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IN THE SUPREME COURT OF FLORIDA

LENNART S. KOO, Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO. SC14-2347

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Lennart S. Koo, the defendant at trial and appellant on appeal, will be referred to as "Petitioner" in this brief. The State of Florida, the prosecution at trial and appellee on appeal, will be referred to as "Respondent" or "the State" in this brief. The record on appeal consists of four volumes and will be referenced by the volume number (in Roman numerals) followed by the page number(s). "IB" will designate Petitioner's initial brief on the merits, and "AB" will designate Respondent's answer brief on the merits. The exhibits entered at trial will be referenced by "Ex."

STATEMENT OF THE CASE AND FACTS

Petitioner's statement omits material facts and is not cast objectively in a form appropriate to the applicable standards of review.[1] (IB 1-10). Therefore, Respondent provides the following supplementation and corrections:

During opening statement, defense counsel conceded that Petitioner removed the "guns" from Dr. Saleh's storage unit. (III. 143).

Dawn Lester worked at the U-Haul storage facility where the burglary occurred. (III. 145). Around the time of the burglary, a U-Haul employee advised Ms. Lester that Dr. Saleh's storage unit was missing a lock. (III. 145). They secured the unit and then called Dr. Saleh to advise him of what happened. (III. 145-46).

A copy of Dr. Saleh's U-Haul self storage agreement was entered into evidence without objection as State's Exhibit 5. (I. 72; III. 128, 133, 146). Petitioner was not listed anywhere on the document as a person with authorized access. (I. 72; 146-47). The document did not indicate that anyone else was allowed to go in the unit other than Dr. Saleh. (III. 146).

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[1] Petitioner's duty is to provide this Court with "a full and fair statement of facts." *Thompson v. State*, 588 So. 2d 687, 689 (Fla. 1st DCA 1991). This proposition is of "necessity" especially "in a case challenging the sufficiency of the evidence." *Id.* "An appellant's statement of facts must not only be objective, but must be cast in a form appropriate to the standard of review applicable to the matters presented." *Id.*

A surveillance video from the U-Haul storage facility on the day of the burglary was entered into evidence without objection as State's Exhibit 4. (III. 149, 154). The video displayed Petitioner getting into an elevator empty handed. (III. 149; St. Ex. 4 – 1:01:06). Minutes later, the elevator opens back up and Petitioner walks into the hallway. (St. Ex. 4 – 1:03:11). Moments later, Petitioner is seen jogging back to the elevator. (St. Ex. 4 – 1:04:14). When the elevator reopens, Petitioner walks back into the hallway carrying a box and drops something. (St. Ex. 4 – 1:08:30). Petitioner then goes back to pick up what he dropped. (St. Ex. 4 – 1:08:44). Petitioner then returns to elevator. (St. Ex. 4 – 1:09:00). Finally, Petitioner is seen running out of the elevator carrying another box. (St. Ex. 4 – 1:11:00).

Ms. Lester testified that Petitioner was picking up "[a]nother gun case" as he was coming out of the elevator in the video. (III. 152). When asked on cross-examination how she knew the cases were "gun cases," Ms. Lester explained that she knew what gun cases look like. (III. 159-60).

Dr. Saleh took the opportunity to express his love for Petitioner at the very beginning of his direct examination:

> **State:** On November 14th, did you and [Petitioner] put guns in that storage unit?
>
> **Dr. Saleh:** You know I love you, man, but I have to go with the truth.

State: Your Honor, I would ask that –

Trial Court: Okay. Dr. Saleh, just respond to the question. All right, sir.

Dr. Saleh: Yes.

(III. 169).

Dr. Saleh testified that he had clothing, merchandise, and guns in his storage unit. (III. 169). Petitioner was not allowed to go in the unit without Dr. Saleh. (III. 170). Petitioner took guns out of the unit. (III. 170). One of those guns was an AK-47. (III. 170). Dr. Saleh was able to identify this gun based on a particular scratch mark. (III. 170).

Dr. Saleh testified that he knew Petitioner for about five years and Petitioner had been working on and off for Dr. Saleh for the past few years. (III. 171). Petitioner had also lived in a segregated section of Dr. Saleh's house for an extended period of time. (III. 171-72).

Petitioner's mother called Dr. Saleh the day after the burglary. (III. 178). Shortly thereafter, Petitioner and his mother met with Dr. Saleh, where "[Petitioner] said that he had sold the guns for $300." (III. 178-79). Dr. Saleh told Petitioner that "he stole other things and we forgave him, but these guns must come back because I'm not going to have a gun with my name on it out there in the streets." (III. 179).

In addition to the AK-47, Petitioner stole a handgun, ammunition, a BB gun, a .22, and some clothing as well. (III. 179). Dr. Saleh did not trust Petitioner after this "because so many other items were taken," which Dr. Saleh never pressed charges for. (III. 180). "[Petitioner] stole keys, stole a lot of things." (III. 184). Dr. Saleh also reported that some dresses and a cell phone were missing. (III. 190).

When Dr. Saleh met with Petitioner and his mother the day after the offense, Petitioner returned "[t]he AK-47 and a handgun." (III. 179-80). The next day, Dr. Saleh met with Petitioner and his mother again and gave Petitioner $300 to retrieve the gun that he already sold. (III. 180). Petitioner later returned with two more guns but not all of them. (III. 180). The .22 caliber gun was never recovered. (III. 180-81).

Towards the end of his testimony, Dr. Saleh again took the opportunity to express his love for Petitioner:

> **Defense counsel:** Well, you were actually – you and [Petitioner] actually ate dinner at the Koo's residence on Thanksgiving night, correct?
>
> **Dr. Saleh:** I feel like I'm here testifying against my own brother. I love him like a brother. I wish his father was my brother. I don't like to be here.
>
> **Trial Court:** Mr. Saleh – Dr. Saleh.
>
> **Dr. Saleh:** Yes.

Trial Court: All right. Please respond only to a question. All right.

Dr. Saleh: Right. Probably. I don't know. I love him like my own brother and I hate being here right now.

. . .

Dr. Saleh: I loved [Petitioner]. I wanted him to do well.

(III. 183, 185).

Dr. Saleh was never asked about Petitioner's permission to enter any of Dr. Saleh's "dwellings." (III. 168-85). Instead, defense counsel broadly asked about Petitioner's authority to enter any of Dr. Saleh's "properties" for work purposes:

Defense counsel: In fact, [Petitioner], as your employee, had the authority to go to these different properties, which you owned, correct?

Dr. Saleh: No. He may – I may send him on an errand, but nobody gave him permission to go to the room, break in and steal my gun.

Defense counsel: And, in fact, you actually provided [Petitioner] with keys to all of these properties that you owned?

Dr. Saleh: No.

(III. 183). Dr. Saleh denied getting mad if Petitioner was underperforming, and denied ever threatening Petitioner on some of the jobs he did. (III. 185).

Detective Shacklett interviewed Petitioner a few months after the burglary. (III. 193). A copy of the recorded video interview (State's Exhibit 3) was played for the jury at trial. (III. 195). During the interview, Petitioner admitted to going

to the U-Haul storage unit on the day of the burglary. (III. 196). Appellant stated: "I picked up the – the guns he had." (III. 197). When asked why, Petitioner responded: "Because I was scared he was going to lose custody of his girls . . ." (III. 197). Petitioner specifically stated that Dr. Saleh never instructed him to remove the guns. (III. 197).

Petitioner then stated that he removed the guns because he was scared that Dr. Saleh was going to "shoot me with them." (III. 197). Petitioner admitted to breaking the lock on the unit in order to get inside. (III. 197). Petitioner then described the different types of "guns" and "ammunition" that he removed from Dr. Saleh's storage unit:

> **Det. Shacklett:** Okay . . . when you broke the lock, what did you take out of the unit?
>
> **Petitioner:** Just a gun.
>
> **Det. Shacklett:** What kind of guns?
>
> **Petitioner:** AK-47, a safe lockbox, . . . a BB gun, and a Ruger .22 little rifle.
>
> **Det. Shacklett:** Okay. What else?
>
> **Petitioner:** That was it.
>
> **Det. Shacklett:** What was in the safe box?
>
> **Petitioner:** Well, I accidentally dropped the safe box and there was a

.44 Magnum and two clips to the AK and enough ammunition to – [2]

(III. 197-98).

