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

INITIAL BRIEF OF THE PETITIONER

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1. Statement of the Case and Course of Proceedings Below.

Lawrence William Patterson (hereinafter "Petitioner Patterson") was charged in Escambia County, Florida, with two counts of first-degree arson of a dwelling[1] (counts 1 and 3), one count of second-degree arson[2] (count 2), two counts of insurance fraud[3] (counts 4 and 5), one count of arson resulting in injury[4] (count 6), and two counts of burning to defraud an insurer[5] (counts 7 and 8).[6] (R-4).[7] The offenses allegedly occurred in February of 2010.

The record establishes that there were two fires that occurred at Petitioner

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[1] *See* § 806.01(1)(a), Fla. Stat.

[2] *See* § 806.01(2), Fla. Stat.

[3] *See* §§ 817.234(1)(a)2. & 817.234(11), Fla. Stat. Count 4 alleged that the value of the claim/benefit was $100,000 or more. Count 5 alleged that the value of the claim/benefit was less than $20,000.

[4] *See* § 806.031(1), Fla. Stat.

[5] *See* § 817.233, Fla. Stat.

[6] Petitioner Patterson was also charged with one count of grand theft (count 9), but the State *nolle prossed* the grand theft count prior to trial. (T1-72).

[7] References to the district court's record on appeal will be made by the designation "R" followed by the appropriate volume number and page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate volume number and page number (the trial transcripts are contained in volumes 5-10 of the record).

Patterson's residence during the evening of February 15, 2010, and the early morning hours of February 16, 2010. 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). The main issue in this case is whether the trial court erred by denying Petitioner Patterson's request that the State be precluded at trial from calling as witnesses the experts who physically examined the truck prior to its destruction.

At trial, Petitioner Patterson was represented by John Beroset, Esquire. The State was represented by Assistant State Attorneys Raven Reid and Tom Williams. The Honorable Linda Nobles presided over the trial.

The trial began on May 7, 2012, and concluded on May 11, 2012. At the conclusion of the trial, the jury returned a verdict of guilty as charged for all counts. (T6-1008-09; R2-238).

Petitioner Patterson was sentenced on August 2, 2012. (R2-306). The trial court sentenced Petitioner Patterson to a total sentence of ten years' imprisonment followed by fifteen years' probation. (R2-374, R3-436).[8]

On direct appeal to the First District Court of Appeal, Petitioner Patterson argued that the trial court erred by denying his motion to preclude the State from calling as witnesses the experts who physically examined the truck prior to its destruction. On November 20, 2014, the First District Court of Appeal affirmed Petitioner Patterson's convictions and sentence. *See Patterson v. State*, 153 So. 3d 307 (Fla. 1st DCA 2014). On May 4, 2015, the Court accepted jurisdiction of this case.

2. Statement of the Facts.

a. The State's Case in Chief.

David Cheers. Mr. Cheers, an investigator with Jack Ward Fire Consultants,

[8] For counts 1, 3, and 4, the trial court sentenced Petitioner Patterson to ten years' imprisonment followed by fifteen years' probation. For count 2, the trial court sentenced Petitioner Patterson to ten years' imprisonment followed by five years' probation. For counts 5, 7, and 8, the trial court sentenced Petitioner Patterson to 109.8 months' imprisonment. For count 6, the trial court sentenced Petitioner Patterson to "time served."

stated that he was hired by Allied American Adjusters on behalf of Security First Insurance to investigate the fires that occurred at Petitioner Patterson's house on February 15/16, 2010. (T1-162). Mr. Cheers determined that the origin of the first fire was the garage. (T1-181). After conducting a personal examination of the truck,[9] Mr. Cheers opined that the fire "originated on the right front passenger seat" of the truck "and not in the engine compartment." (T1-191-92). Based on his review of the truck, Mr. Cheers further opined that Petitioner Patterson intentionally started the fire to his truck (i.e., the fire "was the result of ignitable liquid being introduced to the seat and subsequently being ignited"). (T1-198). Regarding the second fire, Mr. Cheers opined that "ignitable liquid was introduced through the right rear bedroom and trailed out the great room to the back door where it was ignited." (T1-198).

On cross-examination, Mr. Cheers acknowledged that samples were taken from the house and tested at a laboratory and the test results did *not* indicate the presence of any ignitable liquids. (T2-227).

