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IN THE SUPREME COURT OF FLORIDA

LENNART S. KOO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.: SC14-2347

L.T. NOs.: 1D12-4866
2012-CF-1462

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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A. Introduction

Lennart S. Koo challenges his conviction for burglary of an unoccupied structure, and becoming armed with a firearm, for which a mandatory minimum 10-year prison sentence was imposed. R. I, 20, 67, 89-94. He was accused of breaking into a storage unit rented by his employer and taking a firearm. His core defense was that he was authorized to enter the unit and remove the property.

Mr. Koo contends that a post-trial letter to the trial court from his employer constitutes a material recantation and evidence newly discovered after trial, requiring a new trial or, in the alternative, an evidentiary hearing before the trial court could make a proper determination of whether to grant a new trial. The trial court denied his motion for new trial without allowing an evidentiary hearing to receive testimony from the recanting employer. He asserts that on appeal, the district court applied a legal standard for assessing recantations as newly discovered evidence that conflicts expressly and directly with the standard set forth by this Court and by the Fourth District. Koo also presents an additional issue that was fully briefed below but not reached by the district court that the evidence was legally insufficient to establish that he removed any item satisfying the statutory definition of a "firearm."

B. Statement of the Facts

Mr. Koo was employed as an assistant to Mohammed Saleh. He lived in Saleh's house, performed various daily errands, served as a limousine driver for Saleh, and performed his primary job of developing a website for Saleh. R. III, 171-175, 227-229, 252. Saleh rented a personal storage unit at a U-Haul facility, in which he kept clothing and other property. R. III, 146, 169. On November 14, 2011, Saleh and Koo stored Saleh's "guns" in the unit. R. III, 169, 235-236.

On November 15, 2011, a custodian at the U-Haul facility reported a lock broken on Saleh's storage unit. R. III, 145-146. A surveillance video made that day shows a man entering and exiting an elevator at the facility at 1:11 p.m., carrying one or more items that appeared to be gun cases. R. III, 149-152. The man on the video was identified at trial by the facility manager, who did not know what was inside the cases, as Koo. R. III, 149, 159-160. The man could not have accessed the storage facility without knowing a code for an access key pad to open the front gate. R. III, 155. The code consists of eight digits. The first four digits are the renter's building and unit numbers, and the other four are chosen by the individual renters. R. III, 156-158.

The manager telephoned Saleh to notify him, leaving multiple messages and speaking with him three or four times, but Saleh did not return to the facility until January 7, 2012. R. III, 161, 163, 177-178. Saleh told the manager he was out of

the country. R. III, 161. However, Saleh testified at trial that he was not out of the country from November 2011 to January 2012. R. III, 183. When he returned to the unit on January 7, 2012, Saleh asked the manager to call the police. R. III, 164. Despite admitting at trial that he was notified of the broken lock on November 15, 2011, Saleh told the responding officer that he had only learned of the incident that day, January 7, 2012. R. III, 189.

Saleh alleged that Koo took guns from the storage unit; he identified the only purported gun offered in evidence at trial as his AK-47. R. III, 170. At trial, Saleh said Koo did not have permission to enter the storage unit without him. R. III, 170. He testified that a pistol, a .22, and other items were taken from the storage unit. R. III, 179.

Koo's mother called Saleh on November 16, 2011, and Saleh met with Koo and Koo's mother at Saleh's house the next day. R. III, 178-180. Saleh testified that the pistol and the AK-47 were returned to him at that time. R. III, 179-180. Saleh also claimed that he gave Koo $300 to be able to retrieve the third gun, though he also testified that Koo told him that "he had sold the guns [plural] for $300." R. III, 178-179. Soon after, Koo and Koo's parents hosted Saleh for dinner on Thanksgiving 2011. R. III, 183, 257, 274.

After Koo was arrested on a warrant on February 11, 2012, R. I, 1-13, 16-19, he was interviewed by a Jacksonville Sheriff's Office detective. R. III, 193.

During the recorded interview that was played at trial, he acknowledged having "picked up" the "guns" that he and Saleh had put in the storage unit. R. III, 197. He said Saleh put the guns in the storage unit because Saleh was afraid of losing custody of his daughters. R. III, 197. Koo told the detective that he had taken an AK-47, a small .22 rifle, a BB gun, and a lock box, which he realized contained a pistol when he dropped it and its contents spilled, "[b]ecause I was scared that he was going to shoot me with them." R. III, 197. Koo also said a friend of his had hidden the items at his request at a wood yard before he and his mother retrieved the pistol and AK-47 and returned them to Saleh, without recovering the .22 rifle. R. III, 198-201, 204-207.

The detective, R.B. Shacklett, testified that he has experience with firearms and that a .22 caliber rifle is capable of killing a person. R. III, 207-208. However, he admitted that he was not aware of the existence of any receipt or registration for the actual purported .22 rifle, and that he never examined or even saw it. R. III, 212. Neither Shacklett nor any other witness testified to any of the characteristics of the only purported firearm admitted in evidence, the asserted AK-47. No witness with knowledge of any of Saleh's guns testified to any of them possessing the characteristics of a firearm as defined in §790.001(6), Fla. Stat. (2011).

Koo also testified. He is a native of the Netherlands; Dutch is his primary language, and he had spoken English for seven or eight years. R. III, 226. He was a computer programmer and student who had met Saleh four or five years earlier and had worked for Saleh for about four years. R. III, 227. He performed office and home construction, built a swing set for Saleh's children, whom he also babysat, built a sign for Saleh's office and half of his in-home theater, and drove Saleh around town as a personal assistant. R. III, 227-228. He lived with Saleh for several months, often went alone to various properties Saleh owned without need for specific permission, at times taking tools to workers, and he had keys to Saleh's properties. R. III, 228-231.

Koo testified that in November 2011, Saleh became increasingly violent and threatening in the midst of child custody and other issues in Saleh's pending divorce case. R. III, 232-234. Koo said he was scared of Saleh because of the threats, and on one occasion, Saleh put a knife to Koo's throat and said he was going to kill Koo. R. III, 235.

