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No. 16-116483-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

FRANK ROBINSON

Petitioner – Appellee/Cross-Appellant

V.

STATE OF KANSAS

Respondent – Appellant

# BRIEF OF APPELLEE/CROSS-APPELLANT

APPEAL FROM THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
HONORABLE EVELYN Z. WILSON, JUDGE
DISTRICT COURT CASE NO. 14-CV-795

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## Nature of the Case

Frank Robinson was convicted by a jury of reckless second degree murder and aggravated arson. The district court sentenced Robinson to 438 months in prison. His conviction and sentence were affirmed on direct appeal. Robinson filed a Petition under K.S.A. 60-1507, claiming ineffective assistance of counsel. After an extensive evidentiary hearing, the District court found trial counsel was ineffective on three of the eight issues presented. The court vacated Robinson's convictions and remanded for a new trial. The state appealed and Robinson cross-appealed.

## Statement of the Issues

***State's Appeal***

**Issue I: The district court correctly held that trial counsel was ineffective for failing to call an expert, impeach Detective Wheeles, and investigate Mr. Robinson's alibi, all in violation of the of the Sixth and Fourteenth Amendments of the United States Constitution and § 10 of the Kansas Bill of Rights.**

**A. The district court correctly held that trial counsel's failure to use a qualified expert to refute the claims made by the State's fire investigators constituted ineffective assistance of counsel.**

**B. The district court correctly held that trial counsel's failure to impeach Detective Wheeles constituted ineffective assistance of counsel.**

**C. The district court correctly held that trial counsel's failure to investigate alibi witnesses constituted ineffective assistance of counsel.**

**D. The district court correctly found that the cumulative errors of trial counsel resulted in prejudice to Mr. Robinson.**

***Cross-Appeal***

**II. The district court erred in not finding trial counsel ineffective for failing to suppress statements, impeach additional critical witnesses, present exculpatory testimony, put Mr. Robinson on the stand and stipulating to elements of the offense, all in violation of the of the Sixth and Fourteenth Amendments of the United States Constitution and § 10 of the Kansas Bill of Rights.**

**A. Trial Counsel's failure to move to suppress Mr. Robinson's statement as a product of an unlawful arrest constituted ineffective assistance of counsel.**

**B. Trial counsel's failure to impeach Detective Hill and Fire Marshall Roberts constituted ineffective assistance of counsel.**

**C. Trial counsel's failure to present exculpatory evidence that contradicted Ernest Brown's testimony that Mr. Robinson was seen fleeing the fire constituted ineffective assistance of counsel.**

**D. Trial counsel's failure allow Mr. Robinson take the stand constituted ineffective assistance of counsel.**

**E. Trial counsel's stipulation to an element of the offense constituted ineffective assistance of counsel.**

**F. The cumulative errors of trial counsel resulted in prejudice to Mr. Robinson.**

## Statement of Facts

This case involves a condemned crack house that burned to the ground. One person was injured and one person died in the fire. Two independent fires were found during the investigation. Earlier in the morning a small fire occurred in the cellar, which was accessed only through an outside door in the back of the house. The fatal fire likely started inside the front door stairwell. The questions underlying the criminal case were whether the second fire was arson, and if arson, who set the fire.

### The Fire

On the morning of August 8, 2006, a fire burned at 427 SW Tyler, Topeka, Kansas. Reinna Rodriquez was driving to work and noticed the fire from two blocks away. She parked in front of the burning house and called 911. (R. XXIX, 50). At around

the same time, Topeka Police Officer Boos noticed the smoke from blocks away requested assistance. (R. XI, 14-15, R. XXIX, 771-783).

An ambulance unit arrived on the scene first and cared for a woman who had jumped from the upstairs apartment window to escape the fire. The first firefighters on the scene observed "heavy fire involvement" upon arrival, noting the stairs in the entry area were burning "from top to bottom." The house was largely destroyed. A search of the wreckage revealed the body of a resident who was unable to make it out. (R. XXIX, 771-772).

The investigation also determined that prior to the fire that destroyed the house, there had been a small, independent, uncommunicated fire in the cellar. (R. XXIX, 777). These were not the first fires at this address. Other fires, occurred in previous months. (R. XXIX, 492-94).

**The House**

427 SW Tyler was a known crack house in a struggling neighborhood. (R. XXIX, 46-47). The structure was divided into four units. Apartments 1 and 4 were vacant. In April of 2006, almost four months prior to the fire, an emergency Order to Vacate was issued, posted on the property, and sent to the owners. (R. XXIX, 728-758). The placard posted on the front of 427 Tyler warned in part: "DO NOT ENTER UNSAFE TO OCCUPY" (R. XXIX, 753).

Despite the condemnation order, Marvina Washington lived upstairs in Apartment 3, and Ernest "Bump" Brown lived downstairs in Apartment 2. Neither had a valid lease or had paid rent in months. (R. XXIX, 772). Washington's apartment was the only one

with electricity. From their individual apartments, Washington and Brown sold and smoked crack cocaine. There was heavy foot traffic of drug users at all times of the day and night. (R. XI, 50-52, 62-64; R. XXIX, 10).

The building was "dirty, falling down, unkempt, not taken care of," and there was a "nasty rug" running the length of the stairs. The common entry area was not maintained and full of trash and debris. Food wrappers, cardboard boxes, lampshades, and crack paraphernalia were among the items that littered the entry area and stairwell of the house. (R. XI, 53-56).

Washington's apartment was the only one with electricity. Extension cords ran from her apartment to Apartment 2, belonging to Brown. (R. XXIX, 539, 683, 690, 759). Loleta "Lisa" Miller, Brown's girlfriend, worried about the extension cords because there were so many that they would frequently have shortages. (R. XXIX, 683, 691). The power cords were necessary for Brown to have electricity, as his service had been terminated earlier in the year. A City of Topeka investigation revealed the entire building had electrical problems and extension cords were running outside the house for power. (R. XXIX, 750). The lights would commonly dim and then spark back up, sometimes blowing out electronics. (R. XI, 54-55). Brown was worried the electrical setup might have caused the fire, as he "had everything hooked up," and was "runnin' all kinds of TV," powered by extension cords leading to Washington's apartment. (R. XXIX, 683).

**The People**

There were five people inside the house at the time of the fire: Marvina Washington, with her guests Sheila Ansley and Frank Alston, and Brown and Miller.

Miller discovered the fire and alerted Brown in time for them to make it out safely. Ansley and Alston were able to jump from a window, Washington was not. (R. XXIX, 772).

**Loleta "Lisa" Miller**

Miller was the only person awake at the time of both fires. She was in the living room when she started to smell smoke. Miller thought there might be an electrical fire so she woke Brown. (R. XXIX, 642, 684). Unable to find anything inside the apartment, Miller and Brown searched outside, where they found a small fire burning in the cellar. Miller and Brown extinguished the fire with water. (R. XXIX, 643-647, 684-687).

After they put out the fire, Miller and Brown went back inside. They aired out the apartment. Brown went back to bed and Miller returned to the living room. Between 30 minutes to an hour later, Miller began to smell smoke again. Worried they had not fully extinguished the cellar fire, Miller again woke Brown. The two went back outside to the cellar but found nothing. Miller decided to walk around the north side of the house, at which point she noticed orange flames "shooting out" of the second story window. (R. XXIX, 647-650, 696). Brown followed Miller and the two of them discovered the entry area of the house was "completely engulfed" in flames. Miller began to call out for Washington. (R. XXIX, 651, 697-699). She did not see any other person around, but she kept looking and calling out to Washington. (R. XXIX, 656). They continued around the front to the south side of the house and found Sheila Ansley lying on the ground. She was badly injured after jumping from a second story window. She told Miller that another man had jumped, but that Washington was still inside. (R. XXIX, 653, 700). The only

person Miller saw outside the house was Ansley. She saw no one leaving the scene. (R. XXIX, 656).

Miller told officers that there had been some traffic at Brown's apartment leading up to the fires from people looking to buy crack from him. (R. XXIX, 676, 682). Miller said that Frank Robinson asked about getting dope, and showed his money to Brown about 30 minutes before smelling smoke and discovering the cellar fire, and which was roughly 60-90 minutes prior to smelling smoke for the second time. (R. XXIX, 665-667, 682, 702). Miller never saw Robinson again.

Miller was interviewed by law enforcement twice on August 9, 2006; once at the Topeka Law Enforcement Center (LEC), and once at the scene of the fire. Both interviews were transcribed, and the interview at the scene was also videotaped. Miller died prior to trial and her statements were not introduced at trial.

Ernest "Bump" Brown

Brown was in his apartment in bed at the time of the both fires. Brown had been up for nearly two days smoking crack and drinking vodka, and was not feeling well. (R. XII, 88-89). Brown agreed with Miller that she woke him up to put out the cellar fire and that Robinson came to buy crack. He then went back to bed. (R. XXIX, 590, 649).

Brown's testimony differs from Miller in two areas – timing and allegedly seeing Robinson running from the scene. Although Brown had gone back to bed, he claimed it was just minutes after Robinson left that Miller said she smelled smoke again. (R. XXIX, 590, 611). Brown told her it was probably just the smell from the cellar fire, but Lisa wanted to check. (R. XXIX, 585). Miller quickly made it around the north side of the

house, noticed the fire and called to Brown to come see. (R. XXIX, 608). Brown came around to meet Miller, telling police that as he came around the house he saw Robinson headed North on the sidewalk in front of the house. (R. XXIX, 588-589, 609).

**Sheila Ansley**

On August 6, 2006, Sheila Ansley went to Washington's Apartment. Once there, she and Washington smoked crack together and continued smoking throughout the next day. (R. XI, 28-33). Washington received a "fresh shipment" of crack on August 7, and Ansley observed 30 to 40 people come and go from Washington's apartment that day and evening to buy or smoke crack. (R. XI, 51-52). At some point in the evening, Frank Alston, arrived and stayed the night with Ansley and Washington. (R. XI, 34).

