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

JURISDICTIONAL BRIEF OF THE PETITIONER

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Lawrence William Patterson (hereinafter "Petitioner Patterson") was charged in Escambia County with several arson-related counts stemming from two fires that occurred at Petitioner Patterson's residence. At trial, the parties disputed whether the fires were accidental or intentional. The parties agreed that the first fire started in the garage where Petitioner Patterson's truck was parked. Petitioner Patterson's theory at trial was that the first fire started due to a problem with the truck and the second fire was a "rekindle" from the first fire or the result of a gas pipe that was damaged when the firefighters were extinguishing the first fire. The State's theory at trial was that both fires were started intentionally by Petitioner Patterson. Notably, after the State's experts examined Petitioner Patterson's truck – the key piece of evidence in the case – the State failed to preserve the truck. Thus, the truck was destroyed *before* the State filed charges against Petitioner Patterson, and Petitioner Patterson's expert was denied the opportunity to examine the truck (even though the State's experts were able to examine the truck in forming their opinions). Therefore, as explained in the First District's opinion below, prior to trial, Petitioner Patterson moved to exclude any testimony from the State's expert witnesses opining, based on their physical examination of the truck, on whether the truck fire was intentionally started:

> A jury convicted Lawrence William Patterson of two counts of first-degree arson (a dwelling); second-degree arson (a vehicle); arson

resulting in bodily injury to a firefighter; two counts of insurance fraud; burning a dwelling with intent to defraud; and burning a vehicle with intent to defraud. He seeks reversal of all convictions, arguing the trial court should have dismissed all the charges, or at least should have excluded the State's expert witnesses' testimony about the vehicle – a truck – allegedly used to start the fires, because the State allowed the truck to be destroyed before his expert could examine it. . . .

. . .

As to the first argument, we also affirm, and discuss our reasoning because of the unusual evidentiary issue involved. The arsons for which Patterson was tried and convicted completely destroyed his house and truck (which was parked in the garage at the time). It was alleged that Patterson used the truck to start one of the two arson fires in the house. After State Fire Marshal and insurance company investigators completed their work, including inspecting the truck, and after the auto insurer paid Patterson the proceeds of his insurance policy, the insurer took custody of the truck and had it destroyed. This occurred five months before Patterson was arrested and charged. With the vehicle itself unavailable, Patterson's fire investigation expert reviewed approximately 300 photographs of the burned truck and garage area. (He also personally inspected the dwelling.)

Before trial, Patterson moved the trial court to dismiss all the charges, or alternatively, to exclude any testimony from State expert witnesses opining, based on their physical examination of the truck, on whether the truck fire was intentionally started. He argued the State had intentionally destroyed the truck, making it unavailable to his expert and, as a consequence, violated his constitutional right to due process. The trial court denied the requested relief, allowing prosecution experts Stephen Callahan, Mike Miller and Bob Hallman to describe for the jury how they each examined the truck, and to give the jury their opinions on how the truck fire started.

. . .

Even if dismissal was not warranted, Patterson argues alternatively, the trial court should have excluded the testimony of the State's experts because the truck's unavailability rendered his trial fundamentally unfair. He relies on *Lancaster v. State*, 457 So. 2d 506 (Fla. 4th DCA 1984), which involves facts somewhat similar to, but

> decidedly not on all fours with, the instant case.

Patterson v. State, 153 So. 3d 307, 308-10 (Fla. 1st DCA 2014). Ultimately, the First District attempted to distinguish *Lancaster* from the instant case. Additionally, at the conclusion of the opinion, the First District stated:

> We note that the State did not argue to the jury that its experts' opinions were more credible than [the defense expert]'s because they physically inspected the truck. Had the State done otherwise, we may have concluded differently.

Patterson, 153 So. 3d at 311-12. On rehearing, Petitioner Patterson argued that during her closing argument, the prosecutor did, in fact, argue that the State's experts' opinions were more credible than the defense expert's opinion because they physically inspected the truck (i.e., the prosecutor stated the following about the State's experts: "They told you about the examination and what that [sic] they did[and t]hey told you about their investigation, how thorough it was."). Although the majority denied rehearing, the Honorable Robert T. Benton, II, dissented from the denial of the rehearing motion.