Kenneth Fehl. Mr. Fehl, a firefighter, testified that he responded to a fire at Petitioner Patterson's house on the evening of February 15, 2010. (T2-255). Mr. Fehl stated that when he arrived at the scene, the garage and one side of the house

[9] Mr. Cheers conducted his examination of the truck on March 10, 2010. (T2-231).

were on fire; Mr. Fehl testified that there was a truck in the garage. (T2-255). Mr. Fehl stated that he detected the "smell of gasoline." (T2-255). Mr. Fehl testified that the fire was subsequently extinguished and the firefighters left the house at approximately 4 a.m. (T2-258-59). Mr. Fehl stated that at approximately 5:20 a.m., he was called back to Petitioner Patterson's residence to put out a second fire; Mr. Fehl testified that the second fire was "towards the middle of the structure." (T2-259).

On cross-examination, Mr. Fehl acknowledged that when the firefighters were putting out the first fire, there was gasoline running down the driveway from the garage toward the street and the firefighters used their water hoses to spray the gasoline back into the garage to keep the gasoline from running onto the street. (T2-266-68).

Shay McCarra. Mr. McCarra stated that he was a volunteer firefighter in 2010, and he responded to the fires at Petitioner Patterson's house on February 15/16, 2010. (T2-276). Mr. McCarra stated that after the first fire was extinguished, he used a thermal imager to check for "hotspots" and he did not find any. (T2-278).

James McCloud. Mr. McCloud, a volunteer firefighter, testified that he responded to the first fire at Petitioner Patterson's house on February 15, 2010. (T2-284). Mr. McCloud stated that after the fire was extinguished, he climbed into the

attic in order to use a thermal imager to check for "spot fires." (T2-287-88). Mr. McCloud testified that as he was preparing to come down from the attic, he fell through the ceiling. (T2-291). As a result of the fall, Mr. McCloud injured his knee. (T2-292).[10]

Stephen Callahan. Mr. Callahan stated that he previously worked as a detective for the State Fire Marshal's Office. (T2-299-300). Prior to his retirement, Mr. Callahan investigated the fires that occurred at Petitioner Patterson's house on February 15/16, 2010. (T2-302). Mr. Callahan determined that the origin of the first fire was the garage. (T2-313). After conducting a personal examination of the truck,[11] Mr. Callahan opined that the fire originated in the interior of the truck (passenger compartment) – not the engine. (T2-321-26). Based on his review of the truck, Mr. Callahan further opined that Petitioner Patterson intentionally started the fire to his truck (i.e., Mr. Callahan concluded that the fire was not caused "accidentally"). (T2-330).

Ryan Bennett. Mr. Bennett, a crime laboratory analyst with the Bureau of Forensic Fire and Explosives Analysis, testified that he analyzed burn debris obtained

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[10] Mr. McCloud was treated at the hospital after he fell from the attic. (T2-292).

[11] Mr. Callahan initially examined the truck on February 16, 2010, and he conducted a second examination of the truck on March 10, 2010. (T2-302, 316).

from Petitioner Patterson's truck. (T2-362). Mr. Bennett stated that the burn debris tested positive for gasoline. (T2-366).[12]

On cross-examination, Mr. Bennett acknowledged that a positive result could be obtained from as little as "two drops" of gasoline. (T2-377-78).

Mike Miller. Mr. Miller, a detective with the State Fire Marshal's Office, stated that he investigated the fires that occurred at Petitioner Patterson's house on February 15/16, 2010. (T2-382). Mr. Miller opined that the fires in Petitioner Patterson's house were "incendiary" fires (i.e., he did not believe that the fires were "accidental"). (T3-414).

On cross-examination, Mr. Miller acknowledged that between the initial investigation in mid-February 2010 and the follow-up investigation on March 10, 2010, law enforcement officials did not take any steps to "secure" the scene of the fires (i.e., the house was not boarded up to prevent others from entering the scene). (T3-432).