Petitioner claimed he couldn't remember what he did with the lock that he broke off of the unit, but he recalled twisting it "with a screwdriver or something like that." (III. 198). He then claimed to have given the guns to a friend. (III. 198). Petitioner admitted that he told Dr. Saleh afterwards that he took the guns. (III. 199). Petitioner admitted that his mother gave back the .38 caliber handgun and the AK-47 to Dr. Saleh the day after the burglary. (III. 200). Petitioner claimed he didn't know what happened to the "long rifle." (III. 200).

Detective Shacklett testified that he had experience with firearms, and that the .22 caliber long rifle was not a BB gun. (III. 207-08). It was an "actual firearm" that was "[a]bsolutely" capable of "killing a person." (III. 208). Petitioner repeatedly referred to the firearms he stole as "guns" throughout his interview. (III. 208).

After the State rested, defense counsel moved for a judgment of acquittal (JOA), and argued "they didn't actually prove that this was a firearm which was

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[2] The record reflects that the published video was "[t]ranscribed to the court reporter's best ability as heard in court that day." (III. 195). Although the court reporter transcribed Petitioner's statement as "enough ammunition to --," a careful review of the audio from the recorded interview reveals that Petitioner stated: "enough ammunition to ah, I dunno, to shoot people." (St. Ex. 3 – 2:40).

taken." (III. 220). Defense counsel made no mention of the sufficiency of evidence regarding whether the guns were capable of or designed to expel projectiles by explosion. (III. 220-21). The trial court denied the motion. (III. 221).

Petitioner testified that Dr. Saleh put a knife to his throat and threatened to kill him the night before the burglary. (III. 235, 261-62). Petitioner testified that he and Dr. Saleh brought the "guns" to the storage unit the day before the burglary. (III. 235). Petitioner testified that on the morning of the burglary he got into a big argument with Dr. Saleh and Dr. Saleh kicked Petitioner out of his house. (III. 251). Petitioner then borrowed his parents' car to drive to Dr. Saleh's storage unit. (III. 251). Petitioner didn't have any keys to the unit so he used a tire iron to take the lock off. (III. 251). Petitioner took the "guns" out of the storage unit, gave them to a friend, and then "went to do some things with [his] girlfriend." (III. 251). Petitioner admitted that Dr. Saleh did not give him permission to take the guns, but Petitioner took them anyway. (III. 267).

Petitioner denied taking any clothes, but claimed he believed he had authority to enter the storage unit because Dr. Saleh allegedly told him that he could come there and pick out some dresses for his girlfriend. (III. 257-58). Petitioner claimed Dr. Saleh told him that he was "welcome to take some dresses or whatever was stored in there because he wanted to get rid of it." (III. 236).

According to Petitioner, Dr. Saleh gave him permission to take the dresses that belonged to Dr. Saleh's wife, i.e. commit a theft against Dr. Saleh's wife. (III. 236).

Petitioner claimed that during the argument that morning, Dr. Saleh threatened: "If I ever see you around here (Dr. Saleh's home), I will kill you and I will kill your family." (III. 253). Petitioner described this threat as "ridiculous[,]" yet he claimed to feel in danger at that point. (III. 253).

Despite Petitioner's fear, he decided to personally hand some of the guns over to Dr. Saleh the very next day. (III. 255). Petitioner admitted to returning "an AK-47, a Magnum .44, and a Ruger .22." (III. 255). Petitioner explained how at least one of the guns was capable of expelling projectiles: "The Magnum .44 is like a revolver. It's like a big cowboy gun. It's about that (indicating) big and it is like a BB gun, but it shoots little caps, .22." (III. 255).

Petitioner claimed that Dr. Saleh threatened to go to the police if Petitioner did not finish the website he was working on and stay with Dr. Saleh (in Dr. Saleh's home). (III. 256). Petitioner claimed he "had no choice" and stayed with Dr. Saleh that night. (III. 256). The next day, they got into another argument so Petitioner took a taxi and left. (III. 256). When asked about discrepancies in his statements to police, Petitioner claimed he "might have drank too much and it was late at night" during his interview. (III. 269).

Petitioner's mother testified that she and Petitioner brought the "guns" back to Dr. Saleh the day after the offense. (III. 273). She described the guns as "one large one. It looked like a rifle. There was one that was a little shorter maybe and there was a pistol or a handgun." (III. 273). After the guns were returned, Petitioner stayed with Dr. Saleh. (III. 274).

Despite there being no evidence of an "imminent" threat, Petitioner received a jury instruction on the affirmative defense of necessity. (I. 52; III. 279).

The trial court asked Petitioner if there was "anything at this point in time that you feel should have been presented that wasn't presented in the way of any evidence," and Petitioner replied: "No, Your Honor." (III. 292).

During closing argument, the State talked about the physical evidence admitted at trial, and explained how the AK-47 along with "two banana clips you can stick inside of it" was an actual firearm. (III. 311).

Defense counsel's closing argument repeatedly referred to the stolen items as "guns" and "firearms." (IV. 330, 333-35, 337-38, 342). The entire necessity defense (why Petitioner broke into the U-Haul and stole the firearms) rested on the notion that these were real firearms, capable of producing death or great bodily harm. (IV. 330, 333-35, 337-38, 342).

The jury found Petitioner guilty of armed burglary with a firearm. (I. 67). As the foreman of the jury handed the verdict form over to the trial court, he also

gave a note to the judge which read: "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." (I. 70; IV. 400, 405).

On September 5, 2012, the trial judge received an unsworn and unnotarized letter from the victim (42 days after the verdict). (I. 67, 84). The letter read as follows:

> I am writing this letter in conjunction with the guilty verdict of Lennart Koo. As it was reported during trial, Lennart was living with me and working in my office. He is like a brother to me and I look up to his father like my own father. I miss him very much and I am devastated that he was convicted to serve a minimum ten years in prison. He does not deserve that, nor his mother or father should be punished with the possibility that he may not see his son free, while alive. His father is 78 years old.
>
> As I have been trying to make sense of why Lennart took the guns, when he could have taken something more valuable from one of my homes; I suddenly remembered that his "intent" may have been motivated by something more benign that what has transpired during the trial.
>
> Len ("Lennart") and I spent long hours talking and venting our frustrations with each other or somebody else. I am currently going through a highly contested divorce. My wife has been very vicious and . . . Sometimes my irritation with her is very intense. I just remembered (I am quite certain) that I told Len to make sure I did not do something that I might regret.
>
> The only explanation for Lennart to remove the guns from my storage room, may have been his desire to protect me from my own self. I believe he may have felt that leaving the guns in the storage

> room was not enough, because I could still have access to them. Of course, I would never harm my wife or anybody else; I truly believe in my Hippocratic oath "primum non nocere"; however, to somebody that does not know me very well, my irritation and frustration could appear intense and frightening.
>
> In conclusion, Lennart could have taken jewelry or other valuable items from any of my homes. He had keys to every dwelling. In fact I believe that he removed the guns because he felt that they were not far enough from me. He had seen how vicious my wife could be, and I had told him in the past to stay close by, to keep her from sending me over the edge.
>
> I have known Len for many years, he may do stupid things sometime[s], however, in this instance, his intentions may have been much more benign than it appears. To punish him and his parents, by taking away ten years from his life would not serve Justice Well.

(I. 84-85).

The trial court held a hearing on Petitioner's motion for new trial. (I. 110). The trial court reviewed the letter and entered it into evidence without objection. (I. 110). Petitioner failed to present any other testimony or evidence at the hearing to support his motion for new trial. (I. 110-19). The trial court denied Petitioner's motion for new trial and orally made a number of factual findings on the record:

> I don't find this letter particularly credible, quite candidly. I think Dr. Saleh . . . has conflicted emotions when it comes to [Petitioner] and [Petitioner's] family, and Dr. Saleh probably, I don't know, maybe he's just remorseful now because he knows what the conviction means at this point, which means that, most likely . . . this Court's hands have been tied by the Legislature as far as what's an appropriate sentence in a case like this. I don't find this to be overly credible just from the letter itself.