Ansley awoke to the smell of smoke and screamed to wake the others and let them know there was a fire. The heavy smoke made leaving through the door of the apartment impossible, so Alston suggested they jump from a window he had opened in the bedroom. (R. XI, 39-41). Alston jumped out the window. Ansley leaned out the window and called down to Alston to help her get Washington down because she would not jump. Alston told Ansley "you're going to have to take care of it yourself," and then ran off. Ansley continued to try to help Washington, but ultimately lost her in the smoke. She searched for Washington without success before jumping out the apartment window herself. (R. XI, 41-43). Ansley suffered multiple fractures to her back and lower body in the jump, and was unable to move from where she landed. (R. XI, 44; R. XXIX, 44).

**Reinna Rodriguez**

Rodriguez was on her way to work the morning of August 8. She spotted the fire blocks away and drove to the burning house. According to the police report, when she pulled up to the house, Rodriguez observed two black males in the front yard who were quickly joined by another black male (later identified as Brown) and a woman (later identified as Miller) that came from around the side of the house. Rodriguez did not state she saw any individual running from the scene. Rodriguez called 911, then waited for the authorities to arrive. (R. XXIX, 50-51).

Rodriguez did not testify at trial.

**Frank Robinson**

Robinson went to speak to detectives at the Topeka Law Enforcement Center around 11:30 p.m. on August 8. (R. XXIX, 10). Robinson told police he had been on his way to 427 SW Tyler to buy some crack when he saw the police blockade. He spoke to an officer at the scene about what had happened and then walked down the block to a friend's house. His friend told him that the police wanted to speak with him about the fire, and his girlfriend drove him there. (R. XXIX, 75).

Robinson told police that he had been at the residence briefly the night or early morning before the fire to buy crack from Brown. Robinson admitted that he had been drinking and couldn't be sure about the timing. (R. XXIX, 83). Throughout the interview, Robinson repeatedly denied having started the fire and provided names of people that frequented the residence and who were involved in disputes with Washington. Robinson was never told that there was more than one fire.

**Fire Investigation**

The Kansas State Fire Marshall's Office, A.T.F, and Topeka Fire Department spent two days investigating the fire. Washington's body was found on August 8, 2006 on the second floor near the windows. The coroner ruled she died from carbon monoxide poisoning. (R. XI, 97, 135).

ATF Agent Monty was the investigator in charge of determining the origin and cause of the fire. (R. XII, 17). A canine alerted to burned and charred pieces of wood, and the pieces were sent for confirmatory testing. (R. XII, 12). All lab reports came back negative for the presence of gasoline or any other liquid accelerant. (R. XII, 15). No ignition source was located, nor was any physical evidence linking any individual to the fire, discovered. (R. XXIX, 771-783).

Monty concluded that the cellar fire was a separate uncommunicated fire in relation to the second fire. Monty ruled out apartments one, two, three, and four as areas of origin of the second fire, and ultimately concluded that the second fire was started somewhere on the stairwell in the entry area. (R. XXIX, 771-783; R. XI, 200). Despite the lab reports, Monty opined the second fire was intentionally set in the stairwell with the use of gasoline. (R. XI, 201, 207, 208).

**Execution of the Search Warrant and Arrest of Robinson**

A federal search warrant for the apartment where Robinson stayed was granted and executed around 5 p.m. on August 9, 2006. (R. XII, 114). Topeka Police Detectives Wheeles and Hill assisted the ATF in executing the search warrant. (R. XII, 115, 157). Robinson was upstairs and immediately taken into custody by the ATF. (R. XII, 160).

After being placed in custody, Hill and Wheeles testified that Robinson made several admissions. According to the detectives, Robinson admitted to lighting his crack with matches and throwing matches them into the empty cellar. (R. XII, 164). Robinson denied having touched the gas can found near the scene or having been in contact with the gas can that night. (R. XII, 167, R. XXIX, 164). Robinson said that if he was the one who started the fire, it was an accident and that he did not mean to do it or hurt anyone. (R. XII, 169, R. XXIX, 164). Wheeles told Robinson he had been identified at the scene after the first fire and leaving the scene after the second fire, to which Robinson did not respond. (R. XII, 126-127). Eventually, Robinson admitted that he might have walked quickly away from the house.

Detective Hill asked Robinson if he might have been smoking and lighting fires in the front entry. Hill testified that Robinson indicated he might have been smoking in the front entry and seen the flames jumped up, but that it was an accident. When asked directly where he was when the second fire started he was silent and didn't answer. (R. XII, 164-168).

The details of these statements are hard to confirm. (R. XII, 129). Most of the alleged details from Robinson came during conversations in the police car, which had no recording devices. Despite initial testimony that he made notes in a notebook, Wheeles testified at trial that he took mental notes because he did not have a notebook at the time. (R. XXIX, 95; R. XII, 147-49). Follow-up conversations at the LEC were recorded and Robinson stated "I didn't do it on purpose." (R. XII, 174). This statement does not refer to specific fire.

At the conclusion of the interview, Detective Wheeles collected Robinson's clothing as part of the evidence of the search warrant. (R. XII, 152, 172). No accelerant was found on his clothing. (R. XII, 16-17).

## PROCEDURAL HISTORY

In August of 2006, Mr. Robinson was charged in Federal District Court with arson and the death of Marvina Washington. (R. XXIX, 485). The Federal Public Defender was appointed and extensively litigated the case pre-trial. Eventually, the federal case was dismissed due to a lack of a federal jurisdiction. (R. XXIX).

Nearly three years later, Robinson was arrested on March 9, 2009, and charged with in Shawnee County with felony murder, K.S.A. 21-3401(b), and aggravated arson K.S.A. 21-3719(a)(2), K.S.A. 21-3719(b)(1). The State's affidavit in support of the arrest warrant was taken verbatim from the federal search warrant affidavit. Joe Huerter was appointed to represent Robinson. All of the federal discovery and filings were made available to him by the Federal Public Defender.

Despite the extensive litigation in federal court, the only motion filed by Huerter was a generic "form" Motion in Limine. (R. II, 85). The State requested and received a *Jackson v. Denno* hearing to determine the voluntariness of Robinson's statements. (R. II, 81). The district court held those statements were voluntary and admissible. (R. XVI, 33). Huerter did not contest the lack of probable cause to support the search or arrest warrants.

**Jury Trial**

The State's theory at trial was the second fire was intentionally set in the stairwell by the use of gasoline. The State relied upon expert testimony to show that the first fire and the second fire were distinct, and the second fire was the one that caused Washington's death. Agent Monty was the lead fire investigator in the case. Monty's opinion was that the second deadly fire was intentionally set on or adjacent to the first steps within the foyer inside the front door. (R. XI, 200). Although the lab results were negative for any accelerant, and no ignition source was found, Monty concluded that, based on his personal experience, the fire in the stairwell was intentionally started with "a handheld open flame device, lighter, match, whatever you can hold in your hand, in contact most likely with an ignitable liquid." (R. XI, 204).

After a five-day trial, the jury ultimately convicted Robinson of reckless second degree murder, K.S.A. 21-3402(b), and aggravated arson, K.S.A. 21-3719(a)(2), K.S.A. 21-3719(b)(1). His convictions were affirmed on direct appeal. *State v. Robinson*, 2012 WL 4794455 (Kan. App. 2012).

## Arguments and Authorities

***State's Appeal:***

**Issue I: The district court correctly held that trial counsel was ineffective for failing to call an expert, impeach Detective Wheeles, and investigate Mr. Robinson's alibi, all in violation of the of the Sixth and Fourteenth Amendments of the United States Constitution and § 10 of the Kansas Bill of Rights**

**Standard of Review**

When a K.S.A. 60-1507 evidentiary hearing is held the district court must make findings of fact and conclusions of law. Rule 183(j). On appeal, "the appellate court must

give deference to the district court's findings of fact, accepting as true the evidence and any inferences that support or tend to support the district court's findings. [citations omitted]" *Bellamy v. State*, 285 Kan. 346, 355, 172 P.3d 10 (2007). The district court decision must be affirmed when the factual findings are supported by substantial competent evidence and are sufficient to support the conclusions of law. *Graham v. State,* 263 Kan. 742, 753, 952 P.2d 1266 (1998). Appellate courts do not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence, although the district court's conclusions of are reviewed de novo. *Bellamy,* 295 Kan. at 355. *See also*, *State v. Hayden,* 281 Kan. 112, 132, 130 P.3d 24 (2006).

**Standard for ineffective assistance of counsel.**

The Sixth Amendment guarantees every defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel is ineffective when the performance was deficient to the prejudice of the defendant. *Strickland*, 466 U.S. at 687. Deficient performance is that which falls below "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. While a court must be careful to avoid the effects of hindsight, trial strategy does excuse all decisions by counsel. *Strickland*, 466 U.S. at 690-91. Counsel has a duty to make reasonable investigations based on information provided by the client, or in the alternative to make a reasonable determination that such investigations are unnecessary; the acts and omissions of counsel must be the result of an informed strategic decision. *Strickland*, 466 U.S at 690-91. When counsel fails to make either reasonable investigations, or a reasonable determination not to investigate, the presumption of reasonableness is overcome.

*Strickland*, 466 U.S. at 689.

When counsel's performance falls below professional norms, the defendant is entitled to relief when there is a reasonable probability that, absent the errors, the result of the proceeding would have been different. This is not a but-for test, and the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. In fact, a preponderance of the evidence standard in a prejudice inquiry was specifically rejected by the United States Supreme Court in *Williams v. Taylor*. 529 U.S. 362, 405-406 (2000). *See also Holland v. Jackson*, 542 U.S. 649 (2004) (prejudice is less than a preponderance of the evidence). The reasonable probability standard is met when confidence in the outcome is undermined. *Strickland*, 466 U.S. at 694.