D. JURISDICTIONAL STATEMENT AND SUMMARY OF ARGUMENT

The Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. *See* art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The First District's decision below conflicts with *Lancaster v. State*, 457 So. 2d 506 (Fla. 4th DCA 1984), regarding whether a State expert should be precluded from testifying at trial if the State expert personally examined evidence that was later destroyed before a defense expert had the opportunity to personally examine the evidence.

The Court also has discretionary jurisdiction to review a decision of a district court of appeal that expressly construes a provision of the state or federal constitution. *See* art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii). In the instant case, the First District expressly construed the due process clauses of the federal and state constitutions.

E. ARGUMENT AND CITATIONS OF AUTHORITY

The Court has jurisdiction to review the instant case.

1. The First District's decision conflicts with *Lancaster v. State*, 457 So. 2d 506 (Fla. 4th DCA 1984).

In *Lancaster*, the Fourth District considered an *almost identical factual scenario* as the instant case and the Fourth District concluded that the appropriate remedy was to prohibit the State's experts from testifying at trial:

> Appellant brings this appeal from a criminal conviction and sentence on arson charges. We reverse and remand for a new trial with instructions.
>
> Factually, this case involves the burning of a truck of which appellant had custody. The Indian River County Sheriff's Department responded to a call and found a truck burning beside a roadway within their jurisdiction. The appellant advised the investigating deputies that he had been driving the vehicle when he noticed a spark and then a blaze coming from under the dashboard area. Appellant further advised that he had recently done some wiring work on the CB radio in that same area of the dash. The truck was towed to a garage, but within a very short period of time, the authorities began to doubt appellant's version of how the fire started. Fire investigators were summoned and they conducted a physical examination of the truck.
>
> In the meantime, the owner of the truck contacted the Sheriff's Department, requesting that the truck be released to him in order that he might salvage it. A lieutenant and a sergeant discussed the matter and authorized the release of the vehicle. The lieutenant, a lead fire investigator who had examined the truck, felt that the truck no longer had evidentiary value to the state. He later testified that another investigator might differ with his opinion that the fire was not accidental. The sergeant justified the release based upon the owner's request and the fact that the state's investigation and examination were complete. The sergeant testified that he did not know whether the truck was of evidentiary value to the defendant. Both the lieutenant and the sergeant admitted that the truck could have been held for evidence until

the time of trial. In any event, the truck was in fact released to the owner, who proceeded to materially change its condition by having salvage work done on it.

The day after the release, an arrest warrant was issued for the appellant. A motion to dismiss the charges was filed alleging due process violations. After an evidentiary hearing, the motion was denied and eventually the case was tried before a jury. Two fire investigators who had examined the truck before its release testified against appellant, who was convicted of second degree arson.

We have examined the body of law which has developed as a result of the state's failure to preserve and produce discoverable evidence. These cases range from deliberate concealment of evidence known to be exculpatory to relatively minor incidents in which the mere exercise of poor judgment resulted in loss of evidence of no value. *See Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Sobel*, 363 So. 2d 324 (Fla. 1978). This problem takes on particular significance when the lost evidence requires scientific analysis or expert testimony. In such cases, the courts have often reversed based upon due process and other considerations. For example, in *State v. Ritter*, 448 So. 2d 512 (Fla. 5th DCA 1984), the defendant was charged with possession of cocaine, but the state negligently allowed the cocaine to leave its custody. In reversing, that court held as follows:

> "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." (448 So. 2d 512, 514)

Earlier in *Stipp v. State*, 371 So. 2d 712 (Fla. 4th DCA 1979), this court had reversed a drug conviction due to the fact that the state's chemist unnecessarily destroyed the entire drug sample during testing. This court noted some lack of clarity in the law as to whether such circumstances violate a defendant's right of confrontation, but went on to hold a due process violation exists when the state unnecessarily destroys the most critical inculpatory evidence and then is allowed to introduce essentially irrefutable testimony of the most damaging nature. In accord is this court's decision in *State v. Counce*, 392 So. 2d 1029 (Fla. 4th DCA 1981) and the decision of the Third District in *Johnson*

v. State, 249 So. 2d 470 (Fla. 3rd DCA 1971).