On November 14, 2011, Koo accompanied Saleh to put Saleh's guns in the storage unit. Saleh did not recall the entry code, so he had Koo jump the gate to identify the unit number to type into the entry key pad along with the second part of the code number, which was Saleh's wife's year of birth and which Saleh told Koo. R. III, 235-236. Koo also said Saleh gave him permission to take some

dresses that were in the unit for Koo's girlfriend because Saleh's wife never wore them. R. III, 236. Saleh also did not have a key to the lock on the unit, so he brought bolt cutters to gain entry, while Koo brought a replacement lock to use when they were finished. R. III, 236.

Koo testified that he was "terrified" and that he "thought he [Saleh] was really going to shoot me." R. III, 236. He said Saleh had threatened another employee with the AK-47, but the trial court sustained an objection to that testimony. R. III, 236-37. Koo later testified that Saleh had threatened the other person with an unspecified gun. R. III, 254. On November 15, 2011, Saleh insisted that Koo, who had previously created four or five websites for him, create or finish another website that day. R. III, 252. Saleh became angry and began yelling, threw Koo's property out of the house and threatened to kill Koo and Koo's family if he ever saw Koo around the house. R. III, 252-253. Koo felt in danger and that the threat was real. R. III, 253.

Koo testified that he took nothing from the storage unit other than the guns. R. III, 257. He said he believed he had permission to enter the unit because Saleh had given him the access code, told Koo to feel free to take dresses, and left Koo with a key to the padlock. R. III, 257-258. He also had authority to live in Saleh's house and enter his other properties. R. III, 258. He testified that he believed he needed to remove the guns because Saleh was either not allowed to have them or

did not want to have them in the house as a result of the divorce case. R. III, 258-59. Additionally, Saleh had threatened Koo, but Koo believed that calling the police would be futile because when police had responded to complaints about Saleh in the past, they had taken no action. R. III, 258-259. He removed the guns the day after Saleh held a knife to his throat and threatened to kill him, only intending to keep himself safe until Saleh's rage calmed. R. III, 261-263, 269. He acknowledged that Saleh had not explicitly told him to remove the guns from the storage unit. R. III, 267.

The next day, Koo told his mother what had happened, and he and his mother took the AK-47, the revolver, and the .22 to Saleh a day later. R. III, 255. He said Saleh then obtained three gun cases from Walmart to lock them away and had a friend take them away from Saleh's house. R. III, 256. Then, Saleh threatened to go to the police if Koo did not stay at the house to finish the website; although Koo stayed overnight, he did not feel safe, and he left in a taxi after an argument with Saleh the next day. R. III, 256. Koo's mother corroborated his testimony about recovering three guns from a wood yard, returning them to Saleh at his house, Koo remaining at Saleh's house, and the Koo family hosting Saleh for Thanksgiving 2011 dinner. R. III, 272-274.

C. The Course of Proceedings

The trial court denied Koo's motion and renewed motion for judgment of acquittal, raising, *inter alia*, that the evidence was insufficient to establish that Koo possessed "an actual firearm." R. III, 220-221, 277. The court agreed to instruct the jury on the defenses of consent and necessity but denied a request that the jury be instructed on use of non-deadly force in self-defense. R. III, 277-293; R. IV, 351-370. In addition to its verdict of guilty, R. I, 67, the jury submitted a note to the court requesting leniency for Koo. R. I, 70.

Koo filed a timely motion for new trial. R. I, 76-77. Koo later filed an amended motion for new trial, asserting that Saleh recanted after trial in a letter Saleh sent to the trial court. R. I, 79-82. Saleh's letter states that notwithstanding his trial testimony to the contrary, Koo "had keys to every dwelling;" that Koo's reason for removing the guns from the storage unit appears to "have been his desire to protect me from my own self;" and that Saleh's "irritation and frustration could appear intense and frightening." R. I, 79-82. Saleh's letter also states, "I just remembered (I am quite certain) that I told Len to make sure I did not do something that I might regret." R. I, 84. The court below denied the motion and amended motion. R. I, 98-99, 110-119. The court denied an evidentiary hearing on the recantation issue. R. I, 116. The court made its determination on the basis

of its expressed doubts about Saleh's credibility, though without an evidentiary hearing. R. I, 98, 118, 127.

The court imposed the minimum mandatory sentence required by law for the offense of burglary, in the course of which becoming armed with a firearm, 10 years imprisonment pursuant to §775.087, Fla. Stat. (2011), based on the jury's finding of possession of a firearm. R. I, 89-94, 128. Koo thereafter filed a timely notice of appeal on the same date. R. I, 88.

On appeal, the First District affirmed the conviction. App. 1-5; s*ee Koo v. State*, 149 So. 3d 693 (Fla. 1st DCA 2014). The court below noted that "newly discovered evidence" must have been unknown to the court, the party or counsel at the time of trial, and could not have been known with the use of diligence. App. at4. However, the district court majority concluded that "any evidence in the victim's letter was known to the parties, and as such, it did not qualify as newly discovered evidence." App. at 4. One judge dissented, and also dissented from the denial of a timely motion for rehearing. App. 8-14; *Koo*, 149 So. 3d at 696-99; *Koo v. State*, __ So. 3d at __, 2015 W.L. 735645 (Fla. 1st DCA Jan. 27, 2015) (corrected order denying rehearing). Petitioner timely sought this Court's discretionary jurisdiction based on conflict between the First District's decision in this case and decisions of this Court and the Fourth District. The Court accepted

jurisdiction, *Koo v. State*, No. SC14-2347, 2015 W.L. 1469181 (Fla. March 19, 2015), and this briefing follows.

SUMMARY OF THE ARGUMENT

The First District's decision below should be quashed and this case remanded for a new trial because the single most critical witness, in his post-trial letter, recanted critical aspects of his trial testimony material to the issues of whether Koo had permission to enter the storage unit or the intent to commit an offense therein. At a minimum, the trial court should have conducted an evidentiary hearing on the recantation in order to determine whether a new trial should be granted. The trial court erroneously denied Koo's amended motion for new trial and an evidentiary hearing; the court could not reject the recantation's credibility and materiality under controlling law without either an evidentiary hearing or a finding that the recantation was inherently incredible or clearly immaterial, which the court did not make. The recantation is neither inherently incredible nor clearly immaterial. The district court's majority erroneously concluded that the statements in the letter did not qualify as newly discovered evidence because the parties knew the facts that Saleh asserted in his letter at the time of trial. The legal standard on which the First District based its conclusion is directly contrary to the legal standard for making such determinations set by this Court and the Fourth District. Accordingly, the decision below should be quashed

and this case remanded for a new trial or for an evidentiary hearing on the amended motion for new trial.

