not have heard a word about Mr. Sims' parole status. *E.g.*, Fotopoulos v. State, 608 So.2d 784, 791 (Fla. 1992).

Order cannot possibly mean what it says. Incredibly, the State asserts three times that it simply "does not believe this Court could have made such a finding." (AB at 17; *id*. at 6, 10.) The State's assertions ignore both the voluminous record on which the April 3 Order was based, and the lower court's own ruling in July 2006 that the prejudice prong of *Strickland* was decided conclusively in Mr. Sims' favor:

> So, the record is clear. The Supreme Court concluded that this [dog-alert] testimony was clearly prejudicial. So the prejudice aspect of it is not an issue. The issue is whether or not under *Strickland* the behavior was deficient or the performance was deficient. (Supp. T. 206:13-18.)

This Court should reject the State's attempt to re-open issues already decided.

The State mischaracterizes Mr. Sims' evidentiary presentation below as "only related to the prejudice prong," (AB at 6). Mr. Sims proffered the testimony of a canine-detection expert (Brisbin) and two police officers to demonstrate (1) trial counsel's gross failure to investigate and discover *additional* available evidence supporting exclusion, and (2) the patent lack of probative content of the dog-alert testimony in this context, and hence the enormity of trial counsel's violation of prevailing professional norms. These purposes related directly to deficient performance. The lower court did not truncate Mr. Sims' July 2006 evidentiary presentation because the evidence proffered went to "prejudice": rather, it essentially endorsed Mr. Sims' position without requiring the evidence, since expert opinion was unnecessary to demonstrate the stark irrelevance of a dog-alert that likely resulted from "anything and everything," including "his

handler saying the sky is blue."[7] The State does not seriously contend that such "clearly prejudicial" speculation could meet the standards of Rules 401 and 403.

The State shoots at a straw target by asserting that "the prejudice prong of *Strickland* requires an analysis of the outcome of trial proceedings not the appeal," (AB at 16). Although Mr. Sims argued that trial counsel's *deficient performance* resulted from the failure to object and thereby either (i) get the evidence excluded or (ii) preserve a meritorious point for appeal, this argument does not go to the prejudice issue decided by the April 3 Order, but merely identifies two possible stages at which Mr. Sims' constitutional right to a fair trial must have been vindicated had his counsel's performance not been deficient. In any event, the authorities cited do not support the State's argument. For example, in *Purvis v. Crosby*, 451 F.3d 734, 740 (11th Cir. 2003), the court did not suggest that ineffective assistance could not be shown where trial counsel failed to properly raise an objection; it merely held – in contrast to the present case – that prejudice had not been shown, *see id*. *Purvis* and the other cases cited by the State (AB at 16-

[7] The lower court's restriction of Mr. Sims' hearing presentation compels a ruling in his favor on both the irrelevance and failure-to-investigate points, because a contrary conclusion necessarily would be founded on an incomplete evidentiary record. The State's assertion that "no evidence adduced at the hearing established that the dog's reliability could have been challenged,"(AB 15), is absurd: In fact, Potolsky testified about the dog's highly dubious performance and training records; the performance and training records were admitted into evidence; and Mr. Sims proffered extensive additional evidence demonstrating trial counsel's failure to investigate. (*See, e.g.*, Supp. T. 277-78 & 417-426.)

17) have no bearing on counsel's deficient performance where, as here, the failure to object results in forfeiture of an invaluable argument for direct appeal.

The numerous cases concerning dog alerts cited by the State also fly far wide of the mark. The State misses the fundamental distinction between a long-after-the-fact, demonstrably unreliable dog sniff with, *inter alia*, no corroborating evidence, no drugs and no chain of custody (as in the present case), and the use of a dog alert as an additional piece of circumstantial evidence linking a defendant to large volumes of illegal drugs that were actually seized. (*See* Init. Br. at 24 & n.12; Supp. ROA 134-49 (Sims Prehearing Mem.)). In this regard, the State's reliance on *State v. Sinclair*, 2003 WL 21954676 (Ohio App. 8 Dist.), which involved a drug conviction based on eye-witness testimony and other evidence, *see id*. at *1-*3, could not be more transparent. (*See* AB at 22-23.)

Nor is there any basis for the State's reliance upon the trial court's *post hoc* comment on the dog-alert testimony *after it had been admitted without objection*, (*see* AB at 19). Not only did Mr. Sims' counsel fail to make a properly presented motion or objection at the time, but the trial court also never heard the evidence and legal arguments that reasonably diligent investigation by counsel would have yielded. These arguments and evidence were precisely what the lower court at the July 2006 hearing referred to when acknowledging the patent irrelevance of an alert that could have resulted from "the handler saying the sky is

blue." (*See* Init. Br. at 22.) The trial court's *post hoc* comment rates no deference because it does not indicate what the trial court would have done had Pitts and Carter adequately investigated and presented the factual and legal basis for an objection. In any event, it was clearly erroneous as a matter of law.

Nor can the State press this Court's decision on direct appeal and its subsequent decision in *Lugo v. State*, 845 So.2d 74 (2003), into service on the State's behalf, (*see* AB at 20). On direct appeal, the Court held (at the State's urging, *see* Init. Br. at 17 n.8), that Mr. Sims' counsel had not objected to the dog-alert evidence, thereby *waiving* any substantive challenge to it. Trial counsel's waiver precluded any evaluation of the underlying competence of the evidence. *Lugo* merely restates the holding in *Sims* in light of the same uncontested (because waived) premise. The April 3 Order plainly signifies this Court's recognition that prior decisions do not preempt the issue here, and this Court's decision on direct appeal only highlights the harm to Mr. Sims caused by counsel's deficiency.

CONCLUSION

The State fails to offer any rational justification or defense of either the lower court's errors or trial counsel's deficient performance in failing to investigate and develop an attack upon the dog-alert testimony or to oppose it by objection or motion. This Court should rectify this clear violation of Mr. Sims' fundamental rights by vacating his conviction and granting him a new trial.

January 2, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Supplemental Reply Brief of Appellant has been furnished by Federal Express this 2d day of January 2007 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Supplemental Reply 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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