> I would expect [Petitioner] to have testified to it if it actually occurred and, quite candidly, I'm not sure that . . . it really would have made much of a difference in the case either. I just note for all these reasons, I mean I believe that a motion for new trial shouldn't be warranted based upon Dr. Saleh's letter to the Court. This is evidence that could have been discovered prior to trial. It wasn't. And . . . again, I don't believe with all the other evidence in the case that it was something which . . . would change things in the end, so the motion for new trial is – is denied on those grounds[.]

(I. 118-19). The trial court also made a number of factual findings in a written order denying Petitioner's motion for new trial:

> As to the amended motion, the court has reviewed the letter from Dr. Saleh and finds that his testimony, should it be consistent with the content of his letter, would not qualify as newly discovered evidence that would have been unknown to [Petitioner] or his counsel at the time of trial, or that they could not have known of this evidence by the use of diligence. Dr. Saleh indicated in his letter that "the only explanation for [Petitioner] to remove the guns from the storage, may have been his desire to protect me from my own self." First, this is not a statement of fact, but an opinion by Dr. Saleh that would be speculation on his part as to the motives of [Petitioner]. Second, assuming that Dr. Saleh had made a statement to [Petitioner] to the effect that "I need you to protect me from my own self," then it is reasonable to assume that [Petitioner] a) had knowledge of the statement at the time of trial; and b) that he would have at least proffered the testimony to the court at trial, not after.
>
> Furthermore, the court is quite skeptical of the credibility of this proposed new testimony and does not believe that it would probably produce an acquittal at retrial. Nothing in this letter would be a recantation of Dr. Saleh's testimony that [Petitioner] did not have permission to enter the storage unit and the jury was given evidence that [Petitioner] had access to all of Dr. Saleh's keys, including the storage unit, and still found him guilty.

(I. 98-99).

SUMMARY OF ARGUMENT

Dr. Saleh's displeasure with Petitioner's potential sentence was irrelevant, and any probative value would have been substantially outweighed by the danger of unfair prejudice. Accordingly, this inadmissible part of the letter did not provide a basis for new trial.

Dr. Saleh's newly-formed opinion about Petitioner's possible motives or intent during the burglary was pure speculation. Accordingly, this inadmissible part of the letter did not provide a basis for new trial.

Dr. Saleh's previous statements to Petitioner would have been known to Petitioner. Thus, the statements were not "newly discovered" evidence. Even if Petitioner was somehow unaware of the statements allegedly made to him ("make sure I did not do something that I might regret" and "stay close by"), they would not have been admissible under section 90.403. These vague and equivocal statements about Dr. Saleh's marital problems would not have given Petitioner the authority (or need) to forcibly break into the storage unit, steal the guns, and then sell them. Thus, any probative value in these statements was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Accordingly, this inadmissible part of the letter did not provide a basis for new trial. Even if such statements were admissible, they would not have *probably* produced an acquittal.

Dr. Saleh's statement that "[Petitioner] had keys to every dwelling" was not a recantation of anything. The statement was also irrelevant. The only issue was whether Petitioner had the authority (or need) to break into Dr. Saleh's U-Haul storage unit to steal Dr. Saleh's guns. Whether Petitioner had keys to "every dwelling" was not material to the elements of the crime or his affirmative defense. Thus, even if this statement was a "recantation," it was not a basis for a new trial. The statement was also cumulative to Petitioner's testimony at trial that he "had all the keys." Thus, the "keys to every dwelling" statement was cumulative to Petitioner's trial testimony, and was not a basis for new trial for this reason alone.

The timeliness of the unsworn letter, the inconsistencies in the letter, the speculative opinions in the letter, and the clear bias in favor of Petitioner in the letter all supported the trial court's conclusion that the statements in the letter were not credible. The inherent unreliability of the letter coupled with the overwhelming evidence of guilt supported the trial court's conclusion that the letter did not provide a basis for new trial. Therefore, the trial court did not abuse its discretion in denying Petitioner's motion for new trial.

Petitioner's specific claim on appeal that the State failed to prove the guns he stole were capable of or designed to expel projectiles by explosion was never made below and is therefore not preserved. Even if preserved, Petitioner's claim is belied by the record and contrary to his own defense theory.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR NEW TRIAL BASED ON CLAIMS MADE IN AN UNSWORN POST-TRIAL LETTER.

Standard of Review

"A trial court's denial of a motion for new trial is reviewed under an abuse of discretion standard." *Stephens v. State*, 787 So. 2d 747, 754 (Fla. 2001). Under this standard of review, a ruling will be upheld unless the ruling is arbitrary, fanciful, or unreasonable. *Blake v. State*, 39 Fla. L. Weekly S729, *4 (Fla. 2014). "[D]iscretion is abused only where no reasonable person would take the view adopted by the trial court." *Id.*

Burden of Persuasion and Presumption of Correctness

Generally, judgments are presumed correct, which shifts the burden to the losing side to convince the appellate court to vacate the judgment. *Savage v. State*, 156 So. 2d 566, 568 (Fla. 1st DCA 1963); § 924.051(7), Fla. Stat. (2014). The trial court's decision, not its reasoning, is presumed correct and in support of that decision, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999). "A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." *State v. Hankerson*, 65 So. 3d 502, 505 (Fla. 2011).

More specifically, Petitioner has the burden of proof to obtain relief on a claim of newly discovered evidence. *See Brooks v. State*, 40 Fla. L. Weekly S241, *21 (Fla. May 7, 2015) ("a defendant must meet two requirements"). Furthermore, Petitioner has the "substantial burden" to overcome the trial court's conclusion as to the credibility of the purported recanted testimony. *See Archer v. State*, 934 So. 2d 1187, 1198 (Fla. 2006).

Merits

In order to grant a new trial based on "newly discovered evidence," Petitioner was required to establish: (1) the evidence was new and material, (2) the evidence, if introduced at trial, would probably produce an acquittal on retrial, and (3) Petitioner could not with reasonable diligence have discovered and produced the evidence at the trial. *See* Fla. R. Crim. P. 3.600(a)(3); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). The trial court should "consider all newly discovered evidence which would be admissible and . . . evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." *Jones*, 591 So. 2d at 916. "This determination includes an evaluation of whether: (1) the evidence goes to the merits of the case or constitutes impeachment evidence; (2) the evidence is cumulative to other evidence presented; (3) there are any inconsistencies in the newly discovered evidence; and (4) the evidence is material and relevant." *Brooks*, 40 Fla. L. Weekly S241, *21.

Here, the alleged "newly discovered evidence" breaks down into four parts: (1) Dr. Saleh's disagreement with Petitioner's sentence, (2) Dr. Saleh's opinions about Petitioner's motive and intent during the burglary, (3) Dr. Saleh's statements to Petitioner to "make sure I did not do something that I might regret" and to "stay close by[,]" and (4) Dr. Saleh's claim that Petitioner "had keys to every dwelling." (I. 84-85). None of this information was admissible, and it would not have probably produced an acquittal even if introduced at trial.

A. Dr. Saleh's opinion about Petitioner's sentence was irrelevant.

In the letter, Dr. Saleh expressed his displeasure with Petitioner's potential sentence and the impact it would have on Petitioner's family. (I. 84-85). This information was clearly irrelevant to any material fact at issue, and any probative value would have been substantially outweighed by the danger of unfair prejudice. *See* § 90.401, Fla. Stat. (2014); § 90.403, Fla. Stat. (2014); *see also* Fla. Std. Jury Instr. 3.10 (Crim.) ("This case must not be decided for or against anyone because you feel sorry for anyone . . . **It is the judge's job to determine a proper sentence** . . . Your verdict should not be influenced by feelings of . . . sympathy.") (emphasis added). Because Dr. Saleh's opinion about Petitioner's sentence would have been inadmissible at trial, it would not have probably produced an acquittal. *See* Fla. R. Crim. P. 3.600(a)(3); *Jones*, 591 So. 2d at 915-16. Accordingly, this part of the letter did not provide a basis for new trial.

