IN THE

SUPREME COURT OF FLORIDA

LAWRENCE WILLIAM PATTERSON, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC15-228 Lower Tribunal No(s).: 1D12-3982 2010-CF-4534

AMENDED REPLY BRIEF OF THE PETITIONER

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The trial court erred by denying Petitioner Patterson's motion to preclude the State from calling as witnesses the experts who physically examined the truck prior to its destruction.[1]

As explained in his Initial Brief, Petitioner Patterson is *not* requesting the Court to *dismiss* the charges in this case due to the failure of law enforcement officials to preserve the *key piece of evidence in this case* (i.e., the truck); rather, Petitioner Patterson is merely seeking the same remedy that was afforded in *Lancaster v. State*, 457 So. 2d 506 (Fla. 4th DCA 1984) – that the State's experts be put in the same position as Petitioner Patterson's expert.[2] In its Answer Brief, the State cites the "bad

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[1] In its Answer Brief, the State argues that "this Court lacks jurisdiction to consider the instant case." Answer Brief at 4. For all of the reasons set forth in Petitioner Patterson's Jurisdictional Brief, the Court properly granted review in this case.

[2] Certainly an argument can be made that the actions of the law enforcement officials in this case amounted to "gross negligence" sufficient to justify dismissal of the charges. *See, e.g., People v. Baca*, 562 P.2d 411, 414 n.5 (Col. 1977); *People v. Fleishman*, 399 N.Y.S.2d 996, 998 (N.Y. Sup. Ct. 1977). Shortly after the fires in this case (in February of 2010), the State Fire Marshal's Office secured the truck so that it could be investigated. (R1-22). After law enforcement officials completed their examination of the truck, Geico Insurance Company took possession of the truck (in March of 2010) and the truck was destroyed in April of 2010. (R1-22-23). Warrants for Petitioner Patterson's arrest were not issued until *September of 2010.* (R1-22). Notably, Guideline 16.11.2 of the "Guide for Fire and Explosion Investigations" published by the National Fire Protection Association states:

Criminal cases such as arson *require that the evidence be kept until the*

faith" standard articulated by the United States Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988), and the State argues that "[w]hile the First District only applied *Youngblood* to Petitioner's motion that the charge be dismissed, *Youngblood* also applies when a defendant requests the exclusion of evidence as a remedy." Answer Brief at 11 (citations omitted). Petitioner Patterson clarifies that he is not seeking a blanket exclusion of evidence. Rather, he is merely seeking that the experts from both parties be placed on a level playing field. Petitioner Patterson's expert at trial (Cam Cope) was prevented from conducting a physical examination of the truck and was forced to rely on pictures of the truck that were taken by law enforcement officials. Yet, during the trial, the State presented three experts (David Cheers, Stephen Callahan, and Bob Hallman) who all formed their opinions based on their *personal examinations* of the truck (i.e., thorough examinations that included inspecting the engine compartment, the passenger compartment, the fuse panel, and the dashboard of the truck, and looking underneath the truck). (T1-162, 192-94, 197-98; T2-299, 318-26; T3-568, 584-88). In fact, during the State's closing argument, the prosecutor actually compared the thoroughness of the investigations conducted

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case is adjudicated.

(SR3-469) (emphasis added). Nevertheless, the remedy sought by Petitioner Patterson is the same remedy afforded by the Fourth District in *Lancaster*.

by the State's experts to the investigation conducted by Mr. Cope:

> Now, as for the arson with the experts. We do have one side of the State experts and one side the defense expert. And the Defense expert told you, not arson, don't know what it is, can't tell you what it is, but not arson.
>
> Think about his testimony, and think about the testimony of the other experts, the two fire marshals, David Cheers and Bob Hallman. *They told you about the examination and what that they did. They told you about their investigation, how thorough it was*.

(T5-920) (emphasis added).[3]

When it was pointed out to the trial court that the truck had been destroyed before Mr. Cope had an opportunity to examine the truck, the fair and proper remedy was to inform the State that it could only present experts at trial who were in the *same position* as Mr. Cope (i.e., experts who based their opinion on the photographs rather than a personal examination of the truck). As explained by the Fourth District in *Lancaster*:

> It would be *fundamentally unfair*, as well as a violation of rule 3.220, to allow the state to negligently dispose of critical evidence and then offer an expert witness whose testimony cannot be refuted by the Defendant.
>
> . . . .
>
> We therefore conclude that the appellant's due process rights have been violated. *Reversal, but not dismissal, is mandated under the facts of this case*. The judgment and the sentence of the lower court are

[3] Petitioner Patterson notes that during their deliberations, the jurors asked to review the testimony of the State's experts (R2-237), but the trial court denied the request. (T6-997).