There were three critical pieces of evidence that the State relied on to convict Mr. Robinson: the conclusion by state experts that the fire was intentionally set, Robinson's admission to being at the scene and perhaps setting one of the two fires, and Earnest Brown's claim that Robinson ran from the scene. In order to effectively defend Robinson, each of these claims had to be refuted. They were not. Trial counsel failed to use an expert to refute the findings of arson, failed to file a motion to suppress Robinson's statements, and failed to present the testimony of two witnesses, or investigate alibi witnesses, to dispute the assertion that Robinson was fleeing the scene. These failures denied Robinson his right to the effective assistance of counsel.

The district court correctly held that the failure to use an actual arson expert, to impeach Detective Wheeles, or to investigate alibi witnesses fell below professional

norms to the prejudice of Robinson. The findings made by the district court are supported by substantial competent evidence and any issues of witness credibility or conflicts in the evidence must be weighed in favor of upholding the district court's reversal. *Bellamy,* 295 Kan. at 355; *Hayden,* 281 Kan. at 132.

**A. The district court correctly held that trial counsel's failure to use a qualified expert to refute the claims made by the State's fire investigators constituted ineffective assistance of counsel.**

The crux of the State's case was that the fire was incendiary. To effectively defend Robinson, counsel had to refute the evidence presented by the State's expert; that much is admitted to by Mr. Huerter, Robinson's counsel (R. XXIV, 251). A qualified expert would have effectively explained to the jury the errors the fire investigators made and how the conclusions were incompatible with professional guidelines. Inexplicably, counsel failed to hire a qualified expert and left the State's evidence unchallenged.

**1. Trial counsel did not obtain a qualified expert.**

The uncontroverted facts establish that Huerter did not utilize a qualified expert or make strategic decisions with regard to the use of an expert. The district court made the following undisputed and specific findings of fact: 1) Huerter did not attempt to contact an expert until 10 days before trial; 2) it was the student intern in Huerter's office who contacted and spoke to the alleged expert; 3) the person contacted, Gene Gietzen, was not an arson expert; 4) Gietzen was not provided pictures or videos of the crime scene; 5) Gietzen was not asked to conduct an origin and cause analysis of the fire; and 6) Jason Belveal, Robinson's co-counsel, along with federal public defenders, Kirk Redmond and Melody Brannon, all testified that an expert was essential to properly defend Robinson

(R.I, 354-71). Each of these findings of fact is supported by substantial competent evidence and is entitled to deference by this court. To the extent the State argues that some findings are ambiguous and there is conflicting testimony, those ambiguities and conflicts must be resolved in favor of the trial court's findings. *See Bellamy, 295 Kan. at 355; Hayden, 281 Kan. at 132.*

Huerter and the State attempt to explain away the failure to hire a qualified expert by asserting that (1) counsel consulted with Geitzen and his initial feedback did not refute the State's expert; (2) it was strategy was to use Gietzen to prepare cross-examination questions; and (3) it was strategy not to seek a different expert. As found by the district court, however, the facts and "Mr. Huerter's testimony belies the conclusion that his inquiry into an arson expert was particularly extensive." (R. I, 365). Huerter waited until 10 days before trial before having an intern in his office contact Gietzen, who is not an arson expert. He then failed to provide adequate information to Gietzen or use what information Gietzen did provide in his cross examination of Agent Monty.

**a. Mr. Gietzen is not a qualified arson expert.**

Unfortunately for Robinson, the individual Huerter contacted was not an arson expert. Gene Gietzen, who Huerter allegedly consulted with to formulate the defense, testified at the 1507 hearing that *he is not an arson or fire expert.* (R.XXIV, 142-43). He is a general crime scene technician specializing in scene photography, evidence collection and preservation, and laboratory work. (R.XXIV, 143). He is not certified by either of the two professional organizations that accredit arson/fire investigators, or any

other similar body, and his only arson-related training comes from one class on laboratory analysis of arson debris. (R.XXIV, 142-43).

Huerter's claim that Gietzen was "an arson investigation-type expert, cause and origin person," (R. XXIV, 12), is simply wrong, and the error is unacceptable. *See Hinton v. Alabama*, 134 S.Ct. 1081 (2014) (counsel is ineffective for failing to use an appropriate expert). Contrary to the State's claim that the district court put too much emphasis on whether Gietzen was certified by professional arson organizations, the credibility call made by the district court must be given deference, especially in light of Gietzen's own testimony that he is not an arson expert. *See Bellamy, 295 Kan. At 355; Hayden, 281 Kan. At 132.* Gietzen may have been a crime scene investigator, but as the district court properly concluded, that does not make him an expert in the origin and cause of fires. (R. I, 368).

**b. It was not trial strategy to use Mr. Gietzen as a consultant for cross-examination.**

Huerter's claim, that Giezten could not contradict the State's expert and that he used Geizten to prepare cross-examination questions, is factually and legally unsupportable. Both Huerter and the State overlook the most important finding by the district court: Gietzen was never asked to give an origin and cause analysis of the fire. In fact, Gietzen, regardless of his qualifications, could not give an origin and cause determination because he was not provided with photographs or video from the crime scene. Glossing over this undisputed fact vitiates the contentions that Gietzen did not contradict Monty's conclusion and it was trial strategy to use Gietzen as a consultant.

Huerter and the State cannot rely on strategy to defend the decision to use Gietzen as a consultant when Huerter failed to provide Gietzen with the necessary material to offer an opinion, or make proper use of the alleged expert. Not only did Huerter wait until 10 days before trial to even contact Gietzen, he failed to ask for the most important evidence for the defense: the origin and cause of the fire.

Huerter's claim that Gietzen could not contradict the State's expert is not support by the facts. Interestingly, some of the work of Agent Monty was so obviously flawed that even Gietzen was able to identify and attack some of it conclusions, providing Huerter with numerous cross examination questions targeted at classifying the cause of the fire as "undetermined." (R. XXIX, 784-804). Gietzen's report reveals issues with the methodology and conclusions of Monty, contradicting Huerter's testimony that he could not refute the State's experts.

Comparing Gietzen's generic fire information with Huerter's cross-examination established further significant omissions on Huerter's part. Huerter inexplicably chose not to question Monty on the perhaps the most critical issue in the case, the four causes of arson and what distinguishes those classifications. Huerter failed to ask a single question about multiple factors that are essential to the origin and cause determination of a fire, such as ignition source, progression of the fire, and the condition of the building. Huerter completely failed to mention the National Fire Protection Association's published codification of accepted practice, the *NFPA 921 Guide For Fire & Explosion Investigations*, which provided numerous grounds to impeach Monty. Huerter also failed to impeach Monty with another seminal text originally cited by Monty, *Kirk's Fire*

*Investigation.* Huerter never addressed the intent issue as it relates to arson. Huerter never mentioned Monty's unscientific and impermissible interpretation of negative evidence, commonly referred to as "negative corpus" methodology, despite an abundance of content that existed at the time in both respected treatises which criticize negative corpus as bad science.

The contention that it was strategy to use Gietzen as a consultant to prepare cross-examination questions strains credulity. Gietzen is not an arson expert, and he was not asked to make an origin and cause determination. What general information Gietzen did provide, Huerter did not use. There is no strategic explanation for Huerter's conduct, and by not seeking a qualified expert for an origin and cause analysis, Huerter left one of the three crucial pieces of the State's evidence – the fire was arson – uncontested.

**2. Trial Counsel's failure to hire and consult with a qualified arson expert falls below professional norms.**

At the evidentiary hearing, two federal public defenders, both of whom had extensive state court practice, establish that using an arson expert is the professional norm. Even Robinson's own trial attorney stated that an expert was crucial. Jason Belveal, Huerter's co-counsel testified, "Many of the things around an arson are very technical in nature...you can study those as much as you like but *you're never going to be able to digest it like an expert in the field.*" (R. XXIV, 261). Defense counsel needed to hire a legitimate expert, one any court would not have a problem qualifying.

In *Hinton v. Alabama*, 134 S.CT. 1081 (2014), the United States Supreme ruled that trial counsel was ineffective for not obtaining the services of a qualified expert.

*Hinton* involved a homicide where the prosecution linked the defendant to the crime mainly through the testimony of a ballistics expert. 134 S.Ct. at 1083-84. Rather than hire a qualified expert, trial counsel obtained the services of a person who's area of expertise did not include ballistics. Explaining that it would not weigh which qualified expert was the best, the Supreme Court specifically stated that the failure to seek a qualified expert could not be deemed strategy, and counsel was ineffective for not searching for a qualified expert. 134 U.S. at 1089.

The Kansas courts have also held that the failure to hire an expert can constitute ineffective assistance of counsel. In *State v. Mullins*, 30 Kan.App.2d 711 (2002), the defendant was convicted of repeatedly sodomizing his young son. The child allegedly reported the abuse to his mother, who took the child to the Children's Center at KU Medical Center. There a nurse interviewed the child and then testified about the child's claims and that the absence of physical evidence was normal. This Court concluded that the failure to hire an expert and properly prepare for the cross-examination of the State's witnesses constituted ineffective assistance of counsel. Noting that linchpin of the State's case was the allegations made by the child, the failure to hire an expert in child interviewing techniques and cross-examine the studies relied upon by the child advocate was found to be ineffective. This Court reversed the conviction. 30 Kan.App.2d at 718-19.

*Mullins* is directly on point. The nurse's testimony was critical to bolstering the credibility of the victim and in resolving the questions about the lack of physical evidence, despite allegations of repeated anal sodomy of a young boy. It was essential

that an expert explain interviewing techniques and challenge the studies relied upon by the nurse. In this instance, the testimony of Agent Monty and Fire Marshall Roberts were critical to establishing that the fire was incendiary. Without presenting testimony to the contrary or properly using a qualified expert, counsel was unable to challenge one of the three essential pieces of evidence presented by the State – the fire had been intentionally set, by an ignitable fluid no less. Had this conclusion been challenged, the State's ability to prove arson is called into serious doubt. The State's attempts to minimize the holding in *Mullins* are unpersuasive.