B. <u>Dr. Saleh's newly-formed opinion about Petitioner's possible motive and intent during the burglary was pure speculation.</u>

Dr. Saleh's newly-formed opinion about what Petitioner "may" have "desire[d,]" "inten[ded,]" or "felt" at the time of the burglary was pure speculation. (I. 84-85); *See* § 90.604, Fla. Stat. (2014) (lack of personal knowledge); *Campbell v. Salman*, 384 So. 2d 1331, 1333 (Fla. 1980) (affidavit based on "information and belief" rather than "personal knowledge" was not admissible into evidence and should not have been considered by the trial court); *Blake v. State*, 39 Fla. L. Weekly S729, *9 (Fla. 2014) (lay opinion about the purpose of another person's actions would be inadmissible speculation).

"[T]he rule is well established that a witness is not permitted to testify as to the undisclosed intention or motive of a third person[.]" *Branch v. State*, 118 So. 13, 15 (Fla. 1928). A witness "must be confined to a statement of facts leaving it to the jury to draw the proper inferences as to what were the party's intentions or motives." *Id.* Here, Dr. Saleh's letter made it clear that Petitioner's intent and motive was never disclosed to Dr. Saleh:

> As I have been **<u>trying</u>** to make sense of why Lennart took the guns . . . his "intent" **<u>may</u>** have been . . . The only explanation for Lennart to remove the guns from my storage room, **<u>may</u>** have been . . . **<u>I believe</u>** he **<u>may</u>** have felt . . . **<u>I believe</u>** that he removed the guns because he felt . . . his intentions **<u>may</u>** have been . . .

(I. 84-85) (emphasis added).

Under the well established rule acknowledged by this Court in *Branch*, Dr. Saleh could not have testified about Petitioner's undisclosed intent or motive as to why he stole the guns from Dr. Saleh's storage unit. *See id.* Accordingly, this inadmissible speculation would not have "probably" produced an acquittal. *See* Fla. R. Crim. P. 3.600(a)(3); *Jones*, 591 So. 2d at 915-16.

C. <u>Dr. Saleh's previous statements to Petitioner were known to Petitioner, inadmissible under section 90.403, and would not have probably produced an acquittal even if introduced at trial.</u>

"[N]ewly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings." *Wright v. State*, 857 So. 2d 861, 871 (Fla. 2003) (citing *Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995)). Here, Dr. Saleh "suddenly remembered" that he may have previously told Petitioner to help Dr. Saleh control his anger issues with his wife. (I. 84-85). Petitioner would have obviously known about these statements if they were actually made to him.

Likewise, Petitioner had the opportunity to present this evidence at trial but failed to do so. The trial court asked Petitioner if there was "anything at this point in time that you feel should have been presented that wasn't presented in the way of any evidence," and Petitioner replied: "No, Your Honor." (III. 292). Thus, these requests (allegedly made to Petitioner) do not qualify as "newly discovered" evidence, and do not warrant a new trial for this reason alone. *See id.*

Even if Petitioner was somehow unaware of the statements made to him, the probative value of such statements would have been substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. *See* § 90.403, Fla. Stat. When viewed in their full context, Dr. Saleh's statements to Petitioner were vague and equivocal:

> [Petitioner] and I spent long hours talking and venting our frustrations with each other or somebody else. I am currently going through a highly contested divorce. My wife has been very vicious and . . . Sometimes my irritation with her is very intense. **I just remembered (I am quite certain) that I told [Petitioner] to make sure I did not do something that I might regret.**
>
> The only explanation for [Petitioner] to remove the guns from my storage room, may have been his desire to protect me from my own self. I believe he may have felt that leaving the guns in the storage room was not enough, because I could still have access to them. **Of course, I would never harm my wife or anybody else;** I truly believe in my Hippocratic oath "primum non nocere"; however, to somebody that does not know me very well, my irritation and frustration could appear intense and frightening.[3]
>
> In conclusion, [Petitioner] could have taken jewelry or other valuable items from any of my homes. He had keys to every dwelling. In fact I believe that he removed the guns because he felt that they were not far enough from me. **He had seen how vicious my wife could be, and I had told him in the past to stay close by, to keep her from sending me over the edge.**

(I. 84-85) (emphasis added).

[3] Petitioner knew Dr. Saleh "very well." (III. 169, 171-73, 175, 183, 185, 227-32, 257). Thus, based on the letter itself, Dr. Saleh's irritation and frustration with his wife would not have appeared "intense and frightening" to Petitioner. (I. 84-85).

The requests above ("make sure I did not do something that I might regret" and "stay close by") would not have been admissible under section 90.403. These vague and equivocal requests, even if actually made to Petitioner, would not have given him the authority to forcibly break into the storage unit, steal the guns, and then sell them. (III. 178-80, 197-98, 251). The requests would also not have given Petitioner authority to break into the unit to remove the other items he stole, such as clothing, keys, and a cell phone. (III. 179-80, 184, 190). Thus, any probative value in these vague and equivocal statements was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. § 90.403, Fla. Stat. Because the statements were inadmissible, they would not have probably produced an acquittal. Therefore, the statements did not warrant a new trial for this reason alone. *See* Fla. R. Crim. P. 3.600(a)(3).

Even if such statements were admissible, they would not have *probably* produced an acquittal. The trial court should "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." *Jones*, 591 So. 2d at 916. "This determination includes an evaluation of whether: (1) the evidence goes to the merits of the case or constitutes impeachment evidence; (2) the evidence is cumulative to other evidence presented; (3) there are any inconsistencies in the newly discovered evidence; and (4) the evidence is material and relevant." *Brooks*, 40 Fla. L. Weekly S241, *21.

In determining whether newly discovered evidence would probably produce an acquittal, this Court looks to the other evidence of guilt that was presented at trial. *See Hunter v. State*, 29 So. 3d 256, 266 (Fla. 2008) ("In light of the strong testimonial evidence establishing Hunter's guilt, we conclude that the newly discovered evidence would not probably produce an acquittal on retrial."). Here, the overwhelming evidence of guilt presented at trial rendered the claims in the post-trial letter meaningless. Dr. Saleh testified that Petitioner was not allowed to go in the storage unit without Dr. Saleh. (III. 170). The day after the burglary, "[Petitioner] said that he had sold the guns for $300." (III. 178-79).

During his interview with police, Petitioner admitted to breaking the lock on the storage unit in order to get inside. (III. 197). Petitioner claimed he couldn't remember what he did with the lock that he broke off of the unit, but he recalled twisting it "with a screwdriver or something like that." (III. 198). **Petitioner specifically admitted that Dr. Saleh never instructed him to remove the guns**. (III. 197). He then claimed that he gave the guns to a friend. (III. 198). When asked why he stole Dr. Saleh's guns, one of his explanations was that he was scared that Dr. Saleh was going to "shoot me with them." (III. 197). This explanation had nothing to do with Dr. Saleh's marital problems.

Petitioner testified during trial that he didn't have any keys to the unit so he used a tire iron to take the lock off. (III. 251). Petitioner took the guns out of the

storage unit, gave them to a friend, and then "went to do some things with [his] girlfriend." (III. 251). **<u>Petitioner admitted that Dr. Saleh did not give him permission to take the guns, but Petitioner took them anyway</u>**. (III. 267). Petitioner denied taking any clothes, but claimed he had authority to enter the storage unit because Dr. Saleh told him that he could come there and pick out some dresses for his girlfriend. (III. 257-58). Petitioner claimed Dr. Saleh told him that he was "welcome to take some dresses or whatever was stored in there because he wanted to get rid of it." (III. 236). Once again, this explanation had nothing to do with Dr. Saleh's marital problems.

Petitioner claimed that during an argument on the morning of the burglary, Dr. Saleh threatened: "If I ever see you around here (Dr. Saleh's home), I will kill you and I will kill your family." (III. 253). There was absolutely no evidence that Petitioner returned to Dr. Saleh's home before the burglary of the storage unit. Petitioner also gave equivocal testimony about how he perceived the alleged threats made by Dr. Saleh. On one hand, he described them as "ridiculous." (III. 253). On the other hand, he felt in danger at that point. (III. 253). Despite Petitioner's alleged fear, he decided to personally hand some of the guns (with ammunition) over to Dr. Saleh the very next day. (III. 255).