Additionally, the Court should exercise its discretion to review the other issue raised and direct that Koo's conviction and sentence for burglary with possession of a firearm should be reversed. No evidence was presented that Koo possessed any object with the characteristics necessary to constitute a "firearm," as established by statute. No witness testified that any of the purported "guns" in the case would, was designed, or could be readily converted to expel a projectile by an explosive action, which is necessary to establish the allegation that any of the items constituted a "firearm" under §790.001(6), Fla. Stat. (2011). Accordingly, if a new trial is not required for the reasons set forth in Argument I, the judgment of the trial court should be reversed and the case remanded for entry of judgment for unarmed burglary of an unoccupied structure and resentencing for that offense.

ARGUMENT

I. A NEW TRIAL IS REQUIRED BY THE POST-TRIAL RECANTATION OR, IN THE ALTERNATIVE, AN EVIDENTIARY HEARING ON THE AMENDED MOTION FOR NEW TRIAL

The decision below should be quashed and the trial court's judgment reversed because the post-trial recantation was sufficient to require a new trial, or, alternatively, an evidentiary hearing to determine the credibility and materiality of Saleh's post-trial recantation. Saleh's statements after trial in a letter to the court

undercut and directly contradict his denials at trial that Koo had permission to access his properties and had keys to them all, and that Saleh had explicitly told Koo to take action to protect Saleh from himself. While expressing doubt about the credibility of Saleh's trial testimony, the trial court rejected the credibility and materiality of his post-trial statements, but without allowing an evidentiary hearing that is required under controlling law to make such determinations. The district court compounded the error by concluding that the recantation statements in the letter did not qualify as newly discovered evidence because the "parties" knew at trial the matters that Saleh said in his letter, despite Koo being unable to corroborate his trial testimony for the jury with Saleh's statements in the post-trial letter. Accordingly, the decision below should be quashed and the trial court judgment reversed.

A. Standard of Review

Generally, a denial of a motion for a new trial is reviewed for abuse of discretion. *See, e.g., Woods v. State,* 733 So. 2d 980, 989 (Fla. 1999). However, if the denial of the motion is based on an error of law, review is *de novo*. *See, e.g., State v. Burnette,* 881 So. 2d 693, 694 (Fla. 1st DCA 2004). The burden of showing an abuse of discretion is lower for an order denying a new trial than for an order granting a new trial. *State v. Dunnaway,* 778 So. 2d 378, 378 (Fla. 4th DCA 2001).

The standards for determining whether a new trial should be granted based on newly discovered evidence are articulated in Fla. R. Crim. P. 3.600(a) and authorities construing that rule.

> Rule 3.600 of the Florida Rules of Criminal Procedure states that courts shall grant a new trial where "[n]ew and material evidence, which, if introduced at trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered." Fla. R. Crim. Pro. 3.600(a)(3). Under this rule, "[a] new trial will not be awarded on the basis of newly discovered evidence unless the evidence was discovered after trial, unless due diligence was exercised to have such evidence at the former trial, unless the evidence goes to the merits of the cause and not merely impeach a witness who testified, unless the evidence is not cumulative, and unless it is such that it probably would have changed the verdict." *Clark v. State*, 379 So. 2d 97, 101 (Fla. 1979); *see also Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994); *Freeman v. State*, 547 So. 2d 125, 128 (Fla. 1989), *abrogated on other grounds*, *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992); *McVeigh v. State*, 73 So. 2d 694, 698 (Fla. 1954); *see generally Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (stating similar rule for new trial based on newly discovered evidence in postconviction proceedings); *State v. Spaziano*, 692 So. 2d 174, 177 (Fla. 1997) (same).

Woods, 733 So. 2d at 988 (raising newly discovered evidence claim on motion for new trial).

B. The District Court Applied the Incorrect Legal Standard for Determining Whether the Recantation Constitutes Newly Discovered Evidence, Contrary to Decisions of this Court and the Fourth District

The decision below should be quashed because the majority applied the wrong legal standard in concluding that Saleh's statements in his post-trial letter did not constitute newly discovered evidence. The majority below decided

erroneously that the evidence did not qualify as newly discovered because the facts asserted in the letter were "known to the parties" at the time of trial. App. 4. This Court and the Fourth District have held that a different standard applies, and application of the correct standard requires that the decision below be quashed.

A witness's post-trial recantation may constitute newly discovered evidence where the recantation is consistent with a criminal defendant's position at trial, but the defendant could not elicit the admission by the witness of the falsity of the witness' trial testimony or otherwise prove its falsity at trial with evidence besides the defendant's own testimony. *Archer v. State*, 934 So. 2d 1187, 1194 (Fla. 2006).

> We find that a recantation is not precluded from being considered newly discovered evidence simply because the defendant knew, as reflected by what the defendant claimed the facts to be, that the recanting witness was not telling the truth at the time of the trial or because the defendant took the stand to testify contrary to the witness . . . . The appropriate question was whether [the defendant] was or should have been aware of the existence of evidence that would demonstrate that [the witness's] testimony was false.

Id. The standard applied by the majority below posed the wrong question, contrary to *Archer*. Application of this Court's precedent requires that the First District's decision below be quashed because this case presents the same circumstances resulting in the holding in *Archer*. Saleh's post-trial recantation significantly corroborated Koo's trial testimony and contradicted his own testimony to the jury.