The cases relied upon by the State to negate the need for an expert are unpersuasive or simply misconstrued. The State cited to *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001), as support for not getting an expert. Specifically, the State emphasized a passage in the case where, in dicta, the court ponders the necessity for an expert and concludes that an expert is not needed in instances where the prosecution's evidence is so weak that it can be "demolished" on cross-examination. *Miller*, 255 F.3rd at 459. What the state does not discuss, however, is the actual holding of the case.

The *Miller* Court reversed on an ineffective assistance of counsel claim for not calling forensic experts. After explaining that the prosecution's expert witness testified that a pubic hair found on the victim's thigh was almost certainly the defendant's, the *Miller* court found:

> Miller's lawyer did not consult with a hair expert, let alone call one as a witness, but was content to cross-examine the state's expert. In the postconviction proceedings, however, new counsel for Miller retained a far more experienced hair expert than the state's and this expert testified that the hair was like the victim's hair and unlike Miller's. The prosecution at

> Miller's trial had also presented DNA evidence that it admitted was inconclusive and had not presented tire-tread and footprint evidence that it had said in opening argument it would present. Had Miller's lawyer called his own DNA, tire-tread, and footprint experts, *they would have testified not that the evidence was inconclusive but that it provided absolutely no basis for supposing Miller present at the scene of the crime.*
>
> . . . . [The government] is content to argue that Miller's lawyer was entitled to rely on cross-examination to undermine the prosecution's experts, and to make no effort to obtain his own experts. This argument would be convincing in some cases, but not in this one; *cross-examination alone could weaken the prosecution's expert evidence, but not to the point of denying it the essential corroborative value for which the prosecutor was using it.* 255 F.3rd at 457(emphasis added).

Like in *Miller*, the testimony of Agent Monty and Fire Marshall Roberts were not sufficiently weak, as evidenced by counsel's inability to demolish their testimony on cross examination. The assistance of a qualified expert was necessary.

Similarly, the State's reliance on *Wilkins v. State*, 289 Kan. 971 (2008), is not persuasive. *Wilkins* involved a homicide where the victim was found in a pond. His identification could only be made through the use of a dental expert and the 11 teeth that were located in the pond. The defense in *Wilkins* was that the defendant did not participate in the murder. The identity of the victim was not at issue. At a 1507 hearing, Wilkins argued that his trial counsel was ineffective for failing to hire an expert to challenge the findings of the State's dental expert. In ruling that an expert was not necessary, the Kansas Supreme Court found it "significant" that the theory of defense did not rise and fall on the identity of the victim. 289 Kan. at 987. In the present case, however, challenging the incendiary nature of the fire was at the heart of Robinson's defense.

The other cases relied upon by the State, are either federal habeas cases, in which a very limited standard of review prevents federal relief, *See Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770178 L.Ed.2d 624 (2011), or are cases where it appears the 1507 counsel failed to make an adequate record. *Ferguson v. State*, 276 Kan. 428, 449-50, 78 P.3d 40 (2003). None of them are persuasive or relevant to the case at hand.

Huerter's failure to obtain a qualified expert and effectively combat the testimony of Agent Monty constitutes ineffective assistance for which there is no excuse. The Federal Public Defender's Office made available to him a well-developed attack that was informed by one of the foremost arson experts in the field. Huerter offered no explanation for ignoring the material provided, or any strategic rationale for his failure to hire a qualified expert and question Monty in critical arson-related areas.

**3. Trial counsel's failure to use a qualified expert prejudiced Mr. Robinson.**

The district court's finding, that the failure to properly challenge the State's experts was prejudicial to Robinson, is supported by substantial competent evidence and the law. Allowing the State's most damning evidence to fall on the ears of the jury almost uncontested rendered perhaps the most important question the jury was charged with answering – whether this fire was an arson or not – a foregone conclusion. In the absence of any voiced opinion to the contrary, the jury had almost no choice but to accept that the fire that killed Marvina Washington was an intentionally set.

Based on this Court's holding in Robinson's direct appeal, the district court properly found that the testimony of Monty was the linchpin to the State's allegation of

arson. *See State v. Robinson*, 2012 WL 4794455, *3 (Kan. App. 2012). Using a properly qualified expert, however, Huerter could have effectively called Monty's testimony into question.

**a. Agent Monty's methodology was flawed.**

Paul Bieber, a qualified arson investigator, found multiple problems with Monty's methodology. He explained that in a forensic fire investigation, there are four prongs that must be evaluated: the oxidizing agent (usually oxygen), the origin of the fire, the cause of the fire, and the how the fire developed. Bieber emphasized that that each prong must be evaluated in order and separately. (R. XXIV, 189). Monty, however, determined that the fire was incendiary through unsupported personal experience and by conflating the origin, cause, and its progression. Monty could not pinpoint the origin of the second fire with any specificity, but still concluded the fire was intentionally set because the it burned too quickly without an adequate fuel source. In his opinion, the only way to explain the progression of the second fire was that an accelerant was used. As Bieber explained, working backwards, conflating the four prongs, and using negative corpus to conclude the fires were incendiary, violated accepted fire investigation protocol.

**i. Agent Monty could not pinpoint the origin of the fire.**

Before a determination as to the cause of the fire, and whether it was incendiary, can be made, the origin of the fire must be located. (R. XXIV, 188-89). Monty, however, could not definitively pinpoint the origin of the fire, testifying that is was "adjacent to the first step within the foyer inside the front door." (R. XI, 200). He then concluded it was "in the stairwell near the first step." (R. XI, 201). The failure to find an ignition source is

crucial. Without that determination, a methodology called "negative corpus" must be utilized.

Negative corpus uses the process of elimination to determine the origin and cause of a fire, without any supporting evidence. (R. XXIV, 193). Consequently, negative corpus is not based on an affirmative finding, but is "a specific conclusion is drawn, not because there is evidence to support the conclusion but simply because there is not evidence to support a competing conclusion." (R. XXIV, 193). Negative corpus, however, is exactly how Agent Monty determined the fire was incendiary (R. XXIV, 194); not because there was evidence of the fire being intentionally set, but because he could not determine how else the fire could have started and progressed rapidly. In the absence of any other explanation, it had to be incendiary. The use of qualified expert would have allowed Huerter to explain that the Monty's failure to follow established protocol casts significant doubt on his conclusion that the second fire was incendiary.

**ii. Agent Monty erred in determining the cause and progression of the fire.**

Standard protocol at the time establishes that the failure of Monty to first pinpoint the origin of the fire, was only one mistake. His conclusions regarding the cause and progression of the fire, also fail basic fire investigation methodologies. Monty asserted that the fire was caused by an accelerant. He based his opinion on the progression of the fire and his personal experience. There are several errors that a qualified expert can dispute.

First, there is no evidence that an accelerant was used. None of the typical fire patterns characteristic of accelerant use, such as trailers, doughnut patterns, saddle burns, or linear radiation lines, were observed by investigators. (R. XXIX, 304). Second, at the scene, a canine alerted to several items for the presence of an accelerant. Those items were sent to a laboratory for confirmatory testing. The tests came back negative for an accelerant.

Despite negative lab results, Monty opined that accelerant had to have been used because of the speed at which the fire spread. Monty, however, had no idea how fast the fire spread because he was not there when the fire began. Bieber explained:

> Using the speed of fire growth, the --- how rapidly a fire grows from a small fire a moderately sized fire, to a large fire, first provides a couple of disabilities. One is, it is a very subjective examination. You're not sitting there with a clock and really have nothing to compare it to. But more important, in this particular case, is that the information that Investigator Monty used to develop a timeline to understand how quickly or slowly the fire progressed begins when the first witness saw or observed the fire. By the time the first witness sees the fire, it was already a very large fire.... (R. XXIV, 188).
>
> ****
>
> In an absence of any information to help understand how quickly or slowly it progressed to the point where it was witnessed, in the absence of that information, you can't use the speed of the development of the fire to support a sub conclusion. (R. XXIV, 193-94).

Bieber went on to explain that in balloon construction of the homes, "there is nothing to stop the flow of the heat, gases, and flames from the first floor to the attic. And very quickly you would expect the fire to travel through the building." (R. XXIV, 196). Balloon construction, combined with the void space under the stairs and the fuel load and

debris in the home, were all significant factors in the progression and the speed of the spread of the fire. (R. XXIV, 202-205).

Second, the use of an expert would have allowed Huerter to explain that the inability to quickly put the fire out is not indicative of the use of an accelerant, but rather, a failure to get the water to the "seat" of the fire. The first firefighter to enter the building stated that when he put his foot on the stair, his foot broke though and he could see flames. (R. XXIV, 197-98). Bieber explained that once the fire is burning under the stairs, "it would be expected to very quickly go to the second floor and then the attic." (R. XXIV, 197-98). At that point, the inability to put out the fire "has nothing to do with ignitable liquid. It has to do with directing your hose to the seat of the fire...The fire did burn at some point underneath the stairs. That is a really good way to block the stream of water – the water stream from getting to the seat of the fire." (R. XXIV, 210). The inability to get to the seat of the fire would explain why Fire Marshall Roberts witnessed the flames return when the hose was moved to a different place. (R. XXIV, 201-03).

Agent Monty's conclusion that an accelerant was used, was also erroneously based upon his experience and the lack of a fuel load; testimony that should have been challenged by Huerter. (R. XI, 203-210). Without any specific support, and contrary to all of the information known about and observed at the scene, Monty assumed, based on his personal life experience, that there was not enough material near the area of the fire to fuel it. He testified that "...stairwells don't typically have things, good fuel to get a fire of this significance going." (R. XI, 201). Not only is this wild speculation unfit to be the basis for any conclusion, but an investigator's lack of experience with the fuel load in a

stairwell does not satisfy the scientific method and is not appropriate grounds to draw any investigatory conclusion according to the NFPA. (R. I, 79).