Perry Koussiafes. Mr. Koussiafes, a crime laboratory analyst for the State Fire Marshal, testified that he analyzed seven samples of burn debris obtained from the fires at Petitioner Patterson's house. (T3-439). Mr. Koussiafes stated that six of the

[12] During closing argument, defense counsel argued that the positive test for gasoline was a result of the firefighters using their water hoses to push/spray the gasoline (that was leaking from the truck after the truck's gas tank melted) back into the garage – as explained by firefighter Kenneth Fehl (T2-266-68). (T5-935-36).

samples tested negative for gasoline and one of the samples tested positive for gasoline. (T3-444-45).[13]

Jennifer Repine. Ms. Repine stated that in 2010, she lived across the street from Petitioner Patterson. (T3-453). Ms. Repine claimed that before the night of the fires, she had never seen Petitioner Patterson's truck parked in his garage. (T3-455).

Donald Brown. Mr. Brown, a "high voltage troubleshooter" for Gulf Power, looked at a photograph of Petitioner Patterson's house and he stated that the photograph demonstrates that the meter had been removed from Petitioner Patterson's house. (T3-459). On cross-examination, Mr. Brown testified that he did not know when the meter was removed. (T3-460).

Rufus Castleberry. Mr. Castleberry testified that in February of 2010, he lived across the street (catacorner) from Petitioner Patterson's house. (T3-461-63). Mr. Castleberry stated that in the month prior to the fires at Petitioner Patterson's house, the police responded on three separate occasions in reference to separate burglaries of Petitioner Patterson's house and truck. (T3-466-67). Mr. Castleberry testified that following the night of the fires, Petitioner Patterson told him that the initial fire was caused by "a solenoid on his truck and that his insurance was going to pay him $200,000 for his vehicle to buy him another house." (T3-470).

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[13] Mr. Koussiafes did not know whether the burn debris was obtained from the truck or the house. (T3-448).

Edward Burke. Mr. Burke, an independent investigator who conducts insurance investigations, testified that he interviewed Petitioner Patterson regarding the fires in this case. (T3-488). Mr. Burke stated that Petitioner Patterson told him that he initially purchased his house to live in it, but he later considered "flipping" the house. (T3-489). Mr. Burke stated that he did not observe any injuries when he interviewed Petitioner Patterson (i.e., he did not see any burn marks or singed hair). (T3-493).

Stephanie Scartin. Ms. Scartin stated that she works for a company that investigates insurance fraud. (T3-515). Ms. Scartin testified that she interviewed Petitioner Patterson on March 2, 2010, regarding the fires that occurred at his house (and she proceeded to recount the interview for the jury). (T3-515-22).

Brett Nezack. Mr. Nezack, the field adjuster on the claim relating to the fires at Petitioner Patterson's house, stated that he interviewed Petitioner Patterson on February 16, 2010. (T3-526). During the interview, Petitioner Patterson stated that he had previously been having problems starting his truck and therefore – a week before the fires – he squirted starter fluid in the engine. (T3-527). Petitioner Patterson further stated that on the night of the first, he drove the truck to Wal-Mart and on the way home, he smelled something funny so he went straight home and parked the truck in the garage. (T3-527).

Guy Burnett. Mr. Burnett, an attorney, testified that he represented Security First Insurance Company in connection with the claim that was filed by Petitioner Patterson. (T3-534). Mr. Burnett stated that as part of his representation, he interviewed Petitioner Patterson (and he proceeded to recount the interview for the jury). (T3-535-54).

Bob Hallman. Mr. Hallman, an electrical engineer, stated that he was asked by Security First Insurance Company to investigate the fires that occurred at Petitioner Patterson's house on February 15/16, 2010. (T3-577-78). After conducting a personal examination of the truck,[14] Mr. Hallman opined that "there was no electrical cause of this fire within the vehicle." (T3-588).

Brittany Chastang. Ms. Chastang stated that she was at her friend Kelly Cobb's house on the night of the fires. (T3-628). Ms. Chastang testified that after the first fire was extinguished, she and Petitioner Patterson went to Kelsey Carr's house. (T3-629). Ms. Chastang stated that Petitioner Patterson subsequently left Ms. Carr's house and the second fire started less than fifteen minutes later. (T3-630).

Janet Knight. Ms. Knight, an employee of Geico Insurance Company, stated that in February of 2010, Petitioner Patterson called her and asked about insurance coverage for his motorcycle. (T3-648). Ms. Knight testified that the following day,

[14] Mr. Hallman examined the truck on March 10, 2010. (T3-581, 584).