Furthermore, in *Archer*, the trial court made its assessment of the credibility of the recantation only after an evidentiary hearing during which the recanting witness was examined in open court for a proper, full exploration of whether the recantation bore credibility and was material. *Id*. at 1193-95. The decision below, however, affirmed the trial court's assessment of Saleh's recantation and its credibility without having conducted an evidentiary hearing. App. 1. An evidentiary hearing is generally required to assess the credibility of a claim of newly discovered evidence. *See McLin v. State*, 827 So. 2d 948, 955-56 (Fla. 2002) (noting that the First District "has correctly observed that summary denial is rarely appropriate if the trial court needs to assess the credibility of the new testimony.") (citing *Murrah v. State*, 773 So. 2d 622, 624 (Fla. 1st DCA 2000)); *Taylor v. State*, 62 So. 3d 1101, 1107 (Fla. 2011); *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) ("[W]e cannot fully evaluate the quality of the evidence which demonstrably meets the definition of newly discovered evidence. Therefore, we believe it necessary to have an evidentiary hearing on the claims that are based upon newly discovered evidence."). The First District has previously held that an evidentiary hearing is necessary to assess a recantation unless the recantation is "inherently incredible or obviously immaterial to the verdict." *Stephens v. State*, 829 So. 2d 945, 945-46 (Fla. 1st DCA 2002). *See also*, App. 12-13 (Makar, J., dissenting) ("Applying

Stephens, a hearing was required unless Dr. Saleh's letter was 'inherently incredible or obviously immaterial to the verdict.' It was neither.")

The Fourth District had reached the same conclusion as did this Court in *Archer*. In *Kendrick v. State*, 708 So. 2d 1011 (Fla. 4th DCA 1998), the court assessed a recantation that it found to qualify as newly discovered evidence sufficient to warrant a hearing. *Id*. at 1012. The court recognized that the new version of testimony cannot be said to have been known to the court, counsel or the party at the time of trial and available to be secured at the time of trial with due diligence. *Id*. As in *Archer*, the reason for the result is that the witness had been unwilling or unable to provide the favorable testimony earlier. The Fourth District noted that while not all claims of newly discovered evidence require a hearing, "where there is conflicting evidence of the defendant's guilt, it is necessary for the trial court to evaluate the weight of the newly discovered evidence and the evidence which was introduced at the trial to determine whether the new evidence would probably have resulted in an acquittal." *Id*. (citing *Jones*, 591 So. 2d at 915-16). "Often, this analysis will require an evidentiary hearing." *Id*. (citing *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996) (recantation claim in Fla. R. Crim. P. 3.850 motion should not have been denied without an evidentiary hearing)).[1]

[1] The standards and procedures for assessing newly discovered evidence claims, including recantation, are the same in the context of both motions for new trial and motions for post-conviction relief. *Woods*, 733 So. 2d at 98.

The statements Saleh made in his post-trial letter to the court were directly material to whether Koo had permission and authority to enter the storage unit and even to remove items as deemed necessary to protect Saleh from himself. The trial court denied the motion based largely on its expressed doubts about the credibility of Saleh's trial testimony and found Saleh's post-trial statements not credible without affording Koo an evidentiary hearing to inquire of Saleh and assess his post-trial credibility. R. I, 118, 127. Saleh testified at trial that the only time Koo possessed keys to his properties was when they were stolen and that Koo did not have permission to enter his properties, except possibly being allowed to get supplies from Saleh's beach house. R. III, 175, 183-84. His statements in the letter to the court directly undermine and contradict his testimony relevant to the defenses of consent and lack of intent to commit an offense in the storage unit, and therefore they are material.

The trial court found that Saleh's post-trial statements do not satisfy the criteria for newly discovered evidence that was unknown to Koo or his attorney at the time of trial and could not have been discovered prior to trial by the use of diligence. R. I, 98. The court also questioned the credibility of the statements in Saleh's letter and whether they could have affected the verdict if known to the jury. R. I, 98-99. However, the court never found the statements in the letter to be inherently incredible or clearly immaterial. The court did not conduct an

evidentiary hearing to determine whether the facts, statements, and circumstances described in Saleh's letter were or could have been known by the defense prior to trial with the exercise of reasonable diligence, or even what degree of diligence was employed by the defense to learn of the matters addressed in Saleh's letter prior to trial.

Saleh's letter states that he had "suddenly remembered" circumstances pertinent to a determination of Koo's intent and "just remembered (I am quite certain) that I told Len [Koo] to make sure I did not do something that I might regret." R. I, 84. He wrote that his behavior could be "intense and frightening" and that he had warned and asked Koo to help him prevent Saleh's wife from "sending me over the edge," while acknowledging that Koo had keys to all of Saleh's residences. R. I, 84. These statements contradict his trial testimony, are not "inherently incredible" and are highly material to issues of Koo's defenses of consent and lack of intent to commit an offense after entering the storage unit. *See* § 810.02(b)(1), Fla. Stat. (2011) (defining burglary, in pertinent part, as entering a dwelling, structure or conveyance with intent to commit an offense therein unless open to the public or the defendant licensed or invited to enter).

The majority below found the statements in the letter not material and not a recantation. App. 4-5; *Koo*, 149 So. 3d at 695-96. The dissent below elaborated on the error of that conclusion, finding that "serious doubt exists about Dr. Saleh's

credibility" and that "the integrity of Koo's conviction is seriously compromised." App. 13; *Koo*, 149 So. 3d at 698 (Makar, J., dissenting).

> The jury could not have convicted Koo without Dr. Saleh's testimony, which it apparently found credible, at least as to some material respects now shrouded in doubt. Likewise, Dr. Saleh's recantation letter may be credible, at least as to the portions related to Koo's consent and necessity defenses, which are material to the verdict. Under these circumstances, when the State's star witness recants a material portion of his testimony that goes to two key defenses in an exceptionally close case in which the jury expressed reservations (if not remorse) about its verdict – beseeching the trial judge to be lenient on the defendant – it was an abuse of discretion not to at least hold a hearing on the matter. Koo's request for a hearing is an exceptionally modest one given his liberty interest is at stake; his freedom for the next ten years has been taken away based on the disavowed testimony of Dr. Saleh, a person that even the trial judge had difficulty believing. A remand for an evidentiary hearing under *Stephens* is necessitated; whether a new trial is warranted would depend upon the results of that hearing. Koo is entitled to this minimal degree of due process before the State can take away a decade of his life.

App. 13-14; *Koo*, 149 So. 3d at 698-99 (Makar, J., dissenting). *See also*, *Koo v. State*, __ So. 3d __, __, 2015 W.L. 735645 (Fla. 1st DCA Jan. 27, 2015) ("Dr. Saleh's recantation is a testimonial turnabout, positing a far different version of motives and actions than he swore to at trial.") (Makar, J., dissenting from denial of rehearing) (corrected order).