More importantly, the facts prove Monty wrong. The house was in a well-documented state of disrepair, with large amounts of trash and debris strewn everywhere. (R. I, 79-80). Monty's own report painted a clear picture of a dilapidated structure with debris littered all around the parts of the structure that remained – trash, clothes, cigarette lighters, old appliances and tires were among the debris he specifically identified. (R. XXIX, 772, 777). Monty offered no explanation for why he would believe that the common entrance area of this crack house was free of the mess found everywhere else around it.

Nothing about the evidence in this case suggests that this was the "typical" stairwell with which Monty seems to be familiar. In fact, survivor Sheila Ansley testified that the foyer and stairwell were covered in trash such as food wrappers, crack paraphernalia, cardboard boxes, and there were frequent electrical problems throughout the whole building. (R. XI, 53-54). All these items would have provided a very significant fuel load in the stairway, which could have supported the second fire. (R. I, 80-81).

The State argued that Agent Monty's conclusions were appropriate based on the version of the NFPA that was in effect at the time of the original investigation. A simple review of the treatises that Monty relied upon, however, demonstrates this assertion is false. According *Kirk's Fire Investigation,* Sixth Ed., 2007, which was the protocol at the time, the prevailing standard in the field of fire investigation was that "there should be a

presumption that a fire is accidental until it is clearly proven to be incendiary[.]" (R. XXIX, 369, 284). Monty relied *Kirk's Fire Investigation* to support his conclusions, and he acknowledged that the NFPA 921is a learned treatise. (R. XXIX, 284). Bieber explained that while the 2011 edition of the NFPA specifically states that negative corpus is not scientifically valid, even prior editions would only permit the use of negative corpus only in very limited circumstances, circumstances that did not exist in the present case. (R. XXIV, 217-219). Ignoring the methodology of his own treatise, Monty erroneously concluded the fire was incendiary. Huerter, however, failed to make these facts known to the jury.

In its attempts to distance Monty from his failure to follow standard protocol, the State turns to case law for support. A look at the facts and procedural posture of the cases cited by the State, however, tell a different story. First, all of the cases are civil products liability cases where the standards of proof are different. Second, the issue in those cases is not whether the experts' negative corpus methodology was proper, but whether competing experts should be allowed to testify at all.

In *Manuel v. MDOW Ins. Co.*, 791 F.3d 838 (8th Cir. 2015), the issue involved the admission of the testimony of an expert who specifically stated that he did not follow the NFPA. The holding of the court, however, was not based on a finding that experts do not have to follow the NFPA. Instead, the court, after expressing some concerns about the reliability of the expert, held the testimony admissible because of the way the issue was raised on appeal. And although the Court in *Pakarek v. Sunbeam Prod., Inc.*, 672 F.Supp.2d 1161 (D. Kan. 2008), took note of a case which holds the failure to follow the

NFPA does not make the testimony per se inadmissible, it nevertheless prohibited the testimony of the expert. The court concluded that the witness failed to follow a reliable method in reaching his conclusion. 672 F. Supp. at 1176-77. Similarly, in *Somis v. Country Mut. Ins. Co.*, 840 F.Supp. 1166, 1172 (D. Minn. 2012), the district court permitted an expert to testify there was an absence of accidental causes, but prohibited the expert from opining that the fire was incendiary. Finally, the holding in *Hickerson v. Pride Mobility Prods., Corp.*, 470 F.3d 1252 (8th Cir. 2006), is inapplicable. In denying a summary judgement motion, and letting the case proceed to trial, the court noted that the expert was able to identify the origin of the fire, 470 F.3d at 1257-58, something Agent Monty was unable to do.

**b. The failure to use a qualified expert resulted in prejudice.**

The State asserts that, even if Monty's methodology could be challenged, there is still no prejudice because Bieber could not provide an origin or cause of the fire. By focusing on Bieber's inability to conclude whether the fire was incendiary, the State asserts that he is no better position to testify as to origin and cause than was Monty. It is accurate the Bieber cannot opine on the origin and cause of the fire, but that is the point. Proper arson investigation protocol requires, Bieber, and required Monty, to conclude that the origin and cause is undetermined. What the district court understood, and the State fails to acknowledge, is that a report that the origin and cause is undetermined is significantly different from concluding the fire was intentionally set. Had the jury known that there was no known origin and cause of the fire, there is a reasonable probability that

the outcome may have been different. Instead, the jury only heard uncontested testimony that the fire was intentionally set.

In his report, Bieber summed up the facts, Monty's flawed approach, and the unreliability of Monty's conclusions:

> When considering the totality of the circumstances, any conclusions regarding ignition sources or the causes of these fires other than "undetermined" and any conclusion that an ignitable liquid was present in the foyer or stairway are not based on an objective application of the scientific method; are not in compliance with NFPA 921 or CADA standards; are not in keeping with generally accepted techniques and methodologies within the field of fire investigation; and are not supported by the evidence currently know. (R. I, 82).

Huerter's choice to not utilize a qualified expert is indefensible. A qualified expert could have called much of the State's evidence, and theory, into question and undermined the credibility of Monty. Instead, Huerter's purported strategy was eviscerated by the State's experts. Huerter's failure to challenge the expert testimony left intact one of the three critical pieces of evidence of the State's case: the fire was intentionally set. The district court's decision is supported by the evidence and must be affirmed.

**B. The district court correctly held that trial counsel's failure to impeach Detective Wheeles constituted ineffective assistance of counsel.**

At the hearing on the motion to suppress in federal court, Detective Wheeles gave important testimony regarding the timing of events and when Miranda warnings were given. He testified that while in the car with Robinson on the way to the station, he jotted down information in his notebook, including the time Detective Hill supposedly read Robinson his rights. (R. XXIX, 95). Yet at trial, Wheeles testified that he did not carry a

notebook with him at that time. (R. XII, 148). Counsel's failure to impeach Wheeles regarding the notebook is indicative of counsel's lack of preparedness for trial.

During cross examination of Wheeles at trial, counsel went in to a line of questioning about whether or not the detective had a notebook with him when Robinson was arrested. Unfortunately, he failed to connect it to Wheeles' testimony at the federal hearing. (R. XII, 147-48). A review of the trial transcript shows very clearly that counsel was attempting to perform the most base of impeachments by pointing out that the detective did not write important details down and thus was relying entirely on memory. It does not appear that counsel was even aware of the glaring contradiction between Wheeles' testimony in federal court two years earlier and the testimony at trial.

It is difficult to conceive of a strategic reason that could explain counsel's failure to impeach the witness, and none was offered. As the State pointed out, counsel tried to get Wheeles to admit he had a notebook, but Wheeles denied it. Impeachment with his testimony from the federal suppression hearing would have affirmatively resolved the credibility issue. The district court correctly held that counsel erred in failing to impeach Detective Wheeles.

The testimony of Wheeles was essential to the State proving its case. It was through the testimony of Wheeles and his partner, Detective Hill, that Robinson's statements were admitted. Essential to Robinson's defense is that any admission he may have made to accidentally setting a fire, referred only to the first fire in the cellar, and not the second fire. Consequently, counsel's ability to attack the credibility of the detectives is critical. While these inconsistencies may seem trivial at first glance, they serve to

establish that the stories of the detectives vary, and perhaps, so too does the story about whether Robinson was referring to the cellar fire or both fires, as claimed by the State. (State's Jury Trial, R. XXIV, 169).

**C. The district court correctly held that trial counsel's failure to investigate alibi witnesses constituted ineffective assistance of counsel.**

The failure to investigate and file a notice of alibi constitutes ineffective assistance of counsel. *State v. Thomas*, 26 Kan. App. 2d 728, 993 P.2d 1249 (1999) aff'd, 270 Kan. 17, 11 P.3d 1171 (2000). In Robinson's case, Robert Hunter put Robinson at Sharon Anderson's apartment at the time of the second fire. This information was known to Huerter at the time of the preliminary hearing. (R. VI, 110-113). Huerter, however, focused solely Anderson for an libi and ignored pursing Hunter. During his testimony, Huerter referred to Anderson as "the only alibi witness that presented themselves," and that "I didn't have anything else to work with that was aware of." (R.XXIV, 119). Huerter unequivocally answered "No" when asked by the State if he was aware of "any other alibi witnesses whatsoever that may have been out there that you talked to, didn't talk to?" (R. XXIV, 120). After Anderson proved to be a less than stellar witness at the preliminary hearing, Huerter simply jettisoned the alibi defense altogether.

As the district court correctly noted, "perfunctory attempts" to contact alibi witnesses is unreasonable and cannot be justified by strategy. (R. I, 375, citing *State v. Sanford*, 24 Kan. App.2d 518, 523, 948 P.2d 1135 (1997)). The prejudice is obvious. Witnesses who could place Robinson at a different location at the time of the fire would

have cast doubt on the reliability of the State's one questionable witness who allegedly saw Robinson run from the scene.

**D. The district court correctly found that the cumulative errors of trial counsel resulted in prejudice to Mr. Robinson.**

According to *Thompson v. State*, 293 Kan. 704, 721, 270 P.2d 1089 (2011), "cumulative trial errors may be so great as to require reversal." The district court correctly found that, in light of the evidence presented at the hearing, the evidence was far from overwhelming. (R. I, 381). The failure to hire a qualified expert resulted in Huerter's inability to refute the State's allegations of a fast burning fire caused by an accelerant. (R. I, 382-383). That error, combined with the failure to impeach the detective with his own prior testimony, and to investigate alibi witnesses, establishes that Huerter was ineffective and Robinson did not receive a fundamentally fair trial.

*Cross-Appeal:*

**II. The district court erred in not finding trial counsel ineffective for failing to suppress statements, impeach additional critical witnesses, present exculpatory testimony, put Mr. Robinson on the stand and stipulating to elements of the offense, all in violation of the of the Sixth and Fourteenth Amendments of the United States Constitution and § 10 of the Kansas Bill of Rights.**

**Preservation and Standard of Review**

All the issues were raised in the 1507 petition and ruled on by the district court. In reviewing findings of facts and conclusions of law, this court gives deference to the district court's findings of fact. *Bellamy v. State*, 285 Kan. 346, 355, 172 P.3d 10 (2007). Conclusions of law are reviewed de novo. *Bellamy*, 285 Kan. at 355.