> hereby vacated and this cause remanded for purposes of a new trial. *At retrial, the state will be precluded from calling as witnesses the experts who physically examined the truck prior to its release*.

Lancaster, 457 So. 2d at 507 (emphasis added) (citations omitted).[4]

In its Answer Brief, the State asserts that "Cam Cope was able to give his expert opinion to the jury on what was the cause of the fire to the vehicle based on his examination of the photos of the truck." Answer Brief at 12 (record citation omitted). Contrary to the State's assertion, Mr. Cope specifically testified that – *even with the photographs* – he was nevertheless hampered in his analysis because he was not able to physically examine the truck itself:

> Q. Based on the investigation, were you able to form any opinions or conclusions?
>
> A. Some, yes.
>
> Q. What were they?
>
> A. That there was a fire in the truck and that the truck fire was most likely electrical in nature. *And to determine more specifically the electrical cause, we would have to have the truck and I requested the truck be made available for me to inspect but at this time it has not been made available*. But it appears that, you know, it is something within the dash area or some of the many after-market components and products that have been added onto this truck as well as the seat heaters.
>
> Q. And since you didn't have the vehicle, I mean, what did you

[4] Petitioner Patterson asserts that the holding in *Lancaster* is consistent with the due process protection afforded by the Florida Constitution. *See* art. I, § 9, Fla. Const.

use to form your opinion?

> A. The photographs that have been provided of the truck. *I have looked at those photographs. They're not all that good because they don't really cover the entire vehicle*. But what photos I do have of the vehicle I have reviewed and it does appear that you have probably a dash fire in this particular vehicle *but you can't eliminate the engine compartment on it.*
>
> Q. You can or cannot?
>
> A. You cannot. *Without seeing the vehicle, you can't really eliminate the engine compartment. You would have to do a much more extensive analysis of the engine compartment*.

(R1-178-79) (emphasis added). During the trial, Mr. Cope again stated that his analysis was impeded because he was not able to personally examine the truck. (T5-827) ("All of the burn patterns would certainly tell me that it's electrical, *and the only way that you would be able to clearly determine which exact electrical components were, you need to, number one, save the vehicles and/or the electrical components that are associated with that or the arcing that was occurring in the attic directly above the truck*.") (emphasis added). *See also* (T5-806) ("There's no pictures of the starter."); (T5-810) ("I don't find any pictures that were taken of the wiring."); (T5-853) ("[I]f I had the vehicle, those would be the things that we would save the circuit boards, we would specifically want to get those particular wires to x-ray them and look at them to determine and trace back what actually is causing and what arcing we

do see within those particular components."); (T5-856) ("[I]f we had the truck, we would be able to go through and look at those [aftermarket components] again. But this is the first time I have had where the vehicle has not been available or the evidence has been destroyed."). In light of Mr. Cope's testimony in this regard, the record is clear that Mr. Cope's analysis in this case was severely limited compared to the analyses that were conducted by the State's experts who were able to physically examine the truck.[5]

In its Answer Brief, the State argues that the reason that law enforcement officials gave the truck to Geico Insurance Company was because Petitioner Patterson submitted an insurance claim. *See* Answer Brief at 13. As explained in footnote 2, the record in this case is clear that at the time that law enforcement officials released the truck to Geico (April of 2010), law enforcement officials had already examined the truck and formed the conclusion that the truck fire was the result of arson. Guideline 16.11.2 of the "Guide for Fire and Explosion Investigations" published by the National Fire Protection Association states:

> Criminal cases such as arson require that the evidence be kept until the case is adjudicated.

(SR3-469).

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[5] State witness Mike Miller conceded that the truck was a "critical" piece of evidence in this case. (T3-434).