The trial court improperly questioned the credibility and significance of the assertions in Saleh's post-trial letter, but did not find the assertions immaterial or "inherently incredible" and incorrectly found that the statements would not likely produce an acquittal upon any retrial. The court could not properly evaluate and

reject the credibility and materiality of Saleh's post-trial statements without an evidentiary hearing. The court failed to appreciate the significance of those statements to the issues of whether Koo was authorized to enter the storage unit or had any intent to commit any offense therein. Absent a grant of a new trial, an evidentiary hearing was required to assess Koo's amended motion for a new trial and Saleh's letter. The trial court's order and denial of a hearing fails to comply with the requirements of applicable law. The district court majority thought the recantation not "newly discovered," contrary to *Archer*, and failed to recognize the recantation's materiality to the theory of defense.

Archer and *Kendrick* logically, naturally and correctly found that post-trial statements of a witness that the witness was unwilling or unable to provide at the time of trial, and which are material to the elements of the charged offense and the theory of defense, and as a result, the verdict, constitute newly discovered evidence. The courts below failed to follow and apply that correct legal standard. Accordingly, the decision below should be quashed and a new trial granted or, alternatively, an evidentiary hearing ordered on the amended motion for new trial.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT KOO POSSESSED A FIREARM AS DEFINED BY STATUTE

The judgment and sentence should be reversed because the evidence was insufficient as a matter of law to establish that Koo ever possessed an actual firearm, the factor that required imposition of the 10-year mandatory minimum sentence of imprisonment in this case.[2] He moved for judgment of acquittal, including on that basis. R. III, 220, 277. The State argued that Koo "admitted he returned an AK-47" and that Detective Shacklett's testimony was sufficient to establish that the .22 rifle was a firearm. R. III, 220-221. The court denied the motion on the basis that "Saleh said he didn't have permission to take an AK-47." R. III, 221. However the evidence failed to establish that Koo took or possessed an actual firearm because no testimony was offered by any witness with knowledge that any of the "guns" involved actually possessed the characteristics necessary for any of them to constitute a "firearm" as defined by Florida statute. Accordingly, the judgment below should be reversed.

[2] Although this issue was not reached by the district court, the Court's acceptance of conflict jurisdiction on the legal standard for assessing a claim of newly discovered evidence provides discretion to review this issue, which was properly briefed below and is so briefed here. *See, e.g.*, *Murray v. Regier*, 872 So. 2d 217, 223 n. 5 (Fla. 2002).

A. Standard of Review

The determination of whether the evidence is sufficient to sustain a criminal conviction is a matter of law, subject to review *de novo*. *See*, *e.g.*, *Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004).

B. The Evidence is Insufficient to Establish Possession of an Actual Firearm

No evidence was presented to establish that any of the items purportedly taken by Koo possessed the characteristics necessary to constitute a "firearm," as defined by Florida statute, even amid testimony that was rife with generalized references to "guns," to a "pistol," to a .22 rifle, and to an "AK-47." When shown an exhibit by the prosecutor, who asked, "Dr. Saleh, is this an AK-47?" Saleh answered in the affirmative and identified it as his and as having been in the storage unit. R. III, 170. That exhibit was the only purported "gun" offered in evidence. Saleh did not testify to familiarity with firearms generally or that exhibit in particular, other than that he recognized a scratch on the exhibit. R. III, 170. Saleh also never testified to any of the characteristics of the exhibit, other than the scratch, or those of either of the other purported "guns" involved, never mentioning any of the characteristics statutorily required to constitute a "firearm."

Detective Shacklett never testified that he had ever seen any of the "guns" at issue in the case. During a pause in the playing of his recorded interrogation of Koo, he testified that he has experience with firearms, though he never described

even generally the nature and extent of that experience. R. III, 207. He was asked if "[t]he .22 caliber long rifle" is "an actual firearm" and responded in the affirmative. R. III, 208. However, he admitted that his only basis for believing that an actual .22 rifle existed was his interrogation of Koo, who had told the detective that he did not know what had happened to that object; Shacklett never saw the purported .22. R. III, 207- 212-213. Further, neither Shacklett nor any other witness testified to any characteristics of the "AK-47" exhibit, or of the purported pistol, necessary to constitute a "firearm" as defined by statute.

Koo testified that he saw Saleh threaten another person with "the AK," but the court sustained the State's objection to that testimony. R. III, 236-237. Koo testified later without objection that Saleh threatened a person with an unspecified gun. R. III, 254.

The statute mandating harsh minimum mandatory penalties for offenses involving firearms, §775.087(2)(a), Fla. Stat. (2011), provides that the definition of "firearm" is that in §790.001, which in turn provides:

> "Firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

§ 790.001(6), Fla. Stat. (2011).

The evidence at trial was insufficient to establish possession of a "firearm" as defined by statute. No evidence was presented that any item Koo possessed would, or was designed to, or could readily "be converted to expel a projectile by the action of an explosive" or any other of the characteristics required by statute to constitute a firearm. The trial court committed reversible error by denying Koo's motion for judgment of acquittal on that basis.

Koo was subjected to a 10-year mandatory minimum sentence based on the jury's verdict finding that he was armed by possessing a "firearm" pursuant to §775.087(2)(a), Fla. Stat. (2011). *See* R. I, 20 (information alleging that the dangerous weapon with which he became armed was a firearm), 67 (verdict finding possession of a firearm). Armed burglary is a first degree felony punishable by up to life imprisonment. §810.02(2)(b), Fla. Stat. (2011). On the other hand, unarmed burglary of an unoccupied structure is a third degree felony punishable by not more than five years of imprisonment. §810.02(4)(a), Fla. Stat. (2011).

In *Butler v. State*, 602 So. 2d 1303 (Fla. 1st DCA 1992), the court reversed a conviction for robbery with a deadly weapon where the trial court had denied a motion for judgment of acquittal on the issue, and remanded for entry of a judgment for the offense of unarmed robbery and for resentencing. *Id*. at 1305-06. The Court considered the sufficiency of the evidence to establish that Butler

possessed a deadly weapon where the robbery victims testified that they believed they could see him pointing an object with a shape generally like a gun under a pair of pants he carried in one hand, though he never said he had a gun or intended to shoot them. *Id*. at 1304. *Butler* noted the critical importance of the issue to the severity of the offense for which Butler could be convicted. *Id*. at 1304-05.