Based on Petitioner's wildly inconsistent and far-fetched explanations above, coupled with the overwhelming evidence of guilt, Dr. Saleh's previous

statements to Petitioner about his marital problems would not have probably produced an acquittal. Therefore, the statements did not provide a basis for new trial for this reason alone.

D. Dr. Saleh's claim that Petitioner "had keys to every dwelling" was cumulative to other evidence, not a recantation of anything, and was irrelevant to the burglary of the U-Haul storage unit.

Petitioner goes to great lengths in his brief to repeatedly characterize the unsworn, post-trial letter as a "recantation." (IB 1, 10-12, 14-20). Petitioner fails to explain which of the different statements in the letter was an actual recantation. (IB 1, 8, 10-12, 14-20). Respondent assumes that Petitioner is referring to the "keys to every dwelling" statement since it is the only part[4] of the letter that even comes remotely close to a recantation of Dr. Saleh's trial testimony. *See* Black's Law Dictionary (9th ed. 2009) (defining "recant" as "To withdraw or renounce (prior statements or testimony) . . ."). Although the "keys to every dwelling" statement may be somewhat exculpatory; it is not a recantation.

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[4] The other parts of the letter include Dr. Saleh's disagreement with Petitioner's sentence, Dr. Saleh's newly-formed opinions about Petitioner's motives and intentions during the burglary, and Dr. Saleh's previous statements to Petitioner regarding his marital problems. (I. 84-85). These parts of the letter could not possibly be considered a "recantation" because they don't "recant" anything that was testified to at trial. *See* Black's Law Dictionary (9th ed. 2009) (defining "recant" as "To withdraw or renounce (prior statements or testimony) . . ."). Petitioner also fails to point to any deposition or other sworn testimony that is in conflict with these statements in the letter.

At trial, Dr. Saleh was never asked about Petitioner's permission to enter any of Dr. Saleh's "dwellings." (III. 168-85). Instead, defense counsel broadly asked about Petitioner's authority to enter any of Dr. Saleh's "properties" for the purpose of work:

> **Defense counsel:** In fact, [Petitioner], as your employee, had the authority to go to these different properties, which you owned, correct?
>
> **Dr. Saleh:** No. He may – I may send him on an errand, but nobody gave him permission to go to the room, break in and steal my gun.
>
> **Defense counsel:** And, in fact, you actually provided [Petitioner] with keys to all of these properties that you owned?
>
> **Dr. Saleh:** No.

(III. 183). The statement that "[Petitioner] had keys to every dwelling" was not a recantation of the testimony above. *See id.* (defining "recant" as "[t]o withdraw or renounce . . ."). "Dwellings" are a specific type of "property," and Dr. Saleh was clearly referring to "homes" in the letter: "[Petitioner] could have taken jewelry or other valuable items from any of my **<u>homes</u>**. He had keys to every **<u>dwelling</u>**." (I. 84-85) (emphasis added). Thus, this statement in the letter was not a recantation of anything.

The statement was also irrelevant. The only issue in this case was whether Petitioner had the authority (or need) to break into Dr. Saleh's U-Haul storage unit (a structure) to steal Dr. Saleh's guns. Whether Petitioner had keys to "every

dwelling" was not material to the elements of the crime or Petitioner's affirmative defense.[5] Thus, even if this statement was a "recantation," it was not a basis for a new trial. *See Brooks*, 40 Fla. L. Weekly S241, *21.

The second *Brooks* factor also supports the denial of the motion for new trial because the "keys to every dwelling" statement was cumulative to other evidence presented at trial. *See id.* Petitioner testified: "I had all the keys . . . he gave them to me." (III. 229). As the trial court noted: "Nothing in this letter would be a recantation of Dr. Saleh's testimony that [Petitioner] did not have permission to enter the storage unit[,] and the jury was given evidence that [Petitioner] had access to all of Dr. Saleh's keys, including the storage unit, and still found him guilty." (I. 98-99). Thus, the "keys to every dwelling" statement was cumulative to Petitioner's trial testimony, and was not a basis for new trial for this reason alone. Even if the statement above was not cumulative, Dr. Saleh could be impeached at the new trial with his prior inconsistent statements. *See Hunter*, 29 So. 3d at 266. Thus, the statement would unlikely be credible at retrial, which is further explained below.

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[5] Even if the burglary here occurred in a dwelling as opposed to a structure, the "keys to every dwelling" statement would still be immaterial. For example, a housekeeper may have keys to a home for the purpose of work, but their lawful possession of those keys would not give them the authority to enter the house for the purpose of stealing items inside. More importantly, Petitioner <u>**broke into**</u> the storage unit; making his possession of keys irrelevant.

E. The claims in the unsworn letter were inherently unreliable.

At the outset, "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399 (1993). "Thus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law . . ." *Id.* at 399-400.

"This Court has repeatedly held that recantations are 'exceedingly unreliable' and that it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true." *Taylor v. State*, 62 So. 3d 1101, 1117 (Fla. 2011). Petitioner's recanted testimony is therefore to be reviewed with "extreme skepticism." *Id.* Further, "this Court will defer to the factual findings of the trial court on this issue as this Court does not substitute its judgment for that of the trial court on questions of the credibility of witnesses." *Id.*

Likewise, the United States Supreme Court has also found late-produced statements and affidavits, like those Petitioner presents here, deeply suspect. First, "the affidavits must be considered in light of the proof of [Petitioner's] guilt at trial . . . ." *Herrera*, 506 U.S. at 418. As explained above, the proof of Petitioner's guilt at trial was truly overwhelming. (AB 24-25).

Second, when affidavits are provided after a lengthy period of time, but offer

"[n]o satisfactory explanation" for the delay in time, they also merit skepticism. *Id.* at 417. Here, the unsworn, post-trial letter was received by the trial court forty-two (42) days after the verdict, but shortly before sentencing. (I. 67, 84). Thus, the timing of the letter merits skepticism. *See id.*

Third, when "the affidavits themselves contain inconsistencies and therefore fail to provide a convincing account of what took place" during a crime, they further merit skepticism. *Id.* at 418. Here, the letter contains a myriad of inconsistencies. For example, Dr. Saleh talks about his rage with his wife, and then explains how he would never hurt his wife or anyone else:

> [Petitioner] and I spent long hours talking and venting our frustrations with each other or somebody else. I am currently going through a highly contested divorce. My wife has been very vicious and . . . Sometimes my irritation with her is very intense. **I just remembered (I am quite certain) that I told [Petitioner] to make sure I did not do something that I might regret.**
>
> The only explanation for [Petitioner] to remove the guns from my storage room, may have been his desire to protect me from my own self. I believe he may have felt that leaving the guns in the storage room was not enough, because I could still have access to them. **Of course, I would never harm my wife or anybody else;** I truly believe in my Hippocratic oath "primum non nocere"; however, **to somebody that does not know me very well**, my irritation and frustration could appear intense and frightening.[6]

[6] Petitioner knew Dr. Saleh "very well." (III. 169, 171-73, 175, 183, 185, 227-32, 257). Thus, based on the letter itself, Dr. Saleh's irritation and frustration with his wife would not have appeared intense and frightening to Petitioner. (I. 84-85).

> In conclusion, [Petitioner] could have taken jewelry or other valuable items from any of my homes. He had keys to every dwelling. In fact I believe that he removed the guns because he felt that they were not far enough from me. **He had seen how vicious my wife could be, and I had told him in the past to stay close by, to keep her from sending me over the edge.**

(I. 84-85) (emphasis added).

The letter is also riddled with qualifying language, evincing Dr. Saleh's lack of personal knowledge of what took place during the burglary:

> As I have been **trying** to make sense of why Lennart took the guns . . . his "intent" **may** have been . . . The only explanation for Lennart to remove the guns from my storage room, **may** have been . . . **I believe** he **may** have felt . . . **I believe** that he removed the guns because he felt . . . his intentions **may** have been . . .