Petitioner Patterson called her back and said that he needed to make an insurance claim because he had a fire the night before. (T3-650-51). During the second call, Petitioner Patterson told Ms. Knight that the fire started due to a faulty ignition in his truck. (T3-651).

At the conclusion of Ms. Knight's testimony, the State rested. (T3-652).

b. Petitioner Patterson's Case in Chief.

Gary Wilbanks. Mr. Wilbanks, Petitioner Patterson's grandfather, stated that he helped Petitioner Patterson purchase his house in Escambia County. (T4-670-71). Mr. Wilbanks testified that after the fires at the house in February of 2010, law enforcement officials failed to secure the house, and he drove by the house on more than one occasion and he noticed that people (i.e., neighbors, kids, etc.) were inside the house because it had not been secured. (T4-687). Mr. Wilbanks explained that even after the house was boarded up, people continued to break into the house (and he referenced pictures that were taken showing holes in the boards where people would enter the house). (T4-688-89). Finally, Mr. Wilbanks stated that prior to the fires, Petitioner Patterson had purchased a "modified" center console for his truck (i.e., a center console that has a cooler). (T4-691).

Kevin Tanner. Mr. Tanner, one of Petitioner Patterson's friends, was present at Petitioner Patterson's house when the first fire started on February 15, 2010. (T4-

714).

Kelsey Carr. Ms. Carr, Petitioner Patterson's fiancé, stated that on February 14, 2010 (the day before the fires), Petitioner Patterson's truck was having engine problems so she went with him to Walmart, where he purchased "starting fluid." (T4-736-37). Ms. Carr testified that she observed him spray the fluid on the engine, and the truck subsequently started. (T4-737). Ms. Carr stated that on the day of the fires, she rode in Petitioner Patterson's truck and she explained that the truck smelled like "burnt oil." (T4-738-39). Ms. Carr testified that when the fires started, Petitioner Patterson's truck was parked in the garage. (T4-739). Ms. Carr stated that when the first fire started, she was at Petitioner Patterson's house and Petitioner Patterson and Kevin Tanner were moving some items around the house (because Mr. Tanner was considering moving into one of the bedrooms in the house). (T4-739-41). Ms. Carr testified that at one point during the evening, Petitioner Patterson opened the door to the garage and "there was smoke and fire" coming from the garage. (T4-741). Ms. Carr stated that prior to discovering the fire, Petitioner Patterson had not been in the garage by himself for any period of time. (T4-741). Ms. Carr testified that she and Petitioner Patterson subsequently fled the house and they went to her parents' house (who lived next door to Petitioner Patterson). (T4-743). Ms. Carr stated that after the first fire started and she and Petitioner Patterson went to her parents' house, Petitioner

Patterson was with her the entire time until the second fire started. (T4-744).

Rhonda Carr. Mrs. Carr, Kelsey Carr's mother, testified that after the first fire occurred at Petitioner Patterson's house on February 15, 2010, her daughter and Petitioner Patterson came to her house. (T4-752). Mrs. Carr stated that after Petitioner Patterson came to her house following the first fire, she did not observe Petitioner Patterson leave her house prior to the second fire occurring. (T4-758).

John Cobb. Mr. Cobb stated that in 2010, Petitioner Patterson lived two houses away from him. (T4-765). Mr. Cobb testified that when Petitioner Patterson moved into his house, he paid Mr. Cobb to assist him with moving things out of the garage that had been left by the previous resident of the house. (T4-765). Mr. Cobb stated that Petitioner Patterson drove a GMC truck and he parked the truck in the garage. (T4-766).

Kelly Cobb. Ms. Cobb stated that in 2010, Petitioner Patterson lived two houses away from her. (T4-767). Ms. Cobb testified that there was a fire at Petitioner Patterson's residence on the evening of February 15, 2010. (T4-768). Ms. Cobb stated that after the fire ignited, Petitioner Patterson was "running around in a panic trying to get his dogs to safety." (T4-768).