> In the case now before us, the State has urged that we should be guided by language contained in *U.S. v. Agurs* 427 U.S. 97 (1976), and quoted with favor by the Florida Supreme Court in *State v. Sobel*, *supra*. The state argues that the "mere possibility" that examination of the truck would have assisted Appellant should not result in reversal. We disagree and in so doing we note that *Ritter*, *Stipp* and *Counce* were all post-*Agurs* and post-*Sobel*, yet the results in those cases were unaffected by either the "mere possibility" standard for materiality or the "balancing approach" to prejudice. (*See Sobel*, 363 So. 2d at 326-327.)
>
> 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 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. *State v. Ritter*, *supra*, and *State v. Sobel*, *supra*.

Lancaster, 457 So. 2d at 506-07. As in *Lancaster*, Petitioner Patterson's due process rights were violated when the State was permitted to present experts at trial who previously examined the truck.

In the opinion below, the First District attempted to distinguish *Lancaster* from the instant case:

> Unlike the instant case, the state actor in *Lancaster* was not the Fire Marshal, but was the entity conducting the criminal investigation into the truck fire with an eye toward possible arrest, which arguably, though not necessarily, implied a responsibility to hold onto the evidence under the circumstances. The more important difference between Patterson's case and *Lancaster* is that the sheriff's fire investigators in *Lancaster* appear to have neither photographed the burned truck, nor preserved any samples taken from it. Consequently, the defendant had no basis on which to challenge their findings and conclusions. And, that is the circumstance that led the Fourth District

> to reverse the defendant's conviction, order a new trial, and direct the trial court on retrial to prohibit the investigators from testifying. *Id.* at 507. The appellate court reasoned that "'[i]t would be fundamentally unfair . . . to allow the state to negligently dispose of critical evidence and then offer an expert witness *whose testimony cannot be refuted by the Defendant*.'" *Id.* (quoting *State v. Ritter*, 448 So. 2d 512, 514 (Fla. 5th DCA 1984)) (emphasis added).
>
> Here, Patterson's expert, Cam Cope, was able to use hundreds of photographs of the burned truck and surrounding garage area to formulate an opinion as to the cause of the fire, refuting the testimony of the two State experts – Callahan and Hallman – who physically inspected the truck and opined that the fire was intentionally set.

Patterson, 153 So. 3d at 311. Initially, Petitioner Patterson submits that the fact that the "state actor" in the instant case was the Fire Marshall is not a sufficient basis to distinguish *Lancaster*. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence *known to the others acting on the government's behalf in the case* . . . .") (emphasis added). Additionally, the First District's conclusion that an expert's review of photographs is the equivalent of a physical examination is also unavailing. Notably, the defense expert (Cam Cope) specifically testified below that – even with the photographs – he was nevertheless hampered in his analysis because he was not able to physically examine the truck itself.[1] This point was emphasized when the prosecutor in closing

[1] Mr. Cope stated that "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." Mr. Cope added that "I have looked at those photographs[and t]hey're not all that good because they don't really cover the entire vehicle."

stated the following about the examination/investigation conducted by the State's experts: "They told you about the examination and what that [sic] they did[and t]hey told you about their investigation, how thorough it was."

Petitioner Patterson submits that the Fourth District's holding in *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. As explained by the Fourth District:

> 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.

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, Petitioner Patterson asserts that the First District's decision in the instant case is in conflict with *Lancaster*. Petitioner Patterson prays the Court to grant review on this basis

2. The First District's decision expressly construed the due process clauses of the federal and state constitutions.

The decision below expressly construed the due process clauses of the federal and state constitutions. *See Patterson*, 153 So. 3d at 309 ("[Patterson] argued the

State had intentionally destroyed the truck, making it unavailable to his expert and, as a consequence, violated his constitutional right to due process."). *See also* U.S. Const. amend. XIV; art. I, § 9, Fla. Const. Accordingly, the Court has discretionary jurisdiction to review the decision below. *See Croteau v. State,* 334 So. 2d 577, 578 (Fla. 1976) ("Since that court construed Article I, Section 12, Florida Constitution and the Fourth Amendment to the United States Constitution, we have jurisdiction.") (citations omitted). Petitioner Patterson prays the Court to grant review on this basis.

F. CONCLUSION

For the reasons set forth above, Petitioner Patterson requests the Court to accept jurisdiction in this case.

G. CERTIFICATE OF SERVICE

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

Office of the Attorney General
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Email: criminalappealsintake@myfloridalegal.com

by email delivery this 6th day of March, 2015.

Respectfully submitted,

/s/ Michael Ufferman

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H. CERTIFICATE OF COMPLIANCE

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

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