(I. 84-85) (emphasis added). These inconsistencies coupled with the speculative opinions in the letter fail "to provide a convincing account of what took place" during the crime, and therefore further merit skepticism. *Id.* at 418.

Fourth, "motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations." *Id.* at 417. Here, Petitioner's newly discovered evidence claim is not even supported by an affidavit. Instead, Petitioner's entire claim rests on an unsworn, unnotarized, post-trial letter that was purportedly written by Dr. Saleh. Petitioner was afforded a full and fair opportunity to present evidence at a hearing on his motion for new trial, yet failed

to call any witnesses or present any other evidence beyond the letter. (I. 110-19).[7] Thus, the letter was extremely suspect for this reason alone.

Even if the hearing on Petitioner's motion for new trial was not considered an "evidentiary hearing" (despite receiving the letter as evidence) (I. 110), summary denial of the motion would have been appropriate based on the unsworn letter. For example, in *Moss v. State*, 943 So. 2d 946, 947 (Fla. 4th DCA 2006), the defendant raised a newly discovered evidence claim based on an unsworn recantation letter written by the victim following the trial. The Fourth District discussed the important legal distinction between a recantation letter that is sworn and one that is unsworn:

> While an evidentiary hearing is "usually required to make that determination," summary denial is authorized where "the purported recantation testimony is neither sworn nor particularized." *See* [*Robinson v. State,* 736 So. 2d 93, 93 (Fla. 4th DCA 1999)]; *Davidson v. State,* 638 So. 2d 626 (Fla. 3d DCA 1994) (unsworn recantation).

Id. at 948. The same is true here.

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[7] Petitioner repeatedly misrepresents that the trial court "**<u>denied</u>**" an evidentiary hearing. (IB 8, 10, 20) (emphasis added). The record is void of any such denial, and the one record cite offered by Petitioner does not even remotely support this claim. (IB 8) (citing I. 116). In fact, defense counsel's own statements at the hearing clearly demonstrate that the only evidence he intended to rely on was the letter itself: "[T]he motion is based on the letter which was received by the Court and then ask[ed] to be entered as a Court exhibit, approximately two weeks ago." (I. 110). Petitioner had the opportunity to present other evidence at that time, like he did moments later when his sentencing hearing began. (I. 119-24).

In *Moss*, the victim's letter did not contain any claim that the recantation was made under oath. *Id.* While the letter included what appeared to be a notary's stamp, the language contained therein did not show that the victim made the allegations under oath or under the penalty of perjury. *Id.* These facts led the Fourth District to conclude that the letter was "legally insufficient to warrant relief for newly discovered evidence." *Id.*

Here, just as in *Moss*, the newly discovered evidence at issue was in the form of an unsworn letter following the trial. (I. 84-85). There was no notary stamp or statement of any kind that the allegations contained therein were made under oath or under the penalty of perjury. (I. 84-85). Therefore, under *Moss*, summary denial would have been appropriate. *See id.*

Finally, as the trial court found, even if Dr. Saleh would have testified to everything stated in the letter, Dr. Saleh was not credible because of his express bias in favor of Petitioner.[8] (I. 98). Consistent with his testimony at trial, Dr. Saleh repeatedly expressed his love for Petitioner in the letter. (I. 84-85).

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[8] A trial court can determine the credibility of statements in a writing without the need for an evidentiary hearing. *See Poff v. State*, 41 So. 3d 1062, 1064-65 (Fla. 3d DCA 2010) (trial court properly weighed credibility of statements in affidavit against the testimony presented at trial); *see also John v. State*, 98 So. 3d 1257, 1259, 1261 (Fla. 3d DCA 2012) (same); *Stephens v. State*, 829 So. 2d 945, 945 (Fla. 1st DCA 2002) (evidentiary hearing not required where "affidavit is inherently incredible or obviously immaterial to the verdict.").

Dr. Saleh took the opportunity to express his love for Petitioner at the very beginning of his direct examination:

> **State:** On November 14th, did you and [Petitioner] put guns in that storage unit?
>
> **Dr. Saleh:** You know I love you, man, but I have to go with the truth.

(III. 169). Towards the end of his testimony, Dr. Saleh again took the opportunity to express his love for Petitioner:

> **Defense counsel:** Well, you were actually – you and [Petitioner] actually ate dinner at the Koo's residence on Thanksgiving night, correct?
>
> **Dr. Saleh:** I feel like I'm here testifying against my own brother. I love him like a brother. I wish his father was my brother. I don't like to be here.
>
> **Trial Court:** Mr. Saleh – Dr. Saleh.
>
> **Dr. Saleh:** Yes.
>
> **Trial Court:** All right. Please respond only to a question. All right.
>
> **Dr. Saleh:** Right. Probably. I don't know. I love him like my own brother and I hate being here right now.
>
> . . .
>
> **Dr. Saleh:** I loved [Petitioner]. I wanted him to do well.

(III. 183, 185).

Dr. Saleh's trial testimony above, which evinced his hesitation to see any harm befall Petitioner or Petitioner's family, was reiterated in the letter:

> [Petitioner] is like a brother to me and I look up to his father like my own father. I miss him very much and I am devastated that he was convicted to serve a minimum ten years in prison. He does not deserve that, nor his mother or father should be punished with the possibility that he may not see his son free, while alive. His father is 78 years old. . . . [Petitioner] and I spent long hours talking and venting our frustrations with each other or somebody else. . . . I have known [Petitioner] for many years, . . . To punish him and his parents, by taking away ten years from his life would not serve Justice Well.

(I. 84-85). These bias statements in favor of Petitioner were facially suspect.

The trial court denied Petitioner's motion for new trial and orally made a number of factual findings on the record:

> I don't find this letter particularly credible, quite candidly. I think Dr. Saleh . . . has conflicted emotions when it comes to [Petitioner] and [Petitioner's] family, and Dr. Saleh probably, I don't know, maybe he's just remorseful now because he knows what the conviction means at this point, which means that, most likely . . . this Court's hands have been tied by the Legislature as far as what's an appropriate sentence in a case like this. I don't find this to be overly credible just from the letter itself.
>
> I would expect [Petitioner] to have testified to it if it actually occurred and, quite candidly, I'm not sure that . . . it really would have made much of a difference in the case either. I just note for all these reasons, I mean I believe that a motion for new trial shouldn't be warranted based upon Dr. Saleh's letter to the Court. This is evidence that could have been discovered prior to trial. It wasn't. And . . . again, I don't believe with all the other evidence in the case that it was something which . . . would change things in the end, so the motion for new trial is – is denied on those grounds[.]

(I. 118-19). The trial court also made a number of factual findings in a written order denying Petitioner's motion for new trial:

> As to the amended motion, the court has reviewed the letter from Dr. Saleh and finds that his testimony, should it be consistent with the content of his letter, would not qualify as newly discovered evidence that would have been unknown to [Petitioner] or his counsel at the time of trial, or that they could not have known of this evidence by the use of diligence. Dr. Saleh indicated in his letter that "the only explanation for [Petitioner] to remove the guns from the storage, may have been his desire to protect me from my own self." First, this is not a statement of fact, but an opinion by Dr. Saleh that would be speculation on his part as to the motives of [Petitioner]. Second, assuming that Dr. Saleh had made a statement to [Petitioner] to the effect that "I need you to protect me from my own self," then it is reasonable to assume that [Petitioner] a) had knowledge of the statement at the time of trial; and b) that he would have at least proffered the testimony to the court at trial, not after.
>
> Furthermore, the court is quite skeptical of the credibility of this proposed new testimony and does not believe that it would probably produce an acquittal at retrial. Nothing in this letter would be a recantation of Dr. Saleh's testimony that [Petitioner] did not have permission to enter the storage unit and the jury was given evidence that [Petitioner] had access to all of Dr. Saleh's keys, including the storage unit, and still found him guilty.

(I. 98-99).