Cam Cope. Mr. Cope, a forensic fire investigator/expert, testified that he was retained by the defense to analyze the cause of the fires at Petitioner Patterson's house

on February 15/16, 2010. (T4-783). However, Mr. Cope explained that he has never had the opportunity to personally examine Petitioner Patterson's truck (i.e., although he requested the opportunity to examine the truck, law enforcement officials did not make the truck available for him to examine – so he was forced to examine photographs of the truck). (T4-785-87). Based on his review of the photographs, Mr. Cope opined that the cause of the first fire was "electrical in nature" (i.e., the fire was not intentionally caused by Petitioner Patterson). (T5-827-29).[15] Finally, Mr. Cope discussed some pictures of the natural gas pipeline that came into Petitioner Patterson's house. (T5-824-26). Mr. Cope explained that the gas pipe was damaged – possibly by the firefighters when they were extinguishing the first fire – and Mr. Cope opined that the second fire could have resulted from gas leaking from the damaged pipe. (T5-824-27).

At the conclusion of Mr. Cope's testimony, the defense rested. (T5-908). The State did not present any rebuttal witnesses. (T5-908).

c. Verdict.

The parties gave their closing arguments (T5-908-67) and the trial court

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[15] Mr. Cope stated that there was no indication that someone had introduced and then lit an ignitable liquid in the passenger compartment of the truck. (T5-800). Mr. Cope testified that if someone had ignited a fire in the truck, one would expect to see injuries on the person who ignited the fire (i.e., eyebrows and hair singed, etc.). (T5-801).

instructed the jury. (T5-967-90). The jury returned a verdict of guilty as charged for all counts. (T6-1008-09; R2-238).

D. SUMMARY OF ARGUMENT

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. It was fundamentally unfair for the State's experts to be able to testify at trial and rely on their evaluation of the truck when the defense expert was denied the same opportunity to examine the truck. *See Lancaster v. State*, 457 So. 2d 506, 507 (Fla. 4th DCA 1984) ("[T]he state will be precluded from calling as witnesses the experts who physically examined the truck prior to its release.").

E. ARGUMENT AND CITATIONS OF AUTHORITY

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. Standard of Review.

Petitioner Patterson submits that the issue in this case concerns a pure question of law that is reviewed on appeal pursuant to the *de novo* standard of review. *See Delgado v. State*, 162 So. 3d 971, 980 (Fla. 2015) ("Because this is a pure question of law, our review is *de novo*.") (citations omitted).

2. Argument.

Prior to trial, Petitioner Patterson filed a "Motion to Dismiss or in the Alternative to Exclude Testimony of State's Expert Witnesses." (R1-21). In the motion, Petitioner Patterson explained that the State's theory in this case was that Petitioner Patterson intentionally set fire to his truck, which was parked inside the garage of his residence. (R1-21). The motion further explained that 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). The motion stated that after law enforcement officials completed their examination of the truck, Geico Insurance Company took possession of the truck (in March of 2010). (R1-22). Warrants for Petitioner Patterson's arrest were not issued until *September of 2010.* (R1-22).

Shortly after Petitioner Patterson voluntarily surrendered himself, Petitioner Patterson retained John Beroset, Esquire, to represent him. (R1-22). Mr. Beroset, in turn, hired an arson investigator (Cam Cope). (R1-22-23). Mr. Beroset and Mr. Cope thereafter requested the opportunity to examine the truck, but they were informed that on April 1, 2010 – approximately five months *before* the arrest warrants were issued – Geico Insurance Company sold the truck for scrap metal (i.e., the truck was destroyed). (R1-23).

As a result, Petitioner Patterson sought to dismiss the case due to the destruction of this evidence, or alternatively, to preclude the State from calling as witnesses the experts who physically examined the truck prior to its destruction. In the motion, Petitioner Patterson explained that the truck was "the key and most critical piece of evidence in this case." (R1-23). Petitioner Patterson further explained that his ability to defend the case was severely hampered because his expert (Mr. Cope) was denied the opportunity to examine the truck – even though the State's experts were afforded the ability to personally examine the truck.

A hearing on the motion was held on October 5, 2011. (R1-26). During the hearing, Steven Callahan, a detective with the State Fire Marshal's Office, stated that following the fires in February of 2010, he examined Petitioner Patterson's truck and he determined based on that examination that the first fire "had actually come from

inside of the truck" (i.e., Mr. Callahan relied on his personal examination of the truck and opined that Petitioner Patterson intentionally started the fire in his truck). (R1-42). Mr. Callahan acknowledged that after he examined the truck at Petitioner Patterson's residence on March 10, 2010, the truck was loaded on a flatbed truck and hauled away from the residence. (R1-45). Mr. Callahan admitted that his office did not preserve the truck: "we don't impound vehicles." (R1-46).