> We believe that, to secure a conviction pursuant to Section 812.13(2)(a) or (b), Florida Statutes (1989), for armed robbery while carrying a "firearm or other deadly weapon" or for armed robbery while carrying a "weapon," respectively, the state must present evidence which would be legally sufficient to permit a jury to conclude that the defendant *actually* carried a "firearm," "other deadly weapon" or a "weapon." While the state may meet this burden by the presentation of circumstantial evidence, it may not do so by presenting evidence of nothing more than the victim's subjective belief that the defendant possessed a "firearm," "other deadly weapon" or "weapon."

Id. at 1305 (emphasis in original).

Further, in *Bates v. State*, 561 So. 2d 1341, 1341-42 (Fla. 2d DCA 1990), the court held that a "nut driver" that was concealed with a rag, but believed by a robbery victim to be a ".22," which the defendant said he was carrying, was legally insufficient to establish the element of the charged offense of carrying "a firearm or other deadly weapon." Additionally, the court in *Streetman v. State*, 455 So. 2d 1080 (Fla. 2d DCA 2002), rejected the sufficiency of "second and third-hand evidence" about the characteristics of what turned out to be a fake bomb used in a robbery, concluding that the State failed "to establish the explosive propensities of the bomb," thus rendering the evidence insufficient to support a finding that

satisfied the requirement in that case of being "capable of causing death or serious bodily injury." *Id*. at 1082.

Likewise, in a case arising prior to the statutory definition of "firearm" being amended to include starter pistols, *Hutchinson v. State*, 816 So. 2d 1186 (Fla. 2d DCA 2002), the court reversed a conviction for robbery with a weapon and remanded for judgment and sentence for robbery, where no evidence was presented that the starter pistol in that case was designed to, or could readily be converted to, expel a projectile with an explosive action. *Id*. at 1188. The court in *Hutchinson* observed that the determination must be made using an objective standard, and that "[t]he subjective intent of the perpetrator, or the subjective fear of the victim, is not determinative of whether the object would qualify as a weapon." *Id*.

Butler observed that cases finding legally sufficient evidence have been based on direct observation of the firearm or weapon or on strong circumstantial evidence. 602 So. 2d at 1305-06 (citations omitted). For example, in *State v. Billue*, 497 So. 2d 712 (Fla. 4th DCA 1986), the victims testified that they had handled guns on many occasions, and they believed they saw the defendant pull a real automatic pistol from beneath his shirt, particularly when coupled with their testimony that he threated to blow one's brains out and the other's head off. *Id*. at 712-714. Likewise, the evidence in *Emmons v. State*, 546 So. 2d 69, 71 (Fla. 2d

DCA 1989), established that the flare gun at issue in that case "was actually capable of expelling a projectile by means of an explosive device as its test firing showed."

In this case, no evidence was presented that any of the alleged firearms at issue were capable of expelling a projectile by means of an explosive action, as required to meet the statutory definition of "firearm." Only one purported gun was offered in evidence and received as an exhibit, the supposed AK-47. However, no evidence was offered that the exhibit was ever test-fired, that it was otherwise inspected by any person with knowledge of firearms, or that any person had ever seen it fired. Saleh merely testified that it was his "AK-47," but no evidence was presented of what the exhibit is capable of doing or of its characteristics, nor even generally what an "AK-47" is. Detective Shacklett testified that in general, a .22 caliber rifle is a firearm capable of killing a person, but he never even saw the purported .22 at issue in order to provide any competent testimony based on personal knowledge about that supposed gun. Likewise, no evidence was offered about the characteristics of the purported pistol involved.

The evidence is insufficient as a matter of law to establish that Koo possessed a firearm, as no evidence was presented that any item he possessed had the characteristics statutorily required to constitute a firearm. The testimony merely referred to "guns," and Shacklett's testimony referred to a type of firearm

generally rather than being based on his personal knowledge about any specific purported firearm involved in this case. No competent, substantial evidence was presented at trial to support the statutory requirements for establishing that any object removed from the storage unit by Koo was a "firearm." Accordingly, with respect to this issue, the trial court judgment should be reversed and the case remanded for resentencing as a third degree felony, unarmed burglary of an unoccupied structure.

CONCLUSION

For the reasons set forth in Argument I, the decision below should be quashed and the case remanded for a new trial or, alternatively, for an evidentiary hearing on the amended motion for new trial. For the reasons set forth in Argument II, the trial court's judgment should be reversed and the case remanded for resentencing for the offense of unarmed burglary of an unoccupied structure in the event that a new trial is not ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Justin D. Chapman, Esquire, Assistant Attorney General, electronically, at justin.chapman@myfloridalegal.com and crimapplth@myfloridalegal.com, this 27th day of April, 2015.

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ATTORNEY

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ *D. Gray Thomas*
ATTORNEY

APPENDIX

INDEX TO APPENDIX

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

LENNART S. KOO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-4866

Opinion filed September 2, 2014.

An appeal from the Circuit Court for Duval County.
James H. Daniel, Judge.

D. Gray Thomas of the Law Office of D. Gray Thomas, Jacksonville, for Appellant.

Pamela Jo Bondi, Attorney General; Wesley Cross Paxson and Jay Kubica, Assistant Attorneys General, Tallahassee, for Appellee.

ROBERTS, J.

The Appellant appeals his conviction for burglary with a firearm, arguing that the judgment below should be reversed because the trial court denied a motion for new trial without allowing an evidentiary hearing to determine the credibility and materiality of an unsworn post-trial letter authored by the alleged victim. We affirm.

The facts as gleaned from the testimony of the Appellant and the victim are as follows. The Appellant and the victim had a close relationship, which extended to celebrating holidays together and living together. The victim testified that the Appellant was not allowed to enter the storage unit without him, and the Appellant took the guns without permission. The Appellant told him he had sold the guns so the victim gave him $300 to buy the guns back. The Appellant eventually returned the AK-47 and the .44 Magnum revolver.

The Appellant testified that during November 2011, the victim became increasingly violent, and he became afraid of the victim. He further testified that on November 15, 2011, the Appellant broke into the victim's storage unit with the intention of taking the victim's guns to ensure that the victim would not use them on himself or others. The Appellant took a BB gun, an AK-47, a .22 caliber rifle, and a .44 Magnum revolver from the storage unit. The following day, the Appellant told the victim what he had done, and they agreed to meet so the Appellant could return the guns. The Appellant returned the .22 caliber rifle, the AK-47, and the .44 Magnum revolver.