**Standard for Ineffective Assistance of Counsel**

The standard for ineffective assistance of counsel was set out in the first issue. It

is important, however, to emphasize that trial strategy does not excuse all decisions by counsel. The acts and omissions of counsel must be the result of an informed decision, and counsel has a duty to make reasonable investigations or make a reasonable determination that such investigations are unnecessary. *Strickland,* 466 U.S at 690-91. When counsel fails to make either reasonable investigations, or a reasonable determination not to investigate, the presumption of reasonableness is overcome. *Strickland,* 466 U.S. at 689.

The district court understood the significance of the counsel's failure to obtain an expert; it attacked one of the three cornerstones the State's case – that the fire was incendiary. The other two components of the State's case, however, were equally import for counsel to attack: Robinson's alleged admissions, and that he was seen running from the second fire. Huerter failed Robinson.

**A. Trial counsel's failure to move to suppress Mr. Robinson's statement as a product of an unlawful arrest constituted ineffective assistance of counsel.**

Trial counsel's failure to file a pretrial motion to challenge Robinson's arrest and subsequent statements constitutes ineffective assistance. Huerter's attempt to justify the failure as one of trial strategy, by using Robinson's statement to establish that hestarted the fire accidentally, only serves to highlight Huerter's complete failure to understand the significance of the State's evidence or to refute it. (R. XXIV, 69).

In denying Robinson relief on this issue, the district court simply found the decision not to file a motion to suppress was a strategic choice, albeit a "questionable" one. (R. I, 337). By simply relegating the error as a strategy call, however, the district

court failed to appreciate that Robinson's alleged admission to accidentally starting the fire resulted in his conviction of reckless second degree murder. The failure to challenge Robinson's statement was not strategy, but more evidence that Huerter did not spend the time and effort to effectively defend Robinson.

**1. The failure to file a motion to suppress was an error.**

The "strategic choice" Huerter made rested on the implicit assumption that Robinson set the fatal fire, and resulted in taking Robinson's innocence off the table. Significantly, relying on "an accident defense," Huerter pled Robinson to reckless second degree murder before the trial even began, in violation of Robinson's right to not plead guilty. *State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (2000). By pleading Robinson to reckless second degree, Huerter's conduct was prejudicial per se. 270 Kan. at435-36.

There was no strategic reason not to challenge the lack of probable cause; Huerter even conceded that there was only benefit to be gained and no harm risked. (R. XXIV, 67, 77). There was no detriment if the challenges were unsuccessful, but there was a tremendous advantage to be gained if the challenge had succeeded. Without Robinson's statements about the fire being an accident, it would have been very difficult for the State to connect Robinson to the fire. In fact, it is Robinson's statements that the State relies on in this appeal to argue that Robinson was not prejudiced by any error of counsel (Brief of Appellant, 47), and it was part of the basis for upholding Robinson's conviction on direct appeal. *State v. Robinson*, 2012 WL 4794455, *3 (Kan. App. 2012). No reasonable defense attorney would have similarly neglected their responsibilities, and

despite the finding of the district court, Huerter should not be permitted to cloak himself in the protections typically afforded strategic decisions.

Huerter's complete failure challenge the constitutionality of the statement falls far below professional norms. It should have been forefront in Huerter's mind that, without a valid arrest, statements by Robinson were inadmissible. *Brown v. Illinois*, 422 U.S. 590 (1975). Similarly, Huerter should have known that law enforcement's failure to advise Robinson of his Miranda rights after taking him into custody, would have resulted in suppression of his statement. *Miranda v. Arizona*, 384 U.S. 436 (1966). At the very least, Huerter should have limited the context of the statements to the first fire in the cellar. The failure to challenge the admissibility of Robinson's statements, or in the alternative, to limit their context, allowed an essential piece of the State's case to go unchallenged.

**a. Lack of Probable Cause to Support an Arrest.**

It is well established that, a person cannot be forcibly taken to the police station and detained, even briefly for investigative purposes, without probable cause. *Hayes v. Florida,* 470 U.S. 811, 816, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985). Probable cause requires reliable, objective evidence that a person committed a crime. *See, Illinois v. Gates*, 462 U.S. 213 (1983); *State v. Ramirez,* 278 Kan. 402, 405, 100 P.3d 94 (2004). When applying for a warrant, law enforcement are prohibited from making false statements, either intentionally or with reckless disregard for the truth. *Franks v. Delaware*, 438 U.S. 154 (1978). A lack of firsthand knowledge does not obviate the duty to provide truthful information, nor does it insulate the affidavit from a *Franks* challenge;

officers are imputed with the knowledge of their fellow officers. *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Kennedy*, 131 F.3d 1371 (10th Cir.1997).

In this case, probable cause for the search warrant was only possible with the inclusion of false and misleading statements in the supporting affidavit. Absent those statements, there was not probable cause to support the search or the arrest. Not surprisingly, the invalid search turned up no relevant physical evidence.

**i. No probable cause for the search warrant.**

Several pieces of information were used in the search warrant affidavit to support probable cause, including: 1) witnesses saw Robinson throw a Molotov cocktail and run from the scene, 2) the witnesses who saw Robinson throw the Molotov cocktail and run were survivors or nearby residents, and 3) Lisa Miller corroborated Earnest Brown's statements that Robinson was seen running from the fire. On the stand at the federal suppression hearing, however, Agent Etnier admitted that prior to the submission of the affidavit, law enforcement were aware of several errors. (R. XXIX, 447, 564, 566).

First, Etnier admitted law enforcement knew that Robinson did not throw a Molotov cocktail. If fact, prior to submitting the affidavit, law enforcement knew that no Molotov cocktail was used by any one. (R. XXIX, 447, 548-549). Second, law enforcement knew there were no survivors or nearby residents who saw Robinson run from the scene. The witnesses who allegedly saw Robinson, were friends and relatives of the victims who were not present at the time of the fire, and thus could not see Robinson run from the scene. (R. XXIX, 447, 508-510, 533-535, 548-549).

Third, through two previous and separately recorded interviews with Lisa Miller on August 9, 2006, law enforcement knew were her timelines and facts directly contradict the statements and testimony of Brown in material ways. In the context of establishing probable cause for the search warrant, in no meaningful way can Miller's statements be said to have corroborated Brown's. (R. XXIX, 702).

**ii. No probable cause for the arrest.**

At a pre-search briefing held at the Topeka Law Enforcement Center, law enforcement made the determination to arrest Robinson prior to the execution of the search warrant. Immediately upon entering the apartment with the search warrant, Robinson was placed in custody. (R. XXIX, 518). No physical evidence linked Robinson to either fire, nor was anything found at the scene.

It was not until Robinson told Detective Hill that, if he started the fire, it was an accident, there was probable cause that Robinson committed a crime. Because the statements were the product of an unlawful arrest, the statments were inadmissible. *Brown v. Illinois*, 422 U.S. 590 (1975). It is irrelevant whether the statements were made before or after Miranda; waiving of one's rights cannot cure the taint of an unlawful arrest. *Brown*, 422 U.S. at 602.

**b. Statement made in violation of Miranda.**

At trial, Detective Hill stated, that when the search warrant was executed, Robinson was cuffed and in custody when he first approached Robinson. (R. XII, 160). Hill told Robinson he was taking him to the station. (R. XII, 162). At that point, Robinson was under arrest, *Rhode Island v. Innis*, 466 U.S. 291, 300-301 (1980), and he

should have been read Miranda. Instead, Hill engaged in a conversation about the case with Robinson, after which Robinson made a statement about the fire being an accident. (R. XXIX, 3-4). Absent a reading of *Miranda*, any alleged admission by Robinson should have been suppressed. *Miranda v. Arizona*, 384 U.S. 436, 445, (1966); *Bennet v. Passic,* 545 F.2d 1260, 1263 (10th Cir.1976).

**2. Trial counsel's error resulted in prejudice to Mr. Robinson.**

Had Huerter properly understood and litigated the constitutional problems with Robinson's arrest and subsequent statements, an effective defense and fair trial might have been possible and the outcome could have been very different. Without the unlawfully obtained statements there was no reliable evidence to place Robinson at the scene of the fire. The State never produced any physical evidence connecting Robinson to the fire, and no additional witnesses or information materialized later in the investigation. Robinson's statements were critical to his prosecution and conviction.

Melody Brannon, the Chief Federal Public Defender testified that there were numerous obvious problems related to reliability, the lack of probable cause, and particularly the *Franks* issues. "[I]t was quite clear that the information contained in the search warrant affidavit that was presented to the judge was wrong, it was false, it contradictory, it was, at the very least, recklessly indifferent to the truth, demonstrably so." (R. XXIV, 230). Reasonably effective counsel would have seen these issues and made the appropriate challenges.

Huerter, Belveal, Brannon, and Redmond all testified that the Federal Public Defender's Office made its file available to defense counsel. Huerter and Belveal

testified that they reviewed and copied voluminous amounts of information, specifically including the investigative and pretrial litigation work. (R. XXIV, 259-261). Huerter went so far as to say that his firm obtained all pertinent documents, and that "we review everything we obtain." (R. XXIV, 44-47, 60). When questioned about it, however, Huerter has no explanation for his decision to reject all of the pretrial litigation. (R. XXIV, 60). Interestingly, Huerter testified that "if there is something in the search warrant that we think is of basis for a valid challenge, it's going to be beneficial to our client, we'll do it." (R. XXIV, 62). He went on to say that he was aware that some of the information in the affidavit, like the Molotov cocktail allegation, was false, and known to be false by law enforcement at the time. These statements are particularly tough to reconcile when taken in conjunction with Huerter's acknowledgements that "there's no harm" in making the pretrial challenges. (R. XXIV, 65).