In its Answer Brief, the State asserts that "*Lancaster* is no longer good law . . . ." Answer Brief at 14. Petitioner Patterson submits that not only is *Lancaster* still good law, but *Lancaster* achieves the proper balance when weighing the interests of the parties in a destruction of evidence case – the Fourth District did not impose the extreme sanction/remedy of dismissal, but the Fourth District also did not allow the State to gain an unfair advantage over the defense due to the fact that the State's experts had the opportunity to physically examine the vehicle.[6]

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[6] In its Answer Brief, the State contends that "Petitioner's case is comparable to the case of *State v. Gilson*, 72 So. 3d 263 (Fla. 2d DCA 2011) . . . ." Answer Brief at 15. Contrary to the State's contention, the trial court in *Gilson* imposed the extreme sanction/remedy of dismissal. Moreover, the key piece of evidence that was destroyed in *Gilson* was a shirt, and the only evidentiary value of the shirt was to establish the identification of the shooter. *See Gilson*, 72 So. 3d at 265 ("Gilson argued below that the shirt is necessary to impeach the officer's testimony indicating that Gilson was the shooter. He maintained that immediately after the incident, Deputy Cohen three times described the shooter as wearing a white, off-white, or 'lighter colored' short-sleeved shirt, possibly a button-down. The shirt that Gilson was wearing at the time he was apprehended on the night of the shooting – the same shirt that was destroyed by the State – was a dark blue, long-sleeved shirt."). Although the shirt was destroyed, the parties were in possession of a photograph of the shirt. Thus, the defendant was not prejudiced by the destruction of the shirt because the defendant could still assert his identification argument utilizing the photograph of the shirt. *See id*. ("We conclude that for impeachment purposes, a photograph of the shirt is comparable evidence. In fact, Gilson introduced a photo of the shirt into evidence for this purpose at his first trial during the cross-examination of the officer who first interviewed Gilson on the night of the shooting. That officer confirmed that the photograph accurately depicted what Gilson was wearing when he was apprehended. And after the hearing on the motion to dismiss, but prior to the trial court's issuing its dismissal order, the State informed the court that photos of Gilson's clothing were still available to Gilson."). Unlike the "comparable" photograph of the evidence in *Gilson*, the photographs of the truck in

Finally, in its Answer Brief, the State asserts the following:

> Even if this Court were to find that the State should not have been allowed to present experts at trial who examined the truck, this only would have affected Petitioner's convictions for Count 1: Arson First Degree, Count 2: Arson Second Degree, Count 5: Insurance Fraud Less than $20,000, and Count 8: Burning to Defraud Insurer as these were the only counts that Petitioner was charged with which related to, at least in part, the burned truck. As such, Petitioner's convictions for Counts 3, 4, 6, and 7 were unaffected by any potential error, and thus should be affirmed.

Answer Brief at 16. Petitioner Patterson agrees that his conviction for count 3 (first-degree arson of a dwelling based on the second fire) was unaffected by the error in this case because the State's theory at trial was that the second fire originated in a bedroom in the residence (i.e,. the State did not assert that the second fire originated in the truck). However, to the extent that count 4 (insurance fraud), count 6 (arson resulting in injury), and count 7 (burning to defraud an insurer) are linked to the first fire – which the State alleged originated in the truck – Petitioner Patterson asserts that he is entitled to a new trial on these counts.

As explained by the Fourth District in *Lancaster*:

> It would be fundamentally unfair, as well as a violation of rule 3.220, to allow the state to negligently dispose of critical evidence and then offer

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the instant case were not "comparable" to conducting a personal examination of the truck. As explained above, Mr. Cope specifically testified that – *even with the photographs* – he was nevertheless hampered in his analysis because he was not able to physically examine the truck itself.

an expert witness whose testimony cannot be refuted by the Defendant.

Lancaster, 457 So. 2d at 507 (quoting *State v. Ritter*, 448 So. 2d 512, 514 (Fla. 5th DCA 1984)). For all of the reasons set forth above and contained in the Initial Brief, Petitioner Patterson requests the Court to adopt the Fourth District's well-reasoned analysis in *Lancaster*.

D. CONCLUSION

The appropriate remedy is to quash the district court's decision and to remand this case for a new trial.

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Kathryn Lane
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by email delivery this 6th day of November, 2015.

Respectfully submitted,

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F. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Amended Reply Brief of the Petitioner complies with the type-font limitation.

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