The Appellant was found guilty. A month later, the victim wrote a letter to the trial court stating that, he "suddenly remembered that [the Appellant's] intent may have been motivated by something more benign than what has transpired during the trial," and "in this instance, his intentions may have been much more

benign than it appears." He also wrote, "The only explanation for [the Appellant] to remove the guns from the storage room may have been his desire to protect me from my own self."

The Appellant then filed a motion for new trial and argued that the letter qualified as newly discovered evidence, which required an evidentiary hearing. After hearing arguments from both parties at a hearing on the motion for new trial, the trial court denied the motion for new trial, holding that the letter did not qualify as newly discovered evidence because nothing in the letter was a recantation of the victim's trial testimony and there was nothing in the letter that was unknown to the Appellant at the time of the trial.

The denial of a motion for new trial is reviewed for abuse of discretion. Hubbard v. State, 912 So. 2d 629, 632 (Fla. 1st DCA 2005).

The Florida Supreme Court has established a two-prong standard to use when a newly discovered evidence claim is raised. Aguirre-Jarquin v. State, 9 So. 3d 593, 603 (Fla. 2009) (citing to Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). First, the evidence must be newly discovered. Aguirre-Jarquin, 9 So. 3d at 603. Second, the evidence must be material. Id. To be material, the evidence must "be of such a nature that it would probably produce an acquittal on retrial." Id. (quoting Jones, 709 So. 2d at 521).

Post-trial recantations by state witnesses are a type of newly discovered

evidence. Murrah v. State, 773 So. 2d 622, 624 (Fla. 1st DCA 2000). To qualify as newly discovered evidence, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Jones, 709 So. 2d at 521. Here, any evidence in the victim's letter was known to the parties, and as such, it did not qualify as newly discovered evidence.

Additionally, the evidence in the letter was not material. When determining whether the evidence would likely result in an acquittal, the court looks at whether the evidence goes to the merit of the case or whether it constitutes impeachment evidence. Murrah, 773 So. 2d at 622. Here, the letter constitutes impeachment evidence because it could have been used to call into question the credibility of the victim's testimony. See § 90.608(1), Fla. Stat. (2012) (a witness may be impeached by introducing statements of the witness that are inconsistent with his or her present testimony). To probably produce an acquittal, the letter would have to contain evidence that disproved one of the elements of burglary with a firearm. To prove the crime of burglary, the State had to show (1) the Appellant entered a structure owned by the victim; (2) at the time of entering the structure, the Appellant had intent to commit an offense; and (3) the Appellant was not permitted to enter the structure. § 812.02(1)(b), Fla. Stat. (2012). The letter did not recant any of the victim's testimony that established the elements of the crime. Because

this letter is not a recantation, it cannot qualify as newly discovered evidence and, as such, the trial court did not abuse its discretion.

WOLF, J., CONCURS with opinion; MAKAR, J., DISSENTS with opinion.

WOLF, J., Concurring.

As stated by Judge Roberts, the unsworn letter by the victim did not involve a recantation. In addition, the letter does not serve to nullify any element of the crime. There is no indication in the letter that the victim ever gave appellant permission to go into the storage unit and remove firearms. At the most, the unsworn letter constituted mere speculation as to appellant's motives, evidence which might be admissible at a sentencing hearing, but not at trial.

While appellant may argue the letter was evidence supporting his necessity defense, this defense fails as a matter of law. There is no evidence at trial or in the letter that the danger was imminent or that appellant did not have other reasonable options other than to break into the victim's storage unit. See Butler v. State, 14 So. 3d 269, 270-71 (Fla. 1st DCA 2009) (quoting Williams v. State, 937 So. 2d 771, 772 (Fla. 1st DCA 2006) (explaining that to be entitled to a necessity instruction, appellant must show "(1) the defendant reasonably believed that his action was necessary to avoid an imminent threat of death or serious bodily injury to himself or others; (2) the defendant did not intentionally or recklessly place himself in a situation in which it would be probable that he would be forced to choose the criminal conduct; (3) there existed no other adequate means to avoid the threatened harm except the criminal conduct; (4) the harm sought to be avoided was more egregious than the criminal conduct perpetrated to avoid it; and (5) the

defendant ceased the criminal conduct as soon as the necessity or apparent necessity for it ended.") (emphasis added)).

The trial court did not err in denying the motion for new trial without an evidentiary hearing.

MAKAR, J., dissenting.

Lennart S. Koo appeals from his burglary conviction arguing, in part, that the trial judge erred by not holding an evidentiary hearing despite having received a letter from the alleged victim, Dr. Mohamed Saleh, who had testified as the key witness for the State. Because Dr. Saleh's letter raised sufficient grounds to warrant an evidentiary hearing under the circumstances, it was error to deny Koo's motion seeking one.

Koo was convicted of one count of removing firearms from a storage unit owned by Dr. Saleh, resulting in a ten-year minimum mandatory sentence. Dr. Saleh and Koo had a close personal relationship, one akin to family members (Dr. Saleh said he loved Koo "like my own brother."). Likewise, Koo characterized Dr. Saleh as a "boss and friend" for whom he'd worked almost full-time for the past four years. Koo, who was born in Amsterdam, Netherlands, and whose primary language is Dutch, was introduced to Dr. Saleh by Koo's father (whom Dr. Saleh treated as a family member and wished "was my brother.").

Koo lived in Dr. Saleh's home while doing a wide range of jobs such as working in the physician's office; chauffeuring the physician around town in either "his limousine or one of his trucks" as needed; constructing a home theater, swing set, and other similar tasks, resulting in workdays of between 10 and 15 hours. Koo

also regularly babysat Dr. Saleh's three daughters. He was essentially the physician's personal assistant ("What he said I did."). Koo testified that he worked at and had keys to Dr. Saleh's office, his houses, his beach house, the storage unit, and his cars ("He loses everything so that's why I had all the keys.").