Perhaps the most damning piece of evidence against Huerter's allegation that it was strategy to use Robinson's statement that it was an accident, is Huerter's utter failure to limit the statement to the first fire. When Robinson told Detective Hill that it was an accident and he did not mean to hurt anyone, Robinson was referring the first fire in the cellar. (R. XII, 164-165). According to Hill:

> "He told me he had been at the house where the fire was. He said he had been at the back door smoking crack. He was standing by the open back door. He described it as two stoves in the basement area. He said he was lighting his crack, using three matches, and was throwing matches into the empty - - or, down the stairs into the empty basement area." (R. XII, 164).

It is clear from the detective's own testimony that Robinson was not talking about smoking crack in the front stairwell, where the second fire started, but rather

at the rear of the house near the door to the cellar, where the first fire had burned. Robinson mentioned seeing the stoves and being by the open back door. There is never any mention of the stairwell, foyer area, or anywhere near the front of the residence.

At the time of his arrest, Robinson knew that 427 SW Tyler had burned down and that Washington had died. What Robinson did not know was there was a second point of origin, and he certainly had no way of knowing the two fires were separate. Robinson made those statements after his arrest, while still unaware of the second fire. Robinson thought that the small cellar fire he might have caused was what ultimately caused the place to burn down and resulted in Washington's death.

Every State expert testified that the first cellar fire was not what caused 427 SW Tyler to burn down, rather there was a second point of origin near the front stairwell. Robinson's alleged statements were incriminating as to his involvement with the first cellar fire, but that was not the cause of Washington's death or the loss of the residence. Robinson's statements in no way tied him to the second fire and second point of origin.

Had trial counsel thought through the "strategic" decision to admit the statements, and made it clear the "accident" statements pertained only to the cellar fire, he would have been in a better position to argue that there was no evidence to support the giving of lesser included offense jury instructions. Considering that Robinson was convicted of reckless second degree murder, any line of questioning

that could have prevented a theory of reckless conduct as to the second fire, would have made it much more difficult for the State to prove guilt of the lesser offense of reckless second degree.

It is difficult, if not impossible, to conceive of a justifiable strategic reason, for Huerter's failure to make any of the above challenges, and the district court erred in finding the decision was strategic. There was only benefit to be gained, and no risk of loss. Huerter could have, if nothing else, simply changed the captions on the federal motions and filed them himself. His failure to do so makes his neglect unacceptable.

**B. Trial counsel's failure to impeach Detective Hill and Fire Marshall Roberts constituted ineffective assistance of counsel.**

**1. Trial counsel erred in not impeaching the witnesses.**

In addition to failing to impeach the trial testimony of Detectives Wheeles, as discussed above, trial counsel failed to impeach Detective Hill and Fire Marshall Roberts. In quickly dismissing these omissions, the district court overlooked that the credibility of Wheeles and Hill, both, was critical to establishing that Robinson did not admit to starting the second fire, but only was aware of the first, cellar fire. The testimony of Roberts was contradicted by that of Agent Monty in significant ways, calling the conclusions of the experts into question. The failure to impeach all of these witnesses was error on the part of trial counsel.

Hill testified at trial that, upon executing the search warrant, Robinson immediately told him that it was an accident. (R. XII, 161). At the suppression hearing, Hill stated that it was not until they were in the car that Robinson stated if he did it, it was

an accident. (R. XXIX, 163). Hill's report, however clearly describes dialogue between he and Robinson that occurred after Robinson was arrested, but prior to Robinson's alleged incriminating statements. (R. XXIX, 41). The details vary with each rendition of the story from Hill, and somehow he manages to seem more confident about them with the passing of years. Huerter failed to present the inconsistencies in Hill's statements to the jury.

Trial counsel's failure to impeach the testimony of Fire Marshall Roberts was also significant. Roberts is the only witness to discuss the gas can that was found at the scene. According to Roberts, he found a pristine gas can sitting in front of the garage. He recognized it as important evidence and asked somebody to watch over the gas can. Roberts explained the importance of protecting the integrity of a crime scene. (R. XI, 130).

The federal court testimony of Monty, however, contradicts Roberts. According to Monty, the gas can was not pristine, but that it had been floating around in the water and debris that was brought on by the firefighter's attempts to put out the fire. In fact, it was pictured next to the wheel of a car, looking very dirty. (R. XXIX, 299). The gas can was not the subject of any of Huerter's cross examination of Roberts. In fact, a review of the entire three pages of cross examination transcript shows the absence of a single substantive question. (R. XI, 136-39).

One struggles to conceive of a strategic reason in this case that could explain Huerter's failure to impeach these witnesses, and Huerter offered none. He even conceded that had he been adequately familiar with the record, he would have done it

differently. Not being adequately familiar with the record is an admission that the decision not to impeach Hill and Roberts was not strategic, and only further demonstrates that Huerter was not prepared to effectively defend Robinson.

**1. Trial counsel's failure to impeach witnesses prejudiced Mr. Robinson.**

The testimony of Wheeles and Hill was essential to the State proving its case. It was through their testimony that Robinson's statements were admitted. To the extent that Robinson insists that any admission to accidentally setting a fire referred only to the first fire in the cellar, and not the second fire, Huerter's ability to attack the credibility of the detectives was essential. These inconsistencies gave Huerter the ability to credibly argue that the recollections of the detectives vary, and that they may be wrong about which fire Robinson was referring to. (R. XII, 169).

Huerter's failure to do even the most basic defense work regarding the gas can allowed what should have been a minor detail to take on an alarmingly significant role in Robinson's conviction. Huerter could have easily established through cross examination that there was an old dirty gas can, of which 70+ million were in circulation, with no prints or DNA on it, ultimately pictured next to a car in the back yard in front of the garage. Instead, the State was allowed to tell a narrative in which a pristine gas can having no business at the location was found, raising immediate suspicion among law enforcement and fire investigators, and all in the context of a fire that was concluded to have been started with gasoline. This was a crucial part of the State's prosecution and highly prejudicial to Robinson.

The ability of Huerter to dispel the idea that the gas can was pristine, as though it was new and recently placed at the scene, was important in attacking the testimony that the fire had been set with the use of gasoline. Considering that the whole premise of the State's case was that Robinson used gas to start the fire, the gas can was crucial. Indeed it was specifically mentioned by the court as one of the reasons defense counsel's motion for a directed verdict was denied. (R. XII, 188).

**C. Trial counsel's failure to present exculpatory evidence that contradicted Ernest Brown's testimony that Mr. Robinson was seen fleeing the fire constituted ineffective assistance of counsel.**

Not only did Huerter fail to effectively challenge the origin and cause of the fire, or the statements made by Robinson, Huerter failed to challenge the third prong of the State's case: that Robinson was seen running from the fire. The only witness to testify that Robinson ran from the second fire was Earnest Brown.

**1. Lisa Miller**

Miller gave two separate recorded interviews on August 9, 2006. She stated that she and Brown were in the downstairs apartment, and that Brown was sick in bed, having been up smoking crack and drinking vodka for nearly two days. (R. XII, 88-89). Brown was asleep and it was Miller who first noticed both the cellar fire and the second upstairs fire which consumed the building. Miller remembered Robinson's visit was thirty minutes prior to the first fire in the cellar. She also stated that another half an hour passed, and possibly as much as an hour, after Robinson left, before she smelled smoke again. (R. XXIX, 665-667, 682-702). She was the first person to detect and respond to

the second fire, and was with Brown when he came out of the apartment. She stated that she and Brown discussed how surprising it was that they saw nobody. (R. XXIX, 656).

The district court found the "decision" not to put on Miller's statements a close call, but ultimately determined that it was unclear if Miler's statement contradicted Brown's. The court then simply deferred to Huerter's excuse, that he didn't want another witness on the stand placing Robinson at the scene, as strategy. (R. I, 342-344). The evidence does not support the findings by the district court.

First, Miller's statement is that Robinson was long gone by the time of the second fire, and that he was not observed, by either herself or Brown, fleeing the scene after the fire. According to Miller, she and Brown even discussed that there was nobody around. (R. XXIX, 656-667). Miller's testimony not only directly contradicts Brown's, but it is the only testimony that actually **removes** Robinson from the scene.

Second, Huerter testified that he did not evaluate the use of Miller's statements because he believed they were inadmissible hearsay. (R. XXIV, 38). He is wrong. K.S.A. 60-460 clearly provides that out of court statements are admissible

> (3) if the declarant is unavailable as a witness, [the statement was made] by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.

An unavailable witness includes the inability to testify at trial due to death. K.S.A. 60-459. Miller was interviewed at Topeka LEC on August 9, 2006, the morning following the fire. She had just recently perceived the events, and her recollection was clear. She gave consistent interviews at LEC and at the scene, both of which werer

conducted by law enforcement. Miller's interviews were conducted prior to Robinson's original arrest, and Miller lacked any incentive to falsify or distort the truth. Audio recordings of both interviews were transcribed, and Miller's interview at the scene was videotaped.

In addition to meeting the exception to hearsay, Robinson has a constitutional right to have Miller's statements presented. *Chambers v. Mississippi,* 410 U.S. 284 (1973). In *Chambers*, the United States Supreme Court reversed a state court decision that excluded exculpatory evidence on the basis of statutory hearsay rules. The Court held that when exculpatory evidence exists, and "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. 302.

Huerter's failure to know the law on hearsay prohibits a finding that the decision not to present Miller's statements was strategy. It was not. His lack of understanding of the hearsay statute resulted in the jury not hearing from the only eye witness who removed Robinson from the scene. Huerter's failure to understand the law, as well as the significance of Miller's testimony, require a finding of error. *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (counsel ineffective for not knowing state discovery statutes and process).

Huerter's failure to admit Miller's statements resulted in significant prejudice to Robinson. Brown's testimony is the only evidence that puts Robinson at the scene at the time of the fire. And it is Brown alone who claimed to see Robinson quickly leaving the scene after the second fire. Had the jury heard that the person who was awake, actually

smelled smoke, detected the fire, and alerted Brown both times that morning, state that Robinson was not at the house after the cellar fire, they would likely have felt differently about Brown's crucial testimony. The interviews of Miller are consistent and were made immediately after the event. The jury should have been provided with her statements.