Mike Miller, a detective with the State Fire Marshal's Office, also testified during the October 5, 2011, hearing. Mr. Miller acknowledged that he also examined the truck and based on that examination he determined that the first fire started "[i]nside the vehicle." (R1-60). Mr. Miller stated that he believed that it was an insurance company who towed the truck from Petitioner Patterson's residence on March 10, 2010. (R1-61). Mr. Miller conceded that his office did not "preserve" the truck (he stated that his office only took pictures of the truck). (R1-61).

During the October 5, 2011, hearing, the parties also relied on the deposition transcript of the defense expert – Mr. Cope. (R1-59-70). During his deposition, Mr. Cope opined that the fire was "electrical in nature," but he explained that he was hampered in his analysis because he could not examine the truck. (R1-178-79).

Finally, during the October 5, 2011, hearing, defense counsel introduced the "Guide for Fire and Explosion Investigations" published by the National Fire

Protection Association. (R1-75). Guideline 16.11.2 of the Guide states:

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

(SR3-469).[16]

At the conclusion of the October 5, 2011, hearing, the trial court denied the motion to dismiss/motion to exclude the State's experts. (R2-212). For the reasons set forth below, Petitioner Patterson submits that the trial court should have precluded those State experts who physically examined the truck from testifying at trial.[17] Since the State failed to preserve the truck, it was *patently unfair* for the State's experts to be able to testify at trial and rely on their evaluation of the truck because the defense expert (Mr. Cope) was denied the same opportunity to examine the truck (and refute the opinions of the State's experts).[18]

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[16] Both Mr. Callahan and Mr. Miller acknowledged that they were familiar with the "Guide for Fire and Explosion Investigations." (R1-36, 56).

[17] At trial, Mr. Callahan testified for the State (T2-299), as well as State expert David Cheers. (T1-162). Both witnesses concluded that Petitioner Patterson intentionally started the fire in the passenger compartment of the truck and both witnesses relied on their *personal examination* of the truck in reaching this conclusion. Additionally, State expert Bob Hallman testified at trial and concluded – based on his *personal examination* of the truck – that "there was no electrical cause of this fire within the vehicle." (T3-588).

[18] Notably, State expert David Cheers conceded at trial that it is the policy of the insurance company that he works for to preserve evidence in a criminal case. (T2-242). Mr. Cheers stated that if the truck had been owned by his insurance company, the truck would have been taken "to a salvage facility" until the criminal case was

In support of his argument, Petitioner Patterson relies on the Fourth District Court of Appeal's opinion in *Lancaster v. State*, 457 So. 2d 506 (Fla. 4th DCA 1984). In *Lancaster*, the Fourth District considered an almost identical scenario and 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

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concluded. (T2-243).

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. Consistent with *Lancaster*, Petitioner Patterson's convictions should be vacated and the case should be remanded for a new trial with directions that "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.

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 Marshal 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 (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 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.

At the conclusion of the opinion below, 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. However, during the State's closing argument, the prosecutor compared the thoroughness of the investigations conducted by the State's experts to the investigation conducted by Mr. Cope (the defense expert):

> 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 [sic] they did. They told you about their investigation, how thorough it was*.

(T5-920) (emphasis added). 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). While the prosecutor may not have explicitly "argue[d] to the jury [during closing argument] that its experts' opinions were more credible than Cope's *because they physically inspected the truck*," the prosecutor's argument implicitly made this point (because each of the State's experts relied upon his physical examination of the truck). When the prosecutor stated "[t]hey told you

about the examination *and what they did*" and "[t]hey told you about their investigation, *how thorough it was*," the prosecutor was alluding to the State's experts' "physical inspection of the truck." This is especially apparent when the main distinction between the experts' examinations/investigations was that one set (the State's experts) physically inspected/examined the truck and the other (Mr. Cope) did not.

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). Accordingly, Petitioner Patterson requests the Court to adopt the Fourth District's well-reasoned analysis in *Lancaster*.

F. CONCLUSION

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

G. 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 29th day of June, 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 Initial Brief of the Petitioner complies with the type-font limitation.

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