The timeliness of the unsworn letter, the inconsistencies in the letter, the speculative opinions in the letter, and the clear bias in favor of Petitioner in the letter all support the trial court's conclusion above that the letter was unreliable. There is nothing arbitrary, fanciful, or unreasonable about this conclusion. Accordingly, Petitioner has failed to carry his "substantial burden" to overcome the trial court's conclusion as to the credibility of the purported recanted testimony. *See Archer*, 934 So. 2d at 1198. Therefore, no abuse of discretion occurred.

II. THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL (JOA) FOR THE CHARGE OF ARMED BURGLARY.

Standard of Review

A trial court's ruling on a motion for judgment of acquittal (JOA), to determine solely whether the evidence was legally sufficient, is subject to *de novo* review. *Fritts v. State*, 58 So. 3d 430, 431 (Fla. 1st DCA 2011).

Burden of Persuasion and Presumption of Correctness

The State herein adopts the burden of persuasion and presumption of correctness as stated in Issue I of this brief. (AB 17).

Preservation

Petitioner's specific argument on appeal is that the evidence was insufficient to show the guns he stole were capable of or designed to expel projectiles by explosion. (IB 23-28). This argument was never made below and is therefore not preserved. *See* § 924.051(3), Fla. Stat. (2013). "Preserved" means that a legal argument was timely *raised and ruled on* by the trial court, and that the argument was *sufficiently precise* that it fairly apprised the trial court of the grounds for relief. § 924.051(1)(b), Fla. Stat. Proper preservation entails three components: (1) a timely, contemporaneous objection, (2) a legal ground for that objection, and (3) "it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982);

Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992) ("the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.").

After the State rested, defense counsel moved for a judgment of acquittal (JOA), and argued "they didn't actually prove that this was a firearm which was taken." (III. 220). Defense counsel made no mention of the sufficiency of evidence regarding whether the guns were capable of or designed to expel projectiles by explosion. (III. 220-21). Thus, this new argument, made for the first time on appeal, about whether the guns were capable of or designed to expel projectiles by explosion, was not preserved for review.

The sole exception to this rule is for fundamental error, which has not been raised here. (IB 21-28). Therefore, this Court should not consider such a claim of fundamental error if raised for the first time in Petitioner's reply brief. *See Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011); *J.A.B. v. Enterprises v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) ("[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief."); *Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007).[9]

[9] Such a claim of fundamental error would also be meritless because Petitioner fails to show that "[no] crime was committed at all." *See F.B. v. State*, 852 So. 2d 226, 230 (Fla. 2003).

Merits

Even if preserved, Petitioner's claim for this issue is entirely without merit. "In moving for a judgment of acquittal, a defendant 'admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence.'" *Beasley v. State*, 774 So. 2d 649, 657 (Fla. 2000). A trial court should not grant a JOA unless the evidence is such that no view which the jury may lawfully take of it favorable to the State can be sustained under the law. *Woods v. State*, 733 So. 2d 980, 985 (Fla. 1999); *Taylor v. State*, 13 So. 3d 77, 78 (Fla. 1st DCA 2009); *State v. Ling*, 906 So. 2d 1231, 1233-34 (Fla. 1st DCA 2005). A trial court's view of the evidence "must be taken in the light most favorable to the state. The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." *Thomas v. State*, 894 So. 2d 126, 132 (Fla. 2004) (citations omitted).

Where the State has produced competent, substantial evidence to support every element of a crime, a JOA is not proper. *Donaldson v. State*, 722 So. 2d 177, 182 (Fla. 1988). Further, a JOA motion must be denied if a "rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." *Troy v. State*, 948 So. 2d 635, 646 (Fla. 2006). "Where the evidence is in conflict,

it is within the province of the trier of fact to assess the credibility of witnesses, and upon evaluating the testimony, rely upon the testimony found by it to be worthy of belief and reject such testimony found by it to be untrue." *I.R. v. State,* 385 So. 2d 686, 687 (Fla. 3d DCA 1980). "The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction." *Id.* at 688.

Here, Petitioner claims the evidence was insufficient to show the guns he stole were capable of or designed to expel projectiles by explosion. (IB 23-28). This claim is contrary to Petitioner's defense theory at trial and is belied by the record. The foundation of Petitioner's defense theory was that he broke into the storage unit and stole the guns because he feared for his life. (IV. 330, 333-35, 337-38, 342). To support this defense, counsel and Petitioner repeatedly referred to the guns as "guns" and/or "firearms" throughout the trial. (III. 143, 235, 251, 267). Defense counsel's closing argument repeatedly referred to the stolen items as "guns" and "firearms." (IV. 330, 333-35, 337-38, 342). The entire necessity defense (why Petitioner broke into the U-Haul and stole the firearms) rested on the notion that these were *real* firearms, capable of producing death or great bodily harm. (IV. 330, 333-35, 337-38, 342). This defense theory was entirely dependent on the guns being real. Otherwise, they would not pose such a threat giving rise to the necessity defense.

The irony is that the two issues raised in this appeal contradict one another. If the guns were not real (i.e. not capable of or designed to expel projectiles by explosion), then Petitioner's necessity defense would not make any sense. In other words, if Petitioner was acting out of necessity or self-defense like he claimed, why would he steal guns that didn't shoot? [10]

Consistent with his defense (which asserted the guns were real), the overwhelming evidence presented at trial established that the guns were capable of or designed to expel projectiles by explosion. First, a surveillance video from the U-Haul storage facility on the day of the burglary displayed Petitioner picking up a "gun case" as he was coming out of the elevator. (III. 152). When asked on cross-examination how Ms. Lester knew the cases were "gun cases," Ms. Lester explained that she knew what gun cases look like. (III. 159-60). The jury was free to watch this video and see for themselves if the items possessed by Petitioner were in fact "gun cases."

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[10] Petitioner's self-defeating argument is best observed through his insistence upon presenting excluded evidence to this Court. (IB 6, 23). In his Initial Brief, Petitioner asserts his testimony established that "[Dr.] Saleh had threatened another employee with the AK-47, but the trial court sustained the objection to that testimony." (IB 6, 23). "[Petitioner] later testified without objection that [Dr.] Saleh threatened a person with an unspecified gun." (IB 23). Petitioner presents this evidence to this Court in an obvious attempt to show why the alleged threat from Dr. Saleh was real. However, this same evidence also shows why the AK-47 was a *real* firearm, which defeats Petitioner's claim for Issue II.

Next, Dr. Saleh testified that he had clothing, merchandise, and "guns" in his storage unit. (III. 169). One of those guns was an "AK-47." (III. 170). Dr. Saleh was able to identify this AK-47 based on a particular scratch mark. (III. 170). This firearm was entered into evidence as a physical exhibit. (St. Ex. 1). Thus, the jury could see for themselves whether the actual AK-47, stolen by Petitioner, was capable of or designed to expel projectiles by explosion.

For example, in *Dale v. State*, 703 So. 2d 1045, 1047 (Fla. 1997), this Court noted "of key importance is the fact that the jury had an opportunity to view the weapon first-hand." Likewise, in another case involving armed burglary with a dangerous weapon, the Third District found that "while there was no testimony that the BB gun used by the defendant to commit the burglary . . . was loaded, the weapon itself was introduced and the jury had an opportunity to examine it to determine if it was capable of causing great bodily harm or serious injury." *Santiago v. State*, 900 So. 2d 710, 712 (Fla. 3d DCA 2005). Just like in *Dale* and *Santiago*, the jury was able to examine the actual AK-47 to determine if it was capable of or designed to expel projectiles by explosion.

Petitioner's own words and actions also demonstrated that the guns were actual firearms. Petitioner and his mother met with Dr. Saleh the day after the burglary, and "[Petitioner] said that he had sold the guns for $300." (III. 178-79). When Dr. Saleh met with Petitioner and his mother the day after the offense,

Petitioner returned "[t]he AK-47 and a handgun." (III. 179-80). The next day, Dr. Saleh met with Petitioner again and gave Petitioner $300 to retrieve the gun that Petitioner already sold. (III. 180). Petitioner later returned with two more guns but not all of them. (III. 180). The .22 caliber gun was never recovered. (III. 180-81). Petitioner claimed he didn't know what happened to the "long rifle." (III. 200).