**2. Reinna Rodriguez**

Rodriguez was another witness that had potentially exculpatory information which Huerter ignored. In a statement to law enforcement, Rodriguez told police that when she pulled up in front of the house she observed two black males in the front yard. She said that she then saw a third black male (later identified as Ernest "Bump" Brown) come around the side of the house from the back accompanied by a female (later identified as Lisa Miller). Rodriguez said Brown looked to be getting dressed as he came to the front. She did not see anyone fleeing the scene. She said she yelled to the people in the yard that she was calling for help and asked if anyone was inside. She called 911 and waited until authorities arrived. (R. XXIX, 50-51)

The district court concluded that Huerter's failure to call Rodriguez to the stand was not error because her testimony did not directly contract Brown's. The record does not support that finding. Brown's most damning testimony was his claim that he saw Robinson heading North on the sidewalk in front of the house when he and Lisa were approaching the front yard. This would mean that Robinson would have had to pass between Brown's location in the yard and Rodriguez's vantage point parked to the East of the house immediately in front of the front yard. Rodriguez did not say she saw

anyone on the sidewalk. Rather, her statement corroborates that Miller's, statement that Miller and Brown were together and nobody was running from the scene.

There is no strategic explanation for the failure to present Rodriguez to the jury; even the district court fails to find it was strategy. The court merely finds the evidence not exculpatory. Had the jury, however, heard Rodriguez' account of events that morning, they likely would have viewed Brown's testimony differently. She was more credible than Brown. She was not sick from 2 days of smoking of crack and drinking alcohol, but was a Good Samaritan 911 caller on her way to work.

Contrary to the district court's findings, Rodriguez was also uniquely credible because of her vantage point – her account of events would subsume Brown's. She was parked in front of the burning residence prior to Brown coming around the house from his apartment in the rear. She watched as Brown emerged from the back yard into the side yard on his way to the front yard, noting that he appeared to be getting dressed. Rodriguez also stayed at the location until the authorities arrived. She was a more credible witness with a more complete view of events in question.

**3. Trial counsel's failure to use exculpatory evidence prejudiced Mr. Robinson.**

Huerter offered no satisfactory explanation for his failure to utilize Miller's or Rodriguez's statements. One of the State's key pieces of evidence is that Robinson was seen by Brown running from the second fire; that testimony was relied upon by this Court in the direct appeal, and by the State in arguing the was no prejudice in not using a qualified expert. Brown was the only person to put Robinson at the scene after the

second fire and contesting that testimony was crucial. Miller's and Rodriguez's statements provided Huerter with an opportunity to contest the third key to the prosecution's evidence and present a reasonable possibility to have altered the verdict.

**D. Trial counsel's failure allow Mr. Robinson take the stand constituted ineffective assistance of counsel.**

The decision to testify is one that only a defendant can make; counsel cannot make it for him or her. In *Rock v. Arkansas*, 483 U.S. 44 (1987), the United States Supreme Court held that a defendant has an absolute right to testify that cannot be waived by counsel. The infringement of this right requires a reversal of the conviction.

Admittedly Robinson waived his right to testify in open court. Robinson maintains, however, the waiver was the result of pressure by his counsel. Even Belveal admitted that "I think Frank wanted to testify. I think that he had always wanted to testify...our suggestion to him, repeated suggestion to him, was that he not testify." (Hearing, 281).

The purported reason for suggesting Robinson not testify was the erroneous belief by counsel that he had nothing to add to the case. Huerter claimed that "there was nothing new or different that he was going to be able to tell the jury other than what they had already just heard through the presentation of the State's case." (R. XXIV, 71-74).

Huerter's testimony reveals a critical failure on his part that sadly repeatedly surfaces in this case – he failed to distinguish between the first and second fires. Multiple times Huerter refers to the matches starting "the fire." He just accepted the State's claim that Robinson was talking about the fire out front, while Robinson has always maintained

that his statement, about possibly starting the fire accidentally, was only in reference to the fire in the cellar.

It was critical that Huerter provide the jury with context and a more nuanced understanding of how and why Robinson made the statements he did, especially since he failed to file a motion to suppress. Instead, Huerter allowed Robinson's story to be told by the police, much of it uncontested. Because of Huerter's failure, the jury's entire evidentiary discussion was framed by the prosecution. By taking Robinson's complete innocence functionally off the table, Huerter erred at the most basic level.

**E. Trial counsel's stipulation to an element of the offense constituted ineffective assistance of counsel.**

Huerter's stipulation to an element of arson provided no strategic benefit to Robinson, and actually eliminated an opportunity to elicit beneficial testimony. Huerter attempted to explain decision to stipulate as beneficial by preventing one more witness from testifying about the fire. This explanation does not justify the decision.

It is true that the owner of the building would have testified that he did not give permission to start a fire; that fact that doesn't hurt the defense – it is assumed. What Huerter failed to understand were the beneficial facts that could have been elicited. He could have questioned the owner about the rundowned condition of the property and that it suffered from a number of building code violations, some of which were significant from a fire investigation standpoint (R. XXIX, 728-770. In fact there was a fire at the very same structure just months prior to the fire in this case. (R XXIX, 492-494). Had

the jury been able to get a more accurate picture of the residence at the time of the fire they would have likely evaluated the scene differently.

**F. The cumulative errors of trial counsel resulted in prejudice to Mr. Robinson.**

In the event that the Court determines that any one of the above errors, by itself, does not support a finding of prejudice, the cumulative effect of the errors certainly does.

Robinson was convicted based upon the State's evidence that 1) the fire was intentionally set using a liquid accelerant, 2) Robinson made statements that he may have accidentally started the fire, and 3) Robinson was seen running away from the second fire. The ability of Huerter to contest each of these assertions was crucial to Robinson's defense.

As set out in the first issue, district court was correct that the failure to hire a qualified expert prevented Huerter from effectively challenging the State's experts that the fire was incendiary and an accelerant was used. A wealth of material was available to Huerter to impeach the methodology and conclusions of Agent Monty, but Huerter inexplicably ignored it. Most critically, Huerter failed to present an expert witness to provide indictments of Monty and a competing opinion as to the appropriate determination of origin and cause of the fire. Huerter's lackluster cross examination was the lone defensive answer to the expert testimony of the State's key arson expert. As noted by co-counsel, this case involved highly technical and scientific elements and was just not possible to be digested by an attorney without the aid of a qualified expert. No such expert was ever engaged by Huerter.

That error combined with Huerter's failure to exclude Robinson's statements, or limit them to their appropriate context of the first fire, multiplies the prejudice. Huerter permitted the State to use Robinson's alleged statements essentially as a confession. The sloppy attempt to use Robinson's admission, that he may have started the fires accidentally, as a defense, pled Robinson to reckless second degree murder. His failure to limit Robinson's statements to the first fire allowed the State to argue to the jury that Robinson admitted to starting the second fire. Combined with the failure to impeach Wheeles and Hill about when and how Robinson made his statements, Huerter further contributed to the one-sidedness of the narrative that the jury heard.

Huerter's failure to adequately contest the Brown's statement that Robinson was seen fleeing the scene after the second fire was critically prejudicial and without any strategic justification. Huerter not only failed to make any substantive challenge to Brown's account, other than to generally impeach him with the fact that he used drugs and alcohol, but he failed to present the jury with the exculpatory statements of Miller and Rodriguez. He either did not understand the exception to the hearsay statute or the significance of Miller's statement – which removed Robinson from the scene – and either alternative is an error and prejudicial. He also did not apparently understand that Rodriguez's statement corroborated Miller's. Again, a wealth of material existed for Huerter to use to contradict the most important parts of Brown's testimony, but he failed to take advantage of it.

The errors of Huerter actually build upon each other and interplay to create unique circumstances that demand relief. Huerter's failure in certain areas magnifies the impact

of his error in others. Brown's testimony is ultimately more credible because of the testimony from Monty – knowing that the fire was determined to be arson makes Brown's statement about seeing Robinson flee the scene more expected. More significantly, Monty's opinion would have been bolstered by Brown's testimony – once the jury heard Brown's version, it made Monty's arson determination intuitive and his opinion subject to less scrutiny. Additionally, Monty's actual expert opinion regarding origin and cause of the fires was informed by the statements of both Brown and Robinson, meaning that Huerter's failures to undermine Brown's testimony and to appropriately exclude, or at lease contextualize, Robinson's statements were missed opportunities to contest Monty's conclusion of arson.

Taking all of the identified errors together, there is a reasonable probability that the jury verdict would have been different. Robinson "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693, or even establish prejudice by a preponderance of the evidence. *Williams v. Taylor*. 529 U.S. 362, 405-406 (2000). *See also Holland v. Jackson*, 542 U.S. 649 (2004) (noting that prejudice is less than a preponderance of the evidence). He only needs to show a lack of confidence in the outcome.

As the district court concluded, the evidence is not overwhelming and this Court cannot be confident that the outcome of the trial would have been the same had Huerter not made a multitude of errors. There was error related to every critical issue involved in the case. Even if no single error is enough to warrant relief, the combination and interplay of the many errors must be.

## Conclusion

Based on the issues briefed here and in the original petition, Robinson requests that this Court vacate his conviction and remand for a new trial.

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Counsel hereby certifies that the present Brief of the Appellee/Cross-Appeal has been scanned for viruses with the most recent version of Sophos Anti-virus and the document is virus free and converted into Portable Document Format (PDF).

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I hereby certify that on August 9, 2017, a copy of this Brief of the Appellee/Cross-Appellant was served by email to:

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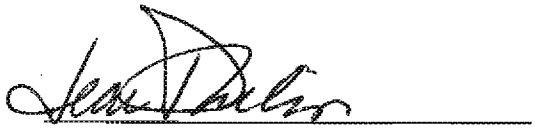

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