At trial, Dr. Saleh testified that on November 14, 2011, he took Koo with him to put guns in the storage unit, where he also stored clothing. He testified that Koo did not have keys to the physician's properties, and that Koo took firearms from the storage unit soon thereafter. He received a call the next day from Koo's mother about the firearms, which Koo and his mother returned the following day.[1]

Koo's defense was twofold. First, Dr. Saleh had effectively given him consent to access the storage unit. Because of their close relationship, Koo testified he was Dr. Saleh's "right hand man" to whom the physician had entrusted the keys to his house and other properties (including the storage unit) as well as his personal vehicles. Koo said he was never told that Dr. Saleh had to be present when Koo went to these properties. Koo believed he had the authority to enter the storage unit.

Second, Koo asserted a necessity defense, claiming it was necessary to keep the firearms out of Dr. Saleh's hands because he had threatened to kill Koo; Dr.

[1] Dr. Saleh testified that Koo said he had sold the weapons, and that he gave Koo $300 to buy them back.

Saleh had also threatened to harm his own wife. Koo testified that in November 2011, Dr. Saleh—who was going through a divorce and custody case— "became increasingly violent and threatening" going so far as to threaten Koo at knifepoint and another employee at gunpoint. Around this same time, on November 14, 2011, Koo went to the storage unit with Dr. Saleh, who had forgotten his key. They opened the lock with wire cutters, and—after Dr. Saleh told Koo to take some dresses for his girlfriend—Koo put a new lock on the unit. According to Koo, Dr. Saleh's behavior soon became very erratic and threatening; the physician kicked him out of the house. Dr. Saleh told Koo, "If I ever see you around here, I will kill you, and I will kill your family." Koo was terrified that Dr. Saleh was going to shoot him, so he went to the storage unit to get and safeguard the guns. Koo's intention was to keep himself safe until Dr. Saleh calmed down. Because Koo did not have the key with him, he broke the lock off. He took the guns to a friend's business, but after talking with his mom, decided to return them to Dr. Saleh. Koo says that Dr. Saleh threatened to report him to the police unless Koo moved back in with him and completed work on a website (besides a handyman, Koo is also a computer programmer). A week or so later, Dr. Saleh spent Thanksgiving with Koo and Koo's parents at their home (Dr. Saleh says the gun issue was not discussed, the Koos saying he "changed his mind" and that the matter had been resolved at the Thanksgiving dinner).

On July 25, 2012, the jury found Koo guilty of burglary with the additional sentencing factor that Koo was in actual possession of a firearm during the commission of the burglary, triggering a mandatory ten-year sentence. The jury sent a note to the trial judge requesting leniency in Koo's sentencing. The note said: "Judge Daniel, we followed the letter of the law and that's what we did, but we would like to ask for leniency. We are not trying to do your job, but you said we can ask you anything. This is what we are asking."

Koo moved for a new trial, but soon filed an amended motion for new trial or hearing based on a post-verdict letter sent by Dr. Saleh to the trial judge. In his letter, Dr. Saleh contradicted his trial testimony, saying that he had allowed Koo to have "keys to every dwelling." He said he had "suddenly remembered" that Koo's intent in removing the firearms "may have been motivated by something more benign than what has transpired at trial." He said Koo's removal of the firearms—when Koo could have taken far more valuable items from the storage unit or the physician's home—was done to protect Dr. Saleh from doing "something that I might regret." The physician said that the "only explanation" for Koo's actions was "to protect me from my own self." He noted that Koo and Koo's parents were like family, and that he had needed Koo to keep the physician's wife from "sending me over the edge."

Following a conviction, a new trial may be granted if "[n]ew and material evidence, which, if introduced at the trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered." Boyd v. State, 910 So. 2d 167, 178 (Fla. 2005); Fla. R. Crim. P. 3.600(a)(3). "Recantation evidence is considered to be a type of newly discovered evidence, and therefore, the same test applies to recantation evidence as to other types of newly discovered evidence." Stephens v. State, 829 So. 2d 945, 945-46 (Fla. 1st DCA 2002). In Stephens, one of the state's witnesses recanted her testimony, but the trial court denied a postconviction motion seeking a new trial without an evidentiary hearing. Id. at 945. This Court reversed, explaining that an evidentiary hearing is necessary unless the recantation (which was in the form of an affidavit) is "inherently incredible or obviously immaterial to the verdict." Id. at 946. The determinations to be made after such a hearing are whether the witness is now testifying truthfully, and if so, whether the new testimony would probably produce an acquittal if used in a retrial. Id.; see also Glendening v. State, 604 So. 2d 839, 840-41 (Fla. 2d DCA 1992).

Applying Stephens, a hearing was required unless Dr. Saleh's letter was "inherently incredible or obviously immaterial to the verdict." It was neither. On the record presented, one could glibly conclude—as the trial judge (perhaps

justifiably) seems to have done—that anything Dr. Saleh says is "inherently incredible" due to his volatile and vacillating prevarications ("I don't place a lot of credibility in Dr. Saleh, quite candidly."). This was reason enough to have held a hearing; if a key witness has serious credibility issues, that's strong evidence that he probably lied at trial, making it far better to err on the side of caution by holding a hearing to ferret out which version of reality is to be credited. Because serious doubt exists about Dr. Saleh's credibility, the integrity of Koo's conviction is seriously compromised, making a hearing that much more important.

The jury could not have convicted Koo without Dr. Saleh's testimony, which it apparently found credible, at least as to some material respects now shrouded in doubt. Likewise, Dr. Saleh's recantation letter may be credible, at least as to the portions related to Koo's consent and necessity defenses, which are material to the verdict. Under these circumstances, when the State's star witness recants a material portion of his testimony that goes to two key defenses in an exceptionally close case in which the jury expressed reservations (if not remorse) about its verdict—beseeching the trial judge to be lenient on the defendant—it was an abuse of discretion not to at least hold a hearing on the matter. See Hubbard v. State, 912 So. 2d 629, 632 (Fla. 1st DCA 2005) (denial of a motion for new trial reviewed for abuse of discretion). Koo's request for a hearing is an exceptionally modest one given his liberty interest is at stake; his freedom for the next ten years has been

taken away based on the disavowed testimony of Dr. Saleh, a person that even the trial judge had difficulty believing. A remand for an evidentiary hearing under Stephens is necessitated; whether a new trial is warranted would depend upon the results of that hearing. Koo is entitled to this minimal degree of due process before the State can take away a decade of his life.