During his interview with police, Petitioner stated: "I picked up the – the guns he had." (III. 197). When asked why, Petitioner responded: "Because I was scared he was going to lose custody of his girls . . ." [11] (III. 197). Petitioner specifically stated that Dr. Saleh never instructed him to remove the guns. (III. 197). Petitioner also stated that he removed the guns because he was scared that Dr. Saleh was going to **"shoot me with them."** (III. 197) (emphasis added). The obvious implication from these statements is that the firearms Petitioner stole were capable of or designed to expel projectiles by explosion. [12]

Detective Shacklett testified that he had experience with firearms, and that the .22 caliber long rifle was not a BB gun. (III. 207-08). It was an **"actual firearm"** that was **"[a]bsolutely" capable of "killing a person."** (III. 208)

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[11] Why would Dr. Saleh lose custody of his girls if these weren't real firearms?

[12] Merriam Webster defines "shoot" as "to drive forth or cause to be driven forth by an explosion (as of a powder charge in a firearm or of ignited fuel in a rocket)[.]" http://www.merriam-webster.com/dictionary/shoot (last visited May 27, 2015).

(emphasis added). Petitioner repeatedly referred to the firearms he stole as "guns" throughout his interview. (III. 208).

Finally, the evidence showed that Petitioner stole ammunition along with the firearms, which demonstrated that those firearms were capable of or designed to expel projectiles by explosion. (III. 179, 197-98); *See* § 790.001(19), Fla. Stat. (2014) ("**Ammunition**" means an object consisting of all of the following: (a) a fixed metallic or nonmetallic hull or casing containing **a primer**, (b) one or more "**projectiles**," one or more bullets, or shot, **and** (c) "**[g]unpowder**.") (emphasis added). In addition to the AK-47, Petitioner stole a handgun, **ammunition**, a BB gun, a .22, and some clothing as well. (III. 179).

During his interview with police, Petitioner described the different types of "guns" and "**ammunition**" that he removed from Dr. Saleh's storage unit:

> **Det. Shacklett:** Okay . . . when you broke the lock, what did you take out of the unit?
>
> **Petitioner:** Just a gun.
>
> **Det. Shacklett:** What kind of guns?
>
> **Petitioner:** AK-47, a safe lockbox, . . . a BB gun, and a Ruger .22 little rifle.
>
> **Det. Shacklett:** Okay. What else?
>
> **Petitioner:** That was it.
>
> **Det. Shacklett:** What was in the safe box?

> **Petitioner:** Well, I accidentally dropped the safe box and there was a .44 Magnum and **two clips to the AK and enough ammunition to** –[13]

(III. 197-98) (emphasis added). During closing argument, the State explained how the AK-47 along with "**two banana clips** **you can stick inside of it**" was an actual firearm. (III. 311) (emphasis added).

Petitioner's admission to taking "two clips to the AK and enough ammunition" was strong evidence that the AK-47 was capable of or designed to expel projectiles by explosion. *See* § 790.001(19), Fla. Stat. (2014) ("**Ammunition**" means an object consisting of all of the following: (a) a fixed metallic or nonmetallic hull or casing containing **a primer**, (b) one or more "**projectiles**," one or more bullets, or shot, **and** (c) "**[g]unpowder**.") (emphasis added). Thus, the fact that Petitioner stole ammunition along with the firearms was sufficient evidence, by itself, that the firearms were capable of or designed to expel projectiles by explosion.

In *Bentley v. State*, 501 So. 2d 600, 602 (Fla. 1987), this Court agreed that

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[13] The record indicates the published video was "[t]ranscribed to the court reporter's best ability as heard in court that day." (III. 195). Although the court reporter transcribed Petitioner's statement as "enough ammunition to --," a careful review of the audio from the recorded interview reveals that Petitioner stated: "**enough ammunition** to ah, I dunno, **to shoot people**." (St. Ex. 3 – 2:40) (emphasis added).

"the legislature did not intend to require a finding that a handgun be operational in order to uphold a conviction of robbery with a firearm because of concerns about the perception of the victim." Moreover, whether the evidence is sufficient to support a conviction for a crime involving a firearm as an element or enhancement thereof is generally a jury question. *See Ahlberg v. State*, 541 So. 2d 775, 776 (Fla. 3d DCA 1989).

In *Ahlberg*, the victim testified that the defendant carried "a gun of some sort. That's a revolver type." *Id.* at 776. In the defendant's confession to the police, he admitted possessing a gun during the commission of the offenses but stated that his partner had handed him the gun saying: "The gun does not work because there are pieces missing from it." *Id.* The Third District held that this self-serving statement alone did not overcome Ahlberg's own admission as to the use of the gun and the victim's testimony. *Id.* The same is true here. Both Dr. Saleh and Petitioner testified that Petitioner stole a number of specific firearms out of Dr. Saleh's storage unit. And unlike *Ahlberg*, there was no testimony to contradict the evidence that these were functional, working firearms at the time.

The cases cited by Petitioner to support his claim are entirely distinguishable. (IB 24-27). For example Petitioner cites to *Streetmen v. State*, 455 So. 2d 1080, 1082 (Fla. 2d DCA 2002), which 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. The Second District concluded that the State failed "to establish the explosive propensities of the bomb," thus rendering the evidence insufficient to support a finding that the bomb was "capable of causing death or serious bodily injury." *Id.* Here, the AK-47 was entered into evidence for the jury to examine, which was direct evidence rather than second or third hand evidence like in *Streetmen*. (III. 128, 170). Unlike *Streetman*, here there was evidence of ammunition that went with the firearms stolen by Petitioner, which were direct evidence of their capability and/or design to expel projectiles by explosion. Thus, Petitioner's reliance on *Streetman* is misplaced.

Appellant also cites to *Butler v. State*, 602 So. 2d 1303, 1305 (Fla. 1st DCA 1992), which held that the State cannot meet its burden of proof "by presenting evidence of nothing more than the victim's subjective belief" that the defendant possessed a firearm or other deadly weapon. In *Butler*, the defendant "never said that he had a gun, and . . . there [was] no evidence that the state ever found a gun or other weapon." *Id.* at 1306. Here, the exact opposite is true. Petitioner admitted he stole the "guns" and there was ample evidence that the AK-47 admitted into evidence was the same gun stolen by Petitioner. (III. 128, 170, 178-80, 197-200, 251, 255, 267). Unlike *Butler*, the State presented much more than the victim's subjective belief that Petitioner possessed a firearm. Thus, Petitioner's reliance on *Butler* is misplaced.

Finally, Petitioner cites to a handful of distinguishable cases that do not support his position. (IB 25-27) (citing *Bates v. State*, 561 So. 2d 1341, 1341-42 (Fla. 2d DCA 1990) ("There is no dispute that Bates was not carrying a firearm when he committed the robbery. . . . We caution, however, that the result we reach is tied entirely to the manner in which Bates employed the nut driver."); *Hutchinson v. State*, 816 So. 2d 1186 (Fla. 2d DCA 2002) (starter pistol did not qualify as a firearm because there was no evidence presented that it was designed to, or could be readily converted to expel a projectile by the action of an explosive); *State v. Billue*, 497 So. 2d 712, 714 (Fla. 4th DCA 1986) (sufficient evidence supported implicit finding by jury that the weapon was a firearm where both victims testified they had experience with guns and had a clear look at the gun used by the defendant, and both victims unequivocally identified the gun as "an automatic pistol."); and *Emmons v. State*, 546 So. 2d 69, 71 (Fla. 2d DCA 1989) (flare gun qualified as firearm because it was designed to and was actually capable of expelling a projectile by means of an explosive device)).

In a light most favorable to the State, one conclusion "that a jury might fairly and reasonably infer from the evidence" was that the "guns" he stole were capable of or designed to expel projectiles by explosion, especially where they were accompanied by ammunition specific to those firearms. *See Beasley*, 774 So. 2d at 657. Therefore, the trial court properly denied Appellant's JOA motion.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Petitioner's conviction and sentence.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by email to D. Gray Thomas, counsel for Petitioner, at dgraythomas.law@gmail.com on May 29, 2015.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210, as it was computer generated using Times New Roman 14-point font.

Respectfully submitted and certified,

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